

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **6 May 2013**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Public Document

**Victims' Response to the Government of Kenya's Submissions on the Status of
Cooperation with the International Criminal Court**

Source: Legal Representative of the Victims

Document 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
Ms Adesola Adeboyejo

Counsel for the Defence

Mr Steven Kay
Ms Gillian Higgins

Legal Representative of the Victims

Mr Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Caroline Walter

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

States Representative

Mr Githu Muigai, SC
Attorney General, Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

1. In accordance with the Trial Chamber's "Decision on the Government of Kenya's application for leave to file observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence" of 24 April 2013,¹ the Legal Representative of the Victims ("Legal Representative") respectfully submits his observations on the submissions of the Government of the Republic of Kenya ("Government") on the Status of Cooperation with the International Criminal Court ("Government Submissions").²

Introduction

2. The Government's submissions on the steps it has taken to "complement its cooperation with the Court"³ are disingenuous, and the steps it identifies fall far short of genuine complementarity. Those at the highest levels of responsibility for the crimes committed during the 2007/2008 post-election violence ("PEV") enjoy total impunity in Kenya. There have been very few prosecutions at *any* level of the perpetrators of the thousands of murders, beatings, rapes, deportations and associated crimes committed during that period. Reform of the police has not yet changed attitudes on the ground. New institutions are egregiously underfunded (the Witness Protection Agency), not yet in operation (the International Crimes Division), or, over five years after the PEV, have yet to show any genuine intent to properly prosecute those most responsible for PEV crimes (the Office of the Director of Public Prosecutions and the Multi Agency Task Force). The absence in the Government Submissions of any reference to investigations in Kenya of "those at the highest levels" is in striking contrast to the repeated references to such investigations in the Government's submissions of March 2011 to the Pre-Trial Chamber.
3. The Government's claims regarding the assistance it has provided to internally displaced persons ("IDPs") are inconsistent with the findings of Kenya's own parliamentary committee on IDPs, the UN Special Rapporteur on IDPs, and domestic and international human rights bodies. The thousands of victims of this case, for the most part, live in conditions of desperate poverty, have received next to

¹ ICC-01/09-02/11-725.

² ICC-01/09-02/11-713.

³ Government Submissions, para. 37.

no assistance from the Government, and doubt that they will ever see true justice in Kenyan courts for the horrific crimes committed against them.

The Government of Kenya's co-operation generally

4. The Government has submitted that "it has fully provided co-operation, support and assistance to the Court in accordance with the Rome Statute"⁴ and "has complied with its obligations under the Rome Statute in good faith and in a practical and affective manner".⁵
5. As a preliminary matter, these assertions appear to be inconsistent with the Government's failure to arrest Omar Al Bashir when he visited Kenya on 27 August 2010, in violation of United Nations Security Council Resolution 1593 (2005) and Article 87 of the Statute of the International Criminal Court ("Statute"). Pre-Trial Chamber I notified the Security Council and the Assembly of States Parties on the day of the visit to Kenya.⁶ Pre-Trial Chamber I later reminded Kenya of its obligation to arrest Omar Al Bashir should he return to Kenya, noting that "Omar Al Bashir was previously present on the territory of the Republic of Kenya and that this country, although under the obligation to do so, failed to enforce the Warrants of arrest".⁷
6. The Government's unambiguous declaration that it is "fully committed to cooperate with the ICC in fulfilment of its international obligations"⁸ is inconsistent with recent statements by the Accused, who is now Head of Government.
7. The Accused is reported to have said on 30 January 2013, during the recent presidential election campaign: "You should trust us with your votes because this would be an endorsement to our leadership and a vote of no confidence to the Court

⁴ Government Submissions, para. 7.

⁵ Government Submissions, para. 23.

⁶ ICC-02/05-01/09, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, ICC-02/05-01/09-107, 27 August 2010.

⁷ ICC-02/05-01/09, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision requesting observations from the Republic of Kenya, ICC-02/05-01/09-117, 25 October 2010, p. 4.

⁸ Government Submissions, para. 36.

itself.”⁹ For his part, Mr Ruto was reported to have said that the presidential election “will be a direct referendum on Uhuru and me and The Hague issue.”¹⁰

8. These comments cast doubt on the sincerity of the declared wish of the Accused to co-operate with the Court, doubt which has not been erased by more recent statements. In a speech on 9 March 2013, after the release of the presidential election results, the Accused said:

To the nations of the world I give you my assurances that [...] we recognize and accept our international obligations and we will continue to co-operate with all nations and international institutions – in line with those obligations. *However we also expect that the international community will respect our sovereignty and the democratic will of the people of Kenya.*¹¹

9. Neither the Accused nor the Government of Kenya has explained what “the democratic will of the people of Kenya” means in this context, and whether the Government considers that it constitutes a basis for reduction of Kenya’s co-operation with the ICC.

10. In his inauguration speech on 9 April 2013, the day after the filing of the Government Submissions, the Accused said:

I assure you again that under my leadership, Kenya will strive to uphold our international obligations, *so long as these are founded on the well-established principles of mutual respect and reciprocity.* Central to our continued contribution to the international community, will be the understanding that the world is made up of many countries, cultures, political experiences and world-views. *We must remember that no one country or group of countries should have control or monopoly on international institutions or the interpretation of international treaties.*¹²

11. Given that the Accused wields enormous formal power and informal influence as Head of State and Head of Government, and is constitutionally required to “ensure that the international obligations of the Republic are fulfilled through the actions of

⁹ See ‘ICC will not affect my regime, says Uhuru’, *The Daily Nation*: <http://elections.nation.co.ke/news/ICC-will-not-affect-my-regime-says-Uhuru/-/1631868/1680382/-/etfqkn/-/index.html>. A later article, also published in *The Daily Nation*, records his words as follows: ‘Mr Kenyatta insisted that a vote for him and Mr Ruto “would be an endorsement of our leadership abilities and a vote of no confidence in the ICC”’. See ‘Uhuru allays fears of power vacuum over Hague trial’, *The Daily Nation*: <http://elections.nation.co.ke/news/Uhuru-allays-fears-of-power-vacuum-over-Hague-trial/-/1631868/1681156/-/105069lz/-/index.html>

¹⁰ See ‘Uhuru, Ruto for joint ticket’, *The Daily Nation*: <http://www.nation.co.ke/News/politics/Uhuru-Ruto-for-joint-ticket/-/1064/1538366/-/py51qfz/-/index.html>

¹¹ Emphasis added. The text of the speech has been reproduced at: <http://www.capitalfm.co.ke/eblog/2013/03/09/speech-by-president-elect-uhuru-kenyatta/>

¹² Emphasis added. The text of the speech has been reproduced at: <http://www.capitalfm.co.ke/eblog/2013/04/09/president-kenyattas-inauguration-speech/>

the relevant Cabinet Secretaries”,¹³ the Trial Chamber should invite him to explain the nature of the conditionality implied by the italicized words above, and whether it affects his view of Kenya’s obligation to co-operate with the Court.

12. The Court is now reliant upon the co-operation of a Government headed by the Accused: the potential for continued obstruction of access to relevant evidence is obvious. If the Trial Chamber is deprived at trial of relevant evidence which is available in Kenya, it should make full use of its powers to order the production of additional evidence.¹⁴ It should also hold the Accused, as Head of Government¹⁵, accountable for any failure by the Government to fully, sincerely and promptly comply with its obligations under the Statute.

The ongoing failure to properly investigate and prosecute PEV cases

13. The Government refers, in the context of discussing steps it has taken to ensure complementarity, to the formation of a Multi-Agency Task Force (“Task Force”) “whose mandate includes, *inter alia*; reviewing, re-evaluating and re-examining all Post-Election Violence pending investigation, pending trial and concluded cases”.¹⁶ The Government did not mention that the Task Force’s mandate also includes: “... recommend on how all the post election violence cases can be expeditiously disposed off; Advice and supervise and guide any investigations and prosecutions being undertaken in relation to the Post-Election Violence”.¹⁷
14. The Task Force has not yet released any public reports on its work, nor any indication of its methodology or the timeframe within which it will release its recommendations (if any) for prosecution. It is thus difficult to assess the depth and quality of its work. So far, concerns expressed by human rights groups upon the

¹³ Constitution of Kenya 2010, Article 132 (5).

¹⁴ Article 64(6)(d) and Article 69(3) of the Statute.

¹⁵ Constitution of Kenya 2010, Article 131(1).

¹⁶ Government Submissions, para. 27.

¹⁷ Terms of Reference of Task Force on Post-Election Violence.

(<http://www.odpp.go.ke/index.php/vacancies/128-task-force-on-post-election-violence-cases>)

Task Force's creation that it "could serve as a smokescreen for continuing inaction"¹⁸ remain valid.

15. Press reports of public statements made by the Head of the Task Force, who is also the Deputy Director of Public Prosecutions, suggest that the Task Force was provided with 6,081 files to review. The Head of the Task Force has provided reasons, mainly based on the absence of evidence, to explain why she believes that only a fraction of the cases will result in prosecution.¹⁹
16. Partly as a result of the failure of the Task Force to provide any indication of how many cases, if any, it will recommend for prosecution, human rights groups in Kenya have recently filed constitutional petitions against the Government for the failure to investigate and prosecute the perpetrators of sexual and gender-based crimes, as well as police shootings, which took place during the PEV.²⁰
17. In its submissions regarding complementarity, it is striking that the Government has not repeated its previous undertakings to the Court to investigate those at "the highest levels of responsibility" for PEV crimes. Those undertakings have come to almost nothing.
18. On 31 March 2011, in an application to have the Kenya cases deemed inadmissible under Article 19(2)(b) of the Statute,²¹ the Government assured the Pre-Trial Chamber: "The adoption of the new Constitution and associated reforms has opened the way for Kenya to conduct its own prosecutions in Kenya for the post-election

¹⁸ IWPR, *New Kenyan Justice Effort Meets Scepticism*, 4 April 2012 (<http://iwpr.net/report-news/new-kenyan-justice-effort-meets-scepticism>)

¹⁹ "5,000 post election suspects to go scot-free", *The Star*, 18 August 2012 (<http://ads.the-star.co.ke/news/article-5656/5000-post-election-suspects-go-scot-free>). See also <http://www.icckkenya.org/2012/10/kenyan-prosecutor-insufficient-evidence-has-made-prosecuting-post-election-violence-cases-hard/>

²⁰ Two groups (the International Commission of Jurists - Kenya Chapter, and Physicians for Human Rights) have filed a constitutional petition against the Government for the failure to investigate sexual and gender-based crimes and to prosecute the perpetrators thereof (Constitutional Petition 122 of 2013, Republic of Kenya, in the High Court of Kenya at Nairobi, Constitutional and Human Rights Division.) The Attorney General has not responded to this petition. Similarly, Citizens Against Violence and several other groups and individuals have filed another constitutional petition on behalf of the victims of police shootings during the post-election violence, also citing the failure to investigate and prosecute these crimes (Constitutional Petition 102 of 2013, Republic of Kenya, in the High Court of Kenya at Nairobi, Constitutional and Human Rights Division).

²¹ ICC-01/09-02/11-26, Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute, 31 March 2011 ("Government submissions of 31 March 2011").

violence in respect of persons at the *highest levels of authority* and for the most serious crimes”.²²

19. Furthermore the Government made the following promise to the Pre-Trial Chamber:

An updated report on the state of these investigations and how they extend upwards *to the highest levels and to all cases*, including those presently before the ICC, will be submitted by the end of July 2011. The report will also outline the investigation strategy which, as envisaged by the February 2009 Report, is building on the investigation and prosecution of lower level perpetrators to reach up to *those at the highest levels* who may have been responsible.²³

20. The Government went on to propose the following series of reports:

(i) End of July 2011 - report on investigations under the new DPP and how they extend up to *the highest levels*, and on the cooperation with the ICC Prosecutor in these investigations; (ii) End of August 2011 - report on progress made with investigations to *the highest levels*, [...]; and, (iii) End of September 2011 - report on progress made with investigations and readiness for trials in light of judicial reforms.²⁴

21. On 4 July 2011, the Government filed one six-page report²⁵ in which the Director of Criminal Investigations reported, in essence, that he had found no incriminatory evidence against the six suspects then before the ICC, but that investigations were ongoing. Significantly, he did not refer to any investigations against any other high-level accused, and made no attempt to report on “how [investigations] extend up to the highest levels and to all cases”, as earlier promised by the Government.

22. Since then, as far as the Legal Representative is aware, the Government has not publicly indicated that there have been any impartial and thorough “investigations to the highest levels” by the Kenyan authorities in respect of PEV crimes.

23. The unfortunate reality, over two years after the Government assured the Pre-Trial Chamber that “Kenyan national investigative processes do extend to the highest levels for all possible crimes,”²⁶ is that not one person at a high level of responsibility for PEV crimes has been prosecuted in Kenya.

²² Government submissions of 31 March 2011, para. 5.

²³ Government submissions of 31 March 2011, para. 71.

²⁴ Government submissions of 31 March 2011, para. 79.

²⁵ Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility, Annex 1, 4 July 2011, ICC-01/09-02/11-153-Anx1.

²⁶ Government submissions of 31 March 2011, para. 32.

24. International and Kenyan human rights groups have repeatedly pointed out the almost total lack of domestic prosecution of PEV cases at all levels.

25. In an 87-page report examining accountability for PEV crimes in Kenya, Human Rights Watch in December 2011 said that of all the killings committed during the violence, only two had resulted in murder convictions and noted the absence of genuine investigations by the Kenyan authorities.²⁷ In an update dated 23 April 2013, Human Rights Watch noted little progress in dealing with the enormous backlog of PEV cases:

[I]n the five years since the violence took place the vast majority of human rights violations documented by Kenya's Commission of Inquiry into Post-Election Violence (CIPEV), known as the Waki commission, have not been addressed. Human Rights Watch has been able to identify convictions in Kenyan courts of only seven cases – one vacated on appeal – involving serious crimes committed during the election violence. The result has been an almost complete lack of accountability for police officers and those alleged to have organized the violence.²⁸

26. Amnesty International's recent findings are consistent with the existence of a climate of impunity for PEV crimes:

There has been little movement towards bringing the police to account, either collectively or individually, for human rights violations during [the post-election violence]. In 2012, a multi-agency taskforce was constituted by the Director of Public Prosecution to review cases from the post-election violence; however, no prosecutions have been initiated in respect of any case, including those involving police.²⁹

27. In a briefing paper to the African Commission on Human and People's Rights ("ACHPR") in April 2013, a number of leading Kenyan human rights organizations summarized the current absence of PEV accountability within Kenya as follows:

The victims of the 2007/8 post election violence continue to yearn for justice; some of them continue to live in deplorable displacement camps while others continue to suffer physical and psychological pain. Efforts by the government to ensure the accountability of perpetrators have been minimal. Very few prosecutions have been instituted with only six convictions. The attempts

²⁷ "The Office of the Attorney General, through the Department of Public Prosecutions, has compiled lists of thousands of cases allegedly linked to the election violence, ranging from petty theft and rioting to rape and murder. But despite efforts to prioritize and act on serious cases in the immediate aftermath of the violence, there have been few prosecutions and fewer convictions, as well as a near total lack of investigations of those who organized and financed the violence". Human Rights Watch: *'Turning Pebbles': Evading Accountability for Post-Election Violence in Kenya* (<http://www.hrw.org/reports/2011/12/09/turning-pebbles-0>), 9 December 2011.

²⁸ Human Rights Watch: *Kenya: New Leaders Should Put Rights First*, 23 April 2013 (<http://www.hrw.org/news/2013/04/23/kenya-new-leaders-should-put-rights-first>)

²⁹ Amnesty International: *Police Reform in Kenya: "A Drop in the Ocean"*, 30 January 2013. (<http://www.amnesty.org/en/library/asset/AFR32/001/2013/en/9c3fb77e-16e2-49e0-94ec-d3c9f0e9f9e2/afr320012013en.pdf>)

to establish a credible local judicial mechanism have been politicized and fallen through with time.³⁰

28. None of the state entities involved in the investigation and prosecution of crimes (the Director of Public Prosecutions, the Multi Agency Task Force, the police, the Attorney General), appears willing to squarely accept responsibility for the non-investigation and non-prosecution of PEV cases. Explanations offered so far have concerned the absence of evidence or the lack of resources. However, the real problem appears to be one of political will at higher levels. There has been no expression of support by the new administration in Kenya for the investigation and prosecution of those most responsible for PEV crimes. Significantly, neither the Accused nor Deputy President William Ruto has expressed support for the investigation and prosecution of such cases to the highest levels, nor to any level.

Assistance provided to IDPs has been inadequate, discriminatory, and has not reached hundreds of thousands of PEV victims

29. The Government's submissions on this issue are in the following terms:

The Kenyan Government has taken *some* measures in respect of a *limited class* of Post-Election Violence victims, the Internally Displaced Persons (IDPs). These measures include the purchase of land for resettlement of the IDPs, construction of houses for the IDPs, offering of counselling services, cash transfers, *some* access to free medical attention for *some* IDPs in government facilities; *periodic* food distribution to victims.³¹

30. The Government does not explain: (i) how it has established which PEV victims fall within the category of IDPs; (ii) what it has done to assist those PEV victims which it does not consider to be IDPs; (iii) what it means by "some measures"; "some access", "some IDPs"; and (iv) how "periodic" the food distribution to victims is.
31. The Government's choice of words appears to implicitly acknowledge its failure to provide sufficient medical (including psychological) care, shelter and food to those it considers to be IDPs, and its almost total failure to provide assistance to the 314,000

³⁰ Briefing Paper on Kenya, submitted during the 53rd session of the ACHPR in April 2013 in Banjul, Gambia by the Kenya Human Rights Commission (KHRC), the International Federation for Human Rights (FIDH), the Kenyan Section of the International Commission for Jurists (ICJ Kenya), The Children's Foundation, the Independent Medico-Legal Unit (IMLU) and the National Coalition of Human Rights Defenders- Kenya, at paragraph 13.

³¹ Government Submissions, para. 28. Emphasis added.

PEV victims that it does not consider to be IDPs. The Government is also silent on the issue of ethnic discrimination in the provision of assistance, discussed below.

32. The UN Special Rapporteur for IDPs, Dr. Chaloka Beyani, said in February 2012: “According to Government figures, the 2007/2008 post-election violence resulted in the internal displacement of nearly 664,000 persons, 314,000 of whom sought refuge with host communities and were considered “integrated”, while the rest sought safety in 118 camps.”³²

33. The Special Rapporteur drew attention to the almost total lack of support for the PEV victims whom the Government does not consider to be IDPs, but which the Special Rapporteur clearly does:

The Special Rapporteur is concerned by the de facto exclusion of various groups of post-election violence IDPs from any assistance, protection or durable solutions. These include post-election violence IDPs who did not register by the cut-off date, those whose registration was rejected by the national database due to discrepancies with registration systems at the local level, and the estimated 314,000 “integrated” IDPs who were not profiled or registered and sought refuge in host communities.³³

34. The Rapporteur called upon the Government to “assist non-registered post- election- violence IDPs, including ‘integrated IDPs’, with outstanding durable-solution needs.”³⁴ That call has not been heeded.

35. The plight of unrecognised IDPs is grave. In relation to those IDPs that the Government refuses to recognise as such, the Special Rapporteur said:

[The Special Rapporteur] believes that the lack of government assistance, protection or monitoring of the situations of these IDPs, particularly vulnerable groups, such as children and female-headed households, has resulted in serious human rights concerns and the lack of durable solutions for many. In the course of his country visit, the Special Rapporteur received reports and had the opportunity to speak to street children and affected families, whose cases illustrate specific vulnerabilities, the lack of durable solutions and the fragility of unsupported hosting arrangements. In one case, the Special Rapporteur interviewed a mother taking care of several children on her own, who had found herself destitute and living in makeshift housing in Eldoret after family hosting arrangements, which had supported her during her displacement, had broken down. Four of the children with her, some as young as 5 years of age, had to resort to living on the street due to hunger, and some lacked any personal identification documents.³⁵

³² Report of the Special Rapporteur on the human rights of internally displaced persons, A/HRC/19/54/Add.2, 6th February 2012 (“Report of the Special Rapporteur”), para. 32.

³³ Report of the Special Rapporteur, para. 38.

³⁴ Report of the Special Rapporteur, para. 65.

³⁵ Report of the Special Rapporteur, para. 39

36. The Special Rapporteur's concerns are consistent with findings by Kenyan organisations. In a 2009 report of the Kenya Human Rights Commission ("KHRC") on the situation of IDPs, the KHRC noted that, in areas like Migori and Rongo in the Nyanza region, there were no visible camps but hundreds of displaced persons living within the community. In such areas, no form of financial assistance was given, as these persons were considered to be "integrated IDPs".³⁶

37. In July 2011, the Kenya National Assembly's Select Committee on the Resettlement of Internally Displaced Persons ("Select Committee")³⁷ stated that it was told in several meetings, in different parts of Kenya, of discrimination in the distribution of Government aid in favour of the Kikuyu community.³⁸ The Select Committee also noted that, despite several invitations, the two Government Ministers of greatest relevance to the position of IDPs (the Minister of Finance, and the Minister of Land) had refused to meet the Select Committee. The Select Committee said that this refusal reflected: "1. Government efforts to frustrate its work and by extension Parliament; 2. Reluctance to resolve with finality the problem of IDPs; 3. Lack of commitment to address the IDPs crisis and thus perpetuating a culture of impunity."³⁹

38. Among the Select Committee's findings were the following:

- vii) The profiling exercise [i.e. the process by which individuals were categorized as IDPs] was shrouded in mystery and characterized by lack of transparency whereby the Provincial Administration (Chiefs, DOs, and DCs) were accused of registering fake IDPs, kins and in some instances of altering the registers. Consequently, many genuine IDPs were left out of the profiling exercise while many fake ones benefited from the resettlement programme. The Committee feels that re-vetting of IDPs is necessary to ascertain the genuine IDPs and expose the fake ones.
- viii) The IDPs in the camps and those referred to as integrated IDPs had similar problems and assistance should be based on the same terms. The Committee further observed that in most cases the IDPs lacked shelter, health facilities, schools and funds to foot the school fees and health bills.
- ix) The ex-gratia payment was discriminatory and was marred by favouritism and corrupt dealings.⁴⁰

³⁶ KHRC, *Out in the Cold: The fate of internally displaced persons (2008-2009)* (available at www.internal-displacement.org), part 3.1, page 38.

³⁷ *Report of the Select Committee on the Resettlement of Internally Displaced Persons*, April 17, 2012. (http://www.knchr.org/Portals/0/Reports/PSC_Final_IDPs_report_2012-2.pdf).

³⁸ *Report of the Select Committee on the Resettlement of Internally Displaced Persons*, pages 37, 41, 45 and 46.

³⁹ *Report of the Select Committee on the Resettlement of Internally Displaced Persons*, page x.

⁴⁰ *Report of the Select Committee on the Resettlement of Internally Displaced Persons*, page 66.

39. Government efforts in respect of IDPs have been not only inadequate, but also discriminatory, in two senses. First, assistance efforts focus primarily on persons who are recognized as IDPs. Those that the Government considers to be “integrated IDPs” are largely ignored. Second, and this issue may not be entirely unrelated to the first issue, assistance has been directed disproportionately towards victims of Kikuyu ethnicity.
40. Human Rights Watch in January 2013 said that its research in “Central Rift’s Nakuru county and North Rift’s Uasin Gishu county in late 2012 revealed significantly preferential treatment for internally displaced persons (IDPs) from the Kikuyu community of President Mwai Kibaki over other displaced people in the two counties.”⁴¹ This is also, of course, the community of the Accused.
41. In its response to the findings of Human Rights Watch, the Government said that “at no time has ethnicity been the guiding principle in the resettlement programme for the 2007/8 Post Election Violence (PEV) Internally Displaced Persons (IDPs) as suggested by the Human Rights Watch”.⁴² However, it did not expressly challenge HRW’s research in Nakuru and Uasin Gishu and did not deny that discrimination in the allocation of aid had taken place.
42. The problems alluded to above by the Special Rapporteur, the Select Committee, the KHRC and Human Rights Watch are consistent with information provided to the

⁴¹ ‘The discrimination in Nakuru and Uasin Gishu counties takes two general forms. First, the government has given priority to displaced Kikuyu when rebuilding homes and providing new homes, land, or money. Some Kikuyu families have received more than one new home. Second, the vast majority of Kalenjin displaced in the 2007-2008 violence, roughly 300,000 people across Kenya, have not been officially registered by the Ministry for Special Programmes, which has responsibility for internally displaced people, or received any government support, Human Rights Watch research indicates. The government says it is providing equal assistance to internally displaced people from all communities, but it refuses to collect data on the ethnic breakdown of people who have received government assistance. ... Government officials in Nakuru and Uasin Gishu confirmed for Human Rights Watch that the national government was favoring displaced Kikuyus, and some said they had advised against the practice. A senior official in the Ministry of Internal Security told Human Rights Watch that the Ministry for Special Programmes had ignored repeated warnings about the dangers of its discriminatory policies. “There seems to be resistance to any suggestion that this kind of bias should be changed,” the security official said. An official at the Ministry for Special Programmes was more direct: “The entire government machinery is Kikuyu and this machinery is favoring the Kikuyu on the ground,” he said.’ Human Rights Watch: *Kenya: Discrimination Against Rift Valley Displaced*, 17 January 2013 (<http://www.hrw.org/news/2013/01/17/kenya-discrimination-against-rift-valley-displaced>).

⁴² Office of the President, Ministry of State for Special Programmes, Press Statement, 23 January 2012: “Government Not Discriminating Against Displaced People”.

Legal Representative's field team by victims who were permitted to participate in this case during the pre-trial phase.

43. Many of those victims, shortly after their forcible expulsion from their homes, were encamped briefly either in Nakuru or Naivasha before being transported to what was considered to be their 'ancestral home' in the Nyanza and Western Regions. There, they were dropped at market centres, churches and other public places nearest to areas presumed to be their homes, and that marked the end of meaningful assistance to the victims. A relatively small number of victims report that they have received one payment from the Government of KSh10,000 (€91). Others report that they received a single two-kilogramme tin of maize meal per household. In those few cases, this is the *total* assistance that they have received from the Government in the past five years.
44. Many victims have reported to the Legal Representative's field staff that they have been systematically ignored in government assistance programmes, from emergency humanitarian aid upon displacement, to construction of shelter, supply of farm implements, medical assistance, and other services which they are aware the Government has provided to other (often Kikuyu) victims.
45. With very few exceptions, the victims who were accepted to participate in the pre-trial period of this case are living in conditions of abject poverty and fall within the category of what the Government considers to be "integrated IDPs". They are therefore not eligible for support or have received minimal support on an *ad hoc* basis. This categorisation has resulted in extreme hardship. In particular, many women were transported to the town of origin of their husbands or former husbands, usually in the Nyanza region, and did not receive support in those towns. Consider the following examples of three women, originally from Naivasha:⁴³
46. **Victim a/9379/11** lived in Naivasha where she worked as a casual labourer in a flower farm. While pregnant, she was gang-raped in Naivasha town during the PEV. She lost all her property due to looting and arson. After her removal from her house

⁴³ In an effort to contribute as far as possible to the public character of these proceedings, this information has been presented in a form which does not disclose the identities of the victims, nor any other confidential information.

in Naivasha, she sought refuge initially at a camp in Naivasha, where she gave birth prematurely. The baby died due to exposure to cold in the camp, and lack of medical care. She was later diagnosed to be HIV positive. She was transported to a town which was the town of origin of her husband, who is serving a term of imprisonment. As she had never lived there before, she rented a one-room mud house on the outskirts of town which she shares with all her six children (all of whom are of school-going age), and pays a monthly rent of KSh 400 (€3.63). In order to find enough money for food, rent and school fees, she takes in clothes for washing and does chores in various households. Her income is extremely low. Due to the difficulty in earning enough to pay rent, she and her children are frequently thrown out of the house by its owner. She has not received any assistance from the Government.

47. **Victim a/9382/11** is an elderly widow. For over 35 years, she lived in Naivasha town where she had worked as a domestic helper. As a result of attacks and displacement during the PEV, she and four grandchildren who were under her direct care were transported to a town together with other victims. While this was the area from which her late husband had originated, she herself had no home to go to there. She sought help from a wellwisher who allowed her to use a one-room mud structure, in which she has lived with two grandchildren to date. She lives on money earned by gardening for her neighbours, and on the occasional support of wellwishers. One of her grandchildren received support from a nongovernmental organisation in order to complete secondary education, and she has not received any assistance from the Government.

48. **Victim a/8281/11** is the single mother of one child. Before the PEV, she worked at a flower farm in Naivasha. She was a victim of multiple crimes in Naivasha during the PEV, including gang rape, displacement and looting of property. As a result of the attack on her, the victim's spinal cord was damaged, and she is now partially paralysed. She has undergone surgery numerous times in relation to this condition, and in order to remove her uterus due to complications arising from the gang rape. She continues to report acute stress and extensive pain. After the PEV, the victim and her child have moved from one relative to another. She has no home for herself

and her child, and cannot engage in any gainful activity due to her condition. Her medical bills, which have been high, have been paid by wellwishers. Despite several requests, she has received no support from the Government.

49. These examples are merely illustrative of the desperate poverty and physical discomfort in which very many of the victims of this case, both women and men, now live, with next to no support from the Government.

The Witness Protection Agency is seriously underfunded

50. The Government characterizes the creation of the Witness Protection Agency (“WPA”) as a sign of Kenya’s co-operation with the Court.⁴⁴ It asserts in particular that all parties are free to refer witnesses to the WPA for consideration. This assertion might well be correct, but should be assessed in light of the finding of a committee of Kenya’s Parliament that the WPA can currently handle only eight witnesses, and does not have any resources to deal with *any* new witnesses referred to it.
51. The Departmental Committee on Justice and Legal Affairs of Kenya’s National Assembly noted in May 2012 that the budget allocated to the WPA for 2012/2013 was a mere 15% of the sum which the WPA had requested,⁴⁵ and that the sum allocated for witness-related expenditures “will only provide for 8 witnesses with an average household of five persons, totaling 40 persons. This amount can only provide for witnesses already in the programme, with inability to take in more”.⁴⁶

Police impunity continues despite reform programme

52. The Government cites several reforms which, it claims “will go a long way in addressing impunity in Kenya”.⁴⁷ This is itself a frank acknowledgment that impunity still exists, and that the new reforms will not necessarily eradicate it, but might at least partially address it. Among the institutions cited by the Government

⁴⁴ Government Submissions, para. 29.

⁴⁵ Kenya National Assembly, Departmental Committee on Justice and Legal Affairs, Report on the 2012/2013 Budget Estimates for Votes, May 2012, page 20.

⁴⁶ *Ibid.*

⁴⁷ Government Submissions, para. 38.

are the Kenya National Police Service and the Independent Policing Oversight Authority.

53. However, as yet, there has been no discernable change in the impunity enjoyed by Kenya's police forces. In a recent and comprehensive review of reform in the police sector in Kenya, Amnesty International noted the extensive nature of the legislation that has been passed, but identified the delay in the implementation of that legislation as the critical issue:

The delays which have hindered the implementation of the new police legislation have meant the establishment of the accompanying accountability mechanisms has, in turn, been considerably delayed, as have the new instructions to the police on the use of force, arrest and detention; internal accountability; and transparency and reporting obligations, including of deaths and serious injuries, to the Independent Policing Oversight Authority. In other words, the police have not yet changed their behaviour, the organizational ethos is still left unaddressed, and the corruption and human rights violations that occurred in the past are still not effectively being addressed by the new institutions.⁴⁸

The new ODPP has not prioritized PEV cases in its strategic document

54. The Government cites the creation of the new Office of the Director of Public Prosecutions ("ODPP") as one of the institutional reforms which will address impunity.⁴⁹ However, there is a serious question as to whether the new ODPP will allocate sufficient personnel and resources, and will receive the political support necessary, to genuinely investigate and prosecute those most responsible for the PEV cases.⁵⁰
55. The Legal Representative notes that: (a) it is widely acknowledged that the PEV was the most intense period of crime in the history of the Republic of Kenya; (b) very few of the PEV cases have been prosecuted and none involving high-level suspects; and (c) the purpose of the new ODPP is, in its own words, "to ensure more accountability and transparency in the functions of the state in handling criminal matters".⁵¹
56. Nevertheless, the 82-page 'Strategic Plan for the Independent Office of the Director of Public Prosecutions', released in March 2012 and covering the period until 2015, is

⁴⁸ Amnesty International: *Police Reform in Kenya: "A Drop in the Ocean"*, 2013, p. 20.

⁴⁹ Government Submissions, para. 38.

⁵⁰ The Multi Agency Task Force has been discussed above at paras. 11 to 14.

⁵¹ ODPP, *Strategic Plan 2011-2015*, March 2012 (<http://www.odpp.go.ke/index.php/downloads/finish/8-strategic-plan/10-strategic-plan>) ("ODPP Strategic Plan").

not encouraging. It makes a single reference to “[t]he expectation on the ODPP to prosecute cases including high level corruption and PEV”,⁵² but no reference whatsoever to any intention, let alone a comprehensive plan, to prosecute PEV cases, at any level. This is a striking omission, and belies the Government’s assertion that the new ODPP will “go a long way in addressing impunity in Kenya”.⁵³

The International Crimes Division of the High Court is not yet operational

57. The Government submits: “the Judiciary has created an international crimes division within the High court [...] for purposes of both dealing with the pending 2007/2008 PEV cases that are being pursued by the Director of Public Prosecutions (DPP) and in order to prepare in the unlikely event that there are similar cases in the future”.⁵⁴
58. The International Crimes Division (“ICD”) was in fact inaugurated on 30 April 2013, after the Government had filed its submissions. It is not yet operational, and it appears that it will be many months before it is operational. As for the purposes of the ICD, the Attorney General’s comments upon its inauguration 30 April 2013 suggest that he does not conceive it principally as a forum in which to clear the thousands of PEV cases.⁵⁵ The Chief Justice has expressed concern regarding the ICD’s funding and the impact this might have on its ability to commence operations.⁵⁶ So far, it remains to be seen whether the ICD will have any impact on the backlog of PEV cases awaiting proper investigation and prosecution, and, in particular, on the total impunity currently enjoyed in Kenya by those at high levels of responsibility for PEV crimes.

⁵² ODPP Strategic Plan, page 8.

⁵³ Government Submissions, para. 38.

⁵⁴ Government Submissions, para. 39.

⁵⁵ The Attorney General is reported to have said: “But this [the post-election violence] is not the primary reason why the ICD is being set up. This is a court set up to deal with cross-border crimes like piracy, human trafficking and drug trafficking among others, but if the Director of Public Prosecutions has other cases he feels are of international magnitude they will definitely be tried here as well.” IWPR, *Kenya’s Special Court Faces Uphill Task*, 30 April 2013. (<http://iwpr.net/report-news/kenyas-special-court-faces-uphill-task>)

⁵⁶ Capital FM news, ‘Cash hinders set up of international crimes court in Kenya’, 30 April 2013. (<http://www.capitalfm.co.ke/news/2013/04/cash-hinders-set-up-of-international-crimes-court-in-kenya/>)

Justifications given by the Government in respect of RFAs from OTP

59. The Legal Representative is not privy to the correspondence between the Prosecution and the Government in relation to the Prosecution's requests for assistance from Kenya, and so can only offer limited submissions on the matters raised in paragraphs 41-45 of the Government Submissions. Nevertheless, the justifications offered by the Government suggest a disingenuous and evasive approach in respect of at least two of the outstanding requests for assistance.

Identification and tracing of assets

60. The Government's sole reason⁵⁷ for its failure to provide information in response to a Prosecution request pursuant to Article 93 (1)(k) for information relating to *inter alia* the property and assets of the Accused is a decision of a Single Judge of the Pre-Trial Chamber of 20 April 2011.⁵⁸ In that Decision, the Single Judge declined a Prosecution request for certain additional conditions (including a condition "to provide complete financial information about their finances") which the Prosecution had claimed were necessary in order to guarantee that the three suspects would continue to appear voluntarily and that they would not obstruct or endanger the investigation or the Court's proceedings.⁵⁹

61. The Legal Representative submits that the Single Judge's Decision of 20 April 2011 does not constitute a valid basis for the Government's refusal to comply with the Prosecution's Article 93 (1)(k) request, and on no reasonable reading of that Decision could it be interpreted to constitute a valid basis for refusal. The Single Judge's Decision was issued in the context of what conditions are necessary to secure the appearance of the three suspects concerned. There is nothing in the Single Judge's Decision suggesting that the Government should not provide to the Prosecution information relating to the assets of the suspects in question. The Government has contrived to interpret that Decision in a manner which is wholly unjustified in an effort to find a legal basis for its refusal to provide to the Prosecution information which the Prosecution was and is fully entitled to receive under Article 93 (1)(k).

⁵⁷ Government Submissions, page 18.

⁵⁸ ICC-01/09-02/11-66.

⁵⁹ ICC-01/09-02/11-66.

Facilitating the interview of ten police officers

62. Similarly, the Government's reason for not facilitating an interview of ten police officers⁶⁰ does not suggest a genuine willingness to co-operate. The sole basis on which the Government relies to justify its failure to act is a domestic court order which dates from 1 February 2011.
63. Even if the Trial Chamber considers the existence of such a court order to be an acceptable justification -- and, in the view of the Legal Representative, it is not for domestic courts to limit the Prosecution's access to relevant witnesses in such a way -- the Attorney General has been at liberty for the past two years to apply for the matter to be set for a full hearing before the High Court of Kenya. In his submissions, the Attorney General has not confirmed that he has applied to the High Court to have the matter heard, and he has not provided for any reasons for this unjustifiable delay. In addition, the Government has not indicated that it has taken steps to "promptly consult with the Court to try to resolve the matter" under Article 93(3) of the Statute, nor to engage with the Court under Article 93(5).

Respectfully submitted,



Fergal Gaynor

Common Legal Representative for Victims

Dated this 6th day of May 2013

At Nairobi, Kenya

⁶⁰ Government Submissions, page 19.