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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

Public Document

Prosecution's Response to the "Defence Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE"

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. On 19 August 2011, the Prosecution submitted its Document Containing the Charges (DCC), List of Evidence (LoE) and comprehensive In-depth Analysis Chart (IDAC) of evidence included in the LoE, pursuant to Article 61(3) of the Rome Statute and Rule 121(3) of the Rules of Procedure and Evidence (the “Rules”).¹
2. On 26 August 2011, the Defence Team of Francis Kirimi Muthaura (“Muthaura”) submitted its “Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE” where it alleged certain defects in the form of the DCC and LoE filed by the Prosecution (the “Defence Motion”).²
3. On 29 August 2011, the Defence Team of Francis Kirimi Muthaura (“Muthaura”) submitted its “Corrigendum to the Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE” where it alleged certain defects in the form of the DCC and LoE filed by the Prosecution (the “Corrigendum”), correcting errors in the footnotes of its original filing³.
4. The Prosecution submits that the DCC, LoE and IDAC submitted on 19 August 2011 meet all necessary criteria under the Statute, Rules and decisions of this Chamber, provide adequate notice to the Defence, and do not overstep the boundaries of the Chamber’s decision authorizing the issuance of the summons. Nor is there merit to the complaint about late disclosure and the request that the Prosecution provide summary statements of witness transcripts. Finally, the Prosecution is of the view

¹ ICC-01/09-02/11-257 and its Annexes.

² ICC-01/09-02/11-268.

³ ICC-01/09-02/11-268 Corr. and Annex

that no meaningful purpose is served by the holding of a status conference pursuant to Rule 121(2)(b) of the Rules as requested by the Defence.

II. PRELIMINARY OBSERVATIONS

5. The Prosecution observes that the submissions contained in the Defence Motion are predicated on (1) a misunderstanding of the purpose of an Article 58 application, and the interplay between a request for an arrest warrant and, following arrest, the charging document; (2) a misunderstanding of the nature and scope of the hearing on the confirmation of charges; (3) a failure to consider relevant decisions of this Chamber; and (4) a misapprehension of the purpose served by the DCC, LoE and IDAC in a confirmation of charges hearing.
6. The Prosecution reiterates that the confirmation hearing is a screen to protect persons against wrongful and wholly unfounded charges.⁴ The confirmation of charges hearing has a limited scope and by no means can it be seen as an end in itself, but must be seen as a means to distinguish those cases that should go to trial from those that should not.⁵ In view of its limited scope and purpose, the hearing “should not be seen as a ‘mini-trial’ or a ‘trial before the trial’”.⁶ In the *Bemba* case, Pre-Trial Chamber II recalled the principle underlying the confirmation process –

⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, para. 37. In *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of Charges, ICC-01/04-01/07-717, para. 63, the Court slightly amended its formulation, but retained the essential point. See also, *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, para. 39; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the Confirmation of Charges, ICC-02/05-03/09-121-Corr-Red, para. 31.

⁵ Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428-Corr, paras 5-6; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 28.

⁶ ICC-01/04-01/07-717, para. 64. See also, ICC-02/05-03/09-121-Corr-Red, para. 31.

that is, judicial economy intended to prevent those cases that do not meet the requisite evidentiary standard at the pre-trial stage from proceeding to trial.⁷

7. Article 61(7) of the Statute provides that the evidentiary standard for the confirmation hearing is one of “substantial grounds to believe” in sharp contrast with the applicable trial standard of “beyond reasonable doubt” under Article 66(3). Accordingly, defence preparation for purposes of the confirmation of charges hearing is clearly to be understood in the context of the lower evidentiary standard of that hearing as well as its limited scope and purpose. It is in this sense that Article 67(1)(a) and (b) of the Statute is to be applied.
8. Secondly, the Defence Motion fails to consider pertinent and relevant decisions of this Chamber defining the obligations of the parties in the disclosure process, including the decision setting the regime for evidence disclosure (the “First Disclosure Decision”),⁸ the decision establishing a calendar for disclosure between the parties (the “Second Disclosure Decision”),⁹ the decision on the Prosecution’s application for leave to appeal the First Disclosure Decision (the “Third Disclosure Decision”) ¹⁰ and the decision on the Defences’ requests for compliance with the First Disclosure Decision (the “Fourth Disclosure Decision”).¹¹
9. The relevance of these decisions is discussed later. At this point, it suffices to say that among other things the decisions (1) established specific deadlines for the disclosure

⁷ ICC-01/05-01/08-424, para. 28.

⁸ Pre-Trial Chamber II, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-01/09-02/11-48.

⁹ Pre-Trial Chamber II, Decision on the “Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge” and Establishing a Calendar for Disclosure Between the Parties, ICC-01/09-02/11-64.

¹⁰ Pre-Trial Chamber II, Decision on the “Prosecution’s Application for leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ (ICC-01/09-02/11-48)”, ICC-01/09-02/11-77.

¹¹ Pre-Trial Chamber II, Decision on the Defences’ Requests for a Compliance Order in regard to Decision “ICC-01/09-02/11-48”, ICC-01/09-02/11-167-Corr.

of evidence so as to guarantee the fairness and expeditiousness of the disclosure proceedings;¹² (2) provided a detailed description of the nature and scope of the IDAC;¹³ and (3) clarified the relationship between the LoE and the IDAC.¹⁴

10. Finally, the Defence Motion ignores the purpose of the DCC, namely that the document as a whole puts the Defence on full notice with respect to the specific facts and allegations on which the Prosecution bases its case. In this regard, the Prosecution recalls the ruling of Pre-Trial Chamber I in the *Lubanga* and *Katanga* cases to the effect that “the Document Containing the Charges transmitted by the Prosecution is to be read in conjunction with the Prosecution List of Evidence.”¹⁵ The Prosecution is not required to set out its evidence in the DCC, but to put forward factual allegations which support each of the legal elements of the crimes charged to the requisite standard under Article 67(1)(a) of the Statute.¹⁶

11. The Prosecution submits that the DCC fully meets the requirements of Article 67(1)(a) of the Statute and Regulation 52 of the Regulations of the Court (the “Regulations”) and that when read as a whole and in conjunction with the LoE and the IDAC, the DCC provides ample notice to the Defence of the nature of the crimes charged. The factual allegations are set out in sufficient and considerable detail in the DCC. The DCC itself contains footnote references to portions of the evidence to be relied on in support of the allegations. Additionally, the Prosecution has provided a detailed analytical chart of the evidence included in the LoE.

¹² ICC-01/09-02/11-64, para. 15.

¹³ ICC-01/09-02/11-48, paras. 22-24.

¹⁴ ICC-01/09-02/11-167, para. 21.

¹⁵ ICC-01/04-01/06-803-tEN, para. 150; ICC-01/04-01/07-648, para. 21.

¹⁶ ICC-01/04-01/06-2205 OA15 OA16, para. 90, fn. 163.

III. SUBMISSIONS

12. The Prosecution will now deal *in seriatim* with each of the issues raised in the Defence Motion.

Charging of Rape in Counts 5 and 6 in Relation to Naivasha

13. The Defence relies on Article 58(6) of the Statute and the Decision on the Prosecutor's Article 58 Application (the "Article 58 Decision")¹⁷ in requesting the exclusion of the allegation of rape in Naivasha.¹⁸ Article 58(6) provides that the "Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein." The Prosecution submits that Article 58(6) is inapplicable as the case has moved beyond Article 58 proceedings.

14. It is the Prosecution's prerogative to "proffer charges against suspects".¹⁹ A holistic reading of the Statute will show that while a trial is subject to the charges confirmed after a confirmation hearing,²⁰ a confirmation hearing is not necessarily limited by summonses or warrants issued in respect of suspects appearing at the hearing.²¹

15. The above interpretation is consistent with the pronouncements of the Chamber in the Article 58 Decision and the Decision on the Prosecution's Application for Leave to Appeal the Article 58 Decision (the "Second Article 58 Decision").²²

¹⁷ ICC-01/09-02/11-1.

¹⁸ ICC-01/09-02/11-268, para. 1.

¹⁹ ICC-01/04-01/06-2205 OA15 OA16, para. 94.

²⁰ Article 61(7)(a) of the Statute.

²¹ See Article 61(1), (3), (4) and (5) of the Statute. The Prosecution submits that a possible limitation presented by Article 101 of the Statute is inapplicable in this case.

²² Pre-Trial Chamber II, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali'", ICC-01/09-02/11-27.

16. In the Article 58 Decision, for example, with regards to the charge of rape in Naivasha the Chamber found:

“the Prosecutor failed to provide evidence substantiating his allegation that rape was committed as part of the attack in Naivasha. Consequently, and *without prejudice to new evidence being submitted at a later stage of the proceeding*, the Chamber finds that there are no reasonable grounds to believe that rape as an act constituting crimes against humanity was committed in Naivasha.”²³

17. The Defence’s request that the Prosecution expunge this charge and prevent the Chamber from considering new evidence on rape in Naivasha would be in direct contradiction with the Article 58 Decision.

Charging of Other Forms of Sexual Violence in Counts 5 and 6

18. In a similar vein, the Defence alleges that the inclusion of “other forms of sexual violence” in the DCC is impermissible because in the Article 58 Decision the Chamber re-characterized the charge of “other forms of sexual violence” as “other inhumane acts”.²⁴

19. As explained above, this argument lacks merit because the Prosecution has the prerogative to charge the suspects based on the evidence it collects. This principle was made explicit by the Single Judge in the Second Article 58 Decision. The Single Judge concluded:

“the findings made by the Chamber with respect to the appropriate characterization of the acts of forcible circumcision as ‘inhuman acts’ were grounded on the evidence and the information submitted to the Chamber for

²³ Emphasis Added. ICC-01/09-02/11-01, para. 26.

²⁴ ICC-01/09-02/11-268, para. 10.

the purposes of the Prosecutor's Application under article 58. *This finding does not preclude the Prosecutor from charging the suspects with acts of forcible circumcision as 'other forms of sexual violence', as it does not preclude the Chamber from accepting the Prosecutor's allegation to that effect, if supported by sufficient evidence to meet the evidentiary standard as required by article 61(7) of the Statute.*"²⁵

20. The Defence's position is contrary to the clear findings of the Single Judge. Its request for an amended DCC expunging the charge of "other forms of sexual violence" should be dismissed.

Expansion of the Temporal Scope of all Counts in the DCC

21. The Prosecution reiterates that it is its prerogative to proffer charges against suspects. The timeframe it will rely on for purposes of the confirmation hearing must and will be based on its evidence.

Expansion of the Geographic Scope of all Counts in the DCC

22. The Defence charges that the Prosecution has impermissibly expanded the geographic region covered by the crimes alleged in the counts by using the phrase "in or around locations including Nakuru Town (Nakuru District, Rift Valley Province) and Naivasha Town (Naivasha District, Rift Valley Province)".²⁶ The Prosecution has the prerogative to expand the scope beyond what was defined in the Article 58 Decision but in this instance did not do so.

²⁵ Emphasis Added. ICC-01/09-02/11-27, para 31.

²⁶ ICC-01/09-02/11-268, para. 14.

23. In its Article 58 Decision, the Chamber found there were reasonable grounds to believe that crimes against humanity occurred in “Nakuru and Naivasha.”²⁷ The Chamber’s finding applied to “Nakuru” which includes Nakuru Town and its environs and “Naivasha” which includes Naivasha Town and its environs. The phrase used in the DCC, “in or around locations including Nakuru Town (Nakuru District, Rift Valley Province) and Naivasha Town (Naivasha District, Rift Valley Province)”, relates precisely to the geographic region identified in the Article 58 Decision. The word “including” is not vague or imprecise and, in fact, this exact formulation was used by the Single Judge in the “First Decision on Victims’ Participation in the Case”.²⁸

Pleading of Alleged Preparatory Meetings

24. As previously stated, the Prosecution is not legally required to discuss its evidence in the DCC. Neither is such an exercise desirable from a practical standpoint. First, due to protection concerns, the Chamber may have approved redactions of certain identifying information in the statement of witnesses. It would defeat the purpose of the redaction if such information were to be incorporated into the DCC. Secondly, a witness is not always able to recall the precise dates and times of events, particularly where the events occurred more than two years before his or her interview.

25. In the DCC, the Prosecution set out in considerable detail and to the requisite standard, the factual allegations of the contributions of Muthaura to the common plan, including information on the dates and places of meetings he attended.

²⁷ ICC-01/09-02/11-01, para 56.

²⁸ In that decision the Single Judge explained that an applicant could be considered a victim in the case if he or she could show that the alleged crime against humanity was committed “in locations, including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya”. Pre-Trial Chamber II, “First Decision on Victims’ Participation in the Case”, ICC-01/09-02/11-23, para. 6.

Additionally, the Prosecution provided footnote references to the most pertinent portions of the evidence to be relied on in support of those allegations. Furthermore, excerpts of the evidence are obtainable from the comprehensive IDAC as submitted on 19 August 2011.

26. In view of the foregoing, the Prosecution submits that when read in conjunction with the LoE and IDAC, the DCC provides sufficiently detailed information for the Defence to prepare its defence.

Participants of the Common Plan

27. The Prosecution notes that there is no requirement or obligation to individually identify each member of the common plan.²⁹ Nevertheless, the Prosecution has provided the names of three members of the common plan and categorized other members under specific groups. The Prosecution submits that the facts pleaded are sufficient to inform Muthaura clearly of the nature and cause of the charges against him.

Identity of the Victims

28. The Prosecution is not required to establish the identity of any specific victim if the “sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters”.³⁰ The Prosecution has described the victims in this case as perceived ODM supporters. The Prosecution submits that this is the most accurate

²⁹ According to the jurisprudence of the *ad hoc* tribunals on joint criminal enterprise (which may be applied by analogy), not every member of the joint criminal enterprise must be identified by name. See for instance, *Prosecutor v. Brdjanin*, IT-99-36-A, Appeals Judgment, 3 April 2007, para. 430.

³⁰ *Prosecutor v. Naletilic et al.*, IT-98-34-A, Appeals Judgment, 3 May 2006, para. 24; *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Appeals Judgment, 23 October 2001, para. 89; *Prosecutor v. Ntakirutimana*, ICTR-96-10; 2; ICTR-96-17, Appeals Judgment, 13 December 2004, paras. 73-74.

description of the victims. Any further description would entail a presentation of the evidence in the DCC.

The List of Evidence

29. The Prosecution refers to the First, Second and Fourth Disclosure Decisions. In the First Disclosure Decision, the Single Judge decided that at the time of submitting evidence to the Registry, the parties shall provide *inter alia* “a list of evidence listing all pieces of evidence enclosed with respective document ID”.³¹ In the Second Disclosure Decision, the Single Judge ordered the Prosecution to file in the record of the case, the DCC and LoE as required by Rule 121(3) of the Rules.

30. The Defence ignores the decisions of this Chamber regarding the scope of the LoE and the IDAC. These two documents are related as can be seen from the Fourth Disclosure Decision wherein the Single Judge ordered the Prosecution to submit a comprehensive in-depth analysis chart of the evidence included in the list of the evidence upon which it intends to rely for purposes of the confirmation hearing.³² The Prosecution therefore refers the Defence to the IDAC to facilitate its reading of the DCC and footnote references.

The In-Depth Analysis Chart

31. The Defence submits that the IDAC does not fulfill its purpose. As their only example, the Defence explains that the IDAC does not make explicit reference to witness identification numbers/pseudonyms for each fact given by a witness and that this information can only be ascertained by consulting the LoE.³³

³¹ ICC-01/09-02/11-48, p. 11.

³² ICC-01/09-02/11-167-Corr, para. 21.

³³ ICC-01/09-02/11-268, paras. 23-24.

32. First, the Prosecution would remind the Defence that the Statute and Rules do not require an IDAC; that is a judicially-devised document designed to assist the Chamber and the Defence, but the core texts do not include it as a prerequisite essential requirement to provide notice to a charged person.
33. Second, the IDAC confirms precisely to the requirement ordered by the Single Judge in the Fourth Disclosure Decision. The Single Judge explained that the obligation placed on the Prosecutor in the creation of the IDAC was to “properly present the evidence supporting his case, by way of relating each piece of evidence to each legal element of the alleged crimes and the alleged mode of participation in such crimes.”³⁴ The Single Judge concluded that the Prosecution was in compliance with the First Disclosure Decision and that the only modification that the Prosecution would need to make for the final IDAC would be to separate the modes of liability for each suspect.³⁵ The Prosecution complied with this order³⁶ and thus the Defence’s complaint is unfounded.

Timing and Manner of Prosecution’s Disclosure

34. The Prosecution submits that the Defence has been given adequate time to prepare its defence in view of the limited scope and purpose of the confirmation hearing. The Prosecution urges the Chamber to resist the attempt by the Defence to equate the confirmation of charges hearing with a trial.
35. The Defence complains about the 19 August 2011 tranche of disclosures in a rather disingenuous manner. First, it fails to indicate that the *final IDAC* which is over 6,600 pages is a combination of all in-depth analysis charts submitted along with each package of disclosed incriminating evidence starting from 3 June 2011. In other

³⁴ ICC-01/09-02/11-167, para. 13.

³⁵ ICC-01/09-02/11-167, para. 21.

³⁶ ICC-01/09-02/11-257 and its Annexes.

words, the pages indicated do not consist of purely new material and in fact includes material that has been in the possession of the Defence since early June 2011.

36. Secondly, in relation to the *disclosed evidence*, the Defence simply alleges that it received 1,401 pages of incriminating materials on 19 August 2011³⁷ without providing an indication as to the volume of materials disclosed prior to that date and the amount of time it took them to review same. It is noteworthy that the Defence does not complain about the volume of materials disclosed prior to 19 August 2011. Before the 19 August 2011 disclosure, the Prosecution had disclosed to the Defence 530 items spanning all categories of evidence and consisting of approximately 7,950 pages. In comparison, this dwarfs the 85 items disclosed on 19 August 2011 which comprises approximately 1,400 pages.

37. Thirdly, the Defence inaccurately gives the impression that the Prosecution deliberately waited until the last moment to disclose its last tranche of incriminating evidence. The Defence submissions in this regard fail to address the disclosure calendar established by the Single Judge in the Second Disclosure Decision. To date, the Defence has not lodged any complaint in respect of that decision. The Prosecution has duly complied with every deadline established in the decision.

38. The Defence also complains about the volume of transcripts disclosed and requests that the Prosecution prepare and submit witness statements. The Defence relies on the *Trial Chamber* decision in *Katanga* to support this request of relief³⁸ but the comparison is unwarranted at this *pre-trial* stage. Furthermore the Defence seeks materials which are of lesser evidentiary value than what has already been disclosed. The Prosecution is the party which must support each charge with sufficient

³⁷ ICC-01/09-02/11-268, para. 30, fn. 34.

³⁸ ICC-01/09-02/11-268, paras. 29-30.

evidence at the confirmation stage³⁹ and the Prosecution must be the party to decide which form the evidence must take to achieve this goal.⁴⁰ The Prosecution submits that the transcripts already disclosed best achieve this goal and the Defence's request for witness statements in addition to the transcripts should be denied.

39. On the issue of assigning pseudonyms to all witnesses, the Prosecution submits that what is essential is that materials relating to a particular witness are grouped together so as not to mislead the Defence. Not only has the Prosecution grouped materials related to specific witnesses together, it has also provided distinct numbers which may be used for identification purposes. The Prosecution emphasizes that it is the responsibility of the Defence to effectively organize itself for the purpose of preparing its case. Any further imposition on the Prosecution in this respect would amount to an encroachment of its duties and responsibilities as provided for under the Statute.

Request for a Status Conference

40. In light of the foregoing, the Prosecution submits that there is no need for the Chamber to convene a status conference. According to the Defence, the status conference "would be aimed at resolving the fundamental difficulties highlighted [in the Defence Motion] and to be further highlighted upon conclusion of the Defence's review of the OTP's disclosures".⁴¹ The Prosecution fails to see how these fundamental difficulties cannot be resolved through written submissions.

IV. RELIEF

³⁹ Article 61(5) of the Statute.

⁴⁰This principal was indirectly endorsed by the Single Judge in the Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-02/11-165-Conf-Exp, para. 80.

⁴¹ ICC-01/09-02/11-268, para. 36.

41. In conclusion, the Prosecution requests that the Chamber dismiss the Defence Motion and deny the relief sought therein.



Luis Moreno-Ocampo
Prosecutor

Dated this 29th day of August 2011
At The Hague, The Netherlands