



Original: English

No.: ICC-01/09-02/11
Date: 15 August 2013

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Public redacted version of the 15 August 2013 Prosecution's response to the
"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" (ICC-01/09-02/11-785)**

Source: The Office of the Prosecutor

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

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Introduction

1. The Prosecution hereby submits its response to the “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” (“Request”).¹ The Prosecution will file a second updated pre-trial brief (“Second Updated PTB”) by 26 August 2013, which forestalls the Defence request to compile a Material Allegations Schedule.

Confidentiality

2. This application is designated “confidential” because it refers to confidential filings and information contained therein. A public redacted version is being filed.

Submissions

- I. The Prosecution will file a Second Updated PTB.
3. The Prosecution recognises the importance of the pre-trial brief to both the Defence and the Chamber. In light of the issues identified in the footnote references of the “Updated Prosecution pre-trial brief” (“Updated PTB”),² the Prosecution has commenced work on a Second Updated PTB, which will be filed by 26 August 2013. The Prosecution invites the Defence to address issues such as this on an *inter partes* basis in the future. The Prosecution encourages open dialogue and fails to see the need for judicial intervention to resolve uncontroversial matters.³

¹ ICC-01/09-02/11-785.

² ICC-01/09-02/11-732-Conf-AnxB.

³ In the lead up to trial in the companion case of *Ruto & Sang*, the Chamber has made it clear that some matters are best dealt with *inter partes*. See, e.g., ICC-01/09-01/11-840-Red, para. 8; [REDACTED].

4. The Prosecution briefly wishes to clarify the Request's characterisation of the 463 footnote references listed in Annex A as "errors".⁴ This description conflates the tripartite nature of the issues identified in paragraph ten of the Request. In fact, only 22 of the 463 footnote references listed in Annex A are "errors" in the true sense of the word – typographical errors or citations to unidentifiable documents or pages.⁵ Many of the "errors" are minor.⁶ While the Prosecution regrets their occurrence, clerical errors are, to a certain extent, unavoidable. It is difficult to imagine that they have "rendered meaningful analysis [of the Prosecution's case] *impossible*".⁷
5. The vast majority of the footnote references – 419 of the 463 or 90 *per cent* – identified by the Defence cite to draft transcripts of witness testimony. The Prosecution acknowledges the difficulty encountered by the Defence and is moving to rectify this situation, but these are not "errors" in the conventional sense of the word as they cite accurately to the evidence. It is also unfortunate to describe 21 of the 463 footnote references that cite to the evidence of recently withdrawn witnesses as "errors": these witnesses were withdrawn *after* the Updated PTB was filed. While the Prosecution is acutely aware of the importance of providing the Defence with the most up-to-date incarnation of its case, the fluid nature of international criminal trials means that this can sometimes prove difficult. Any potential prejudice is mitigated by the fact that none of the three withdrawn witnesses is the sole source cited for allegations regarding Mr Kenyatta, allowing the Defence to easily disregard the relevant references in the interim.

⁴ See ICC-01/09-02/11-785, paras 1, 10, 11, 14.

⁵ The Defence refers to these as "[u]nintelligible references" in the Request (ICC-01/09-02/11-785, para. 10(iii)) and "[e]rror[s] in [the] ERN reference" in the Request's Annex A (ICC-01/09-02/11-785-AnxA, in the column "ERROR CATEGORY").

⁶ Eight of the 22 footnotes cite correctly to the page number, but the pinpointed paragraphs spill over to the following page, which is not cited. See, e.g., footnote 293 "Witness 388 – KEN-OTP-0077-0658 at 0662 – paras 25-29", which is described as an "incomplete page reference" because "paras 25-29 are located at '0662-0663'" (ICC-01/09-02/11-785-AnxA, p. 11, error no. 232) (emphasis added).

⁷ ICC-01/09-02/11-785, para. 10 (emphasis added).

II. Filing the Second Updated PTB obviates the Defence request for a Material Allegations Schedule.

6. The Defence's request for a Material Allegation Schedule is rendered moot by the Prosecution's undertaking to file a Second Updated PTB.
7. *First*, the arguments contained within the Request are premised entirely on the claim that the Updated PTB is "deficient", "not fit for its alleged purpose",⁸ and that the Defence has expended "significant resources" to "analys[e] and identify[] errors" in the Updated PTB.⁹ While sympathetic to these arguments, the Prosecution submits that they are nullified by the filing of an up-to-date and accurate version. The Prosecution regrets the inconvenience it has caused the Defence, but the provision of a Material Allegation Schedule will not recoup these "expend[itures]".
8. *Second*, the Prosecution re-iterates its position, outlined in its 27 May 2013 letter to the Defence, that "the Prosecution's disclosure obligations do not extend to compiling . . . analytical product". The accurate transmission of the Prosecution's case through the text and underlying footnotes of the Second Updated PTB allows the Defence to conduct the analysis that it now requests the Prosecution to do, and fully satisfies its obligation to "explain[] its case with reference to the evidence it intends to rely on at trial".¹⁰
9. This interpretation is supported by the Chamber's 9 July 2012 "Decision on the schedule leading up to trial",¹¹ which explicitly rejected the Defence request for an In-Depth Analysis Chart ("IDAC") as being unreferenced in the "core legal texts of the Court" and "unnecessary" in light of the

⁸ ICC-01/09-02/11-785, para. 13.

⁹ ICC-01/09-02/11-785, para. 14.

¹⁰ ICC-01/09-02/11-451, para. 20.

¹¹ ICC-01/09-02/11-451.

submission of the document containing the charges and the pre-trial brief.¹² The Material Allegation Schedule that the Defence now requests is the same, in all but name, as the IDAC. This is evident from the 2012 Prosecution and Defence joint agreement that, should the Chamber so order, an IDAC was to contain, *inter alia*, the “[f]act[s] upon which the Prosecution seeks to rely” and the “[s]ource[s]”.¹³

10. *Third*, the Prosecution’s case as outlined in its pre-trial brief is the best source of information to assist the Defence in fulfilling its obligations under Rule 79(1)(a). The document’s depth – almost 80 pages – more than puts the Defence on notice of the Prosecution’s allegations. The “[s]tatement of facts”¹⁴ section places Mr Kenyatta at: (i) [REDACTED];¹⁵ (ii) [REDACTED];¹⁶ (iii) [REDACTED];¹⁷ (iv) [REDACTED];¹⁸ (v) [REDACTED];¹⁹ (vi) [REDACTED];²⁰ and (vii) [REDACTED].²¹ It also specifies other actions he took in the commission of the alleged crimes.

11. The provision of a Material Allegation Schedule would involve merely recycling and reformatting the evidence as it is laid out currently. At this late stage before trial, compiling a Material Allegation Schedule is unnecessary and would, moreover, be time and resource intensive.

Conclusion

12. For the foregoing reasons, the Prosecution respectfully requests the Chamber to dismiss the Request as moot. The Prosecution will conduct a

¹² ICC-01/09-02/11-451, para. 11.

¹³ ICC-01/09-02/11-441, paras 5-6.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

thorough review and file a Second Updated PTB by 26 August 2013, which forestalls the Defence request to produce a Material Allegations Schedule.

13. The Prosecution also signals to the Chamber and the Defence that it will request the Chamber pursuant to Regulation 35 to file an updated version of its list of evidence to replace draft interview transcripts and exclude the incriminating evidence of withdrawn witnesses, as soon as practicable.



Fatou Bensouda,
Prosecutor

Dated this 15th day of August, 2013
At The Hague, The Netherlands