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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND UHURU MUIGAI
KENYATTA***

**Public
With Public redacted Annexes 1-2**

**Public redacted version of “Prosecution Submission Regarding the Government of
Kenya’s Cooperation”, 19 September 2012, ICC-01/09-02/11-488-Conf-Exp**

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Introduction

1. The Prosecution has previously alluded to the difficulties in obtaining evidence in Kenya. The purpose of this filing is to update the Chamber on the insufficient cooperation, or in many instances, non-cooperation on the part of the Kenyan government in this case. It also sets out the Prosecution's efforts to engage with the Government of Kenya (GoK) to resolve the problems without provoking a State response that completely shuts the door to further cooperation.
2. The Prosecution acknowledges that, as a general matter, international legal assistance is frequently cumbersome and time-consuming. States cooperate out of obligation or to guarantee reciprocal treatment when they need assistance, but may not give priority to requests or may act slowly when assisting a foreign investigation of criminal activity that does not implicate their direct interests.
3. This case, however, is different. Kenyans are being prosecuted for crimes committed against other Kenyans within the territory of Kenya pursuant to a treaty ratified by the GoK. Accordingly, the ICC is not a foreign court as such, but is rather a part of the Kenyan system of justice, accepted by Kenya and poised to act when the GoK fails to genuinely prosecute crimes that also fall within the Court's jurisdiction. It is well-known that this case is of enormous public and political interest in Kenya and touches directly on the State's national interests.
4. Therefore, it is reasonable to expect prompt and complete cooperation by the GoK. In other words, the absence of full cooperation by the GoK in this case cannot be excused or explained by the prioritization of national business over "foreign" requests.
5. In the Prosecution's view, Kenya's inadequate cooperation reflects a conscious decision by the Kenyan government. It is not simply the ordinary or expected

course of international cooperation. In this regard, it is noteworthy that key officials in the GoK who oversee the Government's security and international cooperation portfolios, and who would be expected to respond affirmatively to Prosecution requests for investigative assistance, submitted themselves as [REDACTED] witnesses at the pre-trial stage. [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
6. The situation presents extreme challenges for the OTP and ultimately for the Court as a whole. Kenya, a State Party with treaty obligations to assist the Court, professed a readiness to cooperate at the outset. But, following the Pre-Trial Chamber's issuance of summonses to appear, the GoK has become increasingly unresponsive, unhelpful, and at times affirmatively obstructive. Despite the GoK's selective provision of some forms of cooperation, the Prosecution continues to encounter considerable difficulties in securing full, effective and meaningful cooperation in a number of areas that are crucial to the two cases. The GoK's approach has, the Prosecution submits, been one of delay, bureaucratic obstacles, and passivity, the individual and cumulative effect of which has been to frustrate the execution of many OTP requests.
7. In uncharted waters, the Prosecution has attempted and continues to attempt to resolve the difficulties and overcome the obstacles. It has undertaken repeated visits and meetings, both at high and working levels, with GoK officials in

¹ ICC-01/09-02/11-301-Conf-AnxA, page 5, [REDACTED].

² Id., page 3, [REDACTED].

³ Id., page 3, [REDACTED].

⁴ Id., page 3, [REDACTED].

Kenya, in New York, at the seat of the Court, and elsewhere. The Prosecution also has taken steps to engage the support of other States and influential non-state actors to encourage the Kenyan government to cooperate meaningfully with the Office.

8. These efforts reflect the Prosecution's calculated determination that, as difficult and unproductive as the current relationship has been, exercising more forceful and confrontational pressure would likely have been even less productive. It was assessed that, if pushed too hard, the GoK would become resolutely and openly opposed, which would have, in turn, led to the end of *any* possibility of cooperation and even possibly to the Accused refusing to appear or participate further in the process.
9. The Prosecution has recently taken a firmer stand with the Kenyan authorities. In a letter dated 11 September 2012 to the Attorney General, the Office noted that the slow pace of processing its requests is a source of frustration and the inordinate delay in responding to long-standing requests hinders the ability of the OTP to access crucial information. It also particularly noted that the OTP has not received the requested information, or indeed any indication that the departments designated to provide the requested assistance have initiated requisite measures or taken concrete affirmative steps to facilitate effective and prompt responses.
10. In short, progress has been frustratingly slow, the relationship with the GoK is tenuous, and both progress and the relationship increasingly appear unlikely to improve. Though it is making efforts to change the situation, the Prosecution does not exclude the possibility that it may seek relief under Article 87(7).

Confidentiality

11. The Prosecution designates this filing as confidential, *ex parte* because the Prosecution's already sensitive relationship with the GoK could be further damaged if these issues were to be addressed publicly or *inter partes*. Mr. Kenyatta is currently Kenya's Deputy Prime Minister, and though Mr. Muthaura has officially resigned from government, he is reported to retain ties to, and influence within, the current administration. Providing information to Messrs Kenyatta and Muthaura would risk the material being passed on to others within the government, further undermining the sensitive relationship with the GoK.

Background

12. As a starting point, much of the most relevant and probative testimony and documentary evidence with respect to the post-election violence (PEV) can be found only in Kenya, where it is largely inaccessible to the Prosecution without official assistance.

13. When the Pre-Trial Chamber publicly authorized the Prosecutor to open an investigation into the situation in Kenya on 31 March 2010,⁵ the GoK expressed support for the work of the Court and outwardly encouraged the OTP's efforts.⁶ This official position was largely driven by the GoK's awareness of the widespread support then enjoyed by the ICC in Kenya. In this context, the GoK did not obstruct OTP's activities, it allowed a number of missions to proceed, and it facilitated high-level visits by the ICC Prosecutor. As detailed further in this filing, however, the GoK was, from the outset, much less eager to assist the OTP in actually collecting evidence. It designed an appearance of cooperation with the OTP while refraining from taking meaningful steps that could actually advance the investigation.

⁵ ICC-01/09-19.

⁶ ICC-01/09-3-Anx28.

14. After the Pre-Trial Chamber issued the summonses on 8 March 2011,⁷ the GoK, or at least some of its officials, attempted to block the ICC proceedings. They embarked on a two-pronged approach: challenging the admissibility of the two cases under Articles 17 and 19 of the Statute, which included seeking additional time to make an admissibility showing,⁸ while concurrently – but unsuccessfully -- attempting to secure a United Nations Security Council deferral pursuant to Article 16.⁹ For the deferral bid, the GoK successfully enlisted the support of the African Union.¹⁰ In both instances, the requests to defer or delay the case were predicated upon an asserted new-found determination by national authorities to investigate and prosecute post-election violence.

15. The Court rejected the complementarity challenges in 2011, finding that the showing of a genuine domestic investigation was inadequate. Subsequent events have done nothing to alleviate doubts about the GoK's national efforts. Since the Appeals Chamber's decision 13 months ago that the ICC cases were admissible,

⁷ ICC-01/09-01/11-01; ICC-01/09-02/11-01.

⁸ Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute, 31 March 2011, ICC-01/09-02/11-26 and ICC-01/09-01/11-19. Its requested six month delay would have stopped ongoing investigations (which, under Article 19(8) of the Statute, must be suspended pending a ruling on admissibility). The Pre-Trial Chamber rejected the GoK's admissibility challenge on 30 May 2011, and the Appeals Chamber affirmed on 30 August 2011. See ICC-01/09-02/11-96 and ICC-01/09-01/11-101; ICC-01/09-02/11-274 OA1 and ICC-01/09-01/11-307 OA1.

⁹ 4 March 2011 letter from Kenyan Ambassador to the UN to the Security Council; UN document S/2011/116; see also Daily Nation, Kibaki names envoys to push ICC deferral bid, 4 March 2011, (<http://www.nation.co.ke/News/politics/-/1064/1119244/-/7p3ko6/-/index.html>); Capital FM, Fresh shuttle diplomacy on ICC, 4 March 2011 (<http://www.capitalfm.co.ke/news/2011/03/fresh-shuttle-diplomacy-on-icc/>). No vote was tabled at the Security Council, given the reported view of many Council members that the conditions for an Article 16 resolution were not satisfied. See Sudan Tribune, 18 March 2011, Kenya's ICC deferral bid at the UNSC comes to an unhappy end, (<http://www.sudantribune.com/spip.php?article38328>).

¹⁰ See, e.g., Reuters, 30 January 2011, AU Accuses ICC Prosecutor of Bias, (<http://af.reuters.com/article/topNews/idAFJOE70T01R20110130?sp=true>); Bloomberg, 29 January 2011, African Union Chief Backs Kenya's Bid to Try Election Violence Suspects, (<http://www.bloomberg.com/news/2011-01-29/african-union-chief-backs-kenya-s-bid-to-try-election-violence-suspects.html>); Capital FM, 27 March 2011, Kalonzo winds up ICC shuttle diplomacy, (<http://www.capitalfm.co.ke/news/2011/03/kalonzo-winds-up-icc-shuttle-diplomacy>). See compilation of the "Decisions, Declarations and Resolutions" of the AU's 16th Ordinary Session, 30-31 January 2011, Addis Ababa, Ethiopia, Assembly/AU/ Dec. 334(XVI) (http://au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AUC_ASSEMBLY_AFRI_CA.pdf, at page 7 of 58).

there has been no visible movement to investigate or prosecute mid-level or high-level perpetrators in Kenya.

16. In addition, officials from the Director of Public Prosecution's Office (DPP) in Kenya have confirmed that fewer than 24 of the post-election violence suspects have been convicted, out of the 6,081 cases presented by the police for review by the DPP's task force.¹¹ These 24 cases, moreover, relate mostly to low-level perpetrators.¹² The DPP attributed the failure in securing convictions in most cases to substantial weaknesses in the evidence collected by the police during their investigations.¹³ The systematic inadequate police statements and incomplete files reported by the DPP's task force in the PEV cases are a further indication that the GoK lacks a genuine willingness to conduct credible investigations and to prosecute PEV perpetrators, and corroborates the evident unwillingness to cooperate fully with the Prosecution in its cases.

The Prosecution's Efforts to Improve the Relationship

17. The Prosecution has made, and continues to make, efforts to resolve the difficulties with the GoK. It has done so through repeated visits and meetings with government officials and steps to engage the support of other States and influential non-state actors. This includes a number of missions to Nairobi by representatives of the Office to meet with the Attorney General and other senior governmental interlocutors – accompanied by routine, sometimes daily, telephone and email contacts with governmental counterparts – to follow-up on individual RFAs, resolve obstacles that might prevent or impede their execution,

¹¹ The Standard, Post-election violence suspects may face international law, 18 August 2012 (http://www.standardmedia.co.ke/?articleID=2000064300&story_title=Post-election-violence-suspects-may-face-international-law)

¹² Human Right Watch, World Report 2012: Kenya, 22 January 2012, (<http://www.hrw.org/world-report-2012/world-report-2012-kenya>)

¹³ Daily Nation, Lack of evidence derails local trials, 17 August 2012 (<http://www.nation.co.ke/News/Lack+of+evidence+derails+local+trials+/-/1056/1482054/-/12jpcr6z/-/index.html>)

obtain further clarity on the status of pending requests and the Government's effort to execute them, and discuss witness security issues.

18. Thus far, the Prosecution's efforts have not enjoyed much success. The GoK continues to indicate *in principle* a willingness to cooperate, but at the same time it provides little in the way of tangible assistance in key areas related to both cases.

Present State of Cooperation by the GoK with the OTP

19. As the Chamber is aware, the Prosecution depends on State assistance in the conduct of its investigative responsibilities, which it seeks through written Requests for Assistance ("requests"/ "request") pursuant to Article 96 of the Statute. Article 86 requires States Parties to "cooperate fully with the Court in its investigation and prosecution of crimes." Further, there is a consensus that customary international law requires that treaties must be performed in good faith.¹⁴ Finally, as argued above, because Kenya itself is the situation country in this case, it has a heightened duty to cooperate fully, promptly and in good faith with the Prosecution's investigation of the crimes that occurred there. Good faith cooperation requires fidelity and loyalty to the purpose of the Statute.¹⁵

¹⁴ See Article 26 of the Vienna Convention on the Law of Treaties. This provision itself is regarded as binding, even though the GoK signed but has not ratified the Convention. Frederic L. Kirgis, Reservations to Treaties and United States Practice, (May 2003), para 2, at http://www.asil.org/insigh105.cfm#_edn3. "The Vienna Convention on the Law of Treaties is the authoritative instrument on the international law of treaties. Most of its provisions are thought to reflect customary international law, so they are considered binding even on nation-states (such as the United States) that are not formally parties to the Vienna Convention." See also Olivier Corten and Pierre Klein, *Les Conventions de Vienne sur le Droit des traités – Commentaire article par article*, Bruyant Bruxelles, 2006, p. 368 and 1081; Nguyen Quoc Dinh, *Droit International Public*, 7th ed. Librairie Générale de Droit et de Jurisprudence, 2002, p. 218 ; Anthony Aust, *Pacta Sunt Servanda*, Max Plank Encyclopedia of Public International Law, Oxford University Press at para 2, at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1449&recno=1&searchType=Advanced&title=pacta+sunt+servanda.

¹⁵ II Luhashuk 'The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law' (1989) 83 AJIL 513, p. 517. "The principle of good faith fulfillment of obligations prescribes a rule of fairness, which governs the ways and means of implementing international legal norms." See also Mark E. Villiger, *Commentary on the 1960 Vienna Convention on the Law of Treaties*, Martinus

20. Since the Pre-Trial Chamber authorized an investigation into the Kenya situation in March 2010, the Prosecution has submitted many requests to the GoK seeking substantive information and investigative assistance. The GoK has fully or, in several instances, partially, executed *some* of the Prosecution's requests, but key evidence has not been provided, as explained below.
21. Notably, opposition to ICC prosecutions in certain official quarters in Kenya continues. This opposition may have affected and may continue to affect the willingness of the GoK to provide the full range of requested assistance. Many members of the GoK and parliamentarians openly oppose the trial of the Accused in this forum and portray the cases to be against the people of Kenya, insinuating that the cases are against Kenya's national interests. In April 2012, President Kibaki endorsed extending the jurisdiction of the East African Court of Justice to cover crimes against humanity, a move reportedly designed to allow that court to assume jurisdiction over the Accused (thereby depriving this Court of jurisdiction).¹⁶
22. Multiple Prosecution sources in Kenya have confidentially reported to the OTP that President Kibaki's suspicion of the ICC is based in part on efforts by Mr. Kenyatta and his associates to persuade President Kibaki that the Prosecution intends to charge him when he steps down from office, and this has

Nijhoff Publishers, 2009, p. 367. "The parties must carry out the treaty obligations in good faith (*bona fides*). Parties are required to the best of their abilities to observe the treaty stipulations in their spirit as well as according to their letter. Good faith furthermore covers the narrower doctrine of the abuse of rights according to which parties shall abstain from acts calculated to frustrate the object and purpose and thus impede the proper execution of the treaty."

¹⁶ See, e.g., Anthony Kariuki, Kenyan President Kibaki Leads East African Community in New Bid to Try Ocampo Four Locally, African Standard News, 28 April 2012, (http://www.africanstandardnews.org/index.php?option=com_content&view=article&id=294:anthony-kariuki-&catid=3:newsflash); Judith Akolo, AU in Final Push to Take over ICC Cases, Kenya Broadcasting Corporation, 9 July 2012, (<http://www.kbc.co.ke/news.asp?nid=77278>); EAC Leaders Agree to Extend Jurisdiction of the East African Court of Justice, State House, Nairobi, Kenya, April 27, 2012, (<http://www.statehousekenya.go.ke/news/april2012/2012280402.htm>).

also been cited in public media reports.¹⁷ If he is fearful of prosecution, that would likely contribute to declining of support for the Court at the highest government levels.

23. But whatever the reason, it remains the fact that in a number of key areas of the Prosecution's investigation, the GoK has not provided substantial cooperation and, in other ways, is affirmatively hindering Prosecution efforts.

- The GoK has failed to execute a number of requests for important and relevant evidence.
- The GoK took no action to defend the Prosecution's interests in a legal proceeding that temporarily enjoined the Prosecution's efforts to take witness statements concerning the police role in the PEV, and has taken no actions to resolve that case over the past 19 months.
- Several sources have informed the Prosecution that its investigators are monitored by the Kenyan security apparatus while in the country, and Prosecution staff reported on several occasions that they suspect having been followed or watched in the course of their in-country investigations.
- There are, additionally, security concerns that limit the Prosecution's ability to obtain necessary information. Kenyan public bodies have subjected persons it believes are cooperating with the Prosecution to questioning and even official government examination. For example, in a series of public hearings earlier this year conducted by Kenya's [REDACTED] [REDACTED] formally questioned certain key actors [REDACTED] about their interaction with the Prosecution in terms that implied that their cooperation with the Court would harm the Kenyan nation. Among them was

¹⁷ See, e.g., Kibaki Worried by ICC, Star, 4 February 2012, (<http://www.the-star.co.ke/national/national/60974-kibaki-worried-by-icc>).

[REDACTED] who is one of those persons (described generally at the 12 June 2012 status conference) whom the Prosecution wishes to call as a witness, but who has yet to confirm his willingness to testify.¹⁸

In another incident, [REDACTED], a senior member of the Kenyan National Security Intelligence Service, telephoned a Prosecution [REDACTED] on mission in Kenya and requested a meeting. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- The GoK repeatedly requested that the Prosecution and the Court provide access to all confidential information in the case, under article 93(10) of the Rome Statute. The Prosecution and the Chamber refused.¹⁹ Subsequently, in a 20 June 2012 letter, the GoK requested the Prosecution to confirm whether two named persons are Prosecution witnesses.²⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁸ See ICC-01/09-02/-11-T-18-ENG ET, page 6, lines 3 to 8.

¹⁹ Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194, 21 April 2011, ICC-01/09-79; Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, 21 June 2011, ICC-01/09-63; Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194, 16 September 2011, ICC-01/09-79; Decision on the Second Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, 12 July 2012, ICC-01/09-97.

²⁰ 20 June 2012 letter from Attorney General Githu Muigai to the Office of the Prosecutor (received 26 June 2012).

[REDACTED]

- The GoK has also requested, as a matter of “diplomatic courtesy,” advance written notice if the Prosecution wishes to speak to any Kenyan civil servants or State officials. While this may be common practice in international relations, the Prosecution submits that this situation is different. Given the known position of the GoK with respect to the cases, the Accuseds’ influence and connections within the government, and the Kenyan government’s perceived interest in blocking the ICC prosecution, the Prosecution cannot give such notice while remaining faithful to its obligation to protect the security of all persons.

24. Finally, a number of the Prosecution’s confidential requests for judicial assistance to the GoK and its ongoing cooperation communications have appeared in the Kenyan media and were given substantial public coverage, contrary to Article 87(3).²² The risk of leaks and public exposure inhibits the ability of the Prosecution to request sensitive information if the disclosure of the request could potentially threaten the well-being or security of individuals.

25. The Prosecution briefly outlines below some of the key instances in which categories of important evidence continue to be effectively withheld.

²¹ *Ibid.*

²² [REDACTED]

i. Documents regarding the State security apparatus.

26. On 27 August 2010, the Prosecution sent the GoK a request for judicial assistance ("August 2010 request") seeking, among other items, the deployment orders of specific police units from December 2007 to March 2008, and the minutes of security committee meetings at the district, provincial and national levels during the same period.²³ The vast majority of the documents, being official documents, can be obtained only through the GoK, and are of significant importance to the Prosecution's case. Indeed, they were relied upon by the Kenyan Commission Investigating the Post Election Violence (CIPEV) to show the GoK's involvement in the PEV.

27. In the months after the August 2010 request was sent, the Prosecution and the GoK exchanged letters regarding the requested assistance. Specifically, the GoK claimed that the request included issues that touched on Kenya's national security and were unrelated to the investigations by the ICC. Although the OTP disputed this claim, it nonetheless agreed to narrow the scope of its request. In response, the GoK produced most, but not all, of the requested documents from the revised and reduced list. At confirmation, the Defence for Mr. Muthaura presented minutes of meetings that fell within the scope of the OTP's original August 2010 request and that were not provided by the GoK to the Prosecution.²⁴

28. In addition, pertinent information was redacted in some of the minutes that were provided by the GoK, even though the GoK had given the same minutes without redactions to the Commission of Inquiry into the Post-Election Violence (CIPEV). For example, the GoK redacted the list of attendees from the Provincial and

²³ 27 August 2010 letter from the Office of the Prosecutor to Minister George Saitoti.

²⁴ Media reports also refer to an alleged vetting process undertaken by the GoK to screen which documents would be sent to the OTP on ostensibly national security grounds, "Wako, NSIS secret assignment on ICC", Standard Media (30 September 2010), available at <http://www.standardmedia.co.ke/?id=2000019346&cid=4&articleID=2000019346>

District Security Committee minutes it provided to the Prosecution, but it did not redact that information in the same minutes previously provided to the CIPEV.

ii. Interviews with police officers

29. The Prosecution's repeated efforts to interview police officers, which could have produced critical information regarding the police role in the PEV, were stymied and ultimately stopped completely.

30. In September 2010, lawyers for the police officers informed the OTP that the officers declined to be interviewed as voluntary witnesses (pursuant to Article 99(4) of the Rome Statute and Section 118 of the Kenya International Crimes Act (ICA)). As such, it was necessary for the OTP to seek national assistance to provide compulsory process (pursuant to Article 93 of the Rome Statute and Sections 77 and 78 of Kenya's ICA). The Kenyan statutes require that evidence taken by the national authorities on the OTP's behalf must be tendered before a judge of Kenya's High Court.²⁵ Section 80 of the same Act provides that the High Court Judge may compel the appearance of a person for questioning, although the person may not be compelled to incriminate him or herself.²⁶

31. On 4 October 2010, the Kenyan Attorney General authorized the OTP's request to interview the 10 officers, and he transmitted this authorization to Chief Justice Gicheru who in turn appointed High Court Justice Rawal to take the evidence. The Prosecution thereafter sent several missions to Kenya for hearings before Justice Rawal. [REDACTED]

²⁵ This was the first time, since the enactment of the ICA in 2008, that the procedure under Article 78 of the ICA had been used.

²⁶ ICC-01/09-39, para 28; [REDACTED]

[REDACTED]

[REDACTED]

32. [REDACTED]

[REDACTED] separately indicated that he would be willing to be interviewed, but when Prosecution investigators subsequently arrived to interview him he declared that he had a lawyer and refused to submit to questioning. [REDACTED]

[REDACTED]

[REDACTED] on 12 January 2011, two private individuals moved the Nairobi High Court for an injunction to prevent the police interviews or any further investigative activities by the ICC, alleging, *inter alia*, that provisions of the Rome Statute contravene the Constitution.²⁹ According to press reports, “[t]he State and the senior Government officials involved in the ICC proceedings did not object to the claims by the businessmen” who submitted the injunction application.³⁰ Nor, apparently, did the GoK contest the standing of the two private businessmen to challenge the cooperation with the ICC. The same media reports indicated that two security officials represented by Evans Monari (who also represented the nine officers before the court in Kenya as well as Major

²⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁹ See The Standard, Taking of statements by ICC from security officials suspended, 1 February 2011 (<http://www.standardmedia.co.ke/InsidePage.php?id=2000027964&cid=4&>); High Court of Kenya at Nairobi, Mwangi & Kuria v. Attorney General, Order, 1 February 2011, page 1.

³⁰ The Standard, Taking of statements by ICC from security officials suspended, 1 February 2011 (<http://www.standardmedia.co.ke/InsidePage.php?id=2000027964&cid=4&>).

General Ali at the ICC), appeared in the case as interested parties and also, predictably, did not oppose the businessmen's request.³¹

33. On 1 February 2011, the High Court granted an interim injunction preventing Justice Rawal from the "taking or recording of evidence from any Kenyan or issuing any summons to any Kenyan for the purposes of taking any evidence pursuant to any International Criminal Court process pending the hearing and determination of [the] application".³² It also referred the application to the Chief Justice of Kenya to appoint a three judge bench to hear the petition on the merits.³³

34. The Chief Justice retired at the end of February 2011, four weeks after the Court issued the interim injunction, without having appointed the three judge bench.³⁴ The GoK has made no effort to resolve the case, as it is required to do consistent with Articles 88 and 97 of the Statute. It did not urge the High Court to lift the injunction. It did not ask the Chief Justice to appoint the bench to hear the case on its merits. Accordingly, the interim – but for all intents and purposes, permanent -- injunction remains in place.

35. On 16 February 2012 the Prosecution [REDACTED] [REDACTED] and requested assistance from the GoK in re-starting the statement taking process. [REDACTED] declined, despite the GoK's obligations under the Statute, claiming that the issue was in the hands of the Courts, though he did request that the OTP reimburse the GoK for the resources that it had

³¹ The Standard, Taking of statements by ICC from security officials suspended, 1 February 2011 (<http://www.standardmedia.co.ke/InsidePage.php?id=2000027964&cid=4&>).

³² High Court of Kenya at Nairobi, Mwangi & Kuria v. Attorney General, Order, 1 February 2011, page 1; *see also* The Standard, Taking of statements by ICC from security officials suspended, 1 February 2011 (<http://www.standardmedia.co.ke/InsidePage.php?id=2000027964&cid=4&>).

³³ High Court of Kenya at Nairobi, Mwangi & Kuria v. Attorney General, Order, 1 February 2011, page 1; *see also* The Standard, Taking of statements by ICC from security officials suspended, 1 February 2011 (<http://www.standardmedia.co.ke/InsidePage.php?id=2000027964&cid=4&>).

³⁴ *See* The Standard, Gicheru's exit: What it means to Kenya's ICC case, 17 March 2011 (<http://www.standardmedia.co.ke/InsidePage.php?id=2000031352&cid=4>).

expended in providing facilities to facilitate the OTP's attempts to take statements from the police.

36. In a 23 April 2012 meeting with government officials, in response to the Prosecution's repeated inquiries, the officials again did not assist, instead inviting the Prosecution either to contact directly the parties who filed the January 2011 petition for an update on the status of the case or to submit a formal request to the Government for updated information on the case.

37. The Prosecution raised the issue again with the Attorney General and the Cabinet Committee on the ICC during its high-level mission of July 2012. The government officials with whom the Prosecution discussed the injunction again insisted that they could do nothing.

38. As a result, the Prosecution has been unable for the past two years to interview or obtain evidence from GoK police officers and security personnel who have knowledge of the Accuseds' role in the PEV. As set out below, the Defence has had access to police evidence and was able to offer such evidence at confirmation.

iii. Access to medical records and facilities

39. On 8 December 2011, the Prosecution sent the GoK a request to facilitate visits to medical facilities in Kenya to meet with medical practitioners and to screen and collect files related to individuals affected by the PEV ("Medical request").³⁵ The Prosecution also requested the GoK to appoint a contact person at the relevant Kenyan Health Ministries with whom the Prosecution could liaise.³⁶ The Prosecution has not been granted access to the medical facilities, has not received

³⁵ 8 December 2011 letter from the Office of the Prosecutor to Minister George Saitoti, transmitting the 6 December 2011 OTP Request for Assistance.

³⁶ *Ibid.*

any of the requested records, and has not been notified of the appointment of a contact person.

40. On 12 March 2012, the GoK sent an interim reply, requesting a list of the specific medical facilities the Prosecution wished to visit.³⁷ The Prosecution provided the list on 17 April 2012.³⁸ Approximately two weeks later, the GoK informed the Prosecution that it sent letters to all the relevant medical facilities to obtain consent for the disclosure of the documents. Nothing happened. Following a high-level mission in late July and related follow-up inquiries by the OTP's Director of the Cooperation Division on the status of this pending request, the Attorney General responded with a letter on 7 August 2012 that merely re-stated that the Attorney General had transmitted the OTP's request to the Ministry of Medical Services. To date, no documents have been provided, no access has been granted and, to the Prosecution's knowledge, no contact person has been appointed.

iv. Production of Records in Response to requests

41. While the GoK has responded partially to a number of requests, most remain pending in whole or in part.³⁹ For example, in response to a request for the Kiambaa judicial files, the Kenyan authorities provided documents that were missing key pages relevant to the Prosecution's request.

42. [REDACTED]
[REDACTED]
[REDACTED]

³⁷ 12 March 2012 letter from Attorney General Githu Muigai to the Office of the Prosecutor (received 19 March 2012). The GoK also sent the Prosecution an acknowledgement letter on 20 February 2012 (received 27 February), indicating that it was "in contact with the relevant competent authorities and holding consultations to determine the appropriate assistance" with respect to the Medical request.

³⁸ 17 April 2012 email from the Office of the Prosecutor to State counsel in the Attorney General's office.

³⁹ See Kiambaa judicial files and the request regarding Kapondi.

43. On 6 December 2011 the Prosecution requested recordings or transcripts of public radio broadcasts aired on KASS FM. Witnesses indicated that Mr. Sang personally made statements in those broadcasts referring to other tribes, using derogatory terms and encouraging his audience to remove them from the Rift Valley by force. Thus, the requested items would be highly relevant to the pending charges. A Prosecution source also informed the Prosecution that he contracted with the GoK to monitor and record the broadcasts for the government during the relevant time period. The GoK has not complied with this request by providing recordings that it may have within its own files or seeking their production by the radio station. As noted below, selective recordings were offered by the Defence at confirmation.

44. On 24 April 2012, the Prosecution requested various financial and telephone records that could be relevant to the charges against the four Accused in the two cases.⁴⁰ None of the requested records has been provided. On 14 June 2012, the GoK asked the OTP for a “schedule” of the specific requests made in the 24 April request for assistance.⁴¹ On 25 July 2012, Prosecution representatives explained to the Attorney General that a “schedule” was not necessary since the request was very clear. In a letter dated 7 August 2012, the Attorney General stated that he had conveyed the request to the Ministry of Finance.⁴² Nearly five months after the request was first made, nothing has been provided.

The Defence’s Apparently Unfettered Ability to Investigate

45. The Accused in both cases appear to have much broader access to the evidence. In the Kenya 2 case, for example, the Prosecution was unable to gain access to all the intelligence documents that it requested. However, Mr. Muthaura produced

⁴⁰ 24 April 2012 OTP Request for Assistance.

⁴¹ 14 June 2012 letter from Attorney General Githu Muigai to the Office of the Prosecutor (received 27 June 2012).

⁴² 7 August 2012 letter from Attorney General Githu Muigai to the Office of the Prosecutor (received 7 August 2012).

32 entries from the National Security Advisory Committee minutes, entries never provided to the Prosecution in response to its August 2010 request, as Defence exhibits during the confirmation hearing.⁴³ These excerpts confirm that full prosecutorial access to these complete documents (beyond the entries introduced into evidence by the Defence) could have affected the presentation of the Prosecution's case against Major General Ali and Mr. Muthaura. The use by the accused persons of discrete entries, with no obligation of course to produce other incriminating portions, while the Prosecution was denied access to the same documents by the GoK, limited the information available to the Pre-Trial Chamber in the confirmation hearing. It also reflects an uneven investigative playing field that is tilted, seemingly with GoK acquiescence, in the Accuseds' favor.

46. As noted previously, the Prosecution has also been legally blocked for over 19 months from taking evidence from police officials. At confirmation, however, the Muthaura and Ali Defence submitted 39 written statements from police and other law enforcement officials.⁴⁴ All of these statements were taken several months after the issuance of the injunction preventing the Prosecution from interviewing police officials.⁴⁵

47. As noted previously, the Prosecution requested recordings or transcripts of KASS FM broadcasts during a six month period. Kenya's failure to provide the requested information is particularly striking in light of the fact that it had enlisted persons specifically to monitor and record the broadcasts for the government. Nor can it be said that the materials were unavailable within Kenya; to the contrary, in the Kenya 1 case, Mr. Sang produced 20 to 30 hours of radio broadcasts preceding the PEV.

⁴³ See Annex 1.

⁴⁴ See Annex 2.

⁴⁵ *Ibid.*

Conclusion

48. In sum, the failure of the GoK to cooperate fully has severely compromised the Prosecution's ability to investigate the crimes in this case. Nonetheless, the Prosecution will continue all efforts to continue engaging the GoK with the aim of obtaining full cooperation.



Fatou Bensouda,
Prosecutor

Dated this 19th day of September, 2012
At The Hague, The Netherlands