

**Cour
Pénale
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**International
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Court**



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No.: ICC-01/09-02/11
Date: 29 August 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 document with confidential annexes A to G

**Prosecution update on the status of cooperation between the Office of the
Prosecutor and the Government of Kenya**

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. In accordance with the Chamber's 31 March 2014 decision,¹ the Prosecution hereby provides its bi-monthly update on the status of its Revised Request for records from the Government of Kenya ("GoK").
2. Regrettably, there has been inadequate progress since the last update on 30 June 2014.² The GoK has produced only 34 pages of materials to the Prosecution during the two month reporting period, some of which is non-responsive to the Revised Request. The majority of the material sought in the Revised Request remains outstanding.

Confidentiality

3. Consistent with previous submissions regarding the Revised Request, this document and its annexes are filed confidentially. The Prosecution recognises, however, that there is an interest in this issue being addressed publicly, particularly since it bears on the status of the *Kenyatta* case moving forward. With the exception of Annex A, the Prosecution does not see a need for the matters addressed in this submission to be kept confidential. The Prosecution therefore does not oppose the reclassification of this submission and Annexes B to F to public.

Developments since the 30 June 2014 update

4. On 19 and 24 June 2014, the GoK produced certain materials said to be responsive to the Revised Request. The materials totaled 39 pages and represented a fraction of those sought in the Prosecution's Revised Request.³

¹ ICC-01/09-02/11-908, page 46.

² ICC-01/09-02/11-927.

³ For details, see ICC-01/09-02/11-927-Conf-Exp-AnxA.

5. On 3 July 2014, the Prosecution sent the GoK a detailed letter, which sought clarifications on the materials provided and asked for the materials that had not been provided.⁴
6. On 7 July 2014, Prosecution and GoK representatives met to discuss the matters raised in the Prosecution's 3 July letter. The participants agreed that the GoK would undertake certain actions within agreed-upon timeframes and that the Prosecution would draft a joint submission to the Chamber containing those agreements (addressed in the following paragraph), which the GoK would review before the document was filed.
7. On 8 July, the Prosecution and the GoK filed the joint submission discussed above.⁵ Among other things, the joint submission informed the Chamber of the agreement between the Prosecution and GoK that the GoK would:
 - (i) Take full faith measures to facilitate meetings between the Prosecution 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;⁶ and
 - (ii) Provide, no later than 15 August 2014, the additional information sought in the Prosecution's 3 July 2014 letter, where the requested information met the requirements of relevance and specificity.⁷
8. The Chamber held a status conference on 9 July 2014, at which the Revised Request was discussed.⁸ The Chamber reserved its ruling on the GoK's challenge to the Revised Request, and stated that:

⁴ Annex A.

⁵ ICC-01/09-02/11-930.

⁶ ICC-01/09-02/11-930, para. 10.

⁷ ICC-01/09-02/11-930, para. 8.

⁸ ICC-01/09-02/11-T-30-ENG.

... the co-operation and negotiations are to proceed in parallel and the fact -- and that the fact that submissions have been requested on this point should in no way suspend the ongoing execution of the request.⁹

9. At the Chamber's request, the Prosecution and the GoK filed further written submissions on 11 and 17 July, respectively.¹⁰
10. On 23 July 2014, having received no communication regarding the proposed meetings with bank officials, the Prosecution sent the GoK a reminder letter.¹¹ The letter referred to the agreed-upon deadlines of 8 and 15 August 2014 and inquired into the status of matters.¹² The Prosecution received no response.
11. On 29 July 2014, the Chamber ruled on the scope of the Revised Request.¹³ The Chamber's decision confirmed the validity of the Revised Request, holding that it "conforms with the requirements of relevance, specificity and necessity for the purposes of a cooperation request pursuant to Part 9 of the Statute".¹⁴
12. With the debate over the validity of the Revised Request resolved by the Chamber's 29 July decision, the Prosecution sent the GoK a letter on 31 July 2014 in an attempt to move matters forward.¹⁵ The letter explained that the Prosecution wished to work with the GoK to ensure that the Revised Request was executed in a timely fashion and was willing to meet with GoK representatives to this end.¹⁶ The Prosecution further explained that it was "open to discussing ways to address any practical hurdles that might delay the implementation of the Revised Request", and was willing to discuss any

⁹ ICC-01/09-02/11-T-30-ENG ET, page 37.

¹⁰ ICC-01/09-02/11-933; ICC-01/09-02/11-934-Conf-Red.

¹¹ Annex B.

¹² *Ibid.*

¹³ ICC-01/09-02/11-937.

¹⁴ ICC-01/09-02/11-937, page 22.

¹⁵ Annex C.

¹⁶ *Ibid.*

suggestions the GoK may have in this regard.¹⁷ The Prosecution received no response.

13. The agreed-upon deadlines of 8 and 15 August 2014 passed without the meetings taking place or the additional information being provided. The Prosecution received no explanation from the GoK regarding its failure to meet the deadlines.

14. On 20 August 2014, the Prosecution sent another letter to the GoK.¹⁸ The letter noted that the GoK had not replied to the Prosecution's communications of 23 July and 31 July and had not undertaken the agreed-upon actions within the 8 and 15 August timeframes.¹⁹ In light of the inaction on the GoK's part, the Prosecution gave 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, the OTP will consider that consultations on this matter have been exhausted [and will] seize the Chamber of the matter in the light of the pending non-compliance procedure under Article 87(7) of the Rome Statute and to reiterate our request that the *Kenyatta* case be adjourned until such time as the Government of Kenya complies with its statutory obligations.²⁰

15. The Prosecution explained that it wished to avoid further litigation with the GoK and reiterated its willingness to meet with GoK representatives to discuss how the Revised Request could be implemented.²¹

16. On 22 August 2014, the GoK replied to the Prosecution's 20 August letter.²² Among other things, the GoK stated that:

... the outstanding requests for assistance ... are being processed in accordance with the legal and administrative parameters that had already been intimated to the Court. We shall revert to you at the earliest.²³

¹⁷ *Ibid.*

¹⁸ Annex D.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² Annex E.

17. The GoK's 22 August letter was accompanied by 27 pages of materials said to be responsive to the Revised Request. As with the materials provided on 19 and 24 June, those provided on 22 August constitute a fraction of the materials sought in the Revised Request, the bulk of which remain outstanding.
18. On 27 August 2014, the Prosecution sent the GoK a response to its 22 August letter.²⁴ The Prosecution thanked the GoK for the material provided on 22 August and expressed regret that 4.5 months after the Revised Request was issued, a substantial amount of information responsive to the request remains outstanding. In particular, the Prosecution re-iterated its request for further information regarding bank accounts associated with Mr Kenyatta, as well as his tax returns, the utility of which the Chamber noted in its 29 July 2014 decision.²⁵ The Prosecution reiterated its desire to see the Revised Request implemented promptly and again expressed its willingness to meet with representatives of the GoK for this purpose.
19. Also on 27 August, the GoK provided the Prosecution with an additional three pages of documentation said to be related to the Prosecution's request for Mr Kenyatta's tax returns. The documents provided are not, however, the tax returns the Prosecution asked for and the Chamber suggested the GoK should provide. Rather, the documents are single-page worksheets issued by the Kenya Revenue Authority, which summarise Mr Kenyatta's annual tax liability for the years 2009 and 2010. The worksheets do not identify the sources of Mr Kenyatta's income or his assets and are therefore

²³ *Ibid.*

²⁴ Annex F.

²⁵ ICC-01/09-02/11-937, para. 41.

of no assistance in determining any interests he may have had in corporate entities during the relevant period.²⁶

20. On 28 August 2014, the GoK responded to the Prosecution's 27 August letter, stating that:

. . . the responses relating to part of the supplementary questions relating to the request for telephone records raised in your letter of 3 July 2014 . . . as well as the Revised Request and supplementary questions in respect of bank records, are being pursued actively by my office from the relevant Kenyan authorities I will promptly transmit them as and when I receive them.²⁷

21. Also on 28 August, the GoK provided the Prosecution with an additional four pages of documentation related to Mr Kenyatta's bank accounts. The documentation answered questions, which the Prosecution posed in its 3 July 2014 letter, regarding the bank statements provided on 24 June 2014.

Conclusion

22. The Prosecution continues to make its best efforts to engage the GoK to ensure that the Revised Request is implemented. Unfortunately, 4.5 months after the Revised Request was issued, much of the requested material remains outstanding.



Fatou Bensouda,
Prosecutor

Dated this 29th day of August, 2014
At The Hague, The Netherlands

²⁶ The GoK provided the same documents for the years 2007 and 2008 on 24 June 2014.

²⁷ Annex G.