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Date: 08 July 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

Decision on the implementation of the request to freeze assets

Order to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims
Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives
Government of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 57(3)(e), 61(11), 64(2), 75, 77, 87(3) and 93 of the Statute and Rule 99 of the Rules, renders this 'Decision on the implementation of the request to freeze assets'.

I. Procedural history

1. On 5 April 2011, Pre-Trial Chamber I ordered[1] the Registrar to: (i) '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 [...] Uhuru Muigai Kenyatta [...]'; and (ii) 'include in the request for cooperation 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 this decision, and that the Registrar report any such information to the Chamber as soon as possible' ('Pre-Trial Chamber's Order').[2]

2. The Single Judge also 'stresse[d] that, pursuant to article 87(3) of the Statute, it is essential for the requested State to keep confidential the request for cooperation and any relevant supporting documents, except to the extent that their disclosure is necessary for executing these requests.'[3]

3. On 28 February 2014, the Registry filed its 'Fourth report on the execution of the request for the purpose of securing the identification, tracing and freezing or

[1] 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 Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 5 April 2011, ICC-01/09-02/11-42-Conf. The Pre-Trial Chamber's Order was filed as under seal, *ex parte*, the Prosecutor only, but was reclassified as under seal, *ex parte*, the Prosecutor and Common Legal Representative of Victims only, on 4 April 2014 pursuant to an order of the Chamber (ICC-01/09-02/11-909-US-Exp-Corr), and was subsequently reclassified as confidential on 7 April 2014 pursuant to a further order of the Chamber (ICC-01/09-02/11-910-Conf).
[2] Pre-Trial Chamber's Order, ICC-01/09-02/11-42-Conf, page 5.
[3] Pre-Trial Chamber's Order, ICC-01/09-02/11-42-Conf , para. 10.

seizure of property and assets of Uhuru Muigai Kenyatta' ('Registry Report').[4] The Registry requested the Chamber's guidance on the Government of the Republic of Kenya's ('Kenyan Government') refusal to execute the Pre-Trial Chamber's Order on the basis 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 second, 'that the Court has also found that upon the 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.'[5]

4. On 10 March 2014, the Office of the Prosecutor ('Prosecution') filed the 'Prosecution observations on the Registry's fourth report on the identification, tracing, and freezing of assets' ('Prosecution Observations').[6] The Prosecution suggested that the Kenyan Government, the defence team for Mr Kenyatta ('Defence') and the Legal Representative for Victims ('LRV') be granted access to the Registry Report, the Prosecution Observations and the related Court documents, in order that they may respond to the Kenyan Government's submissions as summarised in the Registry Report.[7]

5. On 7 April 2014, the Chamber ordered the parties and participants to file observations on: (i) the submissions of the Kenyan Government as reflected in the Registry Report; (ii) whether the Pre-Trial Chamber's Order should be revoked or otherwise modified; and (iii) '[a]ny other order or relief as may be appropriate in the circumstances, with particular regard to the apparent

[4] Registry Report, ICC-01/09-02/11-905-Conf. The Registry Report was filed under seal, *ex parte*, the Registry and the Prosecutor only, but was reclassified as under seal, *ex parte*, the Prosecution and LRV only, on 4 April 2014 pursuant to an order of the Chamber (ICC-01/09-02/11-909-US-Exp-Corr), and was subsequently reclassified as confidential on 7 April 2014 pursuant to a further order of the Chamber (ICC-01/09-02/11-910-Conf).
[5] Registry Report, ICC-01/09-02/11-905-Conf, para. 3.
[6] Prosecution Observations, ICC-01/09-02/11-906-Conf. The Prosecution Observations were filed as under seal, *ex parte*, the Prosecutor and the Registry only, but was reclassified as confidential on 7 April 2014 pursuant to an order of the Chamber (ICC-01/09-02/11-910-Conf).
[7] Prosecution Observations, ICC-01/09-02/11-906-Conf, para. 3.

violation of the confidentiality direction of the Pre-Trial Chamber'.[8] The Chamber also invited the Kenyan Government to make: (i) further submissions, if any, on the legal issue raised in its reply to the Registry; (ii) submissions addressing its compliance with the direction to keep confidential the Pre-Trial Chamber's Order; and (iii) submissions, if any, on whether the Pre-Trial Chamber's Order should be revoked or otherwise modified.[9]

6. Responses were received from the Prosecution,[10] the Defence,[11] the LRV,[12] and from the Kenyan Government,[13] and are summarised in relevant part below.

II. Submissions and Analysis

A. Legal Basis for the Pre-Trial Chamber's Order

1. Relevant submissions

7. In its initial response to the Chamber, the Prosecution argued that Articles 93(1)(k) and 57(3)(e) of the Statute provide a Pre-Trial Chamber with the authority to request protective measures either for the purposes of eventual forfeiture or for an order of reparations, prior to any conviction.[14] The Prosecution argued that an interpretation of the Statute requiring the Pre-Trial Chamber to wait until after a conviction 'defies logic'.[15] The Prosecution further averred that the Kenyan Government's position was not only inconsistent with Kenyan law but also with 'longstanding international practice permitting pre-

[8] Order for submissions on the implementation of the request to freeze assets, ICC-01/09-02/11-910-Conf ('7 April Order for Submissions'), page 6.
[9] 7 April Order for Submissions, ICC-01/09-02/11-910-Conf, page 6.
[10] Prosecution submissions pursuant to the Chamber's 7 April 2014 Order, 1 May 2014, ICC-01/09-02/11-914-Conf ('Prosecution Submissions').
[11] Defence Submissions on the Implementation of the Request to Freeze Assets, 2 May 2014, ICC-01/09-02/11-915-Conf ('Defence Submissions').
[12] Victims' submissions on the implementation of the request to freeze assets, 2 May 2014, ICC-01/09-02/11-916-Conf ('LRV Submissions').
[13] Submissions of the Government of the Republic of Kenya pursuant to the 'Order for Submissions on the Implementation of the Request regarding the Freezing of Assets', 26 May 2014, ICC-01/09-02/11-923-Conf. A corrigendum was filed on 28 May 2014, ICC-01/09-02/11-923-Conf-Corr ('Kenyan Government Submissions').
[14] Prosecution Observations, ICC-01/09-02/11-906-Conf, para. 3.
[15] Prosecution Observations, ICC-01/09-02/11-906-Conf, paras 9 and 11.

conviction asset freezing'.[16] The Prosecution noted that similar orders have been issued by Pre-Trial Chambers in the cases of the *The Prosecutor v. Thomas Lubanga Dyilo*, *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Jean-Pierre Bemba Gombo*.[17] In its further Prosecution Submissions, the Prosecution reiterated its view that the position held by the Kenyan Government is merely pretext and an attempt to obstruct the proceedings.[18]

8. The Defence submitted that Articles 57(3)(e) and 93(1)(k) of the Statute, read together, require a causal link between the alleged offence and the property for which protective measures are sought, and that, in the absence of a clear causal link, the Pre-Trial Chamber's Order lacks legal foundation.[19] This interpretation is supported, in the view of the Defence, by use of the word 'forfeiture' in Article 57(3)(e) of the Statute.[20]

9. The LRV fully supported the submissions of the Prosecution on this issue.[21]

10. The Kenyan Government submitted that the Pre-Trial Chamber's Order lacks legal basis and should be revoked. It reiterated its view that Articles 93(1)(k) and 57(3)(e) of the Statute, as well as Rule 99 of the Rules, read together, provide three basic pre-requisites which must be satisfied prior to making a request for cooperation under these provisions: (i) that the criminal offences have been proven, after a full trial; (ii) that the Court found that the person obtained the proceeds, property and assets directly or indirectly from the commission of the

[16] Prosecution Observations, ICC-01/09-02/11-906-Conf, paras 10 and 12.
[17] Prosecution Observations, ICC-01/09-02/11-906-Conf, para. 14 *citing* Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of property and assets belonging to Mr. Thomas Lubanga Dyilo, 21 March 2006, ICC-01/04-01/06-22-tEN; Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of the property and assets of Germain Katanga, 7 August 2007, ICC-01/04-01/07-7-tENG; Décision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées a la République Portugaise, 27 May 2008, ICC-01/05-01/08-8.
[18] Prosecution Submissions ICC-01/09-02/11-914-Conf, para. 3; *see also* Prosecution Observations, ICC-01/09-02/11-906-Conf, paras 7 and 15.
[19] Defence Submissions, ICC-01/09-02/11-915-Conf, para. 21.
[20] Defence Submissions, ICC-01/09-02/11-915-Conf, para. 21.
[21] LRV Submissions, ICC-01/09-02/11-916, para. 7.

crime; and/or (iii) that in committing the crime the accused person employed the property and assets identified.[22] With its submissions, the Kenyan Government thereby 'inform[ed] the Court of the reasons why its request for assistance [was] being denied'.[23]

2. Analysis

11. The Chamber notes the submission of the Kenyan Government that the implementation of a cooperation request under Article 93(1)(k) of the Statute relating to identifying, tracing and/or freezing assets or property of an accused person requires an express finding that such assets or property were instrumentalities of a crime or that they came into the possession of the person upon execution of the crime.[24]

12. The Majority considers that the statutory framework does not require any such nexus to be established when ordering protective measures under Article 57(3)(e). In the Majority's view, the word 'forfeiture', which may be defined as broadly as the 'divestiture of property without compensation',[25] as contained in Article 57(3)(e) of the Statute, also encompasses an award for reparations under the Statute. In particular, the Majority does not consider that the use of the word 'forfeiture' limits the Pre-Trial Chamber's authority to solely ordering protective measures for the purpose of Article 77(2)(b) of the Statute. It is apparent from, for example, Rule 99 of the Rules, entitled 'Cooperation and protective measures for the purpose of forfeiture under articles 57[(3)(e)], and 75[(4)]', that, when used elsewhere in the statutory framework, the term 'forfeiture' may carry a broader meaning which encompasses an award for reparations. In addition, Rule 99(1) of the Rules provide, *inter alia*, that a legal representative of victims who has made a request for reparations may request a Pre-Trial Chamber or

[22] Kenyan Government Submissions, ICC-01/09-02/11-923-Conf-Corr, para. 12.
[23] Kenyan Government Submissions, ICC-01/09-02/11-923-Conf-Corr, para. 15.
[24] Kenyan Government Submissions, ICC-01/09-02/11-923-Conf-Corr, para. 12.
[25] Bryan A. Garner, Ed., Black's Law Dictionary (1999), page 676.

Trial Chamber to seek relevant measures pursuant to Articles 57(3)(e) or 75(4) of the Statute, as applicable. As noted by Pre-Trial Chamber I, 'in light of rule 99 of the Rules, the contextual interpretation of article 57(3)(e) of the Statute makes clear that the Chamber may, pursuant to article 57(3)(e) of the Statute, seek the cooperation of States Parties to take protective measures for the purpose of securing the enforcement of a future reparation award'.[26]

13. Moreover, as noted by the Prosecution,[27] both Pre-Trial Chamber I[28] and Pre-Trial Chamber II[29] have held that appropriate weight must be given to the phrase 'in particular for the ultimate benefit of victims' contained in Article 57(3)(e) of the Statute. This provision must be read in light of the important role accorded by the Statute to the victims and the power afforded to a Trial Chamber to order a convicted person to make appropriate reparations to address the victims' harm and suffering. The Majority shares the view of Pre-Trial Chamber I that:

> [t]he teleological interpretation of article 57 (3) (e) of the Statute reinforces the conclusion arising from a contextual interpretation. Indeed, since forfeiture is a residual penalty pursuant to article 77 (2) [b] of the Statute, it will be contrary to the "ultimate benefit of victims" to limit to guaranteeing the future enforcement of such a residual penalty the possibility of seeking the cooperation of the States Parties to take protective measures under article 57 (3) (e) of the Statute.[30]

14. Indeed, the Majority considers that such an interpretation – one in which the Court would have authority to order both reparations and the 'residual penalty of forfeiture' yet would only be empowered to take early and effective protective measures in respect of the latter – would be contrary to the effective application

[26] Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo ('Lubanga Decision'), 24 February 2006, ICC-01/04-01/06-8-Corr, para. 134.
[27] Prosecution Observations, ICC-01/09-02/11-906-Conf, para. 14.
[28] Lubanga Decision, ICC-01/04-01/06-8-Corr, paras 135- 136.
[29] Pre-Trial Chamber's Order, ICC-01/09-02/11-42-Conf, para. 7.
[30] Lubanga Decision, ICC-01/04-01/06-8-Corr, para. 135.

of the Statute and to its object and purpose.[31] As emphasised by Pre-Trial Chamber I, the reparation scheme provided for in the Statute is one of its key features, and 'early tracing, identification, freezing or seizure of the property and assets' of a person against whom a warrant of arrest or summons to appear has been issued 'is a necessary tool to ensure that [...] reparation awards ordered in favour of victims' may be enforced.[32] Thus, based on a teleological interpretation of Article 57(3)(e) of the Statute, and to ensure that the relevant Trial Chamber will have recourse to such assets for the purpose of an eventual order for reparations, it is necessary that protective measures are implemented at the earliest opportunity.

15. It follows therefrom that the Majority does not interpret Rule 99(1) of the Rules as reserving the right solely to the Trial Chamber to order protective measures for the purpose of reparations. This is because, as explained above, Article 57(3)(e) of the Statute may also encompass a request for protective measures for the purpose of reparations.

16. The Majority observes that Article 93(1)(k) of the Statute[33] is broadly phrased and allows a Chamber to request cooperation from a State in implementing protective measures in respect of proceeds, property and assets, and 'instrumentalities of crimes'.[34] The text makes no distinction concerning whether

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[31] *See e.g.* International Law Commission Commentary on Article 31 on the Vienna Convention on the Law of Treaties ('[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted', it is noted that this approach does not entail going beyond what is 'expressed or necessarily to be implied in the terms of the treaty'), Yearbook of the International Law Commission, 1966, Vol II, p.219.

[32] Lubanga Decision, 24 February 2006, ICC-01/04-01/06-8-Corr, para. 136.

[33] Article 93(1)(k) of the Statute: 'State Parties shall [...] provide the following assistance in relation to investigations or prosecutions: The 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' (emphasis added).

[34] In the French version of the Statute, the same provision expresses the authority to a Chamber in *'[l]'identification, la localisation, le gel ou la saisie du produit des crimes, des biens, des avoirs et des instruments qui sont liés aux crimes, aux fins de leur confiscation éventuelle'*. It has been suggested that inclusion of the phrase 'instrumentalities of crimes' in Article 93(1)(k) of the Statute was an error, and meant to be omitted when the similar phrase was admitted from the text of Article 77(2)(b) of the Statute. *See, e.g.* Otto Triffterer, Commentary

such property or assets must have been derived directly or indirectly from a crime, as explicitly required under Article 77(2)(b) of the Statute. Read plainly, a request for protective measures in respect of property or assets does not require a nexus between the crimes for which the accused is summoned, charged or convicted, unless it is made solely for the purposes of Article 77(2)(b) of the Statute. In addition, even in those circumstances, any determinative finding as to actual nexus between the proceeds, property or assets in question and crimes could only be made under Article 77(2)(b) of the Statute after conviction. In light of the authority of the Pre-Trial Chamber to make such orders, the submission of the Kenyan Government that a request for protective measures must be predicated upon a nexus already having been established cannot be sustained.

17. Nonetheless, the Majority notes that an order for protective measures for the purpose of reparations should be appropriately tailored to the circumstances, including consideration of the claims of victims and the personal circumstances of an accused, as appropriate.[35] In the context of the Pre-Trial Chamber's Order, the Majority notes that this was an initial order at a preliminary stage of proceedings, which also sought the assistance of the Kenyan Government in identification and tracing of relevant assets, which may then have enabled subsequent modification of the order in light of information provided.

18. Further, Article 57(3)(e) of the Statute clearly confirms the authority of a Pre-Trial Chamber to order such protective measures prior to the commencement of trial, after the issuance of a warrant of arrest or a summons to appear. Thus, the submission that a request under Article 93(1)(k) may be made only after a 'full trial' also cannot be sustained.

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on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article – (2008), page 1578; William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute (2010), page 1021.

[35] The Chamber considers that the criteria identified in Rule 146(2) of the Rules, although relating to fines pursuant to Article 77(2)(a) rather than to reparations, may provide useful guidance in this regard.

19. In sum, Articles 57(3)(e) and 93(1)(k) of the Statute and Rule 99(1) of the Rules confirm the authority of the Pre-Trial Chamber to take protective measures to identify, trace, freeze and seize property or assets of an accused person prior to the commencement of trial. Collectively, these provisions authorise the Pre-Trial Chamber, after the consideration of certain factors,[36] to request cooperation from a State to implement such protective measures after the issuance of a warrant of arrest or a summons to appear and prior to the start of trial, both for the purposes of eventual forfeiture as an applicable penalty under Article 77(2)(b) of the Statute and for reparations under Article 75 of the Statute.

20. Therefore, on 5 April 2011[37] the Pre-Trial Chamber acted pursuant to authority provided in the Statute and Rules when it requested cooperation from the Kenyan Government pursuant to Articles 57(3)(e) and 93(1)(k) of the Statute in 'the identification, freezing and seizure of property and assets' which it considered '[was] necessary in the best interests of the victims' and 'to guarantee that, in the event of a conviction, "the said victims may, pursuant to article 75 of the Statute, obtain reparations for the harm which may have been caused to them"'.[38] Thus, pursuant to Article 61(11) of the Statute, the Majority is satisfied that it may also exercise such authority.

B. Implementation of the Pre-Trial Chamber's Order

1. *Relevant submissions*

21. In respect of whether the Pre-Trial Chamber's Order should now be implemented, the Prosecution submitted that in the current context in which it

[36] Pursuant to Article 57(3)(e) of the Statute, factors to be considered include the strength of the evidence, the rights of the parties concerned, and whether the order for protective measures will, 'in particular [be] for the ultimate benefit of victims'.
[37] Pre-Trial Chamber's Order, ICC-01/09-02/11-42-Conf.
[38] Pre-Trial Chamber's Order, ICC-01/09-02/11-42-Conf, para. 7.

'now has insufficient evidence to secure a conviction at trial', it would not be appropriate to seek enforcement of the Pre-Trial Chamber's Order.[39]

22. In the view of the Defence, in light of (i) the Prosecution's submissions regarding the current strength of the case, and (ii) its view that Article 93(1)(k) of the Statute requires that the Chamber give 'due regard' to the strength of the evidence before the issuance of a forfeiture measure, the Pre-Trial Chamber's Order should now be revoked.[40] The Defence also submitted that freezing Mr Kenyatta's assets would be 'manifestly excessive' because of the impact of doing so on the accused, his family, associates and staff, and especially given the current status of the proceedings.[41]

23. In the view of the LRV, the Pre-Trial Chamber's Order should not be revoked, because doing so would reward what he conceives as obstruction by the accused and the Kenyan Government.[42] The LRV highlighted what he views as: (i) the Kenyan Government's lack of action in relation to the Pre-Trial Chamber's Order; (ii) the Kenyan Government's non-cooperation and obstruction of justice in the case, and (iii) the importance to the victims of receiving reparations for harm, both individually and as a principle on which the Court is based.[43] In the LRV's view, these issues should be fully considered by the Chamber when deciding whether to revoke the Order.[44] The LRV also submitted that because the Chamber has adjourned for six months to allow the Government 'to provide [...] key evidence to the Prosecution', it would be premature to revoke the order to freeze assets.[45] The LRV suggests that the Chamber should wait until 'all the evidence withheld by the Government in violation of Part 9 of the Statute is

[39] Prosecution Submissions, ICC-01/09-02/11-914-Conf, para. 5.
[40] Defence Submissions, ICC-01/09-02/11-915-Conf, paras 18-21.
[41] Defence Submissions, ICC-01/09-02/11-915-Conf, para. 23.
[42] LRV Submissions, ICC-01/09-02/11-916-Conf, paras 8 and 9.
[43] LRV Submissions, ICC-01/09-02/11-916-Conf, paras 10-19 and 21-24.
[44] LRV Submissions, ICC-01/09-02/11-916-Conf, para. 40.
[45] LRV Submissions, ICC-01/09-02/11-916-Conf, para. 25.

provided to the Court and analysed' before revoking the Pre-Trial Chamber's Order.[46]

24. The Kenyan Government submitted that the 'conditions precedent' for the implementation of the Pre-Trial Chamber's Order had not been met and therefore it was unable to execute the request.[47] It asserted that the Pre-Trial Chamber's Order lacks legal basis and should be revoked.[48]

2. *Analysis*

25. As the Chamber previously stated, '[t]o the extent that problems concerning the execution of [a cooperation request] may have been identified, the Chamber emphasises that the Kenyan Government was under an obligation to "promptly", pursuant to Article 93(3) of the Statute, or "without delay", pursuant to Article 97 of the Statute, engage in consultations with a view to resolving the matter'.[49] Yet precisely one month after the Pre-Trial Chamber's Order was issued on 5 April 2011, the Kenyan Government, in its submissions before the Pre-Trial Chamber, stated that it recognised 'that the ICC has power under Article 57 of the Rome Statute where a warrant of arrest or summons has been issued under Article 58 to seek the cooperation of States pursuant to Article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.'[50] It was not until nearly three years later, on 3 March 2014, that the Kenyan Government first communicated to the Chamber concerns regarding the legality of the Pre-Trial Chamber's Order.[51]

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[46] LRV Submissions, ICC-01/09-02/11-916-Conf, para. 26.
[47] Registry Report, ICC-01/09-02/11-905-Conf, para.3.
[48] Kenyan Government Submissions, ICC-01/09-02/11-923-Conf-Corr, page 7 and para. 24.
[49] Decision on Prosecution's application for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, ICC-01/09-02/11-908 ('Article 87(7) Decision'), para. 48.
[50] Submission on behalf of the Government of Kenya in respect of Request for Cooperation, 5 May 2011, ICC-01/09-02/11-84-US-Exp, para. 8. The Chamber has directed the Registry to request the Kenyan Government to submit a confidential redacted version of this filing (e-mail communication from Legal Officer of the Chamber to Registry on 4 July 2014 at 14:50).
[51] Registry Report, ICC-01/09-02/11-905-Conf, para.3.

26. In the case of a genuine dispute regarding the legality of a request for cooperation, a State is directed by Regulation 108(1) of the Regulations of the Court ('Regulations') to apply for a ruling from the competent Chamber. In addition, the Pre-Trial Chamber specifically requested that the Kenyan Government 'inform the Registry, at least every two months, of any seizure of property and freezing of assets carried out in execution of this decision.'[52] Yet no such information was ever submitted.[53] Neither formal consultations[54] on the Pre-Trial Chamber's Order nor a request concerning the legality of the Pre-Trial Chamber's Order was initiated. Moreover, arguments similar to those which have been advanced in this proceeding were communicated to the Prosecutor as early as 23 November 2012.[55] Thus, there has been a substantial unexplained delay on the part of the Kenyan Government in either giving effect to the Pre-Trial Chamber's Order or raising any concerns which may have prevented execution of the request.

27. In addition to raising, on 3 March 2014, issues concerning the legality of the Pre-Trial Chamber's Order under the Statute, which have been addressed above, the Kenyan Government also stated in its further submissions on 28 May 2014[56] that

[52] Pre-Trial Chamber's Order, ICC-01/09-02/11-42-Conf, page 5.
[53] See e.g. Report on the notification of the Request for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Registry's First Report), 16 April 2011, ICC-01/09-02/11-58-US-Exp, para. 3(referring to the request to postpone the execution of the request '[i]n view of the admissibility challenge lodged by the Government of Kenya'); Second report on the execution of the Request for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Muthaura and Uhuru Muigai Kenyatta (Registry's Second Report), 25 April 2012, ICC-01/09-02/11-419-US-Exp, para. 2 (referring to the communication by the Kenyan Government that 'in view of the nature and complexity of the legal issues raised by the request, a committee of experts was appointed [by the Kenyan Government] to advise on this matter'); Third report on the execution of the Request for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura and Uhuru Muigai Kenyatta (Registry's Third Report), 20 February 2013, ICC-01/09-02/11-654-US-Exp, para. 6, (indicating that no reply had been received from the Kenyan Government reporting on its implementation of the Pre-Trial Chamber's Order). The Registry's First Report, Registry's Second Report and the Registry's Third Report were all filed under seal, *ex parte*, the Registry and the Prosecutor only, but were reclassified as under seal, *ex parte*, the Prosecution and LRV only, on 4 April 2014 pursuant to an order of the Chamber (ICC-01/09-02/11-909-US-Exp-Corr). The Chamber has directed the Registry to prepare confidential redacted versions of each of these three reports (e-mail communication from Legal Officer of the Chamber to the Registry on 4 July 2014 at 14:43).
[54] Articles 93(3) and 97 of the Statute.
[55] *See* Annex H to Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya, 29 November 2013, ICC-01/09-02/11-866-Conf-Exp-AnxH, page 6.
[56] Kenyan Government Submissions, ICC-01/09-02/11-923-Conf-Corr.

even if Pre-Trial Chamber's Order was valid, it is still unable to implement the request because doing so is not permitted under its national law.[57]

28. In this regard, once again:

> The Chamber notes the obligation, pursuant to Article 88 of the Statute, to ensure there are procedures for cooperation available under national law. These procedures should facilitate timely compliance with requests for assistance. The Chamber finds it unnecessary to consider whether or not the International Crimes Act and other Kenyan domestic legislation provides a sufficient basis for executing cooperation requests under Part 9 of the Statute. Any purported deficiency in domestic legal procedures (or interpretation thereof), cannot be raised as a shield to protect a State Party from its obligation to cooperate with the Court, or to undermine any application for non-compliance under Article 87(7) of the Statute that may result.[58]

29. Nevertheless, given the Prosecution's acknowledgement that it 'now has insufficient evidence to secure a conviction at trial',[59] that any information provided 'may or may not yield evidence relevant to this case',[60] and the directive contained in Article 57(3)(e) of the Statute that the Chamber pay due regard to the strength of the evidence and the rights of the parties concerned, the Chamber considers it would not be appropriate at this stage of the proceedings to seek execution of the Pre-Trial Chamber's Order. Mindful, however, that the current limited period of adjournment in this case may enable necessary evidence to be obtained 'potentially shedding light on matters central to the charges',[61] the Majority suspends the Pre-Trial Chamber's order until further notice.

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[57] Kenyan Government Submissions, ICC-01/09-02/11-923-Conf-Corr, para. 17 ('International Crimes Act, which sets out the "relevant procedure" for the implementation of the Rome Statute, does not permit the identification, tracing and freezing of property and assets where there is no link established between the assets sought and the crimes committed').
[58] Article 87(7) Decision, ICC-01/09-02/11-908, para. 47.
[59] Prosecution Submissions, ICC-01/09-02/11-906-Conf, para. 5.
[60] Prosecution opposition to the Defence request for the termination of the Kenyatta case, 31 January 2014, ICC-01/09-02/11-892, para. 23; ICC-01/09-02/11-T-27-ENG ET WT, page 9, line 23 - page 10, line 4 and page 11, lines 8-11 and page 11, line 16 – page 12, line 1.
[61] Article 87(7) Decision, ICC-01/09-02/11-908, para. 96.

C. Apparent breach of confidentiality of the Pre-Trial Chamber's Order

1. Relevant submissions

30. The Prosecution averred, firstly, that the information concerning the Pre-Trial Chamber's Order was not provided to the press by the Prosecution and that therefore 'the only reasonable inference' was that the information was leaked to the press by sources within the Kenyan Government.[62] It noted, however, that the news article appeared to relate to the Kenyan Government's refusal to comply with the Prosecution's requests for financial information, and not the Pre-Trial Chamber's Order.[63] Secondly, the Prosecution submitted that disclosure of such information to the press put the accused on notice of the Court's activities and undermined the Court's efforts to secure assets for the purpose of eventual forfeiture. The Prosecution asserted that it is, however, for the Chamber to determine whether and what action should be taken in respect of the apparent breach.[64]

31. The Defence did not make any submissions on the apparent disclosure of confidential information to the press.

32. The LRV submitted that in his view, it was 'vital' that the Kenyan Government clarify its knowledge of who is responsible for providing information to the press regarding the asset freezing requests and that the Chamber consider such sanctions as it deems appropriate pursuant to Article 70 of the Statute and Rule 166 of the Rules.[65]

33. The Kenyan Government submitted that it is not clear from the media report cited by the Prosecution who leaked the information to the media,[66] asserting that the Prosecution's allegation that it is the source of the leak is baseless. The

[62] Prosecution Submissions, ICC-01/09-02/11-914-Conf, para. 10.
[63] Prosecution Submissions, ICC-01/09-02/11-914-Conf, para. 8.
[64] Prosecution Submissions, ICC-01/09-02/11-914-Conf, para. 7.
[65] LRV Submissions, ICC-01/09-02/11-916-Conf, paras 35-46.
[66] Kenyan Government Submissions, ICC-01/09-02/11-923-Conf-Corr, para. 20.

Kenyan Government maintained that there is no evidence to substantiate a finding that the Kenyan Government provided confidential information to the press.[67]

2. *Analysis*

34. The Chamber notes with concern that the news article cited by the Prosecution[68] and available on the internet contains information concerning a request to identify or freeze assets of Mr Kenyatta, in clear contravention of the statutory obligation of confidentiality as referenced by the Pre-Trial Chamber.[69] However, no evidence has yet been presented which would allow the Chamber to make any findings concerning the person or persons responsible for the apparent breach.

35. The Chamber regards seriously any allegation that confidential or under seal information has been provided or leaked to the press. It underlines the importance of the parties, participants and other persons appearing before the Court respecting their obligations under the Statute concerning the confidentiality of the proceedings. In the view of the Chamber, it is incumbent upon each to take appropriate measures to ensure that confidentiality is respected, investigate and ascertain any facts pertaining to a potential breach, and take any required measures, including reporting to the Chamber thereon, as applicable. In this regard, the Chamber recalls its authority to sanction breaches

[67] Kenyan Government Submissions, ICC-01/09-02/11-923-Conf-Corr, para. 23.
[68] 'T[he] Kenya government yesterday told ICC prosecutor Fatou Bensouda that it would not identify or freeze the assets of the four Kenyans accused of crimes against humanity charges at the Hague' (http://www.the-star.co.ke/news/article-102541/kenya-will-not-freeze-assets-icc-four).
[69] Pre-Trial Chamber's Order, ICC-01/09-02/11-42-Conf, para. 10. The Chamber notes that the Kenyan Government previously apologised for what it referred to as an 'inadvertent disclosure' of Prosecution requests for assistance. *See* Annex 1 to Registry Transmission, ICC-01/09-02/11-743-Anx1, para. 3; *and* Decision concerning the Government of Kenya's Submissions on its cooperation with the Court, 3 July 2013, ICC-01/09-02/11-770, paras 16 and 17.

of its orders and of statutory obligations of confidentiality, should the Chamber be presented with evidence making it necessary to do so.[70]

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

SUSPENDS the Pre-Trial Chamber's Order until further notice.

Judge Henderson appends a dissenting opinion.

Done in both English and French, the English version being authoritative.

Judge Kuniko Ozaki, Presiding Judge

Judge Robert Fremr

Judge Geoffrey Henderson

Dated this 08 July 2014

At The Hague, The Netherlands

[70] Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, ICC-01/09-02/11-747, 31 May 2013, paras 13-15.