THE PROSECUTION OF UHURU KENYATTA AT THE INTERNATIONAL CRIMINAL COURT

INTRODUCTION

1. President Uhuru Kenyatta was charged at the International Criminal Court with crimes against humanity arising from the Kenyan post-election violence (PEV) that took place between 30 December 2007 and 28 February 2008. These charges were eventually withdrawn before trial and he is no longer a suspect, nor an accused person.[1]

2. The withdrawal of those charges after the final key witness admitted he had lied to the Prosecution, took over a year to achieve.[2] In that year, the Prosecution has embarked upon a campaign to blame others for what was a doomed case from the beginning, without any proper foundation for presentation in a court of law. By avoiding a trial, the Prosecution prevented Mr Kenyatta from receiving what would have been inevitable: that verdicts of not guilty would have been issued by the Judges of all the charges against him.

3. This report looks at the key aspects of the proceedings against him and the nature of the evidence that was proved by the Defence to be false and the exposure of which eventually caused the case to fail.

Background

4. The proceedings against Mr Kenyatta at the ICC display a catalogue of errors and failures by the Prosecution. At the Confirmation of Charges stage, one of the three accused in his trial, the Former Chief of Police, General Ali, was discharged from the proceedings as a result of the Pre-Trial Chamber finding that the Prosecution had charged him inappropriately given the context of the alleged case.[3]

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[1] ICC-01/09-02/11-983.
[2] OTP-12 admitted that he had lied on 4 December 2013; the charges against Mr Kenyatta were not withdrawn until 5 December 2014.
[3] ICC-01/09-02/11-382.

5. It is important to note that at the same Confirmation of Charges hearing, the Defence for Uhuru Kenyatta put forward a comprehensive and thorough challenge to all aspects of the Prosecution case and alerted the Pre-Trial Chamber to each and every one of the fabricated and false testimonies being submitted by the Prosecution.[4] Mr Kenyatta also gave evidence and made himself available for cross-examination.[5]

6. All the Defence submissions were rejected by a majority of the Judges of the Pre-Trial Chamber and caused Mr Kenyatta to face trial proceedings at the ICC along with the remaining co-accused, Francis Muthaura, the former Head of the Kenyan Civil Service.[6] All those submissions by the Defence in the course of the next three years were proved to have in fact been the truth of the case and the Confirmation of Charges to have been based upon false evidence.

7. At a later stage and still before trial had been reached, the co-accused Francis Muthaura had the charges against him withdrawn as a result of the failure by the Prosecution to disclose key exculpatory evidence to the Defence for the confirmation of charges hearing.[7]

8. It is clear, however, that the Prosecution was determined to build a case against Mr Kenyatta and, as this report shows, in the hands of the ICC Prosecutor the case was developed through a collection of witnesses who were providing the Prosecution with false stories. The Prosecution was desperate to have a PEV case against the alleged PNU axis and, in order to ensure that Mr Kenyatta (as he then was) faced a trial, failed to apply any of the demanded standards of professionalism.

9. This report will now review below those key aspects of evidence upon which the false prosecution was based.

[4] ICC-01/09-02/11-T-4-ENG ET WT 21-09-2011; ICC-01/09-02/11-T-10-ENG ET WT 28-09-2011; ICC-01/09-02/11-T-11-CONF-ENG ET WT 29-09-2011; ICC-01/09-02/11-T-12-CONF-ENG ET WT 30-09-2011; ICC-01/09-02/11-T-15-CONF-ENG ET WT 05-10-2011.
[5] ICC-01/09-02/11-T-11-CONF-ENG ET 29-09-2011.
[6] ICC-01/09-02/11-382.
[7] ICC-01/09-02/11-687.

KENYA PEV JURISDICTION ISSUES

10. The ICC failed properly to consider the jurisdiction of the ICC to try the case against Mr Kenyatta, despite Defence submissions prior to the Confirmation of Charges and the dissenting opinions of His Honour Judge Kaul in the Decision to Authorise an Investigation, the Decision on the Application for Summons, and the Decision on the Confirmation of Charges.[8]

11. Prior to the Confirmation of Charges against Mr Kenyatta, his Defence challenged the ICC's jurisdiction to try the case against him under Article 7 of the Statute for crimes against humanity as there was no attack on any civilian population pursuant to a State or 'organisational policy' as disclosed by the evidence of the Prosecution.

12. Despite the requirement under Article 19(1) of the Statute that the Court shall satisfy itself that it has jurisdiction over any case brought before it, the Majority of the Pre-Trial Chamber dismissed *in limine* the jurisdictional challenge and determined that it was not jurisdictional in nature, but instead a challenge to the merits of the Prosecutor's case on the facts,[9] thus failing to engage in the Defence's submissions, or indeed, the concerns of one of their number. HHJ Kaul in his dissenting opinion vehemently disagreed and observed that the argument that the correct legal definition of the contextual element of 'organisation' does not fall "within the ambit of the 'jurisdiction test' but concerns matters of substance relating to the merits of the case is as astonishing as it is misconceived."[10] Their approach prevented the legitimate challenge to the fundamental issue of whether the ICC had jurisdiction over the case at all.

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[8] Dissenting Opinion, ICC-01/09-19-Corr, p. 84; Dissenting Opinion, ICC-01/09-02/11-03; Dissenting Opinion, ICC-01/09-02/11-382-Conf.

[9] ICC-01/09-02/11-382-Conf, paras 30-37, reaffirming Decisions on 31 March 2010, ICC-01/09-19-Corr, paras 73-88 and 8 March 2011, ICC-01/09-02/11-01, para. 16.

[10] Dissenting Opinion, ICC-01/09-02/11-382-Conf, para. 32.

13. Moreover, the organisational requirement caused the Prosecution to construct a case that in the Document Containing Charges was highly ambiguous as to the structure and membership of the alleged organisation that was claimed to have a "policy to attack a civilian population". During the Confirmation Hearing and within the Amended Document Containing Charges, the Prosecution clearly argued that the Mungiki and the Kenyan Police were 'one' organisation as they had produced charges against General Ali (a state actor as Chief of Police) on the one hand, and Francis Muthaura (also a state actor as Head of the Civil Service) and Uhuru Kenyatta on the other.[11] The Majority of the Pre-Trial Chamber fundamentally changed the Prosecutor's presentation of the facts by arguing that the Mungiki alone represented the 'organisation'. [12]

<u>GENERAL NATURE OF THE EVIDENCE: HEARSAY AND RUMOUR</u>

14. The general nature of the evidence in the case against Uhuru Kenyatta was based upon hearsay, rumour and gossip, and was without proper foundation. The failure to properly investigate the truth, as it was required to do under Article 54 of the Rome Statute, led the Prosecution to construct a case against him and use witnesses who were providing them with false evidence.

15. Amongst the many examples that could be given, the Prosecution sought to rely on a rumour posted on the *Jaluo.com* blog on 28 January 2008 by a Kenyan dentist working in Finland, alleging that Mr Kenyatta and others were tasked to raise enough money to arm the Kikuyu in the event that the Luo retaliate.[13] The blog warns that the content is "unconfirmed", and the Prosecution did not support it with statements from the author or the disseminator. The individual who posted the statement was not in Kenya during the period of the post-election violence and had no first-hand knowledge of the facts. The Prosecution never pointed these facts out to the Court. This might be because it did

[11] ICC-01/09-02/11-280-AnxA, paras 35-36; ICC-01/09-02/11-T-5-RED-ENG CT, p. 10, line 1-15; p. 22, lines 3-5; p. 35, line 19.
[12] Majority Decision, ICC-01/09-02/11-382-Conf, para.226.
[13] KEN-OTP-0066-1476.

not know of the salient details, in which case it failed in the duty required of it under Article 54 to investigate to find the truth. The production of un-researched evidence such as this did nothing to aid the interests of justice.

16. The reliance on hearsay, rumour and gossip and the failure to properly investigate is evident from the outset of the Prosecutor's investigation. In 2009 the Prosecutor's request for authorisation from the Pre-Trial Chamber to proceed with an investigation into the situation in Kenya in relation to the post-election violence of 2007-2008, pursuant to Article 15(3) of the Rome Statute, relied on a number of reports on alleged crimes that it described as "reliable".[14] This included the report, "On the Brink of the Precipice: a Human Rights Account of Kenya's Post-2007 Election Violence", of 15 August 2008, by the Kenyan National Commission on Human Rights, which the Prosecutor described as an "independent" institution.[15]

17. The Prosecutor failed to examine the reliability or independence of this report or institution, despite the fact that an earlier draft had been altered and suggested its partisan nature. KNCHR in the first draft of the report included Raila Odinga the ODM leader in the table of alleged post-election violence perpetrators and recommended further investigations and his subsequent possible prosecution. However, ODM-sympathising KNCHR officers ordered that report to be quashed. In the edited report, Raila Odinga was not included in the table recommended for further investigation or prosecution. In the earlier draft, Raila Odinga was alleged to have incited people in Migori at a political rally by uttering the words "we do not want madoadoa" and that the phrase "was understood to mean that other communities were unwanted in Migori."[16] In contrast, in the final report the alleged incitement is watered down and states that Raila Odinga is quoted as having told people in Migori at a political rally that "we do not want madoadoa" and that the phrase "was understood either to mean that the other communities were unwanted in Migori; or that he preferred the 'three-

[14] ICC-01/09-3, p. 3.
[15] ICC-01/09-03, para. 29.
[16] First version of KNCHR Report (unreleased), para. 462 ,fn 397.

piece' voting system in which voters would tick against one party's civic, parliamentary and presidential candidates."[17]

18. After the Confirmation of Charges Hearing, the Defence observed that the Pre-Trial Chamber had been asked to believe facts in respect of which there was no supporting evidence beyond that of mere assertion.[18] Not a single contemporaneous statement, act or deed emanating from Mr Kenyatta was adduced to support the Prosecution's case theory. Instead the court was provided with witness accounts lacking in specificity, often anonymous, and often amounting to rumour and gossip, never progressing to the level of substantial grounds to believe. The alleged criminal link between the Mungiki and Mr Kenyatta, for example, was never established by credible evidence. Moreover, the evidence as to key meetings upon which the decision to confirm the charges was made had serious issues as to reliability and credibility and was purportedly corroborated by hearsay evidence from anonymous witnesses.

19. The difficulties and dangers that anonymous hearsay evidence present in relation to the possibility of ascertaining its truthfulness and authenticity and thus their probative value have been recognised by the ICC in the cases of *Lubanga*[19] and *Katanga,*[20] in which the Chamber refused to rely solely on anonymous hearsay evidence.

20. The Kenyatta case lacked any specific witnesses for the Prosecution outside witnesses OTP-4, OTP-11 and OTP-12. Their alleged eyewitness accounts provided the so-called corroboration for the Pre-Trial Chamber needed by the Prosecution. However, their evidence as this report will show, was so riddled with inconsistencies and indications of unreliability and falsity that any reasonable Prosecution team would have been alerted to the problems and not relied upon them in the search for the truth.

[17] ICC-01/09-3-Anx4, para. 396, fn 393.
[18] ICC-01/09-02/11-372, 17 November 2011, para. 113.
[19] ICC-01/04-01/06-803, paras 102-106.
[20] ICC-01/04-01/07-717, paras 119 and 140.

PROSECUTION KEY WITNESS OTP-4 AND THE FABRICATED EVIDENCE AGAINST UHURU KENYATTA

21. The evidence of OTP-4, which is now known was based upon lies, was critical to the Prosecution's case. His account contained fundamental inconsistencies concerning allegations at the very heart of the case against Mr Kenyatta. Unjustifiably, and in violation of its duty under Article 54, the Prosecution consistently failed to question OTP-4 appropriately in order to verify his credibility and the truthfulness of his evidence. It was this failure, in large part, that lead to the wrongful confirmation of the charges by the Pre-Trial Chamber in 2012 and the unjustified continuation of the proceedings against Mr Kenyatta.

22. Between 2008 and May 2012, OTP-4 made six witness statements. OTP-4 was a purported eyewitness to three meetings that he alleged to have taken place at the Yaya Centre, Nairobi on 17 or 25 November 2007; State House, Nairobi on 26 November 2007; and Nairobi Members' Club on 3 January 2008.[21] These meetings formed the foundation of the Prosecution's case against Mr Kenyatta and resulted in his being charged and those charges being confirmed. However, it was later established he had lied and had made up a series of facts to provide a case for the Prosecution during their investigations in order to bring charges against Mr Kenyatta. OTP-4 had been encouraged by certain prominent human rights campaigners in Kenya to provide this evidence to the ICC to further their campaign against the PNU and Mr Kenyatta.

23. In OTP-4's first statement, given to Open Society East Africa in January 2008, he alleged two meetings took place, namely at the State House and at the Nairobi Members Club but did not say he was present.[22] At no point did he claim that Mr Kenyatta was present or participated in any way at either of these meetings.

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[21] During the Confirmation of Charges Hearing, OTP-4 was the only Prosecution witness to provide direct evidence of these meetings. The Defence's assertions that OTP-4 lied about these meetings were proved true in May 2012 when he admitted lying.

[22] ICC-01/09-02/11-372, para. 27.

24. In September 2008, OTP-4 gave his second statement, this time to the Waki Commission.[23] OTP-4 claimed for the first time that he was physically present at both the State House and the Nairobi Members Club meetings. He still did not allege that Mr Kenyatta was present at either of these meetings, notwithstanding the fact that he named several other alleged attendees. In this statement, he added an allegation concerning a further relevant meeting at the Yaya Centre, Nairobi which he claimed took place on 25 November 2007. He alleged for the first time the presence of Mr Kenyatta at this particular meeting and purported to link him to the Mungiki, but not to the PEV. In this statement, OTP-4 also claimed for the first time that he was forced to join the Mungiki.

25. In 2009, OTP-4 provided a third statement, this time in support of an application made to a foreign state for asylum. When scrutinised against his previous two statements, it was clear that this third statement contained a substantial number of serious flaws and inconsistencies, for example OTP-4:
    a. Made no mention of being oathed into the Mungiki;
    b. Did not to mention the alleged Yaya Centre meeting;
    c. Stated, for the first time, that Mr Kenyatta was present at the alleged State House meeting;
    d. Changed his story in relation to the Nairobi Members Club meeting, stating that he had only *heard* of the meeting from someone present and had not been present himself. He also alleged for the first time that Mr Kenyatta was present;
    e. Changed the location of the alleged Nairobi Members Club meeting to a location several kilometres away;
    f. Contradicted himself within the statement, mentioning that he was not in Nairobi on 26 November 2007, *i.e.* the date he claimed to have attended the meeting at State House, Nairobi; and
    g. Admitted that he was told during his second interview that he would be a key witness before any special tribunal established in Kenya or before the ICC.

[23] ICC-01/09-02/11-T-10-ENG ET WT, p. 22, lines 12-14.

26. Despite the fact that this third statement fundamentally undermined the reliability OTP-4's evidence, and notwithstanding that it had been in the Prosecution's possession and control since 27 September 2010, the Prosecution failed to disclose it to the Defence until 19 October 2012, more than a year after the Confirmation Hearing.[24] Prior to the Confirmation hearing, and upon the application of the Prosecution, the Defence was unfairly precluded from reviewing OTP-4's third statement.[25] In making its applications to the Pre-Trial Chamber, the Prosecution failed to identify the exculpatory nature of the statement, primarily the fact that it contained fundamental inconsistencies capable of undermining its case.

27. In September 2010, OTP-4 gave the fourth of his statements, this time to the Prosecution, and in their hands he enhanced his allegations against Mr Kenyatta. It is clear now that these allegations were lies, but they provided the Prosecution with the case it wanted. In this statement, OTP-4 referred to an alleged Yaya Centre meeting, but changed its date from 25 November to 17 November 2007. He revived his assertion of his Mungiki membership, stating that he did not want people to know about it and had therefore lied previously. He also provided further detail in respect of the 26 November meeting, and stated that Mr Kenyatta was not only present, but that he spoke. In relation to the Nairobi Members' Club meeting, he changed its location back to its original site and purported to provide the exact times of the meeting and details

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[24] ICC-01/09-02/11-628-Red, para. 17 and ICC-01/09-02/11-728, para. 24. *See also* ICC-01/09-02/11-664-Red2, paras 34-41. The Prosecution acknowledged that it overlooked the exculpatory nature of the document when it requested from PTC II that the document be withheld from the Defence prior to the Confirmation of Charges Hearing. Trial Chamber V stated: "*The mistake occurred as a result of a deficient review system in place (at the time) within the Prosecution, where - apparently - persons without knowledge of the overall state of the evidence against the accused, or at a minimum the overall evidence provided by the witness concerned, performed a review of the Affidavit. Further deficiencies in the Prosecution's internal structure are demonstrated by the fact that even though members of the Prosecution, inter alia, conducted further interviews with Witness 4, requested authorisation from the Single Judge to withhold the Affidavit from the Defence, and reviewed the overall evidence provided by Witness 4 when preparing submissions for the Confirmation Hearing, no member of the Prosecution appears to have adequately re-reviewed the Affidavit and noticed the mistake. Moreover, the Prosecution's error appears to have remained unnoticed until the Defence requested the Prosecution to provide information about the Affidavit.*" *See* ICC-01/09-02/11-728, paras 93-94. As a result, Trial Chamber V required the Prosecution to undergo a complete review of all its evidence and certify to the Chamber that no other mistakes of this kind had happened. *See* ICC-01/09-02/11-728, para. 97.

[25] On 8 July 2011 and 15 August 2011, the Prosecution requested, *ex parte*, that OTP-4's third statement be withheld from the Defence. The Pre-Trial Chamber approved the non-disclosure to the Defence (ICC-01/09-02/11-628-Red2, paras 36-39).

of how he travelled there.[26] He also provided details of an alleged impassioned speech given by Uhuru Kenyatta at the Nairobi Members' Club.

28. In June 2011, the Prosecution re-interviewed OTP-4. During this interview, OTP-4 reaffirmed the position he had given in his fourth statement. In addition, OTP-4 claimed for the first time that he was being threatened and bribed to withdraw his statements notwithstanding the fact that some of the threats he alleged happened before he provided his fourth statement, which he failed to mention to the Prosecution at that time.

29. Crucially, the Prosecution failed to question OTP-4 about the inconsistencies in his third statement, even though it had the opportunity to review this statement on several occasions before the June 2011 interview.[27] To date, the Prosecution has failed to explain why it did not question OTP-4 about the obvious discrepancy as to his location on 26 November 2007.

30. In May 2012, OTP-4 gave his sixth statement, his third to the Prosecution. In this statement, OTP-4 finally admitted to lying about his alleged presence at the Yaya Centre meeting and the 26 November Meeting. He maintained his claim as to his presence at the alleged Nairobi Members Club meeting, but cell site evidence obtained by the joint expert for the Prosecution and the Defence has since disproved his assertion.[28]

31. On 9 January 2013, the Prosecution removed OTP-4 as a witness.[29]

<u>The Prosecution's Failure to Verify OTP-4's Inconsistent Statements</u>

32. OTP-4 had provided three substantively different statements about alleged PEV-related activities *before* the Prosecution interviewed him for the first time in September 2010.[30]

[26] OTP-4 also changed the manner in which he arrived at the meeting from the second to the fourth statement.
[27] ICC-01/09-02/11-664-Red2, para. 38 and fn 67.
[28] *See* section on mobile telephone cell site evidence, below.
[29] ICC-01/09-02/11-664-Red2, para. 17.

33. Between the fourth and fifth statements, the Prosecution had eight months to review the third statement made by OTP-4. The Prosecution reviewed it at least twice.[31] Notwithstanding this review, the Prosecution failed, in violation of its duty under Article 54, to scrutinise the substance of OTP-4's evidence, leaving it to the Defence to point out its flaws, which were consistently ignored.

34. It came to the attention of the Defence in late 2012 that the Prosecution had spoken to witnesses before the Confirmation of Charges Hearing who possessed information about OTP-4 and the falsity of his accounts, but that they had failed to ask these witnesses relevant questions about him. The Prosecution had materials in its possession that should have enabled its investigators to plan its interviews professionally in order to obtain the truth, but it became manifestly clear that they failed to do so. A commonly known indicator that a witness is lying that was ignored by the Prosecutor, is the fact that such material discrepancies between statements occur because a witness who was not present as claimed at an event has forgotten the false details he originally gave. An eyewitness remembers the substance of the scene he has seen. A false witness gives different versions as he attempts to remember how he previously lied.

35. During the Confirmation of Charges Hearing, the Defence teams warned the Prosecution about OTP-4's lies.[32] In support, the Defence teams produced witness statements, State House Nairobi entrance logs, NSAC minutes, work diaries, photographs and mobile telephone records which fundamentally contradicted OTP-4's account. This crucial evidence was not adequately assessed by either the Prosecution or the Pre-Trial Chamber at that stage or subsequently.

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[30] The Prosecution received his first two statements in July 2009. The third statement was provided to the Prosecution during his September 2010 interview.

[31] Prosecution records revealed that the third statement was reviewed on 1 October 2010 and 24 May 2011.

[32] *See* ICC-01/09-02/11-T-10-ENG ET WT, p. 21, line 9 – p. 25, line 3; p. 49, lines 4-8; p. 71, line 15 – p. 72, line 6; p. 82, line 7 – p. 84, line 7. *See also* ICC-01/09-02/11-372 at paras 26-32, 64-66 and 70-71.

36. It was not until May 2012 that the Prosecution finally confronted OTP-4 with the manifest inconsistencies in his statements. It was not until January 2013 that OTP-4 was removed from the Prosecution's list of witnesses.

PROSECUTION WITNESSES OTP-11, OTP-12 AND OTP-152

37. The Prosecution relied heavily on the evidence of witnesses OTP-11 and OTP-12 in order to obtain the confirmation of charges against Uhuru Kenyatta.[33] Pre-Trial Chamber II accepted the assurances of the Prosecutor as to their reliability and authenticity as witnesses and relied on them to corroborate OTP-4 in the Decision to confirm the charges against Uhuru Kenyatta.[34] After the confirmation of charges and before the trial, OTP-12 admitted he had lied and OTP-11 accused the Prosecution of misrepresenting his evidence.[35] Both these witnesses had been protected ICC witnesses having been given secure lives outside Kenya.

38. The Defence gave repeated warnings as to the credibility of these witnesses and their associate, OTP-152. Their accounts were, from the start, wholly called into question by irreconcilable inconsistencies. More shockingly, they were involved in: (i) attempts to extort money from the Defence in exchange for favourable testimony;[36] and (ii) attempts, in conjunction with senior members of the Prosecution, to entice associates of Uhuru Kenyatta into making financial offers for favourable testimony.[37] These attempts failed.

39. The individuals who would become known as OTP-11, OTP-12 and OTP-152 were members of the Mungiki who were interviewed by the Defence in February and March 2011. The Defence sought information on any involvement the Mungiki had in the PEV

[33] ICC-01/09-02/11-T-4-CONF-ENG – ICC-01/09-02/11-T-15-CONF-ENG.
[34] ICC-01/09-02/11-382.
[35] KEN-OTP-0123-0247 at 0265, line 651; ICC-01/09-02/11-878-Conf-AnxD.
[36] See ICC-01/09-02/11-878-Conf-AnxB, in particular paras 1(a)-(d), citing KEN-D13-0006-0001 to KEN-D13-0006-0071; KEN-D13-0007-0001 to KEN-D13-0007-0081; KEN-D13-0008-0001 to KEN-D13-0008 to 0015; ICC-01/09-02/11-281-Conf-Anx1; ICC-01/09-02/11-281-Conf-Anx1, para. 5; ICC-01/09-02/11-T-10-ENG, p. 16, lines 5-7; ICC-01/09-02/11-T-10-ENG, p. 17, lines 10-13; ICC-01/09-02/11-372.
[37] ICC-01/09-02/11-822, paras 63-67 and 69-70, and Annexes B.2.ii-xlix thereto.

and the history and culture of the group. The Defence first interviewed OTP-12 on 7 February 2011 and OTP-11 on 9 February 2011. They gave detailed, verifiable information regarding the Mungiki and the limited extent of the Mungiki involvement in the PEV. Both maintained that Uhuru Kenyatta was not involved in the PEV.

40. However, OTP-11 subsequently sent sinister and threatening emails to individual members of the Defence in which he demanded money. A document signed by both OTP-11 and OTP-12 in March 2011 promised to silence "detractors" in exchange for 2,340,000 KSh.[38] As soon as this document came into the possession of the Defence, both OTP-11 and OTP-12 were informed that the Defence took the view that the document displayed a plan to intimidate witnesses and that the Defence for Uhuru Kenyatta would have nothing to do with such activity. The Defence realised these individuals were interested in attempting to extort money in exchange for their cooperation and that their primary concern was for personal financial gain.

41. The Honourable Lewis Nguyai, MP for Kikuyu, had introduced OTP-11, OTP-12 and OTP-152 to the Defence for the briefing and information meetings. Testifying for the Defence at the Confirmation of Charges hearing, Mr Nguyai described how he "had received threats and extortion messages from 12 and X and another one demanding 3 million Kenya shillings for the work they had done with the Defence team."[39] Mr Nguyai explained that "when 12 had exhausted channels of trying to extort money, he one day appeared at the reception of my office [...] he told me that he had a very hot envelope and it had a deadline, and if I did not honour what we had on the SMS the envelope was going to explode, and he told me to pass on the message to Uhuru."[40] These messages were produced as original exhibits to the Court directly from the phone. Mr Nguyai also recollected coming across these individuals in Nairobi at the time of the PEV, when they were begging for money as their usual lines of financial supply had been disrupted by the unusual events in Kenya at the time.[41] The important

[38] KEN-D13-0006-0031.
[39] ICC-01/09-02/11-T-12-CONF-ENG ET 30-09-2011, p. 44, lines 8-10.
[40] ICC-01/09-02/11-T-12-CONF-ENG ET 30-09-2011, p. 45, line 20 – p. 46, line 2.
[41] ICC-01/09-02/11-T-12-CONF-ENG ET 30-09-2011, p. 37, line 10 – p. 42, line 9.

point to note from this evidence was that these were not men in possession of millions of shillings as they claimed to have been when interviewed by the Prosecution.

42. During the Confirmation of Charges hearing, the Defence argued that the evidence of OTP-11 and OTP-12 "must be set aside as centrally flawed and thoroughly unreliable."[42] Defence investigations into the conduct of OTP-11 and OTP-12 concluded that: (i) the Defence's refusal to pay anything other than expenses incurred in the process of speaking to the Defence led to the disenchantment of OTP-11 and OTP-12 with the Defence; (ii) both OTP-11 and OTP-12 knowingly and willingly attempted to extort money from Uhuru Kenyatta in 2011; and (iii) both attempted to pervert the course of justice by approaching the Prosecution to give accounts inculpating Uhuru Kenyatta having given wholly exculpatory accounts earlier in the same year.

43. The Prosecution was fully informed of this course of conduct, but neither sought to withdraw these witnesses, or even to challenge them on their evidence. Instead, senior members of the Prosecution investigation team embarked on an attempt, with OTP-12 and his associates, to entrap Uhuru Kenyatta. The Executive Committee, headed by the Prosecutor, authorized this operation in which OTP-12 and others sought money to interfere with the collection of evidence.

44. In January 2013, the Prosecution disclosed audio recordings of these telephone conversations to the Defence, and made assurances that transcriptions and translations were in progress and would be disclosed upon completion. The Prosecution relied upon information provided by OTP-11 and OTP-12 to allege that 'Mr [REDACTED] was attempting to locate them, purportedly on behalf of Mr Kenyatta, to offer them a deal not to testify.' The Prosecution never provided the promised transcripts and translations. The Defence instead transcribed and translated these recordings and on 10 May 2013 disclosed them to the Prosecution. In its accompanying letter, the Defence set out examples from the transcripts it had prepared and stated:[43]

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[42] ICC-01/09-02/11-T-10-ENG ET WT 28-09-11, p. 13, lines 11-12.
[43] ICC-01/09-02/11-822-Conf-AnxB.4.

> It is apparent that in the transcript of KEN-OTP-0078-2268_Track 02_R02_KEN2 OTP-12 misleads the "handler" as to what was actually said between him and [REDACTED] in KEN-OTP-0078-2268-Track 01. The activities of OTP-12 and his family in attempts to contact Uhuru Kenyatta and others to obtain money and to carry out clear plans of extortion are alarming and scandalous. The transcripts reveal a protected witness carrying out such activities whilst in the protection of the VWU and with the connivance of officers of the ICC, of whose provenance the Defence is unaware.

The letter continued:

> The Defence appreciates that the Prosecution lawyers may not have been involved in these activities, nor understood the nature and content of these conversations, but they are deeply concerning and go towards significant issues in the case.

45. Despite failing to translate the audio files properly or at all, and despite the Defence communications, the Prosecution continued to make misleading assertions as to the conduct of Mr Kenyatta's associates that simply could not be supported by the content of the recordings. Astonishingly, the Prosecution maintained its position while serving a statement of one of the associates involved in the attempted entrapment which directly contradicted the Prosecution's own assertions and supported the Defence analysis.[44]

46. The Prosecution's reliance on second-hand hearsay to lay the foundation of claims of witness intimidation by or on behalf of Uhuru Kenyatta betrayed unacceptably poor standards of prosecutorial investigation in breach of Article 54, particularly in circumstances where the providers of the information were self-confessed members of a criminal gang, the Mungiki. The Prosecution failed at every stage to verify the reliability of the information providers and the information they provided in what can only be described as an utter dereliction of duty.

47. Despite evidence of deeply concerning behaviour towards members of the Defence team and Defence witnesses, as well as clear inconsistencies and demonstrated willingness to lie, the Prosecution failed to withdraw OTP-11, OTP-12, or OTP-152, or even to challenge their varying accounts and poor conduct.

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[44] KEN-OTP-0092-0737.

48. OTP-11 eventually resiled from the evidence that he gave to the Prosecution and publicly in a letter sent to the Kenyan media stated his refusal to testify against Uhuru Kenyatta. In so doing, he criticised the Prosecution's investigative standards and emphasised Uhuru Kenyatta's innocence.[45]

49. It was not until 4 December 2013, more than two years after the Confirmation of Charges hearing, that the Prosecution sought to address the obvious and fundamental inconsistencies between the accounts OTP-12 had provided to the Prosecution and the inconsistencies between his evidence and the evidence of OTP-152. Once confronted by his own differing accounts in interview, the speed with which OTP-12 admitted the fabrication of events is no less than sobering when considered within the context of the Prosecution's duty to conduct timely investigations, including into the veracity of its own evidence.[46]

50. The Prosecution's persistent failure to conduct basic, necessary and timely investigations into the veracity of these witnesses' accounts, despite serial detailed requests supported by evidence from the Defence, constitutes a gross violation of its obligations under Article 54(1)(a). Desperate to bring a case against Mr Kenyatta, the Prosecution willfully avoided making background evidential checks to confirm the veracity of the stories in order to avoid discovering exculpatory evidence. In such circumstances, and in an unacceptable reversal of the burden of proof, it became necessary for the Defence to conduct these important investigations to prove Mr Kenyatta's innocence before the Court.

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[45] ICC-01/09-02/11-878-AnxD.

[46] On 4 December 2013, P-0012 was interviewed for no more than 3 hours, during which time he admitted that he had lied to the Prosecution concerning his presence at the alleged 30 December meeting: "OK. So instead of all that, then you can just move it. I was not there," KEN-OTP-0123-0247 at 0265, line 651.

CRIMINAL CONDUCT OF OTP-118 AND THE MISUSE OF AN INTERMEDIARY

51. In September 2013, the Defence for Uhuru Kenyatta requested an urgent hearing of the Trial Chamber following the discovery of evidence that a group of Prosecution witnesses had conspired to fabricate evidence and that there had been a related serious attempt to interfere with certain Defence witnesses in order to sabotage the Defence case.

52. The Defence requested an immediate permanent stay of the proceedings as an abuse of the process of the court had taken place and requested to vacate the 12 November trial date.[47] The Trial Chamber granted an adjournment to enable the Prosecution to investigate the alleged wrongdoing.[48] Those responsible for this serious misconduct were OTP-118 and an intermediary who had recruited ten key witnesses for the Prosecution.[49] All these witnesses including OTP-118 had been collected by the Prosecution after the confirmation of charges hearing against Mr Kenyatta and were brought in to try and support the case that had been constructed by the Prosecutor against him.

53. OTP-118 and the intermediary had the aim of removing Uhuru Kenyatta from public life in Kenya and had devised a plan to recruit false witnesses and to prevent the cooperation of witnesses with the Defence so that only the story wanted by the Prosecution would be heard at the trial. The Prosecution team when speaking to him in an interview in the presence of the intermediary had asked OTP-118 to provide evidence of payment of money to finance the post-election violence and meetings to support their case. Without doubt, this was the mainspring for the witnesses to embark upon their corrupt activities, which were welcomed by the Prosecution in their subsequent interviews with them.

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[47] ICC-01/09-02/11-822 and ICC-01/09-02/11-835.
[48] ICC-01/09-02/11-847.
[49] These witnesses were OTP-217, OTP-219, OTP-428, OTP-429, OTP-430, OTP-493, OTP-494, OTP-505, OTP-506 and OTP-510.

54. The Defence investigations uncovered audio recordings (supplied to the Trial Judges and the Prosecution and authenticated by an independent expert) that revealed OTP-118 admitting he had coached the lately recruited witnesses on what to say about the post-election violence in order to support the Prosecution case against Uhuru Kenyatta.[50] In the recordings, OTP-118 stated that he, like the other recruited witnesses, had sought financial gain from participating in the case and promised that others would also benefit by testifying in support of the Prosecution. The conduct of OTP-118 did not stop there. He also subjected Defence witnesses to physical abuse and then ordered them to attend the ICC as Defence witnesses but to change their exculpatory evidence when testifying so as to sabotage the case for Mr Kenyatta with lies in support of the Prosecution.[51]

55. The Defence argued that in the circumstances the evidence of the ten witnesses recruited by the intermediary must be considered as "irremediably tainted" and that it was repugnant to the rule of law and seriously prejudicial to the integrity of the trial process to put Mr Kenyatta on trial given the state of the evidence in the case.[52]

56. To corroborate the investigative findings, the Defence also instructed an independent forensic linguistic expert, Mr Olsson,[53] who concluded, *inter alia,* that there were signs to show that the intermediary had himself authored statements by some of those witnesses he had helped to recruit.[54] In his recent article "Was the President Framed?

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[50] ICC-01/09-02/11-822, paras 73-77.
[51] ICC-01/09-02/11-822, para 76.
[52] ICC-01/09-02/11-822, paras 7 and 78-82.
[53] Dr Olsson works as an independent forensic linguistics consultant and has written reports or given evidence to courts in approximately 500 civil and criminal cases in a number of countries, especially the UK.
[54] In his initial report dated 3 April 2013, Dr Olsson concluded that in relation to two witness statements referred to as K1 and K2, both shared "many dialectal features and individual characteristics" (p.3) In his subsequent report on the same documents, dated 15 April 2013, Dr Olsson concluded that "both documents were authored by the same individual." In his third report dated 30 April 2013, Dr Olsson considered K1, K2 and two other statements, referred to as K048 and K0080. He concluded that "the two documents most recently received, K0478 and K0080 are possibly of shared authorship. K1 and K0478 are possibly of shared authorship…K1 and K0080 are likely to be of shared authorship." In his report dated 29th May 2013, Dr Olsson compared the 4 documents in his possession with two others (referred to as the Annex and the Affidavit). His conclusions as to the shared authorship can be seen at p.12: (possibility of shared authorship between the Annex and the Affidavit; possibility of shared authorship between the Annex and K0478. In his report dated 3rd October 2013, Dr Olsson considered the language of several written statements with the language found in the excerpts from the transcripts of interviews relating to 4 different Prosecution witnesses recruited by the Prosecution intermediary in order to test the linguistic authenticity of the witness statements, given the previous similarities noted between

Language DNA, plagiarism and the incrimination of a President",[55] Dr Olsson explained that "there were many linguistic similarities between the statements and that they were not the independent eye-witness accounts they purported to be."[56] He also noted that the numerous statements he considered were "low on meaningful content and high on innuendo, gossip and rumour."[57] He explained that "in any investigation witness statements – whether written or audio or video-recorded – should be quarantined from each other and that…investigators and those conducting interviews need to avoid re-using phrases and expressions previous witnesses or suspects have used"[58] but that in this case, "the investigators themselves [had] polluted the inquiry by, perhaps unwittingly, feeding ideas back to successive groups of witnesses" and that therefore, the "evidence is not generated *sua sponte* by live witnesses."[59] He concluded that "a concerted effort had been made to implicate the defendant."[60]

57. Dr Olsson's reports were disclosed by the Defence to demonstrate to the Prosecution the extent of the corruption to be found in their case. Despite this warning, the Prosecution continued to be willfully blind to the obvious fabrication of evidence that had taken place.

58. The Chamber cautioned that it was "entirely unacceptable for any person to inappropriately manipulate the testimony of the court's witnesses and that such behaviour will render the affected testimony unreliable or inadmissible."[61] The Court also reminded the parties that corruptly influencing the court's witnesses constitutes an offence against the administration of justice and is punishable under Article 70(1)(c) of the Statute.[62] The Chamber accepted that the materials provided by the Defence tended

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them. He did not consider "any of the witness statements analysed in his report to be the exclusive work of their respective claimed authors. Moreover, the similarities among these statements, indicates that a common authorship lies behind at least some of the content of all the statements." He names the author of these statements, as in fact being the Prosecution's intermediary.

[55] http://www.thetext.co.uk/Wasthepresidentframed.pdf

[56] Ibid., p. 4.

[57] Ibid., p. 6.

[58] Ibid., p. 5.

[59] Ibid., p. 5.

[60] Ibid., p. 10.

[61] ICC-01/09-02/11-868, para. 35.

[62] ICC-01/09-02/11-868, para. 35.

to suggest that OTP-118 was telling witnesses to incriminate Mr Kenyatta and that this suggested a conspiracy to fabricate evidence if these witnesses were encouraged to provide accounts of evidence different from what to their knowledge had actually happened.[63] Moreover, the Chamber went on to say that it was "concerned that the supporting materials submitted by the defence tended to show that witness 118 and others acting on the witness's behalf may have engaged in efforts to intimidate defence witnesses."[64]

59. The Defence had grave doubts about the truthfulness and reliability of OTP-118's Prosecution interviews and the propriety of the manner in which counsel and investigators of the OTP conducted them. The greatest matters of concern were the clear signals being sent in his interviews that he stood to benefit if he supplied evidence to the Prosecution,[65] and the changing of his account over 12 months to suit the questions being asked of him.

60. In August 2013, the Defence instructed Dr Eric Shepherd, an independent chartered forensic psychologist from the UK and world-renowned expert in interviewing techniques, to examine OTP-118's disclosures and behaviour during his interview by CIPEV and in his numerous interviews with the Prosecution. The Defence gave the opportunity to the Prosecution to jointly instruct him as an expert witness, in accordance with the wishes of the Judges; this offer was summarily dismissed.

61. In his final report dated 29 September 2013, Dr Shepherd made a series of compelling conclusions about the lack of authenticity, inconsistencies and authorship of Witness 118's statements; the involvement of the Prosecution's intermediary and crucially, the failings of the Prosecution in their interviewing techniques for this witness.

[63] ICC-01/09-02/11-868, para. 37.
[64] ICC-01/09-02/11-868, para. 52.
[65] ICC-01/09-02/11-868, para. 28.

62. At the outset, he noted OTP-118's "deceptive behaviours",[66] and the fact that in his statement to CIPEV, he made "no allegations about Kenyatta".[67] He also noted serious contradictions between the interviews OTP-118 provided[68] and the "multiple factors" which gave reasons to challenge the authenticity of his accounts,[69] and "significant shortcomings in the investigation team's interviewing planning."[70]

63. In respect of the intermediary, Dr Shepherd concluded that he "engaged in extraordinarily inappropriate behaviour to address 118's inability to give detailed, coherent answers".[71] Dr Shepherd also concluded that OTP-118 sought to construct a deceptive account to implicate Mr Kenyatta in the PEV, that his accounts were bogus, constructed by another or others, and that OTP-118 was a "serial, incompetent liar".[72]

64. The expert report of Dr Shepherd, which was nearly 200 pages long, was served by the Defence upon the Prosecution to warn them of the dangers in relying upon this evidence. No counter report was ever served. However, by again wilfully ignoring compelling evidence that pointed clearly in the direction that their witness was fabricating a story, the Prosecution belied its desire to seek the truth. Why the Prosecution sought to ignore clear evidential failings in relation to this witness, has never been publicly explained.

65. The affair of the recruitment of OTP-118 and the use of the intermediary reveals that the conduct of the Prosecution was naïve at best or unprofessionally motivated at worst, to construct a case at all costs against Mr Kenyatta. In their dealings with parties who were motivated by self-interest and personal gain, the Prosecution should have taken steps to seek independent evidence that corroborated these witnesses' accounts.

[66] KEN-D13-0011-0320, at conclusions 1, 34, 35, 36, 45, 52, 53, 54, 56, 57, 58, 59, 60 and 62.
[67] KEN-D13-0011-0320, at conclusion 1.
[68] KEN-D13-0011-0320, at conclusion 4.
[69] KEN-D13-0011-0320, at conclusion 6.
[70] KEN-D13-0011-0320, at conclusions 13, 19, 20, 21, 24, 25, 28, 31, 32, 33, 37, 38, 39, 41, 44, 46, 48, 49, 50 and 51.
[71] KEN-D13-0011-0320, at conclusion 18.
[72] KEN-D13-0011-0320, at overall conclusions.

MOBILE TELEPHONE CELL SITE EVIDENCE THAT CONTRADICTED THE PROSECUTION CASE AGAINST UHURU KENYATTA

Background

66. Cell site data obtained in 2013 by the single joint expert for the Prosecution and the Defence for mobile telephone communications ("SJE"), Mr Paul Vella,[73] established that key individuals did not participate in post-election violence planning meetings as alleged by the Prosecution. The cell site data came into the possession and control of the Prosecution and Defence through extraction processes operated by Mr Vella in mid-to-late 2013 and upon analysis revealed a version of events that to any impartial, objective and professional observer, wholly contradicted key allegations at the very heart of the Prosecution's case.

67. In July 2013, the SJE visited Airtel and Safaricom, both Kenyan mobile phone service providers to extract the cell site data of telephone numbers associated with key individuals central to the Prosecution's case against President Kenyatta. Between August and October 2013, the SJE provided both parties with the extracted data.

68. As soon as it was in receipt of the data, the Defence conducted a detailed analysis of the material. As a result of its forensic analysis, the Defence was also able to confirm the ownership of the telephone handsets by certain Prosecution witnesses and other key individuals for the December 2007 to January 2008 period, *i.e.* the time range within which all of the fundamental Prosecution allegations fell.[74]

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[73] Mr Paul Vella was recommended to the Prosecution and Defence by the UK based forensic science company Emersons as a world renowned expert in his field.

[74] The following methods were used to attribute mobile telephone handsets to individual users for the December 2007 – January 2008 period: (a) analysis of witness statements and transcripts of interview with respect to the ownership of the number in question and any relevant telecommunications activity; (b) examination of the handset's pattern of life, particularly with regard to probable areas of residence and daily movement patterns; (c) correlation between the handset's movement and activity with witness statements and transcripts of interview; and (d) call pattern analysis, *i.e.* analysis of the numbers communicated with, both over the general period and with respect to any specific timeframes.

Results of the Analysis of Central Prosecution Allegations with Cell Site Evidence

30 December 2007 State House Meeting

69. OTP-12 alleged that he was present at a meeting between 15:00 and 20:00 on 30 December 2007, the day of Mwai Kibaki's inauguration as President at Nairobi State House, at which Uhuru Kenyatta handed over cash to Kikuyu politicians to fund post-election violence.[75]. This was the key allegation of the Prosecution against Uhuru Kenyatta.

70. The cell site data for OTP-12's telephone was analysed by the SJE and he concluded that OTP-12's telephone "could not have been at State House between 15:00 and 20:00 on 30th December 2007".[76] Furthermore, a review of all the data for his telephone reveals a man who was a continuous telephone-user who was never at or near State House on that day or any other day during that period.

71. The cell site evidence reviewed by the SJE proved that the MP with whom OTP-12 claimed he accessed State House also did not access State House that day as alleged by the Prosecution.[77]

72. Contrary to the account provided by OTP-12, other attendees alleged by him to have been present at State House on 30 December 2007 for the swearing in of Mwai Kibaki, were also proved by cell site evidence to have not been present.[78]

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[75] In essence, OTP-12 – who provided the critical mass of the evidence concerning the 30 December meeting, and was the only Prosecution witness to claim that he attended – alleged that he, Uhuru Kenyatta, John Mututho, Francis Muthuara and numerous other politicians and Mungiki members met at Nairobi State House at a time between 1500hrs and 2000hrs on 30 December 2007 in order to mobilize, coordinate, finance and provide logistical support for the Mungiki during the PEV.

[76] Report of the SJE on Request 2, para. 5.1.

[77] OTP-12's account was contingent upon the presence of John Mututho at State House at the same time as OTP-12 on 30 December 2007. Crucially, OTP-12 claims that it was because he was with John Mututho, the then newly-elected MP for Naiavsha, that he was permitted to enter State House and attend the alleged meeting. OTP-12 is clear that he was not invited to State House or the alleged meeting, and that he only joined the meeting because "it just happened that [he] used to move with John Mututho" and he "happened to enter with Mututho".[77] John Mututho's presence at State House at the same time as OTP-12 was therefore a *sine qua non* for the latter's presence at the 30 December meeting.

73. It was therefore the case that prior to OTP-12's 4 December 2013 admission to Prosecution counsel that he had lied about the meeting at State House, the Prosecution had in their possession incontrovertible evidence that OTP-12's account of the alleged meeting was not true. A Defence report was supplied to the Prosecution to direct their attention to the state of the evidence and was summarily dismissed out of hand by Prosecution counsel. The Defence conclusion at the time was that the Prosecution was willing to pursue the case against Uhuru Kenyatta, notwithstanding reliable forensic evidence that contradicted their assertions. The mind-set of the Prosecution was to wilfully ignore exculpatory evidence in this case, notwithstanding the statutory duty under Article 54 of the Statute of the Court to investigate incriminating and exonerating evidence equally.

3 January 2008 Nairobi Members' Club Meeting

74. OTP-4 alleged Uhuru Kenyatta and other Kikuyu leaders were present at a meeting that he attended in the Nairobi Members' Club in the morning of 3 January 2008 in which they organised post-election violence. This was also a key event relied upon by the Pre-Trial Chamber in confirming the charges.

75. The mobile telephone cell site data also proved OTP-4's allegation was entirely false.[79] The SJE stated that OTP-4's handsets, which were in regular use during the morning of 3 January 2008, did not use cell masts that covered the Nairobi Members' Club that day.[80]

76. The Defence obtained the telephone numbers of the others alleged by OTP-4 to be present at this key meeting. The cell site evidence also proved the full falsity of the 3 January meeting by illustrating that the other key purported participants could not

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[78] It is clear from publicly available media reports and from official State House records that Uhuru Kenyatta, Martha Karua, Francis Muthaura, Mwangi Kiunjuri, John Michuki, Kiraitu Muringi and Lewis Ngiyai were all legitimately present at State House on 30 December 2007.

[79] OTP-4 alleged that at the 3 January meeting, President Kenyatta, Francis Muthaura, George Saitoti and others met with Mungiki members and directed them to commit the crimes charged.

[80] Report of the SJE on Request 1, para. 5.1.

have been at the meeting as alleged.[81] Again the Defence served a report of the fruits of this research and the investigations were totally ignored by the Prosecution.

77. By the time the telephone cell site data had been obtained, this witness had retracted other serious allegations he had made against Uhuru Kenyatta being present at relevant meetings elsewhere and admitted he had lied about these facts.[82] The Defence, therefore, did not need to employ this form of forensic investigation to disprove these allegations. However, the Defence was compelled to prove the falsity of the 3 January 2008 allegation because the Prosecution persisted in claiming that this alleged meeting took place despite the admission by the witness he had lied.

Late January Windsor Hotel

78. The Prosecution alleged that Uhuru Kenyatta attended a fundraising meeting at the Windsor Hotel in late January 2008 to promote the PEV.[83] The Defence obtained the telephone numbers of the alleged participants and in respect of these again the SJE concluded that a number of the key alleged attendees were not "making or receiving calls at or near the Windsor Hotel between 24 and 26 January 2008."[84]

79. In particular, the cell site evidence examined by the SJE proved that the key Mungiki member alleged to be at this meeting, Charles Ndungu Wagacha, the purported source of the allegation, never used his telephone inside or close to the Windsor Hotel during the period in question.[85]

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[81] ICC-01/09-02/11-382-Conf, paras 341 and 375-76.
[82] Yaya Centre 17 November 2007, State House 26 November 2007.
[83] The Prosecution based its claims concerning the Windsor Hotel meeting on hearsay evidence from OTP-494, OTP-429, and OTP-430 who all claimed to have been told about the meeting by Charles Ndungu Wagacha, a key alleged participant and Mungiki member. The Prosecution alleged that additional funds were contributed for the retaliatory attacks at the Windsor Hotel meeting, and that President Kenyatta stated that he would 'sell part of his father's land if necessary to secure the safety of the Kikuyus'.
[84] Report of the SJE on Request 4, para. 5.1.
[85] The cell site evidence concerning Charles Ndungu Wagacha demonstrated that he used his telephone frequently and in a consistent manner throughout the entire PEV period. In particular, he made 308 outbound calls at regular intervals during the 24-26 January 2008 period. However, the evidence did not place him at the site of violence.

Naivasha Coordination

80. The cell site data also demonstrated that a number of handsets associated with key Mungiki members – who were alleged to have coordinated the Naivasha PEV by, for example, receiving and distributing funds on the ground and issuing critical orders to Mungiki in the town – were not even present in Naivasha as alleged.

Conclusion

81. The proceedings at the ICC against Uhuru Kenyatta represented a miscarriage of justice. Rights to ensure fairness by the Prosecution towards an accused that would have been expected in any jurisdiction were plainly not employed in his case. The failure to check credibility of witnesses, wilful blindness to obvious fabrication of stories by witnesses in the pursuit of a case, represented an unreasonable campaign to prosecute an individual at all costs.

82. The impact of such conduct upon an individual's private and public life cannot be easily dismissed. Such prosecutorial conduct would be considered in most reasonable jurisdictions to have been a gross abuse of power. The ICC structure that even permitted counsel for the victims to make representations to continue the proceedings notwithstanding the admission of insufficiency of evidence by the Prosecutor reflects a system that pays little attention to the validity of the case but more to the image that it is pursuing campaigns against impunity. The irony that Uhuru Kenyatta was subject in these proceedings to nothing less than a prosecutorial impunity is clear and obvious.

Steven Kay Q.C.

Steven Kay QC

20 January 2015