



Original: English

No.: ICC-01/09-02/11  
Date: 3 February 2014

**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**

**Prosecution reply to the Government of Kenya's 20 December 2013  
observations**

**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. The GoK's 20 December 2013 response ("Response")<sup>1</sup> does not contest the facts as set out in the Prosecution's application for a finding of non-compliance under Article 87(7).<sup>2</sup>
  
2. Instead, the GoK contests the legal basis for the issuance of the Records Request. These arguments fail for the following reasons:
  - The Prosecution has the power under Article 93(1) to issue the Records Request;
  - The Records Request can be fulfilled without violating Kenya's national law and procedure;
  - Article 93(1)(k) does not bar the GoK from conveying to the Prosecution the information sought in the Records Request; and
  - Article 93(3) is not a bar to a finding of non-cooperation under Article 87(7).
  
3. Despite the fact that the GoK has had 21 months to formulate a convincing explanation for its refusal to comply with the Records Request, it has failed to do so. The facts are clear and the law is clear – the GoK has not complied with the Records Request and has violated its obligations under the Statute. The net result is that the Court has been deprived of information central to a key allegation in this case, thus limiting its ability to determine the truth.

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<sup>1</sup> ICC-01/09-02/11-877-Conf-Anx2. The Chamber ordered the Registry to file a public redacted version (ICC-01/09-02/11-891, p. 6).

<sup>2</sup> ICC-01/09-02/11-866-Red.

## Submissions

### I. The Prosecution has the power under Article 93(1) to issue the Records Request.

4. Article 42(1) makes it clear that the Court and the Office of the Prosecutor (“OTP”) are not two separate “entities”, as submitted by the GoK.<sup>3</sup> On the contrary, the OTP is an “organ of the Court . . . responsible for . . . conducting investigations and prosecutions”.<sup>4</sup>
5. Article 54(3)(c) explicitly permits the Prosecution to “[s]eek the cooperation of any State . . . in accordance with its respective competence and/or mandate”, while Article 54(2)(a) mandates the conduct of investigations by the Prosecution “in accordance with the provisions of Part 9”. Both provisions explicitly envisage the Prosecution submitting requests for assistance to States – the very action the GoK now challenges.
6. Part 9 of the Statute is entitled “[i]nternational cooperation and judicial assistance”. The first substantive provision within Part 9 (Article 87) provides that “[t]he Court shall have the authority to make requests to States Parties for cooperation”. The reference in Article 54(2) (setting out the powers of the Prosecution) to the provisions of Part 9 would be meaningless if the interpretation advanced by the GoK were to be adopted.
7. Meanwhile, Rule 176(2) describes the method by which requests for cooperation made by the Prosecutor shall be transmitted to the “requested States”, specifying that it is the Prosecution that shall receive the responses from those States.<sup>5</sup> There would be no purpose to such a rule if, as the GoK

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<sup>3</sup> ICC-01/09-02/11-877-Conf-Anx2, Response, para. 6.

<sup>4</sup> Article 42(1).

<sup>5</sup> See also Frederik Harhoff & Phakiso Mochochoko in Roy Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 641 (“Rule 176, sub-rule 2, provides the Office of the Prosecutor with separate and independent standing to

suggests, any requests for cooperation made by the Prosecution are “in flagrant breach of the provisions of the Statute”.<sup>6</sup>

8. The interpretation of the Statute advanced by the GoK would mean that the Prosecution lacks the power to make *any* request for cooperation to a State Party under Article 93, since all of the forms of cooperation set out in subparagraphs (a)-(l) are subject to the chapeau of the first paragraph. In fact, a plain reading of the relevant provisions of the Statute and the Rules cited above makes it plain that the Prosecution does indeed have the ability to make requests for cooperation such as the Records Request. Equally clear is that States Parties are bound to execute these requests.<sup>7</sup>
9. The GoK’s argument is also inconsistent with, and undermined by, its own conduct. The GoK has recognised the Prosecution’s ability to make requests under Article 93(1) by granting Prosecution requests in the past. It has, for example, furnished the Prosecution with certain documents sought in Prosecution requests for assistance, and facilitated an official visit to Kenya by the Prosecutor in September 2012, and a Prosecution mission to Kenya in August 2010. Further, the GoK stated in its 8 April 2013 submission to the Chamber that its “full cooperation with and support and assistance to the Court, *including* the OTP, continue to this day”.<sup>8</sup> The Response provides no explanation for the GoK’s apparent *volte-face*.

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transmit the Prosecutor’s own requests for cooperation *directly to the requested State* and to receive the responses, information and documents in return from that State, without the Registrar or any other organ of the Court as an intermediary.” (original emphasis)).

<sup>6</sup> ICC-01/09-02/11-877-Conf-Anx2, Response, para. 6.

<sup>7</sup> See paras 11-12, below.

<sup>8</sup> ICC-01/09-02/11-713, para. 6 (emphasis added).

II. The Records Request can be fulfilled without violating Kenya's national law and procedure.

10. The purported domestic legal constraints raised in the Response<sup>9</sup> do not – and should not – bar the GoK from fulfilling the Records Request.

11. *First*, the Rome Statute requires the GoK to enact legislation to enable Prosecution requests to be fulfilled. Article 88 requires the GoK to “ensure that there are procedures available under [its] national law for all of the forms of cooperation” under Article 93(1). In doing so, the provision “preclud[es] the absence of domestic procedures as a legitimate ground for refusal to comply with request”.<sup>10</sup> This is also a bedrock principle of international law: States cannot hide behind domestic law limitations to justify failure to comply with international obligations.<sup>11</sup> Even if accepted as accurate, the GoK's list of purported legal barriers violates Article 88's implementation requirement.

12. Further, Article 93(1) requires the GoK to assist the Prosecution in obtaining the information sought. The Prosecution does not contest that there may be rights to privacy and confidentiality enshrined in Kenyan domestic law. But

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<sup>9</sup> See ICC-01/09-02/11-877-Conf-Anx2, Response, paras 10-24.

<sup>10</sup> Frederik Harkoff & Phakiso Mochochoko in Roy Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 639; see also William Shabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010), p. 987 (“article 88 sets out an obligation of result and not one of conduct . . . If [states] cannot comply with a request because of lacunae or incompatibilities in their national legal systems, they will be in breach of article 88.”); Claus Kre & Kimberly Prost in Otto Triffter (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (C.H.Beck/Hart/Nomos, 2<sup>nd</sup> ed., 2008), p. 1534, margin no. 3 (“This provision . . . is intended to ensure that States Parties have procedures under their national law for all the forms of cooperation specified in Part 9. It makes it clear that a State Party cannot use the absence of procedures under national law to refuse a request . . . [and] clarifies that the obligation to cooperate . . . cannot be qualified through domestic law.”); ICC-01/09-02/11-42-US-Exp, para. 8.

<sup>11</sup> See United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”); ICC-02/05-01/09-139-Corr, paras 20-21 (“in line with established principles of international law as embodied in article 27 of the 23 May 1969 Vienna Convention on the Law of Treaties . . . to the extent the Republic of Malawi refers to its internal law in order to justify its failure to comply with the Cooperation Requests, such an argument is rejected by the Chamber *in limine*.”).

it is the GoK's responsibility to obtain the necessary legal permission required by its domestic procedures to fulfill the Prosecution's requests.<sup>12</sup> At the very least, it must assist the Prosecution to navigate the Kenyan legal procedures itself. This requirement is reflected in Article 93(3), which requires States to "consult with the Court to resolve" any obstacles to implementation of requests for assistance caused by national law, and to consider whether assistance can be provided "in another manner or subject to conditions". The GoK has made no such efforts with respect to the Records Request.

13. *Second*, Kenyan domestic law *does* provide legal avenues for the GoK to fulfill the Records Request, if it wished to do so. The Response fails to draw the Chamber's attention to relevant provisions in Kenya's legal framework that permit the GoK to execute the Records Request. For example:

- Section 180 of the Kenyan Evidence Act allows for the inspection and copying of a banker's book if a warrant is obtained and if it is necessary or desirable for the purpose of any investigation into the commission of an offence;<sup>13</sup>
- Section 118 of the Kenyan Criminal Procedure Code authorises the police to search any "place" with a written warrant obtained from a

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<sup>12</sup> This principle was re-affirmed in November 2013 at the Assembly of States Parties, where States "Emphasize[d] the importance of timely and *effective* cooperation and assistance from States Parties and other States under an obligation or encouraged to cooperate with the Court pursuant to Part 9 of the Rome Statute or a United Nations Security Council resolution, as the failure to provide such cooperation in the context of judicial proceedings affects the efficiency of the Court and stresse[d] that protracted non-execution of Court requests has a negative impact on the ability to execute its mandate", Resolution ICC-ASP/12/Res.3, adopted at the 12th plenary meeting, on 27 November 2013, by consensus (emphasis added).

<sup>13</sup> The Evidence Act, Chapter 80, Revised Edition 2009, Chapter VII – Bankers' Books, <http://kenyalaw.org/Downloads/GreyBook/10.%20The%20Evidence%20Act.pdf>, pp. 59-60. See also *Ndeda & Associates Advocates v. Republic* [2012] eKLR, Criminal Case 7 of 2012, in the High Court of Kenya at Nairobi (Milimani Law Courts), <http://kenyalaw.org/caselaw/cases/view/78968/>.

court or magistrate for the purpose of facilitating investigation into the commission of an offence;<sup>14</sup> and

- Section 104 of the International Crimes Act, which refers explicitly to Article 93(1)(i) of the Statute, requires the Attorney General to forward a request for assistance to the relevant agency if two conditions are satisfied: (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and (b) the document or record sought is or may be in Kenya. The relevant agency shall then act “without delay”.

14. These provisions explicitly permit what the GoK repeatedly suggests is a barrier to fulfilling the Records Request: “obtain[ing] a court order”.<sup>15</sup> Similarly, there is no suggestion that the “consent” requirement described in the Response<sup>16</sup> plays any role in a search or seizure for the purpose of any investigation into the commission of an offence. If this were the case, “the entire process of law enforcement . . . would grind to a halt”.<sup>17</sup>

15. The related argument about self-incrimination<sup>18</sup> is misconceived and undermined by the GoK’s own conduct. It is misconceived because self-incrimination protects an individual from providing information that may tend to incriminate him; it does not constitute a basis for a State or its law

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<sup>14</sup> The Criminal Procedure Code, Chapter 75, Revised Edition 2009, Part IV – Provisions relating to all Criminal Investigations, <http://www.kenyalaw.org/Downloads/Acts/Criminal%20Procedure%20Code.pdf>, p. 46. See also *Royal Media Services Ltd v. Director Of Public Prosecutions* [2013] eKLR, Miscellaneous Criminal Application 43 of 2013, in the High Court of Kenya at Nairobi (Nairobi Law Courts), [http://kenyalaw.org/CaseSearch/view\\_preview1.php?link=25332296993435698743171](http://kenyalaw.org/CaseSearch/view_preview1.php?link=25332296993435698743171) (“There is no doubt that the above provisions contemplate the taking of an action where an offence is committed or for the purpose of facilitating investigation into the commission of an offence; this is an investigative function. The section further defines who may be granted the warrant – a person representing the Commission together with a police officer or other person named in the search warrant. And the issuance of the warrants is the power of a magistrate.”); *Ndeda & Associates Advocates v. Republic* [2012] eKLR, Criminal Case 7 of 2012, in the High Court of Kenya at Nairobi (Milimani Law Courts), <http://kenyalaw.org/caselaw/cases/view/78968/>.

<sup>15</sup> ICC-01/09-02/11-877-Conf-Anx2, Response, paras 13, 15, 16, 17, 19.

<sup>16</sup> ICC-01/09-02/11-877-Conf-Anx2, Response, paras 13, 14, 15, 22, 23, 24.

<sup>17</sup> ICC-01/09-02/11-879-Red, para. 39, fn. 34.

<sup>18</sup> ICC-01/09-02/11-877-Conf-Anx2, Response, paras 22-23.



enforcement agencies to abdicate its obligations to investigate criminal conduct and to assist the ICC to do the same. The self-incrimination argument is also undermined by the GoK's own conduct. It has already provided documents and other assistance to the Prosecution that support the Prosecution's case against the Accused.

16. In sum, despite the GoK's suggestion that information in the Records Request "cannot be provided without violating the rights of the concerned persons", legal avenues do exist under Kenyan law, likely involving judicial oversight from a domestic court. The Attorney General's failure to pursue these avenues over the last 21 months and his decision to raise them only when the GoK's failure to co-operate came before the Chamber suggest that the purported obstacles are after-the-fact justifications for the GoK's inaction, rather than genuine impediments to the execution of the Records Request.

III. Article 93(1)(k) does not bar the GoK from conveying to the Prosecution the information sought in the Records Request.

17. The GoK is incorrect in its suggestion that Article 93(1)(k) bars the GoK from "conveying to the Prosecution information on the properties identified".<sup>19</sup> Article 93(1)(k) – a provision dealing with forfeiture – is inapposite to the dispute over the Records Request. The principle purpose of the Records Request is not the possible "eventual forfeiture" contemplated by Article 93(1)(k), but rather to secure evidence which may point towards (or away from) the guilt of the Accused. The Records Request is properly supported by Articles 93(1)(i) and 93(1)(l), which apply without there being any question of a ruling by the Chamber.

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<sup>19</sup> ICC-01/09-02/11-877-Conf-Anx2, Response, para. 27; see also paras 25, 26.

IV. Article 93(3) is not a bar to a finding of non-cooperation under Article 87(7).

18. Contrary to the submissions made in the Response,<sup>20</sup> Article 93(3) does not prevent the Chamber from making a finding of non-cooperation under Article 87(7) in this situation.
19. Despite on-going good faith consultations on behalf of the Prosecution – in the form of numerous letters, e-mails, phone calls, and face-to-face meetings – in the 21 months since the issuance of the Records Request, the GoK has not reciprocated, claiming for the most part that it is “unable to execute” the Records Request.<sup>21</sup> This position contradicts “[t]he underlying assumption . . . that requests by the Court in principle cannot be denied”,<sup>22</sup> and violates Article 93(3), which has been described as requiring that “even if the requested measure is prohibited by the national law . . . the requested State Party does not have the right to deny a request by the Court”<sup>23</sup> but must instead consult.
20. For Article 93(3) to be triggered, the requested State must invoke a prohibition based on a “fundamental legal principle of general application”. Notwithstanding the GoK’s reliance on privacy rights as a barrier to effecting cooperation, the domestic legal provisions outlined above demonstrate that purported privacy concerns do not prevent the GoK from

<sup>20</sup> ICC-01/09-02/11-877-Conf-Anx2, Response, para. 29(ii).

<sup>21</sup> See, most recently, ICC-01/09-02/11-877-Conf-Anx2, Response, para. 18.

<sup>22</sup> Claus Kre & Kimberly Prost in Otto Triffter (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (C.H.Beck/Hart/Nomos, 2<sup>nd</sup> ed., 2008), p. 1581, margin no. 39. An explicit provision to this effect was considered by the drafters as late as in the Zutphen Draft. See *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, U.N. Doc. A/AC.249/1998/L.13 (4 February 1998), p. 154:

“Option 1

A State Party shall not deny a request for assistance from the Court”.

<sup>23</sup> Claus Kre & Kimberly Prost in Otto Triffter (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (C.H.Beck/Hart/Nomos, 2<sup>nd</sup> ed., 2008), p. 1581, margin no. 39.

executing the Records Request. The GoK has therefore failed to show that any fundamental legal principle of general application exists that would bar the Prosecution's request.

21. Even if such a prohibition could be found, Article 93(3) requires that "the requested State shall promptly consult with the Court to try to resolve the matter".<sup>24</sup> The object of such consultations includes consideration as to "whether the assistance can be rendered in another manner or subject to conditions", or, if the issue cannot be resolved, whether the Court needs to "modify the request as necessary".

22. The GoK has not undertaken such consultations. Its insistence that the Records Request come from the Chamber does not constitute "consultations" within the meaning of Article 93(3), nor does it constitute grounds for modification of the request. Similarly, the GoK's argument that national law prohibits the requested measure is incompatible with Article 93(3), since the only apparent modification that would be acceptable to the GoK would be to abandon it. Effective refusal cannot constitute "consultations" under Article 93(3). Instead, the GoK should have "act[ed] in good faith . . . to try and find a way for overcoming [sic] the problem under domestic law".<sup>25</sup>

23. Finally, even if the purported legal barriers canvassed in the Response could somehow be considered as the first steps by the GoK to engage on a

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<sup>24</sup> For the reasons set out above, the references to "the Court" in Articles 93 and 97 include the OTP. Any other reading would mean that during the 21 month period of non-compliance consultations between the Prosecution and the GoK fell outside the statutory regime, and the GoK would be under no obligation to promptly resolve the matter. This cannot be.

<sup>25</sup> Claus Kre & Kimberly Prost in Otto Triffter (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (C.H.Beck/Hart/Nomos, 2<sup>nd</sup> ed., 2008), p. 1582, margin no. 40.

substantive level, the delay with which it did so clearly violates Article 97's requirement to do so "without delay".<sup>26</sup>



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Fatou Bensouda,  
Prosecutor

Dated this 3<sup>rd</sup> day of February, 2014  
At The Hague, The Netherlands

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<sup>26</sup> See also Article 93(3) "...the requested State shall promptly consult with the Court to try to resolve the matter".