

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 06 October 2014

TRIAL CHAMBER V(B)

Before:
Judge Kuniko Ozaki, Presiding
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*)

**Proposed Public Redacted version of 'The Government of the Republic of Kenya's
Observations on the "Prosecution update on the status of cooperation between the
Office of the Prosecutor and the Government of Kenya" (ICC-01/09-02/11-951-
CONF-EXP) dated 15 September 2014**

Source: 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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State's Representatives

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Of the Republic of Kenya

REGISTRY

Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Government of the Republic of Kenya hereby makes observations to the *'Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya'*¹ ('Prosecution Update' / 'Update').
2. In particular, the Government of the Republic of Kenya wishes to make observations on the following statements made in the Prosecution Update:
 - '2. Regrettably, there has been inadequate progress since the last update on 30 June 2014. The GoK has produced only 34 pages of materials to the Prosecution during the two month reporting period, some of which is non-responsive to the Revised Request. The majority of the material sought in the Revised Request remains outstanding...
 7. On 8 July, the Prosecution and the GoK filed the joint submission discussed above. Among other things, the joint submission informed the Chamber of the agreement between the Prosecution and GoK that the GoK would:
 - (i) Take full faith measures to facilitate meetings between the Prosecution and representatives of the banks for which records had been provided, which were to take place as soon as possible and be concluded no later than 8 August 2014...
 17. The GoK's August letter was accompanied by 27 pages of materials said to be responsive to the Revised Request. As with the materials provided on 19 and 24 June, those provided on 22 August constitute a fraction of the materials sought in the Revised Request, the bulk of which remain outstanding...

¹ (Confidential) ICC-01/09-02/11-940-Conf, 29 August 2014.

22. The Prosecution continues to make its best efforts to engage the GoK to ensure that the Revised Request is implemented. Unfortunately, 4.5 months after the Revised Request was issued, much of the requested material remains outstanding.'

II. OBSERVATIONS

The Government of the Republic of Kenya makes the following observations on the above set out paragraphs of the Prosecution's Update:

i. Observations on paragraphs 2, 17 and 22 of the Prosecution Update:

3. Contrary to what the Prosecution alleges at paragraphs 2 and 17 of its Update, the Government of the Republic of Kenya wishes to state that it has cooperated fully in implementing the Revised Request of 8 April 2014 on the basis of the terms set out therein and information provided in the Revised Request.²
4. In particular, the Government of the Republic of Kenya fully executed the Revised Request in two (2) significant instances. **The first instance** was in keeping with the '*Decision on Prosecution's application for a finding of non-compliance pursuant to Article 87 (7) and for an adjournment of the provisional trial date*'³ ('the Trial Chamber's Decision of 31 March 2014') in which Trial Chamber V (B) (the 'Trial Chamber') ordered the Prosecution to, within two weeks of the date of the decision, provide the Government of the Republic of Kenya with an updated request ('Revised Request'), based on its 24 April 2012 request ('Records

² Request for Assistance [REDACTED], transmitted under cover of a Letter from the Office of the Prosecutor of 8 April 2014 [REDACTED]. (Annexed and marked 'I').

³ (Public) ICC-01/09-02/11-908, 31 March 2014.

Request'). The Chamber ordered that the Revised Request be tailored to reflect the items that remain of specific relevance to the charges.⁴

5. In keeping with the Trial Chamber's Decision of 31 March 2014, the Government of the Republic of Kenya and the Prosecution held consultations between [REDACTED] 2014, following which the Government of the Republic of Kenya sent the following records and responses to all the eight (8) request items in the Revised Request, obtained following transmission of the Revised Request by the Office of the Attorney General of the Republic of Kenya ('Office of the Attorney General') to the relevant authorities of the Republic of Kenya.

The following documents were sent to the Prosecution on 19 June 2014:

- a) *Request for motor vehicle records* – Mr. Uhuru Kenyatta's motor vehicle records held by Kenya's National Transport and Safety Authority.⁵

The following were sent to the Prosecution on 23 June 2014:⁶

- b) *Request for Bank Records* - Mr. Uhuru Kenyatta's bank accounts records held by the relevant banks;
- c) *Request for Telephone Records* - Responses and request for pertinent information from the then Communications Commission of Kenya (now Communications Authority of Kenya);

⁴ Ibid, para. 100.

⁵ Letter from the Attorney General of the Republic of Kenya of 19 June 2014 [REDACTED] enclosing motor vehicle records relating to Mr. Uhuru Kenyatta from Kenya's National Transport and Safety Authority. (Annexed and marked 'II').

⁶ Infra note 15, Government of the Republic of Kenya's Update, para. 3.

- d) *Request for Company Records* - Response from Kenya's Companies Registry;
- e) *Request for Land and Real Estate Records* – Response from Kenya's Ministry of Land, Housing and Urban Development;
- f) *Request for Income and Value Added Tax Returns Records* - Mr. Uhuru Kenyatta's income tax returns records held by the Kenya Revenue Authority;
- g) *Request for Foreign Exchange Transaction Records* – Response and request for pertinent information from the Central Bank of Kenya;
- h) *Request for Security and Intelligence Records* – Response from Kenya's National Intelligence Service.

6. **The second instance** was that subsequent to the Trial Chamber '*Decision on the Prosecution's revised cooperation request*'⁷ ('the Trial Chamber's Decision of 29 July 2014') in which it found that the Revised Request conformed to the tripartite principles of relevance, specificity and necessity for the purpose of a cooperation request pursuant to **Part 9** of the Rome Statute.⁸ Moreover, the Trial Chamber called upon the parties to pursue a cooperative approach in resolving practical difficulties identified in implementing some of the request items in the Revised Request.⁹

7. In this instance, the Office of the Attorney General transmitted the Revised Request, for the second time, to the relevant Kenyan authorities for implementation; and in a 'cooperative approach' as directed by the Trial Chamber's Decision of 29 July 2014, the Office of the Attorney General also transmitted the supplementary questions raised in the Prosecution's letter of 3 July 2014, and requested the relevant authorities to explore all alternative means at their disposal in

⁷ (Public) ICC-01/09-02/11-937, 29 July 2014.

⁸ Ibid, para. 47.

⁹ Supra note 7, para. 41&42.

implementing the Revised Request and answering the Prosecution's supplementary questions of 3 July 2014. In particular the following communication was transmitted to the relevant Kenyan authorities:¹⁰

- i. Relating to request for Company Records (*paragraph 17(1) of the Revised Request*) – On 6 August 2014 the Office of the Attorney General sent an internal memo to Kenya's Companies Registry, which is one of its departments, conveying the Prosecution's request and supplementary questions posed in the Prosecution's letter of 3 July 2014.
- ii. Relating to request for Land Records (*paragraph 17(2) of the Revised Request*)- On 6 August 2014 the Office of the Attorney General sent a letter to Kenya's Ministry of Land, Housing and Urban Development conveying the Prosecution's request and supplementary questions posed in the Prosecution's letter of 3 July 2014.
- iii. Relating to request for income tax and value added tax (VAT) returns records (*paragraph 17(3) of the Revised Request*) – On 6 August 2014 the Office of the Attorney General sent a letter to the Kenya Revenue Authority conveying the Prosecution's request and supplementary questions posed in the Prosecution's letter of 3 July 2014.
- iv. Relating to request for motor vehicle records (*paragraph 17(4) of the Revised Request*) – On 6 August 2014 the Office of the Attorney General sent a letter to Kenya's National Transport and Safety Authority conveying the Prosecution's request and supplementary questions posed in the Prosecution's letter of 3 July 2014.
- v. Relating to request for Bank records (*paragraph 17(5) of the Revised Request*) – On 6 August 2014 the Office of the Attorney

¹⁰ Infra note 15, Government of the Republic of Kenya's Update, para. 19.

General sent a letter to the Central Bank of Kenya conveying the Prosecution's request and supplementary questions posed in the Prosecution's letter of 3 July 2014.

- vi. Relating to request for foreign exchange transaction records (*paragraph 17(6) of the Revised Request*) – On 6 August 2014 the Office of the Attorney General sent a letter to the Central Bank of Kenya conveying the Prosecution's request and supplementary questions posed in the Prosecution's letter of 3 July 2014.
 - vii. Relating to request for telephone records (*paragraph 17(7) of the Revised Request*) – On 6 August 2014 the Office of the Attorney General sent letters to the Communications Authority of Kenya, Safaricom Ltd and Airtel Networks Kenya Ltd (the latter two being mobile network operators in Kenya) conveying the Prosecution's request and supplementary questions posed in the Prosecution's letter of 3 July 2014.
 - viii. Relating to request for security and intelligence records (*paragraph 17(8) of the Revised Request*) - On 6 August 2014 the Office of the Attorney General sent a letter to Kenya's National Intelligence Service conveying the Prosecution's request and supplementary questions posed in the Prosecution's letter of 3 July 2014.
8. The responses obtained from the relevant Kenyan authorities in implementation of the Revised Request and the Prosecution's supplementary questions of 3 July 2014 were conveyed by the Office of the Attorney General to the Prosecution between 22 and 28 August 2014 as follows:

The following were transmitted to the Prosecution on 22 August 2014:¹¹

- a) *Relating to Request for Company Records* – Response and request for pertinent information from Kenya's Companies Registry;
- b) *Relating to Request for Motor Vehicle Records* – Response from Kenya's National Transport and Safety Authority;
- c) *Relating to Request for Telephone Records* – Responses and request for pertinent information from Safaricom Ltd and Airtel Networks Kenya Ltd;
- d) *Relating to Request for Security and Intelligence Records* – Response from Kenya's National Intelligence Service.

The following was transmitted to the Prosecution on 26 August 2014:¹²

- e) *Relating to Request for Land and Real Estate Records* – Response and Request for pertinent information from Kenya's Ministry of Land, Housing and Urban Development.

The following was transmitted to the Prosecution on 27 August 2014:¹³

- f) *Relating to Request for Income Tax and Value Added Tax Returns Records* - Response and records relating to Mr. Uhuru Kenyatta's income tax and value added tax returns held by the Kenya Revenue Authority.

¹¹ *Infra* note 15, Government of the Republic of Kenya's Update, para. 20(i).

¹² *Infra* note 15, Government of the Republic of Kenya's Update, para. 20(ii).

¹³ *Infra* note 15, Government of the Republic of Kenya's Update, para. 20(iii).

The following were transmitted to the Prosecution on 28 August 2014:¹⁴

- g) *Relating to Request for Bank Account Records* – Response from the Central Bank of Kenya;
- h) *Relating to Request for Foreign Exchange Transaction Records* - Response from the Central Bank of Kenya.

9. The Government of the Republic of Kenya expresses its regret that while it has made its best endeavours, under procedures of Kenya's national law, at cooperating and complying with every request of the Prosecution as contained in the Revised Request and answered all the questions posed in the Prosecution's supplementary questions of 3 July 2014, the Prosecution has not demonstrated a 'cooperative approach' in implementing the Revised Request. This is because to date the Prosecution has not provided responses to the requests for further particular information regarding some of the request items in the Revised Request, which particular information would assist the relevant Kenyan authorities in implementing all the outstanding items of request on the Revised Request in accordance with the laid down procedures of Kenya's national law.

10. As set out in *'The Government of the Republic of Kenya's Update to the Trial Chamber pursuant to the "Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87 (7) and for an adjournment of the provisional trial date" of 31 March 2014'*¹⁵ ('Government of the Republic of Kenya's Update') the Prosecution has failed to provide further information in relation to the following requests:

¹⁴ Infra note 15, Government of the Republic of Kenya's Update, para. 24.

¹⁵ (Confidential, Ex Parte) ICC-01/09-02/11-941-Conf-Exp, 29 September 2014.

- a) Regarding the request for company records, [REDACTED].¹⁶
- b) Regarding the request for telephone records, [REDACTED].¹⁷
- c) [Regarding the implementation of the request for identification of land and real property transferred during the material time, REDACTED].¹⁸
 - i) [REDACTED];
 - ii) [REDACTED];
 - iii) [REDACTED];
 - iv) [REDACTED]; and
 - v) [REDACTED].

11. Therefore, considering that the Prosecution has been informed of the information required to implement the outstanding requests and still continues to tally in providing this information, there can then be no truth in its averments at paragraph 2 of its Update that there has been inadequate progress occasioned by the Government of the Republic of

¹⁶ Ibid, Government of the Republic of Kenya's Update, para. 20(i)(a).

¹⁷ Infra note 15, Government of the Republic of Kenya's Update, para. 20(i)(c).

¹⁸ Infra note 15, Government of the Republic of Kenya's Update, para. 20(ii).

Kenya. The said 'inadequate progress'¹⁹ is as a result of the Prosecution's failure to provide the Government of the Republic of Kenya with the necessary information required for the implementation of the Revised Request and provision of the 'majority of the material sought on the Revised Request'²⁰ that 'remains outstanding'²¹.

12. In this regard, the Government of the Republic of Kenya also finds fault with the conclusion at paragraph 22 of the Prosecution's Update that the Prosecution 'continues to make its best efforts to engage the GoK to ensure that the Revised Request is implemented'. This assertion cannot be deemed to be true in this case where the Prosecution remains unresponsive to the Government of the Republic of Kenya's request for further information to enable it to execute the outstanding requests in the Revised Request. As such, the only just conclusion that may be reached here is that the material that the Prosecutions seeks remains outstanding owing to the Prosecution's failure to provide the information that has been repeatedly sought by the Government of the Republic of Kenya, including as hereinabove stated at paragraph 10, to enable it to implement the Revised Requested in compliance with the procedures set out in the Republic of Kenya's laws.

13. Besides that, at paragraphs 2 and 17 of its Update the Prosecution appears to lament over the number of pages of documentation that the Government of the Republic of Kenya has provided to it, in the 2 significant instances stated hereinabove at paragraphs 4 to 8, conveying the responses of the relevant Kenyan authorities that implemented the Revised Request. The Government of the Republic of Kenya submits that there is nothing stated in the Revised Request

¹⁹ Supra note 1, para. 2.

²⁰ Ibid.

²¹ Ibid.

indicative of a requirement for a response from Government of the Republic of Kenya to meet a certain number of pages.

14. The Government of the Republic of Kenya submits that the information provided in the transmitted documentation, whose number of pages the Prosecution has been keen to note, is all that could be obtained on the basis of the information provided in the Revised Request implemented in compliance with the procedures of the Republic of Kenya's national laws.
15. The Government of the Republic of Kenya has no particular interest in ensuring that the documents it transmits to the Prosecution add up to a specific number of pages. Instead, the Government of the Republic of Kenya is only interested in meeting its obligations as a State Party of providing the requisite cooperation, in this case within the terms set out in **Article 93 (1)** of the Rome Statute, in the implementation of the Revised Request, which obligation the Government of the Republic of Kenya has discharged in implementation of the Revised Request.

ii. Observations on paragraph 7 of the Prosecution Update:

16. At paragraph 7 of its Update the Prosecution states, in part, as follows:

'7. On 8 July, the Prosecution and the GoK filed the joint submission discussed above. Among other things, the joint submission informed the Chamber of the agreement between the Prosecution and GoK that the GoK would:

- (i) Take full faith measures to facilitate meetings between the Prosecution and representatives of the banks for which records had been provided, which were to take place as soon as possible and be concluded no later than 8 August 2014...'

While the Government of the Republic of Kenya admits that indeed joint submissions were filed on 8 July 2014,²² it nevertheless wishes to distance itself from the assertion by the Prosecution that the joint submissions, in part, informed the Chamber that the Government of the Republic of Kenya would '[t]ake full faith measures to facilitate meetings between the Prosecution and representatives of the banks...'. This assertion by the Prosecution is an inaccurate reporting of what is actually provided in the joint submissions.

17. In this regard, the Government of the Republic of Kenya wishes to state what is exactly provided at paragraph 10 of the joint submissions as follows:

'...It has been agreed in principle [emphasis added] that GoK will take full faith measures to facilitate these meetings ...'

At this juncture, the Government of the Republic of Kenya requests the Trial Chamber to note the distinction in meaning between the assertion made by the Prosecution at paragraph 7 of its Update and what is actually stated in the joint submissions at paragraph 10 and stated hereinabove, which the Prosecution unfortunate appears to conflate.

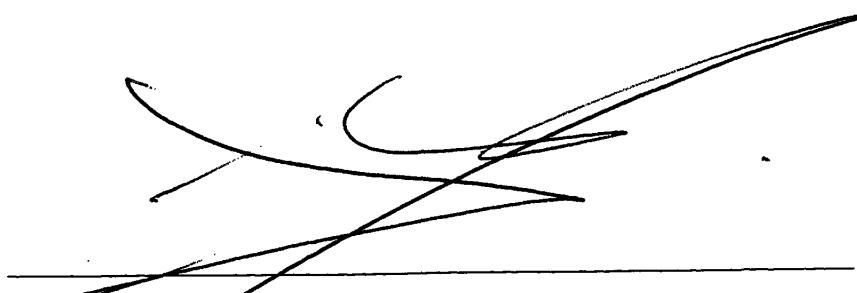
²² (Public) Joint guide to oral submissions to be made by the Prosecution and the Government of Kenya in response to the Chamber's scheduling order of 4 July 2014 concerning the status conference to take place on 9 July 2014' ICC-01/09-02/11-930, 8 July 2014.

III. CONCLUSION

18. From the foregoing, it is clear that the Government of the Republic of Kenya, using its best endeavours, has cooperated fully in implementing the Revised Request as drafted and as directed by the Trial Chamber in its Decisions of 31 March 2014 and 29 July 2014.

19. The Government of the Republic of Kenya submits that the Prosecution's failure to provide the information requested by the relevant authorities of the Republic of Kenya is the reason why implementation of some of the requests in the Revised Request remain outstanding as demonstrated hereinabove.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several sweeping loops and a long horizontal stroke, positioned above the printed name and title.

Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 06 October 2014

At Nairobi, Kenya