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TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. PAUL GICHERU

Public Redacted

**Decision on the Request to Exclude Audio Recordings Pursuant to Article 69(7)
of the Statute**

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

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TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Articles 54(3)(d), 64(2), 67, 69, 70(2), 96 and 99(4) of the Rome Statute (the ‘Statute’) and Rules 163 and 167 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 108 of the Regulations of the Court (the ‘Regulations’) issues this ‘Decision on the Request to Exclude Audio Recordings Pursuant to Article 69(7) of the Statute’.

I. PROCEDURAL HISTORY

1. On 15 July 2021, Pre-Trial Chamber A confirmed the charges against Mr Gicheru. In its decision confirming the charges, Pre-Trial Chamber A noted that the Office of the Prosecutor (the ‘Prosecution’) had introduced as evidence ‘a limited number of transcripts of phone conversations, recorded with the consent of *one* of the parties to the conversation and conducted at the request of Prosecution investigators.’¹ In considering this material, Pre-Trial Chamber A found ‘it appropriate to draw the Trial Chamber’s attention to this evidence in order to conduct any enquiries it may deem necessary pursuant to [Articles] 69(4) and (7) of the Statute’.²
2. On 16 November 2021, the Chamber instructed the Parties to make submissions on the admissibility of the aforementioned audio recordings and related material.³
3. On 15 December 2021, the Defence filed a request to exclude certain audio recordings and other related material (the ‘Request’).⁴

¹ Decision on the confirmation of charges against Paul Gicheru, 15 July 2021, ICC-01/09-01/20-153-Conf, para. 36. A public redacted version was filed on the same day ([ICC-01/09-01/20-153-Red](#)) [Emphasis in original].

² Decision on the confirmation of charges against Paul Gicheru, 15 July 2021, ICC-01/09-01/20-153-Conf, para. 36. A public redacted version was filed on the same ([ICC-01/09-01/20-153-Red](#)).

³ [Decision on the Prosecution’s Request to Admit Prior Recorded Testimony under Rule 68\(3\)](#), 16 November 2021, ICC-01/09-01/20-223, para. 27.

⁴ Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute, 15 December 2021, ICC-01/09-01/20-249-Conf (the ‘Request’) with Confidential Annexes A and B (ICC-01/09-01/20-249-Conf-AnxA, ICC-01/09-01/20-249-Conf-AnxB). A public redacted version was filed on 17 December 2021 ([ICC-01/09-01/20-249-Red](#)).

4. On 14 January 2022,⁵ the Prosecution filed its response to the Request arguing that the Request should be rejected (the ‘Response’).⁶

5. On 18 January 2022, the Chamber sought additional information from the Prosecution concerning further factual details of the Prosecution’s investigations.⁷

6. On 24 January 2022, the Prosecution filed submissions furnishing the information sought by the Chamber (the ‘Prosecution’s Additional Information’).⁸

7. On 26 January 2022, the Defence filed its response to the Prosecution’s Additional Information (the ‘Response to the Prosecution’s Additional Information’).⁹

II. SUBMISSIONS

8. In the Request, the Defence requests the Chamber to exclude ‘audio recordings’ ‘collected [by the Prosecution] in violation of Part 9 of the Statute’.¹⁰ Specifically, the Defence seeks exclusion of 614 items of evidence, comprising 30 audio recordings, 129 transcripts, 449 translations and six Prosecution summaries.¹¹ The Defence avers that the Prosecution violated Part 9 of the Statute by ‘covertly audio-recording Mr. Gicheru and [Prosecution] witnesses on the territories of [REDACTED], [REDACTED], and [REDACTED] without submitting any Request[s] for Assistance (‘RFA’) to these States Parties or seeking the Pre-Trial Chamber’s [...] [authorisation].’¹²

⁵ A courtesy copy was provided to the Chamber and the Defence on 14 January 2022, with the filed version notified on 17 January 2022. A corrected version was filed on 18 January 2022.

⁶ Corrected version of ‘Prosecution’s Response to the Defence “Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute” ICC-01/09-01/20-258-Conf-Exp, 17 January 2022’, 18 January 2022, ICC-01/09-01/20-258-Conf-Exp-Corr (the ‘Response’), with Confidential Annex A (ICC-01/09-01/20-258-Conf-AnxA-Corr). A confidential redacted version was filed on 14 January 2022 (ICC-01/09-01/20-258-Conf-Red). A corrected public redacted version was filed on 19 January 2022 ([ICC-01/09-01/20-258-Corr-Red](#)).

⁷ Email from Chamber to the Parties, dated 18 January 2022 at 13:08.

⁸ Prosecution’s submission of further information and evidence supporting its “Response to the Defence ‘Request to Exclude Audio-Recordings Collected in Violation of Part 9 of the Statute’”, 24 January 2022, ICC-01/09-01/20-264-Conf-Exp (‘Prosecution’s Additional Information’), with Confidential *Ex Parte* Annexes A-I. A confidential redacted version was filed simultaneously (ICC-01/09-01/20-264-Conf-Red), with confidential redacted Annexes A-I.

⁹ Response to the Prosecution’s submission of further information and evidence supporting its ‘Response to the Defence Request to Exclude Audio-Recordings Collection in Violation of Part 9 of the Statute’, 26 January 2022, ICC-01/09-01/20-265 (‘Response to the Prosecution’s Additional Information’). A public redacted version was filed on the same date ([ICC-01/09-01/20-265-Red](#))

¹⁰ [Request](#), p. 3.

¹¹ [Request](#), Annex A.

¹² [Request](#), p. 3.

9. The Defence highlights that the Prosecution, in the course of its investigative activities in respect of the Article 70 investigation, provided [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] with ‘audio-recording equipment and asked them to audio-record telephone conversations and physical meetings in [REDACTED], [REDACTED], and [REDACTED].’¹³ The Defence further recounts the various instances in which [REDACTED],¹⁴ [REDACTED],¹⁵ [REDACTED],¹⁶ [REDACTED]¹⁷ and [REDACTED]¹⁸ recorded various Prosecution witnesses, as well as Mr Gicheru himself.

10. The Defence submits that the Prosecution is able to conduct investigations on the territory of a State Party on two bases: ‘(a) “[i]n accordance with the provisions of Part 9;” or (b) “[a]s [authorised] by the Pre-Trial Chamber.”’¹⁹ In respect of the first basis, the Defence notes that the Prosecution failed to issue RFAs to the relevant State Parties as required by Article 99(4) of the Statute before executing any such request directly on the territory of those State Parties.²⁰ Furthermore, the Defence argues, irrespective of that failure, ‘Article 99(4) does not permit the [Prosecution] to use “proactive” and “covert” methods of investigation without notifying State Party authorities since they require compulsory measures.’²¹ The Defence notes that the Prosecution ‘did not consult with [REDACTED], [REDACTED], or [REDACTED] before conducting the impugned covert investigations as required by Article 99(4)’, indicating that the Prosecution was ‘obligated to “follow[] all possible consultations” before “directly execut[ing]” an RFA under Article 99(4)(a).’²² Last, the Defence avers that the Prosecution’s ‘justification for its claims for having to circumvent the Statute are unfounded.’²³

11. In respect of the second basis, the Defence expresses the view that if the Prosecution ‘considered that it could not secure these States Parties’ cooperation,

¹³ [Request](#), para. 22. *See also*, paras 23-27.

¹⁴ [Request](#), para. 23.

¹⁵ [Request](#), para. 24.

¹⁶ [Request](#), para. 25.

¹⁷ [Request](#), para. 26.

¹⁸ [Request](#), para. 27.

¹⁹ [Request](#), para. 45.

²⁰ [Request](#), para. 47. *See also*, para. 37.

²¹ [Request](#), para. 48.

²² [Request](#), para. 49.

²³ [Request](#), para. 52.

Article 57(3) [of the Statute] required it to seek the [Pre-Trial Chamber's] [authorisation] before proceeding to investigate.'²⁴ In this regard, the Defence avers that the functions of Article 57(3) of the Statute and its 'relationship with the provisions of Part 9 of the Statute all reflect the States Parties' attempt to strike a balance between the need for effective investigations and principles of State sovereignty and judicial cooperation', noting that the Prosecution 'neither made any RFAs to [REDACTED], [REDACTED], or [REDACTED], nor did it request the [Pre-Trial Chamber] for [authorisation] to covertly investigate in these States Parties.'²⁵

12. Based on the foregoing, the Defence argues that '[i]t is antithetical to and would seriously damage the integrity of the proceedings were Trial Chamber III to admit and rely on evidence that was obtained by the [Prosecution's] knowing violation of Part 9 of the Statute.'²⁶ The Defence further submits that in determining whether the admission of this evidence is antithetical to and would seriously damage the integrity of the proceedings, the Chamber 'should not only consider whether Mr. Gicheru's rights were violated and the [Prosecution's] degree of control over the evidence gathering process, but also whether the admission of this evidence offends the core values of sovereignty and judicial cooperation.'²⁷ The Defence argues, in this vein, that the Prosecution violated 'Mr Gicheru's internationally [recognised] human right to privacy', and that this, in conjunction with its '*knowing* disregard of Part 9 as well as Mr Gicheru's fundamental rights', leads to the conclusion that 'only the exclusion of the audio-recordings can prevent the integrity of the proceedings from being seriously damaged'.²⁸ To admit the audio recordings would, in the Defence's view, 'render Part 9 of the Statute meaningless'.²⁹

13. At the outset of the Response, the Prosecution, requests the Chamber to dismiss the Request *in limine* in respect of 362 of the items sought to be excluded. It does so on the basis that these items do not 'pertain to recordings made by Prosecution witnesses in the course of the article 70 investigation at all.'³⁰ In respect of the remaining 252

²⁴ [Request](#), para. 53.

²⁵ [Request](#), para. 56.

²⁶ [Request](#), para. 60.

²⁷ [Request](#), para. 59.

²⁸ [Request](#), para. 61 [Emphasis in original].

²⁹ [Request](#), para. 62.

³⁰ [Response](#), para. 1.

items, which the Prosecution submits ‘comprise of audio recordings of telephone conversations and meetings made by, or with the consent of, Prosecution witnesses’³¹, it argues that ‘[t]he investigative measures directly executed by the Prosecution were non-compulsory, and properly fell within [Article] 99(4)(a) of the Statute.’³² As a result, the Prosecution argues that ‘they did not require a positive act of cooperation by the territorial State Party in question or authorisation by a Chamber of [the] Court.’³³

14. The Prosecution submits that ‘[a]t all material times, the Prosecution complied in good faith with its obligations’³⁴, noting that it was ‘obliged to ensure its investigative measures on the territory of a State Party complied with Part 9 of the Statute.’³⁵ In this respect, the Prosecution avers that these obligations were ‘not altered by Article 70(2) [of the Statute]’ which ‘serves only to ensure that the Court may request a State to provide any form of cooperation corresponding to those set out in Part 9 but [...] the requested State Party has no obligation to ensure the availability of procedures under national law in that regard.’³⁶ Further, the Prosecution notes that ‘[n]othing in [Article] 70(2) [of the Statute] means that Part 9 is otherwise disapplied for the purpose of governing the conduct of the Prosecution in carrying out [Article] 70 investigations.’³⁷

15. Continuing in this vein, the Prosecution avers that [Article 99(4)] permits ‘the Prosecution to *directly execute* certain kinds of non-compulsory investigative measures on the territory of a State Party.’³⁸ Furthermore, whilst acknowledging that it ‘must make a prior “request” to the territorial State Party’ it argues that ‘this need not satisfy all the formalities under [Article] 96.’³⁹ The Prosecution submits that the investigative measures it directly executed ‘were non-compulsory, insofar as they amounted to “taking evidence from a person on a voluntary basis [...]”’.⁴⁰ In making this determination, the Prosecution notes that it ‘specifically took into account its

³¹ [Response](#), para. 2.

³² [Response](#), para. 2.

³³ [Response](#), para. 2.

³⁴ [Response](#), para. 30.

³⁵ [Response](#), para. 31.

³⁶ [Response](#), para. 32.

³⁷ [Response](#), para. 32.

³⁸ [Response](#), para. 33 [Emphasis in original].

³⁹ [Response](#), para. 34.

⁴⁰ [Response](#), para. 38.

appreciation of the domestic law of the territorial States as one factor in its decision making’.⁴¹

16. The Prosecution further argues that it had ‘assessed at the time that it was essential for the investigative measures to be carried out without the presence of the territorial authorities, in order to preserve the effectiveness of the measures.’⁴² In this regard, the Prosecution submits that [REDACTED] ‘[REDACTED].’⁴³ In any event, the Prosecution avers that it ‘carried out all possible consultations with the territorial States Parties prior to the direct execution of the investigative measures on their territory.’⁴⁴ It notes that, in respect of [REDACTED] and [REDACTED], it ‘provided advance notice of the presence of Prosecution staff on their territories for the purpose of conducting voluntary witness interviews and meetings.’⁴⁵ As for [REDACTED], the Prosecution submits that it ‘visited [REDACTED] from [REDACTED] to consult with [REDACTED] authorities regarding its [Article] 70 investigations, specifically the modalities for the participation of Prosecution staff in [REDACTED], during the [REDACTED].’⁴⁶

17. Notwithstanding the above, the Prosecution concedes that ‘it did *not* specifically apprise the authorities of these States Parties that it intended to carry out “one party consent” recordings because it did not consider that this was possible [...] nor in any event [that this was] required by [Article] 99(4)(a) [of the Statute][...]’.⁴⁷ Furthermore, the Prosecution acknowledges ‘that it did not inform the authorities of [REDACTED], [REDACTED], and [REDACTED] that the presence of Prosecution staff on their territories was specifically for the purpose of an [Article] 70 investigation.’⁴⁸ However, the Prosecution submits that ‘it was a harmless omission insofar as the notification to the authorities in question was for the purpose of [Article] 99(4) only – and therefore did not materially alter the nature of their obligations under the Statute.’⁴⁹

⁴¹ [Response](#), para. 38

⁴² [Response](#), para. 39.

⁴³ [Response](#), para. 39.

⁴⁴ [Response](#), para. 40.

⁴⁵ [Response](#), para. 40.

⁴⁶ [Response](#), para. 40.

⁴⁷ [Response](#), para. 41 [Emphasis in original].

⁴⁸ [Response](#), para. 42.

⁴⁹ [Response](#), para. 42.

18. In response to the Defence's submission that the Prosecution should have sought the authorisation of the Pre-Trial Chamber before initiating these investigative measures, the Prosecution argues that the Pre-Trial Chamber was not 'competent to decide on the matter' as the Prosecution 'only sought to execute non-compulsory measures' which are 'authorise[d]' by Article 99(4) of the Statute.⁵⁰

19. Last, the Prosecution avers that if the Chamber considers that the investigative measures 'did in some way breach Part 9 of the Statute', it does not give rise to a 'violation of the Statute' for the purposes of Article 69(7) of the Statute.⁵¹ In this regard, the Prosecution submits that there is 'no tangible impact at all on the Accused's individual rights'.⁵² Furthermore, the Prosecution argues that admission of the relevant material would not be antithetical to nor would it seriously damage the integrity of the proceedings.⁵³ It grounds this submission on the fact that any violation was: (i) 'limited in its nature and gravity, and flowed only from an inadequate degree of consultation with the relevant States Parties';⁵⁴ (ii) 'did not violate internationally recognised rights of the Accused';⁵⁵ (iii) 'the Prosecution sought to minimise the consequences of the investigative measures', namely considering that 'alternative measures carried a greater (and real) risk of compromising the security of witnesses and the investigation';⁵⁶ and (iv) 'the evidence contained in the [material] is precisely the same evidence about which the witnesses in question would undoubtedly be permitted to testify [...]'.⁵⁷

20. In the Prosecution's Additional Information, the Prosecution submits further information regarding the factual background to its investigation, annexing various documents relating, inter alia, to cooperation with the relevant States.⁵⁸ Specifically, the Prosecution annexes correspondence and negotiations with [REDACTED], as well as relevant cooperation agreements/memoranda of understanding and notification letters sent to States in the context of the Prosecution's investigations.⁵⁹

⁵⁰ [Response](#), para. 43.

⁵¹ [Response](#), para. 44.

⁵² [Response](#), para. 45.

⁵³ [Response](#), para. 49.

⁵⁴ [Response](#), para. 50.

⁵⁵ [Response](#), para. 51.

⁵⁶ [Response](#), para. 52.

⁵⁷ [Response](#), para. 53.

⁵⁸ See, Annexes A-I to Prosecution's Additional Information.

⁵⁹ See, Prosecution's Additional Information, paras 3-6.

21. In respect of the cooperation agreements annexed to the Prosecution's Additional Information, the Prosecution submits that '[w]hile [memoranda of understanding] may not derogate from States Parties' cooperation obligations under the Statute and rules, these are minimum levels of cooperation and the countries concerned are free to agree bilaterally to additional or greater cooperation measures.'⁶⁰ Furthermore, the Prosecution notes, in response to the Chamber's queries that: (i) it 'is not in possession of [any] evidence' that [REDACTED] '[REDACTED]'⁶¹; (ii) it 'did not submit any RFAs in relation to the [audio] recordings, since it considered these to be non-compulsory measures that could be executed directly on the territories of the relevant States Parties under [Article] 99(4) and [...] did not require their assistance'⁶²; and (iii) it 'did not specifically advise the relevant authorities' that it was 'conducting Article 70 investigations on their territories'. However, with regards to this latter point, the Prosecution maintains that 'these activities related also to the *Ruto and Sang* case and not only the Article 70 investigation.'⁶³

22. In the Response to the Prosecution's Additional Information, the Defence submits that the Prosecution has 'provided no evidence or articulable reasons why during its investigations members of the [Prosecution] knowingly and consciously violated Part 9 of the Rome Statute'.⁶⁴ Specifically in respect of Article 99(4) of the Statute, the Defence notes that 'the Prosecutor may exercise those powers, only after a request has been presented'.⁶⁵ Furthermore, the Defence argues that to admit the audio recordings 'would effectively nullify the checks and balances in Part 9 of the Statute'.⁶⁶

III. APPLICABLE LAW

23. Before proceeding to analyse the Parties' submissions, the Chamber deems it pertinent to set out its interpretation of the applicable law in respect of the matters in issue which has guided its analysis.

⁶⁰ Prosecution's Additional Information, para. 14.

⁶¹ Prosecution's Additional Information, para. 9 [Emphasis removed].

⁶² Prosecution's Additional Information, para. 19.

⁶³ Prosecution's Additional Information, para. 23.

⁶⁴ [Response to the Prosecution's Additional Information](#), p.3.

⁶⁵ [Response to the Prosecution's Additional Information](#), para. 4 [Emphasis removed].

⁶⁶ [Response to the Prosecution's Additional Information](#), para. 7.

A. Article 70 Proceedings and Part 9 of the Statute

24. Article 70 of the Statute gives the Court jurisdiction over certain offences against the administration of justice. In the exercise of this jurisdiction, Article 70(2) of the Statute provides, in relevant part, that '[t]he conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State'.

25. Article 70(2) of the Statute is to be read in conjunction with Rule 167(1) and (2) of the Rules. Rule 167(1) provides that '[w]ith regard to offences under article 70, the Court may request a State to provide any form of international cooperation or judicial assistance corresponding to those forms set forth in Part 9. In any such request, the Court shall indicate the basis for the request is an investigation or prosecution of offences under article 70.' Similarly, Rule 167(2) reads '[t]he conditions for providing international cooperation or judicial assistance to the Court with respect to offences under article 70 shall be those set forth in article 70, paragraph 2.'

26. As expressed by the Appeals Chamber, Part 9 of the Statute regulates the interactions between the Court and States.⁶⁷ In this regard, the Appeals Chamber observes that 'Part 9 protects the sovereign competences of States within their territories while ensuring, at the same time, certain mandatory forms of cooperation, which the Court is entitled to request.'⁶⁸ The Appeals Chamber further recalls that the system set out in Part 9 'reflects in many respects the "lowest common denominator" with which all States Parties are obliged to comply', and in this regard 'States may go beyond the explicit duties contained therein and offer additional cooperation unilaterally in their implementing laws or through agreements and informal *ad hoc* arrangements with the Court'.⁶⁹

⁶⁷ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"](#), 8 March 2018, ICC-01/05-01/13-2275-Red ('Bemba et al Appeals Judgment'), para. 319. See also Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V \(A\) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation"](#), 9 October 2014, ICC-01/09-01/11-1598 OA 7 OA 8, ('Ruto & Sang OA 7 OA 8 Judgment') para. 112.

⁶⁸ *Bemba et al Appeals Judgment*, para. 319.

⁶⁹ *Bemba et al Appeals Judgment*, para. 319; See also, *Ruto & Sang OA 7 OA 8 Judgment*, para. 112.

B. Requirements of Article 99(4) of the Statute

27. Turning to Article 99(4) of the Statute, on a plain reading of the provision, the Chamber finds that this provision allows the Prosecution to directly execute certain investigative measures on the territory of a State Party only when specific requirements are fulfilled.

1. *The meaning of ‘without any compulsory measures’ under Article 99(4)*

28. First, investigative measures under Article 99(4) of the Statute are limited to those which do not require any ‘compulsory measures’ (i.e., ‘non-compulsory measures’). Article 99(4) notes several measures in this regard, namely the ‘interview of or taking evidence from a person on a voluntary basis’. The Chamber notes that this list is not exhaustive, as illustrated by the use of the word ‘including’ in the provision.

29. At the outset, the Chamber is not in agreement with the Defence’s submission that the definition of ‘compulsory’ is dependent on the national law of the State where the measure took place.⁷⁰ In this regard, the Chamber recalls the jurisprudence from the Appeals Chamber that ‘no particular national law constitutes part of the applicable law under [A]rticle 21[(1)(c)] of the Statute’.⁷¹ Accordingly, for the Court’s purposes, the Chamber finds that determining what constitutes a non-compulsory measure must be determined objectively and national law is not determinative.

30. In determining what constitutes a non-compulsory measure for the Court’s purposes, the Chamber observes that the Statute is largely silent in this regard, save for the limited examples noted above. The Chamber notes that the word ‘compulsory’ is key in delineating the limits of the Prosecution’s powers under Article 99(4) of the Statute. Furthermore, as noted above, the Chamber finds that the reference to voluntariness in the *chapeau* of Article 99(4) is equally determinative.

31. In order to define the notion of ‘compulsory’, the Chamber notes that Black’s Law Dictionary defines ‘compulsory’ as ‘required or compelled’ or ‘mandated by legal process or by statute’.⁷² In respect of voluntary, Black’s Law Dictionary defines

⁷⁰ [Request](#), para. 48.

⁷¹ [Bemba et al Appeals Judgment](#), para. 291.

⁷² ‘Compulsory’, B.A. Garner (ed.) *Black’s Law Dictionary* (2019).

‘voluntary’ as ‘without compulsion or solicitation’⁷³ When read together, the Chamber finds that a non-compulsory measure is one that does not require positive action on the part of the national authority in order to be executed and can be executed through voluntary means only, the latter of which includes the consent of the subject of the measure – as applicable.

32. As to the manner of the execution of the measure, the Chamber notes that Article 99(4) further states ‘including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed’. In respect of the latter proviso, the Chamber finds that this presupposes that there may be situations whereby, in order to successfully effect the non-compulsory measure, absence of the authorities of the State Party may be required.

2. Requirements for a ‘request’ under Article 99(4)

33. Second, the Chamber notes the wording of the *chapeau* of Article 99(4) which provides as follows, ‘where it is necessary for the successful execution of a request’. In this regard, the Chamber notes the Defence’s submissions that this ‘presupposes that there has already been an RFA under Article 93 [of the Statute]’.⁷⁴ Similarly, the Chamber observes that the Prosecution largely agrees with the Defence on this point noting that ‘the Prosecution must make a prior “request” to the territorial State Party.’⁷⁵ Considering the wording of the provision and also having in mind the Parties’ submissions on the matter, the Chamber finds that a prior request is required before investigative measures under Article 99(4) of the Statute can be executed.

34. However, the Chamber notes the divergence between the Parties in respect of the content of such a request. The Defence submits that the requirements of Article 96 of the Statute must be satisfied,⁷⁶ whereas the Prosecution argues that such a request ‘need not satisfy all the formalities under [Article] 96 [...] [and] may not necessarily be more than a bare notification of the Prosecution’s intention to proceed under [Article] 99(4) in that State’.⁷⁷

⁷³ ‘Voluntary’, B.A Garner (ed.) *Black’s Law Dictionary* (2019).

⁷⁴ [Request](#), para. 37.

⁷⁵ [Response](#), para. 34.

⁷⁶ [Request](#), para. 36.

⁷⁷ [Response](#), para. 34.

35. The Chamber notes that in order to determine the level of specificity for a request for the purposes of Article 99(4) of the Statute, regard must be had to the nature of the measures sought to be executed under this provision. As noted above, the measures allowed under Article 99(4) are limited to non-compulsory measures which do not require intervention on the part of the State Party. Accordingly, the Chamber does not agree with the Defence that the level of specificity required for a request for the purposes of Article 99(4) must include the level of detail as that set out in Article 96 of the Statute. In this regard, the Chamber observes that the level of detail set out in Article 96(2) of the Statute is largely to assist the State in the effective execution of the request for assistance. However, in the context of Article 99(4) of the Statute, these considerations are not as pertinent as the measures envisaged pursuant to Article 99(4) do not necessarily require intervention on the part of the State in order to be successfully executed.

36. Turning to the question of what level of detail is required, the Chamber notes the clear wording of Rule 167(1) of the Rules which provides that ‘the Court shall indicate that the basis for the request is an investigation or prosecution of offences under [Article] 70.’ Accordingly, for the purposes of Article 99(4) the Chamber finds that a request must make reference to the fact that it pertains to investigations under Article 70 of the Statute.

37. Beyond this, the Chamber finds that any further level of detail will largely be determined by the nature of the non-compulsory investigative measure sought to be executed, the different requirements of Articles 99(4)(a) and (b) of the Statute and the extent to which advance notice of the measure will undermine its effectiveness. Accordingly, the Chamber will determine on a case-by-case basis, bearing in mind the relevant factual context and circumstances, whether the request contains sufficient information for the purposes of Article 99(4).

3. *Consultations with the relevant State Party under Articles 99(4)(a) and (b)*

38. Moving beyond the *chapeau* of Article 99(4), the Chamber now turns to consideration of the requirements of Article 99(4)(a). The Chamber notes for the purposes of the determination of the present Request, analysis of Article 99(4)(b) of the

Statute is not required given that the alleged criminal activity has occurred on the territory of three State Parties, namely [REDACTED], [REDACTED] and [REDACTED].

39. The Chamber observes that the wording of Article 99(4)(a) of the Statute provides that the Prosecution may ‘directly execute’ a request ‘following all possible consultations with the requested State Party’. The Chamber views this as imposing a requirement to consult with the State Party in respect of the measures sought to be executed. However, the Chamber notes the inclusion of the word ‘possible’ in respect of the consultations. The Chamber interprets this to mean that there may be situations where consultations are not possible.

40. In the Chamber’s view, there are two broad categories of situations that may make it impossible to hold consultations. First, there may simply not be enough time for the Prosecution and the State Party to engage in meaningful consultations because the (non-compulsory) investigatory opportunity may only be available for a limited period. Second, the Chamber finds, as has also been argued by the Prosecution, that the Prosecution is not required to reveal certain details during the consultations if doing so would potentially jeopardise the safety of the persons involved or the efficacy of the planned investigatory measure. However, the Prosecution must always endeavour to provide the State Party with sufficient information to make meaningful consultations possible. Absent any specific circumstances which would render it impossible, the Prosecution should therefore at least inform the State Party in the request for cooperation of the nature of the non-compulsory measures it wants to execute on the territory of the State Party. This will allow the State Party to raise potential requirements under its national law that it considers to be applicable to the proposed non-compulsory measure⁷⁸ and to potentially seek a ruling from the competent Chamber if disagreements remain.⁷⁹

41. Based on the foregoing, the Chamber finds that, for the purposes of Article 99(4) of the Statute, in the context of Article 70 proceedings, and pursuant to Article 99(4)(a) specifically, the Prosecution has the power to: (i) execute a request which can be executed without any compulsory measures; (ii) directly on the territory of a State Party

⁷⁸ Article 96(3) of the Statute.

⁷⁹ Regulation 108(2) of the Regulations.

where the crime is alleged to have been committed; (iii) provided that: (a) a request to that State Party exists which notes that the basis for the request are proceedings under Article 70 of the Statute; and (b) all possible consultations with the requested State Party have taken place.

C. Article 57(3) of the Statute

42. Article 57(3)(d) of the Statute gives the Pre-Trial Chamber the power to authorise the Prosecution to ‘take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9’. In making such an authorisation, the Pre-Trial Chamber must determine that ‘the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9’.

43. The Chamber notes that the phrasing ‘unavailability of any authority or any component of its judicial system’ is key to determining when this power is available. In this regard, the Chamber observes that this is a restrictive condition that will only be satisfied if there is an inability of a State’s authorities to respond to a request for cooperation, for example due to the collapse of public order.⁸⁰

D. Article 69(7) of the Statute

44. As noted by the Appeals Chamber, Article 69(7) of the Statute ‘envisages two consecutive enquiries’. First, as noted in the *chapeau* of Article 69(7), it must be determined whether the evidence at issue was ‘obtained by means of a violation of th[e] Statute or internationally recognized human rights’.⁸¹ An affirmative answer to this question is, however, not sufficient for the concerned evidence to be inadmissible. If the conditions of the *chapeau* of Article 69(7) are met, the second step is to consider whether ‘[t]he violation casts substantial doubt on the reliability of the evidence’⁸² or

⁸⁰ The Chamber observes from the *travaux préparatoires* for Article 57(3)(d) that a prior version of this provision had used the formulation ‘the State is unable to execute a request for cooperation due to a total or partial collapse or unavailability of its national judicial system’ - See UN Doc A/CONF.183/C.1/WPGM/L1. See further, Ambos, Rome Statute of the International Criminal Court – Article-by-Article Commentary, 4th edition, p. 1705.

⁸¹ [Bemba et al Appeals Judgment](#), para. 280.

⁸² Article 69(7)(a) of the Statute.

‘[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’⁸³.⁸⁴ The evidence concerned will be inadmissible in case of an affirmative answer to either of these two alternatives.⁸⁵

45. Furthermore, the Chamber observes that the *chapeau* of Article 69(7) of the Statute provides that the provision applies where evidence was ‘obtained *by means of* a violation’.⁸⁶ The Chamber notes that this requires not only a breach of the Statute or internationally recognised human rights but also a causal link between the violation and the gathering of evidence.⁸⁷

46. Pertinently, the Appeals Chamber has held that ‘breaches of Part 9 of the Statute do not constitute *per se* violations of the Statute for the purposes of exclusion of evidence under Article 69 (7) of the Statute.’⁸⁸ In this regard, the Appeals Chamber has clarified that ‘Part 9 of the Statute regulates the interactions between the Court and States’, endorsing the reasoning of Trial Chamber VII that ‘the [s]afeguard clauses embedded in the various provisions of Part [9] address sovereignty concerns of States and are not generally apt to protect the interests of the individual’.⁸⁹

47. Accordingly, should the Chamber determine that Part 9 of the Statute has been violated, this does not automatically mean that there is a corresponding breach of the *chapeau* of Article 69(7) of the Statute.

48. Furthermore, in line with the Appeals Chamber’s holding, it is only if such a violation is found that the Chamber will proceed to consider the second enquiry, namely whether the violation casts substantial doubt on the reliability of the evidence *or* its

⁸³ Article 69(7)(b) of the Statute.

⁸⁴ [Bemba et al Appeals Judgment](#), para. 280.

⁸⁵ [Bemba et al Appeals Judgment](#), para. 280.

⁸⁶ [Emphasis added].

⁸⁷ See Trial Chamber X, *The Prosecutor v Al Hassan AG Abdoul Aziz AG Mohamed AG Mahmoud, Decision on requests related to the submission into evidence of Mr Al Hassan’s statements*, ICC-01/12-01/18-1475, (‘*Al Hassan* 69(7) Decision’) para. 33.

⁸⁸ [Bemba et al Appeals Judgment](#), para. 318.

⁸⁹ [Bemba et al Appeals Judgment](#), para. 319 citing, Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Aido, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)*, 29 April 2016, ICC-01/05-01/13-1854, para. 36.

admission would be antithetical and would seriously damage the integrity of the proceedings.

49. In respect of an assessment under Article 69(7)(b) of the Statute, the Chamber notes that it is for the Chamber to ‘determine the seriousness of the damage (if any) to the integrity of the proceedings that would be caused by admitting the evidence.’⁹⁰ In this regard, the Chamber recalls the following factors to guide such an assessment: (i) the nature and gravity of the violated right [or obligation];⁹¹ (ii) whether the rights violated relate to the accused;⁹² (iii) the Prosecution’s degree of control over the evidence gathering process or power to prevent any improper or illegal activity;⁹³ and (iv) the level of care that was displayed to minimise the risk of any violations occurring and measures taken once the violation has occurred to reduce the impact thereof.⁹⁴

IV. ANALYSIS

A. First Preliminary Matter: Recourse to the Pre-Trial Chamber under Article 57(3)(d)

50. First, in respect of the Defence’s argument that the Prosecution should have sought recourse to the Pre-Trial Chamber pursuant to Article 57(3)(d) of the Statute if it was of the view that it could not secure the relevant State Party’s cooperation under Part 9, the Chamber is of the view that Article 57(3)(d) of the Statute was not available to the Prosecution in the present proceedings.

51. As noted above, Article 57(3)(d) of the Statute requires that there must be an unavailability of any authority or any component of its judicial system competent to execute such a request. In this regard, the Chamber recalls that this requirement relates to the situation where States are unable to execute such a request. In the present proceedings, the Chamber finds that this criterion is not satisfied. This is due to the fact that it has not been argued that the authorities of either [REDACTED], [REDACTED],

⁹⁰ Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, ‘[Decision on the admission of material from the “bar table”](#)’, ICC-01/04-01/06-1981, (‘*Lubanga* 69(7) Decision’), para. 47; [Al Hassan 69\(7\) Decision](#), para. 34.

⁹¹ [Lubanga 69\(7\) Decision](#), para. 47; [Al Hassan 69\(7\) Decision](#), para. 34.

⁹² [Lubanga 69\(7\) Decision](#), para. 47; [Al Hassan 69\(7\) Decision](#), para. 34.

⁹³ [Lubanga 69\(7\) Decision](#), para. 47; [Al Hassan 69\(7\) Decision](#), para. 34.

⁹⁴ *Bemba et al* Appeals Judgment, Separate Opinion of Judge Henderson, [ICC-01/05-01/13-2275-Anx](#), para. 34.

[REDACTED] or indeed [REDACTED] were unable to execute such a request. Indeed the Defence argues, to the contrary, that these States were able to execute such requests.

52. Accordingly, the Chamber rejects the Defence's argument that the Prosecution could have sought recourse to the Pre-Trial Chamber under Article 57(3)(d) of the Statute.

53. Further, with regard to the application of Article 57(3) of the Statute more generally, the Defence submits, that '[i]f the [Prosecution] considered that it could not secure these States Parties' cooperation, Article 57(3) required it to seek the [Pre-Trial Chamber's] authorization before proceeding to investigate.'⁹⁵ In essence, the Defence submits that the Prosecution did not have any contact with the State Parties concerned regarding the issue of cooperation. However, as explained below, the Prosecution did have contact on the question of how to execute cooperation matters with all three State Parties. Accordingly, irrespective of whether Article 57(3) of the Statute constitutes the appropriate avenue to proceed in such cases, the submissions by the Defence are factually misguided. Accordingly, the Chamber will not address the matter any further.

B. Second Preliminary matter: The Prosecution's request to dismiss part of the Request *in limine*

54. In its Response, the Prosecution submits that 362 of the items identified in Annex A to the Request (the 'Irrelevant Items') do not pertain to the recordings made by witnesses during the course of the Article 70 investigations.⁹⁶ Instead, the Prosecution states that these Irrelevant Items 'relate to telephone interceptions lawfully conducted by [REDACTED] authorities pursuant to a request for assistance [...] from the Prosecution.'⁹⁷ Of these 362 Irrelevant Items, the Prosecution identifies only 15 which are listed in its List of Evidence (the '15 [REDACTED] Intercepts'). The Prosecution

⁹⁵ [Request](#), para. 53.

⁹⁶ In footnote 3 of its [Response](#), the Prosecution identifies Audio Recording items 1, 27-29; Transcript items 1, 122-126; Translation items 1, 105-449; and Summaries items 1-6 in Annex A to the [Request](#) as the 'Irrelevant Items'.

⁹⁷ [Response](#), para. 1.

has, therefore, asked the Chamber to dismiss the Request to exclude these 362 Irrelevant Items *in limine* on the basis that they are ‘unsubstantiated and moot’.⁹⁸

55. For the purpose of this Decision, the Chamber does not think it necessary to consider items which are not listed in the Prosecution’s List of Evidence on the basis that such items will not be relied upon as evidence at trial. Therefore, it has limited its analysis of the Prosecution’s submission to dismiss the Request regarding the Irrelevant Items *in limine* to only the 15 [REDACTED] Intercepts which the Prosecution identified as being listed in its List of Evidence.⁹⁹ For the avoidance of doubt, should the Prosecution wish to rely upon any of the Irrelevant Items which are not yet included in its List of Evidence further determination may need to be made by the Chamber at the relevant time.

56. The submissions made in the Request cover audio recordings which were obtained by recording of witnesses ‘on the territories of [REDACTED], [REDACTED], and [REDACTED] without submitting any Request for Assistance’ or seeking authorisation from the Pre-Trial Chamber.¹⁰⁰ As noted above, the Prosecution argues that the 15 [REDACTED] Intercepts fall outside the scope of the present Request on the basis that the evidence was obtained by the [REDACTED] authorities pursuant to a RFA. The Chamber notes that the Defence has raised no concerns or objections regarding the existence of a RFA with [REDACTED] authorities pursuant to which this evidence was gathered.

57. On this basis, it is first necessary to consider whether the 15 [REDACTED] Intercepts identified by the Prosecution in its Response were, in fact, obtained from [REDACTED] authorities. Having reviewed the evidence, the Chamber is not satisfied that KEN-OTP-0106-0908_01¹⁰¹ and associated materials KEN-OTP-0153-0513¹⁰²; and KEN-OTP-0153-0526¹⁰³ are evidence obtained from [REDACTED] authorities.

⁹⁸ [Response](#), para. 1.

⁹⁹ The Prosecution identifies these 15 items in footnote 4 of its [Response](#): KEN-OTP-0106-0908_01; KEN-OTP-0141-0970; KEN-OTP-0141-0977; KEN-OTP-0153-0513; KEN-OTP-0153-0526; KEN-OTP-0157-1758; KEN-OTP-0157-1791; KEN-OTP-0157-2701-R01; KEN-OTP-0157-2723-R01; KEN-OTP-0157-3118-R01; KEN-OTP-0157-3196; KEN-OTP-0157-3434; KEN-OTP-0157-3446-01; KEN-OTP-0157-3746; and KEN-OTP-0157-3783.

¹⁰⁰ [Request](#), p. 3.

¹⁰¹ Item 211 on the Prosecution’s Provision of the Updated List of Evidence with Confidential Annex A (ICC-01/09-01/20-262-Conf-AnxA) (‘Prosecution’s Updated List of Evidence’).

¹⁰² Item 799 on the Prosecution’s Updated List of Evidence.

¹⁰³ Item 800 on the Prosecution’s Updated List of Evidence.

Indeed, the metadata of the source material (KEN-OTP-0106-0908_01) lists the chain of custody as beginning with Witness [REDACTED]. The metadata shows that the evidence was subsequently passed to Prosecution investigators. The [REDACTED] authorities do not appear to have been involved in obtaining the evidence. Similarly, it is apparent from the metadata that this recording occurred in [REDACTED]. Accordingly, these items will be dealt with below regarding the recordings made by Witness [REDACTED].

58. The Chamber is, however, satisfied that the source material of the remaining items identified by the Prosecution were obtained from [REDACTED] authorities. Accordingly, the Prosecution's request to dismiss the Request *in limine* in regards to: KEN-OTP-0141-0970¹⁰⁴; KEN-OTP-0157-1758¹⁰⁵; KEN-OTP-0157-3746¹⁰⁶; KEN-OTP-0141-0977¹⁰⁷; KEN-OTP-0157-1791¹⁰⁸; KEN-OTP-0157-3783¹⁰⁹; KEN-OTP-0157-2701-R01¹¹⁰; KEN-OTP-0157-2723-R01¹¹¹; KEN-OTP-0157-3118-R01¹¹²; KEN-OTP-0157-3196¹¹³; KEN-OTP-0157-3434¹¹⁴; and KEN-OTP-0157-3446-01¹¹⁵ is granted.

59. Concerning the remainder of the items listed in Annex A of the Request which also appear on the Prosecution's List of Evidence, the Chamber notes that the Defence ultimately requests that the Chamber finds them to be inadmissible pursuant to Article 69(7) of the Statute. The Chamber will therefore assess whether the criteria of Article 69(7) of the Statute – as explained in the section on the applicable law above¹¹⁶ – are fulfilled.

60. The Chamber notes that the Defence only argues that the recordings should be declared inadmissible pursuant to Article 69(7)(b). No submissions are made in respect of Article 69(7)(a) of the Statute. Further, the Chamber does not find any other reason

¹⁰⁴ Item 649 on the Prosecution's Updated List of Evidence.

¹⁰⁵ Item 815 on the Prosecution's Updated List of Evidence

¹⁰⁶ Item 823 on the Prosecution's Updated List of Evidence.

¹⁰⁷ Item 650 on the Prosecution's Updated List of Evidence.

¹⁰⁸ Item 816 on the Prosecution's Updated List of Evidence.

¹⁰⁹ Item 824 on the Prosecution's Updated List of Evidence.

¹¹⁰ Item 817 on the Prosecution's Updated List of Evidence.

¹¹¹ Item 818 on the Prosecution's Updated List of Evidence.

¹¹² Item 819 on the Prosecution's Updated List of Evidence.

¹¹³ Item 820 on the Prosecution's Updated List of Evidence.

¹¹⁴ Item 821 on the Prosecution's Updated List of Evidence.

¹¹⁵ Item 822 on the Prosecution's Updated List of Evidence.

¹¹⁶ See paragraph 23 to 49 above.

which suggests that the items should be excluded under the latter provision. Accordingly, it will only discuss whether the items should be declared inadmissible pursuant to Article 69(7)(b) of the Statute.

61. In order to conduct this assessment the Chamber will – due to the volume of the items concerned – first provide a short overview of the measures undertaken by the Prosecution in order to obtain the items. The Chamber will then assess whether any of the items were obtained by means of violation of the Statute (Section D) or by means of violation of internationally recognised human rights (Section E). Lastly, it will discern whether such violation fulfilled the criteria of Article 69(7)(b) of the Statute, meaning that the admission of these items would be antithetical to and would seriously damage the integrity of the proceedings.

C. The Prosecution's Investigative Measures

62. The Chamber will now proceed to analyse the audio recordings on which it requested submissions. As noted above, the Chamber considers it necessary to establish what (investigative) measures the Prosecution employed during the course of its investigation into potential Article 70 offences in the Situation in the Republic of Kenya. Similarly, as highlighted above, the Chamber's analysis will focus on what the Prosecution seeks to rely upon as evidence in support of its case, this being the audio recordings of calls and meetings between Prosecution witnesses which are listed on the List of Evidence and set out in the Prosecution's Response and associated Annex. Similarly, the Chamber's analysis will focus only on recordings which the Defence make substantive submissions on in the Request.

63. The Chamber notes that five Prosecution witnesses who made audio recordings of conversations involving various individuals, namely [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], are referred to by both the Defence in its Request and the Prosecution in its Response and associated Annex. The Chamber also observes that the Prosecution provided [REDACTED], [REDACTED],

[REDACTED] and [REDACTED] with the capacity to audio record conversations.¹¹⁷ The audio recordings of each Prosecution witness will be addressed in turn.

64. First, in respect of [REDACTED], whilst in [REDACTED], [REDACTED] recorded two calls between [REDACTED],¹¹⁸ two calls with an effective exchange of information on or around [REDACTED],¹¹⁹ two calls on [REDACTED],¹²⁰ two calls on [REDACTED],¹²¹ two calls on [REDACTED],¹²² one call on [REDACTED],¹²³ and two calls and one [REDACTED] on [REDACTED].¹²⁴ Whilst in [REDACTED], [REDACTED] recorded three calls on [REDACTED],¹²⁵ two calls on [REDACTED],¹²⁶ two calls on [REDACTED],¹²⁷ two calls on or around [REDACTED],¹²⁸ four calls on [REDACTED],¹²⁹ one call on [REDACTED],¹³⁰ one call on [REDACTED],¹³¹ one call on [REDACTED],¹³² two calls on [REDACTED],¹³³

¹¹⁷ See e.g. [REDACTED]: KEN-OTP-0106-0910, para. 27; [REDACTED]: KEN-OTP-0111-0188-R01, para. 16; [REDACTED]: KEN-OTP-0103-2473, para. 34; [REDACTED]: KEN-OTP-0125-0461-R01, lines 671 and 676.

¹¹⁸ KEN-OTP-0106-0910, para. 30; Annex A to the [Response](#), Item 22; Annex A to the [Request](#), Audio-recordings Item 1, Transcripts Item 1 and Translations Item 1.

¹¹⁹ KEN-OTP-0111-0162, paras 16 and 20; Annex A to the [Response](#), Items 25-26; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Items 15 and 17 and Translations Items 13 and 18.

¹²⁰ KEN-OTP-0111-0162, paras 23 and 25; Annex A to the [Response](#), Items 27-28; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Items 9 and 18 and Translations Items 10 and 19.

¹²¹ KEN-OTP-0106-0922, paras 20-21; Annex A to the [Response](#), Items 23-24; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Items 13-14 and Translations Items 14-15.

¹²² KEN-OTP-0115-0216, para. 46; KEN-OTP-0115-0244; Annex A to the [Response](#), Items 55-56; Annex A to the [Request](#), Audio-recordings Items 17-18, Transcripts Items 96 and 99 and Translations Items 83-84.

¹²³ KEN-OTP-0115-0216, para. 62; Annex A to the [Response](#), Item 58; Annex A to the [Request](#), Audio-recordings Item 19, Translations Item 101 and Transcripts Item 85.

¹²⁴ KEN-OTP-0115-0216, paras 72-74; Annex A to the [Response](#), Items 57 and 59; Annex A to the [Request](#), Audio-recordings Items 20-21, Transcripts Items 103 and 105 and Translations Items 86-87.

¹²⁵ KEN-OTP-0111-0162, paras 34-35 and 39; Annex A to the [Response](#), Items 29-31; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Items 19-21 and Translations Items 17, 20 and 24.

¹²⁶ KEN-OTP-0111-0162, paras 42 and 49; Annex A to the [Response](#), Items 32-33; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Items 22-23 and Translations Items 21-22.

¹²⁷ KEN-OTP-0111-0162, paras 52 and 55; Annex A to the [Response](#), Items 34-35; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Items 9 and 24 and Translations Items 10 and 23.

¹²⁸ KEN-OTP-0111-0557, paras 14 and 16; Annex A to the [Response](#), Items 36-37; Annex A to the [Request](#), Audio-recordings Item 11, Transcripts Items 45 and 48 and Translations Items 46-47.

¹²⁹ KEN-OTP-0111-0557, paras 19, 21 and 23-24; Annex A to the [Response](#), Items 38-41; Annex A to the [Request](#), Audio-recordings Item 11, Transcripts Items 46-47, 49 and 51 and Translations Items 48-51.

¹³⁰ KEN-OTP-0111-0557, para. 25; Annex A to the [Response](#), Item 42; Annex A to the [Request](#), Audio-recordings Item 11, Transcripts Item 50 and Translations Item 52.

¹³¹ KEN-OTP-0111-0557, para. 26; Annex A to the [Response](#), Item 43; Annex A to the [Request](#), Audio-recordings Item 11, Transcripts Item 52 and Translations Item 54.

¹³² KEN-OTP-0111-0557, para. 29; Annex A to the [Response](#), Item 44; Annex A to the [Request](#), Audio-recordings Item 11, Transcripts Item 53 and Translations Item 53.

¹³³ KEN-OTP-0111-0557, paras 34-35; Annex A to the [Response](#), Items 45-46; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Item 9 and Translations Item 10.

four calls on [REDACTED],¹³⁴ one call on [REDACTED],¹³⁵ one call on [REDACTED],¹³⁶ one call on [REDACTED],¹³⁷ and one call on [REDACTED].¹³⁸

65. Second, in respect of [REDACTED], whilst in [REDACTED], [REDACTED] recorded three calls on [REDACTED],¹³⁹ three calls on [REDACTED],¹⁴⁰ one call with an exchange of information on [REDACTED]¹⁴¹ and two calls on [REDACTED].¹⁴² Whilst in [REDACTED], [REDACTED] recorded one call on [REDACTED],¹⁴³ one call on [REDACTED],¹⁴⁴ three calls on [REDACTED],¹⁴⁵ one call on [REDACTED],¹⁴⁶ one call on [REDACTED],¹⁴⁷ two calls on [REDACTED],¹⁴⁸ one call on [REDACTED]¹⁴⁹ and three calls on [REDACTED].¹⁵⁰

¹³⁴ KEN-OTP-0111-0557, paras 40-41, 50 and 55; Annex A to the [Response](#), Items 47-50; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Item 9 and Translations Item 10.

¹³⁵ KEN-OTP-0111-0557, para. 61; Annex A to the [Response](#), Item 51; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Item 9 and Translations Item 10.

¹³⁶ KEN-OTP-0111-0557, para. 69; Annex A to the [Response](#), Item 52; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Item 12 and Translations Item 12.

¹³⁷ KEN-OTP-0111-0557, para. 74; Annex A to the [Response](#), Item 53; Annex A to the [Request](#), Audio-recordings Item 7, Transcripts Item 11 and Translations Item 11.

¹³⁸ KEN-OTP-0115-0216, para. 22; Annex A to the [Response](#), Item 54; Annex A to the [Request](#), Audio-recordings Item 13, Transcripts Item 70 and Translations Item 65.

¹³⁹ KEN-OTP-0111-0188-R01, paras 18-19 and 24; Annex A to the [Response](#), Items 1-3; Annex A to the [Request](#), Audio-recordings Item 10, Transcripts Item 35 and Translations Items 37 and 39.

¹⁴⁰ KEN-OTP-0111-0201-R01, paras 15 and 17-18; Annex A to the [Response](#), Items 4-5; Annex A to the [Request](#), Audio-recordings Item 10, Transcripts Item 35 and Translations Items 41-42.

¹⁴¹ KEN-OTP-0118-0011-R01, para. 15; Annex A to the [Response](#), Item 6; Annex A to the [Request](#), Audio-recordings Item 10, Transcripts Item 56 and Translations Item 55. The witness tried unsuccessfully to make another call.

¹⁴² KEN-OTP-0118-0011-R01, paras 24 and 27; Annex A to the [Response](#), Items 7-8; Annex A to the [Request](#), Audio-recordings Items 10 and 12, Transcripts Item 57 and 59-60 and Translations Items 56, 58 and 60.

¹⁴³ KEN-OTP-0118-0011-R01, para. 39; Annex A to the [Response](#), Item 9; Annex A to the [Request](#), Audio-recordings Item 10, Transcripts Item 64 and Translations Item 61.

¹⁴⁴ KEN-OTP-0118-0011-R01, para. 45; Annex A to the [Response](#), Item 10; Annex A to the [Request](#), Audio-recordings Item 10, Transcripts Item 67 and Translations Item 63.

¹⁴⁵ KEN-OTP-0118-0011-R01, paras 57, 59 and 61; Annex A to the [Response](#), Items 11-13; Annex A to the [Request](#), Audio-recordings Item 14, Transcripts Items 74-76 and Translations Items 66-68.

¹⁴⁶ KEN-OTP-0118-0011-R01, para. 64; Annex A to the [Response](#), Item 14; Annex A to the [Request](#), Audio-recordings Item 14, Transcripts Item 80 and Translations Item 70.

¹⁴⁷ KEN-OTP-0118-0011-R01, para. 72; Annex A to the [Response](#), Item 15; Annex A to the [Request](#), Audio-recordings Item 14, Transcripts Item 82 and Translations Item 71.

¹⁴⁸ KEN-OTP-0118-0011-R01, paras 78 and 83; Annex A to the [Response](#), Items 16-17; Annex A to the [Request](#), Audio-recordings Item 14, Transcripts Items 86-87 and Translations Items 73-74.

¹⁴⁹ KEN-OTP-0118-0011-R01, para. 85; Annex A to the [Response](#), Item 18; Annex A to the [Request](#), Audio-recordings Item 14, Transcripts Item 90 and Translations Item 76.

¹⁵⁰ KEN-OTP-0118-0011-R01, paras 92, 97 and 101; Annex A to the [Response](#), Items 19-21; Annex A to the [Request](#), Audio-recordings Item 16, Transcripts Items 93-95 and Translations Items 79-81.

66. Third in respect of [REDACTED], whilst in [REDACTED], [REDACTED] recorded one call on [REDACTED],¹⁵¹ one call on [REDACTED],¹⁵² one call on [REDACTED],¹⁵³ one call around [REDACTED],¹⁵⁴ one call on [REDACTED],¹⁵⁵ one call and [REDACTED] on [REDACTED],¹⁵⁶ and three [REDACTED] on [REDACTED].¹⁵⁷

67. Fourth in respect of [REDACTED], the Chamber notes that, during the course of his [REDACTED], four calls were recorded on [REDACTED]¹⁵⁸ and ten calls on [REDACTED].¹⁵⁹

68. Fifth, in respect of [REDACTED], in [REDACTED], during the [REDACTED], the Prosecution asked the witness to record at least three calls on [REDACTED].¹⁶⁰

69. The Chamber observes that the above calls were audio recorded by a person located on the territory of three [REDACTED]. None of the audio recordings were made by persons on the [REDACTED]. Furthermore, the Chamber notes that some of the calls were conducted and audio recorded in the presence of Prosecution staff and others were not.¹⁶¹ Similarly, the Chamber also notes that for some of the calls the

¹⁵¹ KEN-OTP-0103-2473, para. 35; Annex A to the [Response](#), Item 60; Annex A to the [Request](#), Audio-recordings Item 2, Transcripts Item 2 and Translations Item 2.

¹⁵² KEN-OTP-0106-0388, para. 17; Annex A to the [Response](#), Item 61; Annex A to the [Request](#), Audio-recordings Item 3, Transcripts Item 5 and Translations Item 4.

¹⁵³ KEN-OTP-0109-0002, para. 19; Annex A to the [Response](#), Item 62 (also duplicated in Item 73); Annex A to the [Request](#), Audio-recordings Item 8, Transcripts Item 33 and Translations Item 33.

¹⁵⁴ KEN-OTP-0111-0140, para. 28; Annex A to the [Response](#), Item 63; Annex A to the [Request](#), Audio-recordings Item 3, Transcripts Item 6 and Translations Item 36.

¹⁵⁵ KEN-OTP-0111-0140, para. 29; Annex A to the [Response](#), Item 64; Annex A to the [Request](#), Audio-recordings Item 3, Transcripts Item 7 and Translations Item 8.

¹⁵⁶ KEN-OTP-0111-0140, para. 30; KEN-OTP-0160-0308; Annex A to the [Response](#), Items 65 and 69 (Item 65 also duplicated in Item 74); Annex A to the [Request](#), Audio-recordings Item 3, Transcripts Items 3 and 8 and Translations Items 9 and 43.

¹⁵⁷ KEN-OTP-0111-0140, paras 39, 48 and 53; Annex A to the [Response](#), Items 66-68; Annex A to the [Request](#), Audio-recordings Item 3.

¹⁵⁸ KEN-OTP-0159-1175-R01, lines 92, 128, 139 and 152; Annex A to the [Response](#), Items 76-79; Annex A to the [Request](#), Audio-recordings Item 25, Transcripts Items 112-115 and Translations Items 95-98.

¹⁵⁹ KEN-OTP-0159-1402-R01, lines 59, 97, 143, 160, 339 and 364; KEN-OTP-0124-0019, Tracks 2-3; KEN-OTP-0125-0547-R01, line 588; KEN-OTP-0125-0571-R01, line 970; Annex A to the [Response](#), Items 80-89; Annex A to the [Request](#), Audio-recordings Item 26, Transcripts Items 116-117 and 119-121 and Translations Items 99-100 and 102-104.

¹⁶⁰ KEN-OTP-0130-0566-R01, lines 22, 58-59 and 103; KEN-OTP-0114-0472; Annex A to the [Response](#), Items 90-92; Annex A to the [Request](#), Audio-recordings Items 22-23, Transcripts Items 102, 107, 127-129 and Translations Items 89-90 and 447-449.

¹⁶¹ See e.g. KEN-OTP-0111-0162, paras 55-56; KEN-OTP-0111-0557, paras 17, 19, 21 and 23-24; KEN-OTP-0159-1175-R01, line 92.

aforementioned witnesses were provided with scripts of what to say during the course of the calls.¹⁶²

D. Violation of the Statute: Cooperation with the relevant States and Compliance with Part 9 of the Statute

70. As noted above, the Chamber recalls that the system set out in Part 9 of the Statute ‘reflects [...] the “lowest common denominator” with which all States Parties are obliged to comply’ and that States are free to offer additional cooperation to the Court through agreements and other arrangements.¹⁶³ The Chamber notes that in the Prosecution’s Additional Information, the Prosecution makes reference to a number of agreements and memoranda of understanding between the Prosecution and several of the aforementioned States where the investigative measures took place. As a result, before engaging in an analysis of compliance with Part 9 of the Statute, the Chamber will first address whether there are any specific arrangements in place with those States which might cover the investigative measures at issue.

1. [REDACTED]

71. First, in respect of [REDACTED], the Chamber notes that, on the [REDACTED], the Prosecution signed an agreement with [REDACTED] entitled ‘Agreement on Cooperation and Assistance between [REDACTED] and the Office of the Prosecutor of the International Criminal Court’ (the ‘[REDACTED] Cooperation Agreement’).¹⁶⁴ The Chamber observes that the [REDACTED] Cooperation Agreement aims to ‘facilitate[] cooperation and assistance between [the Prosecution and [REDACTED]]’.¹⁶⁵ Furthermore, the Chamber also notes that the [REDACTED] Cooperation Agreement provides that ‘[REDACTED] shall cooperate fully with the Office of the Prosecutor *in accordance with the provisions of the Rome Statute*’¹⁶⁶ and

¹⁶² See e.g. KEN-OTP-0130-0566-R01, lines 8-10.

¹⁶³ See paragraph 26 above; [Bemba et al Appeals Judgment](#), para. 319.

¹⁶⁴ Agreement on Cooperation and Assistance between [REDACTED] and the Office of the Prosecutor of the International Criminal Court’ (the ‘[REDACTED] Cooperation Agreement’) - Annex C of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxC-Red.

¹⁶⁵ Preamble, [REDACTED] Cooperation Agreement - Annex C of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxC-Red, p. 4.

¹⁶⁶ Section 1(1), [REDACTED] Cooperation Agreement [Emphasis added] - Annex C of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxC-Red, p. 4.

‘build[s] upon the cooperation regime set out in the Rome Statute’.¹⁶⁷ Accordingly, based on the above, the Chamber finds that the [REDACTED] Cooperation Agreement compliments the cooperation regime set out in Part 9 of the Statute and should be interpreted in light of the provisions set out in Part 9 of the Statute. Noting the aforementioned jurisprudence of the Appeals Chamber,¹⁶⁸ the Chamber will first have regard to the [REDACTED] Cooperation Agreement in order to determine the legality of the audio recordings undertaken in [REDACTED] and will have recourse to the provisions of Part 9 of the Statute to the extent that there is any lack of clarity surrounding the former’s applicability or interpretation.

72. In the Prosecution’s Additional Information, the Prosecution makes reference to several provisions of the [REDACTED] Cooperation Agreement which, in its view, allow it to execute non-compulsory investigative measures on the territory of [REDACTED]. Specifically the Prosecution refers to sections 4(1), (3) and (4) of the [REDACTED] Cooperation Agreement. These provisions provide that the Prosecution: (i) may, ‘subject to advance notification’, ‘conduct interviews directly on the territory of [REDACTED] without the presence of national authorities [...]’¹⁶⁹; (ii) may, ‘[f]ollowing 48 hours[’] notice [...], carry out non-compulsory measures directly on the territory of [REDACTED], without the presence of national authorities. Where circumstances do not permit 48 hours[’] notice, [REDACTED] may consent to such measures within a shorter period of time’;¹⁷⁰ and (iii) must ‘keep [REDACTED] authorities informed as to any investigative activities being undertaken in its territory, except where it is necessary to keep such activities confidential.’¹⁷¹

73. The Chamber notes that ‘non-compulsory measures’ are not defined in the [REDACTED] Cooperation Agreement and therefore the Chamber will be guided by its interpretation of such measures in the context of Part 9. In this regard, the Chamber finds that the audio recordings by Prosecution witnesses do constitute non-compulsory

¹⁶⁷ Section 1(2), [REDACTED] Cooperation Agreement - Annex C of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxC-Red, p. 4.

¹⁶⁸ See paragraph 26 above; [Bemba et al Appeals Judgment](#), para. 319.

¹⁶⁹ Section 4(1), [REDACTED] Cooperation Agreement - Annex C of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxC-Red, p. 7.

¹⁷⁰ Section 4(3), [REDACTED] Cooperation Agreement - Annex C of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxC-Red, p. 8.

¹⁷¹ Section 4(4), [REDACTED] Cooperation Agreement - Annex C of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxC-Red, p. 5.

measures for the purposes of Part 9 of the Statute, and by extension the [REDACTED] Cooperation Agreement. First, the Chamber notes that the recordings were made by the relevant Prosecution witnesses of their own accord, in other words, they voluntarily undertook to make the recordings and were at no point forced by the Prosecution to do so. Each witness freely consented to cooperating with the Prosecution in this regard and had the choice to refuse not to do so. The fact that the other party to the conversation was not informed of the fact that the conversation was being recorded on behalf of the Prosecution does not alter this assessment. Indeed, as already expressed by the Chamber, for the Court's purposes, determining the compulsory nature of a measure is not dependent on the national law of where the measure took place. Rather this must be determined objectively based on whether the measure requires positive action on the part of the national authority in order to be executed and can be executed through voluntary means. The Chamber finds, for the purposes of making a determination whether objectively speaking the Prosecution's measures were non-compulsory, that such positive action was *de facto* not required as the measures were done on a request by the Prosecution and with the consent of the persons executing them.

74. Turning to the requirements of section 4(3) and (4) of the [REDACTED] Cooperation Agreement, the Prosecution makes reference to a number of letters sent from the Prosecution to [REDACTED] authorities between [REDACTED] and [REDACTED].¹⁷² These letters, citing section 4(1) and (3) of the [REDACTED] Cooperation Agreement, inform the relevant authorities that the Prosecution would be carrying out 'voluntary interviews and meetings' on the territory of [REDACTED]. The Chamber notes, as acknowledged by the Prosecution, that these letters do not mention the use of audio recordings.¹⁷³ However, in the Prosecution's view, because they constituted non-compulsory measures, it was not required to do so.¹⁷⁴ Similarly, the Chamber notes that these letters also do not mention that the presence of the Prosecution staff was for the purpose of an Article 70 investigation. However, the Chamber is of the view that these omissions are not fatal for the following reasons.

¹⁷² See, Prosecution's Additional Information, para. 5; Annex E of the Prosecution's Additional Information, ICC-01/09-01/20-264-Conf-AnxE-Red, pp. 2-9.

¹⁷³ See [Response](#), para. 41; Prosecution's Additional Information, para. 19.

¹⁷⁴ Prosecution's Additional Information, para. 19.

75. The Chamber notes that the [REDACTED] Cooperation Agreement imposes no requirement, as reflected in Rule 167(1) of the Rules, that the Prosecution explicitly states that presence of Prosecution staff is for the purposes of Article 70 investigations. Furthermore, it is clear from the interactions between the Prosecution and [REDACTED] that [REDACTED] did not wish to receive any details on the Prosecution's investigatory activities.¹⁷⁵ Accordingly, the Prosecution acted within the framework of the [REDACTED] Cooperation Agreement and in accordance with the express wishes of [REDACTED].

76. In respect of the failure to explicitly mention the use of audio recordings, while the Chamber expresses some concern about the lack of detail, the Chamber also notes that the letters sent to [REDACTED] specifically refer to Section 4(3) of the [REDACTED] Cooperation Agreement which allows the Prosecution to carry out 'non-compulsory measures'. The Chamber observes that this is in addition to the reference to Section 4(1) which pertains specifically to interviews, and thus implies that the Prosecution was carrying out additional non-compulsory measures beyond voluntary interviews. In any event, the letters sent invite [REDACTED] to ask any questions or request any further information that it requires. Furthermore, the Chamber recalls again that [REDACTED] expressly provided that it did not wish '[REDACTED]'¹⁷⁶ and that the Prosecution did submit RFAs to [REDACTED]¹⁷⁷ and [REDACTED]¹⁷⁸ notifying both States that it was conducting investigations into alleged Article 70 offences.¹⁷⁹

77. Accordingly, the Chamber is satisfied that the Prosecution complied with the [REDACTED] Cooperation Agreement and thus the audio recordings made in [REDACTED] are admissible in the present proceedings.

2. [REDACTED]

78. In respect of [REDACTED], on [REDACTED], the Prosecution signed a Memorandum of Understanding with [REDACTED] entitled '[REDACTED]' (the

¹⁷⁵ See, Annex A of the Prosecution's Additional Information, ICC-01/09-01/20-264-Conf-AnxA-Red, pp. 2-3.

¹⁷⁶ Annex A of the Prosecution's Additional Information, ICC-01/09-01/20-264-Conf-AnxA-Red, p. 3.

¹⁷⁷ Annex F of the Prosecution's Additional Information, ICC-01/09-01/20-264-Conf-AnxF-Red.

¹⁷⁸ Annex G of the Prosecution's Additional Information, ICC-01/09-01/20-264-Conf-AnxG-Red.

¹⁷⁹ See, Annex F of the Prosecution's Additional Information, ICC-01/09-01/20-264-Conf-AnxF-Red, p. 3; Annex G of the Prosecution's Additional Information, ICC-01/09-01/20-264-Conf-AnxG-Red, p. 3.

‘[REDACTED] Memorandum of Understanding’).¹⁸⁰ The Chamber observes that the [REDACTED] Memorandum of Understanding ‘[REDACTED]’.¹⁸¹ Furthermore, the Chamber also notes that the [REDACTED] Memorandum of Understanding provides that ‘[REDACTED]’.¹⁸² Accordingly, as with the [REDACTED] Cooperation Agreement, the Chamber finds that the [REDACTED] Memorandum of Understanding complements the cooperation regime set out in Part 9 of the Statute and should be interpreted in light of the provisions set out in Part 9 of the Statute, unless it is clear that the parties intended to deviate from the regime outlined in Part 9 and agreed on a more flexible or informal manner of cooperation. In this regard, the Chamber will first have regard to the [REDACTED] Cooperation Agreement in order to determine the legality of the audio recordings undertaken in [REDACTED] and will have recourse to the provisions of Part 9 of the Statute to the extent that there is any lack of clarity surrounding the former’s applicability or interpretation.

79. First, the Chamber notes that Articles 19, 21 and 28 of the [REDACTED] Memorandum of Understanding mirror Sections 4(1), (3) and (4) of the [REDACTED] Cooperation Agreement and provide that: (i) subject to advance notice, the Prosecution may conduct interviews directly on the territory of [REDACTED] without the presence of national authorities;¹⁸³ (ii) following 48 hours’ notice the Prosecution may carry out, directly on the territory of [REDACTED] without the presence of national authorities, non-compulsory measures. Where circumstances do not permit 48 hours’ notice, [REDACTED] may consent to such measures within a shorter period of time;¹⁸⁴ and (iii) the Prosecution must inform the authorities of [REDACTED] of any investigative

¹⁸⁰ [REDACTED] (the ‘[REDACTED] Memorandum of Understanding’) - Annex D of Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxD-Red.

¹⁸¹ Article 1, [REDACTED] Memorandum of Understanding [Emphasis added] - Annex D of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxD-Red, p. 2.

¹⁸² Article 2, [REDACTED] Memorandum of Understanding - Annex D of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxD-Red, p. 2.

¹⁸³ ‘[REDACTED]’: Article 19, [REDACTED] Memorandum of Understanding - Annex D of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxD-Red, p. 5.

¹⁸⁴ ‘[REDACTED]’: Article 21, [REDACTED] Memorandum of Understanding - Annex D of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxD-Red, p. 5.

activities on their territory, except where necessary to keep such activities confidential.¹⁸⁵

80. The Chamber notes at the outset that the Prosecution concedes that ‘no written notifications were sent’ to the authorities of [REDACTED] before carrying out any audio recordings.¹⁸⁶ That being said, the Prosecution makes reference to in-person consultations with [REDACTED] authorities ‘[REDACTED]’.¹⁸⁷ In support of this statement the Prosecution provides email correspondence which discusses these consultations,¹⁸⁸ noting that it had discussed ‘[REDACTED] and in addition our investigative activities’.¹⁸⁹

81. Whilst it is evident that there were discussions between the Prosecution and [REDACTED] regarding the [REDACTED] and the Prosecution did discuss ‘investigative activities’ with the authorities of [REDACTED], the Prosecution has failed to demonstrate whether the measures employed fell within the scope of the more flexible regime of [REDACTED] Memorandum of Understanding. In particular, it is unclear from the information provided by the Prosecution to what extent [REDACTED] authorities consented to the [REDACTED] Memorandum of Understanding also being applied to Article 70 investigations. Given this uncertainty, and recalling the aforementioned provisions of [REDACTED] Memorandum of Understanding which provide that cooperation between [REDACTED] and the Prosecution should conform to the provisions of the Statute,¹⁹⁰ the Chamber will have regard to the provisions of Part 9 in respect of audio recordings carried out in [REDACTED].

82. As detailed above, Article 99(4)(a) of the Statute gives the Prosecution the power to execute non-compulsory measures directly on the territory of a State Party where the crime is alleged to have been committed provided that: (a) a request to that State Party exists which notes that the basis for the request are proceedings under Article 70 of the Statute; and (b) all possible consultations with the requested State Party have taken

¹⁸⁵ ‘[REDACTED]’: Article 28, [REDACTED] Memorandum of Understanding - Annex D of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxD-Red, p. 6.

¹⁸⁶ Prosecution’s Additional Information, para. 21.

¹⁸⁷ Prosecution’s Additional Information, para. 21.

¹⁸⁸ See, Annex H of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxH-Red.

¹⁸⁹ Annex H of the Prosecution’s Additional Information ICC-01/09-01/20-264-Conf-AnxH-Red, p. 2.

¹⁹⁰ See, Article 2, [REDACTED] Memorandum of Understanding - Annex D of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxD-Red, p. 2. See also, Article 1, [REDACTED] Memorandum of Understanding.

place. In respect of the audio recordings in [REDACTED], the Chamber notes that no request was sent to [REDACTED], other than general cooperation negotiations for the purpose of a potential arrest operation for an individual wanted for alleged Article 70 offences. As alluded to above, given the fact that no formal request was made, the Chamber finds that this is insufficient to satisfy the request requirement of Article 99(4)(a) of the Statute.

83. Accordingly, the Chamber finds that the Prosecution violated Part 9 of the Statute in respect of the audio recordings carried out on the territory of [REDACTED].

3. [REDACTED]

84. Unlike [REDACTED] and [REDACTED], the Chamber observes that there is no formal written agreement or memoranda of understanding between the Prosecution and [REDACTED] which regulates cooperation. That being said, the Prosecution refers to ‘agreed procedures’ and that ‘practices were established through [REDACTED]’ and the ‘first notification letter to [REDACTED] dated [REDACTED]’ which refers to a meeting ‘between [REDACTED] and [REDACTED] on [REDACTED]’.¹⁹¹

85. The Prosecution makes further reference to a number of notification letters sent from the Prosecution to [REDACTED] informing the latter of the presence of Prosecution representatives on the territory of [REDACTED] to ‘interview witnesses on a voluntary basis’ ‘[i]n furtherance of our investigative activities into the situation in the Republic of Kenya’.¹⁹²

86. It is evident from the material submitted by the Prosecution that there existed an arrangement between [REDACTED] and the Prosecution with respect to cooperation and investigative measures. However, it is unclear from the material submitted what the exact parameters of this arrangement are, namely what is permissible under the ‘agreed procedures’ and what is not. While the Chamber observes from the wording of the letters sent to [REDACTED] that the latter was informed that the Prosecution was: (i) conducting investigative activities into the situation in the Republic of Kenya; and

¹⁹¹ Prosecution’s Additional Information, para. 17; Annex E1 of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxE1-Red, p. 2.

¹⁹² Annex E of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxE-Red, pp. 10-12.

(ii) interviewing witnesses on a voluntary basis, it is entirely unclear whether the investigative measures conducted by the Prosecution fall within the scope of these ‘agreed procedures’, and whether these ‘agreed procedures’ apply, to the extent that they do, to the current situation. Although the Chamber has no reason to doubt that the Prosecution was acting in good faith, given the lack of information surrounding the scope and application of cooperation arrangements between [REDACTED] and the Prosecution, the Chamber will have regard to Part 9 of the Statute.

87. As detailed above, Article 99(4)(a) of the Statute gives the Prosecution the power to execute non-compulsory measures directly on the territory of a State Party where the crime is alleged to have been committed provided that: (a) a request to that State Party exists which notes that the basis for the request are proceedings under Article 70 of the Statute; and (b) all possible consultations with the requested State Party have taken place. In respect of the audio recordings in [REDACTED], the Chamber notes that no formal request was sent to [REDACTED].

88. Accordingly, the Chamber finds that the Prosecution violated Part 9 of the Statute in respect of the audio recordings carried out on the territory of [REDACTED].

E. Violation of internationally recognised human rights

89. Before proceeding to analyse whether the aforementioned violations constitute violations of the Statute for the purposes of Article 69(7) of the Statute, the Chamber will have regard to the Defence’s argument that the Prosecution’s conduct also resulted in a ‘violation of Mr. Gicheru’s internationally [recognised] human right of privacy’¹⁹³ In the Response, the Prosecution submits that the Defence ‘fails to substantiate this claim – especially since the vast majority of the [audio] Recordings relate to the voluntary recording of conversations with other persons.’¹⁹⁴

90. At the outset, the Chamber notes, that only four of the audio recordings sought to be excluded pertain to the Accused himself, specifically the conversations with [REDACTED] which were recorded by [REDACTED] in [REDACTED]. The rest of the audio recordings pertain to other Prosecution witnesses. In this regard, the Chamber finds that the Defence cannot claim that Mr Gicheru’s right to privacy has been violated

¹⁹³ [Request](#), para. 61.

¹⁹⁴ [Response](#), para. 51 [Emphasis removed].

through the recording of other individuals. The Chamber observes that, to the extent the right to privacy is affected by the recording of other persons, it is the right to privacy of those other persons who are affected, not Mr Gicheru. Accordingly, the Chamber rejects the Defence's submissions in this respect.

91. In regards to the four audio recordings of the Accused, at the outset, the Chamber notes that the Defence does not explain how Mr Gicheru's right to privacy was violated by the recording of his phone conversations. Rather, the Defence merely states that there has been a violation of this right without further substantiation. In this regard, the Chamber finds that the Defence has failed to articulate a clear and cogent argument as to why Mr Gicheru's right to privacy was violated in the applicable legal context. It merely submits that 'the impropriety in this case arises from the [Prosecution's] willful [*sic*] disregard of the carefully negotiated judicial cooperation regime and the requirements of domestic law.'¹⁹⁵ However, this argument merely repeats the alleged violations of the Prosecution's cooperation regime and does not provide any factual or substantive legal submission on the question of the alleged violation of Mr Gicheru's privacy rights. Accordingly, the Chamber rejects the Defence's submissions in this respect.

F. Assessment in respect of Article 69(7) of the Statute

1. Violation of the Statute for the purposes of Article 69(7) of the Statute

92. As noted above, the Chamber has found a violation of Part 9 of the Statute in two respects, firstly in respect of the audio recordings carried out in [REDACTED] and secondly in respect of the audio recordings carried out in [REDACTED]. In accordance with the applicable law set out above, the Chamber will now proceed to analyse whether these breaches of the Statute constitute violations of the Statute for the purpose of exclusion of evidence under Article 69(7) of the Statute.

93. The Chamber recalls that not all breaches of Part 9 of the Statute constitute violations of the Statute for the purposes of exclusion of evidence under Article 69(7) of the Statute. This is rooted in the fact that Part 9 primarily addresses questions of

¹⁹⁵ [Request](#), para. 61.

sovereignty of States and does not generally relate to protecting the interests of an accused. The Chamber finds that the breaches of Part 9 in the present instances do not affect the interests of the Accused but rather pertain to the interests of the relevant States. The Chamber grounds this holding in the fact that the breaches in these instances relate to a lack of formal requests. The lack of requests impinge exclusively upon the right of the relevant States to have some form of notification and an opportunity to engage in consultations about the Prosecution's intention to conduct non-compulsory investigative measures on their territory. Accordingly, in the present instance, on the facts presented, the Chamber finds that the breaches of Part 9 do not constitute a violation of the Statute for the purposes of Article 69(7) of the Statute.

2. Whether admission is antithetical to and would seriously damage the integrity of the proceedings

94. The finding above alone is sufficient to reject the Request. However, for the sake of completeness, even if the Chamber were to find to the contrary and that the breaches of Part 9 did constitute a violation of the Statute for the purposes of Article 69(7) of the Statute, the Chamber does not consider that to admit the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

95. In this regard the Chamber notes the submissions of the Defence that, if the evidence would be admitted, this 'risks rendering Part 9 of the Statute meaningless, effectively giving the OTP *carte blanche* authority to investigate in States Parties without any judicial oversight'.¹⁹⁶ Before analysing the interactions with each State specifically, the Chamber notes that there is no indication that the Prosecution tried to systematically sidestep its obligations arising from Part 9 of the Statute or attempted to exclude or misinform State Parties in a knowing, deliberate or systematic manner. To the contrary, in all three instances there is proof that the Prosecution communicated with the relevant authorities and indicated investigative activities, albeit not always in accordance with the requirement of Part 9 of the Statute, as indicated above.

96. Concerning the specific violations found by the Chamber, first, in respect of [REDACTED], it is clear from the material submitted by the Prosecution that it acted in good faith. The Chamber finds that any violation was not grave, it is clear that there

¹⁹⁶ [Request](#), para. 60.

were consultations with the national authorities of [REDACTED] and that [REDACTED] was aware that the Prosecution wished to carry out investigative activities for the purposes of an Article 70 investigation.¹⁹⁷ This is apparent given the fact that the [REDACTED]. In this regard, it is clear that the Prosecution sought to minimise the risk of a violation occurring given that it did actively engage with [REDACTED]. Accordingly, whereas it is true that the Prosecution failed to abide by the formal requirements of the cooperation regime, there is no indication that it attempted to mislead or go behind the back of [REDACTED] authorities.

97. Furthermore, as already alluded to above, the breaches in this regard do not affect the rights of the Accused, rather they pertain to issues of State sovereignty. In this regard, the Chamber notes that the Defence has not substantiated how any specific right of the Accused is affected by the breaches of Part 9 in this context. Accordingly, the Chamber finds that it would not be antithetical to and seriously damage the integrity of the proceedings to admit the audio recordings carried out in [REDACTED].

98. Second, in respect of [REDACTED], the Chamber similarly finds that any violation was not grave. Again it is clear that the Prosecution did not wilfully seek to circumvent its obligations under the Statute and the Chamber similarly has no reason to doubt that it did not act in good faith.

99. First, whilst the precise parameters are unclear, it is clear that there were ‘agreed procedures’ in place with [REDACTED] and the Prosecution. Similarly, in this regard, it is evident that there was a practice in place between the Prosecution and [REDACTED] in respect of investigative activities. The Chamber is mindful of the level of detail of the first notification letter dated [REDACTED] sent by the Prosecution to [REDACTED] which appears to have been sufficient for [REDACTED]. This conclusion is based on the fact that it was open to [REDACTED] to ask for further information, and indeed it was invited to do so by the Prosecution. It appears that [REDACTED] chose not to avail itself of this option, thereby indicating that it was largely satisfied with the level of detail given.

100. Second, the Prosecution sent multiple letters to the national authorities of [REDACTED] notifying them that they were carrying out ‘investigative activities into

¹⁹⁷ See, Annex H of the Prosecution’s Additional Information, ICC-01/09-01/20-264-Conf-AnxH-Red.

the situation in the Republic of Kenya', that there would be Prosecution representatives on [REDACTED] territory, that they would be interviewing witnesses, and that the witnesses were not [REDACTED] citizens.¹⁹⁸ The Chamber is of the view that these letters demonstrate that the Prosecution acted in good faith and did keep [REDACTED] apprised that investigative measures into the Kenya situation were being carried out on [REDACTED] territory.

101. Last, as also noted above, the breaches of Part 9 in respect of [REDACTED] do not affect the rights of the Accused, rather they pertain to issues of State sovereignty. In this regard, the Chamber notes that the Defence has not substantiated how any specific right of the Accused is affected by the breaches of Part 9 in this context.

102. Accordingly, the Chamber finds that it would not be antithetical to and seriously damage the integrity of the proceedings to admit the audio recordings carried out in [REDACTED].

103. In conclusion, even if a violation of the Statute for the purposes of Article 69(7) were to be presumed, the Chamber finds that the threshold for the exclusion of evidence as set out in Article 69(7)(b) of the Statute has not been met. Accordingly, the Chamber therefore finds that the material sought to be excluded by the Defence is admissible.

¹⁹⁸ Annex E of the Prosecution's Additional Information, ICC-01/09-01/20-264-Conf-AnxE-Red, pp. 10-12.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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

A handwritten signature in blue ink, appearing to read 'Miatta', is written over a horizontal line.

Judge Miatta Maria Samba

Dated 14 February 2022

At The Hague, The Netherlands