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**International
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Court**



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No.: ICC-01/09-02/11
Date: 5 September 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 *EX PARTE* document
**With confidential, *EX PARTE* Annexes available to the Prosecution, VWU and
The Government of Kenya only**

**Prosecution observations on the Government of Kenya's 2 September 2014
update (ICC-01/09-02/11-941-Conf-Exp)**

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

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Government of the Republic of Kenya

Amicus Curiae

REGISTRY

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Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. In accordance with the Chamber's 31 March 2014 decision,¹ the Prosecution and the Government of Kenya ("GoK") have recently provided the Chamber with updates² on the status of cooperation, referred to hereafter as "The Prosecution Filing" and "The GoK Filing". The Prosecution is concerned that there are inaccuracies within The GoK Filing which might, if left uncorrected, cause the Chamber to be under a misapprehension. The purpose of this filing is to dispel any such misapprehension.

Confidentiality

2. Pursuant to Regulation 23bis(2), this document and its annexes are filed as "confidential *Ex Parte*" because they respond to a document with that classification. 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. 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 to public. The Annexes should remain *Ex Parte* and confidential, since they represent communications between a State Party and the Prosecution on a subject unrelated to this case or which the GoK would have designated in this way.

Correspondence

3. The GoK Filing refers to a letter of 22 July 2014; to an email of 7 August 2014; to "informal consultations" and "several telephone conversations" in July 2014.³ However, the contacts referred to did not relate to the Revised

¹ ICC-01/09-02/11-908, page 46.

² ICC-01/09-02/11-941-Conf-Exp and ICC-01/09-02/11-940-Conf.

³ GoK Filing, paras. 11 and 17.

Request, but to different matters. All Prosecution correspondence related to the Revised Request bears the reference OTP/KEN/KEN-84 (underlining added).

4. The Prosecution's letter of 22 July (with the reference OTP/KEN/KEN-87a/JCCD-kc),⁴ to which the email of 7 August relates, was a follow up to a separate Request for Assistance of 13 May 2014, in a separate case, with the unique reference: OTP/KEN/KEN/87-ID-kc as demonstrated by the related reference number (underlinings added).
5. The "informal consultations" referred to above, the letter of 22 July and the email of 7 August 2014,⁵ were all understood by the Prosecution to relate to two distinct issues of cooperation with the GoK: (i) the Prosecution's investigations under Article 70 of the Rome Statute, and (ii) sensitive matters of public safety in Kenya.⁶
6. The Revised Request was never part of those discussions and has always been the subject of separate and distinct correspondence.
7. There was no communication from the GoK to the Prosecution concerning the Revised Request for records in the *Kenyatta* case between the court hearing on 9 July and 22 August 2014.
8. During this period, the Prosecution wrote to the GoK on 23 July, 31 July and 20 August in letters which have already been brought to the Chamber's attention.⁷

⁴ GoK Filing, paras. 11 and 15, Annex X.

⁵ See Annex I hereof.

⁶ The 22 July letter refers to these matters as "the issues we have already discussed".

⁷ See ICC-01/09-02/11-940-Conf-AnxB; ICC-01/09-02/11-940-Conf-AnxC; ICC-01/09-02/11-940-Conf-AnxD.

The fullest possible responses

9. The GoK Filing asserts that the GoK has “provided the fullest possible responses” in this matter.⁸ This assertion is not borne out by the facts.

Bank Statements

10. The Chamber has ruled that the Prosecution request for Uhuru Kenyatta’s bank statements covering a three year period is valid.⁹ The only bank statements provided by the GoK cover a period of just three or in some cases four months. The large majority of the bank statements have simply not been supplied by the GoK.

Telephone records

11. No response has been provided to the question of whether the relevant telephone companies actually hold billing records (irrespective of their legal obligation to do so and of difficulties with record extraction) for Uhuru Kenyatta for the relevant period, although the Safaricom company appears to confirm¹⁰ that he was indeed a subscriber with that company.
12. The notion that the entire apparatus of the GoK cannot produce a single record of a telephone number which its current President may have been using when he was a Cabinet Minister at the relevant time is not to be taken seriously.

Tax returns

13. The Prosecution has asked repeatedly for copies of Uhuru Kenyatta’s tax returns for the relevant period. There has been no challenge to the propriety

⁸ ICC-01/09-02/11-941-Conf-Exp, para. 25.

⁹ ICC-01/09-02/11-937, paras. 36-37.

¹⁰ See GoK Filing, Annex XXI(a).

of this request and the Chamber has specifically approved it.¹¹ At paragraph 22 of The GoK Filing it is stated that “the relevant tax returns records” (sic) have been provided. What has been provided are the working documents generated by the Kenya Revenue Authority (“KRA”) in order to calculate Uhuru Kenyatta’s tax liability for the relevant period, together with the assurance by the KRA¹² that the KRA had not “determined any beneficial holdings in other entities by the taxpayer.” Neither of these things are what the Prosecution requested. What has been requested are the documents submitted by Uhuru Kenyatta, or on his behalf, in which he declared the various sources of his income to the KRA.

Alternative sources of information

14. No response has been given which indicates that any heed has been paid by the GoK to the Chamber’s observations, in its 29 July decision,¹³ that alternative official sources of information (such as declarations of interest which public office holders may be required to make) should be consulted and that a “cooperative approach” should be adopted by the GoK with a view to overcoming practical difficulties in obtaining the information requested.

15. It may assist the Chamber to view, in tabular form, the response of the GoK to the Revised Request. This can be seen below:

Request	Result	GoK Explanation
<u>Company records (Revised Request para 17(1))</u> <i>Request:</i> “[I]dentify...the records relating to companies (etc.)...in which [Uhuru Muigai Kenyatta] had an ownership interest...between [1/6/07] and [15/12/10].”	Requested records not provided.	“...the legal and administrative regime employed at the Companies registry...makes it impossible to do a search by using an individual’s [sic] or any other search item other than [the name of the company or the registration number of

¹¹ ICC-01/09-02/11-937. para. 41.


¹² GoK Filing, Annex XXXI.

¹³ ICC-01/09-02/11-937, paras. 41 and 42.

		the company]”: GoK Filing Annex XXIV.
<p><u>Land registry records (Revised Request para 17(2))</u> <i>Request:</i> “[I]dentify land ...transferred [from Uhuru Muigai Kenyatta or third parties identified above] to any other person... between [1/6/07] and [15/12/10].”</p>	Requested records not provided.	<p>“...we have not found any records relating to Mr Uhuru Kenyatta’s land and real property...or companies associated to him. And therefore we are certainly sure that it will not be possible to find any land or property owned or associated with the said individual unless we get further information...on the details [of the property concerned]....There are no alternative means open to the Ministry to obtain this information”: GoK Filing Annex XXIX.</p>
<p><u>Tax returns (Revised Request para 17(3))</u> <i>Request:</i> “Identify...Income Tax and VAT returns submitted by [Uhuru Muigai Kenyatta or third parties identified above] between [1/6/07] and [15/12/10].”</p>	Requested Income Tax records not provided. Letter provided stating that Mr Kenyatta was not registered for VAT.	<p>“...the relevant tax returns records obtained from the Kenya revenue Authority were sent to the prosecution...”: GoK Filing para. 22 (see para. 14 above).</p>
<p><u>Vehicle registration records (Revised Request para 17(4))</u> <i>Request:</i> “Identify...records...[of any] vehicle registered to...[Uhuru Muigai Kenyatta or third parties identified above] between [1/11/07 and 1/4/08].”</p>	Complied with, save that no checks done on companies/3 rd parties in which Uhuru Muigai Kenyatta had an ownership interest as per Revised Request para 17(1).	<p>“...The Authority has no mechanism in place by which it can identify any vehicle(s) regularly used by...corporate entities belonging to or associated to any particular individual”: GoK Filing Annex XXV.</p>
<p><u>Bank records (Revised Request para 17(5))</u> <i>Request:</i> “Identify...accounts...held by [Uhuru Muigai Kenyatta] personally, or through third parties...and provide statements...between [1/6/07] and [15/12/10].”</p>	Complied with for 3/4 month period in 2008/9. No other records provided.	None.
<p><u>Foreign exchange records (Revised Request para 17(6))</u> <i>Request:</i> “Identify...transactions by [Uhuru Muigai Kenyatta or third parties identified above] at foreign exchange institutions</p>	Complied with, save that no checks done on companies/3 rd parties in which Uhuru Muigai Kenyatta had an ownership interest as per Revised Request para 17(1).	<p>“...All foreign exchange Bureaus, they (sic) are required to report to the Central bank. Transactions that are above...[US\$] 10,000. A review of [the] records for the pertinent period do not indicate</p>

between [1/6/07] and [15/12/10].”		any that relate to Mr Kenyatta.” ¹⁴
<u>Telephone records (Revised Request para 17(7))</u> <i>Request:</i> “Identify...numbers ascribed to, used by, or associated with [Uhuru Muigai Kenyatta] and... provide...call data records... between [1/6/07] and [15/12/10].”	Requested records not provided.	“...the information sought relates to a period when mandatory subscriber registration was not in place. Consequently, the only way Safaricom can extract the records requested (if still available) is where the Office of the Prosecutor (OTP) confirms the Mobile Station International Subscriber Directory number (MSISDN) or mobile phone number that was in use by our subscriber Mr. Uhuru Muigai Kenyatta between 1 June 2007 and 15 December 2010”: GoK filing Annex XXVI(a).
<u>Intelligence records (Revised Request para 17(8))</u> <i>Request:</i> “Identify ...any information held by the security and intelligence services of Kenya concerning the activities of [Uhuru Muigai Kenyatta] and any corporate entities identified under paragraph (1) above between [1/6/07] and [15/12/10].”	Complied with.	No such information held: GoK filing Annex XXVII.

16. The Prosecution notes with regret that the full and effective compliance required of the GoK by the Chamber has not materialized to date.



Fatou Bensouda, Prosecutor

Dated this 5th day of September, 2014
At The Hague, The Netherlands

¹⁴ This letter should, it would appear, be part of The GoK Filing Annex XXXV. It seems to have been omitted in error. It is to be found at Annex II to this filing.