

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 3 December 2014

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Decision on Prosecution's application for a finding of non-compliance under
Article 87(7) of the Statute**

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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber')¹ of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 64, 86-88, 93, 96-97, 99 and 112 of the Rome Statute ('Statute') and Regulations 108-109 of the Regulations of the Court ('Regulations') renders the following 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'.

I. Procedural history

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

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

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

³ Article 87(7) Application, ICC-01/09-02/11-866, para 1. See Records Request attached at Annex A to the Article 87(7) Application.

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

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

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

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

3. On 3 February 2014, having been granted leave to reply by the Chamber,⁸ the Prosecution filed a reply to the Cooperation Observations.⁹
4. The Chamber convened a status conference on 13 February 2014,¹⁰ at which oral submissions on the Article 87(7) Application were received from the Prosecution, the Kenyan Government, the defence team for Mr Kenyatta ('Defence') and the Legal Representative of Victims ('LRV').¹¹
5. On 31 March 2014, in its 'Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date' ('Decision of 31 March 2014')¹² the Chamber adjourned the provisional trial commencement date to 7 October 2014 to allow further time for the resolution of certain cooperation issues between the Kenyan Government and Prosecution. Specifically, the Chamber, *inter alia*, instructed the Prosecution to provide the Kenyan Government with an updated and revised version of the Records Request ('Revised Request').¹³ 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').¹⁴

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

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

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

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

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

¹² ICC-01/09-02/11-908.

¹³ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 100 and page 46.

¹⁴ Decision of 31 March 2014, ICC-01/09-02/11-908, page 46.

6. Following the Decision of 31 March 2014, the Prosecution transmitted to the Kenyan Government a Revised Request, dated 8 April 2014,¹⁵ to which the Kenyan Government responded requiring certain clarifications.¹⁶ Further correspondence ensued,¹⁷ culminating in a meeting between the Prosecution and the Kenyan Government to discuss the ambit of the Revised Request.¹⁸
7. Following Prosecution requests,¹⁹ the Chamber extended the filing deadline for the First Updates to 23 May 2014.²⁰
8. On 23 May 2014, the Prosecution²¹ and the Kenyan Government²² each duly filed their First Updates and, on 30 June 2014, filed their subsequent updates ('Second Updates').²³

¹⁵ Correspondence contained in ICC-01/09-02/11-911-Conf-AnxA at page 15.

¹⁶ Correspondence contained in ICC-01/09-02/11-911-Conf-AnxA at page 12.

¹⁷ Correspondence contained in ICC-01/09-02/11-911-Conf-AnxA at pages 1-11 and ICC-01/09-02/11-917-Conf-AnxA.

¹⁸ 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, para. 2; Public redacted version of the 'Corrigendum of 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-Corr) dated 29 May 2014, ICC-01/09-02/11-925-Anx, paras 2 and 20.

¹⁹ 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.

²⁰ 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.

²¹ 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, Registry 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.

²² 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.

9. 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, and making certain proposals regarding the level of confidentiality required in respect of the different issues to be addressed ('Joint Submission').²⁴
10. The Chamber convened a status conference on 9 July 2014²⁵ - 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.²⁶
11. 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 particular information sought in the Revised Request; and (ii) the appropriate time period to be covered by the requests.²⁷ The Prosecution and Kenyan Government filed their submissions on 11 July 2014²⁸ and 17 July 2014,²⁹ respectively.

²³ 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-Exp-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). On 22 July 2014 the Registry transmitted the Kenyan Government's proposal (ICC-01/09-02/11-936-Conf-Exp and Conf-Exp-Anx). Pursuant to a direction of the Chamber (ICC-01/09-02/11-954) the proposal was reclassified as public (ICC-01/09-02/11-928-Red).

²⁴ 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.

²⁵ See Decision of 31 March 2014, ICC-01/09-02/11-908, para. 102 and page 46; Scheduling order and agenda for status conference on 9 July 2014, 4 July 2014, ICC-01/09-02/11-929.

²⁶ Transcripts of hearings on 9 July 2014, ICC-01/09-02/11-T-29-CONF-EXP-ENG and ICC-01/09-02/11-T-30-ENG.

²⁷ 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.

²⁸ 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. Pursuant to a direction of the Chamber (ICC-01/09-02/11-937) the submissions were reclassified as public (ICC-01/09-02/11-933).

²⁹ 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. 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 found it in the interests of justice, in that

12. On 29 July 2014, the Chamber issued its 'Decision on the Prosecution's revised cooperation request' ('Decision of 29 July 2014')³⁰ in which it found, *inter alia*, that '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'.³¹
13. The third updates to the Chamber on the status of cooperation from the Prosecution³² and the Kenyan Government³³ were notified on 1 and 2 September 2014, respectively ('Third Updates'). Observations on the Third Updates, from the Prosecution and Kenyan Government, were notified on 5 September 2014³⁴ and 16 September 2014³⁵ respectively.

instance, to accept them. On 29 July 2014, the Chamber invited the Kenyan Government to propose a public redacted version of its submissions (ICC-01/09-02/11-937). On 19 July 2014 the Kenyan Government filed publicly its redaction proposals (ICC-01/09-02/11-934-Red). Pursuant to a direction of the Chamber (e-mail from Legal Officer of the Chamber to the Registry on 26 August 2014 at 9:48) the proposals were reclassified as confidential (ICC-01/09-02/11-934-Conf-Red). Pursuant to a direction of the Chamber (ICC-01/09-02/11-967), this document was subsequently reclassified as 'Public'.

³⁰ ICC-01/09-02/11-937.

³¹ Decision of 29 July 2014, ICC-01/09-02/11-937, page 22.

³² Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya, ICC-01/09-02/11-940-Conf, with annexes A-G ('Prosecution's Third Update'). Pursuant to a direction of the Chamber (ICC-01/09-02/11-954), public or public redacted versions of the filing and annexes B, C, D and F thereof were subsequently notified (ICC-01/09-02/11-940).

³³ 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 noncompliance pursuant to Article 87 (7) and for an adjournment of the provisional trial date' of 31 March, ICC-01/09-02/11-941-Conf-Exp, with annexes I-XXXVI ('Kenyan Government's Third Update'). On 19 September 2014, the Chamber directed the Kenyan Government to propose a public redacted version of the filing (ICC-01/09-02/11-954). On 7 October 2014 the Kenyan Government filed its proposal (ICC-01/09-02/11-941-Conf-Exp-Red). Pursuant to a direction of the Chamber (e-mail from Legal Officer of Chamber to Registry on 29 October 2014 at 9:28) this proposal was reclassified as public (ICC-01/09-02/11-941).

³⁴ Prosecution observations on the Government of Kenya's 2 September 2014 update (ICC-01/09-02/11-941-Conf-Exp), ICC-01/09-02/11-943-Conf-Exp ('Prosecution's Observations'). Pursuant to a direction of the Chamber (ICC-01/09-02/11-954), this document was reclassified as 'Public'.

³⁵ The Government of the Republic of Kenya's Observations on the 'Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya', ICC-01/09-02/11-951-Conf-Exp ('Kenyan Government's Observations'). On 19 September 2014, the Chamber directed the Kenyan Government to propose a public redacted version of the filing (ICC-01/09-02/11-954). On 7 October 2014 the Kenyan Government filed its proposal (ICC-01/09-02/11-951-Conf-Exp-Red). Pursuant to a direction of the Chamber (e-mail from Legal Officer of Chamber to Registry on 29 October 2014 at 9:28) this proposal was reclassified as public (ICC-01/09-02/11-951).

14. On 19 September 2014, the Chamber issued an order, *inter alia*, vacating the trial commencement date of 7 October 2014 and scheduling status conferences for 7 and 8 October 2014.³⁶
15. During the status conference on 7 October 2014, which was confined to discussion of 'the status of cooperation between the Prosecution and the Kenyan Government',³⁷ the Prosecution indicated that it maintained its Article 87(7) Application.³⁸
16. On 8 October 2014, pursuant to an oral direction of the Chamber,³⁹ the Defence filed the 'Defence Submission of Documents Concerning Consents to Disclosure'.⁴⁰

II. Submissions

17. By way of background, the Chamber notes that the Revised Request seeks materials relating to eight categories of records, as follows:
 - 1) the identification and provision of records of 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' and 'Other Entities');
 - 2) the identification and provision of records relating to land and real property belonging to the accused, either personally or through the Other Entities identified under (1) above, which was transferred between 1 June 2007 and 15 December 2010 ('Land Transfer Records');

³⁶ Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters, ICC-01/09-02/11-954.

³⁷ ICC-01/09-02/11-954, para. 11.

³⁸ Transcript of hearing on 7 October 2014, ICC-01/09-02/11-T-31-CONF-ENG, page 11, lines 16-25. Reclassified as public pursuant to the Chamber's direction (ICC-01/09-02/11-967).

³⁹ ICC-01/09-02/11-T-31-ENG, page 40, line 24 – page 41, line 10; page 48, lines 4-8.

⁴⁰ ICC-01/09-02/11-964, with confidential annexes A-D.

- 3) the identification and provision of the Income Tax and Value Added Tax ('VAT') returns submitted to the tax authorities by the accused, and any of the Other Entities pursuant to (1) above, between 1 June 2007 and 15 December 2010 ('Tax Records');
- 4) the identification and provision of records relating to any vehicles registered to, owned or regularly used by the accused, or any of the Other Entities identified pursuant to (1) above, between 1 November 2007 and 1 April 2008 ('Vehicle Records');
- 5) the identification and provision of statements for any current, savings and/or other accounts, whether at banks or other financial institutions, held by the accused personally, or through any of the Other Entities pursuant to (1) above, between 1 June 2007 and 15 December 2010 ('Bank Records');
- 6) the identification and provision of all documents relating to transactions by the accused, or any of the Other Entities identified pursuant to (1) above, at foreign exchange institutions between 1 June 2007 and 15 December 2010 ('Foreign Transaction Records');
- 7) the identification and provision of all telephone numbers ascribed to, used by or associated with the accused between 1 June 2007 and 15 December 2010, and complete call data records and any financial details held by service providers and records of M-PESA transfers ('Telephone Records'); and
- 8) the identification and provision of copies of any information held by Kenyan security and intelligence services concerning the activities of the accused, and of any of the Other Entities identified pursuant to (1)

above, between 1 June 2007 and 15 December 2010 ('Intelligence Records').⁴¹

18. The Chamber will first summarise general submissions made regarding the current overall status of cooperation – as contained in the Third Updates, observations thereto and the submissions made during the status conference on 7 October 2014 – before turning to the status of the eight individual categories of material sought in the Revised Request. The Chamber has also carefully considered the relevant submissions contained in each of the First Updates, Second Updates, the Joint Submission and those made during the 9 July 2014 status conference. These are not summarised in detail below, but are referred to throughout this decision, where applicable. Similarly, underlying documents or correspondence relating to the Revised Request, as annexed to various filings, are not individually summarised but have been considered by the Chamber and are referred to throughout, as necessary.⁴²

General Submissions

19. In the Prosecution's Third Update, it submitted that there had been 'inadequate progress' since the previous update on 30 June 2014.⁴³ The Prosecution submitted that agreed upon deadlines of 8 and 15 August 2014 – for facilitating meetings with bank officials and for the provision of additional information respectively – had passed without the relevant actions being taken, and without any explanation having been provided by the Kenyan Government for 'its failure to meet the deadlines'.⁴⁴ The

⁴¹ Copies of the Revised Request are contained in ICC-01/09-02/11-911-Conf-AnxA, pages 16-20, and ICC-01/09-02/11-924-Conf-Exp-AnxA, pages 2-6. Each of the categories was also discussed publicly at the status conference on 9 July 2014, ICC-01/09-02/11-T-30-ENG.

⁴² The Chamber notes that at certain points in this decision it has made reference to filings and submissions which are currently classified as *ex parte* and/or confidential. Where it has done so, the Chamber has determined that the information in question may be referred to in this manner.

⁴³ Prosecution's Third Update, ICC-01/09-02/11-940, para. 2.

⁴⁴ Prosecution's Third Update, ICC-01/09-02/11-940, paras 7, 10 and 13. *See also* paras 14-15 (regarding the Prosecution's letter to the Kenyan Government dated 20 August 2014 providing notice that unless the Kenyan Government supplied the outstanding materials, or 'entered into good faith consultations', by 25 August 2014, it would

Prosecution further submits that certain communications referred to in the Kenyan Government's Third Update did not relate to consultations on the Revised Request, but rather to separate cooperation matters.⁴⁵

20. The Prosecution submits that the 'majority of the material sought in the Revised Request remains outstanding',⁴⁶ and that this includes the 'truly critical material' requested.⁴⁷ The Prosecution contests the Kenyan Government's submission that the Kenyan Government has provided the 'fullest possible responses'⁴⁸ to the Revised Request.⁴⁹ In that regard, the Prosecution highlights, in particular and as set out in further detail below, the state of cooperation with respect to Bank Records, Telephone Records and Tax Records.⁵⁰ The Prosecution submits that there is a 'considerable body of material' which the Prosecution 'should have been provided, could have been provided and hasn't been provided'.⁵¹ However, the Prosecution acknowledges that it does not know what is contained in the records which have not so far been provided and that, in relation to what the records may actually show, it remains 'in a position of speculation'.⁵²
21. In addition, the Prosecution submits that it has no indication that the Kenyan Government has consulted alternative sources of official information or adopted a 'cooperative approach' to overcoming practical difficulties in obtaining the requested

'seize the Chamber of the matter'). A copy of the letter from the Prosecution dated 20 August 2014 is contained in ICC-01/09-02/11-940-AnxD and ICC-01/09-02/11-941-Conf-Exp-AnxXIII.

⁴⁵ Prosecution's Observations, ICC-01/09-02/11-943, paras 3-6; ICC-01/09-02/11-T-31-ENG, page 17, lines 3-6.

⁴⁶ Prosecution's Third Update, ICC-01/09-02/11-940, para. 2. *See also* paras 17 and 22. *See also* ICC-01/09-02/11-T-31-ENG, page 10, lines 4-6.

⁴⁷ ICC-01/09-02/11-T-31-ENG, page 12, lines 23-34. *See also* ICC-01/09-02/11-T-31-ENG, page 10, line 18- page 11, line 6.

⁴⁸ *See* Kenyan Government's Third Update, ICC-01/09-02/11-941, para. 25 (referring to further questions raised by the Prosecution in its letter of 3 July 2014).

⁴⁹ Prosecution's Observations, ICC-01/09-02/11-943, para. 9.

⁵⁰ Prosecution's Observations, ICC-01/09-02/11-943, paras 10-13; ICC-01/09-02/11-T-31-ENG, page 10, line 18 – page 11, line 6 (referring to Bank Records and Tax Records).

⁵¹ ICC-01/09-02/11-T-31-ENG, page 5, lines 16-18.

⁵² ICC-01/09-02/11-T-31-ENG, page 12, lines 1-9 and 19; page 13, lines 3-4.

information.⁵³ The Prosecution acknowledges that ‘one cannot compel the impossible’, but states that if it is the case that there are lawful alternative methods by which the requested records could be obtained, then compulsory measures should be used to secure them.⁵⁴

22. The Prosecution states that it considers the consultations to be ‘deadlocked’, meaning that it has concluded that the Kenyan Government is not going to provide the material requested.⁵⁵ Consequently, the Prosecution requests that a finding of non-compliance, pursuant to Article 87(7) of the Statute, be made against the Kenyan Government.⁵⁶
23. Detailing at length its correspondence with the Prosecution,⁵⁷ the Kenyan Government submits that ‘using its best endeavours, [it] has cooperated fully in implementing the Revised Request’, as well as in answering the further questions raised in the Prosecution’s letter dated 3 July 2014.⁵⁸ The Kenyan Government submits that the Prosecution has not demonstrated a ‘cooperative approach’ in relation to the Revised Request by not providing responses to requests from the Kenyan Government for further information.⁵⁹ The Kenyan Government submits that the Prosecution’s alleged failure to provide additional information requested by the Kenyan authorities is the reason why implementation of some of the requests in the Revised Request ‘remains outstanding’.⁶⁰ The Kenyan Government states that if, for

⁵³ Prosecution’s Observations, ICC-01/09-02/11-943, para. 14; ICC-01/09-02/11-T-31-ENG, page 24, line 20 – page 25, line 2.

⁵⁴ ICC-01/09-02/11-T-31-ENG, page 35, lines 7-23.

⁵⁵ ICC-01/09-02/11-T-31-ENG, page 48, lines 17-23. *See also* page 11, lines 7-20.

⁵⁶ ICC-01/09-02/11-T-31-ENG, page 11, lines 21-24.

⁵⁷ *See e.g.* Kenyan Government’s Third Update, ICC-01/09-02/11-941, paras 3-24 and Annexes I-XXXVI; Kenyan Government’s Observations, ICC-01/09-02/11-951, paras 5-8.

⁵⁸ Kenyan Government’s Observations, ICC-01/09-02/11-951, para 9 and 18; Kenyan Government’s Third Update, ICC-01/09-02/11-941, para. 25. A copy of the letter of the Prosecution dated 3 July 2014 is at ICC-01/09-02/11-940-Conf-AnxA and ICC-01/09-02/11-941-Conf-Exp-AnxII.

⁵⁹ Kenyan Government’s Observations, ICC-01/09-02/11-951, paras 9-12 and 19.

⁶⁰ Kenyan Government’s Observations, ICC-01/09-02/11-951, paras 9-12 and 19; ICC-01/09-02/11-T-31-ENG, page 17, line 23 – page 18, line 9, *see also* page 18, line 17 – page 19, line 2; page 49, lines 8-16.

example, the Prosecution had provided it with specific land reference numbers, vehicle registration numbers or telephone numbers, the related information could be obtained 'within 72 hours'.⁶¹

24. The Kenyan Government submits that the Revised Request is a cooperation request and not 'a request for [the Attorney General] to investigate'.⁶² In the course of making submissions in relation to Telephone Records, it averred further that the proper role of the Kenyan Government is 'to co-operate and to facilitate in confirmation of the availability of material'.⁶³ The Kenyan Government argues that '[w]hat is now being prosecuted through the backdoor as an application for co-operation is a breakdown in the ability of the Prosecution to conduct: (a) proper investigations and (b) to disclose mutually to the Defence',⁶⁴ and that the Kenyan Government ought not to be 'required to assume responsibility for identifying the evidence itself' as it is not a party to the proceedings.⁶⁵
25. In respect of steps it had taken in relation to potential alternative measures to secure the materials requested by the Prosecution, the Kenyan Government submits that there is 'only' the Revised Request to which it has responded in 'great detail' explaining why it is 'impractical, impossible, irregular' to execute.⁶⁶ The Kenyan Government submits that there is 'no procedure that allows [it] to bypass the regulatory framework' and that it has no 'extralegal or extrajudicial measures',⁶⁷ under the Kenyan domestic framework for obtaining the requested material.

⁶¹ ICC-01/09-02/11-T-31-ENG, page 18, line 17 – page 19, line 2; page 23, lines 13-17.

⁶² ICC-01/09-02/11-T-31-ENG, page 20, lines 7-9; page 27, lines 4-5.

⁶³ ICC-01/09-02/11-T-31-ENG, page 22, lines 20-21. *See also* page 22, line 18 – page 23, line 5.

⁶⁴ ICC-01/09-02/11-T-31-ENG, page 29, lines 6-10.

⁶⁵ ICC-01/09-02/11-T-31-ENG, page 27, lines 4-7.

⁶⁶ ICC-01/09-02/11-T-31-ENG, page 25, lines 18-25.

⁶⁷ ICC-01/09-02/11-T-31-ENG, page 25, line 23 – page 26, line 16; page 27, lines 16-19.

26. The Kenyan Government also specifically notes that the agreement to facilitate meetings, by the deadline of 8 August 2014, was an ‘in principle’ agreement.⁶⁸ It submits that the reason the meetings were not held is because the Kenyan Government and Prosecution were ‘completely at cross purposes’.⁶⁹ In that regard, the Kenyan Government refers to certain communications with a member of the Prosecution seeking to arrange a time for a meeting,⁷⁰ which, as noted above, the Prosecution submits were unconnected to cooperation relating to the Revised Request.⁷¹ Regarding the period between 9 July and 22 August 2014, during which the Prosecution submits that there was no communication from the Kenyan Government in relation to the Revised Request,⁷² the Kenyan Government submits that it was conducting consultations with internal authorities in Kenya.⁷³ The Attorney General, on behalf of the Kenyan Government, submitted that upon receipt of a Prosecution letter dated 31 July 2014 he ‘immediately commenced consultations within government’, and, about a week later, on 6 August 2014, which he submitted was ‘not a month’ after the Decision of 29 July 2014, he sent communications to a number of relevant Kenyan authorities.⁷⁴
27. The Defence confirms that it provided ‘unqualified consent’ for the provision of three months of Bank Records.⁷⁵ It confirmed that it had also provided Vehicle Records.⁷⁶ In relation to Telephone Records, the Defence stated that its records matched a telephone number the Prosecution already had.⁷⁷ The Defence submits that it had

⁶⁸ Kenyan Government’s Observations, ICC-01/09-02/11-951, paras 16-17.

⁶⁹ ICC-01/09-02/11-T-31-ENG, page 16, lines 11-13.

⁷⁰ ICC-01/09-02/11-T-31-ENG, page 16, line 13 – page 17, lines 1-2 and 7-16.

⁷¹ See paragraph 19 above.

⁷² Prosecution’s Observations, ICC-01/09-02/11-943, para. 7.

⁷³ ICC-01/09-02/11-T-31-ENG, page 13, lines 11-19 and page 14, lines 10-12.

⁷⁴ ICC-01/09-02/11-T-31-ENG, page 13, lines 16-24.

⁷⁵ ICC-01/09-02/11-T-31-ENG, page 38, lines 11-13; page 39, lines 11-14; ICC-01/09-02/11-964, para. 4. See also ICC-01/09-02/11-964-Conf-AnxA.

⁷⁶ ICC-01/09-02/11-T-31-ENG, page 39, lines 18-20; page 40, lines 14-23; ICC-01/09-02/11-T-30-ENG, page 19, lines 19-25.

⁷⁷ ICC-01/09-02/11-T-31-ENG, page 39, lines 22-24. It is noted that correspondence from the Communications Commission of Kenya, and one of the telecoms companies, makes reference to certain consent having been obtained

received 'less credit' than it deserved for voluntary disclosure in the case and had therefore decided not to voluntarily provide further material,⁷⁸ on the basis that a defendant should not have to 'prove his innocence'.⁷⁹

28. The LRV submits that the 'ongoing refusal' of the Kenyan Government to comply with the Records Request constitutes 'deliberate interference with the collection of evidence' consistent with a campaign by the accused to end the case against him, and that the matter should be referred to the Assembly of States Parties ('ASP') pursuant to Article 87(7) of the Statute.⁸⁰

Submissions on the individual categories of material in the Revised Request

29. Company Records: The Prosecution states that the requested records in this category have not been provided.⁸¹ It submits that it is not in a position to challenge the explanations offered by the Kenyan Government, or the relevant registry, for why a search of the company records to ascertain relevant interests cannot be conducted.⁸² However, the Prosecution submits that there must be alternative methods for ascertaining such information – such as, for example, by consulting a registry of interests of public office holders in Kenya – and that it is 'time [...] beyond time [...] past time' for the Kenyan Government to pursue those alternative methods.⁸³

from the Defence seemingly in connection with the Revised Request (*see* ICC-01/09-02/11-941-Conf-Exp-AnxIII and ICC-01/09-02/11-941-Conf-Exp-AnxXXVI(b)). However, the Defence appears to indicate that the only consent provided in relation to Telephone Records was from the joint investigations in 2013, *see* ICC-01/09-02/11-964, paras 5-7; ICC-01/09-02/11-T-31-ENG, page 39, line 22 – page 40, line 1.

⁷⁸ ICC-01/09-02/11-T-31-ENG, page 40, lines 1-6.

⁷⁹ *See* ICC-01/09-02/11-T-31-ENG, page 40, lines 7-12.

⁸⁰ Public Redacted Version of 'Victims' response to Prosecution notice regarding the provisional trial date', with Public Annex, 10 September 2014, ICC-01/09-02/11-946-Red, paras 1, 9-24, 62-63 and 67.

⁸¹ Prosecution's Observations, ICC-01/09-02/11-943, para. 15.

⁸² ICC-01/09-02/11-T-31-ENG, page 24, lines 4-24.

⁸³ ICC-01/09-02/11-T-31-ENG, page 24, line 20 – page 25, line 2.

The Kenyan Government submits that the name or registration number of a company is required in order to conduct a search.⁸⁴

30. Land Transfer Records: The Prosecution states that the requested records in this category have not been provided.⁸⁵ It submits that it is not in a position to challenge the explanations offered by the Kenyan Government, or the relevant ministry, for why a search of the land records to ascertain relevant interests cannot be conducted.⁸⁶ The Prosecution suggested that alternative avenues, such as ascertaining whether stamp duty, or other sales tax, is payable on such transfers, should be pursued.⁸⁷

The Kenyan Government submits that the Kenyan Ministry of Land, Housing and Urban Development ('Ministry of Land') advises that it is 'impossible to execute' the request unless the Prosecution provides: (i) the relevant Land Reference, Inland Reference or Coast Registry number; (ii) a copy of the title certificate of the land to be searched; (iii) a copy of the identification document of the person / company seeking the search; (iv) a copy of the personal identification number ('PIN') issued by the Kenyan Revenue Authority; and (v) a copy of the registration map or deed plan of the property.⁸⁸ The Kenyan Government submits that this documentation must be provided by everyone, including by the Kenyan Government itself, in order to 'get a report relating to titles'.⁸⁹

31. Tax Records: In relation to the material requested under this category, the Prosecution notes that it has received confirmation that Mr Kenyatta is not registered

⁸⁴ Kenyan Government's Third Update, ICC-01/09-02/11-941-Conf-Exp, para. 20(i)(a).

⁸⁵ Prosecution's Observations, ICC-01/09-02/11-943, para. 15.

⁸⁶ ICC-01/09-02/11-T-31-ENG, page 24, lines 4-24.

⁸⁷ ICC-01/09-02/11-930-Conf-Exp-AnxA, page 2. *See also* ICC-01/09-02/11-940-Conf-AnxA, page 2.

⁸⁸ Kenyan Government's Third Update, ICC-01/09-02/11-941-Conf-Exp, para. 20(ii).

⁸⁹ ICC-01/09-02/11-T-31-ENG, page 18, lines 10-13. *See also* ICC-01/09-02/11-T-31-ENG, page 19, line 7 – page 20, line 14 (where the Attorney General submits that provision of a PIN, which is 'like a social security number', is a 'requirement of the law' and that he has 'no way of knowing' the accused's PIN).

for VAT.⁹⁰ However, the Prosecution states that the requested income tax returns have not been provided. Rather, the Kenyan Government has supplied worksheets summarising the accused's income tax liability for various years between 1992 and 2012.⁹¹ The Prosecution submits that these worksheets are of 'no assistance' in determining any interests the accused may have had in corporate entities during the relevant period.⁹² The Prosecution additionally notes that it has asked 'repeatedly' for the tax returns and that the 'propriety' of the request had not been challenged.⁹³

The Kenyan Government initially submitted, both in the Third Update and at the status conference on 7 October 2014, that the 'relevant tax returns records obtained from the Kenyan Revenue Authority' had been sent to the Prosecution.⁹⁴ However, the Attorney General subsequently stated that it was his understanding that the revenue authority extracts relevant information but does not retain copies of the actual tax return forms submitted by a taxpayer.⁹⁵ The Kenyan Government submits that the Kenyan Revenue Authority has stated, *inter alia*, that it has not 'determined any beneficial holdings in other entities by the taxpayer'.⁹⁶

⁹⁰ Prosecution's Observations, ICC-01/09-02/11-943, para. 15.

⁹¹ Prosecution's Third Update, ICC-01/09-02/11-940, para. 19; ICC-01/09-02/11-927-Conf-Exp-AnxA, pages 1-2 (the Chamber notes that this filing says 2002, however it would appear that 2012 was intended (*see e.g.* the reference to 2004 and filing ICC-01/09-02/11-930-Conf-Exp-AnxA, page 3/7)).

⁹² Prosecution's Third Update, ICC-01/09-02/11-940, para. 19. *See also* ICC-01/09-02/11-T-31-ENG, page 31, lines 16-24; ICC-01/09-02/11-930-Conf-Exp-AnxA, page 3/7.

⁹³ Prosecution's Observations, ICC-01/09-02/11-943, para. 13; ICC-01/09-02/11-T-31-ENG, page 31, line 25 – page 32, line 1 (where the Prosecution submits that it 'couldn't possibly have been clearer' on this point).

⁹⁴ Kenyan Government's Third Update, ICC-01/09-02/11-941, para. 22; ICC-01/09-02/11-T-31-ENG, page 31, lines 1-10.

⁹⁵ ICC-01/09-02/11-T-31-ENG, page 32, line 4 – page 33, line 2; page 34, lines 2-8. The Attorney General referred to a letter of the Kenyan Revenue Authority, dated 26 August 2014, as a source of his understanding (a copy of the letter is contained at ICC-01/09-02/11-941-Conf-Exp-AnXXXXI).

⁹⁶ Kenyan Government's Third Update, ICC-01/09-02/11-941-Conf-Exp, para. 20(iii) referring to ICC-01/09-02/11-941-Conf-Exp-AnXXXXI.

32. Vehicle Records: The Prosecution states that the material requested in this category has been provided, except for any records relating to Other Entities, as required by the Revised Request.⁹⁷

The Kenyan Government submits that the National Transport and Safety Authority has 'no mechanism in place' by which it could identify vehicles used by entities associated with an individual.⁹⁸

33. Bank Records: In relation to the material requested under this category, the Prosecution submits that, although the Chamber has ruled on the validity of the Bank Records request covering a three year period, only statements covering a 3-4 month period have been provided.⁹⁹ It submits that the Kenyan Government should have pursued compulsory measures to obtain the Bank Records for the full three year period.¹⁰⁰

The Kenyan Government notes that the Bank Records provided were obtained on the basis of the consent of the accused.¹⁰¹ The Kenyan Government indicated that it negotiated 'in good faith on a time frame that is reasonable', and that the Prosecution was provided 'material for that [three-month] period',¹⁰² and therefore '[t]here has been no need' to take further steps to compel the production of bank records.¹⁰³ In relation to why, following the Decision of 29 July 2014, Bank Records for the full three year period have not been provided, the Kenyan Government provided no further explanation.¹⁰⁴

⁹⁷ Prosecution's Observations, ICC-01/09-02/11-943, para. 15.

⁹⁸ Kenyan Government's Third Update, ICC-01/09-02/11-941-Conf-Exp, para. 20(i)(b).

⁹⁹ Prosecution's Observations, ICC-01/09-02/11-943, paras 10 and 15.

¹⁰⁰ ICC-01/09-02/11-T-31-ENG, page 34, line 15 – page 35, line 6.

¹⁰¹ ICC-01/09-02/11-T-31-ENG, page 28, lines 8-21; page 36, lines 13 – 23.

¹⁰² ICC-01/09-02/11-T-31-ENG, page 37, lines 6-7.

¹⁰³ ICC-01/09-02/11-T-31-ENG, page 36, lines 21-23. *See also* page 37, lines 5-24.

¹⁰⁴ ICC-01/09-02/11-T-31-ENG, page 37, lines 5-24.

34. Foreign Transaction Records: The Prosecution states that the request under this category has been complied with, except for any records relating to Other Entities.¹⁰⁵
35. Telephone Records: The Prosecution submits that the requested records within this category have not been provided.¹⁰⁶ It submits that no response has been received as to whether the telephone companies actually hold billing records for the relevant period, irrespective of: (i) whether there was any legal obligation at the time to register subscribers; and (ii) any difficulties with record extraction.¹⁰⁷ The Prosecution states that the most recent communication from the Communications Commission of Kenya – which indicates that a court order is required to compel the licensees to produce the requested data – ‘crystallises [...] one of the problems’, being the absence of the use of compulsion on the part of the Kenyan Government in implementing the Revised Request.¹⁰⁸ The Prosecution additionally notes that – with the exception of one number which it does not consider represents the entirety of the accused’s telephone contacts during the relevant time – it does not have the numbers used by the accused, and is seeking that precise information from the Kenyan Government.¹⁰⁹ The Prosecution submits that the idea that the ‘entire apparatus’ of the Kenyan Government cannot produce a record of any telephone number the accused was using while a Cabinet Minister is ‘not to be taken seriously’, and that if the Kenyan Government were ‘to do a diligent and proper search in their own records, they would come up with the numbers which were being used’.¹¹⁰

¹⁰⁵ Prosecution’s Observations, ICC-01/09-02/11-943, para. 15.

¹⁰⁶ Prosecution’s Observations, ICC-01/09-02/11-943, para. 15.

¹⁰⁷ Prosecution’s Observations, ICC-01/09-02/11-943, para. 11.

¹⁰⁸ ICC-01/09-02/11-T-31-ENG, page 6, lines 2-18.

¹⁰⁹ ICC-01/09-02/11-T-31-ENG, page 21, lines 5-21; page 22, lines 5-9 (submitting that it is a ‘circular argument’ for the Kenyan Government to request the Prosecution to provide it with precisely the information which the Prosecution has sought from it).

¹¹⁰ Prosecution’s Observations, ICC-01/09-02/11-943, para. 12; ICC-01/09-02/11-T-31-ENG, page 21, line 21 – page 22, line 4.

The Kenyan Government submits that the telephone companies have advised that at the relevant time there was no legal requirement to register subscribers and therefore they are unable to conduct a search unless the Prosecution provides mobile phone numbers or a Mobile Station International Subscriber Directory Number ('MSISDN').¹¹¹ The Kenyan Government confirms that the Kenyan Communications Authority has indicated that a court order is required in order to obtain the relevant records.¹¹²

36. Intelligence Records: The Prosecution states that the request under this category has been complied with.¹¹³

The Kenyan Government submits that confirmation has been provided that neither the accused nor any entity associated with him was a target of the National Intelligence Service at the relevant time and consequently no information exists.¹¹⁴

III. Analysis

I. Applicable Law

37. Article 87(7) of the Statute provides:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

¹¹¹ Kenyan Government's Third Update, ICC-01/09-02/11-941-Conf-Exp, para. 20(i)(c); ICC-01/09-02/11-T-31-ENG, page 46, lines 10-17; page 47, lines 4-23.

¹¹² ICC-01/09-02/11-T-31-ENG, page 44, lines 15-19 (referring to the letter, dated 1 September 2014, contained at ICC-01/09-02/11-966-Conf-Anx2).

¹¹³ Prosecution's Observations, ICC-01/09-02/11-943, para. 15.

¹¹⁴ Kenyan Government's Third Update, ICC-01/09-02/11-941-Conf-Exp, para. 20(i)(d).

38. The Chamber observes that the Court has not yet adjudicated upon a request for a finding under Article 87(7) of the Statute on the basis of a State's alleged failure to comply with a request for cooperation made under Article 93 of the Statute. However, the Court has previously made findings of non-compliance pursuant to Article 87(7) of the Statute in relation to states which had failed to cooperate in respect of arrest and surrender pursuant to, *inter alia*, Articles 89(1) and 91 of the Statute.¹¹⁵ As a consequence of such findings being made the situations were, pursuant to Regulation 109(4) of the Regulations, referred to the President of the Court for transmission to the Security Council, through the Secretary General of the United Nations, and to the ASP.¹¹⁶
39. It is apparent, from a plain reading of the provision itself, that the Chamber's power to make a finding of non-compliance under Article 87(7) of the Statute, and to refer the matter to the ASP or Security Council, is a discretionary one.¹¹⁷ Therefore, even where it has been determined that a State has failed to comply with a request for cooperation and that this failure has prevented the Court from exercising its functions under the Statute, the Chamber has to consider whether making a finding pursuant to Article 87(7) of the Statute is appropriate in the circumstances. The Chamber notes that both in assessing the failure of compliance as well as in

¹¹⁵ See e.g. Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, ICC-02/05-01/09-139-Corr; Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, ICC-02/05-01/09-140-tENG dated 23 March 2012; Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 26 March 2013, filed 27 March 2013, ICC-02/05-01/09-151; Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, ICC-02/05-01/09-195.

¹¹⁶ See e.g. ICC-02/05-01/09-139-Corr, page 21; ICC-02/05-01/09-140-tENG, page 8; ICC-02/05-01/09-151, page 11; ICC-02/05-01/09-195, page 17. It is noted that these decisions order transmission of the respective non-compliance matters to the Security Council given that the Security Council referred the situation in Darfur to the Court on 31 March 2005 (see United Nations Security Council Resolution 1593, S/RES/1593 (2005)), which is the situation in which the arrest warrant for Mr Al Bashir was issued. See also Article 112 of the Statute regarding the responsibility of the ASP for considering findings of non-compliance pursuant to Article 87(5) and (7) of the Statute.

¹¹⁷ See e.g. Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court, 5 September 2013, ICC-02/05-01/09-159, para. 13.

exercising this discretion the explanation proffered by the State about the reasons, if any, that non-compliance occurred may be a valid consideration.¹¹⁸

40. In determining that a State has failed to comply with a request for cooperation under the first part of Article 87(7) of the Statute, the Chamber considers that a certain restraint is appropriate. Not every instance of non-compliance with a cooperation request will constitute a failure to comply under that provision. For example, where the non-compliance in question is technical or trivial in nature, such non-compliance, which in most cases would not materially prevent the Court from exercising its functions and powers under the Statute, will not reach the threshold of non-compliance required by Article 87(7) of the Statute. Indeed, the Chamber considers it appropriate for a presumption of good faith to apply to States Parties in their cooperation with the Court. In the context of an application under Article 87(7) of the Statute, where some degree of compliance and explanations for any non-execution of the request has been provided, it may be necessary for such a presumption to be clearly rebutted. Additionally, where a requested State did not immediately comply with a cooperation request, it may not amount to statutory non-compliance, if, through consultation and negotiation with the requesting entity, the requested State materially complied with the request within a reasonable timeframe. In this regard, the Chamber reiterates its view that cooperation is a continuing process and that both the requesting entity and the requested State should make genuine efforts to resolve any difficulties in order to facilitate the execution of a request.¹¹⁹
41. Where the requested State asserts that non-compliance is as a result of lack of capacity, the Chamber has to consider whether such inability is genuine and well-founded. The Chamber will first consider whether the requested State has complied with its obligation under Article 88 of the Statute which provides that ‘States Parties

¹¹⁸ See e.g. ICC-02/05-01/09-159, para. 13.

¹¹⁹ See e.g. Decision of 31 March 2014, ICC-01/09-02/11-908, para. 101.

shall ensure that there are procedures available under their national law for all forms of cooperation which are specified under [Part 9 of the Statute]'. If the Chamber is satisfied that the requested State has fulfilled the requirements under Article 88 of the Statute (which in itself involves a margin of assessment), the Chamber still may consider whether there is a persuasive reason why the State lacks capacity to comply with the cooperation request. This inquiry is a case-specific one, depending on the nature of the request concerned and the specific circumstances of the requested State, including whether the requested State made *bona fide* efforts to overcome any difficulties encountered. Therefore, where the non-compliance arises from a genuine and demonstrated lack of capacity or ability, the Chamber may decide that such non-compliance will not amount to that required under the first part of Article 87(7) of the Statute.¹²⁰

42. By contrast, non-compliance arising from, *inter alia*, unjustified inaction or delay, or a clear failure to have in place appropriate procedures for effecting the cooperation, as required under Article 88 of the Statute, constitutes failure to comply under Article 87(7) of the Statute which may, depending upon the circumstances, warrant a finding of non-compliance and concomitant referral under the same article. The approach of the relevant State during the cooperation process, as well as of the party seeking a finding under Article 87(7) of the Statute, may be of particular importance in finding whether there has been the standard of good faith cooperation required from State Parties. The Chamber considers that the burden is on the party seeking the finding under Article 87(7) of the Statute. The determination is case-specific, and determining that a degree of non-compliance has occurred may not, in itself, be sufficient to

¹²⁰ See also ICC-02/05-01/09-159, paras 11-12 (where a finding under Article 87(7) of the Statute was not made in circumstances where (i) the relevant state had reiterated its commitment to cooperate with the Court and to fight against impunity; (ii) Mr Al Bashir was not invited to 'undertake a visit' to the country but was rather there to attend the special Summit of the African Union; and (iii) Mr Al Bashir had departed suddenly prior to the end of the summit before any action could be taken in relation to him).

necessarily trigger a referral.¹²¹ The Chamber will approach its analysis of the Prosecution's Article 87(7) Application on this basis.

II. Analysis

43. At the outset, the Chamber will consider the appropriateness of making a decision under Article 87(7) of the Statute at this stage.¹²² The Chamber notes that while the Prosecution avers that the cooperation is at a 'deadlock', the Kenyan Government maintains that cooperation is still possible if the Prosecution supplies it with certain information. However, the Chamber recalls its Decision of 31 March 2014 where, considering, *inter alia*, the crucial importance of cooperation by State Parties to the functioning of the Court, it exceptionally allowed the continuation of cooperation during a fixed timeframe and under stringent conditions.¹²³
44. In the Chamber's view, allowing further time for cooperation, without intervention at this stage, would be contrary to the interests of justice. The Chamber recalls that it had previously emphasised the need for expeditiousness in the execution of the Revised Request and had clearly advised that the opportunity for further investigations granted in the Decision of 31 March 2014 was a strictly limited one.¹²⁴ As the adjournment period granted has now come to an end, it is appropriate for the Chamber to assess the status of cooperation and definitively rule upon the Article 87(7) Application.
45. Having decided to make an assessment in accordance with Article 87(7) of the Statute at this stage, the Chamber will first consider the current degree of cooperation in the present proceedings, and whether any non-compliance which may be found to have

¹²¹ These additional elements are discussed in further detail from paragraph 79 onwards.

¹²² The Chamber notes that in accordance with Regulation 109(3) of the Regulations it has heard from the State concerned prior to making this ruling.

¹²³ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 95, 98 and 100-101.

¹²⁴ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 95, 100-101 and 103.

occurred has prevented the exercise of powers and functions under the Statute. The Chamber will then turn to consideration of other matters which may, in this case, influence its discretion in relation to the making of a referral under Article 87(7) of the Statute.

46. The Chamber recalls, in this connection, that in its Decision of 31 March 2014, it found, *inter alia*, that there had been a 'substantial unexplained delay on the part of the Kenyan Government in either giving effect to the cooperation request or raising any problems which may have prevented execution of the request'.¹²⁵ Nonetheless, having ruled on the authority of the Prosecution to make such cooperation requests the Chamber, as noted above, deferred making any finding under Article 87(7) of the Statute in order to provide the Kenyan Government with a further opportunity to comply.¹²⁶
47. In its Decision of 29 July 2014, the Chamber confirmed that the Revised Request conforms to the requirements of specificity, relevance and necessity for the purposes of a cooperation request under Part 9 of the Statute.¹²⁷ In addition, the Chamber indicated that alternative sources of official information should be explored and reiterated that, where necessary, compulsory measures to obtain the requested material should be pursued by the Kenyan Government.¹²⁸

Categories of material sought in the Revised Request

48. The Chamber notes that of the eight categories of materials identified in the Revised Request it appears that only one, Intelligence Records, has been executed in full (through a confirmation that no relevant records exist). Four of the categories - Tax

¹²⁵ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 51. The Chamber incorporates by reference its analysis in paragraphs 45-52 of the Decision of 31 March 2014.

¹²⁶ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 2(a) and 92.

¹²⁷ Decision of 29 July 2014, ICC-01/09-02/11-937, page 22.

¹²⁸ Decision of 29 July 2014, ICC-01/09-02/11-937, paras 41-42 and 47.

Records, Vehicle Records, Bank Records and Foreign Transaction Records - have been partially executed. In respect of the three remaining categories - Company Records, Land Transfer Records and Telephone Records - no requested materials have been provided, but various explanations have been proffered by the Kenyan Government for their non-provision.

49. The Chamber recalls that it has previously noted that the Kenyan Government may be best placed to identify both potential difficulties, or obstacles, to execution of the requests, and alternative possibilities for their execution.¹²⁹ However, this does not mean that the Prosecution would not be in a position to conduct any necessary investigations, or, where appropriate, seek specialised advice in order to effectively challenge explanations provided by the Kenyan Government. In the absence of such specific and substantiated submissions, the Chamber may only be in the position of assessing rival contentions regarding the feasibility of the execution of the requests.
50. In the following analysis, in relation to some of the categories of materials requested, the Chamber has highlighted certain actions that it considers it may have been appropriate for the Kenyan Government, and/or the Prosecution, to explore in an attempt to execute the Revised Request. The Chamber emphasises that it is not in a position to be certain whether the courses of action identified would have actually enabled execution of the requests. Nonetheless, at least some of these alternative methods had been specifically previously identified to the Kenyan Government, in addition to a general direction that alternative means should be explored, and it is in that context that the Chamber has considered them.

¹²⁹ Decision of 29 July 2014, ICC-01/09-02/11-937, para. 42.

1) Company Records

51. The Kenyan Government has repeatedly advised in relation to the request under this category that, in order to conduct a search, the Kenyan Companies Registry requires either the name or registration number of the companies in question.¹³⁰ While it initially appeared to suggest that a physical search of the approximately 2 million companies records would be at least a theoretical possibility,¹³¹ this avenue was not followed up by the Kenyan Government in any meaningful way.¹³² Notably, subsequent communications from the Kenyan Companies Registry simply describe as ‘impossible’, due to the ‘legal and administrative regime’, the conducting of a search using anything other than the name or registration number of a company.¹³³ The Chamber does not consider that this adequately explains why a physical search, with assistance from the Prosecution if necessary,¹³⁴ of all records of companies in existence during the relevant time period could not, at least as a theoretical possibility, be conducted.
52. The Chamber has noted the Prosecution’s submission that it is not in a position to challenge the explanations offered by the Companies Registry. As indicated above, the Chamber considers that - in pursuit of its burden to persuade the Chamber that there had been relevant non-compliance in this case - it would have been advisable on the part of the Prosecution to take further steps to determine whether or not the information sought might nonetheless be extracted from the relevant registry by some other means, and to provide the Chamber with any additional relevant information, in a substantiated manner. In the absence of such steps, the Chamber

¹³⁰ ICC-01/09-02/11-928-Conf-Exp, para. 7(ii); ICC-01/09-02/11-941-Conf-Exp-AnxVIII; ICC-01/09-02/11-930-Conf-Exp-AnxA, page 1; ICC-01/09-02/11-941-Conf-Exp-AnxXXIV; Kenyan Government’s Observations, ICC-01/09-02/11-951-Conf-Exp, para. 10(a).

¹³¹ ICC-01/09-02/11-930-Conf-Exp-AnxA, page 1; ICC-01/09-02/11-941-Conf-Exp-AnxIX, page 3.

¹³² The Prosecution raised this again in a letter dated 31 July 2014 (*see* ICC-01/09-02/11-940-AnxC).

¹³³ ICC-01/09-02/11-941-Conf-Exp-AnxXXIV, page 5.

¹³⁴ *See e.g.* ICC-01/09-02/11-930-Conf-Exp-AnxA, page 1.

considers the Kenyan Government's explanation not to have been rebutted. Notwithstanding, a cursory search by the Chamber, indicates, for example, that details of all directorships of bodies corporate registered in Kenya must be provided as part of the company registration and returns process.¹³⁵ Therefore, obtaining the records of just one company with which the accused is associated, if any, would potentially have generated the names of a significant number of other potentially relevant entities which, while perhaps not comprehensive, would have provided a basis for further searches. Why neither the Kenyan Government nor the Prosecution pursued this line of enquiry in a genuine effort to obtain relevant materials is unclear.

53. Additionally, the Chamber observes that nothing in the Revised Request directed the Kenyan Government to confine itself to making enquiries only of the Companies Registry. If ownership or directorship interests could not be obtained through a direct search with that registry, other avenues, which have been repeatedly identified to the Kenyan Government,¹³⁶ such as lists of interests of office holders or tax returns, should have been pursued. No adequate explanation has been provided for why this was not done by the Kenyan Government. The Chamber notes that the failure to execute the Company Records request has also impacted on execution of each of the requests for Land Transfer Records, Tax Records, Vehicle Records, Bank Records and Foreign Transaction Records.
54. In light of the above, the Chamber is not persuaded that, at this stage, the failure to execute this category of the Revised Request is simply an issue of capacity, of practical or administrative barriers or a result of insufficient information having been provided by the Prosecution. However, in this context, and as mentioned above, the

¹³⁵ See Annual Return Form and Form 203 (Particulars of Directors and Secretaries), which are standard Companies Registry forms publicly available on the website of the Office of the Attorney General and the Department of Justice, under which the Companies Registry falls, see <http://www.attorney-general.go.ke/Resources.html>.

¹³⁶ See e.g. ICC-01/09-02/11-930-Conf-Exp-AnxA, para. 3; ICC-01/09-02/11-940-Conf-AnxA (letter from the Prosecution to the Kenyan Government dated 3 July 2014); ICC-01/09-02/11-T-30-ENG, page 15, lines 10-15; Decision of 29 July 2014, ICC-01/09-02/11-937, para. 41.

Chamber again notes the Prosecution's submission that it is not in a position to challenge the explanations offered by the Companies Registry.

2) Land Transfer Records

55. The Kenyan Government has submitted that certain further information is required in order to execute the request issued under this category. In this regard, when the Chamber asked the Kenyan Government about the reasonableness of its submission that a PIN is a necessary prerequisite to conducting relevant searches, the Attorney General provided an explanation that focused on the PIN of the accused. However, upon a cursory search by the Chamber, the publicly available 'Application for official search' form¹³⁷ suggests that the PIN in question may rather be that of the party seeking the search to be conducted.¹³⁸
56. In either event, the Chamber considers unhelpful the Kenyan Government's repeated representation that the provision of, *inter alia*, such a PIN by the Prosecution is necessary in order to execute the request. Furthermore, even if the Chamber assumes that the accused's PIN is necessary in order to execute the request, it considers it unreasonable that the Kenyan Government could not identify the PIN of the accused.¹³⁹
57. However, the Chamber notes that the Prosecution did not make any substantive submissions regarding the reasonableness or necessity of the additional information sought by the Kenyan Government in the context of the Land Transfer Records. The

¹³⁷ Accessible on the website of the Ministry of Land, see <http://www.ardhi.go.ke/default/downloads/search.pdf>.

¹³⁸ It is noted that neither the Kenyan Government's Third Update (ICC-01/09-02/11-941-Conf-Exp, para. 20(ii)) nor the underlying memo from the Ministry of Land (ICC-01/09-02/11-941-Conf-Exp-AnxXXIX) specify whether it is the PIN of the accused or of the person seeking the search which is required. Moreover, it is noted that the copy legislation and prescribed forms annexed to the memo from the Ministry of Land do not mention a PIN. However, the Chamber additionally notes the Thirteenth Schedule to the Kenyan Income Tax Act Cap. 470 which specifies that a PIN of the applicant may be required for certain transactions, including with the Commissioner of Lands, see <http://www.revenue.go.ke/incometax/pdf/Incometaxact.pdf>.

¹³⁹ See ICC-01/09-02/11-T-31-ENG, page 19, line 24 – page 20, line 4.

Chamber considers that again, in the circumstances, it would have been advisable for the Prosecution to do so.

58. Nonetheless, in considering the conduct of the Kenyan Government, the Chamber observes that nothing in the Revised Request directed the Kenyan Government to confine itself to making enquiries only with the Ministry of Land. If it is the case that transfers of land cannot be identified through a direct search of the land registries based on the name of the transferor, it would have been appropriate to consider alternative sources of information. The Prosecution, as early as 3 July 2014, highlighted to the Kenyan Government that records of payments of stamp duty, or other tax, on the transfer of land may be a relevant alternative in this case.¹⁴⁰ It does not appear that any enquiry in that regard has been made of relevant tax authorities¹⁴¹ and no explanation for the failure to do so has been provided.
59. In light of the above, the Chamber is not persuaded that, at this stage, the failure to execute this request can simply be attributed to a lack of capacity, to practical or administrative barriers or to the provision of insufficient information on the part of the Prosecution. However, as mentioned above, in this context, the Chamber notes: (i) the Prosecution's submission that it is not in a position to challenge the explanations offered by the Kenyan Government; and (ii) that, other than with respect to the exploration of alternative sources of information, the Prosecution made no specific or substantive submissions regarding the reasonableness, or otherwise, of the position adopted by the Kenyan Government.

¹⁴⁰ See ICC-01/09-02/11-940-Conf-AnxA, page 2/8. The Chamber observes that indeed the Kenyan Ministry of Land appears to have subsequently confirmed that this may be a viable line of enquiry, *see* ICC-01/09-02/11-941-Conf-Exp-AnxXXIX, page 7.

¹⁴¹ See ICC-01/09-02/11-941-Conf-Exp-AnxXVI (where the Prosecution's query in this regard is simply forwarded back to the Ministry of Land).

3) Tax Records

60. The Chamber notes that the request under this category has been partially executed in that a confirmation that the accused was not registered for VAT has been provided. It has also been confirmed that the accused did submit income tax returns for the relevant years. In the Revised Request, and subsequent correspondence,¹⁴² the Prosecution has clearly, and repeatedly, requested the Kenyan Government to provide copies of those tax return forms. The Chamber notes that the Kenyan Government has not done so. The Chamber considers that no adequate explanation has been provided for this failure. Indeed, it was only at the status conference on 7 October 2014 - six months after the Revised Request was issued and only when directly asked by the Chamber - that the Kenyan Government for the first time specifically addressed the non-provision of those materials. The explanation then provided by the Attorney General - that the revenue authority does not retain the tax return forms submitted by tax payers - appeared to base itself on a letter from the Kenyan Revenue Authority,¹⁴³ which, in the view of the Chamber, is not necessarily clear on this point.¹⁴⁴
61. Although again the Prosecution did not significantly challenge the Kenyan Government's submission, the Chamber observes that it would be unusual for original tax return forms to be destroyed within a short timeframe from the date of their receipt; as such documents may be required for evidentiary purposes in the event of subsequent disputes or allegations of fraud in relation to a taxpayer. Even if it is the case that tax return forms from the relevant years have now been destroyed, the Chamber notes that providing a clear response to that effect in a timely manner

¹⁴² See e.g. ICC-01/09-02/11-940-Conf-AnxA, page 3/8; ICC-01/09-02/11-930-Conf-Exp-AnxA, page 3; Prosecution's Third Update, ICC-01/09-02/11-940, para. 19; ICC-01/09-02/11-940-Conf-AnxF, page 3/4; Prosecution's Observations, ICC-01/09-02/11-943, para. 13.

¹⁴³ ICC-01/09-02/11-T-31-ENG, page 32, line 4 – page 33, line 2; page 34, lines 2-8.

¹⁴⁴ See ICC-01/09-02/11-941-Conf-Exp-AnXXXXI.

would have enabled the Prosecution to either challenge the position or consider alternative avenues. Additionally, in the absence of any indication as to what steps, if any, might have been taken to identify beneficial interests, the Chamber considers inadequate the mere representation¹⁴⁵ that no beneficial interests of the accused have been identified by the authority.

62. In light of the above, the Chamber concludes that, at this stage, the failure to execute the request under this category is not simply an issue of capacity, of practical or administrative barriers or a result of insufficient information having been provided by the Prosecution. The Chamber considers that the continuing failure on the part of the Kenyan Government to provide any clear and substantiated explanation for the non-provision of the requested income tax returns falls below the standard of good faith cooperation required from States Parties.

4) Vehicle Records

63. The Chamber notes that the Prosecution considers that the Kenyan Government has complied with the request under this category, save with respect to Other Entities.¹⁴⁶ However, the Chamber observes that the information provided appears to have been the result of vehicle registration numbers voluntarily provided by the Defence.¹⁴⁷ The Chamber notes with concern that when providing the records to the Prosecution, the Kenyan Government appears not to have initially indicated that voluntary provision by the Defence was the basis upon which the records were obtained.¹⁴⁸ Moreover, from the documentation available to the Chamber, it is not apparent whether the Kenyan Government has provided specific confirmation that the materials provided

¹⁴⁵ See Kenyan Government's Third Update, ICC-01/09-02/11-941-Conf-Exp, para. 20(iii); ICC-01/09-02/11-941-Conf-Exp-AnxXXXI.

¹⁴⁶ Prosecution's Observations, ICC-01/09-02/11-943, para. 15.

¹⁴⁷ ICC-01/09-02/11-T-30-ENG, page 19, lines 19-25.

¹⁴⁸ This information appears to have been revealed only at the status conference on 9 July 2014 when noted by the Defence, see ICC-01/09-02/11-T-30-ENG, page 20, lines 15-18. See also ICC-01/09-02/11-951-Conf-Exp-AnxII containing a copy of the 19 June 2014 letter from the Kenyan Government to the Prosecution, enclosing vehicle records.

reflect a comprehensive record of all vehicles registered in the accused's name during the relevant time period.

64. As noted in its Decision of 29 July 2014, the Chamber recalls that while such voluntary provision of materials from the Defence may be a helpful means of expediting receipt of relevant records, cooperation under Part 9 of the Statute is not conditioned on an accused's consent.¹⁴⁹ Indeed, in the absence of cooperation from the requested State, in which it confirms that the items voluntarily provided are indeed exhaustive and comprehensive of those requested, the Chamber does not consider that such provision by the Defence can relieve a State of its cooperation obligations under Part 9 of the Statute.
65. However, noting the Prosecution's apparent satisfaction with the execution of this request (other than with respect to Other Entities), the Chamber will, for the purposes of this analysis, treat it as having been complied with.

5) Bank Records

66. Bank Records for appropriately a 3 or 4 month period have been provided on the basis of the voluntary consent of the accused.¹⁵⁰ Although the Prosecution has reiterated its request for Bank Records for the full three year period,¹⁵¹ and the Chamber has upheld the validity of that request,¹⁵² it appears that the Kenyan Government has taken no steps to provide the requested records. Neither has any adequate explanation been provided for the failure to do so.¹⁵³ Moreover, the

¹⁴⁹ Decision of 29 July 2014, ICC-01/09-02/11-937, para. 47.

¹⁵⁰ Prosecution's Observations, ICC-01/09-02/11-943, paras 10 and 15; ICC-01/09-02/11-T-31-ENG, page 28, lines 8-21; page 36, line 13 – 23. *See also* a copy of the consent letter from the Defence contained at ICC-01/09-02/11-945-Conf-AnxC and ICC-01/09-02/11-964-Conf-AnxA.

¹⁵¹ *See e.g.* ICC-01/09-02/11-930-Conf-Exp-AnxA, pages 4-5; Prosecution's Observations, ICC-01/09-02/11-943, para. 10.

¹⁵² Decision of 29 July 2014, ICC-01/09-02/11-937, para. 37.

¹⁵³ *See* paragraph 33 above.

Chamber notes that the Kenyan Government has so far failed to facilitate a Prosecution request to meet directly with relevant bank officials.¹⁵⁴

67. In light of the above, the Chamber concludes that the failure to execute this request is not simply an issue of capacity, of practical or administrative barriers or a result of insufficient information having been provided by the Prosecution. The Chamber considers that the continuing failure on the part of the Kenyan Government to provide the remainder of the requested Bank Records, or to take any steps to do so, falls below the standard of good faith cooperation required from States Parties.

6) Foreign Transaction Records

68. The Chamber observes under this category of requested materials that the initial response provided by the Kenyan Government was that the identities of specific foreign exchange institutions would need to be provided.¹⁵⁵ However, when the Prosecution queried whether there was not an obligation on the part of foreign exchange entities to record and report such transactions,¹⁵⁶ the Kenyan Government confirmed that such an obligation does exist for transactions greater than USD 10,000.¹⁵⁷ It was reported by the Kenyan Government that a search of the relevant register indicated no such transactions recorded in the accused's name during the time period in question.¹⁵⁸
69. The Chamber notes the Prosecution's satisfaction with the execution of this request (other than with respect to Other Entities), and therefore will, for the purposes of this analysis, treat it as having been complied with.

¹⁵⁴ This request was reiterated in a letter from the Prosecution to the Kenyan Government dated 27 August 2014, ICC-01/09-02/11-940-Conf-AnxF.

¹⁵⁵ ICC-01/09-02/11-928-Conf-Exp, para. 7(iv).

¹⁵⁶ ICC-01/09-02/11-940-Conf-AnxA, pages 5/8-6/8.

¹⁵⁷ See ICC-01/09-02/11-941-Conf-Exp-AnxXXXVI.

¹⁵⁸ ICC-01/09-02/11-941-Conf-Exp-AnxXXXVI. See also Prosecution's Observations, ICC-01/09-02/11-943, para. 15.

7) Telephone Records

70. It is noted that the request under this category of materials sought both the identification of relevant telephone numbers and the provision of records of related call data and mobile cash transfers. The Chamber observes that although, at the meeting between the Prosecution and the Kenyan Government in May 2014, Telephone Records was one of the categories on which certain agreement appeared to have been reached,¹⁵⁹ no records have so far been provided. Regarding identification of telephone numbers used by the accused, the Chamber considers there to be a significant distinction between whether, at the relevant time, there was a legal obligation to register subscribers, and whether the telecommunications commission, or companies, actually hold or can access data – such as billing information – which may enable identification of such numbers. A specific response to the latter aspect has not been clearly provided by the Kenyan Government,¹⁶⁰ despite a clear request for clarification by the Prosecution. Moreover, no answer has been provided to the Prosecution’s query from 3 July 2014,¹⁶¹ subsequently repeated,¹⁶² as to whether there

¹⁵⁹ ICC-01/09-02/11-921-Conf-Exp-Corr, para. 22(i); ICC-01/09-02/11-922-Conf-Exp-AnxA, para. 8.

¹⁶⁰ See e.g. ICC-01/09-02/11-928-Conf-Exp, para. 4(b) (indicating that registration of mobile phone numbers had not commenced in Kenya at that time and that the Communications Commission of Kenya required provision of the relevant telephone numbers); ICC-01/09-02/11-941-Conf-Exp-AnxIII (the underlying letter from the Communications Commission of Kenya, which it is noted indicates not that provision of telephone numbers is a necessary prerequisite to obtaining call data but that it would ‘assist’ in the ‘faster retrieval and processing’ thereof); ICC-01/09-02/11-941-Conf-Exp-AnxXXVI(a) (stating that ‘mandatory subscriber registration’ was not in place at the relevant time and ‘consequently’ the company concerned cannot extract the records request without provision of a telephone number or MSISDN – the Chamber notes that this does not directly answer whether or not billing data is, or would have been, available); ICC-01/09-02/11-941-Conf-Exp-AnxXXVI(b) (again stating that mandatory subscriber registration was not in place at the relevant time and ‘consequently’ call data records cannot be provided by that telephone company. While this letter does also state that a search of its systems and records did not identify any numbers associated with the accused during the relevant period, no specific confirmation was provided as to whether this search included billing records and whether such records would indeed be a potential source of such information); ICC-01/09-02/11-966-Conf-Anx2, page 4 (where the Communications Commission of Kenya reiterates that there was no ‘regime’ for the capture of subscriber information during the relevant period and it therefore can’t ‘guarantee’ that the information could be retrieved, but that it ‘might help’ for the Prosecution to identify the specific telephone lines in question). See also Kenyan Government’s Third Update, ICC-01/09-02/11-941-Conf-Exp, para. 20(1)(c); Kenyan Government’s Observations, ICC-01/09-02/11-951-Conf-Exp, para. 10(b).

¹⁶¹ See ICC-01/09-02/11-940-Conf-AnxA, pages 6-7.

¹⁶² See e.g. ICC-01/09-02/11-930-Conf-Exp-AnxA, pages 6-7; ICC-01/09-02/11-T-30-ENG, page 29, lines 4-9; Prosecution’s Observations, ICC-01/09-02/11-943, para. 12.

were formal or informal records of contact numbers for Cabinet ministers and members of parliament.¹⁶³

71. In respect of call and mobile cash transfer data related to certain telephone numbers, the Kenyan Government has indicated, *inter alia*, that a court order is required.
72. In light of the above, the Chamber concludes that, at this stage, the failure to execute the request under this category is not simply an issue of capacity, of practical or administrative barriers or a result of insufficient information having been provided by the Prosecution. The Chamber considers that the failure on the part of the Kenyan Government to provide clear and specific responses to the queries raised or to take necessary domestic steps to compel production of the relevant information,¹⁶⁴ falls below the standard of good faith cooperation required from State Parties.

8) Intelligence Records

73. As noted above, it appears that the request under this category has been executed in full. The Chamber therefore treats it as complied with for the purposes of this analysis.

III. Overall assessment

74. The Chamber observes that some information sought by the Prosecution has been supplied by the Kenyan Government. In addition, it is apparent that certain steps to implement the outstanding elements of the Revised Request have been taken, such as making enquiries to primarily responsible internal ministries. Therefore, the Chamber observes that this is an instance where the question of compliance is one of degree, and, as indicated above, the Chamber must have particular regard to the

¹⁶³ See ICC-01/09-02/11-930-Conf-Exp-AnxA, pages 6-7, where it was indicated by the Kenyan Government that such enquiries would be made.

¹⁶⁴ See *e.g.* ICC-01/09-02/11-940-Conf-AnxA, pages 6-7, requesting that this be done.

explanations provided by the Kenyan Government in considering the adequacy of the steps taken. The Chamber notes that it may ultimately be the case that certain elements of the Revised Request may no longer be capable of execution.¹⁶⁵ Therefore the Chamber's assessment is based not on whether all of the materials sought in the Revised Request have been supplied, but rather on whether the Kenyan Government has taken reasonable steps to execute the request.

75. In an overall consideration of these eight specific categories of requested material, the Chamber finds that the explanations provided by the Kenyan Government for non-provision of materials, were, in certain cases, framed in an unhelpful manner that did not respond clearly to queries raised. Moreover, it is apparent that – save in the case of Foreign Transaction Records – there has been a complete failure to pursue alternative sources of information. Despite the open language of the Revised Request, which provided the Kenyan Government with a degree of flexibility in how it could be implemented, and the provision of specific suggestions of avenues of potential enquiry from the Prosecution, the Kenyan Government appears to have persisted in a narrow approach which simply repeated the alleged 'impossibility' of one particular method of execution.¹⁶⁶
76. Further, despite the clear terms of the Revised Request,¹⁶⁷ subsequently reiterated by the Prosecution,¹⁶⁸ and the clear terms of the Decision of 29 July 2014,¹⁶⁹ it is apparent that the Kenyan Government has taken no meaningful steps to compel production of the requested materials. Indeed, the Chamber observes that the execution of the

¹⁶⁵ This may be the case if, for example, records have now been destroyed due to the length of time which has elapsed.

¹⁶⁶ As highlighted above, in the case of, for example, Land Transfer Records this consisted of forwarding Prosecution queries to the Ministry of Land rather than engaging the Kenyan Revenue Authority, or other relevant tax body, directly in an alternative attempt to obtain the relevant information. A similar approach is apparent in respect of, for example, Company Records and Telephone Records.

¹⁶⁷ ICC-01/09-02/11-911-Conf-AnxA, pages 16-20 (*see, in particular*, para. 18).

¹⁶⁸ *See e.g.*, especially in respect of Telephone Records, ICC-01/09-02/11-930-Conf-Exp-AnxA, page 6; ICC-01/09-02/11-940-Conf-AnxA, page 7; ICC-01/09-02/11-940-AnxC; ICC-01/09-02/11-T-31-ENG, page 6, lines 2-18.

¹⁶⁹ Decision of 29 July 2014, ICC-01/09-02/11-937, para. 47.

Revised Request which has taken place to date relied to a significant degree on the voluntary consent of the accused, which does not in any way relieve the Kenyan Government of its cooperation obligations.

77. The Chamber additionally recalls its specific direction that cooperation was to proceed pending the Chamber's ruling on the conformity of the Revised Request with the requirements of specificity, relevance and necessity.¹⁷⁰ However, it appears that the Kenyan Government did not act in accordance with this direction and instead waited over a month from receipt of the Prosecution's additional queries, on 3 July 2014, before taking meaningful steps to obtain further responses from relevant internal ministries to the majority of those queries.¹⁷¹ Moreover, during the overall course of the litigation, the Chamber has noted with concern certain submissions of the Kenyan Government which are indicative of a non-cooperative stance premised on factors which the Chamber considers are inappropriate and irrelevant considerations in the sole context of the cooperation.¹⁷²
78. Based on the materials available to the Chamber, the Kenyan Government's submission that it has taken all possible steps available to it to execute the Revised

¹⁷⁰ ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 38, line 17- page 39, line 4 (mentioning, in particular, that the agreed upon deadlines of 8 and 15 August 2014 should still be met); ICC-01/09-02/11-T-30-ENG, page 37, line 22 – page 38, line 2 (stressing the importance of this direction in open session).

¹⁷¹ ICC-01/09-02/11-T-31-ENG, page 13, lines 16-24; Kenyan Government's Third Update, ICC-01/09-02/11-941-Conf-Exp, para. 19.

¹⁷² As previously noted in the Decision of 31 March 2014 at footnote 80, one such inappropriate consideration on the part of the Kenyan Government appeared to be that the Attorney General could not facilitate compliance with the execution of the Records Request as the accused himself was not a 'proper defendant' – *see* Hearing of 13 February 2014, ICC-01/09-02/11-T-28-ENG, page 96, lines 18-20 – 'If in this court there is a proper defendant, properly presented to the court, with the threshold evidence required by law, with requests processed in accordance with the statute and the law, I shall comply'. The Chamber notes further that in the observations of the Kenyan Government of 3 February 2014, the Kenyan Government initially appeared to assert that the right against self-incrimination precluded it from providing the records requested by the Prosecution without the consent of the accused (*see* ICC-01/09-02/11-877-Conf-Anx2-Red, paras 22-24). *See also* ICC-01/09-02/11-T-29-Conf-Exp-Eng, page 19, lines 10-14 (where the Attorney General comments on the sufficiency of the evidentiary basis in the main proceedings); ICC-01/09-02/11-T-29-Conf-Exp-Eng, page 23, lines 4-5 (where the Attorney General suggests that '[i]f the Prosecution was trying to do this five years ago, there wouldn't have been a difficulty. This is on the eve of trial'); and ICC-01/09-02/11-T-31, page 27, lines 11-22 (where, rather than responding to the question asked, the Attorney General interpreted a question from the Chamber as to whether domestic investigations in Kenya are premised on a requirement of consent from the accused as a suggestion to 'acquire evidence illegally').

Request, and that it is only the failure of the Prosecution to provide certain additional information that has prevented execution, is not supported. The Chamber considers that, where a State fails to meaningfully take basic steps to obtain requested material, or to provide clear, timely and relevant responses, mere declarations of compliance are insufficient. Therefore, and notwithstanding the Chamber's concerns regarding the adequacy of the Prosecution's approach to this litigation, the Chamber finds that, cumulatively, the approach of the Kenyan Government, as outlined above, falls short of the standard of good faith cooperation required under Article 93 of the Statute. The Chamber considers that this failure has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute.

79. The Chamber will now turn to the issue of whether or not the Kenyan Government's non-compliance has affected the exercise of the Court's functions and powers under the Statute, as a prerequisite to determining whether to make a finding under Article 87(7) of the Statute. In this regard, the Chamber notes the Prosecution's statement that, even if the request were to be fully executed, it is speculative whether or not the evidence would be sufficient to proceed to trial. The Chamber notes that this remains the Prosecution's view even after the 6 month adjournment period.¹⁷³ At the same time, the Chamber recalls that, having considered, *inter alia*, the potential relevance of the material being sought, it had directed the Prosecution to submit a revised request to the Kenyan Government.¹⁷⁴ Moreover, in its Decision of 29 July 2014, the Chamber confirmed that the Revised Request conforms to the requirements of specificity, relevance and necessity.¹⁷⁵ The Chamber further recalls that, as stated above,¹⁷⁶ in its Decision of 31 March 2014, having found a 'substantial unexplained delay', it deferred making a finding under Article 87(7) of the Statute in order to provide the

¹⁷³ ICC-01/09-02/11-T-31-ENG, page 12, lines 1-9 and 19; page 13, lines 3-4.

¹⁷⁴ Decision of 31 March 2014, ICC-01/09-02/11-908, page 46.

¹⁷⁵ Decision of 29 July 2014, ICC-01/09-02/11-937, page 22.

¹⁷⁶ See paragraph 46 above.

Kenyan Government a further opportunity to comply with the cooperation request. The Chamber, therefore, finds that the Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges,¹⁷⁷ but has ultimately impinged upon the Chamber's ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute.¹⁷⁸

80. Having so found, the Chamber will now consider whether or not making a formal finding of non-compliance pursuant to Article 87(7) of the Statute is warranted. In exercising its discretion in this regard, the Chamber will first be guided by the object and purpose of such a finding and concomitant referral to the ASP. The Chamber will also consider, *inter alia*, whether such a course of action would promote the functions of the Court and assist a fair trial, including the protection of the rights of the accused, the integrity of the proceedings or the wider interests of justice. The Chamber considers that the burden is on the Prosecution to demonstrate that the conduct of the Kenyan Government warrants a finding and referral under Article 87(7) of the Statute, based on those considerations.
81. In the Chamber's view, a formal finding of non-cooperation under Article 87(7) of the Statute amounts to a judicial finding that a State has breached its international obligations under the Statute.¹⁷⁹ By referring such breach to the ASP, the Court, which has limited powers of sanction, entrusts the matter to the ASP for appropriate action to remedy, or otherwise address, the breach.¹⁸⁰ The Statute does not specify either the measures which the ASP may take upon receipt of such referral or the remedies they may deem appropriate to impose in light of the non-compliance giving rise to the

¹⁷⁷ See Decision of 31 March 2014, ICC-01/09-02/11-908, paras 91 and 95.

¹⁷⁸ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 90. See also para. 51.

¹⁷⁹ See, *similarly*, International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v Tihomir Blaskic*, Appeals Chamber, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, ('Blaskic Appeals Judgement'), para. 35.

¹⁸⁰ See *e.g.* Blaskic Appeals Judgement, paras 35-36 (in the context of a referral to the Security Council).

referral.¹⁸¹ Indeed, it is for the ASP to decide on these matters, once a referral is made. The Chamber notes that, in the case of certain forms of non-cooperation, the ASP may also act *proprio motu*.¹⁸² Nonetheless, as mentioned above, the Chamber shall take into account the possible consequences and implications of the referral on the trial proceedings, and on the work of the Court, when it exercises its discretion under Article 87(7) of the Statute.

82. The Chamber notes that, for the purpose of enhancing the work of the Court, one of the primary rationales for making such a finding and a referral might be to further the proceedings in the main case, by, for example, securing compliance with the cooperation requests at issue. The ASP has also clearly acknowledged the possibility of measures being taken with a view to securing outstanding cooperation.¹⁸³ However, it is apparent that such a referral might result in further uncertainty and potential delay for the proceedings. Moreover, considering the Prosecution's concession that the evidence fell below the standard required for trial and that the possibility of obtaining the necessary evidence, even if the Revised Request was to be fully executed, is still nothing more than speculative, the Chamber is not persuaded that a referral to the ASP would facilitate a fair trial or the interests of justice. In any case, in this specific case, the Chamber does not consider it appropriate for the proceedings to be further prolonged under the current circumstances.
83. It is noted that in a separate decision issued today the Chamber has denied the Prosecution's request to adjourn the case until the Kenyan Government complies with the Revised Request and has directed the Prosecution to file a notice indicating

¹⁸¹ The Chamber notes that the relevant Bureau of the ASP has indicated that it may deploy 'political and diplomatic efforts to promote cooperation and to respond to non-cooperation' based on its 'competencies under [A]rticle 112 of the Statute', see Report of the Bureau on potential Assembly procedures relating to non-cooperation, 10th Session, 30 November 2011, [ICC-ASP/10/37](#), para. 6.

¹⁸² See e.g. Report of the Bureau on potential Assembly procedures relating to non-cooperation, 10th Session, 30 November 2011, [ICC-ASP/10/37](#), para. 7(b).

¹⁸³ See e.g. Report of the Bureau on potential Assembly procedures relating to non-cooperation, 10th Session, 30 November 2011, [ICC-ASP/10/37](#), para. 10.

either (i) its withdrawal of the charges in this case, or (ii) that the evidentiary basis has improved to a degree which would justify proceeding to trial. In that decision, the Chamber specifically found that the alleged non-compliance by the Kenyan Government in this case cannot justify an indefinite adjournment of the proceedings. Therefore, the Chamber considers the question of whether or not a referral might progress cooperation in the context of this case to be moot in the circumstances, without prejudice to a situation where the Prosecution might notify the Chamber that the evidentiary basis has improved to a degree which would enable the case to now proceed to trial. It is also without prejudice to whether a request for a finding of non-compliance and referral to the ASP may be appropriate in the context of any continuing investigations conducted in the Kenya situation, or potentially in the context of any new charges submitted following a withdrawal of the charges in the present proceedings. However, any such request would need to be dealt with by way of separate procedure before the competent chamber.

84. The Chamber also notes that a referral to the ASP under Article 87(7) of the Statute could be made regardless of whether or not there is a possibility that action by the ASP would promote compliance with the particular cooperation requests at issue. In this context, the Prosecution has indicated that the referral should be made as a 'sanction' or 'disciplinary measure'.¹⁸⁴ The Chamber acknowledges that there might be situations where referral as a disciplinary measure is warranted, and that such a referral might also indirectly enhance the work of the Court by, for example, promoting future cooperation, or cooperation more generally. Such a referral may be especially warranted when the non-cooperation at issue, and the breach of international obligations, is of a serious nature. Any request for referral on such basis would have to be carefully considered in the context of the circumstances as a whole, considering both the conduct of the party requesting the referral and that of the

¹⁸⁴ Transcript of Hearing dated 8 October 2014, ICC-01/09-02/11-T-32-ENG, page 5, lines 8-22.

relevant State. For example, referral for the purpose of sanction should not be seen as compensating for any deficiency on the part of the Prosecution in fully investigating and prosecuting the crimes under the jurisdiction of this Court. In assessing the Prosecution's request, the Chamber has had regard to the full course of proceedings including cooperation relating to both the Records Request, issued in April 2012, and the Revised Request, issued in April 2014.

85. First, the Chamber stresses that, while cooperation by States Parties is crucial for the functioning of this Court, the primary responsibility for investigation lies with the Prosecution.¹⁸⁵ It is for the Prosecution to decide the lines of investigation and gather relevant evidence. One of the tools at the disposal of the Prosecution is cooperation requests under Article 93(1) of the Statute. In making such requests, the Prosecution has to be sure about the nature and purpose of the specific evidence it seeks, including, where applicable, its relationship with other evidence. The Prosecution is also expected to follow up its request expeditiously, thoroughly and meaningfully. As mentioned in the Decision of 31 March 2014,¹⁸⁶ and as admitted by the Prosecution,¹⁸⁷ even if an initial request is drafted in rather a broad way, the Prosecution, in the following consultation with the requested State, should make *bona fide* efforts to clarify its intent.

86. In this case, as mentioned in the Decision of 31 March 2014, the Chamber cannot ignore the delay by the Prosecution in meaningfully following up on the original Records Request.¹⁸⁸ The Chamber had noted serious concerns regarding the timeliness and thoroughness of Prosecution investigations in this case.¹⁸⁹ This delay in pursuing investigations is particularly aggravated in the circumstances where,

¹⁸⁵ See Decision of 31 March 2014, ICC-01/09-02/11-908, para. 88.

¹⁸⁶ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 83.

¹⁸⁷ ICC-01/09-02/11-T-28-ENG, page 89, lines 8-18.

¹⁸⁸ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 83 citing to ICC-01/09-02/11-T-28-ENG, page 103, line 23- page 104, line 5.

¹⁸⁹ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 87-88.

following the withdrawal of one witness, the Prosecution's evidence apparently fell below the standard required for trial.¹⁹⁰ In the Chamber's view, the issue of the Kenyan Government's cooperation with the Records Request should have been addressed at a much earlier stage; doing so would, to a significant degree, have mitigated the impact that the non-compliance has had on the proceedings in this case.

87. The Chamber further notes that the cooperation in relation to the Revised Request was directed to take place in an expeditious manner, under 'close oversight', and that the Chamber was to be promptly seised of any difficulties arising with respect to its execution.¹⁹¹ While, as a matter of principle and law, the Prosecution may have satisfied its obligations in respect of the cooperation request, the Chamber considers that, in light of these directions and the manner in which the cooperation subsequently evolved, the Prosecution should have taken, at an earlier point, decisive steps to resolve the difficulties.¹⁹²
88. In the Chamber's view, in the context of a cooperation request under Article 93 of the Statute, where cooperation may be a question of degree and where it was apparent to the Prosecution from an early stage that the Kenyan Government was repeatedly presenting obstacles to the execution of the request, a detailed and specific examination of the reasonableness of the positions presented by the Kenyan Government was required.¹⁹³ As indicated above, the Chamber was dissatisfied by

¹⁹⁰ Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, 19 December 2013, ICC-01/09-02/11-875, para. 15.

¹⁹¹ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 98, 100-101 and 103.

¹⁹² For example, the Chamber notes the decision not to seise the Chamber of the clear dispute regarding the specificity, relevance and necessity of the Revised Request at the time when it arose in May 2014, *see* ICC-01/09-02/11-922-Conf-Exp-AnxA, paras 12-13 (where the Prosecution stated that it was 'eventually agreed that, rather than asking the Chamber for guidance at the present time, the parties would simply note the existence of a significant difference of opinion in respect of these two paragraphs of the revised request and use the time following the meeting to consider ways in which this difference could be narrowed or overcome').

¹⁹³ It is noted that the Prosecution did send a letter to the Kenyan Government on 3 July 2014 with detailed and specific questions (ICC-01/09-02/11-940-Conf-AnxA). In a follow-up letter of 27 August 2014, the Prosecution stated, *inter alia*, that the majority of these queries had still not been responded to at that time and again addressed certain categories of material in a specific manner (ICC-01/09-02/11-940-Conf-AnxF).

the Prosecution's somewhat complaisant approach towards the explanations provided by the Kenyan Government in relation to certain of the eight categories of requested materials. It is especially so with regard to the Company Records, which provide the basis for requests for other materials. The Chamber considers that the approach adopted by the Prosecution to the cooperation was, in some respects, not reflective of a prosecutorial and investigative body effectively seeking to obtain the requested materials. If the primary objective of pursuing the cooperation request at this time was to actually obtain the requested materials, the Chamber would have expected to see a greater degree of diligence, persistence and, where necessary, flexibility on the part of the Prosecution. The Chamber does not accept that the Prosecution has no independent means of taking such an approach. It ought to be pursued both throughout the course of the cooperation and when ultimately seeking to persuade the Chamber that a finding under Article 87(7) of the Statute is warranted. In summary, considering the overall interests of justice and integrity of the proceedings, the Chamber does not consider that the requisite burden has been met.

89. The Chamber is also of the view that a referral might, in principle, be warranted when judicial measures have been exhausted. The Chamber notes, in this regard, the disagreement between the Prosecution and the Kenyan Government as to whether the cooperation is at a 'deadlock'. As mentioned above, the Chamber has determined it appropriate to take a decision on the Article 87(7) Application at this stage as it considers that allowing a further adjournment would be contrary to the interests of justice under the circumstances,¹⁹⁴ rather than because the Chamber finds there to be no possibility of further cooperation. Therefore, in terms of the seriousness of the breach of international obligations on the part of Kenyan Government, while the Chamber noted above serious concerns regarding certain aspects of the Kenyan

¹⁹⁴ See paragraph 44 above.

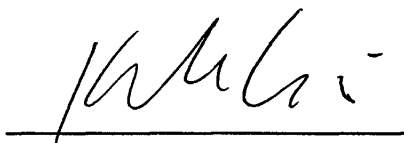
Government's approach to the cooperation, which might make the prospect of further cooperation less probable, the Chamber is also not persuaded that the circumstances warrant referral on the basis of exhaustion of judicial measures at this stage.

90. While the factors considered above do not excuse the conduct of the Kenyan Government, they have influenced the Chamber in the exercise of its discretion under Article 87(7) of the Statute. The Chamber emphasises that each application must be considered in its own particular context and, for the reasons described above, the Chamber does not consider it appropriate to make a referral of the matter to the ASP on this occasion.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Article 87(7) Application.


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



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 3 December 2014

At The Hague, The Netherlands

No. ICC-01/09-02/11

46/46

3 December 2014