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No.: **ICC-01/09-02/11**
Date: **18 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
Prosecution Response to "Defence Request for Extension of the Page Limit for the Response by the Defence to the Pre-Trial Brief"

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 Office of the Prosecutor ("Prosecution") opposes the "Defence Request for Extension of the Page Limit for the Response by the Defence to the Pre-Trial Brief" and requests that it should be dismissed *in limine* for the following reasons: i) the application is a veiled attempt to impermissibly place on the record a document that the Defence is not entitled to file and accordingly is procedurally defective; ii) the defence issues with the publication of the Pre-Trial Brief (PTB) have been litigated and resolved and iii) it offends the principle of judicial economy and efficiency.

Procedural background

2. On 9 July 2012, the Trial Chamber issued the "Decision on the Schedule leading up to Trial" establishing the deadline for the Prosecution to file its PTB.[1]

3. On 11 December 2014, the Trial Chamber issued its "Decision on the request of the Legal Representative of Victims for a public redacted version of the pre-trial brief" ("Decision on LRV's Request"), in effect ordering the Prosecution to file a public redacted version of its second updated PTB.[2]

4. On 16 December 2014, the Defence filed its "Request for Extension of the Page Limit for the Response by the Defence to the Pre-Trial Brief" ("Defence Request").[3]

[1] ICC-01/09-02/11-451, para. 20.
[2] ICC-01/09-02/11-988.
[3] ICC-01/09-02/11-990.

Submissions

i) Procedural defect

5. The Defence Request lacks any proper basis and is procedurally defective. It is also disingenuous: it wrongly assumes that the Defence is now entitled to file a response to the public redacted version of the Pre-Trial Brief, without leave from the Chamber, and accordingly authorisation is only required to exceed the statutory page-limit. The contrary is true: the Defence has no entitlement, past or present, to file any response to the Prosecution's Pre-Trial Brief.

6. First, under the plain terms of the Trial Chamber's 9 July 2012 Decision, a Defence response to the Prosecution's Pre-Trial Brief was never contemplated, let alone authorised. The Chamber's schedule was clear: the Prosecution was to file its Pre-Trial Brief on 9 January 2013, disclosure of different categories of evidence as well as joint submissions on agreed facts would follow, and then trial would commence on 11 April 2013.[4] There is no mention of any Defence response to the PTB in the sequence of procedural steps leading up to the trial contemplated by the Chamber. Nor does the Decision on LRV's Request ordering the filing of the public redacted version of the PTB envisage a response by the Defence.[5]

7. But even assuming, *arguendo*, a hypothetical Defence entitlement to respond to the PTB, this could certainly not extend to the current situation: the public redacted version of the PTB is *not* a new document; it is a re-filing of the same document previously filed under the Chamber's 9 July 2012 Decision, but including redactions that allow that document to conform to the requirements of the principle of publicity of the proceedings. In this

[4] See ICC-01/09-02/11-451, paras. 20-25.
[5] ICC-01/09-02/11-988, page 9.

sense, the public redacted version of the PTB is identical in essence to a decision or ruling which is issued first confidentially, and subsequently reclassified as public by the same Chamber which made it. In such a situation, a party that was notified of the ruling when it was first issued, and decided to remain passive, cannot seek to challenge that very same ruling once it is reclassified as public, pretending that the reclassification has somehow created a fresh ruling. The same considerations apply to the public redacted version of the PTB. Accordingly, if there was any entitlement to respond, that entitlement was waived a long time ago.

8. A cursory look at the applicable regulations and the procedural background confirms this: if the Defence considered that it had a right to respond to the PTB, it must have also realised that under Regulation 34(b) of the Regulations of the Court ("Regulations") there is a limited time frame within which a party may respond to a filing by another party. The confidential version of the second updated PTB was filed on 26 August 2013, over 15 months prior to this application by the Defence. No application for a variation of the time limit to file a response under Regulation 35 of the Regulations was ever made by the Defence. This further demonstrates that the Defence Request has no arguable basis and should be dismissed *in limine*.

ii) The Defence's issues with the publication of the Pre-Trial Brief have been litigated and resolved.

9. Should the Chamber be minded to examine the substance of the application by the Defence, the Prosecution recalls that the Chamber has already effectively considered the merits of the Defence arguments in its Decision on LRV's Request, and ruled in favour of the principle of publicity. The Chamber ruled *inter alia*:

> [C]ontrary 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.[6]

10. The Defence had the ability to seek leave to appeal this decision if it considered that it was prejudicial to its interests. It did not. The Request, which rehearses these previously rejected arguments,[7] adds nothing to its unsuccessful response to the LRV's request, apart from a conclusory statement that "[a response is] necessary and in the interests of fairness".[8]

iii) The Request should be dismissed for reasons of judicial efficiency.

11. In addition to the procedural reasons for rejecting the Request, the Chamber should dismiss the Request for reasons of judicial efficiency. The Defence Request is an attempt to re-open litigation on a matter the Chamber has essentially ruled upon after hearing submissions form all parties and participants.

12. Further, proceedings in this case have been completed: the Prosecution withdrew the charges against Mr. Kenyatta on 5 December 2014. There is no

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[6] ICC-01/09-02/11-988, para. 15.
[7] See ICC-01/09-02/11-988, paras. 10-11 ("the PTB has become 'an out-dated articulation of the Prosecution case, which now includes wholly unsupported allegations'. 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', which would neither serve the interests of victims nor the integrity of proceedings […] 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 therein' is therefore unlikely. It submits further that the publication of the PTB would result in 'further unjustified damage to the reputation of Mr Kenyatta', and that, in light of these circumstances, it would not be appropriate to issue a public redacted version of the PTB" (footnotes omitted)).
[8] ICC-01/09-02/11-990, para. 11.

room at this stage for further litigation. The Chamber's 11 December 2014 Decision is not an invitation for additional submissions by the parties. Rather, it is an effort to align the record of the case with the requirements of the principle of publicity, a practice that, the Prosecution notes, is common in the Court.[9] In this sense, the Defence is not permitted to use the Chamber's procedural ruling as a springboard to place fresh submissions on the record of a case that has already finished. For this reason, too, the Request must be rejected.

Conclusion

13. The Prosecution requests the Chamber to dismiss the Defence Request.

Fatou Bensouda,
Prosecutor

Dated this 18th day of December, 2014
At The Hague, The Netherlands

[9] *Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13-781, page 3 ("CONSIDERING that, in the Single Judge's view, disclosure of relevant documents to the public may no longer prejudice the investigations and the suspect's rights and that, accordingly, all restrictions to the principle of publicity, at the relevant time deemed necessary for those purposes, shall now be lifted;"), page 4; *Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-T-363-Red-ENG, page 4, lines 12-17 ("the Appeals Chamber notes that several filings have been made on a confidential basis without public redacted versions also being filed. The parties are hereby ordered to review their respective filings and to ensure that they have also submitted public redacted versions and, if not, to do so as soon as possible").