

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 2 May 2014

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

**CONFIDENTIAL
WITH CONFIDENTIAL ANNEX A**

Defence Submissions on the Implementation of the Request to Freeze Assets

Source: Defence for Uhuru Muigai Kenyatta

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

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(Participation/Reparation)

Applicants

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I. INTRODUCTION

1. Pursuant to the 7 April 2014 Order of Trial Chamber V(B) ('Chamber'),¹ the Defence for Uhuru Muigai Kenyatta ('Defence') hereby submits its observations on the implementation of Pre-Trial Chamber II's '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').²
2. The Defence provides observations on the issue of whether or not 'the Pre-Trial Chamber's Order should be revoked or otherwise modified.'³
3. The Defence submits that the Pre-Trial Chamber's Order should be revoked as there is no legal basis to support its implementation having due regard to: (i) the lack of evidence against Mr Kenyatta as conceded by the Prosecution;⁴ and (ii) the lack of any causal link between the property of Mr Kenyatta and the crimes alleged by the Prosecution. The implementation of the Order at this stage in the proceedings in the absence of an evidential basis and causal link would be legally unjustifiable.
4. This submission is filed confidentially as it concerns documents so designated.

¹ ICC-01/09-02/11-910.

² ICC-01/09-02/11-42-Conf.

³ ICC-01/09-02/11-910, *disposition*, p. 6.

⁴ ICC-01/09-02/11-875; ICC-01/09-02/11-892.

II. PROCEDURAL HISTORY

5. On 5 April 2011, the Single Judge of Pre-Trial Chamber II issued the Pre-Trial Chamber's Order, in which she ordered the Registrar to 'prepare and transmit, in accordance with article 87(2) of the Statute and rule 176(2) of the Rules [...] 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 Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, without prejudice to the rights of bona fide third parties.'⁵ The Single Judge ordered the Registrar to include 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 the decision and that the Registrar report any such information to the Chamber as soon as possible.⁶
6. The Registry submitted Reports on the execution of the Request on 7 June 2011, 25 April 2012 and 20 February 2013,⁷ and on 28 February 2014,⁸ the Registry submitted its Fourth Report.⁹
7. On 24 February 2014, the Attorney General of the Republic of Kenya responded to the Registry's *notes verbales*, stating the Government of Kenya's view 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 '[s]econdly, that the Court has also found that upon the

⁵ ICC-01/09-02/11-42-Conf, *disposition*, p. 5.

⁶ ICC-01/09-02/11-42-Conf, *disposition*, p. 5.

⁷ ICC-01/09-02/11-905-Conf.

⁸ This filing was notified on 3 March 2014.

⁹ ICC-01/09-02/11-905-Conf.

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.’¹⁰

8. On 10 March 2014, the Prosecution submitted its observations on the Registry’s Fourth Report.¹¹
9. On 7 April 2014, the Chamber directed the parties to file written submissions on, *inter alia*, whether the Pre-Trial Chamber’s Order should be revoked or otherwise modified.¹²
10. On 1 May 2014, the Prosecution filed its submissions pursuant to the Chamber’s 7 April 2014 Order, in which it accepted that ‘it would not be appropriate to seek to enforce the Single Judge’s 5 April 2011 Order.’¹³

III. APPLICABLE LAW

11. Where a warrant of arrest or summons has been issued, Article 57(3)(e) of the Statute vests the Pre-Trial Chamber with the power to seek the cooperation of States pursuant to Article 93(1)(k) in order ‘to take protective measures for the purpose of forfeiture [...] for the ultimate benefit of victims,’ ‘having *due regard to the strength of the evidence* and the rights of the parties concerned’ (emphasis added).
12. The Pre-Trial Chamber in *The Prosecutor v. Bosco Ntaganda* held that ‘the literal, contextual and teleological interpretation of the scope of Article 57(3) of the Statute leads to the conclusion that it also covers cooperation requests for the taking of protective measures for the purpose of

¹⁰ ICC-01/09-02/11-905-Conf, para. 3.

¹¹ ICC-01/09-02/11-906-Conf.

¹² ICC-01/09-02/11-910-Conf, *disposition*.

¹³ ICC-01/09-02/11-914-Conf, para. 5.

securing the enforcement of *a future* reparation award' (emphasis added).¹⁴

13. Article 93(1)(k) of the Statute requires States Parties to comply with requests by the Court to provide assistance, in relation to investigations or prosecutions, regarding '[t]he identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.'
14. Under Article 96(2) of the Statute, any request for assistance under Article 93 must be made in writing and contain '[a] concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request.'

IV. SUBMISSIONS

15. In circumstances where a Chamber exercises its power to seek the cooperation of States pursuant to Article 93(1)(k), in order to take protective measures for the purpose of forfeiture, the Chamber is required to have due regard to the 'strength of the evidence and the rights of the parties concerned.'
16. Previous requests at the Court for the identification, tracing and freezing or seizure of property and assets of accused have been submitted in conjunction with arrest warrants and were based upon the assertions of the Prosecution as to the perceived strength of its case at that time.¹⁵

¹⁴ ICC-01/04-02/06-1-Red-tENG, para. 85.

¹⁵ See, for example: *Katanga*, ICC-01/04-01/07-7-tENG; *Ngudjolo*, ICC-01/04-02/07-35; *Ntaganda*, ICC-01/04-02/06-1-Red-tENG; *Bemba*, ICC-01/05-01/08-8.

17. In the present case, the Pre-Trial Chamber's Order on 5 April 2011 was made on the basis of representations submitted by the Prosecution as to the strength of its case against Mr Kenyatta for the confirmation of charges.¹⁶ Key evidence in support of those submissions that was believed to incriminate Mr Kenyatta, including the evidence of Witnesses 4, 11 and 12, has since been withdrawn and demonstrated to be false.
18. On 20 December 2013, the Prosecution conceded that it has 'insufficient evidence to proceed to trial at this stage.'¹⁷ The Prosecution has also described the possibility that further permitted investigative steps might be sufficient to enable the case to be brought as 'just the wildest speculation'¹⁸ and the prospect of their yielding 'potentially conclusive evidence' as 'minimal.'¹⁹ The Prosecution has conceded that as 'it now has insufficient evidence to secure a conviction at trial,' 'it would not be appropriate to seek to enforce the Single Judge's 5 April 2011 Order.'²⁰
19. The Defence submits that the current state of the Prosecution's case is directly attributable to its own failure to review the consistency and reliability of its witnesses 'in an appropriately timely manner.'²¹
20. The Defence submits further that the requirement of having due regard to the strength of the evidence pursuant to Article 93(1)(k) of the Statute before the issuance of a forfeiture measure necessitates the revocation of the Pre-Trial Chamber's Order in the present circumstances. At this stage, there is insufficient evidence to proceed to trial and therefore insufficient evidence to justify upholding the Pre-Trial Chamber's Order,

¹⁶ The confirmation of charges hearing took place between 21 September and 5 October 2011.

¹⁷ ICC-01/09-02/11-875, para. 3.

¹⁸ ICC-01/09-02/11-T-27-ENG, p. 11, line 22.

¹⁹ ICC-01/09-02/11-T-27-ENG, p. 12, line 18.

²⁰ ICC-01/09-02/11-914-Conf, para. 5.

²¹ ICC-01/09-02/11-908, para. 87.

made in excess of three years ago, on a different evidential basis that no longer exists.

21. The Defence submits further that by referring to 'proceeds, property and assets and instrumentalities of crimes,' Article 93(1)(k) requires a causal link between the property concerned and the alleged offence.²² This interpretation is supported by the use of the term 'forfeiture' in Article 57(3)(e).²³ Any potential ambiguity in the drafting of this provision is allayed by reference to the French text, which specifies the words '*qui sont liés aux crimes*.'²⁴ In the absence of a clear causal link between the property and the crime, the Pre-Trial Chamber's Order lacks proper legal foundation.
22. Furthermore, as noted by the Chamber, no evidence has been provided to substantiate the Prosecution's serious allegation that Mr Kenyatta is in any way responsible for alleged interference with the collection of evidence or alleged non-compliance on the part of the Government of Kenya.²⁵ Mr Kenyatta's full cooperation with the Court has most recently been illustrated by his immediate request to be removed from Walter Barasa's petition to the High Court of Kenya, noting that he was improperly joined and not consulted before his name was added as an interested party to the proceedings. The Notice of Motion is attached at Confidential Annex A.

²² Triffterer, *Commentary on the Rome Statute of the International Criminal Court : Observers Notes, Article by Article*, Second Edition, 2009, p. 1430, para. 32; 'Forfeiture presupposes also causation as to whether and to what extent the offender has benefitted from the crime.'

²³ Sluiter et al., *International Criminal Procedure*, 2013, p. 297: '[T]he use of the term 'forfeiture' in Article 57(3)(e) suggests that only proceeds, assets, or property which are directly or indirectly related to the crime can be seized.'

²⁴ The French version of Article 93(1)(k) reads: *L'identification, la localisation, le gel ou la saisie du produit des crimes, des bien, des avoirs et des instruments qui sont liés aux crimes, aux fins de leur confiscation éventuelle, sans préjudice des droits des tiers de bonne foi*. See also: Martinez, 'Forfeiture of Assets at the International Criminal Court,' *Journal of International Criminal Justice* (2014), p. 14.

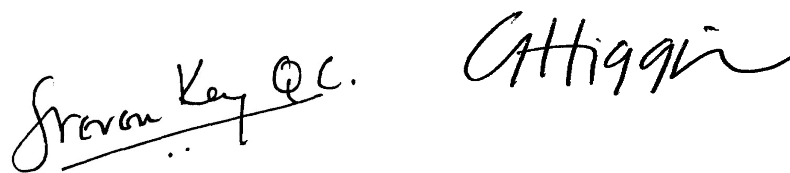
²⁵ ICC-01/09-02/11-908, para. 86.

23. The practical repercussions of the blanket freezing or seizure of assets or property would include the loss of personal bank accounts and homes. Such measures would impact not only the Accused, but also his family members, associates and staff. The Defence submits that the punitive effect of any implementation of the measures sought would be disproportionate, manifestly excessive, and would constitute an error of law, given the lack of evidential foundation, the lack of causal link between the property concerned and the alleged offences, and Mr Kenyatta's entitlement to the presumption of innocence under Article 66 of the Statute. Article 93(1)(k) requires the Chamber to have due regard to this presumption when considering the rights of Mr Kenyatta.

V. RELIEF

24. For the reasons set out herein, the Defence respectfully requests the Chamber to revoke the Pre-Trial Chamber's Order.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 2nd day of May 2014

At London, England