

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 20 November 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 regarding the content of 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
Alagenda

Legal Representatives of Victims
Mr Morris Anyah

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins
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

Trial Chamber V (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, pursuant to Articles 67(1)(a) and 74 of the Rome Statute (“Statute”) and Regulations 52 and 55 of the Regulations of the Court (“Regulations”), issues the following Order regarding the content of the charges.

I. Background and Submissions

1. On 5 July 2012, the Chamber ordered the Office of the Prosecutor (“prosecution”) to file an updated document containing the charges (“Updated DCC”) by 21 August 2012.¹ In its order, the Chamber directed the prosecution to clearly indicate the material facts and circumstances underlying the charges confirmed² and not to include any facts explicitly rejected by the Pre-Trial Chamber in the Decision on the Confirmation of the Charges (“Confirmation Decision”).³ Before submitting the Updated DCC, the prosecution and the defence teams were to liaise *inter se* so as to discuss whether the draft of the Updated DCC properly reflects the Confirmation Decision⁴ and “any points of disagreements that could not be resolved” during the consultation were to be raised in a jointly submitted prosecution-defence annex to the Updated DCC.⁵
2. On 21 August 2012, the prosecution and Kenyatta defence jointly requested an extension of the deadline to conclude their discussion on the content of the

¹ Order for the prosecution to file an updated document containing the charges, ICC-01/09-02/11-450.

² ICC-01/09-02/11-450, para. 9.

³ ICC-01/09-02/11-450, para. 10.

⁴ ICC-01/09-02/11-450, para. 8.

⁵ ICC-01/09-02/11-450, para. 11.

Updated DCC.⁶ The Chamber granted the request and ordered the parties to submit the Updated DCC along with the annex by 24 August 2012.⁷

3. On 24 August 2012, the prosecution submitted the Updated DCC with five annexes,⁸ including a chart explaining the issues that remain in dispute between the parties.⁹
4. On 11 September 2012, the defence filed a joint defence response to the “Prosecution’s Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450”: (1) requesting the Chamber to refer certain issues to the Pre-Trial Chamber, and (2) making observations in response to the prosecution’s submissions in the above-mentioned chart appended to the Updated DCC.¹⁰
5. In response, on 17 September 2012, the prosecution submitted a motion to strike the Defence Response from the case record, or, in the alternative, grant leave to reply to the Defence Response.¹¹
6. The present Order is limited in nature and focuses solely on the “Charges” section of the Updated DCC. It does not address the issues that remain in dispute between the parties as to the content of the Updated DCC, the joint defence filing of 11 September 2012 or the prosecution’s response thereto, which will be the subject of a separate later decision or decisions.

⁶ Joint Prosecution/Kenyatta Defence Application Pursuant to Regulation 35 of the Regulations of the Court, 21 August 2012, ICC-01/09-02/11-466.

⁷ Decision on the “Joint Prosecution/Kenyatta Defence Application Pursuant to Regulation 35 of the Regulations of the Court”, 21 August 2012, ICC-01/09-02/11-467.

⁸ Prosecution’s Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450, 24 August 2012, ICC-01/09-02/11-468.

⁹ Prosecution’s Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450, 24 August 2012, Annex including the public redacted version of the parties’ observations on the updated document containing the charges, ICC-01/09-02/11-468-AnxD-Red.

¹⁰ Joint Defence Response to the “Prosecution’s Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450”, 11 September 2012, ICC-01/09-02/11-481-Conf (a public version was filed as ICC-01/09-02/11-481-Red).

¹¹ Motion to strike the “Joint Defence Response to the ‘Prosecution’s Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450’”, or in the alternative, request for leave to reply, 17 September 2012, ICC-01/09-02/11-487-Conf.

II. Analysis and Conclusion

7. At the outset, the Chamber observes that, according to the Court's statutory instruments, it is the prosecution's responsibility to articulate the charges. Whereas, at the pre-trial phase, the Pre-Trial Chamber may confirm, decline to confirm or request the prosecution to consider amending its charges,¹² it may not add or modify charges, which is the responsibility of the prosecution.¹³ Similarly, Article 61(9) of the Statute provides that after the charges have been confirmed and before the trial has begun, only the prosecution may amend the charges, albeit with the permission of the Pre-Trial Chamber. Similarly, after the commencement of the trial, it is again only the prosecution that can, with the permission of the Trial Chamber, withdraw charges. It follows therefore that the primary responsibility to present the readily accessible statement of charges as confirmed by the Pre-Trial Chamber lies with the prosecution.
8. The Chamber recalls that the prosecution was instructed to clearly indicate in the Updated DCC the "material facts and circumstances underlying the charges as confirmed."¹⁴ However, the section entitled "Charges" in the Updated DCC only specifically includes: the time of commission of the alleged crimes; the place of their commission; and their legal characterisation. The other relevant "facts and circumstances", within the meaning of Article 74(2) of the Statute and Regulation 55(1) of the Regulations, while described elsewhere in the Updated DCC, have not been incorporated, in full or by way of cross-reference, into the "Charges" section. For instance, Count 3 contains the allegation of "deportation or

¹² Article 61(7) of the Statute.

¹³ The idea of giving the Pre-Trial Chamber a power to amend the prosecution's charges was contemplated in the Statute's drafting history, only to be removed. *Compare* Article 61(7) of the Statute *with* Report of the Preparatory Committee for the Establishment of an International Criminal Court, "Draft Statute for the International Criminal Court", 14 April 1998, A/Conf.183/2/Add.1, p. 83; Working paper submitted by France, 6 August 1996, A/AC.249/L.3, p. 42 .

¹⁴ ICC-01/09-02/11-450, para. 9.

forcible transfer of a civilian population perceived to be supporting the Orange Democratic Movement political party” without specifying, in the same paragraph, which of the acts described in the other sections of the Updated DCC underlie this charge. Similarly, Count 7 alleges that “inhumane acts” were committed, without specifying, in the same paragraph, which of the acts described elsewhere in the Updated DCC are the inhumane acts in question.

9. As a result, although the Updated DCC as a whole provides detailed information on the prosecution’s allegations, it is not immediately apparent which allegations contained in the Updated DCC the prosecution considers to be part of the “facts and circumstances” in the relevant sense, and which information it considers to be of a subsidiary nature.

10. The Chamber further notes that the distinction between the “facts and circumstances” underlying the charges and other factual allegations in the DCC appears to be of significance to the parties’ disagreements with regard to a number of allegations. In its response to the defence’s objections to the retaining of certain factual allegations in the Updated DCC, the prosecution at times contends that some of those allegations fall within the scope of the confirmed charges and some other allegations are mere background detail.¹⁵ Further, the prosecution submits that the confirmation of a charge implies confirmation of all its “core constituent facts”, absent explicit language to the contrary.¹⁶ In some of the defence’s objections reference is made to the “fact[s] and circumstance[s]”, which, the defence asserts, had to be decided by the Pre-Trial Chamber in order for the prosecution to be allowed to retain them in the Updated DCC.¹⁷ The Majority of the Chamber, Judge Eboe-Osuji dissenting, is of the view that having clarification from the prosecution as to

¹⁵ See, for example, ICC-01/09-02/11-468-AnxD-Red, pp. 2 to 10, 66 to 70, 92 to 93.

¹⁶ ICC-01/09-02/11-468-AnxD-Red, pp. 3 to 10.

¹⁷ See, for example, ICC-01/09-02/11-468-AnxD-Red, p. 75.

which information in the Updated DCC it considers to be the “facts and circumstances” underlying the charges will be of assistance to the Chamber’s determination of the disputes between the parties in relation to the content of the Updated DCC.

11. For the purposes of this clarification exercise, the Majority wishes to provide some guidance to the prosecution on what “facts and circumstances” it considers should be incorporated into the “Charges” section of the Updated DCC. The most relevant provisions of the Statute in this regard are: Article 67(1)(a) and Article 74(2), which articulate the two basic functions of the charge, namely, (i) notification to the accused of the precise factual and legal basis of the accusation, in order to enable the accused to prepare his or her defence,¹⁸ and (ii) delimitation of the allegation for the purpose of establishing what the trial is about, in order for the Chamber to properly conduct the trial and render the decision in accordance with Article 74(2).

12. Regulation 52 of the Regulations further specifies that a charge should consist of “[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” and “[a] legal characterisation of the facts”. The references to “facts” in Regulation 52, “facts and circumstances described in the charges” in Article 74(2) and “material facts and circumstances” in the Chamber’s Order of 5 July 2012¹⁹ carry the same

¹⁸ European Court of Human Rights, Grand Chamber, *Hermit v. Italy*, Judgment, 18 October 2006, no. 18114/02, para. 68 (“An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on notice of the factual and legal basis of the charges against him”). The Chamber also notes the jurisprudence from the *ad hoc* tribunals on pleading practices which, despite the significant procedural differences between these tribunals and this Court (see *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Three Defences’ Requests Regarding the Prosecution’s Amended Charging Document, 25 June 2008, ICC-01/04-01/07-648, paras 6-9) has some relevance in the context of pleading an appropriate Updated DCC. ICTY, Appeals Chamber, *Prosecutor v. Kupreškić et al*, Judgment, 23 October 2001, IT-95-16-A, para. 88; ICTR, Trial Chamber III, *Prosecutor v. Zigiranyirazo*, Decision on the defence preliminary motion objecting to the form of the amended indictment, 15 July 2004, ICTR-2001-73-I, para. 28; SCSL, Trial Chamber, *Prosecutor v. Sesay*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, SCSL-2003-05-PT, paras 5-6.

¹⁹ ICC-01/09-02/11-450, para. 9

meaning as they refer to the essential facts constituting the elements of the crime charged, and have been described by the Appeals Chamber as the “factual allegations which support each of the legal elements of the crime charged”.²⁰

13. The “facts and circumstances” underlying charges are to be distinguished from other factual allegations which may be contained in a DCC as a whole. These other allegations may provide general background information²¹ or indicate intermediate steps in the prosecution’s chain of reasoning.²² However, they are not central to the charges and could not be the subject of any legal re-characterisation pursuant to Regulation 55. The “facts and circumstances” are the fundamental points of reference throughout the trial, which cannot be amended once the trial started, whereas other information and evidence of the case may be subject to change as the trial evolves, subject to sufficient notice being provided.
14. In any given case, whether a particular fact or circumstance is one of the “facts and circumstances” will depend on the nature of the prosecution’s allegations.²³ By way of example, in the case of a factual allegation pertaining to a simple criminal act or omission, the “facts and circumstances” would include, as a minimum, (i) the person or persons who

²⁰ *Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga”), Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, para. 90 n. 163.

²¹ Decision on the Three Defences’ Requests Regarding the Prosecution’s Amended Charging Document, 25 June 2008, ICC-01/04-01/07-648, para. 21; *Lubanga*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 152 (“nothing prevents the Prosecution from mentioning any event which occurred before or during the commission of the acts or omission with which the suspect is charged, especially if that would be helpful in better understanding the context in which the conduct charged occurred”).

²² Pre-Trial Chamber I, *Prosecutor v. Banda and Jerbo*, Corrigendum of the ‘Decision on the Confirmation of charges’, 7 March 2011, ICC-02/05-03/09-121-Red-Corr, para. 36; Pre-Trial Chamber II, *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, para. 47

²³ ICTY, Appeals Chamber, *Prosecutor v. Kvočka et al.*, Judgement, 28 February 2005, IT-98-30/1-A, para. 28; ICTY, Trial Chamber I, *Prosecutor v. Mladić*, Decision on Defence Preliminary Motion Objecting to the Form of the Second Amended Indictment, 13 October 2011, IT-09-92-PT, para. 10.

engaged in the conduct, (ii) the nature of the conduct, (iii) the time, place and manner in which the conduct took place and (iv) the results of the conduct, such as how it affected other persons including victims. These “facts and circumstances” should be specified, in a clear and concise manner in the Charges section of a DCC. Background information about the persons concerned or specific allegations aimed at proving the “facts or circumstances”, should not be included in the Charges section of a DCC.

15. With this guidance in mind and in order to resolve the parties’ disputes on the Updated DCC, the Majority orders the prosecution to clearly indicate, using the wording of the allegations contained in other sections of the Updated DCC, which are the material facts and circumstances underlying each count in the Charges section.

**FOR THE FOREGOING REASONS, THE MAJORITY OF THE CHAMBER
HEREBY**

ORDERS the prosecution to submit, no later than 7 days from notification of this Decision, a modified “Charges” section of the DCC in accordance with the above considerations and following guidelines:

- i. all (but no more than) the “facts and circumstances described in the charges” should be presented separately for each count;
- ii. any “facts and circumstances” added to the Charges section should be based on the allegations already contained in other sections of the Updated DCC and should retain the original wording of those allegations; and
- iii. the Counts should be numbered consecutively;

GRANTS the defence 10 days to raise any objections it may have to the content of the modified Charges section ; and

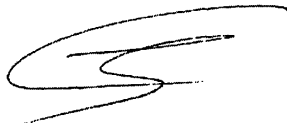
GRANTS the prosecution 5 days to respond to any objections the defence has thus made.

Judge Eboe-Osuji appends a partially dissenting opinion.

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 20 November 2012

At The Hague, The Netherlands

PARTLY DISSENTING OPINION OF JUDGE EBOE-OSUJI

1. I regret my inability to join fully in the Chamber's decision, beyond my limited agreement as follows: (i) that the primary responsibility to present readily accessible statement of charges lies with the Prosecution; and, (ii) that the counts should be numbered consecutively. Beyond that, I am unable to join in the decision.

2. I can well understand the desirability of requiring the Prosecutor to spell out allegations and their probative connections more clearly, in order to make their forensic significance more 'immediately apparent' or to make the Chamber's deliberation easier for purposes of the Chamber's anticipated further decision on the DCC. But, such would be a pursuit of perfection that I do not consider called for at this stage; beyond, perhaps, requiring the Prosecution to clarify the following: (a) whether the Prosecution would refrain from any view that the 'charges' pleaded in the DCC are, for purposes of the 'facts and circumstances' as contemplated in article 74(2), only what the Prosecution has specifically stated in Section VII entitled 'Charges'; and (b) whether the Prosecution would clearly accept that 'facts and circumstances' for purposes of article 74(2) are also contained in Section II entitled 'Statement of Facts', Section IV entitled 'Facts Relevant to Article 7 Chapeau Elements', Section V entitled 'Facts Relevant to Individual Crimes Charged', and any facts described in Section VI specifically speaking to the criminal responsibility of the accused.

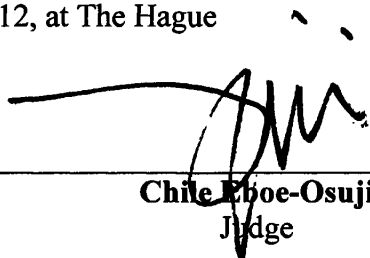
3. On an appropriate occasion in the future, the Court may confront the need to fully explore and clearly settle the import of the phrase 'facts and circumstances' as employed in the Court's core legal instruments in relation to the DCC. Is it a stock phrase with an undifferentiated meaning, thus warranting the judicial invention of a further concept, such as 'subsidiary facts', to indicate a different grade of factual information that a DCC could also contain?¹ Or, does 'facts' mean something different from 'circumstances', and that the latter may be confidently ascribed to factual information indicated in the DCC other than the facts that address the legal elements of a crime?² That discussion is beyond the intended scope of this Opinion.

¹ See *Prosecutor v Banda & Jerbo (Corrigendum of the "Decision on the Confirmation of Charges")* ICC-02/05-03/09-121-Conf-Corr dated 7 March 2011, para 36.

² The Appeals Chamber has already foreshadowed that discussion when it rightly considered, albeit in a footnote, that the term 'facts' means 'the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished ... from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged': *Prosecutor v Lubanga (Judgment on the Appeals of Mr Lubanga Dyilo*

4. I particularly do not share the view—inasmuch as such a view may be implied in the Chamber’s decision—that the Updated DCC in this case is unclear in relation to the legal significance of the details of the allegations pleaded in it. It is granted that an indictment will be generally easier to follow—and that is always a desirable thing—if the narrative of *all* the facts and circumstances relating to a charge of criminal conduct are set out under the particular count to which they relate; although some readers may see some inconvenience in the resulting repetition and prolixity, when the indictment addresses a very large set of facts and circumstances cumulatively supporting multiple counts. But, that it is less easy to follow an indictment in which the narrative of all the facts and circumstances had not been set out under the relevant counts is, in my view, not a compelling reason for a decision like the one made by the Chamber. An international criminal indictment is rarely without a flaw in the eyes of the reader who did not draft it. But counsel of prudence generally recommends that judges live with its imperfections, so long as reasonable notice of the charges has been adequately communicated to the accused. The Chamber must necessarily determine such questions whenever specifically raised by the accused, as was the case when the Single Judge of the Pre-Trial Chamber considered and dismissed the preliminary motion alleging defects in the DCC.³ The absence of such a specific complaint by an accused entails one of those occasions in which the Chamber as the umpire should simply resist the urge to insert itself so heavily into the play, in order to cause the production of an improved indictment.

Dated this 20 November 2012, at The Hague



Chile Eboe-Osuji
Judge

and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 ...) ICC-01/04-01/06-2205 OA 15 OA 16 dated 8 December 2009, p 32 at footnote 163. Perhaps, the Appeals Chamber did not feel called upon on that occasion to say more, but it might have assisted if the Appeals Chamber had further explained whether or not ‘circumstances’ should be seen as the intended shorthand terminology for what the Appeals Chamber described as ‘background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged’, or whether they are ‘subsidiary facts’ that are different from ‘facts and circumstances’, as some decisions of the Pre-Trial Chamber appear to suggest: see, for instance, *Prosecutor v Banda & Jerbo (Corrigendum of the “Decision on the Confirmation of Charges”)* ICC-02/05-03/09-121-Conf-Corr, *supra*, para 36.

³ See *Prosecutor v Muthaura et al (Decision on the “Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE” ...)*, ICC-01/09-02/11-315 dated 12 September 2011.