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TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Public redacted version of the Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya

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Introduction

1. Pursuant to Article 87(7), the OTP requests the Chamber to find that the Government of Kenya (“GoK”) has failed to comply with OTP’s April 2012 request to produce financial and other records of the Accused (“Records Request”). These records are relevant to critical issues in this case, and may shed light on the scope of the Accused’s conduct, including the allegation that he financed the crimes with which he is charged.

2. The OTP seeks an Article 87(7) finding because all of its previous attempts to secure the records have been exhausted. For 19 months, the OTP’s repeated requests have been met with obfuscation and intransigence. Now, just over two months before the start of trial, the Accused’s financial records remain outstanding. The net effect of the GoK’s inaction has been to limit the body of evidence available to the Chamber, hindering its fact-finding function and ability to determine the truth. It has also limited the OTP’s ability to investigate all the facts in this case under Article 54(1).

3. The GoK has not updated the OTP with concrete steps it has taken to obtain the outstanding records for over one year, nor has it provided any specific justification as to why it has still not furnished them, other than offering a broad-brush explanation on 10 June 2013 that “information must be collated from various sources within and outside the government” and “consent [obtained] from relevant individuals” was required.¹ Given that financial records relevant to the alleged commission of crimes can be obtained by any national law enforcement agency acting in good faith without undue difficulty, this explanation,

¹ ICC-01/09-02/11-755, para. 6.

offered over 12 months after the request was made, does not bear scrutiny.

Confidentiality

4. This filing is designated as “confidential, *ex parte*, Office of the Prosecutor and Government of Kenya only” because it contains information about confidential communications between the GoK and the OTP. A public redacted version will be filed.

5. As the GoK itself publicly revealed the existence of the Records Request in a previous filing,² maintaining the confidentiality of this information would serve no identifiable purpose. Thus, the OTP has referred to the Records Request in the public redacted version of this submission. In an abundance of caution, the OTP has not referred to the remainder of the confidential communications since such communications are normally subject to confidentiality treatment. However, in light of the GoK’s decision to reveal the existence of the Records Request in a public filing, the OTP submits that the GoK has also waived confidentiality for the communications related to the Records Request. In the circumstances, these communications, too, should be made public. Should the Chamber accept this submission, the OTP asks that the Chamber reclassify this submission as public.

Statement of facts

6. On 24 April 2012, the OTP sent the GoK a request for assistance seeking financial and other records of the then-four Kenya accused,³ and requesting the GoK to [REDACTED] (“Request for Assistance”). The request is attached to this submission as confidential, *ex parte* Annex A.

² ICC-01/09-02/11-713, para. 41. See below at para. 18.

³ [REDACTED].

The Prosecution is not seeking the Chamber's intervention at this stage with respect to the request for [REDACTED] in paragraph 12 of the Request for Assistance; this application is restricted to the request for financial and other information specifically identified in paragraphs 9 to 11 thereof, referred to throughout this submission as the "Records Request".

7. Since the issuance of the Records Request, there have been several filings on the state of GoK's cooperation with the Court.⁴ In May 2013, the Prosecution foreshadowed its intention to seek relief under Article 87(7) if the GoK did not subsequently comply with the Records Request.⁵
8. The GoK's initial response to the Records Request is dated 14 June 2012. In it, [REDACTED].
9. On 7 August 2012, the GoK informed the Prosecution that it had forwarded the request to the Ministry of Finance.⁶ On 11 September 2012, the Prosecution wrote a candid letter to the GoK, noting:

[REDACTED].⁷
10. The GoK's only response was to inform the Prosecution in a letter dated 18 September 2012 that the position was "still the same as it was on 7 August 2012".⁸
11. On 22 October 2012, the Prosecutor traveled to Kenya to appeal to the GoK, at the highest level, to produce these items. In a meeting with the then-President Kibaki and Prime Minister Odinga, the Prosecutor highlighted the outstanding Records Request, specifying the information

⁴ See, e.g., ICC-01/09-02/11-T-23-ENG, p. 4, lines 19-22, ICC-01/09-02/11-713; ICC-01/09-02/11-733-Red; ICC-01/09-02/11-755; ICC-01/09-02/11-770.

⁵ ICC-01/09-02/11-733-Red, para. 36.

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

requested and the date of the request, and received assurances of the continued willingness of the GoK to ensure timely and effective compliance with the outstanding requests. The Prosecutor stressed the urgency of the request and expressed her strong desire to receive the requested information by 30 November 2012.

12. The Prosecutor reiterated this urgency in a 29 October 2012 letter to President Kibaki, [REDACTED].⁹ [REDACTED].

13. Notwithstanding the assurances that the Prosecutor received during her visit to Kenya, the GoK failed to meet the Prosecutor's 30 November 2012 deadline for the outstanding Records Request.

14. In a 7 November 2012 letter to the OTP, the GoK stated that [REDACTED].¹⁰ [REDACTED]. At any rate, the letter did not mention any steps taken to comply with the Records Request.

15. In a 15 November 2012 meeting between the Prosecutor and the Attorney General of Kenya, the Prosecutor [REDACTED]. The Prosecutor's request [REDACTED] was repeated in a letter of 20 November 2012.¹¹

16. On 23 November 2012, the GoK re-stated that it had referred the Records Request to the Ministry of Finance and other "[c]ompetent authorities".¹²

17. The GoK failed to meet the Prosecution's 30 November 2012 and 9 January 2013 deadlines. During this period the OTP sent more letters to the GoK, requesting additional information on the steps, if any, the GoK

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

had taken to execute the Records Request.¹³ In its responses, the GoK failed to address the Records Request. [REDACTED].¹⁴

18. On 9 April 2013, the GoK filed its “Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence” (“Submissions”).¹⁵ In its Submissions, the GoK [REDACTED] that it was unable to process the Request for Assistance, contending, [REDACTED] that “there has to be a court order in place in order to fulfil this request”.¹⁶ The GoK remained ambiguous on which part of the request it was “unable to process”.¹⁷

19. On 8 May 2013, the Prosecution filed its response to the GoK Submissions (“Response”), listing the Records Request as one of the requests that had not yet been complied with.¹⁸

20. On 10 June 2013, the GoK submitted its reply to the Prosecution’s Response (“Reply”),¹⁹ which, for the first time since 23 November 2012, directly addressed the Records Request. In the Reply, the GoK stated that “information must be collated from various sources within and outside the government and in respect of information held by private individuals, the consent of the relevant individual is required by law first before the government can access such information”.²⁰ The Reply contained no information on whether the GoK had taken any steps to “collate” the information from the “various sources” referenced, or to seek “consent of the relevant individual[s]”. Additionally, this was the

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ ICC-01/09-02/11-713.

¹⁶ ICC-01/09-02/11-713, para. 41.

¹⁷ Ibid.

¹⁸ ICC-01/09-02/11-733-Red, paras 16-19.

¹⁹ ICC-01/09-02/11-755.

²⁰ ICC-01/09-02/11-755, para. 6.

first time since the transmission of the Records Request that the GoK had invoked potential privacy considerations as a reason to further delay the execution of (any portion of) the request.

21. In sum, the Records Request remains outstanding to date, and the GoK has not produced any of the information sought therein. In more than one-and-a-half years, the GoK's only apparent action aimed towards furnishing the requested records has been to inform the OTP that it has forwarded the Records Request to relevant agencies and then, lately, assert potential privacy considerations as a reason to not execute the request.

Submissions

I. The OTP has taken all possible measures to secure the GoK's compliance with the Records Request.

22. The exchanges between the Prosecution and the GoK demonstrate that the Prosecution has "tak[en] all possible measures to ensure the cooperation" of the GoK.²¹ Despite repeated missions to Kenya by Prosecution staff, the exchange of numerous letters, and persistent phone-calls to exhort the GoK to furnish the items sought in the Records Request it has been pending for over one-and-a-half years. In this period, the GoK has provided inconsistent and often ambiguous responses to explain why the Records Request has not been executed. Only on a few separate occasions were these responses clearly directly related to the Records Request.²² On others, the GoK failed to mention the Records Request, seemingly focusing only on the request for [REDACTED].

²¹ ICC-02/05-01/07-57, p. 7.

²² On 7 August 2012, 18 September 2012, 23 November 2012 and in a submission to the Court on 10 June 2013. See above paras. 9-20.

II. The GoK has failed to fulfil the Records Request.

23. The GoK's responses to the Prosecution's repeated requests for records suggest that it has not made a genuine effort to retrieve them. Kenya is the situation country, and therefore relevant and probative documentary evidence for the Prosecution's case can be only found in Kenya. Critical evidence that could incriminate or exculpate the Accused – such as his financial records – is accessible to the Prosecution only through the effective assistance of the GoK. As Pre-Trial Chamber II in the *Al Bashir* case noted in the context of an Article 87(7) finding, “the ICC relies mainly on the States' cooperation, without which it cannot fulfil its mandate”.²³

24. Against this backdrop, the GoK has failed to execute the OTP's most important request for evidence in this case. Pursuant to Article 93(3), the GoK has a statutory obligation to consult with the Prosecution regarding any obstacles that may impede the execution of the Records Request, in particular when the “execution of a particular measure of assistance detailed in a request [...] is prohibited in the requested State”. During the consultations, “consideration should be given to whether the assistance can be rendered in another manner or subject to conditions”. Article 97 contains a similar obligation on the State to consult “without delay in order to resolve the matter” if it identifies problems which may impede or prevent the execution of a request. The objective of such consultations is to seek a resolution of any disputes, so that the Court's request can be effectuated.

25. The GoK has not engaged in any meaningful consultation with respect to the Records Request. Contrary to the GoK's own submissions regarding

²³ ICC-02/05-01/09-151, para. 22. See also ICC-02/05-01/09-139-Corr.

the consultative process that is supposed to take place when resolving requests for assistance from the Court,²⁴ the GoK has not identified, as required by Articles 93(3) and 97, any specific legal impediments that would justify its failure to fully implement the outstanding request beyond generalised and oftentimes vague assertions. By effectively “avoid[ing] consultations with the Court”, the record of lengthy delays and ineffective responses indicate that the GoK is “deliberately disregarding . . . its obligation to cooperate” in relation to the Accused’s financial records.²⁵

26. Although, in its Reply, the GoK asserted that “the consent of the relevant individual is required by law first before the government can access . . . information” held by private individuals,²⁶ it did not specify the nature of the purported obstacle, such as: (i) the legal basis for requiring the individual’s consent; (ii) whether any exceptions to this rule exist under Kenyan law; or (iii) whether this barrier exists for all of the requested information, given the broad variety of categories of information that were requested. Further, the GoK has failed to inform the OTP about what steps it has taken or plans to take in order to address the purported obstacle, and which, if any, of the individuals concerned it has approached to obtain consent, if indeed that is required under Kenyan law. The GoK’s silence on this issue is not surprising: it is nonsensical to suggest that, before seeking to gather evidence in the form of the financial records of a person facing trial for serious criminal offences, permission must be obtained from the accused person himself or from his bank.

²⁴ ICC-01/09-02/11-713, paras 6, 12, 17 (“The wording and approach of Article 93 is meant to ensure that cooperation between the Court and States Parties is flexible and dynamic”).

²⁵ ICC-02/05-01/09-151, para. 21.

²⁶ ICC-01/09-02/11-755, para. 6.

27. The information of the type sought in the Records Request is standard in criminal investigations with a financial dimension. It is routinely obtained without undue burden on state resources. A law enforcement authority acting in good faith could normally be expected to be in possession of such records in a matter of days or weeks. The GoK's failure to do so 19 months after the Records Request was sent is unjustifiable, especially in the absence of proper explanation. Nor can the GoK, at this late stage, continue to rely on the mere assertion that it has forwarded the various requests to the "competent authorities" for action. Given the length of time that has passed since the OTP transmitted the Records Request, it is remarkable that *none* of the agencies to which the GoK purportedly forwarded the pending requests have yet produced *any* of the requested information. In the circumstances, it is reasonable to infer that no meaningful action has been taken with respect to the execution of this request.

28. In sum, the Prosecution submits that, given the time that has passed since the transmission of the Records Request, the GoK's responses demonstrate unwillingness on the part of the GoK to cooperate in order to execute the request.

III. A finding of non-compliance pursuant to Article 87(7) is warranted.

29. This application is necessary as a measure of last resort. The Prosecution cannot wait any longer for the GoK to execute a request that should have been resolved long ago. Had the request been complied with in a timely manner, the Prosecution may have had additional relevant evidence to offer to the Chamber in this case.

30. Information regarding to the Accused's finances is directly relevant to the Prosecution's allegation that he helped fund the violence following

the election in Kenya in 2007, and therefore is likely to assist the Chamber in adjudicating the charges against him. In the absence of this material, the Chamber's ability to determine the truth is severely curtailed.

Relief Requested

31. For the reasons elaborated above, the Prosecution requests the Chamber to: (i) find that the GoK has failed to comply with the Records Request under Article 87(7); (ii) refer the matter to the Assembly of the States Parties; and (iii) reclassify this filing as public.



Fatou Bensouda,
Prosecutor

Dated this 2nd day of December 2013
At The Hague, The Netherlands