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Date: 5 January 2015

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

**Victims' response to the observations of the Government of the Republic of
Kenya on the Prosecution's leave to appeal request**

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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Other

Introduction

1. In accordance with the Order of the Trial Chamber,¹ and on behalf of the victims of this case, the Legal Representative for Victims ('LRV') hereby respectfully submits this response to the observations of the Government of the Republic of Kenya ('Government') on the Prosecution's leave to appeal request ('Observations').²
2. The Observations demonstrate that the Government continues to act in manner wholly aligned with the interests of Mr Kenyatta and opposed to the interests of the victims. Those interests include the well-established right to know the truth about the crimes in question, and to have those responsible put on trial, within a reasonable time.
3. In particular, the Government shows no intention to comply in good faith with its obligation under the Rome Statute and the International Crimes Act to provide the information sought in the Revised Request and other pending requests. This factor itself weighs in favour of granting leave to appeal.

The Observations fail to address the Article 82(1)(d) test

4. The Government has failed to address, let alone rebut, the assertion that the 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute' ('Decision') involves issues that would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.
5. The Observations largely contain arguments on the merits of the appeal. These arguments should more properly be presented (if leave to appeal is granted) by the Government to the Appeals Chamber, in response to the Prosecution's document in support of the appeal, in accordance with Regulation 64(4) and 65(5) of the Regulations of the Court.

¹ Order requesting observations from the Government of Kenya on the Prosecution's leave to appeal request, ICC-01/09-02/11-986, 10 December 2014, page 4.

² Observations of the Government of the Republic of Kenya pursuant to 'Order requesting observations from the Government of Kenya on the Prosecution's leave to appeal request', ICC-01/09-02-11-992, 22 December 2014.

Arguments relating to the Trial Chamber's judicial autonomy are misconceived

6. The Government argues that the Trial Chamber, in exercising its discretion under Article 87(7) of the Rome Statute, is not obliged to 'confer with any organ of the Court' and later argues that the Trial Chamber 'should enjoy judicial autonomy to make its decision free of external influence (including that from other organs of the Court)'.³
7. The Government's submissions on this point are somewhat unclear. If the 'organ of the Court' referred to is the Appeals Chamber, the argument is misconceived. An appeal to the Appeals Chamber is not a consultation but an *appeal*, and is foreseen in Article 82 of the Rome Statute.
8. If the 'organ of the Court' is the Prosecutor, this argument is also misconceived, in light of Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence and Regulation 109(1) of the Regulations of the Court. None of these provisions affect the Trial Chamber's judicial autonomy.

The relevance, specificity and necessity of the Revised Request is *res iudicata*

9. The Government refers to 'the Prosecution's inability to specifically ascertain the relevance and necessity of the Revised Request. This is even after the Trial Chamber specifically directed the Prosecution to revise its request in tandem with the tripartite principles of requirements of relevance, specificity and necessity'.⁴
10. This argument is without merit. The Government is, no doubt, aware that the Trial Chamber in its decision of 29 July 2014 expressly found that the Revised Request satisfies the tripartite principles of requirements of relevance, specificity and necessity.⁵ The Government did not seek to appeal the decision of 29 July 2014. The issue is *res iudicata*.

³ Observations, paras. 9 and 10.

⁴ Observations, page 9. The Government repeats this argument at para. 16 of the Observations.

⁵ Decision on the Prosecution's revised cooperation request, ICC-01/09-02/11-937, 29 July 2014, page 22.

Government appears to dispute its obligation to comply with the Revised Request

11. The Submissions make no reference, whether implicitly or explicitly, to the Trial Chamber's many findings in the Decision concerning the Government's non-compliance, and the serious effect on this case of that non-compliance.
12. In particular, the Submissions ignore the Trial Chamber's finding that the Government's non-compliance 'has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute'.⁶ Nor does the Government acknowledge in any way the Trial Chamber's finding that 'cumulatively, the approach of the Kenyan Government [...] falls short of the standard of good faith cooperation required under Article 93 of the Statute. The Chamber considers that this failure has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute'.⁷
13. Further, the Government makes no reference to the Trial Chamber's acknowledgement that the Prosecution may return to the Pre-Trial Chamber with fresh charges against Mr Kenyatta.⁸
14. Instead, the Government takes the view that the Decision 'simply put to rest the unending charades of the Prosecution and time-buying tactics frame[d] as allegations of non-co-operation by the Republic of Kenya'.⁹
15. Furthermore, the Government, as noted above, appears to continue to contest the specificity, relevance and necessity of the Revised Request,¹⁰ and does not appear to acknowledge its ongoing duty to comply with that request.
16. In addition, recent statements attributed to the Attorney General throw in doubt the notion that the Attorney General is an impartial participant in the present proceedings.¹¹

⁶ Decision, ICC-01/09-02/11-982, para. 79.

⁷ Decision, ICC-01/09-02/11-982, para. 78.

⁸ Decision, ICC-01/09-02/11-982, para. 83.

⁹ Observations, para. 14.

¹⁰ Observations, para. 16.

17. All of this suggests that the Government appears to believe that its obligation to comply with the Revised Request (and other pending requests) has been dispensed with as a result of the withdrawal of the charges.
18. From the perspective of the victims, all of whom are Kenyan citizens entitled to impartial protection by State authorities in accordance with the Constitution of Kenya, this is highly regrettable. Under the Rome Statute and the International Crimes Act, the victims remain entitled to see the Government comply in good faith and without further delay with its obligation to provide the Prosecution the information sought in the Revised Request and other pending requests for assistance.

Conclusion

19. The Observations do not address whether the Prosecutor's request for leave to appeal meets the criteria required by the Rome Statute. When the criteria of Article 82(1)(d) of the Rome Statute are met, as is the case here, the Trial Chamber ought to grant leave to appeal.
20. An immediate resolution by the Appeals Chamber will permit the President of the Court to refer the matter to the Assembly of States Parties in accordance with Regulation 109 of the Regulations of the Court. The Assembly of States Parties will then be far more likely than at present to take action with the aim of securing the Government's compliance with the Revised Request, and other outstanding requests for assistance to Kenya. These steps will materially advance the proceedings.

¹¹ 'I also proudly congratulate H.E The President of the Republic of Kenya, Uhuru Kenyatta for being exculpated. Victoria Ascerta.' (6 December 2014); 'One of my high moments in 2014 was the withdrawal of the ICC criminal case against Uhuru' (31 December 2014; retweeted from the KTN Twitter account). These statements appear on the Twitter account of the Attorney General (<https://twitter.com/agmuigai> accessed 3 January 2015).

Respectfully submitted,

A handwritten signature in black ink, reading "Fergal Gaynor". The signature is written in a cursive, flowing style with a prominent initial 'F' and a long, sweeping underline.

Fergal Gaynor
Common Legal Representative of Victims

Dated this 5th day of January 2014

At Dublin, Ireland