

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 7 April 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***

Confidential

Order for submissions on the implementation of the request to freeze assets

Order to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Government of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Rule 99(3) of the Rules of Procedure and Evidence, and Regulations 23 *bis* and 28(2) of the Regulations of the Court, renders this 'Order for submissions on the implementation of the request to freeze assets'.

1. On 5 April 2011, the Single Judge of Pre-Trial Chamber II issued a 'Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of [...] Uhuru Muigai Kenyatta' ('Pre-Trial Chamber's Order').¹ The Single Judge ordered the Registrar: (1) 'to prepare and transmit, in accordance with article 87(2) of the Statute and rule 176(2) of the Rules and in consultation with the Prosecutor, a request for cooperation to the competent authorities of the Republic of Kenya for purposes of identifying, tracing and freezing or seizing the property and assets belonging to or under the control of [...] Uhuru Muigai Kenyatta [...]; and (2) 'to include in the request for cooperation a provision requesting that the competent authorities of the Republic of Kenya inform the Registry, at least every two months, of any seizure of property and freezing of assets carried out in execution of this decision, and that the Registrar report any such information to the Chamber as soon as possible.'²
2. The Single Judge also 'stresse[d] that, pursuant to article 87(3) of the Statute, it is essential for the requested State to keep confidential the request for cooperation and any relevant supporting documents, except to the extent that their disclosure is necessary for executing these requests.'³
3. On 28 February 2014, the Registry filed its 'Fourth report on the execution of the request for the purpose of securing the identification, tracing and freezing or

¹ ICC-01/09-02/11-42-US-Exp.

² Pre-Trial Chamber's Order, ICC-01/09-02/11-42-US-Exp, p. 5.

³ Pre-Trial Chamber's Order, ICC-01/09-02/11-42-US-Exp, para. 10.

seizure of property and assets of Uhuru Muigai Kenyatta' ('Registry Report').⁴ The Registry requests the Chamber's guidance on the Government of Kenya's refusal to execute the Pre-Trial Chamber's Order on the basis that Article 93(1)(k) of the Statute 'can only be properly interpreted to mean, first, that criminal offences under the jurisdiction of the Court have been proved as against the accused persons, after full trial' and second, 'that the Court has also found that upon the execution of the crime the accused persons came into possession or ownership of identified property and assets; and/or that in committing the crime the accused persons employed the property and assets identified.'⁵

4. On 11 March 2014, the Office of the Prosecutor ('Prosecution') filed the 'Prosecution observations on the Registry's fourth report on the identification, tracing, and freezing of assets' ('Prosecution Observations'),⁶ suggesting that the Government of Kenya, the defence team for Mr Kenyatta ('Defence') and the Common Legal Representative of Victims be granted access to the Registry Report, the Prosecution Observations and the related Court documents, in order that they may respond to the Government of Kenya's reply to the Registry.⁷ The Prosecution submits that although normally requests to freeze assets should 'remain under seal until implemented, [...] there is no longer a need for such an approach in this case because: (i) the [Government of Kenya] has indicated in a public filing that this Court has made efforts to identify, trace, freeze and seize assets of the accused in the Kenya cases; (ii) the Court's efforts to freeze the assets have been reported in the Kenyan media; and (iii) as a result, the asset freezing issue was discussed in public session during the 13 February 2014 hearing.'⁸

⁴ ICC-01/09-02/11-905-US-Exp.

⁵ Registry Report, ICC-01/09-02/11-905-US-Exp, para. 3; *see also* Annex III to the Registry Report, ICC-01/09-02/11-905-US-Exp-AnxIII.

⁶ ICC-01/09-02/11-906-US-Exp.

⁷ Prosecution Observations, ICC-01/09-02/11-906-US-Exp, para. 3.

⁸ Prosecution Observations, ICC-01/09-02/11-906-US-Exp, para. 3, citing to ICC-01/09-02/11-713, para. 41 and to an article available from <http://www.the-star.co.ke/news/article-102541/kenya-will-not-freeze-assets-icc-four>.

5. The Chamber notes that the news article cited by the Prosecution and available on the internet contains information about a request to identify or freeze the assets of the accused, in apparent contravention of the instruction of the Single Judge to keep the matter confidential.⁹ It may be observed here, without making a final determination of it now, that the Government of Kenya appears to have been attributed as the source of such information.¹⁰ The Chamber considers that, under these circumstances, the basis for the Pre-Trial Chamber's Order to be classified as 'under seal' or '*ex parte*' has been seriously compromised.
6. Additionally, in light of the current status of the proceedings in this case, and considering the position articulated by the Government of Kenya in its reply to the Registry in relation to executing the Pre-Trial Chamber's Order,¹¹ the Chamber considers that the Registry Report and related documents raise issues for which observations from the Government of Kenya, the parties and participants are warranted.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Registry to reclassify as confidential:

- the Pre-Trial Chamber's Order (ICC-01/09-02/11-42-US-Exp);
- the Registry Report (ICC-01/09-02/11-905-US-Exp);
- the Prosecution Observations (ICC-01/09-02/11-906-US-Exp);

⁹ Pre-Trial Chamber's Order, ICC-01/09-02/11-42-US-Exp, para. 10.

¹⁰ 'T[he] Kenya government yesterday told ICC prosecutor Fatou Bensouda that it would not identify or freeze the assets of the four Kenyans accused of crimes against humanity charges at the Hague' (<http://www.the-star.co.ke/news/article-102541/kenya-will-not-freeze-assets-icc-four>). The Chamber notes that the Government of Kenya previously apologised for what it referred to as an 'inadvertent disclosure' of Prosecution requests for assistance. See Annex 1: Registry Transmission of a document received from the Government of Kenya, represented by the Attorney General of Kenya, 24 May 2013, ICC-01/09-02/11-743-Anx1, para. 3; and Decision concerning the Government of Kenya's Submissions on its cooperation with the Court, 3 July 2013, ICC-01/09-02/11-770, paras 17 and 18.

¹¹ Registry Report, ICC-01/09-02/11-905-US-Exp, para. 3; see also Annex III to the Registry Report, ICC-01/09-02/11-905-US-Exp-AnxIII.

DIRECTS the parties and participants to file, within 18 days of the date of this decision, written submissions, if any, on:

- i. the legal issue raised by the Government of Kenya, as quoted in the Registry Report;
- ii. whether the Pre-Trial Chamber's Order should be revoked or otherwise modified; and
- iii. 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; and

INVITES the Government of Kenya to make, within 30 days of the date of this decision:

- i. further submissions, if any, on the legal issue raised in the Government of Kenya's reply to the Registry;¹²
- ii. submissions specifically addressing the issue of the Government of Kenya's compliance with the Pre-Trial Chamber's direction to 'keep confidential the request for cooperation and any relevant supporting documents, except to the extent that their disclosure is necessary for executing these requests';¹³
- iii. submissions, if any, on whether the Pre-Trial Chamber's Order should be revoked or otherwise modified.

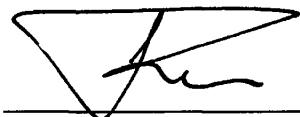
Done in both English and French, the English version being authoritative.

¹² Registry Report, ICC-01/09-02/11-905-US-Exp, para. 3; *see also* Annex III to the Registry Report, ICC-01/09-02/11-905-US-Exp-AnxIII.

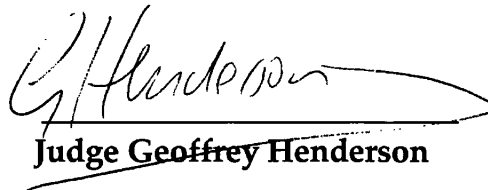
¹³ Pre-Trial Chamber's Order, ICC-01/09-02/11-42-US-Exp, para. 10.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated this 7 April 2014

At The Hague, The Netherlands