

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 11 December 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

**Decision on request of the Legal Representative of Victims for a public
redacted version of the pre-trial brief**

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Article 64(6)(f) of the Rome Statute ('Statute') and Regulation 23 *bis* of the Regulations of the Court ('Regulations'), renders the following 'Decision on request of the Legal Representative of Victims for a public redacted version of the pre-trial brief'.

I. Procedural History

1. On 26 August 2013, the Office of the Prosecutor ('Prosecution') filed a confidential version of its second updated pre-trial brief ('PTB'), indicating that it would file a public redacted version 'as soon as practicable, pending the implementation of protective measures for some of its witnesses who are in VWU care'.¹
2. On 29 October 2014, the Legal Representative of Victims ('LRV') filed the 'Victims' request for reclassification' ('Request'),² in which he seeks the Chamber: (i) to reclassify as public certain filings identified in the Request;³ and (ii) to order the Prosecution to file a public redacted version of its PTB.⁴
3. On 11 November 2014, the Prosecution filed its response, stating, *inter alia*, that it does not oppose the Request ('Prosecution Response').⁵
4. On 14 November 2014, the defence team for Mr Kenyatta ('Defence') filed its response, requesting that the Chamber reject the part of the Request relating to the filing of a public redacted version of the PTB ('Defence Response').⁶

¹ Prosecution's submission of the second updated pre-trial brief, ICC-01/09-02/11-796, with Confidential Annex A.

² ICC-01/09-02/11-970-Conf. A public redacted version was filed on the same day (ICC-01/09-02/11-970-Red).

³ Request, ICC-01/09-02/11-970-Red, paras 6-11.

⁴ Request, ICC-01/09-02/11-970-Red, paras 12-27. *See also* ICC-01/09-02/11-970-Conf-Anx.

⁵ Prosecution's response to the Defence's and the Common Legal Representative's requests for reclassification, ICC-01/09-02/11-973, paras 5-6.

⁶ Defence Response to Victims' Request for Reclassification dated 29 October 2014, ICC-01/09-02/11-975, para. 31.

5. On 2 December 2014, having requested⁷ and been granted leave to reply to the Defence Response on two particular issues,⁸ the LRV filed his reply ('Victims' Reply').⁹

II. Submissions

6. The LRV argues that, while the Court's statutory framework is 'silent about the existence of a PTB, and consequently, whether it is to be filed as a public document',¹⁰ there exists an overarching presumption of public access to proceedings, which 'is a bedrock principle of the Rome Statute'¹¹ and which has been 'repeatedly emphasised by Chambers of the Court'.¹² The LRV notes that this principle is also reflected in a number of other international¹³ and domestic¹⁴ jurisdictions. The LRV argues that the presumption in favour of public proceedings is applicable to the filings of the parties and participants, and accordingly, to the PTB.¹⁵ He avers that, while this presumption is 'not absolute',¹⁶ there is no foundation in the Court's statutory framework or jurisprudence, nor in other international tribunals or domestic jurisdictions, 'to justify withholding from the public a non-vexatious filing merely to prevent what the accused considers to be embarrassment or damage to his reputation'.¹⁷

⁷ Victims' request for leave to reply to the "Defence response to Victims' request for reclassification", 18 November 2014, ICC-01/09-02/11-976.

⁸ Decision on request of the Legal Representative of Victims for leave to reply, 26 November 2014, ICC-01/09-02/11-979.

⁹ Victims' reply to the 'Defence response to Victims' request for reclassification', ICC-01/09-02/11-980.

¹⁰ Victims' Reply, ICC-01/09-02/11-980, para. 2.

¹¹ Victims' Reply, ICC-01/09-02/11-980, para. 3.

¹² See Request, ICC-01/09-02/11-970-Red, para. 4 and footnote 3; Victims' Reply, ICC-01/09-02/11-980, footnote 9, para. 24.

¹³ See, *inter alia*, references in the Victims' Reply, ICC-01/09-02/11-980, to the statutory framework and jurisprudence of the International Criminal Tribunal for the former Yugoslavia (para. 4) and of the European Court of Human Rights (paras 5 and 19-20).

¹⁴ See references in the Victims' Reply, ICC-01/09-02/11-980, to the statutory framework / jurisprudence stemming from various jurisdictions within the United States of America (paras 21-23), Ireland, (para. 16), Australia (para. 25), and Canada (para. 26).

¹⁵ Victims' Reply, ICC-01/09-02/11-980, paras 2, 8, 10 and 27.

¹⁶ Victims' Reply, ICC-01/09-02/11-980, para. 13.

¹⁷ Victims' Reply, ICC-01/09-02/11-980, para. 14.

7. The LRV also argues that the statutory framework of the Court requires that any restrictions to the public's right to access Court records must be necessary and proportionate.¹⁸ He points to Regulations 20(3) and 23 *bis*(3) of the Regulations which stipulate that, where reasons for maintaining confidentiality no longer exist, records may be rendered public. The LRV argues that the Defence has failed to provide any valid reasons as to why the PTB ought to remain confidential, in whole or in part, and has thus failed to comply with the principles of necessity and proportionality.¹⁹
8. The LRV avers further that the Court has a statutory duty to take appropriate measures to protect the safety and the interests of victims, the latter of which include 'the right to know the truth about the crimes committed against them and the identities of those most responsible'.²⁰ The LRV submits that the surviving victims participating in the proceedings are therefore 'entitled to the dignity of access' to the PTB and thus to the more detailed allegations contained therein regarding the role of Mr Kenyatta in the post-electoral violence.²¹ It submits that States Parties ought also 'have a full and informed understanding of the allegations at the heart of this case',²² and that, given the publicity that the proceedings have generated, the general public retains a specific interest in the filing of a redacted version of the PTB.²³ The LRV concludes that it is therefore in the interests of (i) the victims of the crimes alleged in the present case; (ii) the public; and (iii) States Parties, that a redacted version of the PTB be filed by the Prosecution 'without delay'.²⁴

¹⁸ Victims' Reply, ICC-01/09-02/11-980, para. 28.

¹⁹ Victims' Reply, ICC-01/09-02/11-980, para. 29.

²⁰ Request, ICC-01/09-02/11-970-Red, para. 16. *See also* para. 5 and the paragraph that follows, which is erroneously labelled para. 3, and paras 16-24.

²¹ Request, ICC-01/09-02/11-970-Red, para. 18. *See generally* paras 16-23.

²² Request, ICC-01/09-02/11-970-Red, para. 22. It is noted that this argument appears to be predicated upon the Chamber making a finding of non-cooperation in relation to the Government of the Republic of Kenya under Article 87(7) of the Statute, which the Chamber did not do - *see* Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, 3 December 2014, ICC-01/09-02/11-982.

²³ Request, ICC-01/09-02/11-970-Red, para. 22.

²⁴ Request, ICC-01/09-02/11-970-Red, para. 24. *See also* Victims' Reply, ICC-01/09-02/11-980, para. 30.

9. The Prosecution notes that, as it has previously indicated, a public redacted version of the PTB has been prepared. The Prosecution argues that this version is presently confidential due to a Defence request that it remain so,²⁵ and that the Prosecution would be 'perfectly happy for it to be a public document tomorrow'.²⁶ The Prosecution therefore does not oppose the Request.²⁷
10. The Defence opposes the Request on the basis that, in its submission, there is no provision in the Court's statutory framework that requires the public distribution of the PTB.²⁸ It argues that the PTB is a document prepared to assist the Defence,²⁹ and to provide it 'with sufficient notice of the way in which the Prosecutor intends to plead her case at trial',³⁰ rather than constituting 'a statement of fact'.³¹ The Defence submits that, given the credibility issues affecting the witnesses that the Prosecution previously sought to reply upon, the PTB has become 'an out-dated articulation of the Prosecution case, which now includes wholly unsupported allegations'.³² On this basis, the Defence argues that the publication of the PTB 'would serve only to proliferate untruths and further obfuscate and frustrate future endeavours to learn the truth',³³ which would neither serve the interests of victims³⁴ nor the integrity of proceedings.³⁵
11. The Defence argues that the PTB ought not be made publicly available in a situation in which the Prosecution has admitted the evidence it has in its possession is not sufficient to go to trial, and where the 'proper testing of the allegations contained

²⁵ See Prosecution Response, ICC-01/09-02/11-973, para. 5 and confidential Annex A.

²⁶ See Prosecution Response, ICC-01/09-02/11-973, para. 5 and transcript of hearing of 9 July 2014, ICC-01/09-02/11-T-30-ENG ET WT, page 9, lines 18-22.

²⁷ See Prosecution Response, ICC-01/09-02/11-973, para. 6.

²⁸ Defence Response, ICC-01/09-02/11-975, para. 13.

²⁹ Defence Response, ICC-01/09-02/11-975, paras 4, 13 and 16.

³⁰ Defence Response, ICC-01/09-02/11-975, para. 14.

³¹ Defence Response, ICC-01/09-02/11-975, para. 16.

³² Defence Response, ICC-01/09-02/11-975, para. 17. See also para. 22.

³³ Defence Response, ICC-01/09-02/11-975, para. 1.

³⁴ Defence Response, ICC-01/09-02/11-975, para. 17.

³⁵ Defence Response, ICC-01/09-02/11-975, para. 24.

therein' is therefore unlikely.³⁶ It submits further that the publication of the PTB would result in 'further unjustified damage to the reputation of Mr Kenyatta',³⁷ and that, in light of these circumstances, it would not be appropriate to issue a public redacted version of the PTB.

III. Analysis

12. As a preliminary matter, the Chamber notes that this decision addresses only the portion of the Request relating to the ordering of the Prosecution to file a public redacted version of its PTB. The other portion of the Request relating to the reclassification of certain other filings³⁸ is addressed by way of separate decision.
13. The Chamber notes the principle of publicity of proceedings that underpins the Court's statutory framework,³⁹ and considers that it is indeed bound to 'safeguard[...] the fundamental principle of public hearings and ensur[e] that the record of the case is as complete as possible'.⁴⁰ The Chamber notes further that, pursuant to Regulation 23 *bis* of the Regulations, unless there is a continuing basis for a filing to remain confidential, it may be reclassified as public. The Chamber's analysis will therefore focus on ascertaining whether a direct reason exists to maintain the confidentiality of the PTB.
14. In conducting this analysis, the Chamber observes that, since the filing of the submissions of the parties and participants in relation to the Request, the Prosecution has withdrawn the charges against Mr Kenyatta ('Notice of Withdrawal of

³⁶ Defence Response, ICC-01/09-02/11-975, paras 20-23. *See also* para. 9.

³⁷ Defence Response, ICC-01/09-02/11-975, para. 2. *See also* para. 25.

³⁸ *See* Request, ICC-01/09-02/11-970-Red, paras 6-11.

³⁹ *See, for example*, Articles 64(7), 67(1) and 68(2) of the Statute, Rule 15 of the Rules and Regulations 20(3) and 23*bis* of the Regulations.

⁴⁰ *See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the application for registration in the record of decisions and motions transmitted solely by e-mail, 8 February 2013, ICC-01/04-01/07-3237-tENG, para. 3.

Charges’).⁴¹ Therefore, while the Chamber has indicated that this ‘does not prejudice the right of the Prosecution to bring new charges against the accused at a later date, based on the same or similar factual circumstances’,⁴² the case, as based on the evidence reflected in the current PTB, will not be proceeding.

15. This is of relevance to the Defence argument that the issuing of a public redacted version of the PTB will be ‘profoundly damaging’ to, *inter alia*, Mr Kenyatta⁴³ because ‘the core evidence cited in support of the assertions in the PTB has proved to be deficient’ and therefore ought not be made public.⁴⁴ First, the Chamber notes that the Defence has not provided a legal basis justifying the consideration of the issue of Mr Kenyatta’s ‘reputation’ in the decision on the classification of the PTB.⁴⁵ Second, contrary to the Defence assertion that the PTB is inaccurate and therefore prejudicial, it is clear from the public record of this case, including from the Notice of Withdrawal of Charges, that the evidence against Mr Kenyatta, as outlined in the PTB, was *not* sufficiently compelling to allow the case to proceed to trial. Therefore, even if it were to be accepted that impact on Mr Kenyatta’s reputation is a relevant factor, the issuing of a public redacted version of the PTB, rather than ‘proliferating untruths’, must be viewed in this light. Moreover, the principle of publicity, which encompasses the charges and factual allegations against an accused, is not dependant on the ultimate determination, if any, made in relation to those allegations.
16. The Chamber notes that the Prosecution is ready and willing to file a public redacted version of its PTB, and that the present reason that it remains confidential is due to a request from the Defence to this effect, dated 29 August 2013 and contained in Annex

⁴¹ Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, 5 December 2014, ICC-01/09-02/11-983.

⁴² Decision on Prosecution’s application for a further adjournment, 3 December 2014, ICC-01/09-02/11-981, para. 56.

⁴³ Defence Response, ICC-01/09-02/11-975, para. 29.

⁴⁴ Defence Response, ICC-01/09-02/11-975, para. 22.

⁴⁵ The Chamber notes that, to the contrary, the LRV referred to domestic jurisprudence precluding consideration of reputation in deciding whether or not to render court records public - *see, inter alia*, Victims’ Reply, ICC-01/09-02/11-980, paras 15-16 and footnote 23.

A to the Prosecution Response.⁴⁶ Having noted the reasons provided by the Defence for non-disclosure of the PTB, which the Defence has not reiterated as a current justification for its continuing confidentiality, the Chamber is of the view that, subject to an assessment by Victims and Witnesses Unit ('VWU'), the direct reasons for the current classification of the PTB no longer exist. The Chamber therefore considers it to be consistent with its obligation to ensure publicity of the case record to order the filing of a redacted version of the PTB pursuant to Regulation 23 *bis* of the Regulations.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the portion of the Request relating to the filing of a public redacted version of the Prosecution's second updated PTB; and

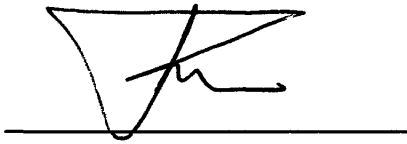
ORDERS the Prosecution to consult with the VWU in relation to the second updated PTB, and to file a public redacted version by 16h00 on 19 January 2015, taking into account the amendment proposed by the LRV in ICC-01/09-02/11-970-Conf-Anx, and any further amendments proposed by VWU.

⁴⁶ See Prosecution Response, ICC-01/09-02/11-973, confidential Annex A.

Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge ~~Geoffrey~~ Henderson

Dated this 11 December 2014

At The Hague, The Netherlands