

Cour
Pénale
Internationale

International
Criminal
Court



Original:

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

Date: 4 February 2014

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. UHURU MUIGAI KENYATTA

Public

The Government of the Republic of Kenya's Request for Leave Pursuant to Rule 103 to Submit *Amicus Curiae* Observations in Response to the Prosecutor's 'Notification of the Removal of a Witness from the Prosecutor's Witness List and Application for an Adjournment of the Provisional Trial Date'

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:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC
Gillian Higgins

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
Mr Silas Chekera

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

Paolina Massidda

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States' Representatives

Mr. Githu Muigai, SC
Attorney General, Republic of Kenya

Amicus curiae

REGISTRY

Registrar

Herman von Hebel

Defence Counsel Support Section

Deputy Registrar

Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Government of Kenya hereby seeks leave, under Rule 103 of the International Criminal Court (ICC) Rules of Procedure and Evidence, to submit amicus curiae observations in relation to the Prosecutor's recent observations and submissions in the "*Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date*"¹ and "*Public redacted version of the Prosecution opposition to the Defence request for the termination of the Kenyatta case*"² in the case of the *Prosecutor v. Uhuru Muigai Kenyatta*.

2. In its 20 December 2013, "*Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date*", the Prosecutor asserted:

*It is also appropriate for the GoK's failure fully to comply with its cooperation obligations to be adjudicated, so that the Assembly of States Parties can determine whether and what action to take with respect to those failures*³

3. In its 31 January 2014, "*Public redacted version of the Prosecution opposition to the Defence request for the termination of the Kenyatta case*" the Prosecutor made the following observations on the accused as the Head of State:

withdrawing the charges now would also reward the Accused, who heads the government that has obstructed the Court's work, and who is

¹ ICC-01/09-02/11-875

² ICC-01/09-02/11-892-Red

³ ICC-01/09-02/11-875, para. 19

in a position to ensure that the GoK complies with its treaty obligations, if he wishes to do so. The GoK's continuing violation of its obligations under the Accused's leadership negates any argument that he would be unfairly prejudiced by the continuation of proceedings until the GoK's non-cooperation has been adjudicated.⁴

The Prosecutor further asserted that;

In this case, it is possible to attribute the GoK's failure to comply with its statutory obligations to the Accused. He has been President of Kenya since April 2013, and, as the head of government, is in a position to ensure that Kenya fulfills its obligations under the Rome Statute, if he wishes it to do so.⁵

Submissions

4. The Kenyan Government requests leave to make submissions on:
 - (i) The issue of non-cooperation raised by the Prosecutor in the context of the current proceedings;
 - (ii) The Role of the President and Head of State in Kenya vis-à-vis other Constitutional bodies as may be relevant to the issue of co-operation with the Court under the provisions of Article 93 of the Rome Statute, the Constitution of Kenya, 2010 and the International Crimes Act, 2008.
 - (iii) The Separation of Powers and Independence of various Organs of Government under the Kenyan Constitution and other relevant Kenyan laws as they relate to the issue of co-operation with the Court under the Rome Statute.

⁴ICC-01/09-02/11-892-Red, para. 2

⁵ICC-01/09-02/11-892-Red, para.20

The Government of Kenya's submissions on these issues is crucial in informing the Chamber to arrive at a fair and just decision in this matter.

5. First, the Kenyan Government's observations on the issue of cooperation with the Court as envisaged under Article 54 and 93 of the Rome Statute with regard to the current proceedings will be important to the Court's just and fair determination of the issues in the current proceedings.
6. Second, as the Prosecutor imputes the alleged failure on the part of the Government of Kenya to comply with its obligations to the Accused who is the President, Head of State⁶ and of the Government of the Republic of Kenya seeks to make submissions on the constitutional authority, powers, duties and obligations of the President and Head of State as they relate to the issue of co-operation raised in the current proceedings. Further the Government of Kenya would wish to make submissions on whether actions of independent organs of government are in law attributable to the Head of State as asserted by the Prosecutor.⁷

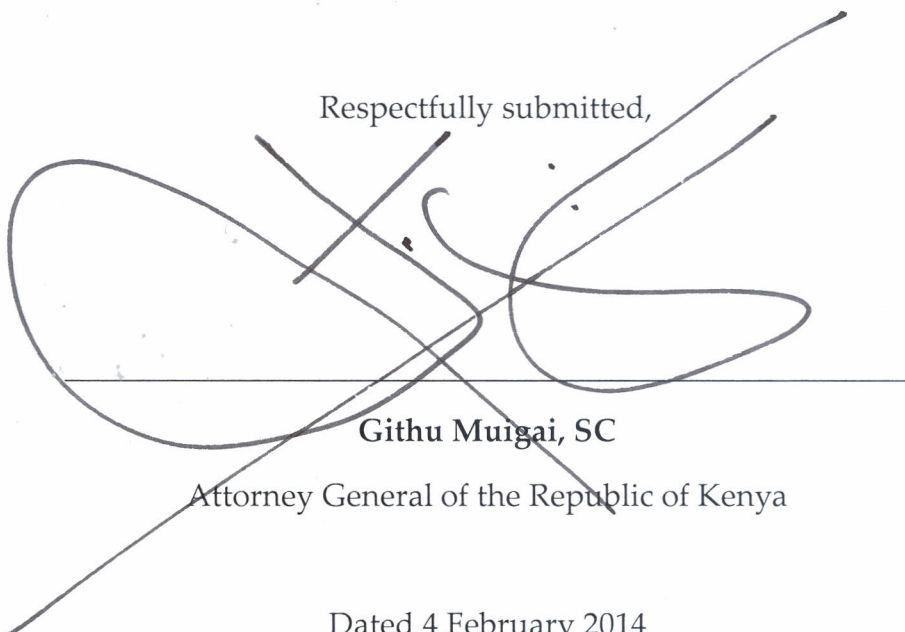
Conclusion

7. For the foregoing reasons, the Government of Kenya respectfully requests that it be granted leave to submit amicus curiae observations on these matters pursuant to Rule 103 of the Rules, within a time limit determined by the Chamber.

⁶ICC-01/09-02/11-892-Red, para. 24

⁷ICC-01/09-02/11-892-Red, para. 21

Respectfully submitted,

A large, stylized handwritten signature in dark ink, consisting of several loops and a long horizontal stroke, is written over the signature line and extends across the name and title.

Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 4 February 2014

At Nairobi, Kenya