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Date: **28 April 2011**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMED HUSSEIN ALI

Public Document

Observations on behalf of victims on the Government of Kenya's Application Under Article 19 of the Rome Statute

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. The Government of Kenya (the "Government") has not shown that it is genuinely investigating the three suspects in this case for their alleged role in post-election violence. The case is therefore admissible before the International Criminal Court ("ICC") and should proceed.

2. The Attorney General's letter, disclosed for the first time on 21 April 2011, is not sufficient to show that Mr Muthaura, Mr. Kenyatta or Mr. Ali are being investigated, much less that such investigations are "genuine". The timing of the letter suggests, on the contrary, that its primary purpose is to derail or delay proceedings before the ICC. No evidence has been provided of any investigation or prosecution of any senior government official in the three-and-a-half years since the post-election violence.

3. The institutional reforms cited by the Government, though laudable, fail to show that a genuine investigation of the suspects is underway or feasible. The Waki Commission, despite its short tenure and limited powers, implicated senior government figures in October 2008. The names were sealed and withheld from the ICC on the express condition that the Government establish an independent Special Tribunal for Kenya. The existing criminal justice system was viewed as irredeemably flawed to effectively investigate or prosecute senior officials, particularly in respect of ethnically-charged crimes and the lengthy record of failed reform efforts. The Government's failure to enact legislation for a special tribunal belies its optimistic and unrealistic assertions that the current round of reforms has paved the way for genuine investigations and prosecutions.

4. The Government has had ample opportunity to exercise jurisdiction over the suspects; having failed to do so, the exercise of complementary jurisdiction by the ICC is now timely, appropriate and necessary.

II. PROCEDURAL HISTORY

5. An investigation into post-election violence in Kenya in early 2008 was authorized by Pre-Trial Chamber II on 31 March 2010. The investigation was deemed admissible in the "absence of national investigations" in relation to "senior business and political leaders" and the "most serious criminal incidents".[1] The investigation led, on 15 December 2010, to requests for summonses of six individuals.[2] The summonses in the present case were granted on 8 March 2011, on the basis that there were "reasonable grounds" to believe that the suspects were responsible for crimes against humanity committed between 24 and 31 January 2008 in Nakuru and Naivasha.[3]

6. The Government on 31 March 2011 filed an application (the "Application") challenging the admissibility of the present case, as well as the *Ruto et al.* case, pursuant to Article 19 of the Rome Statute.[4] More than three weeks later, just days before responses were due, the Government filed hundreds of pages of so-called "Annexes" to its request, though some of these had been created after the filing of the

[1] "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation Into the Situation in the Republic of Kenya", No. ICC-01/09-19, 31 March 2010, para. 187.
[2] "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", No. ICC-01/09-31-Red2, 15 December 2010; "Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang" No. ICC-01/09-30-Red2, 15 December 2010.
[3] "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", No. ICC-01/09-02/11-01, 8 March 2011 ("Summons Decision"), para. 56.
[4] "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute", No. ICC-01/09-01/11-19, 30 March 2011 (*Ruto et al.*); "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute", No. ICC-01/09-02/11-26, 30 March 2011 (*Muthaura et al.*) All further references to "Article" refer to provisions of the Rome Statute.

Application.[5] One of the annexes is a letter dated 14 April 2011 from the Attorney General purporting to direct the Commissioner of Police "to investigate all other persons against whom there may be allegation of participation in the Post-Elections Violence, including the six persons who are the subject of the proceedings currently before the International Criminal Court (ICC)".[6]

7. The Office of Public Counsel for Victims (the "Office") offers its submissions on behalf of victim-applicants in this case in accordance with the decision of the Pre-Trial Chamber[7] and generally on behalf of victims who have communicated with the Court in the case.

III. LEGAL SUBMISSIONS

(i) No National Investigations or Prosecutions Are Ongoing Against the Suspects

(a) Legal Standard

8. Article 17(1) of the Rome Statute prescribes that:

> the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

9. A precondition for the applicability of Article 17(1) is "ongoing investigations or prosecutions" at the national level.[8] Hence, "in case of inaction, the question of

[5] "Filing of Annexes of Matrials (sic) to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", No. ICC-01/09-02/11-67, 21 April 2011 ("Annex Filing").
[6] *Idem.*
[7] "First Decision on Victims' Participation in the Case", 30 March 2011, No. ICC-01/09-02/11-23, para. 23. The applicants so represented are: a/0640/10, a/0641/10, a/0642/10 and a/1203/10.
[8] "Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", No. ICC-01/04-01/07-1497, 25 September 2009, para. 7 ("*Katanga* Admissibility Decision").

unwillingness or inability does not arise."[9] The Appeals Chamber has so far refrained from defining the exact breadth required of such national investigations, but they must, at the very least, include *some* crimes alleged in the ICC proceedings.[10] The unanimous view amongst pre-trial chambers that have addressed the question goes further, requiring that the national proceedings encompass the *same* conduct as alleged in the ICC proceedings.[11]

(b) The Government Has Not Been Candid As to the Existence of an Ongoing Investigation, Which Should Lead to an Adverse Inference As to the Existence of Any Such Investigation

10. The Application avoided indicating whether investigations are currently underway against the suspects. A suggestion of such an investigation is found near the end of the Application, where a promise is made to file, by the end of July 2011, "[a]n updated report on the state of these investigations and how they extend upwards to the highest levels and to all cases, *including those presently before the ICC*."[12] This statement does not expressly promise that investigations against the suspects will be pursued, much less that they are already ongoing; the statement indicates only that the report will explain *how* the highest echelons of officialdom are being investigated, and that those echelons include the suspects.

11. The impression that no investigations are ongoing against Mr. Muthaura, Mr. Kenyatta and Mr. Ali was reinforced by the Government's argument that the "case"

[9] *Idem*. See "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, No. ICC-01/04-01/06-8-US-Corr, 24 February 2006, para. 40 ("*Lubanga* Admissibility Decision") ("in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability"); "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation Into the Situation in the Republic of Kenya", No. ICC-01/09-19, 31 March 2010, para. 187.

[10] *Katanga* Admissibility Decision, paras. 80-81. The Appeals Chamber did not need to examine the question closely because "there were no investigations to establish the alleged criminal responsibility of the Appellant."

[11] "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant for arrest for Mathieu Ngudjolo Chui", No, ICC-01/04-02/07-3, 6 July 2007, para. 21 ("it is a *conditio sine qua non* for such finding that national proceedings encompass both the person and the conduct which is the subject of the case before the Court"); "Decision on the Prosecution Application under Article 58(7) of the Statute", No. ICC-02/05-01/07-1-Corr, para. 24; *Lubanga* Admissibility Decision, para.31.

[12] Application, para. 71.

should be considered inadmissible as long as the national investigations "cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC."[13] This argument is irrelevant unless the Government contemplated only investigating those whom it might deem to be at "the same level" as the suspects, but not the suspects themselves.

12. The argument is legally erroneous. The "case", as that word is used in Article 17(1)(a) of the Rome Statute, is now defined in respect of the alleged crimes of Mr. Muthaura, Mr. Kenyatta and Mr. Ali.[14] Inadmissibility must now be assessed in relation to those crimes and those suspects.[15] Investigation of other high-level suspects, even assuming that there are any such investigations, is irrelevant to the admissibility of *this* case – except perhaps to show that investigations against these three are being deliberately avoided.

13. Instead of indicating any investigative steps being undertaken against the three suspects, the Application enumerated a litany of actual or anticipated constitutional, judicial, prosecutorial and police reforms that "will enable"[16] or "open[] the way"[17] for future investigations and prosecutions. The assumption underlying most of the Government's submission is that "the reform process as a whole [should] be taken into consideration before any final determination on admissibility."[18]

14. Though such reforms may be indirectly relevant, they do not constitute an investigation under Article 17 of the Rome Statute.[19] As a group of eminent commentators has written, "the admissibility assessment is not intended to 'judge' a

[13] *Idem*., para. 32.
[14] Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law* (Nijhoff, 2008), p. 167.
[15] Summons Decision, para. 56.
[16] Application, para. 47.
[17] *Idem*., para. 5.
[18] *Ibidem*., para. 19.
[19] *The Prosecutor v. Kony et al*., "Decision on the Admissibility of the case under article 19(1) of the Statute, No. ICC-02/04-01/05, 10 March 2009, para. 52 (declining to consider the effect of various reform measures in the absence of "implementation of all practical steps", and that the case remained "one of total inaction on the part of the relevant national authorities").

national legal system as a whole, but simply to assess the handling of the matter in question."[20] The Government's original Application sought to broaden the scope of "investigations" to encompass reforms that could facilitate subsequent investigations, without providing any details as to the content or conduct of any such investigations. The tenor of these arguments was that these preparatory steps should be considered as an "investigation" in lieu of any actual investigative steps.

15. The Government disclosed for the first time on 21 April 2011 a letter from the Attorney General of Kenya, dated 14 April 2011, to the Commissioner of Police which states: "Additionally, you are directed to investigate all other persons against whom there may be allegation of participation in the Post-Elections Violence, including the six persons who are the subject of the proceedings currently before the International Criminal Court."

16. The timing of this letter – deferring for the moment how it affects the assessment of genuineness – merits careful scrutiny. The Government presumably knew on 30 March 2011 that such a letter would imminently be issued by the Attorney General. The Application gives no indication to that effect, reflecting either a lack of candour or a lack of certainty. Either way, the failure to provide this information in the Application raises serious questions about the reliability of the Government's assertions, particularly when they are not supported by meaningful and concrete evidence.

17. Some procedural flexibility may, of course, be appropriate to ensure that the Pre-Trial Chamber has all salient facts in relation to an evolving situation. Timing the release of information to gain a tactical advantage, on the other hand, should be discouraged. In an analogous context, the European Court of Human Rights has

[20] "Informal Expert Paper: The Principle of Complementarity in Practice", No. ICC-01/04-01/07-1015-Anx, para. 35 ("Informal Paper").

found that non-disclosure or late disclosure by a State "may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations."[21]

18. The Pre-Trial Chamber is invited to draw an inference, notwithstanding Annex 1, that no investigation is underway against Mr. Muthaura, Mr. Kenyatta and Mr. Ali. The Government's position on 30 March 2011 was that only an investigation of persons at "the same level" as these three was being contemplated. This position should be read in conjunction with the general and vague formulation in the Attorney General's letter of 14 April 2011 that "all other persons" against whom there are allegations of participation in the violence should be investigated, "including the six person" before the ICC. These two statements, considered together, leave a doubt as to whether an investigation of any description against the suspects is ongoing, or even whether the police commissioner has acted on the Attorney General's instructions. The Government, in light of the untimely and unsatisfactory manner in which the information was disclosed, and having waited to announce an investigation only when absolutely necessary to foreclose admissibility, is not entitled to the benefit of any doubt. No investigation can be said to be ongoing merely on the basis of the Attorney General's letter. The initial threshold for the inadmissibility analysis under Article 17(1)(a) of the Rome Statute is therefore not reached.

(ii) Assuming That Investigations Are Ongoing, The Government Is Either Unwilling or Unable Genuinely To Carry Them Out

19. Even assuming that the Government has now finally opened some sort of an investigation against Mr. Muthaura, Mr. Kenyatta and Mr. Ali, no adequate showing has been made that those investigations are genuine. The failure to enact the measures spelled out in the Waki Report, the timing of the Application, and the utter

[21] *Case of Musayev and others v. Russia*, "Judgement", 26 July 2007, Applications nos. 57941/00, 58699/00, 60403/00, para. 179.

failure to investigate any senior officials since the crimes were committed more than three years ago demonstrate that the Government is unwilling or unable to conduct a genuine investigation or prosecution of these three suspects, each of whom holds or has held the highest positions of state.

(a) Article 17(1)(a) Requires a Genuine Investigation and Prosecution, Regardless of Whether the Primary Obstacle Is Unwillingness, Inability or Some Combination Thereof

20. Article 17(1)(a) provides that a case being investigated or prosecuted by a State is inadmissible before the Court, "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." The adjective "genuinely" relates to the phrase "investigation or prosecution", meaning, in other words, that the State is unwilling or unable to carry out a genuine investigation or prosecution.[22] The inquiry is not primarily a psychological assessment as to whether specified officials are "genuinely willing" to investigate or prosecute, but rather whether the State as a whole is "willing to conduct a genuine investigation and prosecution." Bad faith or subterfuge is by no means necessary for a State to fall short of the genuineness requirement. For example, the State may be genuinely willing to take certain steps, but not sufficient steps for a genuine investigation or prosecution. The case would still be admissible under Article 17. One reason for this approach is that determining the intent of a State, as a collectivity of individuals interacting through decision-making institutions, can be complex, contradictory and hard to discern. Even in respect of a situation far simpler than the present, one Chamber remarked

[22] Informal Paper, para. 21 ("The correct interpretation is the latter, i.e. that the term qualifies 'to carry out the investigation or prosecution' and 'to prosecute'"); Jan Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford, 2008), p. 115; El Zeidy, p. 165, fn. 50. This interpretation also accords with the underlying goal, noted by a leading participant in the drafting process, towards a more objective standard, rather than a standard that would require evaluations of the subjective motivation of States. Holmes, p. 49. Applying the adjective to "investigations or prosecution" is in line with this goal, whereas applying it to a State's willingness would involve a markedly subjective analysis.

that it was "not in a position to ascertain the real motives of a State which expresses its unwillingness to prosecute a particular case."[23]

21. Article 17(1)(a) of the Rome Statute is accordingly less concerned with motivations than with objective facts. The phrase "unwilling or unable" is used disjunctively, shifting the focus to the presence or absence of a genuine investigation rather than to the causes thereof. The drafting history of Article 17 reveals a deliberate orientation towards a test that is objective as possible, even under the rubric of "unwillingness".[24] The indicators of "unwillingness" under Article 17(2) even came to include at least one factor that had previously been categorized as an indicium of inability under Article 17(3).[25]

22. The report of eminent commentators confirms the objective nature of unwillingness.[26] The indicators of unwillingness are said to include:

- "Delay in various stages of the proceedings";
- "Degree of independence of judiciary, of prosecutors of investigating agencies";
- "Commonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication";
- "Rapport between authorities and suspected perpetrators";
- "Longstanding knowledge of crimes without action, and investigation launched only when ICC took action";

[23] "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", No. ICC-01/04-01/07-1213, 16 June 2009, para. 80.
[24] John T. Holmes, "The Principle of Complementarity" in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (Kluwer, 1999), p. 49 ("Defining unwillingness was a much more contentious issue to resolve. The difficulties focused on the subjective versus objective nature of the test to be used by the Court…. As negotiations continued, the coordinator restructured the article both to provide greater clarity and to eliminate terms which contained perceived subjective elements."
[25] El Zeidy, p. 168 (observing that Article 17(2)(b) and (c) "incline more towards objectivity than subjectivity of assessment"; Holmes, p. 50 (explaining that Art. 17(2)(c) had first been considered for inclusion under the part concerning "unable", but was ultimately included under the rubric of "unwilling").
[26] Informal Paper, p. 2.

- "Pacing and development of investigation";

- "Uncharacteristic hastiness may also be an indication of a desire to whitewash as quickly as possible";

- "Hierarchical level: how high up the scale of authority did investigations and prosecutions reach?"[27]

23. Many of these indicators are present in this case.

(b) The Chronology of Events Leading to the Application

24. A Commission of Inquiry into Post-Election Violence, set up with the agreement of all major Kenyan political parties through the mediation of Kofi Annan, began its work in May 2008. The Commission, consisting of Judge Philip Waki and two international members, heard testimony from eyewitnesses, victims and government officials.[28] The "Waki Report", released on 15 October 2008, offers a detailed picture of the nature of the post-election violence and offered a roadmap as to how the crimes should be addressed. The central recommendation is the creation of a Special Tribunal for Kenya to investigate and prosecute the post-election violence. Trials would be heard by panels consisting of a Kenyan presiding judge, and two judges drawn from other Commonwealth countries. Significantly, the Tribunal would possess an investigative organ and prosecutor entirely independent of the regular Kenyan criminal justice system.

25. The Waki Report also proposed reforms to the existing criminal justice system, including some that the Government has now adopted or advocates in the Application. The special tribunal was proposed *in addition to* these proposed reforms because (i) all previous reform efforts had failed; and (ii) public mistrust of the existing criminal justice system was considered so deep that it would be incapable of

[27] *Idem*. pp. 28-29.
[28] Commission of Inquiry into Post-Election Violence, Final Report, 16 October 2008, ("Waki Report").

rendering justice in the special context of post-election violence, particularly in respect of those with significant influence and authority.[29] The Commissioners lamented that "impunity has become the order of the day in Kenya."[30] The suspects identified by the Commission included "powerful individuals in politics, government, business, the police and elsewhere whose capacity for interference with its evidence can neither be assumed or dismissed."[31]

26. The Commissioners handed a sealed envelope with names of suspects to Mr. Annan, who was to give the information to the ICC if the Commission's recommendations were not acted upon in a timely manner. A first attempt to pass legislation for the Special Tribunal in the Kenyan Parliament failed on 12 February 2009. Mr. Annan extended the deadline for passage of the legislation, but the Kenyan Government eventually dropped its efforts to pass that legislation in June or July of 2009. The envelope was then transmitted to the ICC Prosecutor on 16 July 2009, along with volumes of evidence gathered by the Commission. On 26 November 2009, the Prosecutor requested authorization to open an investigation into the post-election violence in Kenya pursuant to Article 15, which was granted by the Pre-Trial Chamber on 31 March 2010.[32] Summonses in the present case were issued just under a year later, on 8 March 2011.

(c) The Government's Steps Towards Investigations, In the Context of the Failure of the Waki Report Proposals, Do Not Show A Genuine Investigation or Prosecution of the Suspects

27. The Government argues that the failure to enact legislation setting up a Special Tribunal does not reflect its "unwillingness" to try the highest-level perpetrators because, as a substitute for the tribunal, the entire criminal justice

[29] *Idem*, pp. 16-18, 429-442, 444-460.
[30] *Ibidem*., p. 16.
[31] *Ibidem*., p. 17.
[32] Situation in the Republic of Kenya, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in to the Situation in the Republic of Kenya", No. ICC-01/09-19, 31 March 2010.

system is now being revamped. The Application says that "the new Constitution and related reforms permit the problems of Parliamentary passage of legislation for a Special Tribunal *to be bypassed*. The courts of Kenya are now empowered to try cases involving international crimes, with all the necessary safeguards being in place."[33]

28. This argument is directly contradicted by the findings of the Waki Commission, as described above. The Waki Report identified the police and other investigative agencies as the critical flaw in the Kenyan criminal justice system:

> We find in our assessment that the chain of criminal justice system is generally weak and the weakest link is the investigative function. The weakness in the system impacts on the rule of law and therefore promotes impunity.[34]

29. The Special Tribunal was proposed as the only mechanism that could feasibly overcome the particular challenges posed by the prosecution of crimes related to the post-election violence. Those challenges include the potential influence that could be exerted by powerful individuals; the involvement of the police itself in the events; and the deep-seated mistrust that the system would be unbiased by ethnic considerations.[35] The Special Tribunal proposal reflected the Commission's view that the police services were, in the near term, unreformable to the standard required to genuinely investigate and prosecute the post-election violence. The Commission used strong language in identifying deficiencies in the police, referring to "[t]he sorry state of the criminal justice system" even as the Commission was holding its hearings;[36] to the "lackadaisical manner" in which previous police reform efforts had been undertaken;[37] and that the police had been "slow to accept that police reform is necessary."[38]

[33] Application, para. 43 (italics added).
[34] Waki Report, p. 469.
[35] *Idem*, pp. 446-460.
[36] *Ibidem*, p. 454.
[37] *Ibidem*., p. 456.
[38] *Ibidem*., p. 430.

30. The reforms described in the Application are, in this context, an inadequate basis for genuine investigation and prosecution of the alleged role of Mr. Muthaura, Mr. Kenyatta and Mr. Ali in post-election violence. Virtually nothing is said in the Application as to the deeply-embedded problems of investigation and policing chronicled in the Waki Report, which cannot be remedied by even the most perfect constitutional text. Only two paragraphs of the Application address police reforms – reforms that were already substantially considered by the Waki Commission before proposing the creation of a Special Tribunal.[39]

31. The Government does not explain how the Kenyan criminal justice system can be overhauled from top to bottom to ensure an effective investigation of those who hold amongst the highest offices in the country, whereas the political will was lacking even for the more limited project of the Special Tribunal. The Government says that "the problems" blocking the passage of the Special Tribunal", (described elsewhere as "immense challenges,"[40]) are now being "bypassed."[41] The language acknowledges that strong forces are arrayed against reform, and that those forces succeeded in blocking the Special Tribunal. Those forces have evidently not disappeared, and will now be directed, whether overtly or covertly, against the far less independent, less trusted criminal justice system. The rejection of the Special Tribunal, in the absence of other concrete and specific steps, is strongly indicative of an unwillingness to genuinely investigate and prosecute.[42]

32. The suspects in this case are, it must be recalled, a Minister of the Government who also happens to be Deputy Prime Minister; the head of the Public Service and

[39] *Ibidem*., pp. 444-460, 475-481.
[40] Application, para. 8.
[41] *Idem*., para. 43.
[42] Amnesty International Public Statement, AFR 32/003/2011, 6 April 2011 ("Amnesty International fears that given the enormous problems with the Kenyan criminal justice system, as evidenced by the way it has failed to respond, or to respond effectively to the post elections violence for more than three years, and despite the large police and judicial reform programme initiated following the enacting of the new Constitution, it will not be possible to complete the investigations of these six suspects and prosecute those against whom there is sufficient admissible evidence by September or even in the foreseeable future").

Cabinet Secretary; and the third is a former Commissioner of Police.[43] Mr. Ali was until recently the head of the police, and was its head during the election violence. Mr. Muthaura and Mr. Kenyatta, given current arrangements, are in a position to wield considerable influence over the police service, if not the Attorney General himself. The current situation is undoubtedly one of a "commonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication" and a "rapport between authorities and suspected perpetrators".[44]

33. A genuine investigation and prosecution of the crimes alleged against the three suspects in the present case requires particularly robust guarantees of independence, neutrality, and transparency. Legislative reform alone is insufficient, particularly in the context of the deep-seated mistrust amongst the population of the police in matters connected to those who are politically powerful or that concern ethnically-tinged disputes. [45] In this context, the public perception of those guarantees is, as a practical matter, just as important as concrete legislative and institutional changes.[46] The Government is evidently aware of these "immense challenges", but offers little more than an optimistic agenda as to how the police service is to be reformed.

34. The Government's measures, whether achieved or proposed, must be viewed in light of the rejection of the Special Tribunal, which was the central recommendation of the Waki Report. The lack of political will to introduce the special tribunal may be attributable to a variety of causes.[47] Whatever the precise

[43] "Prosecutor's Application Pursuant to Article 58 as the Francis Kirimi Muthaura, Uhuru Muiguai Kenyatta and Mohammed Hussein Ali," No. ICC 01-/09-31-Red2, 15 December 2010, paras. 34-50.
[44] Informal Paper, p. 30.
[45] See e.g. Waki Report, pp. 35 ("both the police and military are perceived historically to have been recruited along ethnic lines to protect the particular government of the day"), 110, 125, 454-57.
[46] *Case of Sandru and Others v. Romania*, "Judgement", 8 December 2009, Application no. 22465/03, par. 72, ("L'obligation de l'Etat au regard de l'article 2 de la Convention ne peut être réputée satisfaite que si les mécanismes de protection prévus en droit interne fonctionnent effectivement, ce qui suppose un examen de l'affaire prompt et sans retards inutiles.").
[47] *The Guardian*, 5 November 2009 ("Despite international pressure, the government's efforts to pass legislation establishing a special local tribunal have proved half-hearted at best"); Content of diplomatic cable from United

reason may be, the forces of opposition will now set to work against the far less independent structures of the existing criminal justice system, even as reformed. No showing has been made that the legislative steps adopted so far are adequate to ensure that a genuine investigation or prosecution are being, or will be, conducted.

(d) No Senior Official Has Been Prosecuted For Post-Election Violence

35. The nature of the cases investigated and prosecuted to date reflects the institutional weaknesses identified by the Waki Commission. Annex 3 of the Annex Filing purports to be a list of pending or ongoing investigations. The three suspects in this case are notably absent from the list of "3500 pending investigations" – a striking omission considering that the Pre-Trial Chamber has found that there are reasonable grounds to believe that they have committed serious crimes. Indeed, amongst all these investigations, the Government does not point to a single investigation into any reasonably senior government official, even though the Waki Report was evidently able to find such evidence after only a few short months of work, and with limited powers.

36. No more compelling evidence could be found of the unwillingness to genuinely investigate and prosecute Mr. Muthaura, Mr. Kenyatta and Mr. Ali than the absence of any high-level investigations or prosecutions to date.

States Ambassador Michael Ranneberger, 26 June 2009, as reported in *The Nairobi Star*, 15 March 2011 (http://www.nairobistar.com/national/wikileaks-/17279-local-tribunal-will-cause-chaosmuthaura): "With respect to the establishment of a Special Tribunal, Muthaura argued that moving too quickly could even cause civil war…. (Note that Kibaki and Odinga did meet with Parliamentarians and were, extraordinarily, present in Parliament for the vote, but we have heard from multiple sources that this was largely window dressing without a strong behind the scenes push)".

(e) The Timing of the Government's Application Raises Serious Doubts About Its Determination to Conduct a Genuine Investigation

37. The Government's position now appears to be that, as of 14 April 2011, investigations into alleged criminal conduct by Mr. Muthaura, Mr. Kenyatta and Mr. Ali have been underway.[48]

38. The letter comes three-and-a-half years since the violence, but a mere six days after the suspects' initial appearance. The inference is hard to resist that the letter is specifically designed to prevent proceedings at the ICC, rather than reflecting a willingness to conduct a genuine investigation. Had there been such willingness, the investigation would have been opened long ago – or at the very latest soon after the summons request identifying the three suspects in this case was filed. The Attorney General instead chose to wait until after the summons decision had been issued. The timing of the letter falls squarely within that identified in the expert paper, that the Government had "longstanding knowledge of crimes without action", and that its investigation, if any, was "launched only when ICC took action."[49]

39. Doubts about the Government's commitment to a genuine investigation are, regrettably, compounded by the absence of candour in the original Application as to the imminent decision of the Attorney General. Either this was a deliberate attempt to undermine the fairness of the proceedings, or reflects internal divisions and uncertainty within the Government. The genuineness of the investigation announced must, in these circumstances, be seriously doubted. As with the contentious and protracted attempts to enact legislation for the Special Tribunal for Kenya, the Government has waited until the very last moment, seemingly only to forestall prosecution before the ICC.

[48] Annex Filing, Annex 1.
[49] Informal Paper, p. 30.

(f) A Bottom-Up Approach to Criminal Investigations Is Not a Relevant Consideration Once Reasonable Grounds Exist To Believe the Allegations Against the Suspects

40. The Government appears to assert that pursuing investigations into low-level perpetrators is an adequate approach to investigations for the time being, with more senior leaders to be prosecuted later.[50] Whatever merit this claim may have had at the beginning of the investigations phase, the question for present purposes must be assessed in light of the Pre-Trial Chamber's finding that reasonable grounds exist to believe that the three suspects in this case have perpetrated the crimes for which they are summoned. Once those reasonable grounds exist, no justification arises to refrain from not only pursuing investigations against that person, but also charging them publicly. The ICTY, which is presumably relied upon as one of the "[m]any international courts" that purportedly followed this bottom-up approach,[51] indicted Ratko Mladic and Radovan Karadzic for their alleged role at Srebrenica long before lower-level perpetrators had been investigated or charged.[52]

(g) Internal Difficulties Facing the Government Do Not Excuse the Extensive Delays In Investigating Or Prosecuting Those Criminally Responsible For Crimes Under The ICC's Jurisdiction

41. The Government cites a variety of political obstacles that have delayed the reform process, describing the tensions of a coalition government "as a sign of health in a modern, pluralistic, parliamentary democracy."[53] Kenya should therefore be "accorded the respect that it merits",[54] and be given as much "latitude" as has

[50] Application, paras. 34, 71.
[51] *Idem*., para. 34.
[52] *The Prosecutor v. Karadzic & Mladic*, IT-95-5-I, Indictment, 24 July 1995.
[53] Application, para. 9.
[54] *Idem*., para. 10.

arguably been given to some other States where serious crimes have been committed.[55]

42. The drafters of Article 17 of the Rome Statute, as previously discussed, did their utmost to define the conditions for inadmissibility according to objective criteria.[56] The purpose was to avoid, to the greatest extent possible, wide-ranging pronouncements about the propriety of a State's actions. Article 17(2) indicates, for example, that the assessment of unwillingness is to be made "having regard to the principles of due process recognized by international law." The subsections under that *chapeau* then include as indicators of unwillingness that "there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person to justice" and that the "proceedings were not or are not being conducted independently or impartially…." Cases of outright subterfuge or bad faith, on the other hand, are primarily addressed by Article 17(2)(a), which targets proceedings that "were or are being undertaken … for the purpose of shielding the person concerned from criminal responsibility…."

43. The Republic of Kenya signed the Rome Statute as a sovereign state and should be accorded the respect of that sovereign choice. No disrespect arises from doing so. Governments often find themselves subject to rulings by international judicial bodies. European States subject to the European Court of Human Rights are not disrespected when they are told, as routinely happens, that their judicial processes do not accord with their freely-undertaken obligations under the European Convention of Human Rights. Such cases include findings that investigations have not been conducted effectively and fairly.[57]

[55] *Ibidem*., para. 18.
[56] Holmes, p. 49 ; El Zeidy, p. 165.
[57] *Case of Sandru and Others v. Romania*, "Judgement", 8 December 2009, Application no. 22465/03, para. 80 ("la Cour estime que les autorités nationales n'ont pas agi avec le niveau de diligence requis au regard de l'article 2 de la Convention" ; *Case of Agache and Others v. Romania*, "Judgement", 20 October 2009, Application no. 2712/02, para. 84 ("En conséquence, la Cour estime qu'en l'espèce, la procédure pénale n'a pas été menée avec suffisament de diligence").

The Pre-Trial Chamber should therefore accord little weight to the broader policy arguments invoked by the Government. The analysis under Article 17, as one observer has remarked, "is not a question of approving or disapproving the actions of a state."[58] Even in respect of the more limited question of the capacity of the criminal justice system, "the admissibility assessment is not intended to 'judge' a national legal system as a whole, but simply to assess the handling of the matter in question."[59] Hence, the Pre-Trial Chamber is not called upon to make political assessments about whether the Government has done all it could possibly have to force appropriate legislation through Parliament, or to reform an entrenched police service that may be resistant to such reforms. Internal obstacles do not significantly alter the objective character of the analysis that is to be undertaken under Article 17. In a not entirely dissimilar context, the European Court of Human Rights, while sympathizing with the complexity of the legal, social and factual context, rejected these as mitigating factors in respect of investigative delays:

> La Cour rappelle que s'il peut arriver que des obstacles ou difficultés empêchent une enquête de progresser dans une situation particulière, il reste que la prompte réaction des autorités est capitale pour maintenir la confiance du public et son adhésion à l'Etat de droit. L'obligation de l'Etat au regard de l'article 2 de la Convention ne peut être réputée satisfaite que si les mécanismes de protection prévus en droit interne fonctionnent effectivement, ce qui suppose un examen de l'affaire prompt et sans retards inutiles.
> …
> Enfin, si la Cour n'ignore pas la complexité indéniable de l'affaire, elle estime que l'enjeu politique et social invoqué par le Gouvernement ne saurait justifier la durée de l'enquête. Au contraire, son importance pour la société roumaine aurait dû inciter les autorités internes à traiter le dossier promptement et sans retards inutiles afin de prévenir toute apparence de tolérance des actes illégaux ou de collusion dans leur perpétration.[60]

44. The failure to introduce the Waki Commission reforms, despite repeated extensions of the deadline for transferring information to the ICC; the failure thereafter to make any submissions on admissibility at the opening of the investigation; and the failure to make any submissions until finally the summons

[58] B. Batros, "The Judgement on the Katanga Admissibility Appeal: Judicial Restraint at the ICC", Leiden Journal of International Law, 23 (2010), pp. 343, 355.
[59] Informal Paper, para. 35.
[60] *Case of Sandru and Others v. Romania*, "Judgement", 8 December 2009, Application no. 22465/03,, paras. 72, 79.

decision had been issued, collectively, constitute strong objective indicators that the Government is either unwilling or unable to genuinely pursue investigations and prosecutions against high-level perpetrators, including the three suspects in this case. The Attorney General's letter of 14 April 2011 does not alter that long-established unwillingness.

45. This is not to allege bad faith against any person, nor in any way to suggest any disrespect to the Republic of Kenya or its Government. Many honourable people work in various organs of the Government and are undoubtedly committed to the cause of justice. Difficult circumstances combined with political divisions – both of which are acknowledged by the Government – have nevertheless impeded genuine investigations and prosecutions of high-level perpetrators, including the suspects. These exigencies are precisely the circumstances that trigger the admissibility of the case pursuant to Article 17 of the Rome Statute.

IV. VIEWS OF VICTIMS

46. None of the victim-applicants consulted believe that this case can be tried effectively in Kenya.[61] A commonly-held view is that the justice system is too weak and corrupt to withstand the actual or potential influence of those with money, official position or power. Specific concerns were expressed concerning the safety and security of witnesses, notwithstanding potential witness protection reforms of which at least one of the victim-applicants was aware. The general context of insecurity felt by each of the victims consulted was palpable: fears were expressed about a continuing climate of fear and intimidation.

47. One of the victim-applicants expressed optimism that the process of constitutional reform could yield positive results but underlined that the system currently in place was inadequate for holding proper trials. Another believed that

[61] The Office consulted victim-applicants a/0640/10, a/0641/10 and a/0642/10.

lower-level perpetrators, who had less influence and money, could perhaps be tried locally.

48. The victims were evidently keenly aware of ongoing developments in the case and expressed strong support for continued ICC proceedings. They were also plainly well-acquainted with recent reform efforts in Kenya and their perceived inadequacy in relation to realities on the ground.

49. The Office also received unsolicited contributions from victims' organisations in Kenya. These organizations, which are in contact with victims of the post-election violence on a daily basis, echoed the concerns expressed above. In particular, they submit that Kenya lacks the capacity, ability and political will to investigate and prosecute those most responsible for the post-election violence.

50. The Office also recalls the views expressed by victims in relation to the opening of the investigation pursuant to Article 15(3) of the Rome Statute and Rule 50(3) of the Rules of Procedure and Evidence. Victims explained in that context that they did not trust the Kenyan justice system because they believed it to be weak or corrupt, that prosecutions have not occurred in Kenya and therefore, that Kenyan authorities are not willing to investigate and prosecute crimes committed during the post-election violence period. Consequently, they believe that justice will not be achieved in Kenya because the persons allegedly responsible for the violence are in a position to prevent efforts towards accountability. The period of delay in prosecutions is now one year longer than when those comments were received

V. CONCLUSION

51. The Office of Public Counsel for Victims, acting as Legal Representative of victims for the purposes of these Article 19 proceedings, requests that the Pre-Trial Chamber reject the Government of Kenya's Application and find the case admissible before the International Criminal Court.

Christopher Gosnell
Counsel

Dated this 28th day of April 2011
At The Hague, The Netherlands