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Date: **7 February 2013**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA
AND UHURU MUIGAI KENYATTA***

Public

Defence Observations on the “Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”

Source: Defence for Uhuru Muigai Kenyatta
Defence for Ambassador Francis Muthaura

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

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I. INTRODUCTION

1. Pursuant to Article 61(9) of the Rome Statute and Rule 128 of the Rules of Procedure and Evidence, the Prosecution seeks the permission of Pre-Trial Chamber II (“Chamber”) to re-insert a factual allegation into the Document Containing the Charges (“DCC”), namely that “victims were also killed by gunshot” in Naivasha. The Chamber had previously denied the allegation as lacking adequate factual support.
2. The Defence for Uhuru Kenyatta and the Defence for Ambassador Francis Muthaura (collectively: “Defence”) request the Chamber to deny the Prosecution’s application on the basis that the Prosecution seeks to rely upon evidence obtained after the hearing on the confirmation of charges (“Confirmation Hearing”), in contravention of the jurisprudence of the Court.

II. PROCEDURAL HISTORY

3. On 26 November 2009, the Prosecution filed a request for authorisation to commence an investigation into the situation in the Republic of Kenya.¹ On 31 March 2010, the Chamber authorised, by majority, the commencement of an investigation in relation to crimes against humanity within the jurisdiction of the Court committed in the Republic of Kenya between 1 June 2005 and 26 November 2009.²
4. On 8 March 2011, the Chamber issued its majority decision to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali to

¹ Office of the Prosecutor, “Request for authorisation of an investigation pursuant to Article 15”, 26 November 2009, ICC-01/09-3, and annexes.

² 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”, 31 March 2010, ICC-01/09-19-Corr.

appear before the Court.³ The suspects appeared voluntarily at the initial appearance hearing on 8 April 2011. At this hearing, the Chamber set the date for the Confirmation Hearing for 21 September 2011.⁴ The Confirmation Hearing took place between 21 September and 5 October 2011.

5. 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” (“Confirmation Decision”), confirming the charges presented against Mr Kenyatta and Ambassador Muthaura to the extent specified in the decision, committing them to trial on the charges as confirmed.⁵
6. On 28 December 2012, Trial Chamber V issued its “Decision on the content of the updated document containing the charges”.⁶ In this Decision, Trial Chamber V rejected a factual allegation put forward by the Prosecution in the updated DCC on the ground that the Chamber’s conclusion “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”.⁷
7. On 7 January 2013, the Prosecution submitted the Final Updated Document Containing the Charges (“Final Updated DCC”), as modified in accordance with Trial Chamber V’s Decision.⁸ The Final Updated DCC does not contain the allegation that guns were used to commit murders in Naivasha.

³ 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”, 8 March 2011, ICC-01/09-02/11-01.

⁴ ICC-01/09-02/11-T-1-ENG, p. 14, lines 11 to 15.

⁵ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf.

⁶ Trial Chamber V, “Decision on the content of the updated document containing the charges”, 28 December 2012, ICC-01/09-02/11-584.

⁷ Trial Chamber V, “Decision on the content of the updated document containing the charges”, 28 December 2012, ICC-01/09-02/11-584, paras 74-75.

⁸ ICC-01/09-02/11-591; ICC-01/09-02/11-591-Conf-AnxA.

8. On 22 January 2013, the Prosecution requested permission to re-insert the factual allegation previously denied by the Chamber as lacking adequate support.⁹ The Prosecution cited evidence that guns were supplied and used in murders of “perceived ODM supporters in Naivasha”. This evidence has been obtained since the Confirmation Hearing.¹⁰
9. On 29 January 2013, the Single Judge of the Chamber issued her “Decision requesting written observations concerning the Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”.¹¹

III. APPLICABLE LAW

10. Article 54(1) of the Statute imposes upon the Prosecution a duty to ensure that its investigations are proper, expeditious and effective. The European Court of Human Rights has consistently held that the effectiveness of an investigation is contingent on its promptness and reasonable expedition.¹²
11. Article 61(9) of the Statute provides that “[a]fter the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges”.
12. The Statute does not grant the Prosecution free rein to add new facts after the confirmation of charges which may be disclosed by ongoing investigations.¹³ In

⁹ Office of the Prosecutor, “Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, 22 January 2013, ICC-01/09-02/11-607-Conf.

¹⁰ ICC-01/09-02/11-607-Conf, para. 6.

¹¹ Pre-Trial Chamber II, “Decision Requesting Observations on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 29 January 2013, ICC-01/09-02/11-614.

¹² *Bazorkina v. Russia*, Judgment of 27 July 2006, Application n°69481/01, para. 119; *Tanrikidu v. Turkey*, Judgment of 8 July 1999, Application n°23763/94, para. 109.

¹³ Trial Chamber II, “Decision on the Filing of a Summary of the Charges by the Prosecutor”, 21 October 2009, ICC-01/04-01/07-1547-tENG, para. 22.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, the Trial Chamber held that:

[T]he filing of the Confirmation Decision represents not the starting point of the preliminary proceedings, but in fact their termination [...] the decision on the confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed. This is one of the fundamental reasons for the existence of the Pre-Trial Chamber, the purpose of which is to enable the trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain, and accessible to the accused. If the Prosecutor were to be entitled to present at the confirmation hearing a mere sample of the facts with which he intends to charge the accused, and to reserve the right subsequently to add new facts at the trial, this requirement of certainty could not be satisfied.¹⁴

13. In *The Prosecutor v. Thomas Lubanga Dyilo*, the Appeals Chamber ruled that “the investigation should largely be completed at the stage of the confirmation of charges hearing”.¹⁵ In *The Prosecutor v. Callixte Mbarushimana*, the Appeals Chamber held that most of the evidence should therefore be available at the Confirmation Hearing, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber.¹⁶

14. In his Dissenting Opinion on the Decision on the Confirmation of Charges, His Honour Judge Kaul stated:

Another example of such unsatisfactory investigation would be an approach which *de facto* is aiming, in a first phase, (only) at gathering enough evidence to reach the “sufficiency standard” within the meaning of article 61(7) of the Statute, maybe in the expectation or hope that in a further phase after the confirmation proceedings, additional

¹⁴ Trial Chamber II, “Decision on the Filing of a Summary of the Charges by the Prosecutor”, 21 October 2009, ICC-01/04-01/07-1547-tENG, para. 22.

¹⁵ 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. 54.

¹⁶ Appeals Chamber, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’”, 30 May 2012, ICC-01/04-01/10-514, para. 44.

and more convincing evidence may be assembled to attain the ‘beyond reasonable doubt’ threshold, as required by article 66(3) of the Statute.¹⁷

15. Referring to the Appeals Chamber’s Judgment of 13 October 2006,¹⁸ His Honour Judge Kaul expressed his concern that the Prosecution might seek to interpret too broadly the limited permission of post-confirmation investigations articulated therein.¹⁹
16. In the decision requesting observations, and noting the Judgments of the Appeals Chamber cited above, the Single Judge indicated that “the principle approach is that the Prosecutor should be ready with the investigation during [the confirmation] phase and any delay in doing so is exceptional and should be justified”.²⁰ Accordingly she requested that the Prosecutor submit written observations “clarifying the reasons for not conducting the investigation in due course in compliance with the Appeals Chamber’s jurisprudence”.²¹

IV. SUBMISSIONS

(A) The Prosecution’s Use of Evidence Collected Post-Confirmation is not Exceptional and is Inconsistent with the Rights of the Accused

17. The Defence submits that the Prosecution’s request to amend the Updated DCC should be denied because the Prosecution has conducted an unreasonable

¹⁷ “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’”, ICC-01/09-02/11-382-Conf, para. 52.

¹⁸ 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. 54.

¹⁹ “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’”, ICC-01/09-02/11-382-Conf, para. 56.

²⁰ Pre-Trial Chamber II, “Decision Requesting Observations on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 29 January 2013, ICC-01/09-02/11-614, para. 9.

²¹ Pre-Trial Chamber II, “Decision Requesting Observations on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 29 January 2013, ICC-01/09-02/11-614, para. 9.

portion of its investigations after the Confirmation Hearing. The amendment of the Final Updated DCC as requested by the Prosecution is a product of the Prosecution's improper approach to investigations following the Confirmation Hearing, and should not be permitted as it is inconsistent with the rights of the Accused to be informed promptly and in detail of the nature, cause and content of the charge.

18. Whilst the Defence accepts that there may be certain circumstances in which it is necessary for the Prosecution to continue its investigations after the confirmation of charges, it is clear that the Appeals Chamber considers this to be acceptable only exceptionally. The latitude to continue to investigate following the confirmation of charges exists in order to allow the collection of further evidence, whether incriminatory or exculpatory, "in situations where the ongoing nature of [a] conflict results in more compelling evidence becoming available for the first time after the confirmation hearing".²² The situation in Kenya is not akin to the situation so envisaged by the Appeals Chamber. There was no ongoing conflict at the time of the Chamber's authorisation of the investigation; even more so it was not a factor by the time of the Confirmation Hearing. All of the evidence that the Prosecution now seeks to rely upon was available prior to the Confirmation Hearing.
19. His Honour Judge Kaul held that "it is not only desirable, but necessary that the investigation is complete, if at all possible, at the time of the [Confirmation] Hearing, unless the Prosecutor justifies further investigations after confirmation with compelling reasons".²³ The Defence submits that the Prosecution has not justified its further and continuing investigations after confirmation with compelling reasons.

²² 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. 54.

²³ "Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", ICC-01/09-02/11-382-Conf, para. 57.

20. The Prosecution cannot simply aim to present “sufficient” evidence at the Confirmation Hearing and then concentrate its resources on finding more incriminating evidence following the confirmation of charges. Excluding the testimony of expert witnesses, who may reasonably be expected to be instructed after the confirmation stage, the Prosecution has indicated that it intends to rely on the evidence of 31 witnesses.²⁴ Of these, only five were first interviewed prior to the Confirmation Hearing.²⁵ The total expected time for the examination-in-chief of these 31 witnesses amounts to 262 hours. The expected time for the examination-in-chief of the five witnesses *first* interviewed prior to the Confirmation Hearing is 42 hours. The testimony from those interviewed for the first time after the Confirmation Hearing is thus expected to account for 84 *per cent* of the Prosecution’s case. On any reading, the Prosecution is grossly exceeding the limited permission of post-confirmation investigations articulated by the Appeals Chamber in its Judgment of 13 October 2006.²⁶
21. Furthermore, it is noteworthy that all of the witnesses the Prosecution proposes to call at trial were available for interview prior to the Confirmation Hearing. The Defence submits that, had the Prosecution complied with its duty to investigate its case properly and thoroughly prior to the Confirmation Hearing, it would have recognised the need to interview the individuals whose evidence it now proposes to call, at that stage. The procedure for confirmation includes an adversarial hearing precisely because the Defence must be allowed to examine and challenge the evidence that the Prosecution cites in support of its allegations at this preliminary stage.²⁷ Where, as in the instant case, the majority of the evidence the Prosecution seeks to rely on at trial has been gathered in the

²⁴ ICC-01/09-02/11-596-Conf-AnxA.

²⁵ Witnesses 2, 3, 5, 11 and 12.

²⁶ 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. 54.

²⁷ See Article 61(9)(c)

course of post-confirmation investigations, this essential process is entirely subverted. The Defence submits that the Prosecution has in fact used the post-Confirmation Hearing period as a second investigation phase, as forecast and feared by His Honour Judge Kaul.²⁸

22. The restriction on post-confirmation investigation becomes more important in situations such as the Kenya cases where the confirmation hearing and all the other judicial proceedings in the case have been made very public. This is so because of the high potential for such great publicity of the proceedings to pollute the witness pool.

(B) The Defence is Unable to Test the Credibility of the Witnesses Relied on by the Prosecution in its Application to Amend the Charges

23. The Prosecution states that it will seek to rely on the evidence of Witnesses 493, 494, 506 and 510 in support of its proposed allegation that “victims were also killed by gunshot” in Naivasha.²⁹ The identities of each of these witnesses remain redacted and unavailable to the Defence. The evidence of these witnesses was disclosed to the Defence only on 21 December 2012. The Defence has not had adequate time and opportunity completely to review them. Significantly, the Defence has not had time to investigate the veracity of the allegations contained in the draft transcripts of the interviews of these witnesses. In the circumstances, the Defence has not been afforded an adequate opportunity to respond meaningfully to the allegations made by these witnesses. It is impossible at this stage for the Defence to assess their credibility.

²⁸ “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’”, ICC-01/09-02/11-382-Conf, para. 56.

²⁹ Office of the Prosecutor, “Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, 22 January 2013, ICC-01/09-02/11-607-Conf, para. 6.

(C) The Prosecution's General Failure to Investigate Diligently and Effectively Prior to the Confirmation Hearing Led to the Presentation of Evidence that was Neither Credible Nor Reliable and the Subsequent Confirmation of Charges Against Uhuru Kenyatta and Ambassador Muthaura

24. At the Confirmation Hearing, the Prosecution relied primarily on the evidence of three witnesses: Witness 4, Witness 11, and Witness 12. The Defence submits that each of these witnesses was fundamentally flawed and plagued by serious concerns about their credibility. Witness 4 has been the most significant witness in the ICC proceedings as set out in the Defence Article 64(4) motions of 5 and 7 February 2013.³⁰ Crucially, he has been relied upon by the Chamber in the issuance of all the key decisions in this case against Mr Kenyatta and Ambassador Muthaura, including those for the investigation,³¹ summons,³² and confirmation stages.³³ Witness 4 has also been a significant witness for the Kenyan National Commission on Human Rights³⁴ and the Commission of Inquiry into Post-Election Violence,³⁵ and materials from both of these organisations have formed a substantial basis of the evidence in the proceedings and remain trial exhibits. Key findings against the Defence evidence were based upon Witness 4, and Defence evidence was rejected wholesale in the Confirmation Decision on the basis of a flawed and wrongful assessment of his credibility and reliability.³⁶ The Prosecution has recently

³⁰ ICC-01/09-02/11-622; ICC-01/09-02/11-628-Conf.

³¹ ICC-01/09-19, para. 124.

³² ICC-01/09-02/11-1 paras. 37-42.

³³ ICC-01/09-02/11-382-Conf.

³⁴ ICC-01/09-3-Anx4, paras. 169 and 509.

³⁵ ICC-01/09-3-Anx5, pp. 133-134.

³⁶ ICC-01/09-02/11-382-Conf, paras 316-331; *see also* ICC-01/09-02/11-372, paras 32(a)-32(l) and ICC-01/09-02/11-374-Conf, paras 24-26 and 52-54; KEN-D12-0001-0412, para. 38; when D12-37 was asked in his 24 April 2012 Prosecution interview to identify the “untrue” parts of his statement to the Muthaura Defence, he did not select paragraph 38, which states “I was asked if Uhuru Kenyatta was present at the Statehouse on 26 November 2007 during the youth meeting. He was not present there. If Uhuru Kenyatta was present there or any place where I was present I would certainly have noticed and remember that”, KEN-OTP-0074-0053_R01 at 0065. KEN-D12-0001-0412, para. 45; KEN-OTP-0074-0053_R01 at 0066, line 443-444. KEN-D12-0001-0412, para. 45; KEN-OTP-0074-0053_R01 at 0066, line 454-456; ICC-01/09-02/11-382-Conf, para. 324. ICC-01/09-02/11-T-11-CONF-ENG ET at page 22, line 6 to page 24, line 23; KEN-D13-0005-0408 at 0430 to 0431; KEN-D13-

decided not to call Witness 4 to testify at trial. The Defence was informed of this decision only on 9 January 2013.³⁷

25. The Defence submits that had the Prosecution properly investigated the allegations made by Witness 4, and the witness himself, it would not have sought to rely upon him at the Confirmation Hearing. The Prosecution's failure in this regard has unnecessarily and unfairly placed great strain upon the resources of the Defence. In investigating the various shifting allegations arising from Witness 4's evidence, the Defence has interviewed many potential witnesses, investigated new allegations arising from the Prosecution's disclosure, and dealt with the ever-changing focus of the Prosecution's continuing post-confirmation investigations. In the event the Prosecution had complied with its duty under Article 54(1)(a) of the Statute, the Defence submits that the Prosecution would not have relied upon Witness 4 at the Confirmation Hearing. Consequently, given the inherent and obvious credibility issues relating to Witnesses 11 and 12,³⁸ the Defence submits that the case against Uhuru Kenyatta and Ambassador Muthaura would not have been confirmed.

V. RELIEF

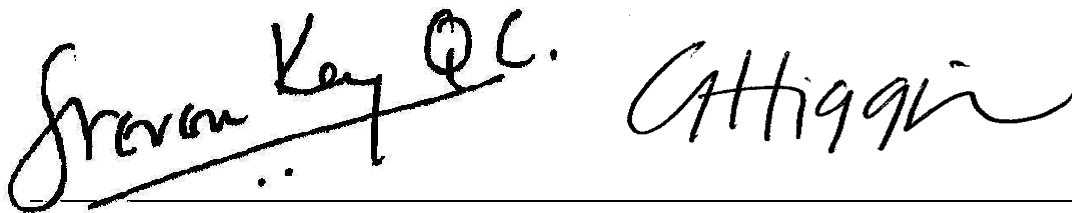
26. The Defence requests the Chamber to dismiss summarily the Prosecution's application to amend the charges to include the factual allegation that "victims were also killed by gunshot" in Naivasha.

0001-0358; KEN-D13-0001-0356; KEN-D13-0001-0357; KEN-D13-0005-0779 at 0800 to 0806; KEN-D13-0005-0179; KEN-D13-0005-0195; KEN-D13-0005-0197; KEN-D13-0005-0475; KEN-D13-0005-0524; KEN-D12-0010-0072 at 0075 to 0076, paras 19-20; KEN-D12-0001-0412 at 0417 to 0419; KEN-D12-0001-0276 at para 51; ICC-01/09-02/11-382-Conf, paras 315-32.

³⁷ ICC-01/09-02/11-596-AnxA.

³⁸ Witnesses 11 and 12 had both previously given wholly exculpatory accounts to the Defence and confirmed that Uhuru Kenyatta had no involvement with the Mungiki. The Defence also contends that these witnesses were knowing and willing parties to an extortion attempt on Uhuru Kenyatta in 2011.

27. In the event that the Chamber is minded to consider the merits of the Prosecution's request, the Defence requests the Chamber to delay the decision until such time that the Article 64(4) applications made by the Defence are disposed of by Trial Chamber V, which may result in remitting the case back to the Chamber.

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Steven Kay QC and Gillian Higgins on behalf of Uhuru Kenyatta

The image shows a single handwritten signature in black ink, which appears to be 'Karim AA Khan'. The signature is written in a cursive, fluid style. Below the signature is a horizontal line.

Karim AA Khan QC on behalf of Ambassador Muthaura

Dated this 7 February 2013

At London, England