

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 30 January 2014

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 on the Prosecution request for leave to reply to the Government of
Kenya's observations**

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
Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

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, SC, Attorney General
of the 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') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Regulations 23bis, 24(5) and 34 of the Regulations of the Court ('Regulations'), renders the following 'Decision on the Prosecution request for leave to reply to the Government of Kenya's observations'.

I. Request for leave to reply

1. On 29 November 2013, the Office of the Prosecutor ('Prosecution') filed the confidential *ex parte*, Prosecution and Government of the Republic of Kenya ('Kenyan Government') only, 'Prosecution application for a finding of non-compliance pursuant to Article 87(7) of the Statute against the Government of Kenya' ('Application').¹
2. On 9 December 2013, the Chamber issued a decision inviting the Kenyan Government and the Registry to submit any observations they may have on the Application, no later than 8 January 2014.²
3. On 9 January 2014, the Registry submitted that the request for assistance referred to in the Application was transmitted to the Kenyan Government pursuant to Article 54 of the Rome Statute ('Statute'), rather than by the Registry, and consequently the Registry had no observations to make in respect of it.³ The Registry simultaneously conveyed, in the form of a confidential Annex 2, the response of the Kenyan Government to the Application ('Response').⁴

¹ Application, ICC-01/09-02/11-866-Conf-Exp. A public redacted version was filed on 2 December 2013 (ICC-01/09-02/11-866-Red).

² Decision requesting observations from the Government of Kenya, ICC-01/09-02/11-870.

³ Registry's report pursuant to the 'Decision requesting observations from the Government of Kenya' dated 9 December 2013, ICC-01/09-02/11-877. The Registry's report was filed on 8 January 2014 but only notified on 9 January 2014.

⁴ Response, ICC-01/09-02/11-877-Conf-Anx2.

4. On 14 January 2014, the Prosecution sought leave to reply to four arguments raised in the Response ('Request').⁵ In the Request, the Prosecution identified the following four issues on which it seeks leave to reply: the Kenyan Government's submissions that (i) the request for assistance is 'in flagrant breach' of Article 93(1) of the Statute because 'the "Court" and the "Office of the Prosecutor" are [...] distinct and independent entities' under the Statute; (ii) the request for assistance cannot be fulfilled without 'violating Kenya's national law and procedure'; (iii) Article 93(1)(k) of the Statute prevents the Kenyan Government from 'conveying to the Prosecution information on the properties identified'; and that (iv) the consultations envisaged in Article 93(3) of the Statute between the Republic of Kenya 'and the Court' have not taken place.⁶
5. Pursuant to Regulation 24(5) of the Regulations, a party may only reply to a response with the leave of the Chamber. The Chamber notes that the Response raises new issues of law and fact which were not addressed by the Prosecution in the Application. In the circumstances, the Chamber is of the view that it may benefit from receiving further observations from the Prosecution on the matters identified in the Request, and therefore grants the Request.
6. The Chamber notes that the Prosecution is ready to file a reply within 48 hours of leave being granted by the Chamber to do so.⁷ The Prosecution is directed to file its reply no later than 3 February 2014.

⁵ Request, ICC-01/09-02/11-880-Conf.

⁶ Request, ICC-01/09-02/11-880-Conf, para. 3.

⁷ E-mail communication from Prosecution to the Chamber 29 January 2014 at 16:36.

II. Reclassification request

7. The Response was marked as 'public' by the Kenyan Government but was reclassified as confidential by the Registry because the 'names of Registry staff' appear in it.⁸
8. The Prosecution filed the Request as confidential as the Response was confidentially designated.⁹ However, the Prosecution submits that, apart from correspondence between the Kenyan Government and the Prosecution, the Response does not contain confidential information. The Prosecution therefore requests that the Chamber: (i) order the Registry to file a public redacted version of the Response, and (ii) re-classify the Request as public.¹⁰
9. Given that both the Kenyan Government and the Prosecution appear to have waived confidentiality in respect of the contents of the Response, the Chamber considers it appropriate for the document to be reclassified, with the exception of annexes 'GoK I' and 'GoK IV'. However, the Chamber notes that reference is also made in the Response to other cases, and other current or formerly accused persons, before the Court and considers that such references, together with the names of Registry staff, should be redacted from this filing before it is made public.

⁸ Registry's report pursuant to the 'Decision requesting observations from the Government of Kenya' dated 9 December 2013, ICC-01/09-02/11-877, page 3.

⁹ Request, ICC-01/09-02/11-880-Conf., para. 2.

¹⁰ Request, ICC-01/09-02/11-880-Conf., paras 2 and 10.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Prosecution request for leave to reply to ICC-01/09-02/11-877-Conf-Anx2;

DIRECTS the Prosecution to file its reply no later than 3 February 2014;

RECLASSIFIES the Request as public; and

DIRECTS the Registry to file a public redacted version of ICC-01/09-02/11-877-Conf-Anx2, subject to the following conditions:

- (i) paragraph 2 of the Response¹¹ and any references in the Response to other cases, or other current or formerly accused persons, before the Court shall be redacted, with the exception of any such references in annexes 'GoK II' and 'GoK III';
- (ii) annexes 'GoK I' and 'GoK IV' shall be redacted in full;
- (iii) pages 2, 3 and 4 of the Response shall be redacted in full;¹² and
- (iv) the names and contact information, as applicable, of all Registry staff shall be redacted.

¹¹Response, ICC-01/09-02/11-877-Conf-Anx2, para. 2 (on page 7/65).

¹²Response, ICC-01/09-02/11-877-Conf-Anx2, pages 2, 3 and 4/65.

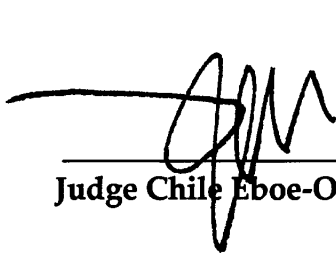
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Chile Eboe-Osuji

Dated this 30 January 2014

At The Hague, The Netherlands