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TRIAL CHAMBER V(B)

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. UHURU MUIGAI KENYATTA***

Public with confidential Annex A

**Prosecution opposition to the Defence request for the termination of the
Kenyatta case**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court to:*

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC
Gillian Higgins

Legal Representatives of Victims

Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Paolina Massidda
Caroline Walter

The Office of Public Counsel for the Defence

States Representatives

Githu Muigai, SC, Attorney General of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Patrick Craig

Detention Section

Victims Participation and Reparations Section

Fiona McKay

Other

Introduction

1. The Defence request to “terminate the proceedings against Mr Kenyatta” should be rejected as premature.¹
2. Before the possibility of withdrawing the charges is considered, the Chamber should rule upon the Prosecution’s application for a finding that the Government of Kenya (“GoK”) has failed to comply with its obligations under the Rome Statute (“Non-Compliance Application”).² Forcing the Prosecution to withdraw its charges before this issue is adjudicated would reward an obstructive government and send a message that the Court will allow non-co-operative States to thwart ICC prosecutions without sanction. Withdrawing the charges now would also reward the Accused, who heads the government that has obstructed the Court’s work, and who is in a position to ensure that the GoK complies with its treaty obligations, if he wishes it to do so. The GoK’s continuing violation of its obligations under the Accused’s leadership negates any argument that he would be unfairly prejudiced by the continuation of proceedings until the GoK’s non-co-operation has been adjudicated.
3. In the circumstances, the Prosecution submits that the appropriate course of action is for the Chamber to: (i) reject the Defence’s request to terminate the proceedings; (ii) adjudicate the Non-Compliance Application, find that the GoK has not complied with its co-operation obligations, and order the GoK to comply; and (iii) adjourn the Accused’s case until the GoK complies with its obligations.
4. If the Chamber rejects the Prosecution’s arguments and decides not to adjudicate the Non-Compliance Application, the parties should be invited to make further submissions regarding the proper procedure for the

¹ ICC-01/09-02/11-878-Red, para 5.

² ICC-01/09-02/11-866-Red.

Prosecution to withdraw its charges. In either scenario, the Defence's request for the proceedings to be terminated is premature.

Confidentiality

5. The annex to this document is filed confidentially because it refers to the substance of non-public communications between the Prosecution and the GoK regarding Prosecution requests for assistance, and to material the Defence has designated confidential. A public redacted version is being filed concurrently.

Submissions

A. Factual developments.

6. The Prosecution's adjournment request was premised on three factors: (i) the possibility of additional investigative activities, which were detailed in a confidential annex ("Annex");³ (ii) the need to adjudicate the Non-Compliance Application;⁴ and (iii) the possibility of determining conclusively whether P-0011 is willing to testify.⁵ The Prosecution hereby provides an update on these matters.
7. **Additional investigative steps.** In the week beginning 20 January 2014, the Prosecution received information that led it to conclude that it would not be able to obtain the material discussed in paragraphs 1-10 of the Annex. The Prosecution no longer considers there to be a prospect of obtaining the material.
8. Since the adjournment application was filed, the individuals listed in paragraphs 11-16 of the Annex have reneged on their previous agreements

³ ICC-01/09-02/11-875, para 18.

⁴ ICC-01/09-02/11-875, para 19.

⁵ ICC-01/09-02/11-875, para 20.

to be interviewed by the Prosecution.⁶ The Prosecution disagrees with the Defence's assertion that "[e]ach individual has provided pertinent reasons" for their change of position.⁷ The Prosecution has given the individuals assurances regarding their rights under the Statute and the purpose of the proposed interviews. Each individual has provided evidence to the Defence and there is no supportable basis for their refusal to meet with the Prosecution. Nevertheless, the Prosecution acknowledges that the hostile stance of these individuals makes it unlikely that they will provide information useful to a prosecution of the Accused.

9. Since the adjournment application was filed, several individuals have approached the Prosecution claiming to have information regarding the Accused's conduct during the post-election violence. To date, they have not yielded evidence upon which the Prosecution intends to rely.

10. **Application for a finding of non-compliance against the GoK.** The GoK's response to the Non-Compliance Application ("GoK Submissions") was notified on 9 January 2014.⁸ On 30 January 2014, the Chamber granted the Prosecution leave to submit a reply by 3 February 2014.⁹

11. **Willingness of P-0011 to testify.** For practical reasons due to P-0011's participation in the Court's protection programme, the Prosecution has been unable to determine conclusively whether he is willing to testify. The Prosecution acknowledges, however, that even if P-0011 agrees to testify, his evidence, together with the other evidence currently available, would be

⁶ In the adjournment application, the Prosecution designated information regarding these prospective interviews "confidential" because its disclosure could frustrate their purpose. *See* ICC-01/09-02/11-875, para 5. The Prosecution considers that confidential treatment is no longer warranted because: (i) the individuals have now refused to meet with the Prosecution; and (ii) the Defence response reveals that one of the matters discussed in the Annex was interviews with individuals with whom the Defence was in contact. *See* ICC-01/09-02/11-878-Red, para 34.

⁷ ICC-01/09-02/11-878-Red, para 34.

⁸ ICC-01/09-02/11-877-Conf-Anx2.

⁹ ICC-01/09-02/11-891.

insufficient to enable the Prosecution to prove the Accused's guilt beyond reasonable doubt.

B. The Defence's request to terminate the proceedings is premature while the litigation regarding the GoK's non-compliance is unresolved.

12. The Prosecution contests the Defence's assertion that the Chamber has the authority to terminate the proceedings at this stage. If the case is to be terminated, the proper procedure is for the Prosecution to withdraw the charges. But the Prosecution should not be required to withdraw its charges while the issue of the GoK's non-compliance remains unresolved. The GoK's non-compliance has blocked an important avenue of investigation in this case and the GoK has failed to provide a supportable explanation for its obstructionism. If the Prosecution were to withdraw its charges before the Chamber addresses this issue, it would send a message that States can thwart this Court's work without consequence.

13. In his concurring opinion regarding the withdrawal of the charges against Mr Muthaura, Judge Eboe-Osuji noted the Prosecutor's statement regarding the limited assistance provided by the GoK and opined that:

. . . where there is credible evidence connecting a defendant to the sort of conducts emphasised above, the consequence should not be withdrawal of the charges against him. Lest, other defendants begin to view those conducts as passports to impunity".¹⁰

14. This analysis applies here. The GoK's lack of co-operation has blocked part of the investigation in this case, and that lack of co-operation can be imputed to the Accused in light of his position as the head of government.

15. In April 2012, the Prosecution requested the GoK's assistance in obtaining financial and other information for the Accused. The Prosecution's request

¹⁰ ICC-01/09-02/11-698, Separate Opinion of Judge Chile Eboe-Osuji, para 4.

was not novel, nor did it seek information that was burdensome to compile. Rather, the request sought information that law enforcement agencies acting in good faith can normally be expected to provide in a matter of days or weeks. Today, twenty-one months later, the GoK has provided the Prosecution with no material responsive to the request.

16. The Prosecution's request for assistance is of critical importance. It seeks information relevant to a central allegation in this case – the alleged funding of the post-election violence. And it seeks it from the sources likely to possess that information – the relevant financial institutions. This is not a situation where a State acting in good faith has misplaced a peripheral request for assistance that seeks information of tangential importance. It is a situation where a State has refused to provide information that could prove decisive, both from an incriminatory and exculpatory perspective, in a prosecution for crimes of the most serious international concern.
17. The GoK's non-compliance with respect to the records request is not an isolated failure by an otherwise co-operative State. As explained in the attached annex, the GoK has also failed properly to assist the Prosecution to take testimony from police officers and to obtain certain documentary evidence. While the Prosecution does not seek a finding of non-compliance with respect to these matters at this stage, they should inform the Chamber's assessment of the Non-Compliance Application as they demonstrate a broader pattern of conduct by the GoK.
18. Notably, the GoK Submissions do not contest the facts as set out in the Non-Compliance Application, *i.e.*, that the GoK has failed to provide information responsive to the Prosecution's requests. Nor do the GoK Submissions provide a convincing justification for this failure. Instead, the GoK relies on a flawed reading of Kenyan and ICC law. As the Prosecution will

demonstrate in its reply to the GoK Submissions, the GoK's assertions are without merit and amount to after-the-fact attempts to justify its obstructive stance rather than genuinely-held beliefs as to the validity of the Prosecution's requests for assistance.

19. Where, as here, it is reasonable to infer that an accused is responsible for efforts to obstruct justice, the Prosecution adopts the reasoning of Judge Eboe-Osuji that the withdrawal of charges may not be appropriate, "[l]est other defendants begin to view those conducts as passports to impunity".¹¹
20. In this case, it is possible to attribute the GoK's failure to comply with its statutory obligations to the Accused. He has been the President of Kenya since April 2013 and, as the head of government, is in a position to ensure that Kenya fulfils its obligations under the Rome Statute, if he wishes it to do so. The Prosecution acknowledges that these "proceedings are against Mr Kenyatta in his personal capacity and not in his capacity as President".¹² The reality is, however, that the actions of the GoK under Mr Kenyatta's leadership have had an impact on the Prosecution's ability to investigate this case. It is this impact that the Chamber should address before any decision is made on the future of these proceedings.
21. This is particularly true here, where the GoK's non-compliance is a continuing violation. Indeed, the Prosecution afforded the Accused a further opportunity, as Head of State, to comply with the request by raising it again after he took office. Yet the GoK has provided no assistance on the Prosecution's records request since the Accused took office. The bottom line is that the Accused's government continues to thwart the Prosecution's efforts to obtain information that may shed light on key allegations in this case.

¹¹ ICC-01/09-02/11-698, Separate Opinion of Judge Chile Eboe-Osuji, para 4.

¹² ICC-01/09-02/11-830, para 57.

22. It is no answer, as the Defence suggests, that the Non-Compliance Application was “made late in these proceedings”.¹³ The question for the Chamber is whether the GoK has violated its treaty obligations, a straightforward inquiry now that the GoK has effectively conceded the facts upon which the Non-Compliance Application is based. The timing of the Non-Compliance Application is irrelevant.
23. The Prosecution acknowledges that the information it has requested from the GoK may or may not yield evidence relevant to this case. If it does not, and in the absence of additional evidence enabling the Prosecution to prove the Accused’s guilt beyond reasonable doubt, then the Prosecution will be required to withdraw the charges. But because the Accused is ultimately responsible for the GoK’s continuing non-compliance due to his position at the apex of government, it would be inappropriate for the Prosecution to withdraw the charges until the issue is adjudicated. Withdrawing the charges now would effectively endorse the obstructive approach of the GoK and would create a precedent that may encourage other States to ignore the Prosecution’s requests for assistance, safe in the knowledge that they will not be held to account if prosecutions are thwarted as a result.
24. Continuing the adjournment of the case until the GoK complies with its obligations would not be unfairly prejudicial to the Accused. While the charges against him would remain in place until the GoK complies, he is in a position to ensure that the GoK does so. Stated differently, it is reasonable to impute any failure on the part of the GoK to comply with its obligations to the Accused, and he is in a position to cure any prejudice he suffers as a result of its non-compliance.

¹³ ICC-01/09-02/11-878-Red, para 36.

C. The Defence's submissions on post-confirmation investigations are inapposite.

25. Given the developments outlined above in paragraphs 7-11, the Chamber need not consider the Defence's arguments on post-confirmation investigations.¹⁴ The issue for the Chamber is not the Prosecution's ability to continue to investigate after confirmation; it is whether charges should be withdrawn in circumstances where a State has obstructed the Prosecution's investigation, and where the obstruction can be attributed to the accused person. For the reasons explained above, the Prosecution believes they should not.

D. The Defence's submissions on the procedure for withdrawing the charges are premature.

26. Since it is premature to consider withdrawal of the charges until the Non-Compliance Application has been adjudicated, it is unnecessary for the Chamber to consider the Defence submissions on the procedure for withdrawing charges, including whether judicial approval is required.¹⁵

27. Only if the Chamber declines to rule on the Non-Compliance Application will the question of the withdrawal of charges arise. In that scenario, the Prosecution suggests that it would be appropriate for the Chamber to seek additional submissions from the parties on the proper procedure for the Prosecution to withdraw its charges.

E. Answers to questions raised by the Common Legal Representative.

28. The Common Legal Representative has posed a number of questions on behalf of the victims arising from the Prosecution's adjournment

¹⁴ ICC-01/09-02/11-878-Red, paras 14-17, 28-30.

¹⁵ ICC-01/09-02/11-878-Red, paras 11-13.

application.¹⁶ The Prosecution has included answers to the questions in the annex to this document.

Conclusion

29. For the foregoing reasons, the Prosecution respectfully requests the Chamber to: (i) reject the Defence's request to terminate the proceedings; (ii) adjudicate the Non-Compliance Application, find that the GoK has not complied with its co-operation obligations, and order the GoK to comply; and (iii) adjourn the Accused's case until the GoK complies with its obligations.



Fatou Bensouda,
Prosecutor

Dated this 31st of January 2014
At The Hague, The Netherlands

¹⁶ ICC-01/09-02/11-879-Anx-Red.