

# PUBLIC ANNEX

## Questions to be addressed by the Prosecution at the Status Conference

If the Trial Chamber is minded to grant the Prosecution's request for a status conference at the end of January ("Application"),<sup>1</sup> the LRV respectfully requests that Trial Chamber invite the Prosecution to address the following issues:

1. In the Prosecution's view, has the Government of Kenya ("GoK") done all that it can reasonably do to facilitate access by the Prosecution to all persons on Kenyan territory who might be able to shed light on key events relevant to the present case?
2. Has any part of the Prosecution's case been weakened by any persons on Kenyan territory who have sought to silence witnesses through bribery, direct intimidation, or the creation of a climate of fear?
3. What obstacles has the Prosecution encountered in its efforts to obtain access to relevant witnesses and material within Kenya, and what measures has the Prosecution taken to deal with those obstacles?
4. In respect of cell phone and cell site data held by Kenyan mobile telephone operators, when did the Prosecution first gain access to such data?
5. Why was access not provided to the Prosecution before that date?
6. If access to relevant mobile telephone data was accessible to the Defence before it was made available to the Prosecution,<sup>2</sup> what is the true reason for this?
7. Has the Prosecution sought and received from mobile telephone companies in Kenya all relevant cell phone and cell site data related to all relevant persons (including but not limited to the Accused, his immediate associates, senior police, army and government officials, senior Mungiki members, and relevant figures in Nakuru and Naivasha who, on the basis of existing material, are likely to have

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<sup>1</sup> ICC-01/09-02/11-875, 20 December 2013.

<sup>2</sup> [REDACTED] It remains wholly unclear to the LRV who is ultimately responsible for providing false information regarding the availability of this vital category of evidence.

participated in directing the violence in those areas) (“Relevant Persons”) for the period November 2007 to March 2008?

8. In respect of all documentary evidence which the Prosecution has received from the Kenyan authorities, and in respect of all cell phone and cell site data that the Prosecution has received, does the Prosecution have reason to believe that any of that material has been filtered, laundered, or tampered with in any way prior to its provision to the Prosecution?
9. Has the Prosecution sought and been provided with full and unhindered access to all relevant documentary evidence in Kenya, including but not limited to internal and external emails, memoranda, minutes, letters and notebooks, held by Relevant Persons and relevant institutions, including the Office of the President, the police forces of Kenya (including the Kenya Police, the Administration Police and the General Service Unit), the Kenya Defence Forces, and the National Security Intelligence Service dating from the period November 2007 to March 2008?
10. Has the Prosecutor sought and been provided with full and unhindered access to all audio and written records of telephone, email and radio communications relating to all Relevant Persons intercepted in the period November 2007 to March 2008 (“Intercepts”) made or held by Kenyan intelligence services, including in particular the National Security Intelligence Service?
11. If there was any deficiency in the quality of the GoK’s co-operation with the Prosecution during the 2008-2013 Kibaki administration,<sup>3</sup> has the Accused done all that he can do as President to remedy those deficiencies?
12. Has the Prosecutor sought and been provided with full and unhindered access to all Intercepts held by other States with access to intelligence-gathering capacities in Kenya?<sup>4</sup>

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<sup>3</sup> The Accused was a senior member in that administration, holding the posts of Deputy Prime Minister, Minister for Trade and later Minister for Finance.

<sup>4</sup> As the Trial Chamber and the parties will be aware, there has been enormous public discussion during 2013 of the interception of communications on the territories of many States, including Kenya, by agencies of the United

13. The Prosecution states that its “adjournment request seeks to ensure that this Court does everything in its power to ensure that the principal perpetrators of the PEV are held to account.”<sup>5</sup> Given the detailed assertions of serious crimes committed in Naivasha and Nakuru in January 2008 in the Prosecution’s pre-trial brief, and significant evidentiary support for those assertions, how does the Prosecutor propose to hold accountable those most responsible for those crimes?
14. In her announcement on 19 December 2013, the Prosecutor said “My decision is based solely on the specific facts of this case devoid of extraneous considerations.” Does the Prosecutor consider the “interests of justice” test set out in Article 53(4) to be relevant in the present circumstances?<sup>6</sup>

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States of America. *Cf. e.g.*, the map referred to in “Boundless Informant: the NSA’s secret tool to track global surveillance data,” *The Guardian*, 11 June 2013, available at <http://bit.ly/1cT1Ad3> [12 January 2014]. The United States expressed its strong support for the continuation of the trial of the present case in its statement to the UNSC in November 2013: United Nations Security Council, 7060<sup>th</sup> meeting, 15 November 2013, New York S/PV.7060, available at <http://bit.ly/1ahEeL9> [12 January 2014].

<sup>5</sup> Application, para. 22.

<sup>6</sup> The Prosecution’s position on this is as follows: “Bearing in mind the objectives of the Court to put an end to impunity and to ensure that the most serious crimes do not go unpunished, a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort.” “Policy Paper on the Interests of Justice,” September 2007, available at <http://bit.ly/1hMueRS> [12 January 2014], par. 6(b).