

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 9 March 2012

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

**SITUATION IN THE REPUBLIC OF KENYA
*IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA***

Public

**Decision on the Defence Applications for Leave to Appeal the Decision on the
Confirmation of Charges**

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for Francis Kirimi Muthaura

Karim Khan, Essa Faal, Kennedy
Ogetto, Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay and Gillian Higgins

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

Other

Appeals Chamber

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”), by majority, hereby renders this decision on the “Defence Application for Leave to Appeal the ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’”¹ submitted by the Defence of Mr. Muthaura (Mr. Muthaura’s Application), and the “Defence Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’”² submitted by the Defence of Mr. Kenyatta (Mr. Kenyatta’s Application) (collectively, the “Defence Applications”).

I. PROCEDURAL HISTORY

1. On 26 November 2009, the Prosecutor filed a request for authorization to commence an investigation into the situation in the Republic of Kenya.³ On 31 March 2010, the Chamber authorized, by majority, the commencement of an investigation into the situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009.⁴

2. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court.⁵ Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011, during which, *inter alia*, the Chamber set the date for the commencement of the confirmation of charges hearing for 21 September 2011.⁶

3. The confirmation of charges hearing commenced on 21 September 2011 and lasted for 12 days.

¹ ICC-01/09-02/11-385.

² ICC-01/09-02/11-384

³ ICC-01/09-3 and its annexes.

⁴ Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr.

⁵ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-01.

⁶ ICC-01/09-02/11-T-1-ENG, page 14, lines 11 to 15.

4. On 23 January 2012, the Chamber issued its “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, in which, *inter alia*, it confirmed the charges presented against Mr. Muthaura and Mr. Kenyatta to the extent specified in the decision, and declined to confirm the charges against Mr. Ali (the “Decision”).⁷

5. On 30 January 2012, the Defence of Mr. Muthaura filed its application, whereby it requests that the Chamber grants it leave to appeal the Decision on the following eight issues:

- (i) “[w]hether the Majority, in its assessment of the evidence, reversed the burden of proof and shifted the onus of rebuttal to the Defence” (“Muthaura’s First Issue”);
- (ii) “[w]hether admission of statements obtained by non-judicial bodies, without the consent of the persons who provided the information for their statements to be used in ICC proceedings, contravenes the established jurisprudence and practice of the Court” (“Muthaura’s Second Issue”);
- (iii) “[w]hether the Majority’s conclusions at paragraph 415 that the suspects knew rape was a virtually certain consequence of the implementation of the common plan is legally and factually permissible” (“Muthaura’s Third Issue”);
- (iv) “[w]hether the Confirmation Decision may re-characterise the Prosecution’s allegations against a suspect, as set out in the DCC, without providing the suspect an opportunity to be heard on the re-characterised allegations” (“Muthaura’s Fourth Issue”);
- (v) “[w]hether NGO and other reports become credible simply because they are corroborated by like evidence (NGO and other reports)” (“Muthaura’s Fifth Issue”);

⁷ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf.

- (vi) “[w]hether in evaluating evidence pursuant to Article 61(7) a Chamber may depart from the evidence and draw conclusions on the basis of speculation (“Muthaura’s Sixth Issue”);
- (vii) “[w]hether allegations of investigative failings of the Prosecution in discharging its responsibilities under Article 54 are matters that fall within the scope of issues for consideration in a confirmation of charges decision (“Muthaura’s Seventh Issue”); and
- (viii) “[w]hether the Majority applied different criteria/consideration to the evaluation of Defence evidence as compared to Prosecution evidence” (“Muthaura’s Eighth Issue”).⁸

6. On the same day, the Defence of Mr. Kenyatta filed its application, whereby it requests that the Chamber grants it leave to appeal the Decision on the following five issues:

- (i) “[w]hether the Majority erred in law in assessing the evidence at confirmation by reversing the burden of proof contrary to Article 67(1)(i)” (“Kenyatta’s First Issue”);
- (ii) “[w]hether the Majority erred in law by determining that alleged failures of the OTP to investigate exculpatory issues or issues of reliability had no consequences for the Confirmation Hearing and did not fall within the scope of the Chamber’s determination pursuant to Article 61(7) of the Statute” (“Kenyatta’s Second Issue”);
- (iii) “[w]hether the Majority’s exercise of discretion was so irrational, unfair and unreasonable so as to constitute an abuse of discretion by attributing significant weight to Prosecution Witnesses 11 and 12, and failing to attribute any weight to the substantial Defence evidence challenging the credibility of these witnesses” (“Kenyatta’s Third Issue”);
- (iv) “[w]hether the Majority’s exercise of discretion was so irrational, unfair and unreasonable so as to constitute an abuse of discretion in assessing

⁸ ICC-01/09-02/11-385, para. 1.

evidence in relation to the allegation of a meeting on 26 November 2007 at State House with members of the Mungiki, at which it is alleged Uhuru Kenyatta, Mr Muthaura, President Kibaki and others attended” (“Kenyatta’s Fourth Issue”); and

- (v) “[w]hether the Majority erred in law and abused its discretion by using anonymous witnesses and indirect evidence from unreliable sources, which also required significant corroboration, as evidence of material corroboration for key witnesses to establish that key meetings took place” (“Kenyatta’s Fifth Issue”).⁹

7. On 30 January 2012, at 6.13 p.m., the Defence of Mr. Muthaura filed a corrigendum to its Application for Leave to Appeal (“Corrigendum”),¹⁰ which was notified to the Chamber and parties and participants the next day.

8. On 31 January 2012, the Prosecutor filed a request before the Chamber that the Corrigendum be disregarded, since “the document filed by the Defence falls outside the proper scope of a corrigendum as defined by the Appeals Chamber”.¹¹

9. On 1 February 2012, the Defence of Mr. Muthaura filed its response to the Prosecutor’s request, seeking that the Chamber: (i) reject the Prosecutor’s request and accept the Corrigendum as properly filed; or, in the alternative, (ii) grant leave to the Defence to file the Corrigendum as an amended version of its Application for Leave to Appeal.¹²

10. On 3 February 2012, the Prosecutor filed his consolidated response to the Defence Applications for leave to appeal the Decision (the “Prosecutor’s Response”), whereby he requests that the Applications be rejected since the putative issues presented by the Defence amount to a mere disagreement with the Chamber’s

⁹ ICC-01/09-02/11-384, para. 2.

¹⁰ ICC-01/09-02/11-385-Corr.

¹¹ ICC-01/09-02/11-389, para. 6.

¹² ICC-01/09-02/11-392.

assessment of the evidence and/or are premised upon misrepresentations of the Decision and the jurisprudence of the Court.¹³

II. APPLICABLE LAW

11. The Chamber notes articles 21(1)(a), (2), (3) and 82(1)(d) of the Rome Statute (the “Statute”) and rule 155 of the Rules of Procedure and Evidence.

III. PRELIMINARY MATTERS

12. At the outset, before analyzing the merits of the Defence Applications for leave to appeal the Decision, the Chamber shall address two preliminary matters.

13. With respect to the Corrigendum filed by the Defence of Mr. Muthaura, the Chamber concurs with the Prosecutor that the said document cannot be deemed to constitute a proper corrigendum. The Chamber notes and adopts the views of the Appeals Chamber that “the purpose of corrigenda is to correct typographical errors” and that corrigenda “may not be used to add or alter the substance of the submissions made in a document”, given that “[o]therwise, corrigenda could be used by the participants to circumvent time or page limits stipulated in the legal instruments of the Court or by a Chamber”.¹⁴

14. With respect to the matter at issue, the Chamber notes that, in its Corrigendum, the Defence of Mr. Muthaura inserts a new paragraph which includes substantive submissions and new reference to the Court’s case-law, as such supplementing its arguments with a document that, therefore, does not conform to the purpose of a corrigendum. Accordingly, and considering that the Corrigendum was filed by the Defence of Mr. Muthaura after the expiration of time-limit for the submission of its application for leave to appeal, the Chamber decides that it shall be disregarded.

¹³ ICC-01/09-02/11-396.

¹⁴ Appeals Chamber, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, ICC-01/05-01/08-631-Red, para. 38.

15. As regards the alternative request of the Defence of Mr. Muthaura to the effect that the Chamber should accept the Corrigendum as an updated version of its Application for Leave to Appeal filed after the expiration of the time-limit, it suffices to note that no legal basis within the Court's statutory texts supports any such request, which shall, accordingly, be rejected.

16. The Chamber further notes that in its Application for Leave to Appeal, the Defence of Mr. Muthaura, with respect to its Seventh Issue, "refers to the submissions in [Mr. Kenyatta's] Application for Leave to Appeal [...] and adopts the submissions therein [...] in order to substantiate this ground".¹⁵

17. In his Response, the Prosecutor submits that this practice has been expressly censured by the Appeals Chamber and Muthaura's Seventh Issue should be dismissed on this basis alone.¹⁶ In fact, as observed by the Prosecutor, the Chamber notes that the Appeals Chamber held that:

The arguments of a participant to an appeal must be fully contained within that participant's filing in relation to that particular appeal. The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere. The practice followed by the appellant in this appeal could also lead, in reality, to a circumvention of the page limits that are stipulated in the Regulations of the Court.¹⁷

18. The Chamber agrees with such approach and is of the view that, despite not being identical, the circumstances before the Appeals Chamber are similar to those in the present case and, thus, that the *ratio* of its ruling is applicable with respect to Muthaura's Seventh Issue, which accordingly, shall be dismissed *in limine*.

IV. THE CHAMBER'S DETERMINATION

19. According to article 82(1)(d) of the Statute, "[e]ither party may appeal [...]":

¹⁵ ICC-01/09-02/11-385, para. 32.

¹⁶ ICC-01/09-02/11-396, para. 50.

¹⁷ Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", ICC-01/04-01/06-774, para. 29.

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

20. In this regard, the Chamber recalls the first decision on interlocutory appeals dated 19 August 2005, in which, albeit with different composition, it held that when addressing an application for leave to appeal under article 82(1)(d) of the Statute, it must be guided by three main principles: a) the restrictive nature of the remedy provided in this provision; b) the need for the applicant to satisfy the Chamber as to the fulfillment of the requirements embodied in this provision; and c) the irrelevance of addressing arguments concerning the merits of the appeal.¹⁸ Moreover, the Chamber also recalls the Appeals Chamber's judgment of 13 July 2006 (the "13 July 2006 Judgment"), which considers that the object of the remedy provided in article 82(1)(d) of the Statute, is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".¹⁹

21. Having laid down the main principles underlying interlocutory appeals, the Chamber turns to the requirements regulating the granting or rejecting an application for leave to appeal.

22. Thus, for a leave to appeal to be granted the following requirements must be met:

a) The decision must involve an "issue" that would significantly affect (i) *both* the "fair" and "expeditious" conduct of the proceedings (ii) or the outcome of the trial; and

¹⁸ Pre-Trial Chamber II, "Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58", ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 15; "Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", ICC-02/04-112, para. 16.

¹⁹ Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, para. 19.

b) In the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

23. It follows that in order to grant the request outlined in the Defence Applications, the Defence teams must demonstrate the existence of an “appealable issue” arising from the Decision, which in turn, meets the requirements as specified in paragraphs (a) and (b).²⁰

24. Furthermore, the Chamber concurs with the established jurisprudence of this Court, according to which an “issue” is an identifiable subject or topic requiring a decision for its resolution and not merely a question over which there is disagreement or conflicting opinion - *i.e.* an appealable issue is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination.²¹

25. In this respect, the Chamber recalls that, as consistently held by Pre-Trial Chambers, the drafters of the Statute intentionally excluded the decision on the confirmation of charges from the categories of decisions which may be appealed

²⁰ Pre-Trial Chamber II, “Decision on the Prosecutor's Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’”, ICC-01/05-01/08-532, paras 14-16.

²¹ See the interpretative findings of the Appeals Chamber, “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, paras 9-14; Pre-Trial Chamber II, “Decision on the Prosecutor's Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’”, ICC-01/05-01/08-532, paras 14-16; see also more recently, Pre-Trial Chamber I, “Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’”, ICC-02/05-02/09-267, pp. 5-6; Trial Chamber III, “Decision on the prosecution and defence applications for leave to appeal the ‘Decision on the admission into evidence of materials contained in the prosecution's list of evidence’”, ICC-01/05-01/08-1169, paras 23-25; Trial Chamber II, “Décision relative à la Demande d'autorisation d'interjeter appel contre la Décision sur le ‘Protocole régissant les enquêtes concernant les témoins bénéficiant de mesures de protection ‘présentée par le Procureur’”, ICC-01/04-01/07-2375, paras 3-4; Trial Chamber I, ‘Decision on the prosecution request for leave to appeal the ‘Decision on intermediaries’”, ICC-01/04-01/06-2463, paras 5-7; Pre-Trial Chamber II, “Decision on a Request for Leave to Appeal”, ICC-01/09-43, para. 12; Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali’”, ICC-01/09-02/11-27, para. 7.

directly to the Appeals Chamber.²² The decision on the confirmation of charges, by its very nature, is predicated upon an assessment of the evidence. Thus, if any alleged issue related to the assessment of the evidence would be considered as meeting the requirements of article 82(1)(d) of the Statute, this would be tantamount to making the decision on confirmation of charges directly appealable. Accordingly, arguing that any alleged error in the Chamber's approach by definition constitutes an appealable issue simply because in the absence of such error the charges would not have been confirmed, is not tenable. This means that the Chamber must take particular care in exercising its judicial functions in determining whether the issues presented are indeed appealable.

26. Bearing in mind these general considerations, the Chamber shall address in the following sections the issues for which the Defence of Mr. Muthaura and the Defence of Mr. Kenyatta request leave to appeal.

i) Muthaura's First Issue and Kenyatta's First Issue

27. The Chamber observes that Muthaura's First Issue and Kenyatta's First Issue are almost identical, namely whether the Chamber, in assessing the evidence presented, reversed the burden of proof and shifted the onus of rebuttal to the Defence. Accordingly, the Chamber shall analyse them together.

28. The Defence of Mr. Muthaura argues that the language used in the Decision is indicative of the Chamber's misapplication of the burden of proof. In particular, the Defence of Mr. Muthaura refers to a number of instances from the Decision, which,

²² Pre-Trial Chamber I, ICC-01/04-01/06-915, "Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges", para. 19; Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo'", ICC-01/05-01/08-532, para. 12; Pre-Trial Chamber I, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, p. 5.

in its view, “clearly demonstrates that the issue arises from the impugned decision”.²³

29. As laid out in detail in the following paragraphs, the Chamber is of the view that the Defence of Mr. Muthaura, in support of its assertion that this issue arises out of the Decision, selectively cites incomplete excerpts of the Decision, purporting that the relevant findings of the Chamber carry a different significance than that plainly discernible from the Decision. Indeed, the Defence mischaracterizes examples of the assessment of the evidence in terms of its relevance and its probative value, individually and within the evidence as a whole.

30. In particular, the Defence of Mr. Muthaura refers to paragraph 128, where the Chamber held that the evidence of Witness D12-9 “does not in itself negate either the participation of Mungiki in the attack or the planned nature of such attack”.²⁴ However, the Defence fails to notice that the said conclusion was based on the fact that “the witness only asserts that none of the attackers were ferried from elsewhere”, a statement that was considered by the Chamber to be reconcilable and compatible with the evidence presented which sufficiently demonstrated that the attack in Nakuru was carried by Mungiki – whether local or otherwise.²⁵ Therefore, the Chamber concurs with the Prosecutor that Mr. Muthaura “confuses the Prosecutor’s burden of proof with the burden placed on any party to support the factual propositions advanced by the party with evidence”.²⁶ In particular, the Chamber, in assessing the evidence presented, considered that the statement of Witness D12-9 was not relevant to the determination as to whether the Mungiki participated in the attack and that the attack had been planned in advance.²⁷ In this

²³ ICC-01/09-02/11-385, para 5.

²⁴ ICC-01/09-02/11-385, para. 5 sub (i), making reference to Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 128.

²⁵ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para 128.

²⁶ ICC-01/09-02/11-396, para. 11.

²⁷ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para 128.

sense, the said conclusion was based upon an assessment of the relevance of the evidence at issue, an exercise that is to be conducted with respect to the evidence presented by both the Prosecutor and the Defence teams, and does not, as alleged by the Defence of Mr. Muthaura, relate in any way to the burden of proof that rests with the Prosecutor.

31. The same conclusion must be reached with respect to the second excerpt of the Decision referred to by the Defence of Mr. Muthaura, namely the Chamber's finding that the "generic statement" provided by Witness D12-17 was not "capable of negating the specific evidence presented by the Prosecutor on the matter at issue".²⁸ Once again, the Defence of Mr. Muthaura, in its selective quotation of the Decision, fails to notice that the Chamber's conclusion was based on its assessment of, on the one hand, the statement of Witness D12-17, in particular the stated unlikelihood that weapons could have been provided to criminal gangs given the procedures and practices followed in the Administration Police, whilst, on the other hand, the witnesses relied upon by the Prosecutor who never stated that the issuance of weapons to the Mungiki was done following the official "procedures and practices" established within the Administration Police.²⁹ Thus, the cited excerpt in no way relates to the question of burden of proof, but rather lays out the way the Chamber assesses the substance of the evidence presented and its relevance to a specific assertion made by a party to the proceedings.

32. Finally, the Defence of Mr. Muthaura quotes another excerpt from the Decision, where the Chamber concluded that "the statement of Witness OTP-11, when read in its entirety, does not support the argument of the Defence of Mr. Muthaura".³⁰ In this respect, the Defence argues that "[b]y so holding, the [Chamber] has effectively

²⁸ ICC-01/09-02/11-385, para. 5 sub (ii), making reference to Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, para 172.

²⁹ Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, para 172.

³⁰ ICC-01/09-02/11-385, para. 5 sub (iii), making reference to Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, para 185.

required that Defence submissions be corroborated by Prosecut[or's] evidence".³¹ The Chamber however notes that it was precisely the Defence of Mr. Muthaura that proposed a certain reading of the statement of Witness OTP-11 in order to support its argument that the Mungiki did not qualify as an "organization" and that the attack in Nakuru and Naivasha was not planned.³² Consistent with its general approach throughout the Decision, the Chamber accordingly considered, following comprehensive analysis of the arguments and evidence presented by the parties, whether the evidence indeed supported the advanced proposition.³³ Once again, the Defence of Mr. Muthaura fails to show how this approach is in any way related to the matter of the Prosecutor's burden of proof.

33. In sum, the Chamber is of the view that the argument presented by the Defence of Mr. Muthaura is grounded on a misrepresentation of the Decision, and constitutes an attempt to present a disagreement with the Chamber's assessment of the relevance and probative value of any item of evidence before it, regardless of the party which has presented it, as an issue which concerns the application of the burden of proof. The same conclusion applies to the other alleged "examples of such reversals of the burden of proof", listed by the Defence of Mr. Muthaura (namely, in paragraphs 306, 321, 327 and 355 of the Decision).³⁴ When read in their context, and in good faith, it is clear that no question of burden of proof arises out of the examples provided by the Defence of Mr. Muthaura. To the contrary, the examples invoked by the Defence show that the Chamber duly assessed the relevance and probative value of the evidence before it and concluded that the requisite evidentiary threshold of substantial grounds to believe had been met.

34. The same conclusion applies with respect to the arguments advanced by the Defence of Mr. Kenyatta in order to demonstrate that the First Issue arises out of the Decision. The examples provided clearly show that what the Defence tries to present

³¹ ICC-01/09-02/11-385, para. 5 sub (iii).

³² ICC-01/09-02/11-374-Red, paras 106 to 108.

³³ Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, paras 182 to 185.

³⁴ ICC-01/09-02/11-385, para. 5 sub (iv).

as a matter of burden of proof is actually the conclusion of the Chamber on the evidence before it with respect to a specific factual proposition or a specific item of evidence, in light of its relevance and probative value. The Decision did not require the Defence to discredit the Prosecutor's evidence, but, since the Defence availed itself of its right to present evidence, the Chamber was mandated to consider whether such evidence was relevant and bore sufficient probative value. Given that the evidence presented by the Defence did not support its arguments while the Prosecutor's evidence met the requisite threshold, the Chamber could not conclude in favour of the Defence simply because the burden of proof rests with the Prosecutor.

35. In light of the above, the Chamber is of the view that Muthaura's First Issue and Kenyatta's First Issue do not arise out of the Decision and therefore do not constitute appealable issues within the meaning of article 82(1)(d) of the Statute. In the absence of an appealable issue, the Chamber does not find it necessary to address the remaining requirements under article 82(1)(d) of the Statute.

ii) Muthaura's Second Issue

36. Muthaura's Second Issue is "[w]hether admission of statements obtained by non-judicial bodies, without the consent of the persons who provided the information for their statements to be used in ICC proceedings, contravenes the established jurisprudence and practice of the Court".

37. In the Decision, the Chamber held that, with respect to summaries of statements provided by individuals to entities other than the Court, it "does not find any grounds in the statutory documents precluding the use of such documentary evidence, nor is there any indication that this evidence is otherwise inadmissible".³⁵

38. The Defence argues that "[w]ithout the consent of the persons who initially provided the statement to Kenyan investigators, there is no reasonable expectation

³⁵ Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, para. 78.

their evidence will be available for the trial stage” and that “the jurisprudence of this [C]ourt makes clear that these statements would not otherwise be admissible at the trial stage”.³⁶ According to the Defence, this stems from the fact that “the requirements of rule 68 would not be satisfied if the Prosecutor were to seek to rely upon these statements at the trial stage”.³⁷ In support of its contention, the Defence of Mr. Muthaura refers to a Judgment of the Appeals Chamber and a decision of Trial Chamber II concerning the scope of application, the criteria and the interpretation of rule 68 of the Rules.³⁸

39. The Defence of Mr. Muthaura asserts that the Second Issue affects the fairness of the proceedings “as the Majority deprived the defence of a fundamental procedural safeguard – that they should not be committed to trial on the basis of evidence, which would otherwise be unavailable or inadmissible at the trial stage”.³⁹ In the Defence submission, this, in turn, will “require the Prosecut[or] to conduct additional investigations to meet this evidentiary lacuna which would delay proceedings”.⁴⁰

40. The argument of the Defence, purportedly demonstrating that the requirements of article 82(1)(d) of the Statute are met with respect to the Second Issue, is thus predicated upon two distinct points: (i) that there exists a “fundamental procedural safeguard” of the rights of the defence not to be committed to trial on the basis of evidence “which would otherwise be unavailable or inadmissible at the trial stage”;⁴¹ and (ii) that the charges against Mr. Muthaura would not be confirmed had non-ICC witnesses statements not been admitted. It is in light of these two assumptions that the Defence asserts that the Second Issue – which, as clarified above, “concerns the

³⁶ ICC-01/09-02/11-385-Corr, para. 9.

³⁷ ICC-01/09-02/11-385-Corr, para. 9.

³⁸ ICC-01/09-02/11-385-Corr, para. 9, with reference to Appeals Chamber, “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’”, ICC-01/05-01/08-1386; and Trial Chamber II, “Decision on the Prosecutor’s Bar Table Motions”, ICC-01/04-01/07-2635.

³⁹ ICC-01/09-02/11-385-Corr, para. 10.

⁴⁰ ICC-01/09-02/11-385-Corr, para. 10.

⁴¹ ICC-01/09-02/11-385-Corr, para. 10.

applicability of Rule 68 to statements obtained from non-ICC witnesses”⁴² – meets the requirements of article 82(1)(d) of the Statute.

41. In the Chamber’s view the Defence argument, as predicated on the two points referred to above, cannot be upheld. In fact, even assuming that rule 68 of the Rules would be applicable to statements obtained from non-ICC witnesses as argued by the Defence – and rejected by the Chamber in its Decision, wherein such statements were considered as “documentary evidence”⁴³ – this would not impair their use for the purposes of the confirmation of charges hearing. Indeed, article 61(5) of the Statute states that, for the purposes of the confirmation of charges hearing, “[t]he Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial”. Further, only at trial, the testimony of a witness must be given in person as provided by the principle of orality enshrined in article 69(2) of the Statute. The exception to this principle at trial and subject to strict conditions is set forth in rule 68 of the Rules. This distinction as to the evidentiary rules between the pre-trial and the trial phase has also been clearly stated by the Appeals Chamber in the same Judgment on which the Defence of Mr. Muthaura relies in its submission:

While it is true that there is, and must be, a strong link between the two phases of the proceedings, this does not mean that the same evidentiary rules apply. On the contrary, the rules regarding orality in the pre-trial phase are more relaxed than at trial. Pursuant to article 61 (5) of the Statute, for the purposes of the confirmation hearing, the Prosecutor “may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial”. At the trial, however, the Trial Chamber must respect article 69 (2). Witness statements may only be introduced under rule 68 of the Rules of Procedure and Evidence if the strict conditions of that rule are met.⁴⁴

42. The first assumption upon which the Defence of Mr. Muthaura bases its argument regarding the issue under consideration is, therefore, legally incorrect and

⁴² ICC-01/09-02/11-385-Corr, para. 10.

⁴³ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 78.

⁴⁴ Appeals Chamber, “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’”, ICC-01/05-01/08-1386, para. 81.

not supported by the Judgement of the Appeals Chamber. With respect to the second assumption, namely that the charges would not have been confirmed had the Chamber not admitted statements of non-ICC witnesses, in the view of the Chamber, the argument of the Defence is purely hypothetical and abstract, and, as such, untenable. In fact, as correctly observed by the Prosecutor in his Response, “[t]he Chamber’s reliance on non-ICC statements was extremely limited. They were only referred to as corroboration for other items evidence, most often statements taken by Prosecution investigators.”⁴⁵

43. In light of the above, the Chamber is of the view that, even if the Appeals Chamber were to conclude that, as argued by the Defence of Mr. Muthaura, rule 68 of the Rules would be applicable to non-ICC witness statements at the trial stage, this would not materially affect the Decision. In this sense, the Chamber observes that Muthaura’s Second Issue does not amount to “a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination”,⁴⁶ but, conversely, merely constitutes “an abstract question or a hypothetical concern”.⁴⁷ Accordingly, Muthaura’s Second Issue does not qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute and there is no need to address the remaining requirements under the said provision.

iii) Muthaura’s Third Issue

44. As recalled above, Muthaura’s Third Issue is the following: “[w]hether the Majority’s conclusions at paragraph 415 that the suspects knew rape was a virtually certain consequence of the implementation of the common plan is legally and factually permissible”.

45. The Defence of Mr. Muthaura argues that, in its Decision, the Chamber established a “new presumption”, according to which “rape is a virtually certain

⁴⁵ ICC-01/09-02/11-396, para. 32.

⁴⁶ See Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, para. 9.

⁴⁷ See Pre-Trial Chamber II, ICC-01/05-01/08-532, para. 17.

consequence of any ethnically motivated attack, even in the absence of any indication or evidence that the perpetrators possessed a propensity to rape, or had discussed rape”.⁴⁸ In this respect, the Defence argues that the Chamber introduced a “new mode of liability” “by introducing a presumption that the intent to commit one crime can be inferred from the intent to commit a different crime”.⁴⁹

46. The Chamber observes that, contrary to the submission by the Defence of Mr. Muthaura, the Decision establishes no legal presumption with respect to the intent to commit the crime of rape. In the Decision, the Chamber clearly indicated its interpretation of the requisite *mens rea* pursuant to article 30 of the Statute and no “new mode of liability” or legal presumption has been introduced in this respect.⁵⁰ Indeed, and as observed by the Prosecutor in his Response,⁵¹ the Chamber, in the Decision, found that, in light of the evidence before it, Mr. Muthaura and Mr. Kenyatta “knew that rape was a virtually certain consequence of the implementation of the common plan”.⁵² The Chamber is therefore of the view that the Defence misrepresents a factual finding – with which it merely disagrees – in order to make it a point of law. Accordingly, Mr. Muthaura’s Third Issue does not arise out of the Decision, and, thus, does not qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute. In the absence of an appealable issue, the Chamber does not find it necessary to address the remaining requirements under article 82(1)(d) of the Statute.

iv) Muthaura’s Fourth Issue

47. Muthaura’s Fourth Issue reads as follows: “[w]hether the Confirmation Decision may re-characterise the Prosecution’s allegations against a suspect, as set out in the

⁴⁸ ICC-01/09-02/11-385, para. 12.

⁴⁹ ICC-01/09-02/11-385, para. 14.

⁵⁰ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 411.

⁵¹ ICC-01/09-02/11-396, para. 35.

⁵² Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 415.

DCC, without providing the suspect an opportunity to be heard on the re-characterised allegations”.

48. This issue is presented as an issue of law, founded on the assumption that, in the Decision, the Chamber re-characterized the Prosecutor’s allegations in two respects. Firstly, the Defence of Mr. Muthaura argues that the Chamber determined that “Mr. Muthaura possessed sufficient *de facto* authority [...] to secure the institutional support for the commission of the crimes”, despite the Prosecutor’s allegation that Mr. Muthaura committed the crimes in his official capacity as Chairman of NSAC.⁵³ The Chamber observes that the argument of Mr. Muthaura is grounded on an incorrect reading of the document containing the charges, wherein the Prosecutor, contrary to the submission of the Defence, did allege that Mr. Muthaura’s contribution of crimes was done, *inter alia*, by virtue of both his *de jure* and *de facto* authority.⁵⁴ It was on the basis of this allegation that the Chamber determined that the evidence before it provided substantial grounds to believe that Mr. Muthaura, *inter alia*, contributed to the commission of the crimes charges by virtue of his *de facto* authority. Accordingly, no re-characterization of the Prosecutor’s allegations can be discerned from the Decision in this respect.

49. The same conclusion applies with respect to the second point raised by the Defence of Mr. Muthaura, *i.e.* that the Chamber concluded that Maina Njenga was part of the common plan, together with Mr. Muthaura and Mr. Kenyatta, to commit the crimes charged, despite the absence of an allegation to that effect by the Prosecutor.⁵⁵ Contrary to the submission of the Defence of Mr. Muthaura, the Chamber notes that, in the document containing the charges, and during the

⁵³ ICC-01/09-02/11-385, paras 19 to 21, making reference to Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 383.

⁵⁴ See *e.g.* ICC-01/09-02/11-280-AnxA, para. 38. See also the Prosecutor’s submission during the confirmation of charges hearing, ICC-01/09-02/11-T5-RED-ENG, p. 10, lines 9 to 10, p. 17, line 25, to p. 18, line 1, p. 20, lines 16 to 18.

⁵⁵ ICC-01/09-02/11-385, para 21, making reference to Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 362.

confirmation of charges hearing, the Prosecutor alleged that: (i) Mr. Muthaura and Mr. Kenyatta were part of a common plan, together with other individuals, including Mungiki leaders;⁵⁶ and (ii) Maina Njenga was the effective leader of the Mungiki throughout the period under consideration.⁵⁷ It was therefore clear that, in the Prosecutor's allegation, Maina Njenga was indeed part of the common plan to commit the crimes charged. Hence, even in this respect there was no re-characterization of the Prosecutor's allegations in the Decision.

50. Accordingly, since no re-characterization of the Prosecutor's allegations took place, the Chamber concludes that the issue of whether any such re-characterization is legally permissible does not arise out of the Decision, and constitutes a mere abstract question as opposed to "a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination".⁵⁸ Accordingly, Muthaura's Fourth Issue does not amount to an appealable issue within the meaning of article 82(1)(d) of the Statute and there is no need to address the remaining requirements under the said provision.

v) Muthaura's Fifth Issue

51. Muthaura's Fifth Issue reads as follows: "[w]hether NGO and other reports become credible simply because they are corroborated by like evidence (NGO and other reports)".

52. The Defence of Mr. Muthaura observes that in the Decision substantial grounds to believe that acts of rape were committed in Naivasha and that acts of forcible circumcision and penile amputation were carried out in Nakuru were found only on

⁵⁶ See ICC-01/09-02/11-280-AnxA, paras 77 and 78.

⁵⁷ See ICC-01/09-02/11-280-AnxA, para 39. See also the Prosecutor's submissions at the confirmation of charges hearing, ICC-01/09-02/11-T5-RED-ENG, p. 27, lines 22 to 23.

⁵⁸ See Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, para. 9.

the basis of items of indirect evidence.⁵⁹ According to the Defence, “this approach is flawed”.⁶⁰

53. The Chamber notes that the Defence of Mr. Muthaura premises its argument that its Fifth Issue is an appealable issue upon the assumption that indirect evidence is, by definition, unreliable. It is upon this assumption that the Defence asserts, with respect to NGO reports and indirect evidence in general, that “unreliable evidence does not become credible, simply because it is corroborated by other unreliable evidence”.⁶¹ In the Defence submission, this, in turn, demonstrates that Muthaura’s Fifth Issue arises out of the Decision and affects the fairness of the proceedings.⁶²

54. Indeed, it is to be observed that, in the Decision, the Chamber did not state that indirect evidence is unreliable by definition, nor did it find, upon assessment of their probative value, that the relevant NGO reports were, in and of themselves, not credible; rather, the Chamber considered them to bear sufficient probative value to meet the threshold required at this stage of the proceedings. Accordingly, and contrary to the assumption of the Defence, the Chamber never asserted that those NGO reports *became* credible *because* they were corroborated by like evidence. Therefore, the issue “[w]hether NGO and other reports become credible simply because they are corroborated by like evidence (NGO and other reports)”, premised as it is on the assumption that the mentioned NGO reports are not credible – either by definition or as a result of the Chamber’s case-by-case assessment thereof – does not arise out of the Decision and, accordingly, does not amount to an appealable issue within the meaning of article 82(1)(d) of the Statute. In the absence of an appealable issue, the Chamber does not find it necessary to address the remaining requirements under article 82(1)(d) of the Statute.

⁵⁹ ICC-01/09-02/11-385, para. 23.

⁶⁰ ICC-01/09-02/11-385, para. 24.

⁶¹ ICC-01/09-02/11-385, para. 24.

⁶² ICC-01/09-02/11-385, para. 25.

vi) Muthaura's Sixth Issue

55. Muthaura's Sixth Issue is "[w]hether in evaluating evidence pursuant to Article 61(7) a Chamber may depart from the evidence and draw conclusions on the basis of speculation". The Defence of Mr. Muthaura argues that this issue arises out of the Decision since, on a number of occasions, "the conclusions drawn [...] were not borne out of the evidence, but from speculation" by the Chamber.⁶³ In light of this, the Defence argues that its Sixth Issue "concerns whether in the assessment of the evidence, the Chamber may depart from the evidence and enter the realm of speculation to justify its findings".⁶⁴

56. In order to establish that Muthaura's Sixth Issue is an appealable issue under article 82(1)(d) of the Statute, the Defence of Mr. Muthaura provides examples of specific findings where, in its view, the Chamber departed from the evidence and drew speculative conclusions. However, upon review of the Decision, the Chamber considers that the submissions by the Defence of Mr. Muthaura are without merit.

57. First, the Defence of Mr. Muthaura asserts that the Chamber speculated when stating that a number of Defence witnesses seemed to refer to a meeting at State House other than that mentioned by Witness OTP-4.⁶⁵ Notwithstanding the fact that the Defence of Mr. Muthaura incorrectly quotes the relevant statement made by the Chamber in the Decision, making it more assertive, the Chamber observes that the said conclusion, far from being speculative, was exclusively based on the evidence presented by the parties, as plainly shown by the language of the Decision. In fact, whilst the Prosecutor alleged, in light of the statement provided by Witness OTP-4, that the concerned meeting commenced at 11:45 a.m., two Defence witnesses referred to a meeting at State House that started, respectively, at 9.45/10.00 a.m., lasting for about an hour, and at 10.30 a.m., lasting for about 1 hour

⁶³ ICC-01/09-02/11-385, para. 28.

⁶⁴ ICC-01/09-02/11-385, para. 28

⁶⁵ ICC-01/09-02/11-385, para. 27, making reference to Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, para. 320.

and 20 minutes.⁶⁶ In light of this – *i.e.* the accounts provided by the concerned witnesses in their evidence submitted before the Chamber – and therefore without speculation, the Chamber concluded that the two Defence witnesses “seem to refer to a meeting other than that with the Mungiki mentioned by Witness OTP-4”.⁶⁷

58. The same holds true with respect to the second instance referred to the Defence of Mr. Muthaura as a departure from the evidence into speculation. In particular, the Defence asserts that “the Chamber speculated that it was *possible* for [Mr.] Muthaura to have attended the meeting at Nairobi Members Club”.⁶⁸ Also in this case, the Chamber did not speculate, but based its inference on the evidence before it, and particularly on the minutes of the NSAC meeting of 3 January 2008, reporting its starting time.⁶⁹

59. The assertion of the Defence of Mr. Muthaura that “the Chamber speculated that it was possible that [Mr.] Muthaura ‘would use other phone numbers’” is similarly without merit.⁷⁰ As a plain reading of the Decision reveals, the Chamber, contrary to the submission of the Defence, reached its conclusion in light of “the fact that the phone number for which the Defence of Mr. Muthaura provides records is not registered in Mr. Muthaura’s name and [...] the relatively low number of phone calls listed in the phone records”.⁷¹ The Chamber’s conclusion therefore was rooted in no less than an assessment of the evidence provided by the Defence.

⁶⁶ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 320.

⁶⁷ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 320.

⁶⁸ ICC-01/09-02/11-385, para. 27, making reference to Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 351.

⁶⁹ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 351.

⁷⁰ ICC-01/09-02/11-385, para. 27, making reference to Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 355.

⁷¹ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 355.

60. Lastly, the Defence of Mr. Muthaura refers to the Chamber's conclusion that uniforms were distributed under the directions of Mr. Muthaura and that the guns were secured by his intervention, defining such conclusion as "without any evidential basis".⁷² The Chamber cannot but observe that the Defence selectively presented the Decision in this respect. It suffices to note, in fact, that the two paragraphs explicitly mentioned by the Defence expressly refer to the "evidential basis" of the Chamber's conclusion.⁷³ This conclusion cannot therefore be considered speculative or otherwise not rooted in the evidence presented.

61. Accordingly, since Muthaura's Sixth Issue is predicated upon the incorrect assumption that the Chamber speculated and departed from the evidence in the instances referred to above, the issue whether speculation is permissible must be regarded as abstract and not arising out of the Decision. Consequently, the first requirement of article 82(1)(d) of the Statute is not met.

vii) Muthaura's Eighth Issue

62. Muthaura's Eighth Issue is "[w]hether the Majority applied different criteria/consideration to the evaluation of Defence evidence as compared to Prosecution evidence".

63. With respect to this issue, the Defence of Mr. Muthaura argues that "[i]n its assessment of evidence, the [Chamber] has adopted an approach that favours the Prosecut[or] even where [his] evidence suffers from material deficiencies. Regarding Defence witness statements, the [Chamber] applies a more stringent standard, finding fault in each and every Defence witness statement".⁷⁴ As a result, according

⁷² ICC-01/09-02/11-385, para. 27, making reference to Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, paras 174 and 175.

⁷³ See Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, footnotes 298 and 300 and corresponding text.

⁷⁴ ICC-01/09-02/11-385, para. 33.

to the Defence, “like witnesses have not been assessed in a like manner” thus “requiring the defence to prove more than the OTP”.⁷⁵

64. In his Response, the Prosecutor argues that Muthaura’s Eighth Issue does not arise out of the Decision, since the Defence, in order to demonstrate that the Chamber indeed applied more stringent criteria for Defence evidence than for the Prosecutor’s, merely refers to “classic example[s] of a finder of fact critically evaluating the evidence to determine its probative value vis-à-vis other evidence on the same topic”.⁷⁶

65. The Chamber concurs with the Prosecutor and is of the view that, with respect to the issue under consideration, Mr. Muthaura attempts to present as an appealable issue his mere disagreement with the Chamber’s assessment of the evidence. In fact, the instances referred to by the Defence of Mr. Muthaura are those in which Defence evidence regarding particular facts was addressed and found by the Chamber as not bearing relevance or sufficient probative value, in light of the totality of the evidence presented. Accordingly, Muthaura’s Eighth Issue does not arise out of the Decision and does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

viii) Kenyatta’s Second Issue

66. Kenyatta’s Second Issue is “[w]hether the Majority erred in law by determining that alleged failures of the OTP to investigate exculpatory issues or issues of reliability had no consequences for the Confirmation Hearing and did not fall within the scope of the Chamber’s determination pursuant to Article 61(7) of the Statute”.

67. The Defence of Mr. Kenyatta argues that the Chamber failed to consider a number of alleged failures to investigate exculpatory issues or issues of reliability on the part of the Prosecutor. In this respect, the Defence asserts that, in the Decision,

⁷⁵ ICC-01/09-02/11-385, para. 40.

⁷⁶ ICC-01/09-02/11-396, para. 27.

the Chamber determined that such failures “had no consequences for the Confirmation Hearing”.

68. The Chamber observes that, contrary to the submission of the Defence, the Chamber did not refuse to consider Prosecutor’s alleged investigative failures or state that they would have “no consequences”. Conversely, in the Decision, the Chamber stated that any failure on the side of the Prosecutor “to investigate properly will certainly have a bearing on the quality and sufficiency of the evidence presented and the matter will be finally decided by way of an examination of the said evidence pursuant to article 61(7) of the Statute”.⁷⁷

69. Furthermore, the Chamber notes that the Defence of Mr. Kenyatta identifies specific matters that “should have been discovered by the Prosecutor in the proper pursuance of his duty”.⁷⁸ In particular, the Defence refers to matters relating to: (i) the credibility of Witness OTP-4, OTP-11, OTP-12; (ii) Mr. Kenyatta’s “participation in fundraising events aimed at assisting the victims of post-election violence, as well as his involvement in public pleas for peace and political compromise”; and (iii) whereabouts of Mr. Kenyatta on significant dates.⁷⁹

70. The Chamber considers without merit Mr. Kenyatta’s argument that these matters, since addressed by Defence evidence, should have been discovered by the Prosecutor. Indeed, the fact that these matters were presented by the Defence does not, as such, indicate that the Prosecutor failed to properly conduct his investigation. As pointed out by the Prosecutor, the argument of the Defence, if upheld, “would enable every suspect to claim that the Prosecut[or] has failed to properly exercise [his] investigative function simply by presenting evidence not presented by the Prosecut[or]”.⁸⁰ Conversely, it is in the nature of an adversarial proceeding, like the confirmation of charges hearing, that the Defence presents evidence and challenges

⁷⁷ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 63.

⁷⁸ ICC-01/09-02/11-384, para. 7.

⁷⁹ ICC-01/09-02/11-384, para. 7.

⁸⁰ ICC-01/09-02/11-396, para. 52.

the evidence presented by the Prosecutor, as allowed pursuant to article 61(6)(b) and (c) of the Statute. The evidence presented by the Defence and the challenges to the Prosecutor's evidence, including those pertaining to the above-mentioned matters, were accordingly addressed and considered by the Chamber in the Decision, within the context of its determination under article 61(7) of the Statute. In these circumstances, the Chamber is of the view that, with its Second Issue, the Defence of Mr. Kenyatta is in fact challenging the Chamber's factual findings on the said matters.

71. In particular, with respect to matters related to the credibility of Witnesses OTP-11 and OTP-12, the Chamber recalls that in the Decision it addressed in detail the challenge brought by the Defence of Mr. Kenyatta and, upon assessment of the evidence presented, concluded that said challenge could not be upheld.⁸¹ The same holds true with respect to Mr. Kenyatta's alleged participation at a number of fundraising meetings to assist the victims of the post-election violence, which the Chamber, in the Decision, considered to have "no significant bearing on the determination of the case", given that "such activity on the part of Mr. Kenyatta is compatible with the allegations of the Prosecutor".⁸² Likewise, the Chamber considered all Defence evidence before it relating to the whereabouts of Mr. Kenyatta on 26 November 2007,⁸³ 30 December 2007⁸⁴ and 3 January 2008,⁸⁵ taking it into account in order to determine the relevant facts under the applicable threshold and on the basis of the evidence as a whole.

72. Therefore, the Chamber is of the view that Kenyatta's Second Issue, while framed in the context of the Prosecutor's duties under article 54(1)(a) of the Statute, is in

⁸¹ Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, paras 93 to 100.

⁸² Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, para. 397.

⁸³ Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, paras 330 and 331.

⁸⁴ Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, paras 339 and 340.

⁸⁵ Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, para. 358.

substance an expression of disagreement with the Chamber's findings. Accordingly, Kenyatta's Second Issue does not amount to an appealable issue under article 82(1)(d) of the Statute and there is no need to address the remaining requirements under the said provision.

ix) Kenyatta's Third, Fourth and Fifth Issue

73. 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(1)(d) of the Statute beyond repeating – and occasionally slightly adapting, in light of the Decision – the arguments presented at the confirmation of charges hearing.

74. Kenyatta's Third Issue reads as follows: “[w]hether the Majority's exercise of discretion was so irrational, unfair and unreasonable so as to constitute an abuse of discretion by attributing significant weight to Prosecution Witnesses 11 and 12, and failing to attribute any weight to the substantial Defence evidence challenging the credibility of these witnesses”. With respect to its Third Issue the Defence of Mr. Kenyatta argues again that the evidence provided by Witnesses OTP-11 and OTP-12 should be entirely disregarded, relying on the same arguments and the same material that the Chamber considered in the Decision, wherein, upon assessment of the evidence before it, it dismissed the challenge to the credibility of these witnesses presented by the Defence of Mr. Kenyatta.⁸⁶ The Chamber is of the view that the Defence of Mr. Kenyatta merely disagrees with such conclusion by the Chamber. Accordingly, the Third Issue does not amount to an appealable issue within the meaning of article 82(1)(d) of the Statute.

75. Kenyatta's Fourth Issue is “[w]hether the Majority's exercise of discretion was so irrational, unfair and unreasonable so as to constitute an abuse of discretion in assessing evidence in relation to the allegation of a meeting on 26 November 2007 at

⁸⁶ ICC-01/09-02/11-384, paras 11 to 26.

State House with members of the Mungiki, at which it is alleged Uhuru Kenyatta, Mr Muthaura, President Kibaki and others attended". The Chamber observes that the Defence of Mr. Kenyatta merely argues that the Chamber should not have attributed "excessive weight" to the evidence of Witness OTP-4, but should have found the Defence evidence more persuasive.⁸⁷ For this purpose, the Defence refers to a number of "indicators", which, in its view, show that on 26 November 2007 there was only one meeting at Nairobi State House, which did not involve the presence of Mungiki members; for this purpose, the Defence relies on the fact that a number of details provided by Witness OTP-4 with respect to this meeting are confirmed by several Defence witnesses, and particularly by Witness D12-37.⁸⁸ Notwithstanding that those "indicators" only confirm that the account of Witness OTP-4 is indeed corroborated by external and independent sources, the Chamber notes that the Defence of Mr. Kenyatta simply expresses its disagreement with the assessment of evidence conducted by the Chamber with respect to the meeting of 26 November 2007. Kenyatta's Fourth Issue, therefore, is no more than a mere disagreement with the Chamber's assessment of the evidence, and therefore does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

76. The same conclusion applies with respect to Kenyatta's Fifth Issue, namely "whether the Majority erred in law and abused its discretion by using anonymous witnesses and indirect evidence from unreliable sources, which also required significant corroboration, as evidence of material corroboration for key witnesses to establish that key meetings took place". According to the Defence of Mr. Kenyatta "[e]ach meeting was found to have taken place by the Chamber upon evidence that had serious issues as to reliability",⁸⁹ namely the statements of Witnesses OTP-4, OTP-6, OTP-11 and OTP-12. The argument of the Defence is thus predicated upon the purported unreliability of the witnesses concerned, which, in turn would require "significant corroboration" of their accounts. The Chamber observes that such

⁸⁷ ICC-01/09-02/11-384, paras 27 and 28.

⁸⁸ ICC-01/09-02/11-384, para. 28.

⁸⁹ ICC-01/09-02/11-384, para. 30.

assumed unreliability is grounded only in Mr. Kenyatta's own submissions at the confirmation of charges hearing: submissions that were considered and addressed in detail by the Chamber in its Decision.⁹⁰ It cannot be the case that the very allegation, by any of the parties, that a piece of evidence is not to be considered credible makes such piece of evidence indeed "unreliable" and in need of "significant corroboration". This being the argument upon which the Defence of Mr. Kenyatta grounds his application for leave to appeal the Decision on the Fifth Issue, the Chamber concludes that such issue is, in substance, a mere disagreement with the Chamber's assessment of the evidence and, as such, does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

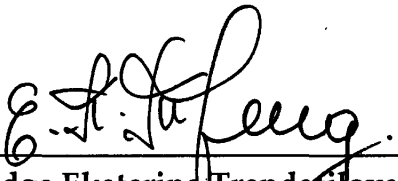
FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY

- a) decides** that the "Corrigendum to 'Defence Application for Leave to Appeal the 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'" be disregarded;
- b) dismisses *in limine*** Mr. Muthaura's Application with respect to the Seventh Issue;
- c) rejects** the remainder of Mr. Muthaura's Application;
- d) rejects** Mr. Kenyatta's Application;
- e) orders** the Registrar to transmit to the Presidency the Decision on the Confirmation of Charges together with the record of the proceedings in the present case, as provided for in rule 129 of the Rules of Procedure and Evidence;
- f) orders** the Registrar to remove the name of Mohammed Hussein Ali from the case name for all subsequent filings.

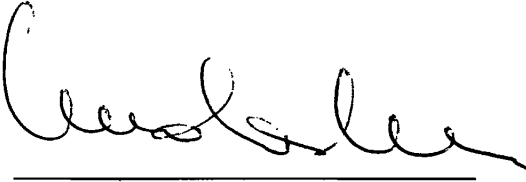
⁹⁰ See Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, paras 93 to 100 and paras 310 to 359.

Judge Hans-Peter Kaul appends a declaration

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Presiding Judge

Judge Hans-Peter Kaul
Judge

Judge Cuno Tarfusser
Judge

Dated this Friday, 9 March 2012

At The Hague, The Netherlands

Declaration

I, Judge Hans-Peter Kaul recall that in three subsequent Dissenting Opinions dated 31 March 2010,¹ 15 March 2011² and 23 January 2012³ I concluded, after having examined comprehensively and carefully the arguments, evidence and material submitted, that the International Criminal Court lacks jurisdiction *ratione materiae* in the situation in the Republic of Kenya, including in the present case. Consequently, while having fully participated in the confirmation proceedings, I have not participated in the Majority's "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute"⁴ in which the Majority confirmed the charges against Francis Kirimi Muthaura and Uhuru Muigai Kenyatta and committed them for trial.

As a result, I feel barred, at least in principle, from pronouncing a view whether or not the thirteen issues raised in the Defence applications⁵ for leave to appeal the Majority's decision on the confirmation of charges in the case of *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* represent appealable issues within the meaning of article 82(1)(d) of the Rome Statute that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

¹ Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, pp. 84 *et seq.*

² Pre-Trial Chamber II, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', ICC-01/09-02/11-3.

³ Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, pp. 156 *et seq.*

⁴ Pre-Trial Chamber II, ICC-01/09-02/11-382-Red.

⁵ See the Defence application for Uhuru Muigai Kenyatta, ICC-01/09-02/11-384-Red; Defence application for Francis Kirimi Muthaura, ICC-01/09-02/11-385-Corr.

A handwritten signature in black ink, appearing to read 'Kaul 9/3/12', is written over a horizontal line.

Judge Hans-Peter Kaul

Dated this Friday, 9 March 2012

At The Hague, The Netherlands