

Confidential

Annex D



**Cour
Pénale
Internationale**
**International
Criminal
Court**

**Le Bureau du Procureur
The Office of the Prosecutor**

Hon. Professor Githu Muigai
Attorney General
Attorney General's Chambers
P.O. Box 40112-00100
Nairobi
Kenya

Ref.: OTP/KEN/KEN-84h/JCCD-bgsm

Date: 20 August 2014

Dear Attorney General,

I write in relation to the Office of the Prosecutor (OTP)'s 8 April 2014 Revised Request for records.¹ The purpose of this letter is to give notice that unless the Government of Kenya provides the outstanding materials sought in the Revised Request or enters into good faith consultations on the same by 17:00 Hague time on Monday, 25 August 2014, the OTP will consider that consultations on this matter have been exhausted. We are providing such notice for the following reasons:

First, as you will recall, the Trial Chamber in its 31 March 2014 decision emphasised that timely and meaningful efforts should be made on an *inter partes* basis to resolve any difficulties which may arise during the course of the cooperation schedule.² The Chamber stressed that in the event of genuine and irreconcilable differences between the OTP and the Government of Kenya, or any matter otherwise requiring resolution, it was to be promptly seized of the matter at issue.³

Second, you will recall that on 8 July 2014, the OTP and the Government of Kenya filed a joint submission regarding the implementation of the Revised Request.⁴ Among other things, the joint submission informed the Trial Chamber of our agreement that the Government of Kenya would:

¹ Reference number: OTP/KEN/KEN-84/ID-bgsm.

² ICC-01/09-02/11-908, para. 101.

³ *Ibid.*

⁴ ICC-01/09-02/11-930.

- (i) Take full faith measures to facilitate meetings between the OTP 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;⁵ and
- (ii) Provide, no later than 15 August 2014, the additional information sought in my 3 July 2014 letter,⁶ where the requested information met the requirements of relevance and specificity.⁷

Having received no communication regarding the proposed meetings, I sent you a letter on 23 July 2014.⁸ My letter recalled that our joint submission of 8 July 2014 had informed the Chamber of the agreements described above, as well as the deadlines of 8 and 15 August 2014. As those dates were approaching, I inquired into the status of matters. We received no response.

The agreed-upon dates of 8 and 15 August 2014 have now passed. The proposed meetings have not taken place and we have not received the additional information requested. Nor have we received any explanation from the Government of Kenya regarding the reason for the delay.

Third, on 29 July 2014, following your submissions on the consistency of the Revised Request with the requirements of the Chamber's 31 March 2014 decision, the Bench ruled that the Revised Request conforms with the requirements of relevance, specificity and necessity for the purposes of a cooperation request pursuant to Part 9 of the Statute.⁹ As the citation to Regulation 108-109 in the opening paragraphs of the Chamber's two decisions demonstrates, the Trial Chamber has thus already been seized of, and made a ruling regarding, the legality of the request.

Fourth, on 31 July 2014, I sent you a letter regarding the Chamber's 29 July 2014 decision,¹⁰ in which the Chamber found the Revised Request to be proper. I explained that the OTP is ready to work with the Government of Kenya to ensure that the Revised Request is executed without further delay and is willing to enter into consultations with you or your representatives at your earliest convenience. Three weeks have passed and we have not received a response.

If the situation remains unchanged, we will have no option but to seize the Chamber of the matter in the light of the pending non-compliance procedure under Article 87(7) of the Rome Statute.

To be clear, the OTP wishes to avoid further litigation with the Government of Kenya and wants to engage in a constructive manner to resolve any difficulties regarding the Revised Request in

⁵ ICC-01/09-02/11-930, para 10.

⁶ Reference number: OTP/KEN/KEN-84d/JCCD-sm.

⁷ ICC-01/09-02/11-930, para 8.

⁸ Reference number: OTP/KEN/KEN-84f/JCCD-bgsm.

⁹ ICC-01/09-02/11-937.

¹⁰ ICC-01/09-02/11-937.

line with the Chamber's expectations, as outlined in paragraph 101 of its 31 March 2014 decision. In this regard, I reiterate the OTP's willingness to meet with you or your representatives to discuss how the Revised Request can be implemented in a timely manner. If, however, the Government of Kenya fails to comply with its obligations, we will submit the matter to the Chamber for its resolution.

In light of the above, we invite the Government of Kenya to provide the outstanding material requested in the Revised Request without further delay and in any event no later than Monday 25 August 2014.

Yours sincerely,



Phakiso Mochochoko

Director

Jurisdiction, Complementarity and Cooperation Division

Cc:

- Hon. Joseph Ole Lenku, Secretary for Interior and Coordination of National Government
- H.E. Ms Rose Makena Muchiri, Ambassador Extraordinary and Plenipotentiary of the Republic of Kenya to the Kingdom of The Netherlands