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**International
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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Public Redacted Version of "Addendum to ICC-01/09-02/11-628-Conf and ICC-01/09-02/11-628-Conf-AnxA", submitted on 20 February 2013

Sources: 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. At the status conference held on 14 February 2013 (“status conference”), the Defence for Francis Kirimi Muthaura (“Defence”) stated its intention to submit a filing correcting certain errors¹ to its 7 February 2013 “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)” (“Article 64(4) Application”).² As alluded to at the status conference, such a correction to the Article 64(4) Application is necessary due to certain inaccuracies the Defence discovered with respect to Confidential Annex A to that filing,³ which contained a “selection of the PEXO materials that had been disclosed after the confirmation hearing which were in the possession of the OTP prior to the hearing”.⁴
2. In addition, at the status conference, the Defence submitted to the Chamber two charts it had compiled:⁵ the first chart contained an expanded list of potentially exonerating (“PEXO”) materials that were collected by the Prosecution prior to the confirmation hearing, but that appear not to have been disclosed to the Defence in any shape or form, be it in full, redacted or summary format until the trial stage; the second chart contained the same information *vis-à-vis* Rule 77 materials. The honourable Presiding Judge instructed the Defence that, should it wish to put these two charts into the record of the case, the charts should be submitted via a formal filing.⁶ The Defence informed the Chamber that it would

¹ ICC-01/09-02/11-T-22-ENG ET, p. 21, line 20 to p. 22, line 2.

² ICC-01/09-02/11-628-Conf.

³ ICC-01/09-02/11-T-22-ENG ET, p. 21, line 20 to p. 22, line 2.

⁴ Article 64(4) Application, para. 25.

⁵ ICC-01/09-02/11-T-22-ENG ET, p. 14, lines 7-10.

⁶ *Ibid.*, p. 21, lines 18-19.

file the two charts into the record of the case as part of its filing correcting the errors to the Article 64(4) Application.⁷

3. Following correspondence between the Chamber and the Defence on 15 February 2013 and 18 February 2013, the Chamber granted leave to the Defence, on 18 February 2013, to file, no later than 20 February 2013, an addendum to the Article 64(4) Application including the charts distributed during the status conference.⁸
4. Accordingly, the Defence hereby submits its addendum to the Article 64(4) Application, consisting of: (i) Confidential Annex 'A1' replacing Confidential Annex A to the Article 64(4) Application; Confidential Annex 'E' (Chart of PEXO items); Confidential Annex 'F' (Chart of Rule 77 items);⁹ and the below explanations and additional submissions.

II. Confidentiality of filing

5. This filing is submitted as 'confidential' as it is an addendum to a confidential filing and refers to information that is presently classified as confidential.

III. Submission of Confidential Annex 'A1' to replace Confidential Annex A to the Article 64(4) Application

6. In conducting its time and resource intensive review for the purposes of producing the two charts submitted as Confidential Annex E and Confidential Annex F, the Defence discovered that three of the items listed in Confidential Annex A to its Article 64(4) Application (listed below) were, in fact, disclosed in anonymous summary format to the Defence at the pre-confirmation stage. Accordingly, the Defence's inclusion of these three items in Confidential Annex

⁷ *Ibid.* 22, lines 1-2.

⁸ Email from Legal Officer of Trial Chamber V to the parties, dated 18 February 2013 at 13h06.

⁹ The two charts submitted as Confidential Annex E and Confidential Annex F contain some modifications in format and substance from the physical documents distributed during the status conference.

A as having not been disclosed to the Defence pre-confirmation in full, redacted or summary format is incorrect.

7. The Defence submits that this error was due to the Prosecution's manner of labeling documents that makes it difficult for the Defence to readily identify whether a document had been previously disclosed as an anonymous summary or in a more redacted format. The Prosecution practice in this circumstance was to assign ERN numbers to the underlying documents that were disclosed at the trial stage that do not correspond to the document reference numbers for the underlying documents listed on the anonymous summaries disclosed pre-confirmation, or, in the case of one of the anonymous summaries, giving no indication to the Defence that the document disclosed in December 2012 was a lesser redacted version of a summary disclosed at the pre-confirmation stage.
8. The practice adopted by the Prosecution in this regard does not lend itself to the greatest clarity and absorbs a great deal of Defence time in attempting to discern whether documents disclosed are entirely new or whether they are lesser redacted versions of documents or the underlying source material of anonymous summaries that had been disclosed previously. It would have been quite easy for the Prosecution to include columns in the relevant disclosure notes such as "previously disclosed as" or "related to pre-confirmation summary" to address this issue. It is submitted that the interests of clarity would commend such a practice. In any event, the manner of disclosure of these documents made it very difficult for the Defence to tally the documents disclosed or realize that a document had been disclosed previously in a more redacted version without first doing a content search of the physical documents thus far disclosed by the Prosecution.

9. For its part, the Defence regrets the errors that crept into its filing and accordingly files this addendum to correct them. Notwithstanding these errors, the Defence respectfully submits that its underlying submissions in its Application with respect to these items remain entirely valid:

- i. Transcripts KEN-OTP-0061-0327 and KEN-OTP-0061-0348: The PEXO summary (KEN-OTP-0060-0591) of this screening interview [REDACTED], disclosed to the Defence on 6 August 2011, prior to the confirmation of charges hearing, lists a document reference number ("KEN-OTP-0060-0581 to KEN-OTP-0060-0584") that does not correspond to the document ID of the underlying transcripts that were *disclosed 16 months later*, on 14 December 2012. Accordingly, it was only based on the 'content check' procedure, described in Confidential Annexes E and F to this addendum, that the Defence realized its error. However, the Defence's submission in Confidential Annex A to its Article 64(4) Application that the OTP did not pursue a full interview of this PEXO witness still stands.
- ii. Transcripts KEN-OTP-0072-0509 R01 and KEN-OTP-0072-0529 R01: Just as for the above listed item, the PEXO summary (KEN-OTP-0060-0595) of the screening interview [REDACTED], disclosed to the Defence on 19 August 2011, lists a document reference number ("KEN-OTP-0060-0586 to KEN-OTP-0060-0589") that does not correspond to the document ID of the underlying transcripts *disclosed 16 months later*, on 14 December 2012. Nonetheless, the Defence's submission in Confidential Annex A to its Article 64(4) Application that the OTP did not pursue a full interview of this PEXO witness remains valid.
- iii. KEN-OTP-0088-0447 [REDACTED]: This document was also disclosed to the Defence in December 2012. As this item is a [REDACTED] (i.e. not the

underlying material) [REDACTED], it was not immediately apparent to the Defence that a document *with the same exact content*, with a single critical difference, had been disclosed at the pre-confirmation stage *16 months earlier* under a different document ID: [REDACTED]. The critical difference was the redaction of [REDACTED] from the pre-confirmation version of the document. Accordingly, the Defence's core submission at paragraph 26 of its Article 64(4) Application still stands: "*In assessing the evidence of Witness 4 regarding [REDACTED] meeting, the Chamber made an adverse inference in the Confirmation Decision that [REDACTED]*", whereas, in fact, [REDACTED] – and provided exonerating evidence to that Office.

10. With respect to the two items that remain in Confidential Annex A1 – summaries of PEXO information [REDACTED] ([REDACTED]) – the Defence notes that the Prosecution has commented on the two individuals who are the subject of these summaries in a filing subsequent to the Article 64(4) Application. In its [REDACTED],¹⁰ [REDACTED] as the PEXO summary of [REDACTED] and [REDACTED] as the PEXO summary of [REDACTED].
11. With respect to [REDACTED], the Prosecution submits that [REDACTED].¹¹ The Prosecution did not [REDACTED].¹² Nothing in the Prosecution's [REDACTED] indicates that [REDACTED], which the Prosecution certainly ought to have sought in view of its Article 54(1)(a) obligations after summonses to appear in this case were issued and as part of its continuing investigations prior to the confirmation hearing. That [REDACTED],¹³ does not invalidate the Defence's Submission in Confidential Annex A to its Article 64(4) Application

¹⁰ [REDACTED].

¹¹ *Ibid.*, para. 32.

¹² *Ibid.*

¹³ *Ibid.*

as well as Confidential Annex 1A to this addendum that the “*Witness [was] not interviewed because he/she provided PEXO in violation of 54(1)(a)*”.

12. With regards to [REDACTED], whom the Prosecution [REDACTED], the Prosecution submits that [REDACTED].¹⁴ Like [REDACTED], the Prosecution did not [REDACTED].¹⁵ Notwithstanding that [REDACTED], given the high PEXO value [REDACTED],¹⁶ surely the Prosecution, *in pursuit of its Article 54(1)(a) obligations*, should have sought [REDACTED] – after summonses to appear in this case were issued and as part of its continuing investigations prior to the confirmation hearing.

IV. Submission of PEXO and Rule 77 Charts

13. The Defence submits the charts included as Confidential Annexes E and F to this addendum as they supplement the Defence’s submissions in its Article 64(4) Application and further demonstrate that, as far as the Defence can ascertain, critical PEXO and Rule 77 items in the Prosecution’s possession prior to the confirmation of charges hearing were not disclosed to the Defence in full, redacted or summary format until the trial stage.
14. The Defence do not know whether the items included in these charts simply slipped through the cracks of the Prosecution’s disclosure review, as was the case with the crucial items listed at 1¹⁷ and 2¹⁸ of the PEXO Chart and at number 4¹⁹ in the Rule 77 Chart, or whether the Prosecution indeed submitted these items to the Pre-Trial Chamber (“PTC”) for the PTC’s determination on whether *complete non-disclosure* of each item was permissible and whether the

¹⁴ *Ibid.*, para. 34.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

explanations of the Prosecution in this regard were fair, appropriate and clearly notified the PTC of the PEXO and / or Rule 77 value of each item.

15. Whatever the reason, the apparent non-disclosure of these items to the Defence resulted in crucial evidence undercutting key aspects of the Prosecution's case at confirmation, or "affect[ing] the credibility of prosecution evidence" relied upon at confirmation,²⁰ not being available to the Defence for the purposes of Defence investigations. Nor was such evidence available to be relied upon by the Defence in making submissions at confirmation, in order to assist the PTC to properly and accurately determine whether the charges against Ambassador Muthaura should be confirmed. The Defence submits that this apparent non-disclosure of information provides further support as to why a referral to the PTC or an available Judge of the Pre-Trial Division on the question of whether the confirmation decision is vitiated is both appropriate and necessary.
16. The items contained in the two charts provide evidence that, *inter alia*:
 - i. The Mungiki were [REDACTED] – which is contrary to what the Prosecution submitted at the confirmation hearing and which was in line with the Defence's submissions.²¹
 - ii. The CIPEV material was inherently unreliable and lacked the necessary probative value. The Prosecution relied extensively on CIPEV statements and material at the confirmation hearing. The Defence disputed the probative value and propriety of relying on the material.²² The material

²⁰ Rome Statute, Article 67(2).

²¹ See, e.g., [REDACTED] ([REDACTED]); KEN-OTP-0012-0010 at p. 0023 (No. 10 in PEXO Chart); KEN-OTP-0026-4966 (No. 7 in Rule 77 Chart); KEN-OTP-0006-1804 (No. 16 in Rule 77 Chart) KEN-OTP-0015-0248 at p. 0254 (No. 18 in Rule 77 Chart; [REDACTED]); KEN-OTP-0002-0391 at p. 0405 (No. 23 in Rule 77 Chart; [REDACTED]).

²² See Confirmation Hearing Transcript of 21 September 2011, ICC-01/09-02/11-T-4-ENG ET, p. 33, line 14 to p. 37, line 7; Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing, 21 November 2011, ICC-01/09-02/11-374-Conf, para. 11.

which was in the possession of the Prosecution, and not disclosed to the Defence and subjected to judicial scrutiny includes [REDACTED].²³

- iii. The causes of the post-election violence (PEV) were long-standing and complex, and the violence itself spontaneous, organic and reactionary, and – critically – if organised, done so in a more rudimentary fashion at the local level.²⁴

17. Arguably, the most egregious non-disclosure by the Prosecution with respect to the materials listed in Confidential Annexes E and F are statements made by [REDACTED], regarding Ambassador Muthaura:

- i. [REDACTED]

- ii. [REDACTED]

18. According to [REDACTED], Ambassador Muthaura, the same individual whom the Prosecution alleged at confirmation was responsible for planning and implementing the PEV by means of his government position, [REDACTED], *“took an instant decision and it was implemented very quickly”*. Similarly, [REDACTED], whom the Prosecution alleged at confirmation Ambassador Muthaura acted through to plan and implement the PEV. [REDACTED], it states that Ambassador Muthaura willingly [REDACTED].

²³ See, e.g., KEN-OTP-0061-0002_R01 (No. 1 in Rule 77 Chart); KEN-OTP-0091-1203 (No. 2 in Rule 77 Chart); KEN-OTP-0091-1184 (No. 3 in Rule 77 Chart); [REDACTED] ([REDACTED]); KEN-OTP-0091-1188_R01 (No. 5 in Rule 77 Chart); KEN-OTP-0003-0341 (No. 24 on Rule 77 Chart); KEN-OTP-0003-0862_R01 (No. 25 on Rule 77 Chart).

²⁴ See, e.g., [REDACTED] ([REDACTED]); KEN-OTP-0014-0060 (No. 7 in PEXO Chart); KEN-OTP-0013-0609 (No. 9 in PEXO Chart); KEN-OTP-0012-0010 (No. 10 in PEXO Chart); KEN-OTP-0012-0123 (No. 17 in Rule 77 Chart); KEN-OTP-0015-0248 (No. 18 in Rule 77 Chart); KEN-OTP-0003-0629 (No. 22 in Rule 77 Chart); KEN-OTP-0002-0391 (No. 23 in Rule 77 Chart); KEN-OTP-0017-0860 (No. 34 in Rule 77 Chart);

19. [REDACTED] align perfectly with the Defence's position at confirmation, namely that Ambassador Muthaura supported the process of investigating the PEV, was a lifelong civil servant who has always served his country with professionalism and distinction, and without political bias, and who had no connection whatsoever to the alleged planning of the PEV. The Defence submits that it is unacceptable and a clear violation of Ambassador Muthaura's Article 67 rights for this information to have been withheld from the Defence at the confirmation stage.

V. PEXO and Rule 77 Charts are relevant to the Chamber's decision on the commencement of trial

20. In the event the Chamber is minded to reject the Article 64(4) Application, the Defence respectfully requests that the PEXO and Rule 77 charts attached as Confidential Annexes E and F to this filing be considered by the Chamber in determining whether the 11 April trial date remains viable.
21. In particular, as the Chamber will note, 6 out of the 16 items listed in the PEXO chart were not disclosed to the Defence until December 2012 or January of this year. Similarly, with respect to the Rule 77 items, [REDACTED], the lengthy [REDACTED] and the three summaries of Rule 77 information [REDACTED] were all disclosed only last month – January 2013. Another 18 items listed in the Rule 77 Chart were also not disclosed until December 2012 or January 2013.
22. The information contained in the annexes is not exhaustive and is, of course, just a small sampling of the Prosecution's practice of delayed disclosure of critical material that, the Defence submits, has resulted in the 11 April trial date being wholly untenable if the fundamental rights of Ambassador Muthaura to adequate time to prepare his defence and to know the case against him before

trial commences are to be upheld. The Defence reiterates its submissions that it has always conducted itself in a manner respecting the need for expeditious trial proceedings in this case. This same Defence which was ready for trial “as soon as possible” in June 2012, is now in a position where it is not able to effectively defend this case in a trial which is to start in April 2013, through no fault of its own. The conduct of the Prosecution in this case in altering the entire case against Ambassador Muthaura and attempting to introduce a case at trial, which was not subject to judicial scrutiny at a confirmation hearing coupled with the massive failings of the Prosecution in meeting its disclosure obligations makes any trial commencing before September 2013, untenable in the face of fairness and respect for the rights of Ambassador Muthaura.

Respectfully Submitted,



Karim A. A. Khan QC

Dated this 6th Day of March 2013
At The Hague, the Netherlands