

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-02/11

Date: 29 July 2014

**TRIAL CHAMBER V(B)**

**Before:** Judge Kuniko Ozaki, Presiding Judge  
Judge Robert Fremr  
Judge Geoffrey Henderson

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public**

**Decision on the Prosecution's revised cooperation request**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

Mr Benjamin Gumpert

**Counsel for Uhuru Muigai Kenyatta**

Mr Steven Kay

Ms Gillian Higgins

**Legal Representatives of Victims**

Mr Fergal Gaynor

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

Mr Githu Muigai, SC, Attorney General  
of the Republic of Kenya

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V(B)** ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 64(2) and (6), 86-88, 93, 96-97 and 99 of the Rome Statute ('Statute') and Regulations 23*bis* and 108 of the Regulations of the Court ('Regulations'), renders the following 'Decision on the Prosecution's revised cooperation request'.

## **I. Procedural history**

1. On 31 March 2014, the Chamber issued a decision,<sup>1</sup> *inter alia*, directing the Office of the Prosecutor ('Prosecution') to provide the Government of the Republic of Kenya ('Kenyan Government') with an updated and revised version of its April 2012 request under Article 93(1) of the Statute to produce financial and other records relating to the accused ('Revised Request'). The Chamber noted that the Revised Request should be tailored to reflect items which 'remain of specific relevance to the charges' and should adhere to the requirements of specificity, relevance and necessity.<sup>2</sup> The Chamber further directed the Prosecution and Kenyan Government to file submissions updating the Chamber on the progress in executing the Revised Request, or related consultations, on a two-monthly basis, with the first updates due on 30 April 2014 ('First Updates').<sup>3</sup>
2. Following two Prosecution requests,<sup>4</sup> the Chamber subsequently extended the filing deadline for the First Updates to 23 May 2014.<sup>5</sup>

<sup>1</sup> 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, ICC-01/09-02/11-908 ('Adjournment Decision').

<sup>2</sup> Adjournment Decision, ICC-01/09-02/11-908, para. 100(i).

<sup>3</sup> Adjournment Decision, ICC-01/09-02/11-908, para. 100(iii).

<sup>4</sup> Prosecution application to adjourn until 12 May the provision of the update due on 30 April, 29 April 2014, ICC-01/09-02/11-911-Conf; Prosecution application to further adjourn until 23 May the provision of the update originally due on 30 April, 8 May 2014, ICC-01/09-02/11-917-Conf.

<sup>5</sup> Urgent Confidential Order extending deadline for filing of first update due on 30 April 2014, 30 April 2014, ICC-01/09-02/11-912-Conf; Order further extending deadline for filing of first update due on 30 April 2014, 12 May 2014, ICC-01/09-02/11-918.

3. On 23 May 2014, the Prosecution<sup>6</sup> and the Kenyan Government<sup>7</sup> each duly filed their First Updates and, on 30 June 2014, filed their subsequent updates ('Second Updates').<sup>8</sup>
4. On 8 July 2014, the Prosecution and Kenyan Government filed a joint submission providing a further update on the status of cooperation relating to the Revised Request, making certain proposals regarding the level of confidentiality required in respect of the different issues to be addressed ('Joint Submission').<sup>9</sup>
5. The Chamber convened a status conference on 9 July 2014<sup>10</sup> - comprising both an *ex parte*, Prosecution and Kenyan Government only, and a public *inter partes* session - to discuss the status of execution of the Revised Request and any other relevant issues.<sup>11</sup>

<sup>6</sup> Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya originally due on 30 April, ICC-01/09-02/11-922-Conf, with confidential *ex parte*, Prosecution and Kenyan Government only, annex. On 5 June 2014, the Chamber directed the Prosecution to propose a public redacted version of this filing (e-mail from Legal Officer of the Chamber to the Prosecution and Registry on 5 June 2014 at 8:45). On 16 June 2014 the Prosecution advised that it proposed for the entire filing, excluding the annex, to be reclassified as public (e-mail from Prosecution to Legal Officer of the Chamber on 16 June 2014 at 17:31). Pursuant to a direction of the Chamber (e-mail from Legal Officer of the Chamber to the Registry on 19 June 2014 at 10:47) the filing was reclassified accordingly.

<sup>7</sup> The Government of the Republic of Kenya's First Update to the Trial Chamber Pursuant to the 'Order further extending deadline for filing of first update due on 30 April 2014', ICC-01/09-02/11-921-Conf-Exp. On 30 May 2014 the Kenyan Government filed both a corrigendum (ICC-01/09-02/11-921-Conf-Exp-Corr) and an addendum (ICC-01/09-02/11-924-Conf-Exp) to this first update. On 5 June 2014, the Chamber directed the Kenyan Government to propose a public redacted version of this filing (e-mail from Legal Officer of the Chamber to the Prosecution and Registry on 5 June 2014 at 8:45). On 11 June 2014 the Registry transmitted the Kenyan Government's proposal (ICC-01/09-02/11-925-Conf-Exp + Conf-Exp-Anx). Pursuant to a direction of the Chamber (e-mail from Legal Officer of the Chamber to the Registry on 19 June 2014 at 10:47) ICC-01/09-02/11-925, and its annex, were reclassified as public.

<sup>8</sup> Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya due on 30 June, ICC-01/09-02/11-927 and Conf-AnxA; The Government of the Republic of Kenya's Update to the Trial Chamber Pursuant to the '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' of 31 March 2014, notified on 2 July 2014, ICC-01/09-02/11-928-Conf-Exp. On 9 July 2014 the Chamber requested the Kenyan Government to propose a public redacted version of its second update by 20 July 2014 (see Transcript of Hearing dated 9 July 2014, ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 3, lines 18-25).

<sup>9</sup> Joint guide to oral submissions to be made by the Prosecution and the Government of Kenya in response to the Chamber's scheduling order of 4 July 2014 concerning the status conference to take place on 9 July 2014, 8 July 2014, ICC-01/09-02/11-930 and Conf-Exp-AnxA.

<sup>10</sup> Adjournment Decision, ICC-01/09-02/11-908, para. 102; Scheduling order and agenda for status conference on 9 July 2014, 4 July 2014, ICC-01/09-02/11-929.

<sup>11</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG; ICC-01/09-02/11-T-30-ENG.

6. During the course of the status conference, the Chamber requested the Prosecution and the Kenyan Government to file written submissions on two areas of apparent dispute: (i) the specificity, relevance and necessity of certain of the information sought in the Revised Request; and (ii) the appropriate time period to be covered by the requests.<sup>12</sup> The Prosecution and Kenyan Government filed their submissions on 11 July 2014<sup>13</sup> and 17 July 2014,<sup>14</sup> respectively.

## II. Confidentiality

7. The Prosecution states that it has no objection to the Prosecution Submissions being reclassified as public as the matters discussed therein were raised during the public portion of the status conference on 9 July 2014 and no longer require confidential treatment.<sup>15</sup> For the reasons mentioned by the Prosecution, the Chamber considers it appropriate to reclassify the filing accordingly. The Chamber also considers it appropriate to invite the Kenyan Government to propose a public redacted version of the Kenyan Government's Submissions for approval by the Chamber.
8. The Chamber has referred at certain points throughout this decision to filings and submissions currently classified as *ex parte* and/or confidential. However, where it has done so the Chamber has found that the information in question may be disclosed in this manner.

<sup>12</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 31, line 21 – page 33, line 12; ICC-01/09-02/11-T-30-ENG, page 36, line 13 – page 37, line 21.

<sup>13</sup> Prosecution written submissions in compliance with the order made by the Chamber in the course of proceedings on 9 July 2014, ICC-01/09-02/11-933-Conf-Exp ('Prosecution Submissions').

<sup>14</sup> The Government of the Republic of Kenya's Submissions pursuant to the Order for Submissions given by the Trial Chamber at the Status Conference of 9 July 2014, ICC-01/09-02/11-934-Conf-Exp, confidential *ex parte*, Prosecution and Kenyan Government only, ('Kenyan Government's Submissions'). The Kenyan Government's Submissions were filed on 16 July 2014 without annexes, the filing together with Annexes A-O was notified on 17 July 2014. Notwithstanding the fact that these submissions were not filed within the requisite time or page limit, which is contrary to Regulations 34, 36 and 37 of the Regulations, the Chamber finds it in the interests of justice, in this instance, to accept them.

<sup>15</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 2.

### III. Submissions

9. By way of background, the Chamber notes that the Revised Request seeks materials relating to eight categories of information, as follows:
- (1) companies, businesses, partnerships or trusts in which the accused has an ownership interest, directly or indirectly, whether as shareholder, director, officer of the company, partner, trustee, beneficiary or otherwise between 1 June 2007 and 15 December 2010 ('Company Records');
  - (2) land and real property belonging to the accused either personally or through third parties or to any company or business identified under (1) above, which was transferred between 1 June 2007 and 15 December 2010 ('Land Transfer Records');
  - (3) the Income Tax and Value Added Tax returns of the accused, and any corporate entities identified pursuant to (1) above, submitted to tax authorities between 1 June 2007 and 15 December 2010 ('Tax Records');
  - (4) vehicles registered to, owned or regularly used by the accused, or any corporate entity identified pursuant to (1) above, between 1 November 2007 and 1 April 2008 ('Vehicle Records');
  - (5) the identity of and statements for any current, savings and other accounts, whether at banks or other financial institutions, held by the accused personally, or through third parties or corporate entities identified pursuant to (1) above, between 1 June 2007 and 15 December 2010 ('Bank Records');

- (6) transactions by the accused, or any corporate entities identified pursuant to (1) above, at foreign exchange institutions between 1 June 2007 and 15 December 2010 ('Foreign Transaction Records');
- (7) telephone numbers ascribed to, used by or associated with the accused between 1 June 2007 and 15 December 2010, including call data records and financial details held by service providers and records of M-PESA transfers ('Telephone Records'); and
- (8) information held by security and intelligence services concerning the activities of the accused, and any corporate entity identified pursuant to (1) above, between 1 June 2007 and 15 December 2010 ('Intelligence Records').<sup>16</sup>

10. Although not summarised in full in the submissions sections below, the Chamber has also noted the specific challenges to, justifications for and explanations relating to each of the eight categories of materials as contained in the Prosecution's and Kenyan Government's First Updates, Second Updates and in the Joint Submission.<sup>17</sup>

#### 1. *Prosecution Submissions*

11. The Prosecution submits that a distinction should be made between: (i) the conformity of the Revised Request with the Chamber's direction in the Adjournment Decision as a matter of principle; and (ii) whether there may be practical or technical difficulties in executing the Revised Request. It submits that it is only the former which is presently at issue and that practical difficulties 'can and should' be dealt

<sup>16</sup> Copies of the Revised Request are contained at ICC-01/09-02/11-911-Conf-AnxA, page 16, and ICC-01/09-02/11-924-Conf-Exp-AnxA. Each of the categories was also discussed publicly at the status conference on 9 July 2014, ICC-01/09-02/11-T-30-ENG.

<sup>17</sup> See e.g. ICC-01/09-02/11-922-Conf-Exp-AnxA, especially paras 5- 7; ICC-01/09-02/11-921-Conf-Exp-Corr, paras 21-22; ICC-01/09-02/11-927-Conf-Exp-AnxA; ICC-01/09-02/11-928-Conf-Exp, paras 4(b) and 7; ICC-01/09-02/11-930-Conf-Exp-AnxA.

with through negotiation, or, failing agreement, subsequent determination by the Chamber.<sup>18</sup>

12. The Prosecution submits that the Revised Request is 'substantially less broad' than the April 2012 cooperation request on which it is based, noting in particular that it is now only seeking eight, rather than fourteen, categories of materials and that the time period to which the request relates has been reduced by sixteen months. The Prosecution states that the categories of information which have been retained in the Revised Request are those 'judged to be central to the charges'.<sup>19</sup>
13. The Prosecution states that the principal areas of dispute arise in relation to the Company Records and Land Transfer Records, but 'spill[] over' into other categories of documents where the Prosecution has requested records not only held directly by the accused but also by any entities which may be identified pursuant to the Company Records request.<sup>20</sup>
14. The Prosecution states that there is a 'substantial body of evidence' suggesting that the accused played a role in financing the violence and that identification of the corporate bodies in which the accused has an interest is a 'central part of its investigations'.<sup>21</sup> The Prosecution argues that the idea that someone would participate in the commission of serious crimes openly, using only funds and assets registered in his own name, is 'somewhat naïve'.<sup>22</sup> It submits that any 'competent domestic investigative agency' would seek the materials identified in the Revised

<sup>18</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, paras 3-4; ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 27, lines 9-21.

<sup>19</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, paras 10 and 20; ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 29, lines 10-20.

<sup>20</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, paras 6-7; ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 10, line 19 - page 11, line 4; page 20, lines 12-23. *See also* ICC-01/09-02/11-922-Conf-Exp-AnxA, paras 10-11.

<sup>21</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 12; ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 10, lines 4-6. *See also* ICC-01/09-02/11-922-Conf-Exp-AnxA, para. 5.

<sup>22</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 13; ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 10, lines 7-13; page 11, lines 4-6. *See also* ICC-01/09-02/11-922-Conf-Exp-AnxA, para. 7(1).



Request.<sup>23</sup> The Prosecution states that these are ‘basic investigative steps’ in a domestic context and that the Court’s investigation should be ‘no less thorough’.<sup>24</sup> It submits that the Kenyan Government has an obligation to provide assistance enabling such thorough inquiries to take place in ‘exactly the same way’ that government agencies would be ‘compelled to provide this material’ to domestic investigative agencies.<sup>25</sup>

15. The Prosecution specifically rejects the suggestion that the Revised Request should be confined to only corroborating particular allegations regarding, for example, corporate entities or land transfers which are already known to the Prosecution, rather than seeking a ‘comprehensive search’ of the official records.<sup>26</sup> Similarly, the Prosecution further submits that what is required is not the position as represented by the accused, but rather what is shown by the official records.<sup>27</sup> Regarding Telephone Records specifically, the Prosecution submits that it is not satisfied that the material in its possession represents ‘anything like [a] comprehensive record’.<sup>28</sup> The Prosecution notes that, save in the case of ‘pay as you go’ users, contact information is a necessity for billing purposes and that contact information is likely to have also been kept for cabinet ministers and members of parliament. It states that it is requesting the Kenyan Government to take formal steps, including legal powers of compulsion if necessary, to obtain such information.<sup>29</sup>

<sup>23</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 14; ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 11, lines 6-12. *See also* ICC-01/09-02/11-922-Conf-Exp-AnxA, para. 5.

<sup>24</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 15; ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 11, lines 15-20. *See also* ICC-01/09-02/11-922-Conf-Exp-AnxA, para. 5.

<sup>25</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 17.

<sup>26</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, paras 8 and 16; ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 11, line 21 – page 12, line 12; page 27, line 24 – page 29, line 2; page 37, lines 8-21; ICC-01/09-02/11-T-30-ENG, page 5, line 22 – page 6, line 1.

<sup>27</sup> *See e.g.* ICC-01/09-02/11-T-30-ENG, page 20, line 24 – page 21, line 1.

<sup>28</sup> ICC-01/09-02/11-T-30-ENG, page 32, line 7-15.

<sup>29</sup> ICC-01/09-02/11-T-30-ENG, page 28, line 12 – page 29, line 9.

16. In response to the submission that it is too late in the proceedings for such inquiries, the Prosecution accepts that the situation is 'far from ideal', but states that the material was originally requested in April 2012 and was not obtained due to the Kenyan Government's refusal to provide it until instructed to do so by the Chamber, and that the stage of proceedings does not relieve the Prosecution's 'duty of due diligence'.<sup>30</sup>
17. In respect of the appropriate time period to be covered by requests relating to Bank Records and Telephone Records, the Prosecution submits that a longer time period than just the time when the violence was occurring is necessary for comparative purposes in order to assess the significance of transactions which may have occurred in or around the time of the violence.<sup>31</sup> In addition, the Prosecution notes that it is reasonable to expect there to have been a period of advance planning and preparation.<sup>32</sup> The Prosecution further refers to certain allegations regarding the accused's interactions with members of the Mungiki in the aftermath of the violence for which it submits that funds may have been expended.<sup>33</sup> It notes that the proposed end date of December 2010 is the date on which the summons to appear was issued.<sup>34</sup>

## 2. *Kenyan Government*

18. During the status conference on 9 July 2014, the Kenyan Government indicated that due to the 'lack of common understanding' on the 'proper scope of what the Prosecution may legitimately require at this stage', 'clear and specific' guidance from the Chamber is required.<sup>35</sup>

<sup>30</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 21; ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 12, lines 13-24.

<sup>31</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 19(a); ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 34, lines 1-24; ICC-01/09-02/11-T-30-ENG, page 21, lines 10-20.

<sup>32</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 19(b).

<sup>33</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 19(c)-(e).

<sup>34</sup> Prosecution Submissions, ICC-01/09-02/11-933-Conf-Exp, para. 19(f).

<sup>35</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 7, lines 2-8.

19. The Kenyan Government notes that it is not a party to the case and does not have access to the evidence on the basis of which relevance is being alleged. It submits that the burden is on the Prosecution to show relevance.<sup>36</sup> Moreover, it submits that there has been little change between the original 2012 request for assistance and the Revised Request.<sup>37</sup> The Kenyan Government submits that the Revised Request constitutes a 'fishing expedition',<sup>38</sup> and that it does not satisfy the criteria of specificity, relevance and necessity.<sup>39</sup> It refers to an earlier statement of the Prosecution which mentioned that the 'financial records' are those which remain relevant, which it interprets as precluding anything other than financial statements being required to be provided.<sup>40</sup>
20. The Kenyan Government submits that if, on the basis of the evidence before it, the Prosecution identifies, for example, specific companies, pieces of land or telephone numbers, the Kenyan Government would conduct the relevant searches in respect of them, and that this is 'the only way [it] can be a useful, constructive process'.<sup>41</sup>
21. In respect of the Company Records, in particular, the Kenyan Government advises that the registry of companies does not have any system that can search for ownership interests.<sup>42</sup> Moreover, it submits that the request is 'too broad, unspecific and incapable of execution'<sup>43</sup> and fails the necessity component of the tripartite test when considered in light of the status of the evidence in the case.<sup>44</sup> The Kenyan

<sup>36</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 14, lines 3- 21; page 16, lines 6-12; ICC-01/09-02/11-T-30-ENG, page 11, lines 8-13; page 12, lines 5-11.

<sup>37</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 16, lines 21-22; Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, paras 38-39.

<sup>38</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 8, lines 7-10; page 30, lines 6- 15.

<sup>39</sup> Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, para. 37.

<sup>40</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 18, line 4 – page 19, line 14.

<sup>41</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 21, line 1 – page 22, line 6; page 23, lines 12-25; page 25, line 24 – page 26, line 4; page 26, line 25 – page 27, line 7; page 30, lines 16-22; page 37, line 25 – page 38, line 8; Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, paras 51, 53 and 69.

<sup>42</sup> Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, paras 25(a), 29-30 and 44-45; ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 25, lines 12-19.

<sup>43</sup> Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, para. 46.

<sup>44</sup> Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, para. 43.

Government claims that it was the lack of specificity of the Prosecution's request in relation to Tax Records that resulted in it providing materials that did not reflect what was requested.<sup>45</sup> Regarding Bank Records, the Kenyan Government states that the Prosecution's request is 'too broad and unspecific and has not been demonstrated to be relevant', in light of the stage of proceedings.<sup>46</sup> In respect of Telephone Records, the Kenyan Government submits that there was no 'comprehensive regime of mobile [telephone] subscribers' at the time and that, because the Prosecution had not disclosed the steps taken with a joint expert on telephone data, the request had not been made in 'good faith'.<sup>47</sup>

22. Additionally, in respect of Land Transfer Records and Bank Records the Kenyan Government submits that the references to 'through third parties' are too vague, broad and unspecific.<sup>48</sup>
23. The Kenyan Government adds that it does not have the resources or 'administrative capacity' to conduct the broader search of records requested.<sup>49</sup> It submits that the Prosecution 'cannot outsource to us the investigation of their case'.<sup>50</sup> The Kenyan Government notes that there are 'legal administrative and other practical difficulties' to executing the request and states that where the cooperation of judicial and other institutions is required in order to execute the request it 'isn't practical' to expect it to occur with the 'time bound trial schedule'.<sup>51</sup> Citing Article 93(3) of the Statute, the

<sup>45</sup> Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, para. 58.

<sup>46</sup> Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, para. 67.

<sup>47</sup> ICC-01/09-02/11-T-30-ENG, page 29, line 19 – page 30, line 14; Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, paras 73-74.

<sup>48</sup> Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, paras 50, 52 and 67.

<sup>49</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 22, lines 4-10.

<sup>50</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 23, lines 6-11.

<sup>51</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 7, line 20 – page 8, line 6.

Kenyan Government states that the request should be modified 'to what is reasonable, to what is practical, to what is timeous'.<sup>52</sup>

24. The Kenyan Government further notes the stage of the proceedings and states that 'if the Prosecution was trying to do this five years ago, there wouldn't be a problem' but that this is 'on the eve of the trial'.<sup>53</sup> It submits that, due to the timeline, it had been agreed that the Kenyan Government would take 'full faith measures' to produce as quickly as possible 'material that was available without problem', noting that for certain other information court orders may be required.<sup>54</sup>
25. In respect of the relevant timeframe for the requests, the Kenyan Government relies on certain earlier statements by the Prosecution which referred specifically to 'the time of the post-election violence'.<sup>55</sup>

### 3. *Defence*

26. During the status conference on 9 July 2014, the defence team for Mr Kenyatta ('Defence') queried the relevance of Company Records on the basis that corporate entities are not mentioned in statements, the Pre-Trial Brief or the Document Containing the Charges.<sup>56</sup> The Defence submits that the Kenyan Government is 'almost being made a whipping boy' to conduct manual searches 'without any purposive effect'.<sup>57</sup>
27. In respect of the Land Transfer Records, the Defence submits that the Pre-Trial Brief makes no mention of anything other than cash being paid and that it is an 'irrelevant

<sup>52</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 31, lines 1-18; Kenyan Government's Submissions, ICC-01/09-02/11-934-Conf-Exp, para. 81.

<sup>53</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 23, lines 3-5. *See also* ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 19, lines 15- 17;

<sup>54</sup> ICC-01/09-02/11-T-30-ENG, page 24, line 16 – page 27, line 1.

<sup>55</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 17, line 14 – page 18, line 11.

<sup>56</sup> ICC-01/09-02/11-T-30-ENG, page 7, lines 20-24; page 8, lines 5-12, 20-22.

<sup>57</sup> ICC-01/09-02/11-T-30-ENG, page 7, line 25 – page 8, line 4.

request'.<sup>58</sup> In respect of the Tax Records, the Defence submits that there is no suggestion that cash paid was made tax deductible.<sup>59</sup> Regarding the Bank Records, the Defence submits that no payments in the disclosed bank records fit with the allegations in the Prosecution's case and that if the Prosecution had required further explanation of the transactions it should have contacted the banks in question as soon as the documents were disclosed.<sup>60</sup> The Defence similarly submits that the Foreign Transaction Records request is not relevant.<sup>61</sup> In respect of Telephone Records, the Defence submits that the Prosecution was informed in July 2013 that the telephone companies could not identify the names of users, but that phone data and the ability to obtain phone data relating to specified numbers have been available to them since that time.<sup>62</sup>

28. The Defence submits that the requests constitute a 'completely fruitless exercise' and that the case should be terminated.<sup>63</sup> The Defence alleges that the Revised Request extends beyond the basis upon which the case was adjourned and submits that 'a whole multitude of unrelated matters' have been requested from the Attorney General to 'set him up to fail'.<sup>64</sup>

#### 4. *Legal Representative of Victims ('LRV')*

29. The LRV submits that the position that incriminating evidence can only be provided to the Prosecution with the consent of the accused is 'wholly absurd' and does not

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<sup>58</sup> ICC-01/09-02/11-T-30-ENG, page 13, lines 14-25.

<sup>59</sup> ICC-01/09-02/11-T-30-ENG, page 17, lines 4-5.

<sup>60</sup> ICC-01/09-02/11-T-30-ENG, page 22, line 13 – page 23, line 11.

<sup>61</sup> ICC-01/09-02/11-T-30-ENG, page 26, lines 21-25.

<sup>62</sup> ICC-01/09-02/11-T-30-ENG, page 30, line 17 – page 31, line 24.

<sup>63</sup> ICC-01/09-02/11-T-30-ENG, page 8, lines 13-18.

<sup>64</sup> ICC-01/09-02/11-T-30-ENG, page 17, lines 5 -15; page 23, lines 2-5 ; page 31, lines 21-24; page 35, lines 11-19; page 38, line 16 – page 41, line 22.

reflect the position in the Statute, Kenyan domestic law or in any jurisdiction of which he is aware.<sup>65</sup>

30. The LRV further submits that the Kenyan Government does not have a mandate to consider the relevance of the requests and that any material which the Prosecution 'believes is relevant' should be provided.<sup>66</sup>
31. Finally, the LRV submits that the Prosecution has been 'very lax' towards the 'policy of obstruction' the LRV claims to have been adopted by the Kenyan Government, specifically in pursuing requests for findings of non-cooperation.<sup>67</sup> The LRV cites an instance of recent cooperation by the Kenyan Government with the Swiss authorities as an example of 'very prompt' cooperation, reportedly at the direction of the accused, where the 'political will' to cooperate existed.<sup>68</sup>

#### IV. Analysis

##### 1. *Guiding Considerations*

32. In conducting its analysis, the Chamber has applied the criteria of relevance, specificity and necessity to the Revised Request.<sup>69</sup>
33. As a preliminary matter, the Chamber considers it appropriate to address the elements of relevance and necessity in light of the current stage of proceedings, as raised by both the Kenyan Government and Defence. The Chamber recalls that, substantively, the information sought in the Revised Request was originally sought in April 2012. The Chamber has already found there to have been a 'substantial

<sup>65</sup> ICC-01/09-02/11-T-30-ENG, page 17, lines 19-24; page 23, lines 14-21.

<sup>66</sup> ICC-01/09-02/11-T-30-ENG, page 27, lines 3-10.

<sup>67</sup> ICC-01/09-02/11-T-30-ENG, page 42, lines 3-20.

<sup>68</sup> ICC-01/09-02/11-T-30-ENG, page 43, line 9 – page 45, line 2.

<sup>69</sup> Adjournment Decision, ICC-01/09-02/11-908, para. 101(i) and footnote thereto.

unexplained delay' in addressing that cooperation request.<sup>70</sup> In the Adjournment Decision, the Chamber adjourned the start date of the trial precisely in order to 'facilitate execution of [the] long outstanding request for assistance – that may bear upon matters central to the charges'.<sup>71</sup> The stage of the proceedings was within the contemplation of the Chamber at the time of making the Adjournment Decision and the Chamber remains conscious of this factor in its current analysis. However, the Chamber considers misguided arguments premised on the relevance or necessity of material being entirely abrogated simply by reference to the imminence of the tentative trial date, and the fact that the cooperation request has yet to be executed.

34. Similarly, regarding the Kenyan Government's reliance on Article 93(3) of the Statute, the Chamber recalls that this provision relates to 'fundamental legal principle[s] of general application' which would prohibit providing the assistance requested, but does not relate to practical or administrative difficulties in effecting execution. While practical difficulties might provide a basis for exploring, in good faith, alternative means of providing the requested information, they do not constitute fundamental legal principles preventing execution of a request. Practical difficulties will also not invalidate a request which otherwise objectively meets the requirements of specificity, relevance and necessity. Moreover, the Chamber notes that while the Kenyan Government may be in a position to raise arguments relating to the specificity of the requests, it is not - save in cases of seemingly blatant irrelevance - well placed to dispute their relevance or necessity in relation to the Prosecution's inquiries. In this case, it is noted that detailed explanations of alleged relevance were provided to the Kenyan Government,<sup>72</sup> to which the Chamber gave due consideration in making its independent assessment of this aspect of the Revised Request.

<sup>70</sup> Adjournment Decision, ICC-01/09-02/11-908, para. 51.

<sup>71</sup> Adjournment Decision, ICC-01/09-02/11-908, para. 98.

<sup>72</sup> See e.g. ICC-01/09-02/11-922-Conf-Exp-AnxA.



## 2. *General Points of Disagreement*

35. The Chamber will now start by considering the issues which are common to a number of the categories of materials, before proceeding to address any discrete difficulties arising with respect to specific records. The common issues include, in particular: (i) the appropriate time period to be covered by the Revised Request and (ii) the acceptability of the requests for provision of information, under each of the categories, relating to corporate entities in which the accused has a controlling interest or influence.
36. Turning to the first of these issues, with respect to the time period to be covered in the Revised Request, the Chamber notes that, with the exception of Vehicle Records, information has been sought for each of the other categories for the period 1 June 2007 – 15 December 2010.
37. In the Chamber's view, investigative inquiries need not be confined merely to the immediate period of the violence. Such inquiries are also appropriately conducted with respect to any period during which it is reasonably surmised, having regard in particular to the existing evidence, that related preparatory or post-violence steps may have been undertaken by an accused. In the context of certain records, a longer time period may also be justified for comparative purposes where patterns of activity may be significant in revealing unusual communications or transactions. In this case, the Chamber is satisfied that the Prosecution has appropriately specified and justified, in terms of relevance and necessity, the time period in question.
38. Regarding the request for information relating to corporate entities in which the accused has a controlling interest or influence, the Chamber notes that two aspects arise. First, the Company Records request itself seeks the identification and provision of relevant filings in respect of companies, businesses, partnerships and trusts in

which the accused has an interest. Second, each of the requests relating to Land Records, Tax Records, Vehicle Records, Bank Records, Foreign Transaction Records and Intelligence Records seeks materials relating both to the accused directly and to any corporate entities identified pursuant to the Company Records request. Noting that the ‘corporate entities’ aspect of these later requests is dependent upon, and will be defined by, any entities identified in response to the Company Records request, the Chamber will consider first the Company Records request itself.<sup>73</sup>

39. As indicated during the status conference,<sup>74</sup> the Chamber considers that, as a matter of principle, in investigations of this kind which involve allegations of payments and financing of crimes, inquiries may legitimately be conducted with respect to corporate or other entities in which an accused has a controlling interest, either as an owner or officer. It is noted that such information is not sought primarily for its own evidentiary value but rather to facilitate the subsequent requests for transactional records, including in respect of land transfers and bank account details. In the Chamber’s view, it is a reasonable investigative premise that an accused with access to substantial resources may choose to act through various intermediary entities, as this would, in particular, reduce the traceability of transactions intended to further a criminal purpose.<sup>75</sup>
40. Moreover, the Chamber considers that requesting the information from official sources maintained by relevant government agencies constitutes an appropriate means of seeking to obtain such information. The Chamber notes that the Prosecution has specified the relevant time period, the identity of the relevant individual and the

<sup>73</sup> The Chamber considers that these clear cross-references to the results of the Company Records request address the Kenyan Government’s submissions regarding the ‘unidentified’ nature of the corporate entities referred to under the other categories of materials (*see e.g.* submissions at ICC-01/09-02/11-T-30-ENG, page 16, lines 15-21; page 18, line 23 – page 19, line 9; page 22, lines 1-10; page 34, line 18 – page 35, line 4; Kenyan Government’s Submissions, ICC-01/09-02/11-934-Conf-Exp, paras 57, 62 and 77).

<sup>74</sup> ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 22, lines 17-20; page 24, lines 11-19.

<sup>75</sup> It is additionally noted that the Kenyan Government explicitly acknowledged the apparent relevance of such information, ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 24, line 20.

nature of the Company Records information it seeks. Consequently, the Chamber considers that the Company Records request, being a necessary prerequisite to meaningful transactional searches, satisfies the requirements of relevance, specificity and necessity.

41. Nonetheless, the Chamber notes the Kenyan Government submissions that the records of all companies incorporated prior to 2009 are maintained only in paper form.<sup>76</sup> The Chamber recognises that this may significantly increase the practical difficulties of executing the request. However, the Chamber has already indicated that practical difficulties that may arise in carrying out a request do not invalidate it. In addition, the Chamber notes that the Prosecution has indicated a willingness to provide additional resources, if required, to assist in conducting manual searches.<sup>77</sup> The Chamber additionally considers that this is an instance where the difficulties encountered might be either mitigated or overcome by good faith exploration of alternative official sources of information. These could, for example, include more recent corporate filings that do exist in electronic form and which may list directorships (some of which, it is presumed, might also have been held prior to the establishment of the electronic registration system and therefore can give an indication as to the directorships held during the relevant time period), any declarations of interests which public office holders may be required to make and, as suggested by the Prosecution,<sup>78</sup> tax returns.
42. The Chamber considers that a similar cooperative approach ought to be adopted in seeking to resolve the practical difficulties that have been identified in respect of, for example, Land Transfer Records, Foreign Transaction Records and Telephone Records. The Chamber notes that the Prosecution has already made a number of

<sup>76</sup> ICC-01/09-02/11-930-Conf-Exp-AnxA, para. 1; ICC-01/09-02/11-T-30-ENG, page 6, lines 14-17.

<sup>77</sup> ICC-01/09-02/11-T-30-ENG, page 6, lines 2-6; ICC-01/09-02/11-930-Conf-Exp-AnxA, para. 1.

<sup>78</sup> ICC-01/09-02/11-T-30-ENG, page 15, lines 11-15; ICC-01/09-02/11-930-Conf-Exp-AnxA, para. 3.

suggestions regarding potential alternative sources of information in respect of these requests, and the Chamber understands that the Kenyan Government will pursue those leads.<sup>79</sup> In this context, the Chamber finds no merit in the submission of the Kenyan Government that the work of Prosecution investigators is being 'outsourced' to it.<sup>80</sup> It is noted that, just as the Kenyan Government may be best placed to identify potential difficulties in executing the cooperation requests, it is similarly best placed to advise on the alternative possibilities presented by the Kenyan domestic framework for obtaining the information sought. The provision of such guidance forms part of the essence of good faith cooperation.

43. It follows from the analysis above that the Chamber considers materials relating to corporate entities identified pursuant to the Company Records request to be relevant and necessary in the context also of the other categories of materials sought. With regard to specificity, the Chamber notes that, upon execution of the Company Records request, specific company names would be available, in addition to the accused's own name, for the purposes of conducting those searches.
44. Regarding the references to 'through third parties' in respect of Land Transfer Records and Bank Records, the Chamber notes a certain ambiguity in the drafting of the request. However, the Chamber understands that these references are similarly intended to be read by reference to the Company Records request and to capture intermediaries which are not necessarily corporate entities (such as, for example, trust or partnership arrangements).

### 3. *Discrete Issues and Concluding Observations*

45. Turning to discrete issues raised, the Chamber will address the submissions made regarding the Telephone Records request. The Chamber notes the Prosecution's

<sup>79</sup> Joint Submission, ICC-01/09-02/11-930-Conf-Exp-AnxA.

<sup>80</sup> ICC-01/09-02/11-T-30-ENG, page 12, lines 18-19.

submission that it does not consider that comprehensive materials have been provided through the channels already available to it. In this regard, the Chamber notes the particular difficulties the Prosecution appears to have had regarding access to such information and the reliability of the information provided.<sup>81</sup> Consequently, the Chamber does not consider the Telephone Records request to be duplicative with steps already taken, and, given the potential evidentiary significance of such material, finds that it is appropriate for the Prosecution to pursue all possible means of obtaining such information.

46. Finally, the Chamber notes that it appears that all of the information provided by the Kenyan Government to the Prosecution to date has been provided on the basis of the consent of the accused and/or from information supplied by the Defence.<sup>82</sup> The Chamber recognises that this approach has been adopted with a view to expediting the process. Where an unconditional consent to the relevant authorities providing complete records is provided, this may negate the necessity of pursuing alternative avenues.
47. Nonetheless, the Chamber finds it appropriate to note that, in most cases, the voluntary disclosure of certain information by the accused would not be a satisfactory alternative to obtaining complete and comprehensive information as contained in official records. The Chamber also notes that the execution of the cooperation provisions in Part 9 of the Statute is not conditioned on an accused's consent. Moreover, Article 88 of the Statute obligates States Parties to 'ensure that there are procedures available under their national law for all the forms of cooperation which are specified under this part'. Therefore, the Chamber considers that additional steps, pursuant to ordinary domestic investigative channels – utilising

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<sup>81</sup> See e.g. Prosecution opposition to the Defence request for the termination of the Kenyatta case, ICC-01/09-02/11-892-Conf-AnxA-Red, pages 4-5.

<sup>82</sup> Joint Submission, ICC-01/09-02/11-930-Conf-Exp-AnxA, para. 5; ICC-01/09-02/11-T-30-ENG, page 19, line 19 – page 20, line 20. See also ICC-01/09-02/11-T-30-ENG, page 15, lines 21-25 (in respect of Tax Records).

compulsory measures where appropriate - ought to be being undertaken in parallel and in a timely manner.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**DIRECTS** the Registry to reclassify filing ICC-01/09-02/11-933-Conf-Exp as public;

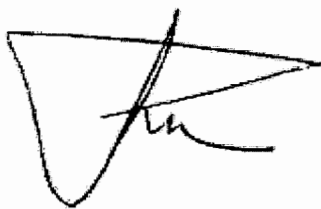
**INVITES** the Kenyan Government to propose a public redacted version of filing ICC-01/09-02/11-934-Conf-Exp by 18 August 2014; and

**FINDS** that, in the terms discussed in the preceding analysis, the Revised Request conforms with the requirements of relevance, specificity and necessity for the purposes of a cooperation request pursuant to Part 9 of the Statute.

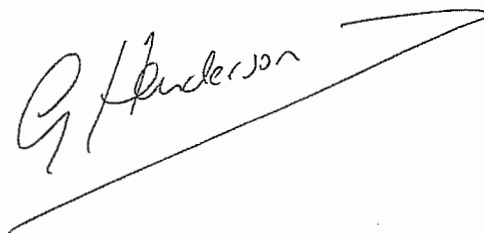
Done in both English and French, the English version being authoritative.



**Judge Kuniko Ozaki, Presiding Judge**



**Judge Robert Fremr**



**Judge Geoffrey Henderson**

Dated 29 July 2014

At The Hague, The Netherlands

No. ICC-01/09-02/11

22/22

29 July 2014