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International Criminal Court

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No.: **ICC-01/09-02/11**
Date: **21 May 2015**

THE APPEALS CHAMBER

Before: **Judge Silvia Fernández de Gurmendi**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Bertram Schmitt

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 Response to the '*Amicus Curiae* Observations of the Africa Centre for Open Governance pursuant to Rule 103 of the Rules of Procedure and Evidence'

Source: **The Government of the Republic of Kenya**

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

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I. INTRODUCTION

1. On 30 April 2015 the Appeals Chamber of the International Criminal Court ('the Appeals Chamber') issued *'Order in relation to the Africa Centre for Open Governance's "Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence'*[1] ('Order of 30 April 2015') granting Africa Centre for Open Governance (AFRICOG) to submit *amicus curiae* observations on specific issues identified by AFRICOG. In particular the Appeals Chamber ordered as follows:

> '1. The Africa Centre for Open Governance may file observations on the topics listed in the above-mentioned request of no more than 15 pages, in accordance with regulation 36 of the Regulations of the Court, by 16h00 on 8 May 2015.
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> 2. The Prosecutor, Mr Uhuru Muigai Kenyatta and the Government of Kenya, and the legal representative of victims may file responses, of no more than 15 pages, to the above-mentioned observations by 16h00 on 15 May 2015.'

2. On 8 May 2015 AFRICOG filed ***'Amicus Curiae Observations of the Africa Centre for Open Governance pursuant to Rule 103 of the Rules of Procedure and Evidence'***[2] ('AFRICOG's observations').

3. The Government of the Republic of Kenya submits that AFRICOG's observations are untenable, baseless and abuse of the process of the court. AFRICOG has not provided any evidence in support of the scandalous and sensational observations it has made.

4. In the submissions made here below, the Government of the Republic of Kenya identifies the most offending parts of AFRICOG's submissions on the basis of which the Government humbly requests the Appeals Chamber to dismiss AFRICOG's observations.

5. Moreover, the Government of the Republic of Kenya will demonstrate that AFRICOG's observations not only fail to adhere to the Appeals Chamber's clear Order of 30 April 2015, but also that the observations are largely biased personal observations made in bad faith.

[1] (Public) ICC-01/09-02/11-1018, 30 April 2015.
[2] (Public) ICC-01/09-02/11-1020, 8 May 2015.

II. SUBMISSIONS

6. The Government of the Republic of Kenya submits that the observations of AFRICOG, which allege non-cooperation on the part of the Government of the Republic of Kenya, are ill-timed as the present proceedings before the Appeal Chamber relate to the exercise of the discretion of the Trial Chamber under **Article 87(7)** of the Rome Statute. AFRICOG should have made its observations at Trial Chamber V (B) where the matter of cooperation between the Court and the Government of the Republic of Kenya; and the Prosecution's allegation of the Republic of Kenya's non-cooperation, was canvassed at length and ultimately the Trial Chamber in '***Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute***'[3] ('Trial Chamber Decision of 3 December 2014') determined that it was not appropriate to refer the matter to the Assembly of States Parties ('Assembly').

7. Moreover, the Government of the Republic of Kenya submits that the observations of AFRICOG are untruthful. Firstly, at paragraph 4 of its observations AFRICOG states as follows:

> 'Violence between ethnic groups has become almost a norm as a way of resolving political competition… An occurrence that was repeated during the post-election violence in 2007 between the supporters of Mr Ruto and Mr Kenyatta…'

The Government of the Republic of Kenya submits that in 2007, Mr. Ruto and Mr. Kenyatta were not presidential candidates. AFRICOG has not submitted evidence in support of such serious allegations linking Mr. Ruto and Mr. Kenyatta to the violence in the aftermath of the 2007 general elections.

8. Secondly, at paragraph 7 of its observations, AFRICOG claims thus:

> 'Despite the promulgation of a new Constitution in 2010, which attempts to curtail the power of the president to an extent, the culture and practice of a powerful president has remained the norm. It is submitted by the *amicus* that this custom has had a serious impact on the provision of genuine cooperation

[3] (Public) ICC-01/09-02/11-982, 3 December 2014.

> by the Kenyan Government, given that Mr Kenyatta is the President of Kenya.'

The Government of the Republic of Kenya submits that this is an inflammatory statement aimed at embarrassing it since AFRICOG has not provided evidence in support of its claim that Mr. Kenyatta has negatively influenced the cooperation between the Government of the Republic of Kenya and the Court.

9. The Government of the Republic of Kenya further submits that this is not the first time that such an unfortunate speculation regarding Mr. Kenyatta's purported influence on the Government's cooperation with the Court, has been made. The Prosecution in ***'Prosecution opposition to the Defence request for the termination of the Kenyatta case'***[4] ('Prosecution Response of 31 January 2014'), particularly at paragraph 20 stated as follows:

> 'In this case, it is possible to attribute the GoK's failure to comply with its statutory obligations to the Accused. He has been the 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. The Prosecution acknowledges that these "proceedings are against Mr. Kenyatta in his personal capacity and not in his capacity as President". The reality is, however, that the actions of the GoK under Mr Kenyatta's leadership have had an impact on the Prosecution's ability to investigate this case…'

The Government of the Republic of Kenya submits that no evidence has ever been adduced to support the claims that Mr. Kenyatta negatively influences the cooperation of the Government of the Republic of Kenya with the Court.

10. In response to these untenable claims, the Government of the Republic of Kenya reiterates its response in ***'Submissions of the Government of the Republic of Kenya as Amicus Curiae 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'***[5]

[4] (Public) ICC-01/09-02/11-892, 31 January 2014

[5] (Public) ICC-01/09-02/11-901, 13 February 2014. The submissions were initially filed as 'confidential' on 12 February 2014. Subsequently, on 13 February 2014 the Trial Chamber reclassified them as 'public'.

('Government's Submissions of 12 February 2014'), particularly at paragraph 15 and 73 which state as follows:

> '15. The extent of the cooperation of the Government of the Republic of Kenya with the Court is a matter of public record. A filing by the Government of the Republic Kenya was made on 8 April 2013 and the Court pronounced itself on 3 July 2013. As to the further issues raised by the Prosecution through its application of 29 November 2013, the Government of the Republic of Kenya responded fully by way of its submissions dated 20 December 2013. As regards the allegation by the Prosecution and the representatives of the victims, that the cooperation of the Government of the Republic of Kenya has been affected in any manner by the election and assumption of office of Mr. Uhuru Kenyatta as the President and Head of State of Kenya, the Government of the Republic of Kenya submits that the allegation is baseless. Kenya became a situation country on 31 March 2010 and formal proceedings in the two (2) Kenyan cases were commenced on 8 March 2011 and throughout that period until the election of Mr. Uhuru Kenyatta on 4 March 2013 and his assumption of office on 9 April 2013 and thereafter, the cooperation has been consistent.
>
> 73. It is significant to note that other than mere allegations based on speculation and innuendo, there is no evidence presented to suggest that the President and Head of State of the Republic of Kenya has obstructed any specific request for assistance or in any way influenced the manner in which a specific request was handled and /or processed by the relevant authorized agencies. '

11. Moreover, the Government of the Republic of Kenya takes exception to the assertion made at paragraph 8 AFRICOG's observations. In particular, AFRICOG asserts as follows:

> '...The determination as to whether Kenya has complied with its obligations under article 87(7) of the RS is solely for the Appeals Chamber to consider...'

The Government of the Republic of Kenya respectfully submits that AFRICOG's statement reiterated hereinabove is a demonstration of its lack of appreciation of the present nature of proceedings before the Appeals Chamber. The determination, pursuant to **Article 87(7)** of the Rome Statute, of whether the Republic of Kenya has discharged its treaty of obligation of

cooperation with the Court, was made by the Trial Chamber. The Trial Chamber exercised its discretion, deciding not to refer the Republic of Kenya to the Assembly. The present proceedings before the Appeals Chamber relate to the exercise of the Trial Chamber's exercise of discretion.

The jurisprudence of the ICC on the Appeals Chamber limited power of review of the discretionary decision of a lower court has crystallised. Recently, the Appeals Chamber restated this settled legal position in the case of ***The Prosecutor v. Thomas Lubanga Dyilo***[6]**.** In particular, the Appeals Chamber stated as follows:

> '41. In respect of discretionary decisions, the Appeals Chamber has held in relation to appeals raised pursuant to article 82 (1) of the Statute:
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> "The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion […] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.
>
> …the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion […], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position…'

12. Further, the Government of the Republic of Kenya takes exception to the untruthful claims made at paragraph 10 of AFRICOG's observations. In particular, AFRICOG stated as follows:

> '10. Four years later, it appears that the Government's "house is still not yet in order", given that there has been no prosecution of high-to-mid level perpetrators of violence during the post-election violence. The Government specifically stated that the national Courts in Kenya would be able to carry out prosecutions in Kenya without the need to

[6] (Public) ICC-01/04-01/06-3122, 1 December 2014, para. 41.

> form a Special Tribunal. Tragically for the victims of the post-election violence this has not been the case.'

The Government of the Republic of Kenya submits that it has openly demonstrated its efforts aimed at prosecution of the perpetrators of the 2007/2008 post-election violence (PEV). The Republic of Kenya has openly made this fact known even to the Assembly when its Director of Public Prosecutions addressed the Plenary on 21 November 2013 at the Twelfth Session of the Assembly.

13. During the Plenary, the Assembly was informed that in the year 2012 the Directorate of Public Prosecution of Kenya (DPP) gazetted a taskforce created to review about 4,000 crime investigation files opened by police during the PEV period. The Court, in particular the Prosecution, availed its representatives to participate in the said taskforce.

14. In addition, the DPP invited the participation of the civil society organisations (CSOs) in the process. In particular the CSOs were requested to provide officers to participate in the process of reviewing the investigation files; and to provide to the taskforce any evidence they may have relating to the crimes committed during the PEV period. The CSOs provided officers who were gazetted as special prosecutors for the purpose of prosecuting the crimes committed during the PEV period. However, the CSOs did not provide any evidence relating to the crimes committed during the PEV .

15. The taskforce established that almost 1,200 cases had been prosecuted as ordinary crimes under the Penal Code, Chapter 63 of the Laws of Kenya, as ordinary crimes since at that time the Republic of Kenya had not yet domesticated the Rome Statute in its national legal system and as such there were no domestic procedures for prosecution of the PEV atrocities as international crimes.

16. Moreover, the Government of the Republic of Kenya had earlier approached the Prosecution with a request for the sharing of the evidence collected and presented to the Prosecution by Kenya's Commission of Inquiry on Post-Election Violence (CIPEV), to assist the Government to conduct local prosecutions of perpetrators. However, the Prosecution declined to share the evidence with the Government of the Republic of Kenya

17. Furthermore, the Government of the Republic of Kenya takes exception to the claims made at paragraph 11 of AFRICOG's observations. In particular, AFRICOG states as follows:

> '11. On 15 July 2010 the Prosecution made a request to interview ten senior police officers... A suit challenging the process was subsequently filed before the High Court of Kenya and to date there is still a court order in place that prevents the Prosecution from interviewing these officers. The Attorney General to date has failed to oppose, appeal, or apply to have set aside for want of prosecution the said order...'

The Government of the Republic of Kenya submits that the above claim is factually mistaken and misleading since the suit referred to in AFRICOG's observations was eventually dismissed for want of prosecution. At all times during the pendency of the said suit, the Attorney General of the Republic of Kenya was effectively represented. Moreover, the Attorney General independently exercises his constitutional responsibilities, in particular as set out at **Article 156** of the Constitution of Kenya, which includes representing the Government in civil proceedings; promoting, protecting and upholding the rule of law; and defending the public interest.

18. Moreover, the Government of the Republic of Kenya submits that the personal observations made at paragraph 12 of AFRICOG's observations have no meaningful value or relevance to the proceedings. In particular, AFRICOG observes as follows:

> '12. As the Chamber is aware, in the lead up to the 2013 presidential elections, Mr Kenyatta and Mr Ruto formed a joint ticket under the Jubilee Coalition and positioned themselves opposite the then Prime Minister, Raila Odinga, who headed ... [CORD]. This development inevitably led to the ICC investigation becoming a central campaign issue and an exceptionally divisive one. During an election debate Mr Kenyatta assured the public that his indictment at the ICC was a "personal challenge" which he would be able to manage beside his official duties. Although, the alliance between Mr Kenyatta and Mr Ruto is portrayed as an example of inter-tribal reconciliation, the reality is quite different. Rather than a thoroughgoing, inclusive process of reconciliation, this seemed to represent an elite pact between individuals who faced the same predicament.'

19. The personal, subjective and political observations made by AFRICOG at paragraph 12 of its observations, are unfounded, scandalous and do not relate to either of the two issues which the Appeals Chamber ordered AFRICOG to confine its observations to. In particular, the Appeals Chamber, in its Order of

30 April 2015 ordered that AFRICOG files observations regarding 'the context in which the alleged non-cooperation by the Kenyan Government has occurred'; and 'the relevant statutory provisions under Kenyan law relating to cooperation with the Court'.

AFRICOG has not demonstrated that the Government of the Republic of Kenya, in anyway, failed to cooperate during the general election period of the year 2013 when Mr. Kenyatta was elected president or thereafter. The Government of the Republic of Kenya maintains that it has at all times cooperated with the Court before and after the election of Mr. Kenyatta as President, and will continue to cooperate for as long as the Court requires its cooperation in the cases in the situation in Kenya.

20. Also, the Government of the Republic of Kenya takes concern over the allegations made at paragraphs 13 to 19 of AFRICOG's observations, which are not only unfounded and sensational, but also fail to adhere to the restrictions on AFRICOG's observations that the Appeal's Chamber Order of 30 April 2015 issued, that is, that the observations ought to relate to 'the context in which the alleged non-cooperation by the Kenyan Government has occurred'; and 'the relevant statutory provisions under Kenyan law relating to cooperation with the Court'.

21. The Government of the Republic of Kenya takes exception to the claim made at paragraph 21 of AFRICOG's observations, that is, that the Government of the Republic of Kenya failed to freeze any of Mr Kenyatta's assets. This is a misrepresentation of facts since the Pre-Trial Chamber Order requesting the identification, tracing and freezing or seizure of Mr. Kenyatta's assets was suspended by Trial Chamber V(B) in its ***'Decision on the implementation of the request to freeze assets'***[7]**.**

22. Relating to AFRICOG's observations at paragraphs 23 to 35, the Government of the Republic of Kenya wishes to reiterate its earlier submissions before Trial Chamber V (B), both orally and in writing, made on its behalf by the Attorney General of the Republic of Kenya, on Kenya's national procedures and law relating to cooperation with the Court.

[7] ICC-01/09-02/11-931, 22 October 2014.

In particular, in respect of the claim made at paragraph 28 of AFRICOG's observations, the Government of the Republic of Kenya will briefly, reiterate its previous arguments relating to the release of confidential information under the laws of Kenya and general international law.

23. In part, paragraph 28 of AFRICOG's observations reads thus:

> '… Oftentimes, the Attorney General has argued that the consent of an accused person is required in respect to search and seizure evidence. However, it is instructive to note that the ICA contains no such provisions regarding a duty to obtain the consent of the accused in respect of any matter. Instead, the ICA foresees that, if a court order is necessary, it is a domestic court order rather than an ICC court order, and that it is imperative that the Attorney-General authorizes the arrangements for a court order to be obtained.'

The above set out observation by AFRICOG offends the Republic of Kenya's national law and general international law, especially as it relates to the inalienable and fundamental human rights of all people.

The Government of the Republic of Kenya submits that at all times in its cooperation endeavours with the Court, it is expected to perform two simultaneous roles, that is, that of providing assistance to the Court and that of respecting the human rights of the accused.

24. International law as it relates to international cooperation has metamorphosed, and international cooperation relationship can no longer be viewed as bilateral relationships between two States or a State and a requesting institution.[8] Rather, 'acceptance has grown that the relationship is a triangular one which includes the individual or individuals concerned with their individual and, most importantly, their human rights.'[9]

25. At **Article 93(1)** of the Rome Statute ('the Statute'), States Parties are expected to cooperate with the Court in accordance with the provisions under Part IX of the Statute and procedures of national law.

[8] C. Kreß, K. Prost and P. Wilkitzki, *Part 9. International Cooperation and Judicial Assistance: Preliminary Remarks*, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article,* (Second Edition, 2008), p. 1510.
[9] See note 8 above.

As earlier stated in ***'Response of the Government of the Republic of Kenya Pursuant to Trial Chamber V(B) 'Decision requesting observations from the Government of Kenya' on the Prosecution's Application for a Finding of Non-Compliance Pursuant to Article 87(7) Against the Government of Kenya'***[10] ('Response of the Government regarding application for a finding of non-compliance'), the International Crimes Act, No. 16 of 2008, of Kenya ('the Act') provides the national procedure for cooperation between the Republic of Kenya and the Court.

26. The Act, particularly at **Section 23 (1)**, requires that a request for assistance from the Court should be dealt with in accordance with the relevant procedure under the law of Kenya, as provided in the Act. In Kenya, just like in all sovereign democratic States, the Constitution is the supreme law and all laws of the land are created, read and interpreted in accordance with the Constitution. The Constitution of Kenya provides and guarantees fundamental human rights of all people in Kenya. Particularly at **Article 31, t**he Constitution **g**uarantees the right to privacy and confidentiality, subject to the requirement of reasonableness in an open and democratic society. The particular provision reads thus:

> 'Every person has the right to privacy, which includes the right not to have –
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> (a) their person, home or property searched;
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> (b) their possessions seized;
>
> (c) information relating to their family or private affairs unnecessarily required or revealed; or
>
> (d) the privacy of their communications infringed.'

This right to privacy extends to protection of information on a person's property and assets.

27. Nonetheless, since the right to privacy is not an absolute right, it is restricted by **Article 24 (1)** of the Constitution of Kenya that sets out its limitation by

[10] ICC-01/09-02/11-877-Anx2-Red, 5 February 2014.

law, to the extent that is reasonable and justifiable in an open and democratic society. The particular proviso states as follows:

> 'A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> (a) the nature of the right or fundamental freedom;
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> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
>
> (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.'

28. Moreover, as stated in Response of the Government regarding application for a finding of non-compliance, under the laws of Kenya, where information held by a third party relating to a person is sought and its disclosure is likely to infringe on the relevant person's freedoms and rights, such as the right to privacy and confidentiality, the laws require the consent of the relevant person to be obtained prior to the third party's disclosure of the information or that the entity seeking the disclosure of such information, produce a court order directing the production of the information.

29. The court order guarantees the fact that, at least, an independent and impartial judge has considered the request for an investigative or judicial measure that is likely to infringe on a person's fundamental human rights, and finds that it is necessary, in light of the proceedings before the court and the relevance of the requested measure to the ultimate goal of the search for the truth and justice, to limit that right, in this case by allowing a request for disclosure of confidential information relating to an accused person.

Contrary to what is postulated in AFRICOG's observations, the proper court to ensure that the requested measure, in this case requested by the Prosecution

in the course of its investigations, does not unnecessarily infringe on the human rights of the accused person would be an ICC Chamber, in this case Trial Chamber V(B). This is because Trial Chamber V (B) is the one that is adjudicating over the relevant case and hence is best placed to safeguard the rights of the accused by determining whether in light of the proceedings in the matter, the requested assistance that is likely to infringe on the rights of the accused is necessary; and also that Trial Chamber would determine to what extent the infringement of the rights are legally reasonable and justifiable.

III. REQUESTED RELIEF

30. From the foregoing submissions, the Government of the Republic of Kenya has demonstrated that AFRICOG's observations have not adhered to the order of the Appeals Chamber of 30 April 2015 regarding the issues that the observations should relate to, that is, that the observation relate to 'the context in which the alleged non-cooperation by the Kenyan Government has occurred'; and 'the relevant statutory provisions under Kenyan law relating to cooperation with the Court'. Instead, AFRICOG has abused the court process by making unfounded, biased, political, sensational and in most cases untruthful and legally misplaced claims. Thereby, the Government of the Republic of Kenya prays that the Appeals Chamber dismiss AFRICOG's observations.

Respectfully Submitted,

Githu Muigai, SC
Attorney General of the Republic of Kenya

Dated 21 May 2015
At Nairobi, Kenya