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No.: ICC-01/09-02/11  
Date: 11 September 2014

**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' request for leave to reply to the 'Defence response to the Prosecution notice regarding the provisional trial date and request to terminate the case against Mr Kenyatta'**

**Source:** Legal Representative of Victims

**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 Benjamin Gumpert

**Counsel for the Defence**

Mr Steven Kay  
Ms Gillian Higgins

**Legal Representatives of Victims**

Mr Fergal Gaynor

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda  
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**The Office of Public Counsel for the  
Defence**

**States Representative**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Deputy Registrar**

**Detention Section**

**Victims and Witnesses Unit**

**Victims Participation and Reparations  
Section**

**Other**

## **I. Introduction**

1. On behalf of the victims of this case, the Legal Representative for Victims ('Victims' Representative') respectfully requests, pursuant to Regulation 24 of the Regulations of the Court ('Regulations'), leave to reply to paragraphs 32-34 of the 'Defence Response to 'Prosecution notice regarding the provisional trial date' (ICC-01/09-02/11-944) and Request to Terminate the Case against Mr Kenyatta', filed on 10 September 2014 ('Response').<sup>1</sup>

## **II. Issues to which the Victims' Representative wishes to reply**

2. The Victims' Representative submits that the Trial Chamber would 'benefit from receiving further observations',<sup>2</sup> on Defence submissions relating to 'the conduct of the Victims' Representative'.<sup>3</sup> These are new issues, which were not alluded to nor flow from the Prosecution filing to which the Defence was responding.
3. Specifically, the Defence has alleged that the Victims' Representative:
  - a. has made 'unfair and potentially harmful public comments and accusations [which] are unacceptable and do not properly represent the best interests of the victims. He has commented on matters to which he is not party, repeatedly making grave and unfounded accusations against Mr Kenyatta, which in fact demonstrate his fundamental lack of understanding of the evidence in the case';<sup>4</sup> and
  - b. 'is recklessly and illegitimately raising the expectations of those he represents' and has made 'unsupported allegations'.<sup>5</sup>
4. These assertions might be the result of an innocent misunderstanding or misinterpretation on the part of the Defence. The only other possible

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<sup>1</sup> ICC-01/09-02/11-945.

<sup>2</sup> ICC-01/09-02/11-530, para 5 (granting leave to reply where the Chamber concluded that it 'may benefit from receiving further observations').

<sup>3</sup> Response, para. 32.

<sup>4</sup> Response, para. 32.

<sup>5</sup> Response, para. 34.

explanation is that they are a deliberate and unwarranted public attack on the the Victims' Representative, his field staff, and, indirectly, on the integrity of the thousands of Kenyans he represents. The Victims' Representative notes with real regret that, instead of responding in detail to the substance of the assertions in question, the Defence instead has chosen to characterize those assertions as reckless and illegitimate.<sup>6</sup>

5. If granted leave, the Victims' Representative proposes to file a concise reply in which he will, for the benefit of the Trial Chamber, the parties, and others who closely follow these proceedings, recall the basis (whether as a matter of inference or otherwise) for each of the assertions which he made and which are referred to by the Defence at footnotes 48 and 49 of the Response.
6. Those assertions were made by the Victims' Representative to this Trial Chamber on 5 February 2014 and on 9 July 2014. They are also contained in a newspaper article quoting the Victims' Representative and in a letter he sent in November 2013 to the United Nations Security Council, copied to the Trial Chamber and to the Defence.
7. Specifically, he will clarify his basis, should this be deemed necessary by the Chamber, for asserting to the Trial Chamber on 5 February 2014, in the presence of the Defence, that:<sup>7</sup>
  - a. The Police Commissioner during the 2007-2008 post-election violence, Mr Ali, had 'little interest in facilitating access to evidence which might further incriminate him';
  - b. The Government has been 'dilatory and obstructing in providing documents and has deliberately filtered out those which appear to be most capable of revealing the truth';

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<sup>6</sup> Attacks by Government of Kenya representatives on the Special Rapporteur on extrajudicial, summary or arbitrary executions, after he issued a report on extrajudicial killings in Kenya, raised the same issue: a tendency, as he put it, to attack the messenger rather than to address substantively the issues raised. See [http://www.un.org/webcast/unhrc/11th/statements/Alston\\_STMT.pdf](http://www.un.org/webcast/unhrc/11th/statements/Alston_STMT.pdf) at pages 3-4.

<sup>7</sup> ICC-01/09-02/11-T-27-ENG ET WT 05-02-2014, p. 19, lines 12-24; referred to in footnote 48 of the Response.

- c. The Government has 'put forth bizarre and contrived legal arguments to justify its failure to co-operate';
  - d. 'The Prosecution was deliberately misled as to the availability of cell-phone data, obstructed in trying to access it, and when it did access it, some of it, it was provided with fabricated data';
  - e. 'This entire investigation and prosecution has been infected with unprecedented levels of witness intimidation and interference'; and
  - f. 'Instead of giving legal, logistical and moral support to the prosecution of this case, the Accused has devoted enormous resources to bringing it to an end'.
8. Further, the Victims' Representative proposes to explain his good faith belief for asserting to the Trial Chamber on 9 July 2014, in the presence of the Defence and the Government of Kenya, that:
- If you could imagine for a moment that you did have the requested telephone data, then your Honours would know exactly where Mr Kenyatta was during the period of the crimes alleged, and you would know exactly who he was speaking to, and you would also know that information for his close associates. In other words, your Honours would have a very clear picture as to what exactly he was up to. The fact that that information is being withheld from your Honours is a matter of very great concern. The suggestion that the telephone numbers have either been erased or no longer exist or have been forgotten, if that suggestion has been made, is thoroughly unpersuasive. And I think this issue in my submission, Madam President, illustrates perhaps more than any other just what we're up against here, and that is a policy of deliberate obstruction of access to relevant evidence in this case.<sup>8</sup>
9. The Victims' Representative will also concisely clarify his good faith basis for making the statements cited in the newspaper article and in the letter to the United Nations Security Council.
10. The Victims' Representative can indicate in advance that the basis for his assertions is largely to be found in:

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<sup>8</sup> ICC-01/09-02/11-T-30-ENG ET WT 09-07-2014, p. 32, lines 19-25 to p. 33, lines 1-5, cited in footnote 48 of the Reply.

- a. Written and oral submissions in this case, including the Prosecution's 8 May 2013 filing on the insufficiency of the Government's co-operation with the Court,<sup>9</sup> its 31 January 2014 response to 14 questions from the Legal Representative,<sup>10</sup> and Defence submissions;<sup>11</sup>
  - b. The Confirmation of Charges decision;<sup>12</sup>
  - c. The statement by the Special Rapporteur on extrajudicial, summary or arbitrary executions to the United Nations Human Rights Council, on 3 June 2009,<sup>13</sup> and his statement on 25 February 2009;<sup>14</sup>
  - d. Information in the public domain, previously cited in the Legal Representative's filings, relating to the absence of justice for victims in Kenya and the international campaign by the Government to delay or to terminate this case, or to provide immunity to the Accused.
11. Furthermore, if granted leave to reply, the Victims' Representative will briefly address the question raised by the Defence of whether he is properly representing the best interests of the victims.<sup>15</sup> Due to the summons conditions in this case, the Defence is not permitted to contact victims. The Victims' Representative, on the other hand, has a mandate to do so. He represents their interests on the basis of what he has heard in 45 meetings he has attended in Kenya with 1049 Kenyans, 759 of whom have been verified to be victims of the crimes charged in this case. As a result, he is inevitably better placed than the Defence to determine how best to represent the interests of his clients. The Legal Representative does so fully and fearlessly, in accordance with the views and concerns they express, and in accordance with the Code of Professional Conduct for Counsel.

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<sup>9</sup> ICC-01/09-02/11-733-Red.

<sup>10</sup> ICC-01/09-02/11-892-Conf-AnxA.

<sup>11</sup> For example, ICC-01/09-02/11-835-Conf. and ICC-01/09-02/11-878-Conf-AnxF.

<sup>12</sup> ICC-01/09-02/11-382-Red.

<sup>13</sup> [http://www.un.org/webcast/unhrc/11th/statements/Alston\\_STMT.pdf](http://www.un.org/webcast/unhrc/11th/statements/Alston_STMT.pdf), pages 2-5.

<sup>14</sup> <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8673&LangID=E>.

<sup>15</sup> Response, para. 32.

### III. Relief requested

12. In light of the foregoing, the Victims' Representative respectfully requests the Chamber to:

- a. grant leave to reply on the issues identified in paragraph 3;
- b. extend the time limit specified in Regulation 34(c) of the Regulations so that the reply is to be filed within 10 days of notification of the decision to grant leave.

Respectfully submitted,



Fergal Gaynor  
Common Legal Representative of Victims

Dated this 11<sup>th</sup> day of September 2014

At Nairobi, Kenya