

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 19 January 2015

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 Defence request for extension of page limit to respond to the
Prosecution's 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')¹ of the International Criminal Court, in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Article 64(6)(f) of the Rome Statute ('Statute') and Regulations 24, 31, 33-35 and 37 of the Regulations of the Court ('Regulations'), renders the following 'Decision on Defence request for extension of page limit to respond to the Prosecution's pre-trial brief'.

I. Procedural History

1. On 9 July 2012, the Chamber issued a decision, *inter alia*, directing the Office of the Prosecutor ('Prosecution') to file a pre-trial brief ('PTB') by 9 January 2013 ('Original Decision').²
2. Accordingly, on 9 January 2013, the Prosecution filed its PTB.³
3. On 26 August 2013, following certain revisions, the Prosecution filed a confidential version of its second updated pre-trial brief, 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'.⁴
4. On 11 December 2014, the Chamber ordered the Prosecution to file a public redacted version of its PTB ('December 2014 Order').⁵

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber V(b) as composed by the Presidency's 'Decision replacing a Judge in Trial Chamber V(b)', 30 January 2014, ICC-01/09-02/11-890, and to the chamber in its previous compositions as Trial Chamber V(b) and Trial Chamber V.

² Decision on the schedule leading up to trial, ICC-01/09-02/11-451.

³ Prosecution's provision of materials pursuant to Decision ICC-01/09-02/11-451, ICC-01/09-02/11-596. The PTB was contained at confidential, *ex parte*, Annex D (ICC-01/09-02/11-596-Conf-Exp-AnxD). A confidential redacted version was filed on 10 January 2013 (ICC-01/09-02/11-596-Conf-AnxD-Red). A corrigendum of Annex D was filed on 24 January 2014. Pursuant to an order of the Chamber, ICC-01/09-02/11-596-Conf-Exp-AnxD-Corr was reclassified as confidential on 11 June 2013.

⁴ Prosecution's submission of the second updated pre-trial brief, ICC-01/09-02/11-796, with Confidential Annex A.

⁵ Decision on request of the Legal Representative of Victims for a public redacted version of the pre-trial brief, ICC-01/09-02/11-988.

5. On 16 December 2014, the defence team for Mr Kenyatta ('Defence') filed a request for an extension of page limit in order to respond to the public redacted version of the Prosecution's PTB ('Defence Request').⁶
6. On 18 December 2014, the Prosecution responded seeking that the Defence Request be dismissed *in limine* ('Prosecution Response').⁷

II. Submissions

7. The Defence submits that, given the 'nature, scope and seriousness' of the allegations contained in the PTB, it is 'necessary and in the interests of fairness' that they are addressed in 'sufficient detail' in its response.⁸ The Defence notes that the Prosecution's PTB exceeds the prescribed page limit, and the 'clear need' of enabling the Defence to sufficiently address the 'complex and voluminous factual allegations' in the PTB satisfies the exceptional circumstances requirement of Regulation 37(2) of the Regulations.⁹ The Defence submits that a page limit equivalent to that of the Prosecution's unredacted PTB would be appropriate.¹⁰
8. The Prosecution submits that the Defence Request should be dismissed for three reasons.¹¹
9. First, the Prosecution argues that the Defence has no entitlement to file a response to the PTB.¹² The Prosecution submits that the Original Decision, setting the schedule and procedural steps leading up to trial, did not envisage the filing of any response to

⁶ Defence Request for Extension of the Page Limit for the Response by the Defence to the Pre-Trial Brief, ICC-01/09-02/11-990.

⁷ Prosecution Response to "Defence Request for Extension of the Page Limit for the Response by the Defence to the Pre-Trial Brief", ICC-01/09-02/11-991.

⁸ Defence Request, ICC-01/09-02/11-990, paras 10-11. *See also* para. 12.

⁹ Defence Request, ICC-01/09-02/11-990, para. 12.

¹⁰ Defence Request, ICC-01/09-02/11-990, para. 13.

¹¹ Prosecution Response, ICC-01/09-02/11-991, para. 1.

¹² Prosecution Response, ICC-01/09-02/11-991, para. 5.

the PTB.¹³ The Prosecution additionally argues that, even if the Defence had been entitled to file a response to the PTB, this entitlement would have arisen at the time the Defence was originally notified of the PTB, on 26 August 2013, and not now in the context of the filing of a public redacted version of that document.¹⁴

10. Second, the Prosecution submits that the reasons for which the Defence seeks the relief sought were already litigated before, and resolved by, the Chamber in the December 2014 Order, which the Defence did not seek leave to appeal.¹⁵
11. Third, the Prosecution argues that the Defence Request is contrary to the principle of judicial efficiency in seeking to 'place fresh submissions on the record of a case that has already finished' in response to a procedural decision aimed simply at 'aligning the record [...] with the principle of publicity'.¹⁶

III. Analysis

12. The Chamber considers that the Defence had no automatic entitlement to file a response to the Prosecution's PTB, and has no such entitlement in respect of a public redacted version of the PTB.
13. Regulation 24 of the Regulations provides that '[t]he Prosecutor and the defence may file a response to any document filed in the case in accordance with' the Statute, the Rules of Procedure and Evidence, the Regulations 'and any order of the Chamber'. The Chamber notes that the Original Decision, issued after hearing the submissions of the parties, created a disclosure and briefing schedule for the period leading up to trial, which included the filing of a PTB by the Prosecution. The Original Decision did

¹³ Prosecution Response, ICC-01/09-02/11-991, para. 6.

¹⁴ Prosecution Response, ICC-01/09-02/11-991, paras 7-8.

¹⁵ Prosecution Response, ICC-01/09-02/11-991, paras 9-10.

¹⁶ Prosecution Response, ICC-01/09-02/11-991, paras 11-12.

not envisage the filing of any response to the PTB as part of that schedule.¹⁷ This position was not altered by the December 2014 Order. Consequently, any response could only be filed with leave of the Chamber.

14. The Chamber notes that the Defence Request does not seek leave for the filing of a response, but rather assumes an entitlement to respond and seeks an extension of the page limit for doing so. The Chamber nonetheless considers it appropriate to address the Defence Request as if such request for leave had been made.
15. In the Chamber's view, the extremely belated filing of the Defence Request, at a stage when the Prosecution has already withdrawn the charges in the case,¹⁸ militates against granting such leave. The Chamber observes that the Defence was notified of the PTB almost eighteen months ago, on 26 August 2013, and made no prior request to file a response.¹⁹ The timeframe to respond begins from the moment that a document is first notified to a party, and not from a subsequent reclassification or redacted version of that document.²⁰
16. The Chamber does not consider there to be any justifiable reason why the Defence is only now seeking to file a response to the PTB. The Chamber consequently does not consider that leave to file a response to the PTB should be granted and accordingly also denies the Defence Request, for extension of the page limit for doing so.

¹⁷ See also for a prior ruling by the Chamber on a similar matter: Decision on the content of the updated document containing the charges, ICC-01/09-02/11-584, paras 1-4 and 9.

¹⁸ Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, 5 December 2014, ICC-01/09-02/11-983.

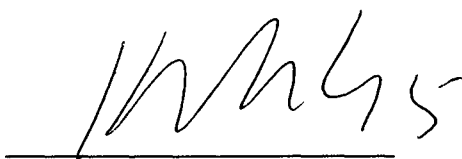
¹⁹ The Chamber notes that in cases where a right to respond arises such response must, pursuant to Regulation 34 of the Regulations, be filed within 21 days of notification of the initial document, unless otherwise ordered.

²⁰ See e.g. Regulation 34(b) of the Regulations.

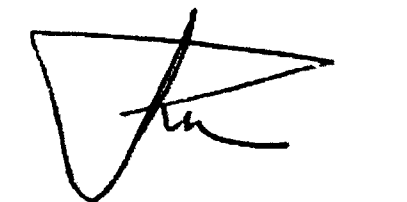
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Request.


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



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 19 January 2015

At The Hague, The Netherlands