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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 with public annex

Victims' response to the 'Prosecution's notice of withdrawal of the charges against Uhuru Muigai Kenyatta'

Source: **Legal Representative of Victims**

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Introduction

1. On behalf of the victims of this case, and in accordance with the time limit directed by the Trial Chamber,[1] the Legal Representative for Victims ('LRV') respectfully submits this response to the 'Notice of withdrawal of the charges against Uhuru Muigai Kenyatta', filed by the Prosecution on 5 December 2014 ('Notice').
2. Nearly seven years ago, tens of thousands of civilians in Naivasha and Nakuru were targeted, for no reason other than their tribe. Men were beheaded. Others suffered the pain and humiliation of forcible circumcision and castration. Human heads were paraded on sticks to instil terror. Women were serially raped. Children and their mothers were locked in buildings and burned alive. Houses, and small business premises (such as welding and carpentry shops; tea houses; hairdressing salons), were pillaged and destroyed in their thousands. Pigs and dogs fed on the remains of the dead: the murdered were denied dignity even after death.
3. The surviving victims received no justice from the Kenyan criminal justice system. If the Prosecution now also walks away from them, it will betray thousands who have already had their lives torn asunder.
4. All involved in this case agree that the victims must get justice, and fair compensation for their losses. It is now time for Mr Kenyatta to publicly disclose how and when he intends to provide assistance and justice to the victims of the post-election violence ('PEV').
5. It is also time for the Prosecution to reintensify its investigation into the crimes committed in Naivasha and Nakuru, and to charge others who participated in those crimes. It should prosecute those responsible for police and sexual and gender based violence ('SGBV') crimes committed during the PEV. It should also prosecute those responsible for interference with witnesses in this case.
6. The Government of the Republic of Kenya ('Government') should support those efforts, in accordance with the Statute and the International Crimes Act 2008. If it does not, the Prosecution should deal firmly and swiftly with any further non-

[1] Email from the Trial Chamber to the Defence and the LRV, 5 December 2014.

cooperation by the Government by making such applications as are necessary in accordance with article 87(7) of the Rome Statute (the 'Statute'). The Trust Fund for Victims must urgently begin its work in Kenya.

Views and concerns of the victims regarding withdrawal of charges, and the conduct of this case generally which led to the withdrawal

7. The views and concerns of a sample of victims of this case, collected in the period 5-8 December 2014, following the withdrawal of charges, are attached in the Annex. The victims' views make uncomfortable reading: anger, betrayal and disbelief at the prospect that they to be totally abandoned by the ICC. In addition, the LRV has received reports of security concerns, in the Rift Valley region, following the dropping of the charges.[2]
8. It is clear that most victims wish both the Prosecution, and the Court in general, to do whatever they can within their power to bring justice to the victims.
9. During 49 days of meetings with 839 PEV victims in the Nyanza, Western and Rift Valley regions of Kenya in 2013 and 2014,[3] victims also expressed other concerns, summarised below, which are relevant to consideration of what should happen now from their perspective.

[2] Victim a/8797/11 informed the LRV's field staff that, at a location along the Nakuru-Nyahururu highway, many of the Luo residents had been threatened with eviction immediately after the charges were withdrawn in this case. It is important to appreciate the current security context in the Rift Valley. The victims were attacked in January 2008 in Naivasha and Nakuru, and saw their neighbours and close relatives murdered, on the basis of their ethnic identity. Those who have managed to return to that area live in an area of mixed ethnicity which is characterized by volatility. Earlier in 2014, and particularly in June, the security situation in parts of Kenya was particularly grave. Social media contained an alarming number of expressions by Kenyans of ethnically-motivated hostility towards fellow Kenyans. Anti-Kikuyu hate leaflets circulated in Burnt Forest. Following this, leaflets ordering Luos to move out were distributed in Naivasha and Nakuru. In June and July 2014, Luo families fled Naivasha in considerable numbers, in fear of their lives. Rumours of the mass purchase of machetes appeared in the newspapers. Foreign diplomats and church leaders called for a cessation of inflammatory statements. In late June 2014, a writer for *Deutsche Welle* said: 'The atmosphere in the country is reminiscent of 2007 shortly before riots broke out.' See: *Hate speech in Kenya fuels ethnic conflicts* http://www.dw.de/hate-speech-in-kenya-fuels-ethnic-conflicts/a-17738982.

[3] The LRV held meetings with over a thousand PEV victims. Of those, 839 have been individually verified, either by the Pre-trial Chamber, or by the LRV and (operating under his direct supervision) his field staff, to be victims of this case. The majority of the approximately 200 other victims were deemed to be victims of crimes committed during the PEV but outside the temporal scope of the present case and are thus not victims of the crimes charged in the present case. The LRV has excluded their views from consideration, in line with the 3 October 2012 decision on victim participation.

10. These views were expressed by victims to the LRV in the context of discussions concerning repeated setbacks in the progress of this case. The summary below fails to convey the powerful cumulative effect of receiving so many reactions of anger and betrayal from so many people.
11. The victims expressed these views during 2013 and 2014:
    i. Mr Kenyatta must face the charges against him, and the Prosecution and the LRV should do everything necessary to ensure that this case is not terminated.
    ii. With each day that passes, witnesses are dropping out of the case, and elderly or infirm victims are dying.
    iii. The Prosecution has not sought to replace those witnesses who had dropped out of the case. Victims also expressed skepticism about the reasons why witnesses had changed their stories. They want the Prosecution to work hard to find replacement witnesses.
    iv. If Mr Kenyatta is innocent, he should support the process of procuring and forwarding the documents (bank details and mobile phone data) requested by the Prosecution.
    v. As President of Kenya, Mr Kenyatta should not obstruct justice and should ensure that the Government cooperates with the Court.
    vi. In the years that had elapsed since the PEV, the Prosecution has had plenty of time to gather adequate evidence to conduct a trial. Victims did not understand why it has not yet done so.
    vii. Many victims volunteered, of their own initiative, to testify to describe to the Court what happened to them and what they saw. When the LRV asked one volunteer whether he had any fears about testifying, he said that he has no fear. His wife and two young daughters went missing during the PEV. He has never found their bodies. He does not know what happened to them. Having lost everything he ever had, he said, he had no reason to fear anything.
    viii. Victims who first learned a long time ago, through the Victims Participation and Reparations Section ('VPRS') and others, of the Trust Fund for Victims,

were frustrated regarding the total absence from Kenya of the Trust Fund for Victims.

ix. Victims felt that the Court should take action against all witnesses who had refused to testify or who had lied to the Court. Some expressed the view that such witnesses should be compelled to testify in order to hear their evidence and to determine the real reasons why they had changed their stories.

x. Many victims believe that relying on co-operation from Mr Kenyatta's Government to deliver evidence against him is naïve. They wanted the Prosecution to focus on other avenues in order to get evidence.

xi. A small minority of victims saw the prospect of a trial as so remote, and are so angry at having been led on for so long, that they would favour a settlement: they would accept financial compensation in return for the withdrawal of charges.

xii. Some victims said that the very presence of the ICC in Kenya was protecting them. The end of the case, they said, would embolden Mr Kenyatta and his associates, as well as those Mungiki and others who physically perpetrated the crimes, and could well result in a new round of killing and retaliatory bloodletting.

xiii. Victims who live in or near Nakuru and Naivasha are particularly concerned about a possible re-run of the 2007-2008 violence.

xiv. Victims do not feel at all represented by the African Union. They appear to consider this to be a club where powerful and corrupt leaders look after each other's interests.

xv. Victims were totally opposed to the ICC diluting its rules or procedures under pressure from the Government.

xvi. Victims want the Court to remain strong and unyielding when dealing with the Government.

12. The victims' feeling of betrayal has been exacerbated by Mr Kenyatta's failure to act on two issues: (i) the fact that the great majority of them, all of whom are Kenyan

citizens, are living in abject poverty, and (ii) the fact that they have not seen justice for the crimes committed against them.

13. On these two issues, Mr Kenyatta, in accordance with his duties under the Constitution of Kenya, must now instruct the Government urgently to act.

Withdrawal of charges means the end of the only current prospect of assistance to the victims: the Government must provide proper assistance to all PEV IDPs

14. Mr Kenyatta said on 5 December 2014: 'The Government of Kenya has sustained its efforts to restitute and reintegrate the victims of the PEV as best as it can.'[4] This statement is inconsistent with the reality on the ground. It is not the first time that Mr Kenyatta has made inaccurate statements with respect to assistance to PEV internally displaced persons ('IDPs').[5]

[4] See *President Kenyatta's Statement On Withdrawal of ICC Case*, available at : http://allafrica.com/stories/201412051872.html (accessed 8 December 2014).

[5] Mr Kenyatta has previously conflated statistics relating to assistance to forest evictees (an issue unrelated to the PEV) with assistance to PEV victims. In his 27 March 2014 State of the Nation speech, he said: '... in September 2013, the government began the implementation of a cash payment programme for all pending cases of IDPs that had not been resettled so far, a total of 8298 households. A total of 777 have received cash payments of Ksh 400,000.00 per household, totalling Ksh 3.3 billion. The exercise continues. This settlement was followed by a concerted effort by government that focused on peace building among communities.' (President Kenyatta's state of the nation address at Parliament Buildings, Nairobi on 27 March 2014, available at http://www.the-star.co.ke/news/article-160655/president-uhurus-state-nation-speech (accessed 8 December 2014)) First, note the arithmetical difficulty in these figures. 777 multiplied by 400,000 equals Ksh 310,800,000. This is less than one tenth of KSh 3.3 billion. Second, the figures appear to refer to aid to forest evictees, not PEV victims. The source for Mr Kenyatta's figures remains unclear. But it is to be noted that the government ministry now responsible for the plight of IDPs, the Ministry of Devolution and Planning, has indicated in its Performance Contract with Mr Kenyatta that it aims to resettle 8242 IDPs: 969 PEV IDPs, as well as 7273 forest evictees. (Performance Contract between the Cabinet Secretary and President Kenyatta for the period 1 July 2013 to 30 June 2014, page 14.) The ministry's total of '8242 IDPs' appears to be close to the '8298 households' referred to by Mr Kenyatta in his state of the nation speech. It therefore appears likely that Mr Kenyatta's reference to '8298 households' in his state of the nation speech is in fact a reference to group of individuals who are largely forest evictees, and not PEV IDPs. This conclusion is reinforced by the President's 27 March 2014 'Annual Report on Measures Taken and Progress Achieved in the Realization of National Values and the Principles of Governance'. This report ignores the question of accountability for PEV crimes, and almost completely ignores the question of IDPs. It does contain one paragraph (para 102, on page 43) about IDPs. That paragraph says: 'The resettlement of Internally Displaced Persons (IDPs) is an indication of the success in the implementation of policies and legal measures that support human dignity, social justice, equality and human rights. A total of 8282 IDP households that had remained in camps were finally resettled in the year 2013/14 through cash payments of KSh. 400,000 as detailed in Table 3.1.' However, a close examination of that table reveals that, of the eight camps listed, six relate to forest evictees. Just two are PEV IDP camps (Mai Mahui and ALKO), containing a total of just 575 'resettled IDPs'. In summary, of the more than 600,000 persons internally displaced during the PEV, it appears that just 575 have received compensation of KSh. 400,000.

15. In many cases, the victims lost everything they had in the attacks on Naivasha and Nakuru, and received next to nothing to replace it. A minority received a single payment from the Government of KSh 10,000 (€90). They were uprooted from their homes and forced to settle in what others considered to be their 'ancestral homelands' in the Nyanza and Western regions of Kenya. A significant number of these victims had few genuine links there, and were left with a feeling that they were unwanted intruders into the lives of others. They were nevertheless categorised by the Government as 'integrated IDPs'.
16. Very many – very likely tens of thousands – are not truly integrated and live in poverty. They struggle to afford the small fees necessary for access to hospital, or to send children to school. The Government provides no assistance to 'integrated IDPs', and promises of assistance by President Kibaki's administration have been forgotten.
17. The message delivered consistently by the victims whom the LRV has met is that they feel that they had been forgotten, and deliberately ignored, both by their own government and by the opposition Orange Democratic Movement (ODM). The majority complain that they have received no assistance whatsoever. They are highly unlikely to accept as truthful the contention the Government has sustained an effort to restitute and reintegrate victims as best it can.
18. The Trust Fund for Victims has carried out no operations to date in Kenya.
19. It is now incumbent upon the Government to implement its obligation under Kenyan law to begin an immediate audit of the needs of PEV IDPs, and swiftly to deliver proper assistance to all those who are in need (regardless of ethnicity) or to request international assistance if it cannot do so.[6] It is also incumbent on the Trust Fund for Victims swiftly to provide livelihood and counselling assistance to PEV victims in Kenya.

[6] ThePrevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act of 2012 requires the Government of Kenya *either* to provide assistance to all IDPs (including'integrated' IDPs), *or* to request international assistance to do so.

Withdrawal of charges means the destruction of the only current prospect of justice for the victims: the Government must provide genuine accountability for PEV crimes

20. Mr Kenyatta also said on 5 December 2014: 'Our justice system continues to process the cases which have been instituted. I have supported these efforts because ultimately, the victims must get justice.'

21. The reference to 'continues to process the cases which have been instituted' might be technically correct. But it is not reflective of the reality. Only a handful of cases have been instituted. There is near-total immunity for those who participated in the organisation, direction or execution of PEV crimes. The much-heralded 'International Crimes Division' of the High Court ('ICD') does not yet exist. There have been no prosecutions in ordinary Kenyan courts for mid- or high-level suspects for PEV crimes committed, and only a handful of prosecutions of direct perpetrators. The DPP showed no intention to bring any further prosecutions for PEV cases, a position which he confirmed on 5 February 2014.[7]

22. It appears that everyone involved in this case agrees that the victims of the PEV deserve justice in Kenya. But nobody has explained concretely how and when they will receive it. The challenge now is for Mr Kenyatta's government to ensure that the victims receive genuine justice. Credible prosecutions by impartial prosecutors, before impartial judges, with trials beginning as soon as possible, would allow the truth to emerge regarding the horrific crimes committed against thousands of Kenyans of many different ethnic groups during the PEV. This not only would meet demand for justice of the victims of this case, but would strengthen the rule of law and promote lasting reconciliation and long-term peace and security.

[7] 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 (accessed 8 December 2014).

'One down: two to go': the campaign of obstruction of justice succeeds

23. From an early stage, the victims made it clear repeatedly to the LRV, in the strongest terms, that they considered that Mr Kenyatta's government was doing all that it could to collapse the case against him, and would not stop until it had persuaded the Court to walk away in despair. Recent events have demonstrated how accurate the victims' prediction was.

24. On 3 December 2014, the Trial Chamber found that the approach of the Government 'falls short of the standard of good faith co-operation required under Article 93 of the Statute'. The Chamber considers that this failure has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute.[8] The Chamber said that 'the Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute'.[9]

25. Bringing about a collapse of this case has been the policy of Mr Kenyatta's government. This has been illustrated with startling clarity in recent days. According to a short video recently released by State House, entitled *Finally, it is over: two to go*, the Cabinet Secretary for Foreign Affairs on 5 December 2014 announced the withdrawal of charges in this case, saying: 'The Prosecutor has dismissed the charges [*applause*] against His Excellency the President, but the road is still long, we still have other cases in court, and with the same determination, with the same passion, and with the same commitment, we will continue working with the other two cases.'

26. Mr Kenyatta then said: 'As they say, one down, two to go. We are nearly there. And I am sure that they will also do their part to engage.'[10]

[8] Decision 982, para. 78.
[9] Decision 982, para. 79.
[10] *Finally, it is over : two to go*, State House Kenya, available at: https://www.youtube.com/watch?v=diuDXMGfyT0#t=20 [accessed 7 December 2014].

27. The Twitter feed of the Presidential Strategic Communications Unit (PCSU) on 7 December 2014 attributed to Mr Kenyatta this statement: 'We will not stop or relent until we see the end of the remaining cases.'
28. These statements have been made despite the continuing duty of Kenya under Part 9 of the Statute and under the International Crimes Act 2008 to comply with requests from the Court (including the pending April 2014 revised records request ('revised request')), and Mr Kenyatta's continuing duty under the Constitution of Kenya to ensure that Kenya complies with its international obligations, including its duty to deliver the material sought in the revised request.
29. The Government's non-compliance with the revised request, in violation of Part 9 of the Statute, must be considered in the context of a pattern of steps indicating a desire by the Government to impede justice, the emergence of the truth, and genuine reparation proceedings at the ICC. Each of these steps was contrary to the victims' interests.[11]

[11] *See also* footnote 80 of the decision of 31 March 2014; paragraphs 75 – 79 and footnote 172 of decision 982 of 3 December 2014. These following issues have been previously brought to the attention of the Chamber and are recalled here for ease of reference:

1. The Government failed to freeze any of Mr Kenyatta's assets, in violation of Part 9 of the Statute.
2. The Government failed to bring its purported legal objections to the Pre-trial Chamber's asset-freezing order to the Court's attention, in violation of Part 9 of the Statute.
3. The Government failed to provide the 'key documents' referred to in the annex to the Prosecution's filing of 31 January 2014, in violation of Part 9 of the Statute.
4. The Government failed to provide the material sought in the original records request, in violation of Part 9 of the Statute.
5. The Government at the 2013 ASP (which the LRV attended) sent a large delegation, including the DPP, the Attorney General, and Kenya's permanent representative to the United Nations. They and other representatives repeatedly provided information during the ASP which was aligned with the interests of Mr Kenyatta and unsupportive of the interests of the thousands of victims of this case.
6. The Government opposed amendments to Rule 68 of the RPE at the 2013 ASP. Those amendments were intended in part to facilitate the admission of the evidence of witnesses who had been bribed, intimidated or who had disappeared. It has never satisfactorily explained its position on this question.
7. The Government secured the inclusion in the resolution adopting the amended Rule 68 of language in effort to inoculate the Kenya cases from its effect.
8. The Government lobbied the AU assembly to hold a special session and adopt a resolution relating to immunity from prosecution for sitting heads of state and government.
9. The Government expended further diplomatic capital in an effort to persuade the Security Council to suspend the Kenya trials pursuant to article 16 of the Statute.
10. The Government has proposed further amendments for consideration by the ASP at this year's ASP, relating to presence at trial and head of state immunity.
11. The Government opposed in the *Ruto & Sang* case interpretations of the Rome Statute that it can be compelled to ensure that witnesses appear to give evidence in Kenya by video-link and put forth inaccurate interpretations of Kenyan law as part of that effort. This impedes the emergence of the truth.

30. Given Mr Kenyatta's formal power and informal influence in Kenya, and in light of the recent statements referred to above, it is inconceivable that the non-delivery of critical cell-phone and financial data in recent months, in defiance of the Trial Chamber's express directions, has been implemented by the Government without the agreement of Mr Kenyatta.
31. Mr Kenyatta's government's persistent determination to hide this data from the Court is itself suggestive of its high probative value. If it were exculpatory or irrelevant, it would have been disclosed years ago. The telephone data would have clarified where Mr Kenyatta was during the PEV, who he was speaking to, who his interlocutors were speaking to, and where the interlocutors were. The financial data would have clarified the source and destination of flows of funds before and during the PEV.
32. There is no reasonable inference available on the facts of this case other than that the Government's non-compliance with the revised request, and other pending requests for assistance in this case, has made a significant and material difference to the outcome of this case.

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12. The Government argued in the present case that the President cannot be held in any way accountable for Kenya's failure to comply with its obligations under the Statute, relying on interpretations of Kenyan law which are largely without merit.
13. The Government failed to keep its written 2011 promises to the Pre-Trial Chamber concerning its intention to fully investigate *all* PEV crimes and to *all* levels.
14. There was 'a pattern of information contained in confidential filings being leaked to the media, in some cases even before the filings have been notified to the Chamber, parties or participants.' The Trial Chamber noted 'with concern the Government's cumulative inattention to the taking of appropriate measures to ensure the confidentiality of the proceedings.' (ICC-01/09-02/11-967, paras. 11 and 12).
15. The Government to date has failed to oppose, appeal, or apply to have set aside for want of prosecution a broadly framed order preventing key security officers being interviewed in Kenya by the Prosecution. The order was sought by individuals who had nothing to do with the case in question. The order, granted in 2011, remains in place.
16. The Government failed to keep numerous promises to establish an International Crimes Division of the High Court, and erroneously claimed in a 2013 filing to the Trial Chamber that the ICD had been established. To date, the ICD has not been established.
17. The DPP in February 2014 confirmed that not one of the thousands of PEV files examined by the 'Multi Agency Task Force' is prosecutable, and that the ICD (if it is established) will not handle any PEV cases. This prevents the emergence of testimonial and documentary evidence which would assist in prosecuting higher-level suspects both in Kenya and at the ICC.
18. The Court awaits the delivery from Kenya of the sole person charged by the Court for offences against the administration of justice, over a year after the arrest warrant was issued.

The Court's response to the Government's obstruction of justice was inadequate

33. The Notice marks the end of the justice process at this Court for the victims of this case, at least for the moment. They have seen the cases against all three accused in case two (Mr Ali, Mr Muthaura and Mr Kenyatta) collapse in worrying circumstances.

34. Victims at the Court are actors of international justice rather than its passive subjects.[12] From the victims' perspective, it is deeply unsettling that a deliberate campaign of obstruction of justice by Mr Kenyatta's government – in violation of the Constitution of Kenya[13] and of the co-operation regime set out in the Rome Statute and the International Crimes Act 2008 – has been so successful.

35. The Prosecution repeatedly acknowledged the effect of Government non-cooperation, particularly in its 8 May 2013 and 31 January 2014 filings.[14] But the Prosecution's failure to make any article 87(7) request until November 2013 was regrettable, particularly so given that the cases against Mr Ali and Mr Muthaura had by then collapsed. Both suffered from evidentiary weaknesses directly linked to the Government's failure to provide proper access to relevant evidence.

36. The fact that only one article 87(7) request was filed throughout the entirety of these proceedings arguably amounts to a dereliction of the duty of the Prosecution to take all action available to it under the Statute to secure fulfilment by Kenya of its duties under Part 9 of the Statute. The victims clearly want the Prosecution – and the States Parties – to show more firmness in the future when confronted by State obstructionism.[15]

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[12] 'The Court-wide strategy in relation to victims notes: 'By providing victims with an opportunity to articulate their views and concerns, enabling them to be part of the justice process and by ensuring that consideration is given to their suffering, it is hoped that they will have confidence in the justice process and view it as relevant to their day to day existence rather than as remote, technical and irrelevant. It is also hoped that their participation will contribute to the justice process of the Court.' Report of the Court on the strategy in relation to victims, at para. 46.

[13] The President has a constitutional obligation to uphold the Constitution, and to ensure that Kenya's international obligations are fulfilled through the relevant Cabinet Secretaries. He is also obliged to ensure the protection of human rights and fundamental freedoms and the rule of law. See articles 131(2)(a), 131(2)(e) and 132(5) of the Constitution of Kenya.

[14] ICC-01/09-02/11-733-Red and ICC-01/09-02/11-892-Conf-AnxA.

[15] *See* the views in the attached Annex.

37. However, it must be recognised that the Prosecution's attempts to secure the Government's compliance with the revised request for assistance were determined, professional, timely and reasonable.[16] The blame for non-compliance with the revised request lies firmly with Mr Kenyatta's Government.
38. Despite the Government's non-compliance with the Trial Chamber's directions of 31 March 2014 and 29 July 2014, the charges against Mr Kenyatta have been withdrawn and the article 87(7) request has been rejected.[17] That Mr Kenyatta and his government have been richly rewarded for non-compliance is, from the victims' perspective, shocking.
39. Understandable concerns about the difficulties of investigating this case in Kenya, and doubts about whether the Government in the future is likely to co-operate or not, cannot act as an argument to now abandon the investigation into the events in Naivasha and Nakuru. The Prosecution must vigorously pursue its obligation to uncover the truth, and swiftly file article 87(7) requests if the Government's action or inaction prevents it from doing so.
40. It is clear that the Prosecution would have made much more progress – specifically, by being able to access more key documentation and key witnesses – were it not for the Government's obstruction, in violation of Part 9 of the Statute.
41. To reiterate, the proper response to violations of Part 9 of the Statute by Mr Kenyatta's government is not to abandon the investigation, but to redouble efforts to remedy that illegal action and vigorously to continue the investigation, if necessary without Government co-operation. The Court should seise the States Parties fully with this issue, in order that the States Parties can take whatever action they can now to persuade the Government to co-operate.

[16] The correspondence annexed to Prosecution filing ICC-01/09-02/11-940, read as a whole, demonstrates that the Prosecution was diligently and reasonably attempting to secure co-operation from the Government of Kenya. It also illustrates the extent of the Government's disingenuous and evasive approach to delivery of the evidence requested by the Prosecution in its 8 April 2014 revised request for assistance.
[17] Decision 982 of 3 December 2014.

The remedy for obstruction of justice is not to shelve the investigation

42. The remedy, when faced with a determined campaign of obstructionism, is not to shelve the investigation but to continue the investigation with greater vigour and determination than ever before.[18] It would be wrong, whether in this case or in any other, for the Prosecution to take action which would in effect reward a campaign of State obstruction of access to evidence. This would dilute the Court's deterrent effect and embolden others charged in the future to block access to relevant evidence.
43. In addition to intensifying the investigation into the crimes committed in Naivasha and Nakuru, the Prosecution should also step up its investigations into police and sexual and gender-based violence ('SGBV') crimes during the PEV, and offences against the administration of justice in this case.

The Prosecution should restart investigation of police crime during the PEV

44. Many victims consider that non-prosecution of the Kenyan police – which enjoys notorious impunity within Kenya for extrajudicial executions[19] and other crimes – for its involvement in the PEV is a grave injustice. Despite information that police shot and killed over 400 people during the PEV, shot and injured over 500 others,[20] and raped an unknown multitude of women, not a single police officer has been convicted for killings or rapes during the PEV.
45. In this context, the dismissal of charges against former police commissioner Ali by the Pre-Trial Chamber was a serious blow to the victims of this case. The Pre-Trial Chamber was not persuaded that the Kenya Police participated in the attack in or around Nakuru and Naivasha, *i.e*. that there existed an identifiable course of conduct of the Kenya Police amounting to participation, by way of inaction, in the attack perpetrated by the Mungiki in or around Nakuru and Naivasha.[21]

[18] See the views contained in the Annex to this response.
[19] The impunity continues under the present government. See, for example, *Inside Kenya's Death Squads*, Al Jazeera English, available at: https://www.youtube.com/watch?v=lUjOdjdH8Uk&feature=youtu.be (accessed 8 December 2014).
[20] Waki report, pages 311, 342, 343.
[21] Pre-trial Chamber's confirmation decision, 23 January 2012, paras. 224-226.

46. It appears likely that the Prosecution could have, and should have, done much more to bring evidence before the Pre-Trial Chamber concerning the true extent and geographic scope of crimes by sections of the police during the PEV in many parts of Kenya (including Mombasa, Kisumu, Kibera, Mathare and Kericho). This would have facilitated proving to the confirmation standard the deliberate failure by the leadership of the Kenyan police either to prevent the crimes taking place or to punish those responsible.
47. It is not too late to do justice. The Prosecution should bring fresh charges in relation to PEV police killings and rapes.

Abandoning the PEV victims of sexual violence would be unconscionable

48. The PEV involved an unknown number, very likely in the thousands, of acts of SGBV of women, girls, men and boys. The *Ruto & Sang* charges do not include sexual violence. The SGBV charges in the *Kenyatta* case represent the sole avenue for accountability, whether in Kenya or elsewhere in the world, for PEV rape victims.
49. That avenue is now closed.
50. The effective investigation and prosecution of sexual and gender-based crimes is one of the Prosecution's key strategic goals in its Strategic Plan 2012-2015. As the June 2014 Policy Paper on Sexual and Gender-Based Crimes notes, the Prosecution seeks to 'combine its efforts to prosecute those most responsible with national proceedings for other perpetrators.'[22]
51. Withdrawing the SGBV charges in the present case in the face of State obstruction of access to evidence relevant to determining those ultimately responsible for those crimes is inconsistent with this aim. It is also profoundly antithetical to the aims and methods set out in the recent 'International Protocol on the Documentation and Investigation of Sexual Violence in Conflict'.[23] As its sponsors note: 'For decades – if

[22] http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (accessed 8 December 2014) .
[23] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf (accessed 8 December 2014).

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.'

52. The withdrawal of charges in the *Kenyatta* case ends the only credible effort to provide justice to the survivors of rape and sexual violence during the PEV, and strengthens Kenya's culture of impunity for such crimes.
53. It is imperative that the Prosecution take all the steps it can to follow through on the justice process for SGBV victims in Kenya. Many thousands of them – and not only those formally accepted to participate in this case – have been led for over four years to believe that the ICC will deliver justice. For the Prosecution to walk away from these victims without taking all steps available under the Statute to defend their interests in the face of state obstruction of justice would be shameful.

Interference with the administration of justice must be punished

54. The LRV is not aware if the Prosecution has instituted any prosecutions relating to bribery or intimidation of witnesses in this case. This problem clearly undermined the Court's search for the truth in respect of the allegations against Mr Kenyatta. It also undermined the Court's search for the truth in the case against Mr Muthaura, where the Prosecution publicly cited interference with witnesses and Government non-cooperation when it asked for charges to be withdrawn; yet it did not file any public applications under articles 70 or 87(7) of the Rome Statute to deal with the serious problems it had identified.
55. For this reason, the victims are entitled to now know who interfered with witnesses due to deliver evidence against Mr Kenyatta, and for what reason. They are also entitled to know what the Court intends to do about this problem. The victims would, in particular, welcome a follow-up from the Prosecution to the information it publicly provided on 31 January 2014:

> Individuals attempted to persuade Witnesses 4, 11 and 12 to recant their testimony and/or to withdraw their cooperation with the Prosecution. On some occasions, money was offered to them. While the Prosecution ultimately withdrew Witnesses 4 and 12 from its witness list for reasons unrelated to the bribery attempts, those attempts required the Prosecution to expend considerable resources to investigate the bribery and to ensure the safety of its witnesses. The Prosecution is considering prosecuting the individuals concerned for offences against the administration of justice.[24]

The Court has failed to deliver to the victims truth, accountability or reparation

56. Regrettably, the Court has delivered to the victims of this case not one of the three basic elements of justice that victims are entitled to expect: a formal declaration of the truth by the Court regarding the crimes committed against them during the PEV; to have those who victimized them held accountable; and to receive just and prompt reparation. Nearly seven years after the crimes and after three years of proceedings, the victims in this case have received no truth, accountability or reparation from the Court. Nor have they received any 'general assistance', which falls within the mandate of the Trust Fund for Victims. In short, they have received almost nothing from the entire ICC process.

Conclusion

57. The Prosecution saw its cases against Mr Ali and Mr Muthaura fail in a context which included State obstruction of access to evidence. For the Prosecution to abandon the victims in the face of unlawful obstruction of access to evidence by a government under the *de facto* and *de jure* control of Mr Kenyatta would be unconscionable. It would be difficult for the Prosecution to convincingly argue that it is on the side of the victims – especially victims of rape – in this or future cases.
58. In order to properly follow through on the expectation of justice it has raised in the minds of thousands of victims, the Prosecution should bring charges against other mid- and high-level suspects for crimes committed in Naivasha and Nakuru. To

[24] ICC-01/09-02/11-892-AnxA-Red at page 3.

ensure that the best possible body of evidence reaches the Pre-Trial Chamber, existing investigations should be greatly intensified, on an urgent basis. It is imperative for the Prosecution to take all action in the courtroom, and in the diplomatic arena, to ensure that it can gain access to every individual and every item necessary – wherever in the world they might be – to uncover the truth.

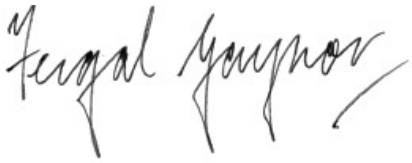
59. However, the victims are also entitled to the truth about the future of their quest for justice, which has been frustrated both in Kenya and at the ICC. For that reason, if the Prosecution intends not to further investigate the present case, the victims are entitled to a public, reasoned statement to that effect, as soon as possible.

60. Equally, if Mr Kenyatta does not intend to ensure the delivery of a genuine, comprehensive justice process at the domestic level, or to deliver proper assistance to all PEV IDPs, regardless of their ethnic background, he should say so publicly, giving reasons. If he does intend to instruct the Government to deliver genuine justice and assistance to PEV victims, he should make public his intentions and timelines for doing so.

61. The Kenyan victims of this case were raped, brutalised and traumatized in 2008. They buried their murdered loved ones, if they could find them at all, and tried to build their lives anew. In most cases, their own government refused to extend a helping hand, and gave a series of disingenuous and evasive excuses to justify its refusal to deliver criminal justice. The least that the surviving victims of the atrocities committed in Naivasha and Nakuru now deserve is the truth.

62. The resilience and bravery of the victims must be recognized, respected and vindicated. Living in a country in which anti-ICC rhetoric has been the norm, they travelled often long distances in order to attend meetings with their legal representatives. With immense dignity, courtesy and courage, these Kenyan citizens communicated at those meetings their views and concerns about this case. Month after month, they chose to participate in proceedings, and fully engaged in all case developments. Despite every setback, they never gave up on the Court. But in the end, the Court gave up on them.

Respectfully submitted,



Fergal Gaynor
Common Legal Representative of Victims

Dated this 9th day of December 2014

At New York, United States of America