

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 28 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.* FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA**

Public with public Annex

Decision on the content of the updated document containing 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
Alagendra

Legal Representatives of Victims
Mr Fergal Gaynor

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

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, pursuant to Articles 61(7) and 67(1)(a) of the Rome Statute (“Statute”) and Regulation 52 of the Regulations of the Court (“Regulations”), issues the following Decision on the content of the updated document containing the charges (“Decision”).

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 Confirmation Decision (“Confirmation Decision”).³ Before submitting the Updated DCC, the prosecution was to liaise with the defence so as to discuss whether the draft of the Updated DCC properly reflects the Confirmation Decision⁴ and “any points of disagreement 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 Updated

¹ Order for the prosecution to file an updated document containing the charges, 5 July 2012, 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.

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 ("Parties' Observations").⁹
4. On 11 September 2012, the defence of Mr Muthaura and the defence of Mr Kenyatta ("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" ("Defence Response") requesting the Chamber to refer certain issues to the Pre-Trial Chamber and to order the prosecution to amend the Updated DCC in accordance with their submissions.¹⁰ In response, on 17 September 2012, the prosecution submitted a motion to strike the Defence Response out from the case record ("Motion to Strike").¹¹
5. On 20 November 2012, the Chamber, by majority, with Judge Eboe-Osuji dissenting, ordered the prosecution, *inter alia*, to submit a modified "Charges" section of the DCC in which "all (but no more than) the 'facts and circumstances described in the charges' should be presented separately for each count".¹²

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 ICC-01/09-02/11-468-Conf-AnxB; public redacted version, 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.

¹² Order regarding the content of the charges, ICC-01/09-02/11-536, 20 November 2012.

6. On 28 November 2012, the prosecution filed, pursuant to the Chamber's order, 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".¹³ Annex A to this submission is a document developing the section "Charges" of the Updated DCC ("Modified Charges Section").
7. On 10 December 2012, the defence filed the "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'", together with Annex A, setting out its objections to the Submission of the Charges ("Defence Objections to the Modified Charges Section").¹⁴
8. On 17 December 2012, the prosecution filed the "Prosecution's Reply to the 'Defence's 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'", together with Annex A containing its reply to the objections raised in the Defence Objections to the Modified Charges Section ("Prosecution Reply").¹⁵

II. Analysis and Conclusion

A. *Preliminary matters*

9. The Chamber notes that pursuant to its order of 5 July 2012, all outstanding points of disagreement between the parties in relation to the content of the DCC were to

¹³ ICC-01/09-02/11-546, with Annex A.

¹⁴ ICC-01/09-02/11-563, with Annex A.

¹⁵ ICC-01/09-02/11-575, with Annex A.

be submitted together with the Updated DCC.¹⁶ The Defence Response, which was filed after the submission of the chart setting out the outstanding points of disagreement between the parties, is thus inconsistent with the Chamber's order. The defence contends that it was informed of some of the prosecution's submissions only at the time the Updated DCC was filed.¹⁷ However, no mention of the defence's wish to respond to those submissions was made in the request for extension of the time limit, filed on 21 August 2012,¹⁸ even though at the time of requesting extension the defence knew that the prosecution had not yet communicated such submissions to the defence and that even if it were to do so shortly after the Chamber's order granting the extension, the defence would have had hardly any time to respond. Furthermore, the defence has not sought the Chamber's leave to file a response to the prosecution's submissions. The Defence Response was thus filed without authorisation and its content shall not be considered.

10. In addition, as far as the defence's request for referral of certain issues (to the Pre-Trial Chamber) is concerned,¹⁹ the Chamber notes, at any rate, that the defence does not identify specific issues in relation to which it seeks referral. It is also not clear from the defence's submissions why clarification by the Pre-Trial Chamber is necessary in this instance. The Chamber notes in this connection that the parties' disputes over modifications to the DCC do not appear to result from the parties' difficulties in interpreting the Pre-Trial Chamber's findings. Rather, these disputes concern the impact of the Pre-Trial Chamber's findings on the content of the DCC, an issue which the Chamber may resolve itself, without referral to the Pre-Trial

¹⁶ ICC-01/09-02/11-450, para. 11.

¹⁷ Defence Response, paras 7 and 10.

¹⁸ ICC-01/09-02/11-466.

¹⁹ Defence Response, paras 11-12, 14.

Chamber. The Chamber is thus not persuaded that there is need for referral under Article 64(4) of the Statute.

11. In its Reply to the Defence Objections to the Modified Charges Section, the prosecution contends that some of the objections by the defence should have been raised at the time of the parties' exchanges regarding the content of the Updated DCC.²⁰ The Chamber agrees with the prosecution that many of these objections could have been raised at an earlier stage. However, it may have become clearer to the defence only from the Modified Charges Section which of the contested allegations are considered to be "facts and circumstances described in the charges", within the meaning of Article 74(2) of the Statute. This might have affected the scope and nature of the defence's objections. In view of this consideration and having regard to the fact that the Chamber's order did not preclude such objections, the Chamber will examine the merits of these objections.

B. Disputes over the content of the Updated DCC

12. The Chamber accepts all modifications to the DCC proposed by the prosecution, to which the defence did not object. The Chamber also accepts modifications made by the prosecution in response to specific objections by the defence, where the prosecution fully accepted the arguments raised by the defence. In the present Decision the Chamber examines those disputes which the parties have not settled. The disputes have been grouped by the Chamber into four categories: disputes relating to facts on which the Confirmation Decision is silent; disputes relating to the addition of facts based on the findings of the Confirmation Decision; disputes relating to the interpretation of the findings of the Confirmation Decision and disputes over the Modified Charges Section.

²⁰ Prosecution Reply, pp. 7, 16, 19, 21.

13. The Chamber notes that in view of the fact that the Modified Charges Section does not incorporate the entire content of the Updated DCC, the latter also contains factual allegations which constitute neither “facts and circumstances described in the charges” within the meaning of Article 74(2) of the Statute, nor their legal characterisation. These allegations are considered to be background information or other information of a subsidiary nature. The Chamber authorises the prosecution to retain such allegations in the Updated DCC.
14. As regards the Modified Charges Section, the Chamber notes that according to the prosecution, paragraphs 11 to 25, 29 to 54 and 73 to 90 of the Updated DCC, as well as all the factual allegations included in the Modified Charges Section, are the material facts and circumstances of the charges. Subject to modifications discussed in this Decision, the Chamber accepts the Section as description of the charges.
15. In the Annex to this Decision, the Chamber will provide more specific instructions regarding modifications of the Updated DCC and the Modified Charges Section. The words and phrases which were copied from the Updated DCC to the Modified Charges Section, should also be modified accordingly.

(1) Facts on which the Confirmation Decision is silent

16. The defence objects to the retaining of a number of factual allegations in the DCC, arguing that the Pre-Trial Chamber did not address them in the Confirmation Decision.²¹ The prosecution disagrees and contends that the fact that the Pre-Trial Chamber did not confirm a factual allegation is not determinative of whether it can be included in the Updated DCC. The prosecution also submits that the

²¹ For instance, Parties’ Observations, pp. 2, 24-25.

confirmation of a charge implies confirmation of all its core constituent facts, absent explicit language to the contrary.²²

17. The Chamber is of the view that these disputes, which are examined in detail in the following sub-sections, relate to a more general issue of the purpose of the confirmation proceedings and the resulting decision. The Chamber notes in this connection that other Trial Chambers have taken the view that the confirmation decision should be the authoritative document setting out the factual allegations for the trial,²³ whereas the prosecution repeatedly insisted that the DCC, rather than the confirmation decision, should play this role.²⁴

18. In accordance with Article 61(1) of the Statute, the purpose of the confirmation hearing is “to confirm the charges on which the Prosecutor intends to seek trial”. The word “confirm” means to “make valid by formal authoritative assent; to ratify, sanction”.²⁵ The Chamber’s understanding of the confirmation process is that the Pre-Trial Chamber validates the charges as formulated by the prosecution by determining that there is sufficient evidence to establish substantial grounds to believe the factual allegations made by the prosecution in support of the charges. The charges are formulated by the prosecution prior to the confirmation hearing and are presented in the DCC.

²² Parties’ Observations, pp. 3 to 10.

²³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on the Filing of a Summary of the Charges by the Prosecutor, 29 October 2009, ICC-01/04-01/07-1547-tENG, paras 14-17; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, ICC-01/05-01/08-836, para. 37.

²⁴ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Office of the Prosecutor, Document Containing the Charges as Confirmed by the Pre-Trial Chamber in accordance with the « Décision relative au dépôt d’un résumé des charges par le Procureur », 28 October 2009, ICC-01/04-01/07-1568, para. 4; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Office of the Prosecutor, Prosecution’s Response to the Defence’s « Requête aux Fins d’obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contentant les Charges » of 12 February 2010, 22 March 2010, ICC-01/05-01/08-731, para. 25.

²⁵ Oxford English Dictionary.

19. As stated in the Chamber's order regarding the content of the charges,²⁶ such understanding is also reflected in Article 61(7), which gives the Pre-Trial Chamber the power to: confirm the charges, decline to confirm the charges and adjourn the hearing. There is no provision authorising the Pre-Trial Chamber to modify the charges formulated by the prosecution. On the contrary, when the evidence appears to establish a different crime, pursuant to Article 61(7)(c)(ii) the Pre-Trial Chamber may request the prosecution to consider amending a charge. Importantly, it is the prosecution which would then amend such a charge, not the Pre-Trial Chamber. Another provision authorising amendments to the charges is Article 61(9), again, conferring on the prosecution the authority to amend, with the permission of the Pre-Trial Chamber.
20. The practice of the Pre-Trial Chambers so far is consistent with the proposition that the confirmation decision alone is not meant to serve as an authoritative statement of facts and circumstances described in the charges as well as of their legal characterisation on which the trial should proceed. As rightly observed by Trial Chamber II, the confirmation decision in the *Katanga and Ngudjolo* case did not "accurately [recapitulate] in summary form the facts and circumstances described in the charges as well as the legal characterisations which [the Pre-Trial Chamber] intended to confirm".²⁷ Similarly, Trial Chamber III observed in the *Bemba* case that the confirmation decision "[did] not provide a readily accessible statement of the facts that underlie each charge".²⁸
21. When determining whether to confirm or decline to confirm the charges, the Pre-Trial Chamber relies on Article 61(7) of the Statute, which requires it to "determine whether there is sufficient evidence to establish substantial grounds to

²⁶ ICC-01/09-02/11-536.

²⁷ ICC-01/04-01/07-1547-tENG, quoted above, para. 13.

²⁸ ICC-01/05-01/08-836, quoted above, para. 30.

believe that the person committed each of the crimes charged". In the present case, the Pre-Trial Chamber in its Confirmation Decision appears to have focused on evidence which it found relevant and sufficient to evaluate elements of a given crime according to the requisite threshold and chose not to analyse in detail each of the facts and circumstances described in the charges contained in the DCC.

22. Therefore, in the Chamber's view, the Confirmation Decision cannot be expected to serve as the only authoritative statement of the charges for the trial. The Chamber is of the view that the description of the charges in the DCC, amended to harmonise it with the findings made in the Confirmation Decision, provides a sufficiently authoritative statement of the charges relevant to the trial proceedings.

23. As indicated above, when determining whether there is sufficient evidence to establish substantial grounds to believe that the crimes charged were committed, the Pre-Trial Chamber may not have examined in detail, in its Confirmation Decision, each factual allegation contained in the DCC and it may have chosen to focus on only some selected allegations and evidence sufficient for the task before it. However, this does not mean that the Pre-Trial Chamber did not confirm the charges themselves, as well as the facts and circumstances described in those charges and their legal characterisation, unless it explicitly declined to do so. For these reasons, the Chamber is not persuaded that, as a general principle, the Pre-Trial Chamber's silence on relevant statements of facts made in the DCC should result in their removal from the post-confirmation Updated DCC. The Chamber thus, in principle, authorises the prosecution to retain such factual allegations in the Updated DCC.

(i) Alleged facilitation of the preparatory meetings by the accused

24. The defence objects to the retaining of the allegation, in paragraph 17 of the Updated DCC, that after the elections Mr Muthaura and Mr Kenyatta facilitated the meetings with the Mungiki. The defence submits that: (1) there is no evidence that Mr Kenyatta facilitated the meetings and (2) that the Pre-Trial Chamber only found Mr Muthaura to be involved in one post-election meeting.²⁹ The prosecution argues that the alleged lack of evidence is of no relevance for present purposes and that there is no inconsistency between the allegations in the Updated DCC and the findings of the Pre-Trial Chamber.³⁰

25. The Chamber agrees with the prosecution that at this stage of the proceedings the alleged lack of evidence is not determinative of whether this factual allegation may be retained in the DCC. The Pre-Trial Chamber made no finding to the effect that it does not confirm this particular allegation as part of the charges. There is thus no merit to the defence's objection and it remains open to the prosecution to prove this allegation with sufficient evidence at trial. In so far as the defence argues that the Pre-Trial Chamber made no specific findings with respect to Mr Muthaura's involvement in more than one post-election meeting, the Chamber refers to its above conclusion that the lack of a specific finding in the Confirmation Decision does not, in general, necessitate the removal of the corresponding allegation from the DCC. This principle applies to the present objection.

(ii) Mr Muthaura's alleged de jure authority

26. The defence seeks modification of allegations in paragraph 36³¹ of the Updated DCC that Mr Muthaura exercised *de jure* authority, or direct authority, over the

²⁹ Parties' Observations, pp. 21-22; Defence Objection to the Modified Charges Section, p. 5.

³⁰ Parties' Observations, pp. 21-23; Prosecution Reply, pp. 14-15.

³¹ Specifically, the phrases to which footnotes 87, 88 and 89 refer.

Kenyan security agencies.³² The defence argues that although the Pre-Trial Chamber found that Mr Muthaura had *de facto* authority, it did not address the prosecution's allegations regarding Mr Muthaura's *de jure* authority, including in relation to Major General Ali, and, as these are "facts and circumstances" of the case, they "would need to have been found by the Pre-Trial Chamber" in order for them to be included in the Updated DCC.³³

27. The prosecution argues that the fact that the Pre-Trial Chamber chose not to address the allegation of Mr Muthaura's *de jure* authority does not mean that the allegation should be removed. The prosecution refers to the jurisprudence from Trial Chamber III to assert that an allegation can be included in the Updated DCC where the allegation falls within the scope of the factual findings of the Pre-Trial Chamber and/or where the allegation simply provides evidential or background information.³⁴

28. The Chamber reiterates its conclusion that the fact that an allegation was not expressly confirmed by the Pre-Trial Chamber does not mean that it needs to be removed from the Updated DCC. The Chamber also notes that the issue of Mr Muthaura's authority is only referred to in a very specific context. This allegation seems to serve the purpose of demonstrating that Mr Muthaura exercised direct authority over Major General Ali. However, as discussed elsewhere in this Decision, the allegations regarding Mr Muthaura's authority over Major General Ali and instructions given thereto are only made in the context of the alleged "overall role assumed by Mr Muthaura in the commission of the crimes".³⁵ The retaining of this allegation thus poses no risk of prejudice to the defence. The

³² Parties' Observations, pp. 66-71.

³³ Parties' Observations, pp. 67 and 70.

³⁴ Parties' Observations, pp. 66-71, citing to ICC-01/05-01/08-836, quoted above, paras 110 and 145.

³⁵ See *infra* para. 55.

Chamber, therefore, concludes that reference to Mr Muthaura's *de jure* and direct authority, including in relation to Major General Ali, may be retained.

(iii) *Nairobi slums*

29. The defence seeks the removal of the words "and in the Nairobi slums" from the phrase "Muthaura used his position to instruct the Kenya Police not to interfere with the work of the Mungiki and pro-PNU youth in the Rift Valley and in the Nairobi slums" which appears at paragraph 78 of the Updated DCC.³⁶ The defence claims that neither of the two paragraphs of the Confirmation Decision relied on by the prosecution in support of the allegation³⁷ mentions the Nairobi slums and also that the reference to the Nairobi slums goes beyond the geographical remit of the case.³⁸

30. The prosecution contends that although the Pre-Trial Chamber did not address this allegation, it did not explicitly reject it and, further, the allegation does not exceed the scope of the charges.³⁹

31. The Chamber notes that all charges listed against the accused both in the DCC and in the Confirmation Decision refer to the commission of the crimes "in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province)."⁴⁰ There is no reference in the Confirmation Decision to any elements of crimes against humanity taking place in Nairobi. Indeed, the Confirmation Decision confirms the scope of the case with regard to the accused's contribution to the crimes as: "Mr. Muthaura and Mr. Kenyatta's essential contribution to the commission of the

³⁶ Parties' Observations, p. 119.

³⁷ Confirmation Decision, paras 342 and 379.

³⁸ Parties' Observations, p. 119; Defence Objections to the Modified Charges Section, pp. 3-4.

³⁹ Parties' Observations, p. 120; Prosecution Reply, p. 12.

⁴⁰ Confirmation Decision, paras 21 and 428.

crimes in or around Nakuru and Naivasha”⁴¹ and “Mr Muthaura and Mr Kenyatta’s control over the Mungiki for the purposes of the commission of the crimes in or around Nakuru and Naivasha.”⁴² The reference to the Nairobi slums cannot thus be understood as extending the charges to allegations of crimes committed at that location. In addition, the Chamber notes that the Nairobi slums are only mentioned in the context of Mr Muthaura’s alleged instructions to the Kenya Police. However, as discussed elsewhere in this Decision, the allegations regarding such instructions are only made in the context of the alleged “overall role assumed by Mr Muthaura in the commission of the crimes”.⁴³ Having regard to these considerations, the Chamber is of the view that the allegation relating to the Nairobi slums can only be examined in a limited context. There is thus no risk of expansion of the charges or prejudice to the rights of the accused. The reference may be retained.

(iv) Mutilations inflicted to conceal gunshot wounds

32. The defence seeks the removal of the allegation, at paragraph 57 of the Updated DCC, that mutilations were inflicted to conceal gunshot wounds in Kaptembwa, Sewage, Ponda Mali, Barut and Kapkures, arguing that the paragraph of the Confirmation Decision relied on by the prosecution does not support the allegation and that the Pre-Trial Chamber did not consider any such allegation.⁴⁴ In response, the prosecution contends that the retaining of this allegation is proper as it was not specifically rejected by the Pre-Trial Chamber.⁴⁵

33. The Chamber notes that paragraph 57 is not incorporated in the Modified Charges Section, but the allegation itself is reiterated in the Section. While the Pre-Trial

⁴¹ Confirmation Decision, title of section (b), p. 144.

⁴² Confirmation Decision, title of section (c), p. 144.

⁴³ See *infra* para. 55.

⁴⁴ Parties’ Observations, pp. 90-91.

⁴⁵ Parties’ Observations, pp. 90-91.

Chamber considered the evidence regarding the deaths caused by gunshot wounds and mutilations in Nakuru,⁴⁶ there is no finding on the nexus between the gunshot wounds and mutilations. The Chamber, nonetheless, reiterates its conclusion that the Pre-Trial Chamber's silence on a specific factual allegation in the DCC does not, in principle, necessitate the deletion of such an allegation. This conclusion applies to the present objection from the defence and, therefore, the allegation may be retained in the Updated DCC.

(2) Addition of information based on findings of the Pre-Trial Chamber

34. Some of the findings of the Pre-Trial Chamber contained in the Confirmation Decision are formulated differently from the original language of the DCC, although they confirm the allegations originally made by the prosecution. The prosecution amended parts of the Updated DCC to adjust its text to the language used by the Pre-Trial Chamber in the Confirmation Decision. In some cases the defence proposes modifications to the reformulation by the prosecution. At times it is the defence who seeks amendments to the Updated DCC arguing that the current text needs to be adjusted to the language of the Confirmation Decision.

(i) Links with Maina Njenga to secure Mungiki services

35. The defence seeks to replace the words "the Mungiki" with "Maina Njenga" in the phrase "establishing links with the Mungiki and securing Mungiki support and services for the PNU coalition" which appears at paragraph 22 of the Updated DCC.⁴⁷ The defence submits that the Updated DCC does not reflect the findings of the Pre-Trial Chamber that the perpetrators established links with Maina Njenga and through his agreement secured Mungiki support and

⁴⁶ Confirmation Decision, paras 126, 271, 280.

⁴⁷ Parties' Observations, pp. 35-38.

services.⁴⁸ The defence also proposes the removal of the word “support” and the addition of the words “respective intermediaries” and “for the purposes of” to the phrase.⁴⁹ The entire phrase, as amended by the defence would read “establishing links with Maina Njenga through their respective intermediaries for the purposes of securing the services of the Mungiki.”

36. The prosecution proposes to amend the phrase at issue to read: “establishing links with Maina Njenga and the Mungiki and securing Mungiki support and services for the PNU coalition”.⁵⁰ It opposes the deletion of the word Mungiki on the grounds that it would narrow the prosecution’s case in a manner inconsistent with the Confirmation Decision. The prosecution also objects to the inclusion of reference to Maina Njenga alone, as opposed to Maina Njenga and the Mungiki more broadly, arguing that the Pre-Trial Chamber made factual findings regarding contacts between the PNU and Mungiki members other than Maina Njenga.⁵¹

37. The phrase at issue appears to rely on the following findings of the Pre-Trial Chamber: (i) that the agreement on the common plan between Mr Muthaura, Mr Kenyatta and Maina Njenga is established to the requisite threshold by the evidence of the contacts between these men through their respective intermediaries “for the purposes of securing the services of the Mungiki for the PNU Coalition”,⁵² and (ii) that Mr Kenyatta’s contribution to the implementation of the common plan consisted of “establishing links, through intermediaries,

⁴⁸ Parties’ Observations, pp. 35-38, referring to Confirmation Decision, para. 400.

⁴⁹ Parties’ Observations, p. 36.

⁵⁰ Parties’ Observations, pp. 35-36.

⁵¹ Parties’ Observations, pp. 35-37, referring to Confirmation Decision, paras 301-308, 310-314.

⁵² Confirmation Decision, para. 400. See also Confirmation Decision, para. 313.

between the PNU Coalition and the Mungiki for the purposes of the commission of the crimes”.⁵³

38. As the prosecution’s intention appears to be to adjust the language of the Updated DCC to the conclusions of the Pre-Trial Chamber, the Chamber is of the view that the amendment sought by the prosecution should accurately reflect these conclusions. The defence’s proposal to add the words “for the purposes of” is thus justified. As regards the reference to Maina Njenga, the Chamber agrees with the prosecution that the removal of the word Mungiki significantly alters the allegation. The prosecution’s proposal to refer to both Maina Njenga and the Mungiki is consistent with the Confirmation Decision and, thus, should be included in the Updated DCC.

(ii) Agreement with Maina Njenga for Mungiki support

39. The defence also seeks the replacement of the words “the Mungiki’s agreement to” with the words “their agreement with Maina Njenga for the Mungiki to” in the phrase “exercising their authority over the Mungiki by virtue of the Mungiki’s agreement to support the PNU coalition”, which appears at paragraph 22 of the Updated DCC.⁵⁴ The defence avers that the corresponding finding of the Pre-Trial Chamber specifically refers to the agreement with Maina Njenga and this should be reflected in the Updated DCC.⁵⁵ The prosecution disagrees and refers to findings of the Pre-Trial Chamber based on evidence of meetings with the Mungiki in the absence of Njenga.⁵⁶

40. The Chamber agrees that in order to accurately reflect the findings of the Pre-Trial Chamber the amended allegation should make reference to the agreement with

⁵³ Confirmation Decision, para. 406.

⁵⁴ Parties’ Observations, pp. 38-39 .

⁵⁵ Parties’ Observations, pp. 38-39, referring to Confirmation Decision, para. 404.

⁵⁶ Parties’ Observations, pp. 38-40, referring to Confirmation Decision, paras 310-314.

Maina Njenga, by virtue of which, in the finding of the Pre-Trial Chamber, Mr Muthaura and Mr Kenyatta allegedly exercised authority over the Mungiki.⁵⁷ However, as the Confirmation Decision also refers to the Mungiki's agreement to support to the PNU coalition,⁵⁸ removing the reference to any agreement with "the Mungiki" from the amended allegation would not accurately reflect the Pre-Trial Chamber's findings. Accordingly, the Chamber considers that the following wording would be more consistent with the Confirmation Decision: "... by virtue of their agreement with Maina Njenga and the Mungiki to support the PNU coalition".

(iii) The Principal Perpetrators

41. The defence seeks the replacement of the term "the Principal Perpetrators", with "Mr Muthaura, Kenyatta and Maina Njenga" in paragraphs 33, 34, 74, and 75 of the Updated DCC.⁵⁹ This term is defined elsewhere in the Updated DCC as a reference to Mr Muthaura and Mr Kenyatta.⁶⁰ The defence argues that the Confirmation Decision is clear as to who the alleged principal perpetrators were.⁶¹ Moreover, the defence contends that the prosecution deliberately avoids mentioning Maina Njenga despite the fact that the Pre-Trial Chamber identified the "principal perpetrators or members of the common plan" as Mr Muthaura, Mr Kenyatta and Maina Njenga.⁶² In response, the prosecution argues that simply being a party to a common plan is not sufficient for principal liability to attach.⁶³ Further, the prosecution asserts that, contrary to the defence's argument, Mr Njenga is referred to elsewhere in the Updated DCC and the prosecution has

⁵⁷ Confirmation Decision, para. 404.

⁵⁸ Confirmation Decision, para. 313.

⁵⁹ Parties' Observations, pp. 61-64, 114-115.

⁶⁰ Updated DCC, para. 14.

⁶¹ Parties' Observations, pp. 61-64, referring to Confirmation Decision, paras 299-300, 368, 400, 408.

⁶² Parties' Observations, pp. 62-63, 114.

⁶³ Parties' Observations, pp. 61-62.

agreed to the defence's suggestions to include additional references to him in other parts of the Updated DCC.⁶⁴

42. In the four paragraphs in question the term "Principal Perpetrators" is used in the context of allegations relating to a shared organisational policy and common plan. However, the term "Principal Perpetrators" is also used elsewhere in the Updated DCC in the context of other allegations which are specific to the accused. For the sake of consistency, it is thus more appropriate to retain the term in the paragraphs in question. However, the Chamber agrees with the defence that adding references to Maina Njenga in the paragraphs in question would be desirable in view of the Pre-Trial Chamber's specific findings regarding Mr Njenga and in order to provide the accused with more information on the charges against them, consistent with their right under Article 67(1)(a) of the Statute. This is particularly significant where the contested references are made in the discussion of existence of an agreement or a common plan in the section on individual criminal responsibility.⁶⁵ For reasons set out above, the Chamber is of the view that reference to Mr Maina Njenga should be added to these allegations. In the first sentences of paragraphs 33, 74 and 75, the words ", including Maina Njenga," should be added after "Mungiki leaders".

(iv) Dates of preparatory meetings

43. The defence objects to the retaining of general references, in paragraphs 47, 75, 80, 86, 88, and 89 of the Updated DCC, to preparatory meetings of Mr Muthaura and Mr Kenyatta with other members of the common plan. It argues that the Updated DCC should only refer to the meetings addressed in the Confirmation Decision

⁶⁴ Parties' Observations, p. 62.

⁶⁵ Updated DCC, paras 74-75.

and should specify the dates of such meetings.⁶⁶ The defence makes similar observations regarding the lack of sufficient detail in the description of time and place of those meetings included in the Modified Charges Section.⁶⁷ In response, the prosecution agrees to indicate the dates of the meetings addressed in the Confirmation Decision. However, it objects to the exclusion of any other preparatory meetings, arguing that the relevant factual allegations were not expressly rejected by the Pre-Trial Chamber and that they do not modify or exceed the scope of the confirmed charges.⁶⁸

44. In the Confirmation Decision, the Pre-Trial Chamber considered the evidence of three preparatory meetings held on 26 November 2007 and 30 December 2007 at the Nairobi State House; and on 3 January 2008 at the Nairobi Club.⁶⁹ The Pre-Trial Chamber concluded that the evidence of these three meetings provided substantial grounds to believe that the accused participated in “a number of” meetings with Mungiki leaders.⁷⁰ The Chamber recalls its conclusion regarding the Pre-Trial Chamber’s silence on specific allegations and considers this conclusion to be applicable to the present issue. Therefore, the Chamber finds that the relevant parts of the Updated DCC should not be limited in the manner proposed by the defence. However, as the inclusion of references to the location and dates of specific meetings would be helpful in order to provide the defence with further information as to the charges, the Chamber considers that the amendments proposed by the prosecution should be adopted in the Updated DCC and, accordingly, in the Modified Charges Section.

⁶⁶ Parties’ Observations, pp. 76-78, 81, 115, 124, 127, 131, 134.

⁶⁷ Defence Objections to the Modified Charges Section, p. 2.

⁶⁸ Parties’ Observations, pp. 76-81, 115-116, 124-125, 127-129, 131-132, 134-135; Prosecution Reply, pp. 2-6.

⁶⁹ Confirmation Decision, paras 309-359.

⁷⁰ Confirmation Decision, para. 309.

45. The defence also avers that the time period of “[f]rom on or about 30 December 2007 to the end of January 2008” in paragraph 47 of the Updated DCC is indefinite and requests that the passage should be altered to read “[o]n 30 December 2007 and 3 January 2008”.⁷¹ However, the Chamber notes that this time frame provided in the Updated DCC relates not only to the preparatory meetings, but also to “a series of activities” in which the accused allegedly participated. The Chamber also does not consider the time frame provided in the Updated DCC to be indefinite, as the start and end dates of this time frame are provided with sufficient precision. Accordingly, the Chamber finds no merit in this objection from the defence.

(3) Disputes over interpretation of findings of the Pre-Trial Chamber

(i) Pro-PNU youth

46. The defence seeks the removal from the DCC of the words “pro-PNU youth” (pro-Party of National Unity youth) from numerous parts of the Updated DCC.⁷² In the view of the defence, the Pre-Trial Chamber found that there was no distinction between the Mungiki and the “pro-PNU youth”, as those persons joined the Mungiki. The defence contends that, as a result, the prosecution’s use of the term “pro-PNU youth” does not accurately reflect the Pre-Trial Chamber’s determination.⁷³ The prosecution objects to such a reading of the Confirmation Decision and submits that the Pre-Trial Chamber did not reject the allegation that “pro-PNU youth” participated in the attacks. The prosecution contends that, when concluding that no distinction should be made between the Mungiki and “pro-PNU youth”, the Pre-Trial Chamber only stated that the term “Mungiki”

⁷¹ Parties’ Observations, p. 76.

⁷² Updated DCC, paras 14, 18-20, 22, 24, 29, 31; sub-heading (ii) on page 12; paras 40, 42, 48-49, 51, 54; title on page 17; paras 55-60; sub-heading on page 20; paras 63-68, 75, 77-83, 86, 89-90.

⁷³ Parties’ Observations, pp. 11-13, 23-24, 29, 40-41, 60, 71-72, 82-84, 86-87, 89-94, 97-98, 105-110, 116, 118-119, 122-131, 135-136; Defence Objections to the Modified Charges Section, pp. 10-11.

could be used as shorthand to describe both Mungiki members and the pro-PNU youth.⁷⁴

47. The relevant passage from the Confirmation Decision reads:

In light of the above, the Chamber is satisfied that the evidence demonstrates to the required threshold that the attack in or around Nakuru was carried out by Mungiki members. In this respect, the Chamber notes that the Amended DCC contains numerous references to “pro-PNU youth”, in the context of the mobilization, recruitment and payment of participants in the attack. However, upon review of the submissions and the evidence, and as explained in greater detail below, the Chamber considers that the mobilized and newly recruited members formed an integral part of the Mungiki organization at the time and in the context of the events under consideration in the present case. For this reason, the Chamber does not find any distinction necessary and finds it appropriate to refer to the organization perpetrating the attack simply as the Mungiki. The Chamber clarifies that this conclusion also applies with respect to the events in or around Naivasha for which the same references to the involvement of “pro-PNU youth” in the attack are contained in the Amended DCC.⁷⁵

There is no suggestion in this passage that the Pre-Trial Chamber rejected the allegation that pro-PNU youths participated in the attack. Rather, the Pre-Trial Chamber considered any distinction between those youths and the Mungiki to be unnecessary. It is significant that in the following sections of the Confirmation Decision, when discussing the groups carrying out the attacks, the Pre-Trial Chamber made reference to persons recruited locally⁷⁶ and to the administration of oath to newly recruited members.⁷⁷ Importantly, the Pre-Trial Chamber relied on a report, which refers to “Kikuyu youth”, not the Mungiki, and nonetheless found that report to be relevant.⁷⁸ The Chamber considers these references to be clear and unambiguous. The Confirmation Decision lends no support to the proposition that the continuing reference to pro-PNU youth should be disallowed

⁷⁴ Parties’ Observations, pp. 11-21, 23, 29, 40-41, 71-72, 82-84, 86-87, 89-93, 97-98, 105-108, 116, 118-119, 122-131, 135-136; Prosecution Reply, pp. 23-28.

⁷⁵ Confirmation Decision, para. 123, references omitted.

⁷⁶ Confirmation Decision, para. 150.

⁷⁷ Confirmation Decision, paras 147, 164, 167.

⁷⁸ Confirmation Decision, para. 156.

in the Updated DCC. Accordingly, the Chamber finds that the prosecution may retain the reference in the relevant parts of the Updated DCC.

(ii) Number of victims of crimes

48. The defence (i) seeks modification of allegations regarding the numbers of persons killed and of persons injured in the attacks, and (ii) objects to extending the allegations of killings to victims other than perceived Orange Democratic Movement (“ODM”) supporters. With regard to the first objection, the defence contends that the evidence relied upon by the Pre-Trial Chamber referred to the deaths of or injury to a lower number of persons than the DCC.⁷⁹ As regards the second objection, the defence asserts that the charges against the accused are limited to the killing of perceived ODM supporters and that the Pre-Trial Chamber did not address the allegation that a certain number of people or civilians were killed during the attack.⁸⁰ The defence also objects to the indication of the time frame of the alleged killings in Naivasha provided in paragraph 5 of the Modified Charges Section, arguing that the temporal scope of the charges related to Naivasha only includes 27-28 January 2008, whereas the contested allegation refers to killings committed “[b]y about 31 January 2008”.⁸¹

49. The prosecution has no objection to amending the contested allegations so that, instead of referring to “people”, they refer to a certain number of “civilians”, “including at least [x number of] perceived ODM supporters”.⁸² In one case, the prosecution agrees to replace the reference to “perceived ODM supporters” with

⁷⁹ Parties’ Observations, pp. 24-29, 44-47, 54-55, 58-60, 94-96, 96-97, 98-103, 103-105, 111-112, referring to Updated DCC, paras 20, 30 (the phrases to which footnotes 64, 65 and 67 refer), 31, 59, 60 (the phrases to which footnotes 174 and 175 refer), 71.

⁸⁰ Parties’ Observations, pp. 44-47, 54-55, 58-60, 94-95, 111-112, referring to Updated DCC, paras 30 (the phrases to which footnotes 64 and 67 refer), 31, 59, 71.

⁸¹ Defence Objections to the Modified Charges Section, p. 6.

⁸² Parties’ Observations, pp. 44, 58, 94-95, 111-112, referring to Updated DCC, paras 30, 31, 59, 71.

“civilians including [x number of] perceived ODM supporters”.⁸³ However, the prosecution objects to any further modification, as suggested by the defence, arguing that the Pre-Trial Chamber’s failure to address a specific allegation does not automatically amount to a rejection of that allegation.⁸⁴ The prosecution submits that its allegations are not limited to crimes committed against perceived ODM supporters and that “[t]he proviso is that irrespective of the perceived political affiliation of the victims, the Accused must have been aware, at a minimum, that the crimes would occur in the ordinary course of events”.⁸⁵ The prosecution contends that the defence’s proposal would create an accountability gap in that there would be no accountability where the attackers killed individuals on an opportunistic basis with no regard to political affiliation. In order to “avoid such anomalies”, the prosecution opted not to limit its charges to crimes committed against perceived ODM supporters.⁸⁶ The prosecution asserts that the Confirmation Decision does not contain a specific rejection of the allegation that the accused may be liable for crimes committed against individuals not perceived to be ODM supporters.⁸⁷

50. First, as regards the defence’s objection to the numbers provided in the Updated DCC, the Chamber notes that the defence does not identify any finding of the Pre-Trial Chamber which rejected the allegations of the prosecution with respect to the number of victims of killings and other crimes. Those paragraphs of the Confirmation Decision in which reference is made to such numbers, only discuss specific pieces of evidence which provide these numbers, without drawing conclusions as to the overall number.⁸⁸ The Chamber is of the view that the fact

⁸³ Parties’ Observations, p. 24, referring to Updated DCC, para. 20.

⁸⁴ Parties’ Observations, pp. 24-28, 54-58, 58-59, 94-95, 96-97, 103-105, 111-112.

⁸⁵ Parties’ Observations, pp. 44-46, 54-58.

⁸⁶ Parties’ Observations, pp. 46-47, 54-58.

⁸⁷ Parties’ Observations, pp. 49-50.

⁸⁸ Confirmation Decision, paras 132, 234, 238.

that in its Confirmation Decision the Pre-Trial Chamber only examined the evidence regarding some of the victims of the alleged crimes does not necessarily mean that the prosecution can no longer allege the total number of victims in the way it does it in the original DCC ("Original DCC").⁸⁹ The Chamber reiterates in this connection its conclusion regarding the statements of the facts on which the Pre-Trial Chamber made no specific findings and considers this conclusion to be applicable to this defence objection.

51. The Chamber notes that the prosecution addresses the defence's objections to the alleged numbers of victims of killings by reformulating some of the allegations. With respect to some of them, the prosecution's proposal is to allege that a certain number of "civilians", "including [x number of] perceived ODM supporters", instead of "people", as originally stated in the DCC, were killed. The Chamber agrees that such a formulation provides more clarity as to the nature of the charges. In order to avoid confusion, the Chamber, however, directs the prosecution to retain references to "people", rather than replacing them with references to "civilians". The addition of "including [x number of] perceived ODM supporters" is allowed.

52. As regards the alleged extension of the charges to crimes committed against persons other than "perceived ODM supporters", the Chamber notes that the Modified Charges Section only lists crimes committed against "a civilian population perceived to be supporting the Orange Democratic Movement political party", thereby making it clear that only allegations regarding the number of victims who were perceived ODM supporters are material to the charges. In view of the clarification provided in the Modified Charges Section, the

⁸⁹ ICC-01/09-02/11-280-AnxA.

Chamber sees no need to modify allegations in the Updated DCC regarding the number of victims of crimes.

53. With regard to the defence's objection to the inconsistency of the indication of the time frame for the alleged killings in Naivasha with the remainder of Count 1, the Chamber is of the view that the formulation proposed in the Modified Charges Section does not provide a clear indication of an important detail of that particular charge. If so formulated, this allegation allows for the possibility that killings other than those allegedly committed "[f]rom on or about 27 January to 28 January 2008" are included in Count 1. This is inconsistent with the accused's right to be informed of the charges. The Chamber agrees with the defence that the overall number of victims of the alleged killings should be provided in relation to the time frame of the relevant charge. The contested time indication should thus be adjusted accordingly.

(iii) Instructions to the Kenya Police and/or Major General Ali

54. The defence objects to the allegation, at paragraphs 21, 34, 76, 78, and 86 of the Updated DCC, that Mr Muthaura issued instructions to members of the Kenyan Police other than Major General Mohammed Hussein Ali, for the Kenyan Police not to interfere with the attacks. The defence submits that the Confirmation Decision only contains findings regarding instructions to Major General Ali and nobody else.⁹⁰ The prosecution argues that the Pre-Trial Chamber's reliance on evidence regarding instructions to Major General Ali cannot be understood to limit the prosecution's allegations regarding Mr Muthaura's interaction with the Police to giving such instructions. The prosecution submits that the Pre-Trial

⁹⁰ Parties' Observations, pp. 29-31, 64-65, 116-118, 119-122, 129-130; Defence Objections to the Modified Charges Section, p. 3.

Chamber did not explicitly reject the allegation of Mr Muthaura's interaction with the Police.⁹¹

55. The Pre-Trial Chamber found that the evidence did not support the allegation that the police agencies active in Nakuru and Naivasha participated, by way of inaction, in the attack carried out by the Mungiki.⁹² The Pre-Trial Chamber nonetheless examined the evidence of instructions issued by Mr Muthaura to Major General Ali in the context of the alleged "overall role assumed by Mr Muthaura in the commission of the crimes".⁹³ It is thus consistent with the Confirmation Decision to retain the allegations regarding instructions issued by Mr Muthaura to Major General Ali, in so far as they are of relevance to Mr Muthaura's overall role in the alleged commission of the crimes. The Chamber finds the allegations regarding instructions to members of the Kenya Police other than Major General Ali to be similarly relevant to Mr Muthaura's overall role. As the Pre-Trial Chamber did not reject such allegations, the defence's objection is essentially of the type discussed earlier in this Decision and concerns the lack of findings on specific issues in the Confirmation Decision. The lack of such findings should not in principle result in the deletion of the corresponding statements of the facts from the DCC. Furthermore, having regard to (i) the non-confirmation of allegations of the involvement of the Kenya Police in the attacks by its deliberate failure to intervene, and (ii) the fact that the allegations regarding the instructions issued by Mr Muthaura can therefore only be examined in a limited context, the Chamber sees no risk of prejudice to the defence.

⁹¹ Parties' Observations, pp. 29-35, 64-65, 116-117, 119-121, 129-130; Prosecution Reply, pp. 8-12.

⁹² Confirmation Decision, para. 226.

⁹³ Confirmation Decision, para. 379.

(iv) Inadequate police response

56. The defence objects to the retaining, in paragraphs 58, 68 and 88 of the Updated DCC, of the prosecution's allegation regarding the inadequate response of the Kenya Police. This allegation is linked to the allegations of unhindered passage of attackers to Nakuru town and Naivasha as well as the allegation that the accused were aware that the inaction of the Kenya Police during the attacks would significantly contribute to the crimes.⁹⁴ The defence contends that it is unacceptable to retain the allegation regarding the Kenya Police in view of the finding of the Pre-Trial Chamber attributing such inadequate response to factors other than police participation in a common plan.⁹⁵ With regard to the unhindered passage to Nakuru town and Naivasha, the prosecution argues that the allegation of inadequate response by the Kenya Police is a background detail which does not constitute a modification of charges and is thus properly included in the Updated DCC.⁹⁶ With regard to the allegation concerning the accused's awareness of the Kenya Police's inaction, the prosecution observes that the Pre-Trial Chamber did not rule on that specific allegation and that it is thus properly included in the Updated DCC.⁹⁷

57. The Chamber notes that the contested allegations in paragraphs 58 and 68 of the Updated DCC were neither copied to the Modified Charges Section, nor incorporated by reference. In the light of the prosecution's submissions, these allegations are thus background details and the Chamber finds it unnecessary to resolve the disputes regarding these paragraphs.

⁹⁴ Parties' Observations, pp. 92-94, 110-111, 132-133.

⁹⁵ Parties' Observations, pp. 93, 110, 132-133.

⁹⁶ Parties' Observations, pp. 93, 110, citing to ICC-01/05-01/08-836, quoted above, paras 42-43.

⁹⁷ Parties' Observations, pp. 133-134.

58. As regards the allegation, in paragraph 88, of the accused persons' awareness that the inaction of the Police would significantly contribute to the crimes, the Chamber notes that, while the Pre-Trial Chamber found the evidence of the inadequate response of the police reliable,⁹⁸ it found that that evidence pointed to ethnic bias, ineptitude and failure to appreciate the violence as the reasons for such inadequate response, rather than to an "identifiable course of conduct" amounting to participation, by way of inaction, in the attack.⁹⁹ In view of this conclusion of the Pre-Trial Chamber, the prosecution can no longer allege that the police inaction contributed to the crimes taking the requirement of *mens rea* into account. However, the Pre-Trial Chamber examined the evidence of instructions issued by Mr Muthaura to Major General Ali to ensure that the Police would not interfere with the attackers and found these instructions to be "indicative of the overall role assumed by Mr Muthaura in the commission of the crimes".¹⁰⁰ Therefore, the allegation of the accused's awareness that the police's non-interference would contribute to the crimes should be viewed in the specific context identified by the Pre-Trial Chamber. It should not be regarded as implying that any police inaction amounting to participation in the attacks resulted from any instructions Mr Muthaura might have allegedly given to Major General Ali. Given the very specific context in which this allegation is made, the Chamber is of the view that retaining this allegation in the Updated DCC does not exceed the scope of the charges and that there is no need to remove it.

(v) Looting

59. The defence seeks the removal of "looting" from the phrase "the direct perpetrators implemented the common plan of the Principle Perpetrators by

⁹⁸ Confirmation Decision, paras 225-226.

⁹⁹ Confirmation Decision, para. 226.

¹⁰⁰ Confirmation Decision, para. 379.

subjecting perceived ODM supporters to systematic acts of violence, including rapes, killings, looting, burning and destruction of their properties” appearing at paragraph 29 of the Updated DCC. The defence argues that it is improper to refer to looting in this context due to the fact that the Pre-Trial Chamber denied looting as a “fact and circumstance” of the case and held that the evidence presented did not establish looting and destruction of property as conduct causing ‘serious injury to mental health’ within the definition of other inhumane acts pursuant to Article 7(1)(k) of the Statute. The defence avers that any mention of looting near language referring to the common plan should be removed.¹⁰¹ The defence also objects, on the same ground, to the inclusion of allegations of looting in the revised Count 2 (Deportation or forcible transfer) in the Modified Charges Section.¹⁰²

60. The prosecution states that the defence’s argument is incorrect as the Pre-Trial Chamber did not reject the allegation of looting altogether. The prosecution argues that the Pre-Trial Chamber relied on evidence of looting and destruction of property as predicate acts underlying the charge of deportation or forcible transfer under Article 7(1)(d) of the Statute.¹⁰³

61. The Pre-Trial Chamber did reject looting¹⁰⁴ as a cause of mental suffering amounting to one of the required elements of other inhumane acts as a crime against humanity. Importantly, however, the Pre-Trial Chamber did not find that the evidence was insufficient to establish substantial grounds to believe that acts

¹⁰¹ Parties’ Observations, p. 42.

¹⁰² Defence Objections to the Modified Charges Section, pp. 7-8.

¹⁰³ Parties’ Observations, pp. 42-43; Prosecution Reply, pp. 17-18.

¹⁰⁴ The reference to ‘destruction of property’ by the Pre-Trial Chamber at paras 278-279 of the Confirmation Decision is intended to include acts such as destroying homes and businesses through acts of arson and looting of personal properties. This is evidenced from the fact that the Pre-Trial Chamber at para. 268 quotes the prosecution’s allegation of acts causing serious injury to mental and physical health as acts of “destroying homes and businesses through acts of arson and looting personal properties.” When the Pre-Trial Chamber then goes on to consider this at para. 278, it refers to the “Prosecutor’s allegation that destruction of property occurred.”

of looting occurred. Instead, the Pre-Trial Chamber found that the evidence did not demonstrate that acts of looting caused the requisite “serious injury to mental health” to fall within the definition of other inhumane acts pursuant to article 7(1)(k) of the Statute. Notably, the Pre-Trial Chamber relied on evidence of looting and property destruction as a predicate act underlying the charge of deportation or forcible transfer.¹⁰⁵ The Pre-Trial Chamber states that: “the evidence presented in fact reveals that ... such destruction of property was used, amongst other coercive acts, as a means to ensure forcible transfer or deportation.”¹⁰⁶

62. Therefore it is only in the context of other inhumane acts that the Pre-Trial Chamber denied looting; it did not deny that looting took place, nor did it deny looting as referred to in paragraph 29 of the DCC in the context of a widespread or systematic attack and as an act underlying the charge of deportation or forcible transfer. Therefore the Chamber finds that there is no reason to delete “looting” from paragraph 29 of the DCC and paragraph 7 of the Modified Charges Section.¹⁰⁷

(vi) Circumcision

63. The defence seeks the removal, from paragraphs 31, 60, and 71 of the Updated DCC, of phrases suggesting that traumatic circumcision was a form of sexual violence¹⁰⁸ and that acts of sexual violence other than rape occurred.¹⁰⁹ The defence submits that the Pre-Trial Chamber expressly excluded traumatic circumcision as an act falling within the definition of “other forms of sexual

¹⁰⁵ Confirmation Decision, paras 134, 244, 279.

¹⁰⁶ Confirmation Decision, para. 279.

¹⁰⁷ The Chamber notes the pending “Prosecution’s application for notice to be given under Regulation 55(2) with respect to certain crimes charged”, whereby the prosecution requests that the Chamber give notice that it may employ Regulation 55(1) of the Regulations to re-characterise, *inter alia*, the acts of looting and property destruction as predicate acts underlying the charge of persecution (3 July 2012, ICC-01/09-02/11-445, paras 23-26).

¹⁰⁸ Parties’ Observations, pp. 60-61, 98-100, referring to Updated DCC, paras 31 and 60.

¹⁰⁹ Parties’ Observations, pp. 112-113, referring to Updated DCC, para. 71.

violence” and therefore phrases suggesting otherwise need to be removed.¹¹⁰ Further, in the view of the defence, the Confirmation Decision does not support the allegation that other forms of sexual violence occurred in Naivasha.¹¹¹

64. The prosecution does not object to amending the passages to remove the challenged reference to sexual violence, taking into account the defence’s objection, albeit using language different from that proposed by the defence.¹¹²

65. The Chamber agrees with the defence that, given the Pre-Trial Chamber’s findings that these acts of traumatic circumcision do not fall within the definition of “other forms of sexual violence,”¹¹³ it is appropriate to alter the passages at issue so that they do not imply that these acts are acts of sexual violence for the purposes of the charges against the accused. Thus the Chamber accepts the prosecution’s proposal to amend the relevant phrase in paragraph 31 of the Updated DCC to read: “this type of violence”. As regards paragraphs 60 and 71, the Chamber notes that they were not incorporated by reference in the Modified Charges Section and that not all content of these paragraphs was copied to that new Section. The Chamber thus finds it unnecessary to resolve the dispute regarding the language of those two paragraphs.

66. Portions of these two paragraphs were copied to paragraphs 8 and 11 of the Modified Charges Section. With regard to paragraph 8, the Chamber notes that the Pre-Trial Chamber declined to confirm the charge of other forms of sexual violence and, as such, reference to other forms of sexual violence as a crime within the meaning of article 7(1)(g) needs to be removed. The Chamber therefore finds the phrase “forty-five cases of sexual violence, including rape” to be suggestive of

¹¹⁰ Parties’ Observations, pp. 60-61, 98-100.

¹¹¹ Parties’ Observations, pp. 112-113, citing Confirmation Decision, paras 264-266.

¹¹² Parties’ Observations, pp. 60-61, 98-100 and 112-113.

¹¹³ Parties’ Observations, pp. 60-61, 98-100, citing Confirmation Decision, paras 264-266.

there being cases of sexual violence other than rape, which is inconsistent with the ruling of the Pre-Trial Chamber. The prosecution is therefore directed to modify the allegation in paragraph 8 of the Modified Charges Section to refer only to the number of cases of rape. The direction given by the Chamber in this paragraph is without prejudice to the pending “Prosecution’s application for notice to be given under Regulation 55(2) with respect to certain crimes charged”, whereby the prosecution requests that the Chamber give notice that it may employ Regulation 55(1) of the Regulations to re-characterise, *inter alia*, the acts of forcible circumcision and penile amputation as “other forms of sexual violence”.¹¹⁴

67. Finally, the Chamber notes that in view of the new formulation of paragraph 11 of the Modified Charges Section, which does not make reference to “sexual violence”, the defence’s objections are moot.

(vi) Local Mungiki attackers

68. The defence seeks modification of allegations, at paragraphs 42, 56 and 58 of the Updated DCC, which make reference to large numbers of Mungiki being transported from outside the Rift Valley to Nakuru.¹¹⁵ The defence contends that these allegations are inconsistent with the Confirmation Decision as the Pre-Trial Chamber held that “the majority of attackers in Nakuru were local Mungiki”.¹¹⁶ The prosecution argues that while the Pre-Trial Chamber found that the majority of attackers in Nakuru were local, this is not the same as finding that all Mungiki were from Nakuru and that none of the Mungiki attackers had come from elsewhere.¹¹⁷

¹¹⁴ 3 July 2012, ICC-01/09-02/11-445, paras 18-22.

¹¹⁵ Parties’ Observations, pp. 72-73, 89-90, and 92-93.

¹¹⁶ Confirmation Decision, para. 163.

¹¹⁷ Parties’ Observations, p 92, referring to Updated DCC, para. 58.

69. As regards paragraphs 56 and 58, the Chamber notes that the contested content of these paragraphs was neither copied to the Modified Charges Section, nor incorporated by reference. The Chamber thus finds it unnecessary to resolve the disputes regarding the language of those two paragraphs.

70. As regards paragraph 42, the Pre-Trial Chamber found that “viewed as a whole, the evidence establishes that the majority of the attackers in Nakuru were local Mungiki”.¹¹⁸ It is to be noted, however, that the Pre-Trial Chamber did make reference to the fact that some attackers in Nakuru arrived from elsewhere.¹¹⁹ The Chamber is of the view that the allegations that large numbers of Mungiki were transported to Nakuru are not inconsistent with the finding that the majority of the attackers were local Mungiki. The Pre-Trial Chamber’s finding should not be taken to mean anything other than that the local Mungiki members outnumbered those transported from elsewhere. The defence’s objection is unfounded and the contested allegation may be retained in the current form.

(4) Disputes over the Modified Charges Section

(i) Securing the release of arrested Mungiki members

71. The defence objects to the inclusion, in paragraph 2(b) of the Modified Charges Section, of the allegation that Mr Muthaura contributed to the commission of the crimes by securing the release of arrested Mungiki members. The defence contends that this allegation was a mere background fact in the Updated DCC.¹²⁰ The prosecution argues that this fact is material to the charges, as it “forms part and parcel of the ‘institutional support’ Mr Muthaura provided on behalf of the PNU coalition”. The prosecution submits that at trial it will present evidence that

¹¹⁸ Confirmation Decision, para. 163.

¹¹⁹ Confirmation Decision, para. 163.

¹²⁰ Defence Objections to the Modified Charges Section, pp. 4-5.

Mr Muthaura secured the release of arrested Mungiki members both before and during the post-election violence.¹²¹

72. The Chamber notes that the Updated DCC includes in the “Background” section the allegation that Mr Muthaura intervened to secure the release of arrested Mungiki members.¹²² The same allegation is included in the section discussing the “Preparatory Meetings and Activities”,¹²³ but not in Section VI of the Updated DCC, discussing the alleged criminal responsibility of the accused. The Chamber notes, however, that the Pre-Trial Chamber found that while “the activation of the mechanism that led to the physical commission of the crimes is the most important contribution of both Mr Muthaura and Mr Kenyatta to the crimes”, the evidence also showed “additional forms of contribution”, including Mr Muthaura’s intervention to secure the release of Mungiki members.¹²⁴

73. In view of the Pre-Trial Chamber’s express finding to the effect that this alleged fact constituted an additional form of contribution, the Chamber considers the inclusion of the allegation in the Modified Charges Section to be consistent with the Confirmation Decision. While it would have been preferable if the prosecution had included this allegation in Section VI of the Updated DCC earlier, this late addition of the allegation is acceptable.

(ii) Type of weapons provided to the perpetrators

74. The defence contends that, in view of the Pre-Trial Chamber’s rejection of the allegation that guns were distributed to the Mungiki for the alleged attack in Naivasha, the prosecution should specify what kind of weapons were allegedly distributed, rather than referring to “weapons” in general in paragraph 1(h) of the

¹²¹ Prosecution Reply, pp.13-14.

¹²² Updated DCC, para. 23.

¹²³ Updated DCC, para. 50, internal references omitted.

¹²⁴ Confirmation Decision, paras 376, 378.

Modified Charges Section.¹²⁵ Relying on the same finding of the Pre-Trial Chamber, the defence also objects to the allegation, in paragraph 5 of the Modified Charges Section, that 6 victims were killed by gunshots.¹²⁶ The prosecution submits that the Pre-Trial Chamber did not expressly reject the allegation that weapons were used in Naivasha and points to the Pre-Trial Chamber's conclusion that *at that stage of proceedings* it did not find sufficient evidence supporting that allegation.¹²⁷

75. The Pre-Trial Chamber did not find sufficient evidence with respect to the allegation that weapons and uniforms were used in Naivasha.¹²⁸ The words "at this stage of proceedings" used by the Pre-Trial Chamber do not alter the significance of that finding, since they clearly refer to the stage of confirmation of the charges. The Pre-Trial Chamber's conclusion should thus be viewed as a rejection of that particular allegation based on the lack of sufficient evidence establishing substantial grounds to believe, within the meaning of Article 61(7) of the Statute. The allegation in the Modified Charges Section that 6 victims were killed by gunshots is inconsistent with that finding of the Pre-Trial Chamber. In addition, when making that finding the Pre-Trial Chamber relied, *inter alia*, on the evidence that gunshot deaths were attributable to the police.¹²⁹ The Chamber is thus of the view that the prosecution should not include the allegation that gunshots were the cause of some of the alleged killings in Naivasha. The allegation at issue should be removed both from the Modified Charges Section and the remainder of the Updated DCC.

¹²⁵ Defence Objections to the Modified Charges Section, pp. 2-3, citing to Confirmation Decision, para. 174.

¹²⁶ Defence Objections to the Modified Charges Section, pp. 6-7, citing to Confirmation Decision, para. 174.

¹²⁷ Prosecution Reply, pp. 7-8, 17.

¹²⁸ Confirmation Decision, para. 174.

¹²⁹ Confirmation Decision, para. 174.

76. The Chamber, however, notes that the allegation that the accused provided weapons to the direct perpetrators is not inconsistent with the Pre-Trial Chamber's findings. The finding concerns the use of weapons in the attack in Naivasha, rather than provision of weapons before the attack. The defence does not explain why the finding of the Pre-Trial Chamber should necessitate the addition of detail by the prosecution in relation to the allegation of provision of weapons. The Chamber is of the view that the allegation contains sufficient detail and there is no need for modification.

(iii) Rape in Naivasha

77. The defence seeks the removal of the entire paragraph 9 of the Modified Charges Section and submits that the prosecution failed to state the facts and circumstances outlining the alleged rape in Naivasha.¹³⁰ The prosecution submits that the Pre-Trial Chamber confirmed the charge of rape and that, in view of the ongoing disclosure of evidence, the defence's request for the withdrawal of this charge is premature.¹³¹

78. The Chamber notes that allegations of rape in Naivasha were made in the Updated DCC¹³² and the evidence of such rapes was analysed by the Pre-Trial Chamber.¹³³ On the basis of that evidence, the Pre-Trial Chamber confirmed the charge of rape with respect to Naivasha.¹³⁴ The Chamber thus cannot agree with the defence that the prosecution should withdraw this charge. The Chamber, however, agrees that more detail should be provided. The instances of rape discussed in the Confirmation Decision could be used as the basis. If possible, the

¹³⁰ Defence Objections to the Modified Charges Section, p. 8.

¹³¹ Prosecution Reply, pp. 19-20.

¹³² Updated DCC, paras 31, 71.

¹³³ Confirmation Decision, para. 259.

¹³⁴ Confirmation Decision, paras 145, 257.

material facts of other such cases alleged by the prosecution with respect to Naivasha should be added.

(iv) Injuries to people in Naivasha

79. The defence contends that the prosecution failed to detail how the injuries referred to in paragraph 11 of the Modified Charges Section qualify as inhumane acts under the Statute. The defence refers to the Pre-Trial Chamber's ruling on other inhumane acts, which the defence interprets as requiring the prosecution to demonstrate that the acts at issue inflicted great suffering and serious injury to body or to mental or physical health.¹³⁵ The prosecution refers to the Pre-Trial Chamber's conclusion that other severe injuries fall within the category of other inhumane acts. The prosecution contends that the issue of whether it can prove that the injuries caused to 53 people satisfy the requirements of Article 7(1)(k) of the Statute is to be determined at trial and that this is not a matter of precision of the allegations.¹³⁶

80. The Chamber notes that the paragraph of the Confirmation Decision to which the defence cited does not require the prosecution to detail how the alleged injuries qualify as other inhumane acts within the meaning of Article 7(1)(k) of the Statute. Rather, it merely summarises the prosecution's allegations. The basis of the defence's objection is thus unclear. It must also be noted that the Pre-Trial Chamber analysed the evidence provided in support of these allegations and concluded that the crime of other inhumane acts, in so far as based on these allegations, was established to the required threshold.¹³⁷ The Pre-Trial Chamber had no difficulty qualifying the alleged acts as other inhumane acts, even though it relied on the allegations formulated in the same way as they are in the Modified

¹³⁵ Defence Objections to the Modified Charges Section, pp. 8-9, citing to Confirmation Decision, para. 267.

¹³⁶ Prosecution Reply, pp. 21-22.

¹³⁷ Confirmation Decision, paras 271-273, 280.

Charges Section. The Chamber is of the view that these allegations are formulated with sufficient clarity and that there is no need for modification.

(v) Severe physical injuries as acts of persecution

81. The defence contends that “causing severe physical injuries” is not an independent fact and circumstance and should thus not be listed separately as an act underlying the charge of persecution. The defence seeks the removal of this section from Count 5 in the Modified Charges Section.¹³⁸ The prosecution agrees to delete the reference to severe physical injuries.¹³⁹

82. Having regard to the parties’ agreement and their arguments, the Chamber agrees that the reference to the acts of causing severe physical injuries should be removed from Count 5.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISREGARDS the Defence Response;

ORDERS that the Motion to Strike be re-classified as public; and

DIRECTS the prosecution to modify the Updated DCC and the Modified Charges Section as indicated in this Decision and the Annex thereto, and file, no later than 5 January 2013, a final Updated DCC thus modified and replacing the previous Charges section with the Modified Charges Section modified in accordance with this Decision.

¹³⁸ Defence Objections to the Modified Charges Section, pp. 9-10.

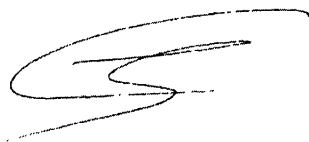
¹³⁹ Prosecution Reply, p. 22.

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

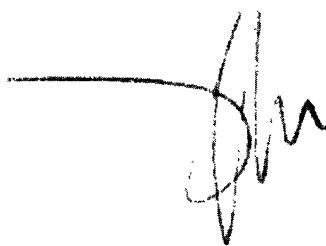
Judge Eboe-Osuji appends a concurring separate opinion. Judge Van den Wyngaert appends a separate opinion.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 28 December 2012

At The Hague, The Netherlands

CONCURRING SEPARATE OPINION OF JUDGE EBOE-OSUJI

1. I concur with the decision of the Chamber. I do, however, consider it important to express a separate view on the question whether the document containing the charges [‘the DCC’] is an authoritative document of reference for purposes of the charges after their confirmation, including for the following purposes: (i) fair notice of the charges to the accused (in terms of article 67(1)(a) of the Rome Statute that gives to the accused the right to be informed promptly and in detail of the nature, cause and content of the charges against him); (ii) the trial of the charge (in terms of provisions including article 64(8)(a) that requires the Trial Chamber, at the commencement of the trial, to read the charges to the accused and satisfy itself that (s)he understands them and to enter a plea to them); and (iii) the judgment on the merits (in terms of article 74(2) that requires the Trial Chamber to confine the judgment to factual circumstances described in the charges and any amendments to the charges).

2. The issue is provoked by the proposition, among other things, that at the ICC, the DCC is no longer a document of reference following confirmation of the charges; that thenceforth, the exclusive document of reference for the purposes indicated above is the confirmation decision [‘the CD’] issued by the Pre-Trial Chamber.

3. In my view, that proposition is not supported by (i) a fair construction of the Rome Statute; (ii) practical considerations relating to the workings of the ICC; and (iii) customary international law in the area of criminal procedure.

I. A FAIR CONSTRUCTION OF THE ROME STATUTE

4. In the *Katanga and Ngudjolo* case, Trial Chamber II held that following confirmation of charges, the Confirmation Decision would wholly supplant the Document Containing the Charges; and that thenceforth, the CD would become the only document which can serve as a reference during the trial before a Trial Chamber.¹ This proposition would be relatively uncontroversial, if it meant to say that the CD shall be the sole document of reference for purposes of resolving any inconsistency between the DCC and the CD. But it is clear that such a non-eventful proposition was not what TC II had in mind to say. Rather, it was this:

¹*Prosecutor v Katanga and Ngudjolo Chui*, transcript of status conference of 2 November 2009, Doc No ICC-01/04-01/07-T-74-CONF-ENG CT 02-11-2009 1/65 NB T, p 7. See also *Prosecutor v Katanga and Ngudjolo Chui (Decision on the Filing of a Summary of the Charges by the Prosecutor)* dated 21 October 2009, Doc No ICC-01/04-01/07-T-74-CONF-ENG CT 02-11-2009 1/20 CB T, para 16.

the Document Containing the Charges 'can no longer serve as a reference for the hearing on the merits.'²

5. With respect, I am unable to concur with that view, although the view is not without some value. One such value could result from a vision of uniform construct of *stare decisis* on the charges, in a manner that eclipses the Prosecutor's charging document as the document of reference in the same sphere of operation. Traditionally [*vide* international criminal practice and procedure before or outside the ICC], such manner of *stare decisis* would be found only in the judgments of the Trial Chambers and the Appeals Chamber. But with the Pre-Trial Chamber as a distinct feature of the ICC, one sees the allure of a similarly overarching voice for the Pre-Trial Chamber as regards the fate of the charges, for purposes of symmetrical appearance. That is to say, the symmetry lies in giving the Pre-Trial Chamber, the Trial Chamber and the Appeals Chamber each a voice that resonates in the sphere of the charges. It is certainly an attractive proposition as far as it goes. Nevertheless, such a consideration is insufficient to sustain the theory that the DCC is no longer a document of reference following confirmation of charges. Despite its value, it is not a naturally compelling theory. It is particularly undermined by a close consideration of the texts of the basic documents of the Court and the practical circumstances of their application in the relevant context, buttressed by a clear view of generally accepted practice that has become customary in the administration of international criminal justice of which the ICC forms a part.

The 'Document Containing the Charges'

6. The texts of the basic documents do not clarify the matter in explicit terms. But their construction gives confident clues. One such clue appears in the terminology of article 61(3)(a)--the only provision in which the Rome Statute indicates the full title of the DCC. There, it is provided that within a reasonable time before the confirmation hearing, the suspect shall be given a copy of 'the document containing the charges on which the Prosecutor intends to bring the person to trial.' Common sense squirms at the proposition that for purposes of the trial, 'the document containing the charges *on which the Prosecutor intends to bring the person to trial*' can no longer serve as a reference for the conduct of the contemplated trial.

²*Prosecutor v Katanga and Ngudjolo Chui*, transcript of status conference of 2 November 2009, *ibid*. See also *Prosecutor v Katanga and Ngudjolo Chui (Decision on the Filing of a Summary of the Charges by the Prosecutor)* dated 21 October 2009, *ibid*, para 14.

Amendment of Charges

7. But, perhaps, the surest clue indicating the likely incorrectness of that conclusion lies in a proper appreciation of article 74(2) of the Rome Statute. That provision operates at the point of verdict on the merits of the case upon conclusion of the trial. It requires the Trial Chamber to confine its judgment on the merits to the factual circumstances ‘described in the charges and any amendments to the charges.’ At its lowest denominator, the clue lies in the power of amendment of charges. It is the authority with the power to make ‘any amendments to the charges’ that is encumbered with the obligation to frame the document which shall serve as the primary document of reference that describes the facts and circumstances which provide notice of the crime to the accused (for purposes of the trial), while limiting the scope of the Trial Chamber’s judgment on the merits (at the conclusion of the case). That the Prosecutor is the authority encumbered with that obligation is quite clear from the context of other instances in which the Statute makes provisions relating to the amendment of charges. They appear particularly in three provisions in article 61 concerning confirmation of charges. I briefly review them next.

8. Article 61(4) gives the Prosecutor the power (i) to continue her investigation while a confirmation hearing is pending, but before the hearing itself; and (ii) to amend or withdraw any charges; provided the suspect charged is given reasonable notice, before the hearing, of any amendment or withdrawal of charges.

9. Article 61(7)(c)(ii) contemplates a situation in which the evidence before the Pre-Trial Chamber, during the confirmation hearing, appears to establish a different crime than the crime(s) charged by the Prosecutor in the DCC. The provision *requires* the Pre-Trial Chamber to adjourn the hearing and, among other things, request the Prosecutor to amend the charge. Notably, the provision does not authorise the Pre-Trial Chamber to proceed with the hearing and render a confirmation decision which would recognise the different crime revealed in the hearing. The consideration alone that article 61(7)(c)(ii) *requires* the Pre-Trial Chamber to adjourn the hearing and request the Prosecutor to amend the charge clearly negates the proposition that following the confirmation of charges the DCC ‘can no longer serve as a reference for the hearing on the merits.’ It would surely be an unnecessary step resulting in unnecessary delay to require such an adjournment and amendment of a document that would no longer serve as a reference for the hearing on the merits, if the CD, as the sole document of reference for the confirmed charges, could just as easily have indicated what the

Pre-Trial Chamber found during the confirmation hearing—i.e. that a different crime had been indicated in the evidence adduced before the Pre-Trial Chamber.

10. Finally, article 61(9) provides that *the Prosecutor* ‘may amend the charges’ in the period between their confirmation and commencement of trial, with the permission of the Pre-Trial Chamber and after notice to the accused. The notion of ‘amendment’ of charges in this context contemplates an amendment of charges that will control the trial. In terms of practical aspects of amendment of charges following the confirmation decision, the question is necessarily engaged as to whether the drafter had in mind that the Prosecution would be amending the confirmation decision, if indeed the drafter is to be presumed to intend the confirmation decision rather than the DCC as the document to be looked to for purposes of framing the charges that will control the trial. Surely, such an obviously awkward question would have caused the drafter to be clear in stating that it is indeed the confirmation decision that controls the notice of the charges; and then explain how the Prosecutor may amend the charges without engaging the question whether her power of amendment relates to the confirmation decision.

11. In addition, why would the drafter go through the trouble of giving the Prosecutor the power to ‘amend’ the charges after confirmation, albeit with the permission of the Pre-Trial Chamber, if the charging document she frames is no longer to serve as a reference for the charges? It would just have been as easy and better for the provision to give the Pre-Trial Chamber the authority to amend the charges by way of variation of the CD (possibly at the request of the Prosecutor), which shall thereafter control every question of notice of the crimes charged.

12. In light of the role of the Pre-Trial Chamber in confirming charges or permitting their amendment, I anticipate a demurrer from proponents of the view that the CD is the sole document of reference: they would argue, I expect, that article 74(2) must be read to mean that judgment on the merits shall not exceed the factual circumstances ‘described in the charges and any amendments to the charges’ *as described in the CD or, as the case may be, the decision permitting the Prosecutor to amend the charges*. But the improbability of such a reading becomes self-evident when one considers what would be entailed in an *amendment* process. Here it is. With the view that the CD controls notice of the charges, it would mean that a decision permitting the Prosecutor to amend, would either involve having the accused to read two decisions (the original confirmation decision and the decision permitting the amendment of charges) in order to get notice of the charges under prosecution. Alternatively, the Pre-Trial Chamber would have to reissue the entire CD and incorporate all its unvaried

terms into the decision permitting amendment. Either of these procedures is more cumbersome than the simpler process of permitting the Prosecutor to amend the charges, as is often done in other forums, by updating the contents of an existing document and then reissuing it. At any rate, as noted earlier in another context, had the drafters intended for the CD to be the sole document of reference for the charges following their confirmation, they would have been able to add the few words necessary to make that intent clear.

The Confirmation Process

13. But beyond the clue that article 74(2) and its related provisions provide in the resolution of the question now under discussion, the next point of inquiry is whether there is anything about the confirmation of charges that intrinsically imports as inevitable the conclusion that the CD must be the sole document of reference thereafter? I see nothing at all that suggests such an answer. To the contrary, the preponderance of factors weighs against such a conclusion. To begin with, the very idea of 'confirmation' would point to the conclusion that the DCC drawn up by the Prosecutor should be the primary document of reference. In *Black's Law Dictionary*, for instance, the verb 'confirm' is defined as follows: '1. To give formal approval to ... 2. To verify or corroborate ... 3. To make firm or certain' These various senses of the word, all of which are consistent with the idea of confirmation of charges at the ICC, would then make that document which is approved, verified or corroborated or made firm or certain, the prominent document of reference for what was confirmed. One struggles to follow the process of reasoning by which the document containing what is approved, verified or corroborated or made firm or certain 'can no longer serve as a reference' for what is confirmed.

II. PRACTICAL CONSIDERATIONS REGARDING THE ICC's WORK

14. Indeed, the practical circumstances of the application of the contrary view also make its objective highly unlikely. Here, we should first consider the relationships between the Trial Chamber (in their view and use of the charging document), on the one hand, and, on the other, the Pre-Trial Chamber or Prosecutor (depending on who is seen as bearing the responsibility for lack of clarity in the document of reference). The assignment of a case to a Trial Chamber comes with the corollary power to issue necessary orders for the efficient management of the trial process. These powers include the power to require, by way of appropriate direction, greater clarity in the charging document if it is seen to be deficient in giving proper notice of the charge. This trains the spotlight on the document seen as the primary document of reference. There is no power in the Trial Chamber to order the Pre-Trial

Chamber to clarify the content of the CD if it is to be taken as the primary document of reference for the charges. But there is always a power unquestioned in a Trial Chamber to issue an order to the Prosecutor—which she must obey—directing her to make her charging document clearer if it is an important document of reference. It would be unfair and wrong to blame the Prosecutor and order her to clarify a CD which is not clear in providing proper notice of the charges, if the CD were to be the only document of reference for notice of the charges. That consideration therefore negates the suggestion that the CD is the primary document of reference.

15. Another factor to consider is the practical matter of who is best situated to conceive, distil, frame and sharpen the charges in writing in a manner that achieves both the quality of conciseness and comprehensiveness that should be the ideal of a properly crafted indictment. To frame this aspect of the inquiry, one might consider that reg 53 of the Regulations of the Court requires the Pre-Trial Chamber to deliver the confirmation decision in writing within 60 days from the end of the confirmation hearing. The implication of this factor cannot be overstated. It means that the Pre-Trial Chamber has just two months to review, consider, digest and deliberate upon all the documentary and viva-voce evidence (tendered by the Prosecution, the Defence and victim groups) and then draft, edit and revise their decision. Anyone with a modest familiarity with the nature of the judicial process in the international criminal justice system knows that this is a hard thing to achieve even in the smaller cases, let alone the larger ones. It does not leave much time for the essential task of rendering a lengthy legal writing into its most concise and comprehensive form through the desirable process of extensive revising and editing.³ The result would be to deliver what may be an understandable target of meeting the deadline for delivery of judgment, though it may be more voluminous than it should really be and not as ideally arranged in its presentation as the issuing judges might have wished if they had more time. Yet, the difficulty with such very lengthy decisions is not merely that they may make more work for the reader, but that they may not always convey the needed information (significantly to the accused) without generating some difficulties and possible confusion of their own.⁴ This explains both the general tendency of ICC Trial Chambers to require the Prosecutor to clarify or update the charges following the delivery of the CD and the attendant observations of the various Trial

³ See Bryan A Garner, *The Elements of Legal Style* [New York: Oxford University Press, 1991] pp 178—179 and 208—209.

⁴ See the observations of Trial Chamber II in *Prosecutor v Katanga and Ngudjolo Chui (Decision on the Filing of a Summary of the Charges by the Prosecutor)* dated 21 October 2009 para 13, indicating frustrations that are all too common at the ICC.

Chambers (in those decisions) that the CDs at the ICC do ‘not provide a readily accessible statement of the facts that underlie each charge’.⁵

16. These consequences of the time-limit on the PTC as compared with the incidence of the time available to the Prosecutor to frame charges should leave little doubt that the onus to draft a concise and comprehensive charging document is properly upon the Prosecutor, as a practical matter. This is for the simple reason that there is no time limit—certainly not a 60 day time limit—placed upon the Prosecutor to complete the document containing the charges. This leaves the Prosecutor in a better position, compared to the Pre-Trial Chamber, to distil a concise and comprehensive document of a considerably shorter number of pages than the Pre-Trial Chamber could have written within a 60 day time-limit.

III. CUSTOMARY INTERNATIONAL LAW OF CRIMINAL PROCEDURE

17. In the subsection entitled ‘Indictment’ in the *Max Planck Encyclopedia of Public International Law*, Wolfgang Schomburg and Jan Christoph Nemitz began their discussion with the following accurate observation: “Interestingly, the ICC Statute does not use the term ‘indictment’, referring instead to ‘the document containing the charges’”.⁶

18. Indeed, the omission of the word ‘indictment’ is an interesting omission. There is some anecdotal information that the avoidance of that word in the Rome Statute might, at least to some extent, have been inspired by the theory that ‘[t]he term “indictment” was also strange to many delegations’ to the meetings of the Rome Statute Preparatory Committee.⁷

19. It is of course difficult to accept that a term that had acquired customary usage in international criminal law (and more on that later) was avoided in the preeminent international criminal law treaty because those who drafted the treaty had found the word ‘strange’, as reported by the commentator quoted above. It is notable that the longer designation ‘document containing the charge’ has an absolute sameness of function with the

⁵See, for instance, *Prosecutor v Jean-Pierre Bemba Gombo (Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges)* dated 20 July 2010, para 30; *Prosecutor v Katanga and Ngudjolo Chui (Decision on the Filing of a Summary of the Charges by the Prosecutor)* dated 21 October 2009, *supra*, para 13; and *Prosecutor v Muthaura and Kenyatta (Order for the Prosecution to File an Updated Document Containing the Charges)* dated 5 July 2012, para 7.

⁶Wolfgang Schomburg and Jan Christoph Nemitz, ‘International Courts and Tribunals, Procedure’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition, <www.mpepil.com>, visited on 12 October 2012.

⁷See Fabricio Guariglia, ‘Investigation and Prosecution’ in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* [The Hague: Kluwer Law International, 1999] p 235.

single word ‘indictment’ that has been consistently and customarily used in English language documents to prescribe or describe processes of international criminal law. This is clear from the definition of ‘indictment’ stated in the *Concise Oxford English Dictionary*. It defines an indictment as ‘a document containing a charge.’ It is reasonable, of course, to suppose that there is a functional reason indicating why the draft persons chose to employ four English words in the English version of the Rome Statute to do the job that one English word had traditionally been employed to do in customary international criminal law. Unfortunately, however, the drafting history of the Rome Statute does not readily supply such a functional reason. What we are left with is the suggestion by the commentator quoted above that some delegates found the word ‘strange’. The situation is thus left to the better explanation of the phenomenon described in *Oppenheim’s International Law* and in *Pertulosa Claim* in the following observations: ‘The circumstances in which treaties are drafted are ... often such as to lead to lack of consistency in drafting and care must be taken in attributing significance to variations in terminology: “an interpreter is likely to find himself distorting passages if he imagines that their drafting is stamped with infallibility”: *Pertulosa Claim*, ILR 18 (1951) No 129 p 148’.⁸

20. The foregoing notwithstanding, the omission of the term ‘indictment’ has a certain incidence that is inconsistent with the theory that the DCC is not a primary document of reference for the charges following their confirmation. Surely, the failure to employ the terminology of ‘indictment’ necessitated its rather awkward replacement with the term ‘charges.’ Hence, wherever the word ‘indictment’ would ordinarily appear in the instruments of the other international criminal courts, one is apt to find the word ‘charge(s)’ in the equivalent place in the ICC documents. And if one followed the trail of the appearance of the word ‘charge(s)’ in the Rome Statute, one would eventually arrive at the conclusion that the DCC is a primary document of reference following the confirmation of charges. For instance, article 64(8) is one instructive place where the word ‘charges’ appears in the Rome Statute, in place of the traditional word ‘indictment’(the equivalent of the DCC) invariably used in the same place in the basic documents of other international—and quasi-international—criminal courts and tribunals. The provision requires the charges to be read to the accused before the commencement of trial. It would then have been truly strange to contend that after reading the charges in the ‘indictment’—had the word been used there in the sense of the document containing the charges—the indictment would no longer serve as the document of reference for the trial and determination of the factual boundaries of the judgment on the merits.

⁸*Oppenheim’s International Law*, 9th edn, by Sir Robert Jennings and Sir Arthur Watts [London and New York, Longman: 1997] p 1273, footnote 12.

21. In this connection, it may be of assistance to reiterate that ‘indictment’ is a word that has certainly acquired usage as a matter of customary international law, in the use of English legal language to describe the document containing the charges in the relevant aspects of international law. This is in the same way that the expression ‘*acte d’accusation*’ is the usual way of describing the equivalent idea when communicating about international criminal processes in the French language.

22. That the word ‘indictment’ has acquired the status of customary international legal usage is without a doubt. The evidence of it began with the London Agreement of 8 August 1945 entered into among France, UK, US and the USSR. That Agreement adopted the Charter of the Nuremberg International Military Tribunal, as an integral part of the Agreement. The word ‘indictment’ was employed in the Nuremberg Charter as the name for the documents containing the charges.⁹ Similar usage appears in the Charter of the Tokyo Tribunal¹⁰ and in Ordinance No 7 that established military tribunals empowered to try persons pursuant to Control Council Law No 10.¹¹

23. In the present era of enforcement of international criminal legal norms, the word ‘indictment’ has also been consistently used as the name for the document containing the charges. One sees it in the Statutes of the ICTR¹² and the ICTY¹³ adopted by the United Nations Security Council. Annexed to Security Council resolution 1757(2007) adopted on 30 May 2007 is the Agreement between the United Nations and the Lebanese Republic to which, in turn, is attached the Statute of the Special Tribunal for Lebanon. In the STL Statute, the word ‘indictment’ is also employed to describe the document containing the charges.¹⁴ Similar usage appears in the rules of procedure and evidence of the Special Panels for Serious Crimes established by the United Nations Transitional Authority for East Timor¹⁵ as well as in those of the Special Court for Sierra Leone¹⁶ and the Extraordinary Chamber in the Courts of Cambodia,¹⁷ also established by agreements between the United Nations and the governments

⁹See art 24 of the Nuremberg Charter.

¹⁰See article 15 of the International Military Tribunal for the Far East.

¹¹See articles III(a), IV(a) and XI(a) of Ordinance No 7 pursuant to the Control Council Law No 10.

¹²See article 19(3) of the ICTR Statute.

¹³See article 20(3) of the ICTY Statute.

¹⁴See art 20(1) of the STL Statute.

¹⁵See s 29.2 of UNTAET Reg 2000/30.

¹⁶See rr 61(ii) and (iii) of the Rules of Procedure and Evidence of the SCSL.

¹⁷See r 89bis(1) of the ECCC Internal Rules. It may be tempting to point to the singular instance of the ECCC where the ‘indictment’ is drawn up by the investigative judges—and not the prosecutors—as supporting the idea that the DCC at the ICC is no longer a document of reference for the charges following their confirmation. The supposed parallel, in that case, would be that investigative judges are ‘judges’ and not prosecutors. But such an argument that would ignore the fact that investigative judges are still investigators—they are not Pre-Trial Judges

of Sierra Leone and Cambodia respectively. In view of the constancy of the employment of the word 'indictment' to designate the document containing the charges in the instruments and processes of ancient and modern international criminal courts, there is little doubt that the practice has acquired the status of customary international law.

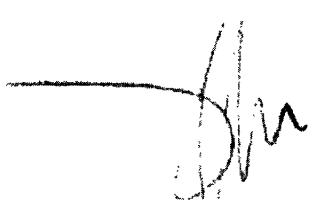
Generally Accepted Practice in the Administration of International Criminal Justice

24. The idea that an indictment drawn up by the Prosecutor as the investigating authority ceases to be a document of reference for the charges, following their confirmation, stands starkly alone in the practice and procedures of international criminal justice. The contrary is the case in virtually every other court or tribunal that has been known to administer international criminal justice. As indicated above, the standard practice is epitomised in the rule of practice that requires the charges in 'the indictment' to be read to the accused upon their settlement and before the commencement of the trial. Such was the case before the Nuremberg Tribunal, the Tokyo Tribunal, the ICTY, the ICTR, the SCSL, the STL, and the ECCC. It follows, therefore, that in the absence of express language, there is no compelling basis to depart from that settled practice in the interpretation and application of article 64(8)(a) of the Rome Statute which makes a similar provision.

25. Now, one practical difficulty that further makes it highly improbable that the drafters of the Rome Statute intended the CD—and not the DCC—as the document of reference is the sheer length of the CDs at the ICC. In the *Bemba* case, for instance, the CD ran into 244 pages; in the *Ruto and Sang* case, the majority decision ran into 139 pages; and, in the *Muthaura and Kenyatta* case, the majority decision ran into 155 pages. Is it really the case that the drafters of the Rome Statute intended that documents of these lengths are to be read to the accused at the commencement of trial?

at the ECCC. And the ICC PTC judges are not investigators. At the ICC, the investigator-in-chief is the Prosecutor. Hence, there is no true parallel between the investigative judge at the ECCC and the PTC judges at the ICC. We are then left with a situation in which the document of reference for the charges at the ECCC is the 'indictment' drawn up by the investigators and not by the PTC judges. At the ECCC, the PTC judges do get a chance to render decisions that affect notice of the charges. But such decisions, when they occur, never displace the indictment as a document of reference for the charges.

Dated this 28 December 2012, at The Hague



Chile Eboe-Osuji
Judge

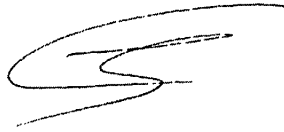
SEPARATE OPINION OF
JUDGE CHRISTINE VAN DEN WYNGAERT

1. Although I agree with my esteemed colleagues on the general approach taken in this decision, I am of the view that on some points it does not go far enough.
2. In general, I share the view that, in the absence of a sufficiently clear statement of all the material facts in the Confirmation Decision, Trial Chambers are entitled to ask the Prosecutor to provide an Updated Document Containing the Charges ("Updated DCC") and that such document is sufficiently authoritative, as long as it is consistent with the Confirmation Decision. This is not to say that I believe this to be an ideal situation. It would be far better if the Pre-Trial Chamber had itself formulated the charges exhaustively or made clear which parts of the Prosecutor's Document Containing the Charges it confirmed and which ones it rejected. However, under the present circumstances, I am satisfied that the proposed approach provides an appropriate solution to a complex problem. The comments I make below should thus be understood in light of the context of the present case, in which the Confirmation Decision does not provide the necessary information about the facts and circumstances of the case against the accused and in which it was necessary to ask the Prosecutor to provide an Updated DCC.
3. Where I depart from my colleagues is on what should be the content of the Updated DCC. In particular, I am of the view that the factual part of any DCC should contain a comprehensive statement of all but no more than the material facts and circumstances underlying the charges. It should not

contain any unnecessary background information or subsidiary facts. The right place for the Prosecutor to develop her narrative of the case, which must include the essential background information as well as the subsidiary factual allegations on which the Prosecutor relies to prove, directly or by inference, the material facts of the case, is the Pre-Trial Brief.

4. My main reason for making this distinction is that, in my view, the purpose of the DCC and the Pre-Trial Brief are different. Whereas the Pre-Trial Brief must provide the Defence with sufficient notice of the way in which the Prosecutor intends to plead her case at trial, the DCC plays a more fundamental role: it defines the legal and factual limits of the case. Considering the significance of the DCC, in terms of Article 74(2) of the Statute and especially Regulation 55 of the Regulations of the Court, it is of the utmost importance that the facts and circumstances contained in the DCC are clear, precise, and unambiguous.
5. The current format of the Updated DCC does not comply with these requirements. This is in part due to the fact that the DCC as it is currently drafted seems to be a hybrid between a proper DCC and a pre-trial brief. Unfortunately, the present decision does not cure this problem, as it allows the Prosecutor to retain background information and other information of a subsidiary nature in the DCC. I am also uncomfortable with the current dual structure of the Updated DCC, in which part of the Updated DCC would not formally contain the actual facts and circumstances of the charges, except for those passages that are included in the Modified Charges Section by reference. In my view this unnecessarily complicates matters which should be clear and simple.

6. For these reasons, I would not have allowed the Prosecutor to retain background facts and/or subsidiary facts in the Updated DCC. For the same reasons, I would have required the Prosecutor to provide a single clear statement of *only* the material facts and circumstances underlying *all* legal elements in this case, including the contextual circumstances and the mode(s) of criminal responsibility. In sum, the Updated DCC should be a concise and self-contained document in which the Chamber and parties alike find, in addition to the necessary identifying information, all but no more than the material facts and circumstances of the case as well as their legal qualification, in accordance with Regulation 52 of the Regulations of the Court.



Judge Christine Van den Wyngaert

Dated 28 December 2012

At The Hague, The Netherlands