

# **Public Redacted Version of Confidential Annex A**

**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?**

No.

Most notably, the Prosecution's efforts to interview Kenyan police officers regarding the role of the police during the PEV were stymied by domestic litigation in Kenya. The GoK failed to represent the Court's interests in this litigation and took no meaningful steps to ensure that police interviews took place. As a result, the Prosecution has not been able to access members of the police believed to have relevant information. The GoK's stance on this matter effectively blocked a principal avenue of inquiry into the PEV.

Another example of the GoK's failure to take all reasonable measures to facilitate access to individuals with relevant knowledge relates to medical facilities and practitioners. In December 2011, the Prosecution requested access to medical facilities and practitioners thought to have relevant information. To facilitate the timely execution of this request, the Prosecution asked the GoK to designate a contact person in the relevant ministries. It took the GoK a full year to appoint the contact person. The GoK's dilatory approach to such a simple request is indicative of its inadequate approach to its co-operation obligations.

**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?**

Yes.

In terms of the climate of fear, the Prosecution's case has been weakened by the withdrawal of witnesses concerned that testifying against Mr Kenyatta would expose them or their families to retaliation. Three witnesses – 5, 66 and 426 – have been withdrawn from the Prosecution's witness list on this basis. While the Prosecution does not have evidence suggesting that these witnesses were subject to direct intimidation, their reluctance to testify appears to have been motivated, at least in part, by the anti-ICC climate in certain parts of Kenyan society.

This climate of fear has also chilled the willingness of individuals with information relevant to the case to come forward. For example, several individuals with information relevant to the case refused to agree to be included on the Prosecution's witness list due to fears that they or their family members would be targeted for retaliation. This was the case with several witnesses who agreed to be part of the

case at confirmation, where their identities were withheld from the Accused, but who have since refused to testify at trial because this would have entitled the Accused to know their identities.

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

### **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?**

Certain individuals with information relevant to the charges have refused to speak with the Prosecution, despite our repeated attempts to contact them and to hear their story. On some occasions, the individuals cited security concerns, which the Prosecution evaluated, and, where possible, took measures to mitigate. On other occasions, individuals with relevant information refused to meet with the Prosecution and offered no supportable reasons for their refusal. Often these were individuals with established ties to the Accused. Their refusal to meet with us hampered our ability to investigate the case and to verify information received from other sources. Their failure to provide a supportable basis for refusing to meet with us calls into question their desire to see the truth emerge in this case.

Obtaining cooperation from Mungiki members has been challenging given the closed nature of the organisation and the security concerns of its members, which stem in large part from the extra-judicial killings of Mungiki members before and after the PEV. The Prosecution has dedicated considerable efforts to accessing the organisation and to securing members willing to testify. This challenge was compounded by the fact that Mungiki members said to have interacted with the Accused in person during the PEV were killed or forcibly disappeared in an apparent clean-up operation after the violence.

Even where individuals have been willing to meet with the Prosecution, the security situation in Kenya has presented challenges. Many individuals expressed concerns that they or their families would be subject to retaliation if their co-operation with the Prosecution was revealed to the GoK. We determined these concerns to be well-founded and took extraordinary efforts to ensure that our contacts with potential witnesses did not expose them to undue risks.

Finally, as discussed earlier (see question 1) the GoK has failed to facilitate Prosecution's requests to take evidence from Kenyan police officers and to access government records. This stance effectively blocked the Prosecution from investigating aspects of the PEV.

**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?**

In April 2013, the Defence provided the Prosecution with apparent telephone records [REDACTED]. The Defence suggested that these records provided incontrovertible evidence that Prosecution witnesses were lying. It has since been determined that these records were falsified.

[REDACTED].

**5. Why was access not provided to the Prosecution before that date?**

It appears that the relevant telecom providers were unwilling to assist in the Court's investigation until approached by the Defence.

In January 2012, Prosecution investigators met [REDACTED]. He also stated that all data were overwritten after three years. The Prosecution proceeded on the basis that this assertion was accurate until April 2013, when the false records purporting to relate to 2007 and 2008 (obviously older than three years) were produced by the Defence.

[REDACTED], the Prosecution requested [REDACTED] relating to a set of phone numbers of interest. [REDACTED] a letter stating that a formal request had to be made through the Kenyan authorities. The Prosecution submitted a request for assistance to the GoK on 24 April 2012 for telephone numbers of the then four accused, going back to June 2007. The request is outstanding.

As explained below in relation to question 6, the Prosecution obtained access to telephone data only after the Defence requested the same.

**6. If access to relevant mobile telephone data was accessible to the Defence before it was made available to the Prosecution, what is the true reason for this?**

[REDACTED]

However, unofficial access to data [REDACTED], as mentioned above, is said to have been given to the Defence (and not to the Prosecution) before this time. There is

compelling evidence that this data was fabricated. Indeed, the joint expert instructed by the Prosecution and Defence has reached this conclusion.

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

Since gaining access to the data [REDACTED], the Prosecution has received call data records (“CDR”) covering the period of the charges for approximately 30 numbers. A request for data for a further 32 numbers is awaiting a response, but the process of retrieving them is underway. The numbers concerned emerge from the Prosecution’s investigations and are believed to be attributable to national and local politicians, and Mungiki members thought to have been involved in the PEV.

**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?**

Yes. The Prosecution has reason to believe that documents provided by the GoK to the Prosecution may have been filtered.

The GoK states that it “authorised the provision to and use by the Court of . . . the full and complete minutes of National Security Advisory Committee”.<sup>1</sup> The Prosecution first requested these materials from the GoK on 27 August 2010, after which the Prosecution exchanged several letters with the GoK regarding the requested documents. The GoK finally produced some, but not all, of the requested documents from a revised and reduced list.<sup>2</sup> However, pertinent information was redacted in some of the Provincial Security Intelligence Committee and District Security Intelligence Committee minutes that were provided by the GoK, even though the GoK had given the same minutes without redactions to the Commission of Inquiry into the Post-Election Violence (“CIPEV”). For example, the GoK systematically redacted [REDACTED] from the Provincial and District Security Intelligence Committee minutes it provided to the Prosecution, but it did not redact that information in the same minutes it had previously provided to the CIPEV.

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<sup>1</sup> ICC-01/09-02/11-713, para. 33.

<sup>2</sup> The GoK invited the Prosecution to re-submit a more detailed request, including [REDACTED], despite there being no requirement to do this in the Statute.

Materials provided by the GoK have also been incomplete. For example, on 15 July 2010, the Prosecution submitted a request for the transmission of documents from the Ministries of Internal Security, Immigration and Justice. The Prosecution was granted access to many of these documents between July and September 2010. Some documents, however, were missing. These included documents from a judicial file relating to crimes committed against Witness 414 and his family. On 4 April 2012, the Prosecution requested these specific documents from the GoK. To date, the GoK has failed to comply with this request, despite numerous letters and several meetings to follow up on the request.

Similarly, the GoK has not provided all the security-related documents requested by the Prosecution. On 27 August 2010, the Prosecution requested the GoK to provide a series of security-related documents relevant to the PEV. On 24 September 2010, at the request of the GoK, the Prosecution sent a revised version of the request, identifying the requested documents with greater specificity. The Prosecution collected many of the requested documents in December 2010. However, key documents were missing, including:

- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED]; and
- [REDACTED].

The Prosecution has sent several letters to the GoK and has engaged in multiple meetings to request the outstanding items. To date, the GoK has not provided them.

With respect to the data received from the telephone companies, enquiries are ongoing. As mentioned above, the data received from [REDACTED] have been determined to have been fabricated. Given the manner in which the fabrication occurred, there is reason to question the veracity of the data received from the telephone companies directly, but no direct evidence thus far of tampering. Enquiries and verifications are being undertaken as the project continues.

**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?**

No.

The Prosecution's position on this issue is fully canvased in a public filing dated 8 May 2013 on the insufficiency of the GoK's co-operation with the Court.<sup>3</sup>

The Prosecution has sought part of the material listed in the question but not all of it. Part of the material was requested from the GoK in a request for assistance dated 24 April 2012. The Prosecution asked for the Accused's financial records in the light of the fact that one of the central allegations against him is that he financed the PEV. The GoK has not provided that information. Instead it has provided a series of excuses that the Prosecution considers meritless. The Prosecution has requested that the Chamber issue a finding that the GoK has failed to comply with its co-operation obligations under the Rome Statute with respect to this request for assistance.

The same request for assistance asked for details of property records, vehicle ownership records, police records and National Security Intelligence Service records. There has been no substantive reply to those requests.

**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 ?**

See the answer to Question 12, below.

**11. If there was any deficiency in the quality of the GoK's co-operation with the Prosecution during the 2008-2013 Kibaki administration, has the Accused done all that he can do as President to remedy those deficiencies?**

No.

The situation has not improved since Mr Kenyatta took office as President. Key requests for assistance remain outstanding and there is no indication that the Kenyatta administration will provide more assistance than the Kibaki administration. On the contrary, there has been a decline in the level of co-operation, which was already inadequate.

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<sup>3</sup> ICC-01/09-02/11-733-Red.

Mr Kenyatta's public statements (in which he accused the Court of being "the toy of declining imperial powers" engaged in "bias and race-hunting") and the GoK's multi-faceted campaign to derail the ICC process on the diplomatic front (e.g., UNSC, AU) suggest a lack of willingness to co-operate.

**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?**

Certain aspects of the Prosecution's investigative techniques and interactions with States and bodies have to remain confidential. To speak openly about such matters would imperil future operations that may be dependent upon such liaison. The Prosecutor has nothing to say about communications between her Office and State intelligence gathering bodies, save that the Prosecution does not have any outstanding requests to the GoK for intercepts made or held by the National Security Intelligence Council.

**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." 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?**

First, it should be emphasised that the case against Mr Ruto and Mr Sang is proceeding strongly.

The Prosecution already has in its possession evidence to show that other senior PNU operatives and prominent Kikuyu politicians and businessmen may be criminally liable for the crimes committed during the PEV. It would not be proper to go into details of that investigation at this stage. The Prosecution is currently assessing the strength of its evidence against these individuals.

This does not preclude the Kenyan Government from leading its own trials. The prosecution of perpetrators of the PEV is better done by domestic courts in Kenya. Article 1 of the Rome Statute states that the Court shall be complementary to Kenya's domestic criminal jurisdiction. Under this provision, Kenya has the responsibility to hold accountable those most responsible for the crimes committed during the post-election violence in 2007-08. Sadly, there has been no sign of that occurring. However, Kenya's assurances at the recent Assembly of States Parties that the implementation of the International Crimes Division at the High Court of Kenya is nearing completion are welcome.



**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) *sic* to be relevant in the present circumstances?**

No.

As laid out in the Prosecution’s 2007 policy paper on the interests of justice, the interests of justice test set out in Article 53(2)(c) applies to a different stage of the proceedings. The interests of justice provide a potential reason not to proceed with a prosecution even where all the other requirements of jurisdiction and admissibility are met and where the evidence is satisfactory. No part of the Rome Statute can be said to suggest that it might be in the interests of justice to bring a prosecution where the evidence is insufficient to provide a reasonable prospect of conviction.

In this case, the Prosecution decided to prosecute Mr Kenyatta, and it has the power to reconsider its decision if it no longer reasonably believes it will be able to secure a conviction beyond a reasonable doubt.