Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-02/11**
Date: **29 January 2014**

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA

Under seal, *ex parte*, Prosecution and Common Legal Representative of Victims only

Request for access to filings which may relate to steps taken to identify, trace, freeze or seize assets of the accused

Source: **Common 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
Mr James Stewart
Mr Benjamin Gumpert

Counsel for the Defence

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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States Representative

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Counsel Support Section

Detention Section

Victims and Witnesses Unit

Victims Participation and Reparations Section

Other

I. Introduction

1. On behalf of the victims in this case, the Common Legal Representative of Victims ("Legal Representative") respectfully requests access to filings that may relate to steps taken to identify, trace, freeze or seize the assets of Uhuru Kenyatta ("Accused"), pursuant to the Chamber's "Decision regarding request for access to information concerning steps taken to identify, trace, freeze or seize assets" ("Decision").[1]

II. Procedural background

2. On 22 October 2013, the Office of the Prosecutor notified the Chamber, by way of an under seal *ex parte* filing,[2] that it had received an e-mail dated 7 October 2013 from the Legal Representative inquiring 'about efforts by the Prosecution and orders by the Pre-Trial Chamber or by the Trial Chamber to identify, trace, freeze or seize the assets of Mr Kenyatta'.[3]
3. On 23 January 2014, the Chamber invited the Legal Representative to apply to the Chamber directly with a request for access to any relevant filings in the case which may relate to steps taken to identify, trace, freeze or seize the assets of the Accused.
4. The Chamber ruled: "Any such application should explain the purpose of such inquiry and the legal basis supporting the existence of a legitimate interest in the information in question."[4]

III. Submissions

The purpose of the inquiry

5. The purpose of the inquiry is to ensure that all steps available under the Statute of the International Criminal Court ("Statute") and the Rules of Procedure and

[1] ICC-01/09-02/11-855-US-Exp, 23 January 2014.
[2] Decision, para. 1.
[3] Decision, para. 1.
[4] Decision, para. 2.

Evidence ("Rules") have been taken to ensure that assets will be available to ensure prompt reparations to the victims of this case in the event of a conviction of the Accused.

6. A vast proportion of victims that have met with the Legal Representative live in desperate poverty. Many have reported to him that they are unable to provide for their families; unable to pay for school fees for their children; unable to afford proper health care; and have lived in wholly inadequate shelter since the post-election violence. The stories of their daily struggle to survive are often shocking. Many previously earned a modest living working in Naivasha and Nakuru, and are unable to find work in the areas to which they were forcibly transferred, and in which they now live, in the Nyanza and Western regions of Kenya. It is clear that, were it not for the crimes charged in this case, a great number of victims of those crimes would be living in far better conditions.

7. A topic that is consistently raised in meetings that the Legal Representative has conducted with victims is when and how the victims might expect to benefit from Court's reparations programme. On the basis of the frequency with which this issue has been raised, it can be assumed that the vast majority of victims in this case will wish to participate in the reparations process, should the Accused be convicted.

8. It is well known that the Accused has access to considerable wealth (including vast quantities of real and personal property) both in Kenya and overseas. For example, in 2011, *Forbes* magazine estimated his personal wealth at US$ 500 million.[5]

[5] "Kenya's Deputy Prime Minister Uhuru Kenyatta is the son of Kenya's first president, Jomo Kenyatta, and heir to some of the largest land holdings in Kenya. He owns at least 500,000 acres of prime land spread across the country. The land was acquired by his father in the 1960s and 1970s when the British colonial government and the World Bank funded a settlement transfer fund scheme that enabled government officials and wealthy Kenyans to acquire land from the British at very low prices. Uhuru and his family also own Brookside Dairies, Kenya's largest dairy company, as well as stakes in popular television station K24 and a commercial bank in Nairobi, among other interests". *See* http://www.forbes.com/lists/2011/89/africa-billionaires-11_Uhuru-Kenyatta_FO2Q.html

9. It is imperative that all action which is available under the Statute and the Rules be taken to preserve assets, in order that they are available for reparation to the victims of this case, in the event of a conviction.

The legal basis supporting the existence of a legitimate interest in the information

10. Article 75(2) of the Statute empowers the Court to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".

11. Article 57(3)(e) of the Statute provides that the Pre-Trial Chamber may seek the cooperation of States pursuant to Article 93(1)(k), "to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims".

12. Under Article 61(11), the Trial Chamber may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in the proceedings.

13. Under Article 75(4), the Court may, after conviction, determine whether, in order to give effect to an order for reparations, it is necessary to seek measures under Article 93(1).

14. Rule 99 of the Rules deals with protective measures for the purpose of forfeiture. Under Rule 99(1) of the Rules:

> The Pre-Trial Chamber, pursuant to article 57, paragraph 3(e), or the Trial Chamber pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested.

15. Regulation 54(1) of the Regulations of the Office of the Prosecutor requires the Prosecution to "consider requesting measures for the identification, tracing and freezing or seizure of, *inter alia* property and assets".

16. The Court is required under Article 68(1) to take appropriate measures *inter alia* to protect the physical and psychological well-being of victims.

17. The Legal Representative is required to represent the interests of all individuals qualifying as victims in the present case.[6]

18. The Code of Professional Conduct for counsel requires counsel to exercise his duties with integrity and diligence, acting *inter alia* expeditiously and conscientiously.[7]

19. Articles 57(3)(e) and Article 61(11) of the Statute, and Rule 99(1) of the Rules, together permit a legal representative of the victims to make a request to the Pre-Trial Chamber or to the Trial Chamber to take measures to identify, trace, freeze and seize assets of an accused.

20. The provisions cited above, taken together, recognise that the victims have a legitimate interest in ensuring that assets are available for reparation in the event of a conviction, and that the Legal Representative is required to act with integrity and diligence in representing the interests of all victims in this case.

Measures taken by the Legal Representative to protect victims' interests

21. The Legal Representative has attempted to determine the extent to which all action available under the Statute and the Rules has been taken to preserve assets for the purpose of forfeiture for the ultimate benefit of the victims, in accordance with Article 57(3)(e).

22. He is aware of the Pre-Trial Chamber's 20 April 2011 decision[8] denying a request by the Prosecution for, *inter alia,* an order requiring the Accused to provide complete information about his finances, including assets and liabilities and the identities of all to whom money or property is owed. The Legal Representative is also aware of the Prosecution's request to Kenya relating to the seizure of assets[9] and Kenya's failure to act on that request. Furthermore, the Legal Representative is aware of the existence of public

[6] ICC-01/09-02/11-498, para. 52.
[7] Code of Professional Conduct for counsel, Article 5.
[8] ICC-01/09-02/11-66.
[9] Para. 41, ICC-01/09-02/11-713.

orders issued by the Court in other cases to all States Parties[10] or to specific states[11] to identify, trace, freeze and seize assets.

23. However, Legal Representative is not privy to any filings relating to any other action by the Office of the Prosecutor or by the Pre-Trial Chamber or by the Trial Chamber to trace, seize or freeze assets of the Accused in Kenya or outside Kenya.

24. Specifically, the Legal Representative has not been notified of any decision by the Pre-Trial Chamber or the Trial Chamber to identify, trace, freeze or seize the Accused's assets.

IV. Relief requested

25. Given the importance, for the victims, of their right to receive reparations, and in order to protect their legitimate interest in the preservation of the assets of the Accused so that they are available for any future order for reparation, the Legal Representative respectfully requests access to any relevant filings in this case which may relate to steps taken to identify, trace, freeze or seize assets of the Accused.

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[10] See "Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr Thomas Lubanga Dyilo", 31 March 2006, ICC-01/04-01/06-62-tEN.
[11] See "Request to the Democratic Republic of Congo for the purpose of obtaining the identification, tracing, freezing and seizure of the property and assets of Germain Katanga", 6 July 2007, ICC-01/04-01/07-7-tENG. See also, in the *Bemba* case, the request to Portugal: 'Decision on the Second Defence's Application for Lifting the Seizure of Assets and Request for Cooperation to the Competent Authorities of the Republic of Portugal', 14 November 2008, ICC-01/05-01/08-249 and 'Request for Cooperation to Initiate an Investigation Addressed to the Competent Authorities of the Republic of Portugal', 17 November 2008, ICC-01/05-01/08-254.

Respectfully submitted,

Fergal Gaynor

Common Legal Representative of Victims

Dated this 29th day of January 2014

At Nairobi, Kenya