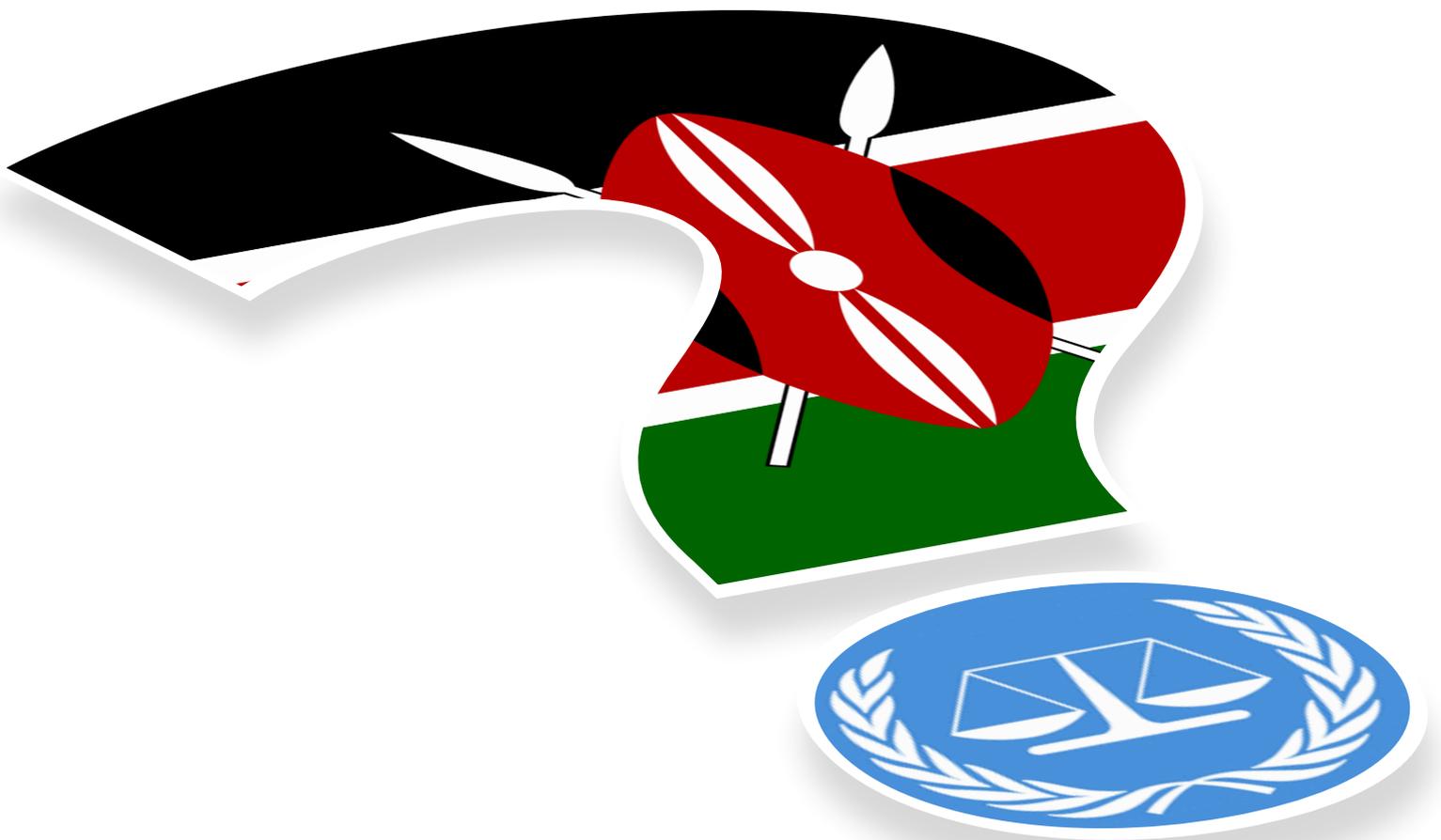


# All Bark No Bite?

State Cooperation and  
the International Criminal Court





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## Abbreviations

ASP	Assembly of States Parties
AU	African Union
CAR	Central African Republic
CIPEV	Commission of Inquiry into the Post-Election Violence
GOK	Government of Kenya
ICC	International Criminal Court
ICTY	International Criminal Tribunal for Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
OTP	Office of the Prosecutor
LRV	Legal Representative for Victims
PEV	Post-election violence
RS	Rome Statute
UNSC	United Nations Security Council

# All Bark No Bite?

## State Cooperation and the International Criminal Court

### Background

In late 2007, Kenya held a closely contested presidential election whose outcome was challenged by the opposition. The disputed election results were followed by widespread violence that left 1,133 people dead, 663,921 displaced, hundreds of women and men sexually violated and property worth millions of shillings destroyed.<sup>1</sup> When Kenya failed to establish a domestic tribunal to prosecute those suspected of serious atrocity crimes, as recommended by a Commission of Inquiry established by the international mediation process led by Kofi Annan, the International Criminal Court (ICC) intervened, opening cases against six high profile Kenyans in March 2010.

In February 2012, the Pre-Trial Chamber declined to confirm the charges against two of the suspects while confirming the charges against the remaining four, namely Uhuru Muigai Kenyatta, Francis Muthaura, William Samoei Ruto and Joshua Arap Sang. Subsequently, the Prosecutor withdrew charges against Mr Muthaura, citing the death or withdrawal of key witnesses and frustrations from the Government of Kenya in the collection of evidence.

The case against Uhuru Kenyatta, now President of Kenya, was withdrawn on 5th December 2014 by the Prosecutor citing the non-cooperation of the Government of Kenya in accordance with its Rome Statute obligations. The trial of William Ruto, now Deputy President of Kenya, and radio journalist Joshua Arap Sang, is currently before

the ICC. Mr Ruto's and Mr Sang's trials began in September 2013.

Before being eventually withdrawn, the start of Mr Kenyatta's trial was postponed a number of times for both procedural reasons and due to what the Prosecutor cited as lack of cooperation and deliberate frustration of investigations by the Kenya Government, now under the executive control of Mr Kenyatta.

This report chronicles the history of the Kenya Government's failure to cooperate with the ICC leading to the collapse of the Kenyatta case, identifies gaps in the cooperation enforcement regime of the Rome statute and offers some suggestions as to how to ensure that the Rome Statute system is not slow-punctured by recalcitrant states to the detriment of victims of mass crimes.

### Introduction

In 1999, before the Rome Statute (RS) came into force, the late and eminent jurist Judge Antonio Cassese, stated that "the provisions on state cooperation with the Court should be clarified and strengthened so as to leave no loopholes available to those states which are unwilling to allow the Court to exercise criminal jurisdiction over persons under their control."<sup>2</sup>

It remains to be seen whether Kenya has become one of those 'unwilling' states that Cassese was referring to. The Rome Statute imposes a general duty on states to cooperate, and an obligation

<sup>1</sup> See for example, the Commission of Inquiry into the Post-Election Violence (CIPEV) report.  
<sup>2</sup> A.Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', EJIL 1999, P171.

to amend their domestic laws to facilitate such cooperation with the Court.<sup>3</sup> In her keynote address at a seminar on cooperation this year, ICC Judge Silvia Fernández de Gurmendi stated: “[C]ooperation is essential for the proper functioning of the ICC. Such cooperation involves political support, as well as legal and operational cooperation. It should also be recognised that a good knowledge and proper understanding of the activities of the Court, and of the States’ experiences and difficulties in their relations with the Court, are a prerequisite for cooperation.”<sup>4</sup>

ICC President, Judge Song, in October 2014 reiterated similar sentiments in his address to the United Nations Security Council (UNSC) marking 10 years of the Agreement between the ICC and the United Nations. Judge Song stated that, “Both organisations are based on the ideals of peace, security and respect for human rights, and the realisation that these goals can only be attained through the rule of law and international cooperation.”<sup>5</sup> Thus, the backbone of the ICC is state cooperation, in the absence of which proper prosecution of perpetrators cannot take place, causing devastating repercussions, especially for the victims of mass atrocities. It remains to be seen whether the existing structures in place at the ICC and Assembly of States Parties (ASP) in the event of non-cooperation, are strong enough to ensure that proper and genuine cooperation is obtained from non-cooperative states.

## State Cooperation

Part 9 of the Rome Statute is dedicated to matters of international cooperation and judicial assistance. Article 86 of the RS provides that, “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of the crimes within the jurisdiction of the Court.” Without its own police force or enforcement mechanism, the ICC is dependent on the

cooperation of States Parties in the investigation and prosecution of crimes under the jurisdiction of the Court.

Under article 87(7) of the Rome Statute, failure to comply with a request for cooperation authorizes the ICC to make a finding of non-compliance and to refer the matter to the ASP or to the Security Council, if the Security Council had referred the situation being investigated or prosecuted to the Court for further action. In all of its activities, the ICC relies on international cooperation from States. States Parties are obligated to cooperate with the Court in its investigations, and prosecutions. More specifically, the Court may request States Parties to assist in the arrest and surrender of persons to the Court; providing evidence for use in proceedings; relocating witnesses; and enforcing the sentences of convicted persons.

Other examples of state cooperation include enforcing the orders and judgments of the ICC, such as seizing and forfeiting proceeds of crime, enforcing asset freezing orders, protecting victims and witnesses and allowing the Prosecutor to conduct investigations on the territory of the state. For example, on 17 March 2006, Thomas Lubanga Dyilo was arrested by the Congolese authorities and transferred into ICC custody after a warrant was issued by the Court for his arrest. More recently ICC Prosecutor Fatou Bensouda met with the Central African Republic’s (CAR) Minister for Justice with responsibility for judicial reform and human rights and the Attorney-General, in order to discuss the issue of the CAR’s cooperation with the Court, particularly in relation to the investigation opened on 24 September 2014. States Parties, especially those where investigations are taking place, regularly provide the Court with cooperation in relation to any orders, decisions or requests made. Kenya, as a State Party to the Rome Statute, has an obligation to cooperate fully with the ICC in the completion

<sup>3</sup> See Part 9 of the RS.

<sup>4</sup> ICC-CPI-20141105-PR1060, Press Release : 05/11/2014, available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1060.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1060.aspx)

<sup>5</sup> ICC-CPI-20141031-PR1057: 30/10/2014, available at: <http://www.icc-cpi.int/iccdocs/presidency/UNGA-PS-30-10-2014-Eng.pdf>

of requests such as those cited above. Therefore, the success of the ICC almost exclusively relies upon the cooperation of States Parties. The Kenya cases clearly illustrate that cooperation is essential to have an effective judicial process. This is probably best demonstrated in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*.

## The Prosecutor v. Uhuru Muigai Kenyatta

After a series of delays in the start of the Kenyatta trial, in November 2013 the Prosecution filed a request with Trial Chamber V(B) to make a finding of non-compliance under article 87(7) of the RS against the Kenyan Government.<sup>6</sup> Under this provision, if a state has failed in its obligation

to cooperate with the Court, the Chamber can make a finding to that effect and refer the state to the ASP for further action in order to secure the required cooperation.

The Prosecutor pointed to serious difficulties that she had faced in obtaining several key records, including mobile phone data and Mr Kenyatta's financial records, amongst others. Shortly after, on 19 December 2013, the Prosecutor announced that she did not have sufficient evidence to proceed to trial due to the fact that a key witness, P-0012, admitted that he had provided false evidence regarding an "event at the heart of the Prosecution's case," and P-0011, another key witness, stated that he no longer wanted to testify in the case.<sup>7</sup>



Uhuru Kenyatta

<sup>6</sup> 'Prosecution application for a finding of non-compliance pursuant to Article 87(7) of the Statute against the Government of Kenya', ICC-01/09-02/11-866-Red.  
<sup>7</sup> ICC-01/09-02/11-875.

On 23 January 2014, Trial Chamber V(B) vacated the scheduled trial commencement date of 5 February 2014 as a result of this announcement. The Defence for Mr Kenyatta subsequently asked the Chamber to terminate the proceedings on the basis of the Prosecution's admission that they no longer had sufficient evidence to prove the case against Mr Kenyatta "beyond a reasonable doubt." In January 2014, the Prosecution responded to the Defence termination request and asked the Chamber to (i) reject the Defence request; (ii) find that the government has failed to comply with its cooperation obligations, and order such compliance; and (iii) adjourn the trial of the present case until the government "complies with its obligations".

After several months of back and forth between the Government of Kenya and the Prosecution, Trial Chamber V(B) vacated the trial commencement date in the case once again, which had been provisionally scheduled for 7 October 2014. The Chamber also convened two

public status conferences on 7 and 8 October 2014 to discuss the status of cooperation between the Prosecution and the Kenyan Government.

## Kenyan Government's failure to comply with the revised records request

One of the central allegations made by the Office of the Prosecutor (OTP) is that Mr Kenyatta<sup>8</sup> provided large quantities of money to intermediaries, which was funnelled down and delivered as cash to the perpetrators of the post-election violence in Nakuru and Naivasha, enabling them to carry out acts of rape and murder, and resulting in the forced displacement of thousands. The Prosecution asserts that there is a "substantial body of evidence" suggesting that the accused played a role in financing the violence and that the identification of corporate bodies in which the accused has an interest is a "central part of its investigations".<sup>9</sup>



Fatou Bensouda

<sup>8</sup> As this report refers to President Uhuru Kenyatta in the context of proceedings against him before the ICC in his individual capacity, 'Mr Kenyatta' will be used in this report instead of his official designation as the President of the Republic of Kenya.

<sup>9</sup> See Decision on the Prosecution's revised cooperation request, ICC-01/09-02/11-937, see para, 14 where the Chamber refers to confidential Prosecution submissions on the matter.

## Chronology of events

On 24 April 2012, the OTP sent the Government of Kenya a request for assistance in seeking financial and other records of Mr Kenyatta, and requested the Government of Kenya to freeze his assets. Within this request the OTP had specifically asked the Government of Kenya for financial and other information relating to Mr Kenyatta ('records request'). After 19 months of what the Prosecution referred to as "obfuscation" and "intransigence" by the Kenyan Government the OTP stated that it was left with no choice but to seek out the assistance of the Chamber.<sup>10</sup>

On **29 November 2013**, the Prosecution filed a request for a finding of non-compliance under article 87(7)<sup>11</sup> against the Government of Kenya,<sup>12</sup> alleging that the Kenyan Government had failed to comply with the Prosecution's April 2012 request under Article 93(1) of the Statute to produce financial and other records relating to the accused.<sup>13</sup> In its request to the Chamber, the OTP protested that, "The information of the type sought in the records request is standard in criminal investigations with a financial dimension. It is routinely obtained without undue burden on state resources. A law enforcement authority acting in good faith could normally be expected to be in possession of such records in a matter of days or weeks."<sup>14</sup>

On **13 February 2014** the Chamber held a status conference, at which oral submissions on the article 87(7) application were received from the Prosecution, the Kenyan Government, the Defence and the Legal Representative of Victims

(LRV).<sup>15</sup> At this status conference the Government of Kenya (GoK) argued that without a Court order from the Chamber, it could not comply with the records request. The Attorney General purported to draw a distinction between the Court as a judicial organ and the OTP, asserting that the two were distinct entities and any requests made to the GoK must emanate from the Chamber and not the OTP. He stated: "The Prosecution cannot parade itself in the garments of the court, demanding and invoking powers that inhere in the court itself as a judicial body, because to do that would be to – to create a playing field that can never possibly produce justice".<sup>16</sup> The Kenyan Government also queried the ambit of the records request, arguing that it had not encountered anything in the language of the Statute or the Rules to permit requesting "full financial profiles" of persons of interest.<sup>17</sup> Essentially, the Kenyan Government argued that it would only comply with requests made directly by the Chamber and not the OTP, because they were two distinct entities and that the RS did not allow for the provision of information relating to the financial records of Mr Kenyatta by the Kenya state.

On **31 March 2014** the Chamber reached a decision in which it ordered the Prosecution to provide the GoK with an updated revised request.<sup>18</sup> The Chamber noted that the revised request should only include items that "remain of specific relevance to the charges" and should meet the requirements of specificity, relevance and necessity.<sup>19</sup> The purpose of this adjournment was to give the GoK a further, time-limited opportunity to provide the Prosecution with

10 ICC-01/09-02/11-866-Red. Pursuant to an order of the Chamber (ICC-01/09-02/11-900), the Article 87(7) Application was reclassified as public on 12 February 2014.

11 ICC-01/09-02/11-866-Red.

12 *Ibid.*

13 Under article 93(1) States Parties shall comply with requests by the Court to provide assistance in relation to investigations or prosecutions in relation to: the execution of searches and seizures; the provision of records and documents, including official records and documents; the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of *bona fide* third parties; amongst other types of assistance the Court can request under this article.

14 *Ibid.*, para.27

15 Order scheduling a status conference on 13 February 2014, 6 February 2014, ICC-01/09-02/11-897. Under the Rome Statute, victims are also represented in trials through a legal representative.

16 ICC-01/09-02/11-T-28-ENG ET WT, lines 17-20.

17 ICC-01/09-02/11-T-28-ENG ET WT, page 95, lines 4-6.

18 '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, p. 46.

19 ICC-01/09-02/11-908, para.100 (i).

access to certain records that the Prosecution had previously requested, on the basis that the records were relevant to a central allegation to the case. In so doing, the Chamber rejected the Defence request to terminate the proceedings in the case, as well as the Prosecution request to indefinitely suspend the proceedings until the Kenyan Government had complied with its cooperation obligations. The Chamber further directed the Prosecution and the Kenyan Government to file submissions informing the Chamber, every two months, on the progress of executing the revised request.

The revised records request covers eight separate categories of information comprising:

- bank accounts held by Mr Kenyatta personally or through third party entities between June 2007 and December 2010;
- telephone numbers used by Mr Kenyatta and all data records for those telephone numbers within the same period;
- records of all motor vehicles registered in Mr Kenyatta's name from December 2007 to February 2008;
- records relating to companies and other corporate institutions in which Mr Kenyatta had an ownership interest between June 2007 and December 2010;
- identification of land which was transferred from Mr Kenyatta or third parties to any other person between June 2007 and December 2010;
- income tax and VAT returns submitted by Mr Kenyatta;
- an identification of transactions by Mr Kenyatta or those third-party entities at foreign exchange institutions between 1 June 2007 and December 2010;
- the identification of any information held by the Security and Intelligence Services of Kenya concerning the activities of Mr Kenyatta.

After a series of submissions from both the Prosecution and the Government of Kenya it became apparent that there were serious difficulties in carrying out the request in a timely manner. Thus, the Chamber convened another status conference on 9 July 2014 to discuss the status of the execution of the revised request and asked for written submissions on the areas of dispute, namely: (1) the specificity, relevance and necessity of certain information in the revised request; and (2) the appropriate time period to be covered by the request.

At the status conference the Attorney General, who described the request as a "fishing expedition",<sup>20</sup> submitted that "... from the resources available, the name given to us [Uhuru Muigai Kenyatta], which is the specific name of an individual citizen, we have no record at the moment indicating that that person owns any land."<sup>21</sup> This statement raised eyebrows in Kenya, since it is common knowledge that the Kenyatta family is one of the biggest landholders in the country.<sup>22</sup> It is also noteworthy that in May, a few weeks before the status conference, Lands Minister and close Kenyatta ally, Charity Ngilu, had controversially shut down the central lands registry in Nairobi for a 10 day period, during which time members of the public and staff of the National Land Commission (NLC) were denied access to the NLC offices. This was ostensibly to "clean up the land register" in a move that the National Land Commission termed as illegal and contested in court.

On **29 July 2014** the Chamber found that the records request did conform to the requirements of specificity, necessity and relevance for the purposes of cooperation under Part 9 of the RS, noting that difficulties in executing the requests could be overcome by the "good faith exploration of alternative official sources of information".<sup>23</sup>

20 ICC-01/09-02/11-T-30-ENG ET WT, p. 17, line 6.

21 ICC-01/09-02/11-T-30-ENG ET WT, p.12, lines 2-4.

22 During the second televised Presidential candidates' debate ahead of the 2013 elections, when asked how he intended to address the land question given the fact that his family owns huge tracts of land, Kenyatta did not deny this fact, instead only pointing out that the land 'was acquired on a willing buyer willing seller basis'.

23 Decision on the Prosecution's revised cooperation request, ICC-01/09-02/11-937, para. 41.

On **29 August 2014**, the Prosecution provided an update on the status of the implementation of the revised records request. Noting the inadequate progress, the Prosecution stated that, "The GoK has produced only 34 pages of materials to the Prosecution during the two month reporting period, some of which is nonresponsive to the Revised Request. The majority of the material sought in the Revised Request remains outstanding."<sup>24</sup>

In **September 2014**, the Prosecution provided a further update and response to the Government of Kenya.<sup>25</sup> With regards to the bank records, the records supplied related to three to four months and not the three year period requested by the Prosecution. In relation to telephone records the GoK provided no response as to whether the relevant telephone companies actually hold billing records.<sup>26</sup> The Prosecution noted that, "The notion that the entire apparatus of the GoK cannot produce a single record of a telephone number which its current President may have been using when he was a Cabinet Minister at the relevant time is not to be taken seriously."<sup>27</sup> It is worth noting that the GoK holds 35% of shares in Kenya's largest mobile telecommunications provider, Safaricom Limited. With regards to the other six categories in the revised records request, information had not been provided, or had only been provided for a small part of the entire time-period requested.

On **5 September 2014** the Prosecutor informed the Trial Chamber that it was not in a position

to commence trial on 7 October 2014, asserting that she did not have sufficient evidence to prove Mr Kenyatta's guilt beyond reasonable doubt. However, the Prosecutor stated that, "In ordinary circumstances, the insufficiency of evidence would cause the Prosecution to withdraw the charges... however, it would be inappropriate for the Prosecution to withdraw the charges at this stage in light of: (i) the Government of Kenya's ("GoK") continuing failure to cooperate fully with the Court's requests for assistance in this case; and (ii) Mr Kenyatta's position as the head of the GoK."<sup>28</sup> Instead she requested an indefinite adjournment until such time that the revised records request is complied with in full by the Government of Kenya.

Another status conference was scheduled on **7 October 2014** to discuss the status of cooperation between the Prosecution and the Government of Kenya. At the outset the Prosecution noted that, "there is a considerable body of material which the Prosecution says should have been provided, could have been provided and hasn't been provided."<sup>29</sup> Pointing to the 'deadlock' in relation to cooperation, the Prosecution urged the Chamber to make a finding pursuant to article 87(7) of the RS and refer Kenya to the Assembly of States Parties for non-compliance with its obligations. The Attorney General of Kenya accused the Prosecution of conducting prosecutions through the "back-door" and complained that Kenya was being made a "sacrificial lamb" for the failure of the Prosecutor to conduct "proper investigations."<sup>30</sup>

24 Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya, ICC-01/09-02/11-940, para.2.  
25 Prosecution observations on the Government of Kenya's 2 September 2014 update (ICC-01/09-02/11-941-Conf-Exp) (Pursuant to Trial Chamber V(B)'s Order, dated 19 September 2014, the document is reclassified as "Public"), ICC-01/09-02/11-943.  
26 Although GoK claims it is unable to provide the telephone records requested by the OTP, in July 2013, Mr. Uhuru Kenyatta's lawyer Stephen Kay sued the two leading mobile service providers in a domestic court seeking orders for the release to himself of unspecified information, presumably including mobile phone data, although this cannot be confirmed since the proceedings were held in camera. See *Uhuru ICC lawyer takes Airtel and Safaricom to court*, Daily Nation, 29 July 2013, <http://www.nation.co.ke/News/Uhuru-ICC-lawyer-takes-Airtel-and-Safaricom-to-court/-/1056/1931012/-/v669vgz/-/index.html>  
27 *Ibid*, para. 12.  
28 Prosecution notice regarding the provisional trial date, ICC-01/09-02/11-944, para.3.  
29 ICC-01/09-02/11-967, p.5, lines 16-18  
30 ICC-01/09-02/11-967, p.29, lines 6-10.

**Box 1. The Revised Records Request**

<b>Request</b>	<b>Description</b>	<b>OTP Submissions</b>	<b>GoK Submissions</b>
<b>Bank records</b> (Revised Request para 17(5))	<i>Request:</i> "Identify... accounts... held by [Uhuru Muigai Kenyatta] personally, or through third parties... and provide statements... between [1/6/07] and [15/12/10]."	Complied with for 3/4 month period in 2008/9. No other records provided.	Initially, the GoK informed the OTP that it was unable to process this request, contending that there had to be a Court order for them to fulfil it.
<b>Telephone records</b> (Revised Request para 17(7))	<i>Request:</i> "Identify... numbers ascribed to, used by, or associated with [Uhuru Muigai Kenyatta] and... provide... call data records... between [1/6/07] and [15/12/10]."	Upon this, the OTP argued "the notion that the entire apparatus of the GoK cannot produce a single record of a telephone number which its current President may have been using when he was a Cabinet Minister at the relevant time is not to be taken seriously".	"...the information sought relates to a period when mandatory subscriber registration was not in place. Consequently, the only way Safaricom can extract the records requested (if still available) is where the Office of the Prosecutor (OTP) confirms the Mobile Station International Subscriber Directory number (MSISDN) or mobile phone number that was in use by our subscriber Mr Uhuru Muigai Kenyatta between 1 June 2007 and 15 December 2010": GoK filing Annex XXVI(a).
<b>Company records</b> (Revised Request para 17(1))	<i>Request:</i> "Identify... the records relating to companies (etc.)... in which [Uhuru Muigai Kenyatta] had an ownership interest... between [1/6/07] and [15/12/10]."	Requested records not provided.	"...the legal and administrative regime employed at the Companies registry... makes it impossible to do a search by using an individual's [sic] or any other search item other than [the name of the company or the registration number of the company]": GoK Filing Annex XXIV

<p><b>Land registry records</b> (Revised Request para 17(2))</p>	<p><i>Request:</i> "Identify land ...transferred [from Uhuru Muigai Kenyatta or third parties identified above] to any other person... between [1/6/07] and [15/12/10]."</p>	<p>Requested records not provided.</p>	<p>"...we have not found any records relating to Mr Uhuru Kenyatta's land and real property...or companies associated to him. And therefore we are certainly sure that it will not be possible to find any land or property owned or associated with the said individual unless we get further information...on the details [of the property concerned]...There are no alternative means open to the Ministry to obtain this information": GoK Filing Annex XXIX.</p>
<p><b>Tax returns</b> (Revised Request para 17(3))</p>	<p><i>Request:</i> "Identify... Income Tax and VAT returns submitted by [Uhuru Muigai Kenyatta or third parties identified above] between [1/6/07] and [15/12/10]."</p>	<p>Requested Income Tax records not provided. Letter provided stating that Mr Kenyatta was not registered for VAT.</p>	<p>"...the relevant tax returns records obtained from the Kenya revenue Authority were sent to the prosecution...": GoK</p>
<p><b>Foreign exchange records</b> (Revised Request para 17(6))</p>	<p><i>Request:</i> "Identify... transactions by [Uhuru Muigai Kenyatta or third parties identified above] at foreign exchange institutions between [1/6/07] and [15/12/10]."</p>	<p>Complied with, save that no checks done on companies/3rd parties in which Uhuru Muigai Kenyatta had an ownership interest as per Revised Request para 17(1).</p>	<p>"...All foreign exchange Bureaus, they (sic) are required to report to the Central Bank. Transactions that are above...[US\$] 10,000. A review of [the] records for the pertinent period do not indicate any that relate to Mr Kenyatta."<sup>31</sup></p>

31 See ICC-01/09-02/11-943.

“...since the beginning of the OTP’s investigations in April 2010, the GoK has constructed an outward appearance of cooperation, while failing to execute fully the OTP’s most important requests.”

<p><b>Vehicle registration records</b> (Revised Request para 17(4))</p>	<p><i>Request: “Identify... records... [of any] vehicle registered to... [Uhuru Muigai Kenyatta or third parties identified above] between [1/11/07 and 1/4/08].</i></p>	<p>Complied with, save that no checks done on companies/3rd parties in which Uhuru Muigai Kenyatta had an ownership interest as per Revised Request para 17(1).</p>	<p>“...The Authority has no mechanism in place by which it can identify any vehicle(s) regularly used by... corporate entities belonging to or associated to any particular individual”: GoK Filing Annex XXV.</p>
<p><b>Intelligence records</b> (Revised Request para 17(8))</p>	<p><i>Request: “Identify ... any information held by the security and intelligence services of Kenya concerning the activities of [Uhuru Muigai Kenyatta] and any corporate entities identified under paragraph (1) above between [1/6/07] and [15/12/10].”</i></p>	<p>Complied with.</p>	<p>No such information held: GoK filing Annex XXVII.</p>

## Roadblocks to effective prosecution

The OTP has characterized the position of the Government of Kenya as one of “pure obstructionism.”<sup>32</sup> After the withdrawal of charges in the *Muthaura* case the Prosecution highlighted the extent to which the Kenyan Government’s obstructionism has affected its case:

*“...since the beginning of the OTP’s investigations in April 2010, the GoK has constructed an outward appearance of cooperation, while failing to execute fully the OTP’s most important requests. Indeed, while the GoK has provided some cooperation and has complied with a number of OTP requests, the most critical documents and records sought by the OTP remain outstanding, despite the OTP’s exhaustive efforts to urge the GoK to furnish these items. The outstanding documents and records that the OTP has requested from the GoK have*

*been pending for periods that range from one to three years. The individual and cumulative effect of the GoK’s actions has been to undermine the investigation in these cases and limit the body of evidence available to the Chamber at trial.”<sup>33</sup>*

In fact, to date there is still a court order in place that *prevents* the Prosecution from interviewing ten key police officers in Kenya. On **15 July 2010** the Prosecution made a request to interview these ten senior police officers. Hon. Justice Kalpana Rawal was appointed to conduct the process. A suit challenging the process was subsequently filed before the High Court of Kenya.<sup>34</sup>

On **1 February 2011**, a court order was issued, prohibiting Hon. Justice Kalpana Rawal from “taking or recording any evidence from any Kenyan or issuing any summons to any Kenyan for purposes of taking any evidence pursuant

32 ICC-01/09-02/11-T-27-ENG ET WT, lines 11-12.

33 ICC-01/09-02/11-733-Red, 13 May 2013, paras 1-4.

34 *Mwangi v The Hon. Attorney General & Hon. Kalpana Rawal*, HCCC, Petition No. 2 of 2011.

to any International Criminal Court process pending the hearing and determination of the application". The Attorney General, who is the principal legal adviser to the Government and is constitutionally mandated to promote, protect and uphold the rule of law and defend the public interest<sup>35</sup>, did not challenge the application, nor did he appeal against the ruling.<sup>36</sup>

This evidence could be vital, given the widely reported prevalence of crimes committed by the Kenyan police in Kenya during the post-election violence<sup>37</sup>, and could have a direct correlation with the Pre-Trial Chamber's decision not to confirm charges against the former Kenyan police commissioner, Major General Mohammed Hussein Ali. The Prosecutor has stated as much: *"...the Prosecution's efforts to interview police officers, who may have shed light on the alleged police role in the PEV, have been thwarted to date. At the confirmation of charges hearing, however, the **Muthaura** and **Ali** Defence submitted 39 written statements from police and other law enforcement officials. These statements were taken after the issuance of the injunction preventing the Prosecution from interviewing the ten police officials. The GoK's failure actively and effectively to facilitate the OTP's request to interview these police officials contributed to the uneven investigative playing field in this case, in which the Accused has enjoyed unfettered access to evidence that has been denied to the Prosecution."*<sup>38</sup>

Thus, according to the Prosecution, it appears that the Defence team for Major General Mohammed Hussein Ali was able to conduct interviews with a total of 39 police and other law enforcement officers, yet the Prosecution to date has been unable to interview a single Kenyan police officer.

## **Withdrawal of witnesses**

In relation to witness intimidation, the Prosecution has confirmed that the withdrawal of some witnesses "appears to have been motivated at least in part by the anti-ICC climate in certain parts of Kenyan society."<sup>39</sup> In March 2013, the Prosecution decided to apply to withdraw charges against Francis Muthaura citing, amongst other things, state obstruction of access to relevant evidence, but, more chillingly, the actual killing of witnesses:

*"Witnesses who may have been able to provide evidence concerning Mr Muthaura's role in the events of 2007 and 2008 have either been killed, or have died since those events, and other witnesses refuse to speak with the Prosecution. In addition, Madam President, despite assurances of co-operation with the Court, the Government of Kenya has provided only limited assistance to the Prosecution and they have failed to provide the Prosecution with access to witnesses, or documents, that may shed light on Mr Muthaura's case. Further, and as the Chamber is aware, it came to light after the confirmation hearing that a critical witness for the Prosecution against Mr Muthaura had recanted part of his incriminating evidence after receiving bribes."*<sup>40</sup>

By **January 2014** the OTP had withdrawn seven witnesses in the case, three of whom were 'insider' witnesses who had made direct allegations against Mr Kenyatta regarding his alleged role in the post-election violence.<sup>41</sup> Answering a series of questions (see Box 2) posed by the Legal Representative for Victims, whose clients were dismayed at the prospect of the case not going to trial, the Prosecution relayed that:

*"In terms of the climate of fear, the Prosecution's case has been weakened by the withdrawal of witnesses concerned that testifying against*

35 Article 156 Constitution of Kenya. The constitution also provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya" Article 2(4). This also applies to the Rome Statute.

36 As the Legal Representative for victims, Fergal Gaynor, asserts the Attorney General has instead used the interim order to justify the inaction of the Government of Kenya; cf. ICC-01/09-02/11-713, 9 April 2013, para.42. This is contrary to the spirit of ss. 77 and 78, International Crimes Act 2008, in ICC-01/09-02/11-904-Corr.

37 cf. The Commission of Inquiry on the Post-Election Violence (CIPEV) Report. .

38 ICC-01/09-02/11-733-Red, 10 May 2013, paras 20-24.

39 ICC-01/09-02/11-892-AnxA-Red, p.2.

40 ICC-01/09-02/11-T-23-ENG ET WT 11-03-2013 1-28 NBT, 11 March 2013, page 4.

41 ICC-01/09-02/11-892-AnxA-Red.



This climate of fear has also chilled the willingness of individuals with information relevant to the case to come forward.



*Mr Kenyatta would expose them or their families to retaliation. Three witnesses – 5, 6 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 the confirmation stage, 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.”<sup>42</sup>*

**Box 2. Questions from the Legal Representative for Victims, answered by the OTP<sup>43</sup>**

**Q1. 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?**

A: 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.

**Q3. 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?**

A. 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.

<sup>42</sup> ICC-01/09-02/11-892-AnxA-Red, annexed to ‘Prosecution opposition to the Defence request for the termination of the Kenyatta case’, ICC-01/09-02/11-89.

<sup>43</sup> *Ibid.*

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.

**Q11. 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?**

A. 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.

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.

### **Asset Freezing Request**

The story is just as dire in relation to the freezing of Mr Kenyatta's assets. Issued by Pre-Trial Chamber II on **5 April 2011**, under seal, the Asset Freezing Order (Order)<sup>44</sup> required the Government of Kenya to freeze the assets of Mr Kenyatta, stating that "the underlying rationale for issuing an order to freeze or seize the assets of an accused person under seal is to ensure that steps are not taken to frustrate the implementation of the order prior to its execution"<sup>45</sup> in particular for the ultimate benefit of victims.

However, the Order was never implemented by the GoK prior to its suspension. The decision issued under seal, required the Kenyan Government to keep the contents of the Order strictly confidential. On **8 April 2013**, in a public filing, the Kenyan Government referred

to a request by the Prosecution for assistance in relation to identifying, tracing, and freezing property and assets of Mr Kenyatta, revealing the existence and substance of the Order.<sup>46</sup>

On 8 May 2014 the OTP requested Trial Chamber V(B) to caution the Government of Kenya under article 87(3) for its improper disclosure of confidential information into the public domain. Further, the OTP stated that further confidential treatment of this information was no longer warranted since "the prejudice caused by this disclosure is irreversible."<sup>47</sup>

On 24 May 2013, the Government stated that the disclosure had been inadvertent and apologised. However in April 2014, nearly one year later, during a status conference, the Trial Chamber was made aware by the Prosecution of a news article available on the internet containing information

44 ICC-01/09-02/11-42, 'Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', pursuant to Trial Chamber V(b)'s Order ICC-01/09-02/11-967, dated 21st October 2014, this document was reclassified as "Public.

45 ICC-01/09-02/11-42, in this decision the Single Judge stressed the identification, freezing and seizure of property and assets "[...] is necessary in the best interests of the victims" to guarantee that, in the event of a conviction, "the said victims, may pursuant to article 75 of the Statute, obtain reparations for the harm which may have been caused to them."

46 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, ICC-01/09-02/11-713, para. 41.

47 ICC-01/09-02/11-733-Red, para. 7.

about the request to identify or freeze the assets of the accused. Tellingly, this was after the Chamber had issued an Order for submissions on the implementation of the request to freeze assets<sup>48</sup> requesting submissions from the parties, participants and Kenyan Government.

Again in September 2014, the Kenyan media reported on information contained in confidential, *ex parte* filings made by the Kenyan Government,<sup>49</sup> quoting directly from those filings.<sup>50</sup> During a public status conference on 7 October 2014, the Attorney General referred to the Prosecutor's confidential application to freeze assets of the accused.<sup>51</sup> Finally, Trial Chamber V(B) was forced to formally caution the Government of Kenya<sup>52</sup>, noting with concern the Government's cumulative inattention to the taking of appropriate measures to ensure the confidentiality of the proceedings; this was together with a pattern of information contained in confidential filings being leaked to the media, in some cases even before the filings had been notified to the Chamber, parties or participants. Indeed, the Chamber noted five occasions in which confidentiality requirements under the Order were breached, four of them involving the Attorney General, Mr Githu Muigai.

## Unprecedented, high-level campaign to terminate the case

For the purposes of article 87(7) the above examples, perhaps with the exception of Kenya's failure to freeze Mr Kenyatta's assets and the

failure of the Kenyan Government to allow 10 key police officers to be interviewed by the OTP<sup>53</sup>, cannot strictly be defined as non-cooperation. However, they have presented significant, if not pivotal, stumbling blocks to the Prosecution's ability to effectively prosecute this case. In addition the position of the accused as the head of state cannot be divorced from the lack of cooperation and obstructionism by the Kenyan Government.<sup>54</sup> Under the Constitution of Kenya, the accused, as President, is constitutionally required to "ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries".<sup>55</sup> Instead of fulfilling this constitutional obligation, the President, his Deputy and their supporters have used their considerable powers and control over the state and their influence at the African Union to continually undermine the search for justice at the ICC for victims of post-election violence, through a sustained local, regional and international campaign against the Court. Since they were elected to office, the following are some of the developments that have increasingly frustrated victims in their quest for justice:

- In March 2013, during his victory speech following the announcement of the election results, President-elect Kenyatta, while committing his future government to continuing to abide by its international obligations, stated pointedly, "However we also expect that the international community will respect our sovereignty and the democratic will of the people of Kenya."<sup>56</sup>
- During President Kenyatta's inauguration ceremony in April 2013, the only foreign head of state chosen to address the gathering,

48 ICC-01/09-02/11-910-Conf.

49 AG Githu Muigai accuses Bensouda of dishonesty on Uhuru data', published 11 September 2014 (<http://www.the-star.co.ke/news/article-189625/ag-githu-muigai-accuses-bensouda-dishonestv-uhuru-data>). This statement was reported in the Kenyan press on 11 September 2014, even before the filing was notified to the Chamber and the Prosecution on 12 September 2014. 'I'm blameless in Uhuru case, Githu tells ICC', published 17 September 2014 (<http://www.the-star.co.ke/news/article-190709/im-blameless-uhuru-case-githu-tells-icc>).

50 ICC-01/09-02/11-948-Anxl, para. 18.

51 ICC-01/09-02/11-T-31-CONF-ENG ET, page 25, lines 7-9

52 "Order concerning the public disclosure of confidential information", ICC-01/09-02/11-967.

53 Given that the OTP has been unable to interview these police officers to date, and have publicly stated their frustrations which the GoK in this matter, it is unclear why this example of non-cooperation by the GoK is not also the subject of an article 87(7) request to the Chamber.

54 The Legal Representative for victims, Mr Fergal Gaynor, asserts that "the positions taken by the accused and by the Government since the election of the accused in March 2013 suggests that the accused continues to preside over a policy of deliberate obstruction of access to evidence relevant to the case against him." See ICC-01/09-02/11-904-Corr, para. 46 (d).

55 Article 132(5) Constitution of Kenya.

56 Speech by president-elect Uhuru Kenyatta, March 9 2013, <http://www.capitalfm.co.ke/eblog/2013/03/09/speech-by-president-elect-uhuru-kenyatta/>

President Yoweri Museveni of Uganda, rabidly attacked the ICC and saluted Kenyans for what he called “the rejection of the blackmail of the International Criminal Court,” which he said was steered by “arrogant actors” to “install leaders of their choice in Africa and eliminate those they don’t like.”<sup>57</sup>

- In May 2013, immediately following the presidential elections, Kenya’s Permanent Representative to the United Nations wrote a letter to the UN Security Council demanding that the cases facing the President and his Deputy at the ICC be withdrawn forthwith “because Kenyans have elected the two to be their political masters.”<sup>58</sup>
- In May 2013, the African Union resolved to support and endorse an East African request for a referral of the ICC investigations and prosecutions in relation to the 2007 post-election violence in Kenya, in line with the principle of complementarity, to allow for a National Mechanism to investigate and prosecute the cases.<sup>59</sup> This despite the fact that there had been a clear lack of political will to prosecute even lower level perpetrators in domestic courts.<sup>60</sup>
- In September 2013, both Chambers of Parliament, which are dominated by Kenyatta’s and Ruto’s ruling Jubilee Coalition, passed resolutions to withdraw Kenya from the Rome Statute and repeal the International Crimes Act, which domesticates it.<sup>61</sup> These resolutions have to date not been acted upon by the Executive, but a Member of Parliament representing the President’s constituency,

and one of his most vocal supporters, has recently filed a motion to summon the Foreign Secretary to Parliament to show cause why she should not be sacked for failing to implement the resolutions.<sup>62</sup>

- In October 2013, at the request of Kenya and Mauritania, the African Union held an extraordinary summit at which it resolved that no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity during their term of office; and that the trials of President Kenyatta and Deputy President Ruto should be suspended until they complete their terms of office.<sup>63</sup>
- In November 2013, the Kenya Government sought, but failed to have the cases against President Kenyatta and Deputy President Ruto at the ICC deferred by the UN Security Council under Article 16 of the Rome Statute.<sup>64</sup>
- In late November 2013, during the 12th meeting of the Assembly of States Parties in The Hague, Kenya demanded and got an extended eight hour plenary debate on head of state immunity and subsequently managed to force through changes to Rule 134 of the rules of procedure allowing senior officials such as Mr Kenyatta and Mr Ruto to be away from trial and be represented by their lawyers.<sup>65</sup>
- On 22nd November 2013, the Kenyan Government notified the UN Secretary General, in accordance with the requirement of the Rome Statute, of its intention to propose

57 Silence on Awkward Topics at Inauguration of Kenya’s President, New York Times, 9 April 2013, [http://www.nytimes.com/2013/04/10/world/africa/kenyatta-sworn-in-as-president-of-kenya.html?\\_r=0](http://www.nytimes.com/2013/04/10/world/africa/kenyatta-sworn-in-as-president-of-kenya.html?_r=0)

58 Kenya asks UN to end Uhuru, Ruto ICC trial, The East African, 9 May 2013, <http://www.theeastafrican.co.ke/news/Kenya-asks-UN-to-end-Uhuru-Ruto-ICC-trial/-/2558/1848168/-/w9u2r1/-/index.html>

59 Assembly of the African Union, Twenty-First Ordinary Session, Decisions, Declarations and Resolution, [http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20474-489%20\(XXI\)%20\\_E.pdf](http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20474-489%20(XXI)%20_E.pdf)

60 The Director of Public Prosecutions has declared over 6000 PEV files reviewed by a special task force to be un-prosecutable for lack of evidence

61 Kenyan MPs vote to withdraw from the ICC, <http://www.bbc.com/news/world-africa-23969316>

62 Gatundu South MP Moses Kuria files motion to summon CS Amb. Amina Mohamed [“The first term legislator says that Cabinet Secretary Amina will appear before parliament on 14th October to explain why she should not be sacked for ignoring the national assembly’s decision.”], <http://www.standardmedia.co.ke/ktn/video/watch/2000083240/-gatundu-south-mp-moses-kuria-files-motion-to-summon-cs-amb-amina-mohamed>

63 Extraordinary Session of the African Union, Decisions and Declarations, 12 October 2013, [http://www.iccnw.org/documents/Ext\\_Assembly\\_AU\\_Dec\\_Decl\\_12Oct2013.pdf](http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf)

64 Uhuru Kenyatta’s bid to stop ICC trials fails at the UN, The Daily Nation, November 15 2013, <http://mobile.nation.co.ke/News/UN-rejects-bid-to-stop-Uhuru-and-Ruto-trials/-/1950946/2074990/-/format/xhtml/-/snxatbz/-/index.html>

65 ASP adopts Kenya, AU amendments to ICC rules, The Star Newspaper, 28 November 2013. <http://www.the-star.co.ke/news/article-145410/asp-adopts-kenya-au-amendments-icc-rules>



Instead of working to secure co-operation with this Court, the Accused instead presided over an unprecedented, high-level campaign to terminate the case against him. This included the GoK seeking and securing debates before the African Union, the United Nations Security Council and the ASP, and lobbying for rule changes in favour of the Accused at the ASP. - Legal Representative for Victims.



amendments to the Statute including the following:

- a. "...serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions"
  - b. "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions."<sup>66</sup>
- In June 2014 during its 23rd Ordinary Session held in Malabo, Equatorial Guinea, the African Union adopted an amendment to the Protocol on the Statute of the African Court of Justice and Human Rights granting immunity from criminal prosecution to African leaders accused of committing serious human rights violations before the proposed African Court of Justice and Human Rights.<sup>67</sup>
  - On 30 October 2014, using the well-worn argument of the ICC being a neo-colonial court, Kenya's Permanent Representative to the United Nations, Amb. Macharia Kamau, in his response to the report of the International Criminal Court to the 69th Session of the UN General Assembly, made a scathing attack on the Court. He accused the ICC, without substantiation, of acting at the behest of "a pernicious group of countries that have hijacked its operational mandate and created a distorted institution that now represents the moral, ethical, and...political values of this group of countries."<sup>68</sup>

A clear line can be drawn from Kenya's failure to fulfil its obligations under the Rome Statute to the

President of Kenya. As the Legal Representative for victims argues "Instead of working to secure co-operation with this Court, the Accused instead presided over an unprecedented, high-level campaign to terminate the case against him. This included the GoK seeking and securing debates before the African Union, the United Nations Security Council and the ASP, and lobbying for rule changes in favour of the Accused at the ASP."<sup>69</sup> *"Instead of working to secure co-operation with this Court, the Accused instead presided over an unprecedented, high-level campaign to terminate the case against him. This included the GoK seeking and securing debates before the African Union, the United Nations Security Council and the ASP, and lobbying for rule changes in favour of the Accused at the ASP. - Legal Representative for Victims.*

### **Waiting for arrest and surrender: The Prosecutor v. Walter Osapiri Barasa**

On **2 October 2013** an arrest warrant against Mr Walter Osapiri Barasa was unsealed.<sup>70</sup> The Prosecution alleges that Walter Barasa is criminally responsible as direct perpetrator, under article 25(3)(a) or alternatively article 25(3)(f) of the Rome Statute for three counts of offences against the administration of justice consisting in corruptly or attempting to corruptly influence three ICC witnesses. Mr Barasa is accused of corruptly trying to influence witnesses P-0336, P-0536 and P-0256 by offering to pay them various sums of money in order to influence them to withdraw as prosecution witnesses in the Ruto & Sang case, during the period 20 May to 21 July 2013 at or near Kampala, Uganda.<sup>71</sup>

66 Rome Statute Proposed Kenyan Amendments, <https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>

67 The 23rd Ordinary Session of the African Union ends in Malabo, <http://summits.au.int/en/23rdsummit/events/23rd-ordinary-session-african-union-ends-malabo>

68 Statement by Amb. Macharia Kamau, Ambassador/Permanent Representative of the Republic of Kenya, Agenda Item 73, Report of the International Criminal Court, 69th Session of the United Nations General Assembly, Thursday October 30th, 2014. <https://papersmart.unmeetings.org/media2/4654809/kenya-e-34-73.pdf>

69 ICC-01/09-02/11-879-Red, Para. 35. As S.D Mueller also notes "as late as October 2012, Kenya's Attorney General Githu Muigai still insisted that the EACJ could be used to try the ICC cases while also making anti-ICC statements in a conference on the ICC in Nuremberg. These were not cooperative noises, especially coming from Kenya's chief legal officer." S.D Mueller, 'Kenya and the International Criminal Court (ICC): politics, the election and the law', *Journal of Eastern African Studies*, 2014, p 7 available at: <http://dx.doi.org/10.1080/17531055.2013.874142>

70 'Warrant of arrest for Walter Osapiri Barasa', ICC-01/09-01/13-1-Red2 02-10-2013 3/20 NM PT, pursuant to the Decisions ICC-01/09-01/13-14-US-Exp and ICC-01/09-01/13-11-US-Exp, this document was reclassified as public.

71 *Ibid.*

Rule 162(1) of the Rules states that the Chamber, before deciding whether to exercise jurisdiction over offences against the administration of justice under article 70 of the Statute, may consult with States Parties that may have jurisdiction over the offence. However, the Single Judge was convinced by the Prosecutor's argument that there were "good reasons for the Court to proceed to exercise its jurisdiction without engaging in prior consultations with any State Party" – namely "the unlikelihood that effective prosecution over the facts alleged in the Prosecutor's Application be promptly undertaken by a State Party, especially in light of the apparent urgency of the matter and the ensuing need to act with the utmost expeditiousness."<sup>72</sup> Note the Single Judge's use of the words "urgency" and "expeditiousness". According to article 59, a State Party that has received a request for the arrest and surrender or provisional arrest of a person must take *immediate* steps to arrest that person following its national procedures and Part 9 of the RS. At the time of this report going to print, Mr Barasa has yet to be arrested and surrendered to the Court.<sup>73</sup> It is unclear why this is the case. In some circumstances one could point to lack of enabling domestic legislation. However, Kenya has excellent domestic enabling legislation. The Kenyan International Crimes Act of 2008 (ICA) makes provision for the punishment of international crimes and enables Kenya to cooperate with the ICC.

### **Arrest and Surrender**

Under the ICA, the relevant minister is required to present the ICC arrest warrant to a judge of the High Court.<sup>74</sup> The judge of the High Court is then required to issue a Kenyan arrest warrant and the suspect is entitled to apply for bail. The High

Court is required to consider the eligibility of a suspect for surrender. If such a consideration is made in the affirmative, the competent minister is required, formally, to make a surrender order with respect to the person that the High Court has declared eligible for surrender.

Mr Barasa contested the legality of any surrender to the ICC as contrary to the Kenyan Constitution in an attempt to stop both his own transfer to The Hague, and more generally to have the ICC's acts in Kenya declared as unconstitutional. Mr Barasa claimed to be concerned about the possibility of obtaining a fair trial at the ICC as a result of the Prosecutor's conduct. Mr Barasa's petition was rejected on 31 January 2014, with the High Court finding that the ICC was competent to act in Kenya, that the Statute had been lawfully ratified and implemented through the International Crimes Act 2008 and that Mr Barasa could be transferred to the ICC.<sup>75</sup> Mr Barasa's lawyer filed an appeal, but failed to show up for the hearing in Kenya. This petition was rejected on 31 January 2014.<sup>76</sup>

Thereafter, on 14 May 2014, Principal High Court Judge Mwangi ordered that a Kenyan arrest warrant be issued against Mr Barasa – based on an application by the Director of Public Prosecutions, after which an ICC arrest warrant was issued. On 29 May 2014, the Kenyan Court of Appeal suspended the ICC arrest warrant to allow Mr Barasa's case to be heard and determined by the Court of Appeal.<sup>77</sup> However, in September 2014 the appeals hearing failed to kick off due to the failure of the office of the Inspector General of Police (IG), Attorney General (AG) and Interior Cabinet Secretary (CS) to file their responses in a timely manner.<sup>78</sup>

72 *Ibid.*, para.

73 Article 89 specifically addresses "surrender of persons to the Court. Under Article 89(1), the Court can transmit a request for the arrest and surrender of a person, together with material supporting that request, to a State on the territory of which that person may be found. The Statute is clear as to the obligation of States Parties upon receiving such a request: they must comply

74 See articles 29, 30, 36, 39 and 43 of the International Crimes Act, Kenya, 2008.

75 *Walter Osapiri Barasa v Cabinet Secretary Ministry Of Interior And National Co-Ordination & 6 others* [2014] eKLR, available at: <http://kenyalaw.org/caselaw/cases/view/93955/> [7 November 2014].

76 *Ibid.*

77 See, International Justice Monitor, 'Kenyan Court of Appeal Suspends Arrest Warrant Against Barasa', 29 May 2014, available at: <http://www.ijmonitor.org/2014/05/kenyan-court-of-appeal-suspends-arrest-warrant-against-barasa/>.

78 <http://www.capitalfm.co.ke/news/2014/09/barasa-icc-appeal-fails-to-kick-off/>

It was hoped that the procedure for arrest and surrender to the ICC of suspects would be less burdensome than ordinary extradition procedures; however, in this case this does not appear to be so.<sup>79</sup> Whether this is a sign of things to come is debatable; the failure of the Attorney General, Inspector General and Interior Cabinet Secretary to file their responses in good time could well point to another well-rehearsed saga of obfuscation by the Kenyan Government. The matter of whether the Rome Statute has the force of law in Kenya has even been affirmed by the Government of Kenya in filings to the Appeals Chamber in the *Ruto & Sang* case, so a reasonable conclusion would be that domestic appeals proceedings in Kenya would be expeditious, given that the law in this area is practically settled.<sup>80</sup>

Given the prevalence of witness intimidation in both the Kenya cases, Mr Barasa's trial would shed light on whether witnesses were in fact bribed as the Prosecutor alleges, and more importantly, at whose behest? Thus it is in the interests of the Kenyan Government that Mr Barasa is surrendered to the ICC as expeditiously as possible, if only to ensure that they are not seen to be non-cooperative and obstructing the emergence of the truth.

## The Prosecutor v. William Samoei Ruto and Joshua Arap Sang

On **29 November 2013**<sup>81</sup>, the OTP requested Trial Chamber V(A) to exercise its powers under article 64(6)(b)<sup>82</sup> to "require the attendance

and testimony of witnesses" P-0015, P-0016, P-0336, P-0397, P-0516, P-0524 and P-0495.<sup>83</sup> The Prosecution asserted that the seven persons had given statements to the Prosecution describing pre-election meetings they had attended, some at Mr Ruto's home, where the post-election violence was planned. At these meetings they asserted that those present, including Mr Ruto, distributed money and weapons. In addition, some of these witnesses described broadcasts on Mr Sang's radio station in which Mr Sang incited violence and acts of violence during the post-election violence itself. The identity of these witnesses was disclosed to the Defence in February, March and April 2013 and subsequently the witnesses either refused to communicate with the Prosecution or informed the Prosecution that they were no longer willing to testify, after years of cooperating. Thus, the OTP requested the Court to seek the assistance of the Kenyan Government pursuant to article 64(6)(b) and article 93, to take steps to secure the witnesses' appearance at an appropriate location in Kenya for purposes of testifying before the Court (in situ or by means of video-link technology) in the on-going trial.<sup>84</sup>

The Trial Chamber held a status conference on 29 January 2014 and requested written submissions from the Government of Kenya as to whether the relief sought by the Prosecutor was prohibited by Kenyan law. The Government submitted that "for purposes of testifying before the Court", and under the International Crimes Act, "a witness cannot be compelled to appear and testify before the Court regardless of where the Court is sitting."<sup>85</sup>

79 V. Oosterveld, M. Perry and J. McManus, 'The Cooperation of States with the International Criminal Court' *Fordham International Law Journal*, Vol.25, Issue 3, 2004, Article 14, argue that "States agreed to create a process for the ICC that is somewhat more streamlined than State-to-State extradition. The solution adopted was to oblige States to "surrender" persons to the Court, with the procedure to be followed left to the individual States, subject to certain limitations. Accordingly, under Article 91 (2) (c) of the Rome Statute, the procedural requirements imposed by States for the surrender of persons to the ICC: should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

80 See ICC-01/09-01/11-1406, para.6, where the Government of Kenya states that "...Article 2(6) of the Constitution and Section 4(1) of the ICA does give the Rome Statute the direct force of law in Kenya".

81 ICC-01/09-01/11-1120-Red2-Corr.

82 Article 64(6)(b) reads as follows: In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute.

83 On 20 February 2014, the Prosecution filed a supplementary request adding a witness to the relief sought in the Summonses Request, Prosecution's supplementary request under article 64(6)(b) and article 93 to summon a further witness, 19 February 2014, ICC-01/09-01/11-1188-Conf-Red, with confidential annexes 1 to 6. An ex parte version was filed on the same day, and the ex parte and confidential redacted versions were notified on 20 February 2014.

84 ICC-01/09-01/11-1120-Red2-Corr, para.3.

85 ICC-01/09-01/11-1184, para. 5.

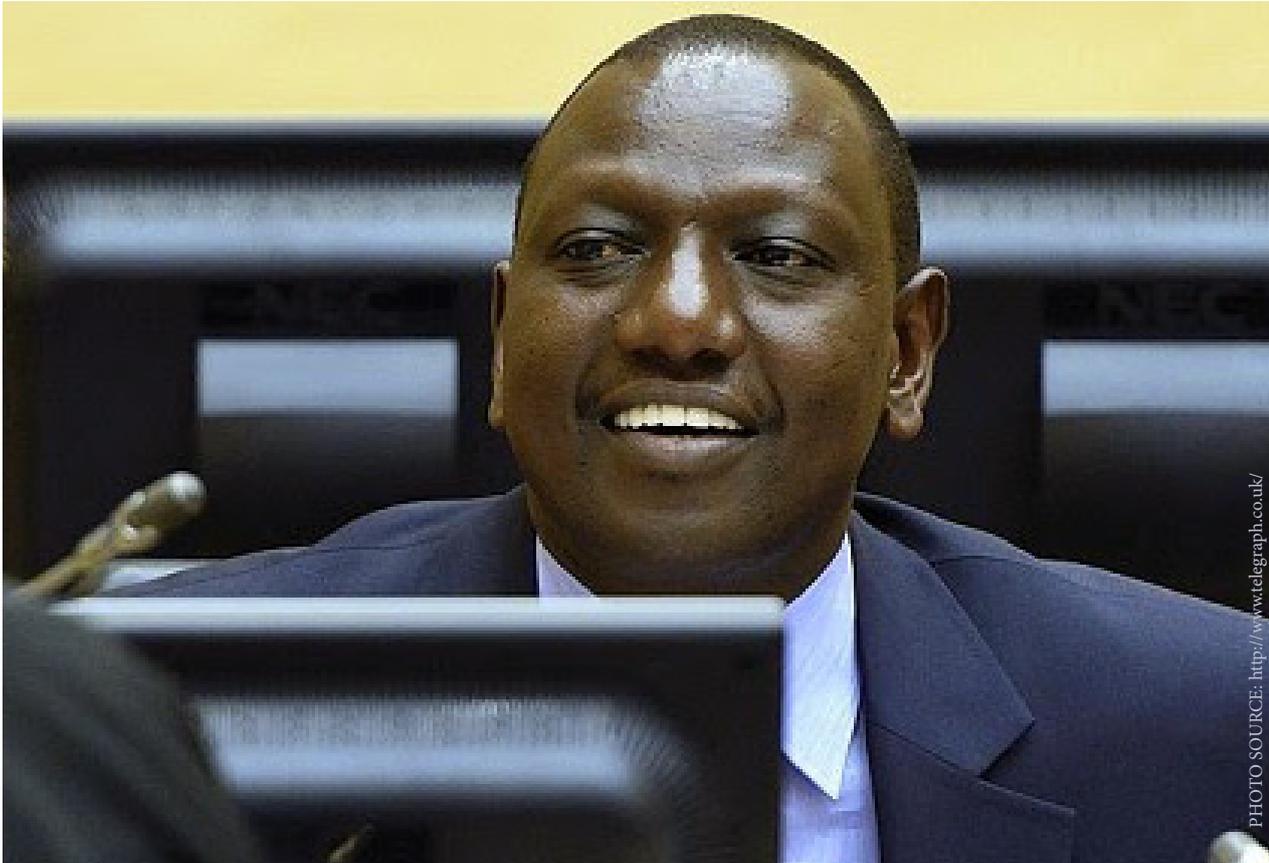


PHOTO SOURCE: <http://www.telegraph.co.uk/>

William Ruto



PHOTO SOURCE: <http://thekenyanonline.com/>

Joshua Sang

On **17 April 2014**, Trial Chamber V (A) granted, by majority, the Prosecutor's request to subpoena eight Kenyan witnesses to appear before the Trial Chamber in the trial of *Ruto & Sang*. The Chamber considered that the decision was amply supported by both general international law and the provisions of the Rome Statute, to the effect that the Rome Statute States Parties did not intend to create an ICC that is 'in terms a substance, in truth a phantom'. Rather, they must be presumed to have created a court with every necessary competence, power, ability and capability to exercise its functions and fulfil its mandate in an effective way. These include the power to subpoena witnesses.

In that connection, the Chamber found that there is unity among international law, the Rome Statute, the Constitution of Kenya and the laws of Kenya concerning its dealings with the ICC. As such, the Chamber found that the Government of Kenya has an obligation to cooperate fully with the Court, by serving the subpoenas to the witnesses, by assisting in compelling their attendance before the Chamber and by the use of compulsory measures as necessary. Trial Chamber V (A) directed the Registry of the Court to prepare and transmit a cooperation request to the Republic of Kenya for: (i) the service of summonses by the GoK on these eight witnesses; (ii) assistance in compelling and ensuring the eight witnesses' appearance before the Chamber by video-link, or before the Chamber convened on the territory of Kenya; (iii) and the GoK to make appropriate arrangements for the security of the eight witnesses until they appear before the Court.<sup>86</sup>

### **Kenyan Government questions fairness of proceedings**

A few weeks later the Government of Kenya filed a request seeking leave to appeal the decision, or alternatively to be allowed to file *amicus curiae* observations.<sup>87</sup> In these observations the Government questioned the fairness of the proceedings if the eight witnesses were compelled to appear, submitting that "when it was signing the Statute, there was nothing in the Statute's terms that would have put it on notice of a requirement that it assist the Court in compelling witness testimony."<sup>88</sup>

On **23 May 2014**, Trial Chamber V (A) granted the Defence teams for Mr Ruto and Mr Sang leave to file an appeal.<sup>89</sup> On 3 June 2014, the Government of the Republic of Kenya sought leave from the Appeals Chamber to submit observations pursuant to Rule 103<sup>90</sup>, which was granted on 10 June 2014.<sup>91</sup> In its submissions the Government argued that the Majority had erred in finding that the Government is obliged to compel the appearance of witnesses subject to a subpoena, stating that: "(i) it contradicts the plain language of Kenya's domestic implementing legislation, the International Crimes Act (2008) and its drafting history; (ii) it is contrary to the Constitution of Kenya, it would unfairly and retroactively impose a criminal sanction on witnesses who thought they were participating in a voluntary process; and (iii) it is contrary to the Rome Statute and controverts the understanding of other States Parties who have ratified the Rome Statute."<sup>92</sup>

The Prosecution termed the Government's arguments as not being "cogent" or "well-reasoned", stating that "the Court cannot be asked to accept blindly a State's position on

86 ICC-01/09-01/1 1-1274.

87 The Government of the Republic of Kenya's Request for an Extension of Time and/or Leave to Seek Leave to Appeal the Decision on Prosecutor's Application for Witness Summons and resulting Request for State Party Cooperation, 25 April 2014, ICC-01/09-01/11-1277

88 ICC-01/09-01/11-1304, para. 22.

89 ICC-01/09-01/11-1313.

90 ICC-01/09-01/11-1333.

91 ICC-01/09-01/11-1350.

92 ICC-01/09-01/11-1406, para.2.

what its legislation says when that State has not shown that its interpretation is firmly rooted in the applicable domestic provisions, or when its arguments are manifestly weak or plainly unpersuasive.”<sup>93</sup> The Appeals Chamber rejected the Defence appeal and the arguments made by the Kenyan Government<sup>94</sup>, noting that “... the question before it is whether Kenya is under an obligation to assist in compelling the appearance of witnesses before the Court. In light of the foregoing and having found that article 93 (1) (b) of the Statute provides the legal basis for Kenya’s obligation to compel witnesses to appear before the Trial Chamber sitting in situ or by way of video-link, the Appeals Chamber will not consider the arguments relating to Kenyan domestic law any further.”<sup>95</sup> The eight witnesses were able to testify via video-link eventually, with several being declared as hostile witnesses by the Chamber.

## State cooperation and the future of the ICC

The three Kenya cases illustrate that the Kenyan Government has been less than forthcoming in providing prompt and genuine cooperation with the ICC. In fact, it could be argued that it has done exactly the opposite, often aligning its position with the three accused. In the face of such non-cooperation, what can the ICC do in order to ensure that it remains able in carrying out effective prosecutions?

Victims have expressed strong opinions on the matter: in an annex<sup>96</sup> to a filing submitted by the Legal Representative for Victims, a/35046/14, a victim participating in the *Kenyatta* case states that he “...want[s] the Government of Kenya to

be sanctioned. All those countries that provide aid to Kenya should pull out and the Assembly of State parties notified of Kenya’s non – cooperation...”

In the same annex, victim a/9308/11 further asserts that “Kenya is undermining the Rome Statute that it signed. Arrest warrants should be issued against those who are obstructing the court. Strong action should be taken to deal with Kenya...”

Other victims want sanctions against the Kenyan government or arrest warrants to be issued against those who are obstructing the course of justice; all are frustrated. These are the voices of Kenyan victims - victims whose quest for justice and compensation has been thwarted at every turn. They do not see the Court as a “toy of declining imperial powers.”<sup>97</sup> To them justice has no tribe, no ethnicity, no colour. Not a single victim has raised questions about why investigations were commenced in Kenya; instead, investigations were welcomed wholeheartedly by victims from across ethnic divides. However, whether sanctions or arrest warrants will make cooperation with the ICC more effective remains to be seen. What is clear is that the States Parties cannot and must not allow non-cooperation by fellow member states to pervert the course of justice.

### **Decision on the Prosecution’s application for a finding of non-compliance**<sup>98</sup>

On 3 December 2014, Trial Chamber V(B) ruled on the Prosecution’s request that the Government of Kenya be referred to the ASP under article 87(7)

93 ICC-01/09-01/11-1412, para 4.

94 Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”, ICC-01/09-01/11-1598.

95 *Ibid*, para. 133.

96 Annex to the Public Redacted Version of ‘Victims’ response to Prosecution notice regarding the provisional trial’, ICC-01/09-02/11-946-Anx.

97 Mr Kenyatta addressed the AU at the Extraordinary Session of the Assembly of Heads of State at Government in Addis Ababa on 13 October 2013, describing the court as “the toy of declining imperial powers” and saying it represented “a fetid insult” to Africa. He added: “It is the fact that this court performs on the cue of European and American governments against the sovereignty of African States and peoples that should outrage us. People have termed this situation ‘race-hunting’. I find great difficulty adjudging them wrong.” Full speech available at <http://bit.ly/1eAeoGS> [7 November 2014].

98 Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-01/11-982.

for a failure to provide financial and other records relating to Mr Kenyatta. Despite highlighting that the Government of Kenya had not complied with its cooperation obligations, and that it had failed to meet a standard of good faith cooperation in relation to the record requests, the Chamber did not refer Kenya to the ASP. The Chamber asserted that its power to make a finding of non-compliance under article 87(7) is a discretionary one. Therefore, even where a state has been non-compliant, it is up to the relevant Chamber to determine whether making such a referral would be “appropriate in the circumstances.”<sup>100</sup>

### **Company Records**

The Chamber was not convinced by the Government of Kenya’s argument that a physical search of approximately 2 million companies records would be impossible by the Kenyan Government with the assistance of the OTP if necessary. Further to this, the Chamber noted that no adequate explanation was provided by the Kenyan Government as to why ownership or directorship interests could not have been obtained through a direct search with the Companies registry or other avenues. The Chamber was not persuaded that the failure to execute this request was one of capacity, and criticized the OTP for failing to rebut the Kenyan Government’s argument.

### **Land Transfer Records**

In relation to this request the Chamber considered “unhelpful the Kenyan Government’s repeated representation that the provision of, inter alia, such a PIN by the Prosecution is necessary in order to execute the request. Furthermore, even if the Chamber assumes that the accused’s PIN is necessary in order to execute the request, it considers it unreasonable that the Kenyan Government could not identify the PIN of the accused.”<sup>101</sup>

99 Emphasis added.

100 *Ibid*, para.39.

101 ICC-01/09-01/11-982, para. 56.

102 *Ibid*, para. 60.

### **Tax Records**

The Chamber noted that in the Revised Request, the Prosecution has clearly, and repeatedly, requested the Kenyan Government to provide copies of those tax return forms and that the Kenyan Government had not done so. The Chamber stating that “no adequate explanation has been provided for this failure. Indeed, it was only at the status conference on 7 October 2014 - six months after the Revised Request was issued and only when directly asked by the Chamber - that the Kenyan Government for the first time specifically addressed the non-provision of those materials. The explanation then provided by the Attorney General - that the revenue authority does not retain the tax return forms submitted by tax payers - appeared to base itself on a letter from the Kenyan Revenue Authority, which, in the view of the Chamber, is not necessarily clear on this point.”<sup>102</sup> Again the Chamber concluded that the issue was not one of a lack of capacity on the part of the Kenyan Government, and the response by GoK fell below the standard of good faith cooperation from States Parties.

### **Vehicle Records**

Noting that the Prosecution considered this request has been complied with; the Chamber highlighted that the information provided appeared to have been provided voluntarily by the Defence and that provision of such material by the Defence does not relieve a State of its cooperation obligations under the RS.

### **Bank Records**

The Chamber noted that the Government of Kenya had taken no steps to provide the OTP with the requested records, and nor was an explanation provided for its failure to do so. Once again, the Chamber found that the failure to facilitate this request was not one of capacity, or

practical and administrative barriers and that the failure to provide the bank records fell short of the standard of good faith cooperation required from States Parties.

### **Foreign Transaction Records**

Noting that the Prosecution was satisfied with the execution of this request, the Chamber treated this request as being complied with, despite the Kenyan Government's response that a search of the relevant register revealed that no such transactions were recorded by Mr Kenyatta within the relevant period.

### **Telephone Records**

In relation to the failure of the Kenyan Government to execute this request and provide the OTP with the relevant data, the Chamber noted once again that "the failure to execute the request under this category is not simply an issue of capacity, of practical or administrative barriers or a result of insufficient information having been provided by the Prosecution. The Chamber considers that the failure on the part of the Kenyan Government to provide clear and specific responses to the queries raised or to take necessary domestic steps to compel production of the relevant information, falls below the standard of good faith cooperation required from State Parties."<sup>103</sup>

### **Intelligence Records**

The Chamber considered this category of material to be complied.

The Chamber in its overall assessment, pointed to the explanations provided by the Kenyan Government in relation to the provision of certain materials, as being 'unhelpful' or not responding to the query raised. The Chamber

also criticized the 'narrow approach' taken by the Kenyan Government and "noted with concern certain submissions of the Kenyan Government which are indicative of a non-cooperative stance premised on factors which the Chamber considers are inappropriate and irrelevant considerations in the sole context of the cooperation."<sup>104</sup> Indeed, the Chamber stated that "notwithstanding the Chamber's concerns regarding the adequacy of the Prosecution's approach to this litigation, the Chamber finds that, cumulatively, the approach of the Kenyan Government, as outlined above, falls short of the standard of good faith cooperation required under Article 93 of the Statute. The Chamber considers that this failure has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute."<sup>105</sup> Additionally, the Chamber was also of the opinion that non-compliance by the Kenyan Government had compromised Prosecution's ability to thoroughly investigate the charges and impinged upon the Chamber's own truth-seeking function under article 69(3) of the RS.

Despite its findings, the Chamber eventually concluded that "considering the Prosecution's concession that the evidence fell below the standard required for trial and that the possibility of obtaining the necessary evidence, even if the Revised Request was to be fully executed, is still nothing more than speculative, the Chamber is not persuaded that a referral to the ASP would facilitate a fair trial or the interests of justice. In any case, in this specific case, the Chamber does not consider it appropriate for the proceedings to be further prolonged under the current circumstances."<sup>106</sup> Thus, Kenya's non-cooperation was not referred to the ASP for further action which could have serious repercussions for general state cooperation at the ICC. If Kenya can "get away with it", it is likely that other states will act in a similar manner and act as an obstacle to criminal proceedings and investigations.

103 ICC-01/09-01/11-982, para. 72.

104 *Ibid.*, para. 77.

105 *Ibid.*, para. 78.

106 ICC-01/09-02/11-982, para.82.

## Future considerations

Essentially, the problem remains that the Rome Statute is largely silent concerning repercussions for violations of its provisions. The ICC cannot issue binding orders to States, but can only request their cooperation. This is exemplified in the *Blaskic* Subpoena Interlocutory Appeal the Chamber which determined that the Tribunal could not issue subpoenas to States or state officials as a result of functional immunity and therefore could not take enforcement measures against States. The Rome Statute provisions follow in the same vein.

It is clear from the experiences of the ICTY and the ICTR that state cooperation is imperative to the effectiveness of any prosecutions. The decisions, orders and requests of the Court can only be enforced by national authorities. With no enforcement agency at its disposal, the ICC cannot execute arrest warrants, compel witnesses to give testimony, collect evidence or visit the scenes where the crimes were perpetrated, without the acquiescence of national state authorities. Article 28 of the ICTR Statute and Article 29 of the ICTY provided a very general provision for state cooperation in that, "States shall cooperate with the International Tribunal" and "shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber". Most of the law of the two tribunals were thus judge-made, of course, (as opposed to statutory law which the ICC judges have to interpret) with the Chapter VII authority of the Security Council behind them.

Furthermore, effective cooperation is not only an issue for the proper investigation and prosecution of a case – it is crucial for mounting a proper defence in respect of an accused person or suspect. Fair trial rights are at risk if proper cooperation is not effectuated by States Parties as demonstrated by cases at the ICTY and the ICTR. Indeed, one can imagine instances where a State might block evidence to an accused person – evidence necessary, for example, to prove the innocence of such an accused. As Katz<sup>107</sup> argues, the same problems relating to cooperation also affect the defence, citing the *Blaskic* case before the ICTY where the then president of Croatia, Franjo Tudjman, had refused numerous requests for cooperation from the ICTY. In addition, counsel for Tadic stated that the "lack of cooperation displayed by the authorities in the Republika Srpska had a disproportionate impact on the Defence ... and The effect of this lack of cooperation was serious enough to frustrate [Tadic's] right to a fair trial."<sup>108</sup>

In relation to the ICTR, apart from Rwanda's failure to cooperate regarding defence requests concerning the production of documents or the summoning of witnesses,<sup>109</sup> the *Barayagwiza* case is illustrative of how a State can bully an international tribunal into submission.<sup>110</sup> The decision of the Appeals Chamber granting Barayagwiza's release and dismissal of charges against him in order to "remedy prosecutorial inaction and the resultant denial of Barayagwiza's rights in 1999"<sup>111</sup> resulted in Rwanda suspending all cooperation with the Tribunal until the Appeals Chamber reversed its decision in 2001.<sup>112</sup> Thus,

107 J.C. Katz, 'International Criminal Courts and Fair Trials: Difficulties and Prospects', *Yale Journal of International Law*, Vol. 27, p. 111, 2002, University of Cincinnati Public Law Research Paper No. 06-29

108 The Appeals Chamber did recognise this problem, stating that "[it would] conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State," however it did reject Tadic's Appeal, *Prosecutor v. Duto Tadic*, Case No: IT-94-1-A, Appeals Chamber, 15 July 1999, para.29.

109 For an analysis of the intricacies of problems faced by the defence when requesting such documents see: Charmaine de los Reyes, 'State Cooperation and its Challenges for the International Criminal Tribunal for Rwanda', in Emmanuel Decaux, Adama Dieng and Malick Sow (eds.), *From Human Rights to International Criminal Law / Des droits de l'homme au droit international pénal* (Nijhoff, Leiden, 2007) 55, 80.

110 This example is given to illustrate the power that states have to hamper the effective functioning of international tribunals through non-cooperation. For an analysis of whether the initial decision of the Appeals Chamber granting a permanent stay of proceedings was far too drastic a measure see, for example: The 3 November 1999 decision was quite simply bad law, and the Appeals Chamber had to do something to fix it! William A. Schabas, in André Klip & Göran Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals* (Antwerp, Intersentia, Vol. VI) 261-262). And Swart has commented that 'the violations of the Appellant's rights, although serious, were considerably less egregious and numerous than the Appeals Chamber believed' (Bert Swart, in André Klip and Göran Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, (Intersentia, Antwerp, Vol. II) 206).

111 Appeals Chamber, *Barayagwiza I*, ICTR-97-19-AR72, 3 November 1999, para.99.

112 Appeals Chamber, *Barayagwiza II*, ICTR-97-19-AR72, 31 March 2000.

it is in the best interests of the prosecution, the defence and the victims at the ICC that States fulfil their obligations to cooperate.

Cassese highlights the difference between the 'supra-state' model of cooperation at the ICTY and ICTR whereby the international court is empowered to issue binding orders to States and, in the case of non-compliance, may set in motion enforcement mechanisms, and the state-orientated model at the ICC.<sup>113</sup> Cassese argued that the ICC could have gone further than an article 87(7) referral to the ASP in the case of non-compliance and:

*"articulated the consequences of a Court's finding of non-cooperation by a state. The Statute could have specified that the Assembly of States Parties might agree upon countermeasures, or authorise contracting states to adopt such countermeasures, or, in the event of disagreement, that each contracting state might take such measures. In addition, it would have been appropriate to provide for the possibility of the Security Council stepping in and adopting sanctions even in cases where the matter had not been previously referred by this body to the Court: one fails to see why the Security Council should not act upon Chapter VII if a state refuses to cooperate and such refusal amounts to a threat to the peace, even in cases previously referred to the Court by a state or initiated by the Prosecutor proprio motu. Of course, this possibility is not excluded by the ICC Statute, but it also would have been a good idea expressly to include it."*<sup>114</sup>

Instead Cassese argues that the drafters of the RS were not bold enough to grant the Court greater authority over States, leaving "too many loopholes permitting states to delay or even thwart the Court's proceedings."<sup>115</sup> Unfortunately

the *Prosecutor v Uhuru Muigai Kenyatta* would appear to be a sad example of exactly that, with the Government of Kenya being allowed to delay and do its best to thwart the court proceedings.

### **Political Pressure**

Despite the UNSC backed authority of these tribunals under Chapter VII of the UN Charter, both the ICTY and the ICTR still faced grave and numerous difficulties in securing cooperation from relevant states,<sup>116</sup> notwithstanding the UNSC's condemnation of these instances of non-cooperation. What did work was exercising political leverage. Commentators have argued that what worked in the Balkans in promoting compliance with the ICTY was the political support exercised by international actors including the EU's Stabilisation and Association Process, NATO's Partnership for Peace programme, the lifting of economic sanctions and the rendering of multilateral and bilateral assistance by the World Bank and the US.<sup>117</sup> Unfortunately, with the Kenya cases, the institutions that could have exercised that deterrent pressure are either weak, subject to political pressure to toe an anti-ICC line, or absent. The most obvious example would be the African Union, which has even threatened the mass exodus of African countries from the RS and recently approved a resolution granting immunity for heads of state and other senior officials at the African Court of Justice and Human Rights.

Goldsmith and Posner argue that international law is intrinsically weak and unstable, because states will comply with international law only when they fear that noncompliance will result in retaliation or other reputational injuries.<sup>118</sup> In this case

113 A.Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', EJIL 1999, P164. See also R. Rastan, 'The responsibility to enforce – Connecting justice with unity', Chapter 10, in 'Emerging Practice of the International Criminal Court' Carsten Stahn and Göran Sluiter (eds.), 2009, p.165, who states that "the Court is entitled to act, and request compliance from States with its requests for cooperation, even in situations and cases where States or the Security Council have not requested intervention, The ability of the ICC to act independently of prior political sanction represents a significant challenge to state-centric assumptions of world order."

114 *Supra* note 83, p.166.

115 *Ibid.*

116 For example, after having fled Rwanda in 1994, Félicien Kabuga has remained at large and is believed to have resided in the Democratic Republic of Congo and Kenya amongst other countries, a warrant for his arrest remains outstanding.

117 See for example, R.Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities', *Leiden Journal of International Law*, 21 (2008), p.483.

118 J.L Goldsmith and E.A.Posner, 'The Limits of International Law', Oxford University Press, (2005).

there must be severe reputational repercussions for states that do not comply with the RS. A variety of avenues could be used to enforce state cooperation including: condemnation by the Security Council or individual states, financial incentives, conditioning aid to certain states, diplomatic and economic sanctions, as well as the use of force in the most extreme examples. As R. Rastan argues "Should a state fail to cooperate, without an effective international response, the entire system will be undermined" and "the treaty signed in Rome should be viewed not merely as the creation of a court, but rather as the establishment of a system comprising a network of powers and duties between the ICC and nation-states"<sup>119</sup>

### ***Non-states parties and the international community***

Non-states parties, as a part of the international community, also have a part to play. It can be argued that United States and other non-states parties, such as China and Russia, have a role to play, short of ratifying the RS. Indeed the United States can promote the mission of the ICC in many ways, including through its foreign policy agenda.<sup>120</sup> It is clear that the United States has extensive experience using its intelligence capabilities and criminal justice expertise and could play an important role vis-à-vis the ICC. Article 87(5) envisions this type of assistance from non-states parties such as the United States.<sup>121</sup>

At the Kampala Review Conference in 2010 the United States pledged as follows:

- 1) The United States renews its commitment to support rule-of-law and capacity building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide.
- 2) The United States reaffirms President Obama's recognition on May 25, 2010 that we must renew our commitments and strengthen our capabilities to protect and assist civilians caught in the [Lord's Resistance Army's] wake, to receive those that surrender, and to support efforts to bring the LRA leadership to justice.

The US could also condition aid to non-cooperative states.<sup>122</sup> For example, Roper and Barria<sup>123</sup> argue that economic pressure could be one of the most effective methods available to states parties and other states to ensure cooperation from stubborn states, giving the example of the EU, which was very successful in assisting the ICTY because of the perceived economic benefits that Croatia would receive being a member of the EU. They argue that "for states that are highly export-dependent, third-party economic pressure may be one of the most important means by which the international community can assist the ICC in securing the apprehension of suspects"<sup>124</sup> and arguably general state cooperation.

119 *Supra* note 93, p.456.

120 See for example, B. Van Schaak, 'State Cooperation & The International Criminal Court: A Role for the United States?', Santa Clara University School of Law, available at: <http://ssrn.com/abstract=1773691>

121 The American Service members' Protection Act of 2002 (ASPA) was signed into law on January 28, 2008. The current version of ASPA includes the following provisions, subject to full waivers at the discretion of the president: prohibition on cooperation with the International Criminal Court; restrictions on US participation in UN peacekeeping operations; prohibition on direct or indirect transfer of classified national security information, including law enforcement information, to the International Criminal Court, even if no American is accused of a crime; preauthorized authority to free members of the armed forces of the US and certain other persons detained or imprisoned by or on behalf of the international criminal court (the so-called "Hague Invasion" clause). In addition to the specific waiver provisions relevant to specific prohibitions, there is section entitled "Assistance to International Efforts" - also known as the Dodd Amendment - which is essentially a catch-all exception authorizing the US government to participate in a wide-range of international justice efforts.

122 For example, B. Van Schaak, *supra* note 96, argues that "mitigating the anti-cooperation aspects of the American Service-members' Protection Act (ASPA) should be a high priority for the Obama Administration and a repeal of s. 7423 would enable the United States to choose from a range of ways to cooperate with the Court when it is in its interests to do so." She argues that "total ban on U.S. cooperation with the ICC contained within the ASPA hampers the ability of the United States to advance U.S. interests in accountability where they dovetail with situations under investigation by the Court. It also leaves the ICC without U.S. expertise in intelligence and law enforcement. By effectuating modest amendments to the ASPA, the United States can remain a non-State party and still provide cooperation and other forms of support where consistent with United States interests."

123 S.D. ROPER and L. A. Barria (2008), State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects, *Leiden Journal of International Law*, 21, pp 457-476

124 *Ibid.*

It may be worth considering suspension, expulsion, or UNSC sanctions for States Parties that do not comply with their obligations under Part 9 of the Statute.<sup>125</sup> These are all options that the ASP could consider and which would all require amendments to the Rome Statute – amendments which could ensure that the Court continues to remain effective in garnering cooperation from States Parties. However, suspending or expelling Kenya from the States Parties would be counterproductive in this context as it would be the perfect excuse for Kenya to continue its policy of non-cooperation and non-prosecution of mid-to-lower-level perpetrators. The fact is that Kenya is a state that is able but unwilling to cooperate. To quote ICC President Judge Song again '[U]ltimately, the Rome Statute is only as strong as States make it. You hold the key to unlocking the ICC's full potential. The Court has no enforcement powers of its own.'<sup>126</sup>

## Conclusion

Before the Prosecutor withdrew the charges against Uhuru Kenyatta due to, inter-alia, alleged non-cooperation from the Government of

Kenya the International Criminal Court stood at a crossroads. Had the case been referred to the States Parties after a finding of non-compliance, they would have been faced with the choice either to bow to the political pressure that was being exerted by Kenya and her allies under the guise of state sovereignty and extraneous arguments relating to a supposed anti-African bias in the activities of the Court, or the States Parties strengthen the cooperation provisions enshrined in the Rome Statute and give the Kenyan victims the justice they cannot obtain from their own government – the justice they deserve and for which they have waited seven years. In the event, the judges themselves saved the ASP from having to make this choice. But the challenge paused to international criminal justice and the ICC by non-cooperating states remains. Today it is Kenyan victims, but tomorrow there will be others, such as the thousands of Darfurian victims who are yet to see Mr Bashir in court. Unless the States Parties do all that they can to obtain cooperation from non-cooperative states, the value and deterrent effect of the ICC will significantly diminish. Or to put it in another way, the ICC will risk becoming the proverbial dog that barks but has no teeth to bite.

125 For example, the Organisation of American States (OAS) suspended Honduras' membership for interrupting the democratic order, which is a violation of the Charter of the Organization of American States ("OAS Charter"). In order to be suspended, two-thirds of the members must vote affirmatively. While on suspension, Honduras still has a duty to uphold the OAS Charter. The suspension may be lifted "by a decision adopted with the approval of two-thirds of the Member States." This process is comparable to the UN Charter which allows for "expulsion for persistent violations of the principles of the Charter," even though no member state has been expelled since its inception in 1945. The UN allows for suspension first "upon the recommendation" of the UN Security Council and if the principles in the Charter are continuously violated, the UN has the ability to expel a member. In order to expel a member state there must be a two-thirds majority vote and if any UN Security Council member vetoes the expulsion, the member state cannot be expelled.

126 ICC-CPI-20141031-PR1057: 30/10/2014, available at: <http://www.icc-cpi.int/iccdocs/presidency/UNGA-PS-30-10-2014-Eng.pdf>



KENYANS FOR PEACE WITH TRUTH & JUSTICE, (KPTJ) a coalition of citizens and organizations working in the human rights, governance and legal areas that came together after the crisis over the disputed results of the 2007 presidential election and the violence that followed it. Members include: Africa Centre for Open Governance (AfricOG), Bunge la Mwananchi, Centre for the Development of Marginalised Communities (CEDMAC), Centre for Law and Research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The Cradle-the Children's Foundation, Constitution and Reform Education Consortium (CRECO), East African Law Society (EALS), Fahamu, Foster National Cohesion (FONACON), Gay And Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unit (IMLU), Innovative Lawyering, Institute Institute (KLI), Kenya National Commission on Human Rights (KNCHR), Kituo cha Sheria, Mazingira Institute, Muslim Human Rights Forum, The National Civil Society Congress, National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The 4 Cs, Urgent Action Fund (UAF)-Africa, Youth Agenda.

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Editorial: KPTJ [www.africog.org](http://www.africog.org)

Africa Centre for Open Governance  
P.O. Box 18157-00100, Nairobi, Kenya  
Telephone: +254 20-4443707/0737463166  
Email: [admin@africog.org](mailto:admin@africog.org)

Website: [www.africog.org](http://www.africog.org)

KPTJ website: <http://kptj.africog.org>

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