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Date: **13 January 2014**

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA

Public

Victims' response to Prosecution's application for an adjournment of the provisional trial date

Source: **Common Legal Representative of Victims**

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

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I. Introduction

1. On behalf of the victims in this case, the Legal Representative of Victims ("LRV") respectfully supports (a) the application of the Prosecution for an adjournment of the provisional trial date ("Application") for three months in order to "complete efforts to obtain additional evidence";[1] and (b) the Prosecution's request for a status conference in the week beginning 27 January 2014 to address the matters raised in the Application.[2]

II. Procedural background

2. On 19 December 2013, the Prosecution filed the Application. It was notified to the parties and to the LRV on 20 December 2013.
3. The LRV submits this response as a confidential document in accordance with Regulation 23*bis* of the Regulations of the Court, as it contains references to confidential information. A public redacted version is to be filed concurrently.

III. Subject matter is directly linked to the victims' interests

4. The Trial Chamber has ruled: "[I]n accordance with Regulation 24(2) of the Regulations, the Chamber finds that the Common Legal Representative may file responses to documents but must first demonstrate that the subject matter at issue is directly related to the interests of victims."[3]
5. An adjournment would delay the realization of the victims' right to know the truth of the crimes committed against them; to have those responsible for those crimes held accountable; and to receive just reparation for the harm they have suffered.[4] On the other hand, given that there is no realistic

[1] ICC-01/09-02/11-875, 20 December 2013.
[2] *Id*., para. 4.
[3] ICC-01/09-02/11-498, 3 October 2012, para. 71.
[4] *Cf.* ICC-01/04-01/06-1119, 18 January 2008, para. 98; ICC-01/04-01/07-474, 13 May 2008, para. 32; ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 97. At the recent Assembly of States Parties in The Hague, many delegations reaffirmed their support for victim participation. At the United Nations Security Council (UNSC) debate on whether to defer the Kenya cases, the representative for Argentina said: "[W]e understand that all victims have the right not to be forgotten or treated with indifference, including those in Kenya in 2007. They all deserve justice, truth, reparations and a guarantee that what happened will not happen again." United

possibility of genuine prosecution in the Kenyan courts of those most responsible for crimes committed against the victims of this case, termination of these proceedings[5] – a significant and alarming possibility raised by the Application – would wholly destroy the victims' realization of those rights.

IV. Submissions

6. Shortly after she recovered the severed head of her husband in Naivasha in January 2008, Celestine[6] wrapped it in a shawl and carried it away for a dignified burial. She does not know where the rest of his body lies.
7. When asked for her reaction to the Prosecutor's 19 December 2013 announcement that she did not have sufficient evidence to proceed to trial against the Accused, Celestine said: "Please tell our lawyer to tell us the whole truth so that we can cry our last tears on knowing that there will be no justice anywhere in the world."[7]
8. Her reaction was shared by many other victims, who reported varying degrees of anger, frustration and betrayal at the Prosecutor's announcement.
9. Some victims' reactions were: "What have we done to make the Prosecutor mess with us like this?"; "If there's not enough evidence against the suspects, then who did it?"; "They have forgotten the suffering that we faced during the Post-Election Violence. They do not care for us"; "We are crying for justice. Who now will hear us?"
10. The impact on thousands of victims in Kenya of termination of this case cannot be accurately measured nor communicated. Many saw their own fathers or husbands beheaded. Men were forced to watch as their wives were

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Nations Security Council, 7060th meeting, 15 November 2013, New York S/PV.7060, available at http://bit.ly/1ahEeL9 [12 January 2014], page 4.

[5] Given the enormously negative impact on the victims' interests of any application to terminate this case, the LRV suggests that, if the Prosecution decides to seek withdrawal of charges, it should file a written application setting out clearly the reasons in support of its request. The Trial Chamber is entitled to receive full written submissions on an application with such potential negative impact on the Court's deterrent effect, and which might fully and irreparably extinguish the victims' interests. The Defence and the LRV will then be able to respond in the usual way to that written application.

[6] A pseudonym.

[7] This is an English translation of words spoken in Luo. They were relayed to the LRV by the interviewer.

raped. Women were serially raped, doused in paraffin, and set alight. Young men were forcibly circumcised. Others were castrated. Tens of thousands were forced to flee their dwellings, which were ransacked or burnt to the ground. Thousands of small businesses were destroyed. Most of those subjected to these crimes have received next to nothing in compensation and have not seen anyone held accountable by any court.

11. Despite numerous promises, there have been no prosecutions of mid- or high-level suspects in Kenya for these horrific crimes, and only a handful of prosecutions at the lowest levels. The psychological and physical damage that these crimes, and the failure to prosecute those responsible, have done to thousands of Kenyans is immense.
12. For these reasons, it is imperative that the Trial Chamber and the Prosecutor immediately take all steps available to them under the Statute and the Rules to ensure that justice is done for the victims of this case.

Request for adjournment should be granted

13. Granting the adjournment sought by the Prosecution will enable the Prosecution to pursue legitimate avenues of investigation and will have little impact on the Accused as he is at liberty. In contrast, the former president of the Côte d'Ivoire, Laurent Gbagbo, is currently in ICC custody in The Hague, while the Prosecutor carries out an order by the Pre-trial Chamber to collect additional evidence against him.[8]
14. The thousands of victims of the *Kenyatta* case are entitled to treatment equal to that provided to the victims of the *Gbagbo* case. They are entitled to an adjournment in order to permit the Prosecutor's investigations to continue in a robust fashion in order to collect additional evidence so that the truth can emerge. Further, it would be particularly unfair to the victims to deny the

[8] ICC-02/11-01/11-432, 3 June 2013, para. 44. This decision was upheld by the Appeals Chamber in ICC-02/11-01/11-572, 16 December 2013.

request for an adjournment in this case, given that Mr Gbagbo is in custody has no control over the present Government of the Côte d'Ivoire. In contrast, the Accused is at liberty and is in full control of the Government of Kenya ("GoK"), which, as argued below, has impeded access to relevant evidence. It would be unreasonable to permit the Accused to benefit from deliberate obstruction of access to evidence by a government under his direct control.

The GoK has obstructed access by the Prosecution to relevant evidence

15. The Prosecution has obviously encountered serious difficulties throughout the investigation and prosecution of the *Muthaura, Ali & Kenyatta* case. As detailed below, it has periodically made statements suggesting deliberate obstruction of access to evidence by the GoK, but appears not to have taken all steps available to it in relation to that obstruction.
16. On 6 October 2011, the Prosecution said that it: "continues to receive reports that persons living in Kenya face threats, intimidation, and other attempts to discourage their participation in the investigation. This includes publication of information about alleged witnesses on the internet and veiled public threats and incitement by associates of the suspects."[9]
17. At the confirmation stage, the Prosecution failed to persuade the Pre-Trial Chamber to confirm charges against the former Police Commissioner, Mohammed Hussein Ali, despite credible evidence of widespread police participation in killings and other crimes in many parts of Kenya during the 2007-2008 post-election violence ("PEV") and the failure to prevent those crimes or to punish those responsible. It is inconceivable that this would have occurred were it not for state obstruction of access to relevant evidence concerning police crimes. Despite the Prosecutor's acknowledgement[10] that it

[9] ICC-01/09-80, 6 October 2011, para. 10.
[10] ICC-01/09-02/11-733-Red, 10 May 2013, paras 20-24, which concludes: "Thus, the Prosecution's efforts to interview police officers, who may have shed light on the alleged police role in the PEV, have been thwarted to date. At the confirmation of charges hearing, however, the Muthaura and Ali Defence submitted 39 written

faced state obstruction[11] in its efforts to interview senior police officers in Kenya, the Prosecution did not, to the LRV's knowledge, file any request under Article 87(7) of the Rome Statute ("Statute") on this issue.

18. In March 2013, the Prosecution decided to apply to withdraw charges against Francis Muthaura citing *inter alia* state obstruction of access to relevant evidence:

> Witnesses who may have been able to provide evidence concerning Mr Muthaura's role in the events of 2007 and 2008 have either been killed, or have died since those events, and other witnesses refuse to speak with the Prosecution. In addition, Madam President, despite assurances of co-operation with the Court, the Government of Kenya has provided only limited assistance to the Prosecution and they have failed to provide the Prosecution with access to witnesses, or documents, that may shed light on Mr Muthaura's case. Further, and as the Chamber is aware, it came to light after the confirmation hearing that a critical witness for the Prosecution against Mr Muthaura had recanted part of his incriminating evidence after receiving bribes.[12]

19. To the LRV's knowledge, the Prosecution had not by that time made any request regarding Kenya's non co-operation under Article 87(7).

20. On 10 May 2013, after charges against Mr Muthaura had been withdrawn, the Prosecution made clear the extent to which Kenya's non-co-operation had affected its preparations in this case:

> [T]he Office of the Prosecutor ("OTP" or "Prosecution") has encountered serious difficulties in securing full and timely cooperation from the Government of Kenya ("GoK"). The actions and inactions of the GoK have compromised the

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statements from police and other law enforcement officials. These statements were taken after the issuance of the injunction preventing the Prosecution from interviewing the ten police officials. The GoK's failure actively and effectively to facilitate the OTP's request to interview these police officials contributed to the uneven investigative playing field in this case, in which the Accused has enjoyed unfettered access to evidence that has been denied to the Prosecution."

[11] On 15 July 2010 the Prosecution made a request to interview ten senior police officers in Kenya. Hon. Justice Kalpana Rawal was appointed to conduct the process. A suit challenging the process was subsequently filed before the High Court of Kenya (*Mwangi v The Hon. Attorney General & Hon. Kalpana Rawal*, HCCC, Petition No. 2 of 2011). On 1 February 2011, a court order was issued, prohibiting Hon. Justice Kalpana Rawal from "taking or recording any evidence from any Kenyan or issuing any summons to any Kenyan for purposes of taking any evidence pursuant to any International Criminal Court process pending the hearing and determination of the application". The Attorney General, who is the principal legal adviser to the Government and is constitutionally mandated to promote, protect and uphold the rule of law and defend the public interest (Article 156 Constitution of Kenya), did not challenge the application, nor did he appeal against the ruling. He has instead used the interim order to justify the inaction of the Government of Kenya; *cf.* ICC-01/09-02/11-713, 9 April 2013, para. 42. This is contrary to the spirit of ss. 77 and 78, International Crimes Act 2008.

[12] ICC-01/09-02/11-T-23-ENG ET WT 11-03-2013 1-28 NB T, 11 March 2013, page 4.

> ability of the OTP to investigate the crimes in these cases, and limited the evidence available to assist the Chamber to adjudicate the crimes charged. Additionally, some public officials in Kenya have fostered an anti-ICC climate in the country, which has had a chilling effect on the willingness of potential witnesses and partners to cooperate with the OTP. […] [T]he most relevant and probative documentary evidence regarding the post-election violence ("PEV") can be found only in Kenya. Critical documentary evidence that could incriminate the Accused – such as [REDACTED] – is accessible to the Prosecution only through the effective assistance of the GoK.
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> However, since the beginning of the OTP's investigations in April 2010, the GoK has constructed an outward appearance of cooperation, while failing to execute fully the OTP's most important requests. Indeed, while the GoK has provided some cooperation and has complied with a number of OTP requests, the most critical documents and records sought by the OTP remain outstanding, despite the OTP's exhaustive efforts to urge the GoK to furnish these items. The outstanding documents and records that the OTP has requested from the GoK have been pending for periods that range from one to three years. The individual and cumulative effect of the GoK's actions has been to undermine the investigation in these cases and limit the body of evidence available to the Chamber at trial.[13]

21. On 26 August 2013, the Prosecution made serious allegations of [REDACTED].[14]

22. On 2 December 2013, the Prosecutor filed its first application in this case pursuant to Article 87(7), requesting that the Chamber find that the GoK had failed to comply with a request to produce financial and other records of the Accused.[15]

23. During the year 2013, the Prosecutor filed several notices informing the Trial Chamber that prosecution witnesses had decided not to testify; fear of retaliation for testifying appears to have been a strong theme in their decisions not to testify.[16]

[13] ICC-01/09-02/11-733-Red, 13 May 2013, paras 1-4.
[14] [REDACTED]
[15] ICC-01/09-02/11-866-Red, 2 December 2013.
[16] ICC-01/09-02/11-874, 16 December 2013, para. 1: "The witness continues to object to the disclosure of her identity, recently informing the Prosecution that she still has strong concerns for her personal safety and that of her family;" ICC-01/09-02/11-773-Red, 16 July 2013, para. 4: "Witness 5 has informed the Prosecution that he is no longer willing to testify at trial. Witness 5 told the Prosecution that [REDACTED]. This, in his view, has created insurmountable security risks for himself, [REDACTED];" *id*., para. 8: "Witness 426 has informed the Prosecution that he is no longer willing to testify at trial."; ICC-01/09-02/11-708-Red, 28 March 2013, para. 40:

24. On 19 December 2013, nearly four years after the investigation began, the Prosecutor announced that she did not have, in relation to the only remaining accused, Mr Kenyatta, evidence which would be sufficient to reach the standards required at trial.[17]

The Application does not explain why the Prosecution has failed to use all its powers

25. No explanation is provided in the Application as to why the Prosecution has not made more use of Article 87(7) in respect of the GoK's failure to co-operate. Nor does the Application address why the Prosecution has not yet initiated any Article 70 prosecutions in the present case, which might have deterred interference with other witnesses.

26. The Application does not disclose whether the Prosecution has given due consideration to seeking the admission, pursuant to Rule 68(2) of the Rules of Procedure and Evidence ("RPE"), of the evidence of *all* witnesses who have decided not to testify, where their action appears to have been motivated, directly or indirectly, by intimidation. Rule 68 was amended recently by the Assembly of States Parties ("ASP"), in the aftermath of what the Prosecution has described as "unprecedented levels of tampering and anti-witness activity" in the Kenya cases.[18] The high rate of withdrawal of prosecution witnesses in both Kenya cases is not unrelated to that climate of fear: in respect of witness withdrawals in the present case, the Prosecution has frequently referred to fears held by the witnesses.[19]

"When the Prosecution contacted Witness 2 on 3 November 2012 to confirm his availability to testify, he said he was rethinking his decision. The Prosecution made several attempts to persuade Witness 2 to testify, either as a Prosecution or as a Court witness, but on 20 November 2012, he informed the Prosecution that his decision not to testify was final;" *id*., para. 41: "On 17 August 2012, Witness 9 informed the Prosecution that he was unsure whether he could continue to cooperate with the Prosecution due to concerns about 'retaliation against his family' from the 'accused persons;'" *id*., para. 42: "In a series of contacts between April and June 2012, Witness 10 and his lawyer informed the Prosecution that the witness had received harassing phone calls, had 'cold feet,' and wanted to withdraw his cooperation. When Prosecution representatives met with Witness 10 on 15 August 2012 to discuss his concerns, he stated that he 'did not want to testify' for health and security reasons."

[17] OTP Press Release, 19 December 2013, available at http://bit.ly/1dSgZti [12 January 2014].

[18] ICC-01/09-02/11-708-Red, 28 March 2013, para. 38.

[19] ICC-01/09-02/11-874, 16 December 2013, para. 1; ICC-01/09-02/11-773-Red, 16 July 2013, paras. 4, 5 and 8.

27. The Application does not clarify the precise nature of the reasons for the withdrawal of P-0011, a key witness.[20] But in the light of the general climate which appears to have influenced many in this case, it appears likely that it might have been influenced, at least in part, by a form of intimidation. It is clearly in the interest of justice for the Prosecution to seek the admission of this witness's evidence under Rule 68(2).[21]

28. It is to be presumed that the ASP did not act in vain, and amended Rule 68 with the intention that it be used in precisely such a situation. The Prosecution has not fully explained its reluctance to use it.

29. In respect of all witnesses in Kenya who have relevant evidence but who have refused to testify, the Prosecution is at liberty to apply, as it has in the *Ruto & Sang* case, under Article 64(6)(b) and Article 93 of the Statute, to summon those witnesses to provide testimony in Kenya.[22] The Application does not clarify whether the Prosecution proposes to adopt that course in this case.

30. In its updated pre-trial brief, the Prosecution has made a large number of serious allegations relating to the participation of the Accused and his intermediaries in crimes of the utmost gravity. While insider witnesses are the evidentiary support cited for many of those allegations, many rely on other evidence. The Prosecution has not clarified whether the *entirety* of the many allegations set out in the pre-trial brief cannot now be proven to the requisite threshold. The complexity of the evidence of insider witnesses is widely recognised, yet a conviction can safely be entered on the evidence of a sole insider witness. Further, an insider who lies on one aspect of his or her

[20] Application, paras. 11-13.
[21] *Cf. id.*, para. 16; the Prosecution appears, inexplicably, to treat the evidence of this witness as irretrievably lost: "P-0011's withdrawal has also undermined the Prosecution's case, removing evidence regarding the intermediaries who allegedly oversaw the attacks on the Accused's behalf, as well as evidence regarding the logistical support provided to the attackers."
[22] ICC-01/09-01/11-1120-Conf-Red-Corr2, 29 November 2013. The Prosecution requested the Chamber to order the Registrar to request assistance, pursuant to Articles 93(1)(d), 93(1)(l) and 99(1), (a) for *inter alia* the service of summonses by the Government on each of the several witnesses who had declined to testify; and (b) for the Government's assistance in compelling and ensuring the appearance of the summoned witnesses for testimony before the Court on the territory of Kenya.

evidence can be perfectly credible on other aspects. For example, the England and Wales Court of Appeal upheld a conviction based largely upon the evidence of a police protected informant (a category of witness sometimes known as "supergrass") who had himself committed approximately 1,500 offences. The Court observed: "Even a tarnished supergrass who admits offences he did not commit, and tells lies about the participation of others, is not incapable of telling the truth." [23]

31. It therefore appears that the Prosecution has not taken all measures open to it to secure access to all relevant evidence, and to present that evidence at trial. The Prosecution's answers to the questions in the Annex hereto will provide greater clarity on this point.

The GoK and the Accused have failed to deliver genuine co-operation to the Court

32. Kenya is under an obligation under the Statute[24] to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.[25] Specifically, the GoK is required to comply with requests by the Court (including the Prosecution) to provide assistance in:

> (a) The identification and whereabouts of persons or the location of items;
> (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
> (c) The questioning of any person being investigated or prosecuted; [...]
> (e) Facilitating the voluntary appearance of witnesses or experts before the Court; [...]
> (h) The execution of searches and seizures;
> (i) The provision of records and documents, including official records and documents;
> (j) The protection of victims and witnesses and the preservation of evidence.[26]

33. Furthermore, it must be accepted that the form of co-operation envisaged by the Rome Statute is *genuine* co-operation. Co-operation by way of issuing

[23] *R v. Murray* [2003] EWCA Crim 27, para. 35.
[24] Kenya remains a State Party. Parliamentary motions to withdraw from the Rome Statute during 2013 do not affect this position, as no bill to withdraw has been passed by Parliament. In any event, Kenya's obligation to co-operate as a State Party in respect of the present case continues indefinitely: Article 127(2) Rome Statute.
[25] Article 86 Rome Statute.
[26] Article 93 Rome Statute. The obligation to co-operate with the Court is reflected in Kenya's International Crimes Act 2008, which domesticates the Rome Statute.

letters which are facially responsive but which are, in reality, evasive or disingenuous, is not co-operation.

34. Under the Constitution of Kenya, the Accused, as President, is constitutionally required to "ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries".[27] It follows that any failure of Kenya to fulfill its obligations under the Statute – including any obstruction of access to relevant witnesses and documentary evidence – *must* be attributed to the President of Kenya.
35. Instead of working to secure co-operation with this Court, the Accused instead presided over an unprecedented, high-level campaign to terminate the case against him. This included the GoK seeking and securing debates before the African Union, the United Nations Security Council and the ASP, and lobbying for rule changes in favour of the Accused at the ASP.
36. The campaign also involved serious attacks on the ICC's impartiality and integrity by the Accused[28] and by the Permanent Mission of Kenya to the United Nations.[29] Never before in international justice has an accused had the authority and will to disregard his obligation to co-operate with the Court and instead to deploy state resources on sending large, high-level teams of state representatives[30] to argue at the highest international levels in favour of bringing his trial to a halt, and to change the Rules in his favour.[31]

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[27] Article 132(5) Constitution of Kenya.
[28] The Accused addressed the AU at the Extraordinary Session of the Assembly of Heads of State at Government in Addis Ababa on 13 October 2013, describing the court as "the toy of declining imperial powers" and saying it represented "a fetid insult" to Africa. He added: "It is the fact that this court performs on the cue of European and American governments against the sovereignty of African States and peoples that should outrage us. People have termed this situation 'race-hunting'. I find great difficulty adjudging them wrong."
Full speech available at http://bit.ly/1eAeoGS [12 January 2014].
[29] Letter of 2 May 2013 by the Kenya Permanent Representative to the United Nations, Ambassador Macharia Kamau, to the United Nations Security Council (UNSC). The letter, written in intemperate and often derogatory terms, was immediately disowned by lawyers for Mr Ruto and Mr Sang and later by the Attorney General; *cf.* "Queries raised over envoy's letter to UN," *The Standard*, 13 May 2013, available at http://bit.ly/1kwCIhT [12 January 2014]. It was never, to the LRV's knowledge, disowned by the Accused.
[30] The large Kenyan delegation to the Assembly of States Parties included, among others, the Minister of Foreign Affairs, the Director of Public Prosecutions, and the Attorney General.
[31] Rules 134*bis*, *ter*, and *quater* RPE aim to minimize the obligation of an accused to be physically present in the courtroom during trial. The LRV reserves his position as to the consistency of these three rules with the Statute.

The GoK's invocation of the right against self-incrimination is misconceived

37. The approach of the GoK towards the issue of co-operation is also illustrated by a recent filing to the Trial Chamber. In it, the GoK made a number of revealing submissions regarding *inter alia* the meaning of "Court" in Article 93(1); the nature of its obligation to co-operate; and the operation of the right to privacy.[32]
38. But perhaps most illustrative of the GoK's unwillingness to offer genuine co-operation is its claim that, due to the constitutional recognition of the right of every accused person to refuse to give self-incriminating evidence, the GoK "is under a strict duty to seek the consent of the accused persons before furnishing the Prosecution with the information and documentation that may be used as evidence against them at trial."[33]
39. That is to say, the GoK's position is that if it provides to the Prosecution any material which might be used in evidence against the Accused at trial, it is violating the Accused's constitutional rights.[34]
40. This startling admission goes to the heart of the reason why the Prosecution does not have the evidence that it needs in this case: because the GoK has deliberately not facilitated access to that evidence.

Self-incrimination privilege does not displace Accused's obligation to secure co-operation

41. Furthermore, the GoK's position on the self-incrimination privilege raises the concern that there might also be a misunderstanding by the Accused regarding his right not to give self-incriminating evidence in the present proceedings. That right belongs to the Accused as an individual. It does not excuse him in any way from his obligation, under the Constitution of Kenya,

[32] ICC-01/09-02/11-877, dated 20 December 2013, filed 9 January 2014. The GoK classified its filing as "public". The LRV wishes to reserve the right to file, in due course, its observations on the GoK's submissions.
[33] *Id.*
[34] If courts around the world were to accept the argument that potentially incriminating information may only be provided by a state authority to a prosecutorial authority with the consent of the suspect, the entire process of law enforcement in many countries would grind to a halt.

to ensure that the Republic of Kenya complies with all of its international obligations, including its obligation under the Statute to fully co-operate with requests from the Prosecution for access to relevant evidence.

42. If the Defence's position is that the Accused is absolved from his constitutional obligation to ensure that Kenya delivers full co-operation to the Court, due to his right as an individual not to incriminate himself, it should make this submission without delay. The Trial Chamber might then receive full submissions on this matter.

Judicial oversight of prosecutorial discretion not to prosecute

43. It is premature to litigate fully the extent and exercise of the Prosecutor's discretion in the present case,[35] but it is important to note that the Prosecutor's discretion to withdraw charges is subject to judicial control. On 19 March 2013, this Trial Chamber, by majority, clearly accepted that the Prosecution is *required* to seek leave of a chamber in order to withdraw charges against an accused after the confirmation hearing and prior to the commencement of trial.[36] By recognizing that the Prosecution must seek leave in order to withdraw the charges, the Trial Chamber implicitly accepts that it may deny permission to the Prosecution to withdraw the charges.

44. This is consistent with the position in many jurisdictions, which permit aggrieved parties to object to, appeal, or seek judicial review of prosecutorial decisions not to prosecute, or to terminate an existing prosecution.

45. France[37] and Switzerland[38] permit a victim to challenge a decision not to prosecute. Germany permits an aggrieved party to challenge a decision by the

[35] The LRV respectfully wishes expressly to reserve the right to make, at the appropriate moment, pending the outcome of the further Prosecution investigations referred to in the Application, full written submissions on: (a) the extent of the GoK's co-operation in this case; (b) the extent of the Accused's fulfilment of his duty to ensure that co-operation; and (c) the extent to which the Prosecution has fulfilled its statutory duties.
[36] ICC-01/09-02/11-696, 18 March 2013; ICC-01/09-02/11-698, 19 March 2013, "Partially dissenting opinion of Judge Ozaki," para. 1; *id.*, "Concurring separate opinion of Judge Eboe-Osuji", para. 32.
[37] Articles 40(3), 175(1) and 186 Criminal Procedure Code of the French Republic.
[38] Article 322 Criminal Procedure Code of the Swiss Confederation.

prosecutor not to prosecute,[39] empowers a court to order the preferment of charges, and requires the prosecution to carry out this order.[40]

46. The 27 Member States of the European Union are required to "ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute".[41]

47. In the common law world, it is now widely accepted that a court may judicially review a decision of the prosecution service (often called the "Director of Public Prosecutions" ("DPP")), not to prosecute, as well as a decision of the prosecution to withdraw charges (*nolle prosequi*).

48. The Supreme Court of Fiji has recognised the power to judicially review a prosecutorial decision to file a notice of *nolle prosequi*.[42] This decision[43] was referred to, quoted and approved, by the Privy Council on three occasions: one on appeal from Mauritius[44], another on appeal from Trinidad and Tobago[45] and a third on appeal from Jamaica.[46] It was also cited and applied in 2008 in the High Court of Justice in Northern Ireland[47] and, in 2009, in the decision of the House of Lords in *R. v. Director of the Serious Fraud Office*.[48]

49. In Kenya, the DPP may not discontinue a prosecution without the permission of the court.[49] In England and Wales[50], and in Jamaica, a decision by the DPP

[39] Sections 170-174 Criminal Procedure Code of the Federal Republic of Germany.
[40] *Id.*, section 175.
[41] Directive 2012/29/EU of the European Parliament and of the Council, 25 October 2012, Article 11.
[42] *Matalulu v. Director of Public Prosecutions* [2003] 4 LRC 712; [2003] FJSC 2.
[43] The current Chief Justice of the High Court of Australia, Robert French AC, was one of the authors of the decision of the Fijian Supreme Court, and provided this information in "Cooperation and Convergence - Judiciaries and the Profession", 21 April 2012, available at http://bit.ly/KdQ69X [12 January 2014].
[44] *Mohit v. Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343.
[45] *Sharma v. Brown-Antoine* [2007] 1 WLR 780.
[46] *Marshall v. Director of Public Prosecutions* [2007] WL 2866; [2007] UKPC 4.
[47] *Re Hammel's Application* [2008] NIQB 73.
[48] *R. (ex p. Corner House Research) v. Director of Serious Fraud Office* [2009] 1 AC 756.
[49] Article 157(8) Constitution of Kenya.
[50] *Marshall v. Director of Public Prosecutions* (*supra*). The Privy Council entered into a detailed examination of the evidence before the DPP of Jamaica in assessing the possibility of mounting a successful prosecution in a case of a man shot dead by police officers; the applicant was the mother of the deceased.

not to prosecute is susceptible to judicial review.[51] In Mauritius a decision by the DPP to enter a *nolle prosequi* is subject to judicial review.[52]

50. In Ireland, a failure by the DPP to perform his statutory duties can be the subject of a *mandamus* (a mandatory order directed to the DPP to prosecute).[53]

It would be unacceptable to permit withdrawal of charges in the present case

51. The GoK is under the direct control of the Accused, and the Accused is constitutionally obliged to ensure co-operation with the Court, including the Prosecution's access to all relevant individuals and documentary evidence in Kenya. It would be unacceptable for the Prosecution to seek to withdraw charges against the Accused, if that access has been in any way impeded due to the action or inaction of the GoK. Withdrawal of charges in such circumstances would create a damaging precedent for the Court.

52. Further, the real reasons underlying the Prosecution's difficulties in the *Kenyatta* case remain unclear to the public. But it can hardly be denied that many outside the Court will perceive that the withdrawal of charges in this case will have been influenced either by the Accused's high-level campaign to terminate the case against him; or by state obstruction to relevant evidence; or by witness intimidation and bribery; or by a combination of these factors.[54]

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[51] *Per* Lord Bingham CJ in *R. v. Director of Public Prosecution, ex parte Manning* [2001] QB 330. Recently, for example, the England and Wales High Court ordered a judicial review of a decision by the DPP not to initiate a prosecution for rape and/or sexual assault. The claimant was the victim: *R. (ex p. F) v. DPP*, [2013] EWHC 945 (Admin). Applications for judicial review of decisions not to prosecute have been successful in *R. (ex p. C) v. DPP* [1995] 1 Cr App R 136; *R. (ex p. Jones*) *v. DPP*, [2000] Crim LR 858; *R. (ex p. Treadaway) v. DPP*, *The Times*, 31 October 1997; *R. (ex p. Manning) v. DPP* [2001] QB 330; *R. (ex p. Joseph) v. DPP* [2001] Crim LR 489; *R. (ex p. Dennis) v. DPP* [2006] EWHC 3211.

[52] *Mohit v. Director of Public Prosecutions of Mauritius* (*supra*).

[53] *The State (McCormack) v. Curran and others* [1987] ILRM 225, *per* Walsh J: "I concur in the opinion of the Chief Justice that the actions of the DPP are not outside the scope of review by the courts. If he oversteps or attempts to overstep his function he can, if necessary, be restrained by injunction but I do not think any step he takes or any action or omission which is *ultra vires* can be of the nature of orders which attract *certiorari*. A failure to perform his statutory duties could however, be the subject of *mandamus*". In later cases, the Supreme Court reaffirmed that the DPP may be ordered to bring a prosecution: *Eviston v. Director of Public Prosecutions* [2002] IESC 43; *H v. Director of Public Prosecutions* [1994] 2 IR 589.

[54] *Cf.* E. Evenson, "Justice for Kenya stumbles at the ICC," Human Rights Watch, 7 January 2014, available at http://bit.ly/1aHgzUc [12 January 2014]; and P. Guest, "Getting away with murder," *Newsweek*, 5 January 2014, available at http://bit.ly/1lvLcDS [12 January 2014].

53. Withdrawal of charges, therefore, could do serious damage to the Court's credibility and effectiveness, and is unlikely to increase the Court's general deterrent effect. This is regrettable, as the Court was created in part to send forth a message that impunity for major crimes will no longer be tolerated.[55] In the light of reports from authoritative sources of recent atrocities in South Sudan and the Central African Republic, it is more important than ever that the Court sends a strong message that impunity will not be tolerated.
54. Withdrawal of charges in this case risks sending out the message that the Court is, in reality, powerless in the face of witness intimidation and bribery, and state obstruction of access to evidence.
55. Further, termination of the present case will mean the total destruction of the justice process for *all* the victims targeted because they belong to ethnic groups perceived to be in favour of the Orange Democratic Movement ("ODM"), given the lack of credible prosecutions in Kenya. Failure to prosecute would also be inconsistent with the Prosecution's own policy,[56] and it might well impede the reconciliation process in Kenya for the ICC to hold a trial dealing *only* with crimes committed against the largely Kikuyu victims in the *Ruto & Sang* case, ignoring the crimes committed against the largely Luo, Luhya, Kalenjin and Kisii victims of this case.[57] Such one-sided action would negatively affect perceptions of the Court's neutrality and would amount to a total betrayal of all victims of crimes committed by one side in the PEV.

[55] *Cf.* Preamble to the Rome Statute: "**Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished [...]; **Determined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes…"
[56] "The Office's aim remains to investigate and prosecute within each situation before it all relevant instances of Rome Statute crimes no matter which side in a given conflict may have committed them." ("OTP strategic plan June 2012 - 2015," 11 October 2013, available at http://bit.ly/1eyWm5A [12 January 2014], para. 17).
[57] *Cf. e.g.* opinion pieces in the media alluding to a possible a political fall-out if charges are withdrawn in this case; *e.g.* J. Githongo, "Kenya no longer at ease," *The Star*, 11 January 2014, available at: http://bit.ly/1auH3fl [12 January 2014]; and B. Arum, "If Uhuru Kenyatta's ICC case is ended, will William Ruto and Joshua Sang proceed?" *The Standard*, 7 January 2014, available at: http://bit.ly/1calwot [12 January 2014].

Questions to be addressed at status conference

56. The Prosecution suggests that a status conference be held in late January, "in which the Prosecution will update the Chamber on the progress of the investigative steps, and answer any questions the Chamber may have".[58]

57. Given the likelihood that the submissions of the Prosecution and the Defence at this status conference, and any questions the Trial Chamber might wish to raise, are likely to have a critically important impact on the victims' rights, the LRV requests the Trial Chamber to recognize that the status conference is a "critical juncture" requiring the LRV's personal attendance.[59] This is particularly so as the Application has already triggered a significant level of distress in the victim community, and it is important that the hundreds of victims whom the LRV has met personally during 2013 are able to see that the LRV is personally present to fully and fearlessly defend their interests.

58. At the status conference, the Trial Chamber and the victims are entitled to receive a detailed explanation of why, after four years,[60] the Prosecution is not in a position to proceed to trial with *any* of the three persons who the Prosecutor initially considered most responsible for the thousands of vicious crimes committed against those perceived to have been ODM supporters.

59. Specifically, the Trial Chamber is entitled to know the extent to which the GoK's non-cooperation has prevented the Prosecution from collecting documentary evidence (including cell phone[61] and cell tower data;[62]

[58] Application, para. 4.
[59] ICC-01/09-01/11-460, 3 October 2012, paras 71 and 73.
[60] On 5 November 2009, the then Prosecutor submitted a letter to the President of the Court stating that he had determined "that there is a reasonable basis to proceed with an investigation into the Situation in the Republic of Kenya in relation to the post-election violence of 2007-2008." ICC-01/09-1-Anx, 6 November 2009.
[61] *I.e.* data which includes the time, date and duration of each call or text message, and the numbers of the caller and recipient. It also includes the content of text messages. The investigation into the killing of Rafik Hariri and associated attacks by the United Nations International Independent Investigation Commission ("UNIIIC") (the investigative predecessor of the Office of the Prosecutor of the Special Tribunal for Lebanon) appears to have relied heavily on mobile telephone data. In a report issued two years after the assassination, the Commission said: "Since its inception, the Commission has acquired more than 5 billion records of telephone calls and text messages sent through cellular phones in Lebanon, as well as communications data from a number of other countries. The Commission has also acquired a very large number of detailed subscriber call records. Since 2005, the Commission has issued more than 300 requests for assistance to support its communications analysis related to the Hariri investigation." Eighth Report of the UNIIIC, UN Doc. S/2007/424, July 2007, para. 41. A

intercepts;[63] and official records) which, combined with testimonial evidence, would be sufficient to satisfy the evidentiary standards required at trial.

60. It is inevitable and understandable that the victims, after years of raised expectations and high hopes, will want clear answers to many troubling questions raised by the Application, including the extent to which the GoK has blocked access by the Prosecution to relevant persons and evidence in Kenya, and whether the Prosecution has taken, and is taking, all action available to it under the Statute and the Rules.

61. On their behalf, and in the interest of maintaining the public and transparent character of these proceedings, the LRV sets out in an Annex hereto detailed questions for the Prosecution arising from the Application.

62. Having received the Prosecution's answers, the Trial Chamber will be in a more informed position as to what remedies to adopt. If it appears that the Prosecution has been reluctant to use the powers conferred upon it in the Statute and Rules to secure access to relevant evidence in the face of state obstruction, the Trial Chamber should take robust action to remedy that issue.

63. Further, granting the Prosecution several additional months before the start of the trial, without the back-up of orders by the Chamber aimed at securing *genuine* state co-operation and *genuine* production of evidence, is likely to amount to postponing a process which has little chance of success.

64. At or after the status conference, the Trial Chamber should give very close consideration to exercising its power and duty under the Statute to:

    a. Require the attendance and testimony of witnesses and the production of documents and other evidence in Kenya (Art. 64(6)(b) to (f));

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public report in November 2007 stated that the UNIIIC was by then "working on a data set in excess of 6.5 billion call records covering various time-frames of interest to the Investigations." Ninth Report of the UNIIIC, UN Doc. S/2007/684, 28 November 2007, para. 40. It remains unclear if the OTP in the present case has had access to a similar quantity of communications from the relevant period in Kenya; and if not, why not.

[62] *I.e.* data indicating the closest cell towers to the person making and the person receiving the telephone call, which shows the approximate locations of the interlocutors at the time of the conversation in question.

[63] *I.e.* audio recordings and transcripts of intercepted telephone and radio communications; intercepted emails.

b. Request the submission of all evidence located in Kenya that it considers necessary for the determination of the truth (Art. 69(3));
c. Hold accountable those responsible for obstructing or interfering with the attendance or testimony of a witness, or destroying, tampering or interfering with the collection of evidence (Art. 70(1)(c));
d. Issue requests to Kenya and engage in such consultations with Kenya as are necessary in order to compel it to provide the level of assistance which it is obliged to provide (Arts. 86, 93, 96, 97 and 99).

VII. Conclusion

65. For these reasons, the LRV respectfully requests that the Trial Chamber:

a. Grant the Application;
b. Recognise that any status conference scheduled to address the Application is a "critical juncture", requiring the LRV's presence;
c. Invite the Prosecution to answer the questions raised in the Annex attached hereto, either in writing or at the status conference; and
d. Direct the Prosecution that if it wishes to withdraw charges against the Accused, it must file a written reasoned application for leave to do so.

Respectfully submitted,

Fergal Gaynor

Common Legal Representative of Victims

Dated this 13th January 2014

At Nairobi, Kenya