

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 28 December 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

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 William Samoei Ruto
Mr Kioko Kilukumi Musau
Mr David Hooper

Legal Representatives of Victims
Mr Wilfried Nderitu

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek
Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 61(7) and 67(1)(a) of the Rome Statute (“Statute”) and Regulation 52 of the Regulations of the Court (“Regulations”), renders the following Decision on the content of the updated document containing the charges (“Decision”).

I. Procedural Background

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 The Updated DCC was to clearly indicate the material facts and circumstances underlying the charges² and not to include any facts explicitly rejected by the Pre-Trial Chamber in the Decision on the Confirmation of the Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute (“Confirmation Decision”).³ In its order, the Trial Chamber directed the prosecution to liaise with the defence teams of Mr Ruto and Mr Sang (together the “Defence”) during the preparation of the Updated DCC. Any points of disagreements between the parties regarding the content of the Updated DCC that could not be resolved during the consultations were to be filed in a jointly submitted prosecution-defence annex to the Updated DCC.⁴

¹ Order for the prosecution to file an updated document containing the charges, ICC-01/09-01/11-439.

² ICC-01/09-01/11-439, para. 8.

³ ICC-01/09-01/11-439, para. 9.

⁴ ICC-01/09-01/11-439, para. 10.

2. On 21 August 2012, the prosecution submitted the Updated DCC⁵ with three Annexes, including a chart submitted jointly by the prosecution and the Defence which comments on the remaining issues in dispute ("Parties Observations").⁶
3. On 20 November 2012, the Trial Chamber issued, by majority, with Judge Eboe-Osui dissenting, an Order regarding the Content of the Charges⁷: directing the prosecution to submit a modified "Charges" section of the Updated DCC containing all (but no more than) the "facts and circumstance described in the charges", presented separately for each count, by taking the facts and formulations already contained in the other sections of the Updated DCC. The Chamber granted the Defence 10 days to file its response and the prosecution 5 days to reply to the responses of the Defence.⁸
4. On 28 November 2012, the prosecution filed the 'Prosecution's Submission of the Charges against William Samoei Ruto and Joshua Arap Sang' with an annex containing a modified section of the "Charges" of the Updated DCC ("Modified Charges Section").⁹
5. On 10 December 2012, both defence teams filed their responses to the Modified Charges Section. The responses were notified to the Chamber on 11 December 2012 (together "Responses to the Modified Charges Section").¹⁰ On 12 December 2012, in an e-mail communication the Defence requested the Chamber to accept

⁵ Prosecution's Updated Document Containing the Charges pursuant to the Trial Chamber's Order (ICC-01/09-01/11-439), ICC-01/09-01/11-448.

⁶ Prosecution's Updated Document Containing the Charges pursuant to the Trial Chamber's Order, Annex C: Parties' Observations on the Updated Document Containing the Charges, ICC-01/09-01/11-448-AnxC, numbering each dispute after five general objections.

⁷ Order regarding the content of the charges, ICC-01/09-01/11-475.

⁸ ICC-01/09-01/11-475, p. 9.

⁹ Prosecution's Submissions of the Charges against William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11-486 and ICC-01/09-01/11-486-AnxA.

¹⁰ Sang Defence Response to Prosecution's Submission of the Charges against William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11-505; Ruto Defence Response to Prosecution's Submission of the Charges against William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11-506.

the filings despite them having been filed too late and informed the Chamber about logistical and technical difficulties which caused the delay.¹¹

6. On 17 December 2012, the prosecution filed its reply to the objections made by the defence (“Reply to the Defence Responses to the Modified Charges Section”).¹²

II. Analysis

7. The Chamber notes that the Responses to the Modified Charges Section filed by the Defence were notified on 11 December 2012 and thus not within the time limit set by the Chamber. However, the Chamber also notes that the delay is not substantial¹³ and that the defence informed the Chamber about the logistical and technical difficulties which caused the delay.¹⁴ Further, in its Reply to the Defence Responses to the Modified Charges Section the prosecution addressed the objections raised by the Defence on their merits. In view of the foregoing, the Chamber will consider the Defence Responses to the Modified Charges Section.
8. The Chamber considers that all modifications to the DCC proposed by the prosecution to which the defence does not object may be retained in the final Updated DCC. The Chamber also accepts the 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 five categories: disputes relating to facts on which the Confirmation Decision is silent; disputes relating to the temporal and geographic scope of the charges; disputes relating to the addition of facts that were

¹¹ Email to the Trial Chamber on 12 December 2012, 12.51PM.

¹² Prosecution’s Reply to the Defence Responses to the Prosecution’s Submission of the Charges, ICC-01/09-01/11-514.

¹³ A delay of 2 minutes in the case of the response of Mr Sang and a delay of 20 minutes in the case of the response of Mr Ruto.

¹⁴ Email communication of 12 December 2012, *supra*.

not included in the original DCC; disputes relating to different language used in the Updated DCC and the Confirmation Decision; and disputes relating to the Modified Charges Section.

9. 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.
10. As regards the Modified Charges Section, the Chamber notes that according to the prosecution, paragraphs 16 to 28, 32 to 64 and 92 to 133 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. Although the Chamber also notes the comments of the prosecution on page 3 and with regard to points 3, 4 and 18 of the Parties’ Observations which suggest that some of the statements contained in those paragraphs might constitute background information or evidential details rather than material facts and circumstances, the Chamber, based on the Modified Charges Section and subject to modifications discussed in this Decision, accepts the Section as description of the charges.
11. In the Annex to this Decision, the Chamber provides specific instructions regarding modifications to be made to the Updated DCC.

(a) Facts on which the Confirmation Decision is silent

12. The Defence objects to the retaining of factual allegations in the DCC which were not addressed by the Pre-Trial Chamber in the Confirmation Decision.¹⁵ The prosecution disagrees and contends that the fact that the Pre-Trial Chamber did not explicitly confirm a factual allegation is not determinative of whether it can be included in the Updated DCC.¹⁶ Further, the prosecution submits that the confirmation of a charge implies confirmation of all its core constituent facts, unless the Pre-Trial Chamber explicitly stated the contrary.¹⁷

13. The Chamber is of the view that these disputes 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,¹⁸ whereas the prosecution repeatedly insisted that the DCC, rather than the confirmation decision, should play this role.¹⁹

14. 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”.²⁰ The Chamber’s understanding of the confirmation process is

¹⁵ Parties’ Observations, pp. 1 to 2.

¹⁶ Parties’ Observations, p.1; Reply to the Defence Responses to the Modified Charges Section, paras 8 to 12.

¹⁷ Parties’ Observations, pp.1 to 6.

¹⁸ *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 to 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.

¹⁹ *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.

²⁰ Oxford English Dictionary.

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.

15. As stated in the Order regarding the Content of the Charges, 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.

16. 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”.²¹ Similarly, Trial Chamber III observed in the

²¹ ICC-01/04-01/07-1547-tENG, quoted above, para. 13.

Bemba case that the confirmation decision “[did] not provide a readily accessible statement of the facts that underlie each charge”.²²

17. 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 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.
18. 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, rather than the Confirmation Decision itself, provides a sufficiently authoritative statement of the charges relevant to the trial proceedings.
19. 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-

²² ICC-01/05-01/08-836, quoted above, para. 30.

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 will thus, in principle, authorise the prosecution to retain such factual allegations in the Updated DCC.

20. The Chamber notes that there are numerous disputes between the Defence and the prosecution in which the Defence opposes the insertion of a fact that has been contained in the original DCC, arguing that it exceeds the scope of the facts of the Confirmation Decision. The response of the prosecution in these cases is usually to challenge this assumption and aver that factual findings of the Confirmation Decision do include the disputed allegation or that the fact in dispute is a mere elaboration or detail of a finding by the Pre-Trial Chamber.²³ Following the above-mentioned principle regarding the silence of the Confirmation Decision, even where the defence's assertion is correct and there is no finding on a given statements of facts, this will not, in principle, preclude the retaining of such statements in the Updated DCC. Therefore, with the exception of the issues addressed below, the Chamber will not rule individually on each of these disputes and authorises the prosecution to retain such statements in the Updated DCC.

(i) The mode of the alleged liability of Mr Sang

21. The defence team of Mr Sang opposes the mode of liability alleged by the prosecution in respect of Mr Sang, namely Article 25(3)(d). It argues that the prosecution should allege liability under Article 25(3)(d) sub-paragraph (i) as this is the precise form of liability confirmed by the Pre-Trial Chamber.²⁴ The prosecution, in the Parties' Observations, submits that the way in which it presents Mr Sang's individual criminal responsibility in the Updated DCC – by

²³ E.g. points 4, 5, 7, 8, 9, 14, 15, etc. of the Parties' Observations.

²⁴ Parties' Observations, p. 11, ICC-01/09-01/11-505, para. 15.

referring to the entirety of Article 25(3)(d) – is in compliance with the Confirmation Decision.²⁵ Further, in its Reply to the Defence Responses to the Modified Charges Section, the prosecution argues that the fact that the Pre-Trial Chamber found Mr Sang criminally liable under Article 25(3)(d) sub-section (i), does not limit his liability to said sub-section.²⁶

22. The Chamber notes that the Pre-Trial Chamber did not explicitly reject the mode of liability under Article 25(3)(d)(ii) of the Statute. In paragraph 351 of the Confirmation Decision the Pre-Trial Chamber set out the specific requirements of Article 25(3)(d), referring to both Article 25(3)(d)(i) and (ii). Paragraph 353 of the Confirmation Decision commences with the finding that ‘Mr Sang contributed intentionally to the crimes and made this contribution with the aim of furthering the criminal activity and criminal purpose’, which reflects the language of Article 25(3)(d)(i). The decision then proceeds with the analysis under this provision.²⁷ At no point does the Pre-Trial Chamber reject the mode of liability with regard to Article 25(3)(d)(ii). Therefore, and bearing in mind the general principle stated above with regard to silence in the Confirmation Decision, the Chamber is of the view that the presentation by the prosecution of the mode of liability does not exceed the scope of the charges as confirmed by the Pre-Trial Chamber.

(ii) Disputes with regard to inclusion of an attack and the allegations regarding the number of victims

23. The Defence objects to the inclusion of the attack on Kimumu in paragraph 73 of the Updated DCC and page 3 and 9 of the Modified Charges Section.²⁸ Further, the Defence also objects to the allegations regarding the number of people killed

²⁵ Parties’ Observations, p. 11.

²⁶ Reply to the Defence Responses to the Modified Charges Section, para. 27.

²⁷ Confirmation Decision, ICC-01/09-01/11-373, paras 535ff.

²⁸ Parties’ Observations, p. 32, pt. 26; ICC-01/09-01/11-505, para. 11; ICC-01/09-01/11-506, para. 1.

in the attacks on Langas,²⁹ Huruma³⁰ and Kiambaa Church³¹ in paragraph 73 of Updated DCC and page 3 and 9 of the Modified Charges Section. The Defence argues that the Pre-Trial Chamber made no findings in respect of the contested information.³² The prosecution, in its reply to all of the disputes, contends that the information does not exceed the scope of the charges as confirmed by the Pre-Trial Chamber.³³ In its Reply to the Defence Responses to the Modified Charges Section the prosecution adds that the fact that the Pre-Trial Chamber in its Confirmation Decision did not make specific findings in respect of each alleged victim does not preclude the prosecution from including these allegations in the Updated DCC.³⁴

24. The Chamber 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 objections from the defence and, therefore, the allegations may be retained in the Updated DCC.

(b) Disputes over the temporal and geographic scope of the charges

25. In the view of the Defence, the current Updated DCC does not reflect the temporal scope of the charges as confirmed.³⁵ The Defence proposes that the charges be grouped either (i) by crime, with sub-sections for each location and time frame; or (ii) by location and time frame, with sub-sections for each crime; or (iii) every crime listed with corresponding location and date separately.³⁶ The Defence

²⁹ Parties' Observations, pp 33 to 34, pt. 27; ICC-01/09-01/11-505, para. 12; ICC-01/09-01/11-506, para. 1.

³⁰ Parties' Observations, p. 34, pt. 28.

³¹ Parties' Observations, p. 34, pt. 29.

³² Parties' Observations, pp. 32 to 34, pt. 26 to 29; ICC-01/09-01/11-505, paras 11 to 12; ICC-01/09-01/11-506, para. 1.

³³ Parties' Observations, pp. 32 to 34, pt. 26 to 29.

³⁴ Reply to the Defence Responses to the Modified Charges Section, para. 21.

³⁵ Parties' Observations, p. 6; ICC-01/09-01/11-505, paras 6 to 10; ICC-01/09-01/11-506, para. 1.

³⁶ Parties' Observations, pp. 6 to 7.

additionally objects to the use of the word 'including' in the Updated DCC with regard to the specific locations of the crimes.³⁷

26. With regard to the Defence's specific proposals for reformulation of the charges, the Chamber notes its Order regarding the content of the charges in which it ordered the prosecution to indicate "...the material facts and circumstances underlying each count in the Charges section".³⁸ Accordingly, the prosecution listed in the Modified Charges Section those facts which it considered to be material for each of the crimes charged individually with sub-sections for each location, with reference to the starting date of the attacks.³⁹ Therefore, the Chamber considers that the prosecution has partially complied with the request of the defence.

27. In respect of the temporal scope of the charges,⁴⁰ the prosecution argues that the Pre-Trial Chamber confirmed the charges "for the purpose of the Confirmation Process".⁴¹ The prosecution is of the view that the temporal limitation set out by the Pre-Trial Chamber in the Confirmation Decision should be indicative and not binding due to the limited role of the Pre-Trial Chamber and the confirmation process.⁴² In its Reply to the Defence Responses to the Modified Charges Section, the prosecution further clarifies that the fact that the Pre-Trial Chamber in the Confirmation Decision found that the alleged crimes are established to the required threshold is sufficient for the prosecution to retain the full temporal scope confirmed by the Pre-Trial Chamber for all the crimes alleged, irrespective

³⁷ Parties' Observations, pp. 11 to 13; ICC-01/09-01/11-505, paras 3 to 5; ICC-01/09-01/11-506, para. 1.

³⁸ ICC-01/09-01/11-475, para. 12.

³⁹ ICC-01/09-01/11-486-AnxA, pp. 3 to 14.

⁴⁰ Confirmation Decision, paras 225, 228, 241, 249, 254, 264, 271, 349 and 367.

⁴¹ Parties' Observations, p. 6; Reply to the Defence Responses to the Modified Charges Section, paras 18 to 20.

⁴² Parties' Observations, pp. 6 to 8.

of the specific findings for each individual count and for the specific locations for each count.⁴³

28. The Chamber disagrees with the prosecution that the temporal scope set out in the Confirmation Decision is not binding. As set out above, the charges are to be formulated by the prosecution in DCC, but as confirmed by the Confirmation Decision. With regard to the charge of murder in Turbo town, the Pre-Trial Chamber, in paragraph 225 of the Confirmation Decision, found that it "...is not satisfied that the Prosecutor has provided sufficient evidence to establish substantial ground to believe that network perpetrators killed PNU supporters in Turbo town after 31 December 2007." The Chamber also made findings limiting the temporal scope with regard to the murder charges in the Greater Eldoret area,⁴⁴ Nandi Hills town⁴⁵ and the charges of deportation or forcible transfer of population in Turbo town,⁴⁶ the Greater Eldoret area⁴⁷ and Nandi Hills town.⁴⁸ With respect of the crime of persecution the Confirmation Decision relied on the findings of the crimes of murder and deportation or forcible transfer of population and specifically states that it is satisfied that these crimes have been committed "...during the timeframe specified in the previous paragraphs."⁴⁹

29. The Chamber therefore finds that in the Confirmation Decision the Pre-Trial Chamber specifically declined to confirm part of the charges in relation to the temporal scope of the crimes. On this basis, the prosecution is to ensure that the charges described in the Updated DCC reflect the limited temporal scope for each crime and location as specified in the Confirmation Decision.

⁴³ Reply to the Defence Responses to the Modified Charges Section, para. 20.

⁴⁴ Confirmation Decision, para. 228.

⁴⁵ Confirmation Decision, para. 241.

⁴⁶ Confirmation Decision, para. 249.

⁴⁷ Confirmation Decision, para. 254.

⁴⁸ Confirmation Decision, para. 264.

⁴⁹ Confirmation Decision, para. 271.

30. The Chamber notes that in its Modified Charges Section the prosecution indicates for each count and each location within the counts a starting date when the alleged acts constituting the specific crime occurred. However, the prosecution does not indicate an end date. This does not reflect the temporal scope of the charges as confirmed by the Pre-Trial Chamber and therefore does not reach the necessary level of specificity for the charges. The prosecution is to ensure that starting and end date for each count are reflected in the Updated DCC.
31. With regard to the geographic scope of the charges⁵⁰ the Defence objects to the usage of the word 'including' in the charges with regard to the specific locations of the crimes arguing that the Pre-Trial Chamber explicitly limited its findings to the locations specifically listed in the DCC.⁵¹ In the Parties' Observations the prosecution avers that the manner in which the charges are drafted complies with the Confirmation Decision.⁵² In its Reply to the Defence Responses to the Modified Charges Section, the prosecution further argues that the word 'including' used in the charges means "...that the crimes occurred in one or more, but not necessarily all, of the identified locations."⁵³ It argues that without the term 'including' a failure to prove the existence of a crime in one of the locations could be interpreted as a failure to provide sufficient evidence for all of the locations.⁵⁴
32. The Chamber disagrees with the prosecution's interpretation of the term 'including'. The Chamber notes that the Pre-Trial Chamber in its Confirmation Decision found that the use of the term 'including' "...might have an impact on expanding the parameters of [...] [the] case before the Trial Chamber."⁵⁵ The

⁵⁰ Confirmation Decision, paras 99, 225, 228, 241, 249, 254, 264, 271, 349 and 367.

⁵¹ Parties' Observations, pp. 11 to 13; ICC-01/09-01/11-505, paras 3 to 5; ICC-01/09-01/11-506, para. 1.

⁵² Parties' Observations, p. 11.

⁵³ Reply to the Defence Responses to the Modified Charges Section, para. 16.

⁵⁴ Reply to the Defence Responses to the Modified Charges Section, para. 16.

⁵⁵ Confirmation Decision, para. 99.

Chamber agrees with this conclusion. Used as it is in the Updated DCC⁵⁶ and the Modified Charges Section,⁵⁷ the term ‘including’ suggests that the locations specified hereafter are exemplary and not exhaustive.

33. The use of the formulation ‘including’ is thus inconsistent with the findings of the Confirmation Decision. In paragraph 99 of the Confirmation Decision the Pre-Trial Chamber stated that it interprets the term ‘including’ as encompassing exclusively the locations mentioned specifically by the prosecution. Further, the Pre-Trial Chamber stated that the charges are confirmed against the accused “to the extent specified in paragraph 349” in the case of Mr Ruto and “to the extent specified in paragraph 367” in the case of Mr Sang,⁵⁸ and thus at the locations specified in those paragraphs. In this regard, the Chamber points out, that the Pre-Trial Chamber considered the ‘greater Eldoret area’ to be confined to the locations specified in the Confirmation Decision, namely Huruma, Kiambaa, Kimumu, Langas and Yamumbi.⁵⁹ The Chamber is therefore of the view that the charges have been confirmed only with regard to the locations specified in these paragraphs and instructs the prosecution to adapt the Updated DCC to reflect the specific locations in the charges, as set out in the Confirmation Decision.

(c) Disputes relating to the addition of facts that were not included in the original DCC

34. The Defence requests that the names of the three commanders and other known members of the network are included in the updated DCC.⁶⁰ The Defence argues that this information is part of the ‘sufficient legal and factual basis’ within the meaning of Regulation 52(b) of the Regulations necessary for a complete

⁵⁶ ICC-01/09-01/11-448-AnxA, pp. 39 to 41.

⁵⁷ ICC-01/09-01/11-486-AnxA, pp. 3, 4, 6, 8, 10 and 12.

⁵⁸ Confirmation Decision, p. 138.

⁵⁹ Confirmation Decision, para.227.

⁶⁰ Parties’ Observations, p. 8.

understanding of the facts underlying the charges.⁶¹ The prosecution objects to this request, relying on the section of the Confirmation Decision in which the Pre-Trial Chamber found that the prosecution was not required to provide the exact composition of the Network.⁶²

35. The Chamber recalls that, pursuant to Article 67(1)(a) of the Statute, the accused has the right to be informed “in detail” of the content of the charges. This enables him to meaningfully prepare his defence. The required level of specificity of the content of the charge depends on the specific circumstances of the case. The Chamber notes that Mr Ruto is charged with agreeing to a common plan, whose members were “other members of the organisation (the Network)”.⁶³ It would be difficult for Mr Ruto to prepare for his defence on the issue of whether he agreed to such common plan if he is not provided, to the extent possible, with the identity of the persons with whom he allegedly agreed to that common plan. The Chamber therefore agrees with the Defence that, in order to give effect to the accused’s right to be informed of the charges against him, he is entitled to be provided with the identity of the persons whose involvement in the common plan the prosecution appears to allege. This information should include the names of the three commanders, if the prosecution considers them to be members of the common plan as well as the names of any other members of the common plan, whose identity is known to the prosecution.

36. Further, the Defence disagrees with the prosecution’s amended wording of paragraph 123 of the Updated DCC, in which the purpose of the group, led by Mr Ruto, is described as discriminatory. It argues that this does not accurately reflect

⁶¹ Parties’ Observations, p. 8 to 9.

⁶² Parties’ Observations, pp.8 9.

⁶³ Confirmation Decision, para. 302.

the Confirmation Decision.⁶⁴ The prosecution asserts that the use of the phrase “discriminatory purpose” is supported by the fact that the Chamber confirmed the charges of persecution.⁶⁵

37. The Chamber notes that the Pre-Trial Chamber found in its Confirmation Decision, that “...the intention of Mr Ruto as a member of the group is in itself a sufficient indication of the intention of the group as a whole”.⁶⁶ Further, the Pre-Trial Chamber ruled that there are substantial grounds to believe that Mr Ruto intended to attack particular parts of the civilian population by, among others, persecuting PNU supporters. This was, according to the Pre-Trial Chamber, a primary goal of the common plan.⁶⁷ It concludes its finding in this regard with the explicit statement that Mr Ruto acted with the required discriminatory intent.⁶⁸ Conferring the discriminatory purpose of Mr Ruto to the group as a whole, the Chamber considers that the formulation used by the prosecution does not exceed the scope of the charges confirmed by the Pre-Trial Chamber.

38. The Defence also seeks modification of the allegation in paragraph 132 of the Updated DCC that Mr Sang’s use of coded language during his broadcasts was “understood by listeners as instructions to attack specific targets”.⁶⁹ The defence avers that this exceeds the scope of the confirmation decision since the Pre-Trial Chamber made no finding regarding the usage of coded language in broadcasts during the attacks. The prosecution argues that the Pre-Trial Chamber did rule on the fact that Mr Sang broadcast instructions during the attack and that the

⁶⁴ Parties’ Observations, p. 44, pt. 44.

⁶⁵ Parties’ Observations, p. 44, pt. 44.

⁶⁶ Confirmation Decision, para. 352.

⁶⁷ Confirmation Decision, para. 347.

⁶⁸ Confirmation Decision, para. 347.

⁶⁹ Parties’ Observations, pp. 48 to 49, pt. 51.

indicated manner of this communication does not exceed the scope of the charges that were confirmed.⁷⁰

39. The Chamber notes that the Pre-Trial Chamber only mentioned that Mr Sang broadcast instructions during the attacks, without elaborating on the use of coded language.⁷¹ The provision of this additional specification by the prosecution on the manner in which the broadcasts were carried out does not exceed the scope of the charges as confirmed by the Pre-Trial Chamber.

(d) Disputes relating to different language used in the Updated DCC and the Confirmation Decision

40. The Defence objects to the formulation in paragraph 36 of the Updated DCC which states that the policy promoted by the Network “was aimed to punish and expel” perceived or actual PNU supporters from the Rift Valley.⁷² Instead, the Defence proposes to replace the word ‘expel’ with the word ‘evict’, as used by the Pre-Trial Chamber in the Confirmation Decision. The prosecution objects, arguing that the terms are interchangeable.⁷³

41. The Chamber notes that the prosecution used the word ‘expel’ in the original DCC to describe the policy of the Network⁷⁴ and the Pre-Trial Chamber used both terms in the Confirmation Decision in this connection.⁷⁵ On this basis, the Chamber authorises the wording used by the prosecution.

⁷⁰ Parties’ Observations, pp. 48 to 49, pt. 51.

⁷¹ Confirmation Decision, para. 355. Furthermore, at paragraph 360, the Pre-Trial Chamber quotes the statement of a witness who felt compelled to participate in the attacks after listening to the instructions.

⁷² Parties’ Observations, pp. 15 to 16, pt. 6.

⁷³ Parties’ Observations, p. 15, pt. 6.

⁷⁴ Prosecution’s Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rules 121(3), (4) and (5), Public Annex Document Containing the Charges, ICC-01/09-01/11-261-AnxA.

⁷⁵ See for instance: Confirmation Decision, paras 154, 216 and 355.

42. Furthermore, the Defence objects to the inclusion of the sentence “On some of these occasions, Sang acted as “Master of Ceremony” in the Updated DCC, arguing that the Pre-Trial Chamber found that Mr Sang fulfilled this role only on two occasions.⁷⁶ The prosecution argues that the wording of this allegation, which has not been originally included in the DCC, is in line with the findings of the Confirmation Decision.⁷⁷

43. The Chamber notes that the disputed formulation is contained in paragraph 15 of the Updated DCC which is not incorporated by reference in the Modified Charges Section. However, in paragraph 132 of the Updated DCC, which is incorporated by reference, the prosecution alleges that “Sang along with Ruto led meetings advocating for the expulsion of PNU supporters”. The Chamber notes that the paragraphs of the Confirmation Decision referenced in support of this allegation are, among others, those where the Pre-Trial Chamber discussed the role of Mr Sang as “Master of Ceremony”.⁷⁸ The Chamber thus considers the allegation in paragraph 132 of the Updated DCC to be a paraphrase of the allegation that Mr Sang acted as master of ceremony.

44. For these reasons and based on the findings of the Pre-Trial Chamber,⁷⁹ the Chamber is of the view that the words “on some of these occasions” are consistent with the charges as confirmed.

(e) Disputes relating to the Modified Charges Section

45. In this section the Chamber will address the additional objections made by the Defence in the Response to the Modified Charges Section if they have not been already addressed in the previous parts of this Decision.

⁷⁶ Parties’ Observations, p. 14, pt.2.

⁷⁷ Parties’ Observations, p. 14, pt.2.

⁷⁸ Confirmation Decision, paras 142, 191 and 193.

⁷⁹ Confirmation Decision, paras 142, 191 and 193.

(i) *Dates of the alleged preparatory meetings*

46. The Defence requests that the prosecution include in the Modified Charges Section a list of the dates of all the alleged core preparatory meetings.⁸⁰ It argues that the Pre-Trial Chamber relied on evidence of the preparatory meetings to establish the contextual element of the existence of an 'organisation' within the meaning of Article 7 of the Statute. Therefore they are part of the facts and circumstances of the charges which need to be described with sufficient specificity.⁸¹ The prosecution argues that it is not possible to precisely identify all the dates of the meetings since many of them were informal and unrecorded events.⁸²

47. In section V of the Confirmation Decision the Pre-Trial Chamber made findings with regard to a series of meetings in relation to which the accused presented evidence of an *alibi*.⁸³ In paragraphs 59 to 64 of the Updated DCC the prosecution provides some but not all of the dates of these meetings. The Chambers is of the view that, consistent with the right of the accused to be informed in detail of the charges against them, the prosecution should include the dates of the meetings the occurrence of which was known to it and established to the required threshold by the Pre-Trial Chamber in the Confirmation Decision. As regards the concerns raised by the prosecution,⁸⁴ the Chamber points out that this does not prevent the prosecution from referring to preparatory meetings in a general manner as it does in paragraph 59 of the Updated DCC, which is incorporated in the Modified Charges Section in its entirety.

⁸⁰ ICC-01/09-01/11-505, para. 14, ICC-01/09-01/11-506 para. 1.

⁸¹ ICC-01/09-01/11-505, para. 13.

⁸² Reply to the Defence Responses to the Modified Charges Section, para. 24.

⁸³ Confirmation Decision, paras 105 to 160.

⁸⁴ Reply to the Defence Responses to the Modified Charges Section, para. 24.

48. With regard to the question whether the prosecution needs to include references to the specific meetings and their dates in the Modified Charges Section or in section V A ('Preparatory Meetings and Events') of the Updated DCC, the Chamber reiterates that in view of the prosecution's statement on page two of the Modified Charges Section, whereby it incorporates parts of the Updated DCC, including the paragraphs at issue, by reference, these allegations are considered to be the material facts of the charges. Therefore, the Chamber does not find it necessary for the prosecution to list the meetings specifically in the Modified Charges Section.

(ii) Mr Sang's alleged contributions to the crimes

49. The defence of Mr Sang objects to the inclusion in the Modified Charges Section of certain alleged contributions by Mr Sang to the crimes.⁸⁵ In particular, the defence objects to three allegations: (1) that Mr Sang "broadcast propaganda against PNU supporters prior to the attacks", (2) that Mr Sang "broadcast preparatory meetings and event locations and organized fundraising events that financed the attacks" and (3) that Mr Sang "called on perpetrators to begin the attacks". The defence of Mr Sang avers that the findings of the Pre-Trial Chamber in paragraph 355 of the Confirmation Decision are exhaustive and that the three contested allegations surpass a simple recharacterisation of these findings.⁸⁶ The prosecution argues that the list of the Pre-Trial Chamber's findings, contained in the Confirmation Decision with regard to Mr Sang contribution is not exhaustive and does not exclude other contributions.⁸⁷

50. The Chamber recalls its conclusion regarding the Pre-Trial Chamber's silence on specific allegations. Consequently, the Chamber does not consider that the list of

⁸⁵ ICC-01/09-01/11-505, paras 17 to 21.

⁸⁶ ICC-01/09-01/11-505, paras 17 to 18 and 21.

⁸⁷ Reply to the Defence Responses to the Modified Charges Section, para. 22.

findings of the Pre-Trial Chamber with regard to the contributions of Mr Sang in paragraph 355 of the Confirmation Decision is exhaustive. In respect of the first objection the Chamber notes that in the DCC and the Updated DCC the prosecution alleges that Kass FM, although not Mr Sang specifically, broadcast propaganda against PNU supporters. However, in the Confirmation Decision the Pre-Trial Chamber found that before the eruption of violence Mr Sang “broadcasted inciting statements”. The Pre-Trial Chamber cited in this connection to the evidence that Mr Sang called to evict and kill Kikuyus in case the candidate of the PNU won the elections.⁸⁸ Accordingly, the Chamber is of the view that the prosecution can retain this allegation.

51. The Chamber notes with regard to the second objection raised by Mr Sang’s defence that the Pre-Trial Chamber, in paragraph 355 (ii) of the Confirmation Decision, found it established to the required threshold that Mr Sang contributed by “...advertising the meetings of the organisation...”. Accordingly, the prosecution can retain the allegation that Mr Sang broadcast preparatory meetings and event locations. However, the Pre-Trial Chamber made no findings with regard to the allegation that he organised fundraising events which financed the attacks. In paragraph 129 of the DCC the prosecution alleged that Kass FM organised fundraising events and reiterates this allegation in paragraph 128 of the Updated DCC. There is no allegation made by the prosecution that the accused himself organised these fundraising events. Accordingly, the absence of any findings by the Pre-Trial Chamber to this effect is not a case of silence of the Pre-Trial Chamber on existing allegations. The prosecution is thus not allowed to retain this allegation in the Modified Charges Section and is instructed to modify the section accordingly.

⁸⁸ Confirmation Decision, para. 358.

52. In respect of the third objection the Chamber notes that in paragraph 359 and 360 of the Confirmation Decision the Pre-Trial Chamber relies on evidence in which the accused broadcasts calls to start the attacks. The Chamber considers that the disputed allegation is reflected in the findings made in these paragraphs. Accordingly, the Chamber finds no merit in this objection from the defence.

(iii) Mr Sang as an alleged key member of the Network

53. The Chamber notes that in the allegations pertaining to Mr Ruto the prosecution uses the formulation "...Ruto, together with other key members of the Network including Joshua Arap Sang, ..." ⁸⁹ (emphasis added) and "...committed jointly with other high-ranking members of the Network including Joshua Arap Sang,..." ⁹⁰ (emphasis added). However, in the Updated DCC Mr Sang is not described as a "key member" of the alleged Network or as a member of the group of persons who allegedly committed the crimes jointly with Mr Ruto. Rather, in paragraph 100 of the Updated DCC the prosecution alleges that "Ruto and other key members of the Network, together with Sang and others, adopted and implemented...", suggesting that Mr Sang is not a key member of the Network.

54. Therefore, the Chamber considers that the formulation "including Joshua Arap Sang" used by the prosecution in the Modified Charges Section in the places mentioned in the foregoing paragraph is contrary the Order regarding the content of the charges.⁹¹ The prosecution is to adapt the Modified Charges Section, refraining from this formulation.

⁸⁹ ICC-01/09-01/11-486-AnxA, p.1.

⁹⁰ ICC-01/09-01/11-486-AnxA, pp. 3, 4 and 6.

⁹¹ ICC-01/09-01/11-475, p.8.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

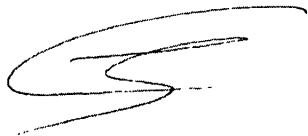
DIRECTS the prosecution to modify the Updated DCC and the Modified Charges Section as indicated in this decision and the Annex thereto, and file, no later than 5 January 2013, a final Updated DCC thus modified and replacing the previous Charges section with the Modified Charges Section modified in accordance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

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

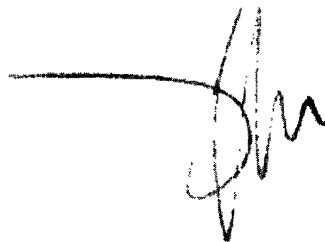
Judge Eboe-Osuji appends a concurring separate opinion. Judge Van den Wyngaert appends a separate opinion.



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.

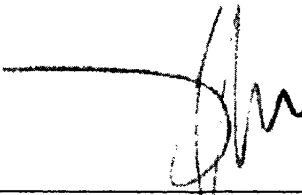
Generally Accepted Practice in the Administration of International Criminal Justice

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

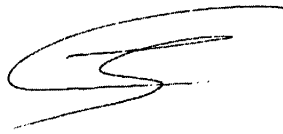
SEPARATE OPINION OF
JUDGE CHRISTINE VAN DEN WYNGAERT

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