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No.: ICC-01/09-02/11
Date: 15 October 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

**Further Submissions of the Government of the Republic of Kenya pursuant
to the Trial Chamber's 'Order inviting further submissions on the
Prosecution's application for a finding of non-compliance under Article
87(7) of the Statute'**

Source: Government of the Republic of Kenya

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

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I. INTRODUCTION

1. The Government of the Republic of Kenya hereby humbly makes the following submissions pursuant to the '*Order inviting further submissions on the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*'¹ ('Order for further submissions' / 'the order') made by Trial Chamber V(B) ('the Trial Chamber'); and in response to the '*Further submissions on the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*'² ('Prosecution's further submissions') made by the Office of the Prosecutor ('Prosecution').

II. RELEVANT BACKGROUND

5. On 3 December 2014, the Trial Chamber issued '*Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*'³ ('Impugned Decision') wherein it rejected the '*Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya*'⁴ ('Prosecution's application for a finding of non-compliance').
6. On 19 August 2015 the Appeals Chamber issued '*Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the*

¹ (Public) ICC-01/09-02/11-1033, 27 August 2015.

² (Public) ICC-01/09-02/11-1034, 14 September 2015.

³ (Public) ICC-01/09-02/11-982, 3 December 2014.

⁴ (Public) ICC-01/09-02/11-866, 2 December 2013.

Statute”⁵ (‘Appeal’s Chamber Judgment’ / ‘the judgment’) wherein it reversed the Impugned Decision and ‘remanded it for the Trial Chamber to determine’ in light of the relevant factors considered in the judgment ‘whether Kenya failed to comply with a cooperation request and has prevented the Court from exercising its functions and powers under the Statute and, if so, to make an assessment of whether it is appropriate to refer Kenya’s non-compliance to the ASP.’⁶

7. On 26 August 2015 the Trial Chamber issued the Order for further submissions’ directing the Prosecution, Government of the Republic of Kenya, Legal Representative for Victims and the defence team for Mr Kenyatta, to file, by 15 October 2015, any further submissions they may have, in accordance with the guidance provided in the order, including any responses to the further submissions Prosecution’s further submissions which the Trial Chamber had directed be filed no later than 14 September 2015.
8. On 14 September 2015 the Prosecution filed *‘Further submissions on the Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’*⁷ (‘Prosecution’s Further Submissions’) requesting the Trial Chamber ‘(i) to confirm its previous finding that Kenya has failed to comply with its Records Request, which prevented the Court from exercising its functions and powers under the Statute; and (ii) to refer Kenya to the ASP’⁸.

⁵ (Public) ICC-01/09-02/11-1032, 19 August 2015

⁶ Appeals Chamber Judgment, para. 98.

⁷ (Public) ICC-01/09-02/11-1034, 14 September 2015.

⁸ Prosecution’s Further Submissions, para. 37.

III. SUBMISSIONS

9. The Government of the Republic of Kenya makes the following submissions in response to the Appeals Chamber Judgment and the Prosecution's Further Submissions.

10. At the outset, the Government of the Republic of Kenya reiterates that, **Article 93(1)** of the Rome Statute ('the Statute'), provides that State Parties in providing assistance to the Court must comply with the Statute itself as well as the procedures under their national laws. The Government of the Republic of Kenya maintains that the Prosecution's Revised Request failed to meet the requirements stipulated at **Article 96** of the Statute as well as the procedures under the Laws of Kenya.

11. The Government of the Republic of Kenya submits that the Prosecution's prayer to the Trial Chamber for the Chamber to 'confirm its previous finding that Kenya has failed to comply with its Records Request'⁹, and other several references to the Records Request in its further submissions, is a dishonest attempt to reopen arguments on the amended and settled matter of its request of 24 April 2012 to the Government of the Republic of Kenya for records ('Records Request'). The Prosecution is fully apprised that the matter was amended and settled by the Trial Chamber's *'Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment*

⁹ Prosecution's Further Submissions, para. 37.

of the provisional trial date' of 31 March 2014 ('Trial Chamber Decision of 31 March 2014').

12. The Trial Chamber Decision of 31 March 2014 directed the Prosecution to update its Records Request in adherence to the tripartite principles of specificity, relevance and necessity.¹⁰ The Prosecution accordingly amended the Records Request and created the Revised Request dated 8 April 2014.
13. Moreover, the Government of the Republic of Kenya submits that the Trial Chamber should maintain its decision not to refer the Republic of Kenya to the Assembly of States Parties ('The Assembly') and direct the Prosecution to thoroughly and effectively investigate its case. This would ensure that the requests for assistance in gathering evidence that the Prosecution makes to the Government of the Republic of Kenya, comply with the tripartite principles of relevance, necessity and specificity to the proceedings.
14. At the moment, on the Prosecution's own admission, the Prosecution is speculative and uncertain of the relevance of the evidence sought by the Revised Request.¹¹ This is despite more than five years of active and sustained investigations since the prosecution was authorised to initiate *proprio motu* investigations into the situation in Kenya.

¹⁰ Trial Chamber Decision of 31 March 2014, fn. 216.

¹¹ Impugned Decsion, para. 82.

15. In respect of paragraphs 3, 10, 13 and 34 of the Prosecution's Further Submissions, the Government of the Republic of Kenya submits that factual findings that the Trial Chamber is required to make, pursuant to the directions issued in the Appeals Chamber Judgment, ought to be limited to those relating to the Revised Request and not the Record Request. As pointed out at paragraphs 10 and 11, the Trial Chamber had earlier made a determination on the Records request, wherein it found it to be too broad for the purpose of effective cooperation at the relevant stage of the proceedings.¹³

16. Contrary to the Prosecution's submissions at paragraph 9 of its further submissions that the Trial Chamber should set aside its earlier determination, particularly set out in the Impugned Decision, that is, that 'it is still nothing more than speculative that the cooperation request, if implemented would provide the Prosecution with the necessary evidence', the Government of the Republic of Kenya submits that the Trial Chamber should affirm this determination. This is because it arises from the Prosecution's own admission and will therefore be necessary in assessing the Prosecution's conduct; and also demonstrates that a referral of the Republic of Kenya to the Assembly would not assist the work of the Court and the proceedings in any way.

17. In addition, the Government of the Republic of Kenya finds paragraph 12 of the Prosecution's Further Submissions exaggerative of the current and future of cooperation between the Court and States under the

¹³ Trial Chamber Decision of 31 March 2014, paras. 32 and 83.

Rome Statute. At any given stage of the proceedings before the Court, an appropriate Chamber has always and will always be designated to conduct proceedings and oversee cooperation between the Court and the relevant State Party. For instance, the present Trial Chamber that is conducting proceedings in the present case found, in its Decision of 31 March 2014, that the Prosecution's Records request was too broad for the then stage of the proceedings, and that such broadness might only be justified in the context of preliminary investigations.¹⁴

18. Further, the Government of the Republic of Kenya takes exception to the assertions at paragraphs 17 to 19 of the Prosecution's Further Submissions, particularly that at the time of the Appeals Chamber Judgement, 'judicial measures to obtain cooperation had been exhausted and consultations had reached a deadlock'. This is untrue and subjective since the Trial Chamber did not make such a determination in the Impugned Decision or in subsequent decisions thereafter. Contrary to the Prosecution's assertion that the 'Trial Chamber concluded that allowing further time for cooperation, without intervention at that stage would be contrary to the interests of justice, the Government of the Republic of Kenya avers that the intervention of the Trial Chamber by way of the Impugned Decision was for the explicitly stated reason that the further grant of the Prosecution's requests for adjournment of proceedings would be contrary to the interests of justice.¹⁵

¹⁴ Trial Chamber Decision of 31 March 2014, para. 83.

¹⁵ Impugned Decision, para. 89.

19. Furthermore, contrary to the Prosecution's assertion at paragraphs 25 to 28 of its submissions, that the Trial Chamber's consideration of its conduct is not relevant to the question of referral, The Government of the Republic of Kenya firmly states that it is necessary for the Prosecution's own conduct to be considered because it demonstrates that the Prosecution failed to properly investigate its case. Therefore, the Prosecution developed a request for assistance, presently the Revised Request, which did assist the Court's work of truth seeking since the evidence sought by the Revised Request could not enable progress of proceedings to trial.

20. The Government of the Republic of Kenya respects the Appeals Chamber Judgment but nonetheless, respectfully, takes exception to the observations of the Appeals Chamber at paragraphs 53 and 77 on the essence of a referral to the Assembly.

21. Relating to paragraph 53 of the judgment, the Government of the Republic of Kenya submits that, contrary to the view of the Appeals Chamber, a referral to the Assembly might 'not necessarily be intended to cast a negative light on the conduct of a State'. A referral to the Assembly is a resort to the application of counter-measures against the referred State by other States Parties to Statute, in a bid to compel the referred State to stop a violation and comply with its treaty obligations.

22. By the time a Chamber resorts to referring a State to the Assembly, it, most likely, has made a negative perception about a State's cooperation with the Court. Therefore, the Court's referral of such a State to the

Assembly is meant to get the assistance of external actors in compelling the 'errant' State to comply with its treaty obligations.

23. Subsequently, contrary to the Appeals Chamber's observations at paragraph 77, it would be unjust and prejudicial for a Chamber to refer to the Assembly a State that is found to be non-compliant on a particular request for the Court, for the sake of ensuring its cooperation in future in other unrelated trials.

24. Keeping a State Party to the Statute under the threat of countermeasures for an indefinite period of time in order to guarantee its future cooperation on, yet to be initiated, unrelated trials is not only unjust, prejudicial and humiliating, but also an expedient use of the discretionary power of a Chamber to refer a State to the Assembly.

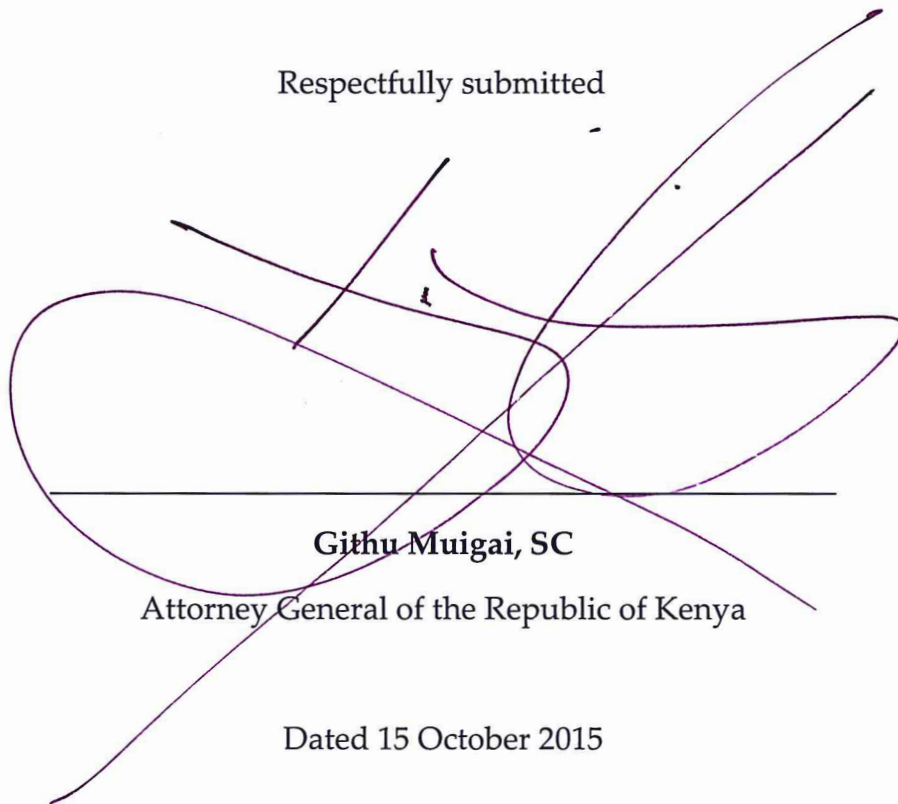
25. Throughout the period in which this issue of cooperation has been pending, the Republic of Kenya has continued to avail unlimited and unrestricted entry to the Republic of Kenya of ICC officials and has continued to avail information and documents and materials available to the Republic of Kenya, not only in the present Kenya One situation case but in the Kenya Two situation case as well. This is in the public domain and the Court can independently verify the same. This case therefore cannot be described as fit and proper for referral to the Assembly of State Parties.

IV. RELIEF REQUESTED

26. The Government of the Republic of Kenya humbly requests the Trial Chamber to determine that Kenya had not failed to comply with the Prosecution's Revised Request, and instead direct the Prosecution to undertake further and effective investigations of its case in order to meaningfully engage the Government of the Republic of Kenya in cooperation on its requests.

27. Subsequently, that the Trial Chamber affirms its earlier consideration, that it is not appropriate to refer the matter of the alleged non-compliance to the Assembly.

Respectfully submitted



Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 15 October 2015

at Nairobi, Kenya

