SEPARATE FURTHER OPINION OF JUDGE EBOE-OSUJI

1. Judge Fremr and I are fully agreed on what we have said in the majority decision. I do, however, feel it important to make the following additional observations. They are entirely mine alone.

Negative Impact on the Image of the Court

2. The Prosecution have submitted that the 'seriousness and integrity' of the proceedings would be compromised if the accused is not present during trial.[1] But, it is only necessary to note that trials in the absence of the accused have been widely accepted, by international courts and domestic courts (in both common law and civil law jurisdictions),[2] to demonstrate the fallacy of this argument. If a contention of that sort were to be accepted, the necessary consequence would be to denigrate all such proceedings. Such a proposition must be rejected.

3. In a related submission opposing the Ruto relief in that case, the Prosecutor had submitted that granting the relief would have a negative impact on the image of the Court. The majority of the Chamber in that case summarily dismissed the argument, partly because it was unsupported by empirical data.

4. It is notable now that the empirical data points in the opposite direction, in the sense that failure to grant the relief will have a negative impact on the image of the Court. In that regard, one notes the stream of concerns registered by a number of African States, both individually[3] and through the collective instrumentality of the African Union.[4] Those concerns are, perhaps, best encapsulated in the recent

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[1] ICC-01/09-02/11-818, para 30.
[2] *See* Decision on Mr Ruto's Request for Excusal from Continuous Presence at trial, 18 June 2013, ICC-01/09/11-777 (Ruto Decision,) paras 46 and 75 and footnotes cited therein.
[3] See e.g. the Joint *Amicus* Submissions, ICC-01/09-01/11-948.
[4] See e.g. Letter from the Chairperson of the African Union and Chairperson of the African Union Commission to the President of the Court, dated 10 September 2013, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/pr943/130910-AU-letter-to-SHS.pdf.

comments of President Zuma of South Africa. According to a press report dated 27 September 2013, he appealed for 'compromise with Kenyan leaders by sparing them the obligation of sitting through their trials for crimes against humanity. He said President Uhuru Kenyatta and his deputy, William Ruto, had a country to run and therefore were in a different category to other defendants.' The report continued:

> Mr Zuma has not declared his country's official position, but his remarks to the South African media contingent on Wednesday on the margins of the United Nations (UN) General Assembly were sympathetic to the Kenyatta-Ruto cause. "They (are saying that) we are ready to come at the opening," he said.
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> "They are not necessarily witnesses, and so then the case could go on and they will come (back) when there is a verdict. But some people say 'no, no, no, they must come and sit' at the court.
>
> "That is what is making people feel uncomfortable, it's not in keeping with what we would want to happen in Africa."
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> Mr Zuma said a feeling that the ICC was being unreasonable had led to the planning of the special summit in Addis Ababa. An Addis-based ambassador said it was now likely to happen on October 12.
>
> Asked why political leaders should receive special treatment, compared with ordinary citizens or executives running companies who had to be at their trials every day, he replied: "Running a company and running a country are two different things."[5]

5. As an aside, it may be useful, indeed, to highlight the elementary fallacy in any attempt to compare the functions of the executive head of state of the average State, to those of the chief executive officer of the average company. It is not necessary to dwell on the matter. As indicated in the overview of this decision, it is enough only to consider that it is part of the functions of the head of state to worry about the welfare of the multitude of the natural and corporate citizens of the State—including the welfare of the corporate CEO and of his or her company.

6. Speaking two days earlier in a statement to the UN General Assembly, Prime Minister Desalegn of Ethiopia and the Chairperson of the African Union complained

[5] Nicholas Kotch, 'Zuma backs Kenyatta, Ruto in tiff with ICC', *Business Day*, 27 September 2013 available at http://www.bdlive.co.za/national/2013/09/27/zuma-backs-kenyatta-ruto-in-tiff-with-icc

that 'the recent decision of the ICC in relation to the Kenyan situation is unhelpful adversely affecting the ability of the Kenyan leaders in discharging their constitutional responsibilities.'[6]

7. It may be tempting to dismiss these statements as the grumbles of political leaders giving vent to their own wounded dignities, and, as such, should not be taken into account in the judicial work of the Court. But, as will be shown below, such an attitude ignores the legal phenomenon that the views of leaders of States often comprise state practice that are, in turn, an ingredient in the formation of customary international law. There is also the view that the Vienna Convention on the Law of Treaties also requires such views to be considered when judges interpret treaties.

8. It is, therefore, not only naïve for the judges and the prosecutor of this Court to ignore the views of heads of state in important questions of the day in international affairs, but it is also possibly wrong, as a matter of law, to do so. This is all the more the case when such views are either consistent with a proper and workable legal analysis in the particular case, or it is possible to take them into account in a manner that does not negate in any essential way the core mandate of the Court. On both accounts, the views of the State leaders, encapsulated in Mr Zuma's remarks, should be taken into account in the present case.

9. Those views are also notably consistent with the views of a senior scholar of foremost eminence in the field of international criminal law.[7]

10. Here, the dictum of Judge McDonald and Judge Vohrah (already noted in our Majority decision) may be recalled. According to them, the point of allowing scope

[6] Statement of Prime Minister Hailemariam Desalegn at the 68th Session of the General Assembly of the United Nations: available at http://gadebate.un.org/sites/default/files/gastatements/68/ET_en.pdf.
[7] See the commentary of Professor William A Schabas, Attendance at Trial and the Kenya Cases Before the International Criminal Court, 21 August 2013 available at http://humanrightsdoctorate.blogspot.nl/2013/08/attendance-at-trial-and-kenya-cases.html.

to policy 'is not that policy concerns dominate the law but rather, where appropriate, are given due consideration in the determination of a case.'[8]

The Propriety of taking into Account Statements of Leaders of States

11. In our Majority reasoning, we agree that '[i]t need not be gainsaid that the view which insists that international law is capable of operating in a politically sterile environment implicates amazing naïveté as to how life really works.' And, among other authorities, we cited Lauterpacht's following observation: '[I]n interpreting and applying concrete legal rules the Court does not act as an automatic slot-machine, totally divorced from social and political realities of the international community.'[9]

12. In my own further view, it is possible, as indicated earlier, to put the proposition on a stronger legal footing. That is to say, it may be considered that the judicial attitude of ignoring statements of leaders of States is likely contrary to how international law *as such* really works. One reason for this view is because political considerations, in the manner of state practice, are often an ingredient in the formation of customary international law itself: noting that customary international law is formed by the combined operation of consistent practice of states and *opinio juris*. As Professor Malcolm Shaw observed as regards the 'material fact' as an element of the formation of customary international law: 'The actual practice engaged in by states constitutes the initial factor to be brought into account' in the formation of customary international law.[10] And it is emphasized in *Oppenheim's* 'that the substance of this source of international law is to be found in the practice of

[8] *Prosecutor v Erdemović* decision dated 7 October 1997 [ICTY Appeals Chamber], Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 78.
[9] Hersch Lauterpacht, *The Function of Law in the International Community* [Oxford: Oxford University Press, 1933 (first publication) and 2011 (reissued)] p 327.
[10] Malcolm Shaw, *International Law*, 6th edn [Cambridge: CUP, 2008] p 76.

states.'[11] As regards where to find evidence of state practice, Professor Shaw observes as follows:

> The obvious way to find out how countries are behaving is to *read the newspapers*, consult historical records, *listen to what governmental authorities are saying* and peruse the many official publications. There are also memoirs of various past leaders, official manuals on legal questions, *diplomatic interchanges* and *the opinions of national legal advisors. All these methods are valuable in seeking to determine actual state practice.*
>
> In addition, one may note resolutions of the General Assembly ... and general practice of international organisations.[12]

13. Another reason that the statements of leaders of State cannot be ignored by judges is because as regards treaty interpretation, Article 31(3)(b) of the VCLT recognizes the 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Such subsequent state practice sits in superior hierarchy to *travaux préparatoires* as an aid to treaty interpretation. That hierarchy is clear from Article 31(3)(b) when read together with Article 32 of the VCLT.

14. In that light, it is clear that evidence of the preferences of States Parties recently revealed suggest the contrary position to that advocated for by the Prosecution, when they argue that States Parties had made clear choice of policy that denied ICC Trial Chambers the discretion to grant a Ruto relief. Notably, among African States Parties, who form the largest block of States Parties to the Rome Statute, there is, as noted earlier, evidence of an emergent trend of state practice in

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[11] *Oppenheim's International Law*, Volume 1 (Peace), 9th edn (Sir Robert Jennings and Sir Arthur Watts) [London: Longman, 1996] p 26.

[12] Shaw, *supra*, p 82 (emphases added). As regards the feature of international organizations—obviously including the African Union—to generate state practice, the following observation is made in *Brierly's*: 'Today, it is admitted that the activities of states within international organisations contribute to a "more rapid adjustment of customary law to the developing needs of the international community". Moreover the activity in these organizations provides new evidence of custom: "the concentration of state practice now developed and displayed in international organizations and the collective decisions and the activities of the organizations themselves may be valuable evidence of general practices accepted as law in the fields in which those organizations operate." This material evidence of customary international law should be distinguished from any law-making activity that one may ascribe to the international organizations themselves. Furthermore, it is increasingly clear that the existence of these organizations facilitates interaction between states and other actors, so that even where the activity cannot be seen as law-making (in the sense of treaty drafting or the formation of custom), such interaction accelerates the process of international standard setting.': *Brierly's Law of Nations*, 7th edn (Andrew Clapham) [Oxford: Oxford University Press, 2012] pp 61—62.

favour of discretion in a Trial Chamber to grant a Ruto relief. The statements of the Presidents of South Africa and the Prime Minister of Ethiopia, and the communication by the African Union, have already been referred to. In addition, the Appeals Chamber has been seised of the Joint *Amicus* Submissions of five African states. Moreover, two more African States also applied to make *amicus* submission before the Appeals Chamber but were rejected, *inter alia*, because their proposed submissions support an identical position to that presented in the Joint *Amicus* Submissions,[13] thereby bringing to seven the number of individual African states, making clear and formal expressions in favour of the interpretative approach adopted in the *Ruto* Decision.

15. Notable also in that regard is the clear absence of evidence of state practice of other States Parties questioning the correctness of a Ruto relief.[14] The absence of opposition from other States can indeed amount to acquiescence to the emergence of a state practice. The following passage in *Akehurst's* speaks to the idea:

> [S]tate practice also includes omissions; many rules of international law forbids states to do certain acts, and, when proving such a rule, it is necessary to look not only at what states do, but also at what they do not do. *Even silence on the part of states is relevant because passiveness and inaction with respect to claims of other states can produce a binding effect creating legal obligations for the silent state under the doctrine of acquiescence.*[15]

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[13] ICC-01/09-01/11-988.

[14] It cannot of course be excluded that the public silence of other states may merely represent an unwillingness to engage in what may be viewed as political interference in matters that are *sub judice*. But nothing stops such states from expressly saying so by reiterating, as the need arises, that it is best that the Court is left alone to decide controversial questions before it. At any rate, it is noted that the Statute provides a means through Article 103 of the Statute for *amicus* submissions to be properly brought before the Court. Such legal submissions made to the Court, as was done in the Joint *Amicus* Submissions, are a generally accepted way through which governments in most mature democracies seek to present views (even on questions of policy) in the context of matters pending before the Courts. It is never viewed as an attempt at 'political interference.'

[15] *Akehurst's Modern Introduction to International Laq*, 7th revised edn (Peter Malanczuk) [London: Routledge, 1997] p 43 (emphasis added).

The Court's Work in Africa as a Matter of Concern in the Present Case

16. As indicated above, international judges may take into account elements of reasoning that are not legal considerations *stricto sensu*. Jurists of eminent stature who had served as former judges of the ICJ (Lauterpacht and Higgins) and of the ICTY (McDonald and Vohrah), have also said so. And, having regard to such extra-legal elements, in the manner of statements of leaders of State on weighty matters of international affairs, is consistent with both the realities of life and aspects of international law. It is also a matter of ordinary principles of politeness that people should be made to know that they have been listened to, when they have registered an anxious complaint and made a request. It helps to let them know that their request may not sit well, if that is the case, and why. To keep silent, might convey the unintended impression that their complaint is not important enough to be considered.

17. In the light of the above, I feel it important to return to another aspect of the concern about the image of the Court, since that has become a consideration in the cases of the Kenya post-election violence, one of which is pending before this Court. The question that has been raised is this: Should the case now underway against Mr Kenyatta be stopped in its tracks because of how the work of the Court has been received by African leaders? As I am a judge in the case, I believe that I am entitled to a view on the matter, either as an advisory opinion—or a functional opinion—of a judge who will take part in rendering any decision that might have the effect of stopping the case.

18. It is a matter, judicially noticeable, that, currently, the docket of the Court comprises exclusively of situations in Africa. It has led to criticisms that some may view as likely having the effect of weakening the confidence of the Court in the discharge of its mandate and, in turn, the relative potency of the Court. Some of

these criticisms have been framed in the unhappy language of 'targeting' Africans and their leaders for prosecution. One of the leaders said to have been so targeted is the accused in this case—although the case against him was commenced well before his ascension to the Presidency of his country.

19. It is understandable that the exclusively African content of the Court's current docket is a matter of concern for African leaders. It may be accepted that they are entitled to press that concern in every legitimate way, as a matter of public policy. But, as will be discussed below, the concern does not make legitimate all the demands and arguments that have been made in its name. This is particularly the case with the complaint frequently heard that the Court has been used to target Africans and their leaders—including the accused in this case. All that should be required to address the complaint is the reassurance that the exclusively African content of the current docket of the Court does not prove the validity of that particular complaint.

20. There are many other wholly legitimate reasons to explain the current content of the Court's docket. But these explanations need also to be made with some emotional intelligence. In particular, the simplistic argument that most of the court's cases were referred to the Court by African leaders themselves is one such argument that may be found deficient in emotional intelligence. For one thing, its repeated use has not dispelled the complaint. Second, it may leave those who have referred the cases in question to feel awkward to know that they are the only ones referring cases to the Court when no one else is doing so according to the pact agreed upon in Rome. Finally, aside from self-referrals, there are many more ways that could be used to refer cases to the Court—and they have been used to seise the Court of cases in its current docket.

21. The better point of public policy is that all efforts must be made to reassure African leaders that they and their people are not the only ones under the law of the ICC. From the perspective of victims, there is no indication, of course, that African victims of the situations of which the Court is seised, are complaining that their plights are receiving the lion share of attention at the ICC, leaving unattended the yearnings for justice of victims elsewhere. But since the obligation to protect victims of atrocities wherever they are in the world is an *obligatio erga omnes*[16] (an obligation to the whole world), African leaders are also entitled to press both the Court and the international community to ensure that victims of atrocities everywhere—not only in Africa—are extended the very justice that the ICC promises humanity. So, too, are leaders outside Africa entitled to insist that justice must be done for African victims of international crimes, notwithstanding any optics in the Court's work that might cause even legitimate worry to African leaders. This is the whole point of responsibility to protect as an international norm.

22. In the light of these considerations, it is possible then to give the concern of both African and non-African leaders an equal altruistic value, in the order of Martin Luther King's famous observation, that 'injustice anywhere is a threat to justice everywhere'. But that is a compelling reason to strengthen the Court in its ability to pursue the cause of justice everywhere. It is not an argument to weaken either the Court's ability or its confidence to do justice anywhere, especially in Africa. It is therefore heartening to learn that in a recent speech, the African Union Commission Chairperson, Dr Nkosazana Dlamini Zuma has had to restate Africa's commitment to the ICC, in the terms not only that Africa and the African Union 'remain committed to the system of international justice and action against impunity',[17] but also that it is 'critical that [African Union] remain within the legal framework of the

[16] See *Barcelona Traction Case* (1970) ICJ Reports 3 at p 32 [International Court of Justice].
[17] African Union, 'Welcome Remarks of the African Union Commission Chairperson, H E Dr Nkosazana Dlamini Zuma to the Extraordinary Session of the Assembly of Heads of State and Government', Addis Ababa, 12 October 2013 http://www.au.int/en/sites/default/files/welcomeExtOrdAsembly12Oct2013%20(FINAL)_0.pdf, p 6.

Rome Statute'.[18] Her ultimate objective was to signal strongly the adjustments that the AU demands to be made, in how the Court carries out its mandate in the context of situations in Africa. I shall address an aspect of that matter below, to the extent that the demands concern the case now before this Trial Chamber.

23. Beyond any altruistic service that the complaint may have, as indicated above, it is also important to keep in clear view, at all times, the fact that an ICC that is strong in its mandate inures obviously to the *bona fide* interests of Africa, both as a berth for humanity in its essence and as a place in which the human being should pursue happiness and potentials in the fullest measure.

24. It is not necessary to overwork any proposition that the ICC is an aid to economic development. Dr Zuma had adequately framed the proposition when she opened her remarks with the following observation: 'When the Assembly adopted the Constitutive Act in 2002, it was mindful of the fact that the scourge of conflicts constitutes a major impediment to the socio-economic development of the continent.'[19] It is indeed a matter of eminent common sense that one of the ICC's main stocks in troubled places lies in the dividends of peace in society. It stands to promote the stability that allows children to go to school, good health and freedom to their parents to pursue productive activities, and the resultant economic growth that enables political leaders to exult in improvements, in the human development index and the achievement of millennium development goals.[20] Valuable resources channelled toward the needs of raging armed conflicts are valuable resources denied to projects that assist national development. From that point of view, the ICC is to be embraced as a veritable gift of development for Africa. It is not to be held in suspicion as a Trojan horse of ill-purpose for the continent and its leaders.

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[18] *Ibid*, p 7.
[19] *Ibid*, p 3.
[20] Young African men and women should not be perishing at sea, time after time, off the coast of Lampedusa, while engaged in 'perilous journeys, leaving [African] shores in search of illusive green pastures' while running away from poverty or conflict and often both: see *ibid*, p 8.

25. It is also to be recalled that modern international criminal justice has had occasion to intervene in the aftermath of a violent military coup that occasioned crimes against humanity and war crimes. That was the case with the work of the Special Court for Sierra Leone, whose mandate covered a period before the ICC came into its own jurisdiction. Therefore, the presence of the ICC should cause some concern in the minds of those who are minded to embark upon violent overthrow of government and seek to consolidate powers by way of methods that involve violation of norms of international criminal law.

26. What is more: with a weakened or disabled ICC, who will stay the hand of the next genocide? But the question needs no asking. It is only sufficient to recall that the last big genocide, that the world witnessed, occurred on the African continent. It takes little to imagine that had the ICC existed decades earlier and been seised of the Rwandan situation before the genocide, the same argument we hear now might have been heard then: about 'the witch-hunt and disrespect of African leaders'. It is not enough to say that these things happened in the past and that Africans have now learned to not fight; for, the past in question is only recent and conflicts and unrest have continued in some African countries. It is better to have in place a strong institution that should loom large in the consciousness of those who engage in atrocities in the present and the future.

27. With the foregoing in mind, I have read with great care the outcome documents and other documents of the recently concluded Extraordinary Summit of Heads of State and Government of the AU on 12 October 2013. In light of the specificity of the Summit's interest in the *Kenyatta* case, and since this Trial Chamber is the only authority in this Court that is in the position to act *judicially* in that case at this point in time, I consider it proper then to express my own opinion on the matter.

28. The outcome documents indicate the following:

> [N]o charges shall be commenced or continued before any international court or tribunal against any serving head of state or Government or anybody acting in such capacity during his/her term of office. To safeguard the constitutional order, stability and integrity of member states, we have resolved that no serving AU Head of State or Government or anybody acting or entitled to act in such a capacity, shall be required to appear before any international court or tribunal during his term of office.[21]

29. In my view, there are two divisible propositions, in as many sentences, engaged in the quote. The second of the propositions sits better with the law. Long before the AU Extraordinary Summit of 12 October, that proposition was already exposed in the majority decision in the *Ruto* case delivered last June, when Mr Ruto was excused from continuous presence at trial. The proposition is also consistent with the majority decision of today in the *Kenyatta* case. That is to say, in both this decision and a similar decision rendered much earlier in Ruto's case, the majority of the judges of the trial chambers are of the view that it is not necessary to require Mr Kenyatta or Mr Ruto to sit in court on a daily basis, when they have obligations to discharge as President or Deputy President of Kenya. They will be required to attend some critical hearings, but should be excused from daily attendance for the rest. It is for that reason that the second proposition sits better with the law.

30. But, the first proposition in the quote is to the effect that an individual may not be tried before an international tribunal while in office as head of state or head of government. That proposition presents the far less satisfying option. There is much that is wrong with that proposition, beyond the unfortunate impression that all that it will take to secure protection against prosecution is for any individual *already* facing a criminal charge to campaign successfully for election as head of state. The proposition is inconsistent with the rule of law in many ways. In particular, it is

[21] See African Union, 'Closing Remarks by H E Mr Hailemariam Dessalegn, Prime Minister of the Federal Democratic Republic of Ethiopia and Chairperson of the African Union at the Extraordinary Summit of Heads of State and Government of the African Union', Addis Ababa, 12 October 2013 available at http://summits.au.int/en/icc/speeches/remarks-he-mr-hailemariam-dessalegn-prime-minister-federal-democratic-republic-ethiopia. See also African Union, Press Release No 177/2013 'Africa to Request Deferment of Indictments against Kenyan President and Vice President', p 1.

inconsistent with principles of international law. It also does not sit well with the Constitution of Kenya.

31. First, from the perspective of international law, the proposition is directly obstructed by the clear language of Article 27 of the Rome Statute which explicitly rejects immunity for anyone by reason of office, including the office of head of state or government. For that reason alone, the request is not one that could reasonably be acceded to in the terms in which it is reflected in the quote.

32. It must also be said very clearly that the obstacles obstructing the proposition in question, as a matter of international law, is not only Article 27 of the Rome Statute. It is also the case that customary international law does not recognize immunity for a head of state against prosecution before an international tribunal. In the *Ruto* Excusal Decision, it was clearly explained that customary international law had granted prosecutorial immunity to heads of state and heads of government and other senior officials of a state. But that immunity was only to protect them from prosecution before the domestic courts of other *states*. As regards prosecution before international tribunals, the situation has always been different—certainly since World War II. Customary international law has never recognized immunity to heads of state before international tribunals. As was held in the *Ruto* Decision: 'Quite to the contrary, it is now firmly settled that accommodations to office holders no longer may go so far as to permit such officials immunity from the jurisdictions of international criminal courts.'[22] The International Court of Justice recognized that situation in the *Yerodia* case.[23] It is helpful, perhaps, to keep in mind that what impelled customary international law to develop in the direction of denying immunity to heads of state or government or senior government officials was not the conduct of African leaders and the need to prosecute them. It was rather the conduct

[22] Ruto Decision, *supra*, para 92.
[23] See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, ICJ Reports (2002) 3, para 61.

of leaders of two super powers of the day—Germany under the Nazi regime and leaders of Japan during World War II—and the need to prosecute those of them that were suspected of complicity in the violations of norms of international criminal law. Their conducts and the need to prosecute them set in motion the development of customary international law in the direction that would culminate in sitting heads of state being prosecuted before the ICC. It is therefore incorrect to say that Article 27 of the Rome Statute had refused to recognize immunity that was recognized all along in customary international law. As was explained in the *Ruto* decision, what Article 27 of the Rome Statute did in fact was to receive into the framework of the Rome Statute a norm of customary international law that had evolved since World War II—to the effect that the office of head of state does not cloak an individual with immunity from prosecution before an international tribunal.[24]

33. But all that is not say, of course, that there is any inconsistency between requiring a head of state to be tried before this Court (as Article 27 does) and permitting him reasonable leeway to attend to his constitutional duties while the trial proceeds largely in his absence. As was held in the *Ruto* Decision in June and is decided in the present matter, there is no inconsistency. This is because, while Article 27 denies immunity from trial, it was decided in the *Ruto* case, and reiterated here, that Article 27, read in the context of the whole Statute and against the backdrop of international law, does not deny a Trial Chamber the discretion to permit the head of state to be absent from his trial for purposes of attending to his constitutional duties.

34. A second legal reason that the first proposition in the AU Summit outcome documents is not together with the rule of law is that it is apparently inconsistent with the terms of the Constitution of Kenya. That constitution follows Article 27 of the Rome Statute and international law in general in denying immunity for the

[24] See Ruto Decision, *supra*, paras 66—70.

President of Kenya as regards crimes proscribed in the Rome Statute. This is because the Constitution of Kenya specifically provides in s 143(4) that the immunity that even the President enjoys from criminal proceedings 'shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity.' A well-known treaty that primarily comes to mind in the context of that provision is the ICC Statute under which the accused is now being prosecuted. It is a matter of respect for the rule of law and the constitution to respect the provisions of the Constitution of Kenya which has denied immunity to the President of Kenya for the crimes within the Rome Statute.

35. It may be noted here, that s 2(5) of the Constitution of Kenya provides that the 'general rules of international law shall form part of the law of Kenya'; and s 2(6) provides that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.' In this regard, it must be kept in mind those in the apex of Kenya's rule of law have stated that the ICC is part of the legal system of Kenya. Notably, the Attorney General of Kenya, Dr Githu Muigai SC, representing the Government of Kenya, recently submitted in a filing before the Court that the ICC is part of Kenya's legal system. According to him, 'the ICC [is] part of the judicial system of [Kenya]'; and according to him, 'the [ICC] Prosecutor has a constitutional right to deal with crimes committed in Kenya.' As he put it in reference to the Constitution of Kenya (2010):

> The new Constitution incorporates all international treaties ratified by Kenya as part of the country's laws, including the Rome statute to which Kenya is a signatory. After promulgation of the new constitution the ICC became part of the judicial system of our country, and therefore the Prosecutor has a constitutional right to deal with crimes committed in Kenya.[25]

[25] 'Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence' dated 88 April 2013, ICC-01/09-02/11-713, para 35.

36. For his part, the Chief Justice of Kenya, Dr Willy Mutunga, has also observed as follows: 'The ICC is not a foreign court. It is international, but it is also mobile. It is a Kenyan Court. It is part of our legal system. We ratified the Rome Statute, domesticated it and proceeded to anchor it in Article 2 of our Constitution.'[26]

37. The reality that the Constitution of Kenya follows the Rome Statute in denying immunity to the President of Kenya is not easily defeated by the recent resolutions of the Kenyan Parliament to the effect that the Government of Kenya should withdraw Kenya as a state party to the Rome Statute. The difficulty confronting such a move goes beyond the fact that the withdrawal of a state party does not prejudice cases already before the Court.[27] But withdrawal in the current circumstances holds a more worrying implication for the rule of law and accountability in Kenya. To get the point, we must rely on an account of events relayed by persons whose views must be taken seriously. Here, we must consider the account of no less a person than the AU's own lead emissary in the mediation of the 2007 Kenya post-election violence. One may look beyond the fact that Mr Kofi Annan is also a former Secretary General of the UN and a Nobel Peace Prize winner. But it will be inconvenient to ignore that he was the Chairperson of African Union Panel of Eminent Personalities; and, he was a witness to these matters to which he addressed below as part of his recent commentary entitled 'Justice for Kenya'. According to him:

> In 2008, I was appointed chairman of the African Union Panel of Eminent African Personalities and mediated an agreement to end the crisis. I arrived in Nairobi as the violence was intensifying, prompting fears that the country could ignite into civil war. The first aim of the mediation was to stop the violence, which it did. Recognizing the complex roots of the conflict, the

[26] Willy Mutunga, 'Judiciary Unveils Plan to Establish International Crimes Division. Remarks by Chief Justice Willy Mutunga at the Wayamo Meeting on the International Justice System', Strathmore University, Nairobi, Monday, Nov 26, 2012: available at http://www.judiciary.go.ke/portal/assets/files/Reports/WAYAMO%20MEETING%20ON%20THE%20INTERNATIONAL%20JUSTICE%20SYSTEM.pdf. See also 'ICC part of Kenya system, says CJ', *The Star*, 27 April 2012: see http://www.the-star.co.ke/news/article-20645/icc-part-kenyan-system-says-cj.

[27] See Article 127(2) of the Rome Statute.

agreement also called for establishing responsibility for the crimes committed and for constitutional, electoral and security-sector reforms, so that the cycle of violence would not be repeated.

One concrete outcome was the Waki commission, a national inquiry into the postelection violence. It concluded that the violence was not just spontaneous, but, in at least some areas, a result of planning and organization, often with the involvement of politicians and businessmen. This was not surprising — politicians hungry for power have long exploited Kenya's ethnic divisions with impunity.

To break this cycle, the commission recommended that Kenya form a special tribunal to bring to account those most responsible. But the commission also foresaw that Kenya's entrenched political interests might undermine justice, so in the event of inaction, the matter was to be turned over to the International Criminal Court. Kenya's president, prime minister and parliament agreed to these terms. The commission also gave me a sealed envelope with the names of high-level people allegedly responsible for the violence.

Sadly, the commission proved prescient. Kenya's leaders initially agreed to establish a special tribunal, but proposals for a court were defeated twice by Parliament. It was on the back of these broken promises for justice that, in July 2009, I complied with the commission's recommendations and handed over the sealed envelope to the I.C.C. prosecutor. In the absence of national steps toward accountability, the prosecutor decided, with the approval of the judges of the court, to open investigations.

...

But the record is clear and there should be no doubt: it was the Kenyan government's own failure to provide justice to the victims and their survivors that paved the way to the I.C.C., a court of last resort. These trials also do not reflect the court's unfair targeting of Africa, as has been alleged. Instead they are the first steps toward a sustainable peace that Kenyans want, deeply, and can only be assured of if their leaders are not above the law.[28]

38. The point that Mr Annan makes is this. The ICC did not usurp the jurisdiction of Kenya in these cases; the Prosecutor only stepped in to trigger the Court's jurisdiction as a court of last resort, following the failings of national authorities to do what international law required in the circumstances to investigate and prosecute as part of their responsibility to protect.

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[28] Kofi Annan, 'Justice for Kenya', *New York Times*, 9 September 2013: http://www.nytimes.com/2013/09/09/opinion/justice-for-kenya.html?emc=eta1&_r=0

39. The cases are now proceeding in earnest at the ICC. It is difficult in those circumstances to accept as reasonable the proposition that the cases may no longer continue because some of those accused of complicity in the events have now been elected into office—after their cases have been in process at the Court. It is harder to accept that the proposition is saying, in effect, that it does not matter that international law, the Rome Statute and even the Kenyan Constitution reject the immunity that is now being suggested.

40. It is true that the ICC is a court of last resort and its jurisdiction is complementary. But complementarity cannot mean that justice for victims of atrocities may be reduced to a small ball to be played, as in a Ping-Pong game, by people in power, with the high probability that it may be played off the table. As this must be presumed to not be what the AU leaders had in mind in their Summit decision[29], the best approach then is to accept that these cases must be dealt with in a reasonable way, in accordance with the applicable regime of international law as expressed in the Rome Statute—including both Article 27 and indeed a sensible application of Article 16.

41. A third legal and practical reason that the first proposition in the AU Summit outcome documents is unpalatable is because of the maxim 'justice delayed is justice denied.' It is said that the trial should not take place while the accused remains in office. But, it needs to be considered that the events that made victims of innocent Kenyans (directly resulting in these cases) took place at the end of 2007 and beginning of 2008. That was five years ago. The accused has been elected into office for a term of five years.[30] To hold off proceedings during the term of office of the accused would mean a delay of 10 years at least before the trial begins. It is not

[29] It is noted that the AU Summit documents do not reveal that all the elements discussed in this Separate Opinion were considered. It is also noted that there no indication that African victims of atrocities had also addressed the Summit on the same stage that leaders who criticised the work of ICC had spoken. It must be presumed, in good faith, that had the Summit heard from the victims of atrocities, the Summit might have reached a decision that does not appear in the manner communicated in the outcome documents.
[30] See the Constitution of Kenya, s 136(2)(a).

necessary also to consider that the accused is entitled to run for a second term of another five years,[31] thus holding out the prospect of delaying the proceedings for 15 years. The delay of 10 years alone is hardly justifiable as reasonable. No victim should have to wait for that long before a trial begins, when it could have begun earlier. Memory does fade. Witnesses do die or become infirm. Evidence does deteriorate.

42. The best of both worlds lies in the regime of excusal granted by the Majority of the Trial Chamber V(A) in the *Ruto* case and the Majority of the Trial Chamber in this case. In this connection, one is mindful that the primary motivation of the Summit's request are the needs to '[allow the accused] to lead [their] country in the consolidation of peace, reconciliation, reconstruction, democracy and development as per the will of the Kenyan people, expressed in elections in March this year;'[32] as well as to 'allow the leadership of Kenya to ensure that the country does not slide back into violence and instability.'[33] These are truly worthy considerations that need to be taken seriously in the present circumstances.

43. It is my view, however, that these considerations are positively served, they are not impeded, by proceeding with these trials, under the arrangement permitted both in this decision and in the *Ruto* Decision. This is how. Were the prosecution to succeed in proving its case beyond a reasonable doubt, the Chamber could be urged, in sentencing, to take into account any real contributions that the accused had made in the meantime in 'the consolidation of peace, reconciliation, reconstruction, democracy and development' in their country and their efforts 'to ensure that the country does not slide back into violence and instability'. Such mitigating circumstances could result in penitent credits or suspended sentence pending completion of term of office, depending, of course, on other considerations as well.

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[31] *Ibid*, s 142(2).
[32] See Dr Zuma's Opening Remarks, *supra*, p 6.
[33] *Ibid*, p 7.

Conclusion

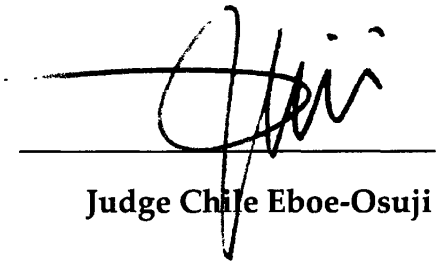
44. It is apt to conclude with the following words of Kenya's Chief Justice Mutunga: '[T]he international justice system ... has, over years, focused on power, wealth, impunity and justice for the wretched of the earth, the poor, the victims of violence and injustice. Global citizens have fought long and hard for the ICC to become a reality. That struggle continues. Although the international justice system has its limitations, deficits and gaps, we cannot throw out the baby with the bath water. We must improve on our international justice system.'[34] I wholly agree.

45. It is my view that the trial should proceed according to the Rome Statute. This includes, according to the interpretation that the majority has given to Article 63(1), which allows reasonable flexibility to permit the accused to attend to constitutional duties.

46. It is up to those whose mandate it is to decide on Article 16 to decide in a sensible way. Depending on the particular decision to be rendered, it will be possible to decide that question in a manner that need not produce injustice in the particular circumstances of this case. It is one thing to suggest that no injustice will be necessarily occasioned if Mr Kenyatta's case is deferred pursuant to Article 16 in order to allow room for the ongoing trial of Mr Ruto to proceed with greater speed and ease;[35] it is quite another matter to accept that Mr Kenyatta's trial may not proceed for another five years—possibly ten—when the events in question occurred five years ago. Nor is it wise to accept a proposition that reverses the course of international law that has rejected immunity for heads of state or heads of government before international tribunals.

[34] Mutunga, *supra*.
[35] It is to be noted indeed that both cases will be sharing the same courtroom and the same complement of logistical support. As well, Judge Fremr and myself sit in both cases.

Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji

Dated 18 October 2013

At The Hague, The Netherlands