Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **17 December 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. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

PUBLIC

Prosecution's Reply to the Defence Responses to the Prosecution's Submission of the Charges

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor
Ms. Fatou Bensouda, Prosecutor
Ms. Cynthia Tai, Trial Lawyer

Counsel for the Defence
For William Samoei Ruto:
Mr. Kioko Kilukumi Musau
Mr David Hooper
For Joshua Arap Sang:
Mr. Joseph Kipchumba Kigen-Katwa
Mr. Joel Kimutai Bosek

Legal Representatives of the Victims
Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit
Maria Luisa Jacome-Martinod

Detention Section

Victims Participation and Reparations Section

Others

INTRODUCTION

1. The Defence requests the Chamber to order the Prosecution to amend its Updated Document Containing the Charges ("Updated DCC"). It objects that the charges as currently formulated include allegations that exceed the specific facts found by the Pre-Trial Chamber, fail to provide sufficient detail in the allegation of the common plan and misstate the confirmed mode of liability.

2. Contrary to the Defence position that seeks to inappropriately narrow the Updated DCC, the challenged "Charges" section as drafted by the Prosecution in the Updated DCC is entirely appropriate. The Charges are designed to inform both Accused of the scope of the Prosecution's case. They are consistent with the appropriate findings in the Decision on Confirmation of Charges and they meet the requirements that this Chamber identified – they provide "notification to the Accused of the precise factual and legal basis of the accusation" and "delimit […] the allegation for the purpose of establishing what the trial is about".[1] The Defence application should therefore be dismissed.

PROCEDURAL BACKGROUND

3. On 23 January 2012, the Pre-Trial Chamber confirmed charges against the Accused. [2] On 21 August 2012, in response to an order by the Trial Chamber, the Prosecution submitted a post-confirmation Updated DCC along with annexes. The filing indicated that the Prosecution and Defence had discussed the contents of the Updated DCC but were unable to agree on some points.[3]

4. On 20 November 2012, a majority of the Trial Chamber ordered the Prosecution to submit a modified "Charges" section of the Updated DCC that presents, for each count "all (but no more than) the 'facts and

[1] ICC-01/09-01/11-475, para. 8.
[2] ICC-01/09-01/11-373.
[3] ICC-01/09-01/11-448, with Annexes.

circumstances described in the charges'". It also advised 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". It also authorized the Defence to "raise any objections it may have to the content of the modified Charges section" and the Prosecution to respond to Defence objections. [4]

5. On 10 December 2012, the Defence for both Accused raised objections.[5] This reply is submitted by the Prosecution as requested in the Chamber's order.

SUBMISSIONS

6. The Defence for Mr Sang raises the following specific objections, the first four of which are also adopted by Mr Ruto:[6]

"i. The use of the word "including" when referring to geographic locations in the Charges;

ii. The overly broad span of dates relating to the crime bases in the Charges;

iii. The inclusion of the allegation of six people being killed in Kimumu and the allegation of thirty people being killed in Langas, which are not findings made by the Pre-Trial Chamber;

iv. The omission of the dates of the alleged preparatory meetings from the Charges;

v. The general use of Article 25(3)(d) as the mode of liability applicable to Mr. Sang, where the Pre-Trial Chamber expressly found him liable according to the more specific mode of liability requiring an intentional contribution found in Article 25(3)(d)(i); and

vi. The inclusion of other categories of alleged contributions by Mr. Sang, which were not expressly found by the Pre-Trial Chamber."

[4] ICC-01/09-01/11-475, pages 9-10.
[5] ICC-01/09-01/11-505; ICC-01/09-01/11-506.
[6] ICC-01/09-01/11-505, para. 1; ICC-01/09-01/11-506 para. 1.

(i) Preliminary observations

7. At the outset, the Defence complaints, though not precisely articulated, appear to be predicated upon two theories: first, that the Charges exceed the findings of the Pre-Trial Chamber; and second, that they do not adequately provide notice to the Defence.

8. *First*, the Defence appears to assume that a post-confirmation DCC cannot allege or identify facts, in the Charges portion or elsewhere in the document, unless they were expressly found and confirmed by the Pre-Trial Chamber. The Prosecution fundamentally disagrees.

9. Clearly, the Accused may be tried only on the charges confirmed by the Pre-Trial Chamber. Thus, for example, the Prosecution cannot proceed against the Accused for counts that the Pre-Trial Chamber declined to confirm, nor can it base the charges on factual allegations that the Pre-Trial Chamber expressly rejected as unproven. For reasons set out below, however, it is incorrect to assume that all factual allegations in the DCC, including in the Charges themselves, must have been specifically cited, accepted and confirmed by the Pre-Trial Chamber. The Prosecution therefore rejects the assumption that the post-confirmation Charges can only cite those facts and circumstances expressly found by the Pre-Trial Chamber, and even more egregiously, that its case must exclude facts or allegations that the Pre-Trial Chamber did not specifically decide upon, i.e. those on which the Decision on Confirmation is silent.

10. This is so because the Prosecution, not the Pre-Trial Chamber, is responsible for formulating the charges.[7] Moreover, the Prosecution is not expected to allege, much less prove, every possible fact at the confirmation hearing. To do so would require a comprehensive airing of the entirety of the Prosecution's evidence and an exhaustive Decision rendered in the 60 day timeframe set forth in the Rules.[8] It follows, then, that its case at trial cannot

[7] ICC-01/09-01/11-475, para. 4.
[8] Regulation 53 of the Regulations of the Court

be limited to facts that were alleged and proven at the confirmation hearing. Any other interpretation would impermissibly convert the confirmation process into a rehearsal of the trial, literally a full-blown 'trial before the trial', and not a screen to assure that charges are founded and not frivolous.[9]

11. As a matter of policy, it would also be dangerous and unwarranted to require that the universe of relevant facts be fully proven at confirmation and to exclude factual statements from a post-confirmation DCC if those facts were not expressly found by the Pre-Trial Chamber. The confirmation hearing by its very nature operates as a protection against unsubstantiated charges, not a practice run or dress rehearsal of the facts supporting the Charges or the entire trial itself. Given its limited purpose, it is unreasonable to require, and it cannot even reasonably be expected, that all factual allegations and evidence to be offered at the trial must first be offered, evaluated, and specifically approved at the confirmation proceeding. Nor can the Prosecution meet that requirement without significantly violating its duty to witnesses under Article 68 and taxing the resources of the Court overall; if the Prosecution were obliged to present its entire case at confirmation or be forever barred from proving those facts, it would be required to subject its witnesses and their families to life-disrupting protection and other intrusive measures from the outset of the case. All that is required is for the Prosecution to present substantial evidence. Moreover, the standard at confirmation does not require that the Prosecution fully air its case-in-chief.

12. Such a requirement would, in any event, be impossible since the confirmation proceeding relies largely or entirely on evidence – such as witness statements or summaries – that can reasonably be expected to be different than *viva voce* trial testimony. The Prosecution simply cannot be bound at trial to the details in a witness statement, without allowing for the

[9] ICC-01/04-01/10-514, para. 47; ICC-01/09-01/11-221, para.9; ICC-01/09-02/11-321, para.8; ICC-01/04-01/07-717, para.64; ICC-02/05-03/09-121-Corr-Red, para.31; ICC-01/04-01/06-803-tENG, para.37; ICC-01/04-01/07-428-Corr, paras.5-6.

fact that witnesses recall or forget over time and that details attain different significance as more evidence is gathered and the case is shaped.

13. The Prosecution also notes the comment by Judge Eboe-Osuji in a partly dissenting Opinion from the Chamber's Decision directing the Prosecution to submit amended Charges. Judge Eboe-Osuji noted that the Court has not yet clearly settled the meaning of "facts and circumstances" in the Rome Statute and Rules of Procedure and Evidence.[10] Absent consensus from the Court that the DCC before the Trial Chamber is limited to the express factual findings of the Pre-Trial Chamber, the essence of the Defence argument must fail.

14. *Secondly*, the requirement of the DCC is to provide adequate notice to the Accused of the charges. Notice requires sufficient specificity to enable: (a) the Trial Chamber to determine with confidence that the pending charges were confirmed by the Pre-Trial Chamber, (b) the Accused person/s to prepare a defence, and (c) the Accused person/s to contest, as a violation of *ne bis in idem*, a subsequent prosecution for the same crime. The Charges as formulated here easily meet these requirements. The Statute, Rules of Procedure and Evidence, and the weight of the jurisprudence of the ICC do not further require that the Charges themselves set forth all the evidentiary details that will establish the commission of the charged crimes. Equally invalid is the suggestion that the Charges will be deemed defective on notice grounds if they contain more evidentiary details than might be warranted or than were expressly approved by the Pre-Trial Chamber.

(ii) Matters allegedly wrongly included in the charges

15. The Defence objects to the use of the word "including" when referring to geographic locations of crimes; of an alleged expansion of dates when crimes occurred; the inclusion of other categories of contributions; and the

[10] ICC-01/09-01/11-475, partly dissenting opinion, para. 3 and n.2.

reference to persons killed in post-election violence, absent express findings as to those deaths by the Pre-Trial Chamber. The Prosecution disagrees.

16. As to the first point, the recitation of locations of crimes as "including" specifically identified places signifies that the crimes occurred in multiple locations. While "includes" can be understood in some contexts to "expand the parameters of [the] case",[11] it is clear that the term does not have that meaning in this context. Rather, when read in a commonsense manner, the term signifies that the crimes occurred in one or more, but not necessarily all, of the identified locations. Deleting the term, as suggested by Mr. Sang, could invite the Defence to argue at the close of the case that the charges were not proved if the Prosecution's evidence failed to establish that attacks occurred in each of the named locations.

17. The Prosecution agrees that the Accused cannot be convicted based solely on crimes that occurred in other unspecified locations, but it submits that the Accused can be convicted if crimes occurred in one or more, even if not every one, of the specified locations. To the extent that evidence might emerge about attacks in other unnamed places (which would be probative of planning, intent, knowledge, or other related factors), this Chamber could follow the lead of the Pre-Trial Chamber, as quoted by Mr Sang,[12] and decline to rely on those events as constituting the *actus rea* of the charges.

18. The Prosecution also disagrees with the Defence objection to the dates set forth in the Charges. To be sure, with respect to some events, the Pre-Trial Chamber made specific findings as to cut-off dates of crimes, but the Prosecution submits that those cut-off dates were beyond the proper scope of the Pre-Trial Chamber's determination.

19. The issue at confirmation is whether there exists substantial grounds to believe the charged person committed the crimes charged. Where charges are alleged to have occurred within a particular time period, the issue before

[11] ICC-01/09-01/11-505, para. 4.
[12] ICC-01/09-01/11-505, para. 3.

the Pre-Trial Chamber is whether the crimes alleged – multiple acts in multiple places – occurred within that time period. In the Prosecution's submission, it is beyond the authority of the Pre-Trial Chamber to confine confirmation to events on specific dates and thereby rewrite the charges to exclude other events or evidence. So long as the Prosecution proves, as it did here, that the alleged crimes occurred within the alleged time period, it has met its burden.

20. Here, the charges were alleged to have taken place during the very confined period of "on or about 30 December 2007 to 16 January 2008". The precise finding, for example, that events occurred in Turbo Town on 30 December but not afterwards, exceeded the scope of the confirmation decision and, if allowed to redefine the Prosecution's charges, will seriously transform the process of confirmation itself. As noted previously, confirmation is not a rehearsal of the trial and the Prosecution is not obliged to present all its evidence at that early stage. So long as the Prosecution has shown substantial grounds to believe that the crimes alleged occurred within the time period alleged, it has met its burden and the case can proceed to trial on those charges.

21. The Defence next challenges the allegations of numbers of people murdered on the ground that the Pre-Trial Chamber's Decision on Confirmation does not expressly find those numbers and those facts.[13] As previously argued, the Decision on Confirmation confirmed the allegations of murder in the locations and times alleged in the DCC; its failure to expressly identify each victim at each location does not require that the allegations as to victims now be struck.

22. In similar fashion, the Defence urges that alleged contributions of Mr Sang be limited to those expressly identified and specified in the Decision on Confirmation.[14] The Pre-Trial Chamber found the evidence sufficient to

[13] ICC-01/09-01/11-505, paras. 11-14.
[14] ICC-01/09-01/11-505, paras. 17-21.

sustain the charges, and in that context specifically noted that there existed substantial grounds to believe he made certain identified contributions. But, notwithstanding the Defence argument that its findings contained an "exhaustive list",[15] it did not state that its list was exhaustive or expressly exclude other contributions.

(iii) Allegedly insufficient details as to dates of preparatory meetings

23. The Defence also argues that the Prosecution should be required to "list with certainty the dates of all the alleged preparatory meetings"[16] that they participated in, in anticipation of upcoming election violence. The allegations of planning meetings appear in the description of the common plan but are not included within the specific counts. Neither the core texts of this Court nor principles of fundamental fairness require that all the details in the common plan be expressly identified in advance in the Charges by date, place, attendees, and the like.

24. Moreover, it is difficult if not impossible to precisely identify all the dates, since many were informal and unrecorded events and attendees will have differing recollections as to the exact dates. To the extent that the witnesses' evidence as to dates are necessary as an attribute of fair notice, they will be included in the pre-trial disclosure of evidence under article 67(2) and rule 77 or in the pre-trial brief. They are not, however, essential evidentiary details that are required to be included in the charges themselves.

(iv) Requested change to the Charges' mode of liability applicable to Mr Sang

25. Mr Sang requests that the mode of liability be amended and narrowed. As currently written, the "criminal responsibility" portion of the Charges states that the Accused "is criminally responsible for the crimes charged below pursuant to article 25(3)(d) of the Statute" and that he "intentionally contributed to the commission of the crimes committed by a group of high-

[15] ICC-01/09-01/11-505, para. 18.
[16] ICC-01/09-01/11-505 , para. 14.

ranking members of the Network led by WILLIAM SAMOEI RUTO acting with the common purpose […]". According to Mr Sang, the allegation of criminal responsibility under article 25(3)(d) is impermissibly broad, because that provision addresses contributions or attempted contributions that are intentional and made either: (i) with the aim of furthering criminal activity or (ii) with the knowledge of the intention of the group to commit the crime.

26. The charges originally brought against Mr Sang alleged a mode of liability under article 25(3)(d). The confirmation decision found substantial grounds to believe that Mr Sang contributed to the crimes "with the aim of furthering the criminal activity or criminal purpose of the group", tracking the language of article 25(3)(d)(i). Because the Pre-Trial Chamber did not address the alternative limb in article 25(3)(d), Mr Sang argues, the Charges may not include an allegation that incorporates that limb for purposes of trial.

27. The Prosecution disagrees with the essential factual core of this argument, that the Pre-Trial Chamber "made express findings limiting his liability to Article 25(3)(d)(i)".[17] The Chamber did no such thing. It simply found liability based on his intent under subsection (i), obviating the need to address as an additional basis for liability the alternative situation of knowledge under subsection (ii). Notably, these are not mutually exclusive bases for liability, and though only intent *or* knowledge may be required, it will likely be common that a person has both.

28. For the reasons set forth previously, consistent with the limited purpose of confirmation, the Pre-Trial Chamber's omission of factual or legal conclusions as to a particular matter in the confirmation decision does not rationally foreclose the ability to include that matter in the trial charges.

29. Indeed, on this point Mr Sang acknowledges that this Chamber can itself provide notice to the parties that it will assess liability also under subsection

[17] ICC-01/09-01/11-505, para. 15.

(ii). Thus, he concedes the permissibility of considering the alternative condition for article 25(3)(d) liability notwithstanding that the Pre-Trial Chamber did not see a need to rule on that issue. If the Trial Chamber has the authority to act in such a fashion and there is nothing in the Decision on Confirmation that suggests the Prosecution failed to prove the alternative limb of article 25(3)(d), there is no principled basis for striking it from the Charges from the outset. [18]

CONCLUSION

30. For the reasons set forth above, the Prosecution requests that the Chamber dismiss the applications by the two Accused.

Fatou Bensouda, Prosecutor

Dated this 17th December 2012

At The Hague, the Netherlands

[18] Notably, a similar issue arose in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*. The Pre-Trial Chamber, considering a mode of liability under article 28(a)(i), found that the Accused knew his forces were committing or about to commit the charged crimes. It did not exclude the alternative in that provision, that the Accused "should have known" (*see* ICC-01/05-01/08-424). The Prosecutor included the "should have known" language in its post-confirmation amended DCC, (*see* ICC-01/05-01/08-593-Conf-AnxA) but the Trial Chamber struck it because there was no specific confirmation finding (*see* ICC-01/05-01/08-836). Recently, it gave notice under Regulation 55 that it might modify the legal characterization, and subsequently issued an order delaying the trial to permit the Accused to prepare a Defence to that allegation (*see* ICC-01/05-01/08-2324).