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

Date: 15 May 2015

**APPEALS CHAMBER**

**Before:** Judge Silvia Fernández de Gurmendi, presiding Judge  
Judge Sanji Mmasenono Monageng  
Judge Howard Morrison  
Judge Piotr Hofmański  
Judge Bertram Schmitt

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public**

**Prosecution response to the Government of Kenya's request for extension of time to file its response to the "*amicus curiae* observations of the Africa Centre for Open Governance pursuant to Rule 103 of the Rules of Procedure and Evidence"**

**Source:** Office of the Prosecutor

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

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**REGISTRY**

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**Registrar**

Mr Herman von Hebel

1. The Prosecution does not object to the Government of Kenya's ("GoK") application for an extension of time<sup>1</sup> to file its response to the *amicus curiae* observations of the Africa Centre for Open Governance.<sup>2</sup> However, such a response must address the *Amicus Curiae* Observations and cannot be used by the GoK to litigate issues that are not the subject of the Prosecution's appeal.<sup>3</sup> Moreover, the GoK's response to the *Amicus Curiae* Observations should not be used to file a second response to the Appeal or to re-hash arguments that it has already made in its response to the Appeal.<sup>4</sup>
2. While the GoK may address the *Amicus Curiae* Observations on the "context" in which the GoK's non-cooperation has occurred,<sup>5</sup> it cannot challenge the Trial Chamber's conclusion that the GoK had failed to cooperate with the Court in violation of article 87(7) of the Statute.<sup>6</sup> This factual finding was not appealed by the Prosecution, nor by the GoK. Rather, the Prosecution's Appeal is limited to the question of whether the Trial Chamber, having made this finding, erred—either in law or in the exercise of its discretion—by not referring the GoK to the Assembly of States Parties.<sup>7</sup>
3. Similarly, the GoK may respond to the *Amicus Curiae* Observations regarding the relevant statutory provisions under Kenyan law relating to cooperation with the Court.<sup>8</sup> However, in doing so it cannot exceed the scope of the Prosecution's appeal by re-litigating the issue of whether domestic law prevented it from complying with the Prosecution's requests for cooperation,<sup>9</sup> or by challenging the Trial Chamber's separate decision that any purported deficiency in domestic

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<sup>1</sup> ICC-01/09-02/11-1023 ("Application").

<sup>2</sup> ICC-01/09-02/11-1020 ("*Amicus Curiae* Observations").

<sup>3</sup> ICC-01/09-02/11-1006 ("Appeal").

<sup>4</sup> ICC-01/09-02/11-1013.

<sup>5</sup> *Amicus Curiae* Observations, paras.2-22.

<sup>6</sup> ICC-01/09-02/11-982 ("Decision"), para.78; *see also* paras.72, 67, 62.

<sup>7</sup> Appeal, paras.1-4.

<sup>8</sup> *Amicus Curiae* Observations, paras.22-35.

<sup>9</sup> See the GoK's arguments before the Trial Chamber as summarised by the Trial Chamber in its decision of 31 March 2014: ICC-01/09-02/11-908, paras.37-40.

legal procedures does not protect a State Party from complying with its obligation to cooperate with the Court.<sup>10</sup>



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**Fatou Bensouda, Prosecutor**

Dated this 15<sup>th</sup> day of May 2015

At The Hague, the Netherlands

Word Count:523<sup>11</sup>

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<sup>10</sup> ICC-01/09-02/11-908, para.47.

<sup>11</sup> It is certified that this document contains the number of words specified and complies in all respects with the requirements of regulation 36 of the RoC. This statement (51 words), not itself included in the word count, follows the Appeals Chamber's direction to "all parties" appearing before it: ICC-01/11-01/11-565 OA6, para.32.