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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 with a public annex

**Victims' reply to the
'Defence response to Victims' request for reclassification'**

Source: Legal Representative of Victims

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

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Introduction

1. In the ‘Decision on request of the Legal Representative of Victims for leave to reply’ of 26 November 2014 (‘Decision’), the Trial Chamber permitted the Legal Representative for Victims (‘LRV’) to file a reply on two issues raised in the ‘Defence Response to Victims’ Request for Reclassification dated 29 October 2014’,¹ filed on 14 November 2014 (‘Response’). On behalf of the victims, the LRV hereby respectfully files the reply.

I. The Defence argument that ‘[t]here is no provision in the Statue or the Rules of Procedure and Evidence that requires the public distribution of the [Prosecution’s pre-trial brief (‘PTB’)]’

2. By arguing that ‘[t]here is no provision in the Statue or the Rules of Procedure and Evidence that requires the public distribution of the PTB’,² the Defence implicitly argues that a presumption of confidentiality applies to filings by parties and participants. This is misconceived. The Rome Statute, Rules of Procedure and Evidence (‘RPE’), and Regulations of the Court (‘ROC’) are silent about the existence of a PTB, and, consequently, about whether it is to be filed as a public document. But the filing of a PTB – like any other written submission – must be subject to the general presumption of public access to the proceedings.
3. The presumption of publicity of proceedings is a bedrock principle of the Rome Statute. In 1996, the preparatory committee said:

With regard to paragraph 4, the view was expressed that the principle of public trials should be clearly stated as the strong preference in the Statute and that any exceptions should be very limited. Suggested exceptions to this principle related to public order; the dignity of the proceedings; the security or safety of the accused, victims or witnesses; crimes allegedly committed by minors; and victim or witness testimony concerning sexual violence. Various concerns

¹ ICC-01/09-02/11-975.

² Response, ICC-01/09-02/11-975, para. 13.

were expressed regarding the reference to ‘confidential or sensitive information.’³

4. The requirement that proceedings take place in public is reflected in articles 64(7),⁴ 67(1)⁵ and 68(2)⁶ of the Rome Statute. At the ICTY, a pre-trial judge considered the ICTY statutory provisions requiring public hearings – which are substantively the same as those in the Rome Statute – and ruled that ‘it is appropriate for the Prosecution’s Pre-Trial Brief to be available to the public to the fullest extent possible.’⁷
5. The principle of public proceedings has a solid basis in international law, *inter alia* in Article 14(1) of the International Covenant on Civil and Political Rights and Article 6(1) of the European Convention on Human Rights (‘ECHR’).⁸
6. The presumption of public access to submissions filed before a Chamber flows from the general principle of public proceedings. It appears in Rule 15 of the RPE: ‘The Registrar shall keep *a database containing all the particulars of each case* brought before the Court, subject to any order of a judge or Chamber providing for the non-disclosure of any document or information, and to the protection of sensitive personal data. *Information on the database shall be*

³ Preparatory Committee 1996, Report (Report of the Preparatory Committee on the Establishment of an International Criminal Court), Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), para. 267. Emphasis added.

⁴ ‘The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.’

⁵ This guarantees *inter alia* that ‘the accused shall be entitled to a public hearing.’

⁶ ‘As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.’ Emphasis added.

⁷ The Pre-Trial Judge said: ‘Article 20(4) of the Statute of the Tribunal (‘Statute’) provides that hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence. Article 21(2) of the Statute provides that, in the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute. In addition, Rule 78 of the Rules provides that all proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided. I therefore consider that it is appropriate for the Prosecution’s Pre-Trial Brief to be available to the public to the fullest extent possible.’ *Hadžić*, Order on filing of Public Redacted Version of Prosecution Pre-trial Brief, 31 August 2012, pars. 1-2.

⁸ Both of these provide that -- as an exception to the general principle that trials be held in public -- the press and the public may be excluded in the interest of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or ‘to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’

available to the public in the working languages of the Court.’⁹ (Emphasis added).

7. In order to facilitate the public’s access to this material, Regulation 8 of the ROC requires that ‘Decisions and orders of the Court and other particulars of each case brought before the Court as described in rule 15’ must be published on the Court’s website.
8. The presumption of public access to court records (and the principles of necessity and proportionality in restricting that access, discussed further below) features in Regulations 20(3) and 23 *bis*(3) of the ROC.
9. Exhibits tendered and admitted at trial are presumptively public. Regulation 21(7) of the ROC provides: ‘All documentary evidence and other evidence introduced by a participant during a public hearing shall be available for broadcast, unless otherwise ordered by the Chamber.’
10. The record of the proceedings is presumptively public. Regulation 21(9) ROC provides: ‘The audio- and video-record of hearings shall be made available to the participants and the public in accordance with the procedures set out in the Regulations of the Registry, unless otherwise ordered by the Chamber.’
11. The confirmation of charges process is presumptively public. The confirmation of charges decision is public, and, where it resolves a ‘fundamental issue’, it must be published in all of the Court’s official languages (Arabic, Chinese, English, French, Russian and Spanish).¹⁰ This applies even where the charges are dismissed in full.
12. The ICC therefore provides more extensive protection of the public’s access to the proceedings than is available at the *ad hoc* tribunals, where the

⁹ See also Decision to Unseal and Reclassify Certain Documents in the Record of the Case Against Mr. Thomas Lubanga Dyilo (PTC I, Single Judge), ICC-01/04-01/06-42, 20 March 2006, at p. 3 (‘CONSIDERING that article 67 (1) of the Statute embraces the principle of public hearings, and that regulation 8 (c) of the Regulations of the Court requires all ‘[D]ecisions and orders of the Court and other particulars of each case brought before the Court as described in rule 15’ to be published on the website of the Court’) and Decision to Unseal and Reclassify Certain Additional Documents in the Record of the Case Against Mr. Thomas Lubanga Dyilo (PTC I, Single Judge), ICC-01/04-01/06-46, 22 March 2006, p. 4.

¹⁰ Rule 40(2) RPE.

confirmation of charges process is not public. It is also more extensive than that granted to the public in the United States, where grand jury proceedings (akin to confirmation of charges hearings) take place in secret, and there is no presumptive right of public access to grand jury proceedings or records.¹¹

13. The presumption of public access to written filings at the Court is not absolute. It must not apply to information which might put at risk a victim or witness or other person participating in the proceedings; such information should be filed confidentially.¹² There is also arguably a presumption of confidentiality in respect of medical information relating to the health of an accused; such information is customarily filed confidentially at the Court and at the *ad hoc* tribunals.¹³ A presumption of confidentiality might also apply to frivolous or vexatious filings by non-participants, on the ground that publicity would merely encourage such filings.¹⁴
14. The Rome Statute recognizes the presumption of innocence.¹⁵ This presumption does not permit filings which the accused considers to be embarrassing or injurious to his reputation to be filed confidentially on that basis. There is no foundation in the Rome Statute, RPE or ROC, nor (to the LRV's knowledge) in the jurisprudence of the ICC or of the *ad hoc* tribunals, 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.

¹¹ Federal Rules of Criminal Procedure, Rule 6(e). See also *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 US 211 (1979) and *United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997).

¹² Article 87(3) of the RPE permits a Chamber to order protective measures 'to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness'. Regulation 21 (8) of the ROC: 'the Chamber may, in the interests of justice, order that any information likely to present a risk to the security or safety of victims, witnesses or other persons, or likely to be prejudicial to national security interests, shall not be published in any broadcast, audio- or video-recording or transcript of a public hearing.'

¹³ Examples of public filings from which data relating to an accused's medical condition has been redacted are: ICC-02/11-01/11-286-Red, at para. 70; Public redacted version of the confidential 'Decision on the Stanišić Defence Request for Provisional Release' of 10 April 2012, at paras. 9-11.

¹⁴ '[D]istrict courts have an obligation to protect the orderly administration of justice and prevent abuse of the court's process by frivolous and vexatious litigants.' *Ruston v. Dallas County*, 2008 WL 958076, at *2 (N.D. Tex. Apr. 9, 2008) (Fitzwater, C.J.).

¹⁵ Article 66 of the Rome Statute.

15. The argument that the public should be excluded from court proceedings in order to prevent damage to the reputation of litigants has been rejected in the United States¹⁶ and Canada.¹⁷
16. In Ireland, where the state is under an express constitutional duty to protect the good name of every citizen,¹⁸ this does not outweigh the presumption that all criminal proceedings (including pre-trial proceedings and the hearing of evidence likely to be damaging to the reputation of the accused) are conducted in public.¹⁹
17. By their nature, many of the Court's decisions, and many filings, inevitably concern the participation of the accused in serious crimes. They are likely to contain information which an accused might consider to be injurious to his reputation. To interpret the Statute as imposing a presumption of confidentiality for submissions which an accused might consider to be injurious to his reputation would result in almost all defence filings being public and almost all prosecution and victims' filings being confidential. This

¹⁶ The Illinois Supreme Court has said: 'If the circuit court placed the counterclaim under seal in order to save the Skolnicks from embarrassment, then this, too, would constitute an abuse of discretion. The mere fact a person may suffer embarrassment or damage to his reputation as a result of allegations in a pleading does not justify sealing the court file.[...] Allegations of a complaint are, by their very nature, likely to be critical in some fashion of the defendant named in the pleading. The mere fact that allegations stated in a counterclaim might embarrass the counterdefendant do not, therefore, amount to an 'improper purpose' in filing the pleading.' *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214, 231, 730 N.E.2d 4, 16, 246 Ill. Dec. 324, 336 (2000).

¹⁷ Chief Justice Dickson of the Supreme Court of Canada, in *Nova Scotia (Attorney General) v. MacIntyre* [1982] 1 S.C.R. 175, said that the presumption is in favour of public access to court records and the burden of contrary proof lies upon the person who would deny the exercise of the right. He said: 'Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.' He cited the following comments which were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359: 'Though publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.'

¹⁸ Constitution of Ireland 1937, article 40.3: The state is required to protect 'the personal rights of the citizen', and in particular to defend 'the life, person, good name, and property rights of every citizen.'

¹⁹ Constitution of Ireland 1937, article 34: 'Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public'. Family law proceedings take place in private and are publicly reported in accordance with section 40 of the Civil Liability and Courts Act, 2004.

would be a ‘manifestly absurd’ and ‘unreasonable’ result.²⁰ The public’s right to scrutinize the Court’s processes would be seriously compromised if the Court were to rule that allegations made by the Prosecutor against an accused, and information relating to interference with witnesses due to testify against that accused, cannot be made public in order to protect the accused’s reputation.

18. The right to a public trial belongs not only to the accused, but also to the public. It is a vital element of the public’s right to monitor the work of the Court. In a commentary on the Rome Statute, Antonio Cassese *et al.* said:

Free access for the public and the press to the courtroom contributes to the fairness of the trial, by enabling third parties to assure themselves of the quality of the proceedings. In this sense, the principle of publicity is a guarantee for the accused, and is as such mentioned in Article 67 dealing with the rights of the accused, which provides in particular that the accused is entitled to a public hearing. The same principle also guarantees freedom of information for the public on the functioning of a public and international institution.²¹

19. The European Court of Human Rights (‘ECtHR’) also places great importance on transparency as a means of enhancing public confidence in the administration of justice:

The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.²²

²⁰ Vienna Convention on the Law of Treaties, Article 32.

²¹ *The Rome Statute of the International Criminal Court: a commentary*. A. Cassese and others (Oxford : 2002), page 1281.

²² *Werner v. Austria*, Judgement of 24 November 1997, par. 45, citing *Diennet v. France*, Judgment of 26 September 1995, Series A no. 325-A, pp. 14–15, § 33. See also *Schlumpf v. Switzerland*, Judgment of 8 January 2009, paras. 62-63. See also *Pretto & Ors v Italy*, Judgement of 8 December 1983, Series A, No. 71 (1984) 6 EHRR 182: Publicity ‘offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered.’

20. The ECtHR found that denying public access to a constitutional petition filed by a parliamentarian was an unwarranted interference with Article 10 of the ECHR, and said: 'it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights.'²³
21. The ECtHR's defence of the public's right to access court filings reflects jurisprudence in many countries, where a presumptively public trial record is considered to be a cornerstone of justice. In the United States, there is a 'presumption of access accorded to judicial records.'²⁴ The public has a common law right to inspect and copy judicial records.²⁵ The principle of public access to judicial records furthers not only the interests of the outside public, but also the integrity of the judicial system itself.²⁶ The right to public access 'serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.'²⁷ 'Public confidence [in the judicial system] cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record

²³ *Társaság a Szabadságjogokért* (the Hungarian Civil Liberties Union) v. *Hungary*, Judgment of 14 April 2009, para. 37. The applicant (a non-governmental organisation whose declared aim is to promote fundamental rights as well as to strengthen civil society and the rule of law in Hungary) alleged that decisions of the Hungarian courts denying it access to the details of a parliamentarian's complaint pending before the Constitutional Court had amounted to a breach of its right to have access to information of public interest. (*Ibid.* para. 3). The ECtHR found that denial of access to the constitutional petition was interference with the applicant's freedom of expression which could not be regarded as having been necessary in a democratic society, and found that there had been a violation of Article 10 of the ECHR. (*Ibid.* para. 39).

²⁴ *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)).

²⁵ *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). This common law right, however, is not absolute. *Id.* at 598. 'A court may deny access to records if the records become a vehicle for improper purposes.' *United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 689 (5th Cir. 2010) (citing *Nixon*, 435 U.S. at 597-98). 'Nevertheless, a court must use caution in exercising its discretion to place records under seal.' *Id.* at 689-90 (citing *Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987) ('The district court's discretion to seal the record of judicial proceedings is to be exercised charily[.]')). '[T]he power to seal court records must be used sparingly in light of the public's right to access.' *Id.* at 690.

²⁶ *Van Waeyenberghe*, 990 F.2d at 849-50 (contrasting public's right to information about judicial proceedings to right to access to judicial records).

²⁷ *Littlejohn v. BIC Corp.*, 851 F.2d 673, 682 (3d Cir. 1988).

supporting the court's decision sealed from public view.'²⁸ The 'power to seal court records must be used sparingly in light of the public's right to access.'²⁹

22. The U.S. Supreme Court has said that a public trial is 'a shared right of the accused and the public, the common concern being the assurance of fairness.'³⁰ Justice William Brennan of the Supreme Court said: 'Open trials are bulwarks of our free and democratic government: Public access to court proceedings is one of the numerous "checks and balances" of our system, because "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."' ³¹ He also emphasised that 'a special solicitude for the public character of judicial proceedings is evident in the Court's rulings upholding the right to report about the administration of justice. While these decisions are impelled by the classic protections afforded by the First Amendment to pure communication, they are also bottomed upon a keen appreciation of the structural interest served in opening the judicial system to public inspection.'³²

23. U.S. Chief Justice Warren Burger said in *Richmond v. Virginia*: 'A trial is a public event. What transpires in a courtroom is public property.'³³ He also emphasized the importance of allowing the public to see the full context in which judges take their decisions, in order to enable the public to understand why those decisions have been taken:

A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected

²⁸ *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 230 (5th Cir. 2008) (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)) (alteration omitted).

²⁹ *United States v. Holy Land Foundation for Relief and Development, et al.* The case concerned a claim of reputational damage by a publicly-named unindicted co-conspirator, which is not raised here. In any event, uncharged co-perpetrators are routinely publicly named in international criminal proceedings in indictments, documents containing the charges, pre-trial briefs, and judgements.

³⁰ *Press Enterprise v. Superior Court* (1986) 478 U.S. 1.

³¹ *Richmond Newspapers v. Virginia* 448 U.S. 555. In this case, the U.S. Supreme Court ruled that the press and public have a right of access to criminal trials under the First Amendment to the U.S. Constitution. In another case, it was said: '[I]t is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.' *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

³² *Richmond Newspapers v. Virginia* 448 U.S. 555 (1980).

³³ 448 U.S. 555 (1980).

outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' . . . and the appearance of justice can best be provided by allowing people to observe it.³⁴

24. This concern was echoed by the Appeals Chamber in *Lubanga*, where it emphasised the importance, where an *ex parte* decision has been taken, of permitting the un-notified party the ability to understand 'the context in which the Impugned Decision was made to determine how the Pre-Trial Chamber reached its decision.'³⁵
25. In Australia, section 314 of the Criminal Procedure Act 1986 of New South Wales permits members of the media to 'inspect any document relating to criminal proceedings, at any time from when the proceedings commence until the expiry of 2 working days after they are finally disposed of, for the purpose of compiling a fair report of the proceedings for publication.'³⁶ The documents that are available for inspection include 'copies of the indictment, court attendance notice or other document commencing the proceedings, witnesses' statements tendered as evidence, brief of evidence, police fact sheet (in the case of a guilty plea), transcripts of evidence and any record of a conviction or an order.'³⁷ Australian courts have protected the public's right to observe judicial proceedings.³⁸
26. According to a 2005 report by the Canadian Judicial Council, 'Canadian courts have consistently held that the openness of court proceedings is an important constitutional principle that fosters many fundamental values, including public confidence in the judicial system, understanding of the

³⁴ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571-72 (1980) (internal citations omitted).

³⁵ ICC-01/04-01/06-773, para. 22.

³⁶ Criminal Procedure Act 1986 (New South Wales), chapter 7, section 314.

³⁷ *Id.*

³⁸ In *John Fairfax & Sons Limited v. Police Tribunal*, (1986) 5 NSWLR 465, Justice McHugh stated: 'The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule when its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.'

administration of justice, and judicial accountability. Included within the open courts principle is the public's right of access to court records.'³⁹

27. The ICC's presumption of public access to filings by the parties and participants extends to the PTB. Much of the public debate regarding this case, both in Kenya and beyond, has suffered from serious misinformation. Permitting access to a public redacted PTB (along with all other public submissions filed in this case by the Defence, the Government of Kenya and others) will enable the victims, the States Parties and the public at large to have a more balanced and informed understanding of the context of this case, including the serious problem of witness interference. It will also facilitate a more informed public discourse regarding the problem of systematic obstruction of justice, and how best to deal with it in this case and in future cases at the Court, and (in line with the principle of promoting domestic accountability) at the national level.

II. The Defence's failure to identify and provide reasoned justification for maintaining the confidentiality of specific parts of the PTB and its failure therefore to comply with the principles of necessity and proportionality.

28. The principles of necessity and proportionality⁴⁰ when restricting the public's right to access court records⁴¹ is a central part of the Court's legal framework.

³⁹ Model Policy for Access to Court Records in Canada, Judges Technology Advisory Committee, Canadian Judicial Council, September 2005, at (vi).

⁴⁰ See ICC-01/04-01/07-322, which refers to 'the requirements of necessity and proportionality', and footnote 25, which reads: 'ICTY, *The Prosecutor v Slobodan Milosevic* [IT-02-54], Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (1 November 2004), para. 17, where the Appeals Chamber stated that '[w]hen reviewing restrictions on fundamental rights such as this one, many jurisdictions are guided by some variant of a basic proportionality principle: any restriction of a fundamental right must be in service of 'a sufficiently important objective,' and must 'impair the right... no more than is necessary to accomplish the objective'; and ICTY, *The Prosecutor v Fatmir Limaj* [IT-03-66], Decision on Fatmir Limaj's Request For Provisional Release, para.13, where the Appeals Chamber stated that 'when interpreting Rule 65(B) and (D) of the Rules, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target.'

⁴¹ *Társaság a Szabadságjogokért* (the Hungarian Civil Liberties Union) v. *Hungary* (Application no. 37374/05), Judgment, 14, April 2009. U.S. courts patrol the operation of the principle of necessity with vigilance. Interference with the public's right to access court proceedings must be necessary and 'narrowly tailored' (i.e.

This is illustrated by Regulation 23 *bis*(3) of the ROC, enabling filings to be made public where the basis for their previous classification no longer exist, and Regulation 20(3): ‘A Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.’

29. In the Response, the Defence has failed to provide valid reason to withhold the PTB in its entirety from the public. It has also failed to identify any specific assertions or information⁴² which might be redacted from the PTB for any of the reasons set out in Article 87(3) of the RPE or Regulation 21(8) of the ROC, or for any other valid reason. Notably, it has failed to identify any specific reasons why the information set out in paragraphs 85-95 of the PTB should be withheld from the public and the States Parties. It has therefore failed to comply with the principles of proportionality and necessity.

30. A redacted version of the PTB exists, and the Prosecution has indicated that it is ready to be filed. Justice requires that it be filed as soon as possible.

proportionate). Under the First Amendment, a ‘denial of access must be necessitated by a compelling government interest and narrowly tailored to serve that interest.’ *Rushford v. New Yorker Magazine*, 846 F.2d at 253 (citing multiple cases). The party seeking to prevent access to judicial documents filed in connection with a summary judgment motion has the burden of establishing ‘that the denial [of access] serves an important governmental interest and that there is no less restrictive way to serve that governmental interest.’ *Rushford v. New Yorker Magazine*, 846 F.2d at 253. In *Globe Newspaper v. Superior Court*, 457 U.S. 596 (1982), the U.S. Supreme Court struck down a Massachusetts law that mandated that criminal trials be closed to the public if they involved minor sexual assault victims. In striking down the law, the court said that ‘it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.’ *Globe Newspaper v. Superior Court*, 457 U.S. at 607. The Canadian Judicial Council, which has authority over all federally appointed judges in Canada, has proposed guiding principles for a model policy regarding access to judicial information. These provide, *inter alia*, that restrictions on access to court records can only be justified where: ‘Such restrictions are carefully tailored so that the impact on the open courts principle is as minimal as possible’. Model Policy for Access to Court Records in Canada, Judges Technology Advisory Committee, Canadian Judicial Council, September 2005.

⁴² ICC-01/09-02/11-482, par. 8.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Fergal Gaynor', with a stylized, cursive script.

Fergal Gaynor
Common Legal Representative of Victims

Dated this 2nd day of December 2014

At Dublin, Ireland