



Original: English

No.: ICC-01/09-02/11
Date: 7 February 2013

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

With confidential, *ex parte*, Prosecution and VWU only Annex A

Prosecution observations on the conduct of its investigations

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Fatou Bensouda
Adesola Adeboyejo

Counsel for Francis Kirimi Muthaura

Karim A. Khan QC, Essa Faal, Kennedy
Ogetto and Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Legal Representatives of Victims

Fergal Gaynor

Legal Representatives of 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

REGISTRY

Registrar

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Pursuant to the order of the Single Judge of Pre-Trial Chamber II (“Chamber”),¹ the Prosecution hereby submits its observations on the conduct of its investigations after the Confirmation hearing of charges against Messrs Muthaura and Kenyatta.
2. In the conduct of its investigations, the Prosecution has always sought to fulfil its obligations pursuant to Articles 54(1), 67(2) and 68(1) of the Rome Statute (“Statute”), and remain within the confines of the applicable jurisprudence. Components of the Prosecution’s investigation were conducted after the confirmation hearing due to reasons explained in confidential, *ex parte*, Annex A to this submission, including the implementation of an investigative strategy tailored to fit the unique security concerns associated with the Kenya cases and designed to minimize the risk to individuals who cooperate with the Court. In the Prosecution’s submission, the applicable Appeals Chamber’s jurisprudence does not preclude the Prosecution from undertaking investigative activities once the confirmation process has taken place. Accordingly, it is not necessary for the Chamber to assess the merits of the justifications for post-confirmation hearing investigations in order to decide on the addition of one factual allegation to the charges against Messrs Muthaura and Kenyatta.

Confidentiality

3. Annex A to this submission is designated confidential, *ex parte*, Prosecution and VWU only, because it contains information about investigation strategies of the Office of the Prosecutor, which is not subject to disclosure to the Defence or the public.

¹ ICC-01/09-02/11-614.

Background

4. On 28 December 2012, Trial Chamber V issued the “Decision on the content of the updated document containing the charges.”² In this decision, the Trial Chamber rejected a factual allegation put forward by the Prosecution in its updated document containing the charges on the ground that the Pre-Trial’s Chamber’s rejection “should [...] be viewed as a rejection of that particular allegation [...] and thus, the Prosecution should not include the allegation that gunshots were the cause of some of the alleged killings in Naivasha.”³
5. On 22 January 2013, the Prosecution filed the request before the Chamber seeking permission to reinsert the said factual allegation into its updated document containing the charges.⁴
6. On 29 January 2013, the Single Judge issued a decision requesting the Prosecution to “[...] submit written observations clarifying the reasons for not conducting the investigation in due course in compliance with the Appeals Chamber’s jurisprudence”.⁵

Submissions

7. While the Prosecution has complied – in confidential, *ex parte* Annex A – with the Chamber’s order to justify its continued investigation following the confirmation hearing, it has a different reading of the Appeals Chambers’ decisions regarding the Prosecution’s ability to continue its investigation after confirmation and the authority of the Chamber to require justification from the Prosecution for its continued investigation.
8. The Appeals Chamber judgments in *Lubanga*⁶ and *Mbarushimana*⁷ imposed no restrictions or special conditions on the post-confirmation hearing

² ICC-01/09-02/11-584.

³ ICC-01/09-02/11-584, paras. 74-75.

⁴ ICC-01/09-02/11-607-Conf.

⁵ ICC-01/09-02/11-614, para. 9.

⁶ ICC-01/04-01/06-568.

exercise of the Prosecutor's ability and obligation to investigate fully the case in accordance with its obligations under Article 54(1). In *Lubanga*, the Appeals Chamber established that the duty to establish the truth is not limited to the time before confirmation hearing.⁸ While the Appeals Chamber did state that, "ideally", it would be "desirable" that investigations are completed by the time of the confirmation hearing,⁹ in that decision it reversed Pre-Trial Chamber I's finding that the Prosecution could conduct its investigations post-confirmation hearing only in *exceptional* circumstances that needed to be *justified*.¹⁰ The Appeals Chamber found that the "Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation".¹¹ The Appeals Chamber went on to say that "under certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence".¹²

9. The Appeals Chamber in *Mbarushimana* referred to the findings in *Lubanga* when it found that "the investigation should largely be completed at the stage of the confirmation of charges hearing".¹³ The issue at stake in *Mbarushimana*, however, was the manner in which the Prosecution evidence should be assessed at the confirmation stage, and, by implication, its sufficiency. It was in this context that the Appeals Chamber noted in *Mbarushimana* that the Prosecution's investigation should "largely be completed at the stage of the confirmation hearing".¹⁴ Critically, however, this finding did not limit post-confirmation investigation to only exceptional

⁷ ICC-01/04-01/10-514.

⁸ ICC-01/04-01/06-568, para 52.

⁹ ICC-01/04-01/06-568, para 54.

¹⁰ ICC-01/04-01/06-568, paras 2, 49-53, referring to ICC-01/04-01/06-108-Corr, para 39 (emphasis added).

¹¹ ICC-01/04-01/06-568, para 53.

¹² ICC-01/04-01/06-568, para 54.

¹³ ICC-01/04-01/10-514, para 44 (referring to ICC-01/04-01/06-568, para 54).

¹⁴ Ibid.

circumstances or suggest that the Pre-Trial Chamber could require the Prosecution to justify its continued investigation.

10. The jurisprudence of the Appeals Chamber is in keeping with a plain reading of the Statute and the Rules of Procedure and Evidence, neither of which imposes limitations on the Prosecution's investigation after confirmation or requires the Prosecution to justify its subsequent investigations to the Chamber. Moreover, Article 61(9) stipulates that charges may be amended before the trial begins, which indicates that the investigation does not have to stop after the confirmation hearing.¹⁵

11. Not only is there no textual or jurisprudential support for the proposition that the case must be trial-ready at the time of confirmation, that proposition fails to take into account realities that may be unique to this Court. Unlike national legal systems, securing evidence in this Court – in cases against highly powerful and influential figures who, it is alleged, have committed serious violent crimes against civilian populations – is impossible without the confidence of prospective witnesses that they and their families will be protected and safe. Such confidence cannot be guaranteed without a sound and reliable protection system. The Prosecution in these cases has to carefully balance the competing interests and not overburden the protection system with demands for long-term protection of dozens of witnesses (and their families) before the Pre-Trial Chamber has confirmed the charges. Other prospective witnesses may also not cooperate until they are confident, based on the fact that the charges are confirmed, that the prosecution is serious and likely to proceed.

¹⁵ Article 61(9); *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "decision establishing General Principles Governing Applications to restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, para 52.

12. With respect to the Prosecution's application to add a factual allegation to the Pre-Trial Chamber's confirmation decision, the Prosecution submits that the reasons for the Prosecution's continued investigation after confirmation should not be a factor in the Chamber's decision. Rather, the only considerations should be whether there exists evidence to support the application and whether the Accused would, at this stage, be unduly prejudiced by the requested amendment. In this case, the Prosecution submits that the requested change is factually substantiated and would cause no undue prejudice to the Accused and should therefore be allowed by the Pre-Trial Chamber.

Conclusion

13. The Prosecution acted within the scope of its powers and obligations pursuant to the Court's legal framework and jurisprudence in continuing its investigations after the confirmation of charges in this case. The timing of investigative steps taken after the confirmation hearing, reasons for which are provided in Annex A to this filing, should not have a legal impact on the Chamber's assessment of the Prosecution's application to amend the charges against Messrs Muthaura and Kenyatta.



Fatou Bensouda,
Prosecutor

Dated this 7th day of February, 2013
At The Hague, The Netherlands