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

Date: 15 October 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF
THE PROSECUTOR *v.* WILLIAM SAMOE RUTO *and* JOSHUA ARAP SANG**

Public

Submissions of the Government of Kenya, Pursuant to Rule 103 (1) of the Rules of Procedure and Evidence of the International Criminal Court, on the Proposed Motion by Kenya's National Assembly and Senate to Withdraw Kenya from the Rome Statute

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

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

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Unrepresented Victims

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Amicus curiae

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**Victims Participation and Reparations
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Others

I. Introduction

1. Pursuant to **Rule 103(1)** of the Rules of Procedure and Evidence (the Rules), the undersigned, being the principal legal advisor to the Republic of Kenya, a State Party to the Rome Statute (the Statute), respectfully makes submissions, on behalf of the Government of Kenya, to this Trial Chamber V (A) ('the Chamber'), in response to the concern raised by the Chamber regarding the possible impact of the resolutions made by Kenya's National Assembly and Senate (collectively constituting the Parliament pursuant to **Article 93 (1)** of the Constitution of Kenya, 2010), regarding Kenya's withdrawal from the Rome Statute.

II. Background

2. On 5 September 2013, Kenya's National Assembly voted on a special motion to withdraw Kenya from the Rome Statute. Thereafter, on 10 September 2013, Kenya's Senate likewise approved a motion to withdraw Kenya from the Rome Statute. The *amicus curiae*, herein below, addresses the Chamber on the relevant factual matters in issue and the domestic law of Kenya on the ratification and termination of treaties, namely, the Constitution of Kenya, 2010 and the Treaty Making and Ratification Act, No. 45 of 2012.
3. During the hearing on 17 September 2013, the Chamber notified the parties and participants that it wished to receive oral submissions, the following day, on the following questions:
 - Is it a fact that the Parliament of Kenya debated and adopted resolutions that may have any relevance to this case? If so, when? If so, why?
 - If it is the case that the Parliament of Kenya had adopted any such resolutions, what effect should that development have, either alone or together with any other national or communicative factor, and evidence of any such communicative factor must also be provided, in the assessment of witness protection measures in the courtroom? And
 - Does such a factor override the need for individualized assessment of each witness for the purposes of witness protection measures in the courtroom?
4. On 18 September 2013, the parties and participants made submissions on the questions posed by the Chamber.

5. On 20 September 2013, the Defence for Mr. Ruto filed an Addendum to its submissions.
6. On 1 October 2013, the Registry transmitted to the Chamber the 'Government of Kenya's Application Pursuant to Rule 103 (1) for Leave to file Observations Pursuant to Rule 103 (1) of the Rules of Procedure and Evidence of the International Criminal Court to file Submissions on the Proposed Motion by Kenya's National Assembly and Senate to Withdraw Kenya from the Rome Statute' ('the Application').

III. Submissions

7. On 27 August 2010, Kenya's new Constitution was promulgated. This Constitution incorporates all international treaties ratified by Kenya, as part of its laws. In particular, **Article 2(6)** of the Constitution of Kenya ('the Constitution') provides that '*Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.*'
8. On 24 December 2008, Kenya domesticated the Rome Statute ('the Statute') through the enactment of the **International Crimes Act**, which came into force on 1 January 2009. More specifically, the **International Crimes Act** ('the Act') at **section 6**, criminalises in Kenya international crimes (except the crime of aggression) which the International Criminal Court ('the Court') has jurisdiction over in **Article 5** of the Statute and provides for their punishment. Moreover, **Part III** to **X** of the Act implements provisions of **Part IX** of the Rome Statute which sets out the scope of cooperation between the Court and States Parties.
9. On 5 September 2013 Kenya's National Assembly passed a resolution to withdraw Kenya from the Rome Statute. Thereafter, on 10 September 2013, Kenya's Senate likewise approved a motion to withdraw Kenya from the Rome Statute.
10. The resolution of 5 September 2013 was not the first attempt by the National Assembly to withdraw Kenya from the Rome Statute. Initially, on 22 December 2010, the National Assembly passed a resolution authorising the Government to take '*immediate action to have the International Crimes Act repealed and further*

that the Government takes appropriate action to withdraw from the Rome Statute pursuant to Articles 127, 19, and 17 of the Rome Statute as read together with the Principle of Complementarity emphasised at Paragraph 10 of the Preamble to the Rome Statute and further that any criminal investigations or prosecutions arising out of the post- election violence of 2007/2008 be undertaken under the framework of the new Constitution".¹

11. The Constitution of Kenya as read with the National Assembly and Senate Standing Orders ('the Standing Orders') require the publication of a Bill and its eventual assent by the President to give legislative effect to resolutions of Parliament. The Government of Kenya wishes to notify the Chamber that such a Bill has not been introduced in Parliament to give effect to the resolutions of Parliament.
12. In addition, Kenya's **Treaty Making and Ratification Act, No. 45 of 2012**, sets out the procedure of Kenya's withdrawal from a treaty. In particular, **Section 17** of this Act states thus:

'17. (1) Where Kenya wishes withdraw from a treaty; the relevant Cabinet Secretary shall prepare a cabinet memorandum indicating the reasons for such an intention.

(2) The provisions of sections 4, 5 and 6 shall apply with necessary modifications, to withdrawal from a treaty.'

The Government of Kenya wishes to notify the Chamber, that there has not been to date any Cabinet Memorandum prepared regarding Kenya's withdrawal from the Rome Statute. No Bill has been tabled before Parliament. No debate of any Bill has taken place and no Bill has been presented to the President for assent. Presently therefore the status of the treaty is intact.

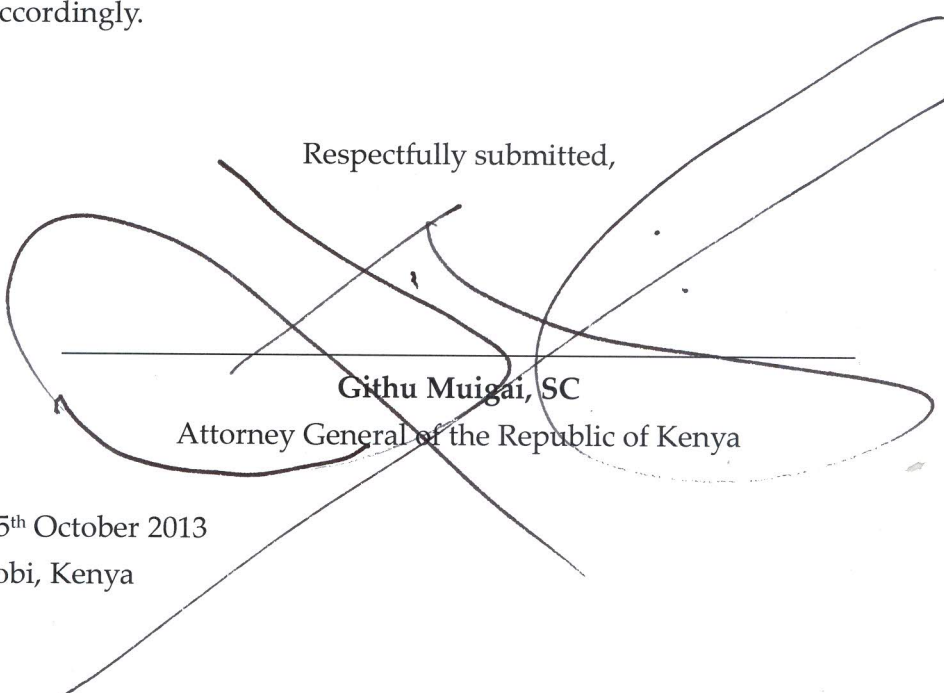
13. The Government of Kenya is clearly aware of its State Party obligations of cooperation and assistance with the Court under **Part IX** of the Rome Statute and the International Crimes Act. At this juncture, the Government of Kenya wishes to reiterate its consistent efforts of cooperation with the Court from the

¹ 'Notice of Motion: Repeal of International Crimes Act' National Assembly, Official Report, Wednesday 22nd December, 2010 (A), 1.

year 2010, when it received the first request for assistance from the Court,² to date.

14. In this regard, the Government of Kenya wishes to reiterate the structure of the Kenya Government and the separation of powers in the three arms of Government, namely the legislature, executive and judiciary; as set out in the Constitution. Although these arms of Government are coordinated and work harmoniously in the exercise of their functions, they exercise their powers independent of each other.
15. The Government of Kenya wishes to assure the Chamber of its intention to continue fully cooperating with the Court in regard to the cases in the situation in Kenya before the Court, and should there be any material change in circumstances , the Government of Kenya shall notify the Court accordingly.

Respectfully submitted,



Githu Muigai, SC
Attorney General of the Republic of Kenya

Dated 15th October 2013
At Nairobi, Kenya

²Request for Screening the KNCHR Database' OTP/KEN/KEN-2/JCCD-er, 5 February 2010.