Cour
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International
Criminal
Court

Original: **English**

No.: **ICC-01/09-02/11**
Date: **10 September 2014**

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA

Public Redacted Version of 'Victims' response to Prosecution notice regarding the provisional trial date ', with Public Annex

Source: **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	**Counsel for the Defence** Mr Steven Kay 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**
States Representative Government of the Republic of Kenya	**Amicus Curiae**

REGISTRY

Registrar Mr Herman von Hebel	**Counsel Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

I. Introduction

1. In accordance with the Trial Chamber's 28 August 2014 'Order requiring a notice in relation to the provisional trial commencement date' ('Order')[1] and on behalf of the victims in this case, the Legal Representative of Victims ('LRV') submits,[2] in summary, that:
    a. The ongoing refusal of the Government of Kenya ('Government') to comply with the 2012 request for access to key evidence and the Trial Chamber's directions of 31 March 2014 and 29 July 2014[3] constitutes deliberate interference with the collection of evidence;
    b. The Government's interference with the collection of evidence is consistent with a campaign by the Accused to bring his case to an end;
    c. The Accused is responsible for the Government's obstruction of justice and for its noncompliance with the Trial Chamber's directions;
    d. The Accused is liable for interference with the collection of evidence;
    e. Termination is inappropriate and would set a dangerous precedent;
    f. Termination would be a cruel betrayal of the victims;
    g. The Accused has waived his right to trial without undue delay; and
    h. The appropriate remedies are adjournment until the Government complies with its outstanding obligations under Part 9 of the Rome Statute ('Statute'), referral under Article 87(7) to the Assembly of States Parties ('ASP'), and warning the Accused of his liability for arrest for violation of the summons conditions and under Article 70.

II. Submissions

Introduction

2. The screams of those who were burned to death in Naivasha and Nakuru are silent. They echo only in the memory of those who survived. Those whose right arms were hacked off have learnt to write with their left hands. Those

[1] ICC-01/09-02/11-939.
[2] The LRV submits these observations as a confidential document in accordance with Regulation 23*bis* of the Regulations of the Court, as it refers to confidential filings, and files a public redacted version concurrently.
[3] ICC-01/09-02/11-908 and ICC-01/09-02/11-937 respectively.

infected with HIV by their rapists have learnt to live with it, and all that it entails. But the surviving victims of the hell that engulfed Naivasha and Nakuru are now forced to confront new frustrations.

3. Callously denied justice and compensation in Kenya, they now see the Accused and his Government frustrate with impunity justice at The Hague. They expected justice, truth and accountability from the ICC, and have so far received nothing. They have expressed in strong terms their wish to see this Court remain true to its principles in the face of obstruction of justice.[4]

4. Termination of the proceedings in the face of a deliberate refusal to comply with the Trial Chamber's directions by the Accused's Government would be inappropriate. It would be unfair to the victims, as it would mean the complete destruction of justice for all those on one side of the 2007-2008 post-election violence ('PEV'), given the termination of the cases against Mr Ali and Mr Muthaura, and the effective impunity in Kenya for those involved in PEV crimes. Termination will incentivise further non-cooperation by Kenya with the ICC, and this in turn is likely to mean the total and permanent denial of justice, truth and accountability for the thousands of Kenyan victims of this case. Termination would enormously damage the ICC's credibility and deterrent effect, as it would complete the half-written playbook for future high-level and powerful accused to avoid justice at the ICC.

5. This is an unprecedented case, requiring unprecedented resolve. The Accused is the President of Kenya. He is the serving Head of State and Head of Government[5] of a State Party. *De jure* he controls the Government of Kenya,[6] which continues to fail to comply with the Trial Chamber's directions of 31 March 2014 and 29 July 2014. *De facto*, he is the most powerful and influential person in Kenya, and is better placed than anyone else to ensure that Kenya complies, or fails to comply, with those directions.

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[4] A representative sample of views of victims collected by the LRV's field staff on 8 and 9 September 2014, in English translation, are annexed.
[5] Constitution of Kenya, Article 131(1)(a).
[6] See further the arguments in paras. 33f below.

6. Instead of providing good faith co-operation, Mr Kenyatta's Government has presented an ever-varying series of obfuscations in an effort to justify its reluctance to disclose all but a recently-delivered, small proportion of the material first sought by the Prosecution two and a half years ago.
7. The Government's inaction speaks for itself: if the evidence requested were harmless or exculpatory, it would have been provided to the Court years ago.
8. The Court must not retreat in despair in the face of a ruthless and unrelenting campaign of obstruction of justice by Mr Kenyatta's Government. Rather, it must remain faithful to the directions it has already given to the Government and to the procedures set out in the Statute to deal with individual and State interference with the collection of evidence.

The ongoing refusal of the Government to comply with the 2012 request and the Trial Chamber's directions constitutes deliberate interference with the collection of evidence

9. The Prosecution's notice of 5 September 2014[7] is confirmation that the Accused's Government continues deliberately to refuse to comply with the Trial Chamber's unanimous decisions of 31 March 2014 and 29 July 2014. It is important to recall, in brief, salient events which led to those decisions.
10. The Trial Chamber on 31 March 2014 found that the Prosecution's efforts in this case had been affected by a number of unique circumstances beyond its control, which contributed to a loss of evidence in this case. Those factors included unprecedented security concerns relating to victims and witnesses.[8]
11. A climate of fear, fed by the Accused's public expressions of hostility to this Court, led to the withdrawal of witnesses[9] and chilled the willingness of individuals with information relevant to the case to come forward.[10]
12. Another factor beyond the Prosecution's control was the Government's noncompliance with the April 2012 request by the Prosecution for access to financial and telephone evidence.[11] That evidence is likely to throw significant

[7] ICC-01/09-02/11-944.
[8] ICC-01/09-02/11-908.
[9] *Ibid*; ICC-01/09-02/11-892-Conf-AnxA, page 2.
[10] *Idem*.
[11] ICC-01/09-02/11-866.

light on the whereabouts of the Accused during the crimes alleged; the persons with whom he was in contact; their whereabouts; and flows of funds from accounts ultimately associated with the Accused. That evidence is anything but marginal: it goes to the heart of the case.

13. As the Trial Chamber noted on 31 March 2014, the Government did not initially query the legality of the request, and eventually confirmed that it had sent specific requests to the relevant ministries.[12]

14. The Government then changed strategy, and provided a series of legal arguments to justify non-disclosure which were contradictory, irrational and wholly at variance with Kenyan domestic law and practice. These were not genuine legal hurdles raised in good faith by a State Party trying its best to co-operate. The Government's invocation of the principles of privacy and self-incrimination, in an effort to argue that it could not disclose incriminatory evidence to prosecutorial authorities without the consent of the accused, was particularly revealing of the extent of the Government's desperation to find some legal basis for its refusal to hand over the evidence requested.[13]

15. It was not until 9 January 2014, nineteen months after it had received the request, that the Government unequivocally stated its objection to it.[14]

16. On 31 March 2014, the Trial Chamber found that the Prosecution's access to the evidence in question had been 'unjustifiably frustrated'.[15] The Chamber expressed its expectation that the Government would act immediately to deliver the requested items as soon as it received a revised request, or to immediately engage with the Prosecution in good faith to resolve any problems which might impede that delivery.[16] That did not happen.

17. Further, the Trial Chamber clarified that if domestic court orders are needed in order to secure the provision of the evidence, it is up to the Kenyan

[12] ICC-01/09-02/11-908, para. 50.
[13] According to the OTP-GOK correspondence provided by the Prosecution to the Defence and the LRV prior to the 13 February 2014 status conference, [REDACTED] (ICC-01/09-02/11-919 and Annexes) Later excuses to justify non-disclosure included the argument that the right to privacy and the privilege against self-incrimination prevented disclosure, and that there was no 'proper defendant' in this case (ICC-01/09-02/11-908, footnote 80).
[14] ICC-01/09-02/11-908, para. 50.
[15] *Idem*, para. 98.
[16] *Idem*, paras. 100-101.

authorities to secure those domestic court orders.[17] The Chamber emphasized that 'it is now incumbent on the Kenyan Government to take the necessary actions – through relevant office holders, as appropriate – to ensure compliance with its outstanding co-operation obligations and in an expeditious manner.'[18]

18. The Government did not comply with these directions.

19. In its 31 March 2014 Decision, the Chamber invoked 'its truth-seeking function in accordance with Article 69(3) of the Statute'.[19]

20. In failing to deliver the evidence requested, the Accused and his Government therefore withheld from the Trial Chamber evidence which the Trial Chamber considers necessary for the determination of the truth. They also acted to frustrate the right to the truth of the thousands of victims of this case.[20]

21. On 29 July 2014, the Trial Chamber ruled upon arguments raised by the Government and by the Defence to justify the continued non-production of the evidence, now sought in a more focused and reduced 'revised request'.[21]

22. The Trial Chamber unanimously found that the Prosecution's revised request fulfils the requirements of relevance, specificity and necessity.[22] Among other things, the Trial Chamber:

    a. reiterated its expectation that there would be 'good faith exploration of alternative official sources of information'.[23]

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[17] *Idem*, para. 31.
[18] *Idem*, para. 103.
[19] *Idem*, page 3 (introduction); para. 90; footnote 213. That provision permits the Chamber to 'request the submission of all evidence that it considers necessary for the determination of the truth'.
[20] The Government's approach echoes that of states recently involved in covering up evidence of torture and 'extraordinary rendition.' The European Court of Human Rights has cited the findings of Council of Europe Human Rights Rapporteur Senator Dick Marty in a several recent decisions regarding the role of state authorities in providing effective impunity to state officials involved in torture. *E.g. Al Nashiri v. Poland* 28761/11, para. 481: 'The experience of the past decade had shown that there were various means by which the right to truth and the principle of accountability could be and had been frustrated, perpetuating effective impunity for the public officials involved in these crimes. They included, in particular, *de facto* immunities, officially authorised destruction of relevant evidence, objective obstruction of or interference in independent investigations, unjustified assertions of executive secrecy, dilatoriness, interruptions in investigations, and the suppression and delayed publication of reports.' *Cf. Husayn v. Poland* 7511/13; *El-Masri v. Macedonia* 39630/09; and the Marty Reports and associated Resolutions and Recommendations, http://www.coe.int/T/E/Com/Files/Events/2006-cia/ [10 September 2014]; in particular Res. 1507, para. 11.
[21] ICC-01/09-02/11-937.
[22] *Idem*, page 22.
[23] *Idem*, para. 41.

b. set out its expectation that telephone records – a critically important body of evidence where the Prosecution has encountered particular difficulties in securing co-operation – would be provided and that 'given the potential evidentiary significance of such material ... it is appropriate for the Prosecution to pursue all possible means of obtaining such information.'[24]

c. affirmed that the consent of the Accused is not necessary for relevant evidence to be disclosed to the Prosecution, and directed that 'additional steps, pursuant to ordinary investigative channels -- using compulsory measures where appropriate -- ought to be undertaken in parallel and in a timely manner'.[25]

23. It appears that the Prosecution has made reasonable efforts to secure full co-operation from the Government, and to engage the Government in meaningful discussions with a view to promptly resolving any remaining practical difficulties, in accordance with the Trial Chamber's directions.[26]

24. As far as the LRV is aware, the Government nevertheless has continued its practice of providing nominal co-operation while obstructing access to most of the material in question, and has not meaningfully complied with the Trial Chamber's directions of 31 March 2014 and 29 July 2014.

The Government's interference with the collection of evidence is consistent with a multifaceted campaign by the Accused to bring his case to an end

25. This ongoing inaction constitutes deliberate interference by the Government with the collection of evidence. This becomes especially clear when viewed in the context of an unprecedented international campaign by the Accused and his Government to bring his case to an end. For example:

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[24] *Idem*, para. 45.
[25] *Idem*, paras. 46f. [REDACTED] ICC-01/09-02/11-892-AnxA-Red.
[26] ICC-01/09-02/11-892-AnxA-Red.

26. The Government continues to obstruct access by the Prosecution to relevant witnesses and documentary evidence in Kenya.[27] Two examples are:

   a. The Government continues without justifiable excuse to block access by this Court to what the Prosecution has described as 'key documents' which would almost certainly reveal much truth about crimes committed in Nakuru and Naivasha in January 2008, and the identities of those most responsible.[28]

   b. The Government continues without justifiable excuse to fail to take the action available to it[29] to remove the three-year-old 'temporary' order preventing the interview in Kenya by the Prosecution of critically important senior security officials.[30]

27. The Accused, as President of Kenya, has engaged in overtly hostile conduct towards the Court, which, as the Trial Chamber has noted, 'has the potential to contribute to an atmosphere adverse to the Prosecution's investigation on the ground, as well as to foster hostility towards victims and witnesses who are cooperating with the Court.'[31] The Chamber has noted that 'at least three Prosecution witnesses appear to have withdrawn as a direct result of security concerns'.[32]

28. The Accused presides over a practice of non-prosecution in Kenyan courts of PEV crimes, resulting in total impunity for those most responsible.[33] Since he assumed office, the Accused has not expressed any support for any kind of

[27] The LRV has not been notified of the 2 September 2014 update from the Government of Kenya, referred to at footnote 4 of ICC-01/09-02/11-944. Should the Government have recently remedied any of the areas of non-compliance referred to in this filing, the LRV will be happy to acknowledge that.

[28] See the 'key documents' referred to by the Prosecution at ICC-01/09-02/11-892-Conf-AnxA, pp. 6f.

[29] The Attorney-General, as a named party to that litigation, can under Rules 23 and 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 apply to have the order discharged or set aside. He can also apply to have the order lifted for want of prosecution, under Order 17 of the Civil Procedure Rules 2010.

[30] ICC-01/09-02/11-908. The Prosecution has submitted: 'The GoK's stance on this matter effectively blocked a principal avenue of inquiry into the PEV.' *Id*em, page 1.

[31] *Idem*, para. 94.

[32] *Idem*, para. 93.

[33] The total paralysis in domestic accountability for PEV crimes is a matter of serious concern. A genuine domestic justice process for low-level suspects would result in the emergence of relevant testimonial and documentary evidence. This in turn would assist in identifying what happened and who was most responsible at higher levels, and would help to heal the wounds of the many thousands, from different tribes, who were so unfairly targeted. That evidence would likely assist the Trial Chamber in its search for the truth in this case.

domestic accountability for the savage crimes which tore through Kenya during the PEV. The existence of a policy of non-prosecution is confirmed by:

a. the fact that the International Crimes Division of the High Court ('ICD') remains inexistent and non-operational;[34]

b. the 5 February 2014 statement by the DPP that not one of the thousands of PEV cases currently before the DPP is 'prosecutable,' and none will therefore be prosecuted before the ICD;[35]

c. the fact that, over three years after the Government assured the Pre-Trial Chamber that Kenyan national investigative processes extend to 'the highest levels for all possible crimes,'[36] nobody at a high level of responsibility has been prosecuted for even one PEV offence in Kenya.

29. At the international level, high-level Government delegations have consistently adopted positions which are aligned with the interests of the Accused and opposed to the interests of the thousands of victims in this case, all of whom are Kenyan citizens. Some illustrative examples are:

a. In November 2013, the Government's delegation to the ASP (which included the Attorney-General, the DPP, and the Foreign Minister) supported numerous positions intended to shield the Accused from accountability. It opposed amendments to Rule 68 of the Rules of Procedure and Evidence which were intended in part to facilitate the admission of the initial recorded evidence of witnesses who are subsequently bribed, intimidated or who disappear.[37]

[34] It is well over a year since the Government assured the Trial Chamber that the ICD has been created 'for purposes of [...] dealing with the pending 2007-2008 PEV cases that are being pursued by the Director of Public Prosecutions (DPP)'. ICC-01/09-02/11-713, para. 39.

[35] 'PEV Perpetrators Escape Local Courts Justice,' *Citizen News*, 6 February 2014, http://www.citizennews.co.ke/news/2012/local/item/16990-pev-perpetrators-escape-local-courts-justice [10 September 2014].

[36] ICC-01/09-02/11-26, para. 32.

[37] The Government secured the inclusion in the resolution adopting the amended Rule 68 of language in an attempt to inoculate the Kenya cases from its effect: 'Hearsay evidence excluded in Uhuru, Ruto ICC cases,' *Capital News*, 27 November 2013, http://www.capitalfm.co.ke/news/2013/11/hearsay-evidence-excluded-in-uhuru-ruto-icc-cases [10 September 2014]: 'Kenya's Foreign Secretary Amina Mohamed said even though amendments to rule 68 of the Rules of Procedure and Evidence had been agreed within the working group, Kenya forced a caveat to delay enforcement of the rule in the current cases'.

b. The Government is tabling further amendments[38] aligned to the interests of the Accused for consideration at this year's ASP, relating to presence at trial and head of state immunity.[39]

c. The Accused described the Court in contemptuous terms in an address to the Assembly of the African Union in October 2013, which he attended with his Foreign Minister and the Attorney-General.[40]

d. The Government petitioned the United Nations Security Council to suspend the Kenya trials in November 2013.[41]

e. The Government has filed submissions in the *Ruto & Sang* case before the Trial Chamber and the Appeals Chamber to resist an arrangement to compel witnesses to give evidence in Kenya.[42] This is seriously detrimental to the emergence of the truth regarding PEV crimes.

f. The Government has argued in the present case that the President is not in any way responsible for Kenya's failure to comply with its obligations under the Statute, relying on assertions which are inconsistent with the Constitution of Kenya 2010 ('Constitution').[43]

30. It is only to be expected that the Foreign Minister updates the Accused on these developments and that Counsel for the Defence update him on decisions in his case at this Court, and receive instructions from him.

31. The only reasonable inference to be drawn from all of this is that the Accused is not only aware of but, at the very least, approves of his Government's

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[38] UN, C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), 14 March 2014, https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf [10 September 2014].

[39] The Government has also promoted the inclusion in a draft protocol to expand the authority of the African Court on Human and People's Rights of a clause providing immunity for heads of state and senior government officials from prosecution for serious crimes, which was adopted in June 2014. 'African Union approves immunity for government officials in amendment to African Court Of Justice and Human Rights' Statute,' *International Justice Resource Centre*, 2 July 2014, http://www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute [10 September 2014]. See also http://legal.au.int/en/content/press-conference-au-summit-decision-protocol-african-court-human-and-peoples-rights [10 September 2014].

[40] Speech by President Uhuru Kenyatta at the Extraordinary Session of the African Union,' *The Standard*, 13 October 2014, http://www.standardmedia.co.ke/thecounties/article/2000095433/speech-by-president-uhuru-kenyatta-at-the-extraordinary-session-of-the-african-union [10 September 2014].

[41] UN, S/2013/624, 22 October 2014, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf [10 September 2014].

[42] *E.g.* ICC-01/09-01/11-1406.

[43] The LRV's submissions on this point were set out in ICC-01/09-02/11-904-Corr.

stance on ICC co-operation, including its deliberate refusal to comply with the Trial Chamber's directions of 30 March 2014 and 29 July 2014.[44]

The Accused is responsible for the Government's obstruction of justice and for its noncompliance with the Trial Chamber's directions

32. *De facto*, Mr Kenyatta as President is the most powerful and influential person in Kenya. Nobody is better placed to facilitate, or to obstruct, the provision of evidence to the Court. This is illustrated by the following recent examples.

   c. The Accused ordered and personally supervised the spectacular destruction of evidence in a pending criminal case on 29 August 2014. That destruction was reportedly in violation of an express order of the High Court of Kenya not to destroy the evidence.[45] It was also a violation of the President's duty to respect, uphold and safeguard the Constitution,[46] and to ensure the protection of human rights and fundamental freedoms and the rule of law.[47] If the Accused can order the destruction of evidence in Kenya in violation of an order of the High Court of Kenya, he can surely order the delivery of evidence in Kenya to The Hague in compliance with a direction of this Court.

   d. The Accused reportedly ordered the immediate transfer to Swiss prosecutors of potentially inculpatory evidence, relating to crimes committed by Kenyan citizens, sought by Switzerland.[48]

[44] This is subject to the possibility, admittedly remote, that the Government will in fact comply in good faith with those decisions.

[45] 'Court faults State's decision to destroy Sh1b drugs ship,' *The Standard*, 8 September 2014, http://www.standardmedia.co.ke/article/2000134299/court-faults-state-s-decision-to-destroy-sh1b-drugs-ship [10 September 2014]; 'Court slams Uhuru order to destroy Sh1.3bn heroin ship', *The Star*, 3 September 2014, http://www.the-star.co.ke/news/article-188065/court-slams-uhuru-order-destroy-sh13bn-heroin-ship [10 September 2014].

[46] Article 131(2)(a) of the Constitution.

[47] Article 131(2)(e) of the Constitution.

[48] The Swiss ambassador to Kenya, Jacques Pitteloud, was interviewed about the Government's recent decision to provide to Swiss prosecutors documents sought by those prosecutors relating to a money laundering investigation in Switzerland concerning a fraud on the Kenyan state known as the Anglo- Leasing scandal. The Swiss ambassador said that, following initial delay, 'The level of co-operation we have had with the Kenyan government … is impressive… and you can feel that there is a political will behind that.' He also said that 'there has to be some kind of justice, and we feel that the President is really serious about finally giving this kind of justice, so it's very good news' (See the interview at http://www.nation.co.ke/news/politics/Saba-Saba-Rallies-Swiss-Ambassador-Jacques-Pitteloud/-/1064/2367466/-/370hdq/-/index.html [10 September 2014],

33. *De jure*, the Accused cannot convincingly argue that he is somehow powerless to control Kenya's co-operation with the ICC and, in particular, to secure compliance by the Government with the Trial Chamber's express directions.

34. In international law, Kenya may not rely on the provisions of its internal law as justification for an intentionally wrongful act.[49] It must ensure that there are procedures available under national law for all of the forms of co-operation specified in Part 9 of the Statute.[50] Kenya has a general obligation to perform its treaty obligations in good faith.[51] Mr Kenyatta must give effect to that obligation: 'Heads of state or relevant government organs [...] have to give effect to the obligations and ultimately have responsibility to ensure State compliance with their treaty obligations.'[52]

35. In domestic law, the President holds more formal power than any other person in Kenya. The Defence has persuasively emphasised the extensive nature of the Accused's day-to-day responsibilities as Head of State and Head of Government.[53] The depth and breadth of the President's powers and responsibilities is evident from Articles 131 and 132 of the Constitution. Those Articles *inter alia* confer upon him all the executive authority of the Republic, and place him in charge of the armed forces and the National Security Council ('NSC').

36. The President's constitutional obligation to ensure that Kenya fulfils its treaty obligations[54] is reinforced by a requirement that he submit annually a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic of Kenya.[55]

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at six to seven minutes.) An editorial in *The Star* said: 'The President ordered his civil servants to furnish the Swiss with the documents in not more than 24 hours. The bureaucrats procrastinated that there was not enough time but Uhuru insisted. He did not want his government to be tainted by accusations of corruption' (Uhuru Showed True Grit Over Anglo Files,' *The Star*, 24 June 2014, http://www.the-star.co.ke/news/article-172671/uhuru-showed-true-grit-over-anglo-files [10 September 2014].

[49] Article 27, Vienna Convention on the Law of Treaties 1969; Article 32, Articles on the Responsibility of States for Internationally Wrongful Acts 2001.

[50] Article 88 of the Statute.

[51] Article 26, Vienna Convention on the Law of Treaties 1969.

[52] ICC-01/09-02/11-908, para. 92. The Accused has taken no action to deal with the potential conflict of interests in this case, identified by the Trial Chamber in that paragraph.

[53] ICC-01/09-02/11-882-Red, paras. 18-30.

[54] Article 132(5) of the Constitution.

[55] *Idem*, Article 132(1)(c)(iii).

37. The President's power is exercised through Cabinet Secretaries and others,[56] over whom he has complete control[57].

38. The President has the power to appoint and to dismiss the Attorney-General; neither requires parliamentary approval.[58] The Attorney-General is a member of the Cabinet[59] and of the NSC.[60] Both the Cabinet[61] and the NSC[62] are chaired by and operate under the direction of the President.

39. With such immense formal power and informal influence in Kenya, nobody is better placed than the Accused to facilitate, or to obstruct, the Prosecution's investigations in Kenya. The only reasonable inference to be drawn is that he has chosen to obstruct the investigations against him.

The Accused is liable for interference with the collection of evidence

40. Victims have repeatedly expressed to the LRV their deep anger at what they perceive to be interference with justice in this case. They are aware that they live in a country in which the rich and the powerful are able to bribe, kill or intimidate their way out of justice. No senior Kenyan politician since independence in 1963 has ever been convicted of a serious crime.[63]

41. Many victims have expressed surprise and anger at what they see as the ICC's inability to deal firmly with bribery, intimidation, and the refusal to hand over relevant evidence. They had assumed that the ICC would be better able to deal with these matters than Kenyan courts.

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[56] *Idem*, Article 152(1): '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.'

[57] The President 'exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries': Article 131(1)(b) of the Consitution; The President may appoint and dismiss the Cabinet Secretaries, the Attorney-General, the Secretary to the Cabinet and the Principal Secretaries: Article 132(2); Cabinet Secretaries are accountable individually, and collectively, to the President for the exercise of their powers and the performance of their functions': Article 153(2); The President chairs Cabinet meetings; directs and co-ordinates the functions of ministries and government departments; and assigns responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary: Article 132(3).

[58] *Idem*, 132(2); Section 12(1) of the Office of the Attorney-General Act, 2012.

[59] Article 152(1)(c) of the Constitution.

[60] *Idem*, Article 240(1)(f).

[61] *Idem*, Article 132(3).

[62] *Idem*, Articles 130(1) and 240(4).

[63] This is despite their involvement in thousands of crimes of murder, torture and forced expulsion since independence, as confirmed in the Truth Justice and Reconciliation Commission, *Report*, 3 May 2013, http://www.kenyamoja.com/tjrc-report [10 September 2014]. The Government has not implemented *any* of the report's recommendations, even its request for a public Presidential apology for all the injustices set out therein.

42. The Trial Chamber should consider inviting a prosecution[64] of the Accused for the offence of intentionally interfering with the collection of evidence, due to the continued non-delivery of evidence in violation of the Trial Chamber's decisions of 31 March 2014 and 29 July 2014.

43. The Accused *de facto* and *de jure* is in total control of his State's policy towards the Court, and in particular its intentional breach of its obligations under the Statute. His failure to ensure Kenya's compliance with its obligations under the Statute is in contravention of his obligations under international law and under the Constitution of Kenya, as discussed above.

44. Therefore, any further failure by the Accused to secure his Government's compliance with the Trial Chamber's directions of 31 March 2014 and 29 July 2014 amounts to intentionally interfering with the collection of evidence, entailing individual criminal responsibility under Article 70(1)(c).

45. The Accused cannot hide behind the doctrine of act-of-state. Kenya's gross and systematic failure to comply with Part 9 of the Statute is an internationally wrongful act within the meaning of the Articles on the Responsibility of States for Internationally Wrongful Acts 2001.[65]

46. However, this does not shield the Accused from personal criminal liability for interfering with the collection of evidence. An intentionally wrongful act of a State is without prejudice to the individual responsibility under international law of any person acting on behalf of a State.[66]

47. Further, the Accused's failure to enable access to relevant evidence is a breach of the summons conditions in this case. Under those conditions, the Accused is obliged to refrain from 'obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence'.[67]

[64] The LRV notes the Trial Chamber's ruling that 'the onus is on the Prosecution to substantiate this allegation and, as appropriate, to bring proceedings pursuant to Article 70 of the Statute' (ICC-01/09-02/11-908, para. 86). This does not preclude the Trial Chamber from expressly inviting the Prosecution to bring proceedings under Article 70 and Rule 165 of the Rules of Procedure and Evidence.
[65] Articles 1-3 and 28-33 of the Articles on the Responsibility of States for Internationally Wrongful Acts.
[66] *Idem*, Article 58.
[67] ICC-01/09-02/11-01, pp. 23f.

48. The Accused, with the permission of the Trial Chamber, has not set foot in an ICC courtroom in three years. The freedom and flexibility afforded to him, a person accused of crimes against humanity, is unprecedented in the history of international criminal justice. He has repaid that generosity with gross and scandalous insults towards this Court,[68] and with interfering with the Prosecution's collection of evidence by deliberately failing to secure his Government's compliance with the Prosecution's requests for assistance and with the Trial Chamber's directions. His violation of the summons conditions, and his Government's deliberate refusal to comply with the Trial Chamber's directions, cannot go without sanction.

The Accused has knowingly waived his right to trial without undue delay

49. The Trial Chamber referred in the 31 March 2014 Decision to the right of the accused to trial without undue delay as a relevant element in the present case. Important as this right is, it must be assessed in its proper context and cannot act as a reason to terminate the proceedings in the present case.

50. The right of an accused to trial without undue delay must be assessed in light of the accused's conduct. Conduct which amounts to a knowing waiver of the right to an expeditious trial, as well as dilatory procedural tactics that might not amount to a knowing waiver, are relevant factors in determining whether delay has been reasonable.[69]

[68] Speech by President Uhuru Kenyatta at the Extraordinary Session of the African Union,' *The Standard*, 13 October 2014, http://www.standardmedia.co.ke/thecounties/article/2000095433/speech-by-president-uhuru-kenyatta-at-the-extraordinary-session-of-the-african-union [10 September 2014].

[69] In *R v. Askov*, [1990] 2 S.C.R. 1199, the Supreme Court of Canada set out the criteria by which courts in Canada judge whether an accused's right 'to be tried within a reasonable time', under Section 11(b) of the Canadian Charter of Rights and Freedoms, has been infringed. Among those criteria are (i) knowing waiver of the right to an expeditious trial; and (ii) the conduct of the accused. A waiver by the accused of his rights must be informed, unequivocal and freely given to be valid. In *Askov*, it was said that 'the accused must undertake some direct action from which a consent to delay can be properly inferred.' In respect of the conduct of the accused, it was stated in *Askov* that 'an inquiry into the actions of the accused should be restricted to discovering those situations where the accused's acts either directly caused the delay […], or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial. These direct acts on the part of the accused, such as seeking an adjournment to retain new counsel, must of course be distinguished from those situations where the delay was caused by factors beyond the control of the accused, or a situation where the accused did nothing to prevent a delay caused by the Crown.' In *R. v. Morin*, [1992] 1 S.C.R. 771, Sopinka J. of the Supreme Court of Canada said that the category of actions of the accused included 'all actions taken by the accused which may have caused delay. In this section I am concerned with actions of the accused which are voluntarily undertaken. Actions which could be included in this category include change of venue motions, attacks on wiretap packets, adjournments which

51. In the present case, the Accused has chosen to preside over the intentional non-delivery of relevant evidence, in knowing violation of Part 9 of the Statute and the Trial Chamber's directions. The effect of that choice is seriously to delay these proceedings.
52. There is no direct precedent in international justice. No other accused about to commence trial at the ICC, ICTY, ICTR, ECCC or STL has had immediate access to such a vast state apparatus with its attendant potential to delay the Prosecution's collection of evidence and the Chamber's search for the truth.
53. The Accused is better placed than anyone else to remove immediately the most significant obstacle to the progress of these proceedings: full compliance with the Prosecution's revised records request. Until he does so, he cannot pray in aid his right to trial without undue delay in seeking to have the charges withdrawn. To permit an accused who has deliberately and unlawfully delayed the Prosecution's access to evidence to benefit from that delay would be absurd and unreasonable.

Termination of proceedings would be a particularly cruel betrayal of the victims

54. The victims frequently complain that they have been abandoned by the Government, which has offered next to no compensation for all that they lost, and no justice whatsoever. They are now facing the same fate from the ICC.
55. Victims of grave crimes often rely on the legal system for help and recovery. [70] The reaction of those within the legal system can greatly affect a victim's recovery.[71] If the Court abandons the victims in the *Kenyatta* case, they are likely to feel re-traumatised and thrice betrayed: first by the perpetrator, then

do not amount to waiver, attacks on search warrants, etc. I do not wish to be interpreted as advocating that the accused sacrifice all preliminary procedures and strategy, but simply point out that if the accused chooses to take such action, this will be taken into account in determining what length of delay is reasonable.'

[70] Criminal prosecutions can sometimes result in secondary traumatization, depending on how they are handled: 'Victims' accounts of their encounters with the criminal justice system range from positive experiences resulting in feelings of satisfaction to tales of horror best described as a further victimization by the criminal justice system.' E. McCabe, 'The Quality of Justice: Victims in the Criminal Justice System,' in *Victimization of the Weak*, J. Scherrer and G. Sheperd (eds.) (1982), 133.

[71] When victims reach out for help, they place a great deal of trust in the legal, medical, and mental health systems as they risk disbelief, blame, and refusals of help. How these system interactions unfold can have profound implications for victims' recovery : R. Campbell, 'The Psychological Impact of Rape Victims' Experiences With the Legal, Medical, and Mental Health Systems' 63 Am. Psychol. 8 (2008), 704.

by the Kenyan state, then by the ICC. This particularly applies to victims of sexual and gender-based violence ('SGBV').

56. The PEV involved an unknown number, but very likely in the thousands, of acts of SGBV against women, girls, men and boys. The *Ruto & Sang* charges do not address SGBV. The SGBV charges in the *Kenyatta* case represent the sole avenue for accountability, anywhere, for PEV rape victims.

57. Mr Kenyatta's government has shown no political will to prosecute those responsible for SGBV crimes committed during the PEV. The total non-prosecution was confirmed in a recent ICTJ report.[72]

58. This reinforces a general culture of impunity for rapists in Kenya. Those victims who summon up the courage to report the crime are often laughed at by police officers. Perpetrators are given punishments which are derisory, such as an afternoon of cutting grass.[73]

59. In the absence of domestic accountability for PEV sex crimes, the ICC must deliver on the expectation of justice which it has raised in the minds of the PEV victims of rape and other horrific crimes of a sexual nature.

60. Abandoning the victims of such crimes in the face of state obstruction of access to evidence relevant to determining those ultimately responsible for those crimes is deeply antithetical to the aims and methods set out in the recent *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, which aims to shatter the culture of impunity for rapists.[74]

[72] 'Despite the vast documentation of the SGBV, to date, no individual has been convicted of a sex crime related to the PEV, nor have victims been repaired for the harms they suffered.' ICTJ, *The Accountability Gap on Sexual Violence in Kenya: Reforms and Initiatives Since the Post-election Crisis*, 16 June 2014, http://www.ictj.org/publication/accountability-gap-sexual-violence-kenya-reforms-and-initiatives-post-election-crisis [10 September 2014]. Kenyan NGOs have sought court orders compelling the DPP to prosecute those responsible. Their efforts have been met with responses from the DPP and the police which are dilatory and evasive, and demonstrate absolutely no will to investigate or prosecute.

[73] 'Kenya's women fight for justice as rapists are sentenced to cut the grass', *The Guardian*, 26 October 2013, http://www.theguardian.com/world/2013/oct/26/rape-kenya-women-crime-campaign [10 September 2014].

[74] UK Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, June 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf [10 September 2014]. As its sponsors note: 'For decades – if not centuries – there has been a near-total absence of justice for survivors of rape and sexual violence in conflict. We hope this Protocol will be part of a new global effort to shatter this culture of impunity, helping survivors and deterring people from committing these crimes in the first place.'

61. To withdraw charges in this case would end the *only* credible effort to provide justice to the survivors of rape and sexual violence during the PEV, and would strengthen Kenya's culture of impunity for rapists.

The appropriate remedies are adjournment until the Government complies with its outstanding obligations under Part 9 and referral under Article 87(7) of the Statute

62. The Trial Chamber has deferred any formal finding of non-compliance under Article 87(7) of the Rome Statute until the expiration of the adjournment period ordered on 31 March 2014.[75] By then, it will be clear whether the Government is going to provide good faith co-operation in respect of the revised request.[76]

63. If it is not, Trial Chamber should make a formal finding under Article 87(7).

64. The ASP, which recognizes 'the negative impact that the non-execution of Court requests can have on the ability of the Court to execute its mandate,'[77] can then initiate its own process in order to secure Kenya's compliance. That process covers both a 'formal response procedure' and an 'informal response procedure'. These include an emergency Bureau meeting, triggering the good offices of the President of the ASP, a meeting of the New York Working Group, an open letter from the ASP President to Kenya, and other measures. That process would be meaningless if this case had by then been terminated.

65. The process adopted by the ASP, which also has an important role in combating impunity, must be permitted to take its course. Kenya will have no incentive to comply with its Part 9 obligations if referral follows termination.

Conclusion

[75] ICC-01/09-02/11-908, para. 52.
[76] [REDACTED].
[77] ASP, Resolution ICC-ASP/10/Res.5, para. 9. The 'formal response procedure' appears on page 40 and the 'informal response procedure' is set out at page 41.

66. If the Trial Chamber's decisions of 31 March and 29 July 2014 have proved ineffective, that in itself is not a sufficient reason to withdraw the charges, as their very ineffectiveness is a direct result of the ongoing failure of the Accused and his Government to secure compliance. The remedy for systematic obstruction of justice cannot be termination of the case.

67. Termination before the Government has provided the evidence which it is obliged to provide would be premature, inconsistent with the Trial Chamber's decisions, and tantamount to rewarding the Government for its systematic violation of Part 9 of the Statute. The trial should be adjourned until the Accused discharges his responsibilities under national and international law to ensure the fulfilment of the State's obligations under Part 9. The Trial Chamber should make a finding of non-compliance under Article 87(7), and warn the Accused of his liability for arrest for obstruction of justice in violation of the summons conditions in this case, and under Article 70.

68. Termination would be a rich reward for an Accused who continues to employ the resources of the Government which he controls in order systematically to frustrate the Trial Chamber's search for the truth, and to deny justice to the thousands of Kenyans who are the victims in this case.

Respectfully submitted,

Fergal Gaynor

Fergal Gaynor

Common Legal Representative of Victims

Dated 10th September 2014

At Nairobi, Kenya