

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

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 914 formerly classified as "Confidential"

**Prosecution submissions pursuant to the Chamber's 7 April 2014 Order
(ICC-01/09-02/11-910-Conf)**

Source: The Office of the Prosecutor

**Document to be notified in accordance with Regulation 31 of the
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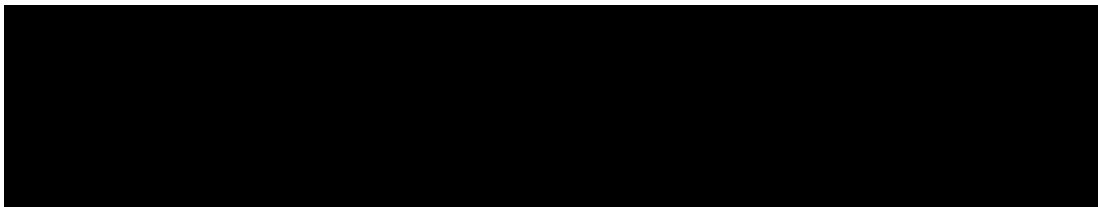
Introduction

1. The Prosecution hereby provides its observations on the three matters raised in the Chamber's 7 April 2014 Order.¹

Confidentiality

2. This submission is classified as confidential as it responds to a decision so designated.²

Submissions



3. The Prosecution refers the Chamber to paragraphs 7 to 15 of its 10 March 2014 Observations and reiterates its position that "the GoK's stated reasons for refusing to comply with the Order are mere pretext [...] and serve only to illustrate the obstructionist stance the GoK has taken to this Court".³

B. Whether the Pre-Trial Chamber's Order should be revoked or otherwise modified.

4. The GoK's disclosure of the Court's efforts to identify, trace, freeze and seize assets of the accused in the Kenya cases⁴ has destroyed any chance

¹ ICC-01/09-02/11-910-Conf, page 6.

² Regulation 23bis(2).

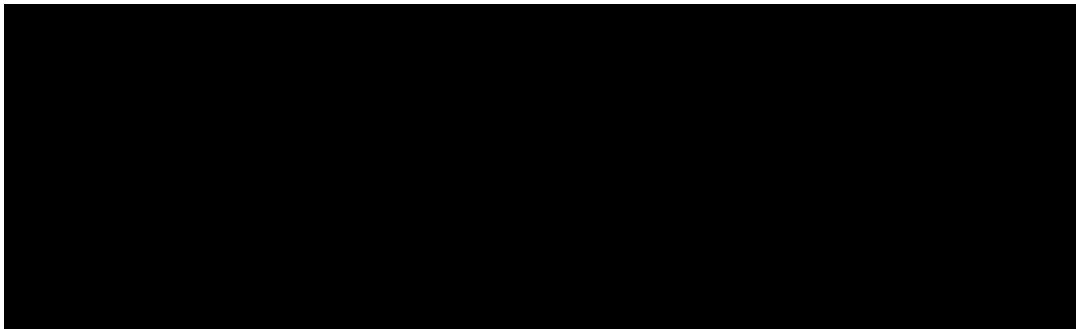
³ ICC-01/09-02/11-906-Conf, para. 15. The Prosecution does not address the second part of the GoK's argument in this filing – that there must also be a finding that the property and assets identified were employed in the commission of the crime or were acquired upon the execution of the crime, for which a conviction has been entered. The Prosecution does not concede the correctness of the argument, but believes that resolving it would not materially affect the issue which the Chamber has to resolve. For that reason, it refrains from separately addressing the argument.

⁴ In relation to the information published in the news article available on the Internet, the Chamber has specifically noted that the Government of Kenya appears to have been attributed as the source of

of action being taken to freeze the Accused's assets without his knowledge. This in turn reduces the chances of asset freezing efforts being successful.

5. The Prosecution acknowledges that, due to developments concerning key Prosecution witnesses, it now has insufficient evidence to secure a conviction at trial.⁵ In this context, the Prosecution accepts that it would not be appropriate to seek to enforce the Single Judge's 5 April 2011 Order at this stage.

6.



C. Any other order or relief as may be appropriate in the circumstances with particular regard to the apparent violation of the confidentiality direction of the Pre-Trial Chamber.

7. While it is for the Chamber to determine whether and what action should be taken with respect to the GoK's apparent breach of the Pre-Trial Chamber's confidentiality direction, the Prosecution offers the following observations.
8. Although the news article relates to the GoK's refusal to comply with the Prosecution's 24 April 2012 request for financial information related to the accused persons in the two *Kenya* cases – and not the Single Judge's 5

information and is "in apparent contravention of the instruction of the Single Judge to keep the matter confidential" (see ICC-01/09-02/11-910-Conf, para. 5).

⁵ ICC-01/09-02/11-875, paras. 6-16.

April 2011 Order⁶ – the GoK’s apparent disclosure of information about the Prosecution’s request violated the requirement of confidentiality under Article 87(3), which applies to *any* request for cooperation and supporting documents even in the absence of a specific court direction or order to that effect.

9. Further, the news article put the Accused on notice of the Court’s activities in terms of identifying, tracing, freezing and seizing of his assets – the very harm the Single Judge was trying to avert – which in effect amounts to a breach of the confidentiality envisaged in the Single Judge’s 5 April 2011 Order. The unfortunate reality is that the disclosure undermined the Court’s efforts to undertake *bona fide* efforts to secure assets for the purpose of eventual forfeiture, as envisaged in the Statute.

⁶ ICC-01/09-02/11-910-Conf, para. 5 and footnote 9.

10. Finally, the above disclosure is not an isolated incident. As recently as 26 April 2014, the Daily Nation published details of the Prosecution's revised records request, submitted in accordance with the Chamber's 31 March 2014 decision,⁷ together with information about the correspondence between the Prosecution and the GoK.⁸ It is apparent from the article that the Daily Nation has obtained copies of the relevant correspondence. This information was not provided by the Prosecution. The only reasonable inference is that the information was obtained from the GoK or sources within the GoK. While the Prosecution wishes to work with the GoK constructively to give effect to the Chamber's 31 March 2014 decision, such disclosures, whether they occur deliberately or otherwise, do not assist in this task.



Fatou Bensouda,
Prosecutor

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

⁷ ICC-01/09-02/11-908.

⁸ Daily Nation, *Bensouda probes Uhuru's billions and phone secrets*, 26 April 2014, available at: <http://www.nation.co.ke/news/politics/Bensouda-probes-Uhuru-billions-and-phone-secrets/-/1064/2294662/-/p2k40nz/-/index.html>.