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Date: **9 January 2015**

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 Redacted Version of Filing 906 formerly classified as "Under Seal, *EX PARTE*, available to the Prosecution and the Registry only"

Prosecution observations on the Registry's fourth report on the identification, tracing, and freezing of assets

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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The Office of Public Counsel for Victims	**The Office of Public Counsel for the Defence**
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REGISTRY

Registrar Herman von Hebel	**Defence Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

Introduction

1. [redacted] Submission explains that the GoK has refused to comply with such an order, issued by the Single Judge in April 2011. Further, the Submission reveals that the GoK obfuscated for almost three years before finally admitting that it had no intention of complying with the Single Judge's order, and even then, failed to offer a supportable justification for its refusal to comply. In the Prosecution's view, this conduct demonstrates that the GoK's purported reasons for failing to comply with the Prosecution's Records Request are not, as the GoK suggests, good faith disagreements on issues of law, but are mere pretext designed to obscure a policy of obstructing this Court's work.

Confidentiality

2. This submission is classified as under seal, *ex parte* as a response to a document so designated.[2]

3. While the Registry understandably filed the Submission on an *ex parte* basis due to the under seal nature of the Single Judge's order, the Prosecution considers that it would be appropriate, in the particular circumstances of this case, for the GoK, the Defence and the Common Legal Representative of Victims to be granted access to the Submission, this document and the related Court documents in order to provide a response, if they wish to do so. The Prosecution would normally wish asset freezing requests to remain under seal until implemented, but there is no longer a need for such an approach in this case because: (i) the GoK has indicated in a public filing that this Court has made efforts to identify, trace, freeze and seize assets of

[1] ICC-01/09-02/11-905-US-Exp.
[2] Regulation 23*bis*(2) of the Regulations of the Court.

the accused in the Kenya cases;[3] (ii) the Court's efforts to freeze the assets have been reported in the Kenyan media;[4] and (iii) as a result, the asset freezing issue was discussed in public session during the 13 February 2014 hearing.

Submissions

4. During his oral submissions to the Chamber on 13 February 2014, the Attorney General of Kenya suggested that if a Chamber of this Court issued an order seeking assistance from the GoK, the GoK would take steps to implement it.[5] The matters addressed in the Registry Submission cast doubt on the accuracy of this representation.

5. The Submission and related Registry filings[6] indicate that the GoK has taken no steps to implement the Single Judge's April 2011 order to identify, trace, freeze and seize assets of the Accused ("Order").[7] [redacted]

6. This tactic of obfuscation and delay is familiar. It is the same approach the GoK employed with respect to the Records Request, which forms the basis for the Prosecution's application for a finding of non-compliance.[9] As with the Records Request, it appears that the GoK side-stepped the Registry's

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[3] *See* ICC-01/09-02/11-713, para. 41.
[4] *See, e.g.*, The Star, *Kenya will not freeze assets of ICC Four*, 12 January 2013, available at: http://www.the-star.co.ke/news/article-102541/kenya-will-not-freeze-assets-icc-four.
[5] *See, e.g.* ICC-01/09-02/11-T-28-ENG ET WT, page 55 (stating that if the GoK received an order from a Chamber of the ICC to produce financial records, the Attorney General "would pass it to the DPP, pointing out our obligations under the law"); page 39 (stating that "if I received an order from you, for example, I would receive it as the competent authority under the Statute to receive the order, but then I would have to surrender it to the constitutional organ in Kenya that has the mandate to represent the Government of Kenya in any criminal process"); pages 44-45 (stating that if the Chamber issued an order for the production of bank records, Kenya "would require to have a domestic process, which would involve "taking the order of the [International Criminal] court to a Kenyan court").
[6] *See* ICC-01/09-02/11-58-US-Exp and annexes, ICC-01/09-02/11-107-US-Exp and annexes, ICC-01/09-02/11-419-US-Exp and annexes, ICC-01/09-02/11-654-US-Exp and annexes.
[7] ICC-01/09-02/11-42-US-Exp, page 5.
[8] ICC-01/09-02/11-905-US-Exp-AnxIII.
[9] ICC-01/09-02/11-866-Red.

inquiries about the implementation of the Order for years, and when pressed, fell back on unsupportable legal arguments in an attempt to justify its inaction.

7. In the Prosecution's view, the legal arguments the GoK now relies upon in defence of its failure to implement the Order are without merit and are simply pretext designed to window dress a policy of State obstructionism. In particular, there are at least five reasons why the GoK is wrong when it suggests that [redacted]

8. *First*, the GoK's position is inconsistent with the plain language of Article 93(1)(k), which requires States to take steps to assist the Court "for the purpose of eventual forfeiture". The use of the adjective "eventual" indicates that steps to identify, trace, freeze or seize may be taken before any post-conviction forfeiture orders are "eventual[ly]" issued under Article 77(2)(b).[11] This reading is confirmed by the *chapeau* paragraph of Article 93(1), which requires States to comply with the Court's requests for assistance – including asset freezing requests under Article 93(1)(k) – "in relation to investigations and prosecutions", *i.e.*, prior to conviction. This reading is further confirmed by Article 57(3)(e), which provides the Pre-Trial Chamber with an explicit power, after a summons or arrest warrant is issued, to "seek the cooperation of States pursuant to article 93,

[10] ICC-01/09-02/11-905-US-Exp-AnxIII, page 3/3.

[11] While Article 75(4) permits a Trial Chamber to issue Article 93(1)(k) requests for assistance during the reparations phase of proceedings, this in no way diminishes the authority of the Court to issue such requests at an earlier stage of proceedings, as provided in Articles 91(1) and 57(3)(e). This conclusion is most clearly demonstrated by Rule 99(1), which permits a Pre-Trial Chamber – which by definition will no longer be presiding over a case after a conviction is entered – to take "protective measures for the purpose of forfeiture". *See also* Donat-Cattin, D. *Reparations to victims* in Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. 2d ed. 2008), pp. 1408-09 (noting that there is "a statutory norm that makes possible to take protective measures before conviction, namely, article 57 para. 3(e), which relates to the powers and functions of the Pre-Trial Chamber").

paragraph 1(k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims".

9. As Articles 75(2) and 77(2) and Rules 146 and 147 make clear, only the granting of a final reparation or forfeiture order would require a conviction to be entered. There is no conviction requirement for interim measures to identify and freeze property so that it can be preserved in anticipation of future reparation or forfeiture orders, as demonstrated by Articles 57(3)(e) and 93(1)(k). As one commentator notes: "[i]t is obvious that, if appropriate measures are not timely undertaken, the accused has the chance to hide or 'destroy' all means and results of any alleged criminal conduct . . . to freeze assets makes justice effective and reparations possible".[12] While the Court's legal framework reflects this common sense proposition, the GoK's stance does not.

10. *Second*, and perhaps most telling, the GoK's position is inconsistent with Kenyan law. Section 106(a) of Kenya's International Crimes Act 2008 ("ICA") requires the Attorney General to authorise a request under Article 93(1)(k) if "the request relates to an international crime that is being *investigated* by the Prosecutor, or which is *the subject of proceedings* before the ICC".[13] The ICA in no way restricts the GoK's ability to implement freezing orders before a conviction is entered. On the contrary, the Second Schedule to the ICA contains detailed provisions on the implementation of Article 93(1)(k) requests, which presuppose that freezing requests may be made and executed prior to conviction.[14] These provisions of the ICA are

[12] Donat-Cattin, D. *Reparations to victims* in Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. 2d ed. 2008), p. 1408.
[13] The International Crimes Act, 2008, Section 106(a) (emphasis added). The only other condition under Section 106 is the requirement that "the property concerned is or may be located in Kenya", a proposition that is beyond dispute with respect to property covered by the Order.
[14] *See, e.g.*, Second Schedule, Part C, Section 8(4)(b) (restraining orders issued in accordance with an Article 93(1)(k) request may permit part or all of the affected property to be used to fund the "defendant's reasonable expenses in defending any charge that he has committed an international crime"); Second

consistent with the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009 – Kenya's law governing asset freezing for domestic investigations and prosecutions – which permits Kenyan courts to issue a freezing order *before a person is even charged* with an offence.[15] [redacted][16] when Kenya's own legislation permits the opposite.[17]

11. *Third*, the GoK's position defies logic. The purpose of Article 93(1)(k) is to enable measures to be taken to prevent a person's assets from being hidden from the Court, which could thwart any post-conviction forfeiture or reparations awards. The rationale behind this regime was recognised by the *Lubanga* Trial Chamber, which observed that if freezing orders are not issued early in the proceedings, "by the time an accused person is convicted and a reparation award ordered, there will be no property or assets available to enforce the award".[18] The Single Judge adopted the same reasoning in her Order, finding that "existing technology may make it possible to place property and assets beyond the Court's reach in a short period of time".[19] The GoK makes no attempt to reconcile its illogical

Schedule, Part B, Section 6(b) (Police required to return seized property if the "ICC has declined to make a forfeiture order in respect of the property" or fails do so within six months of the seizure").

[15] *See* The Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009, Section 69(1)(b) (providing that one scenario in which a court may issue a restraint order is when "(i) that court is satisfied that a person is to be charged with an offence; and (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that person.").

[16] ICC-01/09-02/11-905-US-Exp-AnxIII, page 3/3.

[17] The International Crimes Act, 2008, Section 106(a).

[18] ICC-01/04-01/06-8-US-Corr, para. 136 (reclassified as public pursuant to decision ICC-01/04-01/06-37); *see also* Kress, C., Prost, K. and Wilkitzki, P. *International Cooperation and Judicial Assistance* in Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. 2d ed. 2008), pp. 1578-79 ("According to article 57, para. 3(e) the issuance of a warrant of arrest of a summons to appear . . . constitute the earliest moments in the proceedings as from which on a request under [Article 93(1)(k)] may be made").

[19] ICC-01/09-02/11-42-US-Exp, para. 9.

position with these judicial pronouncements, or the fact that pre-conviction freezing orders are standard practice in domestic jurisdictions.

12. *Fourth*, the unsupportable nature of the GoK's position is further demonstrated by longstanding international practice permitting pre-conviction asset freezing, as reflected in international treaties, including those signed and ratified by Kenya. For example, Article 12(2) of the United Nations Convention Against Transnational Organised Crime (acceded to by Kenya on 16 June 2004)[20] provides for the freezing of assets in anticipation of a future forfeiture order, stating that "States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of *eventual* confiscation".[21] The United Nations Convention Against Corruption (ratified by Kenya on 9 December 2003)[22] is even more explicit, requiring that State Parties:

> (a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would *eventually* be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;
>
> (b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would

[20] Ratification status available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en.
[21] Emphasis added. Available at: http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf *See also* Article 13(2): "Following a request made by another State Party having jurisdiction over an offence covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention for the purpose of *eventual* confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party." (emphasis added).
[22] Ratification status available at: https://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

> *eventually* be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and
>
> (c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, *such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property*.[23]

13. The well-established principles codified in the above treaties cannot be reconciled with the GoK's stated position than assets cannot be frozen until after a conviction is entered.

14. *Fifth*, the unsupportable nature of the GoK's position is demonstrated by orders from this Court, in which Chambers have requested State assistance to identify, trace, freeze or seize assets well before trial. In *Lubanga*, the Pre-Trial Chamber issued a request to the Democratic Republic of the Congo ("DRC") to identify, trace, freeze and seize Mr Lubanga's assets two months after issuing a warrant for his arrest,[24] and subsequently issued a similar request to all States Parties.[25] The *Katanga* Pre-Trial Chamber issued a near-identical request to the DRC on the same day as the Chamber issued the warrant for Mr Katanga's arrest.[26] The same approach was taken in *Bemba*, where the Pre-Trial Chamber issued a request to Portugal to identify, trace, freeze and seize property of Mr Bemba just three days after his arrest and well before his trial.[27] These decisions further demonstrate that there is no basis for the GoK's assertion that actions to identify, trace, freeze or seize property may take place only after a conviction is entered.

15. In the Prosecution's view, the GoK's stated reasons for refusing to comply with the Order are mere pretext. They are unsupported by even an arguable

[23] Article 54(2) (emphasis added). Available at: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.
[24] ICC-01/04-01/06-22-tEN.
[25] ICC-01/04-01/06-62-tEN.
[26] ICC-01/04-01/07-7-tENG, page 2.
[27] ICC-01/05-01/08-8. The request was executed by the Portuguese authorities. *See* ICC-01/05-01/08-254, para. 3.

legal analysis and serve only to illustrate the obstructionist stance the GoK has taken to this Court.

16. The Prosecution acknowledges that the Registry Submission addresses a matter that the Prosecution is not asking the Chamber to rule upon in the non-compliance application – namely, the identification, tracing, freezing and seizure of assets. However, the GoK's refusal to comply with an order issued by a Judge of this Court is indicative of the GoK's pattern of non-compliance in the *Kenyatta* and *Ruto & Sang* cases. It is appropriate for the Chamber to take this pattern into account when ruling on the non-compliance application and the related request for the *Kenyatta* case to be adjourned until the GoK complies with its treaty obligations.

17. Further, the Chamber could properly conclude that the GoK's refusal to comply with the Single Judge's Order is an additional instance of non-compliance for which a finding could be entered under Article 87(7). The reality is that the GoK has not, as it would have this Chamber believe, acted "in good faith" to ensure "compliance with its obligations under the Rome Statute".[28] Rather, the GoK has refused to comply with sensitive requests for assistance from this Court, and has thereby obstructed this Court's work.

Fatou Bensouda,
Prosecutor

Dated this 9th day of January 2015
At The Hague, The Netherlands

[28] ICC-01/09-02/11-713, para. 23.