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TRIAL CHAMBER V(b)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public, with Public Annex A

**Defence Request to the Trial Chamber to Order the Prosecution to File a Corrected
Pre-Trial Brief and to Compile and Disclose a Schedule of Material Allegations**

Source: Defence for President 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 hereby requests Trial Chamber V(b) (“Chamber”) to order the Prosecution to conduct a thorough review of its Updated Pre-Trial Brief (“PTB”),¹ and submit a corrected version in order to ensure that the PTB fulfils its intended purpose as a “roadmap” to the Prosecution’s case.² The multiple errors within the PTB identified by the Defence are set out in Annex A. Furthermore, given the critical deficiencies in the PTB, the Defence requests the Chamber to order the Prosecution to compile and disclose a schedule identifying all material places, dates, times and supporting witnesses with respect to any allegation that President Kenyatta was present at a given location which the Prosecution rely upon as being in furtherance of the crimes alleged (“Material Allegation Schedule”).

II. PROCEDURAL HISTORY

2. On 12 June 2012, the Chamber presided over the first Status Conference in this case. At the hearing, the Prosecution stated that its PTB would be a “roadmap” to its case, and that it intended “to refer in that document to everything [it was] going to rely on as evidence in trial”.³ The Prosecution submitted that an in-depth analysis chart (“IDAC”) was not necessary prior to trial, and that the PTB would “be a much more useful document to both the Chamber and to the Defence in terms of understanding [its] case before a trial proper commences.”⁴ Similarly, the Prosecution insisted that a PTB would, compared to an IDAC,

¹ ICC-01/09-02/11-732-Conf-AnxB-Red.

² ICC-01/09-02/11-T-18-ENG, p. 38, lines 20-22.

³ ICC-01/09-02/11-T-18-ENG, p. 38, lines 20-22.

⁴ ICC-01/09-02/11-T-18-ENG, p. 40, lines 21-40.

prevent delay and enable the case to proceed to trial as expeditiously as possible.⁵

3. On 25 June 2012, the Registry notified the “Joint Submission of the Prosecution and the Kenyatta Defence Regarding the Defence Request for a Summary of the Presentation of Evidence and an In-Depth Analysis Chart for the Trial Stage”.⁶ In this filing, the Prosecution agreed that the PTB would “include ‘references to witnesses it intends to call and the other evidence it intends to rely upon, and...explain how the evidence relates to the Charges’.”⁷
4. On 9 July 2012, the Chamber ordered the Prosecution to provide, in addition to an updated document containing charges (“Updated DCC”), “a detailed document explaining its case with reference to the witnesses it intends to call and the other incriminating evidence it intends to rely on.”⁸ The Chamber further stated that the filing of the Updated DCC and the PTB would ensure that “the accused are informed of the charges against them and are not prejudiced in their preparation for trial.”⁹
5. On 26 April 2013, the Defence wrote to the Prosecution regarding its intention “to raise alibi in these proceedings pursuant to Rule 79(1)(a)” (“26 April Letter”). In the 26 April Letter, Lead Counsel for the Defence stated: “[in] order to ensure full compliance with our obligations and because the Prosecution case is by no means clear to me, I request that you identify all material places, dates, times and supporting witnesses in a schedule, so that we have knowledge of the allegations in respect of which we are required to give notice and disclose exculpatory material.”

⁵ ICC-01/09-02/11-T-18-ENG, p. 41, lines 9-17.

⁶ ICC-01/09-02/11-441.

⁷ ICC-01/09-02/11-441, para. 3, citing ICC-01/09-02/11-427, para 35.

⁸ ICC-01/09-02/11-451, para. 11.

⁹ ICC-01/09-02/11-451, para. 11.

6. On 6 May 2013, the Prosecution, in accordance with the “Decision on defence application pursuant to Article 64(4) and related requests”,¹⁰ notified the Defence of a redacted version of the current PTB.¹¹
7. On 27 May 2013, the Prosecution responded to the 26 April Letter, stating that “[t]he requested information is identified in the Prosecution's updated pre-trial brief...and the supporting evidence cited in the footnotes” (“27 May Letter”). The Prosecution added that “[s]ince the PTB enables the Defence to compile the requested schedule through an analysis of the text and footnotes, we consider it neither appropriate nor required to compile the requested schedule. In our view, the Prosecution's disclosure obligations do not extend to compiling such analytical product.”
8. On 12 June 2013, the Chamber directed the Registry to reclassify as “Confidential” the *ex parte* Prosecution version of the PTB,¹² which was notified to the Defence on the same day.¹³
9. On 16 July 2013, the Prosecution notified the Court that it was withdrawing Witnesses 5, 334 and 426.¹⁴

III. SUBMISSIONS

(A) The Prosecution Must File a Corrected PTB

10. As a result of an analysis of the most recent version of the PTB, the Defence has identified fundamental problems concerning the references to supporting

¹⁰ ICC-01/09-02/11-728, para. 116 and p. 56, disposition.

¹¹ ICC-01/09-02/11-732, para. 1, and ICC-01/09-02/11-732-Conf-AnxB-Red.

¹² ICC-01/09-02/11-757.

¹³ ICC-01/09-02/11-732-Conf-AnxB.

¹⁴ ICC-01/09-02/11-773-Conf-Red2.

evidence. There are problematic references within 211 of the 575 footnotes. Further, as many footnotes contain multiple references, some of them contain multiple errors. The Defence has identified 463 errors in total, which severely affect the utility of the document. These errors have rendered meaningful analysis impossible and have hindered the Defence's preparation for trial. The problems identified by the Defence fall into the following three categories:

(i) *Witness no longer relied on*

The Defence submits that references to Witnesses 5, 334 and 426 (for example, see footnote 25) must now be removed to reflect their withdrawal from the case.¹⁵ Similarly, any allegations which they alone support, or for which they supply the sole direct evidence, must be removed.

(ii) *Use of draft documents*

The Evidence Reference Numbers ("ERNs") cited in the PTB for the transcripts of Witnesses 493, 494, 505, 506 and 510 relate to drafts. When the Prosecution served the final, non-draft, versions of the interview transcripts of these witness on the Defence, they were disclosed with entirely new ERNs. The footnotes in the PTB that refer to draft transcripts, therefore, direct the Defence to documents that are now out-dated. The references to draft transcripts in the PTB are obsolete and prevent the Defence from meaningfully analysing the evidence cited in support of the allegations. As a result of the PTB's footnote references to draft transcripts, it is impossible for the Defence to determine which passages of the final transcripts the Prosecution is referring to (for example, see footnote 221).¹⁶ Accordingly, the Defence requests that all references to evidence in the

¹⁵ Further examples are set out in Annex A.

¹⁶ The second citation within the footnote refers to "P-506 - KEN-OTP-0091-0529 at 0548-0551", all four pages of which are entirely redacted. Further examples are set out in Annex A.

PTB are updated to cite the ERN of the *most recent version* of that document. The Defence also notes that the Prosecution disclosed the vast majority of the final transcripts of these witnesses several months before it filed the most recent version of the PTB.¹⁷

(iii) *Unintelligible references*

Some references are unintelligible, for example the ERN cited at footnote 396 is incomplete, whilst other ERN references do not refer to a specific document.¹⁸

11. These errors are outlined in Annex A. In the circumstances, the PTB fails to set out the Prosecution's case in accordance with the directions of the Chamber i.e. "with reference to the witnesses it intends to call and the other incriminating evidence it intends to rely on".¹⁹ In order to ensure that the minimum guarantees afforded to the Accused under the Rome Statute are properly respected, the PTB must be provided to the Defence in a manner that facilitates meaningful analysis of the allegations contained therein.²⁰ These rights are fundamental to the fairness of the trial.

¹⁷ The Prosecution intends to rely at trial on 63 transcripts in respect of these five witnesses. Fifty nine of those transcripts had originally been disclosed to the Defence in *draft* form with old ERNs which have now been replaced. The remaining four transcripts relate to new interviews which were disclosed to the Defence after the Updated PTB had been filed. The 59 transcripts were re-disclosed to the Defence as *final, non-draft* versions, with entirely different ERNs in December 2012 and January 2013. The final transcripts of OTP-493 were disclosed on 21 December 2012; the final transcripts of OTP-494 and OTP-510 were disclosed on 25 January 2013; and the final transcripts of OTP-505 and OTP-506 were disclosed to the Defence on 31 January 2013.

¹⁸ Further examples are set out in Annex A.

¹⁹ ICC-01/09-02/11-451, para. 11.

²⁰ In particular, see Article 67(a) and (b), which state that the Accused is entitled, as a minimum guarantee, "[t]o be informed promptly and in detail of the nature, cause and content of the charge..." and "[t]o have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence".

(B) The Prosecution Must Provide the Defence with the Information Requested in the 26 April Letter

12. The Defence requests the Chamber to order the Prosecution to comply with the Defence's request in the 26 April Letter. The Defence submits that in order to provide an alibi notification to the Prosecution in accordance with Rule 79(1)(a) of the Rules of Procedure and Evidence ("Rules"), the Prosecution must be ordered to provide a schedule identifying all material places, dates, times and supporting witnesses with respect to any allegation that President Kenyatta was present at a given location which the Prosecution rely upon as being in furtherance of the crimes alleged.²¹ The Accused is entitled to be informed of the case the Prosecution are making against him and to know what evidence he needs to adduce to challenge the case.
13. Contrary to the Prosecution's assertion in the 27 May Letter, the current PTB does not enable "the Defence to compile the schedule through an analysis of the text and footnotes". In particular, the use of references in the PTB that refer to out-dated, sometimes heavily redacted, draft transcripts prevents the Defence from identifying the precise allegations in the evidence. To date, the Defence has been caused to waste a great deal of time and resources in attempting to fathom precisely the case that it has to meet, because of the disclosure of excessively redacted materials and now a deficient PTB that is not fit for its alleged purpose.
14. The Defence submits that in order to enable it to comply with its obligations under Rule 79(1)(a), and considering the significant resources it has expended

²¹ Under Rule 79(1)(a), the Defence must notify the Prosecution of its intent to "[r]aise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi".

in analysing and identifying errors in the PTB, it is entirely reasonable and necessary in the current circumstances for the Chamber to order the Prosecution to produce the Material Allegation Schedule in advance of the corrected PTB. Articles 64(2) and 64(6)(f) of the Rome Statute and Rule 134 empower the Chamber to order the Prosecution to produce a Material Allegation Schedule as a means of ensuring that the proceedings are fair, expeditious and conducted with full respect for the rights of the Accused.

IV. RELIEF

15. For the reasons set out above, the Defence respectfully requests the Chamber to order the Prosecution to:
- a. Update the PTB and issue a corrected version thereof; and
 - b. Compile and disclose a Material Allegation Schedule.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 12th day of August 2013

At London, England