

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 3 July 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Decision concerning the Government of Kenya's Submissions on its cooperation with
the Court**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Adesola Adebeyejo

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

**The Office of Public Counsel for the
Defence**

States Representatives

Mr Githu Muigai, Attorney General,
Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) (“Chamber”)¹ of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 64(2), 64(6)(f) and 87(7) of the Rome Statute (“Statute”), Rule 103(1) of the Rules of Procedure and Evidence (“Rules”), and Regulations 24(3), 31 and 109(3) of the Regulations of the Court (“Regulations”) issues the following Decision concerning the Government of Kenya’s Submissions on its cooperation with the Court (“Decision”).

I. Procedural history

1. On 8 April 2013, the Government of the Republic of Kenya (“Kenyan Government”) filed the “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” (“Submissions”).²
2. In the Submissions, the Kenyan Government set forth responses to allegations of non-cooperation raised by the Office of the Prosecutor (“Prosecution”) in various public filings and statements. The Kenyan Government asserted that it was entitled to file the Submissions pursuant to Part 9 of the Statute, Regulation 24(3) of the Regulations and the *audi alteram partem* principle.³ In the alternative, it sought leave to file observations pursuant to Rule 103(1) of the Rules and for the substantive parts of the Submissions to be treated as those observations.⁴
3. On 24 April 2013, the Chamber ruled that as the Kenyan Government is not a party to or participant in the current proceedings, leave was required pursuant to Rule 103(1) of the Rules in order for it to file observations.⁵ The Chamber granted this leave and accepted the substantive parts of the Submissions as the Kenyan

¹ Where “Chamber” is used in this decision it refers to both the Trial Chamber V in its composition as until 21 May 2013 and to Trial Chamber V(B) as composed by the Presidency’s Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto* and *Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*, 21 May 2013, ICC-01/09-02/11-739.

² ICC-01/09-02/11-713.

³ ICC-01/09-02/11-713, paras 13-14.

⁴ ICC-01/09-02/11-713, para. 14.

⁵ Decision on the Government of Kenya’s application for leave to file observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, ICC-01/09-02/11-725, para. 2.

Government's observations for the purposes of Rule 103(1) of the Rules.⁶ In the same decision, the Chamber directed the parties and participants to submit any response to the Kenyan Government's observations within 14 days.⁷

4. The Common Legal Representative for Victims ("Legal Representative") filed his response on 6 May 2013.⁸ The Prosecution filed its response on 8 May 2013 ("Response").⁹ The defence team for Mr Kenyatta did not file a response.
5. On 24 May 2013, the Registry transmitted to the Chamber a request from the Kenyan Government seeking firstly, leave to reply to the Response and, secondly in the event leave is granted, an extension of the time limit specified in Regulation 34(c) of the Regulations to allow the reply to be filed within ten days of notification of the Chamber's decision.¹⁰
6. On 30 May 2013, the Chamber granted the Kenyan Government leave to file a reply to the Response within 10 days of notification of the decision.¹¹ The reply was duly filed on 10 June 2013.¹²
7. This Decision addresses two procedural requests made by the Kenyan Government in the Submissions and by the Prosecution in the Response.
8. As noted in its decision of 30 May 2013 granting leave to reply, the Chamber is not presently seized of any application for a ruling in respect of the Kenyan Government's compliance with its obligations under Part 9 of the Statute. Accordingly the Chamber does not make any substantive findings on that issue in this Decision.

⁶ ICC-01/09-02/11-725, para.2.

⁷ ICC-01/09-02/11-725, para. 3.

⁸ Victim's Response to the Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, ICC-01/09-02/11-731.

⁹ Prosecution Response to the "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" (ICC-01/09-02/11-713), ICC-01/09-02/11-733-Conf-Exp. A public redacted version was filed on 10 May 2013.

¹⁰ Registry Transmission of a document received from the Government of the Republic of Kenya, represented by the Attorney General of Kenya, ICC-01/09-02/11-743 and Annex 1 thereto. The leave request was filed as a public document. On 27 May 2013, the Registry transmitted a confidential *ex-parte*, Kenyan Government and Prosecution only, version of the leave request to the Chamber. ICC-01/09-02/11-745-Conf-Exp and Annex 1 thereto.

¹¹ Decision granting the Government of Kenya leave to reply, ICC-01/09-02/11-746.

¹² Reply by the Government of Kenya to the "Prosecution response to the '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' (ICC-01/09-02/11-713)", ICC-01/09-02/11-755.

II. Kenyan Government's request

A. Submissions

9. The Kenyan Government requests the Chamber to issue an order 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" so as to ensure that it is made aware of and can respond to the application or complaint.¹³ It expresses concern about the Prosecution's approach of "alleging non-cooperation and delaying tactics" in support of its legal submissions and requested relief without affording the Kenyan Government an opportunity to respond.¹⁴ It submits that requiring these kinds of allegations to be made "on notice" would "enhance the decision making process of the Trial Chamber and also be conducive to public order in Kenya."¹⁵
10. The Prosecution submits that since the Kenyan Government has been provided with ample notice of the Prosecution's dissatisfaction regarding the level of cooperation, the request sought is moot and should be denied.¹⁶ It submits that there is "no need to impose a notification requirement that would inform the [Kenyan Government] of what it already knows".¹⁷ The Prosecution further submits that as the Kenyan Government is not a party to or participant in the current proceedings, it can only be notified within the meaning of Regulation 31 of the Regulations, if its interests are implicated.¹⁸ The Prosecution acknowledges, however, that in the event of any future litigation pursuant to Article 87(7) of the Statute the Kenyan Government should be given the opportunity to be heard.¹⁹

¹³ ICC-01/09-02/11-713, paras 15, 46.

¹⁴ ICC-01/09-02/11-713, para. 23.

¹⁵ ICC-01/09-02/11-713, para. 15.

¹⁶ ICC-/01/09-02/11-733-Red, paras 42-44.

¹⁷ ICC-/01/09-02/11-733-Red, para. 44.

¹⁸ ICC-/01/09-02/11-733-Red, para. 45.

¹⁹ ICC-/01/09-02/11-733-Red, para. 45.

B. Analysis

11. The Kenyan Government does not identify any specific legal basis for its request for notification. However, the request can be understood to be made on the same basis as the Kenyan Government's assertion that it is entitled to respond to allegations of non-cooperation made in the proceedings, namely Part 9 of the Statute, Regulation 24(3) of the Regulations and the *audi alteram partem* principle.²⁰ The Chamber has already rejected this assertion in its decision of 24 April 2013, whereby it ruled that, as the Kenyan Government is not a party to or participant in the proceedings, it required leave pursuant to Rule 103(1) of the Rules to file submissions in response to the Prosecution's past allegations of non-cooperation. The terminology of filing a motion "on notice" as it is used in the Submissions implies a general requirement upon a party to litigation to inform an opposing party of request for relief made to the judges in the case. Strictly speaking, that requirement does not apply in order to inform non-parties to the litigation of requests or other filings made in the case. Given that the Kenya Government is not a party or participant to the present proceedings, the notice requirement does not apply to it as a general matter.
12. As acknowledged by the Prosecution, different considerations would apply in the event of an application for a finding of non-cooperation and referral to the Assembly of State Parties pursuant to Article 87(7) of the Statute. As expressly recognised in Regulation 109(3) of the Regulations, the Kenyan Government would have a right to be heard in such a case. It would be entitled to be notified of relevant filings and to submit responses in accordance with Regulations 24(1) and 31 of the Regulations.
13. In the present circumstances, however, where no such application has been filed the Chamber finds that the Kenyan Government has no express right under the Court's statutory framework to be notified of filings which include submissions relating to its cooperation.

²⁰ ICC-01/09-02/11-713, paras 13 -14.

14. Notwithstanding the above, the Chamber agrees with the Kenyan Government that in circumstances where allegations of non-cooperation are relied upon in support of a request for relief, hearing from the Kenyan Government may be of benefit to the Chamber's determination of the request and to its overall duty, under Article 64(2) of the Statute, to ensure a fair and expeditious trial.²¹ Formal notification will ensure that the Kenyan Government is informed of relevant filings in a timely way and can determine whether to submit a request for leave to file observations in response pursuant to Rule 103(1) of the Rules. This finding is without prejudice to the Prosecution's right pursuant to Regulation 23 *bis*(1) of the Regulations to designate relevant filings as confidential or confidential *ex parte* not to be notified to the Kenyan Government. In such cases, a redacted version should be notified to the Kenyan Government, wherever possible.

III. Prosecution's request

A. Submissions

15. The Prosecution asserts that the Submissions publicly disclosed the existence and volume of Prosecution requests for assistance, as well as the specific information requested.²² It submits that publication of this information violates the requirement in Article 87(3) of the Statute for requests for cooperation to be kept confidential and requests the Chamber to caution the Kenyan Government regarding Article 87(3)'s confidentiality requirement.²³ The Prosecution explains that it has included references to the confidential information in the public version of the Response on the grounds that "further confidential treatment is not warranted, since the prejudice caused by the disclosure is irreversible".²⁴

16. In its request for leave to reply to the Response, the Kenyan Government apologises for what it terms an "inadvertent disclosure" and assures the

²¹ Article 64(2) of the Statute.

²² ICC-/01/09-02/11-733-Red, para. 39.

²³ ICC-/01/09-02/11-733-Red, paras 39-41.

²⁴ ICC-/01/09-02/11-733-Red, para. 7.

Chamber that it “will proceed with the appropriate and necessary caution” when referring to confidential requests for assistance in the future.

B. Analysis

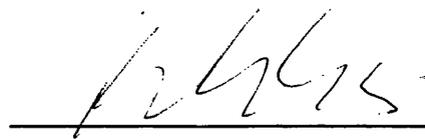
17. In light of the apology and assurance provided by the Kenyan Government, the Prosecution’s request for a caution can be considered moot and need not be ruled upon by the Chamber.

FOR THE FOREGOING REASONS, THE CHAMBER:

DIRECTS the parties and participants to request notification of relevant filings to the Kenyan Government in accordance with paragraph 14 of the present Decision; and

DISMISSES as moot the Prosecution’s request for the Chamber to caution the Kenyan Government in relation to the confidentiality requirement in Article 87(3) of the Statute.

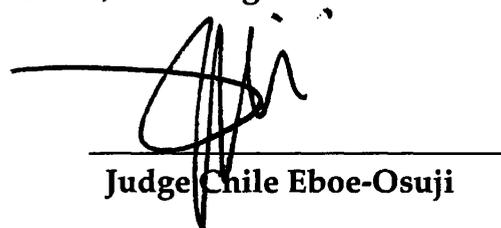
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Robert Fremr



Judge Chile Eboe-Osuji

Dated 3 July 2013

At The Hague, The Netherlands