

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER V

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

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA***

Public
**Response to the “Prosecution’s application for notice to be given under Regulation
55(2) with respect to certain crimes charged”**

Source: Defence for Uhuru Muigai Kenyatta

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

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I. INTRODUCTION

1. The Defence for Mr. Uhuru Kenyatta (the “Defence”) responds to the “Prosecution’s application for notice to be given under Regulation 55(2) with respect to certain crimes charged” (“the application”).¹
2. The Defence submits that the application for the initial notice requirement under Regulation 55(2) of the Regulations of the Court (“Regulations”) dealing with the possible legal re-characterisation of the facts should be dismissed in its entirety on the basis that (i) it is prematurely filed, and/or (ii) it attempts to circumvent Article 61(9) of the Rome Statute and amend the charges.

II. PROCEDURAL HISTORY

3. On 23 January 2012, Pre-Trial Chamber II issued its Decision on the Confirmation of Charges Hearing (“Confirmation Decision”) against Ambassador Muthaura and Mr. Uhuru Kenyatta.²
4. On 12 March 2012, the full record of proceedings before Pre-Trial Chamber II was transmitted to the Presidency, including the Confirmation Decision.³ Trial Chamber V (“the Chamber”) was constituted on 29 March 2012,⁴ and Judge Kuniko Ozaki was appointed as the Presiding Judge for the Chamber on 26 April 2012.⁵

¹ ICC-01/09-02/11-445

² ICC-01/09-02/11-382.

³ ICC-01/09-02/11-407.

⁴ ICC-01/09-02/11-414.

⁵ ICC-01/09-02/11-420.

5. On 12 June 2012, the Chamber held a status conference with the participants of the case. During this status conference, the Chamber asked the Prosecution to file submissions on the application of the initial notice requirement of Regulation 55(2) on or before 3 July 2012.⁶ The Chamber gave the Defence and the Victims' Legal Representative 21 days after the submission of the Prosecution's application to file their responses.⁷
6. On 3 July 2012, the Prosecution filed its "application for notice to be given under Regulation 55(2) with respect to certain crimes charged."⁸

III. APPLICABLE LAW

7. The Defence relies upon Regulation 55(2) and Article 61(9) of the Statute.
8. Regulation 55(2) provides that:

"If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or,

⁶ ICC-01/09-02/11-T-18-ENG ET WT at page 37:11-16.

⁷ ICC-01/09-02/11-T-18-ENG ET WT at page 37:11-16.

⁸ ICC-01/09-02/11-445.

if necessary, it may order a hearing to consider all matters relevant to the proposed change.”

9. Article 61(9) of the Statute provides that:

“After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.”

IV. SUBMISSIONS

(i) **The Prosecution’s Application is Premature**

10. Regulation 55 describes the powers and requirements of a Trial Chamber when it determines that there is a possibility of a legal re-characterisation of the facts. It is clear from the provision that these powers are available to the Chamber “at any time during the trial.”
11. The Prosecution cites the jurisprudence of Trial Chamber I in *Lubanga* to submit that the initial notice requirement of Regulation 55(2) can be

given before the trial commences.⁹ However, in that case Trial Chamber I was not asked by the participants to decide whether the notice requirement could be given before trial.¹⁰ Trial Chamber I's analysis and conclusions show that this issue was never considered.¹¹ The Defence submits that the correct method by which to deal with this matter at this stage of the legal proceedings is for the Prosecution to request an amendment to the charges under Article 61(9) of the Rome Statute. As defined by the Appeals Chamber in *Lubanga*, "Article 61(9) of the Statute and Regulation 55 [of the Regulations] address different powers of different entities at different stages of the procedure...."¹² Regulation 55 addresses the power of the Chamber during the trial; Article 61(9) addresses the ability of the Prosecutor to amend the charges with leave of Court after the charges have been confirmed. The Defence submits the Prosecution is not following the proper procedure set out in the Rome Statute.

(ii) The Legal Re-Characterisation of "Other Inhumane Acts"

12. Through its Regulation 55(2) application for initial notice, the Prosecution is attempting to amend the charges to include "other forms

⁹ ICC-01/09-02/11-445 at paras. 27-28. In *Lubanga*, Trial Chamber I gave the initial notice requirement of Regulation 55(2) over 13 months before the trial started. (see paras. 13, 17, 35, 36, 40 and 41 of ICC-01/09-02/11-445 and paras. 24, 28 and 49 of ICC-01/09-02/11-444)

¹⁰ *The Prosecutor v. Lubanga*, "Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted," ICC-01/04-01/06-1084 at paras. 27-38 and 47-50.

¹¹ ICC-01/04-01/06-1084 at paras. 39-50.

¹² Appeals Chamber, *The Prosecutor v. Lubanga*, "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2205 at para. 77.

of sexual violence” instead of “other inhumane acts”¹³ as confirmed by Pre-Trial Chamber II.

13. In considering the Prosecution’s Application for the issuance of the summonses, Pre-Trial Chamber II changed the legal characterisation of the alleged crime from “other forms of sexual violence” to “other inhumane acts” because “of the serious injury to [the] body that...forcible circumcision causes and in view of its character, similar to other underlying acts constituting crimes against humanity.”¹⁴ The Pre-Trial Chamber did not consider forcible circumcision to be an act of a sexual nature as defined within the ICC “Elements of Crimes.”¹⁵ In the Prosecution’s Article 82(1)(d) application for leave to appeal the summonses on this issue,¹⁶ the Single Judge did not grant leave and based her findings on the evidence and information supplied.¹⁷ The Single Judge stated the Prosecution was not precluded from charging “other forms of sexual violence” but it must be “supported by sufficient evidence to meet the evidentiary standard as required by article 61(7) of the Statute.”¹⁸
14. The Prosecution repeated the same evidence in the amended Document Containing the Charges (“DCC”), and in the Article 58 Application for Summonses – that forced circumcision and penile amputation during the

¹³ The Defence notes that this amendment would only be for the alleged acts of forced circumcisions and penile amputations. If the re-characterisation were to take place, the charge of “other inhumane acts” would still exist on other grounds as confirmed by Pre-Trial Chamber II.

¹⁴ ICC-01/09-02/11-1 para. 27.

¹⁵ ICC-01/09-02/11-1 para. 27; Article 7(1)(g)-6.1 “The perpetrator committed an act of a sexual nature...”

¹⁶ ICC-01/09-02/11-2-Red.

¹⁷ ICC-01/09-02/11-27 at para. 31.

¹⁸ ICC-01/09-02/11-27 at para. 31.

PEV should be characterised as “other forms of sexual violence.”¹⁹ The chart below lists the location of each fact relied upon for the confirmation hearing within the DCC and the Article 58 Application for Summonses.

Confirmation Hearing Transcript ²⁰	DCC ²¹	Article 58 Application for Summonses ²²
Pages 88:20-89:6	Para. 63, footnote 158	Para. 151, footnote 226
Page 89:7-18	Para. 69, footnote 181	Para. 155, footnote 243 (footnote redacted)
Page 89:19-24	This citation refers to actions occurring in Nairobi Province and on or before 21 January 2008.	
Pages 89:25-90:13	Para. 63, footnote 158	Para. 151, footnote 226
Page 90:14-19	Para. 63, footnote 159	Para. 151, footnote 227
Pages 90:22-91:3	Para. 63, footnote 157	Para. 151, footnote omitted
Page 91:4-10	Para. 32, footnote 63	Because of redactions to the DCC, it cannot be determined if this citation is used.
Page 91:11-14 ²³	Para. 69, footnote 182	Para. 155, footnote 244

¹⁹ A comparison of ICC-01/09-02/11-197-Conf-AnxA at paras. 151, 155 and ICC-01/09-02/11-280-AnxA at paras. 63,69 reveals the only difference between these facts is the grammatical changes.

²⁰ ICC-01/09-02/11-T-5-Red-ENG CT WT.

²¹ ICC-01/09-02/11-280-AnxA.

²² ICC-01/09-02/11-197-Conf-AnxA.

²³ During the Confirmation Hearing, the OTP cited to EVD-PT-OTP-00004 at 0630-0631 (KEN-OTP-0001-0364 at 0630-0631). The Chamber will notice that the witness referred to (Waki Commission Witness 36) is the **same witness** that gave the statement found at KEN-OTP-0001-0364 at 0494-0495.

15. Two instances relied upon by the Prosecution for the confirmation hearing were not within the Article 58 Application. Firstly, the passage at page 89:19-24 detailed occurrences that happened on or before 21 January 2008 in Nairobi Province.²⁴ In the Summonses issued by Pre-Trial Chamber II, it restricted the temporal scope from 24 January 2008 to 31 January 2008,²⁵ and restricted the territorial scope to those occurrences that happened in the towns of Nakuru and Naivasha.²⁶ Pre-Trial Chamber II did not take the evidence proffered at page 89:19-24 (KEN-OTP-0001-0364 at 0572) into account when writing the Confirmation Decision.
16. Secondly, the Defence cannot determine whether the passage found at page 91:4-10²⁷ was within the Article 58 Application for Summonses because of the redactions in both the text and footnotes from paragraphs 152-62.²⁸
17. The Prosecution failed before the confirmation hearing to produce the specific evidence required by Pre-Trial Chamber II in order to satisfy it that the character of the alleged crime was one of a sexual nature. Pre-Trial Chamber II reconfirmed this in the Confirmation Decision:

“The Chamber finds that the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo

²⁴ ICC-01/09-02/11-T-5-Red-ENG CT WT, page 89:19-24 (citing KEN-OTP-0001-0364 at 0572 and noting that if the Chamber turns to page 0570, it will notice that the entire section refers to Nairobi Province).

²⁵ ICC-01/09-02/11-1 at para. 56.

²⁶ ICC-01/09-02/11-1 at para. 56.

²⁷ ICC-01/09-02/11-T-5-Red-ENG CT WT, page 91:4-10

²⁸ ICC-01/09-02/11-197-Conf-AnxA at paras. 152-62.

men. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other.”²⁹

18. Pre-Trial Chamber II did not request additional evidence to determine whether substantial grounds existed to demonstrate the acts but requested additional evidence as to the *motivation* behind the acts to determine if the alleged crimes were sexual in nature. As both Pre-Trial Chamber decisions demonstrate, the Prosecution did not proffer the further evidence as to motivation and it declined to confirm the allegations as “other forms of sexual violence.”
19. The Defence submits that the Prosecution is attempting to circumvent Article 61(9). The Prosecution stated that a refusal to accept its characterisation of the evidence would require it to resort to Regulation 55 if the charges were confirmed without “other forms of sexual violence.”³⁰
20. For the reasons stated above, the Defence respectfully requests the Chamber deny the Prosecution’s proposal in relation to the use of Regulation 55(2) in respect of possible re-characterisation of the facts of forced circumcision and penile amputation.

²⁹ ICC-01/09-02/11-382-Red at para. 266.

³⁰ ICC-01/09-02/11-2-Red at para. 29.

(iii) **The Legal Re-Characterisation of Property Destruction and Looting**

21. The Defence submits Pre-Trial Chamber II properly determined the issue of property destruction and looting in the Confirmation Decision. As noted by the Victims' Legal Representative, the Prosecution failed to include the underlying crimes of property destruction and looting for the crime of persecution in its case.³¹
22. The Prosecution is now requesting the Chamber to act outside its powers. The Prosecution is not asking for a re-characterisation of the facts but to add an additional charge. In the Confirmation Decision, Pre-Trial Chamber II ruled that the facts and circumstances did not include persecution through property destruction and looting.³² The Prosecution did not appeal the Decision under Article 82(1)(d) and has not made an Article 61(9) application to amend the charges to the Pre-Trial Chamber in accordance with ICC procedure.³³
23. Regulation 55(1) states that the Chamber has the power to re-characterise only "the facts and circumstances described in the charges and any amendments to the charges." In *Lubanga*, the Appeals Chamber held:

"[T]he term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the

³¹ ICC-01/09-02/11-360 at para. 49.

³² ICC-01/09-02/11-382-Red at paras. 284-86.

³³ The right under Article 82(1)(d) is no longer available to the OTP because it failed to seek leave to appeal the Confirmation Decision before 30 January 2012.

evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67(1)(a) of the Statute.”³⁴

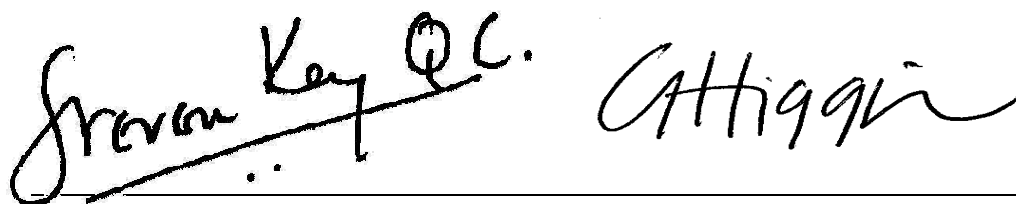
24. The Prosecution has failed to proffer an argument as to which alleged crime has been characterised incorrectly in relation to persecution by way of property destruction and looting. It offered a complaint as to how Pre-Trial Chamber II “misconstrued and incorrectly circumscribed the Prosecution’s allegations regarding looting and property destruction.”³⁵ The Prosecution cannot now argue this issue because it failed to identify it with “sufficient clarity and detail” during the confirmation process. The re-characterisation, as requested by the Prosecution, cannot be done because this issue is not a part of the facts and circumstances decided in the Confirmation Decision.
25. For the aforementioned reasons, the Defence respectfully requests the Trial Chamber to deny the Prosecution request for initial notice under

³⁴ Appeals Chamber, *The Prosecutor v. Lubanga*, “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, ICC-01/04-01/06-2205 at footnote 163. See also Article 74(2).

³⁵ ICC-01/09-02/11-445 at para. 25.

Regulation 55(2) of the possible re-characterisation of the facts of property destruction and looting as an underlying crime of persecution.

Respectfully submitted,

Handwritten signatures of Steven Kay QC and Gillian Higgins. The signature of Steven Kay QC is on the left, and the signature of Gillian Higgins is on the right. A horizontal line is drawn below the signatures.

Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta

Dated this 24 July 2012

London, England