

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 7 March 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
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

Decision on Defence requests for leave to reply

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

The Office of the Prosecutor

Ms Fatou Bensouda
Ms Adesola Adeboyejo

Counsel for Francis Kirimi Muthaura

Mr Karim A. Khan, Mr Essa Faal, Mr
Kennedy Ogetto, Ms Shyamala
Alagenda

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of 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

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, pursuant to Regulations 24(5) and 34 of the Regulations of the Court (“Regulations”), issues the following Decision on Defence requests for leave to reply.

I. Procedural history

1. On 5 February 2013, the defence for Mr Kenyatta (“Kenyatta Defence”) filed the Defence 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 (“Kenyatta Article 64(4) Application”).¹ On 7 February 2013, the defence for Mr Muthaura (“Muthaura Defence”) filed the 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)² (“Muthaura Article 64(4) application”; together, “Article 64(4) Applications”).
2. On 20 February 2013, the Kenyatta Defence and the Muthaura Defence each filed an addendum to the aforementioned applications.³

¹ ICC-01/09-02/11-622.

² ICC-01/09-02/11-628-Conf.

³ Addendum to ICC-01/09-02/11-628-Conf and ICC-01/09-02/11-628-Conf-AnxA, 20 February 2013 (ICC-01/09-02/11); and Corrigendum to Observations on the Conduct, Extent and Impact of the Prosecution's Investigation and Disclosure on the Defence's Ability to Prepare for Trial with Confidential Annex A, Public Annex B, and Public Annex A1, 20 February 2013 (ICC-01/09-02/11-655); respectively.

3. The Office of the Prosecutor (“Prosecution”) filed a consolidated response to the Defence Article 64(4) Applications on 25 February 2013 (“Prosecution Response”).⁴
4. On 1 March 2013, the Muthaura Defence and the Kenyatta Defence each sought leave to reply to the Prosecution Response (together “Leave to Reply Requests”).⁵ The Muthaura Defence seeks leave to file submissions on the Prosecution’s portrayal of the internal review of Witness 4’s affidavit.⁶ It submits that these submissions will assist the Chamber in evaluating to what extent the Prosecution’s conduct can be characterised as an “error” or “oversight”.⁷ The Kenyatta Defence argues that the arguments put forward in the Prosecution Response necessitate a reply, because of the distinction the Prosecution makes between the two accused.⁸ It further submits that the Prosecution’s explanation of the evolution of the evidence merits a response.⁹
5. On the same day, the Prosecution opposed the request by the Muthaura Defence.¹⁰ It submits that the requested reply seeks to make submissions on a “non-issue”, both (i) legally and (ii) factually, because the Prosecution already agreed, in case the Chamber decides that there

⁴ Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber (ICC-01/09-02/11-664-Conf-Exp). Confidential and public redacted versions were filed the same day, ICC-01/09-02/11-664-Conf-Red and ICC-01/09-02/11-664-Red2.

⁵ 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” (ICC-01/09-02/11-668); and Defence Request for Leave to Reply to the “Confidential 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” (ICC-01/09-02/11-669); respectively.

⁶ ICC-01/09-02/11-668, para. 13.

⁷ ICC-01/09-02/11-668, para. 14.

⁸ ICC-01/09-02/11-669, paras 8-9, 12-17.

⁹ ICC-01/09-02/11-669, paras 10-11.

¹⁰ Prosecution 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’” (ICC-01/09-02/11-670).

is a legal basis, to the relief requested by the Muthaura Defence. As such, it argues, further submissions will not assist the Chamber in ruling on the Muthaura Article 64(4) Application.¹¹ Furthermore, it submits that (iii) the request for leave improperly contains the substantive arguments that the Muthaura Defence wishes to make in its reply¹², and that (iv) the proposed submissions would address assertions which have already been made in the Muthaura Article 64(4) application.¹³ The Prosecution also requests that it be granted a sur-reply in the event that the Chamber would grant leave to reply to the Muthaura Defence.¹⁴

6. Later that day, the Chamber notified the parties by e-mail that it granted the Leave to Reply Requests, ordered that the replies be filed by noon on 8 March 2013 and indicated that a reasoned decision would follow.¹⁵

II. Analysis and conclusions

7. The Chamber does not agree with the Prosecution that the fact that the Prosecution conditionally agreed to part of the relief requested in the Muthaura Article 64(4) Application renders the present matter a “non-issue”. The scope of the Article 64(4) Applications is broader than the Prosecution’s concession in its Response. Moreover, the Prosecution’s third and fourth argument against granting leave to reply do not find support in the content of the request or the Muthaura Article 64(4) Application.

¹¹ ICC-01/09-02/11-670, paras 2-4.

¹² ICC-01/09-02/11-670, para. 5.

¹³ ICC-01/09-02/11-670, paras 6-7.

¹⁴ ICC-01/09-02/11-670, paras 6

¹⁵ E-mail from Legal Officer to the parties, dated 1 March 2013.

8. In addition to the foregoing, in light of the substantial distinction the Prosecution makes between its case against each of the accused, and the resulting disparate conclusions it draws as to the effect of the non-disclosure of the Witness 4 affidavit for each case, the Chamber is of the view that it will benefit from additional observations on what the Kenyatta Defence refers to as “[t]he inconsistent position taken by the Prosecution over the effect of the withheld exculpatory evidence in the case of Amb. Muthaura as compared to that of Mr Kenyatta”.¹⁶
9. Pursuant to Regulation 24(5) of the Regulations, the parties may only reply to a response with the leave of the Chamber. In all the circumstances, the Chamber is of the view that it may benefit from receiving further observations from the Defence concerning the issues raised in the Leave to Reply Requests.
10. As the reply by the Muthaura Defence has not yet been filed, the Chamber cannot decide at this point in time whether the Prosecution should be granted leave to further respond. The Chamber may provide the Prosecution with an opportunity to address any new issues raised in the replies during the status conference that will be held on 11 March 2013, if warranted.

For the foregoing reasons, the Chamber hereby:

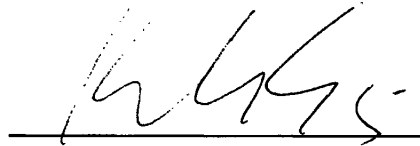
GRANTS the Muthaura Defence application for leave to file a reply to
ICC-01/09-02/11-664-Conf-Red;

¹⁶ ICC-01/09-02/11-669, p. 7.

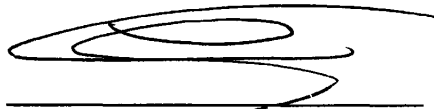
GRANTS the Kenyatta Defence application for leave to file a reply to ICC-01/09-02/11-664-Conf-Red;

DIRECTS the Kenyatta Defence and the Muthaura Defence to file their replies by noon on 8 March 2013.

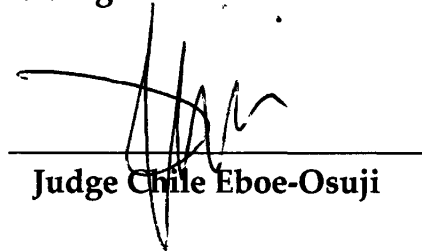
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 7 March 2013

At The Hague, The Netherlands