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**APPEALS CHAMBER**

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

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public**

**Victims' response to the *Amicus Curiae* Observations of the  
Africa Centre for Open Governance**

**Source:** Legal Representative of Victims

**Document to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:**

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**REGISTRY**

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## Introduction

1. On behalf of the victims, and in accordance with the Order issued by the Appeals Chamber on 30 April 2015,<sup>1</sup> the Legal Representative for Victims ('LRV') respectfully submits this response to the '*Amicus Curiae* Observations of the Africa Centre for Open Governance pursuant to Rule 103 of the Rules of Procedure and Evidence' filed on 8 May 2015 ('Observations').<sup>2</sup>
2. The LRV supports the views set out in the Observations. He adds the submissions below in response to arguments contained in the Observations concerning (i) the power of the President of Kenya;<sup>3</sup> (ii) the failure of the Government of Kenya ('Government') to prosecute those most responsible for crimes committed during the 2007-2008 post-election violence ('PEV');<sup>4</sup> and (iii) the context in which the alleged non-cooperation by the Government has occurred.<sup>5</sup>

### **The power of the President of Kenya and his ability to facilitate, or to obstruct, cooperation with the Court and domestic prosecution for serious crimes**

#### *The President's de jure power*

3. *De jure*, the President of Kenya holds more power than any other person in Kenya. The President is the Head of State and Head of Government.<sup>6</sup> As is evident from Articles 131 and 132 of the Constitution of Kenya, the President controls the Government. The Defence has persuasively emphasised the extensive nature of a serving President's responsibilities.<sup>7</sup> His power is illustrated in these provisions:
  - a. The President 'exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries',<sup>8</sup>

<sup>1</sup> 'Order in relation to the Africa Centre for Open Governance's Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence', ICC-01/09-02/11-1018, 30 April 2015.

<sup>2</sup> '*Amicus Curiae* Observations of the Africa Centre for Open Governance pursuant to Rule 103 of the Rules of Procedure and Evidence', ICC-01/09-02/11-1020, 8 May 2015.

<sup>3</sup> Observations, para. 23.

<sup>4</sup> Observations, para. 10.

<sup>5</sup> Observations, paras. 8-22.

<sup>6</sup> Constitution of Kenya, 27 August 2010, Article 131(1)(a).

<sup>7</sup> 'Public redacted version of the 'Defence Request Pursuant to Article 63(1) of the Statute and Rule 134 *quater* of the Rules of Procedure and Evidence to Excuse Uhuru Muigai Kenyatta from Continuous Attendance at Trial' (ICC-01/09-02/11-882-Conf)', ICC-01/09-02/11-882-Red, 24 January 2014, paras 18-30.

<sup>8</sup> Constitution of Kenya, Article 131(1)(b). 'Cabinet secretary' is the term used to describe what in other countries is often called a 'minister'.

- b. The President may appoint and dismiss the Cabinet Secretaries, the Attorney-General, the Secretary to the Cabinet and the Principal Secretaries;<sup>9</sup>
  - c. 'Cabinet Secretaries are accountable individually, and collectively, to the President for the exercise of their powers and the performance of their functions';<sup>10</sup>
  - d. The President chairs Cabinet meetings; directs and co-ordinates the functions of ministries and government departments; and assigns responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary.<sup>11</sup>
4. The President has a clear constitutional obligation to ensure that Kenya fulfils its treaty obligations.<sup>12</sup> This echoes international law: 'Heads of state or relevant government organs [...] have to give effect to the obligations and ultimately have responsibility to ensure State compliance with their treaty obligations.'<sup>13</sup>
  5. Any failure by Kenya to comply with its obligation to cooperate under the Rome Statute is the responsibility, in the first instance, of the Attorney-General, who is the principal government officer mandated under the International Crimes Act 2008 ('ICA') to ensure Kenya's cooperation. The Minister of the Interior is responsible for a limited range of functions under the ICA.<sup>14</sup>
  6. But neither the Attorney General nor any Cabinet Minister is at liberty to act in a manner contrary to the Constitution. This includes as acting in a manner inconsistent with Kenya's obligation to fulfil its international obligations, and in particular, its obligation to cooperate with the Court. The manner in which Kenya is required to fulfil that obligation is set out in detail in the International Crimes Act 2008.
  7. The President is ultimately responsible for the work of the Cabinet Secretaries and the Attorney-General. As noted above, Cabinet Secretaries are appointed and can be dismissed by the President. The President also has the power to appoint and to dismiss the Attorney-General; neither requires parliamentary approval.<sup>15</sup> The Attorney-General is a member of the Cabinet<sup>16</sup> and of the National Security Council

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<sup>9</sup> *Idem*, Article 132(2).

<sup>10</sup> *Ibid.*, Article 153(2).

<sup>11</sup> *Ibid.*, Article 132(3).

<sup>12</sup> *Ibid.*, Article 132(5).

<sup>13</sup> 'Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date', ICC-01/09-02/11-908, 31 March 2014, para. 92.

<sup>14</sup> For example, International Crimes Act, Section 21.

<sup>15</sup> Constitution of Kenya, Article 132(2); Office of the Attorney-General Act, 2012, Section 12(1).

<sup>16</sup> Constitution of Kenya, Article 152(1)(c).

(‘NSC’).<sup>17</sup> Both the Cabinet<sup>18</sup> and the NSC<sup>19</sup> are chaired by and operate under the direction of the President.

8. It emerges from this that ultimately any failure by the Attorney General or a Cabinet Secretary to ensure that the Government fulfils its international obligation to co-operate with the Court is the responsibility of the President.<sup>20</sup>
9. Failure by the President to act if there are clear indications that Kenya is not complying with its international obligations is inconsistent with the President’s duty to uphold the Constitution and to ensure that the international obligations of the Republic are fulfilled.<sup>21</sup>
10. That Mr Kenyatta is aware of Kenya’s ongoing failure to comply with its obligations is beyond dispute. He was an accused before the Court and is President of Kenya. The issue of the ICC has been intensely controversial in Kenya and has been a leading foreign policy issue. It is inconceivable that it has not been discussed in meetings Mr Kenyatta has held with his Cabinet Secretary for Foreign Affairs and with the Attorney General.<sup>22</sup> Mr Kenyatta has no doubt also received briefings from, and has held consultations with, his Defence Counsel. He was also personally present at the status conference of 8 October 2014. From this, it can be inferred that Mr Kenyatta has knowingly failed to ensure Kenya’s fulfilment of its obligation to fully cooperate with the Court.

*The President’s de facto power*

11. *De facto*, Mr Kenyatta as President is the most powerful and influential person in Kenya. Nobody is better placed to facilitate, or to obstruct, the provision of evidence to this Court, and the prosecution of persons responsible for PEV crimes. This is illustrated by the following examples:

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<sup>17</sup> *Idem*, Article 240(1)(f).

<sup>18</sup> *Ibid.*, Article 132(3).

<sup>19</sup> *Ibid.*, Articles 130(1) and 240(4).

<sup>20</sup> If Mr Kenyatta considered that his position as an accused person compromised his ability to fulfil his constitutional duty to ensure fulfilment of Kenya’s international duties, he could have delegated his constitutional duty to ensure cooperation with the Court to another person. To the LRV’s knowledge, he has not done so. This is suggestive of a desire to ensure continued control over the issue of cooperation with the ICC.

<sup>21</sup> Constitution of Kenya, Articles 131 and 132.

<sup>22</sup> Both the Cabinet Secretary for Foreign Affairs and the Attorney General are members of the NSC (Article 240 of the Constitution) and of the Cabinet (Article 152(1) of the Constitution). Both the NSC and the Cabinet are chaired by the President.

- a. Mr Kenyatta reportedly ordered and personally supervised the destruction of evidence in a pending criminal case on 29 August 2014, in violation of an order of the High Court not to destroy the evidence.<sup>23</sup>
- b. Mr Kenyatta reportedly ordered the immediate transfer to Swiss prosecutors of potentially inculpatory evidence, relating to crimes committed by Kenyan citizens as part of the so-called 'Anglo Leasing affair', sought by Switzerland.<sup>24</sup>
- c. Recent comments by the Attorney General (concerning prosecutions for the Anglo Leasing affair) confirm that decision-making regarding whether to prosecute powerful suspects takes place at 'the highest level of Government'.<sup>25</sup>
- d. In a 26 March 2015 address to Parliament, Mr Kenyatta confirmed his personal support for Anglo Leasing investigations and prosecutions: 'When I addressed the nation on this matter, I pledged that my Government would do everything in its power to ensure that we recover all that was due to the Republic. From that moment, I took a personal interest and asked to be briefed on a regular basis of the progress on Anglo Leasing related investigations. My administration

<sup>23</sup> 'Uhuru defies judge, destroys drugs ship', *The Star*, 30 August 2014, available at: <http://allafrica.com/stories/201409010268.html> [13 May 2015]; 'Court slams Uhuru order to destroy Sh1.3bn heroin ship', *The Star*, 3 September 2014, available at: <http://allafrica.com/stories/201409030704.html> [13 May 2015]; 'Court faults destruction of drugs ship', *The Daily Nation*, 2 September 2014, available at: <http://mobile.nation.co.ke/news/Heroin-Ship-Destruction-Drugs/-/1950946/2439188/-/format/xhtml/-/myjrtw/-/index.html> [15 May 2015].

<sup>24</sup> The Swiss ambassador to Kenya, Jacques Pitteloud, was interviewed about the Government's decision to provide to Swiss prosecutors documents sought by those prosecutors relating to a money laundering investigation in Switzerland concerning a fraud on the Kenyan state known as the Anglo-Leasing affair. The Swiss ambassador said that, following initial delay, 'The level of co-operation we have had with the Kenyan government is impressive and you can feel that there is a political will behind that.' He also said that 'there has to be some kind of justice, and we feel that the President is really serious about finally giving this kind of justice, so it's very good news' ('Saba Saba rallies a bad idea, says Swiss envoy Jacques Pitteloud,' *Daily Nation*, 30 June 2014, <http://www.nation.co.ke/news/politics/Saba-Saba-Rallies-Swiss-Ambassador-Jacques-Pitteloud/-/1064/2367466/-/370hdq/-/index.html> [15 May 2015], at six to seven minutes. An editorial in *The Star* said: 'The President ordered his civil servants to furnish the Swiss with the documents in not more than 24 hours. The bureaucrats procrastinated that there was not enough time but Uhuru insisted. He did not want his government to be tainted by accusations of corruption' ('Uhuru Showed True Grit Over Anglo Files,' *The Star*, 24 June 2014: <http://allafrica.com/stories/201406241322.html> [15 May 2015].

<sup>25</sup> 'Attorney-general Githu Muigai told the [Financial Times] that prosecutions remain the aim: "We have expended a lot of time, energy and resources to putting together information from several jurisdictions and now there is, more than ever before, the greatest possibility of credible prosecutions and convictions." He insisted the cases would go ahead. "I think that there is the greatest possible clarity at the highest level of government that this prosecution must take place," he said'. 'Kenya targets architects of Anglo Leasing corruption scandal', *Financial Times*, 15 March 2015, available at: [on.ft.com/1LfVk33](http://on.ft.com/1LfVk33) [12 May 2015].

also supported the investigating authorities in obtaining support from a number of friendly foreign governments.’<sup>26</sup>

12. Wielding immense formal power and informal influence, nobody in Kenya is in a better position than Mr Kenyatta to direct resources to the effective prosecution of mid-level and high-level persons responsible for PEV crimes, in the same way as he has directed resources towards investigations and prosecutions in the Anglo Leasing affair. But Mr Kenyatta in his 26 March 2015 address to Parliament indicated that the Government has abandoned credible domestic investigations and prosecutions of those most responsible for the crimes of the PEV.<sup>27</sup> In a report which accompanied his address, Mr Kenyatta indicated the Government’s support for suspending cooperation with the Court.<sup>28</sup> The era of impunity continues.<sup>29</sup>
13. Mr Kenyatta was and is also uniquely positioned to ensure Kenya’s compliance with the directions issued by the Trial Chamber on 31 March 2014, and in particular the direction that: ‘it is now incumbent on the Kenyan Government to take the necessary

<sup>26</sup> Hansard Report, 26 March 2015, page 15. Available at: <http://www.parliament.go.ke/the-national-assembly/house-business/hansard?start=15> [13 May 2015].

<sup>27</sup> 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.’ Hansard Report, 26 March 2015, page 13, available at <http://www.parliament.go.ke/the-national-assembly/house-business/hansard?start=15> [13 May 2015].

<sup>28</sup> The President is required by Article 132(1)(c) of the Constitution of Kenya to submit to the National Assembly an annual report ‘on the progress made in fulfilling the international obligations of the Republic’. The most recent annual report reads in relevant part: ‘The National Executive is aware that the National Assembly of the 10<sup>th</sup> Parliament approved a resolution “To Suspend Any Links, Cooperation and Assistance” with the ICC. This position was subsequently affirmed by a Resolution of the National Assembly on 5<sup>th</sup> September, 2013 and by the Senate on 11<sup>th</sup> September, 2013 respectively. Parliament is urged to take such necessary measures to ensure the actualization of this resolution but to do so in a manner that respects our Constitutional Order.’ *Report on Progress Made in Fulfilling the International Obligations of the Republic*, March 2015. See ‘Kenyan President and Attorney General Make Contradictory Statements on ICC’, Open Society Justice Initiative, 13 May 2015, available at: <http://www.ijmonitor.org/2015/05/kenyan-president-and-attorney-general-make-contradictory-statements-on-icc/> [13 May 2015].

<sup>29</sup> The Government’s approach echoes that of states involved in covering up evidence of torture and ‘extraordinary rendition.’ The European Court of Human Rights cited the findings of Council of Europe Human Rights Rapporteur Senator Dick Marty in several decisions regarding the role of state authorities in providing effective impunity to state officials involved in torture. *E.g. Al Nashiri v. Poland* 28761/11, para. 481: ‘The experience of the past decade had shown that there were various means by which the right to truth and the principle of accountability could be and had been frustrated, perpetuating effective impunity for the public officials involved in these crimes. They included, in particular, *de facto* immunities, officially authorised destruction of relevant evidence, objective obstruction of or interference in independent investigations, unjustified assertions of executive secrecy, dilatoriness, interruptions in investigations, and the suppression and delayed publication of reports.’ *Cf. Husayn v. Poland* 7511/13; *El-Masri v. Macedonia* 39630/09; and the Marty Reports and associated Resolutions and Recommendations, <http://www.coe.int/T/E/Com/Files/Events/2006-cia/> [12 May 2015]; in particular Resolution 1507 (2006), para. 11.

actions – through relevant office holders, as appropriate – to ensure compliance with its outstanding cooperation obligations and in an expeditious manner.’<sup>30</sup>

14. Mr Kenyatta’s Government did not comply with that direction then, nor in the thirteen months since it was handed down.

**Non-cooperation took place in the context of steps to interfere with key witnesses**

15. The non-cooperation by the Government appears to have taken place in the context of credible claims of intimidation of key witnesses who were due to testify in the trial of Mr Kenyatta. In its updated pre-trial brief, the Prosecution made the following allegations, from which it has not resiled:

92. At each stage of the judicial process, the Accused’s intermediaries have attempted to bribe witnesses to shield the Accused from responsibility for his role in the PEV.

[...]

94. The Defence has attempted to cast the pre-confirmation attempt by Defence intermediaries to use Witnesses 11 and 12 to suborn Mungiki witnesses as “extortion attempts” by the witnesses against Mr Kenyatta. As the Pre-Trial Chamber correctly observed, “the evidence . . . manifestly does not support [the Defence’s] allegations”. New evidence that will be presented at trial demonstrates the point.

95. Shortly after the Prosecution disclosed the identities of Witnesses 11 and 12 in August 2012, the witnesses informed the Prosecution that purported Kenyatta intermediaries were attempting to locate them to offer a “deal” for them to agree not to testify. One of the intermediaries was Ferdinand Waititu, a sitting Member of Parliament and an associate of Mr Kenyatta. In a series of controlled telephone conversations recorded by the Prosecution with the witness’ consent, Mr Waititu told Witness 12 that he wanted to meet with him to discuss assisting Mr Kenyatta to “solve this fight” and the “lump of money to be given”. Mr Waititu indicated that he had spoken about the scheme to Mr Kenyatta and was keeping him informed of its progress. He explained that Mr Kenyatta wanted to avoid “direct” involvement because he was worried about getting caught tampering with evidence. Mr Waititu’s attempts to bribe Witness 12 – the recordings of which will be presented at trial – demonstrate that the Defence’s “extortion” theory regarding Witnesses 11 and 12 gets it backwards. Far from targeting Mr Kenyatta for “extortion”, it is the witnesses themselves who have been targeted by Mr Kenyatta’s

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<sup>30</sup> *Supra* footnote 13, ICC-01/09-02/11-908, para. 103.



associates – apparently with his knowledge – in attempts to resolve this case through bribery rather than the judicial process.<sup>31</sup>

## Conclusion

16. It can be inferred from the foregoing that Mr Kenyatta continues to use his *de facto* and *de jure* power to preside over a policy of non-prosecution of PEV crimes within Kenya. As a result, there will be no accountability at the Kenyan courts for those responsible for the horrific crimes in the present case, committed against tens of thousands of Kenyan citizens. The Government has pursued this policy of non-prosecution in parallel with a policy of withholding from the International Criminal Court, in violation of Kenya's international obligations, important evidence relating to those responsible for crimes committed during the PEV. The Appeals Chamber cannot compel Kenya to prosecute. But it can act in the face of obstruction of justice. As a first step in delivering truth and justice to the victims at this Court, the Appeals Chamber should refer Kenya's non-cooperation to the Assembly of States Parties.

Respectfully submitted,



Fergal Gaynor  
Common Legal Representative of Victims

Dated this 15<sup>th</sup> day of May 2015  
At New York, United States of America

It is certified that this document contains a total of 1,925 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.

<sup>31</sup> 'Public Redacted Version of "Second updated Prosecution pre-trial brief"', ICC-01/09-02/11-796-AnxA-Red, filed 19 January 2015, paragraphs 92, 94 and 95. Footnotes omitted. *See also* 'Prosecution submission of the public redacted version of the second updated pre-trial brief', ICC-01/09-02/11-997, 19 January 2015, pages 3-4.