

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 7 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

**Decision granting the request of the Government of Kenya to submit
observations as *amicus curiae***

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')¹ of the International Criminal Court in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Article 64(2) of the Rome Statute ('Statute') and Rule 103 of the Rules of Procedure and Evidence ('Rules'), renders the following 'Decision granting the request of the Government of Kenya to submit observations as *amicus curiae*'.

I. Procedural history and submissions

Prosecution request for finding of non-compliance pursuant to Article 87(7) of the Statute

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').²
2. Having been invited to do so by the Chamber,³ the Kenyan Government submitted its observations on the Application ('Observations'), which were conveyed to the Chamber by the Registry on 9 January 2014,⁴ disputing the allegations contained in the Application.⁵

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber V(b) in its composition as until 31 January 2014 and to Trial Chamber V(b) as composed by the Presidency's 'Decision replacing a Judge in Trial Chamber V(b)', 30 January 2014, ICC-01/09-02/11-890.

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

³ Decision requesting observations from the Government of Kenya, 9 December 2013, ICC-01/09-02/11-870.

⁴ Registry's report pursuant to the "Decision requesting observations from the Government of Kenya" dated 9 December 2013, ICC-01/09-02/11-877-Conf. The Observations are contained in Annex 2 of this filing (ICC-01/09-02/11-877-Conf-Anx2). A public redacted version was filed by the Registry on 5 February 2014 as ICC-01/09-02/11-877-Anx2-Red.

⁵ Observations, ICC-01/09-02/11-877-Anx2-Red, *see in particular* para. 29 at page 24 of Annex 2.

3. On 3 February 2014, after having been granted leave to reply by the Chamber,⁶ the Prosecution filed a reply to the Observations.⁷

Prosecution requests for adjournment of proceedings

4. On 19 December 2013, the Prosecution filed a request ('First Prosecution Request')⁸ seeking, *inter alia*, an adjournment of the provisional trial date for three months in order to 'undertake additional investigative steps' in relation to its case against Mr Kenyatta and for the Chamber convene a status conference.⁹
5. On 13 January 2014, the defence team for Mr Kenyatta ('Defence') filed a confidential response ('Defence Request'),¹⁰ seeking that the Chamber dismiss the First Prosecution Request and terminate the proceedings under Article 64(2) of the Statute on the grounds of insufficiency of evidence.¹¹ On the same day, the Common Legal Representative of Victims ('LRV') filed a response¹² supporting the First Prosecution Request.¹³
6. Having been authorised to do so by the Chamber,¹⁴ on 31 January 2014, the Prosecution filed a response to the Defence Request ('Second Prosecution Request', and together with the First Prosecution Request the 'Prosecution Requests'), seeking threefold that the Chamber (i) reject the Defence Request to terminate the

⁶ Decision on the Prosecution request for leave to reply to the Government of Kenya's observations, 30 January 2014, ICC-01/09-02/11-891.

⁷ Prosecution reply to the Government of Kenya's 20 December 2013 observations, 3 February 2014, ICC-01/09-02/11-894.

⁸ Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, ICC-01/09-02/11-875.

⁹ First Prosecution Request, ICC-01/09-02/11-875, paras 3, 4, 23-25.

¹⁰ Defence Response to the Prosecution's "Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date", ICC-01/09-02/11-878-Conf. A public redacted version was notified on 24 January 2014 as ICC-01/09-02/11-878-Red.

¹¹ Defence Request, ICC-01/09-02/11-878-Conf, paras 5, 38 and 39.

¹² Victims' response to Prosecution's application for an adjournment of the provisional trial date, ICC-01/09-02/11-879-Conf. A public redacted version was filed concurrently (ICC-01/09-02/11-879-Red).

¹³ ICC-01/09-02/11-879-Red, para. 1.

¹⁴ Order vacating trial date of 5 February 2014, convening a status conference, and addressing other procedural matters, 23 January 2014, ICC-01/09-02/11-886, para. 8.

proceedings; (ii) rule on the Application, find that the Kenyan Government has failed to comply with its co-operation obligations, and order such compliance; and (iii) adjourn the case against Mr Kenyatta until the Kenyan Government 'complies with its obligations'.¹⁵

7. On 4 February 2014, the Kenyan Government filed a request for leave pursuant to Rule 103 of the Rules to make submissions in relation to the Prosecution Requests ('Rule 103 Request') 'within a time limit determined by the Chamber'.¹⁶ In the Rule 103 Request, the Kenyan Government identified three specific issues on which it sought to make submissions: (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 cooperation with the Court'; and (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 cooperation with the Court' under the Statute.¹⁷
8. The Chamber held a status conference on 5 February 2014 to address, *inter alia*, the issues raised by the Prosecution Requests.¹⁸ During the course of that hearing, the Prosecutor,¹⁹ Defence,²⁰ and LRV²¹ indicated that they do not oppose the granting of the Rule 103 Request.

¹⁵ Prosecution opposition to the Defence request for the termination of the Kenyatta case, ICC-01/09-02/11-892, paras 3 and 29.

¹⁶ 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', ICC-01/09-02/11-895, para. 7. Corrigendum filed on 5 February 2014 as ICC-01/09-02/11-895-Corr.

¹⁷ Rule 103 Request, ICC-01/09-02/11-895-Corr, para. 4.

¹⁸ See Scheduling order and agenda for status conference of 5 February 2014, 3 February 2014, ICC-01/09-02/11-893.

¹⁹ ICC-01/09-02/11-T-27-ENG ET WT, page 4, line 18 to page 5, line 6.

²⁰ ICC-01/09-02/11-T-27-ENG ET WT, page 6, line 22 to page 7, line 1.

²¹ ICC-01/09-02/11-T-27-ENG ET WT, page 7, lines 4-5.

9. The Chamber has scheduled a second status conference, to be held on 13 February 2014, to address the Prosecution's Application in relation to Article 87(7) of the Statute.²²

II. Analysis

10. The Chamber considers that it would be assisted by receiving submissions from the Kenyan Government, pursuant to Rule 103(1), in relation to the Prosecution Requests.
11. However, the Chamber notes that the Kenyan Government has already extensively addressed the question of its alleged non-cooperation in its Observations.²³ Therefore, in granting the Rule 103 Request, the Chamber directs the Kenyan Government to confine its submissions only to the other two issues identified in the Rule 103 Request.²⁴
12. In terms of timing, the Chamber notes that it would be appropriate to receive the Kenyan Government's submissions pursuant to Rule 103 *prior* to the next status conference of 13 February 2014, that is, no later than 12 February 2014. This would be efficacious given that the Second Prosecution Request relates directly to cooperation issues, and in light of the fact that a representative of the Kenyan Government has been invited to attend the status conference and to make oral submissions pertaining to these matters.²⁵

²² Order scheduling a status conference on 13 February 2014, 6 February 2014, ICC-01/09-02/11-897.

²³ Observations, ICC-01/09-02/11-877-Anx2-Red.

²⁴ Rule 103 Request, ICC-01/09-02/11-895-Corr, para. 4, matters (ii) and (iii).

²⁵ Order scheduling a status conference on 13 February 2014, 6 February 2014, ICC-01/09-02/11-897, para. 6.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

INVITES the competent authorities of the Government of the Republic of Kenya to submit their observations on the second and third issues identified in the Rule 103 Request no later than 16h00 on 12 February 2014.

ORDERS, pursuant to Rule 103(2) of the Rules, that any responses to the observations filed by the Government of the Republic of Kenya are to be filed no later than seven days from the date of the notification of the observations.

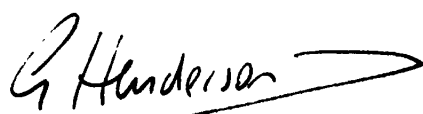
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated this 7 February 2014

At The Hague, The Netherlands