

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original:

No.: ICC-01/09-02/11

Date: 8 May 2015

APPEALS CHAMBER

Before: Judge Silvia Fernández De Gurmendi
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF KENYA

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

Public

***Amicus Curiae* Observations of the Africa Centre for Open Governance pursuant
to Rule 103 of the Rules of Procedure and Evidence**

Source: Africa Centre for Open Governance (AfriCOG)

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

Ms Helen Brady

Mr Uhuru Muigai Kenyatta

Legal Representative of Victims

Mr Fergal Gaynor

States Representative

Mr Githu Muigai SC, Attorney-General of
the Republic of Kenya

REGISTRY

Registrar

Mr Herman von Hebel

Introduction

1. Having sought and been granted leave pursuant to Rule 103 of the ICC Rules of Procedure and Evidence (“Rules”), the Africa Centre for Open Governance (hereafter referred to as the “*Amicus*”) hereby submits its observations in relation to (i) the context in which the alleged non-cooperation by the Kenyan Government has occurred; and (ii) the relevant statutory provisions under Kenyan law relating to cooperation with the Court.¹

Submissions

- (i) *The context in which the alleged non-cooperation by the Kenyan Government has occurred*

Preliminary observations

2. It is the view of the *Amicus* that some preliminary observations on the genesis of the post-election violence in Kenya in 2007 and 2008 would be useful to the Appeals Chamber in helping to explain the context behind the Kenyan Government’s alleged non-cooperation.
3. Unfortunately, election related violence has been almost a regular feature in Kenya since the inception of multi-party politics in 1992, with hundreds of people being displaced or killed.² Ethnicity has played a divisive role in Kenyan politics since shortly after independence. Indeed it has been argued that since the 1990s ‘certain leaders have exploited ethnic grievances over perceived historical

¹ ICC-01/09-02/11-1018.

² For example, the clashes in 1992 affected more than 300,000 people and left thousands of people displaced. Although on a lesser scale, the elections in 1997 also resulted in various acts of rape and looting between the Kalenjin and Kikuyu communities, as well as displacement of so called up-country settlers in the Likoni area of the Coast Province. See, for example, 'Post-Election Political Violence', a report by Article 19, available at: <http://www.article19.org/data/files/pdfs/publications/kenya-post-election-political-violence.pdf>.

injustices' in Kenya and the post-election violence in 2007 and 2008 was just another manifestation of such manoeuvres.³

4. Violence between ethnic groups has become almost a norm as a way of resolving political competition. For example, in December 1998 there was widespread violence between the Kikuyu and Kalenjin communities in the Rift Valley relating to the election of local leaders in the area. An occurrence that was repeated during the post-election violence in 2007 between the supporters of Mr Ruto and Mr Kenyatta.⁴ Furthermore, the demand for and control of scarce arable land has often resulted in conflicts.⁵
5. Violent mobs, consisting mainly of unemployed youth have also been mobilised into gangs along ethnic lines. Politicians have used these groups to their own ends, including using them to terrorise opponents or supporters thereof. A clear example of this is the Mungiki, who, according to victims in Nakuru and Naivasha attacked them on the basis that they were perceived to be supporters of the Orange Democratic Movement (“ODM”).⁶
6. The Commission of Inquiry into the Post-election Violence (“Waki Report”) highlighted that one of the key reasons for the post-election violence in Kenya was the fact that power has been personalised around the presidency and as such all decisions flow from the president, and not through the operation of the law.⁷ This has led the Kenyan public to believe that a person from their own tribe must

³ Bayne, S. (2008). Post-election Violence in Kenya: An Assessment for the United Kingdom Government. Nairobi. April, 2008.

⁴ This is not to say that other ethnicities, such as the Luo, Luhya and others, were not involved in both perpetrating crimes or were not victims of crimes during the post-election violence.

⁵ F. Stewart. (2008), ‘Note for Discussion: Kenya, Horizontal Inequalities and the Political Disturbances of 2008’, CRISE, p.4, who states that it was generally perceived that Kikuyu and Central Province had been enjoying more of the economic and political resources of Kenya before and after independence at the expense of other regions or tribes.

⁶ Commission of Inquiry into the Post-Election Violence (“Waki Report”), p.33-35.

⁷ Commission of Inquiry into the Post-Election Violence, p. 28-30, available at: http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf

be in power in order to secure benefits and as a defensive strategy to keep other ethnic groups from taking jobs, land and entitlements.⁸

7. Despite the promulgation of a new Constitution in 2010, which attempts to curtail the power of the president to an extent, the culture and practice of a powerful president has remained the norm. It is submitted by the *amicus* that this custom has had a serious impact on the provision of genuine cooperation by the Kenyan Government, given that Mr Kenyatta is the President of Kenya.

The context behind the alleged non-cooperation

8. The *Amicus* submits that cooperation as envisaged under Part 9 of the Rome Statute (“RS”) warrants a good faith colourable attempt to comply with the provisions of the RS.⁹ The determination as to whether Kenya has complied with its obligations under the article 87(7) of the RS is solely for the Appeals Chamber to consider. However, the *Amicus* will detail the context behind the alleged instances of non-cooperation.
9. Certain reluctance on the part of the Government of Kenya can be evidenced as early as the year 2011 after summonses to appear were issued for six prominent Kenyans by Pre-Trial Chamber II.¹⁰ One year after issuance of the summonses the Kenyan government challenged the ICC’s jurisdiction.¹¹ In its submissions, the Government of Kenya argued that “...with its house already being put in order, Kenya is not allowed to finish the task and to investigate and try those at all levels, particularly

⁸ *Ibid.* See also P. Kamungi, (2000). Refugees, Conflict, and Diplomacy: A case Study of Great Lakes Region, 1993-1998. University of Nairobi: Master’s Thesis, p 52-61 who argues that "control of the state is core to political competition because it means access to and disposal of resources, and patronage through which ethnic elites can remain in power"

⁹ See for example, a policy paper on the ramifications of non-cooperation in Kenya, ‘All Bark and No Bite’. Kenyans for Peace with Truth and Justice, available at: <http://kptj.africog.org/wp-content/uploads/2015/02/FINAL-ICC-COOPERATION-210215.pdf>

¹⁰ ICC-01/09-01/11-01 and ICC-01/09-02/11-01.

¹¹ ICC-01/09-02/11-26.

those at the top of political, military and administrative hierarchies, who merit being tried.”¹²

10. Four years later, it appears that the Government’s ‘house is still not yet in order’, given that there has been no prosecution of high-to-mid level perpetrators of violence during the post-election violence.¹³ The Government specifically stated that the national Courts in Kenya would be able to carry out prosecutions in Kenya without the need to form a Special Tribunal. Tragically for the victims of the post-election violence this has not been the case.¹⁴
11. On 15 July 2010 the Prosecution made a request to interview ten senior police officers.¹⁵ Hon. Justice Kalpana Rawal then on the High Court of Kenya and currently Deputy Chief Justice of the Republic was appointed to conduct the process. A suit challenging the process was subsequently filed before the High Court of Kenya and to date there is still a court order in place that prevents the Prosecution from interviewing these officers. The Attorney General to date has failed to oppose, appeal, or apply to have set aside for want of prosecution the said order. In addition, the Government has not taken steps to “promptly consult with the Court to try to resolve the matter” under Article 93(3) of the RS, nor has it, to the best of the *Amicus’s* knowledge, attempted to engage with the Court under Article 93(5).¹⁶
12. As the Chamber is aware, in the lead up to the 2013 presidential elections, Mr Kenyatta and Mr Ruto formed a joint ticket under the Jubilee Coalition and positioned themselves opposite the then Prime Minister, Raila Odinga, who

¹² ICC-01/09-02/11-26, para. 10

¹³ See for example, *‘Crying for justice: Victims’ perspectives on justice for the post-election violence in Kenya’* a report by Amnesty International, available at: <https://www.amnesty.org/en/documents/AFR32/001/2014/en/>

¹⁴ Mr Tobiko Keriako, Director of Public Prosecutions said on 5 February 2014: ‘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>.

¹⁵ Jackson Mwangi vs. The Hon. Attorney General - Constitutional Petition No.2 of 2011.

¹⁶ Article 93(3 and article 93 (5), Part 9 of the Rome Statute of the International Criminal Court.

headed the Coalition of Reform and Democracy (CORD). This development inevitably led to the ICC investigation becoming a central campaign issue and an exceptionally divisive one. During an election debate Mr Kenyatta assured the public that his indictment at the ICC was a “personal challenge” which he would be able to manage beside his official duties. Although, the alliance between Mr Kenyatta and Mr Ruto is portrayed as an example of inter-tribal reconciliation, the reality is quite different. Rather than a thoroughgoing, inclusive process of reconciliation, this seemed to represent an elite pact between individuals who faced the same predicament.

13. Exploiting discontent amongst many African governments with the ICC’s perceived bias towards Africa, Mr Kenyatta also managed to inflame his supporters’ enmity to the ICC and to transform the election into a referendum on the ICC. Shortly after being controversially declared to have won¹⁷ the elections Mr Ruto, Mr Sang and Mr Kenyatta filed motions requesting that they be excused from attending trial in person, stating that this would significantly impede their ability to fulfil their respective public office duties, and motioned to move the trials to Nairobi or Arusha, Tanzania.¹⁸ The latter move was seen by both the victims and civil society in Kenya as an attempt to prevent witnesses from attending trial to testify for fear of reprisals.
14. In March 2013, in his victory speech following the announcement of the election results, Mr. Kenyatta, while committing his future government to continuing to abide by its international obligations, stated pointedly, “However we also expect

¹⁷ See for example, James D. Long, Karuti Kanyinga, Karen E. Ferree, Clark Gibson, *Journal of Democracy*, Volume 24, Number 3, July 2013, pp. 140-155 (Article) DOI: 10.1353/jod.2013.0048; N.Cheeseman, ‘*State of the nation: Kenya after the ‘fragile’ 2013 poll*’, <http://democracyinafrica.org/state-nation-kenya-fragile-2013-poll/>; John Harrington & Ambreena Manji (2015): *Restoring Leviathan? The Kenyan Supreme Court, constitutional transformation, and the presidential election of 2013*, *Journal of Eastern African Studies*, DOI: 10.1080/17531055.2015.1029296; and ‘Kenya: A Guidebook to Impunity’, available at: <http://www.informaction.tv/index.php/film-list/item/439-kenya-a-guidebook-to-impunity>

¹⁸ ICC-01/09-02/11-427 and ICC-01/09-02/11-429.

that the international community will respect our sovereignty and the democratic will of the people of Kenya.”¹⁹

15. In May 2013, immediately following the presidential elections, Kenya’s Permanent Representative to the United Nations wrote a letter to the UN Security Council demanding that the cases facing the President and his Deputy at the ICC be withdrawn forthwith “because Kenyans have elected the two to be their political masters.”²⁰
16. In the same month, the African Union resolved to support and endorse an East African request for a referral of the ICC investigations and prosecutions in relation to the 2007 postelection violence in Kenya, in line with the principle of complementarity, to allow for a National Mechanism to investigate and prosecute the cases.²¹
17. In September 2013, both Chambers of Parliament, which are dominated by Mr Kenyatta’s and Mr Ruto’s ruling Jubilee Coalition, passed resolutions to withdraw Kenya from the Rome Statute and repeal the International Crimes Act, which domesticates it.²² These resolutions have to date not been acted upon by the Executive, but a Member of Parliament representing the President’s constituency, and one of his most vocal supporters, has filed a motion to summon the Foreign Secretary to Parliament to show cause why she should not be sacked for failing to implement the resolutions.²³

¹⁹ Speech by president-elect Uhuru Kenyatta, March 9 2013, <http://www.capitalfm.co.ke/eblog/2013/03/09/speech-by-president-elect-uhuru-kenyatta/>

²⁰ Kenya asks UN to end Uhuru, Ruto ICC trial, The East African, 9 May 2013, <http://www.theeastafrican.co.ke/news/Kenya-asks-UN-to-end-Uhuru-Ruto-ICCtrial-/-/2558/1848168/-/w9u2r1/-/index.html>

²¹ Assembly of the African Union, Twenty-First Ordinary Session, Decisions, Declarations and Resolution, [http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20474-489%20\(XXI\)%20_E.pdf](http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20474-489%20(XXI)%20_E.pdf) During this summit Mr Kenyatta described the court as “the toy of declining imperial powers” and said that certain positions taken by the Prosecution represented “a fetid insult” to Africa. He added: “It is the fact that this court performs on the cue of European and American governments against the sovereignty of African States and peoples that should outrage us. People have termed this situation ‘race-hunting’. I find great difficulty adjudging them wrong.” Full speech available at <http://www.newvision.co.ug/news/648328-uhuru-blasts-us-uk-in-his-speech- full-speech-below.htm>

²² Kenyan MPs vote to withdraw from the ICC, <http://www.bbc.com/news/world-africa-23969316>

²³ Gatundu South MP Moses Kuria files motion to summon CS Amb. Amina Mohamed [“The first term legislator says that Cabinet Secretary Amina will appear before parliament on 14th October to explain why she

18. In October 2013, at the request of Kenya and Mauritania, the African Union held an extraordinary summit at which it resolved that no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity during their term of office; and that the trials of President Kenyatta and Deputy President Ruto should be suspended until they complete their terms of office.²⁴
19. In November 2013, the Kenya Government sought, but failed to have the cases against President Kenyatta and Deputy President Ruto at the ICC deferred by the UN Security Council under Article 16 of the RS.²⁵
20. In late November 2013, during the 12th meeting of the Assembly of States Parties in The Hague, Kenya demanded and got an extended eight hour plenary debate on head of state immunity and subsequently managed to force through changes to Rule 134 of the rules of procedure allowing senior officials such as Mr Kenyatta and Mr Ruto to be away from trial and be represented by their lawyers.²⁶
21. Furthermore, the Government of Kenya failed to freeze any of Mr Kenyatta's assets, in direct violation of Part 9 of the RS as obligated to do so. Moreover, the Government failed to bring its purported legal objections to the Pre-trial Chamber's asset-freezing order²⁷ to the Court's attention, in violation of Part 9 of the Statute. Moreover, the Trial Chamber noted 'with concern the Government's

should not be sacked for ignoring the national assembly's decision.'], <http://www.standardmedia.co.ke/ktn/video/watch/2000083240/-gatundu-south-mp-moses-kuria-files-motion-to-summon-cs-amb-amina-mohamed>

²⁴ Extraordinary Session of the African Union, Decisions and Declarations, 12 October 2013, http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf

²⁵ Uhuru Kenyatta's bid to stop ICC trials fails at the UN, The Daily Nation, November 15 2013, <http://mobile.nation.co.ke/News/UN-rejects-bid-to-stop-Uhuru-and-Ruto-trials/-/1950946/2074990/-/format/xhtml/-/snxatbz/-/index.html>

²⁶ ASP adopts Kenya, AU amendments to ICC rules, The Star Newspaper, 28 November 2013. <http://www.the-star.co.ke/news/article-145410/asp-adopts-kenya-auamendments-icc-rules>

²⁷ ICC-01/09-02/11-42, 'Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', pursuant to Trial Chamber V(b)'s Order ICC-01/09-02/11-967, dated 21st October 2014, this document was reclassified as "Public".

cumulative inattention to the taking of appropriate measures to ensure the confidentiality of the proceedings.’²⁸

22. Taken together, these actions by the Kenyan Government appear to illustrate a general policy of unwillingness to cooperate with the ICC. The Attorney General of Kenya, Mr Githu Muigai, has stated on numerous occasions, both in oral and written submissions, that the Government of Kenya has fully cooperated with the ICC and will continue to do so. Nonetheless, the fervent efforts that the Government of Kenya has undertaken to shield Mr Kenyatta from attending trial are difficult to reconcile with the Attorney General’s statements relating to cooperation.²⁹

(ii) the relevant statutory provisions under Kenyan law relating to cooperation with the Court

23. The Constitution is the supreme law of Kenya and binds all persons and all State organs.³⁰ Any act or omission in contravention of the Constitution is invalid.³¹ The general rules of international law form part of the law of Kenya.³² Any treaty

²⁸ ICC-01/09-02/11-967, paras. 11 and 12. Furthermore under the International Crimes Act 2008, Article 25. (1) states that “ *A request for assistance and any documents supporting the request shall be kept confidential by the Kenyan authorities who deal with the request, except to the extent that the disclosure is necessary for execution of the request* ”. It is also worth noting that recently the Central Bank of Kenya (CBK) has instructed commercial banks and microfinance banks to freeze assets of four top public officials in Sudan in a delayed response to a 2005 United Nations resolutions. The officials are three commanders of warring factions and a paramount chief in the troubled North Darfur region. They are accused of involvement in human rights violations in the region. The Government of Kenya responded to this Resolution with great speed and it appears that they did not have any legal objections to the freezing the assets of the Sudanese commanders, including any claim that they required a conviction, as the Attorney General has previously argued, before they could commence an asset freeze. See: <http://asokoinsight.com/news/central-bank-of-kenya-orders-banks-to-freeze-assets-of-sudanese-officials/>

²⁹ It is also worth noting that on 5 September 2013, the Kenyan Parliament overwhelmingly supported a proposal from *the government* to withdraw from the jurisdiction of the International Criminal Court (ICC). The motion purported “to suspend any links, *cooperation and assistance*” to the Court. (Emphasis added). This vote was undertaken after earlier submissions by the Government of Kenya in April 2013 where it had reasoned that Kenya’s decision not to withdraw from the Rome Statute in 2010 displayed “the importance of State Parties providing the necessary assistance and cooperation to the Court...”, ICC-01/09-02/11-713, para. 25.

³⁰ Article 2(1) of the Constitution of Kenya 2010.

³¹ Article 2(4) of the Constitution.

³² Article 2(5) of the Constitution.

or convention ratified by Kenya forms part of the law of Kenya under the Constitution.³³

Furthermore, the President is required to respect, uphold and safeguard the Constitution.³⁴ The requirement that the President is the person principally responsible for ensuring that Kenya fulfils its treaty obligations 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.³⁵ The President's power is exercised through Cabinet Secretaries and others.³⁶

24. The International Crimes Act 2008 ("ICA") is an act of Parliament which makes provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes. The ICA also enables Kenya to cooperate with the ICC in the performance of its functions.

25. The Act provides with force of law in Kenya almost the entirety of the RS, including the sections pertaining to the relevant crimes, jurisdiction and admissibility (Part 2) and international co-operation and judicial assistance (Part 9). The ICA also details the exact procedure for requests for arrest and surrender received from the ICC.³⁷

³³ Article 2(6) of the Constitution.

³⁴ Articles 131 and 132 of the Constitution.

³⁵ Article 132(1)(c)(iii) of the Constitution.

³⁶ Article 152(1) of the Constitution states that the "Cabinet consists of: (a) the President; (b) the Deputy President; (c) the Attorney-General and (d) not fewer than fourteen and not more than twenty-two Cabinet Secretaries."

³⁷ According to the ICA should a request for arrest and surrender be received from the ICC, the Executive shall, if satisfied that the request is supported by the information and documents required by Article 91 of the Rome Statute, notify a judge of the High Court so that an arrest warrant is issued. Such an arrest warrant may be issued if the judge is satisfied that, inter alia, the person is or is suspected of being present in Kenya or may go to Kenya. See also Kenya Section of The International Commission of Jurists v Attorney General & another [2011] eKLR, available at : http://kenyalaw.org/Downloads_FreeCases/84203.pdf, on 28th November 2011, Justice Nicholas Ombija, a judge of the High Court of Kenya, delivered his ruling on an application for issuance of a provisional warrant of arrest against President Omar al Bashir. The application had been filed by the Kenyan Section of the International Commission of Jurists, (ICJ Kenya), and had joined both the Attorney General and the Minister for Internal Security as the Respondents. - See more at: <http://www.icj-kenya.org/index.php/more-news/435-pressstatement-al-bashir#sthash.oFrcQaIO.dpuf>

26. Part III of the ICA contains general provisions relating to requests for assistance from the ICC. Specifically, Section 20 of the ICA applies to requests for assistance made under Part 9 of the RS, including: *“(ix) the execution of searches and seizures; (x) the provision of records and documents, including official records and documents; (xi) the protection of victims and witnesses and the preservation of evidence; (xii) the identification, tracing and freezing, or seizure of proceeds, property and assets.”*³⁸
27. Section 20(2) of the ICA states as follows: *“(2) Nothing in this section— (a) limits the type of assistance that the ICC may request under the Rome Statute or the ICC Rules (whether in relation to the provision of information or otherwise); or (b) prevents the provision of assistance to the ICC otherwise than under this Act, including assistance of an informal nature.”* In addition, jurisprudence from the High Court of Kenya emphasises that under the ICA, the relevant sections of the RS related to “the making of requests by the ICC to Kenya for assistance and the method of dealing with those requests” have the force of law in Kenya.³⁹
28. The Attorney-General is the principal officer authorised under the ICA to handle and deal with requests for assistance from the ICC.⁴⁰ Oftentimes, the Attorney General has argued that the consent of an accused person is required in respect to search and seizure evidence.⁴¹ However, it is instructive to note that the ICA contains no such provisions regarding a duty to obtain the consent of the accused in respect of any matter. Instead, the ICA foresees that, if a court order is

³⁸ Article 20, The International Crimes Act 2008, available at:

http://www.issafrica.org/anicj/uploads/Kenya_International_Crimes_Act_2008.pdf.

³⁹ Section 4(1)(e) ICA 2008. In *Walter Osapiri Barasa v Cabinet Secretary Ministry Of Interior And National Co-Ordination and others*, Constitutional Petition No. 488 of 2013, judgement delivered 31 January 2014, R.M Mwongo J. observed at para. 59: “In light of the foregoing, it is evident that Kenya, through a process of domestication, and the people of Kenya in exercise of their sovereignty will through their constitutionally mandated representatives in Parliament, have in exercise of such sovereignty, ratified, adopted, incorporated and received the Rome Statute, excluding the provisions not domesticated, as part of the law of Kenya under the supremacy of the Constitution. That being so, the effect is that the Rome Statute forms part of the laws of Kenya to the extent stated. Being a statute through a process of ratification and domestication the Rome Statute is, in terms of Article 2(6) of the Constitution, thus “under the Constitution”, and hence is subordinate to the Constitution.”

⁴⁰ See Section 22 of the ICA and the “Submissions of the Government of the Republic of Kenya as *Amicus Curiae* in Response to the Prosecutor’s ‘Notification of the Removal of a witness from the Prosecutor’s Witness List and Application for an Adjournment of the Provisional Trial Date’”, para. 14, ICC-01/09-02/11-901.

⁴¹ ICC-01/09-02/11-877, dated 20 December 2013, filed 9 January 2014.

necessary, it is a domestic court order rather than an ICC court order, and that it is imperative that the Attorney-General authorizes the arrangements for a court order to be obtained.⁴²

29. Indeed, Section 27 of the ICA pertains to the official capacity of a person as states that *“(1) The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for— (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.”*
30. Section 24 of the ICA envisages that if there are any difficulties in the execution of a request from the ICC, the Attorney must engage in consultation with the Court “without delay”.
31. Sections 104 and 108 of the ICA expressly deal with requests for assistance from the Court which fall within those subsections of Article 93 of the RS. Namely: facilitating the provision of records and documents; protecting victims and witnesses and preserving evidence; requests relating to property associated with crime; and request for other types of assistance.
32. The Attorney-General’s discretion to refuse to give authority for an Article 93(1)(i) request to proceed under Section 104 of the ICA is extremely limited.⁴³ Section 108 of the ICA, which pertains to requests for assistance under Article 93(1)(l), provides comparable terms. Further, the discretion of the Kenyan agency to which the Attorney General forwards the request to refuse to comply is also exceedingly limited. The agency must “without delay” use its best endeavours to locate and make available the document or record sought, and to deliver the document or record, if located, to the Attorney-General.

⁴² See sections 20 (1)(a)(ix), 72, and 96-100 of the ICA.

⁴³ The Attorney-General must give authority for the request to proceed if he is satisfied only of two things: (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and (b) the document or record sought is or may be in Kenya. Section 104 of the ICA.

33. Under section 108(3) of the ICA, if the Attorney-General considers that the assistance sought cannot lawfully be provided, he must before refusing the request, “(a) consult with the ICC; and (b) consider whether the assistance can be provided subject to conditions or whether it can be provided at a later date or in an alternative manner”.⁴⁴ Sections 76(1), 77(2) and 84(1) of the ICA set out other modalities for complying with a Request for Assistance (“RFA”) from the ICC. The Attorney-General’s discretion to refuse to comply with any RFA under those sections is also very limited.

34. Furthermore, domestic Kenyan law also provides avenues that the Attorney-General may utilise in order to fulfil Kenya’s cooperation obligations. For example, the Attorney General may apply for a court order for financial and telephone records⁴⁵ under the Evidence Act⁴⁶ and under the Criminal Procedure Code.⁴⁷

⁴⁴ See also Section 107 of the ICA, which emphasises that any court orders necessary shall be Kenyan court orders and shall be arranged by the Attorney-General:

“If the Attorney-General gives authority for the request for assistance in identifying, tracing and freezing, or seizing, property to proceed, he may authorise the appropriate Kenyan authority to apply for one or more of the following orders or warrants—

- (a) a search warrant in respect of property under Part B of the Second Schedule;
- (b) a restraining order under Part C of the Second Schedule;
- (c) a production order under Part D of the Second Schedule;
- (d) a monitoring order under Part E of the Second Schedule”.

⁴⁵ Although Government of Kenya has claimed that it is unable to provide the telephone records requested by the OTP in its revised records request, in July 2013, Mr. Uhuru Kenyatta’s lawyer Stephen Kay sued the two leading mobile service providers in a domestic court seeking orders for the release to himself of unspecified information, presumably including mobile phone data, although this cannot be confirmed since the proceedings were held in camera. See Uhuru ICC lawyer takes Airtel and Safaricom to court, Daily Nation, 29 July 2013, <http://www.nation.co.ke/News/Uhuru-ICC-lawyer-takes-Airtel-and-Safaricom-to-court/-/1056/1931012/-/v669vgz/-/index.html>

⁴⁶ Sections 178 and 180 of the Evidence Act provide: “A banker or officer of a bank shall not, in any proceedings to which the bank is not a party, be compellable to produce any banker’s book the contents of which can be proved under this Chapter or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court made for special cause. [...] 180. (1) Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker’s book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker’s book, and such warrant shall be sufficient authority for the production of any such banker’s book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker’s book.”

⁴⁷ A search warrant may be issued for access to any document or property that will reasonably aid in conducting a criminal investigation in Kenya. Section 118 of the Criminal Procedure Code provides ‘Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to

35. As illustrated above Kenyan law provides a very specific and direct framework for compliance with the RS. The ICA and Kenyan domestic laws are unambiguous and leave little room for manoeuvre or interpretation. Thus, the *Amicus* concludes that again it is difficult to reconcile the Kenyan Government's dilatory tactics,⁴⁸ with respect to requests for cooperation, with the Kenyan legal framework for cooperation with this Court.

Conclusion

36. In conclusion, the *Amicus* respectfully offers the above observations to assist the Appeals Chamber in its deliberations and expresses its appreciation for the opportunity to be heard.

Respectfully submitted,



Gladwell Otieno
Executive Director, Africa Centre for Open Governance

Dated this 8th day of May 2015

At Nairobi, Kenya

be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.' Section 121(1) provides: "When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation."

⁴⁸ The Trial Chamber found that in respect of the Revised Records Request that the Government of Kenya had not complied with its cooperation obligations, and that it had failed to meet a standard of good faith cooperation in relation to the record requests, ICC-01/09-01/11-982, para.93.