

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 10 October 2013

TRIAL CHAMBER V(b)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

PUBLIC REDACTED VERSION

**Defence Application for a Permanent Stay of the
Proceedings due to Abuse of Process**

Source: Defence for President 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 is in possession of substantial evidence of a serious, sustained and wide-ranging abuse on the process of the Court carried out by (a) Prosecution witness OTP-118 and Prosecution intermediary [REDACTED], and (b) Prosecution witnesses OTP-11 and OTP-12.
2. As a matter of urgency, the Defence requests a permanent stay of the proceedings. In the alternative, the Defence requests the Trial Chamber to hold an evidential hearing entailing the calling of live evidence to determine this issue conclusively prior to the commencement of trial, as the finding of an abuse of process on the current proceedings would necessitate a permanent stay of the proceedings. An evidential hearing on abuse of process would require the calling of live witnesses, including: OTP-118, Prosecution intermediary [REDACTED], [REDACTED], OTP-11, and OTP-12.
3. This motion is filed confidentially as it contains information concerning protected witnesses and defence investigations. A public redacted version is filed concurrently. All annexes are confidential as they concern protected witnesses and disclose information about ongoing Defence investigations.

A. OTP-118 and [REDACTED]

4. The Defence has extensive evidence that OTP-118 and [REDACTED] have intimidated and interfered with [REDACTED] potential Defence witnesses and embarked upon a wide scale course of conduct against the Defence for the benefit of the Prosecution amounting to a perversion of the course of justice before the Court.

5. OTP-118 and [REDACTED] were responsible for bringing ten other trial witnesses to the Prosecution whose evidence must now be considered as irremediably tainted by reason of their illegal conduct as uncovered by Defence investigations. These witnesses are: OTP-217, OTP-219, OTP-428, OTP-429, OTP-430, OTP-493, OTP-494, OTP-505, OTP-506, and OTP-510.¹
6. The illegal conduct of OTP-118 and [REDACTED] has directly led to [REDACTED]. Their conduct has also prevented the Defence from obtaining witness cooperation due to [REDACTED] OTP-118 preventing any person or former person of [REDACTED] from co-operating with the Defence.
7. Evidence obtained from Defence investigations supports the submission that the foundation of the Prosecution is now so tainted by the illegal actions of OTP-118 and [REDACTED] that it is repugnant to the rule of law and seriously prejudicial to the integrity of the trial process to put Uhuru Kenyatta on trial. It is 'unacceptable for justice to embark on its course' as a fair trial is 'no longer possible and justice cannot be done.'²

B. OTP-11 and OTP-12

8. The Defence has extensive evidence that OTP-11 and OTP-12 have been interfering and tampering with the collection of evidence through channels provided by the Prosecution. Prosecution disclosure to the Defence reveals an attempt to extort money in return for favourable evidence, and OTP-12 changing his evidence because of the payment of money.³ This evidence also

¹ Witnesses 217, 505, 506 and 510 were introduced to the Prosecution by [REDACTED]. Witnesses 219, 428, 429, 430, 493 and 494 were introduced to the Prosecution by [REDACTED] and OTP-118.

² ICC-01/04-01/06-772, *The Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,' 14 December 2006, para. 31.

³ This evidence is set out in Section IV.

reveals collaboration between OTP-11 and OTP-12 through the interaction and involvement of [REDACTED], in this plan. Offences were planned and committed with the object of interfering with the Accused's right to a fair trial and to obtain money in return for favourable testimony.

II. PROCEDURAL HISTORY

A. Procedural History Relevant to the Conduct of OTP-118 and [REDACTED]

9. On 14 February 2013, during a Status Conference, Lead Counsel for the Accused requested information regarding individuals who have been supplying witnesses to the Prosecution.⁴
10. On 4 April 2013, the Defence was informed that [REDACTED], was acting as an intermediary and had introduced a number of Mungiki witnesses to the Prosecution.⁵ These witnesses were: OTP-118, OTP-217, OTP-505, OTP-506, and OTP-510. The Defence was also informed that [REDACTED] and OTP-118 jointly acted as intermediaries and introduced the following Mungiki witnesses to the Prosecution: OTP-219, OTP-428, OTP-429, OTP-430, OTP-493, and OTP-494. On the same date, the Prosecution informed the Defence of the identity of OTP-118. Both identities had been withheld from the Defence by the Court until after the Kenyan elections.
11. In preparation for trial, the Defence interviewed [REDACTED],⁶ [REDACTED],⁷ [REDACTED],⁸ [REDACTED],⁹ and [REDACTED].¹⁰ During the course of these

⁴ ICC-01/09-02/11-T-22-ENG, pp. 23-24.

⁵ Annex B.1.

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

investigations, [REDACTED] provided the Defence with crucial evidence regarding the whereabouts of Prosecution witnesses during the post-election violence ('PEV'), the truth of their involvement in the PEV and information concerning the Mungiki and its relationship with the PEV.

12. On 22 August 2013, [REDACTED] downloaded from his mobile telephone and provided to the Defence two recordings of conversations that took place [REDACTED].¹¹ Two further recordings from [REDACTED] were later extracted from his telephone.¹² The first conversation involved [REDACTED].¹³ The second,¹⁴ third,¹⁵ and fourth¹⁶ recordings involved [REDACTED].¹⁷
13. [REDACTED],¹⁸ [REDACTED]. [REDACTED] stated that in view of the risks to his safety and that of his family, he required witness protection to be implemented before he would be willing to permit the disclosure of any of the telephone recordings beyond the Chamber, the Defence and the VWU, as OTP-118 was a witness for the Prosecution and he did not trust his security until protective measures had been implemented. The transcripts of the recordings provided by [REDACTED] to the Defence are attached in Annexes A.1.i-iv. A signed statement by [REDACTED] of the background and circumstances concerning the recordings, his interaction with OTP-118 and [REDACTED], and the steps taken by them to pervert the course of justice is attached at Annex A.1.
14. Between 20 and 30 August 2013, the Defence contacted the VWU in relation to the immediate safety of [REDACTED], as well as in relation to the immediate

¹⁰ [REDACTED].

¹¹ Annex A.1.v.

¹² Information in respect of these two further recordings is provided at para. 15 herein.

¹³ Annex A.1, paras 3, and 19-30.

¹⁴ Annex A.1, paras 35-43.

¹⁵ Annex A.1, paras 44-49.

¹⁶ Annex A.1, paras 50-58.

¹⁷ Annex A.1, paras 4, and 31-34.

¹⁸ [REDACTED].

safety of a further witness believed to be at risk due to [REDACTED] OTP-118.¹⁹

The Defence convened a meeting with the VWU on 6 September 2013, at which Steven Kay QC emphasised the need to assess the applicants for protective measures as soon as possible.

15. On 27 August 2013, the handset of [REDACTED] was provided to the parties' joint telephone communications expert, Mr Vella. On 6 September 2013, Mr Vella forwarded to the Defence the two further recordings concerning OTP-118 on [REDACTED] telephone, which the witness had not previously provided. On 13 September 2013, Mr Vella provided the Defence with a report as to the nature of the evidence within the telephone and his finding of no evidence of interference with the recording. Mr Vella's report is attached at Annex A.2.
16. The existence of the telephone recordings made by [REDACTED] of his meetings with OTP-118 was brought to the Chamber's attention during an urgent *ex parte* hearing on 6 September 2013. During the *ex parte* hearing, the Trial Chamber requested VWU to 'do its utmost to secure the security of the witness.'²⁰
17. On 13 September 2013, the Trial Chamber ordered the Defence to file any abuse of process argument in respect of the proceedings 'no later than one day after it has been notified by the VWU that protection measures have been implemented for its witnesses.'²¹

¹⁹ The Defence initially applied, via email, to the VWU for protection for: [REDACTED] at 13:36 (CEST) on 20 August 2013; [REDACTED] at 13.34 (BST) on 20 August 2013; [REDACTED] at 12.52 (CEST) on 21 August 2013; and [REDACTED] at 15.10 (BST) on 30 August 2013. On 29 August 2013, Steven Kay QC communicated, via letter, his concern regarding the threats to which [REDACTED] had been subjected.

²⁰ ICC-01/09-02/11-T-25-CONF-EXP-ENG RT 06-09-2013 T, p. 13, lines 6-7.

²¹ Email sent by Trial Chamber V(b) Communications to members of the Defence and members of the VWU at 12.34 on 13 September 2013.

B. Procedural History Relevant to the Conduct of OTP-11 and OTP-12

18. On 4 January 2013, the Prosecution disclosed 11 audio files containing conversations in Kikuyu between OTP-12 and [REDACTED] from September 2012 ('January 2013 audio files'),²² without transcripts in either Kikuyu or English. On the same day, the Prosecution sent an accompanying letter ('4 January Letter') setting out the evidence registration numbers of the audio files, and stating that '[t]ranslations and transcriptions are in progress and will be disclosed when complete.'²³ In this letter, provided in Annex B.1, the Prosecution explained briefly the subject matter of the material disclosed and the context in which the material was collected. The Prosecution relied upon information provided to them by OTP-11 and OTP-12 that 'Mr [REDACTED] was attempting to locate them, purportedly on behalf of Mr Kenyatta, to offer them a deal not to testify.'²⁴ The Prosecution never provided the proposed translations and transcripts. The Defence transcribed and translated the January 2013 audio files. These translations are provided at Annex B.2. An explanatory table in respect of the contents of Annex B.2 is provided at Annex B.2.i.
19. On 13 January 2013, after conducting a preliminary review of the audio files, Lead Counsel for the Defence responded to the 4 January Letter and requested 'that the entirety of the audio files be transcribed, including the English language parts, so that there is a full record.' This response is attached in Annex B.3. Counsel also stated that the Defence could not accept any Prosecution interpretation of the content in the absence of transcripts of the files.²⁵ Counsel further requested that the Prosecution advise the Defence as to whether it was

²² These audio files were disclosed as part of Incriminatory Evidence Package 27.

²³ See Annex B.1.

²⁴ See Annex B.1, p. 3. See also the clearly contradictory account at Annex B.6 in the statement of [REDACTED], interviewed [REDACTED], at para. 72 *et seq.* Also, at para. 74: 'I called [REDACTED] on a Sunday.'

²⁵ See Annex B.3, p. 2.

proposing to interview Mr [REDACTED] 'to establish his account of his conduct' as Counsel had 'clear instructions that his activities do not arise either directly or indirectly from the conduct of Mr Kenyatta.'²⁶ To date, the Prosecution has not responded to the question of whether or not it intends to interview Mr [REDACTED].

20. On 11 February 2013, the Prosecution disclosed Incriminatory Evidence Package 34 ('Package 34'). Package 34 included 39 audio files, without transcripts, of conversations in Kikuyu between OTP-12, members of his family and Prosecution 'handlers,' from September to November 2012 ('February 2013 audio files'). The Defence transcribed and translated the content of the February 2013 audio files. These translations are also provided in Annex B.2.
21. On 10 May 2013, the Defence wrote to the Prosecution about the content of the February 2013 audio files and served Kikuyu into English transcripts prepared by the Defence as part of its Rule 78 Package 3 disclosure batch ('10 May Letter').²⁷ In the 10 May Letter, the Defence provided the Prosecution²⁸ and the Chamber²⁹ with a brief analysis document outlining a number of extracts showing that the February 2013 audio files 'reveal serious matters in relation to the conduct, credibility, motives and truthfulness of witness OTP-12.' The 10 May Letter and accompanying analysis document are attached at Annex B.4.
22. On 30 May 2013, the Prosecution responded to the 10 May Letter ('30 May Letter,'). This letter is attached at Annex B.5. The Prosecution stated that the Defence had 'misconstrued the audio files. Far from revealing a plan by

²⁶ See Annex B.3, p. 2.

²⁷ The 48 transcripts were disclosed to the Prosecution in the same format as they appear before the Chamber.

²⁸ The Defence sent the analysis document to the Prosecution via email at 15:02 on 10 May 2013. The analysis document was also included in the letter that accompanied Rule 78 Package 3.

²⁹ The Defence attached the analysis document as Confidential Annex E to its 'Observations on Estimated Time Required to Prepare for Trial', ICC-01/09-02/11-735-Conf.

Witnesses 11 and 12 “to extort money from Mr Kenyatta,” the audio files evidence attempts by [REDACTED], an “associate” of Mr Kenyatta who apparently acted with his knowledge, to broker a deal with Witnesses 11 and 12 to withdraw their evidence.’³⁰ The Prosecution stated that, in their view, the true nature of the scheme was ‘clear.’ The Prosecution did not provide any translations or transcriptions of the audio files or any explanation as to why these had not been provided to the Defence. The Defence has reasonable grounds to believe that the untranslated nature of the audio file disclosure indicates that the Prosecution was either unaware of the true content of this material or willfully blind to it.

23. On 22 February 2013, the Prosecution served the statement of OTP-12’s [REDACTED], as exculpatory material. This statement is attached at Annex B.6. The contention that the Prosecution has been misled or deliberately tried to evade the truth as to the activity of OTP-12 is further supported by this statement, which reveals that it was in fact [REDACTED] who initiated contact with Mr [REDACTED], as did [REDACTED].³¹ This evidence directly contradicts the Prosecution assertions and claims as represented at paragraph 95 of the Pre-Trial Brief and is illustrative of its total failure in this case to discharge correctly its duties of equality of investigation under Article 54 of the Statute.³²

³⁰ See Annex B.5, p. 2.

³¹ See Annex B.6, para. 72 *et seq.* and para. 74: ‘I called [REDACTED] on a Sunday.’

³² ICC-01/09-02/11-796-Conf-AnxA.

III. APPLICABLE LAW

Abuse of Process

24. The doctrine of abuse of process requires the permanent stay of proceedings where it is impossible to guarantee the accused a fair trial, or where the integrity of the judicial process is irretrievably vitiated by such serious prejudice that to continue the proceedings would offend the fundamental principles of justice. The jurisprudence of the international tribunals demonstrates a clear acceptance that this doctrine belongs to the corpus of applicable law of the international criminal courts and tribunals, as has been recognised and confirmed by the Appeals Chamber.³³ Chambers of the Court have consistently acknowledged that the Court is empowered to discontinue irretrievably vitiated proceedings before a final determination of the case.³⁴ It is for the Defence to prove, on the balance of probabilities, that the continuation of the case amounts to an abuse of process.³⁵

25. The Appeals Chamber in *Lubanga* ruled:

Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. [...] Unfairness in the treatment of the suspect of the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.³⁶

26. The power to stay proceedings permanently may be exercised 'where either the foundation of the prosecution or the bringing of the accused to justice is tainted

³³ ICC-01/04-01/06-772, paras 26-39.

³⁴ See, for example: ICC-01/04-01/06-772; ICC-01/05-01/08-802, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision on the Admissibility and Abuse of Process Challenges,' 24 June 2010; and ICC-01/09-02/11-728.

³⁵ ICC-01/05-01/08-802, paras 201 and 203.

³⁶ ICC-01/04-01/06-772, para. 39.

with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course.’³⁷ As set out by the Appeals Chamber, the test to be applied is as follows:

- i. Would it be ‘odious’³⁸ or ‘repugnant’³⁹ to the administration of justice to allow the proceedings to continue? *or*
- ii. Have the Accused’s rights been breached to the extent that a fair trial has been rendered impossible?⁴⁰

Intermediaries

27. In *Lubanga*, Trial Chamber I ruled that in circumstances in which evidence before the Chamber suggests that intermediaries may have attempted to persuade individuals to give false evidence, and that some of the intermediaries were in contact with each other, the Defence should be provided with the opportunity to explore whether the intermediary in question may have attempted to persuade one or more individuals to give false evidence.⁴¹ The threshold for calling intermediaries to testify before the Chamber prior to Defence submissions on abuse of process is crossed where there is evidence that the individual or individuals in question attempted to persuade one or more individuals to give false evidence.⁴²

Evidential Hearing

28. Under Article 64(2), the Chamber shall ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for

³⁷ ICC-01/04-01/06-772, para. 31.

³⁸ ICC-01/04-01/06-772, para. 27.

³⁹ ICC-01/04-01/06-772, para. 30.

⁴⁰ ICC-01/04-01/06-772, para. 37.

⁴¹ ICC-01/04-01/06-2434, *Lubanga*, ‘Decision on Intermediaries,’ 31 May 2010, para. 139(c).

⁴² ICC-01/04-01/06-2434, para. 139(f).

the protection of victims and witnesses. Article 64(6)(f) guarantees the Chamber's extensive powers in this regard.

29. Article 69(3) vests the Chamber with the authority to request the submission of all evidence that it considers necessary for the determination of the truth. Under Rule 134 of the Rules of Procedure and Evidence, the Chamber, whether on its own motion or at the written request of the Prosecutor or Defence, may rule on any issue concerning the conduct of the proceedings.

IV. EVIDENCE OF ABUSE OF PROCESS

A. OTP-118 and [REDACTED]

i. Intimidation and Interference with [REDACTED] Potential Defence Witnesses by OTP-118, [REDACTED] and Intermediaries Acting on their Behalf

30. The Defence submits that OTP-118 (a witness-intermediary) intimidated and interfered with [REDACTED], with the assistance of Prosecution intermediary [REDACTED]. The intimidation and interference took the form of direct and deliberate actions as well as indirect actions by others on their behalf to stop the cooperation of these witnesses with the Defence, and to secure a change of testimony in line with the Prosecution's case, in return for reward. The conduct of OTP-118 was also designed to send a message to [REDACTED] of his [REDACTED] non-cooperation with the Defence. Defence witnesses [REDACTED] are linked by the same events. [REDACTED] is, however, separately affected, which demonstrates the wider application of the conspiracy to pervert the course of justice in order to prevent the Defence from accessing the truth.

31. Extracts of evidence providing some of the relevant narrative of the abuse of process on these proceedings are set out below.⁴³

Evidence: [REDACTED]

32. The recordings made by [REDACTED] on his mobile telephone on [REDACTED] identify by name protected Prosecution witnesses as being part of the conspiracy to supply fabricated evidence to the Prosecution. The true extent of the fabrication, captured only in part by [REDACTED] recordings, reveals the following Prosecution witnesses as being involved in the fabricated evidence scheme: OTP-12;⁴⁴ OTP-505⁴⁵; OTP-428;⁴⁶ OTP-430;⁴⁷ and OTP-429.⁴⁸ The Defence submits that this revelation is remarkable given the limited amount of time [REDACTED] had to record the relevant conversations and demonstrates a mere fraction of the true extent of the fabrication. The Defence has indicated the identifying Prosecution witness number after each relevant name.

a. Recording of Conversation on [REDACTED] – Annex A.1.i

33. This recording was made by [REDACTED] without the knowledge of the other participants. [REDACTED]⁴⁹ [REDACTED].⁵⁰ [REDACTED].⁵¹ Further relevant extracts are set out below:

- (i) [REDACTED]⁵²

⁴³ ICC-01/09-02/11-811-Conf-Exp. The Defence has a 50 page limit for this filing.

⁴⁴ Annex A.1.i, pp. 8-9. '[REDACTED]' refers to OTP-12.

⁴⁵ Annex A.1.i, pp. 8-9. '[REDACTED]' refers to OTP-505.

⁴⁶ Annex A.1.i, p. 16. '[REDACTED]' refers to OTP-428.

⁴⁷ Annex A.1.i, p. 21. '[REDACTED]' refers to OTP-430.

⁴⁸ Annex A.1.i, p. 21. '[REDACTED]' refers to OTP-429.

⁴⁹ Annex A.1.i, p. 3.

⁵⁰ Annex A.1.i, p. 4.

⁵¹ Annex A.1.i, p. 5.

⁵² Annex A.1.i, p. 7.

- (ii) [REDACTED]⁵³
- (iii) [REDACTED]⁵⁴
- (iv) [REDACTED]⁵⁵
[REDACTED]⁵⁶
- (v) [REDACTED]⁵⁷ [REDACTED]⁵⁸ [REDACTED]⁵⁹
- (vi) [REDACTED]⁶⁰
[REDACTED]⁶¹
- (vii) [REDACTED]⁶² [REDACTED]⁶³
- (viii) [REDACTED]⁶⁴
- (ix) [REDACTED]⁶⁵
- (x) [REDACTED]⁶⁶
- (xi) [REDACTED]⁶⁷
- (xii) [REDACTED]⁶⁸
- (xiii) [REDACTED]⁶⁹
- (xiv) [REDACTED]⁷⁰
- (xv) [REDACTED]⁷¹

⁵³ Annex A.1.i, p. 7.

⁵⁴ Annex A.1.i, p. 8.

⁵⁵ Annex A.1.i, pp. 8-9.

⁵⁶ Annex A.1.i, p. 9. '[REDACTED]' refers to OTP-118.

⁵⁷ Annex A.1.i, p. 10. '[REDACTED]' refers to OTP-118.

⁵⁸ Annex A.1.i, p. 11. '[REDACTED]' refers to OTP-118.

⁵⁹ Annex A.1.i, p. 12.

⁶⁰ Annex A.1.i, pp. 13-14.

⁶¹ Annex A.1.i, p. 14.

⁶² Annex A.1.i, p. 15. '[REDACTED]' refers to OTP-118.

⁶³ Annex A.1.i, p. 15.

⁶⁴ Annex A.1.i, p. 15.

⁶⁵ Annex A.1.i, pp. 15-16.

⁶⁶ Annex A.1.i, p. 16. '[REDACTED]' refers to OTP-118.

⁶⁷ Annex A.1.i, p. 17.

⁶⁸ Annex A.1.i, pp. 19-21. '[REDACTED]' refers to OTP-12.

⁶⁹ Annex A.1.i, p. 21.

⁷⁰ Annex A.1.i, p. 22.

⁷¹ Annex A.1.i, p. 23.

**b. Recording of Conversation on [REDACTED] between [REDACTED] and
OTP-118 – Annex A.1.ii**

34. On [REDACTED], Defence witness [REDACTED] recorded a further conversation between [REDACTED], OTP-118, [REDACTED]. These extracts provide further evidence of the abuse of process undertaken by OTP-118:

- (i) [REDACTED]⁷²
- (ii) [REDACTED]⁷³ [REDACTED]⁷⁴

**c. Recording of Subsequent Conversation on [REDACTED] between
[REDACTED] and OTP-118 – Annex A.1.iii**

35. In a further recorded conversation on [REDACTED], OTP-118 continues with his plan to pervert the course of justice and reveals what he believes the Prosecution wants from the witnesses. Relevant extracts are set out below:

- (i) [REDACTED]⁷⁵
- (ii) [REDACTED]⁷⁶
- (iii) [REDACTED]⁷⁷ [REDACTED]⁷⁸

**d. Recording of Final Conversation on [REDACTED] between
[REDACTED] and OTP-118 – Annex A.1.iv**

36. In the last recorded conversation on [REDACTED], OTP-118 continues with his plan to pervert the course of justice, which includes a plan to sabotage the Defence case. Relevant extracts are set out below:

⁷² Annex A.1.ii, p. 3.

⁷³ Annex A.1.ii, p. 5.

⁷⁴ Annex A.1.ii, p. 6.

⁷⁵ Annex A.1.iii, p. 3.

⁷⁶ Annex A.1.iii, p. 3.

⁷⁷ Annex A.1.iii, p. 4.

⁷⁸ Annex A.1.iii, p. 5.

- (i) [REDACTED]⁷⁹ [REDACTED]⁸⁰
- (ii) [REDACTED]⁸¹
- (iii) [REDACTED]⁸²
- (iv) [REDACTED]⁸³
- (v) [REDACTED]⁸⁴
- (vi) [REDACTED]⁸⁵
- (vii) [REDACTED]⁸⁶
- (viii) [REDACTED]⁸⁷
- (ix) [REDACTED]⁸⁸
- (x) [REDACTED]⁸⁹ [REDACTED]⁹⁰ [REDACTED]⁹¹
- (xi) [REDACTED]⁹²
- (xii) [REDACTED]⁹³
- (xiii) [REDACTED]⁹⁴
[REDACTED]⁹⁵
- (xiv) [REDACTED]⁹⁶
- (xv) [REDACTED]⁹⁷
- (xvi) [REDACTED]⁹⁸ [REDACTED]⁹⁹ [REDACTED]¹⁰⁰ [REDACTED]¹⁰¹
[REDACTED]¹⁰²

⁷⁹ Annex A.1.iv, pp. 3-4.

⁸⁰ Annex A.1.iv, p. 7.

⁸¹ Annex A.1.iv, pp. 4-5.

⁸² Annex A.1.iv, p. 6.

⁸³ Annex A.1.iv, p. 8.

⁸⁴ Annex A.1.iv, p. 9.

⁸⁵ Annex A.1.iv, p. 11-12.

⁸⁶ Annex A.1.iv, p. 12.

⁸⁷ Annex A.1.iv, pp. 13-14.

⁸⁸ Annex A.1.iv, pp. 15-16.

⁸⁹ Annex A.1.iv, p. 16.

⁹⁰ Annex A.1.iv, p. 17.

⁹¹ Annex A.1.iv, p. 17.

⁹² Annex A.1.iv, p. 19.

⁹³ Annex A.1.iv, p. 22.

⁹⁴ Annex A.1.iv, p. 23.

⁹⁵ Annex A.1.iv, p. 25.

⁹⁶ Annex A.1.iv, pp. 26-28.

⁹⁷ Annex A.1.iv, p. 28.

(xvii) [REDACTED]¹⁰³

(xviii) [REDACTED]¹⁰⁴ [REDACTED]¹⁰⁵ [REDACTED]¹⁰⁶ [REDACTED]¹⁰⁷

(xix) [REDACTED]¹⁰⁸

(xx) [REDACTED]¹⁰⁹

e. [REDACTED] Defence Witness Statement, [REDACTED] – Annex A.3

37. The Defence interviewed [REDACTED]. The statement was signed on [REDACTED]. In this statement, [REDACTED] provides the Defence with information on his background, [REDACTED], and denies the allegations made by Prosecution witnesses that he was involved in planning or participating in the PEV and that he [REDACTED].¹¹⁰ He stated that no money had been given to Mungiki from [REDACTED], to the best of his knowledge, to participate in the violence.¹¹¹ He denied mobilising the Mungiki, or attending either [REDACTED] in January 2008.¹¹² He did not go to [REDACTED] in January 2008.¹¹³ He confirmed that he has never attended a meeting with Uhuru Kenyatta or indeed met him or spoken to him.¹¹⁴ He stated that he did not take part in a fundraising meeting at [REDACTED].¹¹⁵ Neither had he ever been to [REDACTED].¹¹⁶

⁹⁸ Annex A.1.iv, p. 29.

⁹⁹ Annex A.1.iv, p. 30.

¹⁰⁰ Annex A.1.iv, p. 29.

¹⁰¹ Annex A.1.iv, p. 31.

¹⁰² Annex A.1.iv, pp. 32-33.

¹⁰³ Annex A.1.iv, p. 34.

¹⁰⁴ Annex A.1.iv, pp. 36-39.

¹⁰⁵ Annex A.1.iv, pp. 39-40.

¹⁰⁶ Annex A.1.iv, p. 40.

¹⁰⁷ Annex A.1.iv, p. 42.

¹⁰⁸ Annex A.1.iv, p. 43-44.

¹⁰⁹ Annex A.1.iv, p. 45.

¹¹⁰ Annex A.3, para. 14.

¹¹¹ Annex A.3, para. 17.

¹¹² Annex A.3, paras 18-19.

¹¹³ Annex A.3, para. 19.

¹¹⁴ Annex A.3, para. 29.

¹¹⁵ Annex A.3, para. 36.

¹¹⁶ Annex A.3, para. 38.

f. [REDACTED] Defence Witness Statement, [REDACTED] – Annex A.4

38. The Defence re-interviewed [REDACTED] on [REDACTED] regarding his belief that his life was under threat from Mungiki members owing to his cooperation with the Defence. He also provided the background context of [REDACTED]. [REDACTED].¹¹⁷ [REDACTED].
39. [REDACTED].¹¹⁸ [REDACTED].¹¹⁹ [REDACTED].¹²⁰
40. [REDACTED].¹²¹ [REDACTED].
41. On or around [REDACTED], OTP-118 [REDACTED].¹²² [REDACTED], most of whom were known Mungiki members.¹²³ [REDACTED].¹²⁴ [REDACTED].¹²⁵ [REDACTED].¹²⁶ [REDACTED] states that had he refused this request, he would have been labelled a traitor and this would have resulted in his death.¹²⁷ [REDACTED].¹²⁸ [REDACTED] that Mungiki members who had cooperated with the Defence in the past had been killed.¹²⁹ [REDACTED].¹³⁰ [REDACTED].¹³¹

¹¹⁷ Annex A.4, para. 3.

¹¹⁸ Annex A.4, para. 7.

¹¹⁹ Annex A.4, para. 7.

¹²⁰ Annex A.4, para. 7.

¹²¹ Annex A.4, para. 8.

¹²² Annex A.4, para. 9.

¹²³ Annex A.4, para. 10.

¹²⁴ Annex A.4, para. 12.

¹²⁵ Annex A.4, para. 12.

¹²⁶ Annex A.4, paras 12-13.

¹²⁷ Annex A.4, para. 13.

¹²⁸ Annex A.4, para. 13.

¹²⁹ Annex A.4, para. 13.

¹³⁰ Annex A.4, para. 13.

¹³¹ Annex A.4, para. 15.

g. [REDACTED] gives telephone to the Defence, [REDACTED] – Annex A.1.v

42. During an interview with the Defence on [REDACTED] handed over his mobile telephone, on which he had recorded the conversations detailed above. The transcript of this interview is attached at Annex A.1.v. [REDACTED] stated during this conversation that OTP-118 told [REDACTED].¹³² [REDACTED].¹³³ During this interview, [REDACTED] described OTP-118 as a person who would do ‘any kind of thing...just to get money...that is why I recorded him.’¹³⁴

h. [REDACTED] Defence Witness Statement, [REDACTED] – Annex A.1

43. In a further statement, [REDACTED] provides evidence that after the meetings recorded on [REDACTED], he attended a [REDACTED].¹³⁵ [REDACTED], the lawyer for OTP-118 and intermediary for the Prosecution, [REDACTED].¹³⁶ Relevant extracts from this statement are set out below:

- (i) [REDACTED].¹³⁷ [REDACTED].¹³⁸ [REDACTED].¹³⁹
- (ii) [REDACTED].¹⁴⁰ [REDACTED].¹⁴¹ [REDACTED].¹⁴² [REDACTED].¹⁴³
- (iii) [REDACTED].¹⁴⁴ [REDACTED].¹⁴⁵ [REDACTED].¹⁴⁶
- (iv) [REDACTED].¹⁴⁷

¹³² Annex A.1.v, p. 7.

¹³³ Annex A.1.v, p. 7.

¹³⁴ Annex A.1.v, p. 8.

¹³⁵ Annex A.1, para. 24.

¹³⁶ Annex A.1, para. 88.

¹³⁷ Annex A.1, para. 65.

¹³⁸ Annex A.1, para. 65.

¹³⁹ Annex A.1, para. 66.

¹⁴⁰ Annex A.1, para. 70.

¹⁴¹ Annex A.1, para. 68.

¹⁴² Annex A.1, para. 68.

¹⁴³ Annex A.1, para. 86.

¹⁴⁴ Annex A.1, para. 90.

¹⁴⁵ Annex A.1, para. 89.

¹⁴⁶ Annex A.1, para. 67.

(v) [REDACTED].¹⁴⁸

44. [REDACTED].¹⁴⁹ [REDACTED].¹⁵⁰ [REDACTED].¹⁵¹ [REDACTED].¹⁵²
[REDACTED].

Evidence: [REDACTED]

45. The Defence interviewed [REDACTED]. [REDACTED] statement is attached at
Annex A.6. [REDACTED].¹⁵³ [REDACTED].¹⁵⁴ [REDACTED].¹⁵⁵ [REDACTED].¹⁵⁶
[REDACTED].¹⁵⁷

46. [REDACTED].¹⁵⁸

47. [REDACTED].¹⁵⁹ [REDACTED].¹⁶⁰ [REDACTED].¹⁶¹

48. [REDACTED].¹⁶² [REDACTED].

49. [REDACTED].

¹⁴⁷ Annex A.1, para. 91.

¹⁴⁸ Annex A.1, para. 97.

¹⁴⁹ Annex A.1, para. 98.

¹⁵⁰ Annex A.1, para. 98.

¹⁵¹ Annex A.1, para. 98.

¹⁵² Annex A.1, para. 99.

¹⁵³ Annex A.6, para. 2.

¹⁵⁴ Annex A.6, para. 3.

¹⁵⁵ Annex A.6, para. 5.

¹⁵⁶ Annex A.6, para. 5.

¹⁵⁷ Annex A.6, para. 8.

¹⁵⁸ Annex A.6, para. 10.

¹⁵⁹ Annex A.6, para. 11.

¹⁶⁰ Annex A.6, para. 15.

¹⁶¹ Annex A.6, para. 15.

¹⁶² Annex A.6, para. 16

Evidence: [REDACTED]

50. On [REDACTED], the Defence interviewed [REDACTED] who had cause to believe that his life was under threat from members of the Mungiki as a direct result of his decision to cooperate with the Defence. [REDACTED]. His statement, which deals with the threats and intimidation, is attached at Annex A.7.

51. [REDACTED].¹⁶³ [REDACTED].¹⁶⁴

52. [REDACTED].¹⁶⁵ [REDACTED].¹⁶⁶ [REDACTED].¹⁶⁷ [REDACTED].¹⁶⁸

53. [REDACTED].¹⁶⁹

54. [REDACTED].¹⁷⁰ [REDACTED].¹⁷¹ [REDACTED].¹⁷² [REDACTED].¹⁷³

55. [REDACTED].¹⁷⁴

Evidence: [REDACTED]

56. Evidence from [REDACTED], [REDACTED]. This evidence demonstrates the widespread and wholesale nature of the interference with justice that has taken

¹⁶³ Annex A.7, paras 3-5.

¹⁶⁴ Annex A.7, para. 6.

¹⁶⁵ Annex A.7, paras 7-8.

¹⁶⁶ Annex A.7, para. 9.

¹⁶⁷ Annex A.7, para. 10.

¹⁶⁸ Annex A.7, para. 10.

¹⁶⁹ Annex A.7, para. 12.

¹⁷⁰ Annex A.7, para. 14.

¹⁷¹ Annex A.7, para. 15.

¹⁷² Annex A.7, para. 16.

¹⁷³ Annex A.7, para. 16.

¹⁷⁴ Annex A.7, para. 17.

place as a plan to benefit the Prosecution. [REDACTED] statements are attached at Annexes A.8 and A.9.

57. [REDACTED].¹⁷⁵ [REDACTED].¹⁷⁶ [REDACTED].¹⁷⁷ [REDACTED].¹⁷⁸

58. [REDACTED].¹⁷⁹ [REDACTED].¹⁸⁰ [REDACTED].¹⁸¹ [REDACTED].¹⁸²
[REDACTED].¹⁸³ [REDACTED].¹⁸⁴

59. [REDACTED].¹⁸⁵ [REDACTED].¹⁸⁶ [REDACTED].¹⁸⁷

Evidence: [REDACTED]

60. The Defence case that [REDACTED] has been writing statements and constructing a false case against Uhuru Kenyatta with OTP-118 is supported by the expert reports of Dr Olsson, an independent forensic linguistics expert, instructed by the Defence. Dr Olsson's reports have been served on the Prosecution by the Defence and are attached in Annex A.10.¹⁸⁸

¹⁷⁵ Annex A.8, para. 10.

¹⁷⁶ Annex A.8, para. 10.

¹⁷⁷ Annex A.8, para. 11.

¹⁷⁸ Annex A.8, para. 12.

¹⁷⁹ Annex A.8, para. 15.

¹⁸⁰ Annex A.8, para. 18.

¹⁸¹ Annex A.9, para. 1.

¹⁸² Annex A.8, para. 20.

¹⁸³ Annex A.8, para. 21.

¹⁸⁴ Annex A.8, para. 30.

¹⁸⁵ Annex A.8, para. 40.

¹⁸⁶ Annex A.8, para. 47.

¹⁸⁷ Annex A.8, paras 51-54.

¹⁸⁸ Annex A.10.i: KEN-D13-0011-0122, disclosed to the Prosecution on 17 April 2013. Annex A.10.ii: KEN-D13-0011-0147, disclosed to the Prosecution on 17 April 2013. Annex A.10.iii: KEN-D13-0011-0183, disclosed to the Prosecution on 10 May 2013. Annex A.10.iv: KEN-D13-0011-0207, disclosed to the Prosecution on 12 June 2013. Annex A.10.v: KEN-D13-0011-0240, disclosed to the Prosecution on 25 September 2013. Annex A.10.vi: KEN-D13-0011-0251, disclosed to the Prosecution on 3 October 2013. In the interests of judicial economy, the Defence has not annexed the Prosecution documents Dr Olsson refers to in Annex A.10.vi. The Defence will provide these to the Chamber upon request. Documents referred to in the first five reports are attached at Annex A.10.vii.

61. Dr Olsson has professionally analysed several documents provided to the Prosecution by [REDACTED] and OTP-118, and his conclusions show that these documents have one common author.¹⁸⁹ Remarkably, the documents provided to the Prosecution by [REDACTED] include witness statements from OTP-118,¹⁹⁰ OTP-217,¹⁹¹ OTP-428,¹⁹² OTP-429¹⁹³ and OTP-430.¹⁹⁴ The documents provided by OTP-118 include an affidavit of OTP-118,¹⁹⁵ and a letter written and signed by [REDACTED] to Mr Ocampo dated [REDACTED].¹⁹⁶ The conclusion of common authorship discredits the assertions made by OTP-217, OTP-428, OTP-429 and OTP-430 to the Prosecution that they wrote their respective statements themselves.¹⁹⁷
62. In light of the evidence that OTP-118 has been involved in coaching Prosecution witnesses¹⁹⁸ and that he had directed witnesses to go to [REDACTED],¹⁹⁹ the common authorship of the witness statements of OTP-118, OTP-217, OTP-428, OTP-429 and OTP-430 suggests that [REDACTED] has been integral to the plan to concoct false evidence. The statement of OTP-118 was created in [REDACTED], and introduces incriminatory material *seven months* after his

¹⁸⁹ See Annex A.10.v, p. 6: Dr Olsson concludes that, in relation to the witness statements of OTP-118, OTP-428, OTP-429 and OTP-430, the [REDACTED] letter and affidavit of OTP-118, there was a ‘common thread of authorship throughout each document’ and it is ‘likely to be the case that a single authorship underlies all the documents.’ See further, Annex A.10.vi, p. 6: Dr Olsson states that the possibility that each of the witness statements of OTP-217, OTP-428, OTP-429 and OTP-430 ‘is an authentic, independently produced document is not feasible.’

¹⁹⁰ KEN-OTP-0076-0478_R02 and KEN-OTP-0076-0018_R02.

¹⁹¹ KEN-OTP-0077-0898_R02.

¹⁹² KEN-OTP-0077-0908_R02.

¹⁹³ KEN-OTP-0077-0902_R01.

¹⁹⁴ KEN-OTP-0077-0910_R02.

¹⁹⁵ KEN-OTP-0065-0037_R03.

¹⁹⁶ KEN-OTP-0065-0049_R03.

¹⁹⁷ In interview, OTP-217 stated: ‘the statement he has sent to you is what I have written’ (KEN-OTP-0085-1665 at 1675); OTP-429 stated, about KEN-OTP-0077-0902: ‘I wrote with my hand’ (KEN-OTP-0085-1172 at 1175); and OTP-430 stated about KEN-OTP-0077-0910, ‘I have written it on my own’ (KEN-OTP-0083-0253 at 0260 - 0261). The screening notes of OTP-428, OTP-429 and OTP-430 also indicate that these witnesses had confirmed to the Prosecution that they each authored their respective statements (KEN-OTP-0095-0822; KEN-OTP-0095-0824; and KEN-OTP-0095-0820). Witnesses OTP-429 and OTP-430 stated that [REDACTED] typed the statements, which they had written by hand.

¹⁹⁸ Annex A.1.

¹⁹⁹ KEN-OTP-0097-0033 at 0042. OTP-219 indicated in interview that OTP-118 ‘was the one who directed us to come to the lawyer.’

extensive interviews with the Prosecution.²⁰⁰ The statements of OTP-217, OTP-428, OTP-429 and OTP-430, all of whom were witness brought to the Prosecution by [REDACTED] and OTP-118,²⁰¹ were created shortly thereafter.²⁰² Crucially, the statements of witnesses OTP-428, OTP-429 and OTP-430, were created *before* these witnesses were interviewed by the Prosecution.²⁰³ This evidence supports the Defence submission of clear interference with the collection of evidence, namely interference with the content of the statements of witnesses at the outset of their involvement with the Court.

B. OTP-11 and OTP-12

- i. OTP-12 was involved in a conspiracy to interfere with the collection of evidence with others, without the knowledge of Uhuru Kenyatta, for the payment of money*

63. Evidence that OTP-12 was involved in a conspiracy to interfere with the collection of evidence with others, without the knowledge of Uhuru Kenyatta, for the payment of money is provided in a conversation between OTP-12 and [REDACTED], in which OTP-12 asks ‘how many millions do you think Uhuru will part with...do you think he would part with 200 millions?’²⁰⁴

²⁰⁰ The Prosecution interviewed OTP-118 between 13-15 January 2012 and the transcripts run to 347 pages. OTP-118’s additional statement, KEN-OTP-0076-0018, was made ‘through’ [REDACTED] (KEN-OTP-0103-2531 at 2540). On [REDACTED], [REDACTED] provided the Prosecution with an updated version of the statement, KEN-OTP-0076-0478, which added an incriminatory paragraph when OTP-118 ‘sat down’ with [REDACTED] (KEN-OTP-0076-0478 at 2543).

²⁰¹ OTP-217 was brought to the Prosecution by [REDACTED] and OTP-428, OTP-429 and OTP-430 were brought to the Prosecution by [REDACTED] and OTP-118.

²⁰² Statements KEN-OTP-0077-0898_R02, KEN-OTP-0077-0908, KEN-OTP-0077-0902, and KEN-OTP-0077-0910 were provided to the Prosecution by [REDACTED] on [REDACTED].

²⁰³ OTP-428 and OTP-429 were first interviewed on [REDACTED] and OTP-430 was first interviewed on [REDACTED].

²⁰⁴ KEN-OTP-0089-0087 from 00:15:45 to 00:15:47; Defence translation at Annex B.2.xviii, p. 14.

64. In a conversation between OTP-12 and another family member, [REDACTED], on 25 September 2012, OTP-12 states that [REDACTED] should be given ‘10 million Kshs’ to ‘take care of’ his ‘needs back home.’²⁰⁵
65. In a conversation with [REDACTED] on 25 September 2012, OTP-12 asks ‘how many millions would you like.’²⁰⁶ An exchange then takes place in which the two individuals discuss how much OTP-12 should ask for and he concludes that ‘five million is little but when I talk to them I will know how much to ask them for.’²⁰⁷
66. One of the purposes of obtaining the money is also revealed in the transcripts, namely the relocation of the entire extended family.²⁰⁸ These statements are evidence of the intent to carry out the plan to enrich themselves.
67. The evidence disclosed by the Prosecution reveals that Uhuru Kenyatta had no knowledge of and was not involved in the planned conspiracy by OTP-12, OTP-11 and others. The lack of Uhuru Kenyatta’s knowledge is clearly demonstrated by the following Prosecution audio file extracts:
- (i) OTP-12’s [REDACTED] states that in his view Mr [REDACTED] ‘wanted money from the Youngman’ and that ‘he must have refused to give him any money.’²⁰⁹ In context, it appears that the word ‘Kijana’ or ‘Youngman’ is used to refer to Uhuru Kenyatta.²¹⁰ OTP-12’s [REDACTED] explains that he discovered ‘[REDACTED] first wanted to

²⁰⁵ KEN-OTP-0089-0034 from 00:07:34 to 00:07:45; Defence translation at Annex B.2.vi, p. 7.

²⁰⁶ KEN-OTP-0089-0033 from 00:04:53 to 00:04:55; Defence translation at Annex B.2.v, p. 5.

²⁰⁷ KEN-OTP-0089-0033 from 00:05:01 to 00:05:20; Defence translation at Annex B.2.v, p. 5.

²⁰⁸ KEN-OTP-0089-0104 from 00:10:36 to 00:13:47; Defence translation at Annex B.2.xxiii, p. 10.

²⁰⁹ KEN-OTP-0089-0143 from 00:13:38 to 00:13:40; Defence translations at Annex B.2.xxxix, p. 11.

²¹⁰ KEN-OTP-0089-0143 from 00:13:38 to 00:13:40; Defence translations at Annex B.2.xxxix, p. 14.

come up with a plan and then tell the Youngman about it.’²¹¹ OTP-12 asks whether Mr [REDACTED] was crafting a plan, to which his brother answers, ‘yes I think he wanted a plan in place before he tried to contact the Youngman.’²¹² OTP-12’s [REDACTED] states that [REDACTED] had gone ‘completely quiet’ and no longer answered their calls.²¹³ It is unclear from the transcripts as to whether or not Mr [REDACTED] is in fact a victim of a plot to extort money by OTP-12 and others. The Prosecution appears to have accepted at face value the account given by OTP-12 that Mr [REDACTED] was acting on behalf of Uhuru Kenyatta, without having first transcribed and translated the conversations recorded between OTP-12 and his [REDACTED] which clearly reveal that a plan was being ‘crafted’ without Uhuru Kenyatta’s knowledge. There is no suggestion that OTP-12’s family were to hand over money to the Prosecution in a ‘sting’ operation.

- (ii) Having failed to reach Uhuru Kenyatta, on [REDACTED], OTP-12’s [REDACTED]²¹⁴ directly solicited a meeting with Uhuru Kenyatta by letter, attached as Annex B.7, addressing him ‘on behalf of [REDACTED] who have asked me to do whatever possible to contact you so that I may deliver a verbal message from them to you in person.’²¹⁵ No such meeting with Uhuru Kenyatta ever took place. Efforts by OTP-12’s [REDACTED] continue in this vein in an attempt to reach Uhuru Kenyatta via his relatives, in order to attempt to obtain money: ‘[t]here are some other people I am waiting to talk to either today or tomorrow. The Youngman’s uncle...’²¹⁶ When asked by OTP-12 about progress in this regard, OTP-12’s brother confirms that ‘[t]hose ones have not

²¹¹ KEN-OTP-0089-0123_R01 from 00:02:06 to 00:02:16; Defence translations at Annex B.2.xxxi, p. 2.

²¹² KEN-OTP-0089-0123_R01 from 00:02:21 to 00:02:24; Defence translations at Annex B.2.xxxi, p. 3.

²¹³ KEN-OTP-0089-0143 from 00:13:42 to 00:13:45; Defence translations at Annex B.2.xxxix, p. 11.

²¹⁴ KEN-OTP-0089-0123_R01 from 00:03:06 to 00:03:12; Defence translations at Annex B.2.xxxi, p. 4.

²¹⁵ Annex B.7.

²¹⁶ KEN-OTP-0089-0149 from 00:04:36 to 00:04:48; Defence translations at Annex B.2.xxxxii, p. 4.

called.’²¹⁷ Even OTP-12’s [REDACTED] sought money from the Defence as a condition for a further interview, a solicitation that was firmly rejected by the Defence.²¹⁸ The interview was terminated. Further attempts to reach Mr Kenyatta have failed.

- ii. *OTP-12 interfered with the collection of evidence by the Defence by providing the Defence with an initial exculpatory account and then giving a false incriminatory account to the Prosecution*

68. OTP-12 interfered with the collection of evidence by the Defence by providing the Defence with an initial exculpatory account²¹⁹ and then giving a false inculpatory account to the Prosecution.²²⁰ The Defence’s exposition of this plan at the confirmation hearing and thereafter²²¹ is confirmed by the tenor of OTP-12’s language in Kikuyu to [REDACTED] as recently as [REDACTED], when he was under the protection of the VWU. OTP-12 states clearly in his conversation: ‘I told them to send money;’²²² ‘we changed our statements because they did not

²¹⁷ KEN-OTP-0089-0154_R01 from 00:11:01 to 00:11:03; Defence translations at Annex B.2.xxxxiii, p. 8.

²¹⁸ Annex B.6, para. 119: ‘[REDACTED] was supposed to be interviewed again, but [REDACTED] refused [REDACTED] request to receive money to be able to pay school fees prior to the interview. So, [REDACTED] refused to be interviewed further.’

²¹⁹ For example, see ICC-01/09-02/11-452, para. 35, citing KEN-D13-0006-0013 at 0013-0018; KEN-D13-0006-0003 at 0011; KEN-D13-0006-0013 at 0017; KEN-D13-0006-0013 at 0018; KEN-D13-0006-0039 at 0040; KEN-D13-0006-0003 at 0007; KEN-D13-0006-0013 at 0015; KEN-D13-0006-0039 at 0044.

²²⁰ The central elements of OTP-12’s inculpatory account are contained in the Prosecution’s Pre-Trial Brief, ICC-01/09-02/11-796-Conf-AnxA; see paras 26-27, citing KEN-OTP-0060-0112 at 0115-0117; KEN-OTP-0060-0299 at 0313-0314, KEN-OTP-0060-0405 at 0408, KEN-OTP-0060-0426 at 0427-0433, KEN-OTP-0074-0590 at 0597-0598; para. 30, citing KEN-OTP-0074-0486 at 0499; para. 36, citing KEN-OTP-0060-0112 at 0117, KEN-OTP-0060-0299 at 0313-0314, KEN-OTP-0060-0365 at 0371-0377, KEN-OTP-0060-0405 at 0408-0413, KEN-OTP-0060-0426 at 0452, KEN-OTP-0074-0516 at 0524, KEN-OTP-0074-0590 at 0597-0598; para. 39, citing KEN-OTP-0060-0093 at 0099-0100, KEN-OTP-0074-0629 at 0643; paras 45-50, citing KEN-OTP-0060-0093 at 0096, KEN-OTP-0060-0112 at 0115-0117, 0126, KEN-OTP-0060-0365 at 0371, 0373-0377, KEN-OTP-0060-0385 at 0389-0390, 0392, KEN-OTP-0060-0426 at 0448, KEN-OTP-0074-0590 at 0597; paras 71-72, citing KEN-OTP-0060-0112 at 0118, KEN-OTP-0060-0365 at 0370-0378, KEN-OTP-0060-0405 at 0408-0413, KEN-OTP-0074-0516 at 0523, KEN-OTP-0074-0629 at 0642; para. 86, citing KEN-OTP-0060-0325 at 0337-0339, KEN-OTP-0060-0453 at 0459-0461; paras 87-91, citing KEN-OTP-0060-0093 at 0105, KEN-OTP-0060-0112 at 0121-0122, 0124-0125, KEN-OTP-0060-0130 at 0131-0134, 0137-0142, KEN-OTP-0060-0150 at 0155, KEN-OTP-0060-0299 at 0314-0318, 0320, KEN-OTP-0060-0405 at 0408-0412, 0422, KEN-OTP-0060-0470 at 0474-0476, 0480-0483, KEN-OTP-0060-0486 at 0487-0489.

²²¹ For example, see ICC-01/09-02/11-T-10-ENG, p. 15, line 11 to p. 21, line 8; ICC-01/09-02/11-384, paras 11-26; ICC-01/09-02/11-452, paras 26-40.

²²² KEN-OTP-0089-0136 from 00:07:47 to 00:07:49; Defence translation at Annex B.2.xxxvi, p. 6.

agree to what we wanted;'²²³ 'they never fulfilled the deal we wanted;'²²⁴ and 'I told them they would look for me all over the world... because they refused to agree to my terms.'²²⁵ It is clear from the context of the conversation that he is referring to his interactions with the Defence. OTP-12 stated explicitly that if agreements are not reached, statements will be changed: 'recording a statement is no big deal, in fact one can record three or four statements...depending on what they agree on but if you fail to reach an agreement one can change what they have said.'²²⁶ OTP-12's clear willingness to change testimony in the event of alleged agreements not being reached and money not being sent constitutes an offence against the administration of justice and necessitates investigation under Article 70. This is criminal conduct of the offence of extortion that the Prosecution has been unwilling to recognise as it has an interest in protecting the credibility of its witness to maintain what is increasingly clear is an utterly corrupt case. The Prosecution is wilfully blind to these issues or, even worse, constructing a case deliberately in defiance of its Article 54 duties.

iii. OTP-11 was involved in a conspiracy with OTP-12 to tamper with the collection of evidence

69. Evidence of the involvement of OTP-11 in a conspiracy to tamper with the collection of evidence is clear from the statements made by OTP-12's [REDACTED], who acts as an intermediary between OTP-11 and OTP-12.²²⁷
70. Further Prosecution evidence of OTP-11 and OTP-12 acting together in efforts to tamper with or interfere with the collection of evidence was disclosed to the Defence on [REDACTED]. This evidence, in the form of a letter from the

²²³ KEN-OTP-0089-0137 from 00:10:53 to 00:10:56; Defence translation at Annex B.2.xxxvii, p. 10.

²²⁴ KEN-OTP-0089-0137 from 00:10:58 to 00:11:00; Defence translation at Annex B.2.xxxvii, p. 10.

²²⁵ KEN-OTP-0089-0137 from 00:16:52 to 00:16:57; Defence translation at Annex B.2.xxxvii, p. 16.

²²⁶ KEN-OTP-0089-0137 from 00:11:05 to 00:11:17; Defence translation at Annex B.2.xxxvii, pp. 10-11.

²²⁷ Annex B.6, KEN-OTP-0092-0737_R01, paras 83-85, 97-98 and 100-102.

Attorney General of Kenya to the Head of the International Cooperation Section at the ICC dated [REDACTED], attached in Annex B.8, reveals that the Commissioner of Police had opened an investigation into OTP-11 and OTP-12 in respect of:

[A]llegations that they had wanted to meet Hon. Uhuru Kenyatta and Amb. Francis Muthaura with a view of returning firearms, police and prison uniforms which they had obtained during the 2007/2008 post-election violence (PEV). The two are said to have demanded Kshs 3,000,000 for the return of the fire arms.²²⁸

The Attorney General sought confirmation as to whether the two individuals were ‘indeed ICC Prosecution witnesses,’ stating that the information was relevant to the ‘ongoing investigations by the Kenya police.’²²⁹

V. SUBMISSIONS

71. The doctrine of abuse of process requires the permanent stay of proceedings where it is impossible to guarantee the accused a fair trial, or where the integrity of the judicial process is irremediably vitiated by such serious prejudice that to continue the proceedings would offend the fundamental principles of justice. Both thresholds have now been reached.
72. The Defence submits that the extensive evidence set out herein reveals a serious and sustained abuse of the process of the current proceedings by a significant Prosecution witness and a significant Prosecution intermediary both of whom are responsible for providing the majority of witnesses of fact in this case. This abuse is compounded by the actions of OTP-11 and OTP-12 in a conspiracy to interfere with the collection of evidence with others, without the knowledge of Uhuru Kenyatta, for the payment of money. It is now clear from the totality of the evidence annexed to this filing that the Prosecution is presiding over an utterly corrupt and dishonest case that is an affront to justice and amounts to an

²²⁸ Annex B.8, KEN-OTP-0102-0445.

²²⁹ Annex B.8, KEN-OTP-0102-0445.

abuse of process. The Defence has previously served upon the Prosecution further evidence in the course of the last year of the lack of reliability of the witnesses upon which it seeks to rely.

A. OTP-118 and [REDACTED]

73. [REDACTED]. [REDACTED].²³⁰ [REDACTED]. The evidence also reveals the involvement of the entire senior echelons of the Mungiki in the conspiracy to prevent the Defence from having a fair trial at the ICC and an intention for the trial to take place upon perverted evidence.
74. OTP-118 has prevented the Defence investigations by [REDACTED] and has also been engaged with [REDACTED] in the wholesale fabrication of evidence. This is a clear obstruction of the course of justice solely to the advantage of the Prosecution in these proceedings. OTP-118 has even felt able to construct a plan to sabotage the Defence case by suggesting that witnesses give different evidence to that originally intended when they get to The Hague.
75. [REDACTED] is the intermediary for those Prosecution witnesses cited in the recordings made by [REDACTED] as providing false stories relating to the PEV to the Prosecution and is working in concert with OTP-118. [REDACTED]. Furthermore, forensic linguistic evidence supports the Defence submission that [REDACTED] has been involved in the construction of a false case against Uhuru Kenyatta with OTP-118.²³¹
76. It is apparent that the plan masterminded by OTP-118 is to admit to crimes committed during the PEV, and persuade others to do the same, whether or not the allegations are true, in the belief that there is an immunity from prosecution

²³⁰ ICC-01/09-02/11-796-Conf-AnxA. [REDACTED].

²³¹ See paras 60-62 above.

for the admitted conduct and an opportunity for reward. The use by the Prosecution in their interviews of the so-called 'Agreements on Statement of Limited Use' no doubt contributes to this delusion. During the introductory meetings relevant to this application between the Prosecution and the potential witness, the Prosecution explained the witness's Article 55(2) rights under the Statute. Subsequently, the Prosecution introduced an 'Agreement on Statement of Limited Use' form.²³² In return for what it regards as a truthful statement, the Prosecution offered not to use anything said by or against the witness, providing a complete immunity from prosecution in respect of what they have done or what they are alleged to have done. The plain pressure on the witness is to agree to a Prosecution version of facts.

77. Defence investigations have revealed cogent evidence of OTP-118's express efforts to intimidate [REDACTED] potential Defence witnesses in order to secure their testimony for the Prosecution.²³³ A [REDACTED] witness has also been affected.²³⁴ The evidence reveals a provision of misinformation and lies by OTP-118 and others acting on his behalf to Defence witnesses, as well as veiled and direct threats capable of intimidating the recipients of the information and dissuading them and others from assisting the Defence. Narratives have been provided for [REDACTED] witnesses to follow and clear benefits have been promised in return for favourable testimony for the Prosecution. [REDACTED] Defence witnesses now fear for their lives.

²³² KEN-OTP-0091-1594 at 1597.

²³³ [REDACTED].

²³⁴ [REDACTED].

i. Evidence of Ten Prosecution Witnesses Irremediably Tainted by OTP-118 and [REDACTED]

78. In light of the criminal conduct of OTP-118 and Prosecution intermediary, [REDACTED], the Defence submits that the accounts provided by ten other Prosecution witnesses,²³⁵ all of whom were brought to the Prosecution by these two individuals, is now irremediably tainted and can no longer be relied upon as credible evidence at trial.
79. An analysis of the Prosecution's screening materials relating to these ten witnesses confirms the inappropriate proximity of [REDACTED] and OTP-118 to these individuals during their initial meetings with the Prosecution. [REDACTED] was present at the screening interviews of all ten witnesses²³⁶ and it is clear that OTP-118 directed the witnesses to go to [REDACTED]. In the screening transcript of OTP-219, the interviewer asks, 'does [REDACTED] know that you're speaking to me today?' OTP-219 responds, 'Yes, [REDACTED], yes, because *he was the one who directed us to come to the lawyer.*'²³⁷ Far from being legitimate acts of intermediaries, there is evidence that OTP-118 and [REDACTED] have exerted influence and pressure upon the witnesses. One report, written by the Prosecution after speaking to OTP-428, states that on the basis of [REDACTED] requests for him to speak to the Prosecution, '*he felt pressured to agree to the interview.*'²³⁸ The screening note of OTP-217 even records that [REDACTED] had briefed the witness 'prior to the screening.'²³⁹ The Defence submits that the criminal conduct of OTP-118 and [REDACTED] as shown by direct evidence from Defence witnesses and the Prosecution's own

²³⁵ The ten witnesses to be relied upon at trial brought to the Prosecution by OTP-118 and [REDACTED] are: OTP-217, OTP-219, OTP-428, OTP-429, OTP-430, OTP-493, OTP-494, OTP-505, OTP-506, and OTP-510.

²³⁶ The Prosecution has chosen not to rely upon the transcripts of these screening interviews at trial, even though they record the first account provided by these important witnesses.

²³⁷ OTP-219, KEN-OTP-0097-0033 at 0042.

²³⁸ OTP-428, KEN-OTP-0080-0690.

²³⁹ OTP-217, KEN-OTP-0095-0785 at 0785.

screening notes irremediably taints the evidence of ten key Prosecution witnesses.

80. Notably, the ten Prosecution witnesses brought by OTP-118 and [REDACTED] have all been added to the Prosecution's evidence after the confirmation of charges.²⁴⁰ The Defence applied to have these proceedings referred back for a fresh hearing of the newly submitted evidence that had not been subject to consideration by the Pre-Trial Chamber in its filing under Article 64(4).²⁴¹ This application was not, however, granted.²⁴² In retrospect, the Defence submits that the lack of scrutiny of this recent evidence has led to and obscured a perversion of justice within these proceedings.
81. The Prosecution has failed to exercise due diligence in its use of intermediaries by using OTP-118, a serious criminal, and the lawyer [REDACTED] who was a [REDACTED]. Both individuals have had their own causes to serve: OTP-118 [REDACTED] who believes the Prosecution have given him an immunity if he assists the case against Uhuru Kenyatta; and [REDACTED]. The Defence submits that it is difficult to imagine a more obvious source of potential contamination and fabrication in a criminal case. The evidence reveals a course of conduct and lack of prosecutorial wisdom in dealing with these individuals that is shocking when compared to the normal standards of criminal justice. Such conduct is an affront to the impartial observer. Moreover, the Defence had sought to warn the Prosecution at an early stage as to the live reliability issues concerning several of their witnesses who had provided exculpatory accounts

²⁴⁰ ICC-01/02-01/09-655.

²⁴¹ ICC-01/02-01/09-622.

²⁴² ICC-01/02-01/09-728.

to the Defence.²⁴³ These witnesses were OTP-11,²⁴⁴ OTP-12,²⁴⁵ OTP-152,²⁴⁶ OTP-219,²⁴⁷ and OTP-428.²⁴⁸ These warnings were not heeded.

82. The scale and nature of the evidence of the criminal conduct of OTP-118 and [REDACTED] and its impact upon the credibility of ten other Prosecution witnesses bears out the Defence submissions that: (i) it is now impossible to guarantee the fair trial of Mr Kenyatta and (ii) the integrity of the proceedings has been irremediably vitiated. The Defence submits that the Prosecution's case is fatally infected by false accounts from witnesses who are willing to lie and have made express and recorded attempts to suborn others who are now in fear for their lives as part of a plan to secure the conviction of President Kenyatta, at any cost.

ii. Prevention of Effective Defence Investigations by OTP-118 and [REDACTED]

83. The substance of this case is now firmly based upon Mungiki witnesses and they represent the only type of source from which the Defence can challenge the insider evidence relied upon by the Prosecution. The conduct of OTP-118 and [REDACTED] has interfered significantly and irreparably with the ability of the Defence to conduct investigations, which were progressing efficiently until the [REDACTED]. Their conduct has prevented the Defence from obtaining witnesses to the truth and thereby significantly affected their ability

²⁴³ In the interests of judicial economy, the Defence has not annexed the documents referred to. The Defence will provide these to the Chamber upon request.

²⁴⁴ Transcripts of Defence Interview with OTP-11: KEN-D13-0010-0023; KEN-D13-0010-0092. Disclosed to the Prosecution on 11 March 2013 as part of Trial Rule 78 Package 1.

²⁴⁵ Transcripts of Defence Interview with OTP-12: KEN-D13-0010-0164; KEN-D13-0010-0246. Disclosed to the Prosecution on 11 March 2013 as part of Trial Rule 78 Package 1.

²⁴⁶ Defence Witness Statement of OTP-152: KEN-D13-0012-0126. Disclosed to the Prosecution on 10 May 2013 as part of Trial Rule 78 Package 3.

²⁴⁷ Defence Witness Statements of OTP-219: KEN-D13-0012-0001; KEN-D13-0012-0073. Disclosed to the Prosecution on 17 April 2013 as part of Trial Rule 78 Package 2.

²⁴⁸ Defence Witness Statement of OTP-428: KEN-D13-0012-0056. Disclosed to the Prosecution on 17 April 2013 as part of Trial Rule 78 Package 2.

to ensure the fairness of any subsequent trial. The Defence submits that protection of the Defence witnesses cannot remedy the damage caused to this trial by the conduct of OTP-118 and [REDACTED]. This damage has been caused to the viability of Defence investigations, in which direct efforts to secure testimony on behalf of Uhuru Kenyatta have been severely hampered.

84. Defence investigations have been affected to such an extent that to continue to trial would now vitiate the integrity of the judicial process given the serious prejudice that would result to the Defence from the impact of the criminal conduct of OTP-118 and [REDACTED] upon the group of people they led to the Prosecution and represent. Evidence of serious interference with the ability of the Defence to investigate is set out in Annexes A.11 and A.12, which contain statements from Lead Investigation Counsel Mr [REDACTED], and Mr [REDACTED] respectively.

B. OTP-11 and OTP-12

85. The involvement of OTP-11 and OTP-12 in a conspiracy to interfere with the collection of evidence with others, without the knowledge of Uhuru Kenyatta, for the payment of money, further compounds the seriousness and scale of the abuse of process on the current proceedings. It is both noteworthy and inexplicable that the Prosecution failed to serve transcripts of the audio recordings upon which the criminal conduct is based. Instead, transcripts were prepared by the Defence. A close scrutiny of this evidence bears out the Defence submissions of OTP-11 and OTP-12's direct involvement in crimes pertaining to these proceedings before the Court.
86. The Defence submits that such crimes must go neither unpunished nor be permitted to infect the integrity of an international criminal trial before the

Court. In failing to investigate its own witnesses, despite cogent Defence submissions in respect of the conduct of these witnesses,²⁴⁹ the Prosecution has failed in its duties under Article 54 of the Statute to investigate incriminating and exonerating circumstances equally in order to establish the truth. The Prosecution has also failed in its duty to investigate the truthfulness of its witnesses and intermediaries. The Chamber must now take the responsibility for tackling these fundamentally crucial issues, which have real potential to damage the reputation of the Court.

87. The Defence submits that such actions, now exposed, must be addressed appropriately within the framework of the Rome Statute by all parties and the Chamber, in order to ensure the integrity of the Court and most importantly, to ensure the protection of the rights of President Kenyatta. To allow this matter to continue to trial on the basis of clear evidence of crimes having been committed by key Prosecution witnesses would amount to a travesty of justice. The entire foundation of the evidence relied upon by the Prosecution from Mungiki witnesses to attempt to establish individual criminal liability has been revealed as corrupt, false and has been devastated beyond repair by the evidence which has emerged from diligent investigations conducted by the Defence. The Defence submits that the effect of this evidence upon the future non-viability of a fair trial is clear, particularly in circumstances where thirteen witnesses are now known to have either been involved in criminal actions and plans to extort/suborn witnesses or have been impacted irrevocably by such actions.
88. The Defence submits that to seek to continue to trial is capable of resulting in a serious miscarriage of justice. The current proceedings are now so irrevocably tainted by widespread illegal action that to allow justice to embark on its course would result in a gross violation of the rights of President Kenyatta.

²⁴⁹ Annex B.3, pp. 2-3.

VII. RELIEF

89. The Defence respectfully requests the Chamber to:

- (i) Permanently stay the proceedings on the basis of an abuse of process;
or
- (ii) Order an evidential hearing before the start of trial to determine the issue of abuse of process.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 10th day of October 2013

At London, England