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No.: ICC-01/09-02/11
Date: 17 September 2014

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

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

Public document

Request for leave to reply to Defence filing ICC-01/09-02/11-945-Red

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. Pursuant to Regulation 24(5) of the Regulations of the Court (“RoC”), the Prosecution seeks leave to reply to four points raised in Defence submission ICC-01/09-02/11-945-Red.

Submissions

2. **Point one:** the assertion that the “Prosecution prevented the publication” of a letter attributed to P-0011.¹ If leave to reply is granted, the Prosecution will correct the record by explaining that it did not prevent the letter’s publication.
3. **Point two:** the assertion that with respect to the alleged interference with Defence witnesses, “not one of the Defence witnesses who were the subject of the alleged interference has ever been interviewed by the Office of the Prosecutor, an indication that this conduct has been wilfully ignored.”² If leave to reply is granted, the Prosecution will fully address this matter through its submissions and demonstrate why the Defence’s suggestion of “wilful[] ignor[ance]” is incorrect.
4. **Point three:** the assertions, in paragraph 26 of the Defence submission, that Mr Kenyatta:

. . . provided information of his bank records; and entered into a joint process with the Prosecution for the extraction of highly relevant telephone data. All of this demonstrated his innocence . . . The practical and legal difficulties for the Government of Kenya in executing the Prosecution requests are matters for which the Accused is not responsible. All these matters are founded upon issues of Kenyan law. The Prosecution’s refusal to comply with Kenyan legal procedure has frustrated this process.³

5. If leave to reply is granted, the Prosecution will explain that: (i) it has not received all the bank records sought in its Revised Request and has instead

¹ ICC-01/09-02/11-945-Red, para. 8.

² ICC-01/09-02/11-945-Red, para. 22.

³ ICC-01/09-02/11-945-Red, para. 26.

received records covering only part of the relevant time period; (ii) the telephone data extraction to which the Defence refers was initiated in the hope of discrediting Prosecution witnesses, not establishing the activities of Mr Kenyatta, and neither the extraction process nor the Revised Request for assistance to the Government of Kenya (“GoK”) has resulted in a complete set of data being obtained for Mr Kenyatta’s telephones; (iii) the GoK does not claim that its failure fully to comply with the Prosecution’s Revised Request is “founded upon issues of Kenyan law”;⁴ and (iv) the Prosecution has not “refus[ed] to comply with Kenyan legal procedure” and has availed itself of the procedure established in Part 9 of the Statute for seeking State assistance, which the GoK has failed to fully provide.

6. **Point four:** the assertion that granting an adjournment *sine die* would violate Mr Kenyatta’s fair trial rights.⁵ If leave to reply is granted, the Prosecution will explain that Mr Kenyatta’s fair trial rights should be balanced against the need for the Court to take all reasonable measures to ensure that justice is done and that obstructionism is not rewarded. When these factors are balanced in the unique circumstances of this case, where the Constitution of Kenya makes Mr Kenyatta accountable for GoK’s failure to fully cooperate with the Court,⁶ the most appropriate course is to adjourn the case until the GoK complies with its obligations in full.
7. Good cause⁷ exists for a reply on the above four points due to their “importance and potential effect” on the issue submitted for the Chamber’s adjudication.⁸ Points 1-3 raise “new and distinct” matters the Prosecution

⁴ ICC-01/09-02/11-945-Red, para. 26.

⁵ ICC-01/09-02/11-945-Red, paras. 28-31.

⁶ See the Constitution of Kenya, section 132(5) (“The President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries”).

⁷ Regarding the standard of “good cause” see, e.g., ICC-01/05-01/08-294, para. 3.

⁸ See, e.g. ICC-01/04-01/10-61, p.4.

has not had the opportunity to address,⁹ and point 4 is the core matter the Chamber is called upon to decide, and full submissions on it are likely to assist in this process.

Request for relief

8. The Prosecution respectfully requests the Chamber to: (i) grant leave to reply to the four points identified above; and (ii) extend the time limit for submitting the reply under Regulation 35(2) of the RoC such that the reply is due within five days of the decision granting leave.



Fatou Bensouda,
Prosecutor

Dated this 17th day of September, 2014
At The Hague, The Netherlands

⁹ Regarding “new and distinct issues,” *see* ICC-01/04-01/10-61, p.3.