

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 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

Decision on the schedule leading up to trial

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

The following decision is issued pursuant to Articles 64, 67 and 68 of the Rome Statute ("Statute"), Rules 69, 76, 77, 81, 132 and 134 of the Rules of Procedure and Evidence ("Rules") and Regulation 54 of the Regulations of the Court ("Regulations").

I. Background and Submissions

1. On 12 June 2012 the Trial Chamber held an initial status conference in accordance with Rule 132(1) of the Rules, which provides that "[p]romptly after it is constituted, the Trial Chamber shall hold a status conference in order to set the date of the trial." The Chamber indicated at the status conference that it would issue an order on the schedule for trial, including the relevant disclosure deadlines.¹

In-Depth Analysis Chart

2. During the course of the status conference, the Chamber heard submissions from the parties on a number of issues related to the upcoming trial, including views on whether the Office of the Prosecutor ("prosecution") should be required to provide a summary of its presentation of evidence and an In-Depth Analysis Chart ("IDAC").² On this issue, the prosecution submitted that while it had no objection to preparing a summary of its presentation of evidence (or pre-trial brief) after completion of the disclosure of its evidence prior to trial,³ it opposed the defence request for an IDAC.⁴ The defence for both accused requested that they be provided with an IDAC.⁵ The parties were then directed to confer on this issue and to revert to the Chamber within ten days.⁶

¹ ICC-01/09-02/11-T-18-ENG, page 29, lines 18 – 21.

² ICC-01/09-02/11-T-18-ENG, page 38, line 3 to page 52, line 1.

³ ICC-01/09-02/11-T-18-ENG, page 38, lines 14 – 23.

⁴ ICC-01/09-02/11-T-18-ENG, page 38, line 24 to page 42, line 21.

⁵ ICC-01/09-02/11-T-18-ENG, page 43, line 21 to page 49, line 13 and page 50, line 17 to page 51, line 2.

⁶ ICC-01/09-02/11-T-18-ENG, page 51, line 3 to page 52, line 1.

3. On 25 June 2012 the prosecution and the defence for Mr Kenyatta ("Kenyatta defence") jointly filed submissions on the defence request for a summary of the presentation of evidence and an IDAC.⁷ On the same day, the defence for Mr Muthaura ("Muthaura defence") filed its separate submissions.⁸
4. In its joint filing, the prosecution reiterates its objections to providing an IDAC at the trial stage and refers the Chamber to the arguments set out in its oral submissions.⁹ The prosecution argues that an IDAC is not an effective method for presenting the prosecution's evidence at trial, because unlike at the pre-trial stage, trials are based on live testimony as opposed to witness statements. It is submitted that an IDAC based mainly on excerpts from witness statements will be of limited utility to the Chamber and the defence as witnesses' in court testimony is likely to differ from their prior statements.¹⁰ The prosecution also submits that due to its length and lack of accessibility the IDAC is of limited usefulness to the defence, and that a pre-trial brief is a better guide to the prosecution's case at trial.¹¹ Finally the prosecution submits that the investment of time and resources that goes into producing an IDAC would be significantly outweighed by the minimal benefit it would provide to the defence at this stage.¹²
5. The prosecution suggests that in the event that it is required to produce an IDAC, instead of quoting extensive document excerpts in the chart, it should only be required to include pinpoint page citations in the chart itself.¹³ It is submitted that

⁷ 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.

⁸ 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.

⁹ ICC-01/09-02/11-441, paragraph 5, referring to ICC-01/09-02/11-T-18-ENG, page 38, line 24 to page 42, line 21.

¹⁰ ICC-01/09-02/11-T-18-ENG, page 39, line 8 to page 40, line 5.

¹¹ ICC-01/09-02/11-T-18-ENG, page 40, line 6 to page 41, line 8.

¹² ICC-01/09-02/11-T-18-ENG, page 41, lines 9 – 17.

¹³ ICC-01/09-02/11-T-18-ENG, page 42, lines 4 – 10.

this approach would cut down on the length of the document and would assist with witness protection, as redactions would not be needed in the IDAC.¹⁴

6. Although the prosecution opposes the creation of an IDAC, the prosecution and the Kenyatta defence have agreed to a format for this chart in the event that the Chamber decides such a document is necessary.¹⁵ The Muthaura defence has partially agreed to the proposed format,¹⁶ but submits that the prosecution should additionally be required to include text excerpts from the relevant documents.¹⁷ Additionally, the Muthaura defence requests that an IDAC should be provided “as soon as possible”, and that this document should contain references to the relevant paragraphs of the updated Document Containing the Charges (“DCC”).¹⁸ It is submitted that an amended IDAC should be provided to the defence along with the pre-trial brief, upon the completion of prosecution disclosure.¹⁹
7. In its oral submissions, the Muthaura defence referred to its earlier written submissions, relying on the decisions of Trial Chambers II and III requiring the prosecution to produce an IDAC at the trial stage linking all of the incriminating evidence to the factual allegations and the charges in the DCC.²⁰
8. The Kenyatta defence submitted that an IDAC is useful when properly produced, as it enables the defence to consider in advance of trial the quality of the evidence relied on by the prosecution on a particular issue. The Kenyatta defence also submitted that it is helpful to compare the testimony of a witness at trial with the

¹⁴ ICC-01/09-02/11-T-18-ENG, page 42, lines 11 – 21.

¹⁵ ICC-01/09-02/11-441, paragraphs 5 – 6.

¹⁶ ICC-01/09-02/11-442, paragraphs 4 – 5.

¹⁷ ICC-01/09-02/11-442, paragraphs 12 – 14.

¹⁸ ICC-01/09-02/11-442, paragraphs 6 – 9.

¹⁹ ICC-01/09-02/11-442, paragraph 7.

²⁰ ICC-01/09-02/11-T-18-ENG, page 44, line 14 to page 45, line 1, referring to Defence Submissions on the status conference agenda items contained in the Trial Chamber’s “Order scheduling a status conference” of 14 May 2012, 28 May 2012, ICC-01/09-02/11-427, paragraph 36.

evidence referred to in the IDAC, for instance to expose deficiencies in the evidence.²¹

Disclosure

9. The prosecution has proposed a system of delayed disclosure whereby the identities of testifying witnesses who are part of the Court's protection programme ("ICCPP") would be disclosed to the defence 60 days before the start of trial, while the identities of testifying witnesses who are not part of the ICCPP would be disclosed 30 days prior to the start of trial. The prosecution submits that it should be permitted to apply to the Chamber on an exceptional basis, when justified by security concerns to a particular witness, in order to withhold the identity of that witness from the defence until 30 days prior to the start of his or her testimony.²²
10. In their written and oral submissions to the Chamber, both defence teams submit that they require adequate time following the completion of prosecution disclosure in order to prepare for trial.²³ In relation to the prosecution's delayed disclosure proposal, the Muthaura defence submits that it has no objection as long as disclosure occurs no later than two months prior to the start of trial.²⁴ The Kenyatta defence, however, objects to the delayed disclosure proposal in its entirety, suggesting that there is no reason justifying the adoption of such an approach.²⁵

II. Analysis

11. The rights of the accused to be informed of the charges against them and to have adequate time and facilities to prepare their defence, as provided for in the Statute and the Rules, are fundamental to the fairness of the trial. Accordingly, the

²¹ ICC-01/09-02/11-T-18-ENG, page 46, line 19 to page 47, line 15.

²² Prosecution's Submissions on the Agenda for Status Conference, 28 May 2012, ICC-01/09-02/11-428, paragraphs 5 and 16 – 17.

²³ ICC-01/09-02/11-427, paragraphs 5 – 6; ICC-01/09-02/11-429, paragraphs 4 and 7 – 9; ICC-01/09-02/11-T-18, page 17, lines 13 – 18 and page 20, lines 14 – 16.

²⁴ ICC-01/09-02/11-T-18, page 16, line 10 to page 17, line 18.

²⁵ ICC-01/09-02/11-T-18, page 18, line 22 to page 20, line 5 to page 22, line 12.

Chamber has already directed the prosecution to submit an updated DCC that reflects the charges as confirmed by the Pre-Trial Chamber,²⁶ and, as discussed below, will require the prosecution to provide a detailed document explaining its case with reference to the witnesses it intends to call and the other incriminating evidence it intends to rely on. The Chamber is satisfied that these two documents will ensure that the accused are informed of the charges against them and are not prejudiced in their preparation for trial. Although both defence teams submit that the IDAC would be a useful tool, there is no reference to this document in the core legal texts of the Court, and in light of the provision of the two documents just described, the Chamber is of the view that the additional provision of such a document is unnecessary.

12. In order for the defence teams to be able to prepare adequately for trial, it is essential for the prosecution to complete its disclosure obligations sufficiently in advance of trial. The Chamber is of the view that three months between the full disclosure of the prosecution case and the commencement of trial will afford the defence teams sufficient time to carry out all necessary preparations.
13. Subsequent to ruling on the applicable redactions regime, the Chamber will set deadlines for all applications for protective measures and delayed disclosure of the identities of testifying witnesses. In this regard, the prosecution will be required to apply on a case-by-case basis if it wishes to delay disclosure of the identifying information of any witness. The deadlines indicated below in the schedule leading up to trial for disclosure of the identities of ICCPP witnesses and non-ICCP witnesses with security concerns are the latest dates by which disclosure must have occurred. These deadlines are without prejudice to the Chamber's authority to authorise disclosure after these dates on an exceptional basis and where justified by

²⁶ Order for the prosecution to file an updated document containing the charges, 5 July 2012, ICC-01/09-02/11-450.

security concerns. Subject to the case-by-case determinations of the Chamber, disclosure may be required earlier than these dates.

III. Schedule leading up to trial

14. In order to ensure the expeditious conduct of the trial pursuant to Article 64(2) of the Statute and to facilitate the preparation of the parties and participants, the Chamber issues the following schedule leading up to trial:

15. **First joint prosecution/defence filing on agreed facts pursuant to Rule 69 of the Rules.** The prosecution and the defence teams for both accused are directed to liaise with a view to reaching agreement about non-contentious issues. The first joint submission on agreed facts is to be filed by **3 September 2012**.

16. **Prosecution to file *ex parte* (Chamber and Victims and Witnesses Unit (“VWU”) only) provisional list of witnesses to be relied on at trial and list of evidence.** In order to assist the Chamber²⁷ and the VWU, the prosecution is to file a provisional list of witnesses to be relied on at trial. This list should include a bullet-pointed summary of the main facts on which each witness is expected to testify. Additionally, the prosecution should indicate the estimated length of time required for each witness and the total time for the presentation of the prosecution case, in hours. The prosecution is also to provide a provisional list of the material it intends to rely on at trial. The prosecution is to file the provisional witness and evidence lists by **16 October 2012**.

17. **Prosecution report on joint instruction of experts.** The Chamber is of the view that the joint instruction of experts would significantly assist the work of the Court²⁸ and accordingly, experts are to be jointly instructed. If, despite all reasonable efforts, the

²⁷ See, e.g., Rule 132(2) of the Rules and Regulation 54 of the Regulations.

²⁸ The analysis in paragraphs 14 – 23 of Trial Chamber I’s “Decision on the procedures to be adopted for instructing expert witnesses” (10 December 2007, ICC-01/04-01/06-1069) if of particular relevance in this regard.

parties are unable to agree upon the joint instructions to be provided to an expert, the matter is to be raised with the Chamber. The prosecution and the defence for both accused²⁹ are to liaise in order to discuss the joint instruction of experts, and the prosecution is to revert to the Chamber on the outcome of these discussions by **31 October 2012**.

18. Prosecution to file list of witnesses and list of evidence to be relied on at trial.

The prosecution is to provide its witness list, which should include a bullet-pointed summary of the main facts on which each witness is expected to testify, an indication of the estimated length of time required for each witness and the total time for the presentation of the prosecution case, in hours. The prosecution is also to file its list of evidence to be relied on at trial. Both the witness list and the list of evidence are to be submitted by **9 January 2013**.

19. Completion of all disclosure by the prosecution. Prosecution disclosure to the defence of all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2) material and provision of all Rule 77 material for inspection to the defence should be completed by **9 January 2013**.

20. Prosecution to file pre-trial brief. The prosecution shall provide a document explaining its case with reference to the evidence it intends to rely on at trial. This document will be referred to as the “pre-trial brief”. The pre-trial brief should contain, for each count, a summary of the relevant evidence of each witness to be relied on at trial and all other evidence upon which the prosecution intends to rely, and shall clearly explain how the evidence relates to the charges. The pre-trial brief is to be filed by **9 January 2013**.

²⁹ To the extent that the victims are participating on an issue or as regards evidence which is to be the subject of expert evidence, they are to be given an opportunity to contribute to the expert’s instruction.

21. Prosecution disclosure to the defence of identities of witnesses in the ICCPP.

Disclosure to the defence of the identities of ICCPP witnesses who have been the subject of an application for delayed disclosure as discussed in paragraph 13 above should be completed by **11 February 2013**.

22. Disclosure of expert reports. Disclosure of the reports of any expert witness who will be called during the prosecution case should be completed by **14 February 2013**.

23. Second joint prosecution/defence filing on agreed facts pursuant to Rule 69 and evidence. The prosecution and the defence teams for both accused are to liaise with a view to reaching agreement on facts as well as the authenticity of evidence. Any party which is unable to agree to a proposed stipulation shall reflect the reasons and indicate the factual basis for this disagreement in an annex to the joint filing. The second joint submission on agreed facts (including agreements as to evidence) is to be filed by **8 March 2013**.

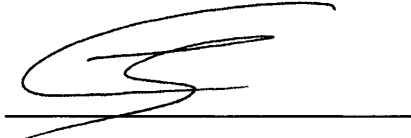
24. Prosecution disclosure to the defence of identities of non-ICCP prosecution witnesses. Disclosure to the defence of the identities of non-ICCP witnesses with security concerns who have been the subject of an application for delayed disclosure as discussed in paragraph 13 above should be completed by **12 March 2013**.

25. Commencement of trial. The trial will commence following the Spring Judicial Recess, on **11 April 2013**.

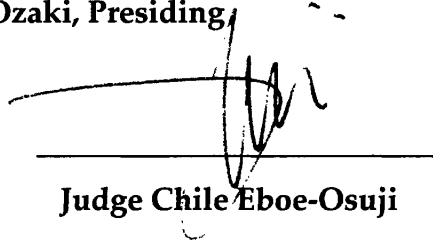
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated this 9 July 2012

At The Hague, The Netherlands