

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 21 March 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE REPUBLIC OF KENYA
*IN THE CASE OF THE PROSECUTOR V. UHURU MUIGAI KENYATTA***

Public

Decision on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute"

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
Adesola Adeboyejo, Trial Lawyer

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Legal Representatives of the Victims
Fergal Gaynor

Legal Representatives of the 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

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REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit
Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”)¹ of the International Criminal Court (the “Court”), issues this decision on the “Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute (the “Request” or the “Prosecutor’s Request”).²

The present decision is classified as public although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential and confidential, *ex parte*. The Single Judge considers that the references to the said documents in the present decision are required by the principle of judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to as they have been kept to a minimum.

I. PROCEDURAL HISTORY

1. 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”, in which, *inter alia*, it confirmed the charges presented against Francis Kirimi Muthaura (“Mr. Muthaura”) and Uhuru Muigai Kenyatta (“Mr. Kenyatta”) to the extent specified in the decision,³ and committed the two accused persons to trial on the charges as confirmed (the “Confirmation of Charges Decision”).⁴

2. On 28 December 2012, Trial Chamber V which was seized of the case against Mr. Muthaura and Mr. Kenyatta at the trial stage issued the “Decision on the

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

² ICC-01/09-02/11-607-Conf and its annexes.

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

⁴ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf, para. 429.

content of the updated document containing the charges”.⁵ In this decision Trial Chamber V, *inter alia*, rejected a factual allegation put forward by the Prosecutor in her updated document containing the charges on the ground that the Pre-Trial 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”.⁶

3. On 22 January 2013, the Prosecutor filed the Request seeking permission to “re-insert [said] factual allegation [...] previously denied [by the Chamber] as lacking adequate support”.⁷

4. On 29 January 2013, the Single Judge issued the “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’”, in which she requested, *inter alia*, that the Prosecutor, the Defence teams of Mr. Muthaura and Mr. Kenyatta and the Victims’ Legal Representative “submit written observations [...], no later than, Thursday 7 February 2013, at 16 h00” (the “29 January 2013 Decision”).⁸ The Single Judge also requested the Defence teams of Mr. Muthaura and Mr. Kenyatta “to file observations, if any, in response to the Prosecutor’s written observations and the Victims’ Legal Representative’s observations, no later than Tuesday 12 February 2013, at 16 h00”.⁹

⁵ Trial Chamber V, ICC-01/09-02/11-584.

⁶ Trial Chamber V, ICC-01/09-02/11-584, paras 74-75.

⁷ ICC-01/09-02/11-607-Conf, paras 1, 4.

⁸ Pre-Trial Chamber II, ICC-01/09-02/11-614, p. 7.

⁹ Pre-Trial Chamber II, ICC-01/09-02/11-614, p. 7.

5. On 7 February 2013, the Victims' Legal Representative filed written observations on the Prosecutor's Request.¹⁰ In his observations, the Victims' Legal Representative argued in favour of granting the Request, mainly on the basis that, *inter alia*, the legal characterization of the facts will remain unchanged, and the Defence will not be prejudiced by the amendment.¹¹

6. On 7 February 2013, the Chamber received the "Prosecution observations on the conduct of its investigations" (the "Prosecutor's Observations" or "Observations"), together with Annex A appended to it.¹² Said annex was marked "confidential, *ex parte*, Prosecution and VWU only".

7. On 7 February 2013, the Defence teams of Mr. Muthaura and Mr. Kenyatta submitted its joint observations on the Request,¹³ and on 12 February 2013, they also jointly responded to the Prosecutor's Observations.¹⁴

8. On 13 February 2013, the Single Judge requested the Prosecutor to file a confidential redacted version of Annex A of the Prosecutor's Observations, to be notified to the Defence teams of Mr. Muthaura and Mr. Kenyatta, no later than Friday 15 February 2013.¹⁵ In the same decision, the Single Judge also requested the Defence teams of Mr. Muthaura and Mr. Kenyatta to file its final observations after having received said annex, no later than Wednesday 20 February 2013.¹⁶

¹⁰ "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'", ICC-01/09-02/11-630.

¹¹ ICC-01/09-02/11-630, para. 5.

¹² ICC-01/09-02/11-633; ICC-01/09-02/11-633-Conf-Exp-AnxA.

¹³ ICC-01/09-02/11-634.

¹⁴ ICC-01/09-02/11-642.

¹⁵ Pre-Trial Chamber II, "Request to file a Confidential Redacted Version of Annex A to the Prosecutor's Observations (ICC-01/09-02/11-633-Conf-Exp-AnxA)", ICC-01/09-02/11-644, p. 6.

¹⁶ Pre-Trial Chamber II, "Request to file a Confidential Redacted Version of Annex A to the Prosecutor's Observations (ICC-01/09-02/11-633-Conf-Exp-AnxA)", ICC-01/09-02/11-644, p. 6.

9. On 20 February 2013, Mr. Muthaura's Defence filed its final observations, in which it reiterated its request that the Chamber summarily dismiss the Prosecutor's Request.¹⁷

10. On 20 February 2013, the Chamber was notified of a request filed by Mr. Kenyatta's Defence on 19 February 2013. In its request, Mr. Kenyatta's Defence sought an extension of the time limit to "submit [the] final observations no later than 16 h00 on Friday 22 February".¹⁸ On the same date, the Chamber granted the requested extension.¹⁹

11. On 22 February 2013, Mr. Kenyatta's Defence filed its final observations, in which it reiterated its request that the Chamber summarily dismiss the Prosecutor's Request.²⁰

12. On 11 March 2013, the Prosecutor filed before Trial Chamber V the "Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura".²¹

13. On 18 March 2013, Trial Chamber V issued the "Decision on the withdrawal of charges against Mr. Muthaura" (the "Withdrawal of Charges Decision"), in which it, *inter alia*, granted, by majority, permission to the Prosecutor to withdraw the charges against him.²² Trial Chamber V has also decided by

¹⁷ ICC-01/09-02/11-653-Conf, para. 17.

¹⁸ ICC-01/09-02/11-650, paras 1, 12, 16.

¹⁹ Pre-Trial Chamber II, "Decision on the Defence's Request for an Extension of Time Limit", ICC-01/09-02/11-652.

²⁰ ICC-01/09-02/11-661-Conf and its annexes.

²¹ Trial Chamber V, ICC-01/09-02/11-687.

²² Trial Chamber V, ICC-01/09-02/11-696, p. 8.

majority to terminate the proceedings against Mr. Muthaura and ordered his removal “from the case name for all subsequent filings”.²³

II. APPLICABLE LAW

14. The Single Judge notes articles 21(1)(a), (2), (3), 57(2), 61(9), 67, 68(1) and 82(1)(d) of the Rome Statute (the “Statute”), rules 128 and 155 of the Rules of Procedure and Evidence (the “Rules”) and regulation 23 *bis* of the Regulations of the Court.

III. DETERMINATION BY THE SINGLE JUDGE

Preliminary Remarks

First Preliminary Remark

15. At the outset, the Single Judge wishes to point out that in light of the Withdrawal of Charges Decision, which *inter alia* terminates the proceedings against Mr. Muthaura, the Prosecutor’s Request shall be addressed only in relation to Mr. Kenyatta.

Second Preliminary Remark

16. In paragraphs 7-13 of her Observations, the Prosecutor disputes the Single Judge’s reasoning and legal interpretation of the Appeals Chamber’s jurisprudence as provided in the 29 January 2013 Decision. In this respect, the Single Judge considers that any concern or disagreement regarding a decision issued by the Chamber should have been raised in accordance with the procedural mechanism set out in the Court’s statutory documents.

²³ Trial Chamber V, ICC-01/09-02/11-696, p. 8.

17. Since article 82(1)(d) of the Statute is the appropriate procedural remedy for the Prosecutor to raise her concern or disagreement within the time limit specified in rule 155 of the Rules, she should have availed herself of such remedy.²⁴ Yet, this was not the case, and the Prosecutor has not lodged an application for leave to appeal the 29 January 2013 Decision. Instead, the Prosecutor has chosen to raise her concern or disagreement in the Observations without regard for the applicable law before this Court. By so doing, the Prosecutor has waived her right to raise any concerns or disagreements as to the said Decision. Accordingly, the Single Judge shall not engage with the Prosecutor's position any further. Instead, she shall resort to an analysis of the relevant legal provision(s) governing the subject-matter of the Prosecutor's Request in view of the documentation and evidence presented.

Merits

18. Turning to the subject-matter of the Prosecutor's Request, the Single Judge recalls article 61(4) and (9) of the Statute which reads:

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

9. After 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. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held.

²⁴ See in this regard, Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, "Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference", ICC-01/04-11 ; also Pre-Trial Chamber II, *Situation in Uganda*, "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification", ICC-02/04-01/05-60, paras 12-13.

19. Upon a plain reading of the text of paragraphs 4 and 9, it is clear that the drafters of the Statute distinguished between the powers of the Prosecutor to amend the charges *before* and *after* the confirmation of charges. Before the confirmation hearing the Prosecutor is at liberty to amend the charges without leave of the Pre-Trial Chamber. This is not, however, the case after the charges are confirmed and before the trial begins, where the Prosecutor's flexibility is restricted and subject to the Pre-Trial Chamber's scrutiny. The insertion of the phrase "with permission of the Pre-Trial Chamber" in paragraph 9 makes clear that the Prosecutor is not allowed to proceed with an amendment of one or more of the charges confirmed, without a prior approval from the Chamber. Thus, the Chamber's permission is *conditio sine qua non* for any amendment to the charges at this stage.

20. This distinction between paragraphs 4 and 9 of article 61 of the Statute has been acknowledged by the Appeals Chamber in one of its early judgments when it stated:

Before the confirmation hearing, the Prosecutor may [...], amend [...] charges without the permission of the Pre-Trial Chamber. This flexibility of the Prosecutor is more limited after the confirmation of the charges with respect to the amendment, addition or withdrawal of charges; pursuant to article 61(9) of the Statute the Prosecutor may amend the charges after their confirmation *only* with the permission of the Pre-Trial Chamber [...].²⁵

Nevertheless, in this same judgment the Appeals Chamber has not defined the word "permission" and the scope of its application.

²⁵ Appeals Chamber, "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'", ICC-01/04-01/06-568, para. 53.

21. In this respect, the Single Judge notes that the word “permission” is defined as “authorization”.²⁶ The usage of this word in the text of article 61(9) of the Statute indicates that an amendment of the charges *after* the confirmation hearing is not *automatic*. Rather, its existence in said provision carries with it a certain connotation, namely, that a request for an amendment of charges post confirmation hearing and prior to the commencement of the trial needs to be supported and justified. It follows that a decision of whether to grant permission to amend the charges confirmed should be taken upon an assessment of all relevant circumstances surrounding the case at this stage of the proceedings. This entails consideration of the Prosecutor’s Request and an evaluation of *other* relevant information which the Pre-Trial Chamber could seek if necessary for the purposes of its final decision. To say otherwise, would mean that the word “permission” in the text of article 61(9) has no added value.

22. This reading finds further support in rule 128(2) of the Rules, which makes clear that “[b]efore deciding whether to authorize the amendment [pursuant to article 61(9) of the Statute], the Pre-Trial Chamber may request the accused and the Prosecutor *to submit written observations on certain issues of fact or law*” (emphasis added). Said construction ensures that the Chamber is aware of the full picture of the state of proceedings and the justification provided by the Prosecutor in support of her request for an amendment. Thus, the Pre-Trial Chamber is assisted in arriving at a proper and balanced decision, taking into consideration diverse factors affecting the case *sub judice* including its fairness, expeditiousness, the rights of the accused as well as those of the victims.

²⁶ B. A. Garner (ed.), *Black’s Law Dictionary*, 7th edn., (West Group, 1999), p. 1160; C. Soanes, A. Stevenson (eds), *Concise Oxford English Dictionary*, 11th edn., (Oxford: Oxford University Press), p. 1068.

23. This was, in fact, the approach followed in the 29 January 2013 Decision. The Single Judge requested written observations from the parties and participants with a particular enquiry about the Prosecutor's state of investigation. Such enquiry is directly related to the subject-matter of her Request (i.e. the amendment of the charge). Said approach is followed with a view towards reaching a fair, sound and balanced decision.

24. Finally, the second part of article 61(9) of the Statute covers the nature of the requested amendment of the charge(s). In this regard, article 61(9) of the Statute envisages two main scenarios for an amendment of the charges: first, if the Prosecutor seeks to add additional charge(s) or to substitute certain charges already confirmed with more serious ones, a hearing must be held; second, where the Prosecutor requests any other amendment to a charge apart from those specified above, a hearing is not required.

25. Having set out the legal framework of article 61(9) of the Statute and the scope of its application on the basis of which a decision shall be made on the Prosecutor's Request, the Single Judge shall proceed in the following paragraphs with an overall assessment of the submissions received from the parties and participants in light of the established legal framework.

26. In her Request, the Prosecutor seeks to add to the document containing the charges a limited factual allegation that "victims were also killed by gunshot in Naivasha".²⁷ In support of the Request, the Prosecutor submitted confidential annexes (A-D) including excerpts of interview transcripts of four witnesses. In

²⁷ ICC-01/09-02/11-607-Conf, paras 1, 6.

compliance with the 29 January 2013 Decision, the Prosecutor has filed confidential, *ex-parte*, Prosecution and VWU only, the full un-redacted copies of the interview transcripts of the four witnesses as well as the requested Observations together with a confidential, *ex-parte*, Annex A. Said Annex includes the clarifications requested by the Chamber regarding the Prosecutor's investigation for the purpose of the decision on the required amendment.

27. Therefore, in order to decide on whether or not to permit or authorize the Prosecutor to re-insert said factual allegation in the document containing the charges, the nature of the requested amendment should first be considered.

28. The Single Judge points out that this factual allegation was addressed by the Chamber in the course of its assessment of the nature of the attack in or around Nakuru and Naivasha. In paragraph 174 of the Confirmation of Charges Decision, the Chamber explicitly rejected the Prosecutor's allegation that weapons were used in Naivasha due to lack of evidence, and stated:

[T]he Chamber clarifies that the use of weapons and uniforms is established by the evidence only in relation to the events in Nakuru. Conversely, the Chamber does not at this stage of the proceedings find sufficient evidence to substantiate the Prosecutor's allegation that weapons and uniforms were used in Naivasha.²⁸

29. Thus, it is apparent that the nature of the requested amendment does not aim at adding an additional charge or substituting an existing charge with a more serious one. Rather, it is a re-insertion, on the basis of the new evidence presented, of an already known specific factual allegation for an existing charge of murder in Naivasha – a location that has already been referred to in the

²⁸ ICC-01/09-02/11-382-Red, para. 174.

Confirmation of Charges Decision. It follows that the Single Judge does not need to hold a hearing for the purpose of deciding on the Prosecutor's Request.

30. Turning to the evidence presented and the observations received from the parties and participants, the Single Judge wishes to make clear that to the extent possible she shall not reveal their content in order to retain their level of classification, which is warranted in the circumstances of the present case.

31. In this regard, the Single Judge points out that she has carefully studied all submissions presented by the parties as well as by the Victims' Legal Representative. On the basis of her assessment, the Single Judge considers that the Prosecutor's Request is warranted for the reasons stated below.

32. Suffice to mention that the four witness statements presented by the Prosecutor reveal that guns such as G3 rifles and more commonly AK47s were used in the killings of Luos in Naivasha. As the Appeals Chamber has stated in one of its early judgments:

[I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.²⁹

²⁹ *Situation in Uganda*, "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06'", 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA 2), para. 36.

Thus, from an evidentiary perspective, the Prosecutor has fulfilled her statutory duty by presenting evidence which supports her allegation that “victims were also killed by gunshot in Naivasha”. With respect to the remaining information submitted to the Chamber in support of acquiring permission to re-insert said factual allegation, the Single Judge has stated earlier that her decision is guided by many factors which aim at drawing a balance between the different competing interests at stake including the specific circumstances of the case, the fairness of the proceedings, their expeditiousness, and the interest of the accused person as well as that of the victims.

33. A major concern of the Single Judge is related to the Prosecutor’s view towards her wide flexibility to conduct an investigation. It appears that, as a matter of principle and without any limitations what so ever, an investigation may continue or even the bulk of it may be conducted subsequent to the confirmation of the charges and close to the commencement of the trial.³⁰ This is a common concern raised by the Defence of Mr. Kenyatta, on the basis of which it constructed its observations in favour of denying the Prosecutor’s Request.³¹

34. In this regard, the Single Judge wishes to highlight that, subject to the limitations provided by the Court’s statutory provisions, during the initial stages of the proceedings before the filing of an application for a warrant of arrest or summons to appear, the Prosecutor bears the entire responsibility with respect to any matter related to her investigations. Once, however, the judiciary is seized of a particular case, the relevant chamber is duty bound to ensure the proper conduct of the proceedings, including all aspects of fairness.

³⁰ ICC-01/09-02/11-633, paras 2, 12, 17.

³¹ ICC-01/09-02/11-642, para. 3, 19; ICC-01/09-02/11-661-Conf., para. 2.

35. The Single Judge reiterates that the Prosecutor is not barred from continuing her investigations post confirmation of charges hearing when there is a genuine need to pursue certain investigative activities crucial for her case and for the principal goal of determining the truth. However, continuing investigations after the charges have been confirmed cannot be the rule, but rather the exception, and should be justified on a *case-by-case* basis. The justification should not be construed to mean that the Prosecutor must obtain prior permission from the relevant Pre-Trial Chamber to continue her investigation post confirmation of charges. Rather, when applying for an amendment of one or more of the charges under article 61(9) of the Statute, the relevant Pre-Trial Chamber might require some explanations for the purposes of its final determination. As the Appeals Chamber has stated “[t]he duty to establish the truth is not limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, *if this is necessary in order to establish the truth*” (emphasis added).³²

36. In the same vein, the Appeals Chamber proceeded by stating that “*in certain circumstances* to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence [...]” (emphasis added).³³ In this regard, the Single Judge considers that the phrases “*if this is necessary in order to establish the truth*” and “*in certain circumstances*” serve as a limitation on

³² Appeals Chamber, “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’”, ICC-01/04-01/06-568, para. 52.

³³ Appeals Chamber, “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’”, ICC-01/04-01/06-568, para. 54.

the continuation of the investigation post confirmation hearing. This language makes it evident that, in principle, the Prosecutor's investigation "should largely be completed at the stage of the confirmation hearing".³⁴ Hence, the Prosecutor is not granted *carte blanche* to conduct her investigation after the confirmation hearing with a view towards bringing further evidence in order to amend the charges, unless she shows that it "is necessary in order to establish the truth" or "certain circumstances" exist that justify doing so.

37. The underlying *rationale* is that the continued investigation should be related only to such essential pieces of evidence which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage. In these circumstances, the Prosecutor is expected to provide a proper justification to that effect in order for the Chamber to arrive at a fair and sound judgment regarding any request for amendment put before it.

38. In the context of the present case, the Prosecutor managed to furnish the Chamber not only with evidence supporting the existence of the factual allegation, but also with a reasonable justification for the continuation of her investigation subsequent to the confirmation hearing. The Prosecutor's justification can be summarized in the following points: 1) lack of cooperation; 2) security concerns; 3) incidents pointed out in the Prosecutor's observations regarding intimidation of witnesses, some of which were reported to the Chamber during the pre-trial phase; and 4) the difficulty in approaching insider

³⁴ 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'", ICC-01/04-01/10-514, para. 44.

witnesses to provide information to the Court.³⁵ This is the core reason weighing in favour of granting the Request.

39. In this context, the Single Judge does not share the Defence's line of reasoning that the Appeals Chamber allowed the Prosecutor to investigate post confirmation hearing *only* in a situation where an ongoing conflict prevented her investigation from being completed prior to the confirmation hearing.³⁶ Although the Appeals Chamber qualified its statement by using the word "particularly", a contextual reading of the judgment supports a broader conclusion, namely, that the statement serves only as an example and does not exclude other possible circumstances.

40. The Defence of the accused person further argues that by allowing "unbridled investigations", and introducing "wholly new allegations or additional evidence that was available [...], 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".³⁷

41. The Single Judge sees merit in the argument put forward by the Defence, but only if it turned out to be sufficiently proven. Nowhere in the Defence's observations is there a clear proof that the Prosecutor deliberately refrained from presenting evidence which was available prior to the confirmation hearing. Furthermore, the Single Judge disagrees with the Defence of Mr. Kenyatta that the Prosecutor is introducing "wholly new allegations". To the contrary, as

³⁵ ICC-01/09-02/11-633-Conf-Exp-Anx A.

³⁶ ICC-01/09-02/11-634, para. 18.

³⁷ ICC-01/09-02/11-642, para. 29.

stated in paragraph 26 of this decision, the Prosecutor is seeking to re-insert a specific factual allegation that was already known to the Defence and addressed in the Confirmation of Charges Decision. Moreover, its re-insertion has no effect on the legal characterization of the facts. Thus, to deprive the Prosecutor of the possibility to re-insert said allegation after providing reasonable justification as well as sufficient evidence in support, merely on the ground that it *allegedly* constitutes a violation to the rights of the Defence under article 67 of the Statute, is untenable. This argument would render the very existence of article 61(9) of the Statute inoperative.

42. In view of the foregoing and mindful of the interests of victims in the present case, the Single Judge finds that the Prosecutor's Request is warranted and without undue prejudice as to the rights of the Defence, and accordingly, should be granted.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

grants the Prosecutor's Request to the extent specified in paragraph 15 of the present decision.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 21 March 2013

At The Hague, The Netherlands

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Pénale
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PRE-TRIAL CHAMBER II

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*IN THE CASE OF THE PROSECUTOR V. UHURU MUIGAI KENYATTA***

Public

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No. ICC-01/09-02/11

1/19

21 March 2013

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REGISTRY

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

⁴ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf, para. 429.

content of the updated document containing the charges”.⁵ In this decision Trial Chamber V, *inter alia*, rejected a factual allegation put forward by the Prosecutor in her updated document containing the charges on the ground that the Pre-Trial 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”.⁶

3. On 22 January 2013, the Prosecutor filed the Request seeking permission to “re-insert [said] factual allegation [...] previously denied [by the Chamber] as lacking adequate support”.⁷

4. On 29 January 2013, the Single Judge issued the “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’”, in which she requested, *inter alia*, that the Prosecutor, the Defence teams of Mr. Muthaura and Mr. Kenyatta and the Victims’ Legal Representative “submit written observations [...], no later than, Thursday 7 February 2013, at 16 h00” (the “29 January 2013 Decision”).⁸ The Single Judge also requested the Defence teams of Mr. Muthaura and Mr. Kenyatta “to file observations, if any, in response to the Prosecutor’s written observations and the Victims’ Legal Representative’s observations, no later than Tuesday 12 February 2013, at 16 h00”.⁹

⁵ Trial Chamber V, ICC-01/09-02/11-584.

⁶ Trial Chamber V, ICC-01/09-02/11-584, paras 74-75.

⁷ ICC-01/09-02/11-607-Conf, paras 1, 4.

⁸ Pre-Trial Chamber II, ICC-01/09-02/11-614, p. 7.

⁹ Pre-Trial Chamber II, ICC-01/09-02/11-614, p. 7.

5. On 7 February 2013, the Victims' Legal Representative filed written observations on the Prosecutor's Request.¹⁰ In his observations, the Victims' Legal Representative argued in favour of granting the Request, mainly on the basis that, *inter alia*, the legal characterization of the facts will remain unchanged, and the Defence will not be prejudiced by the amendment.¹¹

6. On 7 February 2013, the Chamber received the "Prosecution observations on the conduct of its investigations" (the "Prosecutor's Observations" or "Observations"), together with Annex A appended to it.¹² Said annex was marked "confidential, *ex parte*, Prosecution and VWU only".

7. On 7 February 2013, the Defence teams of Mr. Muthaura and Mr. Kenyatta submitted their joint observations on the Request,¹³ and on 12 February 2013, they also jointly responded to the Prosecutor's Observations.¹⁴

8. On 13 February 2013, the Single Judge requested the Prosecutor to file a confidential redacted version of Annex A of the Prosecutor's Observations, to be notified to the Defence teams of Mr. Muthaura and Mr. Kenyatta, no later than Friday 15 February 2013.¹⁵ In the same decision, the Single Judge also requested the Defence teams of Mr. Muthaura and Mr. Kenyatta to file their final

¹⁰ "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*'", ICC-01/09-02/11-630.

¹¹ ICC-01/09-02/11-630, para. 5.

¹² ICC-01/09-02/11-633; ICC-01/09-02/11-633-Conf-Exp-AnxA.

¹³ ICC-01/09-02/11-634.

¹⁴ ICC-01/09-02/11-642.

¹⁵ Pre-Trial Chamber II, "Request to file a Confidential Redacted Version of Annex A to the Prosecutor's Observations (ICC-01/09-02/11-633-Conf-Exp-AnxA)", ICC-01/09-02/11-644, p. 6.

observations after having received said annex, no later than Wednesday 20 February 2013.¹⁶

9. On 20 February 2013, Mr. Muthaura's Defence filed its final observations, in which it reiterated its request that the Chamber summarily dismiss the Prosecutor's Request.¹⁷

10. On 20 February 2013, the Chamber was notified of a request filed by Mr. Kenyatta's Defence on 19 February 2013. In its request, Mr. Kenyatta's Defence sought an extension of the time limit to "submit [the] final observations no later than 16 h00 on Friday 22 February".¹⁸ On the same date, the Chamber granted the requested extension.¹⁹

11. On 22 February 2013, Mr. Kenyatta's Defence filed its final observations, in which it reiterated its request that the Chamber summarily dismiss the Prosecutor's Request.²⁰

12. On 11 March 2013, the Prosecutor filed before Trial Chamber V the "Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura".²¹

13. On 18 March 2013, Trial Chamber V issued the "Decision on the withdrawal of charges against Mr. Muthaura" (the "Withdrawal of Charges Decision"), in which it, *inter alia*, granted, by majority, permission to the Prosecutor to

¹⁶ Pre-Trial Chamber II, "Request to file a Confidential Redacted Version of Annex A to the Prosecutor's Observations (ICC-01/09-02/11-633-Conf-Exp-AnxA)", ICC-01/09-02/11-644, p. 6.

¹⁷ ICC-01/09-02/11-653-Conf, para. 17.

¹⁸ ICC-01/09-02/11-650, paras 1, 12, 16.

¹⁹ Pre-Trial Chamber II, "Decision on the Defence's Request for an Extension of Time Limit", ICC-01/09-02/11-652.

²⁰ ICC-01/09-02/11-661-Conf and its annexes.

²¹ Trial Chamber V, ICC-01/09-02/11-687.

withdraw the charges against him.²² Trial Chamber V has also decided by majority to terminate the proceedings against Mr. Muthaura and ordered his removal “from the case name for all subsequent filings”.²³

II. APPLICABLE LAW

14. The Single Judge notes articles 21(1)(a), (2), (3), 57(2), 61(9), 67, 68(1) and 82(1)(d) of the Rome Statute (the “Statute”), rules 128 and 155 of the Rules of Procedure and Evidence (the “Rules”) and regulation 23 *bis* of the Regulations of the Court.

III. DETERMINATION BY THE SINGLE JUDGE

Preliminary Remarks

First Preliminary Remark

15. At the outset, the Single Judge wishes to point out that in light of the Withdrawal of Charges Decision, which *inter alia* terminates the proceedings against Mr. Muthaura, the Prosecutor’s Request shall be addressed only in relation to Mr. Kenyatta.

Second Preliminary Remark

16. In paragraphs 7-13 of her Observations, the Prosecutor disputes the Single Judge’s reasoning and legal interpretation of the Appeals Chamber’s jurisprudence as provided in the 29 January 2013 Decision. In this respect, the Single Judge considers that any concern or disagreement regarding a decision

²² Trial Chamber V, ICC-01/09-02/11-696, p. 8.

²³ Trial Chamber V, ICC-01/09-02/11-696, p. 8.

issued by the Chamber should have been raised in accordance with the procedural mechanism set out in the Court's statutory documents.

17. Since article 82(1)(d) of the Statute is the appropriate procedural remedy for the Prosecutor to raise her concern or disagreement within the time limit specified in rule 155 of the Rules, she should have availed herself of such remedy.²⁴ Yet, this was not the case, and the Prosecutor has not lodged an application for leave to appeal the 29 January 2013 Decision. Instead, the Prosecutor has chosen to raise her concern or disagreement in the Observations without regard for the applicable law before this Court. By so doing, the Prosecutor has waived her right to raise any concerns or disagreements as to the said Decision. Accordingly, the Single Judge shall not engage with the Prosecutor's position any further. Instead, she shall resort to an analysis of the relevant legal provision(s) governing the subject-matter of the Prosecutor's Request in view of the documentation and evidence presented.

Merits

18. Turning to the subject-matter of the Prosecutor's Request, the Single Judge recalls article 61(4) and (9) of the Statute which reads:

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

²⁴ See in this regard, Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, "Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference", ICC-01/04-11 ; also Pre-Trial Chamber II, *Situation in Uganda*, "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification", ICC-02/04-01/05-60, paras 12-13.

9. After 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. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held.

19. Upon a plain reading of the text of paragraphs 4 and 9, it is clear that the drafters of the Statute distinguished between the powers of the Prosecutor to amend the charges *before* and *after* the confirmation of charges. Before the confirmation hearing the Prosecutor is at liberty to amend the charges without leave of the Pre-Trial Chamber. This is not, however, the case after the charges are confirmed and before the trial begins, where the Prosecutor's flexibility is restricted and subject to the Pre-Trial Chamber's scrutiny. The insertion of the phrase "with permission of the Pre-Trial Chamber" in paragraph 9 makes clear that the Prosecutor is not allowed to proceed with an amendment of one or more of the charges confirmed, without a prior approval from the Chamber. Thus, the Chamber's permission is *conditio sine qua non* for any amendment to the charges at this stage.

20. This distinction between paragraphs 4 and 9 of article 61 of the Statute has been acknowledged by the Appeals Chamber in one of its early judgments when it stated:

Before the confirmation hearing, the Prosecutor may [...], amend [...] charges without the permission of the Pre-Trial Chamber. This flexibility of the Prosecutor is more limited after the confirmation of the charges with respect to the amendment, addition or withdrawal of charges; pursuant to article 61(9) of the Statute the Prosecutor may amend the charges after their confirmation *only* with the permission of the Pre-Trial Chamber [...].²⁵

²⁵ Appeals Chamber, "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'", ICC-01/04-01/06-568, para. 53.

Nevertheless, in this same judgment the Appeals Chamber has not defined the word “permission” and the scope of its application.

21. In this respect, the Single Judge notes that the word “permission” is defined as “authorization”.²⁶ The usage of this word in the text of article 61(9) of the Statute indicates that an amendment of the charges *after* the confirmation hearing is not *automatic*. Rather, its existence in said provision carries with it a certain connotation, namely, that a request for an amendment of charges post confirmation hearing and prior to the commencement of the trial needs to be supported and justified. It follows that a decision of whether to grant permission to amend the charges confirmed should be taken upon an assessment of all relevant circumstances surrounding the case at this stage of the proceedings. This entails consideration of the Prosecutor’s Request and an evaluation of *other* relevant information which the Pre-Trial Chamber could seek if necessary for the purposes of its final decision. To say otherwise, would mean that the word “permission” in the text of article 61(9) has no added value.

22. This reading finds further support in rule 128(2) of the Rules, which makes clear that “[b]efore deciding whether to authorize the amendment [pursuant to article 61(9) of the Statute], the Pre-Trial Chamber may request the accused and the Prosecutor *to submit written observations on certain issues of fact or law*” (emphasis added). Said construction ensures that the Chamber is aware of the full picture of the state of proceedings and the justification provided by the Prosecutor in support of her request for an amendment. Thus, the Pre-Trial

²⁶ B. A. Garner (ed.), *Black’s Law Dictionary*, 7th edn., (West Group, 1999), p. 1160; C. Soanes, A. Stevenson (eds), *Concise Oxford English Dictionary*, 11th edn., (Oxford: Oxford University Press), p. 1068.

Chamber is assisted in arriving at a proper and balanced decision, taking into consideration diverse factors affecting the case *sub judice* including its fairness, expeditiousness, the rights of the accused as well as those of the victims.

23. This was, in fact, the approach followed in the 29 January 2013 Decision. The Single Judge requested written observations from the parties and participants with a particular enquiry about the Prosecutor's state of investigation. Such enquiry is directly related to the subject-matter of her Request (i.e. the amendment of the charge). Said approach is followed with a view towards reaching a fair, sound and balanced decision.

24. Finally, the second part of article 61(9) of the Statute covers the nature of the requested amendment of the charge(s). In this regard, article 61(9) of the Statute envisages two main scenarios for an amendment of the charges: first, if the Prosecutor seeks to add additional charge(s) or to substitute certain charges already confirmed with more serious ones, a hearing must be held; second, where the Prosecutor requests any other amendment to a charge apart from those specified above, a hearing is not required.

25. Having set out the legal framework of article 61(9) of the Statute and the scope of its application on the basis of which a decision shall be made on the Prosecutor's Request, the Single Judge shall proceed in the following paragraphs with an overall assessment of the submissions received from the parties and participants in light of the established legal framework.

26. In her Request, the Prosecutor seeks to add to the document containing the charges a limited factual allegation that "victims were also killed by gunshot in

Naivasha".²⁷ In support of the Request, the Prosecutor submitted confidential annexes (A-D) including excerpts of interview transcripts of four witnesses. In compliance with the 29 January 2013 Decision, the Prosecutor has filed confidential, *ex-parte*, Prosecution and VWU only, the full un-redacted copies of the interview transcripts of the four witnesses as well as the requested Observations together with a confidential, *ex-parte*, Annex A. Said Annex includes the clarifications requested by the Chamber regarding the Prosecutor's investigation for the purpose of the decision on the required amendment.

27. Therefore, in order to decide on whether or not to permit or authorize the Prosecutor to re-insert said factual allegation in the document containing the charges, the nature of the requested amendment should first be considered.

28. The Single Judge points out that this factual allegation was addressed by the Chamber in the course of its assessment of the nature of the attack in or around Nakuru and Naivasha. In paragraph 174 of the Confirmation of Charges Decision, the Chamber explicitly rejected the Prosecutor's allegation that weapons were used in Naivasha due to lack of evidence, and stated:

[T]he Chamber clarifies that the use of weapons and uniforms is established by the evidence only in relation to the events in Nakuru. Conversely, the Chamber does not at this stage of the proceedings find sufficient evidence to substantiate the Prosecutor's allegation that weapons and uniforms were used in Naivasha.²⁸

29. Thus, it is apparent that the nature of the requested amendment does not aim at adding an additional charge or substituting an existing charge with a more serious one. Rather, it is a re-insertion, on the basis of the new evidence

²⁷ ICC-01/09-02/11-607-Conf, paras 1, 6.

²⁸ ICC-01/09-02/11-382-Red, para. 174.

presented, of an already known specific factual allegation for an existing charge of murder in Naivasha – a location that has already been referred to in the Confirmation of Charges Decision. It follows that the Single Judge does not need to hold a hearing for the purpose of deciding on the Prosecutor’s Request.

30. Turning to the evidence presented and the observations received from the parties and participants, the Single Judge wishes to make clear that to the extent possible she shall not reveal their content in order to retain their level of classification, which is warranted in the circumstances of the present case.

31. In this regard, the Single Judge points out that she has carefully studied all submissions presented by the parties as well as by the Victims’ Legal Representative. On the basis of her assessment, the Single Judge considers that the Prosecutor’s Request is warranted for the reasons stated below.

32. Suffice to mention that the four witness statements presented by the Prosecutor reveal that guns such as G3 rifles and more commonly AK47s were used in the killings of Luos in Naivasha. As the Appeals Chamber has stated in one of its early judgments:

[I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.²⁹

²⁹ *Situation in Uganda*, “Judgment on the appeals of the Defence against the decisions entitled ‘Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06’”, 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA 2), para. 36.

Thus, from an evidentiary perspective, the Prosecutor has fulfilled her statutory duty by presenting evidence which supports her allegation that “victims were also killed by gunshot in Naivasha”. With respect to the remaining information submitted to the Chamber in support of acquiring permission to re-insert said factual allegation, the Single Judge has stated earlier that her decision is guided by many factors which aim at drawing a balance between the different competing interests at stake including the specific circumstances of the case, the fairness of the proceedings, their expeditiousness, and the interest of the accused person as well as that of the victims.

33. A major concern of the Single Judge is related to the Prosecutor’s view towards her wide flexibility to conduct an investigation. It appears that, as a matter of principle and without any limitations what so ever, an investigation may continue or even the bulk of it may be conducted subsequent to the confirmation of the charges and close to the commencement of the trial.³⁰ This is a common concern raised by the Defence of Mr. Kenyatta, on the basis of which it constructed its observations in favour of denying the Prosecutor’s Request.³¹

34. In this regard, the Single Judge wishes to highlight that, subject to the limitations provided by the Court’s statutory provisions, during the initial stages of the proceedings before the filing of an application for a warrant of arrest or summons to appear, the Prosecutor bears the entire responsibility with respect to any matter related to her investigations. Once, however, the judiciary is seized of a particular case, the relevant chamber is duty bound to ensure the proper conduct of the proceedings, including all aspects of fairness.

³⁰ ICC-01/09-02/11-633, paras 2, 12, 17.

³¹ ICC-01/09-02/11-642, para. 3, 19; ICC-01/09-02/11-661-Conf., para. 2.

35. The Single Judge reiterates that the Prosecutor is not barred from continuing her investigations post confirmation of charges hearing when there is a genuine need to pursue certain investigative activities crucial for her case and for the principal goal of determining the truth. However, continuing investigations after the charges have been confirmed cannot be the rule, but rather the exception, and should be justified on a *case-by-case* basis. The justification should not be construed to mean that the Prosecutor must obtain prior permission from the relevant Pre-Trial Chamber to continue her investigation post confirmation of charges. Rather, when applying for an amendment of one or more of the charges under article 61(9) of the Statute, the relevant Pre-Trial Chamber might require some explanations for the purposes of its final determination. As the Appeals Chamber has stated “[t]he duty to establish the truth is not limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, *if this is necessary in order to establish the truth*” (emphasis added).³²

36. In the same vein, the Appeals Chamber proceeded by stating that “*in certain circumstances* to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence [...]” (emphasis added).³³ In this regard, the Single Judge considers that the phrases “*if this is necessary in order to establish the truth*” and “*in certain circumstances*” serve as a limitation on the continuation of the investigation post confirmation hearing. This language

³² Appeals Chamber, “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’”, ICC-01/04-01/06-568, para. 52.

³³ Appeals Chamber, “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’”, ICC-01/04-01/06-568, para. 54.

makes it evident that, in principle, the Prosecutor's investigation "should largely be completed at the stage of the confirmation hearing".³⁴ Hence, the Prosecutor is not granted *carte blanche* to conduct her investigation after the confirmation hearing with a view towards bringing further evidence in order to amend the charges, unless she shows that it "is necessary in order to establish the truth" or "certain circumstances" exist that justify doing so.

37. The underlying *rationale* is that the continued investigation should be related only to such essential pieces of evidence which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage. In these circumstances, the Prosecutor is expected to provide a proper justification to that effect in order for the Chamber to arrive at a fair and sound judgment regarding any request for amendment put before it.

38. In the context of the present case, the Prosecutor managed to furnish the Chamber not only with evidence supporting the existence of the factual allegation, but also with a reasonable justification for the continuation of her investigation subsequent to the confirmation hearing. The Prosecutor's justification can be summarized in the following points: 1) lack of cooperation; 2) security concerns; 3) incidents pointed out in the Prosecutor's observations regarding intimidation of witnesses, some of which were reported to the Chamber during the pre-trial phase; and 4) the difficulty in approaching insider

³⁴ 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'", ICC-01/04-01/10-514, para. 44.

witnesses to provide information to the Court.³⁵ This is the core reason weighing in favour of granting the Request.

39. In this context, the Single Judge does not share the Defence's line of reasoning that the Appeals Chamber allowed the Prosecutor to investigate post confirmation hearing *only* in a situation where an ongoing conflict prevented her investigation from being completed prior to the confirmation hearing.³⁶ Although the Appeals Chamber qualified its statement by using the word "particularly", a contextual reading of the judgment supports a broader conclusion, namely, that the statement serves only as an example and does not exclude other possible circumstances.

40. The Defence of the accused person further argues that by allowing "unbridled investigations", and introducing "wholly new allegations or additional evidence that was available [...], 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".³⁷

41. The Single Judge sees merit in the argument put forward by the Defence, but only if it turned out to be sufficiently proven. Nowhere in the Defence's observations is there a clear proof that the Prosecutor deliberately refrained from presenting evidence which was available prior to the confirmation hearing. Furthermore, the Single Judge disagrees with the Defence of Mr. Kenyatta that the Prosecutor is introducing "wholly new allegations". To the contrary, as

³⁵ ICC-01/09-02/11-633-Conf-Exp-Anx A.

³⁶ ICC-01/09-02/11-634, para. 18.

³⁷ ICC-01/09-02/11-642, para. 29.

stated in paragraph 29 of this decision, the Prosecutor is seeking to re-insert a specific factual allegation that was already known to the Defence and addressed in the Confirmation of Charges Decision. Moreover, its re-insertion has no effect on the legal characterization of the facts. Thus, to deprive the Prosecutor of the possibility to re-insert said allegation after providing reasonable justification as well as sufficient evidence in support, merely on the ground that it *allegedly* constitutes a violation to the rights of the Defence under article 67 of the Statute, is untenable. This argument would render the very existence of article 61(9) of the Statute inoperative.

42. In view of the foregoing and mindful of the interests of victims in the present case, the Single Judge finds that the Prosecutor's Request is warranted and without undue prejudice as to the rights of the Defence, and accordingly, should be granted.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

grants the Prosecutor's Request to the extent specified in paragraph 15 of the present decision.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 21 March 2013

At The Hague, The Netherlands

Annex A

1. On 21 March 2013, the Chamber issued the “Decision on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”.¹

2. The following errors have been corrected:

- a. In paragraph 7, line 2, the word “its” has been replaced by “their”;
- b. In paragraph 8, line 5, the word “its” has been replaced by “their”;
- c. In paragraph 41, line 7, the mention to “paragraph 26” should now read “paragraph 29”.

¹ Pre-Trial Chamber II, ICC-01/09-02/11-700.