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

Date: 10th June 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR *v.*
UHURU MUIGAI KENYATTA**

Public

**Reply by the Government of Kenya to the "Prosecution response to the
'Government of Kenya's Submissions on the Status of Cooperation with the
International Criminal Court, or, in the alternative, Application for Leave to file
Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence'
(ICC-01/09-02/11-713)"**

Source: Government of the Republic of Kenya, represented by the Attorney
General of Kenya

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

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 Mr. James Stewart, Deputy Prosecutor
 Ms. Adesola Adeboyejo, Trial Lawyer

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Unrepresented Victims

**Unrepresented Applicants
 (Participation/Reparation)**

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I. Introduction

1. Pursuant to the Trial Chamber's decision of 30 May 2013,¹ the Government of the Republic of Kenya ("Kenyan Government") hereby respectfully files its reply to the "Prosecution response to the 'Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence' (ICC-01/09-02/11-713)" ("OTP Response"), filed on 8 May 2013.²

II. Submissions

2. The purpose of this reply is to correct the following six misrepresentations of fact contained in the OTP Response.

3. First, contrary to the Prosecution's assertion,³ public officials in Kenya have not fostered an anti-ICC climate in the country which has had a chilling effect on the willingness of potential witnesses and partners to cooperate with the Prosecution. The Kenyan Government has never interfered with the Prosecution's witnesses, nor is it aware of the identity of the Prosecution's witnesses. Indeed, the Prosecution fails to substantiate this allegation anywhere in the OTP Response,⁴ a failure which underlines the Kenyan Government's original complaint.⁵ Rather, the government, through the Witness Protection Agency, has facilitated the protection of witnesses and has ensured the safe passage of those witnesses when called upon⁶.

¹ ICC-01/09-02/11-746.

² ICC-01/09-02/11-733-Conf-Exp. This reply will refer to the public redacted version of this filing – ICC-01/09-02/11-733-Red

³ OTP Response, para. 1.

⁴ *Ibid.*, para. 15. In this paragraph the Prosecution simply states, without providing any evidence or support, that "this incident is consistent with reports received from Prosecution witnesses that they have been targeted by GoK officials seeking to influence their testimony".

⁵ ICC-01/09-02/11-713, para. 46.

⁶ See page 8 of the Star newspaper of Friday 7th June 2013; page 13 of the Standard newspaper of Friday 7th June 2013, where the Witness Protection Agency appealed to any ICC witnesses who feel threatened or intimidated to contact them

4. Second, the Prosecution erroneously complains of “an uneven investigative playing field, tilted seemingly with GoK acquiescence, in the Accused’s favour” and cites to the use of the minutes of the National Security Advisory Committee by the *Muthaura* Defence for support.⁷ While the Kenyan Government acknowledges that the Prosecution requested these materials from it in August 2010,⁸ the government advises that it did not provide the materials used by the *Muthaura* Defence. The *Muthaura* Defence obtained the minutes through Ambassador Muthaura’s private efforts and not through official government channels. Therefore, the Prosecution’s allegations of “an uneven...playing field” are without merit. In any event, the Kenyan Government notes that these minutes are now part of the Court record and, thus, available to the Prosecution. Importantly, the GoK has not sought any orders for redaction of the minutes that came into the possession of the OTP. Nor has it sought orders restricting the OTP from using these minutes confidentially, despite the fact that these minutes obviously contain matters that go well beyond the subject matters jurisdiction of the ICC or, on any view, could be possibly relevant to ICC proceedings. For example, they contain information relating to a host of national security issues, including the fight against Al-Shabab. The GoK’s position in this regard in abstaining from seeking the return or non-use of such national security information provides additional evidence of its constructive engagement with the court.

5. Third, the Prosecution falsely asserts that OTP staff members have not been allowed unfettered access into and within Kenya and have been subject to surveillance by government officials while in Kenya.⁹ As is evident from the OTP Response, these claims are unsubstantiated. The Kenyan Government advises that: (i) it has provided security to the Prosecution whenever requested; (ii) the

⁷ OTP Response, para. 13.

⁸ *Ibid.*

⁹ *Ibid.*, para. 15.

Prosecution has been allowed access into the country; and (iii) it has not sanctioned any interference with the Prosecution's activities in the county. The Kenyan Government concludes that the Prosecution is peddling unsupported claims based on paranoia.

6. Fourth, with regard to request for assistance (RFA) 45,¹⁰ the Kenyan Government has on several occasions advised the Prosecutor why it is unable to fully execute this request. However, due to the confidential nature of the RFA, this information cannot be placed in a public filing. Further, in order to respond to RFA 45, information must be collated from various sources within and outside the government. In this regard, and in respect of information held by private individuals, the consent of the relevant individual is required by law first before the government can access such information.
7. Fifth, in relation to the Prosecution's requested interviews with the 10 police officers,¹¹ the Kenyan Government advises that this matter had been scheduled to be heard in court on 24 May 2013 but the matter did not proceed as scheduled. Further, the Prosecution's complaints that the Kenyan Government has failed to *"represent the Court's interests in this instance; ... has not appealed on the Prosecution's behalf to the Kenyan High Court to resolve the issue or to ensure that a bench is appointed to hear the lawsuit on its merits"* is unwarranted.¹² Given that the matter is before the Kenyan courts, the Kenyan Constitution provides for the separation of powers and provides that the judiciary shall be independent and *"shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority"*.¹³

¹⁰ *Ibid.*, paras. 13, 16-19.

¹¹ *Ibid.*, paras. 20-24.

¹² *Ibid.*, para. 22.

¹³ Article 160(1) of the Kenya Constitution, 2010

8. Sixth, the Prosecutor asserts that on certain occasions "*the GoK has executed requests for records but the material conveyed to the OTP was incomplete.*"¹⁴ The Kenyan Government underlines that it has endeavoured to produce the missing documents but, owing to filing problems the documents are currently unavailable. The government continues to encourage the Judiciary to expedite the location of the missing documents and the same shall be conveyed to the Prosecution should they become available.

Relief Requested

The Kenyan Government respectfully requests that the Trial Chamber consider the above submissions when considering the status of its cooperation with the Court.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke, crossing over the printed name and title.

Githu Muigai, SC
Attorney General of the Republic of Kenya

Dated this 10th June 2013
At Nairobi, Kenya

¹⁴ OTP Response, para. 26.