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**International
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Date: 11 July 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**

**Confidential, *EX PARTE*, available to the Prosecution and the Government of
Kenya only**

**Prosecution written submissions in compliance with the order made by the
Chamber in the course of proceedings on 9 July 2014**

Source: The Office of the Prosecutor

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

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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Defence Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution ("OTP") hereby submits its response to the order made by Trial Chamber V(B) during the 9 July 2014 status conference that written submissions on two areas of dispute between the OTP and Government of Kenya ("GoK") should be provided.¹

Confidentiality

2. This document is filed *ex parte* and confidentially given that it reflects oral submissions made during an *ex parte* hearing and makes reference to documents so designated.² Although Regulation 23*bis*(2) requires the OTP to file this document on an *ex parte* basis, the OTP has no objection to this document being reclassified as public since the matters discussed therein were ultimately addressed in public session during the 9 July 2014 hearing, and no longer require confidential treatment.

Preliminary point

3. The OTP submits that it is important in determining the issue at stake to distinguish between matters of principle and matters of practicality. This distinction has not always been observed by the GoK. The issue is not whether there are practical or technical difficulties in complying with aspects of the Revised Request;³ it is whether the terms of the Revised Request offend against the directions set out in the Chamber's decision of 31 March 2014 ("Decision"), such that the Revised Request should be reframed.⁴
4. Practical difficulties, such as those said to be occasioned by the nature of the records kept or the resources required to achieve compliance with the Revised

¹ ICC-01/09-02/11-T-29-CONF-EXP-ENG ET, pp. 31-33.

² See Regulation 23*bis*(2) of the Regulations of the Court.

³ ICC-01/09-02/11-911-Conf-AnxA p.16/20.

⁴ ICC-01/09-02/11-908 para. 100.

Request, can and should be dealt with by negotiation between the OTP and GoK and, failing agreement, reference to the Chamber for determination.

The first issue

5. The GoK argues that the Revised Request does not comply with the Decision. The GoK suggests that the Revised Request is too broad in its nature and that it fails the tests of specificity, relevance and necessity which the Decision had required it to comply with.⁵
6. In fact, rather than requiring an exploration of the meaning and applicability of these three terms, the essence of the dispute between the OTP and the GoK can be expressed more concretely. It derives from the categories of documents identified in paragraphs 17(1) and (2) of the Revised Request. The OTP asks there (in summary) for searches to be conducted of the 'Companies House' registry (17(1)) and the Land Registry (17(2)) to establish (over a given period) all the corporate entities in which the Accused had an interest and all land which was transferred from him or related corporate entities to others.
7. The dispute spills over into other categories of documents because, where requests are made for banks statements, telephone records and other records, the request includes not only accounts and records held in the Accused's own name, but also the accounts and records relating to the corporate identities who may be identified under paragraph 17(1).
8. The GoK suggests that proper compliance with the Decision would have resulted in a request which set out the nature of existing evidence in the possession of the OTP (for example the names of corporate entities in which the Accused is said to have had a significant interest and identified plots of

⁵ See ICC-01/09-02/11-Conf-Exp-AnxA, paras.1-8.

land which are said to have been transferred in connection with the violence) and made requests for specific financial, company or land records which could corroborate or amplify that evidence.⁶

9. The GoK compares the Revised Request to a 'fishing expedition' and relies in particular on paragraph 83 of the Decision where the Chamber said:

...the Chamber has already noted the rather broad nature of the Records Request. While a request of such broadness might be justified in the context of preliminary investigations – or, as submitted by the Prosecution, as a starting point for consultations – it exceeds the permissible scope of investigations at this stage of proceedings.

10. The OTP notes that the passage quoted by the GoK was making reference to the original 'Records Request'⁷ of 24 April 2012. The OTP has noted and acted upon the Chamber's remarks. The Revised Request was substantially less broad in setting out the material which was requested. In particular, six of the 14 categories of documents which had been sought in 2012 did not appear in the Revised Request, and the dates for which the documents were sought had been narrowed by 16 months. Those categories of documents which were carried over from the Records Request were those judged to be central to the charges against the Accused.

11. The OTP relies upon other passages of the Decision (at paragraphs 91-98) in which the Chamber observed:

- that in not responding to the Records Request the GoK had 'prevented access to the financial records of the accused';
- that the Court was 'fundamentally dependent on the cooperation of States Parties';
- that a 'failure to provide such cooperation in the context of judicial proceedings affects the efficiency of the court'; and

⁶ See ICC-01/09-02/11-T-30-ENG ET WT, pp. 6, 12, 18-19, 22, 29-30.

⁷ ICC-01/09-02/11-866-Conf-Exp-AnxA.

- that the Records Request was a 'long outstanding request for assistance - that may bear upon matters central to the charges - and which...the Chamber considers to have been unjustifiably frustrated.'

12. The OTP submits that the identification of corporate entities in which the Accused has an interest is a central part of its investigation. There is a substantial body of evidence⁸ that suggests the Accused played a role in financing the violence in Kenya in early 2008. Contrary to suggestions made at the status conference, the GoK is aware of the nature of this evidence.⁹

13. The idea that a person playing this role in the commission of serious crimes would have done so in open manner, using only funds or other assets such as land or vehicles registered in his own name, is somewhat naïve. Much more likely is that such a person would have sought to distance himself from the events by operating through third parties (whether individuals or corporations), at one or more degrees of separation.

14. No investigation carried out with due diligence would restrict itself to making inquiries about money or assets held only in the name of the Accused. Any competent domestic investigative agency, inquiring into serious crimes which the Accused was suspected of financing, would require a search to be done of records which would reveal whether the Accused had been operating through corporate entities which afforded him the protection of the 'corporate veil'. They would inevitably require the production by the relevant agencies of the state in which it was operating of bank, land, telephone, vehicle registration,

⁸ As set out at ICC-01/09-02/11-922-Conf-Exp-AnxA.

⁹ See ICC-01/09-02/11-922-Conf-Exp-AnxA 2/7 paras. 2-4.

tax and other records associated with the suspect, whether kept in his own name or those of companies in which he had an interest.

15. These would be basic investigative steps. ICC investigations into the charges that the Accused had financed the post-election violence in Kenya in early 2008 should be no less thorough.

16. The OTP rejects the suggestion that the Revised Request should confine itself to making inquiries simply for the purpose of corroborating specific allegations (concerning, say, connections with corporate entities or particular telephone numbers) about which there was already evidence, whether from witnesses or open source media. No competent investigative agency restricts its inquiries of official record keepers to presenting suggestions already made by its potential witnesses and asking for them to be confirmed or refuted. Instead, what is required is a comprehensive search of records which are kept for precisely the purpose of identifying companies in which particular individuals have a stake and the persons who are responsible for paying the bills of particular telephone numbers.

17. There is an obligation on the GoK to provide assistance in enabling these thorough inquiries to take place, in exactly the same way that government agencies would be compelled to provide this material to domestic investigative agencies.

The second issue

18. The second area of dispute is the temporal scope of the Revised Request. The GoK contends that the period for which the request was made is unreasonably long and that the three months central to the charges against the Accused

(December 2007 to February 2008 inclusive) should suffice.¹⁰ The OTP respectfully disagrees.

19. The reasons for the Revised Request's temporal scope are outlined in the OTP's 23 May 2014 submissions,¹¹ and were reiterated during the 9 July 2014 public hearing.¹² To summarise, the OTP believes that the temporal scope of the Revised Request is appropriate because:

a. The only way in which the significance of withdrawals of cash or transfers of money, land or other property at the time of the violence can be properly assessed is by comparing the records for other, more "normal" periods, in order to establish whether such withdrawals or transfers were unusual. Such an analysis would place the transactions during the PEV in their proper context and enable the OTP to determine whether there is any significance to the payments or transfers made, or whether they were normal activity habitually engaged in by the Accused. The shorter period advocated by the GoK would prevent a proper comparison being made and would lead to an analysis based upon a narrow snapshot of time, taken out of context. In the OTP's view, such an approach risks improper conclusions being drawn from the data.

b. It is reasonable to expect that there would have been a period of preparation and planning for some months in advance of the election and the consequent violence. An examination of transactions during this pre-violence period is therefore appropriate.

c. Maina Njenga, as head of the Mungiki movement whose members spearheaded the violence, is alleged to have received payments from the

¹⁰ ICC-01/09-02/11-930, para. 12.

¹¹ ICC-01/09-02/11-922-Conf-Exp-AnxA, paras. 6 and 7(v).

¹² ICC-01/09-02/11-T-30-ENG ET WT, page 21.

Accused. He was not released from prison until October 2009 and any transfers of money to him are likely to have occurred after this date.

d. It is alleged by various witnesses that the Accused was involved in the killings of various senior Mungiki members in the years 2008 and 2009 in order to cover up his involvement with them and through them in the PEV. While these killings are not the subject of any charges, if true, the Accused's involvement would be a powerful indicator of his guilt. These killings are also likely to have involved the expenditure of funds.

e. It is also alleged that the Accused paid for the funerals of a number of Mungiki leaders and of Maina Njenga's wife in January 2010. If true, the obvious motive would be to secure the silence of the deceased's family members.

f. The end date of December 2010 is the date on which summonses to appear were issued. The OTP accepts that the gathering of worthwhile evidence after this date is unlikely.

20. As already stated, the OTP narrowed the temporal scope of the Revised Request significantly – by 16 months – from the April 2012 request for assistance.¹³ The OTP did so in accordance with the directions in the Decision and in a good faith effort to reach agreement with the GoK.¹⁴ The OTP does not believe, however, that it can further narrow the temporal scope of its request without risking the integrity of the inquiry.

21. Finally, the OTP disagrees with the GoK's contention that the temporal scope of the Revised Request is overly broad given the advanced stage of

¹³ Compare ICC-01/09-02/11-866-Conf-Exp-AnxA, pages 4-8 with ICC-01/09-02/11-911-Conf-AnxA, pages 16-20.

¹⁴ See ICC-01/09-02/11-908, paras. 83, 100.

proceedings.¹⁵ While it is correct that the proceedings before this Court are at an advanced stage, the investigations into the Accused's financial activity are not. This is due to the GoK's refusal, until instructed by the Chamber, to provide information regarding the Accused's finances.¹⁶ The OTP should not now be required to conduct a half-hearted investigation as a remedy for the GoK's two year refusal to comply with its co-operation obligations.

Conclusion

22. For the foregoing reasons, the OTP respectfully requests the Chamber to find that the Revised Request complies with the instructions provided in the Decision, does not offend the principles of specificity, relevance and necessity, and should be complied with by the GoK.



Fatou Bensouda,
Prosecutor

Dated this 11th day of July, 2014
At The Hague, The Netherlands

¹⁵ ICC-01/09-02/11-T-29-CONF-EXP-ENG ET, page 7.

¹⁶ See also ICC-01/09-02/11-T-29-CONF-EXP-ENG ET, page 12.