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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**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**

Sources: 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:

The Office of the Prosecutor

Ms. Fatou Bensouda
Ms. Adesola Adeboyejo

Counsel for the Defence

Steven Kay QC
Gillian Higgins

Legal Representatives of the Victims

Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

Ms. Paolina Massidda
Ms. Caroline Walter

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Githu Muigai, SC Attorney General,
Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Ms. Fiona McKay

I. Introduction

1. The Government of the Republic of Kenya ("Kenyan Government") hereby respectfully files with Trial Chamber V of the Court ("Trial Chamber") submissions on the status of the Kenyan Government's cooperation with the Court, and in particular with the Office of the Prosecutor ("OTP"). The Kenyan Government is compelled to make these submissions in view of the Prosecutor's recent observations and submissions in the case of the *Prosecutor v. Uhuru Muigai Kenyatta* on the history and present status of cooperation between the Court and the Kenyan Government.
2. In its 8 March 2013 "Public redacted version of the Additional Prosecution observations on the Defence's Article 64 applications, filed in accordance with order number ICC-01/09-02-11-673",¹ the Honourable Prosecutor makes the following observations regarding certain actions of the OTP prior to the confirmation of charges hearing in this case, namely that it:

*(iii) took multiple steps to interview senior members of the Kenya Police – interviews that were blocked by a preliminary injunction, supported by the Government of Kenya ("GoK"), that remains in place two years later, despite the Prosecution's repeated requests to the GoK to ask the Court to designate judges to hear the case on the merits (iv) made Requests for Assistance to the multiple entities, including the GoK, for documentary materials relevant to the Accused's roles in the PEV; (v) expended considerable efforts to obtain co-operation from the GoK with respect to the Requests for Assistance, and to overcome various tactics employed to stall, delay, or altogether thwart the Prosecution's collection of certain evidence in Kenya.*²

¹ ICC-01/09-02/11-683-Red.

² *Ibid.*, para. 24.

3. Similarly, during the Prosecutor's oral submissions at the status conference held on 11 March 2013 regarding the reasoning of her decision to withdraw all charges against a former accused in this case, Ambassador Francis Kirimi Muthaura, the Prosecutor stated that *"despite assurances of co-operation with the Court, the Government of Kenya has provided only limited assistance to the Prosecution and they have failed to provide the Prosecution with access to witnesses, or documents, that may shed light on Mr Muthaura's case"*.³
4. In addition, the Kenyan Government takes notice of Pre-Trial Chamber II's "Corrigendum to 'Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute' ",⁴ dated 21 March 2013, in which the Single Judge summarised the Prosecution's justifications for continuing its investigations after the commencement of the confirmation of charges hearing. The Prosecution, among other reasons, alleged "lack of cooperation" from the Kenyan Government.⁵
5. The International Criminal Court is a treaty-based entity founded on the principles of complementarity and state cooperation. The States Parties to the Rome Statute have obligated themselves to "cooperate fully with the Court in its investigations and prosecution of crimes within the jurisdiction of the Court" in accordance with the provisions of the Rome Statute.⁶
6. The Kenyan Government submits that, even prior to Pre-Trial Chamber II's authorisation to the Prosecutor to open an investigation in Kenya,⁷ it has fully provided cooperation, support and assistance to the Court in accordance with the

³ ICC-01/09-02/11-T-23-ENG ET, p. 4, lines 19-22.

⁴ ICC-01/09-02/11-700-Corr.

⁵ *Ibid.*, para. 38.

⁶ Rome Statute, Article 86.

⁷ See Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19.

Rome Statute and the “fundamental legal principle[s] of general application”⁸ that are operative in the Republic of Kenya.⁹ This full cooperation with and support and assistance to the Court, including the OTP, continue to this day.

7. The Kenyan Government has previously expressed disquiet with the manner in which the OTP has approached cooperation issues in the Situation in the Republic of Kenya. For instance, on 14 March 2011, the former Prosecutor, Mr. Moreno-Ocampo, made statements to the media concerning the potential impact of Ambassador Muthaura’s position and official functions on Prosecution investigations.¹⁰ The Kenyan Government issued the following public response on the same day:¹¹

The Government has not yet received the letter alluded to by ICC Prosecutor Moreno Ocampo to media on the employment status of Kenyans in the Kenyan Government. The Government finds it strange and un-procedural that it would get communication first through the media. The Government wishes to inform the world that we understand, appreciate and respect the Rome Statute, the Rights enshrined by the United Nations and the ICC process. The Government has from the beginning indicated that it will and still is supporting the International

⁸ Rome Statute, Article 93(3).

⁹ Such fundamental legal principles include, *inter alia*, the separation of powers between the branches of Government, the independence of the judiciary and the Government’s respect for and adherence to the decisions and orders of the judiciary. See, e.g., Statement by H.E. the President and the Right Honorable Prime Minister, 5 November 2009, available at: www.communication.go.ke/print_media.asp?id=1018 (“We have had a constructive meeting with Mr. Louis Moreno-Ocampo, Prosecutor of the International Criminal Court (ICC). The discussions were candid and frank. Mr. Moreno-Ocampo has explained to us his mandate and how he intends to execute that mandate. . . . In addition, the Government remains committed to cooperate with ICC within the framework of the Rome Statute and the International Crimes Act.”).

¹⁰ Office of the Prosecutor, “OTP Weekly Briefing”, 8-14 March 2011 – Issue #78 (“The Prosecutor also informed the assembled journalists that the OTP would soon send a letter to the Kenyan Government, asking them about the current position and functions of one of the suspects, Francis Muthaura. If he is the superior of Kenyan police, Prosecution cannot interview witnesses in Kenya. The Prosecutor recalled the conditions established by the Pre-Trial Chamber, in violation of which the suspects would be subject to arrest, and warned to not protect the interests of any of the suspects, stressing that victims in Kenya should not be threatened or intimidated.”)

¹¹ Office of Public Communications - Office of Government Spokesperson, “GOVERNMENT RESPONSE TO MEDIA STATEMENT BY ICC PROSECUTOR LUIS MORENO OCAMPO”, available at: www.communication.go.ke/print_media.asp?id=1278.

Criminal Court. The Government has continued to co-operate with the Court. The ICC Prosecutor should reciprocate the good working relationship Kenya has with the ICC by respecting the natural rights of countries and individual rights of any people mentioned in ICC cases as enshrined in the ICC's own statutes and other international laws including those of the United Nations.

8. On 11 March 2013, Prosecutor Fatou Bensouda notified the Court that she has withdrawn her case against Francis Kirimi Muthaura¹². As part of her stated reasons for dropping the case, the Prosecutor asserted:

"A number of factors, summarized here, have weighed on the decision to withdraw the charges. The Muthaura case has presented serious investigative challenges, including a limited pool of potential witnesses, several of whom have been killed or died since the 2007-8 post-election violence in Kenya, and others who are unwilling to testify or provide evidence to the Prosecution. Despite assurances of its willingness to cooperate with the Court, the Government of Kenya has in fact provided only limited cooperation to the Prosecution, and has failed to assist it in uncovering evidence that would have been crucial, or at the very least, may have been useful in the case against Mr Muthaura..."¹³.

9. On 15th March 2013, the Republic of Kenya through its Embassies in Hague and in New York issued a statement stating that the Kenyan Government intended to file a complaint the Trial Chamber seeking the Trial Chamber to exercise its inherent trial management powers and either:

- i) *Order the Prosecutor to file a formal application with the Chamber wherein she itemizes which Article 93 requests she has made, with which the Government has failed to cooperate or has failed to give a justifiable explanation for its*

¹² ¹² ICC-01/09-02/11-687 ("Notification of Withdrawal").

¹³ Notification of Withdrawal, para. 11.

inability to cooperate. This would allow the Government the opportunity to respond specifically to these allegations before the Chamber; or

- ii) Grant the Government leave to make a response on the merits to the Prosecutor's general allegations of non-cooperation.*
- iii) to ask the Trial Chamber to urgently order the Prosecutor to desist from making allegations and leveling accusations against the Kenyan Government outside the Court process.*

10. Regrettably, the OTP has not acted in a reciprocal manner with the Kenyan Government and continues to impinge upon the above-mentioned 'natural rights' of the sovereign Kenyan state. The former Prosecutor and current Prosecutor have both made statements to the media alleging and insinuating purposeful delay, ulterior motives, inaction and non-cooperation by the Kenyan Government.¹⁴

11. While such public statements are unhelpful to the cooperation relationship between the OTP and the Kenyan Government, it is a matter of a different magnitude when the Prosecutor alleges, in legal submissions before the Chambers of this court, and in support of her submissions and/or requested relief, that the Kenyan Government's unsatisfactory cooperation in violation of its international obligations as a State Party to the Rome Statute is a reason to withdraw cases or to further its submissions for particular reliefs.

¹⁴ See, for example, Office of the Prosecutor, Statement of the Prosecutor on the Situation in Kenya, 29 May 2011 (*"My question to the Kenyan Government is this: does the Government of Kenya want justice for the victims? We need an unequivocal answer, an answer that Kenyans and the world could understand. Is the Government of Kenya protecting witnesses or protecting the suspects from investigation? That is the question."*); "Witnesses Are Being Intimidated, Says ICC Prosecutor", Kenya Citizen TV, 17 February 2013, <http://www.youtube.com/watch?v=GS7Mna5MDno> at 2m9sec to 2m54 sec (in which the Prosecutor states that she has been in contact with the Attorney General of Kenya and has had correspondence with him "to no avail". The Prosecutor declares that "some very important documents have not been received by the office, contrary to the promises that were given" to her and that cooperation with the Kenyan authorities has been the most difficult out of all the cases she deals with).

12. When this occurs, the natural rights of the Republic of Kenya are squarely implicated and a response required in the same forum in which these legal submissions have been made. Indeed, the Kenyan Government submits it is obligated to answer such allegations pursuant to its Article 86 general obligation to cooperate with the Court, as well as its Article 93(3) and (6) obligations to consult with and inform the Court on matters pertaining to cooperation requests.

II. Legal basis for filing of these submissions

13. The Prosecutor's decision to make formal allegations of non-cooperation against the Government of Kenya is sufficient to permit a response pursuant to Regulation 24(3) of the Regulations of the Court and the *audi alteram partem* principle.
14. In the alternative, should the Trial Chamber determine that a State Party to the Rome Statute does not have the right under Part IX of the Statute to make submissions on the status of its cooperation with the Court, the Kenyan Government respectfully applies for leave to file observations with the Chamber, pursuant to Rule 103(1) of the Rules, on the history and status of its cooperation with the Court as well as on the specific allegations made by the Prosecution in filing ICC-01/09-02/11-683-Red. The Kenyan Government submits that the issue of cooperation is a live one before the Chamber and that observations from the Kenyan Government on the matter would be both "desirable for the proper determination of the case" and will "assist [the Chamber] in making said determination".¹⁵ In the event the Trial Chamber decides to grant leave pursuant to Rule 103(1), the Kenyan Government respectfully requests that its substantive submissions in this filing on the matter of cooperation be treated as its written observations for the purposes of Rule 103.

¹⁵ Decision on the Kenya Human Rights Commission's request to file an amicus curiae brief, 1 February 2013, ICC-01/09-02/11-618, para. 3.

15. Additionally, the Kenyan Government informs the Chamber that the Government is available to make submissions on issues of cooperation now or in the future if such submissions are deemed necessary or appropriate by the Trial Chamber. Finally, the Kenyan Government respectfully requests that an order be issued to the parties and participants in the Kenya Situation requiring that applications or complaints of non-cooperation by the Kenyan Government be made **on notice**, in order that the Kenyan Government is appraised of the complaint and given the opportunity to respond. This would further enhance the decision making process of the Trial Chamber and also be conducive to public order in Kenya. It cannot be right that a State's internal security is suborned by an outside agency's ill-supported allegations of non-cooperation which has the potential to erode national regard for the institutions of Government and their compliance with the rule of law.
16. Part IX of the Rome Statute establishes a comprehensive framework for cooperation between the ICC and States Parties. Article 93(1) details numerous specific types of assistance that the Prosecutor and Court may request from States Parties and which States Parties must comply with in accordance with Part IX of the Statute and the relevant provisions of national law.
17. The wording and approach of Article 93 is meant to ensure that cooperation between the Court and States Parties is flexible and dynamic, and recognises the complexity and nuances of such international cooperation. For example, Article 93(1)(l) is a catch-all provision that allows the Court to request *"any other type of assistance which is not prohibited by the law of the requested State . . ."*. Article 93(3) provides that *"[w]here execution of a particular measure of assistance . . . is prohibited in the requested State on the basis of an existing fundamental principle of general application, the requested State shall promptly consult with the Court to try to resolve the*

matter” and “consideration should be given to whether the assistance can be rendered in another manner or subject to conditions”. Further, “[i]f after consultations the matter cannot be resolved, the Court shall modify the request as necessary”.

18. Article 93(4) sets out that: *“In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.”*

19. Article 93(5) specifies that *“[b]efore denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided at a later date or in an alternative manner . . .”.*

20. Finally, Article 93(6) states that: *“If a request is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.”*

21. Hence, the framework for cooperation pursuant to the Rome Statute is underpinned by effective and meaning full dialogue and communication between the Court and States Parties, and an understanding that the national law and procedure of a State Party, as well as its national security interests, are non-severable components of this framework.

22. If, in the view of the Prosecutor, the above mentioned dialogue and communication has reasonably run its course and a State Party is allegedly in breach of its cooperation obligations under the Rome Statute, the appropriate remedy is to seek the relief provided pursuant to Article 87(7) of the Statute:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from

exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties

23. The Government of Kenya asserts that it has complied with its obligations under the Rome Statute in good faith and in a practical and effective manner. It is in full compliance with its obligations under the Rome Statute. The Government of Kenya further notes that the Prosecutor has not requested any Chamber of the Court to refer the Republic of Kenya to the Assembly of States Parties. Instead, the Prosecution's approach is that of a halfway house – alleging non-cooperation and delaying tactics by the Kenyan Government in support of its legal submissions and requested relief, without affording the Government of Kenya the opportunity to comment on and respond to these claims so as to expose or explain such assertions as false, incomplete, inaccurate or otherwise misleading. In addition, there are circumstances when a State Party and sovereign government may not be able to provide a party to the proceedings before the ICC or the Court itself with everything requested. An obvious example is in circumstances envisaged by Article 72 of the Statute. That not everything requested by a party to proceedings is provided by a State, is not to say that a State has not cooperated with the Court or that its co-operation is deficient so as to justify one sided adverse comment from a party to proceedings, which is what the Prosecutor of the ICC has unfortunately been doing.

III. Submissions on the Republic of Kenya's cooperation with and support for the ICC

(i) Unfettered access into Kenya and within Kenya

24. The former Prosecutor of the ICC, the current Prosecutor of the ICC, staff members of their Office, Registry Officials of the ICC, Defence Counsel, Victims' Counsel and their respective investigators have all been allowed entry into Kenya

and allowed to operate without any interference. The ICC has a field office in Kenya. This cooperation, facilitation and assistance has continued since the opening of the Kenya Situation. This belies, in large measure, the Prosecution's characterization of the Kenyan Government's assistance and/or cooperation as limited, delayed or inadequate. For example, in January 2011, the then President of the Assembly of State Parties, Ambassador Wenaweser, *"welcomed the cooperation that the Government of Kenya had extended to the Court in its activities in the country along with the continued cooperation extended by the Government, as expressed during a recent visit of a technical team of the ICC to Nairobi"*.¹⁶

(ii) Decision of Government of Kenya not to withdraw from the Rome Statute

25. The Kenyan Government is keenly aware of the importance of States Parties providing the necessary cooperation and assistance to the Court in line with the obligations of Part IX of the Rome Statute. It is in this spirit that the Kenyan Government refused to withdraw from the Statute following the overwhelming vote in the 10th Parliament of the Republic of Kenya's requesting the Government to take such action.¹⁷ To the contrary, the Kenyan Government established an ICC Cooperation Committee whose primary responsibility is to ensure that all matters pertaining to cooperation between the Kenyan Government and the ICC are properly and promptly addressed. The Kenyan Government has additionally provided, as indicated below, the following assistance and cooperation to the Court and the Prosecution

(iii) The entering into force of a host country agreement with the Court

¹⁶ ICC Press Release, President of the Assembly of States Parties visits Kenya, 28 January 2011, ICC-ASP-20110128-PR623.

¹⁷ See pages 66-83 of Parliamentary Hansard of 22nd December 2010

26. On the 3rd September 2010, the Government entered into an agreement with the ICC to extend such privileges and immunities as are necessary for the independent and effective functioning of the Court, in the territory of Kenya.

(iv) The formation of a Multi-Agency Task Force on Post-Election Violence

27. In January 2012, the Kenyan Government formed the above mentioned Task Force¹⁸ whose mandate included, inter alia; reviewing, re-evaluating and re-examining all Post-Election Violence pending investigation, pending trial and concluded cases. All the police files that had been forwarded to Post Election Violence Task Force (PEV) were evaluated by the team and in October 2012, the Kenyan Government provided the Office of Prosecutor access to these files.

(v) Settlement of Internally Displaced Persons

28. The Kenyan Government has taken some measures in respect of a limited class of Post-Election Violence victims, the Internally Displaced Persons (IDPs). These measures include the purchase of land for resettlement of the IDPs, construction of houses for the IDPs, officering of counselling services, cash transfers, some access to free medical attention for some IDPs in government facilities; periodic food distribution to victims; and

(vi) Establishment of Kenyan Witness Protection Agency

29. In 2011, the Kenyan Government created an independent Witness Protection Agency ("WPA")¹⁹ which, it should be noted, was constructed with extensive assistance and advice from the United Nations Office on Drugs and Crime, to provide an effective and robust witness protection program. All parties are free to

¹⁸ With representation from the Office of the Attorney General, The Director of Public Prosecutions, The Kenya Police, the Criminal Investigations Department and the Witness Protection Agency.

¹⁹ See, e.g., Haron, "Kenya launches Witness Protection Agency", Safari Africa Radio, 12 August 2011, <http://safariafricaradio.com/index.php/reforms/94-reforms/1398-kenya-launches-witness-protection-agency>.

refer its witnesses to this agency for consideration for inclusion into the Kenyan witness protection scheme. This can hardly be characterized as non-co-operation or obstructive.

(vii) *CIPEV, KNCHR and confidential Government documents were provided to the Prosecution without redactions or limitation on its use in judicial proceedings*

30. The Kenyan Government established the Commission of Inquiry Into Post Election Violence ("CIPEV") (also known as the Waki Commission) as an independent body in May 2008 to investigate the facts surrounding the post-election violence and to make recommendations on this and related matters.²⁰ The CIPEV delivered its report on 15 October 2008.²¹ All the materials that were produced as part of the enquiry as well as the report were delivered to the OTP. This material included reports, classified government documents and testimonies of senior State officials. The Kenyan Government placed no restrictions or limitations on the ability of the Prosecution to use this material.

31. It also bears recalling that the report of the Kenya National Commission for Human Rights ("KNCHR"), an autonomous agency of the Kenyan Government, into the post- election violence of 2007 and 2008 was provided to the Prosecution along with all supporting material. The Kenyan Government made no attempt to

²⁰ See, e.g., Dialogue Africa Foundation, *KRIEGLER AND WAKI REPORTS SUMMARISED VERSION Revised Edition, 2009*, Konrad Adenauer Stiftung, p. viii, http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf?090428104720; Report of the Commission of Inquiry into Post Election Violence (CIPEV), p. vii, <http://kenyastockholm.files.wordpress.com/2008/10/the-waki-report.pdf>; *The role of the International Criminal Court in Kenya's transitional justice process*, Awaaz Magazine, 1 November 2012, <http://www.awaazmagazine.com/index.php/component/k2/item/414-the-role-of-the-international-criminal-court-in-kenya%E2%80%99s-transitional-justice-process>.

²¹ See, e.g., *The Waki Report – After Waki: What Next for Kenya?*, Perspectives From a Public Forum, Hosted by the Kenya Institute of Governance in collaboration with the Africa Policy Institute and the Africa Peace Forum, Nairobi Serena, 4 November 2008, <http://kigafrica.org/downloads/Peaceforum.pdf>; International Coalition for the Responsibility to Protect, Crisis in Kenya, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>.

either block or restrict the ability of the OTP to receive access or use the KNCHR materials in its work.

32. The reports and materials generated by the CIPEV and KNCHR formed the bulk of the materials relied upon by the Prosecution in its application to initiate an investigation in Kenya, in the OTP's applications for summonses to appear in the two Kenya cases, and during the hearings on the confirmation of charges.²² Without these materials, it would have been difficult, if not impossible, for the OTP to provide sufficient evidence to meet the relevant threshold of proof set for the respective stages of the proceedings.

33. Additionally, in the present case, the Kenyan Government authorised the provision to and use by the Court, not just minutes of its provincial security committees, but also the full and complete minutes of the meetings of the National Security Advisory Committee (NSAC)²³ for the relevant period. The provision of such sensitive national security materials to a third- party for use in criminal proceedings is, in the respectful submission of the Kenyan Government, an unprecedented act of cooperation with the Court and demonstrative of the Republic of Kenya's commitment to and respect for the ICC.

34. The Government of Kenya also recalls that the Defence for Ambassador Muthaura requested to interview senior State Officials. The public record of proceedings discloses that 22 state officials, including the President of the Republic of Kenya, His Excellency Mwai Kibaki, provided evidence at the

²² See, e.g., Prosecution's Written Submissions Following the Hearing on the Confirmation of Charges, 28 October 2011, ICC-01/09-02/11-361, paras. 24, 67, 96; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, paras. 122, 136, 157, 178, 225, 240, 245, 247, 261, 262, 276, 346,

²³ The defence team of Ambassador Francis Muthaura formally requested and was permitted to inspect and copy unedited and un-redacted copies of NSAC minutes for the periods relevant to the post-election violence. See, e.g., Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 351.

Confirmation of Charges hearing. Additionally, four government officials testified before the Honourable Pre-Trial Chamber and were cross-examined by the Prosecutor and his lawyers.²⁴ This constitutes a remarkable degree of engagement and cooperation by the Government of Kenya and senior state officials who agreed to give evidence to the court. Properly considered, whether or not such evidence is viewed as helpful or unhelpful to the prosecutor is irrelevant. The duty of the state is to co-operate as it is the duty of witnesses to speak the truth. The Government of Kenya deprecates any attempt by the Prosecutor of the ICC to explain away or excuse evidential gaps or difficulties in her case as being attributable to action or inaction by the Government of Kenya.

IV. Government Submissions on the particular allegations of non-cooperation

35. On the 4th August, 2010, the Kenyans ratified a new Constitution. The new Constitution incorporates all international treaties ratified by Kenya as part of the country's laws, including the Rome statute to which Kenya is a signatory. After promulgation of the new constitution the ICC became part of the judicial system of our country, and therefore the Prosecutor has a constitutional right to deal with crimes committed in Kenya. The Government is however fully committed to cooperate with the ICC in fulfilment of its international obligations.

36. Kenya has domesticated the ICC Rome Statute through the enactment of the International Crimes Act which came into force on 1st January 2009. The Act restates international crimes and provides for a mechanism of punishment of certain international crimes and to enable the Kenyan Government to co-operate with the International Criminal Court.

²⁴ Mr. Thuita Mwangi (Permanent Secretary, Ministry of Foreign Affairs), Mr. Katee Mwanzee (District Commissioner of Naivasha during the period relevant to the charges), and Mr. Uhuru Kenyatta (Deputy Prime Minister and Minister of Finance – then suspect in the case).

- 37. The Kenyan government has enacted several pieces of legislations that complement its cooperation with the Court. These include: the Witness Protection Act²⁵, the Prevention of Organized Crimes Act²⁶, Prevention of Terrorism Act²⁷, the Mutual Legal Assistance Act²⁸ and the Proceeds of Crime and Anti-Money Laundering Act²⁹.
- 38. After the promulgation of the Constitution, the Kenyan Government initiated institutional reforms in the criminal justice system, which will go a long way in addressing impunity in Kenya. Some of the institutions in this regard include the Kenya National Police Service, Independent Policing Oversight Authority, the Judiciary, and Office of the Director of Public Prosecutions, among others.
- 39. The Judiciary has created an international crimes division within the High court and it is intended to give effect to Section 8 (2) of the International Crimes Act, No. 16 of 2008, for purposes of both dealing with the pending 2007/2008 PEV cases that are being pursued by the Director of Public Prosecutions (DPP) and in order to prepare in the unlikely event that there are similar cases in the future. The division is also aimed to deal with crimes of an international nature for example piracy, trafficking in persons et cetera.
- 40. The Kenyan Government since 2010 has received a total of Thirty Seven (37) Request For Assistance (excluding mission notifications) from the Office of the Prosecutor and has processed most of these requests and in circumstances where it has been unable to process them the Prosecutor has been made aware of the difficulties experienced by the Government. For example

²⁵ Cap 79 of the Laws of Kenya

²⁶ Act No. 6 of 2010

²⁷ Act No. 30 of 2012

²⁸ Act No. 36 of 2011

²⁹ Act No. 9 of 2009

41. **On the by the OTP for Financial Information for William Samoei Ruto, Joshua Arap Sang, Francis Kirimi Muthaura and Uhuru Muigai Kenyatta referenced OTP/KEN/KEN-45/ID-smms dated 24/04/2012;**

The Republic of Kenya has informed the OTP of its inability to process this request.

The Republic of Kenya contends that there has to be a court order in place in order to fulfill this request. **Article 93(k)** of the Rome statute provides that States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

“The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties;”

The Prosecutor on **6 April 2011** in “ **The Prosecution’s Request for Conditions of Enforcement In the Situation In The Republic Of Kenya In The Case Of The Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali (No.: ICC-01/09-02/11)**” had sought an order inter alia “.... requiring Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali to provide complete information about their finances, including assets and liabilities and the identities of all to whom money or property is owed;”

The Pre-Trial Chamber II in its ruling of 20 April 2011(No.: ICC-01/09-02/11) in the **Situation In The Republic Of Kenya, In The Case Of The Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein**, decided that the "prosecution's request for conditions of enforcement" that the additional conditions sought by the Prosecutor under rule 119(2) of the rules lack any justification and his request must therefore be rejected”

From the foregoing, the Republic of Kenya is unable to process this request.

42. **On the Request by the OTP to interview 10 Police Officials referenced OTP/KEN/KEN-5/ID-dfms dated 115/07/2010;**

With regard to this request, a suit was filed before the Kenya courts; HCCC, Petition No. 2 of 2011; Jackson Mwangi Vs. The Hon. Attorney General & Hon. Kalpana Rawal.

- On 1st of February 2011, a court order, prohibiting the 2nd respondent from *“taking or recording any evidence from any Kenyan or issuing any summons to nay Kenyan for purposes of taking any evidence pursuant to any international criminal court process pending the hearing and determination of the application”*, was issued. The court order is in force until the matter is heard and determined. Placing this request in abeyance.

43. On the Request by the OTP to Visit Medical Facilities and Screening of Medical Records referenced OTP/KEN/KEN-29/ID-smms dated 06/12/2011;

The Kenyan Government did facilitate this request and the OTP did access the medical facilities and were able to screen the files as requested in December 2012. The OTP further undertook interviews of Kenyan medical personnel who were involved in treating post-election violence victims within the government medical facilities.

44. On the OTPs Request for access and screening to all files related to the PEV referenced OTP/KEN/KEN -41/ID-smms and dated 04/04/2012

The Government of Kenya facilitated this request and the OTP screened the files in October 2012.

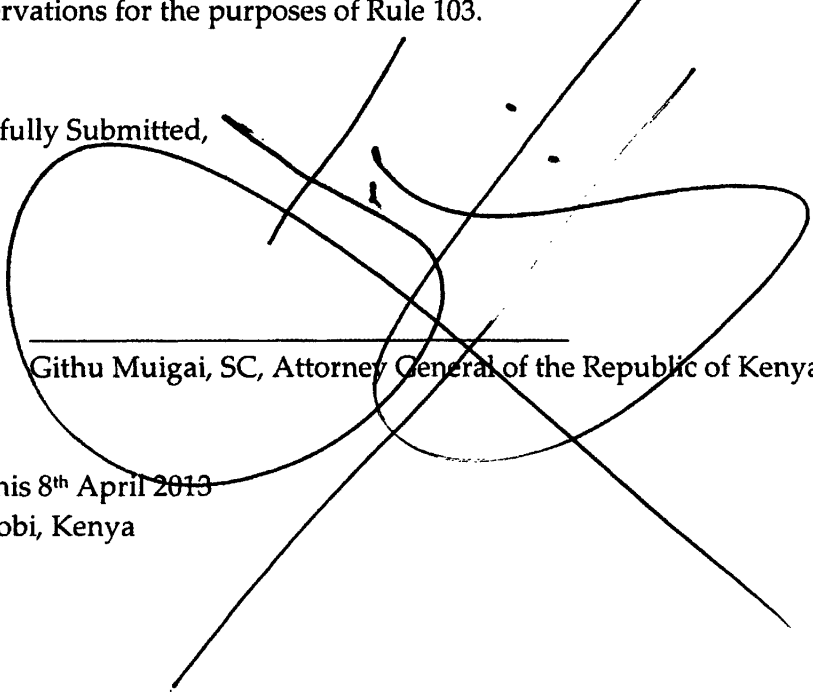
45. The Kenyan government has provided the Prosecutor with all legitimate documents and materials that could be provided under the Rome Statute, the Constitution and the laws of Kenya.

V. Final Submissions & Relief Requested

46. The Kenyan Government hereby informs the Honourable Trial Chamber that it is available to make submissions on issues of cooperation, if required. Additionally, the Kenyan Government respectfully requests that an order be issued to the parties and participants in the Kenya Situation requiring that applications or complaints of non-cooperation by the Kenyan Government be made on notice, in order that the Kenyan Government is appraised of the complaint and given the opportunity to respond.

47. In the event that the Trial Chamber determines that the Government of Kenya must apply pursuant under Rule 103 of the Rules, the Kenyan Government hereby respectfully applies for leave to file observations with the Chamber pursuant to Rule 103(1) of the Rules on the history and status of its cooperation with the Prosecution and Court, as well as on the specific allegations made by the Prosecution in filing ICC-01/09-02/11-683-Red. If leave is granted pursuant to Rule 103(1), the Kenyan Government respectfully requests that its substantive submissions in this filing on the matter of cooperation be treated as its written observations for the purposes of Rule 103.

Respectfully Submitted,



Githu Muigai, SC, Attorney General of the Republic of Kenya

Dated this 8th April 2013
At Nairobi, Kenya