

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-02/11
Date: 14 November 2014

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

PUBLIC

**Defence Response to Victims' Request
for Reclassification dated 29 October 2014**

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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Unrepresented

(Participation/Reparation)

Applicants

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I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta ('Defence') hereby responds to the 'Victims' request for reclassification',¹ in which, *inter alia*, the Legal Representative of the Victims ('LRV') asked Trial Chamber V(B) ('Chamber') to order the Prosecution to file a public redacted version of its Second Updated Pre-Trial Brief ('PTB').² The Defence opposes the LRV's request on the basis that the publication of the PTB would serve only to proliferate untruths and further obfuscate and frustrate future endeavours to learn the truth.
2. Consequently, publication of the PTB would not serve the interests of the victims and would be unjustifiably detrimental to the proper administration of justice and the rights of the Accused by causing further unjustified damage to the reputation of Mr Kenyatta.
3. In the circumstances, the Defence contends that the LRV is motivated in this application to create adverse publicity for the Accused, rather than pursuing any genuine procedural aim for the advancement of the proceedings.

II. PROCEDURAL HISTORY

4. The most recent version of the PTB was submitted by the Prosecution on 26 August 2013.³ This document was intended to assist the Defence and the Court by clarifying the particulars of the Prosecution's case against the Accused. At the time the PTB was submitted, the trial was due to commence on 12 November 2013.⁴

¹ ICC-01/09-02/11-970-Conf.

² See ICC-01/09-02/11-970-Conf, paras 2, 12-27 and 28(b). PTB: ICC-01/09-02/11-796-Conf-AnxA.

³ ICC-01/09-02/11-796-Conf-AnxA.

⁴ ICC-01/09-02/11-763-Conf.

5. On 1 November 2013, Witness 11, who was relied upon by the Pre-Trial Chamber in the Confirmation of Charges Decision⁵ and the Prosecution throughout the PTB, informed the Prosecution that he was no longer willing to appear as a witness.⁶ In a letter to the Judges of the Court dated 28 July 2014, Witness 11 confirmed that he was not willing to appear as a witness, disputed Mr Kenyatta's involvement in the alleged crimes, and criticised the Prosecution for failing to investigate properly.⁷
6. On 4 December 2013, during the period of adjournment afforded to accommodate the Prosecution, Witness 12, a key witness also relied upon in the Confirmation at Charges Decision and throughout the PTB, admitted that he had been lying about matters at the core of the Prosecution's case.⁸
7. On 20 December 2013, the Prosecution filed the 'Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date,'⁹ in which it stated that it no longer intended to rely on Witness 12, had insufficient evidence to proceed to trial, and sought a three-month adjournment to allow it to undertake additional investigative steps and for the Chamber to adjudicate the Prosecution's application for a finding of non-compliance against the Government of Kenya.¹⁰
8. On 31 January 2014, the Prosecution abandoned its 20 December 2013 request, conceding that its proposed further investigations had 'not yielded evidence upon which the Prosecution intends to rely,' and

⁵ ICC-01/09-02/11-382.

⁶ ICC-01/09-02/11-875, paras 11 and 12.

⁷ KEN-OTP-0138-0513 at 0156. The centrality of Witness 11's evidence to the Prosecution's case is briefly outlined at ICC-01/09-02/11-878-Conf, para. 4, fn. 9; *see also* paras 32-33 and ICC-01/09-02/11-945-Conf, para. 8 and Confidential Annexes A and B.

⁸ KEN-OTP-0123-0247 at 0265, line 651. The centrality of Witness 12's evidence to the Prosecution's case is briefly outlined at ICC-01/09-02/11-878-Conf, para. 4, fn. 9 and paras 18-19.

⁹ ICC-01/09-02/11-875.

¹⁰ ICC-01/09-02/11-875, paras 17-19.

instead sought an indefinite adjournment pending the determination of its application for a finding of non-compliance against the Government of Kenya.¹¹

9. At a Status Conference on 7 October 2014, the Prosecution stated that it considered the consultation between itself and the Government of Kenya to be 'effectively at an end.'¹² In light of the Prosecution's submissions, at a further Status Conference the following day, the Chamber characterised the Prosecution's position as being one in which 'the prospect of obtaining sufficient evidence, even if the Kenyan government cooperate fully, [...] remains speculative.'¹³ It is therefore now extremely unlikely that the allegations made in the PTB will ever be presented or challenged at trial.
10. On 21 October 2014, the Chamber ordered the parties, participants and the Registry to request the reclassification of any documents related to Pre-Trial Chamber II's 'Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.'¹⁴
11. On 29 October 2014, the LRV submitted the 'Victims' request for reclassification.'¹⁵ Though unrelated to Pre-Trial Chamber II's Decision, and therefore outside the purview of the Chamber's Order, the LRV

¹¹ ICC-01/09-02/11-892.

¹² ICC-01/09-02/11-T-31-ENG, p.11, line 20.

¹³ ICC-01/09-02/11-T-32-ENG, p.6, lines 23-24.

¹⁴ ICC-01/09-02/11-967.

¹⁵ ICC-01/09-02/11-970.

requested the Chamber to order the Prosecution to file a public redacted version of the PTB.¹⁶

12. On 11 November 2014, the Prosecution filed the 'Prosecution's response to the Defence's and the Common Legal Representative's requests for reclassification'.¹⁷

III. PURPOSE OF THE PRE-TRIAL BRIEF

13. The PTB is a document that is intended to assist the Defence and the Chamber in understanding the nature of the Prosecution's case, and to provide them both with adequate information on the evidence going to the charges in such sufficiency of detail that the Accused's rights under Article 67(1) and (2) are respected. The PTB is also intended to aid the Defence in its trial preparations so that it is aware of the issues that need to be challenged. All references to the PTB in the extensive documentation in this case are in the context of such matters. There is no provision in the Statute or the Rules of Procedure and Evidence that requires the public distribution of the PTB.
14. In its 'Decision on the schedule leading up to trial', the Chamber ordered the Prosecution to provide a pre-trial brief explaining its case with reference to the witnesses it intended to call and the other incriminating evidence upon which it intended to rely.¹⁸ In her Separate Opinion to the 'Decision on the content of the updated document containing the charges,' Her Honour Judge Van Den Wyngaert stressed that the PTB 'must provide the Defence with sufficient notice of the way in which the Prosecutor intends to plead her case at trial.'¹⁹ In authorising an

¹⁶ See ICC-01/09-02/11-970-Conf, paras 2, 12-27 and 28(b). PTB: ICC-01/09-02/11-796-Conf-AnxA.

¹⁷ ICC-01/09-02/11-973.

¹⁸ ICC-01/09-02/11-451, paras 11 and 20.

¹⁹ ICC-01/09-02/11-584, para. 4 of HHJ Van Den Wyngaert's Separate Opinion.

extension of the page-limit for the PTB, the Chamber noted ‘the benefits to the defence and the Chamber of a more detailed articulation of the prosecution’s case.’²⁰

15. The Prosecution has previously stated that the PTB is intended ‘to ensure that the Defence is provided with maximum notice regarding the nature of the Prosecution’s case.’²¹ The Prosecution also conceded that, as a document reliant in large part on witness statements, the PTB could not be considered a wholly accurate prediction of the evidence to be called at trial.²²

IV. SUBMISSIONS

16. The Defence agrees with the LRV²³ that the victims have a central interest in the truth.²⁴ The LRV must not, however, equate the allegations contained within the PTB with the truth. The PTB is a document designed to assist the Defence in its preparation for trial; it is not a statement of fact.
17. In pre-trial proceedings, it has been demonstrated in this case that assertions made by the Prosecutor in the PTB were not based upon the truth. The PTB relies heavily on the proposed testimony of witnesses who have admitted to lying,²⁵ refused to testify on the basis that the Prosecution is presenting a false case,²⁶ or whose credibility must be in serious doubt due to the circumstances of their relationship with the

²⁰ ICC-01/09-02/11-590, para. 4.

²¹ ICC-01/09-02/11-596, para. 15.

²² ICC-01/09-02/11-596, para. 14.

²³ ICC-01/09-02/11-970-Conf, para. 3.

²⁴ *The Prosecutor v. Katanga and Ngudjolo Chui*, ‘Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case,’ ICC-01/04-01/07-474, para. 36.

²⁵ KEN-OTP-0123-0247 at 0265, line 651. *See also* ICC-01/09-02/11-878-Conf, paras 18-24.

²⁶ ICC-01/09-02/11-875, paras 11 and 12; KEN-OTP-0116-0503 at 0503; KEN-OTP-0138-0513 at 0516 and 0518; ICC-01/09-02/11-945-Conf, para. 8 and Confidential Annexes A and B.

Prosecution.²⁷ Consequently, and in view of the Prosecution's repeated admissions that it has insufficient evidence to proceed to trial,²⁸ it is clear that the PTB constitutes an out-dated articulation of the Prosecution case, which now includes wholly unsupported allegations. It cannot, therefore, be considered to hold 'the truth about what happened in Naivasha and Nakuru, and the identities of those most responsible.'²⁹ As such, it cannot be claimed to be 'directly relevant to the victims' interests in this case'.³⁰

18. Moreover, the publication of the PTB, even in a redacted form, at this stage in the proceedings would not assist the Defence and would likely have profound negative ramifications for the integrity of any future proceedings, and would therefore contravene the purpose of the PTB as envisaged by the Chamber and stated by the Prosecution. As a document that no longer provides an accurate explanation of the Prosecution case with reference to the witnesses it intends to call and other alleged incriminating evidence upon which it intends to rely, any previous justification for its publication is nullified.
19. In asking for 'more detailed assertions' as set out in the PTB, the LRV has referred to 'the Prosecution's recent summary of the likely evidence of significant witnesses in this case' and public reference to 'interference with witnesses.'³¹ The Defence notes that in its 'Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date', the Chamber stated that no evidence had been provided to support the serious allegation that the Accused interfered with the collection of

²⁷ See the Defence's previous submissions on this point in ICC-01/09-02/11-828.

²⁸ ICC-01/09-02/11-875, paras 17-19; ICC-01/09-02/11-944, para. 2.

²⁹ ICC-01/09-02/11-970, para. 16.

³⁰ ICC-01/09-02/11-970, para. 16.

³¹ ICC-01/09-02/11-970-Conf, para. 18, citing, at fn 20, ICC-01/09-02/11-T-32-ENG ET WT 08-10-2014, pp. 35-37.

evidence.³² By seeking to put the matters set out in the PTB into the public domain, the Defence submits that the LRV has exceeded his mandate. The Defence further submits that the reasons underlying the LRV's request are not connected with the trial in any relevant manner, and demonstrate that he is unfairly attempting, through the inappropriate use of ICC procedures, to damage the reputation of the Accused.

20. Further, the Defence submits that the Prosecution's public 'summary of the likely evidence of significant witnesses in this case', given at the close of 8 October 2014 Status Conference, was nothing short of a publicity stunt.³³ The Prosecution's purported summary was designed to cause embarrassment to the Accused, was delivered without any notice to the Defence to permit response, and was not relevant to the matters in hand before the Trial Chamber. The Prosecution sought to justify its statement by submitting that:

[a]t various stages of these proceedings the Defence have suggested that the Prosecution has no case, that all the evidence it once relied upon has been exploded. This is the Defence submission throughout the case, but this is incorrect. There remains a considerable body of evidence that implicates Mr Kenyatta. The Prosecution has scrutinized very carefully this body of evidence and we judge that this evidence is insufficient to make you sure, but concerns that the Chamber may have about the injustice of allowing a case to continue where there is simply no evidence can be put aside.³⁴

In such a situation, *i.e.* one in which a prosecutor has admitted that there is insufficient evidence for a case to proceed to trial, it is submitted that

³² "It has also been submitted that the non-compliance on the part of the Kenyan Government can be attributed to the accused. To the extent that deliberate interference with the collection of evidence, contrary to the Statute, is alleged, *the onus is on the Prosecution to substantiate this allegation* and, as appropriate, to bring proceedings pursuant to Article 70 of the Statute. *No evidence was provided to support that serious allegation* and the Chamber is not called upon to decide the issue of any such alleged interference", ICC-01/09-02/11-908, para. 86 (emphases added).

³³ ICC-01/09-02/11-970-Conf, para. 18, citing, at fn 20, ICC-01/09-02/11-T-32-ENG ET WT 08-10-2014, pp. 35-37.

³⁴ ICC-01/09-02/11-T-32-ENG ET WT 08-10-2014, p. 34, lines 17-25.

it is wholly inappropriate and unfair to the Accused for the Prosecution to embark upon a public summary of the remaining untested evidence. The Defence does not contend that there is no evidence; it submits that there is *no sufficient* evidence upon which to bring a case, and that such a state of affairs should, ethically, preclude the Prosecutor from making potentially damaging and unfair statements in open court in an attempt to influence public opinion. This is particularly so in the context of a case where the Prosecution has repeatedly failed to support allegations with reliable evidence and is aware that what remains of the case has not been tested at trial. In the experience of Defence counsel, this action was without precedent and constituted a wholly inappropriate exercise, demonstrating further the lack of regard for normal prosecutorial standards of conduct. Furthermore, the statement was not a fair description of the state of the Prosecution's case, and provides no basis for the LRV's request for the reclassification of the PTB.³⁵ By the Prosecution's own admission, what precarious evidence does remain is not sufficient to proceed to trial. The PTB does not contain the 'flesh' that the LRV wants to place on the Prosecution's remaining 'bones.'

21. The purpose of trial proceedings is to subject the Prosecution's allegations to legal examination and judicial scrutiny, as well as to allow an accused to present his or her own case in their defence. These processes are vital to the Court's truth-seeking function. The Defence submits that it would be wholly inappropriate to publish a document such as the PTB when the proper legal testing of the allegations contained therein is not within the immediate contemplation of the Court.

³⁵ ICC-01/09-02/11-T-32-ENG ET WT 08-10-2014, p. 35, line 5 to p. 38, line 18.

22. As observed by the LRV, 'the likelihood that [the victims] will hear in the near future any evidence at trial is not high.'³⁶ Consequently, the Defence will be unable to test the Prosecution's evidence at trial, nor call its own evidence, and the Prosecution's allegations will not be subject to proper judicial scrutiny. It cannot be justifiable to publish an out-dated and largely unsupported PTB in circumstances where it is highly unlikely that the fundamentally contested allegations contained therein will ever be challenged in open court. The core evidence cited in support of the assertions in the PTB has been proved to be deficient, and therefore to rely upon the less than sufficient remaining evidence as justification for a public position defies the normal standards of justice expected in a criminal court.
23. As the LRV has himself noted, the public version of the Prosecution's updated pre-trial brief in *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* was released only on 9 September 2013,³⁷ just one day before the commencement of trial.³⁸ Accordingly, it is submitted that the situation in *Ruto and Sang* provides no support for the LRV's request for publication of the PTB in the instant proceedings, in which the prospect of trial is highly unlikely, and where the key allegations in the PTB are premised upon false evidence that is no longer relied upon by the Prosecution.
24. As the future conduct of this case remains uncertain, no measures that might unduly affect the integrity of proceedings should be permitted.
25. Moreover, the reputational damage suffered by the Accused would be unduly amplified by the unnecessary further publication of rumours

³⁶ ICC-01/09-02/11-970, para. 17.

³⁷ ICC-01/09-01/11-625-AnxB-Red.

³⁸ ICC-01/09-01/11-T-27-ENG ET WT 10-09-2013 1-83 SZ T.

that the Defence has repeatedly contended were: (i) authored by witnesses motivated by pecuniary and other interests, and upon whose 'evidence' the Prosecution no longer seeks to rely; and (ii) perpetuated by witnesses informed of the Prosecution's case theory as publicised at the Confirmation of Charges and through the Prosecution's own interviews.³⁹ The strategy of publicising the Prosecution's case and the nature of the evidence upon which it seeks to rely is a very dangerous tactic that has the potential to cause false witnesses to attach themselves to the allegations. To date, the background to this case has shown that the Prosecution has demonstrated a complete inability or unwillingness to detect such false witnesses.

26. The Defence submits that by informing witnesses and the public of the Prosecution case, publication of the PTB would preclude any remaining possibility of the proper administration of justice. The potential for such contamination has already been demonstrated.⁴⁰ It is imperative to ensure that the proceedings are not further polluted or influenced by an out-dated, insufficiently supported, and fundamentally disputed Prosecution theory of the case entering the public domain.
27. This concern is especially acute when considered in the context of the present case, where the Defence has made repeated complaints about the dishonest interference with the administration of justice by certain key Prosecution witnesses.⁴¹

³⁹ See the Defence's previous submissions on this point at ICC-01/09-02/11-903, para. 5, fn 7, citing KEN-OTP-0074-0903 annexed thereto.

⁴⁰ See the Defence's previous submissions on this point at ICC-01/09-02/11-903, para. 5, fn 7, citing KEN-OTP-0074-0903 annexed thereto.

⁴¹ See ICC-01/09-02/11-822-Conf and ICC-01/09-02/11-878-Conf, para. 22 and Confidential Annex B.

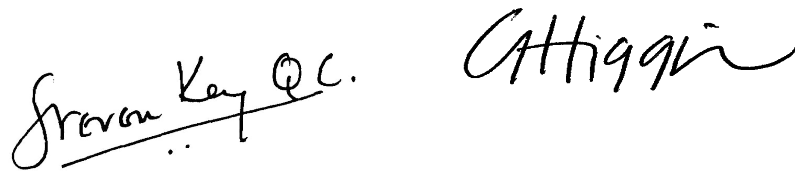
V. CONCLUSION

28. For the above reasons, the publication of the PTB would risk engendering precisely the opposite effect to that desired by the LRV. Consequently, the Defence submits that the LRV's request is misconceived and inappropriate in the circumstances.
29. The Defence submits that the publication of the PTB can serve no legitimate purpose when a trial is not within the immediate contemplation of the Court. At worst, it would be profoundly damaging; at best, scurrilous. The Defence therefore submits that the LRV's request should not be granted.
30. The Defence submits, further, that redactions would not adequately overcome the concerns identified above and would therefore be inappropriate in this instance.

VI. RELIEF

31. For the reasons set out herein, the Defence respectfully requests the Chamber to deny the Legal Representative for the Victims' request to the Chamber to order the Prosecution to file a public version of the PTB.

Respectfully submitted,

The image shows two handwritten signatures in black ink. On the left is 'Steven Kay QC.' with a horizontal line under the name. On the right is 'G Higgins' in a cursive script.

.....

Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 14th day of November 2014

At London, England