

**Cour
Pénale
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**International
Criminal
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Date: 27 March 2015

APPEALS CHAMBER

Before: Judge Silvia Fernández De Gurmendi, Presiding Judge
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

**Victims' request to participate in the Prosecutor's appeal against the
'Decision on Prosecution's application for a finding of non-compliance under
Article 87(7) of the Statute'**

Source: Legal Representative of Victims

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

Counsel for the Defence

Mr Steven Kay
Ms Gillian Higgins

Legal Representative of Victims

Mr Fergal Gaynor

States Representative

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

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Caroline Walter

REGISTRY

Registrar

Mr Herman von Hebel

Introduction

1. On behalf of the victims participating in the proceedings before the Trial Chamber, the Legal Representative for Victims ('LRV') hereby respectfully submits a request to participate in the appeal filed by the Prosecution against the decision of Trial Chamber V(B) on the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute.¹

Procedural history

2. The procedural history of this case is briefly outlined below, insofar as it pertains to: (a) victim participation in these proceedings generally; (b) victim participation in proceedings concerning co-operation by the Government of the Republic of Kenya ('Kenyan Government'); and (c) the present appeal.
3. On 26 August 2011, Pre-Trial Chamber II issued the 'Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings' in which it decided, *inter alia*, to admit 233 victims as participants at the confirmation of charges hearing and in related proceedings.²
4. On 3 October 2012, Trial Chamber V rendered its 'Decision on victims' representation and participation'³ ('3 October 2012 Decision') in which it decided, *inter alia*, that: (i) victims who do not wish to present their views and concerns individually and directly to the Chamber, but rather to express those views and concerns solely through the LRV, will not be required to submit an application under Rule 89(1) of the Rules of Procedure and Evidence. However, such victims may, if they so wish, register with the Registry, indicating their names, contact details as well as information as to the harm suffered; (ii) victims who were

¹ 'Prosecution appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"', ICC-01/09-02/11-1006, 20 March 2015. See also 'Prosecution's application for leave to appeal the 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'', ICC-01/09-02/11-985, 9 December 2014.

² 'Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings', Pre-Trial Chamber II, ICC-01/09-02/11-267, 26 August 2011.

³ 'Decision on victims' representation and participation', Trial Chamber V, ICC-01/09-02/11-498, 3 October 2012.

authorised to participate at the confirmation of charges stage would be considered as having registered for the purpose of participation through the common legal representation system provided that the harm they had suffered is linked to the charges confirmed against the accused; (iii) the Registry would review the applications of individuals who were authorised to participate at the confirmation of charges stage and assess whether the harm they had suffered was linked to the confirmed charges. In the event that the Registry identified any individuals who had been authorised to participate at the confirmation of charges stage but who did not meet the preceding requirement, it would submit a report to the Chamber and inform the LRV; (iv) the LRV would ensure that the views and concerns he or she represents were those of all individuals qualifying as victims in the present case.⁴ It would be the responsibility of the LRV not to take into consideration the views and concerns of persons whom he or she had reason to believe did not qualify as victims in the present case.⁵ The 3 October 2012 Decision was not the subject of any application for leave to appeal by any party or participant.

5. On 21 March 2013, the Registry reported to the Trial Chamber⁶ *inter alia* that: (i) the Victims Participation and Reparations Section of the Registry ('VPRS') had reviewed all applications and supplementary information received from victims permitted to participate in the confirmation of charges hearings ; (ii) the VPRS had identified 18 victims who appeared to fall outside the scope of the case ; (iii) one application remained unclear ; and (iv) four victims had died ; and (v) a duplication of applications in relation to one victim was identified. Therefore, the total number of victims remaining within the scope of the case of the 233 authorised to participate at the confirmation of charges hearing was 208 victims.⁷

⁴ The LRV estimates that the number of persons who are likely to qualify as victims in the present case is in excess of 20,000.

⁵ 3 October 2012 Decision, paras. 45-54.

⁶ 'Second periodic report on the general situation of victims in Kenya', ICC-01/09-02/11-701, 21 March 2013.

⁷ *Ibid*, Public Annex, para.8.

6. On 6 May 2013, the LRV filed the 'Victims' Response to the Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court'.⁸
7. On 5 February 2014, at a status conference, the LRV made oral submissions concerning co-operation by the Kenyan Government and Mr Kenyatta's constitutional duty, as President of Kenya, to ensure co-operation.⁹
8. On 13 February 2014, at a status conference to discuss matters relating to the Prosecution's request for a finding of noncompliance, the LRV made further oral submissions concerning the co-operation by the Kenyan Government.¹⁰
9. On 19 February 2014, the LRV filed the 'Victims' response to "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'", which contains further submissions on co-operation by the Kenyan Government.
10. On 9 July 2014, at a status conference to address co-operation by the Government of Kenya, the LRV made further submissions on behalf of the victims.¹¹
11. On 7 October 2014, at the invitation of Trial Chamber V(B),¹² the LRV also participated in the status conference conveyed to address the status of the co-operation between the Prosecution and the Kenyan government.¹³
12. On 3 December 2014, the Trial Chamber issued its 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute' ('Impugned Decision'), in which the Chamber rejected the Article 87(7) Application.¹⁴

⁸ 'Victims' Response to the Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court', ICC-01/09-02/11-731, 6 May 2013.

⁹ Transcript of the hearing held on 5 February 2014, ICC-01/09-02/11-T-27-ENG ET WT.

¹⁰ Transcript of the hearing held on 13 February 2014, ICC-01/09-02/11-T-28-ENG ET WT.

¹¹ Transcript of the hearing held on 9 July 2014, ICC-01/09-02/11-T-30-ENG ET WT.

¹² 'Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters', ICC-01/09-02/11-954, 19 September 2014, para. 13.

¹³ Transcript of the hearing held on 7 October 2014, ICC-01/09-02/11-T-31-ENG ET WT.

¹⁴ 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', Trial Chamber V(B), ICC-01/09-02/11-982, 3 December 2014. See also 'Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya', ICC-01/09-02/11-866, 29 November 2013, reclassified as public on 12 February 2014; and Transcript of the hearing held on 7 October

13. On 9 December 2014, the Prosecution filed its application for leave to appeal the Impugned Decision.¹⁵
14. On 15 December 2014, the LRV filed the 'Victims' response to the Prosecution's application for leave to appeal the decision on non-compliance'.¹⁶
15. On 5 January 2015, the LRV filed the 'Victims' response to the observations of the Government of the Republic of Kenya on the Prosecution's leave to appeal request'.¹⁷
16. On 21 January 2015, the Registry reported to the Trial Chamber that, according to the information available to the Registry, the total number of victims verified as within the scope of the present case by the LRV stands at 839.¹⁸
17. On 9 March 2015, the Trial Chamber issued its Decision on the Prosecution's request for leave to appeal, and granted the appeal in relation to the following two issues: (i) whether the Chamber had already made the requisite findings under Article 87(7) of the Statute that the Kenyan Government failed to comply with the Prosecution's cooperation request, such that it ought to have refer the matter to the Assembly of States Parties ('ASP'); or in the alternative, if the Chamber's findings are not considered 'formal' or 'judicial' findings under Article 87(7) of the Statute, whether it had any discretion not to enter the required finding under that provision and thus refer the matter to the ASP (First Issue); and (ii) even if the Trial Chamber had discretion not to enter 'formal' findings under Article 87(7) of the Statute and thereby refer the matter to the ASP, whether it erred in the exercise of its discretion by taking into account or giving weight to extraneous or irrelevant considerations, and/or by failing to consider or accord sufficient weight to relevant considerations (Second

2014, ICC-01/09-02/11-T-31-ENG, page 11, lines 16-25.Reclassified as public pursuant to the Chamber's direction (ICC-01/09-02/11-967).

¹⁵ 'Prosecution's application for leave to appeal the 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', ICC-01/09-02/11-985, 9 December 2014.

¹⁶ 'Victims' response to the Prosecution's application for leave to appeal the decision on non-compliance', ICC-01/09-02/11-989, 15 December 2014.

¹⁷ 'Victims' response to the observations of the Government of the Republic of Kenya on the Prosecution's leave to appeal request', ICC-01/09-02/11-993, 5 January 2015.

¹⁸ 'Annex A to the Thirteenth Periodic Report on the general situation of victims in the case and the activities of the Victims Participation and Reparations Section and the Common Legal Representative in the field', ICC-01/09-02/11-998-AnxA, 21 January 2015.

Issue).¹⁹ The Trial Chamber expressly referred to the victims' response to the Prosecution's request for leave to appeal²⁰ in issuing its decision granting leave to appeal.²¹

18. On 20 March 2015, the Prosecution filed the 'Prosecution appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"'.²²

Submissions

19. The Appeals Chamber has held that, with respect to victims' participation in appeals brought under Article 82(1)(d) of the Rome Statute, the following four cumulative criteria must be fulfilled: (i) the individuals seeking participation must be victims in the case; (ii) their personal interests must be affected by the issues on appeal; (iii) their participation must be at an appropriate stage of the proceedings; and (iv) the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused and a fair and impartial trial.²³

¹⁹ 'Decision on the Prosecution's request for leave to appeal', Trial Chamber V(B), ICC-01/09-02/11-1004, 9 March 2015.

²⁰ 'Victims' response to the Prosecution's application for leave to appeal the decision on non-compliance', ICC-01/09-02/11-989, 15 December 2014. See also 'Victims' response to the observations of the Government of the Republic of Kenya on the Prosecution's leave to appeal request', ICC-01/09-02/11-993, 5 January 2015.

²¹ 'Decision on the Prosecution's request for leave to appeal', Trial Chamber V(B), ICC-01/09-02/11-1004, 9 March 2015, paras. 16-18.

²² 'Prosecution appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', ICC-01/09-02/11-1006, 20 March 2015.

²³ See *inter alia* the 'Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'', Appeals Chamber, ICC-01/04-01/06-824 OA7, 13 February 2007; the 'Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007', Appeals Chamber, ICC-01/04-01/06-925 OA8, 13 June 2007; the 'Decision on the Participation of Victims in the Appeal of Mr Katanga Against the 'Decision on the Modalities of Victim Participation at Trial', Appeals Chamber, ICC-01/04-01/07-2124 OA11, 24 May 2010; the 'Decision on the Participation of Victims in the Appeal against Trial Chamber I's Oral Decision of 15 July 2010 to Release Thomas Lubanga Dyilo', Appeals Chamber, ICC-01/04-01/06-2555 OA17, 17 August 2010; the 'Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA))', Appeals Chamber, ICC-01/04-01/10-509 OA4, 2 April 2012; the 'Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court', Appeals Chamber, ICC-01/04-01/07-3346 OA13, 17 January 2013; the 'Decision on the participation of victims in the appeal, Appeals Chamber', ICC-02/05-03/09-470, 6 May 2013. With regard to the timing of any application by victims for participation, the Appeals Chamber has directed that any such application should be submitted as soon as possible after the appeal is filed and at the latest on the day the response to the document in support of the appeal is due.

20. The LRV sets out below arguments in relation to these four criteria.

(i) The individuals seeking participation must be victims in the case

21. 839 persons have been individually verified to be victims of the crimes charged in this case in accordance with the 3 October 2012 Decision, as described above.²⁴

22. On 13 March 2015, Trial Chamber V(B) ruled that ‘the termination of these proceedings is without prejudice to the continuation of the mandate of the LRV for such limited period as may be necessary to enable him to properly inform and advise the victims regarding the impact of the withdrawal of charges in this case and of the present decision, as well as, if applicable, to participate in the outstanding proceedings before the Appeals Chamber.’²⁵

(ii) Personal interests of the victims are affected by the issues on appeal

23. The victims’ situation is unprecedented before this Court. Perhaps no other group of victims before the Court has been led to expect so much, and yet received so little. They saw the charges against Mr Ali collapse at the confirmation stage in 2012, the charges against Mr Muthaura collapse in 2013, and the charges against Mr Kenyatta collapse in 2014. Not one day of trial took place. Non co-operation by the Kenyan Government was a highly significant factor in the collapse of each of these three prosecutions.

24. The Kenyan Government’s serial non-compliance with requests by the Prosecution and express directions of the Trial Chamber, in violation of Part 9 of the Rome Statute, was part of a pattern of steps indicating a desire by the Kenyan Government to impede justice, the emergence of the truth concerning the participation of high-

²⁴ The LRV held meetings in different parts of Kenya with over a thousand victims of the 2007-2008 post-election violence. Of those, 839 persons have been individually verified, either by the Pre-trial Chamber, or by the LRV and (operating under his direct supervision) his field staff, to be victims of this case. The majority of the approximately 200 other victims who the LRV has met were deemed to be victims of crimes committed during the PEV but fell outside the temporal scope of the present case, and are thus not victims of the crimes charged in the present case. The LRV has excluded their views from consideration, in line with the 3 October 2012 Decision.

²⁵ ‘Decision on the withdrawal of charges against Mr Kenyatta’, Trial Chamber V(B), ICC-01/09-02/11-1005, 13 March 2015, para 12.

level suspects, and genuine reparation proceedings at the Court. Each of these steps was contrary to the victims' interests.²⁶

25. Given the overall context of state obstruction, there is no reasonable inference available on the facts of this case other than that the Kenyan Government's non-

²⁶ These following issues arose in proceedings before the Trial Chamber and are noted here in summary:

1. The Government failed to freeze any of Mr Kenyatta's assets, in violation of Part 9 of the Rome Statute.
2. The Government failed to bring its purported legal objections to the Pre-trial Chamber's asset-freezing order to the Court's attention, in violation of Part 9 of the Rome Statute.
3. The Government failed to provide the 'key documents' referred to in an annex to the Prosecution's filing of 31 January 2014 (ICC-01/09-02/11-892-AnxA-Red), in violation of Part 9 of the Rome Statute.
4. The Government failed to provide the material sought in the original records request, in violation of Part 9 of the Rome Statute.
5. The Government to date has failed to oppose, appeal, or apply to have set aside for want of prosecution a broadly framed order preventing key security officers being interviewed in Kenya by the Prosecution. The order was sought by individuals who had nothing to do with the case in question. The order, granted in 2011, remains in place. The Government has never cited any basis recognised in the Rome Statute for its failure to act. Blocking access to key witnesses by a State Party is a violation of Part 9 of the Rome Statute.
6. The Government at the 2013 ASP (which the LRV attended) sent a large delegation, including the DPP, the Attorney General, and Kenya's permanent representative to the United Nations. They and other representatives repeatedly provided information during the ASP which was aligned with the interests of Mr Kenyatta and unresponsive of the interests of the thousands of victims of this case.
7. The Government opposed amendments to Rule 68 of the Rules of Procedure and Evidence at the 2013 ASP. Those amendments were intended in part to facilitate the admission of the initial recorded evidence of a witness who is subsequently bribed, intimidated or who disappears. The Government has never satisfactorily explained its position on this question.
8. The Government secured the inclusion in the resolution adopting the amended Rule 68 of language in effort to inoculate the Kenya cases from its effect.
9. The Government lobbied the AU assembly to hold a special session and adopt a resolution relating to immunity from prosecution for sitting heads of state and government.
10. The Government expended further diplomatic capital in an effort to persuade the Security Council to suspend the Kenya trials pursuant to article 16 of the Rome Statute.
11. The Government proposed further amendments for consideration by the ASP at the 2015 ASP, relating to presence at trial and head of state immunity.
12. The Government opposed in the *Ruto & Sang* case interpretations of the Rome Statute that it can be compelled to ensure that witnesses appear to give evidence in Kenya by video-link and put forth inaccurate interpretations of Kenyan law as part of that effort. This impedes the emergence of the truth.
13. The Government argued in the present case that the President cannot be held in any way accountable for Kenya's failure to comply with its obligations under the Rome Statute, relying on interpretations of Kenyan law which are largely without merit.
14. The Government failed to keep its written 2011 promises to the Pre-Trial Chamber concerning its intention to fully investigate *all* PEV crimes and to *all* levels.
15. There was 'a pattern of information contained in confidential filings being leaked to the media, in some cases even before the filings have been notified to the Chamber, parties or participants.' The Trial Chamber noted 'with concern the Government's cumulative inattention to the taking of appropriate measures to ensure the confidentiality of the proceedings.' (ICC-01/09-02/11-967, paras. 11 and 12).
16. The Government failed to keep numerous promises to establish an International Crimes Division of the High Court ('ICD'), and erroneously claimed in a 2013 filing to the Trial Chamber that the ICD had been established. To date, the ICD has not been established.
17. The DPP in February 2014 confirmed that not one of the thousands of PEV files examined by the 'Multi-Agency Task Force' is prosecutable, and that the ICD (if it is established) will not handle any PEV cases. This prevents the emergence of testimonial and documentary evidence which would assist in prosecuting higher-level suspects both in Kenya and at the ICC.
18. The Court awaits the delivery from Kenya of the sole person charged by the Court for offences against the administration of justice, over a year after the arrest warrant was issued.

compliance with its obligations under the Rome Statute has made a significant and material difference to the non-confirmation of charges against Mr Ali, and the withdrawal of charges against Mr Muthaura and Mr Kenyatta.

26. Good faith compliance by Kenya with its obligation under the Rome Statute to comply with specific requests for access to critical documents and witnesses would almost certainly have resulted in a different outcome in each of those three prosecutions.
27. Kenya's serial violation of its Rome Statute obligations during these proceedings therefore has had catastrophic consequences for the victims' well-recognised right to know the truth about the crimes committed against them, to have those responsible for those crimes held accountable, and to receive reparation for the crimes committed against them. As a result of the action and inaction of the Kenyan Government, there are no proceedings either at this Court or in Kenya itself against any persons responsible for the crimes committed against the victims of this case.
28. The Trial Chamber's failure to refer Kenya to the ASP, in the circumstances of this case, and in light of the findings made by the Chamber in the Impugned Decision, unreasonably deprived the victims of a trigger which would have encouraged States Parties to cooperate to bring to an end, and reverse the consequences of, Kenya's systematic failure to adhere to Part 9 of the Statute.
29. State Party co-operation lies at the heart of the model of investigation and prosecution envisaged by the Rome Statute. Without State Party co-operation, the Court cannot function. Securing good faith compliance by all States Parties with their obligations under the Rome Statute is a central element in ensuring access by the Court to all documentary and testimonial evidence necessary to uncover the truth. A robust mechanism for dealing with State Party non-compliance is a critically important element in ensuring the delivery of truth, accountability and reparations to victims. The Impugned Decision erroneously weakened that structure.
30. Furthermore, as is evident from the procedural history set out above, the Trial Chamber repeatedly permitted the victims to participate in the litigation concerning

Kenyan Government co-operation in this case, and permitted the LRV to make oral and written submissions on non-cooperation.²⁷ On the same day as the Impugned Decision, Pre-Trial Chamber I reaffirmed that victims have a legitimate interest in relation to cooperation and referral issues.²⁸ In the overall circumstances of the present case, it is clear that the victims' personal interests have been negatively impacted by the Kenyan Government's obstructionism, and those interests are clearly affected by the Appeals Chamber's consideration of whether the Trial Chamber erred in not referring Kenya to the ASP.

(iii) Victims' participation in the appeal is appropriate

31. The outcome of the proceedings before the Appeals Chamber will have a direct impact on the personal interests of the victims. If the Appeals Chamber upholds the Impugned Decision, this is likely to seriously damage the Court's co-operation structure as it will be perceived by the Kenyan Government as a victory, thereby further incentivizing further non-cooperation. This is likely to materially decrease the likelihood that the Prosecution will return to the Pre-Trial Chamber with fresh charges against any person. This will further reduce the victims' already low chance of receiving justice before this Court in the future.
32. However, if as a result of the present appeal, Kenya is referred to the ASP in accordance with Article 87(7) of the Statute, this provides a firm basis for States Parties to use diplomatic means and such countermeasures as they deem

²⁷ 'Decision on the Government of Kenya's application for leave to file observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence', Trial Chamber V, ICC-01/09-02/11-725, 24 April 2013, para. 3: 'The Chamber also considers that the Legal Representative of Victims should be given an opportunity to respond.' See further the 'Victims' Response to the Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court', ICC-01/09-02/11-731, 6 May 2013. See also 'Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters', Trial Chamber V(B), ICC-01/09-02/11-954, 19 September 2014, para. 13: 'Additionally, given the significance of the issues and their potential impact on the interests of the victims, the LRV may be present at both status conferences.'; Transcripts of the Status Conference held on 7 October 2014, ICC-01/09-02/11-T-31-ENG ET WT; 'Order requesting observations from the Government of Kenya on the Prosecution's leave to appeal request', ICC-01/09-02/11-986, 10 December 2014.

²⁸ Pre-Trial Chamber I's 'Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council', ICC-01/11-01/11-577, 10 December 2014, para. 29.

appropriate in order to secure Kenya's co-operation with its Rome Statute obligations. This would increase the possibility of securing access by the Court to relevant material and testimonial evidence, and this in turn would facilitate the expeditious delivery of truth, accountability and reparations to victims.

33. For this reason, the outcome of the appeal may have a serious impact of the victims' personal interests, and their participation is therefore appropriate.²⁹

(iv) The manner of participation will neither cause prejudice to nor be inconsistent with the rights of the accused and a fair and impartial trial

34. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations on 29 November 1985 explicitly links the principle of access to justice for victims and the right to fair treatment.³⁰

35. In this regard, victims' participation constitutes an integral part of the concept of fair and impartial proceedings as built into the proceedings of the Court.³¹ Therefore, when participation proceeds in a manner prescribed by the Appeals Chamber, this cannot *per se* unfairly affect the proceedings. Accordingly, and in light of the issues certified for appeal, the LRV respectfully submits that it is the Appeals Chamber's duty to take into consideration the victims' interests.

36. The participation of victims in this appeal aims at ensuring that the rights afforded to them under the Rome Statute are effectively implemented, especially in a context where there is no realistic prospect that they will see justice at the national level.

²⁹ See ICC-01/04-01/10-509, at para. 11: 'The Appeals Chamber considers that participation in this appeal is appropriate in light of the consequences that this appeal might have on the victims' personal interests.' The Appeals Chamber cited ICC-01/04-01/06-2453, para. 10 in support.

³⁰ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations General Assembly, Resolution A/RES/40/34, 29 November 1985, principles 4 to 7, accessed 27 March 2015: <http://www.un.org/documents/ga/res/40/a40r034.htm>.

³¹ See DONAT-CATTIN (D.), Article 68, in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Verlag C.H. Beck, Hart Publishing and Nomos, 2008, pp. 876-877: 'The victims' genuine wish is that the truth be established and the case solved. [...] The second [concept of due process for defendant] is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and international society as such, the foundation of all procedural norms of the Statute'.

There is no credible indication that the Kenyan Government intends to carry out criminal prosecutions for PEV victims. Mr Kenyatta has recently indicated that the Kenyan Government has permanently abandoned credible domestic investigations and prosecutions of those most responsible for the crimes of the PEV.³²

37. The Prosecutor has withdrawn charges against Mr Kenyatta, and he is not (nor has ever been) detained by the Court. In these circumstances, no concerns regarding the right to an expeditious trial arise.
38. In addition, under Rule 91(2) of the Rules of Procedure and Evidence and Regulation 24(1) of the Regulations of the Court, the Prosecution and Defence can respond to any observation submitted by the LRV. The LRV has no objection to the participation of the Defence, as well as the Kenyan Government, in the present appeal.
39. Finally, the LRV notes that, under Regulation 65(4) and 65(5) of the Regulations of the Court, participants may file a response to the document in support of the appeal within 10 days of notification of that document. The LRV respectfully requests the Appeals Chamber, should it grant leave to participate in the appeal, to allow the LRV at least five days from that decision to file a response on behalf of the victims.
40. The LRV will present the views and concerns of the victims in writing, and will also be available to participate in any oral hearing, should the Appeals Chamber so order.

Relief requested

41. For the foregoing reasons, LRV respectfully requests the Appeals Chamber to grant leave to the victims to present their views and concerns on the document submitted

³² In his State of the Nation speech on 26 March 2015, Mr Kenyatta as President of Kenya said: ‘Yesterday, I received the Report on the 2007/2008 Post Election Violence Related Cases from the Office of the Director of Public Prosecutions. A copy of which is annexed to my report on national values. In all, there were 6,000 reported cases and 4,575 files opened. It is the opinion of the Director of Public Prosecutions that there are challenges to obtaining successful prosecutions. These challenges range from inadequate evidence, inability to identify perpetrators, witnesses fear of reprisals, and the general lack of technical and forensic capacity at the time. Nonetheless, the Office of the Director of Public Prosecutions recognises there were victims and recommends that these cases be dealt with using restorative approaches. We must indeed recall our options are not limited to retributive justice. There also exists the promise of restorative justice.’ *Kenya: President Uhuru Kenyatta Speech During State of the Nation Address At Parliament*: Available at <http://allafrica.com/stories/201503261477.html>. Accessed 26 March 2015.

by the Prosecution in support of its appeal, and, more generally, to authorise the LRV to submit observations on any issue affecting the interests of the victims raised by the Prosecution, the Defence or the Kenyan Government during the appellate proceedings, in accordance with the procedure laid down by the Appeals Chamber.³³

Respectfully submitted,



Fergal Gaynor
Common Legal Representative of Victims

Dated this 27th day of March 2015

At Cambridge (Massachusetts), United States of America

³³ It is certified that this document contains a total of 2,932 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.