

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 12 February 2014

TRIAL CHAMBER V (B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

CONFIDENTIAL

**Submissions of the Government of the Republic of Kenya as *Amicus Curiae* in
Response to the Prosecutor's 'Notification of the Removal of a witness from the
Prosecutor's Witness List and Application for an Adjournment of the Provisional
Trial Date'**

Source: Government of the Republic of Kenya, represented by the Attorney
General of Kenya

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

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PROCEDURAL BACKGROUND

1. On 31 January 2014, the Prosecution in this case filed the "Prosecution Opposition to the Defence Request for the Termination of the Kenyatta case" (Public with confidential annex A).¹ At paragraph 2 of the filing, the Prosecution argued, partly, that "...withdrawing the charges now would also *reward the Accused*, who heads the Government that has obstructed the Court's work, and *who is in a position* to ensure that the GOK complies with its treaty obligations, *if he wishes it to do so*. The GOK's continuing violation of its obligations under the Accused's leadership negates any argument that he would be unfairly prejudiced by the continuation of proceedings until the GOK's non-cooperation has been adjudicated". (Emphasis added)
2. At paragraph 20, the Prosecution further stated that in this case, "*it is possible* to attribute the Government of the Republic of Kenya's failure to comply with its statutory obligations *to the Accused*. He has been the President of Kenya since April 2013 and, as the head of Government, *is in a position* to ensure that Kenya fulfills its obligations under the Rome Statute, if he wishes it to do so". (Emphasis added)
3. The Prosecution added that while it acknowledges that these "proceedings are against Mr. Kenyatta *in his personal capacity* and not in his capacity as President, the reality is, however, that the actions of the Government of the Republic of Kenya *under Mr. Kenyatta's leadership* have had an impact on the Prosecution's ability to investigate this case".² (Emphasis added)

¹ICC-01/09-02/11-892.

²ICC-01/09-02/11-892.

4. Similarly, in his 13 January 2014 "Response to Prosecution's Application for an Adjournment of the Provisional Trial Date" the Common Legal Representative of the Victims made the following observation:

"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*,"³ and that "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".⁴

5. On 4 February 2014, the Government of the Republic of Kenya filed a Request for Leave Pursuant to **Rule 103** to submit *Amicus Curiae* Observations in Response to the Prosecutor's "Notification of the Removal of a Witness from the Prosecutor's Witness List and Application for an Adjournment of the Provisional Trial Date".⁵ In this request, the Government of the Republic of Kenya sought leave to make submissions on 3 key issues:

- (i) the issue of non-cooperation raised by the Prosecutor in the context of the current proceedings;
- (ii) the Role of the President and Head of State in Kenya vis-à-vis other Constitutional bodies as may be relevant to the issue of cooperation with the Court; and
- (iii) the Separation of Powers and Independence of various Organs of Government of the Republic of Kenya under the Kenyan Constitution and other relevant Kenyan laws as they relate to the issue of cooperation with the Court under the Statute.

³ICC-01/09-02/11-879-Red, Para. 34.

⁴ICC-01/09-02/11-879-Red, Para. 51. Emphases added

⁵ICC-01/09-02/11-895.

6. During the Status Conference convened by the Chamber on 5 February 2014, the Prosecution made further allegations of non-co-operation on the part of the Government of the Republic of Kenya in which it again sought to adversely introduce the name of the President and Head of State. In its oral submissions, the Prosecution once again blamed the President for this alleged "non-cooperation" and observed that he *had a duty* under **Article 132(5) of the Constitution of Kenya, 2010** to ensure fulfillment of Kenya's international obligations.⁶
7. During the same Status Conference, the Common Legal Representative of the Victims (CLRV) in his oral submissions also further alleged that "the Accused is Head of State and Head of Government. He has simultaneously *presided over ... a policy of obstruction of access to evidence* by the International criminal Court (ICC) which has impeded the emergence of truth at the international level, the *deliberate non-prosecution* of post-election violence crimes in Kenya ..."⁷
8. The CLRV further stated that "this is a case involving an extensive set of steps taken by the Kenyan State, *headed by the Accused, to obstruct the emergence of truth* and the course of justice,"⁸ and that "any continuing failure by Kenya to fulfill its obligations under the Statute, including any obstruction of access to relevant evidence, *must be attributed* to the President of Kenya,"⁹ and added that:

⁶ ICC-01/09-02/11-T-27-ENG ET WT, Page 6, lines 2-5. Emphasis added

⁷ ICC-01/09-02/11-T-27-ENG ET WT, Page 18, line 1-5. Emphasis added

⁸ ICC-01/09-02/11-T-27-ENG ET WT, Page 19, line 6-8. Emphasis added

⁹ ICC-01/09-02/11-T-27-ENG ET WT, Page 21, line 13-15. Emphasis added

"The person who is today ultimately in *control of the police is the Accused in this case*"¹⁰ and that "but far more sinister is the denial of rights by neglect, inaction, and obfuscation, by pretending that something is being done when in fact nothing is. An example of this is the policy of non-prosecution of post-election violence crimes by the Kenyan State since 2008, a policy which has continued *under the presidency of the Accused* to the present day,"¹¹ and that "we are in the situation where there is massive and systematic obstruction of access to evidence by the Government, and *the accused is in complete control* of that Government."¹²

9. On 7 February 2014, the Chamber granted leave to the Government of the Republic of Kenya to make submissions on two of the three issues outlined by the Government in its *Amicus Curiae* request, that is, the role of the President and Head of State of Kenya *vis-à-vis* other constitutional bodies as may be relevant to the issue of co-operation with the Court and Separation of Powers and Independence of various organs of Government of the Republic of Kenya under the **Constitution of Kenya, 2010** and the relevant laws as they relate to the issue of co-operation with the Court.¹³

10. The Government of the Republic of Kenya submits that both the Prosecution and the CLRV have misrepresented the functions and powers of the President and Head of State as outlined in Kenya's constitutional and legal architecture. It is therefore important for the Government of the Republic Kenya to illustrate, by reference to the Constitution, various laws and jurisprudence

¹⁰ ICC-01/09-02/11-T-27-ENG ET WT, Page 25, lines 1-2. Emphasis added

¹¹ ICC-01/09-02/11-T-27-ENG ET WT, Page 26, lines 6-10. Emphasis added

¹² ICC-01/09-02/11-T-27-ENG ET WT, Page 71, line 3-5. Emphasis added

¹³ ICC-01/09-02/11-898.

from Kenyan Courts that the President has no specific legal responsibilities relating to Kenya's co-operation with the International Criminal Court.

11. In order to place this in proper context, an undertaking of the legal basis for Kenya's co-operation with the Court is important.

An Overview of the Legal Basis for Cooperation by A State Party With The International Criminal Court

12. The Rome Statute of the International Criminal Court recognises that national laws of the State Party are to provide the framework for cooperation between the Court and the State Party. Some of the key provisions in this regard are:

- i. **Article 89 (1)** of the Statute, which specifies that 'States Parties shall, in accordance with provisions of this part and the procedure under their national law, comply with requests for arrest and surrender,' and Article 89(3) (a) which provides that, 'a State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.' (Emphases added)
- ii. **Article 91 (4)** which states that 'Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply ... During the consultations, the State Party shall advise the Court of the specific requirements of its national law.'

- iii. **Article 93** which deals with “Other Forms of Co-operation” also emphasizes the central role that national law plays in matters related to co-operation. It provides that ‘State Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the assistance’ specified under that article.

Article 93 further requires that State Parties shall provide ‘Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.’

Article 96 deals with contents of request for other forms of assistance under **Article 93** and provides that among other things, a request shall contain or be supported by such information as may be required under the law of the requested State in order to execute the request and that upon request of the Court, a State party shall consult with the court either generally or with respect to a specific matter, regarding any requirement under its national law that may apply and that during the consultations, the State Party shall advise the Court of the specific requirement of its national law.

The Framework of Cooperation under Kenya Law

13. In the Republic of Kenya, the national law applicable is the **International crimes Act, No. 16 of 2008**. The preamble of the said Act describes the Act as one that ‘makes provision for the punishment of certain international crimes ... and to enable Kenya to co-operate with the International Criminal Court...’ **Section 2 (1)** of the Act specifies that a request for assistance by the ICC shall be dealt with in accordance with the relevant procedure under the Law of Kenya.

14. Under the International Crimes Act of Kenya, the Attorney General is the principal constitutional officer of the Republic mandated to process and deal with issues relating to requests for assistance by the ICC.¹⁴ The Minister for the time being responsible for matters relating to National Security to a limited extent also deals with certain aspects of co-operation with the Court.¹⁵

¹⁴ Under Section 21 of the Act, a request for assistance in any other case apart from matters of execution of arrest warrants, 'shall be transmitted to the Attorney- General or a person authorised by the Attorney- General to receive requests.' Examples of specific provisions relating to request for assistance by the ICC and the central role played by the AG include sections 76, 77 and 95 which provide that where the ICC requests assistance in locating or identifying persons or things, gathering evidence, examining places or sites the same is to be dealt with by the attorney general:-

76. (1) *Where the ICC requests assistance ... in locating, or identifying and locating, a person or a thing believed to be in Kenya, the Attorney-General shall give authority for the request to proceed if he is satisfied that—*

- (a) *the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and*
- (b) *the person to whom or thing to which the request relates is or may be in Kenya.*

77. (1) *This section shall apply if the ICC requests, under paragraph 8 of article 19, article 56, article 64 or paragraph 1 (b) of article 93 of the Rome Statute, that—*

- (a) *evidence be taken in Kenya; or*
- (b) *documents or other articles in Kenya be produced.*

(2) *The Attorney-General shall give authority for the request to proceed if the Attorney-General is satisfied that—*

- (a) *the request relates to an investigation being conducted by the Prosecutor or to any proceedings before the ICC; and*
- (b) *there are reasonable grounds for believing that the evidence can be taken or, as the case may be, the documents or other articles can be produced in Kenya.*

95. *Where the ICC requests assistance ... examining places or sites in Kenya, the Attorney General shall give authority for the request to proceed if he is satisfied that the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC.*

(2) *If the Attorney-General gives authority for the request to proceed—*

- (a) *he shall forward the request to the appropriate Kenyan agency; and*
- (b) *that agency shall, without delay—*
 - (i) *use its best endeavours to undertake the examination of the place or site in the manner that the ICC has requested.*

¹⁵ Certain aspects of co-operation with the ICC are also dealt with by the Minister – for the time being – in charge of Internal Security. Under Section 21 of the Act, *a request for assistance in matters relating to the International Crimes Act, shall be transmitted through to the Minister if such request relates to the arrest and surrender of Persons to ICC.* Examples of these instances can be found under:-

Section 29 (1) which provides that if a request for surrender is received, other than a request for provisional arrest ... *the Minister shall, if satisfied that the request is supported by the information and documents required by Article 91 of the Rome Statute, notify a Judge of the High Court in writing that it has been made and request that the Judge issue a warrant for the arrest of the person whose surrender is sought.*

Both of these State officers are mandated to deal with all requests in compliance with Kenyan law including the Constitution which is the supreme law of the country.¹⁶

15. The extent of the cooperation of the Government of the Republic of Kenya with the Court is a matter of public record. A filing by the Government of the Republic Kenya was made on 8 April 2013 and the Court pronounced itself on 3 July 2013. As to the further issues raised by the Prosecution through its application of 29 November 2013, the Government of the Republic of Kenya responded fully by way of its submissions dated 20 December 2013. As regards the allegation by the Prosecution and the representatives of the victims, that the cooperation of the Government of the Republic of Kenya has been affected in any manner by the election and assumption of office of Mr. Uhuru Kenyatta as the President and Head of State of Kenya, the Government of the Republic of Kenya submits that the allegation is baseless. Kenya became a situation country on 31 March 2010 and formal proceedings in the two (2) Kenyan cases were commenced on 8 March 2011 and throughout that period until the election of Mr. Uhuru Kenyatta on 4 March 2013 and his assumption of office on 9 April 2013 and thereafter, the cooperation has been consistent.

In relation to persons in transit to ICC, Part VII of the Act allows for transit through Kenya and notes that *the Minister shall not refuse a request for transit unless the Minister considers that transit through Kenya would impede or delay the surrender or transfer of the transferee. Under section 134, the Minister may advise the ICC that Kenya is willing to allow persons who are ICC prisoners as a result of being sentenced to imprisonment by the ICC to serve those sentences in Kenya, subject to any specified conditions.*

¹⁶ Article 2 of the Constitution of Kenya provides that '(the) Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government' and that 'no person may claim or exercise State authority except as authorised under (the) Constitution'. (Emphasis added)

THE PRESIDENT AND THE SEPARATION OF POWERS UNDER THE CONSTITUTION OF KENYA

Supremacy of the Constitution of Kenya

16. The Supremacy clause of the Constitution of the Republic of Kenya provides in the two (2) main articles:

Article 1: 'all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution'.

Article 2: '(The) Constitution is the Supreme law of the Republic and binds all persons and all State organs at both levels of government' and that 'no person may claim or exercise State authority except as authorized under (the) Constitution'.

17. The Separation of Powers Doctrine is an integral part of Kenya's Constitutional law. For instance, **Chapter 8** is devoted to the independence of the Legislature; **Chapter 9** to the independence of the Executive; and **Chapter 10**, on the independence of the Judiciary. The effect of the Constitution's detailed provision for the rule of law in the processes of governance is that the legality of executive or administrative actions, in the event of a dispute, is to be determined by *the Courts*, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation".¹⁷

¹⁷Kenya Supreme Court Decision in Constitutional Application no. 2 of 2011, *In the matter of Advisory Opinions of the Court under Article 163 (3) of the Constitution and In the matter of the Interim Independent Electoral Commission*, pars 53 and 54. Available at <http://www.kenyalaw.org/caselaw/cases/view/77634/> (last accessed 11/2/2014)

The Authority of the President

18. The Executive under which the Presidency fall is one of the three arms of government established in the Constitution. The President of Kenya no doubt occupies an important role in the management of government affairs,¹⁸ However, his constitutional authority is to be exercised in accordance with the Constitution and the law.¹⁹ The presidency is therefore subject to the law.

19. To argue therefore that simply because an individual is the President and Head of State he must influence and control the decision making processes that inform the government's interaction and co-operation with the International Criminal Court is to say the least, simplistic and a clear demonstration of a lack of understanding of Kenya's legal and constitutional system.

20. The allegation that the President should be held responsible for the alleged instances of non-cooperation with the Prosecutor is either a conscious misrepresentation intended to mislead the Court or is based on a gross misunderstanding of Kenya's laws and more particularly the **Constitution of Kenya, 2010**.

21. The innuendo that the President of Kenya enjoys unlimited powers that would enable him influence the activities of each and every aspect of government function is fallacious and has no basis in law and practice.

22. The functions and powers of the President as provided for under the **Constitution of Kenya, 2010** and the law include, power to assent to Bills into

¹⁸ Article 131 (1) (b); The President exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries.

¹⁹Constitution of Kenya, Article 129

laws, appointment of Cabinet Secretaries, High Commissioners and other specified public office holders, chairing of Cabinet meetings, coordinating the functions of Ministries etc.²⁰

23. The President's other roles include ceremonial functions like addressing the opening of each newly elected Parliament, receiving foreign diplomatic and consular representatives and conferring honors in the name of the people and the Republic to citizens who have made outstanding contributions to the nation.²¹

24. However, even in the exercise of these important constitutional duties, the President is subject to checks and balances and therefore does not enjoy uncontrolled power. A few pertinent illustrations are discussed below.

25. Under **Articles 109 (1) and 115 of the Constitution of Kenya, 2010**, the power of assenting to Bills belongs to the President.

26. **Article 109 (1) of the Constitution of Kenya, 2010** provides that Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President. **Article 115 of the Constitution of Kenya, 2010** provides that within fourteen days after receipt of a Bill, the President shall either assent to the Bill; or refer the same back to Parliament for reconsideration, noting any reservations that the President has concerning the Bill.

²⁰ Constitution of Kenya, article 109 (1) and 115 provide for power to assent to Bills into laws; article 132 sets out the Functions of the President.

²¹Constitution of Kenya, article 132 (1) (a) and (4).

27. While the President may veto laws as seen in **Article 115 of the Constitution of Kenya, 2010** above, the Legislature can override such a veto. Under the Constitution, should the President decline to assent to a bill into law the Legislature can effectively overrule him.²²

28. With regard to appointments to public offices, the President has power to appoint but only upon approval by the National Assembly. Under Article 132 (2) of the Constitution, the President shall nominate and, with the approval of the National Assembly, appoint Cabinet Secretaries, High Commissioners Ambassadors and other State or public officer whom the Constitution requires or empowers the President to appoint.

29. The key provision that underscores the limits of Presidential powers in Kenya is to be found at Article 129 of the Constitution which provides that executive authority (which derives from the People of Kenya) shall be exercised in accordance with the Constitution. As Chief executive of the Country, the President is therefore mandated to carry out his functions and exercise his powers only as provided for in the Constitution.

30. The Constitution of Kenya creates several independent organs over which the President has no control.

Independent Constitutional Offices

31. One such organ is the Judiciary whose power belongs to the Courts. In the performance of its judicial role, the Judiciary is subject only to the Constitution and the law and shall not be subject to the control or direction of

²²Constitution of Kenya, article 115.

any person or authority.²³ What was intended by the Kenyan citizens in this regard is to ensure that the Judiciary itself shall be the organ of 'management of judicial services and, in that behalf, shall uphold, sustain and facilitate a Judiciary that is independent, impartial and subject only to the provisions of the Constitution and the law.'²⁴

32. As already stated in the foregoing paragraphs, under the Judiciary there is also the Judicial Service Commission (JSC). The JSC is an independent body with its own legal standing and constitutionally incorporated as a body corporate. The Commission is 'independent and not subject to direction or control by any person or authority'²⁵ with its members guaranteed tenure of office²⁶ and serves as the administrative arm of the Judiciary.²⁷

33. Another Constitutional office referred to above is that of the Director of Public prosecution. Article 157 of the Constitution creates the Office of the Director of Public Prosecutions (ODPP). The ODPP enjoys the same autonomy enjoyed by other arms of government and Constitutional offices. As an autonomous

²³Constitution of Kenya, Article 160 (1).

²⁴ Section 3 (a), Judicial Service Act, Chapter 185B of the Laws of Kenya.

²⁵Constitution of Kenya, Article 248 (2) (e) as read with Article 249 (2) of the Constitution.

²⁶Constitution of Kenya, Article 251.

²⁷ Constitution of Kenya, Article 172 (1) provides;

The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall –

(a) recommend to the President persons for appointment as judges;

(b) review and make recommendations on the conditions of service of –

(i) judges and judicial officers, other than their remuneration;
and

(ii) the staff of the Judiciary;

(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament.

office it is vested with the exclusive powers of prosecution²⁸ and the President of Kenya has no control over the functions of the ODPP.

34. Indeed as noted earlier, in the exercise of his powers or functions the Director of Public Prosecutions shall not be under the direction or control of any person or authority.²⁹

35. The other significant independent Constitutional organ discussed above is the Central Bank. Article 231 of the Constitution establishes the Central bank of Kenya whose responsibilities include formulating monetary policy, promoting price stability, issuing currency and general functions provided for under the law including the exercise of any type of central banking function.³⁰ In the performance of these functions or in the exercise of its powers, 'the Central Bank of Kenya shall not be under the direction or control of any person or authority.'³¹ Clearly, the President of Kenya has no control over the functions of the Central Bank.

36. Article 248 of the Constitution creates ten commissions and two independent offices, including as stated above the Judicial Service Commission, National Land Commission, the Independent Electoral and Boundaries Commission,

²⁸ Article 157 (6) of the Constitution provides for the functions of the DPP;

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may –
(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

²⁹Constitution of Kenya, article 157 (10); Section 6, Office of the Director of Public Prosecution Act no. 2 of 2013.

³⁰ Constitution of Kenya, Article 231; Section 3 (3), CBK Act.

³¹Constitution of Kenya, Article 231 (3).

the Parliamentary Service Commission, the Commission on Revenue Allocation, Public Service Commission, the Salaries and Remuneration Commission, the Teachers Service Commission and the National Police Service Commission with the Independent offices created under this article being the offices of the Auditor-General and the Controller of Budget. Other Independent offices created under other articles of the Constitution include also the Office of the Director of Public Prosecutions as shown in the foregoing paragraphs.

37. The independence of these institutions is safeguarded in express terms: ³²

The commissions and the holders of independent offices—

(a) Are subject only to this Constitution and the law; and

(b) Are independent and not subject to direction or control by any person or authority.

38. They enjoy independence of operation from any of the three arms of the Government of the Republic of Kenya. They are not subject to any person or authority's control as their independence is guaranteed³³ so as to enable them protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles; and promote constitutionalism.³⁴

39. The Supreme Court of Kenya in **Re The Matter of the Interim Independent Electoral Commission**³⁵ has also pronounced itself powerfully on the standing of Independent Commissions under the Constitution by stating that:

The independence of Commissions is secured by Article 249(2) of the Constitution which provides that such Commissions and holders of

³²Constitution of Kenya, Article 249 (2).

³³Constitution of Kenya, Article 249 (2) of the Constitution.

³⁴Constitution of Kenya, Article 249 (1).

³⁵Constitutional application 2 of 2011, available at <http://www.kenyalaw.org/caselaw/cases/view/77634/> (last accessed 11/2/2014)

office therein (Article 248), are subject only to the Constitution and the law and are independent and not subject to direction or control by any person or authority.....It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour; this, indeed, is the purpose of the "independence clause".³⁶

40. The Attorney General has a clear role stipulated by **Article 156 (4), (5) and (6)** of the **Constitution of Kenya, 2010**. The Attorney General is designated the principal advisor of the Government of the Republic of Kenya; he represents the national Government in non-criminal proceedings in Court; with the leave of the Court, he may appear in civil proceedings as *amicus curiae*. In the exercise of the functions of his office the Attorney General is not under the direction of any other body or authority.

41. Whereas there exist numerous independent Constitutional offices the Government of the Republic of Kenya shall, in this section single out and

³⁶ Constitutional application 2 of 2011, available at

<http://www.kenyalaw.org/caselaw/cases/view/77634/> (last accessed 11/2/2014), Para. 58-59 Emphasis added.

briefly address issues of independence of only a few of those that are relevant for purposes of the *amicus* submissions, namely; the Judiciary, the Office of the Director of Public Prosecutions (DPP) and the Central Bank of Kenya.

42. A number of requests have been made by the Prosecution which under Kenyan Law require the express involvement of the Judiciary or would necessitate the triggering of a Judicial Process. Insinuations are often made by the OTP and the Victim's Representative that tend to suggest that persons outside the Judiciary are or should be held responsible for the speed and /or outcome of decisions from the Courts. OTP, for instance, continually blames the Government of Kenya for delays or inability to interview police officers.³⁷

43. Under Chapter ten of the Constitution, the independence of the Judiciary is expressly entrenched. Particularly, **Article 160** provides that: "In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority".³⁸ What was intended by the Kenyan citizens in this regard is to ensure that the Judiciary itself shall be the organ of 'management of judicial services and, in that behalf, shall uphold,

³⁷ ICC-01/09-02/11-892-AnxA-Red; "...Most notably the Prosecution's efforts to interview Kenyan police officers regarding the role of the police during the PEV were stymied by domestic litigation in Kenya. The GoK failed to represent the Court's interests in this litigation and took no meaningful steps to ensure that police interviews took place..."

³⁸ Article 161 of the Constitution provides for Judicial offices and officers. As noted by Sihanya, Ben (2011) in 'The Presidency and Public Authority in Kenya's new Constitutional Order', *Constitutional Working Paper No. 2*, Society for International Development (SID), available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fwww.sidint.net%2Fdocs%2FWP2.pdf&ei=TCz7UsHML4rm7AbXp4DwCg&usg=AFQjCNHd2IFgHDjO0OzFbprhlgPvK4RgIw&sig2=ScK5lD2tlhZkY45mOiK1PA&bvm=bv.61190604,d.ZGU> "The 2010 Constitution constructs an administratively, politically and juridically empowered and independent judiciary that is to implement, enforce and offer an authoritative interpretation of the Constitution."

sustain and facilitate a Judiciary that is independent, impartial and subject only to the provisions of the Constitution and the law.’³⁹

44. The Judicial Service Commission (JSC), the body that plays the administrative oversight role over the Judiciary, is ‘independent and not subject to direction or control by any person or authority’⁴⁰ with its members guaranteed tenure of office⁴¹ and serves as the administrative arm of the Judiciary. It recommends persons for appointment as judges and also appoints all other judicial officers.⁴² It is responsible for the appointment and disciplinary issues to do with the Judiciary.⁴³ This Commission is thus mandated with the ‘crucial oversight functions over the Judiciary’⁴⁴ independently from any outside control particularly from the Executive.

45. An independent Judiciary and an elaborate Bill of Rights in the Constitution which confers on all citizens the right to challenge any perceived threat to their fundamental rights has opened up an era of intense litigation in Kenya with several individuals now moving to court daily to challenge various actions they consider harmful or potentially harmful to their rights.⁴⁵

46. It is in this context that the matter of Police Officers sought to be interviewed by the Prosecution should be understood. These Officers have challenged the intended interview by the Prosecution terming it a potential breach of their fundamental rights. In those circumstances, there is little the Attorney

³⁹ Section 3 (a), Judicial Service Act, Chapter 185B of the Laws of Kenya.

⁴⁰ Constitution of Kenya, Article 249 (2).

⁴¹ Constitution of Kenya, Article 251.

⁴² Constitution of Kenya, Article 172 (1).

⁴³ Constitution of Kenya, Article 172.

⁴⁴ Mutunga, Willy S.C., Chief Justice and President of the Supreme Court of Kenya, Critical Reforms Taking Root in the Judiciary, available at <http://kenyalaw.org/kenyalawblog/critical-reforms-taking-root-in-the-judiciary/> (last accessed 11/2/2014)

⁴⁵ Constitution of Kenya, Article 22.

General or indeed any other person can do given the independence of the Judiciary and the right of every citizen to challenge any actions they perceive to be a threat to their rights.

47. The Director of public Prosecutions exercises total independence in the exercise of his duties and enjoys security of tenure.⁴⁶ His is an autonomous office vested with all state powers of prosecution, i.e. to institute and undertake criminal proceedings, take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority and discontinue at any stage before judgment is delivered any criminal proceedings.⁴⁷

48. In the exercise of his powers or functions the Director of Public Prosecutions shall not be under the direction or control of any person or authority.⁴⁸

49. Insinuations that have been made that Decisions relating to Prosecution of and /or failure to prosecute offences related to the PEV are politically motivated or attributable to persons other than the DPP should be assessed in light of these Constitutional provisions.

50. Article 231 of the Constitution establishes the Central bank of Kenya whose responsibilities include formulating monetary policy, promoting price stability, issuing currency and general functions provided for under the law including the exercise of any type of central banking function.⁴⁹ In the performance of these functions or in the exercise of its powers, 'the Central

⁴⁶Constitution of Kenya, Article 157, 158.

⁴⁷Constitution of Kenya Article 157 (6).

⁴⁸Constitution of Kenya Article 157 (10), Section 6 Office of the Director of Public Prosecution Act no. 2 of 2013.

⁴⁹Section 3 (3) of the Central Bank of Kenya Act.

Bank of Kenya shall not be under the direction or control of any person or authority.’⁵⁰

51. The Attorney General has severally indicated to the Prosecution that neither he nor any other person in Government can influence the decision making processes of Independent organs of the Government of the Republic of Kenya including the Central Bank which operate under specific provisions of the law and which they are mandated to comply with.

52. The Supreme Court of Kenya, in addressing the meaning of and rationale behind the autonomy of Independent organs of government, has observed that “... Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit...”⁵¹

53. It should be noted that the Attorney General, whose has a broad mandate in facilitating cooperation between the State and the ICC, does not direct or provide a binding opinion to such independent organs as the Central Bank of Kenya. Whereas it can be said that the Attorney- General bears the mantle of the “chief lawperson” of Government in its diverse dimensions and the various departments of the Government have the liberty to seek his opinion on any legal question of relevance to their day-to-day operations, ⁵² the Supreme Court has observed that “... seeking the advice of the Attorney-

⁵⁰Constitution of Kenya, Article 231 (3).

⁵¹ Supreme Court Decision in Constitutional Application no. 2 of 2011, *In the matter of Advisory Opinions of the Court under Article 163 (3) of the Constitution and In the matter of the Interim Independent Electoral Commission*, Para 60, available at <http://www.kenyalaw.org/caselaw/cases/view/77634/> (last accessed 11/2/2014)

⁵² Supreme Court Decision in Constitutional Application no. 2 of 2011, *In the matter of Advisory Opinions of the Court Under Article 163 (3) of the Constitution and In the matter of the Interim Independent Electoral Commission*, Para. 55. <http://www.kenyalaw.org/caselaw/cases/view/77634/> (last accessed 11/2/2014)

General, or being required to do so by a rule of procedure, does not compromise the independence of a State organ in any way, nor does it vest a veto power in that office. The applicant after obtaining advice from the office of the Attorney General is not necessarily bound by the same.⁵³

54. The Prosecution raises issues relating to delays in meeting its “deadlines” for providing information it seeks and the fact that the AG had to refer the requests to relevant agencies and ministries and laments the resultant delays.⁵⁴ The Common Legal Representative of the Victims equally interprets Article 132 (5) of the Constitution as effectively conferring an obligation, through the Cabinet Secretaries, of requiring relevant agencies to provide information, presumably immediately upon demand.⁵⁵ The Government of Kenya makes the following observations in that regard:

- a) Consultations between different Constitutional bodies would reasonably be expected to take some time, as the respective bodies would need to make their independent assessment of the law, more so when it relates to an uncommon or unusual requests.
- b) The fact of delay has no effect on whether the law permits or prohibits certain conduct, such as the release of confidential information contrary to the law. It may be the case that the Attorney General and the relevant agency do not interpret certain aspects of the relevant law similarly, thus requiring time for consultations. It would be absurd to suggest that the Prosecution must be apprised of each and every consultative step.

⁵³ Supreme Court Decision in Constitutional Application no. 2 of 2011, *In the matter of Advisory Opinions of the Court Under Article 163 (3) of the Constitution and In the matter of the Interim Independent Electoral Commission*, Para. 61. <http://www.kenyalaw.org/caselaw/cases/view/77634/> (last accessed 11/2/2014)

⁵⁴ ICC-01/09-02/11-866-Red, Para.16, 17, 20 and 21.

⁵⁵ ICC-01/09-02/11-879-Red, Para. 34.

- c) Article 132 (5) of the Constitution does not confer powers on the President to direct, supervise or order independent Constitutional and statutory bodies in contravention of express provisions in the Constitution to the contrary.

55. The Government of Kenya submits that suggestions that the President or any other person should require the Central Bank to act in any manner to satisfy the demands relating requests from the Prosecution, should be considered in light of the independence and constitutional insulation of the said institution .

Judicial Interpretation on Presidential Powers or Authority

56. To understand how the **Constitution of Kenya, 2010**, limits Presidential powers in Kenya, all one needs to do is to look at what Kenyan courts have said about the exercise of those powers.

57. In *Brian Weke & another v Attorney General & another*,⁵⁶ the Petitioners challenged what they perceived to be improper exercise of Presidential power. Their Petition related to the lawful procedure for the appointment of the Chairperson and members of the Kenya National Commission on Human Rights.

58. The Petitioners sought among others, a declaration from the Court that the President had no powers and or discretion to decline and or refuse to forward a list of candidates to the National Assembly, shortlisted by the Selection Panel appointed under Section 11 (1) and (2) of the Kenya National Commission on Human Rights Act, No.14 of 2011 for consideration for either approval or rejection.

⁵⁶ Petition No. 502 of 2013, available at <http://www.kenyalaw.org/caselaw/cases/view/93625/> (last accessed 11/2/2014)

59. The Court agreed with the Petitioner and stated:

Turning back to the issue at hand, what options were open to the President once he received the names of shortlisted candidates for nomination? Under Section 11(6), he had, from the date of receipt of the list, 7 days to nominate one person as Chairperson and four persons as members of the Commission. He did not do so and instead opted to begin the whole process afresh and no law was quoted to support his stance. He did not for example invoke Section 11 (15) and extend time for submitting the names to the National Assembly once Mumbi Ngugi, J. declared the process of short listing as lawful. Had he been advised to do so, this Petition would not have been filed and the process would have continued under Section 11(7) of the Act.⁵⁷

The court proceeded to state:

Was his option to reopen the process lawful therefore? Clearly not. The President, like all other State officers, took an oath to uphold the Constitution and the Laws of Kenya. His actions must always be guided by that oath. Convenience is never part of that oath and where the law is clear and lacks ambiguity, it must be followed..... None of the bodies and offices above can be directly faulted for the initial delay but certainly after the judgment in Petition No.358 of 2012, the President should have invoked Section 11(15) and moved the process forward but, instead, he chose a convenient but unlawful process by restarting the whole process. He acted outside the law and this Court has the obligation to point him to the right direction. ⁵⁸

60. In another Constitutional Petition, a local Non-Governmental Organisation (NGO) challenged the powers of the President to appoint persons as County Commissioners and while declaring the appointments unconstitutional, the Court determined that “.....a perusal of the powers vested in the President under Article 132(f) of the Constitution shows that there is clearly no intention that the restructuring of the Provincial Administration to accord with the

⁵⁷Petition No. 502 of 2013, *Brian Weke & another v Attorney General & another*, Para. 27, available at <http://www.kenyalaw.org/caselaw/cases/view/93625/> (last accessed 11/2/2014)

⁵⁸Petition No. 502 of 2013, *Brian Weke & another v Attorney General & another*, Para. 30, available at <http://www.kenyalaw.org/caselaw/cases/view/93625/> (last accessed 11/2/2014)

devolved form of government contemplates a situation in which the President establishes and deploys officers to the county administration".⁵⁹

61. The Court then proceeded to determine that the President had no power to appoint or deploy County Commissioners as he had purported to do under **Gazette Notice No. 6604 of 11th May 2012** and **Gazette Notice No. 6937 of 23rd May 2012** and that even if he had the power to make such appointments or deployments, those appointments or deployments violated **Article 10 and 27 of the Constitution of Kenya, 2010** and the action was therefore unconstitutional, null and void.⁶⁰

62. Another instance that underscores the independence of the Constitutional bodies from Presidential powers relates to a recent decision by the President acting on the recommendation of the National Assembly to suspend Members of the Judicial Service Commission and set up a tribunal to investigate the conduct of the said members.⁶¹

63. This decision was subsequently challenged and the Court subsequently suspended the Tribunal.⁶² The Court was of the view that the President in suspending the members of the Judicial Service commission and setting up the Tribunal did so when he lacked the powers to proceed as such, in light of a court order barring the same and given the independence of constitutional Commissions and Independent Offices. The court noted that:

⁵⁹Centre for Rights Education & Awareness (CREAW) & 8 others v Attorney General & another, available at <http://www.kenyalaw.org/caselaw/cases/view/81715/> (last accessed 11/2/2014)

⁶⁰ It should be pointed out that the Court of Appeal later overturned the High Court Decision stating that the President had not acted unlawfully. The litigation in this matter however demonstrates the fact that Presidential power is not absolute and is subject to intense judicial scrutiny.

⁶¹ Gazette Notice No. 15094 of 2013, available at http://kenyalaw.org/kenya_gazette/gazette/volume/691 (last accessed 11/2/2014)

⁶² Petition no. 518 of 2013, *Judicial Service Commission v. Speaker of the National Assembly & another*, available at <http://kenyalaw.org/caselaw/cases/view/92015/> (last accessed 11/2/2014)

If therefore it turns out that the action by His Excellency the President of appointing the Tribunal was undertaken in breach of the orders of this Court, that action may well be null and void and of no effect. It is as if it was never done in the first place. It is as if it never existed.⁶³

64. The Legislature in Kenya also acts as a check on Presidential powers. An illustration of this is when the President on 30th December 2013, through **Gazette Notice No. 15759⁶⁴**, appointed an individual named Abduba Dida to be the Chairperson of the Constituencies Development Fund, Members of the Legislature objected to the appointment arguing that the President had breached the law in the appointment of Mr. Dida since such appointment was vested in the Cabinet Secretary for devolution who could proceed to make such appointment only from people who had been vetted by Parliament.⁶⁵ Resulting from this objection, the appointment was revoked.⁶⁶

65. As illustrated here, Presidential powers have limits and suggestions that the President of Kenya will arbitrarily influence decision making processes with regard to co-operation with the ICC is not only misleading but grossly disingenuous. The President has no control over constitutional organs or offices.

66. In his response to the OTP application for adjournment, the CLRV proceeds upon the false premise as to the powers of the President with regard to co-operation in attributing to him a generic responsibility for what is termed "deliberate obstruction of access to evidence by a government directly under his control".⁶⁷ The Government of the Republic of Kenya submits that the

⁶³Petition no. 518 of 2013, *Judicial Service Commission v Speaker of the National Assembly & another*, Para. 18, available at <http://kenyalaw.org/caselaw/cases/view/92015/> (last accessed 11/2/2014)

⁶⁴ Accessed at http://kenyalaw.org/kenya_gazette/gazette/volume/774 (last accessed 11/2/2014)

⁶⁵Section 5 of the Constituencies Development Fund 2013 Act.

⁶⁶The Kenya Gazette, Vol. CXVI –No. 3 Gazette Notice No. 112. Accessed at http://kenyalaw.org/kenya_gazette/gazette/volume/778 (last accessed 11/2/2014)

⁶⁷ICC-01/09-02/11-879-Red, par 14.

nature of power sought to be attributed to the President in view of the clear checks and balances to be found in the Constitution is imaginary and non-existent.

67. The CLRV argues in his response that the accused as President is constitutionally required to ensure that International obligations of the Republic are fulfilled through the actions of relevant Cabinet Secretaries and any failure by Kenya to fulfill its obligations under the statute including access to relevant witnesses and documentary evidence must be attributed to the President of Kenya.⁶⁸

68. This argument is without merit and proceeds on the false premise that there are no laws in Kenya to guide compliance with International obligations. Such argument presumes, quite erroneously, that the President of Kenya should facilitate compliance with demands of International entities regardless of national legal and constitutional prerequisites. For the simple reason that the CLRV suggests compliance with International obligations without regard to Kenya's sovereign authority and due process, his argument must fail. Indeed, Kenyan Courts have emphasized the obvious supremacy of the Kenyan Constitution and Kenyan laws over international treaties.⁶⁹

⁶⁸ICC-01/09-02/11-879-Red, par 35.

⁶⁹ Petition 190 of 2011, *Beatrice Wanjiku & Another vs. the Attorney General & Others*, available at <http://kenyalaw.org/caselaw/cases/view/81477/> (last accessed 11/2/2014); Justice Majanja made this observation: "I take the position that the use of the phrase 'under this Constitution' as used in Article 2 (6) of the Constitution means that the international conventions and treaties are 'subordinate' to and ought to be in compliance with the Constitution. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of Article 94..... Article 2 (5) and (6) regulates the relationship between international law and national law in two ways. First, by placing the issue of international law within the supremacy clause, the supremacy of the Constitution is emphasized in relation to international law. Second, the application of international law in Kenya is clarified to the extent that it (is) not left in doubt that international law is applicable in Kenya. The nature and extent of

69. The Prosecution and CLRV are without doubt unhappy with what they perceive to be slow pace of the processes and tend to lay all the blame at the feet of the President. The Government of Kenya submits that these perceived delays have nothing to do with the President, who in any event assumed office only about a year ago long after the contested requests were made. Expediency should not override the requirements of adherence to Constitutional and legal imperatives. Indeed, this is the sacrifice involved in the choice of a democratic system that embraces the doctrine of separation of powers over an autocratic one. The following observations of the Supreme Court of the United States, would apply squarely to situations such as the present one, given the similarities in Kenya's and the United State's Constitutional frameworks:

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford. I know no more impressive words on this subject than those of Mr. Justice Brandeis: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."⁷⁰

application of treaties must be determined on the basis of the subjectmatter and whether there is domestic legislation dealing with the specific issue athand..."

⁷⁰*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), available at

<http://www.michaelariens.com/ConLaw/cases/steelseizure.htm> ;

<http://supreme.justia.com/cases/federal/us/343/579/case.html> (last accessed 11/2/2014)

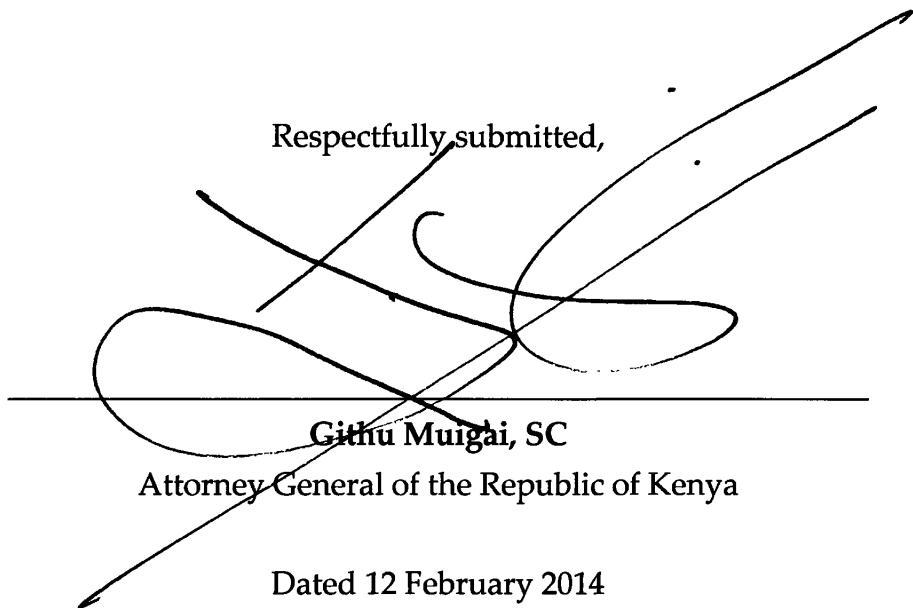
70. As Attorney General of the Republic of Kenya and chief legal advisor to the Government, all requests for co-operation from the Prosecutor of the ICC are processed through my office. The President of the Republic of Kenya has never influenced the manner in which any request was dealt with nor does the office of the Attorney General know of any instance when the President of Kenya obstructed or attempted to obstruct any form of co-operation with the Prosecutor.

71. The Office of the Attorney general of the Republic of Kenya is not aware of any one case when the President of Kenya ever interfered with and obstructed co-operation with any organ of the Court. All decisions emanating from the Office of the Attorney General with regard to the issue of co-operation are based on the office's interpretation of the Constitution and the law and the President and Head of State has never influenced and or controlled any such interpretation.

72. The Office of the Attorney General has never received any information or instruction from the President that was in any way meant to obstruct and / or frustrate cooperation with the ICC or any Organ of the ICC. Allegations made by the Prosecution and the CLRV are serious and should be based on specific factual instances of obstruction of specific requests as opposed to reliance on misplaced inferences, innuendo and speculation.

73. It is significant to note that other than mere allegations based on speculation and innuendo, there is no evidence presented to suggest that the President and Head of State of the Republic of Kenya has obstructed any specific request for assistance or in any way influenced the manner in which a specific request was handled and /or processed by the relevant authorized agencies.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over the text of the signature block.

Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 12 February 2014

At The Hague, Netherlands