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Pénale
Internationale**



**International
Criminal
Court**

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Date: 31 March 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***

Public

**Decision on Prosecution's applications for a finding of non-compliance
pursuant to Article 87(7) and for an adjournment of the provisional trial date**

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

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Mr James Stewart

Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

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Legal Representatives of Victims

Mr Fergal Gaynor

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Unrepresented Victims

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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')¹ of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 1, 34, 42, 64, 67(1), 69(3), 86-88, 93, 96-97 and 99 of the Rome Statute ('Statute'), Rules 132 and 176 of the Rules of Procedure and Evidence ('Rules') and Regulations 29(1) and 108-109 of the Regulations of the Court ('Regulations') renders the following 'Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date'.

I. Introduction

1. As described in the procedural history below, the Chamber has been seised of requests by the Office of the Prosecutor ('Prosecution') for: (i) a finding of non-compliance against the Government of the Republic of Kenya ('Kenyan Government') pursuant to Article 87(7) of the Statute; and (ii) an adjournment of the proceedings in this case pending compliance by the Kenyan Government with its outstanding cooperation obligations. The Chamber is also seised of a related request by the defence team for Mr Kenyatta ('Defence') for termination of the case.
2. Following careful consideration, the Chamber finds, *inter alia*, that:
 - (a) a limited adjournment should be granted. This adjournment is of fixed duration and for the specific purpose of providing an opportunity for compliance by the Kenyan Government with the outstanding cooperation request, within a framework outlined below; and

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber V(b) as composed by the Presidency's 'Decision replacing a Judge in Trial Chamber V(b)', 30 January 2014, ICC-01/09-02/11-890, and to the chamber in its previous compositions as Trial Chamber V(b) and Trial Chamber V.

- (b) any finding under Article 87(7) of the Statute is deferred in light of that adjournment.

3. The analysis of the Chamber on the issues raised is set out below and is divided into three discrete sub-sections, as follows: (A) the validity of the request for cooperation upon which the Article 87(7) application is based; (B) the Prosecution's Article 87(7) application; and (C) the adjournment and termination requests. Each section will include a summary of relevant submissions, concomitant analysis, and the findings of the Chamber.

II. Procedural history

A. Prosecution request for finding of non-compliance pursuant to Article 87(7) of the Statute

4. On 29 November 2013, the Prosecution filed the confidential *ex parte*, Prosecution and Kenyan Government only, 'Prosecution application for a finding of non-compliance pursuant to Article 87(7) of the Statute against the Government of Kenya' ('Article 87(7) Application').² In its Article 87(7) Application, the Prosecution alleged that the Kenyan Government failed to comply with the Prosecution's April 2012 request under Article 93(1) of the Statute to produce financial and other records relating to the accused ('Records Request').³
5. Having been invited to do so by the Chamber,⁴ the Registry⁵ and the Kenyan Government⁶ submitted their observations on the Article 87(7) Application. In its

² Article 87(7) Application, ICC-01/09-02/11-866-Conf-Exp. A public redacted version was filed on 2 December 2013 as ICC-01/09-02/11-866-Red. Pursuant to an order of the Chamber (ICC-01/09-02/11-900), the Article 87(7) Application was reclassified as public on 12 February 2014.

³ Article 87(7) Application, ICC-01/09-02/11-866, para 1. *See* Records Request attached at Annex A to the Article 87(7) Application. The Chamber notes that the finding of non-compliance is sought only in respect of the information specified at paragraphs 9-11 of the request letter.

⁴ Decision requesting observations from the Government of Kenya, 9 December 2013, ICC-01/09-02/11-870.

⁵ Registry's report pursuant to the "Decision requesting observations from the Government of Kenya" dated 9 December 2013, 9 January 2014, ICC-01/09-02/11-877.

observations ('Cooperation Observations'), the Kenyan Government opposes the Article 87(7) Application.⁷

6. On 3 February 2014, having been granted leave to reply by the Chamber,⁸ the Prosecution filed a reply to the Cooperation Observations ('Reply').⁹
7. The Chamber convened a status conference on 13 February 2014,¹⁰ at which oral submissions on the Article 87(7) Application were received from the Prosecution, the Kenyan Government, the Defence and the Legal Representative of Victims ('LRV').¹¹

B. Prosecution's request for an adjournment of the provisional start date of trial

8. On 19 December 2013, the Prosecution filed a request ('First Adjournment Request')¹² seeking, *inter alia*, an adjournment of the provisional trial date for three months in order to 'undertake additional investigative steps' in relation to its case against Mr Kenyatta and for the Chamber to convene a status conference.¹³
9. On 13 January 2014, the Defence filed a confidential response ('Defence Termination Request'),¹⁴ seeking that the Chamber dismiss the First Adjournment Request and terminate the proceedings under Article 64(2) of the Statute on the grounds of

⁶ The observations of the Kenyan Government are contained in Annex 2 of the Registry's report (ICC-01/09-02/11-877-Conf-Anx2). Pursuant to an order of the Chamber (ICC-01/09-02/11-891), a public redacted version was filed by the Registry on 5 February 2014 as ICC-01/09-02/11-877-Anx2-Red.

⁷ Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, *see in particular* para. 29 at page 24 of Annex 2.

⁸ Decision on the Prosecution request for leave to reply to the Government of Kenya's observations, 30 January 2014, ICC-01/09-02/11-891.

⁹ Prosecution reply to the Government of Kenya's 20 December 2013 observations, ICC-01/09-02/11-894.

¹⁰ Order scheduling a status conference on 13 February 2014, 6 February 2014, ICC-01/09-02/11-897.

¹¹ Transcript of hearing on 13 February 2014, ICC-01/09-02/11-T-28-ENG ET WT.

¹² Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, ICC-01/09-02/11-875.

¹³ First Adjournment Request, ICC-01/09-02/11-875, paras 3, 4, 23-25.

¹⁴ Defence Response to the Prosecution's "Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date", ICC-01/09-02/11-878-Conf. A public redacted version was notified on 24 January 2014 as ICC-01/09-02/11-878-Red.

insufficiency of evidence.¹⁵ On the same day, the LRV also filed a response¹⁶ supporting the First Adjournment Request.¹⁷

10. On 23 January 2014, the Chamber issued the 'Order vacating trial date of 5 February 2014, convening a status conference, and addressing other procedural matters'.¹⁸ Having been authorised therein to do so by the Chamber,¹⁹ the Prosecution filed a response to the Defence Termination Request ('Second Adjournment Request',²⁰ and together with the First Adjournment Request the 'Prosecution Requests'), seeking, *inter alia*, that the Chamber reject the Defence's request for a termination of the proceedings and adjourn the case until the Kenyan Government complies with its cooperation obligations under the Statute.²¹
11. The Chamber convened a status conference on 5 February 2014²² to address, *inter alia*, the issues raised by the Prosecution Requests and Defence Termination Request.²³
12. Following leave having been granted by the Chamber,²⁴ the Prosecution filed submissions on 10 February 2014 regarding the question of whether or not there should be a verdict of acquittal entered after any withdrawal of charges ('Prosecution's *Ne bis in idem* Submission').²⁵

¹⁵ Defence Termination Request, ICC-01/09-02/11-878-Red, paras 5, 38 and 39.

¹⁶ Victims' response to Prosecution's application for an adjournment of the provisional trial date, ICC-01/09-02/11-879-Conf. A public redacted version was filed concurrently (ICC-01/09-02/11-879-Red).

¹⁷ ICC-01/09-02/11-879-Red, para. 1.

¹⁸ ICC-01/09-02/11-886 ('Order of 23 January 2014').

¹⁹ Order of 23 January 2014, ICC-01/09-02/11-886, para. 8.

²⁰ Prosecution opposition to the Defence request for the termination of the Kenyatta case, ICC-01/09-02/11-892.

²¹ Second Adjournment Request, ICC-01/09-02/11-892, para. 3. The Prosecution subsequently clarified that the Second Adjournment Request is intended to supersede the First Adjournment Request, *see* Transcript of hearing on 5 February 2014, ICC-01/09-02/11-T-27-ENG ET WT.

²² Scheduling order and agenda for status conference of 5 February 2014, 3 February 2014, ICC-01/09-02/11-893.

²³ ICC-01/09-02/11-T-27-ENG ET WT.

²⁴ ICC-01/09-02/11-T-27-ENG ET WT, page 67, lines 11-15.

²⁵ Prosecution submissions on the *ne bis in idem* principle, ICC-01/09-02/11-899.

13. On 12 February 2014, having been granted leave by the Chamber pursuant to Rule 103 of the Rules,²⁶ the Kenyan Government filed observations in relation to the Prosecution Requests ('Adjournment Observations')²⁷ on the following matters: (i) the role of the President of Kenya in relation to other governmental bodies, in the context of cooperation with the Court; and (ii) the doctrine of separation of powers as enshrined in the Constitution of Kenya as well as the independence it grants to various governmental organs.²⁸
14. On 17 February 2014, the LRV filed observations in support of the Prosecution's *Ne bis in idem* Submission.²⁹ On the same day, the Defence filed a response to the Prosecution's *Ne bis in idem* Submission³⁰, seeking a termination of the proceedings and the issuance of an acquittal pursuant to Article 64(6)(f) of the Statute.³¹
15. On 19 February 2014, the LRV filed a response to the Adjournment Observations.³² The Prosecution did not file a response to the Adjournment Observations.

III. Submissions and Analysis

A. Validity of the Records Request

1. Relevant Submissions

²⁶ Decision granting the request of the Government of Kenya to submit observations as *amicus curiae*, 7 February 2014, ICC-01/09-02/11-898.

²⁷ Submissions of the Government of the Republic of Kenya as *Amicus Curiae* in Response to the Prosecutor's 'Notification of the Removal of a witness from the Prosecutor's Witness List and Application for an Adjournment of the Provisional Trial Date', ICC-01/09-02/11-901. The Adjournment Observations were filed confidentially but were subsequently reclassified as public on 13 February 2014 by an order of the Chamber (ICC-01/09-02/11-T-28-ENG ET WT, page 6, line 8 – page 7, line 4).

²⁸ Adjournment Observations, ICC-01/09-02/11-901, para. 9. *See also* ICC-01/09-02/11-898, para.11 and page 7.

²⁹ Victims' observations on the *ne bis in idem* principle, ICC-01/09-02/11-902, para. 5.

³⁰ Defence Response to the 'Prosecution submissions on the *ne bis in idem* principle' (ICC-01/09-02/11-899), ICC-01/09-02/11-903.

³¹ ICC-01/09-02/11-903, paras 11 and 47.

³² Victims' Response to "Submissions of the Government of the Republic of Kenya as *Amicus Curiae* in Response to the Prosecutor's 'Notification of the Removal of a witness from the Prosecutor's Witness List and Application for an Adjournment of the Provisional Trial Date'", ICC-01/09-02/11-904. A corrigendum was filed on 20 February 2014, ICC-01/09-02/11-904-Corr.

Prosecution

16. The Prosecution averred that Article 93(1) of the Statute confers upon it the authority to issue the Records Request,³³ and that Article 42(1) of the Statute clearly designates the Office of the Prosecutor as an 'organ of the Court'.³⁴ Furthermore, the Prosecution argued that an independent reading of Article 54(2)(a) and (3)(c), together with Part 9, of the Statute, as well as Rule 176(2) of the Rules,³⁵ 'explicitly envisage' the Prosecution requesting cooperation from a state when conducting its investigations.³⁶ It submitted that the powers set out in Article 93 of the Statute are the 'principal investigative powers which the Prosecutor has',³⁷ and that imposing a requirement for a Court order as a precondition to Part 9 cooperation requests would 'transform the way in which the Prosecution carries out its duties under the Rome Statute'.³⁸
17. The Prosecution submitted that the Kenyan Government has recognised the Prosecution's authority to make requests under Article 93(1) of the Statute by granting such requests in the past.³⁹ Further, the Prosecution averred that, with the exception of the assistance sought by it under Article 93(1)(k) of the Statute, the Kenyan Government did not state that a Court order was required to execute the Records Request, but instead indicated that the Records Request had been 'transmitted to the competent authorities' and that it would revert to the Prosecution as soon as it had relevant information.'⁴⁰
18. Finally, in relation to the ambit of the Records Request, the Prosecution submitted that, '[i]n ordinary circumstances, the process of seeking assistance would be an

³³ Reply, ICC-01/09-02/11-894, para. 8.

³⁴ Reply, ICC-01/09-02/11-894, para. 4.

³⁵ Reply, ICC-01/09-02/11-894, paras 4-7.

³⁶ Reply, ICC-01/09-02/11-894, paras 5-6.

³⁷ ICC-01/09-02/11-T-28-ENG ET WT, page 21, lines 8-11.

³⁸ See ICC-01/09-02/11-T-28-ENG ET WT, page 90, lines 6-24 (the Prosecution notes that over the past ten years no state has suggested that the Prosecution does not have the power to make such requests).

³⁹ Reply, ICC-01/09-02/11-894, para. 9.

⁴⁰ ICC-01/09-02/11-T-28-ENG ET WT, page 58, lines 9-11.

ongoing and collaborative one', but that given the Kenyan Government's non-cooperation, the Prosecution had not yet even had any of the documents identified to it.⁴¹

Kenyan Government

19. The Kenyan Government submitted that, absent a Court order from the Chamber, it cannot comply with the Records Request.⁴² The Kenyan Government argued that the majority of the types of assistance provided for by Article 93(1) of the Statute constitute 'judicial requests'⁴³ and that Articles 1 and 42 of the Statute read in tandem with Rule 176 of the Rules demonstrate that the 'Court' and the 'Office of the Prosecutor' are distinct, independent entities.⁴⁴ The Kenyan Government submitted that the Prosecutor cannot be considered to be 'the Court' in the context of the current Records Request given that it falls within the ambit of requests that need to 'be supported by either an order of the [C]ourt, a directive of the [C]ourt, or merely a declaration of the existence of an obligation by the [C]ourt.'⁴⁵ The Kenyan Government argued that this interpretation prevails notwithstanding the definitions contained in Article 34 of the Statute⁴⁶ and Article 2 of the International Crimes Act,⁴⁷ which it submitted merely refer to the Court as a whole in its 'corporate entity'.⁴⁸ The Kenyan Government referred to the example of an arrest warrant as an incidence of

⁴¹ ICC-01/09-02/11-T-28-ENG ET WT, page 89, lines 8-18.

⁴² See for example Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, paras 24 and 27.

⁴³ See ICC-01/09-02/11-T-28-ENG ET WT, page 34, lines 4- page 36, line 11; page 43, line 23 – page 44, line 7; page 93, lines 2-12; (stating that Article 93 contains both judicial and non-judicial requests; however 'on the main [sic], in substance, it enumerates judicial requests').

⁴⁴ Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, paras 6, 24, 26-7; ICC-01/09-02/11-T-28-ENG ET WT, page 11, lines 19-24.

⁴⁵ ICC-01/09-02/11-T-28-ENG ET WT, page 9, lines 3-6.

⁴⁶ ICC-01/09-02/11-T-28-ENG ET WT, page 12, line 19 to page 13, line 1. Article 34 of the Statute provides that 'The Court shall be composed of the following organs: (a) The Presidency; (b) An Appeals Division, a Trial Division and a Pre-Trial Division; (c) The Office of the Prosecutor; (d) The Registry'.

⁴⁷ ICC-01/09-02/11-T-28-ENG ET WT, page 15, line 20 to page 16, line 13. Article 2 of the International Crimes Act of Kenya, No. 16 of 2008 ('International Crimes Act'), states, *inter alia*, that "'ICC" means the International Criminal Court established by the Rome Statute, and includes any of the organs of the Court that are referred to in that Statute'. Available:http://www.legal-tools.org/uploads/tx_ltpdb/Kenya_International_Crimes_Act_2008_rev_ed_2012_02.pdf.

⁴⁸ ICC-01/09-02/11-T-28-ENG ET WT, page 12, line 19 – page 14, line 21; page 15, line 20 – page 16, line 13; page 17, lines 2-7.

the ‘multiple usage of the word “court”’⁴⁹ and also noted the reference in Article 93(6) of the Statute to ‘the court or the Prosecutor’.⁵⁰

20. Additionally, in its oral submissions, the Kenyan Government queried the ambit of the Records Request, arguing that it had not encountered anything in the language of the Statute or the Rules to permit requesting ‘full financial profiles’ of persons of interest.⁵¹

Defence

21. The Defence submitted that, although Article 93 of the Statute generally refers to actions to be taken by both the Prosecution and the Court, Article 93(1) refers only to the Court, not to the Prosecution.⁵² The Defence argued that, for the purposes of requests for cooperation made pursuant to this provision, although the Prosecution is an organ of the Court, it is not the Court itself. The Defence submitted that the Kenyan Government’s interpretation of Article 93 of the Statute may therefore ‘not be unreasonable’ in light of similar procedures regarding requests for cooperation in other tribunals.⁵³

LRV

22. The LRV opined that requests for cooperation under Part 9 of the Statute do not require a Court order as a precondition for their execution. The LRV argued that Article 2 of the International Crimes Act clearly establishes that the term ‘ICC’

⁴⁹ ICC-01/09-02/11-T-28-ENG ET WT, page 17, lines 11-21.

⁵⁰ ICC-01/09-02/11-T-28-ENG ET WT, page 23, lines 13-24. *See also* the Defence submission on this point, ICC-01/09-02/11-T-28-ENG ET WT, page 18, line 22 – page 19, line 3.

⁵¹ ICC-01/09-02/11-T-28-ENG ET WT, page 95, lines 4-6.

⁵² ICC-01/09-02/11-T-27-ENG ET WT, page 14, lines 22-25.

⁵³ ICC-01/09-02/11-T-27-ENG ET WT, page 14, line 22 to page 15, line 20. The Defence referred specifically to Rule 54 of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) Rules of Procedure and Evidence and noted that the relevant provisions in other institutions always specify which organ of the Court may take the action.

includes the organs of the Court that are referred to in the Statute.⁵⁴ He submitted that upon receiving the Records Request from the Prosecution, the Attorney General needed only to satisfy himself under Sections 104 and 108 of the International Crimes Act that '[f]irst, the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and second, the document or records sought is or may be in Kenya. That is the extent of the inquiry that he's expected to carry out or indeed permitted to carry out...'⁵⁵ The LRV argued further that there is no 'reference in the International Crimes Act that the Prosecutor provide an order from a Trial Chamber of this [C]ourt in order to gain access to evidence in Kenya'.⁵⁶

23. The LRV submitted that, if the Kenyan Government believed a Court order was required to execute such a request, it was 'under an obligation immediately to come before the [C]ourt under Article 93(3) of the Statute; Article 99(4)(b) of the Statute; and Article 97 of the Statute', which it failed to do.⁵⁷

2. *Analysis*

24. The Chamber considers that, viewed in the context of the statutory framework as a whole, the Prosecution has clear authority to make independent requests for cooperation under Article 93(1) of the Statute. In the Chamber's view, and as discussed below, a restrictive interpretation of 'the Court' in Article 93(1) of the Statute, as advanced by the Kenyan Government and the Defence, cannot be logically sustained. Moreover, the Chamber considers that an interpretation which would require judicial approval from a Pre-Trial or Trial Chamber for a significant volume of ordinary investigative steps would be inconsistent with the statutory division of mandates between the different organs of the Court – which, it is noted, combines

⁵⁴ ICC-01/09-02/11-T-28-ENG ET WT, page 24, lines 16-18.

⁵⁵ ICC-01/09-02/11-T-28-ENG ET WT, page 73, lines 7-11.

⁵⁶ ICC-01/09-02/11-T-28-ENG ET WT, page 77, lines 8-10.

⁵⁷ ICC-01/09-02/11-T-28-ENG ET WT, page 25, lines 5-13.

features of both adversarial and inquisitorial systems – as well as with the efficient and effective functioning of the Court.

25. The Chamber notes that the Records Request was issued under Part 9 of the Statute, including, in particular, Article 93(1)(i), (k) and (l). The Chamber considers that the bulk of the assistance requested⁵⁸ falls within Article 93(1)(i) of the Statute, being requests for copies of documents and records, including records of accounts, transactions and investigations, as well as various registrations and filings.⁵⁹ Consequently, it is within this framework that the Chamber will consider the Records Request for present purposes.
26. Article 34 of the Statute provides a definition that clearly enumerates the constituent organs of ‘the Court’, and which includes the Prosecution.⁶⁰ This structure is further supported by the language of Article 42(1) of the Statute, which additionally identifies the mandate of the Prosecution as including responsibility for ‘conducting investigations and prosecutions’. That mandate is reiterated in the duties of the Prosecution set out in Article 54(1) of the Statute. In enumerating the powers of the Prosecution with respect to investigations, Article 54(3)(c) of the Statute provides that the Prosecution may ‘[s]eek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate’. That provision alone clearly envisages requests for cooperation emanating independently from the Prosecution in furtherance of its investigative mandate.
27. Part 9 of the Statute further elaborates on the framework for cooperation. Article 86 of the Statute provides for a general obligation on the part of States Parties to ‘cooperate fully with the Court in its investigation and prosecution of crimes’. Article 93(1) of the

⁵⁸ ICC-01/09-02/11-866-AnxA, paras 9-10.

⁵⁹ In respect of the request for ‘financial profiles’, *see* ICC-01/09-02/11-866-AnxA, para. 11; the request may more appropriately fall under either Article 93(1)(k) or (l) of the Statute.

⁶⁰ As noted above, a definition which is inclusive of the constituent organs of the Court is also adopted in Section 2 of the International Crimes Act and is subsequently applied in the relevant cooperation provisions of that statute.

Statute, being the provision at issue in this case, enumerates 'Other forms of cooperation' under a chapeau that provides, in relevant part, that States Parties shall 'comply with requests by the Court to provide the following assistance in relation to investigations and prosecutions'.⁶¹ In the Chamber's view, such language, read in light of Article 34 of the Statute and the explicit mandate of the Prosecution, is sufficiently clear to confirm the independent authority of the Prosecution to make requests for cooperation. It is noted that the drafting history of the Statute further affirms this interpretation.⁶²

28. It is noted that certain articles in Part 9 of the Statute, such as Article 89 relating to arrest and surrender, do explicitly envisage the need for judicial intervention by a Chamber of the Court - through, for example, the requirement for a warrant of arrest having been issued.⁶³ However, that is not the case in relation to Article 93(1) of the Statute and there is no basis for reading such a requirement into that article.
29. Moreover, the Chamber notes that Rule 176(2) of the Rules, which addresses the transmission of requests for cooperation, refers separately to such requests having been made by a Chamber, and to those that have been made by the Prosecutor. In the Chamber's view, this necessary differentiation in channels of communication, in the

⁶¹ The Chamber notes that Article 93(1)(l) is distinct amongst the enumerated forms of cooperation being a catch-all provision designed to encompass any other form of assistance which is not prohibited by the law of the requested State Party and therefore requests falling exclusively under Article 93(1)(l) of the Statute may warrant separate consideration from that given in the present decision.

⁶² See e.g. Report of the Preparatory Committee on the Establishment of an International Criminal Court, 1996, A/51/22, Vol. I, para. 341 ('[t]he view was expressed that the Prosecutor should be competent to request assistance given his or her responsibility for the investigation and prosecution of alleged offenders. There were different views as to the extent to which the Prosecutor should be required to request the assistance of States in obtaining exculpatory information and evidence or the defence should be permitted to request the assistance of States in this regard. The view was further expressed that the Presidency, the Court or the trial chamber should also be competent to request assistance from a State party depending on the stage of the investigation or the judicial proceeding. It was suggested that the Court should be competent to request assistance either *ex officio*, upon the request of the Prosecutor or of the defence. It was also suggested that the Registry should be responsible for transmitting requests for assistance ...'). Moreover, a footnote to Article 85 of the 1998 Draft Statute (which subsequently became Article 86 (General obligation to cooperate), the first article in Part 9 of the Statute) explicitly provided that "'Court" throughout this Part is understood to include its constituent organs, including the Prosecutor, as defined in [then] article 35', see A/Conf.183/2/Add.1, Report of the Preparatory Committee on the Establishment of an International Criminal Court, 1998, page 131.

⁶³ See e.g. Articles 89 and 91 (which refer, *inter alia*, to the specific power of the Pre-Trial Chamber to issue a warrant of arrest under Article 58 of the Statute).

context of independent requests issuing from different organs of the Court, also explains the disjunctive references to 'the Court or the Prosecutor' in Article 93(5) and (6) of the Statute.

30. Similarly, it is noted that Regulation 109 of the Regulations entails a differentiated procedure for proceedings being initiated under Article 87(7) of the Statute according to whether or not it is a Chamber that has made the relevant request for cooperation. This provision further confirms that it is not solely the Chamber who is empowered to issue a request for cooperation.
31. Finally, it is noted that both Articles 93(1) and 99(1) of the Statute explicitly provide that compliance with such requests is to be facilitated under procedures of national law.⁶⁴ In the Chamber's view, this means that where, as a matter of national procedural law, judicial intervention is required in order to execute particular requests, domestic judicial authorities shall be engaged in the ordinary manner and in accordance with relevant procedures available under national law. Further, these provisions envisage that national law will facilitate rather than impede the execution of cooperation requests emanating from the Court.
32. Regarding the content of the Records Request, the Chamber recognises the rather broad nature of the request. However, the Chamber has taken note of the Prosecution's submission that the request was intended to form the basis of a collaborative process through which the information sought would be refined. The Chamber also notes that the specificity of the content of the request does not appear to have been at issue between the parties during the extensive period for which it has been outstanding.⁶⁵

⁶⁴ See also Article 96(2)(e) and (3) of the Statute.

⁶⁵ A reference to the nature of the content of the request made by the Attorney General, on behalf of the Kenyan Government, during his oral submissions on 13 January 2014 has been noted above at para. 20 .

33. In light of these considerations, the Chamber confirms that the Prosecution has independent authority to make cooperation requests under Article 93(1) of the Statute and finds accordingly that the Records Request in the present case was validly issued.

B. Request for finding of non-compliance

1. Relevant Submissions

34. In its Article 87(7) Application, on the basis of the Kenyan Government's alleged failure to comply with the Records Request,⁶⁶ the Prosecution seeks (i) a finding of non-compliance against the Kenyan Government pursuant to Article 87(7) of the Statute; and (ii) referral of the matter to the ASP.⁶⁷
35. The Prosecution submitted that the records sought in the Records Request are relevant to, *inter alia*, the allegation that Mr Kenyatta financed the crimes charged, and that they are only accessible by means of the Kenyan Government's assistance.⁶⁸ The Prosecution argued that over the course of 19 months, it has exhausted all measures to ensure the cooperation of the Kenyan Government, including numerous letters and phone-calls to the Kenyan Government and repeated missions to Kenya by its staff.⁶⁹ The Prosecution stated that it was agreed between members of the Prosecution and the Attorney General of Kenya at a meeting on 25 July 2012 that no additional information was required from the Prosecution in order for the Kenyan Government to comply with the Records Request.⁷⁰ The Prosecution contended that the Kenyan Government's responses have been 'inconsistent and often ambiguous'

⁶⁶Article 87(7) Application, ICC-01/09-02/11-866, para 1. *See* Records Request attached at Annex A to the Article 87(7) Application. The Chamber notes that the finding of non-compliance is sought only in respect of the information specified at paragraphs 9-11 of the request letter.

⁶⁷Article 87(7) Application, ICC-01/09-02/11-866, para. 31.

⁶⁸Article 87(7) Application, ICC-01/09-02/11-866, paras 1, 23 and 30.

⁶⁹Article 87(7) Application, ICC-01/09-02/11-866, paras 2 and 22.

⁷⁰Article 87(7) Application, ICC-01/09-02/11-866, para. 8.

and suggestive of a failure to make genuine efforts to retrieve the records.⁷¹ The Prosecution argued that it is reasonable to infer from the Kenyan Government's inaction to date that 'no meaningful action has been taken with respect to the execution of this request'.⁷²

36. The Prosecution further submitted that the Kenyan Government has not consulted with it regarding any impediments to the execution of the Records Request, as required by Articles 93(3) and 97 of the Statute.⁷³ The Prosecution stated that although on 10 June 2013⁷⁴ the Kenyan Government did assert that Kenyan law requires the consent of an individual for government access to privately held information, it did not specify: (i) the legal basis for this requirement; (ii) possible exceptions to the rule; (iii) whether the rule applied to all the information requested; and (iv) steps it has taken or will take to address the obstacle and obtain the consent.⁷⁵ Moreover, the Prosecution argued that the type of information requested is routinely obtained in criminal investigations by law enforcement without undue burden or delay.⁷⁶
37. In response, the Kenyan Government submitted that it was not possible to execute the Records Request due to the fact that the said request was issued in violation of the Statute and Rules, as well as in violation of Kenyan domestic law, including the International Crimes Act.⁷⁷ The Kenyan Government averred that Article 93(1) of the Statute (which refers to the cooperation being provided 'under procedures of national law') and Section 23(1) the International Crimes Act (which refers to requests for assistance being dealt with 'in accordance with relevant procedures under Kenyan

⁷¹ Article 87(7) Application, ICC-01/09-02/11-866, paras 22-23.

⁷² Article 87(7) Application, ICC-01/09-02/11-866, para. 27.

⁷³ Article 87(7) Application, ICC-01/09-02/11-866, paras 24-25.

⁷⁴ See Reply by the Government of Kenya to the "Prosecution response to the 'Government of Kenya's 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' (ICC-01/09-02/11.713)", ICC-01/09-02/11-755.

⁷⁵ Article 87(7) Application, ICC-01/09-02/11-866, paras 3 and 26. See also confidential annexes A-M.

⁷⁶ Article 87(7) Application, ICC-01/09-02/11-866, paras 3 and 27.

⁷⁷ Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, paras 9-10.

law') invoke the principle of complementarity and mean that cooperation with the Court under Part 9 of the Statute is subject to Kenyan law.⁷⁸ In that regard, the Kenyan Government referred, in particular, to the Constitution, the 'Supreme law of Kenya', which contains a right to privacy.⁷⁹

38. The Kenyan Government detailed a number of further reasons as to why the Records Request would not be executable under Kenyan law in its current form,⁸⁰ including, *inter alia*: (i) the requirement for an order from a Chamber of the Court as a precondition to triggering domestic procedures to facilitate the Records Request;⁸¹ (ii) various provisions of national legislation preventing the disclosure of an individual's confidential financial information without consent or a court order;⁸² (iii) issues raised by the right not to incriminate oneself;⁸³ and (iv) the independence of different constitutional organs in Kenya.⁸⁴ The Kenyan Government submitted that the Prosecution has failed to provide 'proper grounds' warranting disclosure of the protected information in this case.⁸⁵ The Kenyan Government additionally submitted

⁷⁸ Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, paras 9-10 ; ICC-01/09-02/11-T-28-ENG ET WT, page 31, lines 1-2.

⁷⁹ Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, paras 9 and 11 (it is also noted that this right is not absolute being subject to 'reasonable and justifiable' limitations provided by law).

⁸⁰ The Chamber notes that, at the Status Conference of 13 February 2014, one such reason appeared to include the argument that the Attorney General could not facilitate compliance with the execution of the Records Request as the accused himself was not a 'proper defendant' – see ICC-01/09-02/11-T-28-ENG ET WT, page 96, lines 18-20 - 'If in this court there is a proper defendant, properly presented to the court, with the threshold evidence required by law, with requests processed in accordance with the statute and the law, I shall comply'.

⁸¹ See for example Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, paras 24 and 27. For details of Kenyan domestic procedures, see ICC-01/09-02/11-T-28-ENG ET WT, page 44, line 21, to page 45, line 20.

⁸² See for example Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, paras 12-17, referring to Sections 31(1) and 31(2) of the Banking Act, Chapter 488 of the Laws of Kenya; Sections 17(1) and 43 of the Central Bank of Kenya Act, Chapter 491 of the Laws of Kenya; Sections 139 and 178 of the Evidence Act, Chapter 80 of the Laws of Kenya; Section 13 of the Capital Markets Act, Chapter 485A of the Laws of Kenya; Civil Aviation Act, Chapter 394 of the Laws of Kenya; Regulation 25 of the Civil Aviation (Licensing of Air Services) Regulations, 1979; Regulation 39 of the Civil Aviation (Licensing of Air Services) Regulations, 2009. The Kenyan Government submitted that it has not sought to obtain the consent of the accused in this case to disclosure of the information in question as, it was contended, there is no duty on them to do so, the request was confidential and the obtaining of such consent is 'a matter between the Prosecutor and the Defence', ICC-01/09-02/11-T-28-ENG ET WT, page 30, lines 7-20; page 41, lines 3-11. See also ICC-01/09-02/11-T-28-ENG ET WT, page 31, lines 3-11; page 31, line 22 – page 33, line 3 (regarding the necessity of a court order).

⁸³ See for example Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, paras 22-23.

⁸⁴ ICC-01/09-02/11-T-28-ENG ET WT, page 38, line 17 – page 40, line 14.

⁸⁵ Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, paras 20-21.

that the Prosecution failed to adhere to requirements set out in the Public Officer's Ethics Act when requesting certain information pursuant to that act.⁸⁶

39. The Kenyan Government stated that it informed the Prosecution 'at the earliest possible opportunity' that compliance with the requests was not possible as they 'were in violation' of the Statute and Kenyan law.⁸⁷ Indeed, the Kenyan Government argued that where it was of the view that it could cooperate with the Prosecutor in the absence of a Court order, it has done so.⁸⁸ It argued that, on the basis that both the Prosecution and the Kenyan Government have differing interpretations of the applicable law, the issue before the Chamber should not be classified as one of a lack of cooperation, but more properly as one of 'jurisprudential contestation'.⁸⁹
40. Accordingly, the Kenyan Government requested that the Chamber: (i) find the Records Request 'untenable' as it is inconsistent with the aforementioned legal provisions; (ii) find that the Article 87(7) Application is 'unsustainable' because the consultations allowed for under Article 93(3) of the Statute have not yet 'been initiated and concluded'; and (iii) direct the commencement of such consultations in place of a referral to the ASP.⁹⁰

⁸⁶ Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, para. 18.

⁸⁷ Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, para. 5.

⁸⁸ ICC-01/09-02/11-T-28-ENG ET WT, page 9, lines 21-23. The Kenyan Government referred to the very existence of legislation domesticating the Statute and the attendance of the Attorney General at the Status Conference as further evidence of cooperation, ICC-01/09-02/11-T-28-ENG ET WT, page 17, line 22 – page 18, line 12. It was also submitted that the Prosecution has 'been changing its narrative continuously' and that the Kenyan Government only became 'a boogeyman in this case' very recently, that it had never been previously suggested that the status of the Kenyan Government's cooperation would 'stop the case from going to trial', ICC-01/09-02/11-T-28-ENG ET WT, page 107, lines 11-16.

⁸⁹ ICC-01/09-02/11-T-28-ENG ET WT, page 10, line 23 – page 11, line 13. See also ICC-01/09-02/11-T-28-ENG ET WT, page 54, line 9 – page 55, line 2 (where the Attorney General stated that, for this reason, he has not pursued the question of compliance with the Records Request since November 2012).

⁹⁰ Cooperation Observations, ICC-01/09-02/11-877-Anx2-Red, para. 29. See also ICC-01/09-02/11-T-28-ENG ET WT, page 103, lines 12-13 (where the Kenyan Government confirmed that '[a] formal consultative process has never commenced at the instigation of either party').

41. In reply, the Prosecution submitted that Article 93(1) of the Statute does in fact confer upon it the authority to issue the Records Request⁹¹. The Prosecution further argued that the Kenyan Government could implement the Records Request without violating Kenya's national laws because: (i) Article 88 of the Statute requires the Kenyan Government to ensure that there are procedures available under national law for all forms of cooperation; (ii) Article 93(1) of the Statute requires the Kenyan Government to assist the Prosecution in obtaining the information sought, including at the least assisting the Prosecution to navigate Kenyan national procedures; (iii) Article 93(3) of the Statute requires the Kenyan Government to consult with the Court in the resolution of obstacles to the execution of requests;⁹² and (iv) provisions of Kenyan law, not referred to by the Kenyan Government in its Response, do allow for the implementation of the Records Request.⁹³
42. The Prosecution submitted that Article 93(3) of the Statute (referring to the initiation of consultations resulting from obstacles to the execution of requests) does not prevent a finding of non-cooperation under Article 87(7) of the Statute as: (i) the Kenyan Government has failed to demonstrate any 'fundamental legal principle of general application' barring implementation of the Records Request;⁹⁴ and (ii) even allowing for such fundamental principle, the Kenyan Government has not undertaken consultations with the Court to try to resolve the matter, including consideration of whether the assistance can be rendered in another manner or subject to conditions, as required by Article 93(3) of the Statute.⁹⁵

⁹¹ Reply, ICC-01/09-02/11-894, para. 8.

⁹² Reply, ICC-01/09-02/11-894, paras 10-12.

⁹³ Reply, ICC-01/09-02/11-894, para. 13-14, referring to Section 180 of the Kenyan Evidence Act; Section 118 of the Kenyan Criminal Procedure Code; Section 104 of the International Crimes Act.

⁹⁴ Reply, ICC-01/09-02/11-894, paras 18 and 20.

⁹⁵ Reply, ICC-01/09-02/11-894, para. 21-22. *See also* Transcript of hearing on 13 February 2014, ICC-01/09-02/11-T-28-ENG ET WT, page 101, lines 16-17 (where the Prosecution stated that consultations within the meaning of that provision had 'not begun in any meaningful sense').

43. The Defence argued, in light of the fact that the interpretation of Article 93(1) of the Statute advanced by the Kenyan Government is not unreasonable, '[t]o jump to a stage and to start seeking orders before the Assembly of State Parties, to start measures critical of Kenya in [its] submission is highhanded'.⁹⁶
44. The LRV disputed the Kenyan Government's interpretation of Article 93(1) of the Statute and the contention that the operation of Kenyan law precludes the execution of the Records Request; arguing that the obstacle is not one of law but rather '[t]he problem is that the Attorney General has failed to comply with its provisions'.⁹⁷ The LRV argued that a finding of non-cooperation should be made against the Kenyan Government on the basis, *inter alia*, that the Kenyan Government has failed to explain why it did not bring the purported legal barriers immediately to the Chamber 'without delay', as required by Articles 93(3) and 99(4) of the Statute and its own laws.⁹⁸

2. Analysis

45. As a preliminary matter, it is noted that Regulations 108 and 109(1) of the Regulations, read together, identify the circumstances in which a request for a finding of non-compliance may be made pursuant to Article 87(7) of the Statute. It does not appear to the Chamber that the procedure outlined in those provisions – including, in particular, the declaration of exhaustion of consultations and expiry of the timeline within which challenges to the legality of a request may be brought – were followed. However, bearing in mind, *inter alia*, the extensive period for which the request has been outstanding, the Prosecution's submission in the Article 87(7) Application that it had 'exhausted' all attempts to secure the records⁹⁹ and the fact that the Chamber has

⁹⁶ ICC-01/09-02/11-T-27-ENG ET WT, page 15, lines 14-16.

⁹⁷ ICC-01/09-02/11-T-28-ENG ET WT, page 72, line 21-22.

⁹⁸ ICC-01/09-02/11-T-27-ENG ET WT, page 32, lines 13-16.

⁹⁹ Article 87(7) Application, ICC-01/09-02/11-866, para. 2.

now considered and ruled upon the Kenyan Government's challenge to the legality of the Records Request, the Chamber considers it in the interests of justice for the Article 87(7) Application to be considered on its merits.¹⁰⁰

46. The Chamber has already ruled upon the independent authority of the Prosecution, within the statutory framework of the Court, to validly issue the Records Request. It is not in dispute between the Prosecution and the Kenyan Government that the Records Request has not actually been complied with, in the sense of the requested records having been furnished to the Prosecution. It is also agreed that no meaningful consultations, with a view to resolving any differences and executing the Records Request, have taken place.
47. 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.¹⁰¹
48. To the extent that problems concerning the execution of the Records 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

¹⁰⁰ See Regulation 29(1) of the Regulations.

¹⁰¹ See e.g. Article 27 of the Vienna Convention on the Law of Treaties.

resolving the matter. In light of the submissions made, the Chamber finds that this has not occurred.

49. The Chamber notes that, separately to its obligation to initiate consultations, if the Kenyan Government did not recognise the power of the Prosecutor to independently issue Part 9 cooperation requests, and thus intended to deny the Records Request on this basis, it was under an obligation under Article 93(6) of the Statute to ‘promptly’ articulate this objection.
50. The Chamber notes with concern that the Records Request was transmitted to the Kenyan Government in April 2012, almost two years ago.¹⁰² From the copy correspondence that has been provided to the Chamber, it is apparent that the Kenyan Government did not initially query the legality of the Records Request and, on the contrary, after repeated follow-up by the Prosecution,¹⁰³ indicated that the requests had been forwarded to the various relevant ministries.¹⁰⁴ The Chamber considers that it was not until 9 January 2014, when the Report of the Registry containing the Kenyan Government’s Cooperation Observations was received by the Chamber, that the Kenyan Government unequivocally stated its objection to the Records Request.
51. In the Chamber’s view, there has been a substantial unexplained delay on the part of the Kenyan Government in either giving effect to the cooperation request or raising any problems which may have prevented execution of the request. As discussed further below, the cooperation of States Parties is of central importance to the

¹⁰² Article 87(7) Application, ICC-01/09-02/11-866, para 1. See Records Request attached at confidential Annex A to the Article 87(7) Application, dated 24 April 2002.

¹⁰³ See ICC-01/09-02/11-866-Conf-Exp-AnxB – ICC-01/09-02/11-866-Conf-Exp-AnxG.

¹⁰⁴ See e.g. ICC-01/09-02/11-866-Conf-Exp-AnxH. See also ICC-01/09-02/11-866-Conf-Exp-AnxM, dated 11 January 2013, (which fails to make any mention of the information which is the subject of the Records Request) and ICC-01/09-02/11-755, para. 6 (which referred to the need to collate information).

effective functioning of the Court. The Chamber considers that the fact that an adjournment is now being necessitated in order to facilitate compliance amply demonstrates the impact that the Kenyan Government's actions have had on the proceedings in this case.

52. Notwithstanding the findings above, the Chamber considers that, in light of its clarification of the independent authority of the Prosecution within the statutory framework of the Court to validly issue the Records Request, it shall defer any formal finding of non-compliance under Article 87(7) of the Statute until the expiration of the adjournment period (which is discussed in the following section).

C. Request for adjournment

1. Relevant Submissions

Prosecution

53. In the First Adjournment Request, the Prosecution submitted that it 'considers that it has insufficient evidence to proceed to trial at this stage' and therefore sought an adjournment of the provisional trial date by three months in order to enable it to undertake 'additional investigative steps – including those not previously open to the Prosecution – to determine whether a case can be presented to the Chamber that establishes the Accused's guilt beyond reasonable doubt'.¹⁰⁵
54. The Prosecution made this request following: (i) its withdrawal of Witness 12, who admitted to having provided false evidence in relation to an event central to the

¹⁰⁵ First Adjournment Request, ICC-01/09-02/11-875, paras 3 and 18.

Prosecution's case;¹⁰⁶ and (ii) information received by the Prosecution that Witness 11 was no longer willing to testify.¹⁰⁷

55. The Prosecution submitted that additional investigative steps must be pursued according to its Article 54(1) duties.¹⁰⁸ It was further submitted that the proposed adjournment would not be contrary to the accused's right to be tried without undue delay pursuant to Article 67(1)(c), as: (i) that right must be balanced against the interests of justice; and (ii) by virtue of repeatedly seeking adjournment of the commencement of trial, the accused has 'partially waived' that right.¹⁰⁹ The Prosecution additionally submitted that the adjournment would provide an opportunity for the Chamber to rule on the Article 87(7) Application. The Prosecution argued that this was necessary both: (i) in order to ascertain whether witness statements regarding the accused's alleged funding of post-election violence can be corroborated; and (ii) to enable the Assembly of States Parties ('ASP') to determine what action to take in relation to the Kenyan Government's alleged non-compliance with its obligations.¹¹⁰
56. In the Second Adjournment Request, the Prosecution acknowledged that, following certain factual developments, it no longer considers that either of the further investigative steps originally identified in the First Adjournment Request hold the prospect of producing relevant evidence.¹¹¹ Nonetheless, the Prosecution submitted that, prior to any decision to terminate the proceedings as sought by the Defence,¹¹²

¹⁰⁶ First Adjournment Request, ICC-01/09-02/11-875, para. 2.

¹⁰⁷ First Adjournment Request, ICC-01/09-02/11-875, para. 2. *See also* ICC-01/09-02/11-892, para. 11, where it is acknowledged that even if Witness 11's testimony could be secured the Prosecution would not currently have sufficient evidence to prove the accused's guilt beyond reasonable doubt.

¹⁰⁸ First Adjournment Request, ICC-01/09-02/11-875, para. 3. *See also* ICC-01/09-02/11-T-27-ENG ET WT, page 12, lines 7-8.

¹⁰⁹ First Adjournment Request, ICC-01/09-02/11-875, para. 21.

¹¹⁰ First Adjournment Request, ICC-01/09-02/11-875, para. 19.

¹¹¹ Second Adjournment Request, ICC-01/09-02/11-892, paras 7-8. *See also* ICC-01/09-02/11-T-27-ENG ET WT, page 3, lines 10-13; page 8, lines 4-6; and page 12, lines 6-18 (where it is admitted that, absent the requested financial records, the prospect of other investigative avenues yielding 'real potentially conclusive evidence' is 'minimal').

¹¹² The Defence's submissions on termination are discussed in further detail below.

the Chamber should first: (i) adjudicate the Article 87(7) Application and find that there has been non-compliance; (ii) order compliance by the Kenyan Government; and (iii) adjourn the case until the Kenyan Government complies with its obligations.¹¹³ Alternatively, it was submitted that, should the Chamber decline to first rule on the Article 87(7) Application, submissions should be sought regarding the proper procedure for the withdrawal of charges.¹¹⁴

57. The Prosecution submitted that it should not be required to withdraw charges while the issue of non-compliance ‘remains unresolved’, as this would ‘send a message that States can thwart this Court’s work without consequence’.¹¹⁵ The Prosecution argued that the lack of cooperation from the Kenyan Government can be ‘imputed to the Accused’ given his position as head of government and therefore, because he is in a position to ensure compliance, an adjournment pending compliance by the Kenyan Government would not be ‘unfairly prejudicial’ to him.¹¹⁶ The Prosecution submitted that the question to be addressed is not the permissibility of post-confirmation investigations, but rather whether charges should be withdrawn where a State has obstructed investigations and those actions can be attributed to an accused.¹¹⁷ The Prosecution argued that the fact the Article 87(7) Application was not filed until late November 2013 is ‘irrelevant’.¹¹⁸
58. The Prosecution submitted that the financial information sought is ‘relevant to a central allegation’ and ‘could prove decisive’,¹¹⁹ however it also acknowledged that

¹¹³ Second Adjournment Request, ICC-01/09-02/11-892, paras 1, 3 and 29; ICC-01/09-02/11-T-27-ENG ET WT, page 8, lines 19-22; ICC-01/09-02/11-T-27-ENG ET WT, page 10, lines 14-19.

¹¹⁴ Second Adjournment Request, ICC-01/09-02/11-892, paras 4 and 27.

¹¹⁵ Second Adjournment Request, ICC-01/09-02/11-892, paras 12 and 23; ICC-01/09-02/11-T-27-ENG ET WT, page 10, lines 4-19; page 41, lines 17-25.

¹¹⁶ Second Adjournment Request, ICC-01/09-02/11-892, paras 14, 19-21. *See also* ICC-01/09-02/11-T-27-ENG ET WT, page 5, line 18 – page 6, line 5 (where the Prosecution highlights the obligations of the President, under the Kenyan Constitution, to ensure compliance with international obligations).

¹¹⁷ Second Adjournment Request, ICC-01/09-02/11-892, para. 25.

¹¹⁸ Second Adjournment Request, ICC-01/09-02/11-892, para. 22.

¹¹⁹ Second Adjournment Request, ICC-01/09-02/11-892, para. 16; ICC-01/09-02/11-T-27-ENG ET WT, page 9, lines 11-22; page 11, lines 2-7; page 45, lines 18-22. *See also* ICC-01/09-02/11-T-27-ENG ET WT, page 55, lines 19-24.

the information ‘may or may not yield evidence relevant to this case’.¹²⁰ The Prosecution argued that this evidence is ‘available’ within the meaning of Regulation 60 of the Regulations of the Office of the Prosecutor (‘OTP Regulations’), but is being withheld by the Kenyan Government.¹²¹

59. At the status conference on 5 February 2014, the Prosecution clarified that the Second Adjournment Request is intended to entirely supersede the First Adjournment Request.¹²²
60. Finally, the Prosecution contested whether the Chamber has authority to terminate proceedings at this stage.¹²³ The Prosecution submitted that the procedure should instead be a withdrawal of charges by it.¹²⁴ In that regard, the Prosecution also contested whether leave of the Chamber is required for it to withdraw charges after the confirmation decision but before the commencement of the trial,¹²⁵ though submitted that consideration of such matters is premature at this stage.¹²⁶ Nonetheless, the Prosecution argued that, should the charges be withdrawn, the principle of *ne bis in idem* only applies when there has been a trial on the merits of the case, and not, as in these circumstances, where charges are withdrawn prior to the commencement of trial.¹²⁷ In support of that proposition, the Prosecution relied on: (i)

¹²⁰ 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; page 11, lines 8-11; page 11, line 16 – page 12, line 1.

¹²¹ ICC-01/09-02/11-T-27-ENG ET WT, page 45, line 23 - page 46, line 17. Regulation 60 of the OTP Regulations provides that the Prosecution shall promptly, *inter alia*, amend or withdraw the charges if it ‘considers that the evidence *available* [...] does not support an element of the charges pleaded or supports a different charge, or that any charge pleaded otherwise cannot be pursued [...]’. (emphasis added).

¹²² ICC-01/09-02/11-T-27-ENG ET WT, page 7, line 13 – page 8, line 22.

¹²³ Second Adjournment Request, ICC-01/09-02/11-892, para. 12.

¹²⁴ Second Adjournment Request, ICC-01/09-02/11-892, para. 12; ICC-01/09-02/11-T-27-ENG ET WT, page 61, lines 11-15.

¹²⁵ ICC-01/09-02/11-T-27-ENG ET WT, page 56, line 16 - page 57, line 13; page 58, line 9 - page 59, line 19; page 60, lines 18-21.

¹²⁶ Prosecution’s *Ne bis in idem* Submissions, ICC-01/09-02/11-899, para. 2; ICC-01/09-02/11-T-27-ENG ET WT, page 40, lines 16-20.

¹²⁷ Prosecution’s *Ne bis in idem* Submissions, ICC-01/09-02/11-899, paras 1, 6 and 22; ICC-01/09-02/11-T-27-ENG ET WT, page 62, lines 18-22; page 63, lines 3-13.

Articles 20, 61(9) and 81 of the Statute;¹²⁸ (ii) prior jurisprudence of the Court;¹²⁹ (iii) case-law from the *ad hoc* tribunals;¹³⁰ and (iv) various policy considerations.¹³¹

Defence

61. The Defence opposed the Prosecution Requests and instead sought termination of the proceedings pursuant to Article 64(2) of the Statute.¹³² The Defence challenged the merits of the 'change in direction' evident in the Second Adjournment Request, arguing that the Prosecution should have sought a ruling in relation to the alleged non-cooperation at an earlier stage.¹³³ The Defence noted that the three witnesses 'upon which this case was confirmed' are either no longer relied upon or no longer willing to be relied upon.¹³⁴ The Defence submitted that the adjournment request is an 'inappropriate attempt' to investigate a case that is no longer underpinned by 'any confirmation structure'.¹³⁵
62. The Defence argued that it has challenged the credibility of Witness 12 since the confirmation of charges stage but that the Prosecution did not seek to address 'fundamental inconsistencies' in the witness's evidence until December 2013.¹³⁶ The Defence submitted that the Prosecution's 'persistent failure' to investigate the reliability of Witness 12's evidence, in accordance with its responsibilities under

¹²⁸ Prosecution's *Ne bis in idem* Submissions, ICC-01/09-02/11-899, paras 7-10.

¹²⁹ Prosecution's *Ne bis in idem* Submissions, ICC-01/09-02/11-899, paras 12-14 (referring to Decision on the withdrawal of charges against Mr Muthaura, ICC-01/09-02/11-696, 18 March 2013, ('*Muthaura* Decision') and *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802 ('*Bemba* Decision')).

¹³⁰ Prosecution's *Ne bis in idem* Submissions, ICC-01/09-02/11-899, paras 15-18.

¹³¹ Prosecution's *Ne bis in idem* Submissions, ICC-01/09-02/11-899, paras 19-21.

¹³² Defence Termination Request, ICC-01/09-02/11-878-Red, paras 5, 27, 38.

¹³³ ICC-01/09-02/11-T-27-ENG ET WT, page 13, line 22 – page 14, line 17; page 15, line 21 – page 16, line 2.

¹³⁴ Defence Termination Request, ICC-01/09-02/11-878-Red, para. 4; ICC-01/09-02/11-T-27-ENG ET WT, page 47, lines 15-18.

¹³⁵ Defence Termination Request, ICC-01/09-02/11-878-Red, para 21. *See also* ICC-01/09-02/11-T-27-ENG ET WT, page 47, lines 12 - 21; page 48, line 23 - page 49, line 6 (where it is submitted that that the Prosecution has created a narrative based on 'false evidence' and that continuation of the proceedings would lead to a 'miscarriage of justice').

¹³⁶ Defence Termination Request, ICC-01/09-02/11-878-Red, para. 20. *See also* ICC-01/09-02/11-T-27-ENG ET WT, page 48, lines 8-17; page 49, lines 14-18 and line 23 to page 50, line 12; page 51, lines 20-22.

Article 54 of the Statute, renders further investigations at this late stage impermissible.¹³⁷

63. The Defence further argued that granting the adjournment would violate Mr Kenyatta's right to expeditious proceedings.¹³⁸ The Defence rejected the suggestion that this right has been partially waived by Mr Kenyatta and submitted that the delays in the case to date have been necessitated by the Prosecution's 'flawed investigation'.¹³⁹
64. Moreover, the Defence argued that the proposed investigations contravene the permissible scope of post-confirmation investigations.¹⁴⁰ The Defence submitted that the standard – which the Defence claims is not met in this instance – is that post-confirmation investigations may be appropriate where the evidence 'could not with reasonable diligence' have been obtained prior to confirmation or where evidence 'unexpectedly and through no fault of the Prosecution' becomes unavailable for use at trial.¹⁴¹ The Defence further submitted that the financial information requested in the Records Request, which related to identifying particular bank accounts rather than specifically seeking details of transactions during the relevant time period, would not yield evidence which could support the charges.¹⁴² The Defence contested the Prosecution's interpretation of Regulation 60 of the OTP Regulations, arguing that the interpretation advanced by the Prosecution 'would enable [the Prosecution]

¹³⁷ Defence Termination Request, ICC-01/09-02/11-878-Red, para. 24.

¹³⁸ Defence Termination Request, ICC-01/09-02/11-878-Red, para. 25.

¹³⁹ Defence Termination Request, ICC-01/09-02/11-878-Red, paras 26-27.

¹⁴⁰ Defence Termination Request, ICC-01/09-02/11-878-Red, paras 14-17 and 30.

¹⁴¹ Defence Termination Request, ICC-01/09-02/11-878-Red, para.16, relying on Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728 ('Article 64(4) Decision'), para. 120.

¹⁴² ICC-01/09-02/11-T-28-ENG ET WT, page 64, line 22 – page 67, line 21.

to continue with any case notwithstanding the fact that they didn't have the evidence available to themselves'.¹⁴³

65. The Defence submitted that the Prosecution has erroneously premised its argument on a presumption that it enjoys 'unfettered discretion' to withdraw charges.¹⁴⁴ The Defence, relying on the *Muthaura* Decision, argued that, by contrast, leave from the Court is required for a withdrawal of charges.¹⁴⁵ Additionally, the Defence submitted that the Chamber may itself terminate the proceedings.¹⁴⁶ Moreover, it is submitted that, should the Chamber terminate the proceedings against the accused, a final determination of the charges against him should be made and an acquittal entered as a bar to future proceedings relating to the same allegations on which the charges in this case are based.¹⁴⁷

Kenyan Government

66. The Kenyan Government disputes the assertion that its alleged non-cooperation can be attributed to Mr Kenyatta, which it submitted is based on a misrepresentation of the functions and powers of the President.¹⁴⁸ It argued that the Constitution of the Republic of Kenya, which represents the supreme law of the Republic,¹⁴⁹ limits the powers and functions of the President.¹⁵⁰ In this regard, the Kenyan Government noted, in particular, certain constitutional provisions which provide for various degrees of independence of different organs of state, office holders and institutions –

¹⁴³ ICC-01/09-02/11-T-27-ENG ET WT, page 46, line 21 - page 47, line 3.

¹⁴⁴ ICC-01/09-02/11-903, para. 28.

¹⁴⁵ ICC-01/09-02/11-903, para. 25. It is noted that at one point during the status conference on 5 February 2014 the Defence appeared to concede that the authorisation of the Chamber is not required (ICC-01/09-02/11-T-27-ENG ET WT, page 63, line 20 – page 64, line 4), however given that a different position appears to have been advanced in the Defence's subsequent written filing (ICC-01/09-02/11-903) the Chamber will treat the matter as contested.

¹⁴⁶ ICC-01/09-02/11-T-27-ENG ET WT, page 64, lines 18-19; ICC-01/09-02/11-903, para. 34.

¹⁴⁷ ICC-01/09-02/11-T-27-ENG ET WT, page 64, line 21 - page 65, line 4; ICC-01/09-02/11-903, paras 11, 36-46.

¹⁴⁸ Adjournment Observations, ICC-01/09-02/11-901, paras 10 and 19-20.

¹⁴⁹ Adjournment Observations, ICC-01/09-02/11-901, paras 16-17.

¹⁵⁰ Adjournment Observations, ICC-01/09-02/11-901, paras 18-30. *See also* Adjournment Observations, ICC-01/09-02/11-901, paras 56-64.

including the Judiciary, the Director of Public Prosecutions and the Central Bank – over whom, it is asserted, the President has no control.¹⁵¹

67. The Kenyan Government stated that all requests for cooperation from the Court are ‘processed through’ the Office of the Attorney General and that the President has never ‘influenced the manner in which any request was dealt with’.¹⁵² It further asserted that the Office of the Attorney General is not aware of any other case in which the President ‘interfered with and obstructed cooperation with any organ of the Court’.¹⁵³
68. The Kenyan Government denied that any failure to comply with international obligations can be attributed to the President, because this would presume that he should facilitate compliance ‘regardless of national legal and constitutional prerequisites’.¹⁵⁴

LRV

69. The LRV supported the Prosecution Requests.¹⁵⁵ Citing the current situation in the *Gbagbo* case¹⁵⁶ by way of comparison, he submitted that the proposed adjournment would have ‘little impact’ on the accused in this case on the basis, *inter alia*, that Mr Kenyatta is not in custody.¹⁵⁷

¹⁵¹ Adjournment Observations, ICC-01/09-02/11-901, paras 30-55 and 65; ICC-01/09-02/11-T-28-ENG ET WT, page 48, line 4 – page 50, line 8; page 50, line 19 – page 52, line 19; page 91, line 16 – page 92, line 18 (it was submitted that the President has fulfilled his constitutional obligations once he has appointed individuals to hold relevant offices); *see also* paras 54 and 69 (where the Kenyan Government responds to allegations of delays in compliance by submitting that consultations between independent governmental bodies is expected to take time and that the Kenyan President does not have the constitutional power to expedite this process).

¹⁵² Adjournment Observations, ICC-01/09-02/11-901, paras 14, 70-73; ICC-01/09-02/11-T-28-ENG ET WT, page 53, lines 21 – 24.

¹⁵³ Adjournment Observations, ICC-01/09-02/11-901, paras 71 and 73.

¹⁵⁴ Adjournment Observations, ICC-01/09-02/11-901, paras 67-68.

¹⁵⁵ *See e.g.* ICC-01/09-02/11-879-Red, para. 1; ICC-01/09-02/11-T-27-ENG ET WT, page 39, lines 4-8; page 71, lines 5-9.

¹⁵⁶ *The Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11.

¹⁵⁷ ICC-01/09-02/11-879-Red, paras 13-14; ICC-01/09-02/11-T-27-ENG ET WT, page 34, lines 6-22.

70. The LRV emphasised the investigative difficulties which the Prosecution appears to have faced in conducting investigations, including the issuance of a domestic injunction in 2011 prohibiting the taking of evidence for the purposes of the ICC.¹⁵⁸ The LRV submitted that there has been a lack of 'genuine cooperation' from the Kenyan Government¹⁵⁹ and that, under the Constitution of Kenya, any failure by the state to fulfil its cooperation obligations 'must be attributed to the President'.¹⁶⁰ The LRV argued that, rather than working to ensure cooperation, the President has 'presided over an unprecedented, high-level campaign to terminate the case'.¹⁶¹ The LRV submitted that terminating the proceedings at this stage would be 'unconscionable' and would, *inter alia*: (i) send the message that obstruction by the state is a 'viable strategy', thus impacting the Court's 'deterrent effect';¹⁶² and (ii) 'render meaningless the carefully calibrated model of State co-operation' established in Part 9 of the Statute.¹⁶³
71. The LRV additionally submitted that, given the lack of any credible process for domestic prosecutions, termination of the proceedings would result in the 'total destruction' of justice processes for those ethnic groups targeted for their perceived support of ODM.¹⁶⁴

¹⁵⁸ ICC-01/09-02/11-879-Red, paras 15-17; *see also* paragraphs 32-42 regarding the Kenyan Government's alleged lack of cooperation; ICC-01/09-02/11-T-27-ENG ET WT, page 19, lines 9-20; page 29, line 24 – page 31, line 15; page 70, lines 5-9.

¹⁵⁹ ICC-01/09-02/11-879-Red, para. 33; ICC-01/09-02/11-T-27-ENG ET WT, page 31, line 22 – page 32, line 16.

¹⁶⁰ ICC-01/09-02/11-879-Red, para. 34; *see also* paras 38-42 (where it is argued that any invocation of the right to not incriminate oneself is misconceived in these circumstances and does not displace the accused's constitutional obligation to secure cooperation); ICC-01/09-02/11-T-27-ENG ET WT, page 20, lines 10-12; page 21, lines 10-15; page 33, line 10 – page 34, line 3.

¹⁶¹ ICC-01/09-02/11-879-Red, paras 35-36; ICC-01/09-02/11-T-27-ENG ET WT, page 18, lines 1-11; page 19, lines 6-8; page 19, line 22 – page 20, line 2; page 20, lines 15-17; page 21, line 19 – page 24, line 16; page 69, line 22 – page 70, line 4.

¹⁶² ICC-01/09-02/11-879-Red, paras 51-54; ICC-01/09-02/11-T-27-ENG ET WT, page 18, lines 12-14; page 35, lines 15-17; page 36, lines 4-12; page 39, lines 4-8.

¹⁶³ ICC-01/09-02/11-T-27-ENG ET WT, page 35, lines 18-21; *see also* page 38, line 25 – page 39, line 4.

¹⁶⁴ ICC-01/09-02/11-879-Red, para. 55; ICC-01/09-02/11-T-27-ENG ET WT, page 20, lines 12-14; page 37, lines 10-15; page 26, line 6 – page 29, line 4; page 37, line 19 – page 38, line 4; page 38, line 19.

72. The LRV challenges the Kenyan Government's Adjournment Observations, submitting that: (i) the Kenyan Government's arguments concerning 'independent commissions' are inapposite, including because the Attorney General and the Director of Public Prosecutions both fall under the executive branch of the state;¹⁶⁵ (ii) pursuant to the Constitution of the Republic of Kenya, the President is 'ultimately responsible' for any failure by the state to comply with its obligations under the Statute;¹⁶⁶ (iii) the Attorney General's 'inaction' is the reason for the alleged non-cooperation;¹⁶⁷ (iv) the reasons presented by the Attorney General to justify the alleged non-cooperation are 'contradictory, inconsistent and misconceived, and indicative of a policy of non-cooperation';¹⁶⁸ and (v) there is 'reason to doubt' the *de facto* independence of the Attorney General from the President in respect of cooperation with the Court.¹⁶⁹
73. The LRV queried whether the Prosecution has given 'due consideration' to using additional powers to address the difficulties encountered, including those under Article 87(7) of the Statute (non-cooperation), Article 70 of the Statute (offences against the administration of justice), Rule 68(2) of the Rules (prior recorded testimony), or making an application to summons witnesses pursuant to Articles 64(6)(b) and 93 of the Statute.¹⁷⁰ The LRV additionally submitted that the Chamber should itself consider exercising its powers under the Statute to require cooperation

¹⁶⁵ ICC-01/09-02/11-904-Corr, paras 1 and 10.

¹⁶⁶ ICC-01/09-02/11-904-Corr, paras 1, 11-27.

¹⁶⁷ ICC-01/09-02/11-904-Corr, paras 1, 28-31.

¹⁶⁸ ICC-01/09-02/11-904-Corr, paras 1, 32-42.

¹⁶⁹ ICC-01/09-02/11-904-Corr, paras 1, 43-46. *See also* ICC-01/09-02/11-T-28-ENG ET WT, page 113, lines 2-19.

¹⁷⁰ ICC-01/09-02/11-879-Red, paras 25-31. In a confidential Annex to filing ICC-01/09-02/11-879 the LRV listed certain questions for the Prosecution relating to investigative steps which have been taken and the degree of cooperation which has occurred. A redacted version was filed concurrently (ICC-01/09-02/11-879-Anx-Red). The Prosecution responded to these questions in ICC-01/09-02/11-892-Conf-AnxA. A redacted version was filed concurrently (ICC-01/09-02/11-892-AnxA-Red).

and to hold accountable, pursuant to Article 70 of the Statute, anyone responsible for interfering with witnesses or the collection of evidence in this case.¹⁷¹

74. The LRV supported the Prosecution's submission that evidence which is 'prospectively available' but deliberately withheld from the Court in violation of the Statute is 'available' evidence for the purposes of Regulation 60 of the OTP Regulations.¹⁷²
75. The LRV argued that, contrary to the Prosecution's submissions, the withdrawal of charges at this stage would be subject to judicial oversight.¹⁷³ The LRV submitted that there is no merit in the Defence's request for an acquittal to be entered¹⁷⁴ because: (i) the Appeals Chamber upheld the *Bemba* Decision, which supported the proposition that *ne bis in idem* applies only when there has been a decision on the merits of a case;¹⁷⁵ (ii) jurisprudence from the pre-trial chambers of the Court regarding 'the nature of the confirmation of charges' contradicts the Defence's contention that 'the confirmation stage triggers the *ne bis in idem* principle';¹⁷⁶ and (iii) the application of the *ne bis in idem* principle in this particular case would be 'unconscionable' as it would incentivise future suspects to employ state obstructionism of access to evidence.¹⁷⁷

2. Analysis

76. The Chamber notes that the Prosecution has requested it to 'adjourn the Accused's case until the [Kenyan Government] complies with its obligations'.¹⁷⁸ Although the

¹⁷¹ ICC-01/09-02/11-879-Red, para.64; ICC-01/09-02/11-T-27-ENG ET WT, page 34, line 23 - page 35, line 11.

¹⁷² ICC-01/09-02/11-T-27-ENG ET WT, page 71, lines 13-19.

¹⁷³ ICC-01/09-02/11-879-Red, para. 43 (*see also* 44-50); ICC-01/09-02/11-T-27-ENG ET WT, page 65, line 14 - page 66, line 14.

¹⁷⁴ ICC-01/09-02/11-902, para. 1.

¹⁷⁵ ICC-01/09-02/11-902, para. 6.

¹⁷⁶ ICC-01/09-02/11-902, paras 7-8; *see also* paras 9-11.

¹⁷⁷ ICC-01/09-02/11-902, paras 12-13.

¹⁷⁸ Second Adjournment Request, ICC-01/09-02/11-892, para. 3.

Prosecution has not submitted any specific legal standard or authority applicable to its adjournment request,¹⁷⁹ the Chamber observes that an adjournment is a discretionary remedy arising from the Chamber's responsibility to control the conduct of proceedings in a fair and expeditious manner.¹⁸⁰ In particular, Rule 132(1) of the Rules provides that '[t]he Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may postpone the date of the trial'.

77. Adjournments of varying duration may be necessitated by a range of practical as well as legal factors. Chambers of this Court have granted adjournments to, for example, enable further investigations,¹⁸¹ enable consideration of an issue by another Chamber, including on appeal,¹⁸² permit an accused to be excused, including in order to deal

¹⁷⁹ It is noted that reference was made at para. 13 of the Second Adjournment Request, ICC-01/09-02/11-892, to a particular passage in a separate opinion of Judge Eboe-Osuji (referring to Decision on the withdrawal of charges against Mr Muthaura, Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/09-02/11-698, para. 4).

¹⁸⁰ Article 64(2) of the Statute. *See also Prosecutor v. Lubanga*, Reasons for "Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense' filed on 20 February 2007" issued on 23 February 2007, 9 March 2007, ICC-01/04-01/06-844, para. 11 ('the Appeals Chamber examined a distinct aspect of stay, notably the stopping of proceedings, where justice could not be done. The Appeals Chamber did not advert to other aspects of stay of proceedings of a nature regulatory of the progress and fruition of the judicial process').

¹⁸¹ *See e.g.* Decision on commencement date of trial, 20 June 2013, ICC-01/09-02/11-763-Red; Decision adjourning the commencement of trial, 31 October 2013, ICC-01/09-02/11-847; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-642, Decision concerning the start date of trial, 8 March 2013 (adjourning the commencement of trial to allow further defence investigations after delayed evidentiary disclosures by the Prosecution); *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecution's request for the postponement of the confirmation hearing, 31 May 2011, ICC-01/04-01/10-207, (postponing the confirmation of charges hearing to allow for the Prosecution's review of potentially privileged material); *The Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 67(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432.

¹⁸² *See e.g. Prosecutor v. Lubanga*, Decision adjourning the evidence in the case and consideration of Regulation 55, 2 October 2009, ICC-01/04-01/06-2143. *See also Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the Defence Request for Postponement of the Confirmation Hearing, 25 April 2008, ICC-01/04-01/07-446 (postponing the confirmation hearing pending, *inter alia*, Appeals Chamber ruling on the issue of suspensive effect); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Postponing the Hearings with States on Mr Jean-Pierre Bemba Gombo's Conditional Release and Considering the Defence's Additional Applications, 3 September 2009, ICC-01/05-01/08-502.

with an urgent domestic matter relating to national security,¹⁸³ and due to difficulties in scheduling witnesses.¹⁸⁴

78. Therefore, and in contrast to the more ‘drastic’ remedy of a stay of proceedings,¹⁸⁵ the decision of the Chamber on whether or not to grant the requested adjournment is based on a weighing of the interests of justice in this case, including the rights of the accused and the interests of victims.
79. In respect of the Defence Termination Request, the Chamber recalls that it previously found ‘termination’ and an ‘unconditional stay of proceedings’ to have the same essential ‘effect of permanently halting the proceedings without prospect of recommencement’.¹⁸⁶ The Chamber therefore considers that the applicable standard

¹⁸³ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Transcript of hearing dated 23 September 2013, ICC-01/09-01/11-T-37-Red-ENG, page 6, line 20 – page 8, line 24; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Transcript of hearing dated 27 September 2013, ICC-01/09-01/11-T-38-Red-ENG, page 24, lines 7 – 19.

¹⁸⁴ See e.g. *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Transcript of hearing dated 22 November 2013, ICC-01/09-01/11-T-71-Red-ENG, page 14, lines 5-22 (where in circumstances in which, following the unavailability of the next expected witness, Defence counsel claimed not to be in a position to conduct cross-examination of the proposed replacement witnesses, therefore it was determined to adjourn the hearing of further witnesses until after the then upcoming judicial recess); *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2180, Decision postponing the commencement of the presentation of evidence by the legal representatives of victims, 28 March 2012 (postponing the commencement of the presentation of evidence by the legal representatives of victims due to delayed travel arrangements for victims). The jurisprudence of the ICTY and International Criminal Tribunal for Rwanda (‘ICTR’) similarly contain examples of adjournments, of both fixed and unspecified duration, being granted for a wide variety of reasons. See e.g. *Prosecutor v Niyitegeka*, ICTR-96-14-T, Decision to Adjourn Proceedings due to The Unavailability of Witnesses, 19 June 2002 (where the trial was indefinitely adjourned due to the unavailability of Prosecution witnesses arising from new travel procedures implemented by the Government of Rwanda); *Prosecutor v Krstić*, IT-98-33-T, Decision Adjourning the Trial, 15 January 2001 (adjourning the trial indefinitely due to the ill health of the accused); *Prosecutor v Brđjanin*, IT-99-36-T, Decision on Defence Motion for Additional Adjournment, 15 April 2003 (adjourning the trial pending the appointment of co-counsel for the accused); *Prosecutor v Šešelj*, IT-01/67-T, Decision on Prosecution Motion for Adjournment with Dissenting Opinion of Judge Antonetti in Annex, 11 February 2009 (indefinitely adjourning hearing the final prosecution witnesses as it would not be possible to ensure their testimony was being given freely, or to safeguard their security or the integrity of the proceedings).

¹⁸⁵ See e.g. *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 8 October 2010, ICC-01/04-01/06-2582 (OA 18), para. 55 (a stay is a ‘drastic’ remedy which ‘potentially frustrat[es] the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute’).

¹⁸⁶ Article 64(4) Decision, ICC-01/09-02/11-728, para. 70. See also *Prosecutor v Banda*, Trial Chamber IV, Decision on the ‘Defence Request for Termination of Proceedings’, 30 January 2014, ICC-02/05-03/09-535-Red, paras 28-29 (where Trial Chamber IV similarly held that the ‘high threshold applicable to a stay of proceedings’ is ‘a fortiori applicable to a request for termination of proceedings, which in effect, if granted, puts a definitive end to a case’).

to be applied to a termination of proceedings would be that outlined in its previous jurisprudence – and summarised most recently in the Chamber’s ‘Decision on the Defence application for a permanent stay of the proceedings due to abuse of process’.¹⁸⁷

80. The Chamber is fully aware of its duty to ensure that any further adjournment in this case is compatible with the rights of the accused. In particular, the Chamber is mindful of its obligation pursuant to Article 64(2) of the Statute to ensure that the proceedings are conducted in a manner which is fair and expeditious and fully respects the rights of the accused, as well as its obligation to interpret and apply the law in a manner consistent with internationally recognised human rights.¹⁸⁸ The Chamber adverts, in particular, to the right of every accused to be tried without undue delay.¹⁸⁹ It is noted that proceedings in this case have been ongoing for approximately three years,¹⁹⁰ and that the start of trial has already been adjourned on a number of occasions.¹⁹¹ The Chamber considers that any further adjournment without justifiable and compelling reasons could constitute undue delay contrary to the rights of the accused.

81. The Chamber notes that the Prosecution has stated that it does not at this stage have sufficient evidence to prove guilt beyond reasonable doubt. As a general principle,

¹⁸⁷ Decision on Defence application for a permanent stay of the proceedings due to abuse of process, 5 December 2013, ICC-01/09-02/11-868-Red, para. 14. It is further recalled that a stay of proceedings is also a discretionary remedy in which the Trial Chamber would enjoy a ‘margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached’ - *see Prosecutor v Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486 (OA 13), para. 84. *See also Prosecutor v Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 (OA 4) para. 28.

¹⁸⁸ Article 21(3) of the Statute.

¹⁸⁹ Article 67(1)(c) of the Statute.

¹⁹⁰ *See* Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigui Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-1 (‘Decision on Summons Application’).

¹⁹¹ Order concerning the start date of trial, 7 March 2013, ICC-01/09-02/11-677; ICC-01/09-02/11-763-Red; ICC-01/09-02/11-847.

the Chamber considers that it would be contrary to the interests of justice for the Prosecution to proceed to trial in circumstances where it believes it will not be in a position to present evidence sufficient to reach this evidentiary threshold. In the Chamber's view, the appropriate course of action in most circumstances where the Prosecution's evidence falls below the required threshold would be the prompt withdrawal of charges, as envisaged by Regulation 60 of the OTP Regulations. It is noted that, in this case, the Prosecution has indicated that should the Prosecution Requests be denied by the Chamber or the Records Request not yield sufficient relevant material, it would be required to withdraw the charges.¹⁹²

82. The Chamber also notes that the Prosecution has acknowledged that the possibility of obtaining sufficient evidence as a result of the Records Request is highly speculative,¹⁹³ and the realistic prospect of otherwise securing conclusive evidence that could support the charges is 'minimal'.¹⁹⁴
83. Moreover, the Chamber has already noted the rather broad nature of the Records Request. While a request of such broadness might be justified in the context of preliminary investigations – or, as submitted by the Prosecution,¹⁹⁵ as a starting point for consultations - it exceeds the permissible scope of investigations at this stage of proceedings. The Chamber observes that the Records Request was initially made almost two years ago, however the delay in effectively pursuing the request has not been adequately explained.¹⁹⁶
84. Relatedly, it is not certain whether any information obtained as a result of the Records Request, as it is currently framed, would itself have significant evidentiary value (rather than providing a basis for additional investigations) or whether it

¹⁹² Second Adjournment Request, ICC-01/09-02/11-892, paras 4, 23 and 27.

¹⁹³ ICC-01/09-02/11-T-27-ENG ET WT, page 10, line 22 – page 12, line 1.

¹⁹⁴ ICC-01/09-02/11-T-27-ENG ET WT, page 12, lines 3-18.

¹⁹⁵ ICC-01/09-02/11-T-28-ENG ET WT, page 89, lines 8-18.

¹⁹⁶ ICC-01/09-02/11-T-28-ENG ET WT, page 103, line 23 – page 105, line 10.

would be a substitute for the evidence of Witnesses 11 and 12 to support the facts and circumstances described in the charges.

85. As for the Prosecution's submission¹⁹⁷ regarding the repeated prior requests for adjournment made by the Defence,¹⁹⁸ it is important to recognise that the Defence has a right to seek appropriate procedural remedies and, at least in certain instances, those requests were necessitated by untimely disclosure on the part of the Prosecution and thus were granted by the Chamber after hearing the views of the Prosecution and LRV,¹⁹⁹ or were unopposed by the Prosecution itself.²⁰⁰
86. It has also been submitted that the non-compliance on the part of the Kenyan Government can be attributed to the accused. To the extent that deliberate interference with the collection of evidence, contrary to the Statute,²⁰¹ is alleged, the onus is on the Prosecution to substantiate this allegation and, as appropriate, to bring proceedings pursuant to Article 70 of the Statute. No evidence was provided to support that serious allegation and the Chamber is not called upon to decide the issue of any such alleged interference.
87. Additionally, the Prosecution was, from an early stage of the proceedings, on notice regarding potentially serious challenges to the credibility of certain of its key witnesses.²⁰² This should have been sufficient to prompt a thorough review of the

¹⁹⁷ First Adjournment Request, ICC-01/09-02/11-875, para. 21.

¹⁹⁸ See e.g. Defence Application to the Trial Chamber pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration, 5 January 2013, ICC-01/09-02/11-622; Defence Observations on Estimated Time Required to Prepare for Trial, 13 May 2013, ICC-01/09-02/11-735-Red; Transcript of Hearing dated 6 September 2013, ICC-01/09-02/11-T-26-ENG ET WT, pages 27-28; Defence Application to Vacate to 12 November 2013 Date for the Commencement of Trial, 25 October 2013, ICC-01/09-02/11-835-Red.

¹⁹⁹ See Article 64(4) Decision, ICC-01/09-02/11-728, para. 125; ICC-01/09-02/11-763-Red.

²⁰⁰ See ICC-01/09-02/11-677, para. 7; ICC-01/09-02/11-847, paras 2 and 5.

²⁰¹ See Article 70(1)(c) of the Statute.

²⁰² See e.g. Defence Termination Request, ICC-01/09-02/11-878-Conf-Anx-B; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 26, January 2012, ICC-01/09-02/11-382-Red, paras 91-100; Decision on the defence's request for specific relief in respect of three witnesses of the prosecution, 16 August 2012, ICC-01/09-02/11-465; Article 64(4) Decision, ICC-01/09-02/11-728; ICC-01/09-02/11-868-Red.

evidence in the case and, in particular, the consistency and reliability of witness statements. Despite the fact that the Prosecution has had ample time to prepare the case for trial, this was not done in an appropriately timely manner.

88. The Chamber emphasises that the primary obligation to produce a case ready for trial is on the Prosecution. As noted in the foregoing analysis, the Chamber has serious concerns regarding the timeliness and thoroughness of Prosecution investigations in this case - including, in accordance with its responsibilities under Article 54(1)(a) of the Statute, in verifying the credibility and reliability of the evidence upon which it intended to rely at trial. Consequently, the Chamber considers it appropriate to caution the Prosecution in that regard.
89. Each of the factors discussed above would lead to the conclusion that, under ordinary circumstances, the Chamber should not grant a further adjournment at this stage.
90. However, the Chamber is also mindful of the specific circumstances of the present case and some particular factors to be balanced in order to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute. The Chamber notes that the direct reason for the Prosecution's evidence falling below the standard required for trial, and the consequent Prosecution Requests, appears to have been the decision to withdraw Witness 12 following his admission of having misled the Prosecution regarding his presence at a particular meeting. However, the present difficulties with the body of evidence upon which the Prosecution relies is clearly the result of multiple interacting factors which have influenced and impacted the manner in which investigations were conducted in this case.
91. Such factors include the difficulties faced by the Prosecution in securing the cooperation of the Kenyan Government, which prevented access to the financial

records of the accused. The Chamber also notes, in this regard, that there are other outstanding requests for cooperation of the Kenyan Government, although they are not relied on by the Prosecution in the context of the present litigation.²⁰³ The Chamber notes that this Court is fundamentally dependent on the cooperation of States Parties, and a 'failure to provide such cooperation in the context of judicial proceedings affects the efficiency of the Court'.²⁰⁴ Indeed, the Court cannot carry out its mandate without the cooperation of State Parties. Bearing in mind the centrality of State Party co-operation in the Statute, the Chamber considers it appropriate to take all reasonable judicial measures to ensure cooperation by States Parties in furtherance of the truth-seeking function of the Court before making a finding of non-compliance and referring the matter to the ASP for its ultimate consideration.

92. This case is against the accused in his personal capacity. However, the Chamber notes that the accused is President of the State Party whose cooperation is at issue. The Prosecution argued that the lack of cooperation from the Kenyan Government can be imputed to the accused's position as head of government. The LRV, as noted earlier, argued that there has been a lack of genuine cooperation on the part of the Kenyan Government and that under the Constitution of Kenya, failure to fulfil its cooperation obligations 'must be attributed to the President'. The Kenyan Government has robustly disputed this assertion, arguing that under the Constitution of Kenya, the powers and functions of the President are limited and also pointed to the independence of different office holders and institutions. The Chamber notes that State compliance with treaty obligations necessitates actions on the part of persons or organs acting on behalf of the State. Heads of state or relevant government organs therefore have to give effect to the obligations and ultimately have responsibility to

²⁰³ See e.g. Second Adjournment Request, ICC-01/09-02/11-892, para. 17 and Annex A.

²⁰⁴ See e.g. Assembly of States Parties Resolution on Cooperation, adopted at the 12th plenary meeting, on 27 November 2013, by consensus, para. 3.

ensure State compliance with their treaty obligations.²⁰⁵ As such, at the very least, the Chamber notes the possibility of a potential conflict of interests in this case. Notwithstanding this, the Chamber has a responsibility to ensure that there is an opportunity for the Kenyan Government to comply with its obligations, failing which the matter would be referred.

93. Further, the Chamber has previously recognised that the circumstances under which the Prosecution is operating in this case present particular difficulties which may have affected its ability to conduct a fuller investigation prior to confirmation.²⁰⁶ Such circumstances, which continued post-confirmation, include unprecedented security concerns relating to victims and witnesses,²⁰⁷ and necessitated a wide-range of protective measures for both Prosecution and Defence witnesses.²⁰⁸ It is noted that,

²⁰⁵ When international law imposes an obligation upon a State, it ‘means that the individual who by his conduct may fulfil or violate the obligation is not directly determined by the norms of international law, but that the latter leaves the determination of this individual to national law. More exactly, the international legal order delegates the determination of this individual to the national legal order’, Hans Kelsen, *Principles of International Law* (2003), page 115. It is noted that the Kenyan Constitution confirms that the President of Kenya is the head of state in this sense – see Article 132(5) of the Constitution (‘[t]he President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries’); Human Rights Committee, General Comment 31, para. 4 (‘The obligations of the [treaty] [...] are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the [treaty] was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”’). See also International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo, The Democratic Republic of the Congo v Rwanda, Judgment on jurisdiction and admissibility* (2006) 45 ILM 562, 3 February 2006, para. 46, referring, *inter alia*, to Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties.

²⁰⁶ Article 64(4) Decision, ICC-01/09-02/11-728, para. 124.

²⁰⁷ Decision on victims’ representation and participation, 6 October 2012, ICC-01/09-02/11-498, para. 23; First Decision on the Prosecutor’s Requests for Redactions and Related Requests, 12, July 2011, ICC-01/09-02/11-165-Conf-Red, paras 66 and 74. See also Second Adjournment Request, ICC-01/09-02/11-892-AnxA-Red.

²⁰⁸ See e.g. Decision on the Prosecution’s first request for the authorisation of redactions, 13 December 2012, ICC-01/09-02/11-569-Conf; Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, ICC-01/09-02/11-580-Conf-Red; Decision on second prosecution application for delayed disclosure of witness identities, 8 January 2013, ICC-01/09-02/11-593-Conf-Red; Second decision on first and second prosecution applications for delayed disclosure of witness identities, 6 February 2013, ICC-01/09-02/11-619-Conf-Red; ICC-01/09-02/11-868-Red, para. 3; Decision on Prosecution application for delayed disclosure of witness identity, 6 December 2013, ICC-01/09-02/11-869-Conf.

notwithstanding such measures, at least three Prosecution witnesses appear to have withdrawn as a direct result of security concerns.²⁰⁹

94. As noted above, it is a distinct aspect of this case that the accused is currently the Head of the State and Government of the Republic of Kenya, and therefore in a position of particular influence, including over Kenyan society as a whole. In that regard, the Chamber notes certain conduct on the part of the accused, in his capacity as President,²¹⁰ which has the potential to contribute to an atmosphere adverse to the Prosecution's investigation on the ground, as well as to foster hostility towards victims and witnesses who are cooperating with the Court.
95. Therefore, although some of the difficulties described were foreseeable and do not justify the delay in investigations, the Chamber considers that certain of these factors amount to unique circumstances, beyond the Prosecution's control, which contributed to a loss of evidence in this case and, consequently, might justify granting a strictly limited opportunity to pursue outstanding investigations at this stage.²¹¹
96. The Chamber is additionally very mindful of the views of victims, as expressed by LRV, who have an interest in knowing the truth and seeing those who are responsible for the crimes committed held accountable. Given the time which has passed since both the PEV and the commencement of proceedings in this case, it is noted that it would not be in the interests of victims for charges to be withdrawn at this stage when there is a possibility that a limited period of adjournment may enable necessary evidence, potentially shedding light on matters central to the charges, to be obtained. In that regard, the Chamber notes that the greater the passage of time prior to the start of any trial, hypothetically including on any charges re-submitted to the Pre-

²⁰⁹ Second Adjournment Request, ICC-01/09-02/11-892-AnxA-Red, pages 2-3.

²¹⁰ The Chamber refers, in particular, to the widely reported speech of the accused at the African Union's Extraordinary Summit on the ICC, on 12 October 2013, which was overtly hostile towards the Court (text available at <http://www.statehousekenya.go.ke/speeches/uhuru/october2013/2013121001.htm>).

²¹¹ Article 64(4) Decision, ICC-01/09-02/11-728, para. 120.

Trial Chamber should the charges in this case be withdrawn, the greater the risk of deterioration of evidence and potential prejudice to victims, witnesses and the accused. Moreover, it is in the interests of the victims, almost all of whom are Kenyan nationals, to see that the full cooperation of the Kenyan Government with the Court is ensured.

97. With regard to the rights of the accused, the Chamber has also considered the relative complexity of the present case and further recalls that the accused is not, and never has been, detained in custody in relation to these charges, being instead subject to a summons to appear.²¹² Under the circumstances, and considering the various factors referred to above, the Chamber finds that an adjournment of limited duration, and for a clearly defined purpose which the Chamber considers necessary in the interests of justice, would not be inconsistent with the rights of the accused.
98. After balancing each of the factors above, bearing in mind the truth-seeking function of the Chamber²¹³ and without prejudice to any potential power of the Prosecution to withdraw charges, the Chamber considers that, in the present circumstances, it is appropriate to grant an adjournment for a fixed duration with close oversight by the Chamber and for a strictly limited purpose. That is, in order to facilitate the execution of this long outstanding request for assistance - that may bear upon matters central to the charges - and which, as discussed above, the Chamber considers to have been unjustifiably frustrated.
99. It flows from the analysis above, which took into account all of the submissions received, and from the ultimate finding of the Chamber that a limited adjournment is justified at this stage, that the Defence Termination Request is rejected.

²¹² See e.g. Decision on Summons Application, ICC-01/09-02/11-1, para. 57; Transcript of Hearing dated 14 February 2013, ICC-01/09-02/11-T-22, page 6, lines 4-12.

²¹³ See Article 69(3) of the Statute.

100. The Chamber has noted the submissions of the Attorney General of the Republic of Kenya regarding his inability to identify a timeframe within which the requested records could be provided.²¹⁴ Nonetheless, in the Chamber's view, it would not be warranted to adjourn the proceedings indefinitely. The Chamber considers that, within the following framework, a fixed period adjournment of approximately six months is appropriate:²¹⁵

(i) The Prosecution is directed to, within two weeks of the date of this decision, provide the Kenyan Government with an updated request, which is based upon the Records Request and is tailored to reflect the items that remain of specific relevance to the charges ('Revised Request');²¹⁶

(ii) The Kenyan Government is directed to promptly review the Revised Request and notify the Prosecution, within two weeks of having received the Revised Request, of any problems which may impede or prevent its execution. In respect of any items for which problems that may impede or prevent execution of the request are identified, the Kenyan Government and the Prosecution are directed to immediately engage in meaningful consultations with a view to promptly resolving the matter. Such consultations should include the Kenyan Government identifying and, following consultation with the Prosecution, pursuing

²¹⁴ ICC-01/09-02/11-T-28-ENG ET WT, page 55, line 7 – page 56, line 11.

²¹⁵ It is recalled that the provisional trial date of 5 February 2014 was vacated, without prejudice, in order to enable consideration of the matters addressed in this decision – *see* Order of 23 January 2014, ICC-01/09-02/11-886.

²¹⁶ The Revised Request should adhere to the tripartite principles of (i) specificity, (ii) relevance and (iii) necessity that have been articulated by other Chambers of this Court as essential prerequisites for cooperation requests under Part 9 of the Statute, *see, for example, The Prosecutor v. Banda and Jerbo*, 'Decision on "Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union"', 1 July 2011, ICC-02/05-03/09-170, paras 13-14; *The Prosecutor v. Banda and Jerbo*, Public Redacted Decision on the second defence's application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 December 2011, ICC-02/05-03/09-268-Red, para. 13; *The Prosecutor v. Banda and Jerbo* Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 September 2013, ICC-02/05-03/09-504-Red, para. 4.

alternative procedures available under national law pursuant to which the requested information may be provided. In respect of all other requested items, the Kenyan Government should immediately take steps to comply with the request and furnish the information; and

(iii) Both the Prosecution and the Kenyan Government are directed, at two-monthly intervals commencing on 30 April 2014, to file an update with the Chamber detailing the progress in executing the Revised Request, or in conducting any consultations to ensure execution.

101. The Chamber emphasises that this process should be carried out in good faith and it is expected that timely and meaningful efforts will be made on an *inter partes* basis to resolve any difficulties which may arise during the course of the cooperation. However, in the event of genuine and irreconcilable differences between the Prosecution and the Kenyan Government, or any matter otherwise requiring resolution, the Chamber stresses that it is to be promptly seised of the matter at issue.
102. Finally, the Chamber hereby schedules a status conference for 9 July 2014, pursuant to Rule 132(2) of the Rules, in order for the Prosecution and the Kenyan Government to provide an update to the Chamber on the status of the execution of the Revised Request, any consultations, and any other relevant issues. A scheduling order with the specific time and agenda for the status conference will be issued in due course.
103. Having found the contemplated adjournment not to be inconsistent with the rights of the accused, it was not necessary for that purpose to proceed with a consideration of whether or not the degree of cooperation by the Kenyan Government with its obligations under the Statute can be imputed to Mr Kenyatta as its Head of State and Government. Nonetheless, the Chamber reiterates its view that it is now incumbent on the Kenyan Government to take the necessary actions - through relevant office

holders, as appropriate - to ensure compliance with its outstanding cooperation obligations in good faith and in an expeditious manner.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the adjournment of the provisional trial commencement date to 7 October 2014;

DIRECTS the Prosecution to submit, within two weeks of the date of this Decision, the Revised Request to the Kenyan Government, pursuant to Article 93(1) of the Statute, in conformity with the considerations stated in paragraph 100(i) above;

DIRECTS the Kenyan Government to notify the Prosecution, within two weeks of receiving the Revised Request, of any problems which may impede or prevent its execution;

DIRECTS the Prosecution and the Kenyan Government to engage in cooperation, and, as applicable, consultations, without delay in relation to the Revised Request, and within the framework outlined in paragraphs 100 and 101 above;

DIRECTS the Prosecution and the Kenyan Government to file submissions updating the Chamber regarding the status of execution of the Revised Request and the status of related consultations, as applicable, on 30 April 2014 with further updates due thereafter on a two-monthly basis;

SCHEDULES a status conference on 9 July 2014 in order for the Prosecution and the Kenyan Government to provide an update to the Chamber on the status of the execution of the Revised Request, any consultations, and any other relevant issues;

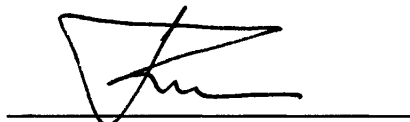
DEFERS the making of any determination under Article 87(7) of the Statute in relation to the Kenyan Government; and

REJECTS all other requests.

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



Judge Kuniko Ozaki, Presiding Judge


Judge Robert Fremr
Judge Geoffrey Henderson

Dated 31 March 2014

At The Hague, The Netherlands