

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 March 2013

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

**Defence Observations on Article 64(4) and 61(11) of the Rome Statute Pursuant to
the “Order Scheduling a Status Conference”**

Source: Defence for Uhuru Muigai Kenyatta

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

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**Unrepresented Applicants
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Section Other**

I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta (“Defence”) submits this filing in response to Trial Chamber V’s (“Chamber”) request for further observations on the definition of a “preliminary issue” under Article 64(4) and the scope of the Chamber’s power under Article 61(11).¹

II. PROCEDURAL HISTORY

2. On 5 February 2013, the Defence submitted its “Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration” (“Article 64(4) Application”).²
3. On 7 February 2013, the Defence for Amb. Muthaura (“Muthaura Defence”) submitted its “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)”.³
4. On 20 February 2013, the Muthaura Defence submitted an addendum to its Article 64(4) Application.⁴

¹ ICC-01/09-02/11-673, para. 3.

² ICC-01/09-02/11-622.

³ ICC-01/09-02/11-628-Conf.

⁴ ICC-01/09-02/11-656-Conf.

5. On 25 February 2013, the Prosecution submitted its Response to the Defence applications under Article 64(4) of the Statute to refer the Confirmation Decision back to the Pre-Trial Chamber (“Prosecution Response”).⁵
6. On 1 March 2013, both the Muthaura Defence and the Kenyatta Defence submitted applications for leave to reply to the Prosecution’ Response.⁶
7. On 1 March 2013, the Prosecution submitted its “Response to the Muthaura Defence Application for Leave to Reply to the ‘Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber’”, in which it requested the Chamber to deny the Muthaura Leave Application.⁷
8. On the same day, at 18:39, by email, the Chamber granted the Muthaura and Kenyatta Leave Applications.
9. On 5 March 2013, the Chamber ordered a Status Conference to be held on 11 March 2013. The Chamber requested that both Defence teams submit their views on the definition of “preliminary issue” under Article 64(4) and the scope of the Chamber’s power under Article 61(11).⁸

⁵ ICC-01/09-02/11-664-Conf-Red3.

⁶ ICC-01/09-02/11-667 (“Muthaura Leave Application”); ICC-01/09-02/11-669 (“Kenyatta Leave Application”).

⁷ ICC-01/09-02/11-670.

⁸ ICC-01/09-02/11-673, para. 3.

III. SUBMISSIONS

(A) The definition of “preliminary issue” under Article 64(4) of the Statute and whether the relief sought by the Defence falls within the definition of this provision

10. The Defence asserts that the issue set out in its Article 64(4) Application constitutes a preliminary issue under the Statute.⁹ Notwithstanding the fact that the proposed application of this Article was not contemplated expressly at its conception,¹⁰ the Defence submits that on a textual and purposive reading of this provision, preliminary issues necessarily include questions or problems related to the conduct of the proceedings’ initial phase, i.e. the confirmation stage, and fall therefore within the remit of this provision.
11. The power to refer an issue is granted to the Trial Chamber only. If issues come to light after the confirmation phase that affect the fair and effective functioning of the proceedings, the Trial Chamber may refer these preliminary issues back to the Pre-Trial Chamber under Article 64(4). The integral modifying phrase of Article 64(4), for its “effective and fair functioning”, requires the Trial Chamber to contemplate the reason behind the possible referral.
12. The Defence accepts that the Trial Chamber is vested with the power to deal with preliminary issues pursuant to Article 61(11). Such issues may include the lifting of redactions, reclassifying confidential *ex parte* documents and modifying witness preparation procedures. In the vast majority of circumstances, the most effective and fair means of addressing the issue would

⁹ ICC-01/09-02/11-622, para. 2 and 17-19.

¹⁰ ICC-01/09-02/11-664-Conf-Red3, para. 11. The Defence notes that the drafting history of Article 64 gives no guidance as to its interpretation.

involve the Trial Chamber making a timely decision without referring the matter back to the Pre-Trial Chamber.

13. However, in the present case, contrary to the Prosecution's categorisation, the issues constitute more than mere concerns as to the impact of the Pre-Trial Chamber's findings. Rather, the issues concern the validity of the entirety of the Confirmation Decision. The Defence submits that in this present case, it would be counter-productive for the Trial Chamber not to delegate this complex decision back to the Chamber responsible for making the relevant factual and legal determinations. Moreover, the Pre-Trial Chamber is the only appropriate body to address the impact of the Defence submissions on the totality of the evidence relied upon to confirm the charges in this case. As the decision-making body specifically mandated, under Article 61(7), with the task of determining, on the basis of the confirmation hearing, "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged", the Defence submits that the Pre-Trial Chamber is the only body that can make this determination.

(B) The Trial Chamber's power under Article 61(11) of the Statute

14. Article 61(11) grants the Trial Chamber the power to "exercise any function of the Pre-Trial Chamber that is relevant and capable in [the] proceedings" following the confirmation of charges. Article 61(9), which is referred to in Article 61(11), restricts the Trial Chamber's ability to modify the charges before

trial begins.¹¹ Before Trial, only the Pre-Trial Chamber may rule on issues pertaining to the modification of the Confirmation Decision.

15. Given the fact that the Article 61(7) specifically mandates the Pre-Trial Chamber with the task of judging the sufficiency of evidence at the confirmation hearing, the Defence respectfully submits that the Trial Chamber is not the “*relevant*” decision-making body to carry out the determination requested in the Article 64(4) Application. Article 61(7) also specifies that any determination as to whether the “substantial grounds to believe” threshold has been met must be carried out “on the basis of the hearing”. In the respectful submission of the Defence, as the Trial Chamber did not preside over the Confirmation Hearing, it is also not “*capable*” of conducting the assessment required by the Article 64(4) Application. Accordingly, any reconsideration of the Confirmation Hearing must be undertaken by the Pre-Trial Chamber.

Respectfully submitted,




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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 8st day of March 2013

¹¹ Article 61(9) of the Rome Statute states: “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. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.”

At London, England