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Internationale**

**International
Criminal
Court**



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No.: ICC-01/09-02/11
Date: 18 August 2014

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. UHURU MUIGAI KENYATTA

Public

Redacted Version of

**'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 dated 16 July 2014**

Source: The Government of the Republic of Kenya

No. ICC-01/09-02/11

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

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor
Mr. James Stewart
Mr. Benjamin Gumpert QC

Counsel for Uhuru Muigai Kenyatta

Mr. Steven Kay
Ms. Gillian Higgins

Legal Representatives of the Victims

Mr. Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

Office of Public Counsel for Victims

Ms. Paolina Massidda

Office of Public Counsel for Defence

State's Representatives

Mr. Githu Muigai, SC
Attorney General, 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**

Other

No. ICC-01/09-02/11

2/24

18 August 2014

I. INTRODUCTION

1. On 9 July 2014, Trial Chamber V (B) ('the Chamber') held a status conference to discuss the following issues as set out '*Scheduling order and agenda for status conference on 9 July 2014*¹:
 - a) Update from the Prosecution and the Kenyan Government on the current status of the co-operation and consultations between them;
 - b) Envisage next steps and timeline in relation to such co-operation; and
 - c) Any other matters.
2. During the *ex parte* closed session discussions before the Chamber, in which only the Prosecution and the Government of the Republic of Kenya ('the parties') were the participants, it became clear to the Chamber that there were contested co-operation issues relating to the specificity and relevance of the Prosecution's requests; and the proper scope to be covered by the Prosecution's requests as communicated in its Revised Request for assistance dated 8 April 2014 and further elaborated in its letter of 3 July 2014, that required the adjudication of the Chamber.
3. Therefore, in light of the significant points of disagreement between the parties, the Chamber requested the parties to provide it with formal written submissions covering all issues relating to relevance, necessity, specificity and scope, to enable the Chamber to decide on the disputed issues.
4. The Prosecution was ordered to file its submissions by 11 July 2014 while the Government of the Republic of Kenya was ordered to file its submissions by 16 July 2014.²

¹ ICC-01/09-02/11-929 (Public) 4 July 2014.

² Transcript of Status Conference of 9 July 2014 (Open Session), ICC-01/09-02/11-T-30-ENG, p. 37, paras. 18-20.

II. PROCEDURAL HISTORY

5. On 31 March 2014, the Chamber issued *'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'*³ ('the Decision / Chamber's Decision') in which the Chamber ordered the Prosecution to, within two weeks of the date of the decision, provide the Government of the Republic of Kenya with an updated request ('Revised Request'), based on its 24 April 2012 request ('Records Request'). The Chamber ordered that the Revised Request be tailored to reflect the items that remain of specific relevance to the charges.⁴

In particular, the Chamber directed that the Revised Request should adhere to the tripartite principles of (i) specificity, (ii) relevance and (iii) necessity that had been articulated by other Chambers of the Court as essential prerequisites for cooperation requests under Part 9 of the Rome Statute.⁵

6. The Chamber then directed that the Government of the Republic of Kenya promptly reviews and notifies the Prosecution, within two weeks of receiving the Revised Request, of any problems which would impede its execution.⁶
7. In cases where problems to implementation of particular requests were identified, the Government of the Republic of Kenya and the Prosecution were directed to engage in meaningful consultations with a view of promptly resolving the problems.⁷
8. Moreover, the Prosecution and Government of the Republic of Kenya were directed to file an update with the Chamber, on a two-monthly basis commencing 30 April 2014, detailing the progress in executing the Revised Request, or in conducting any consultations to ensure execution.⁸

³ (Public) ICC-01/09-02/11-908, 31 March 2014.

⁴ Ibid, para. 100.

⁵ Ibid, fn. 216.

⁶ Supra note 4.

⁷ Ibid.

⁸ Ibid.

9. On 8 April 2014, the Prosecution sent to the Government of the Republic of Kenya a request for assistance providing its Revised Request.⁹
10. On 10 April 2014, the Government of the Republic of Kenya sent a letter to the Prosecution in response to the Revised Request.¹⁰ The Government of the Republic of Kenya took issue with paragraph [REDACTED] of the Prosecution's Revised Request which stated in part thus :

[REDACTED]

In the Government of the Republic of Kenya's view, this statement appeared to suggest that the revised request [REDACTED]. This, in the Government of the Republic of Kenya's opinion, contradicted the directions of the Chamber set out in paragraph 100(i) of the Decision that set limits on the scope of the Revised Request.¹¹

11. Moreover, the Government of the Republic of Kenya reminded the Prosecution of the Chamber's requirement that the Revised Request adheres to the principles of specificity, relevance and necessity, which followed from an earlier note by the Chamber, at paragraph 83 of the Decision, of the broad nature of the Records Request.¹²

In this regard, the Government of the Republic of Kenya sought the Prosecution's clarification of the requests for which the assistance of the Government of the Republic of Kenya was sought in executing, that is, whether they [REDACTED].

Furthermore, the Government of the Republic of Kenya, not being a party to the proceedings before the Chamber and thus not privy to the documents on record, appealed to the Prosecution to assist it in identifying, 'the items that remain of specific relevance to the charges'¹³

⁹ [REDACTED].

¹⁰ [REDACTED] Annexed and marked 'B'.

¹¹ Ibid.

¹² Ibid.

¹³ The Chamber's Decision, para. 100(i).

12. On 11 April 2014, the Prosecution sent a letter in response to the letter of the Government of the Republic of Kenya of 10 April 2014.¹⁴ The Prosecution clarified that it was requesting the Government of the Republic of Kenya [REDACTED].

In addition, the Prosecution stated that [REDACTED].

13. On 25 April 2014, the Government of the Republic of Kenya sent a letter to the Prosecution in response to the Prosecution's letter of 11 April 2014.¹⁵ In its letter, the Government of the Republic of Kenya maintained its contention with the Prosecution's interpretation of the directions issued in the Chamber's Decision, in particular, on the exact scope of the Prosecution's request and how it related to the clear terms of the Chamber's Decision.¹⁶
14. Moreover, the Government of the Republic of Kenya noted that the Prosecution's letter of 11 April 2014 did not provide an identification of the items that remained of specific relevance to the charges as requested by the Government of the Republic of Kenya in its letter of 10 April 2014.¹⁷

Further, the Government of the Republic of Kenya, referring to previous records of proceedings where the Prosecution expressed its position [REDACTED], ascertained that, based on the Prosecution's previous position, the consequent Prosecution's Revised Request exceeded the scope of what the Prosecution had earlier referred to and that which was authorised by the Chamber's Decision.

Furthermore, the Government of the Republic of Kenya set out the need for the Prosecution to provide a more focused request tailored to the Chamber's Decision that would enable the parties to attempt to advance the process of cooperation.

- • Thereby, in view of the Prosecution's position, which the Government of the Republic of Kenya considered as being at odds with the Chamber's Decision

¹⁴ [REDACTED]. Annexed and marked 'C'.

¹⁵ [REDACTED]. Annexed and marked 'D'.

¹⁶ Ibid, p.2.

¹⁷ Ibid.

and rendered the process of cooperation on the Revised Request difficult, the Government of the Republic of Kenya proposed convening an urgent meeting between the parties to discuss the difficulties raised by the Revised Request in the hope of reaching a common position between the parties.¹⁸

15. Following correspondences between the parties on agreeable dates and logistics, the parties held a meeting on 20 and 21 May 2014 [REDACTED] to discuss the issue of concerns in the Revised Request and formulate an agreeable position on cooperation in the execution of the Revised Request.

16. On 23 May 2014, the Government of the Republic of Kenya and the Prosecution, separately filed their First Update to the Chamber providing information on the progress made through the parties consultations on the difficulties encountered in the Revised Request.

17. In its update, the Government of the Republic of Kenya informed the Chamber that during the two-day consultative meetings between the parties, some understanding had been reached on the implementation of certain items of the Prosecution's Revised Request.¹⁹ This was after the Government of the Republic of Kenya expressed its position that the Prosecution's Revised Request failed to meet the Chamber's required tripartite principles of specificity, relevance and necessity,²⁰ and the Prosecution agreed to engage the Government of the Republic of Kenya by agreeing to the reframing of certain aspects of the items of request contained in the Revised Request.²¹

18. The parties agreed on the implementation of three of the eight items on the Revised request, that is provision of bank, telephone and motor vehicle records, as follows :

- a) Bank records – This was the request at paragraph 17(5) of the Revised Request. The parties tailored the nature of assistance and agreed that the Government of the Republic of Kenya would undertake to identify

¹⁸ Supra note 15, p. 5.

¹⁹ *Corrigendum of Confidential, ex parte, Office of the Prosecutor and Government of Kenya Only, 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, 29 May 2014.*

²⁰ Ibid, para. 3.

²¹ Supra note 19, para. 4.

the bank accounts, providing the relevant bank name and account numbers, which were held by Mr. Uhuru Kenyatta in December 2007, January and February 2008. In addition, the Government of the Republic of Kenya would provide copies of statements of those identified accounts for the agreed upon 3 months' period;

b) Telephone records – This was the request at paragraph 17(7) of the Revised Request. The parties tailored the nature of assistance and agreed that the Government of the Republic of Kenya would use its best endeavours to identify the telephone numbers used by Mr. Uhuru Kenyatta in December 2007, January and February 2008; and provide all data records for those telephone numbers for the stated three months' period. This request also included the provision of M-Pesa records of Mr. Uhuru Kenyatta for the 3 months' period; and

c) Motor Vehicle records – This was the request at paragraph 17(4) of the Revised Request. The parties tailored the nature of assistance and agreed that the Government of the Republic of Kenya would use its best endeavours to provide records of all motor vehicles registered to Mr. Uhuru Kenyatta in December 2007, January and February 2008.

19. The parties agreed that records obtained relating to the agreed upon 3 requests would be transmitted to the Prosecution by 23 June 2014.

20. However, agreement was not reached on the implementation of the remaining five items of the Revised Request and the parties agreed to hold future meetings to discuss the implementation of these outstanding requests, which are as follows:

a) Companies' and other Corporates' records – At paragraph 17(1) of the Revised Request, the Prosecution requested the Government of the Republic of Kenya to identify and provide copies (in an electronic format) of the records relating to companies, businesses, partnerships or trusts in which Uhuru Muigai Kenyatta had 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;

- b) Land and Real Estate records – At paragraph 17(2) of the Revised Request, the Prosecution requested the Government of the Republic of Kenya to identify land and real property registered as belonging to Uhuru Muigai Kenyatta either personally or through third parties or to any company or business identified under paragraph (1) above, which was transferred to any other person or entity between 1 June 2007 and 15 December 2010;
- c) Income and Valued Added Tax Returns records - At paragraph 17(3) of the Revised Request, the Prosecution requested the Government of the Republic of Kenya to identify and provide (in an electronic format) the Income Tax and Value Added Tax returns submitted to tax authorities by Uhuru Muigai Kenyatta and any corporate entities identified under paragraph 17 (1) between 1 June 2007 and 15 December 2010;
- d) Foreign Exchange records – At paragraph 17(6) of the Revised Request, the Prosecution requested the Government of the Republic of Kenya to identify and provide all documents (in an electronic format) relating to transactions by Uhuru Muigai Kenyatta and any corporate entities identified under paragraph 17(1) at foreign exchange institutions between 1 June 2007 and 15 December 2010; and
- e) Security and Intelligence records – At paragraph 17(8) of the Revised Request, the Prosecution requested the Government of the Republic of Kenya to identify and provide copies (in an electronic format) of any information held by the security and intelligence services of Kenya concerning the activities of Uhuru Muigai Kenyatta and any corporate entities identified under paragraph 17(1) above between 1 June 2007 and 15 December 2010.

21. Likewise, the Prosecution filed its First Update providing an account of the consultative meetings between the parties, as well as setting out the three

agreed upon requests and their scope of implementation; and stated the parties intended to hold future meetings to discuss the implementation of the requests that remained outstanding.²²

22. In compliance with the agreement reached [REDACTED], under the cover of a letter dated 19 June 2014, the Government of the Republic of Kenya sent to the Prosecution, motor vehicle records relating to Mr. Uhuru Kenyatta covering the scope agreed upon by the Parties.²³

23. In addition, under the cover of a letter dated 23 June 2014, the Government of the Republic of Kenya sent to the Prosecution bank account records relating to Mr. Uhuru Muigai Kenyatta [REDACTED].²⁴

24. Moreover, under the above-stated cover letter dated 23 June 2014, the Government of the Republic of Kenya, communicated to the Prosecution the difficulty [REDACTED] in obtaining the requested telephone records. [REDACTED], the same could not be executed due to its lack of pertinent information. [REDACTED].²⁵

25. Although no agreement had been reached on the modalities of implementation of the outstanding five requests contained in the Revised Request, the Government of the Republic of Kenya, out of good faith and in the spirit of cooperation, proceeded to implement these outstanding requests by sending out letters requesting assistance to the relevant Kenyan authorities. The Government of the Republic of Kenya obtained the following responses which it conveyed to the Prosecution:

a) Request for Companies' and other Corporates' records - The Government of the Republic of Kenya was unable to obtain the

²² Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya originally due on 30 April 2014, (Confidential, with EX PARTE Annex A, only available to the Prosecution, Registry and Government of Kenya) ICC-01/09-02/11-922-Conf, 23 May 2014; and Confidential, Ex Parte, Annex A, ICC-01/09-02/11-922-Conf-Exp-AnxA, 23 May 2014.

²³ [REDACTED]. Annexed and marked 'E'.

²⁴ [REDACTED]. Annexed and marked 'F'.

²⁵ [REDACTED]. Annexed and marked 'G'.

requested records, [REDACTED] that it required the names or registration numbers of the entities of the companies whose records were sought to enable the search of the records requested by the Prosecution.²⁶

b) Land and Real Estate Records - The Government of the Republic of Kenya was unable to obtain land records relating to Mr. Uhuru Kenyatta [REDACTED]. The explanation for this failure was conveyed to the Prosecution [REDACTED]. [REDACTED].²⁷

c) Income and Valued Added Tax Returns records - The Government of the Republic of Kenya sent to the Prosecution records relating to Mr. Uhuru Kenyatta's income tax returns for the period between December 2007 and February 2008 that it had received from the Kenya Revenue Authority (KRA). These records were sent, in both original hard and electronic copies, to the Prosecution under the above-stated cover letter of the Attorney General dated 23 June 2014. [REDACTED].²⁸

However, in relation to the request for value added tax (VAT) returns records, the KRA confirmed that it did not have such records [REDACTED].

d) Foreign Exchange records - Regarding documents relating to transactions at foreign exchange institutions, [REDACTED] the same cannot be executed without identification of the said foreign exchange institutions as there are numerous foreign exchange institutions in Kenya thus making it impossible to obtain the sought records without specifications of the relevant institutions from which the records ought to be obtained.

• • e) Security and Intelligence records - With reference to records of information held by the security and intelligence services of Kenya,

²⁶ [REDACTED]. Annexed and marked 'H'.

²⁷ [REDACTED]. Annexed and marked 'I'.

²⁸ [REDACTED]. Annexed and marked 'J'.

[REDACTED] did not hold any information on the activities of Mr. Uhuru Kenyatta for the relevant period under consideration. [REDACTED].²⁹

26. On 30 June 2014, the Government of the Republic of Kenya filed its bi-monthly update to the Chamber as required by the Chamber's Decision.³⁰ In this bi-monthly update, the Government of the Republic of Kenya elaborately provided its efforts of cooperation subsequent to the parties two-day consultative meeting of 20 and 21 May 2014, which has been captured herein above from paragraphs 17 to 24.

27. Similarly, on 30 June 2014, the Office of the Prosecutor filed its bi-monthly update to the Chamber.³¹ In its filing, the Prosecution admitted to having received several documents following its meeting with the Government of the Republic of Kenya of 20 and 21 May 2014, and that it was in the process of analysing them, and assessing them for disclosure. The Prosecution stated that it expected to be able to conclude and summarise the analysis in time for the status conference hearing scheduled for 9 July 2014.

28. On 3 July 2014, the Prosecution sent a letter to the Government of the Republic of Kenya acknowledging receipt of the documents sent under the cover letter dated 23 June 2014 and also raising supplementary questions relating to the documents it received under the said cover letter on all the eight requests for assistance contained in the Revised Request.³²

29. The Government of the Republic of Kenya conveyed these questions to the relevant Kenyan authorities for their action, [REDACTED].

30. [REDACTED].

²⁹ [REDACTED]. Annexed and marked 'K'.

³⁰ *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* (Confidential, ex parte, Office of the Prosecutor and Government of Kenya only) ICC-01/09-02/11-928, 30 June 2014.

³¹ *Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya due on 30 June 2014* (Public, with EX PARTE Annex A, available to the Prosecution and The Government of Kenya only) ICC-01/09-02/11-927, 30 June 2014.

³² Letter from The Office of the Prosecutor [REDACTED]. Annexed and marked 'L'.

[REDACTED],³³ [REDACTED].

31. Moreover, the parties met on 7 and 8 July 2014 to consult further on the outstanding issues of cooperation on implementation of the Revised Request as well as, pursuant to the Chamber's *'Scheduling order and agenda for status conference on 9 July 2014'*³⁴ to develop a document identifying the issues they wished to raise in the *ex parte* and public sessions, respectively, of the status conference of 9 July 2014.

32. Thereby, the parties developed *'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'*³⁵ ('Joint Submissions'). The Joint Submissions was largely agreed upon between the parties, however, instances where they took divergent views were clearly indicated in the Joint Submissions.

III. SUBMISSIONS ON THE SCOPE AND PROPRIETY OF PROSECUTION'S REQUESTS IN TERMS OF RELEVANCE, SPECIFICITY AND NECESSITY

33. Before providing an examination of the propriety of the Prosecution's requests in terms of relevance, specificity and necessity, the Government of the Republic of Kenya will provide an analysis of these principles guiding the formulation of requests for assistance for a clear demonstration of the extent to which the Prosecution requests fail to meet the standards set by these principles.

34. The tripartite principles of specificity, relevance and necessity are not new concepts, as they are provided for in Article 57(3)(b) of the Statute as read with Rule 116 of the ICC Rules of Procedure and Evidence ('the Rules'). Although initially ICC Chambers invoked these principles in order to safe guard against 'fishing expeditions' in relation to defence requests for

³³ [REDACTED]. Annexed and marked 'M'.

³⁴ (Public) ICC-01/09-02/11-929, 4 July 2014, para. 3.

³⁵ (Public) With EX PARTE Annex A, available to the Prosecution and the Government of Kenya only, ICC-01/09-02/11-930, 8 July 2014.

assistance made under Article 57(3)(b) of the Statute,³⁶ they consequently invoked these principles in relation to Prosecution requests as well to avoid the same mischief of 'fishing expeditions'.³⁷

35. These tripartite principles relate to the quality of evidence that a party, in this case the Prosecution, can collect and ought to produce in proving its case beyond a reasonable doubt. In the Chamber's Decision, the Chamber showed concern that, after almost 5 years of investigations and the case nearing trial, the Prosecution had not yet presented evidence that would be able to prove its case beyond a reasonable.³⁸

36. The legal terms of specificity, relevance and necessity are terms of art with very clear meaning.

'Relevance' is a derivative form of 'relevancy' which is 'a quality of evidence' which means 'that which conduces to the proof of a pertinent hypothesis' and a pertinent hypothesis is one which 'if sustained, would logically influence the issue'.³⁹

'Specificity' is a derivative form of 'specific' which means 'having a certain form or designation; observing a certain form; particular; precise'.⁴⁰

'Necessity' is a derivative form of necessary which imports 'that one thing is convenient or useful or essential to another'.⁴¹

37. The Government of the Republic of Kenya submits that the Prosecution's requests failed to satisfy the requirements set by the Chamber, that the Prosecution updates its request to reflect the items that remain of specific

³⁶ G. Sluiter and others, *International Criminal Procedure: Principles and Rules*, (Oxford University Press, 2013) pp. 293 – 294; Situation in Darfur, Sudan, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, (Public) ICC-02/05-03/09-169, 1 July 2011, paras. 16-17.

³⁷ G. Sluiter and others, *International Criminal Procedure: Principles and Rules*, (Oxford University Press, 2013) pp. 293 – 294.

³⁸ The Chamber's Decision, paras. 80 - 84.

³⁹ Black's Law Dictionary (First Edition).

⁴⁰ Ibid.

⁴¹ Ibid.

relevance to the charges; and in so doing, the Revised Request adheres to the principles of specificity, relevance and necessity.⁴²

38. The Chamber issued the requirements of the Revised Request after noting the broad nature of the Records Request made in April 2012. In particular, the Chamber stated thus:

'Moreover, the Chamber has already noted the rather broad nature of the Records Request. While a request of such broadness might be justified in the context of preliminary investigations - or, as submitted by the Prosecution, as a starting point for consultations - it exceeds the permissible scope of investigations at this stage of proceedings...'⁴³

39. However, it appears that the Prosecution did not heed the Chamber's advice as to formulation of its Revised Request, since the eventual request dated 8 April 2014, which the Prosecution alleged was a Revised Request prepared in accordance to the Chamber's Decision; appeared almost entirely similar to the Records Request of April 2012. The Revised Request was still as broad and unfocussed in scope as the Records Request; and failed to identify which items, from the Records Request, remained of specific relevance to the charges at this point in the proceedings, since all the items in the Records Request were repeated, almost in their entirety, in the Revised Request.⁴⁴

40. Furthermore, the requests in the Prosecution's Revised Request must be read in the light of the Chamber's directions that the Revised Request complies with the tripartite principles of specificity, relevance and necessity.⁴⁵

41. The Government of the Republic of Kenya will herein below demonstrate the limitations of each of the eight items of the Prosecution's Revised Request in meeting the Chamber's tripartite principles for propriety of requests, which

⁴² Supra note 13.

⁴³ The Chamber's Decision, para. 83.

⁴⁴ Records Request (Request for Assistance referenced [REDACTED] dated 24 April 2012) annexed and marked 'N'; Revised Request (Request for Assistance referenced [REDACTED] dated 8 April 2014) annexed and marked 'O'.

⁴⁵ Supra note 13.

have made cooperation on the implementation of the Revised Request a difficult undertaking.

A. Request for Companies' and other Corporate Entities' Records

42. In its Revised Request, the Prosecution asked the Government of the Republic of Kenya to identify and provide records relating to companies and other corporate institutions in which Mr Uhuru Kenyatta had an ownership interest, 'directly or indirectly, whether as shareholder, ...officer of the company,... trustee, beneficiary or otherwise, between 1 June 2007 and 15 December 2010.'⁴⁶

43. This item of the Revised Request must be seen in the light to the '*Decision on the Implementation of the request to freeze assets*'⁴⁷ ('Decision on Asset Freezing Request') which suspended the Pre-Trial Chamber '*Decision Ordering the Registrar to prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*'⁴⁸ pursuant to the Prosecution's acknowledgement that it had 'insufficient evidence to secure a conviction at trial.'⁴⁹

The Decision on Asset Freezing Request demonstrates that there is no element of 'necessity' that can be read into the request for identification and provision of companies and corporate records in which Mr. Uhuru Kenyatta has interests.

44. In addition, the Government of the Republic of Kenya has made clear to the Prosecution, as previously stated in paragraph 30 above, the difficulties it experiences in executing this request for companies' records. [REDACTED]. It is impractical for the Prosecution to expect a company search to be done using the name of an individual.

⁴⁶ Revised Request, para. 17(1).

⁴⁷ (Confidential) ICC-01/09-02/11-931-Conf, 8 July 2014.

⁴⁸ (Confidential) ICC-01/09-02/11-42-Conf, 5 April 2011.

⁴⁹ Ibid, para. 29.

45. In this regard the Government of the Republic of Kenya urges the Chamber to consider the principle of legal personality of companies which gives a company an identity separate from that of its directors and shareholders and requires that a company have its own identifiable name and address which are used to identify a company. In Kenya's Companies Registry, companies are registered by their names, addresses and registration numbers, which are the search items that are required of anyone carrying out a search of a company's records and other information. Thereby, in the absence of the Prosecution specifically identifying specific companies, the Companies Registry in Kenya cannot conduct a search using the name of an individual.
46. Thus, the Government of the Republic of Kenya submits that this item of request is too broad, unspecific and incapable of execution in its current formulation.
47. As such, in keeping with the conditions attaching to the provision of assistance and cooperation under **Article 93 (1)** of the Rome Statute, which requires that a State Party cooperates under procedures of its national law, it would only be prudent for the Prosecution, to provide the Government of the Republic of Kenya with the specific names and registration numbers of the companies whose records it requires.
48. Moreover, in the absence of specific names of companies and corporate entities associated directly or indirectly with Mr. Uhuru Kenyatta, the Government of the Republic of Kenya will not be able to identify these companies and entities that are said to be associated with Mr. Uhuru Kenyatta.

B. Request for Land and Real Property Records

49. In its Revised Request, the Prosecution requested the Government of the Republic of Kenya to 'identify land and real property registered as belonging' to Mr. Uhuru Kenyatta 'either personally or through third parties' which was transferred to any other person or entity between 1 June 2007 and 15 December 2010'.⁵⁰

⁵⁰ Revised Request, para. 17(2).

50. The Government of the Republic of Kenya submits that the request to identify land belonging to Mr. Uhuru Muigai Kenyatta through third parties is vague, unspecific, irrelevant and unnecessary as it has no way of accurately determining who the 'third parties' are.
51. Moreover, in Kenya land is registered by reference to a land reference number specific to each land district. In the absence of a land reference number, it is almost impossible to determine the content of each land file, as the same are maintained manually.
52. Further, it is impossible for the Government of the Republic of Kenya to provide records of land held by unidentified individuals, that is, the third parties, where the Prosecution had not provided land titles held by the third parties who should also be identified.
53. Unless the Prosecution supplies evidence of land transfers relating to specific individuals in respect of specific land titles, it is impossible to find that evidence in Kenya's land registry.
54. A specific, thorough and official search of land in Kenya, whose results are guaranteed by the Government of the Republic of Kenya, would require that land reference numbers and copies of titles be provided.

C. Request for Income Tax and Value Added Tax (VAT) Returns Records

55. In its Revised Request, the Prosecution requested the Government of the Republic of Kenya to 'identify and provide the income tax and VAT returns submitted to tax authorities by Mr. Uhuru Kenyatta and any corporate entities' identified under the first item of the request, for the period between 1 June 2007 and 15 December 2010'.⁵¹
56. Under this item of request, the Government of the Republic of Kenya has provided all documentation in this regard that could legitimately be provided

⁵¹ Revised Request, para. 17(3)

under Kenya law, that is, the income tax records forwarded to the Prosecution under the Attorney General's cover letter of 23 June 2014.

57. The further request that the Government of the Republic of Kenya should provide similar information relating to any corporate entities associated with Mr. Uhuru Kenyatta is unreasonable, unspecific and incapable of fulfilment. This is precisely because the Prosecution has failed to provide specific information on what corporate entities they refer to; and for the reasons set out in paragraph 45 above, there does not exist in Kenya a system of ascertaining such information. The Government of the Republic of Kenya does not know these third parties associated with Mr. Uhuru Kenyatta, and thus it cannot provide their information. It is the duty of party seeking mutual legal assistance to provide specific information.

This request is incapable of compliance for want of specificity.

58. Although the Government of the Republic of Kenya provided all that it could obtain based on the scarce and unspecific information provided by the Prosecution, the Prosecution stated that the information provided was not what it sought. If the Prosecution request had been specific and provided the relevance and necessity of the information it sought, the Prosecution with what it sought for; and the Government of the Republic of Kenya would not have expended time on now what appears to have been a wild goose chase.

D. Request for Motor Vehicle Records

59. In its Revised Request, the Prosecution requested the Government of the Republic of Kenya to 'identify and provide records ... relating to any vehicle registered to, owned by or regularly used by' Mr. Uhuru Kenyatta or 'to any corporate entities identified' under the first item of request.⁵²

60. During the two-day consultative meeting in London the parties agreed on the modification of this request, at the insistence of the Government of the Republic of Kenya, as in its formulation in the Revised Request, it offended the principle of relevance and specificity; and was too broad in terms of the relevant time period covered. The parties thus agreed that the Prosecution be

⁵² Revised Request, para. 17(4).

furnished with only Mr. Uhuru Kenyatta's motor vehicle records relating to the period between December 2007 and February 2008.

61. As pointed out above, the Government of the Republic of Kenya furnished the Prosecution that were identified by its relevant authority as being registered to Mr. Uhuru Kenyatta. However, in its letter of 3 July 2014, the Prosecution required that it be provided also with the motor vehicle records registered to corporate entities associated with Mr. Uhuru Kenyatta.
62. The further request for motor vehicles relating to third parties, that is corporate entities associated with Mr. Uhuru Kenyatta, is not specific and it is incapable of compliance because the Government of the Republic of Kenya does not have the mechanism of determining entities associated with Mr. Uhuru Kenyatta. This request is incapable of compliance for want of specificity.
63. Should the Prosecution be in possession of specific information relating to motor vehicles owned by specific corporate entities associated with Mr. Uhuru Kenyatta the Government of the republic of Kenya will be willing to provide these records. If the Prosecution has specific entities associated with Mr. Uhuru Kenyatta and if it knows that these entities own motor vehicles, then it can transmit its request for the search of the motor vehicle records of these entities for implementation.

E. Request for Bank Accounts' Records

64. In its Revised Request, the Prosecution requested the Government of the Republic of Kenya to 'identify any current accounts, savings accounts or other accounts, whether at banks or other financial institutions' held by Mr. Uhuru Kenyatta 'personally or through third parties or by any corporate entities identified' under the first item of the request.⁵³
65. During the two-day consultative meeting [REDACTED] the parties agreed on the modification of this request, as in its formulation in the Revised Request, it offended the principle of relevance and specificity; and was too broad in terms of the relevant time period covered. It was agreed that the Prosecution would

⁵³ Revised Request, para. 17(5).

be furnished with bank account records relating to Mr. Uhuru Muigai Kenyatta only for the period between December 2007 and February 2008. Nonetheless, the prosecution retained its right to revert back to the request as formulated in the Revised Request.

66. [REDACTED].

67. The Government of the Republic of Kenya submits that the scope of investigations and assistance the Prosecution requests for at this time, when the trial of the case is drawing nigh, is too broad and unspecific and has not been demonstrated to be relevant to the case.

Moreover, the request for bank records relating to third parties, as formulated in the Revised Request, is vague, unspecific and incapable of execution. At this stage of proceedings the Prosecution ought to have done thorough investigations and determined who the third parties are, and thereby formulate a focussed and specific request for assistance.

F. Request for Foreign Exchange Transactions Records

68. In its Revised Request, the Prosecution requested the Government of the Republic of Kenya to 'identify and provide all documents ... relating to transactions by' Mr. Uhuru Kenyatta 'and any corporate entities identified' under the first item of request 'at foreign exchange institutions between 1 June 2007 and 15 December 2010'⁵⁴

69. It is the Government of the Republic of Kenya's submission that this request is incapable of execution in its current form, since, as stated above, there is no way of knowing which foreign exchange institutions, if any, Mr. Kenyatta visited during this time period. There are several foreign exchange institutions in Kenya, and as the Prosecution was advised, it ought to provide the specific names of the foreign exchange institutions which Mr. Kenyatta visited within the relevant time period from which the Government of the Republic of Kenya would obtain the information requested by the Prosecution.

⁵⁴ Revised request, para. 17(6).

70. Moreover, the request for foreign exchange records relating to corporate entities associated with Mr. Kenyatta is too broad and unnecessary as at this time the Prosecution ought to know the corporate entities, and particularly individuals associated with the entities, that carried out the alleged foreign exchange transactions.

G. Request for Telephone Records

71. In its Revised Request, the Prosecution requested the Government of the Republic of Kenya to 'identify all telephone numbers ascribed to, used by, or associated with' Mr. Uhuru Kenyatta 'and to provide copies of the complete call data records ... together with any financial details held by the service provider(s) and any financial information regarding the usage of M-PESA mobile cash transfer system between 1 June 2007 and 15 December 2010'⁵⁵
72. During the two-day consultative meeting in London the parties agreed on the modification of this request, as in its formulation in the Revised Request, it offended the principle of relevance and specificity and too broad. As such the parties agreed that the Prosecution would be provided with telephone records relating to Mr. Uhuru Kenyatta only for the period between December 2007 and February 2008. However, the Prosecution retained its right to revert to the request as formulated in the Revised Request.
73. As stated above, the Government of the republic of Kenya, under its cover letter dated 23 June 2014, [REDACTED] explained that the records the Prosecution sought could not be provided without the particular phone numbers whose records were sought being provided to enable a search. The reason provided for this was that during the relevant period of time, Kenya did not have in place a regime for registration of mobile phone service subscribers.
74. The Government of the Republic of Kenya submits that not only is the Prosecution's request broad and unspecific, it was also not made in good faith since as it later emerged, the Defence and the Prosecution had earlier been jointly involved in serious investigations on the sought telephone records in Kenya, [REDACTED]. The Prosecution, as it would now appear deliberately

⁵⁵ Revised Request, para. 17(7).

decided to withhold this information from the Government of the Republic of Kenya and tried to 'use' it for its own undisclosed interests, most likely totally unrelated to the proceedings at hand.

H. Request for Security and Intelligence Information Records

75. In its Revised Request, the Prosecution requested the Government of the Republic of Kenya to 'identify and provide copies ... of any information held by the security and intelligence services of Kenya concerning activities of' Mr. Uhuru Kenyatta 'and any corporate entities identified' under the first item of request 'between 1 June 2007 and 15 December 2010'.⁵⁶
76. As stated above, the Government of the Republic of Kenya [REDACTED] did not hold such records as Mr. Uhuru Kenyatta was not a subject of investigations during the relevant time.
77. The Government of the Republic of Kenya submits that it is absurd for the Prosecution to require the Government of the Republic of Kenya to search for intelligence records of entities whose identities it has not been provided with, nor made aware of the relevance of the records of these unidentified entities. In its current formulation, the request is vague and incapable of execution.
78. Additionally, it is trite law that any person seeking mutual legal assistance bears the burden of providing specific information capable of compliance.⁵⁷ Thereby, the request of the Government of the Republic of Kenya that the Prosecution's request be specific enough, particularly in light of the stage of proceedings, is not at all onerous or an attempt at frustrating cooperation, but is instead aimed at ensuring efficient implementation of the Prosecution's requests.
79. In this regard, the Government of the Republic of Kenya cites its request to the Prosecution, that remains unaddressed to date, contained in its letter of 10

⁵⁶ Revised Request, para. 17(8).

⁵⁷ For example, under Kenya's mutual legal assistance law as provided in the Mutual Legal Assistance Act, No. 36 of 2011 ('the Act'), in particular at Section 9 of the Act, a party requesting assistance from the Republic of Kenya is required to provide the specifics of the requested assistance.

April 2014 and repeated in the letter of 25 April 2014, for the Prosecution to identify 'the items that remain of specific relevance'⁵⁸ to the charges.

IV. RELIEF REQUESTED

80. The Government of the Republic of Kenya respectfully requests that the Chamber takes note of all the efforts of cooperation and good faith demonstrated by it; the insurmountable task the Prosecution has given to the Government of the Republic of Kenya of implementing broad and ambiguous request; and order that the Prosecution complies with the Chamber's requirements of specificity, relevance and necessity.

81. In addition, the Government of the Republic of Kenya prays that the Chamber [REDACTED] take note of the parties consultations attempts aimed at implementing the items of request in the Revised Request; and the stalemate that has resulted owing to the fact that the requests as formulated in the Revised Request cannot be implemented without violating Kenya's national procedures for cooperation; and that the Chamber pronounces itself on Article 93(3) of the Statute and order that the Revised Request be modified accordingly.

Respectfully Submitted,

Githu Muigai, SC
Attorney General of the Republic of Kenya

Dated 18 August 2014
At Nairobi, Kenya

⁵⁸ Supra note 13.