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Original: **English** | No.**: ICC-01/09-02/11**
Date: **19 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

Public

Victims' response to "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: **Common Legal Representative of Victims**

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

The Office of the Prosecutor Ms Fatou Bensouda Mr James Stewart Mr Benjamin Gumpert QC	**Counsel for the Defence** Mr Steven Kay QC Ms Gillian Higgins
Legal Representatives of Victims Mr Fergal Gaynor	**Legal Representatives of Applicants**
Unrepresented Victims	**Unrepresented Applicants for Participation/Reparation**
The Office of Public Counsel for Victims Ms Paolina Massidda Ms Caroline Walter	**The Office of Public Counsel for the Defence**
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REGISTRY

Registrar Mr Herman von Hebel	**Counsel Support Section**
Victims and Witnesses Unit Mr Patrick Craig	**Detention Section**
Victims Participation and Reparations Section Ms Fiona McKay	**Other**

I. Introduction

1. In accordance with the Trial Chamber's Decision,[1] the Legal Representative of Victims ('LRV') hereby responds to the "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'" ('Government Submissions') and submits in summary that:
    a. The Attorney General's arguments about independent commissions are inapposite;
    b. The President of Kenya is ultimately responsible for any failure by Kenya to comply with its obligations under the Rome Statute;
    c. The Attorney-General's inaction, not a dilatory judicial system, is the reason for non-cooperation;
    d. The Attorney General has provided reasons to justify non-cooperation which are contradictory, inconsistent and misconceived, and indicative of a policy of non-cooperation; and
    e. There is reason to doubt the *de facto* independence of the Attorney General from the President in respect of ICC cooperation.

II. Procedural background

2. On 29 November 2013, the Office of the Prosecutor ('Prosecution') filed the 'Prosecution application for a finding of non-compliance pursuant to Article 87(7) of the Statute against the Government of Kenya' ('Application').[2]
3. Having been invited to do so by the Chamber,[3] the Government of Kenya ('Government') submitted its observations on the Application

[1] Decision requesting observations from the Government of Kenya, 9 December 2013, ICC-01/09-02/11-870.
[2] Application, ICC-01/09-02/11-866-Conf-Exp. A public redacted version was filed on 2 December 2013 as ICC-01/09-02/11-866-Red.
[3] Decision requesting observations from the Government of Kenya, 9 December 2013, ICC-01/09-02/11-870.

('Observations'), which were conveyed to the Chamber by the Registry on 9 January 2014,[4] disputing the allegations contained in the Application.[5]

4. On 31 January 2014, the Prosecution responded to a Defence request to terminate the proceedings,[6] and asked the Chamber to (i) reject the Defence request; (ii) rule on the Application, find that the Government has failed to comply with its cooperation obligations, and order such compliance; and (iii) adjourn the trial of the present case until the Government "complies with its obligations".[7]
5. On 4 February 2014, the Government filed a request for leave pursuant to Rule 103 of the Rules to make submissions ('Rule 103 Request').[8]
6. On 7 February 2014, the Chamber invited the competent Kenyan authorities to submit their observations on two issues identified in the Rule 103 Request.[9]
7. On 12 February 2014, the Government filed the Government Submissions.[10]

III. The subject matter is directly linked to the victims' interests

8. 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."[11]

[4] Registry's report pursuant to the "Decision requesting observations from the Government of Kenya" dated 9 December 2013, ICC-01/09-02/11-877-Conf. The Observations are contained in Annex 2 of this filing (ICC-01/09- 02/1 l-877-Conf-Anx2). A public redacted version was filed by the Registry on 5 February 2014 as ICC-01/09-02/11- 877-Anx2-Red.
[5] Observations, ICC-01/09-02/11 -877-Anx2-Red. See in particular para. 29 at page 24 of Annex 2.
[6] Defence Response to the Prosecution's "Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date", ICC-01/09-02/11-878-Conf. A public redacted version was notified on 24 January 2014 as ICC-01/09-02/11-878-Red.
[7] Prosecution opposition to the Defence request for the termination of the Kenyatta case, ICC-01/09-02/11-892, paras 3 and 29.
[8] The Government of the Republic of Kenya's 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', ICC-01/09-02/11-895, para. 7. Corrigendum filed on 5 February 2014 as ICC-01/09-02/11-895-Corr.
[9] ICC-01/09-02/11-898. The Government Submissions cover ground somewhat broader than that strictly permitted by the Trial Chamber. The LRV makes no objection to the Government Submissions on that basis.
[10] ICC-01/09-02/11-901-Conf, reclassified as a public document on 13 February 2014.
[11] ICC-01/09-02/11-498, para. 71.

9. The Government Submissions are directly relevant to the victims' interests in this case. They relate to the Accused's responsibility for state obstruction of access to evidence in the case which already has negatively impacted on the realization of the victims' rights. Victims have the 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.[12]

IV. Submissions

Arguments about independent commissions are inapposite

10. As a preliminary matter, the Attorney-General's arguments about independent commissions[13] are inapposite. The constitutional provisions relating to the offices of the President, the Attorney General and the Director of Public Prosecutions ("DPP") fall under Chapter 9 of the Constitution, which is headed "The Executive". They are not "independent offices" or "Commissions", which fall under Chapter 15 of the Constitution. The independent commissions referred to by the Attorney General do not constitute a legal barrier to cooperation with the ICC, nor do they affect the President's constitutional responsibility to ensure that Kenya fulfils its international obligations.

The President is ultimately responsible for any failure by Kenya to comply with its obligations under the Rome Statute

11. The Government has rejected as "without merit" the LRV's assertion that any failure by Kenya to fulfil its obligations under the Statute, including any obstruction of access to relevant witnesses and documentary evidence, must

[12] 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.
[13] Government Submissions, paras. 36-39.

be attributed to the President of Kenya.[14] The Government's position is that 'the President has no control over constitutional organs or offices.'[15] It is clear from the Constitution of Kenya, 2010 ('Constitution') that this argument is misconceived.[16]

12. The Constitution is the supreme law of Kenya and binds all persons and all State organs.[17] Any act or omission in contravention of the Constitution is invalid.[18] The general rules of international law form part of the law of Kenya.[19] Any treaty or convention ratified by Kenya forms part of the law of Kenya under the Constitution.[20]

13. Under the International Crimes Act 2008 ("ICA"), those parts of the Rome Statute dealing with "the making of requests by the ICC to Kenya for assistance and the method of dealing with those requests" have the force of law in Kenya.[21]

14. The President has a constitutional obligation to uphold the Constitution and the rule of law,[22] and to ensure that Kenya's international obligations are

[14] Government Submissions, para. 67.
[15] Government Submissions, para. 65.
[16] The Attorney-General's position appears to be that only the Attorney-General of Kenya and the courts of Kenya can interpret the law of Kenya in proceedings before the International Criminal Court: ICC-01/09-02/11-T-28-ENG ET WT 13-02-2014, page 37." This is somewhat inconsistent with the Rome Statute, which at Article 21(c) invites the Court to consider "the national laws of States that would normally exercise jurisdiction over the crime". In the present case, the Trial Chamber is at liberty to examine the domestic law of Kenya, including the International Crimes Act and the Constitution, in order to determine whether Kenya has fulfilled its obligation to co-operate with the Court, and whether the Accused, as President of Kenya, is ultimately responsible for ensuring that the obligations of Kenya under the Rome Statute are fulfilled.
[17] Article 2(1) of the Constitution.
[18] Article 2(4) of the Constitution.
[19] Article 2(5) of the Constitution.
[20] Article 2(6) of the Constitution.
[21] Section 4(1) ICA 2008. In *Walter Osapiri Barasa v Cabinet Secretary Ministry Of Interior And National Co-Ordination and others*, Constitutional Petition No. 488 of 2013, judgement delivered 31 January 2014, R.M Mwongo J. observed at para. 59: "In light of the foregoing, it is evident that Kenya, through a process of domestication, and the people of Kenya in exercise of their sovereign will through their constitutionally mandated representatives in Parliament, have in exercise of such sovereignty, ratified, adopted, incorporated and received the Rome Statute, excluding the provisions not domesticated, as part of the law of Kenya under the supremacy of the Constitution. That being so, the effect is that the Rome Statute forms part of the laws of Kenya to the extent stated. Being a statute through a process of ratification and domestication the Rome Statute is, in terms of Article 2(6) of the Constitution, thus "under the Constitution", and hence is subordinate to the Constitution."
[22] Article 131(2) of the Constitution.

fulfilled through the relevant Cabinet Secretaries.[23] The President has the power to appoint (with parliamentary approval),[24] and to dismiss all Cabinet Secretaries; the power to dismiss a Cabinet Secretary does not require parliamentary approval.[25]

15. Although the Constitution limits some powers of the President in comparison to those in place prior to its adoption, the President of Kenya remains a powerful office.

16. Indeed, the Defence has recently emphasised the extensive nature of the President's day-to-day responsibilities as Head of State and Head of Government.[26] The depth and breadth of the President's powers and responsibilities is evident from Articles 131 and 132 of the Constitution.

17. The President is required to respect, uphold and safeguard the Constitution,[27] and to ensure the protection of human rights and fundamental freedoms and the rule of law.[28] That the President is the person principally responsible for ensuring that Kenya fulfils its treaty obligations is reinforced by a requirement that he submits annually a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic of Kenya.[29]

18. The President's power is exercised through Cabinet Secretaries and others,[30] over whom he has complete control:

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[23] See Article 132(5) of the Constitution. The term "Cabinet Secretary" is the formal term for the government ministers. Therefore, the Ministers for Finance, Foreign Affairs, Defence, Justice, Interior *etc* are all appointed and may be dismissed by the President. As noted further below, it is in fact the Attorney General, rather than a Cabinet Secretary, who is mandated to deal with requests for assistance under the ICA.
[24] Article 132(2) of the Constitution.
[25] Article 152(5)(b) of the Constitution.
[26] ICC-01/09-02/11-882-Red, 24 January 2014, paragraphs 18-30.
[27] Article 131(2)(a) of the Constitution.
[28] Article 131(2)(e) of the Constitution.
[29] Article 132(1)(c)(iii), Constitution.
[30] Article 152(1)(c) of the Constitution states that the "Cabinet consists of: (a) the President; (b) the Deputy President; (c) the Attorney General and (d) not fewer than fourteen and not more than twenty-two Cabinet Secretaries."

a. Article 131(1) of the Constitution provides that the President "exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries";

b. Article 132(2) empowers the President to appoint and dismiss the Cabinet Secretaries, the Attorney-General, the Secretary to the Cabinet and the Principal Secretaries;

c. Article 153(2) provides: "Cabinet Secretaries are accountable individually, and collectively, to the President for the exercise of their powers and the performance of their functions";

d. Article 132(3) provides that the President shall chair Cabinet meetings; direct and co-ordinate the functions of ministries and government departments; and assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary.

19. As for the President's control over the Attorney General, it is common ground that the Attorney General is the principal officer mandated under the ICA to process and deal with requests for assistance ("RFA") from the ICC.[31] The President has the power to appoint and to dismiss the Attorney General; neither requires parliamentary approval.[32]

20. The Attorney-General is a member of the Cabinet[33] and of the National Security Council.[34] Both the Cabinet[35] and the National Security Council[36] are chaired by and operate under the direction of the President.

21. Section 6(5) of the Attorney General's Act[37] states that "[i]n the exercise and performance of functions of the office, the Attorney-General shall not be under the direction or control of any other person or authority."[38]

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[31] Government Submissions, para. 14.
[32] Article 132(2) of the Constitution.
[33] Article 152(1)(c) of the Constitution.
[34] Article 240(1)(f) of the Constitution.
[35] Article 132(3) of the Constitution.
[36] Article 130(1) and 240(4) of the Constitution.
[37] The Office of the Attorney General Act, 2012.

22. However, the Attorney General's Act also provides at Section 12(1) that the President may remove the Attorney General from office for serious violation of the Constitution or any other law; gross misconduct, whether in the performance of their functions or otherwise; physical or mental incapacity to perform the functions of the office; incompetence; or bankruptcy.[39]

23. Taken together, these provisions clearly envisage that the President will dismiss the Attorney General if the Attorney General acts and persists in acting in a manner which is inconsistent with Kenya's international obligations, including its cooperation obligations under Part 9 of the Rome Statue. Failure by the President to do so would be inconsistent with the President's duty to uphold the Constitution and to ensure that his duty to ensure that the international obligations of the Republic are fulfilled.

24. The Attorney General's suggestion that the President's constitutional duty to ensure the observance of Kenya's international obligations is satisfied merely by appointing responsible persons to his Cabinet and appointing an Attorney General[40] is misconceived.

25. As the provisions set forth above make clear, the President's constitutional duty extends far beyond merely knowing that there is a responsible person in place. To limit the President's responsibility in this way would be to nullify his clear obligation to uphold the Constitution and the rule of law, and to ensure that the international obligations of the Republic are fulfilled. The

[38] Note also that Section 29 of the Attorney General Act 2012 states: "The Attorney-General is entitled to have access to persons, relevant records, documents and property pertaining to a civil or criminal case, in the performance of the duties of the Attorney-General." The Attorney General therefore has access to all documents in Kenya sought by the prosecution, including for example those referred to by the Prosecution in its Annex of 31 January 2014 (ICC-01/09-02/11-892-AnxA). It remains unclear whether he has exercised his right to have access to those documents, and whether he has satisfied himself that there is nothing in those documents which might prevent their disclosure to the Court.

[39] Section 12, Office of the Attorney General Act, 2012.

[40] The Attorney General has submitted that "The duty of the president of the Republic of Kenya in the fulfilment of Kenya's international obligations is to ensure that there is in place a responsible cabinet secretary for each purpose. … The failure of the president's mandate would arise if he had failed to appoint responsible persons as required by the treaty and the law. … What the president needs to know and what he knows is that there is an independent officer serving in that position" ICC-01/09-02/11-T-28-ENG ET WT 13-02-2014, pages 50-51.

Constitution, read as a whole, clearly envisages that President will actively take steps to ensure that he is satisfied that the Cabinet Secretaries and the Attorney General are acting in accordance with the Constitution and are ensuring the observance of Kenya's international obligations.

26. The Attorney General's argument is also inconsistent with common sense. For example, if the Minister for Health were to terminate an immunization programme in a manner wholly inconsistent with Government policy, or if the Minister for Defence were to order the invasion of a neighbouring State without the President's approval, the President would hardly be expected to sit on his hands. He would be expected, at the very least, to call in the officer in order to seek clarification, and if the officer in question continued to exercise his or her power in a manner inconsistent with Government policy and the Constitution, the President would be expected to dismiss the officer in accordance with his dismissal powers in the Constitution.

27. It follows from provisions set out above that any failure by Kenya to comply with its obligation to cooperate under the Rome Statute is the responsibility, in the first instance, of the Attorney General (or the Minister of the Interior, in respect of certain functions[41]) and ultimately the responsibility of the President. The President is ultimately responsible for any act or omission by the Attorney General or any relevant Minister resulting in a violation by Kenya of its cooperation obligations under the Rome Statute.[42]

[41] For example, section 21 of the ICA.

[42] If the Accused considered that his position as an accused person compromised his ability to fulfil his constitutional duty to ensure fulfilment of Kenya's international duties, he could have delegated his constitutional duty to ensure cooperation with the ICC to another person. He has not done so. This prevents him from arguing that he has been relieved of his constitutional duty to ensure Kenya's cooperation, and is also suggestive of a desire to ensure continued control over the issue of cooperation with the ICC.

The Attorney-General's inaction, not a dilatory judicial system, is the problem

28. Further, the Government's arguments relating to the independence of the judiciary[43] are also misplaced. The problem in this case is not that the Prosecution's requests for assistance are being dealt with expeditiously by the Attorney General but held up by a dilatory judicial system. Rather, the problem is inaction of the Attorney General.

29. This is illustrated by the one court order which is in place which prevents the Prosecution from interviewing ten key police officers. The Attorney General erroneously claims that "there is little the Attorney General or indeed any other person can do."[44] There is in fact much that he can do. He did not oppose the order when it was sought, nor did he appeal against it. The Attorney General has been at liberty for the past three years to apply for the matter to be set for a full hearing before the High Court of Kenya or to be struck out for want of prosecution. In his submissions, the Attorney General has not confirmed that he has applied to the High Court to have the matter heard, and he has not provided for any reasons for this unjustifiable delay. In addition, the Government has not taken steps to "promptly consult with the Court to try to resolve the matter" under Article 93(3) of the Statute, nor to engage with the Court under Article 93(5).[45]

30. It cannot be right that the Government can rely upon a three-year-old "temporary" injunction which it has not opposed or challanged as a reason to block Prosecution access to a vital category of evidence in Kenya.

31. Further, the Attorney General's suggestion that "[t]hese Officers have challenged the intended interview by the Prosecution" is inconsistent with

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[43] Government Submissions, paras. 31-32; 42-46.
[44] Government Submissions, para. 46.
[45] The LRV made these submissions in a May 2013 filing notified to the Government: ICC-01/09-02/11-731, para. 63.

information in the public domain suggeststhat the applicants for the anti-ICC suit were private individuals and not the police officers themselves.[46]

Attorney General has provided reasons to justify non cooperation which are contradictory, inconsistent and misconceived

32. The question of whether Kenya has made a good faith effort to cooperate with the Court should be considered in light of the reasons advanced by the Attorney General during the long and ongoing period of failure to comply with the RFA at the heart of the Prosecution's Article 87(7) application:

    a. That the Prosecution already has enough evidence;[47]

    b. That he is permitted not to comply with the RFA due to a decision of Pre-Trial Chamber II of 20 April 2011;[48]

    c. That he can do nothing to comply with the RFA without a court order,[49] and he will take no steps to apply for a court order; [50]

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[46] "On Monday, through their advocates, Evans Monari and Kennedy Ogeto, the Provincial Commissioners and police chiefs informed High Court Judge, Justice Daniel Musinga that they were not consulted by the two businessmen who are seeking to stop Lady Justice Kalpana Rawal from taking their evidence. 'Our clients were not consulted with regard to this application and petition and they are affected parties. The impression being created in the press is that they perhaps instigated this petition and that is not so. They will object to the continuance of this petition,' Monari said in court." See *We are not party to anti-ICC suit, says lawyers*, The Standard, 17 January 2011 (http://www.standardmedia.co.ke/business/article/2000026911/we-are-not-party-to-anti-icc-suit-says-lawyers?pageNo=1). Mr Ogeto, who is of course a member of the Defence in the present case, might wish to clarify the position in due course.

[47] Letter to the OTP dated 23 November 2012 (reference number of OTP/KEN/KEN-45b/FB –sm) from the Attorney General: "Furthermore, I pointed out that since the Kenyan cases have been investigated and confirmed, the Government is convinced that the Court, through the Prosecutor has the evidence necessary that it needs to prosecute the trials, and the Government is attending to any pending requests with a view to complementing the evidence already available." This was at tab 10 in the binder of letters provided by the Prosecution to the Trial Chamber, Defence and the LRV in advance of the recent status conference. The LRV respectfully suggests that the letters contained in that binder should be admitted as part of the record of these proceedings. This will assist in preserving a complete record of the material put before the Trial Chamber for its consideration, should the Appeals Chamber wish to refer to that record in due course.

[48] ICC-01/09-02/11-713 09-04-2013, para. 41.

[49] In respect of the RFA at the heart of the Prosecution's Article 87(7) request, the Attorney General said on 9 April 2013: 'The Republic of Kenya contends that there has to be a court order in place in order to fulfill this request' ICC-01/09-02/11-713 09-04-2013, para. 41.

[50] Judge Henderson asked: "What efforts have you, Attorney, yourself, pursued to ensure these specific requests that are at the heart, the nub of this particular application today?" The Attorney General's answer was: "I must say, if what your Honour means is what have done about the requests regarding financial statements, nothing went -- nothing went beyond the final communication we had with the Prosecutor in November 2012. The Prosecutor stated her position. I stated mine. She stated she was entitled to the records. I stated that she wasn't. I encouraged her to take up the matter at an independent forum. She didn't. I considered myself then, as I do now, entitled to assume that the Prosecutor was no longer interested in this particular disputed area of cooperation. Indeed, until the application for adjournment was made a few weeks ago -- or, rather, a few

d. That even with a court order he will not provide the requested material without the consent of the Accused because he "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."[51]

e. That he has not sought the consent of the accused as "it is neither my duty under the Rome Statute nor my duty under Kenyan law to seek such consent".[52]

33. These arguments are mutually contradictory, and inconsistent with the ICA.

34. If the drafters of the ICA had envisaged an obligation on the ICC Prosecutor to obtain a domestic court order, or to obtain an ICC court order, they would surely have included such provisions in the Act. The ICA contains no such provisions. Nor is there any reference in the ICA to a duty to obtain the consent of the accused in respect of any matter, including operations to search and seize evidence.[53] Instead, the ICA envisages that, if a court order is necessary, it is a domestic court order rather than an ICC court order, and it is incumbent on the Attorney General (rather than on the ICC Prosecutor) to authorize the arrangements for a court order to be obtained.[54]

35. Furthermore, the Attorney General has failed to point out that he may at any time apply for a court order for financial and telephone records under the Evidence Act[55] and under the Criminal Procedure Code.[56] Nor has the

months ago, this issue had become moot. It had become moot because two lawyers reading the same set of laws had come to two different conclusions in what the law required. I wasn't therefore in a position, your Honour, to act in a manner inconsistent with my own interpretation of the law, and indeed my own conscience on this matter because I never entertained a doubt then, nor do I now, as I stand before, that the Prosecutor as a prosecutor is not entitled to this form of material without a court order. That is the reason I have not pursued the matter further." No. ICC-01/09-02/11-T-28-ENG ET WT p. 54, lines 6 to 25 and p. 55, lines 1-2.

[51] ICC-01/09-02/11-877, para. 23.

[52] ICC-01/09-02/11-T-28-ENG ET WT, page 30.

[53] See sections 20 (1)(a)(ix), 72, and 96-100 of the ICA.

[54] See for example, sections 96(2) and 107 of the ICA, and the second schedule to the ICA at sections 3, 8, 17, and 23(1).

[55] Sections 178 and 180 of the Evidence Act provide: "178. A banker or officer of a bank shall not, in any proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of

Attorney General pointed out the provisions in the ICA which fully protect a financial institution which discloses information which "may be relevant to an investigation of or the prosecution of a person for, an international crime" or would otherwise be of assistance in the enforcement of the ICA.[57]

36. That there is a deliberate policy of obstruction of access is also reinforced by the Attorney General's failure to refer to, let alone explain his non-compliance with, sections 104 and 108 of the ICA.

37. The RFA in question falls under Article 93(i) and 93(l) of the Rome Statute. Sections 104 and 108 of the ICA expressly deal with requests for assistance from the Court which fall within those subsections of Article 93. The Government has conspicuously failed to discuss sections 104 and 108 of the ICA, and to identify what action has been taken in accordance with those sections, and why it failed to initiate consultation with the Court as required by the ICA and the Statute. This is despite the Government's acknowledgement that: "[A]fter the promulgation of the new constitution the

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which can be proved under this Chapter or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court made for special cause. […] 180. (1) Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book."

[56] A search warrant may be issued for access to any document or property that will reasonably aid in conducting a criminal investigation in Kenya. Section 118 of the Criminal Procedure Code provides 'Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.' Section 121(1) provides: "When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation."

[57] Rule 26 of the Second Schedule to the ICA provides that:

"(1) If a financial institution has information about an account held with the institution and the institution has reasonable grounds for believing that—

(a) the information may be relevant to an investigation of, or the prosecution of a person for, an international crime; or

(b) the information would otherwise be of assistance in the enforcement of this Act or any rules made under this Act,

the institution may give the information to a prescribed authority." Therefore, financial institutions have the option to invoke this particular rule to forward relevant information to the Attorney General.

ICC became part of the judicial system of our country, and therefore the Prosecutor has a constitutional right to deal with crimes committed in Kenya."[58]

38. The Attorney General's discretion to refuse to give authority for an Article 93(1)(i) request to proceed under Section 104 of the ICA is extremely limited.[59] Further, the discretion of the Kenyan agency to which the Attorney General forwards the request to refuse to comply is also extremely limited. The agency must "without delay" use its best endeavours to locate and make available the document or record sought, and to deliver the document or record, if located, to the Attorney-General.

39. Section 108 of the ICA, which deals with requests for assistance under Article 93(1)(l), is in similar terms. Once again, the discretion of the Attorney-General not to approve the request is very limited.[60] Again, the Kenyan agency to which the Attorney-General forwards the RFA must, without delay, use its best endeavours to give effect to the request. Under section 108(3), if the Attorney-General considers that the assistance sought cannot lawfully be provided, he must before refusing the request, "(a) consult with the ICC; and (b) consider whether the assistance can be provided subject to conditions or whether it can be provided at a later date or in an alternative manner".[61]

[58] Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative. Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, 8 April 2013, ICC-01/09-02/11-713, para. 35.

[59] The Attorney-General must give authority for the request to proceed if he is satisfied only of two things: (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and (b) the document or record sought is or may be in Kenya. Section 104 of the ICA.

[60] The Attorney-General must 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 assistance sought is in accordance with Kenyan law. Section 108 of the ICA.

[61] See also Section 107 of the ICA, which emphasises that any court orders necessary shall be Kenyan court orders and shall be arranged by the Attorney General:
"If the Attorney-General gives authority for the request for assistance in identifying, tracing and freezing, or seizing, property to proceed, he may authorise the appropriate Kenyan authority to apply for one or more of the following orders or warrants—
(a) a search warrant in respect of property under Part B of the Second Schedule;
(b) a restraining order under Part C of the Second Schedule;
(c) a production order under Part D of the Second Schedule;
(d) a monitoring order under Part E of the Second Schedule".

40. In addition, under section 24 of the ICA, the Attorney General must consult, without delay, with the ICC if in any case there are any difficulties apparent in executing a RFA received from the ICC. Further, before refusing any RFA, the Attorney General is required under section 24 to consult with the ICC to ascertain whether the assistance sought could be provided subject to conditions or at a later date or in an alternative manner.[62]

41. Sections 76(1), 78 and 79 of the ICA set out other modalities for complying with an RFA from the ICC. The Attorney General's discretion to refuse to comply with any RFA under those sections is also very limited.

42. The LRV understands that the Prosecution's current litigation under Article 87(7) is confined to one particular RFA, upon which it is proceeding as a specimen charge.[63] The Attorney General's position on that single RFA is itself indicative of a general policy of obstruction of access to relevant evidence.

There is reason to doubt the de facto *independence of the Attorney General from the President in respect of ICC cooperation*

43. The Attorney General has contested the suggestion that the issue of ICC cooperation was ever discussed by Cabinet,[64] and claims that 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.[65]

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[62] Furthermore, under Section 2 (1) of the ICA: "[T]he existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for—(a) refusing or postponing the execution of a request for surrender or other assistance by the ICC."
[63] On behalf of the victims, LRV encourages the Prosecution to litigate all relevant instances of noncompliance.
[64] The Attorney General said: 'Mr Gaynor also says that in his own judgement it is inconceivable that the cabinet of the Republic of Kenya could not, over the last year, have discussed the collaboration or cooperation of the ICC and of the Kenyan Government. I do not know his sources of information. I do not know whether he is privy to cabinet papers or cabinet minutes, but I have placed before you a signed statement in which I have controverted the possibility of that issue for reasons that are not far fetched.' ICC-01/09-02/11-T-28-ENG, page 97.
[65] Government Submissions, para. 72.

44. The DPP and the Attorney General take decisions in a manner which is *de jure* independent of the President. However, *de facto* it must be recognised that senior figures within the Government – including the Attorney General and the DPP – have consistently taken positions which are fully aligned with the interests of the Accused and opposed to the interests of thousands of Kenyan citizens who are victims of the crimes charged in this case:

    a. In October 2013, the Kenyan delegation at the African Union (which included the Attorney General) sought a resolution providing for immunity for serving heads of state, contrary to the spirit and letter of the Constitution, which provides no such immunity for Rome Statute crimes.[66] This followed a debate at which the Accused delivered a speech in which he referred to the ICC in derogatory and contemptuous terms.[67]

    b. In October 2013, the Kenyan delegation presented the AU resolution to the United Nations Security Council, and sought a deferral of the trials pursuant to Article 16 of the Statute.[68]

    c. In November 2013, the Attorney General, the DPP and the Minister for Foreign Affairs formed part of the Kenyan delegation to the Assembly of States Parties ("ASP"), which lobbied heavily for immunity from prosecution for sitting heads of state. The Kenyan delegation supported amendments which would permit the President and Deputy President of Kenya to be excused from attending trial, and opposed amendments to Rule 68 of the Rules of Procedure and Evidence which

[66] Article 142 (4) of the Kenyan Constitution states: "The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."
[67] The Accused described the court as "the toy of declining imperial powers" and said that certain positions taken by the Prosecution 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://www.newvision.co.ug/news/648328-uhuru-blasts-us-uk-in-his-au-speech--full-speech-below.html
[68] United Nations document S/2013/624.

would allow for, *inter alia*, the admission at trial of the evidence of witnesses who have been bribed, intimidated or have disappeared.[69] The Kenyan delegation secured the inclusion, in the preamble to the resolution amending Rule 68, of certain words in an effort to ensure that the amendments to the rule would not apply to the trial of the two Kenyan cases.[70] It remains unclear why the Kenyan delegation was so trenchantly opposed to the amendments to Rule 68 adopted by the ASP, and their application to this case and to the *Ruto & Sang* case.

d. In the present case, as noted above, the Attorney General has presented a varying series of arguments opposing legitimate requests for assistance from the Prosecutor in relation to telephone and financial evidence relating to the Accused, Mr Ruto and Mr Sang.

e. In the *Ruto & Sang*[71] case, the Attorney General has argued strongly against efforts to compel witnesses in Kenya to provide testimony in Kenya. [72] It remains unclear why exactly he has taken such a firm stance on this issue, which would surely assist the victims in knowing the truth about events relating to the post-election violence.

f. On 5 February 2014, the DPP confirmed that none of the more than 4,000 PEV files examined by the Multi Agency Task Force are prosecutable, whether before the International Crimes Division of the

[69] See also http://www.capitalfm.co.ke/news/2013/11/kenya-lobbies-against-absent-icc-witnesses-rule/. According to this article, the Kenyan delegation to the ASP included the Attorney General as well as 'Kenya's ambassador to the Netherlands Makena Muchiri, Director of Public Prosecutions Keriako Tobiko, President Kenyatta's Spokesman Manoah Esipisu and Emmanuel Talam of the Deputy President's office'. See also http://www.the-star.co.ke/news/article-144720/kenyas-bid-amend-rome-statute-likely-fail
[70] The preamble to Resolution ICC-ASP/12/Res.7 reads in relevant part: "The Assembly of States Parties …Further decides that the following shall replace rule 68 of the Rules of Procedure and Evidence, emphasizing article 51, paragraph 4, of the Rome Statute according to which amendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted": http://www.icc cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf
[71] ICC-01/09-01/11.
[72] ICC-01/09-01/11-1184, 11 February 2014.

High Court ("ICD") or elsewhere.[73] He made no reference to any intention to comprehensively re-investigate any of those cases in order to compile additional evidence. It therefore appears that the ICD will not deal with any PEV cases at all.

45. It is inconceivable that the general strategy of Kenya relating to ICC cooperation employed by the Attorney General[74] could have been continued without the knowledge and approval of the President of Kenya.

46. From the above, it can be concluded that:

f. The responsibility to ensure Kenya's cooperation with the Court in relation to requests for access to evidence in Kenya lies in the first instance with the Attorney-General and ultimately with the President;

g. The President of Kenya is obliged to ensure that the Attorney General acts in a manner that is consistent with Kenya's international obligations both under the ICA and the Constitution;

h. If the Attorney General consistently fails to ensure compliance with important requests for assistance from the ICC, the ultimate sanction is for the President to dismiss the Attorney General.

i. The positions taken by the Accused and by the Government since the election of the Accused in March 2013 suggest that the Accused continues to preside over a policy of deliberate obstruction of access to evidence relevant to the case against him.

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[73] Mr Tobiko Keriako, Director of Public Prosecutions said on 5 February 2014 in Naivasha: "Of the 4000 plus files that they have reviewed, none of them is prosecutable, none of them, and that is a fact, a sad and painful fact. None of them has been found to contain sufficient evidence to be prosecuted whether as international crimes or otherwise. What am I saying therefore, I am saying this- the sad and painful truth, we must face it, is that at present there are no cases arising out of the PEV that can be prosecuted before the ICD." Source: http://www.citizennews.co.ke/news/2012/local/item/16990-pev-perpetrators-escape-local-courts-justice

[74] As an aside, it must be noted that these positions, which are detrimental to the realisation of justice for PEV victims before the ICC and before domestic courts, also do not appear to be consistent with the obligation which the Constitution places on the State to ensure access to justice for all persons (section 48 of the Constitution) in full equality, and on the President and the Attorney General to uphold the Constitution and to promote the rule of law (Articles 131(2) and 156(1) of the Constitution).

V. Conclusion

47. It is now clear that the victims of this case will receive no justice in Kenya for the crimes committed against them. The impact of this must be emphasized: there will be no accountability whatsoever at the Kenyan courts for those responsible for the horrific crimes alleged in the present case, nor for any crimes committed during the post-election violence against tens of thousands of Kenyan citizens. The Accused, as President of Kenya, has shown no interest whatsoever in holding accountable those most responsible for crimes committed during the post-election violence, whether in Kenyan courts or at this Court. Instead, he continues to preside over a policy of non-prosecution within Kenya, and withholding from this Court important categories of evidence which would almost certainly reveal much truth about the crimes and committed during the post-election violence, and those ultimately responsible for them. To withdraw charges or to terminate the proceedings in these circumstances would be unconscionable.

Respectfully submitted,

Fergal Gaynor

Fergal Gaynor

Common Legal Representative of Victims

Dated this 19th day of February 2014

At The Hague, Netherlands