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Date: **12 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 Response to “Prosecution observations on
the conduct of its investigations”**

Source: Defence for Uhuru Muigai Kenyatta
Defence for Francis Kirimi 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 the order of the Single Judge of Pre-Trial Chamber II (“Chamber”), the Prosecution has submitted its observations on the conduct of its investigations after the hearing on the confirmation of charges (“Confirmation Hearing”).¹
2. Pursuant to Article 61(9) of the Rome Statute and Rule 128 of the Rules of Procedure and Evidence, the Prosecution has sought the permission of the Chamber to re-insert a factual allegation into the Document Containing the Charges (“DCC”), namely that “victims were also killed by gunshot” in Naivasha.² The Chamber, in the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (“Confirmation Decision”),³ previously rejected the allegation as lacking adequate factual support.
3. The Defence for Uhuru Kenyatta and the Defence for Ambassador Francis Muthaura (collectively, “Defence”) reiterate their previous request that the Chamber deny the Prosecution’s application on the basis that the Prosecution seeks to rely upon evidence obtained after the Confirmation Hearing, in contravention of the jurisprudence of the Court.⁴

¹ Office of the Prosecutor, “Prosecution observations on the conduct of its investigations”, 7 February 2013, ICC-01/09-02/11-633.

² 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.

³ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf.

⁴ “Defence Observations on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 7 February 2013, ICC-01/09-02/11-634.

II. PROCEDURAL HISTORY

4. On 26 November 2009, the Prosecution filed a request for authorisation to commence an investigation into the situation in the Republic of Kenya.⁵ 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 2009.⁶
5. On 8 March 2011, the Chamber issued its majority decision to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali to appear before the Court.⁷ 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 2011.⁸ The Confirmation Hearing took place between 21 September and 5 October 2011.
6. On 23 January 2012, the Chamber issued the Confirmation Decision, confirming the charges against Mr Kenyatta and Ambassador Muthaura to the extent specified in the decision, committing them to trial on the charges as confirmed.⁹
7. On 28 December 2012, Trial Chamber V issued its “Decision on the content of the updated document containing the charges”.¹⁰ 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

⁵ Office of the Prosecutor, “Request for authorisation of an investigation pursuant to Article 15”, 26 November 2009, ICC-01/09-3, and annexes.

⁶ 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.

⁷ 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.

⁸ ICC-01/09-02/11-T-1-ENG, p. 14, lines 11 to 15.

⁹ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf.

¹⁰ Trial Chamber V, “Decision on the content of the updated document containing the charges”, 28 December 2012, ICC-01/09-02/11-584.

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”.¹¹

8. 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.¹² The Final Updated DCC does not contain the allegation that guns were used to commit murders in Naivasha.
9. On 22 January 2013, the Prosecution requested permission to re-insert the factual allegation previously denied by the Chamber as lacking adequate support.¹³ 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.¹⁴
10. 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” (“Request”).¹⁵
11. On 7 February 2013, the Defence filed its “Defence Observations on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” (“Observations”).¹⁶ The Defence argued that the Prosecution’s request should be denied on the basis

¹¹ 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.

¹² ICC-01/09-02/11-591; ICC-01/09-02/11-591-Conf-AnxA.

¹³ 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.

¹⁴ ICC-01/09-02/11-607-Conf, para. 6.

¹⁵ 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.

¹⁶ “Defence Observations on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 7 February 2013, ICC-01/09-02/11-634.

that the Prosecution seeks to rely upon evidence obtained after the Confirmation Hearing, in contravention of the jurisprudence of the Court. The Defence, in support of their submissions, relied upon the wholly disproportionate, inappropriate, and fundamentally unfair proportion of the Prosecution's ever-shifting case that has been gathered in the course of post-Confirmation Hearing investigations.

12. On 7 February 2013, the Prosecution filed its observations on the conduct of its investigations.¹⁷
13. On the same date, the Victims' Legal Representative filed his observations in response to the Prosecution's Request.¹⁸

III. APPLICABLE LAW

14. 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.¹⁹
15. Under Article 61(6)(a) and (b) of the Statute, the Accused is allowed to object to the charges and challenge evidence presented by the Prosecution for the purposes of the confirmation of charges.

¹⁷ Office of the Prosecutor, "Prosecution observations on the conduct of its investigations", 7 February 2013, ICC-01/09-02/11-633.

¹⁸ Victims' Legal Representative, "Victims' Observations pursuant to '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'", 7 February 2013, ICC-01/09-02/11-630.

¹⁹ *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.

16. 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”.
17. Article 67(2) of the Statute requires the Prosecution to disclose to the Defence evidence which it believes may be exculpatory or mitigating, or which may affect the credibility of Prosecution evidence.
18. The Court is under an obligation pursuant to Article 68(1) of the Statute to take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses. The measures taken by the Prosecution in this regard shall not be prejudicial to, or inconsistent with, the rights of the Accused and a fair and impartial trial.
19. 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.²⁰ In *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.²¹

²⁰ 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.

²¹ 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.

20. 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”.²² 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.²³
21. 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 and more convincing evidence may be assembled to attain the ‘beyond reasonable doubt’ threshold, as required by article 66(3) of the Statute.²⁴
22. Referring to the Appeals Chamber’s Judgment of 13 October 2006,²⁵ 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.²⁶
23. 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

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 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.

²⁴ “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.

²⁵ 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.

²⁶ “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.

[the confirmation] phase and any delay in doing so is exceptional and should be justified”.²⁷ Accordingly, the Single Judge 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”.²⁸

IV. SUBMISSIONS

(A) Prosecution Investigations must be Conducted in Accordance with Article 54(1)

24. Article 54(1)(b) of the Statute sets out the Prosecution’s obligation to ensure the effective investigation of crimes within the jurisdiction of the Court. In interpreting “effective investigation”, the Defence draw the attention of the Chamber to the jurisprudence of the European Court of Human Rights, which has consistently held that the effectiveness of an investigation is contingent on its promptness and reasonable expedition.²⁹
25. The Prosecution’s investigation has been unacceptably protracted. This conduct has required the Defence to expend considerable investigative resources in order to attempt to deal with an ever-shifting case in a limited period of time, which has resulted in considerable pressure upon the Defence in the preparation of its case.³⁰

²⁷ 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.

²⁸ 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.

²⁹ *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.

³⁰ See Defence Application pursuant to Article 64(4) for an order to refer back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary issue of the Validity of the Decision on the Confirmation of Charges or for an order striking out new facts alleged in the Prosecution’s Pre-Trial Brief and Request for an extension of the page limit pursuant to Regulation 37(2), 7 February 2013, ICC-01/09-02/11-628-Conf, para. 44 and Confidential Annex D thereto (detailing the new allegations made by the Prosecution at the trial stage).

(B) The Prosecution is under an Obligation Largely to have Completed its Investigations by the Confirmation Hearing

26. The Prosecution avers that the Appeals Chamber has imposed no restrictions or special conditions on the post-Confirmation Hearing exercise of the Prosecution's ability and obligation to investigate fully the case in accordance with its obligations under Article 54(1).³¹ The Defence submit that this is a misinterpretation of the clear jurisprudence set out by the Appeals Chamber in *Lubanga* and *Mbarushimana*, and the Trial Chamber in *Katanga*.
27. The Prosecution asserts that the Appeals Chamber in *Lubanga* "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*".³² On the contrary, the Defence submit that by holding that "the investigation should largely be completed at the stage of the [Confirmation Hearing]",³³ the Appeals Chamber impliedly held that any further investigation would be exceptional and therefore require justification.
28. In support of its argument, the Prosecution refers to the Appeals Chamber's ruling that "under certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence".³⁴ The Defence note that the Appeals Chamber was, of course, not able to tie the hands of the parties or the Court by imposing an absolute

³¹ Office of the Prosecutor, "Prosecution observations on the conduct of its investigations", 7 February 2013, ICC-01/09-02/11-633, para. 8.

³² Office of the Prosecutor, "Prosecution observations on the conduct of its investigations", 7 February 2013, ICC-01/09-02/11-633, para. 8.

³³ 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.

³⁴ Office of the Prosecutor, "Prosecution observations on the conduct of its investigations", 7 February 2013, ICC-01/09-02/11-633, para. 8, *cf.* 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.

prohibition on post-Confirmation Hearing investigations. To do so would be illogical and inconsistent with the Prosecution's continuing obligation to seek out and obtain information falling under Article 67(2) of the Statute and the Court's objective to determine the truth. However, the Appeals Chamber did stipulate that further investigation could be permitted only "under certain circumstances".

29. To allow unbridled investigations and the Prosecution to introduce wholly new allegations or additional evidence that was available with the exercise of reasonable diligence at confirmation, but simply not collected or presented by the Prosecution, would be to emasculate the confirmation of charges process and denude confirmation decisions of the required legal certainty. In addition, were the Prosecution granted such unfettered scope to re-investigate, the Prosecution would effectively be granted a licence to not only re-mould its case but also to proceed to confirmation hearings on unsatisfactory evidence in the knowledge they could have a second chance to fill gaps and omissions at a later stage. Whilst confirmation decisions do not act as a complete bar to new evidence being presented, the Defence submit that the presumption must be that Prosecution investigations have been diligently carried out and evidence obtained disclosed to the Defence in a manner that allows all relevant evidence to be considered together by the Pre-Trial Chamber in order to best inform its decision on whether the charges should be confirmed or not.
30. The Defence reiterate their arguments at paragraphs 21 and 22 of their Observations.³⁵ The Defence note in particular that all of the witnesses the Prosecution proposes to call at trial were available for interview prior to the Confirmation Hearing. The Prosecution argues that "[o]ther 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

³⁵ "Defence Observations on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", 7 February 2013, ICC-01/09-02/11-634.

proceed”.³⁶ The Defence submit that a decision to confirm charges cannot be used as an enticement to testify. On the contrary, it is perhaps the very fact of the publicity surrounding the Confirmation Hearing and the Confirmation Decision that has increased the potential for possible witnesses to be influenced.³⁷ In any event, this in no way constitutes a justification for the Prosecution’s failure to adhere to its duty under Article 54(1)(a) of the Statute.

31. While the Defence agree that there is no explicit requirement that the Prosecution obtain the permission of the Chamber to continue its investigation post-confirmation, that is a wholly different matter than the Chamber’s authority and responsibility to review and authorise the Prosecution to use the results of such dilatory or deficient investigations as the basis to amend the confirmed charges. The Defence recall that in *Mbarushimana*, the Appeals Chamber, held that most of the evidence should be available at the Confirmation Hearing.³⁸ The Defence submit that the Prosecution has not presented anything remotely resembling the majority of its evidence at the Confirmation Hearing. In this regard, the Defence reiterate their arguments set out at paragraph 20 of their Observations.³⁹

32. The Prosecution impliedly overstates the limitations placed upon post-confirmation investigation by referring to “the proposition that the case must be trial-ready at the time of confirmation”.⁴⁰ This is not the suggestion of the Court, nor the contention of the Defence. However, accused persons have an absolute right to know the case they face and to be afforded adequate time and facilities

³⁶ Office of the Prosecutor, “Prosecution observations on the conduct of its investigations”, 7 February 2013, ICC-01/09-02/11-633, para. 11.

³⁷ “Defence Observations on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 7 February 2013, ICC-01/09-02/11-634.

³⁸ 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.

³⁹ “Defence Observations on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, 7 February 2013, ICC-01/09-02/11-634.

⁴⁰ Office of the Prosecutor, “Prosecution observations on the conduct of its investigations”, 7 February 2013, ICC-01/09-02/11-633, para. 11.

to prepare a response. The ever-shifting focus of the Prosecution's case since the Confirmation Hearing has seriously eroded these fundamental rights. Though the Prosecution need not necessarily be completely ready for trial at the Confirmation Hearing, the jurisprudence of the Court clearly seeks to limit disproportionate post-Confirmation Hearing investigation for the reasons outlined at paragraphs 19 to 23 above.

(C) The Prosecution is Under an Obligation to Justify its Post-Confirmation Hearing Investigations when Seeking to Rely upon Evidence Arising out of such Investigations

33. Notwithstanding the position that the Prosecution need not seek the authorisation of a Pre-Trial Chamber to continue its investigations post-confirmation, it is undoubtedly the responsibility and within the purview of a Pre-Trial Chamber to ensure that any evidence collected post-confirmation, which the Prosecution seeks to rely upon to amend the confirmed charges, is evidence that was collected in accordance with the Prosecution's Article 54(1)(a) duties and the fundamental rights of an accused.
34. As the Single Judge held in the Request, "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".⁴¹ The Defence submit that this interpretation of the Court's jurisprudence is accurate and appropriate. Furthermore, the Defence submit that the very existence of a threshold presupposes that the Prosecution must justify going beyond it. For the reasons stated in the Defence Observations and above, the Prosecution has most certainly gone beyond the limits established by the jurisprudence of the Court.

⁴¹ 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.

(D) The Defence Should be Granted Access to the Prosecution's Justifications

35. The Prosecution has submitted reasons for conducting its investigations after the Confirmation Hearing in confidential and *ex parte* Annex A to its Observations. Due to the classification of this annex, the Defence are unable to consider and respond to the Prosecution's key submissions. Though the Prosecution seeks to justify its classification of Annex A on the basis that "it contains information about investigation strategies", the Defence submit that this broad-brush approach is inappropriate in the circumstances. The Defence must be allowed to address and challenge the Prosecution's reasons for conducting such a disproportionate amount of its investigations post-Confirmation Hearing. The Defence submit that the Prosecution would be able to overcome its concerns by redacting information that it is truly not able to disclose to the Defence.

(E) The Prosecution Seeks to Rely upon Evidence that the Defence has had No Opportunity to Assess or Challenge

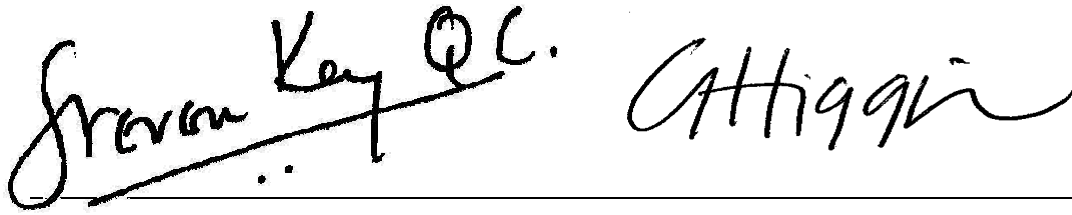
36. At the Confirmation Hearing, the Defence had an opportunity to challenge the evidence presented by the Prosecutor.⁴² The Defence have had no real opportunity to assess the evidence upon which the Prosecution now seeks to rely upon in respect of its proposed amendment to the Final Updated DCC and therefore no opportunity properly to challenge this evidence. Moreover, the identities of the witnesses upon whom the Prosecution seeks to rely to substantiate this proposed factual allegation remain undisclosed to the Defence. As the evidence of these witnesses was not obtained until late 2012, the Victims and Witnesses Unit has not yet completed its assessment. Had the Prosecution

⁴² Article 61(6)(b).

complied with its duty to obtain any such evidence in advance of the Confirmation Hearing, it is submitted that such assessments would have been completed in time for the identities of these witnesses to be disclosed to the Defence by the deadline of 9 January 2013.

V. RELIEF

37. The Defence request the Chamber to reclassify Annex A to permit the Defence access to the submissions contained therein and afford the Defence an opportunity to file additional observations, or, in the alternative, order the Prosecution to file a confidential redacted version of the annex that provides sufficient basis for the Defence to respond to the Prosecution's submissions.
38. The Defence reiterate their request that the Chamber dismiss summarily the Prosecution's application to amend the charges to include the factual allegation that "victims were also killed by gunshot" in Naivasha.
39. In the event that the Chamber is minded to consider the merits of the Prosecution's request, the Defence request 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 Pre-Trial Chamber.



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Steven Kay QC and Gillian Higgins on behalf of Uhuru Kenyatta



Handwritten signature of Karim AA Khan QC. A horizontal line is drawn below the signature.

Karim AA Khan QC on behalf of Ambassador Muthaura

Dated this 12 February 2013

At London, England