Cour Pénale Internationale

International Criminal Court

Original: **English**

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

Decision on three requests for leave to reply

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
Mr Githu Muigai, SC, Attorney General of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Deputy Registrar

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 Regulations 23*bis*, 24(5) and 34 of the Regulations of the Court ('Regulations'), renders the following 'Decision on three requests for leave to reply'.

I. Requests for leave to reply

1. On 28 August 2014, the Chamber issued an order requiring the Office of the Prosecutor ('Prosecution') to confirm whether it anticipated being in a position to start trial on 7 October 2014.[1]

2. Accordingly, on 5 September 2014, the Prosecution filed the 'Prosecution notice regarding the provisional trial date'[2] ('Prosecution Notice'), stating, *inter alia*, that 'the available evidence is insufficient to prove Mr Uhuru Kenyatta's alleged criminal responsibility beyond reasonable doubt',[3] and requesting that the case be further adjourned until the Government of the Republic of Kenya ('Kenyan Government') fully executes the Prosecution's revised cooperation request.[4]

3. On 10 September 2014, the defence team for Mr Kenyatta ('Defence') filed the 'Defence Response to "Prosecution notice regarding the provisional trial date" (ICC-01/09-02/11-944) and Request to Terminate the Case against Mr Kenyatta'[5] ('Defence Response') in which the Defence, *inter alia*, opposed the Prosecution's request for a further adjournment, requested the Chamber to terminate the proceedings,[6] and

[1] Order requiring a notice in relation to the provisional trial commencement date, ICC-01/09-02/11-939, para. 2.
[2] ICC-01/09-02/11-944.
[3] Prosecution Notice, ICC-01/09-02/11-944, para. 2.
[4] Prosecution Notice, ICC-01/09-02/11-944, para. 4.
[5] ICC-01/09-02/11-945-Conf. A public redacted version was filed on the same day as ICC-01/09-02/11-945-Red.
[6] Defence Response, ICC-01/09-02/11-945-Red, para. 37.

alleged the existence of 'unfairness to the Accused emanating from the conduct of the [Legal Representative of Victims ('LRV')]'.[7]

4. On 10 September 2014, the LRV filed the 'Victims' response to Prosecution notice regarding the provisional trial date'[8] ('Victims' Response'), arguing, *inter alia*, that Mr Kenyatta is 'responsible for the [Kenyan] Government's obstruction of justice and for its noncompliance with the Trial Chamber's directions', and is consequently 'liable for interference with the collection of evidence'.[9] The LRV also submitted that '[t]he trial should be adjourned until the Accused discharges his responsibilities under national and international law'.[10]

5. On 11 September 2014, the LRV filed a request for leave to reply to the Defence Response[11] ('Victims' Request for Leave to Reply'), specifically regarding certain allegations made in the Defence Response in relation to the conduct and mandate of the LRV.[12]

6. On 11 September 2014, the Registry received a confidential, *ex parte*, Kenyan Government-only filing,[13] entitled 'The Government of the Republic of Kenya's Request for Leave to file a Response to the "Prosecution notice regarding the provisional trial date"'[14] ('Kenyan Government's Request for Leave to Respond').

7. On 12 September 2014, the Defence filed a request for leave to reply to the Victims' Response[15] ('Defence Request for Leave to Reply'), in particular, to the LRV's

[7] Defence Response, ICC-01/09-02/11-945-Red, para. 32. *See also* paras 33-35.
[8] ICC-01/09-02/11-946-Conf. A public redacted version was filed on 11 September 2014 as ICC-01/09-02/11-946-Red.
[9] Victims' Response, ICC-01/09-02/11-946-Red, para. 1.
[10] Victims' Response, ICC-01/09-02/11-946-Red, para. 67.
[11] Victims' request for leave to reply to the 'Defence Response to Prosecution notice regarding the provisional trial date and request to terminate the case against Mr Kenyatta', ICC-01/09-02/11-947.
[12] *See* Victims' Request for Leave to Reply, ICC-01/09-02/11-947, para. 3.
[13] Registry Transmission of a document received from the Attorney-General of the Republic of Kenya, ICC-01/09-02/11-948-Conf-Exp. This document was registered on 12 September 2014.
[14] ICC-01/09-02/11-948-Conf-Exp-Anx1.
[15] Defence Request for Leave to Reply to the 'Victims' response to Prosecution notice regarding the provisional trial date' (ICC-01/09-02/11-946), ICC-01/09-02/11-949.

submissions that '(i) The [Kenyan] Government's interference with the collection of evidence is consistent with a campaign by the Accused to bring his case to an end; (ii) The Accused is responsible for the [Kenyan] Government's obstruction of justice and for its noncompliance with the Trial Chamber's directions; (iii) The Accused is liable for interference with the collection of evidence; and (iv) The Accused should be warned of his liability for arrest for violation of the summons conditions and Article 70'.[16] The Defence also wishes to make submissions on the 'appropriate role and remit of the [LRV] in proceedings before the Court'.[17]

8. On 12 September 2014, the Registry transmitted to the Chamber the confidential, *ex parte*, Kenyan Government-only filing[18] in which the Kenyan Government indicated that it 'no longer wishes to respond to the Prosecution's notice and now seeks to withdraw its Request for leave application'[19] ('Withdrawal of Request for Leave to Respond').

9. On 17 September 2014, the Prosecution filed a request for leave to reply to the Defence Response[20] ('Prosecution Request for Leave to Reply') in relation to four separate points, namely; the publication of a letter attributed to Witness 11, alleged interference with Defence witnesses being 'wilfully ignored' by the Prosecution, matters concerning the cooperation of Mr Kenyatta and of the Kenyan Government, and the issue of Mr Kenyatta's fair trial rights.[21]

10. Pursuant to Regulation 24(5) of the Regulations, a participant may only reply to a response with the leave of the Chamber.

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[16] Defence Request for Leave to Reply, ICC-01/09-02/11-949, para. 9.
[17] Defence Request for Leave to Reply, ICC-01/09-02/11-949, paras 10-11.
[18] Registry Transmission of a document received from the Attorney-General of the Republic of Kenya, ICC-01/09-02/11-950-Conf-Exp.
[19] *See* ICC-01/09-02/11-950-Conf-Exp-Anx1, para. 2.
[20] Request for leave to reply to Defence filing ICC-01/09-02/11-945-Red, ICC-01/09-02/11-952.
[21] *See* Prosecution Request for Leave to Reply, ICC-01/09-02/11-952, paras 2-6.

11. The Chamber notes that the specific allegations made by the Defence regarding the conduct and mandate of the LRV, which form the central thrust of the Victims' Request for Leave to Reply,[22] are also identified as issues upon which the Defence seeks to make further submissions in the Defence Request for Leave for Reply.[23] The Chamber considers that these are not the type of issues on which it would benefit from receiving further observations from the LRV or the Defence. Moreover, the Chamber also cautions parties and participants from making inflammatory, unsupported or tangential allegations.

12. The Chamber is also not persuaded that the remainder of the issues identified in the Defence Request for Leave to Reply warrant a reply. The Chamber notes that each of the issues (i)–(iv) identified above are matters on which the Defence has previously had the opportunity to make submissions. Specifically, issue (ii), recalled at paragraph 7 above, was raised in the Prosecution Notice[24] and the Defence therefore had the opportunity to address it in the Defence Response, had it wished to do so. Issues (i), (iii) and (iv), also recalled at paragraph 7 above, while not directly raised in the Prosecution's Notice, are matters which have been previously raised before the Chamber.[25] Additionally, the Chamber notes that issue (iii) is an extension of issue (ii), as it is argued on the basis of Mr Kenyatta's alleged responsibility for the Kenyan Government's 'noncompliance with the Trial Chamber's directions'.[26] Accordingly, the Chamber finds that it would not benefit from receiving further written submissions from the Defence on these issues at this time.

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[22] *See* Victims' Request for Leave to Reply, ICC-01/09-02/11-947, para. 3.
[23] *See* Defence Request for Leave to Reply, ICC-01/09-02/11-949, paras 10-11.
[24] Prosecution Notice, ICC-01/09-02/11-944. *See* paras 3 and 6; footnote 4.
[25] This issue was raised in the Prosecution opposition to the Defence request for the termination of the Kenyatta case, 31 January 2014, ICC-01/09-02/11-892, paras 2, 14, 19-21, 23-25. *See also* the oral submissions of LRV in Transcript of hearing on 5 February 2014, ICC-01/09-02/11-T-27-ENG ET WT, page 35, lines 5-11, to which the Defence was given the opportunity to respond (see page 46, line 21 to page 53, line 8). *See also, generally*, 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, 31 March 2014, ICC-01/09-02/11-908.
[26] Defence Request for Leave to Reply, ICC-01/09-02/11-949, para. 9.

13. Similarly, the Chamber is not persuaded that the issues identified in the Prosecution Request for Leave to Reply warrant a written reply. The Chamber considers that the first two issues, recalled at paragraph 9 above, are tangential to the substantive matters of which the Chamber is seised, and that submissions on these points would therefore not be of assistance at this time. While the remaining points identified by the Prosecution in its Request for Leave to Reply are of some relevance, the Chamber does not require further written submissions on these issues at this particular juncture.

II. Reclassification of filings

14. The Chamber notes that while the 'Kenyan Government's Request for Leave to Respond' was filed as confidential, *ex parte*, Kenyan Government-only, 'owing to references made herein of the particular cooperation measures of the Government of the Republic of Kenya and references to particular correspondence with the Prosecution in this regard, which have always been treated confidentially', the Kenyan Government indicated that it would not be 'opposed to a reclassification of this document as "public" if the Trial Chamber so directs'.[27] The Chamber notes that the Withdrawal of Request for Leave to Respond was also filed confidential, *ex parte*, Kenyan Government-only.

15. Given that the references to the cooperation measures and correspondence with the Prosecution contained in the Kenyan Government's Request for Leave to Respond are on the public record, and given the Kenyan Government's submissions in relation to its classification, the Chamber considers it appropriate for this document, and the associated Withdrawal of Request for Leave to Respond, to be made public.

[27] ICC-01/09-02/11-948-Conf-Exp-Anx1, para. 4.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Victims' Request for Leave to Reply;

REJECTS the Defence Request for Leave to Reply;

REJECTS the Prosecution Request for Leave to Reply;

NOTES the Kenyan Government's Withdrawal of Request for Leave to Respond; and

DIRECTS the Registry to reclassify as public both the Kenyan Government's Request for Leave to Respond (ICC-01/09-02/11-948-Conf-Exp-Anx1 and ICC-01/09-02/11-948-Conf-Exp) and the Withdrawal of Request for Leave to Respond (ICC-01/09-02/11-950-Conf-Exp-Anx1 and ICC-01/09-02/11-950-Conf-Exp).

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

Judge Kuniko Ozaki, Presiding Judge

Judge Robert Fremr

Judge Geoffrey Henderson

Dated this 19 September 2014

At The Hague, The Netherlands