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Date: **9 April 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. UHURU MUIGAI KENYATTA

Public redacted version of the Prosecution's *omnibus* response to Defence submissions ICC-01/09-02-11-706 and ICC-01/09-02-11-707

Source: **The Office of the Prosecutor**

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Introduction

1. The Prosecution hereby responds to the two related Defence submissions (the "Submissions"),[1] filed pursuant to the Chamber's 20 March 2013 order.[2]

2. At their core, the Defence's allegations of flaws in the assessment of evidence by the Pre-Trial Chamber ("PTC"), leading to supposed "deficiencies in the confirmation process", are nothing more than an impermissible attempt to bring a *de facto* appeal against the confirmation decision.[3] The PTC has twice rejected the Defence's arguments regarding the evidence supporting the confirmation decision: once when assessing the evidence in the confirmation decision itself, and again when it denied the Defence's application for leave to appeal the confirmation decision.[4] The Defence's analysis of the alleged "deficiencies" is thus nothing more than a third attempt to introduce an evidentiary analysis that the PTC considered, and twice rejected. In essence, the Defence is asking the Trial Chamber to sit as an appellate court and overturn the confirmation decision and the PTC's decision to deny leave to appeal the confirmation decision. Such an exercise is beyond the Trial Chamber's statutory remit and the Submissions should be rejected on this basis.

3. The issue now before the Chamber is to determine whether the PTC reasonably could have confirmed the charges against Mr Kenyatta if the affidavit of Witness 4 had been disclosed before the confirmation hearing, potentially affecting the findings based on his evidence. If the Chamber finds that a reasonable PTC could have confirmed the charges against Mr

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[1] ICC-01/09-02/11-706; ICC-01/09-02/11-707-Corr-Red.
[2] ICC-01/09-02/11-699.
[3] ICC-01/09-02/11-382-Red.
[4] ICC-01/09-02/11-406.

Kenyatta absent the findings based on Witness 4's evidence, it should deny his Article 64 application ("Application").[5]

4. Even under the most generous analysis, the Application fails because the PTC's findings that did not rely on Witness 4's evidence are sufficient for the charges to have been confirmed. To reach this conclusion – and to dispose of the Application – the Trial Chamber need look no further than the alleged meeting at Nairobi State House on or about 30 December 2007.[6] This is because: (i) the PTC's clear and unambiguous factual findings with respect to this meeting were not based upon Witness 4's evidence; and (ii) Mr Kenyatta's alleged role at this meeting is sufficient, in and of itself, for criminal liability to attach. Since the findings regarding the 30 December 2007 meeting are sufficient, in and of themselves, for the charges to have been confirmed, the confirmation decision remains sound despite the Defence's arguments based on former Witness 4. The Application should therefore be denied.

5. As a result, there exist no cogent reasons to terminate or stay the proceedings, as the Defence requests.[7] Indeed, the Defence advances no arguments to show that such exceptional relief is warranted and relies instead on an almost offhand suggestion that the Chamber should simply end the case because of post-confirmation developments with respect to a single witness. This unsupported assertion does not meet the exceptionally high threshold for proceedings to be stayed, let alone terminated, and should therefore be rejected.

[5] ICC-01/09-02/11-622.
[6] *See* ICC-01/09-02/11-708-Red, paras 4, 18-20; ICC-01/09-02/11-T-24-ENG CT WT, pages 41-42.
[7] ICC-01/09-02/11-707-Corr-Red, para. 2.

Confidentiality

6. This document is filed confidentially because it responds to the Submissions, one of which was designated "confidential".[8] A public redacted version is being filed concurrently.

Submissions

I. <u>The Trial Chamber cannot act as an appellate court and reverse the confirmation decision, as the Defence requests.</u>

7. The Defence's analysis of alleged "deficiencies in the confirmation process" in Section III of its factual submissions[9] is an impermissible attempt to have the confirmation decision reversed, 14 months after it was issued by the PTC, and 13 months after the PTC denied the application for leave to appeal. To this end, the Submissions restate evidentiary arguments the Defence made to the PTC on multiple occasions: during the confirmation hearing,[10] in its final written submissions after confirmation,[11] and when seeking leave to appeal the confirmation decision.[12] On each occasion, the PTC rejected the Defence's arguments as to how the evidence should be analysed.[13] Yet the Defence is now asking this Trial Chamber to take a different view and effectively overturn the PTC's confirmation decision and its decision denying leave to appeal. This is impermissible under the Court's legal framework. As the *Lubanga* Chamber held, the Trial Chamber does not have the "power to review the only decision of the Pre-Trial Chamber that is

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[8] ICC-01/09-02/11-707-Corr-Red.
[9] *See*, *e.g.*, ICC-01/09-02/11-707-Corr-Red, paras 20-34.
[10] *See*, *e.g.*, ICC-01/09-02/11-T-4-ENG, pages 104-107.
[11] ICC-01/09-02/11-372, paras 21-31, 34-35.
[12] *See*, *e.g.*, ICC-01/09-02/11-384-RedICC-01/09-02/11-384-Red, paras 11-26.
[13] *See*, *e.g.*, ICC-01/09-02/11-382-Red, paras 93-100; ICC-01/09-02/11-406, paras 69-76 ("The Chamber observes that Kenyatta's Third, Fourth and Fifth Issues do not rise beyond simple expressions of disagreement with the Chamber's assessment of the evidence before it. Indeed, the Defence of Mr. Kenyatta does not advance any argument in order to satisfy the criteria of article 82(l)(d) of the Statute beyond repeating – and occasionally slightly adapting, in light of the Decision – the arguments presented at the confirmation of charges hearing.").

definitely binding on the Trial Chamber: the Decision on the confirmation of charges".[14] This authority, under the Statute, belongs to the Appeals Chamber in carefully prescribed circumstances. To assign the role of the Appeals Chamber to the Trial Chamber would undermine the separation of powers between the various Chambers of the Court enshrined in its legal framework. The Defence's proposed analysis is therefore of no relevance to the Application, and it should be disregarded.

8. The narrow question presently before the Chamber is whether the PTC could have reasonably confirmed the charges against Mr Kenyatta absent the factual findings based on Witness 4's evidence, *not* whether the PTC properly analysed *all* the evidence in its confirmation decision, as the Defence argues. There is a critical distinction to be made between assessing alleged overall "deficiencies in the confirmation process", which amounts to an impermissible appeal against the confirmation decision, and the assessment of whether the non-disclosure of the affidavit of Witness 4 had an impact on the "fairness, integrity or validity of the confirmation proceedings"[15] to such an extent that a referral under Article 64 is appropriate.

9. The Defence Submissions are premised on the claim that a case may be referred back to the PTC when an important Prosecution witness recants part of his testimony after confirmation and the Prosecution decides not to

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[14] *Prosecutor v. Lubanga*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para 43. The Defence, in ICC-01/09-02/11-706, para 4, cites from a *Lubanga* decision made in a different procedural context, where Trial Chamber I was referring to the ability of a Chamber to reconsider *its own* previous decisions, if they are manifestly unsound and their consequences manifestly unsatisfactory, and certainly not the Confirmation decision: *see Prosecutor v. Lubanga*, Decision on the defence request to reconsider the "Order on numbering of Evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para 17 ("At the International Criminal Tribunal for Rwanda ("ICTR"), a similar, although by no means identical approach has been adopted that recognises that in exceptional cases Trial Chambers have an inherent power to reconsider *their decisions* […]") (emphasis added).

[15] ICC-01/09-02/11-699, para. 4(1).

call that witness at trial. The Prosecution disagrees. The remedy of sending a case back to the PTC for reconsideration is an exceptional one, that should be contemplated only under the narrowest of circumstances and only when fundamental fairness requires it. A confirmed case should not be referred back to the PTC for reconsideration simply because the evidence of a confirmation-stage witness changes in some way over time, or because the witness will not testify at trial. In many, if not most, cases there will inevitably be changes in the evidence between confirmation and trial. This is not an exceptional, but a normal, occurrence in criminal litigation; if this were sufficient to trigger new pre-trial proceedings, future cases would become mired in circular pre-trial litigation that would unnecessarily delay the administration of justice. Such a situation would dramatically undermine the efficiency of proceedings before the Court, turn the pre-trial process into a vehicle for slowing cases down rather than expediting them, and defeat the purpose of confirmation of proceedings.[16]

10. Limiting the remedy to those cases where an "important" or even "critical" witness changes his evidence would not make the approach any more workable. Confirmation hearings are necessarily focused on the most critical evidence, and endless disputes will inevitably erupt over whether a witness whose evidence has changed in some way was in fact "important" and whether the alleged changes in the evidence were significant. Moreover, the fact that a witness changes his or her evidence after the confirmation hearing does not retroactively render that confirmation hearing fundamentally unfair, requiring that it be re-done. Rather, the proper remedy for any post-confirmation changes in the evidence is the trial itself, where the Prosecution has the burden of proof beyond a reasonable doubt

[16] *See also* the Prosecution's earlier submissions on this issue: ICC-01/09-02/11-664-Red2, paras 14-15.

and the Defence has the full opportunity to challenge the Prosecution's evidence.

11. There is no provision in the Statute permitting a return to the PTC when there are alleged changes in the evidence, fundamental fairness for the Accused does not require it, and creating such a remedy in this case would undoubtedly create a precedent for accused persons to raise it again and again in future cases. Accordingly, post-confirmation evidentiary developments should not, in principle, be considered when deciding whether to refer a confirmed case back to a PTC for reconsideration.

12. This case is concededly different because at issue is not the witness' changes *after* confirmation but rather the failure of the Prosecution to provide a prior statement of the witness that could have impacted on the assessment of his credibility *during* the confirmation hearing itself. Nonetheless, the Trial Chamber should refer the case back to the PTC only if it finds that the failure to disclose the affidavit would necessarily have changed the PTC's decision to confirm the charges. If the Chamber finds that a reasonable PTC could have confirmed the charges against Mr Kenyatta on the basis of all of the information that should have been provided to it at the time (including the prior affidavit of the witness), then it cannot be said that the confirmation process was fundamentally unfair and there is no reason to send the decision back for re-consideration.

13. For the purposes of the required analysis, it suffices for the Chamber to take the Defence argument at its highest and to assume, for the sake of argument, that the affidavit would have caused the PTC to discard Witness 4's testimony entirely. Even under this generous analysis, the Defence's argument fails on the merits because the portions of the confirmation decision that did not rely on Witness 4's evidence are still sufficient for a

reasonable PTC to have confirmed the charges. Again, the Trial Chamber need look no further than the 30 December 2007 State House meeting to reach this conclusion.

14. In the final analysis, regardless of whether the Chamber adopts the Defence's suggestion that post-confirmation developments are somehow a relevant factor for the Chamber to consider in deciding on the Article 64 Application, the Defence's argument still fails on its merits. As explained below, this is because the PTC's factual findings that were not based on Witness 4's evidence were sufficient for the charges to be confirmed.[17] For this reason, there is simply no basis to afford the Accused the extraordinary remedy of sending this case back to the PTC. Instead, the case should proceed to trial.

II. <u>The PTC's findings regarding the 30 December 2007 meeting are sufficient to dismiss the Application.</u>

15. As indicated above, the Chamber need only consider the PTC's findings with respect to the meeting on 30 December 2007 to dispose of the Application because the findings of the PTC in relation to this meeting are sufficient for criminal liability to attach to Mr Kenyatta. The PTC made clear rulings with respect to this meeting, which can be found in paragraphs 333-336 of the confirmation decision. In particular, the Chamber found that "there are *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".[18] The PTC specifically relied on

[17] *See* ICC-01/09-02/11-664-Red2, paras 23-24.
[18] ICC-01/09-02/11-382-Red, para. 333 (emphasis added).

the 30 December meeting to demonstrate the existence of the common plan,[19] illustrating the meeting's importance in the Chamber's calculation.[20]

16. The findings with respect to the 30 December 2007 meeting are, on their own, sufficient to support the existence of the common plan, because the PTC found that:

- The body of evidence establishes "substantial grounds to believe" that this meeting took place, and that Mr Kenyatta was present at the meeting;[21]
- During this meeting "Mr. Kenyatta said that he had the capability of organizing his people and mobilizing them for any eventuality";[22]
- During this meeting, Mr Kenyatta provided 3.3 million KSh to "MPs and Mungiki coordinators", including [REDACTED], to coordinate the attack in Naivasha;[23]
- Mr Kenyatta provided the money in order to "mobilize the people from the ground";[24]
- The money distributed at this meeting was "later spent in part to purchase guns" that were used in the Nakuru attack.[25]

17. The PTC relied on these specific factual findings to find that Mr Kenyatta and others formed a common plan.[26] In particular, the PTC used these findings to support the findings of:

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[19] ICC-01/09-02/11-382-Red, para. 400, footnotes 774, 776.
[20] *See* ICC-01/09-02/11-382-Red, paras 400, 404, 406. There is no support for the Defence's suggestion that the PTC's findings regarding the 30 December 2007 meeting were "supplemental to the two other key meetings in the Confirmation decision", ICC-01/09-02/11-707-Corr-Red, para. 25. In fact, the confirmation decision makes no such distinction.
[21] ICC-01/09-02/11-382-Red, para. 333.
[22] ICC-01/09-02/11-382-Red, para. 334.
[23] ICC-01/09-02/11-382-Red, para. 334.
[24] ICC-01/09-02/11-382-Red, para. 335.
[25] ICC-01/09-02/11-382-Red, para. 334.
[26] ICC-01/09-02/11-382-Red, para. 400, footnotes 774, 776.

- Contact between Mr Kenyatta, Mr Muthaura and Mr Njenga, through intermediaries, for the purposes of securing the services of the Mungiki for the PNU Coalition;[27]
- Mr Kenyatta's order to Mungiki leaders to commit the crimes in Nakuru and Naivasha.[28]

18. The PTC also relied on these factual findings to conclude that there were "substantial grounds to believe" that Mr Kenyatta exercised his authority over the Mungiki and "directed the Mungiki to commit the crimes in Nakuru and Naivasha, thus activating the mechanisms leading to commission of the crimes".[29] The Chamber found that "in the absence of this action, the common plan [...] would have been frustrated and, in this sense, [...] Mr. Kenyatta's contribution is to be understood as 'essential' [...]".[30]

19. Referring to the 30 December 2007 meeting, the Defence states that "it is illogical to suggest that this meeting was convened in order to coordinate retaliatory violence" because the violence had not yet erupted.[31] This argument is misplaced. What the Prosecution has always alleged is that the common plan was "to keep the PNU in power through any means necessary", including through violence.[32] This is the plan Mr Kenyatta allegedly adopted at the 30 December 2007 State House meeting when he appointed intermediaries to mobilise men "for any eventuality" and provided them with large sums of money for this purpose and to purchase weapons.[33] Thus, contrary to the Submissions, the PTC's findings regarding the 30 December 2007 meeting are capable of supporting the common plan.

[27] ICC-01/09-02/11-382-Red, para. 400(i), footnote 774.
[28] ICC-01/09-02/11-382-Red, para. 400(ii), footnote 776.
[29] ICC-01/09-02/11-382-Red, para. 404, footnotes 781, 782.
[30] ICC-01/09-02/11-382-Red, para. 404, footnotes 781, 782.
[31] ICC-01/09-02/11-707-Corr-Red, para. 28(d).
[32] *See* ICC-01/09-02/11-280-AnxA, para. 77; ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 27, 114.
[33] ICC-01/09-02/11-591- AnxB, paras 47-49; ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 36-37.

20. The Defence argues that "the PTC failed to assess properly the evidence" regarding the 30 December 2007 State House meeting and invites the Trial Chamber to hold that the PTC's findings "are not supported to the requisite standard of 'substantial grounds to believe'".[34] Again, this amounts to a request for the Trial Chamber to sit as an appellate court over the PTC and to reverse the confirmation decision. As explained above, the Trial Chamber may not undertake such a review as it would be outside its statutory remit. Notwithstanding, the PTC's findings are unambiguous: the 30 December 2007 State House meeting was established to "the requisite threshold" of "substantial grounds to believe".[35] As the *Lubanga* Trial Chamber explained, these findings of the PTC are final for the purpose of pre-trial proceedings.[36]

21. For this reason, the Chamber need not address the Defence's submissions regarding the PTC's supposed "fail[ure] to assess properly the evidence" regarding the 30 December 2007 meeting.[37] In any event, the submissions on this point are without merit and do not undermine the PTC's finding of "substantial grounds", relying as they do on excerpts of the evidence of Witnesses 11 and 12, which have been taken out-of-context and which omit important portions that contradict the Defence's argument. Examples of this are numerous and extend throughout the Defence's submissions. As this issue is ultimately irrelevant to the issue before the Trial Chamber, the Prosecution need only provide a few illustrations, below.

22. *First*, the Defence asserts that Witness 11 stated that "Mr Kenyatta gave cash for the coordination of an unspecified 'activity'" only, and that he "merely state[d] that 'part of that money is the money that was used to go and buy

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[34] ICC-01/09-02/11-707-Red, para. 27.
[35] ICC-01/09-02/11-382-Red, para. 333.
[36] ICC-01/04-01/06-1084, para. 43.
[37] ICC-01/09-02/11-707-Corr-Red, para 27.

these guns'".[38] The full analysis, using all relevant portions of the evidence, reveals that the witness in fact stated that Mr Kenyatta was "not ready to hand over power", that he had the "capability of organising his people and mobilise them for any eventuality" and that he provided money "to those whom he thought would coordinate the activity he wanted to be coordinated":

[REDACTED][39]

23. The witness provided this explanation after *previously* stating that part of the money that Mr Kenyatta provided was used to "buy these guns".[40] It is clear from the passage, when read as a whole, that the "activity" the witness refers to is mobilising men who were willing to keep the PNU in power through violence, reflecting the common plan as alleged by the Prosecution.

24. *Second*, the Defence asserts that "OTP-12 does not allege that Mr Kenyatta directed the use of violence through the Mungiki"[41] and that "[t]his meeting [on 30 December 2007 at State House] does not reflect the common plan with the Mungiki; it was not a declaration of war or call to violence".[42] The Defence in this instance omits the most important part of the account: that Mr Kenyatta allegedly told the meeting attendees to "mobilise our men" to "stop these people [ODM and their supporters] from being declared that they have won the elections".[43] Witness 12 then explained that the "men" being mobilised were "Mungiki men".[44] When Witness 12 was directly asked "who gave the order for the Mungiki for mobilisation", he mentioned

[38] ICC-01/09-02/11-707-Corr-Red, para 28 (d).
[39] KEN-OTP-0052-1506 at 1514, lines 308-320 (emphasis added). *See* further KEN-OTP-0052-1506, at 1513-1515.
[40] KEN-OTP-0052-1451 at 1463, lines 453-454.
[41] ICC-01/09-02/11-707-Corr-Red, para 28(f)(i).
[42] ICC-01/09-02/11-707-Corr-Red, para 28(f)(iii).
[43] KEN-OTP-0061-0187, at 0197, lines 361-364.
[44] KEN-OTP-0061-0187, at 0197, lines 378-380.

one name: "Uhuru".[45] The Defence's assertion is directly contradicted by another interview excerpt, quoted elsewhere by the Defence,[46] in which Witness 12 paraphrases Mr Kenyatta's alleged instructions at the meeting: "[REDACTED]".[47]

25. *Third*, there is no merit to the Defence's attempt to gloss over Witness 12's mention of violence by suggesting that it related only to him "personally". When the excerpt is read in context, it is clear that the investigator is referring to the attendees at the 30 December 2007 State House meeting (whom Mr Kenyatta allegedly tasked with mobilising the "Mungiki men") and not the witness personally, when he asks "[h]ow would you not let them go ahead?".[48]

26. The above examples show that the "evidentiary analysis" contained in the Submissions does not undermine the PTC's finding of "substantial grounds" with respect to the 30 December 2007 State House meeting. In fact, the PTC had an evidentiary basis to confirm the charges against Mr Kenyatta (even if Witness 4's evidence is removed).

III. **The Defence fails to provide any cogent reasons in support of its request for a stay or termination of proceedings.**

27. The Defence advances no cogent reasons why a stay of proceedings – conditional or permanent – should be imposed in this case, or why the proceedings should be terminated.

28. As the Prosecution outlined in its 28 March 2013 submission,[49] the Trial Chamber may impose a stay of proceedings only in exceptional

[45] KEN-OTP-0061-0187, at 0201-0202, lines 528-535.
[46] ICC-01/09-02/11-707-Corr-Red, para. 28(f)(iii).
[47] KEN-OTP-0060-0299, at 0313-0314, lines 508-512.
[48] KEN-OTP-0061-0187, at 0200-0201, lines 458-509.
[49] ICC-01/09-02/11-708-Red, para. 30.

circumstances where it is "impossible to piece together the constituent elements of a fair trial"[50] and where no other, lesser, remedy is available.[51] In support of its request for this exceptional relief, the Defence simply quotes its evidential submissions on individual criminal responsibility, in which it effectively requests the Trial Chamber to overrule the PTC's evidentiary analysis.[52] The Defence does not explain how its own assessment of the evidence at confirmation stage supports the notion of unfairness of the proceedings, let alone to such an extent that they would have to be stayed or terminated, especially since the Defence's suggested evaluation has twice been rejected by the PTC. In sum, the request that the proceedings be stayed or terminated appears to be little more than an afterthought, unsupported by argument. It should be denied on this basis alone.

29. For these reasons, the request for a stay or termination of proceedings should be rejected.

IV. **The suggestion that "careful scrutiny" needs to be applied to evaluation of evidence obtained post-confirmation is unsupported in law.**

30. There is no legal basis to support the suggestion that the evidence obtained post-confirmation should be subjected to "careful scrutiny", in order to ensure that "the current situation does not repeat in the future, whereby 84% of the testimonial evidence" was collected after confirmation.[53]

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[50] *Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582 OA 18, para. 55.
[51] *Prosecutor v. Lubanga*, Redacted Decision on the Public "Defence Application Proceedings" Seeking a Permanent Stay of the Proceedings", 7 March 2011, ICC-01/04-01/06-2690-Red2, para 168; ICC-01/04-01/06-2582 OA 18, para. 55.
[52] ICC-01/09-02/11-706, paras 18, 19, 21, referring to section III of ICC-01/09-02/11-707-Corr-Red.
[53] ICC-01/09-02/11-706, para. 34.

31. As the Prosecution explained in detail in its previous submissions, conducting post-confirmation investigative activity is entirely compatible with the Court's legal framework and jurisprudence.[54] Article 54 of the Statute imposes an obligation on the Prosecution to search for the truth, and this applies at all stages of the proceedings. Therefore, there is no basis whatsoever to apply different rules to evidence obtained at different stages.

32. The Prosecution does not dispute that, pursuant to Article 69(4) and in accordance with the jurisprudence of the Court, the Chamber has the power to assess *all* evidence presented at trial, taking into account, *inter alia*, its probative value and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.[55] However, in order to assess admissibility of evidence, there is no distinction made between evidence based on the time of its collection.

33. Further, the Defence is unable to demonstrate that it has suffered any unfair prejudice on account of the evidence that the Prosecution collected after confirmation. Neither the Statute nor the Rules prevents the Prosecution from producing additional evidence to support its confirmed charges in order to reach the threshold of "beyond reasonable doubt" required for a conviction, nor do they require the Prosecution to produce the same evidence at trial as at confirmation.[56] There has been no "factual fundamental shift" of the Prosecution case, as the Defence contends.[57] A comparison between the Prosecution pre-trial brief and the confirmation decision reveals that the charges have not "shifted".[58] It is correct that the

[54] ICC-01/09-02/11-633, paras 8-12; ICC-01/09-02/11-708, paras 6, 36-38.
[55] Article 69(4) ; *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399-Corr, paras 23-24, 27-32; *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, paras 41-44; *Prosecutor v. Katanga et al.*, Decision on the Confirmation of the Charges, 30 September 2008, ICC-01/04-01/07-717, para. 77.
[56] *See* ICC-01/09-02/11-633, paras 8-12; ICC-01/09-02/11-708, paras 6, 36-38.
[57] ICC-01/09-02/11-707-Corr-Red.
[58] ICC-01/09-02/11-622, paras 20-31; ICC-01/09-02/11-706, para. 34.

pre-trial brief contains a more detailed analysis of the broader allegations in the Document Containing the Charges,[59] but this *benefits* the Defence because it provides increased notice of the nature of the Prosecution's evidentiary case. The important point is that the factual allegations contained in the pre-trial brief fall within the four corners of the charges confirmed by the PTC and are consistent with the PTC's characterisation of Mr Kenyatta's alleged role in the PEV.

34. The Defence's request to vacate the trial date has already been granted, ensuring more time for preparation. In this context, it is disingenuous for the Defence to assert that Mr Kenyatta's right to an expeditious trial has been infringed.[60]

Relief requested

35. For the reasons articulated above, the Prosecution respectfully submits that the Application should be denied.

Fatou Bensouda,

Prosecutor

Dated this 9th of April 2013
At The Hague, The Netherlands

[59] The Prosecution's allegations are also consistent with the Updated Document Containing the Charges, ICC-01/09-02/11-591-AnxB, which has been approved by this Chamber.
[60] ICC-01/09-02/11-706, para. 42.