

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 July 2012

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**

URGENT

Public

Order for the prosecution to file an updated document containing the charges

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

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for Francis Kirimi Muthaura

Mr Karim Khan, Mr Essa Faal,
Mr Kennedy Ogetto, Ms Shyamala
Alagendra

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims

Mr Morris Anyah

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

Detention Section

**Victims Participation and Reparations
Section**

Others

This Order is issued pursuant to Articles 61, 64, 67 and 74 of the Rome Statute (“Statute”), Rule 121(3) of the Rules of Procedure and Evidence (“Rules”) and Regulation 52 of the Regulations of the Court (“Regulations”).

Background

1. The Office of the Prosecutor (“prosecution”) filed its original document containing the charges (“DCC”) and list of evidence on 19 August 2011.¹ The prosecution submitted its amended document containing the charges on 2 September 2011 (“Amended DCC”).² The Amended DCC included: five counts against Francis Kirimi Muthaura and Uhuru Muigai Kenyatta for commission as indirect co-perpetrators under Article 25(3)(a) of the Statute of the crimes against humanity of murder, deportation or forcible transfer of population, rape and other forms of sexual violence, persecution and other inhumane acts under Article 7(1)(a), (d), (g), (h) and (k) of the Statute; and five counts against Mohammed Hussein Ali for contribution within the meaning of Article 25(3)(d) of the Statute to the crimes against humanity of murder, deportation or forcible transfer of population, rape and other forms of sexual violence, persecution and other inhumane acts under Article 7(1)(a), (d), (g), (h) and (k).³
2. On 23 January 2012 Pre-Trial Chamber II confirmed the charges against Mr Muthaura and Mr Kenyatta under Article 7(1)(a), (d), (h), (k) and rape under Article 7(1)(g) but declined to confirm the charge of other forms of sexual violence under

¹ Prosecution’s Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis Chart of Evidence Included in the List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), ICC-01/09-02/11-257.

² Prosecution’s Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rules 121(3), (4) and (5), ICC-01/09-02/11-280.

³ ICC-01/09-02/11-280-AnxA.

Article 7(1)(g) against Mr Muthaura and Mr Kenyatta and declined to confirm any of the charges against Mr Ali.⁴

3. On 12 June 2012, during the first status conference before Trial Chamber V (“the Chamber”), the Chamber heard the submissions of the parties on the issue of a post-confirmation DCC.⁵ During the course of these submissions, defence counsel for Mr Muthaura requested that the prosecution provide an updated document reflecting the charges as confirmed.⁶ The prosecution indicated that it would require one month in order to provide an updated DCC.⁷
4. On 25 June 2012 the prosecution and the defence for Mr Kenyatta jointly filed submissions on the defence request for a summary of the presentation of evidence and an In-Depth Analysis Chart (“IDAC”).⁸ On the same day, the defence for Mr Muthaura filed its separate submissions on the same issue.⁹ The defence for Mr Muthaura submits that the prosecution should be required to provide a provisional IDAC at the same time as its updated DCC,¹⁰ a suggestion which the prosecution rejects, submitting that an IDAC, if required at all, should be due after the completion of pre-trial disclosure.¹¹

Relevant legal provisions and jurisprudence

5. Article 67(1)(a) of the Statute provides that the accused is entitled “to be informed promptly and in detail of the nature, cause and content” of the charges against him.

⁴ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red.

⁵ ICC-01/09-02/11-T-18-ENG, page 38, line 3 to page 51, line 4.

⁶ ICC-01/09-02/11-T-18-ENG, page 45, line 25 to page 46, line 17.

⁷ ICC-01/09-02/11-T-18-ENG, page 49, line 24 to page 50, line 2.

⁸ Joint Submission of the Prosecution and the Kenyatta Defence Regarding the Defence Request for a Summary of the Presentation of Evidence and an In-Depth Analysis Chart for the Trial Stage, ICC-01/09-02/11-441.

⁹ Defence Submissions on the provision of a Summary of the Presentation of Evidence and an In-depth Analysis Chart, ICC-01/09-02/11-442.

¹⁰ ICC-01/09-02/11-442, paragraph 7.

¹¹ ICC-01/09-02/11-441, paragraphs 8 – 9.

In the context of the confirmation of charges proceedings, Rule 121(3) of the Rules sets out that the Prosecutor must provide the accused with a “detailed description of the charges”. Regulation 52 further specifies that the document containing the charges must contain, *inter alia*, “[a] statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial”.

6. Article 64(8)(a) requires that, at the commencement of the trial, the Trial Chamber shall “have read to the accused the charges previously confirmed by the Pre-Trial Chamber”, “satisfy itself that the accused understands the nature of the charges” and “afford him or her the opportunity to make an admission of guilt [...] or to plead not guilty.” Finally, Article 74(2) sets out that the Trial Chamber’s decision on the guilt or innocence of the accused “shall not exceed the facts and circumstances described in the charges and any amendments to the charges.”
7. It has been the practice of other Trial Chambers of this Court to instruct the prosecution to provide a post-confirmation DCC.¹² In this regard, Trial Chamber I found that an updated DCC was required “to ensure that there is complete understanding of the ‘statement of facts’ underlying the charges confirmed.”¹³ Trial Chamber III similarly found that a DCC was “critical” on the ground that the Confirmation Decision did not provide a readily accessible statement of the facts underlying each charge.¹⁴
8. In the present case, the Chamber is persuaded that an updated post-confirmation DCC will assist in providing the defence with a readily accessible statement of the

¹² Order for the prosecution to file an amended document containing the charges, 9 December 2008, ICC-01/04-01/06-1548; Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010 (notified on 21 July 2010), ICC-01/05-01/08-836. See also the decision of Trial Chamber II directing the prosecution to prepare a summary of the charges, Decision on the Filing of a Summary of the Charges by the Prosecutor, ICC-01/04-01/07-1547-tENG, 21 October 2009 (notified on 29 October 2009).

¹³ ICC-01/04-01/06-1548, paragraphs 12 and 13.

¹⁴ ICC-01/05-01/08-836, paragraph 30.

facts underlying each charge. Accordingly, on the basis of Article 64(2), the Chamber directs the prosecution to provide the defence with a draft updated DCC by 6 August 2012. Thereafter, both parties are to liaise *inter se* with a view to resolving any areas of disagreement as to the whether the draft updated DCC properly reflects the Confirmation Decision.

9. In preparing its updated DCC, the prosecution is to clearly indicate the material facts and circumstances underlying the charges as confirmed. In this connection, the prosecution should have particular regard for the entitlement of the accused to be informed of "the facts and circumstances in terms of times and locations and also, as far as possible, the precise numbers and identities of the victims and the means employed to commit the crimes."¹⁵
10. The updated DCC is to contain references to the relevant paragraphs of the Confirmation Decision. The document should not include any facts explicitly rejected by the Pre-Trial Chamber in the Confirmation Decision.
11. Following its consultation with the defence, the prosecution is directed to file its updated DCC with the Chamber by 21 August 2012. Any points of disagreement that could not be resolved during *inter partes* consultations are to be raised in the form of a jointly submitted prosecution-defence annex to the updated DCC.
12. Finally, the Chamber will rule separately on the issue of the prosecution's provision of an IDAC. However, insofar as the defence for Mr Muthaura submit that the prosecution should be required to file an IDAC concurrently with the updated DCC,¹⁶ this request is rejected.

¹⁵ See ICC-01/04-01/07-1547-tENG, paragraph 31.

¹⁶ See ICC-01/09-02/011-442.


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 this 5 July 2012

At The Hague, The Netherlands