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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

*IN THE CASE OF
THE PROSECUTOR V. WILLIAM SAMOEI RUTO and JOSHUA ARAP
SANG*

Public redacted version of

Prosecution response to the “Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence” (ICC-01/09-01/11-670)

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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Introduction

1. Contrary to the assertions in the “Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence” (“Submission”),¹ the Office of the Prosecutor (“OTP” or “Prosecution”) has encountered serious difficulties in securing full and timely cooperation from the Government of Kenya (“GoK”). The actions and inactions of the GoK have compromised the ability of the OTP to investigate the crimes in these cases, and limited the evidence available to assist the Chamber to adjudicate the crimes charged. Additionally, some public officials in Kenya have fostered an anti-ICC climate in the country, which has had a chilling effect on the willingness of potential witnesses and partners to cooperate with the OTP.

2. As the Chamber is aware, Article 86 of the Statute requires States Parties to “cooperate fully with the Court in its investigation and prosecution of crimes”. Further, customary international law requires that international treaties be executed in good faith.² As such, Kenya is obliged to cooperate fully, promptly and in good faith with the Prosecution’s investigation.³

¹ ICC-01/09-01/11-670..

² See Article 26 of the Vienna Convention on the Law of Treaties. This provision itself is regarded as binding, even though the GoK has signed but not ratified the Convention; Frederic L. Kirgis, Reservations to Treaties and United States Practice, (May 2003), para 2, at http://www.asil.org/insigh105.cfm#_edn3 (“The Vienna Convention on the Law of Treaties is the authoritative instrument on the international law of treaties. Most of its provisions are thought to reflect customary international law, so they are considered binding even on nation-states (such as the United States) that are not formally parties to the Vienna Convention.”); see also Olivier Corten and Pierre Klein, *Les Conventions de Vienne sur le Droit des traités – Commentaire article par article*, Bruyant Bruxelles, 2006, p. 368 and 1081; Nguyen Quoc Dinh, *Droit International Public*, 7th ed. Librairie Générale de Droit et de Jurisprudence, 2002, p. 218; Anthony Aust, *Pacta Sunt Servanda*, Max Plank Encyclopedia of Public International Law, Oxford University Press at para 2, at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1449&recno=1&searchType=Advanced&title=pacta+sunt+servanda.

³ II Luhashuk ‘The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law’ (1989) 83 AJIL 513, p. 517 (“The principle of good faith fulfilment of obligations prescribes a rule of fairness, which governs the ways and means of implementing international legal norms.”); see also Mark

3. As Kenya is the situation country, the most relevant and probative documentary evidence regarding the post-election violence (“PEV”) can be found only in Kenya. Critical documentary evidence that could incriminate the Accused – such as [REDACTED] – is accessible to the Prosecution only through the effective assistance of the GoK.
4. However, since the beginning of the OTP’s investigations in April 2010, the GoK has constructed an outward appearance of cooperation, while failing to execute fully the OTP’s most important requests. Indeed, while the GoK has provided some cooperation and has complied with a number of OTP requests, the most critical documents and records sought by the OTP remain outstanding, despite the OTP’s exhaustive efforts to urge the GoK to furnish these items. The outstanding documents and records that the OTP has requested from the GoK have been pending for periods that range from one to three years. The individual and cumulative effect of the GoK’s actions has been to undermine the investigation in these cases and limit the body of evidence available to the Chamber at trial.
5. In addition to these substantive failures, the GoK’s Submission publicly discloses information contained in Prosecution Requests for Assistance (“RFAs”), which the Statute requires the GoK to keep confidential. This action violates the express provisions of Article 87(3) of the Statute and has potentially caused harm to the Prosecution’s investigation. Accordingly, the Prosecution requests that the Chamber caution the GoK regarding Article 87(3)’s confidentiality requirement.

E. Villiger, *Commentary on the 1960 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, 2009, p. 367 (“The parties must carry out the treaty obligations in good faith (bona fides). Parties are required to the best of their abilities to observe the treaty stipulations in their spirit as well as according to their letter. Good faith furthermore covers the narrower doctrine of the abuse of rights according to which parties shall abstain from acts calculated to frustrate the object and purpose and thus impede the proper execution of the treaty.”).

Confidentiality

6. This document is designated “confidential, *ex parte*, Prosecution and GoK only”, because it refers to sensitive diplomatic communications with the GoK. It is to be expected that the GoK has established a confidentiality wall to ensure that the Accused does not have access to submissions provided to the GoK on an *ex parte* basis or the Prosecution’s confidential RFAs.
7. A public redacted version will be filed. In that version, the Prosecution will not redact information pertaining to confidential RFAs revealed in the GoK Submission. This information is already in the public domain as a result of the GoK’s improper disclosure, and the Prosecution considers that, in this instance, further confidential treatment is not warranted, since the prejudice caused by the disclosure is irreversible. In an abundance of caution, however, the Prosecution will redact from the public version information contained in GoK communications that the GoK has designated as confidential.

Submissions

I. The GoK has failed to cooperate fully with the OTP.

a. Background

8. The OTP has attempted to pursue a consultative and respectful relationship with the GoK from the onset of its investigations into the PEV. On 5 November 2009, the former Prosecutor met with President Mwai Kibaki and Prime Minister Raila Odinga in Nairobi, Kenya. The Prosecutor requested the full cooperation of Kenyan national authorities with the Court and highlighted the complementary roles of the Court and the Kenyan authorities in combating impunity. After this meeting, the former President and Prime Minister issued a joint statement recalling their constructive

meeting with the Prosecutor and stating that the GoK remained fully committed to cooperating with the Court.⁴

9. It is against this backdrop that, on 26 November 2009, the Prosecutor filed a request for authorisation to open an investigation into the crimes committed in Kenya during the PEV.⁵ However, after the Pre-Trial Chamber issued summonses to appear on 8 March 2011 for senior members of the Kenyan political establishment,⁶ the GoK became increasingly unhelpful.

b. Misleading assertions in the GoK's Submission

10. Before detailing the GoK's failure to comply with important RFAs, it is worth noting various deficiencies in the GoK's Submission. The Submission cites certain actions by the GoK to support its claim that it has complied with all its obligations towards the Court.⁷ However, these examples range from factually and legally incorrect to irrelevant.

11. *First*, most of the actions cited in the Submission are unrelated to the GoK's cooperation obligations under Part 9 of the Statute. For example, the GoK cites its decision "not to withdraw from the Rome Statute" and to enter into "a host country agreement with the Court",⁸ as well as certain domestic initiatives.⁹ While such measures may be laudable, they do not relieve the GoK from its obligations under Part 9 of the Statute to cooperate fully, effectively and in good faith with the Prosecution. The GoK's decision to become a party to the Statute has created such cooperation obligations. This is further emphasised by the GoK itself in its Submission that the Court has

⁴ ICC-01/09-3-Anx28.

⁵ ICC-01/09-3.

⁶ ICC-01/09-02/11-01; ICC-01/09-01/11-1.

⁷ ICC-01/09-01/11-670, paras 36-44...

⁸ ICC-01/09-01/11-670, paras 26, 27..

⁹ ICC-01/09-01/11-670, paras 28-30, 36-40 (referring to the "formation of a Multi-Agency Task Force on Post-Election Violence", the "[s]ettlement of Internally Displaced Persons" and the establishment of an "independent Witness Protection Agency").

become “part of the judicial system” of Kenya and that the Prosecutor “has a constitutional right to deal with crimes committed in Kenya”.¹⁰

12. *Second*, the Prosecution acknowledges that “CIPEV [and] KNCHR documents were provided to the Prosecution”.¹¹ However, the Commission of Inquiry into the Post-Election Violence (“CIPEV”) and the Kenya National Commission on Human Rights are both independent of the Government. The Prosecution engaged and continues to engage these autonomous bodies directly. As such, their provision of assistance to the OTP has little bearing on the GoK’s cooperation.

13. *Third*, the GoK states that it “authorised the provision to and use by the Court of . . . the full and complete minutes of National Security Advisory Committee (NSAC)”.¹² This is misleading. The Prosecution requested these materials from the GoK on 27 August 2010, after which the Prosecution exchanged several letters with the GoK regarding the requested documents. The GoK claimed that [REDACTED]. Although the Prosecution disputed this claim, it nonetheless agreed to narrow the scope of its request. Thereafter, the GoK produced some, but not all, of the requested documents from the revised and reduced list.¹³ Significantly, at the confirmation of charges hearing, the Muthaura Defence submitted 32 entries from the NSAC minutes, evidence sought by the Prosecution in its original August 2010 request.¹⁴ The use by the Defence of discrete portions of the minutes, with no obligation to produce other incriminating portions, limited the information available to the Pre-Trial Chamber in the confirmation hearing.

¹⁰ ICC-01/09-01/11-670, para. 36.

¹¹ ICC-01/09-01/11-670, paras 31-33.

¹² ICC-01/09-01/11-670, para. 34.

¹³ The GoK [REDACTED], despite there being no requirement to do this in the Statute.

¹⁴ ICC-01/09-01/11-670, para. 34 and fn. 23.

This example reflects an uneven investigative playing field tilted, seemingly with GoK acquiescence, in the Accused's favour.

14. Additionally, pertinent information was redacted in some of the [REDACTED] that were provided by the GoK, even though the GoK had given the same [REDACTED] without redactions to the CIPEV. For example, the GoK redacted the [REDACTED] it provided to the Prosecution, but it did not redact that information in the same [REDACTED] previously provided to the CIPEV.
15. *Fourth*, the GoK's assertions that it has allowed "[u]nfettered access into Kenya and within Kenya"¹⁵ glosses over the investigative reality on the ground. OTP staff members have been subject to surveillance by GoK officials while in Kenya. For example, [REDACTED]. The OTP raised this issue with the GoK, which denied that any such activity was authorised. Nonetheless, this incident is consistent with reports received from Prosecution witnesses that they have been targeted by GoK officials seeking to influence their testimony. It is against this backdrop that the GoK's claims of "good faith . . . compliance" with its cooperation obligations must be assessed.¹⁶

c. Outstanding Prosecution requests

i. The GoK's failure to provide critical records and refusal to execute requests

16. The GoK has failed to execute the OTP's most important requests for documentary evidence. On 24 April 2012, the OTP requested from the GoK, among other things, financial and [REDACTED] records regarding the Accused in both Kenya cases ("RFA 45").

¹⁵ ICC-01/09-01/11-670, para. 25.

¹⁶ ICC-01/09-01/11-670, para. 24.

17. The first half of RFA 45 includes a request for financial and [REDACTED] data – information that can be readily obtained by the GoK. The requested information is not novel, nor does its retrieval place an undue burden on the GoK. The compilation of an accused’s financial data is standard law enforcement practice and there is no reason why the GoK cannot undertake it here, in keeping with its Constitution and pursuant to its obligations under the Statute. However, despite numerous letters from the Prosecution to the GoK regarding these pending documentary items, the GoK has not provided the information requested, despite having over a year to compile information that would normally take a matter of weeks.
18. In its responses to the OTP in relation to the first half of RFA 45, the GoK has done nothing other than to inform the Prosecution that it has “forwarded the request to the competent Kenyan authorities”. The Prosecution has received no information from the GoK that the relevant institutions have taken steps to execute the request, or if not, for what reason. On the contrary, the GoK has, since November 2012, questioned the necessity of the Prosecution’s outstanding requests, including RFA 45, despite the GoK’s duty to cooperate with the Court regardless of its perception of the strength or relevance of information it is asked to collect.
19. The second half of RFA 45 is a request to [REDACTED]. In defence of its failure to execute this part of RFA 45, the GoK argues that there must “be a court order in place in order to fulfill this request”,¹⁷ insisting that this order must come from the Chamber.¹⁸ Even assuming, for the sake of argument, that this position were supportable in law – and the Prosecution does not

¹⁷ While noting that this specific argument was provided in the Kenyatta case (ICC-01/09-02/11-713, para. 41) and not in the present case, the Prosecution elects to address it in its response given that it relates to an RFA (RFA 45) which concerns both Kenya cases.

¹⁸ ICC-01/09-02/11-713, para. 41. The GoK has not, for example, submitted that, pursuant to Article 99(1) of the Statute, an order would need to be issued by its own courts in order to execute an OTP request in compliance with national law; rather, it has denied the OTP request.

agree that it is – the argument is [REDACTED]¹⁹ [REDACTED]²⁰ [REDACTED].²¹

ii. Request to facilitate interviews of police officers

20. The GoK has failed to facilitate the Prosecution's access to individuals who may have provided the Prosecution with critical information regarding the police role in the PEV. On 27 August 2010, the OTP requested the GoK to facilitate Prosecution interviews of five Provincial Commissioners and five Police Officers. Since then, the OTP has exchanged over ten letters and deployed its staff on five separate missions to Kenya to follow up on this request. The interviews were never conducted.

21. In September 2010, lawyers for the police officers informed the OTP that the officers declined to be interviewed as voluntary witnesses. The OTP thus had to seek national assistance to provide for the compulsory appearance of the individuals for questioning (pursuant to Article 93 of the Statute and Sections 77 and 78 of Kenya's International Crimes Act).²² On 4 October 2010, the former Chief Justice appointed High Court Justice Rawal to take this evidence.

22. Before the interviews began, a lawsuit brought by two private individuals led the High Court to issue a preliminary injunction prohibiting Justice Rawal from taking or recording evidence not only from the police officers, but from "*any Kenyan*" for the purpose of the "International Criminal Court process".²³ While the preliminary injunction was supposed to be temporary,

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ *See* [REDACTED].

²² Article 78 of the International Crimes Act, implementing the Rome Statute, requires that evidence taken by national authorities on the Prosecution's behalf must be tendered before a Kenyan High Court Judge.

²³ High Court Petition Number 2 of 2011, *Jackson Mwangi et al., v. The Attorney General et al.*, 1 February 2011 (emphasis added).

more than two years later, it remains in force. The GoK has failed to represent the Court's interests in this instance; it has not appealed on the Prosecution's behalf to the Kenyan High Court to resolve the issue or to ensure that a bench is appointed to hear the lawsuit on its merits. Nor, apparently, did the GoK contest the standing of the two private individuals to seek an injunction in the first place.

23. On 16 February 2012, when the Prosecution met with the Head of the Public Service, Mr. Francis Kimemia, and sought the GoK's assistance with completing the statement taking process, he asserted that the issue was in the hands of the courts, and requested that the Prosecution reimburse the GoK for the costs of the preliminary hearings.

24. Thus, the Prosecution's efforts to interview police officers, who may have shed light on the alleged police role in the PEV, have been thwarted to date. At the confirmation of charges hearing, however, the Muthaura and Ali Defence submitted 39 written statements from police and other law enforcement officials. These statements were taken *after* the issuance of the injunction preventing the Prosecution from interviewing the ten police officials. The GoK's failure actively and effectively to facilitate the OTP's request to interview these police officials contributed to the uneven investigative playing field in this case, in which the Accused has enjoyed unfettered access to evidence that has been denied to the Prosecution.

d. Selective cooperation

25. Although the GoK allowed OTP investigative missions in Kenya and executed some of its requests for cooperation, the GoK's cooperation has been inadequate in key areas. Contrary to the GoK's claims to have acted in

“full compliance” with its obligations under the Statute,²⁴ the OTP continues to encounter considerable difficulties in securing full, effective and meaningful cooperation, which continues to deprive the Chamber of evidence that may assist in adjudicating the Kenya cases.

26. In some cases the GoK has executed requests for records but the material conveyed to the OTP was incomplete. For example, on 15 July 2010, the OTP submitted a request for [REDACTED] files. The GoK purported to comply with this request by granting the OTP the requested files in July and August 2010. However, key documents, particularly those geographically or temporally relevant to the Prosecution’s investigations, were missing from the files. In response to a similar request mentioned above in paragraph 14, for the [REDACTED], the GoK supplied the OTP with files that were missing [REDACTED] during the PEV. The GoK offered no explanation for these deficiencies.

e. Unreasonable Delays

27. The outstanding documents and records that the OTP has requested from the GoK have been pending for periods that range from one to three years. For example, in December 2011, the OTP requested [REDACTED]. The Attorney General assured the OTP that he would undertake to obtain the requested material and that he foresaw no difficulties in doing so. However, over one year later, this request remains unexecuted.

28. The GoK has neither provided the OTP with the requested [REDACTED] nor, apparently, has it sought their production by [REDACTED]. Notably, the GoK has failed to explain why it could not furnish these records despite

²⁴ ICC-01/09-01/11-670, para. 24.

OTP'S persistent appeals, pursuant to Article 97, for information on any difficulties the GoK may be facing in providing the assistance requested.

29. Rather, the GoK has obliged the OTP to dedicate significant resources to follow up on the request for [REDACTED]. The OTP requested an update from the Attorney General's office regarding this section of its request on 11 January 2012, during a 16 February 2012 meeting with the Attorney General's office in Nairobi, and in a 20 April 2012 meeting with the Attorney General in Nairobi. During this meeting, the OTP requested information on what, if any, concrete steps had been taken to execute this request, and whether the GoK was facing any difficulties in executing this request. However, despite continued positive assurances, the material was not provided and no substantive information on the request was forthcoming.
30. As a result, on 25 July 2012 the OTP was again obliged to travel to Kenya to meet with the Attorney General to discuss this and similar outstanding requests. As in the meeting of 20 April 2012, the OTP once again sought information from the GoK on what, if any, concrete steps had been taken to execute this request, and whether the GoK was facing any difficulties in executing this request. The Attorney General undertook to obtain the requested material from the [REDACTED] of Kenya.
31. One week later, the OTP dispatched a note to the Attorney General via e-mail, again asking for an update from the GoK on what, if any, concrete steps had been taken to execute this request, and recalling his 25 July 2012 assurances. In October 2012, in an effort to address all pending OTP requests, the Prosecutor traveled to Kenya and exhorted the GoK to fully execute the OTP's outstanding requests. The OTP subsequently sent the GoK four additional letters, asking for an update on the execution of this

request. The Attorney General's responses to the letters simply stated that he had transmitted the request to the relevant Ministry.

32. The above illustrates the resources that the OTP has had to deploy to engage the GoK to provide the assistance requested. Notwithstanding these efforts, the request for [REDACTED] remains pending.

33. Even when the GoK has executed OTP requests, the process has required intense follow-up. For example, although the GoK finally granted the Prosecution access to medical facilities and records in December 2012 (one year after the initial request was made), this happened only after the OTP and Attorney General's office had exchanged fourteen formal letters as well as multiple e-mails and phone-calls to execute this request. This strategy of delay has slowed the pace at which the OTP has been able to obtain materials, resulting in incriminatory materials not being provided to the Prosecution before the expiry of Chamber-imposed disclosure deadlines.

f. Recent efforts to obtain cooperation

34. As noted above, in October 2012, the Prosecutor traveled to Kenya to discuss with the GoK her concerns regarding delays in its response to key, outstanding, OTP requests. The Prosecutor met with then-President Kibaki and Prime Minister Odinga, who assured her that the GoK remained willing to ensure timely and effective execution of the OTP's pending requests. The Prosecutor highlighted the outstanding requests, the information requested, and the dates of those requests. The Prosecutor stressed the urgency of these requests and expressed her strong desire to receive all the requested information by 30 November 2012. The principals instructed the Attorney General and the Cabinet Sub-Committee on ICC matters to facilitate expeditious responses to the OTP's outstanding requests.

35. However, the GoK failed to meet the Prosecutor's 30 November 2012 deadline for all outstanding material and failed to provide the OTP with all the outstanding items by the 9 January 2013 date set by the Trial Chamber for disclosure of the Prosecution's list of evidence.²⁵

36. The GoK is fully aware of all of the requests that remain pending. The OTP has set deadlines in the past which were not met, disclosure deadlines have passed, the trial is imminent, and several key RFAs remain outstanding. Should the GoK fail to cure its inadequate cooperation by fully executing the outstanding requests, the OTP may be compelled to seek relief under Article 87(7).

37. The Prosecution reserves the right to seek leave under Regulation 35 of the Regulations of the Court to supplement its evidence and/or witness lists if the GoK produces the requested material, for the purpose of providing the Chamber with all the evidence it needs to determine the truth.

II. The GoK has impermissibly disclosed information about Prosecution RFAs.

38. In violation of the Statute, the Submission discloses information regarding Prosecution requests for assistance. This disclosure belies the GoK's assertion that "it has complied with its obligations under the Rome Statute in good faith".²⁶

39. The Submission discloses both the existence and volume of Prosecution RFAs to the GoK and also the specific information requested.²⁷ The publication of this information violates Article 87(3), which states that "[t]he

²⁵ See ICC-01/09-01/11-440, para. 13.

²⁶ ICC-01/09-01/11-670, para. 24..

²⁷ ICC-01/09-01/11-670, paras 42-44. In addition, the Prosecution makes specific reference to ICC-01/09-02/11-713, paras 40-45 as it reveals to the Accused in both Kenya cases, among other things, part of the Prosecution's investigative efforts vis-à-vis their financial records.

requested State shall keep confidential a request for cooperation . . . except to the extent that the disclosure is necessary for execution of the request". Article 87(3) is not an optional provision that the GoK can follow if and when it chooses. It is mandatory. The Submission fails to explain why Article 87(3)'s confidentiality requirement was ignored; publishing the information was clearly not in the context or course of assisting in the "execution of the request[s]" in question, which is the only circumstance in which a State may reveal information contained in an RFA.²⁸

40. This improper disclosure has potentially caused irreparable harm to the Prosecution, as it has revealed to the Accused in both Kenya cases part of the Prosecution's investigative efforts vis-à-vis their financial records. This may cause the Accused to conceal their financial records and assets, and may deprive the Court of evidence regarding the Accused's alleged financial contributions to the crimes charged, and limit its ability to enable eventual forfeiture. Unfortunately, this is not the first time that the status and progress of the Prosecution's confidential RFAs to the GoK have been revealed publicly, contrary to Article 87(3).²⁹

41. In light of the above, the Prosecution requests that the Chamber caution the GoK for violating Article 87(3)'s confidentiality requirement.

III. There is no basis for the relief requested in the Submission.

²⁸ Article 87(3).

²⁹ See, e.g., Standard Media, Case ICC is building on Kibaki security chiefs, 28 September 2010, http://www.standardmedia.co.ke/?articleID=2000019237&story_title=Case-ICC-isbuilding-on-Kibaki-security-chiefs; AllAfrica.com, Kenya: ICC Interested in Ruto's Farm, 3 March 2012, <http://allafrica.com/stories/201203030207.html>; Jalau dot Kom, Ruto's supporters in a great panic following the ICC request for the detailed account of the land grabbing Court case in Kenya, 30 March 2012, <http://blog.jaluo.com/?p=26576>; Standard Media, Ruto 'land grab' case attracts attention of ICC prosecutor, 27 March 2012, http://www.standardmedia.co.ke/index.php?articleID=2000054988&pageNo=1&story_title=Ruto-'land-grab'-case-attracts-attention-of-ICC-prosecutor.; Standard Media, Wako, NSIS secret assignment on ICC, 30 September 2010, <http://www.standardmedia.co.ke/?id=2000019346&cid=4&articleID=2000019346>.

42. To the extent that the Submission requests any specific relief, such relief is moot and should therefore be denied.
43. The GoK requests the Chamber to issue an order “to the parties and participants in the Kenya situation, requiring that applications or complaints of non-cooperation by the Kenyan Government be made **on notice**, in order that the Kenyan Government is apprised of the complaint and given the opportunity to respond”.³⁰ The relief sought by the GoK is moot because the OTP has provided the GoK with ample notice of its dissatisfaction with respect to its level of cooperation. As recently as 5 February 2013, the OTP wrote to the GoK with respect to six of its most critical outstanding requests, noting that “there has been absolutely no progress” in some of its “long-pending request[s]”, despite “repeated follow up on a number of occasions” and “the fact that the requests were made more than two years ago”.
44. There is no need to impose a notification requirement that would inform the GoK of what it already knows – that the Prosecution is dissatisfied with the level of cooperation it has received to date. To the extent that the GoK wishes to respond to the OTP’s requests for full cooperation, the Prosecution would welcome such engagement.
45. Further, it is unclear what the GoK means by “on notice”. To the extent that this is a request to be notified, in accordance with Regulation 31, of all future Prosecution submissions referencing cooperation with the GoK, this should be rejected. As decided by the Chamber, the GoK “is not a party to or participant in the current proceedings”³¹ and therefore can only be notified if its interests are directly implicated, as in this case when it has

³⁰ ICC-01/09-01/11-670, paras 16, 45 (original emphasis).

³¹ ICC-01/09-01/11-700, para. 2.

been granted leave to file submissions pursuant to Rule 103(1).³² The Prosecution acknowledges that in the event of future Article 87(7) litigation, the GoK should be given the opportunity to be heard.

Conclusion

46. For the foregoing reasons, the Prosecution respectfully requests the Chamber to (i) deny the relief sought in the Submission, and (ii) caution the GoK regarding Article 87(3)'s confidentiality requirement.



Fatou Bensouda,
Prosecutor

Dated this 10th of May 2013
At The Hague, The Netherlands

³² ICC-01/09-01/11-700, para. 2.