

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **10 December 2012**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
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
With Public Annex A
Defence Response to the “Prosecution’s Submission of the Charges against Francis
Kirimi Muthaura and Uhuru Muigai Kenyatta pursuant to Trial Chamber V’s
Order ICC-01/09-02/11-536”**

Sources: Defence for Uhuru Muigai Kenyatta
Defence for Francis Kirimi Muthaura

Document 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

Karim A. A. Khan QC, Essa M. Faal,
Kennedy Ogetto & Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC & Gillian Higgins

Legal Representatives of the Victims

Mr Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta and Francis Kirimi Muthaura (respectively “Kenyatta Defence” and “Muthaura Defence”, collectively “Defence”) hereby submit the response to the “Prosecution’s Submission of the Charges against Francis Kirimi Muthaura and Uhuru Muigai Kenyatta pursuant to Trial Chamber V’s Order” (“Document Containing the Modified Charges Section”).¹

II. PROCEDURAL HISTORY

2. On 24 August 2012, the Prosecution submitted the “Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450” (“Updated Document Containing the Charges”).²
3. On 11 September 2012, the Defence submitted 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” (“Joint Defence Response”).³
4. On 20 November 2012, a majority of Trial Chamber V (“Chamber”) in its “Order regarding the content of the charges” (“Order”) ordered the “prosecution to submit, no later than 7 days from notification of [the] Decision, a modified “Charges” section of the DCC in accordance with the...following guidelines:

¹ ICC-01/09-02/11-546; ICC-01/09-02/11-546-AnxA.

² ICC-01/09-02/11-468, ICC-01/09-02/11-468-Conf-AnxA, ICC-01/09-02/11-468-Conf-AnxB, ICC-01/09-02/11-468-AnxC, ICC-01/09-02/11-468-AnxD and ICC-01/09-02/11-468-AnxE.

³ ICC-01/09-02/11-481-Conf, ICC-01/09-02/11-Conf-AnxA and ICC-01/09-02/11-Conf-AnxB.

- a. all (but no more than) the "facts and circumstances described in the charges" should be presented separately for each count;
 - b. 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
 - c. the Counts should be numbered consecutively".⁴
5. The Chamber granted the Defence 10 days to respond to the Prosecution's filing.⁵
6. On 28 November 2012, the Prosecution submitted the Document Containing the Modified Charges Section.

III. PRELIMINARY OBSERVATIONS

7. The Defence notes that the Order 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 subject of a separate later decision or decisions".⁶ Considering that the Prosecution was ordered to adhere to guidelines stating, *inter alia*, that "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", the Defence submits that the allegations in the Document Containing the Modified Charges Section still maintain all the issues of disagreement set out in the previous filings regarding

⁴ ICC-01/09-02/11-536, p.9 (disposition).

⁵ *Ibid.*

⁶ *Ibid*, para. 6

the Updated Document Containing the Charges.⁷ In this context, the Defence is of the view that a decision(s) on these points of dispute will most likely have some impact on the modified charges. The Defence expects, therefore, that once those points of dispute have been decided, the Chamber will direct the Prosecution to make consequential changes to the modified charges.

IV. SUBMISSIONS

8. In the Defence's Observation Chart on the Document Containing the Modified Charges Section at Public Annex A ("Annex A"), the Defence outlines its objections to the Document Containing the Modified Charges Section. Most of these objections, except those relating to paragraphs 2b, 7, 9, 11 and 12 of the Document Containing the Modified Charges, are also contained in the Joint Defence Response of 11 September 2012.
9. In order to assist the Chamber, following notification of this Response, the Defence shall forward an editable version of Annex A to the Prosecutor. The Defence suggests that the Prosecutor uses this version to record its comments in respect of the Defence's submissions in the relevant box.

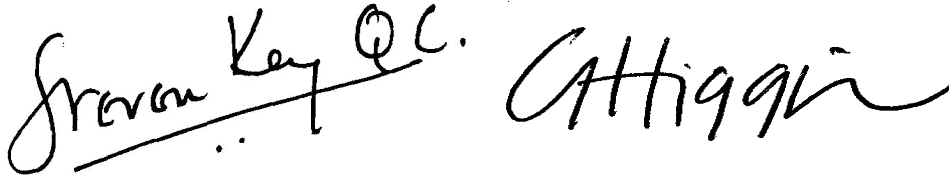
V. RELIEF

10. The Defence respectfully requests that the Chamber order the Prosecution to amend the Document Containing the Modified Charges Section in accordance with the Defence submissions set out in Annex A, the Joint Defence Response of

⁷ ICC-01/09-02/11-468, ICC-01/09-02/11-468-Conf-AnxA, ICC-01/09-02/11-468-Conf-AnxB, ICC-01/09-02/11-468-AnxC, ICC-01/09-02/11-468-AnxD and ICC-01/09-02/11-468-AnxE; ICC-01/09-02/11-481-Conf, ICC-01/09-02/11-Conf-AnxA and ICC-01/09-02/11-Conf-AnxB.

11 September 2012 and Confidential Annex B to the Updated Document
Containing the Charges.⁸

Respectfully Submitted,

Handwritten signatures of Steven Kay QC and Gillian Higgins. Steven Kay's signature is on the left, and Gillian Higgins' signature is on the right.

Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta
At London, England

Handwritten signature of Karim A.A. Khan QC.

Karim A.A. Khan QC
Lead Counsel, Muthaura Defence
At The Hague, the Netherlands

Dated this 10th Day of December 2012

⁸ ICC-01/09-02/11-468-Conf-AnxB.