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**International
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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN THE REPUBLIC OF KENYA

Public
With public annexes 1, 3, 4 and 5 and confidential annex 2
Victims' request for review of Prosecution's decision to cease active investigation

Source: Legal Representative of Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for the Defence

Mr Steven Kay, QC
Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda
Ms Caroline Walter

The Office of Public Counsel for the Defence

States Representative

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

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A. Introduction

1. For the reasons set out herein, the victims of the case against Uhuru Muigai Kenyatta (‘Victims’) respectfully request the Pre-Trial Chamber (the ‘Chamber’) to review a decision by the Office of the Prosecutor (the ‘OTP’ or ‘Prosecution’) not to conduct further active investigations in the Kenya II case in the Situation in the Republic of Kenya (‘Kenya II’). The Victims submit that the Prosecution has failed to ensure the effective investigation and prosecution of the crimes committed against them, and seek an effective remedy from the Chamber.
2. The investigation and prosecution of all three persons charged in Kenya II (Mr Kenyatta, Francis Kirimi Muthaura and Mohammed Hussein Ali) were manifestly ineffective. All charges against all three collapsed, before a single day of trial. The Court’s credibility and deterrent effect were damaged. Instead of encouraging interethnic peace and reconciliation, the collapse of all charges against Mr Ali in 2012, Mr Muthaura in 2013, and Mr Kenyatta in 2014 – and the Prosecution’s decision not to further investigate – have instead created in the Victims feelings of bitterness and anger. A less effective investigation or prosecution is difficult to imagine.

3. The most significant reason why all three prosecutions collapsed was pervasive and unlawful obstruction of access to evidence by the Government of the Republic of Kenya ('the Government') and simultaneous efforts to bribe and intimidate key witnesses. The Victims have long and bitter experience of governmental inaction and of impunity of the powerful for crimes against the powerless. They submit that the Prosecution must effectively investigate and prosecute the Kenya II case in order to hold accountable those responsible for the crimes committed against them. They also submit that the Prosecution must respond firmly to the unlawful campaign of obstruction of justice that has permeated this case.
4. The Prosecution instead has decided not to conduct any further active investigation at present. It says that it has concluded that, in the absence of genuine cooperation from the Government, there is no immediate prospect of strengthening the evidence (the 'Decision'). The Prosecution identifies no basis in the Statute for the Decision.
5. The Victims submit that the Decision is unlawful. Article 54(1) of the Statute imposes a strict obligation on the Prosecution to take appropriate measures to ensure that its investigation and prosecution are effective. It implicitly prohibits the Prosecution from ceasing to actively investigate until it has taken those measures. Article 54(1) imposes an obligation to proceed even in uncondusive environments, including in the face of obstruction of justice. It requires an investigation and prosecution that are successful in achieving the objectives of the Court, including ending impunity for serious crimes. International human rights law requires that to be 'effective' an investigation and prosecution must also be prompt and thorough.
6. The Prosecution failed to carry out an effective investigation and prosecution, as evidenced by the total collapse of Kenya II. It failed to make effective use of the remedies for state and individual obstruction of justice in the Statute, or of the evidence-gathering powers conferred upon it by the Statute. Those failures have resulted in violations of the Victims' rights to truth, justice and reparation.
7. A reasonable interpretation of the Statute allows the Prosecution to cease to actively collect inculpatory evidence where: (a) it has collected all relevant evidence under article 54(1) and the case is trial-ready but the accused is at large; (b) the Security Council has suspended the investigation or prosecution pursuant to article 16; (c) the Prosecution has invoked its article 53(4) power to reconsider a decision whether to initiate an investigation or prosecution. None of these applies in Kenya II.

¹ Confidential Annex 2: Letter from OTP to LRV of 2 April 2015, para. 20.

8. The Court's Statute and applicable legal texts do not deal expressly with the scenario now before the Chamber. In particular, the Statute does not address what should happen when all charges against all suspects in a case are withdrawn before a single day of trial has taken place. Nor does it envisage that the Prosecution will abandon an incomplete investigation on the ground that the State Party on whose territory the crimes were committed is unlikely to cooperate. Nor does it provide a remedy for victims when the Prosecution acts unlawfully.
9. The Chamber must therefore apply article 21(1)(b) and (c) and 21(3). Principles and rules of international law (article 21(1)(b)), and general principles of law 'derived by the Court from national laws and legal systems of the world' (article 21(1)(c)), require an investigation of serious crimes that is prompt and thorough, and an effective remedy for victims of such crimes. The right of victims to obtain judicial review of a failure to investigate or prosecute serious crimes exists in at least 70 legal systems of the world and is a remedy that is 'consistent with internationally recognized human rights' (article 21(3)). The Chamber may therefore judicially review the Decision under articles 21 and 68(1).
10. In addition, the Chamber has discretion to review the Decision under article 53(3)(b) and rule 110(2) of the Rules of Procedure and Evidence ('Rules'). The only valid statutory basis for the Decision is either article 53(1)(c) (that further investigation 'would not serve the interests of justice') or article 53(2)(c) (that further prosecution 'is not in the interests of justice'). That is, that the Prosecution *de facto* has decided not to proceed because it has concluded that further investigation or prosecution would be futile, and therefore would not be in the interests of justice.
11. Many factors favour the exercise of the Chamber's discretion to review. In particular, the Chamber must do what it can to preserve and defend the Court's credibility and its deterrent effect, and to ensure that this effect is not weakened through prosecutorial surrender and inaction following a campaign of obstruction of justice.
12. The Victims therefore invite the Chamber to exercise its discretion to review the Decision; to direct the Prosecution to comply with article 54(1); and to decline to confirm the Decision until it is satisfied that the Prosecution has complied.
13. The core issues for the Chamber to resolve are: (a) whether the Prosecution has complied with its obligations under article 54(1) of the Statute; (b) whether, as a result, the Decision is one which the Prosecution is lawfully entitled to make; (c) whether the Decision is reviewable; and (d) whether to review the Decision.

B. Page limit

14. A 'request by any participant to the Pre-Trial Chamber to take specific measures or to issue orders and warrants or to seek State cooperation' is subject to a page limit of 50 pages under Regulation 38(2)(e) of the Regulations of the Court ('RoC').

C. Annexes and confidentiality

15. Attached to this application are:
- a. a representative sample of the views expressed at meetings held in Kenya by the Legal Representative of Victims (the 'LRV') and his field staff with 702 Victims during May and June 2015 (Annex 1);
 - b. a copy of a letter from the LRV to the Prosecution of 20 March 2015 and the Prosecution's response of 2 April 2015 (Annex 2);
 - c. an overview of national laws providing victims a right of judicial review of prosecutorial decisions not to investigate or prosecute across 70 jurisdictions (Annex 3);
 - d. an overview of jurisprudence of the Inter-American Court of Human Rights (the 'IACtHR') and the European Court of Human Rights (the 'ECtHR') concerning victims' right to a thorough investigation and an effective remedy and internet links to those authorities (Annex 4);
 - e. internet links to all authorities other relied upon and (as far as the LRV was able to obtain them) copies of authorities for which there are no internet links, in accordance with regulation 23(3) of the RoC (Annex 5).
16. With the exception of Annex 2, which is filed confidentially at the OTP's request, this application and the annexes thereto are public.²

D. Procedural background

17. On 31 March 2010, the Chamber granted a request by the OTP to proceed with an investigation into the situation in the Republic of Kenya, pursuant to article 15.³
18. On 8 March 2011, in response to an application by the OTP, the Chamber issued summonses to appear before the Court for, *inter alios*, Mr Ali, Mr Muthaura, and Mr Kenyatta, the three principal suspects in 'Kenya II'.⁴

² This application and annexes 3, 4 and 5 were prepared with *pro bono* support from Bryan Cave LLP in New York. The LRV thanks Emma Lindsay, Jovana Crncevic, Bieta Andemariam and Daniel Lewkowicz for their assistance.

³ ICC-01/09-19.

⁴ ICC-01/09-02/11-01.

19. On 23 January 2012, the Chamber confirmed charges against William Ruto and Joshua Sang (the 'Kenya I' case) and against Mr Muthaura and Mr Kenyatta in Kenya II. It did not confirm charges against Mr Ali, who was head of Kenya's police during the 2007-2008 post-election violence (the 'PEV').⁵
20. On 3 October 2012, Trial Chamber V ordered a revised model of victim participation, and directed the LRV to ensure that the views and concerns of the victims he represents were those of individuals qualifying as victims in the present case.⁶
21. On 18 March 2013, the Trial Chamber terminated proceedings against Mr Muthaura.⁷
22. On 31 March 2014, the Trial Chamber declined a Defence request to terminate the case against Mr Kenyatta and ordered a six-month period of closely supervised cooperation by the Government with the aim of securing the delivery to the Court of cellphone, financial and other data requested by the Prosecution relevant to the case against Mr Kenyatta, failing which referral pursuant to article 87(7) would ensue.⁸
23. On 3 December 2014, the Trial Chamber, in rejecting the Prosecution's sole article 87(7) request, found that the Government had failed to comply with the Statute but declined to refer Kenya to the Assembly of States Parties (the 'ASP').⁹ That decision is subject to an appeal which is pending before the Appeals Chamber.
24. On 5 December 2014, the OTP filed a notice stating that it was withdrawing the charges against Mr Kenyatta, without prejudice to the possibility of bringing new charges at a later date on the same or similar factual circumstances.¹⁰
25. On 21 January 2015, the Registry reported to the Trial Chamber that, according to the information available to the Registry, the total number of victims verified as within the scope of the present case by the LRV stands at 839.¹¹
26. On 13 March 2015, the Trial Chamber terminated proceedings against Mr Kenyatta.¹²
27. On 20 March 2015, the LRV requested the OTP to clarify whether it was still conducting active investigations in the present case and informed the OTP that, if it was not, he intended to seek judicial review on behalf of the Victims.¹³

⁵ ICC-01/09-01/11-373.

⁶ ICC-01/09-02/11-498, in which the Trial Chamber noted at paras. 29 and 32 that the number of eligible victims is estimated to be in the thousands. The LRV estimates that the number of persons eligible to qualify as victims is in excess of 20,000.

⁷ ICC-01/09-02/11-696.

⁸ ICC-01/09-02/11-908.

⁹ ICC-01/09-02/11-982. Reclassified as public pursuant to the Chamber's direction (ICC-01/09-02/11-967).

¹⁰ ICC-01/09-02/11-983.

¹¹ ICC-01/09-02/11-998-AnxA.

¹² ICC-01/09-02/11-1005.

¹³ Confidential Annex 2: letter from LRV to OTP of 20 March 2015.

28. On 2 April 2015, the Prosecution provided a response in which it set out, in brief, the Decision and the reason for it. The OTP also expressed *inter alia* its view that it has not made a decision ‘not to proceed’ in the Kenya II case, that the article 53 review process is inapplicable, and that the Victims have no standing to seek judicial review.¹⁴
29. Between 25 May and 16 June 2015, the LRV and his field staff¹⁵ held 12 meetings in Kenya in the counties of Nakuru, Busia, Siaya, Vihiga, Kisumu and Migori with 702 Victims. The Victims consulted overwhelmingly expressed support for the filing of this application and deep dissatisfaction at the Prosecution’s conduct of this case.¹⁶

E. Matters not in dispute: gravity, jurisdiction, complementarity and access to territory

30. In contrast to other challenges concerning prosecutorial inaction,¹⁷ the present case involves a decision by the Prosecution to cease active investigation, with no indication of when, if ever, the investigation will resume. The following are not in dispute between the Prosecution and the Victims:
- a. The requirements of personal, territorial, subject-matter and temporal jurisdiction are satisfied;
 - b. The gravity of the crimes continues to satisfy the threshold for investigation and prosecution;
 - c. The United Nations Security Council has not suspended the investigation of the present case under article 16 of the Statute;
 - d. Kenya continues to be unable or unwilling genuinely to investigate or prosecute and has made no moves towards genuine accountability;

¹⁴ Confidential Annex 2: letter from OTP to LRV of 2 April 2015.

¹⁵ The LRV expresses his gratitude to the five Kenyans, from five different ethnic backgrounds, who worked fearlessly and tirelessly to communicate constantly with Victims and to organize over 60 meetings with Victims in Kenya in 2013-2015.

¹⁶ A majority of Victims expressed to the LRV profound disappointment – many vocally expressed anger – with the conduct of the present case. A minority expressed a preference for the ICC not to be further involved in Kenya due to its failure to deliver justice. With the prospects for trial now widely perceived to be low, many Victims have expressed increased interest in financial or other assistance. They communicated particularly strong bitterness at the failure of the Government to provide assistance in an ethnically-neutral fashion: the perception of pro-Kikuyu bias in the distribution of assistance is widespread. They are also disillusioned at the failure of the Trust Fund for Victims (‘TFV’) to provide *any* assistance. At each meeting, the LRV sought the views of the Victims regarding whether to file the present application. The concept received an overwhelming level of support. Approximately one per cent of the 702 victims consulted expressed disagreement with the concept. The two primary reasons offered by that small minority were: (1) it is futile to seek to further investigate as Mr Kenyatta will ensure that any further investigation in the case against him fails; and (2) the money to be spent on any further investigation should instead be provided to the Victims, who have received nothing from the Court. *See further* Annex 1.

¹⁷ ICC-01/04-399, at 2.

- e. Kenya's failure to comply with the Statute compromised the Prosecution's ability to thoroughly investigate the charges;
- f. Kenya nevertheless has not barred access to its territory to Prosecution investigators, and has not withdrawn from the Statute; and
- g. The Victims overwhelmingly wish the Prosecutor to carry out a prompt and thorough investigation and prosecution of those responsible for the crimes against them and for trials to commence without delay.

F. Article 54(1) requires the Prosecution to ensure an effective investigation and prosecution

31. The Prosecution's failure to carry out an effective investigation violates article 54(1) and the Decision is a further article 54(1) violation. The Prosecutor is obliged under article 54(1)(a) to 'extend the investigation to cover *all facts and evidence* relevant to an assessment of whether there is criminal responsibility under the Statute' (emphasis added). The Prosecutor is obliged under article 54(1)(b) to 'take appropriate measures to ensure the *effective* investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses [...] and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children' (emphasis added).¹⁸
32. The Triffterer Commentary on article 54(1) notes: 'The use of the imperative "shall" indicates that no discretion exists for the Prosecutor with regard to what follows in subparagraphs (a), (b) and (c) of [article 54(1)]'. It also notes that article 54(1)(a) 'obligates the Prosecutor to be as comprehensive as necessary in his or her investigation to establish whether criminal responsibility exists'; and that '[a]ny fact or evidence that would contribute to the ultimate determination of whether or not an individual is criminally responsible for the commission of crimes within the jurisdiction of the Court is relevant, and may not be excluded from the ambit of the Prosecutor's investigation'.¹⁹ The obligation to investigate under article 54(1) continues as long as evidence exists which is relevant to criminal liability—it has 'no

¹⁸ Article 51(a) of the Prosecutor's Code of Conduct states: 'In accordance with article 54(1)(b), Members of the Office shall ensure that the standards of effective investigation and prosecution are upheld'; the Code requires its staff to act with 'competence and diligence' in this regard.

¹⁹ Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (Beck, Second Edition, 2008), pp. 1079-1080.

mandated end'.²⁰

33. It falls within the Prosecution's discretion to decide what measures are appropriate under article 54(1). But that does not affect the Prosecution's duty to take measures which result in an *effective* investigation. The discretion afforded to the Prosecution does not permit it to carry out an investigation that is ineffective due to a failure to use the powers conferred upon it by the States Parties. Nor does it permit the Prosecution to abandon a partly-investigated case, as it has here.

F.1 The Prosecutor must carry out an investigation and prosecution which are effective in achieving the Court's objective of ending impunity for the most serious crimes

34. Article 54(1)(b) requires the Prosecutor to take appropriate measures to ensure that investigations and prosecutions are 'effective'. According to its dictionary definition, 'effective' means '[s]uccessful in producing a desired or intended result'.²¹ The equivalent words in the Spanish and French versions of article 54(1)(b) have similar meaning.²² The intended result – the objective of the Court – is made clear in the Statute's Preamble, which affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished', and which foreshadows the obligation in article 54(1)(b) by continuing: 'their effective prosecution must be ensured.'
35. The express requirement of an effective investigation and prosecution has as its logical corollary an implicit prohibition on the Prosecution from failing to take measures within its power so as to ensure that the investigation and prosecution are effective. Specific investigative powers are conferred on the Prosecution in article 54(2) and 54(3). To cease to actively investigate, limiting itself to reviewing only such

²⁰ 'There is no reason to think that the prosecutor's article 54 obligation to investigate— and it is an *obligation*— ceases simply because charges have been brought or proceedings are underway. ... There is no mandated end of the prosecution's investigation. In fact, as long as there exists evidence that is "relevant" to the prosecution's assessment of criminal liability, continued investigation appears to be required'. (Alex Whiting, 'Dynamic Investigative Practice at the International Criminal Court', 76 *Law & Contemp. Probs.* 163 (2014), pp. 166-167). Similarly, there is no reason to think that that OTP's obligation to investigate ceases simply because the State on whose territory the crimes were committed adopts a position of hostility to the Court. If this were the case, the core purpose of the Court would be put at risk.

²¹ This is the principal meaning of 'effective' listed in the online *Oxford English Dictionary*.

²² The Spanish version of article 54(1) uses '*asegurar la eficacia*'. *Eficacia* means: '*Capacidad de lograr el efecto que se desea o se espera.*' (Dictionary of the Spanish Language, *Real Academia Española*) The French version of article 54(1) uses '*assurer l'efficacité*'. *L'efficacité* means: '*Caractère de ce qui est efficace ; effet, action utile. Caractère d'une personne, d'un organisme efficace, qui produit le maximum de résultats avec le minimum d'efforts, de moyens; efficence, rendement*'. *Efficace*, in turn, means: '*Se dit d'un produit, d'une méthode, d'un appareil, etc., qui produisent l'effet attendu ; bon pour : Un médicament efficace contre le rhume. Qui remplit bien sa tâche, qui atteint son but, qui aboutit à des résultats utiles : Un employé efficace. Une politique efficace.*' (*Larousse*).

information as might be submitted to it,²³ does not satisfy the Prosecutor's obligation and article 54(1)(b)'s requirement of taking 'appropriate measures to ensure the effective investigation and prosecution of crimes'. Nothing in Part 5 or Part 9 of the Statute, in particular, entitles the Prosecution to cease to actively investigate without taking all measures necessary to ensure that its investigation is effective. Indeed, the Prosecution has itself recognised that article 54(1) requires it to make 'every effort' to hold accountable those responsible.²⁴

36. In circumstances where, as here, the Prosecutor has asked the Chamber under article 15 to authorize an investigation, the investigation takes place, and there emerges a considerable quantity of evidence suggesting the criminal responsibility of identified individuals, article 54(1) obliges the Prosecutor to continue to take appropriate measures to ensure an effective investigation and prosecution.
37. This includes taking prompt action to conduct whatever investigations on the territory of the State are necessary in order for the truth to emerge, as foreseen by article 54(1)(a) and 54(2); to seek such orders as might be necessary in order to carry out the searches and seizures of documentary evidence foreseen in article 93(1)(h); to apply for referrals under article 87(7) when faced with State obstruction of justice; to initiate proceedings under article 70 when faced with efforts to silence or to bribe witnesses; to apply, as the Prosecution has in Kenya I, under article 64(6)(b) and article 93, to summon unwilling witnesses to provide testimony in Kenya.²⁵
38. Where a State other than Kenya has information relevant to the investigation, which it might be reluctant to disclose on national security grounds, articles 72(5) and 72(7) set forth an expectation that the Prosecution will act in conjunction with the relevant Chamber and the State to seek to resolve the matter by cooperative means, and set forth specific steps that might be taken to protect the State's security interests while ensuring that the truth will emerge.

²³ Confidential Annex 2, letter from OTP to LRV, 2 April 2015, page 4.

²⁴ In December 2013, the Prosecution said in respect of its investigation of Mr Kenyatta: 'The Prosecution therefore seeks an adjournment of the provisional trial date for three months, which will enable it to undertake additional investigative steps – including those not previously open to the Prosecution – to determine whether a case can be presented to the Chamber that establishes the Accused's guilt beyond reasonable doubt. There is potential for these investigative steps to produce evidence shedding light on key allegations in this case. *The Prosecution believes they must be pursued in accordance with its Article 54(1) duties, to ensure that every effort has been made to hold to account those most responsible for the crimes committed during the 2007-2008 post-election violence ('PEV'), and to seek justice on behalf of the victims*, who continue to wait for their day in court, almost six years after the crimes were committed.' ICC-01/09-02/11-875, para. 3. Emphasis added. The Prosecution a month later abandoned these steps. *See infra*: 'The prosecution of Mr Kenyatta was ineffective'.

²⁵ ICC-01/09-01/11-1120-Conf-Red-Corr2. The Chamber's order ensuring the appearance of the summoned witnesses for testimony before the Court on the territory of Kenya was upheld by the Appeals Chamber: ICC-01/09-01/11-1598.

39. Only after the Prosecution has made exhaustive efforts to investigate a case, including taking all measures reasonably open to it *inter alia* under articles 54(2) and (3), article 56, article 57(3), article 64(6), article 69(3), article 70, article 72(5), article 72(7), article 87(7) and article 93(1) of the Statute, as well as under rule 104(2) and rule 114, can it be said that the Prosecution has complied with its duty under article 54(1)(b) to take all appropriate measures to ensure that its investigation and prosecution are effective.
40. The Prosecution must, to maintain its own credibility as well as the Court's deterrent effect, investigate and prosecute with resilience and fierce determination, using all powers conferred upon it by the States Parties. It cannot be the case that the Prosecution may cease to actively investigate due to difficulties in accessing relevant witnesses and documentary evidence arising out of individual or state obstruction of justice *unless* it has taken all measures reasonably open to it, as set out above, to access relevant evidence. In particular, the remedy for systematic obstruction of access to evidence is not simply to walk away in despair. To do so profoundly undermines the Court's deterrent effect in respect of grave crimes, and encourages other powerful accused before the Court to carry out similar acts of obstruction. It also damages the Court's ability to attract and retain the cooperation of witnesses.²⁶
41. The Prosecution has said: 'That crimes should be effectively investigated and prosecuted is the core of the Prosecutor's mandate.'²⁷ Failure to effectively investigate and prosecute is a failure by the Prosecution to carry out its core mandate and is unlawful under article 54(1).

F.2 Principles and rules of international law and international human rights standards require that an effective investigation under article 54(1) be prompt and thorough

42. In interpreting the article 54(1) requirement that the Prosecution take measures to ensure that its investigation and prosecution are 'effective', the Chamber may determine the content of 'principles and rules of international law' pursuant to article 21(1)(b) and of internationally recognized human rights pursuant to article 21(3).
43. Principles adopted by the United Nations, in particular the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations

²⁶ If future witnesses see that a prosecution can be derailed by a determined campaign of obstruction of justice, they might withhold their cooperation. As the OTP argued in the present case in February 2013: 'Other prospective witnesses may also not cooperate until they are confident, based on the fact that the charges are confirmed, that the prosecution is serious and likely to proceed.' ICC-01/09-02/11-633, para. 11.

²⁷ ICC-02/05-125, para. 24.

of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly on 16 December 2005 (A/RES/60/147) ('Basic Principles') and the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution, reflect principles and rules of international law. They encapsulate the concept that an investigation must be prompt and thorough in order to be effective.²⁸

44. With regard to the duty to investigate under the International Convention on Civil and Political Rights, the UN Human Rights Committee in its General Comment No. 20 said: 'Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.'²⁹ The aims of an effective investigation are to ensure as far as possible that the truth is established and that those responsible are tried and convicted.³⁰
45. The Court frequently looks to the case law of the ECtHR and the IACtHR to crystalize applicable legal principles under the Statute and ensure that the Court's rulings accord with internationally recognized human rights under article 21(3).³¹
46. Analysis of case law from both the ECtHR and the IACtHR confirms that a failure to adequately and effectively investigate or prosecute criminal conduct may constitute a violation of internationally recognized human rights, including the right to life, the

²⁸ The Basic Principles provide *inter alia* that States have an obligation to 'investigate violations *effectively, promptly, thoroughly* and impartially and, where appropriate, *take action against those allegedly responsible* in accordance with domestic and international law' (Article 3(b); emphasis added). Article 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65 provides, *inter alia*, that: "There shall be a *thorough, prompt* and impartial investigation of all suspected cases of extra legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances ...". Emphasis added. Articles 9 to 17 contain a series of detailed requirements that should be observed by investigative procedures into such deaths.

²⁹ See Human Rights Committee, 'General Comment 20: Article 7'.

³⁰ The Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions ('Minnesota Protocol') provides, *inter alia*, in section B on the "Purposes of an inquiry": "As set out in paragraph 9 of the Principles, the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim. To fulfil that purpose, those conducting the inquiry shall, at a minimum, seek: (a) to identify the victim; (b) to recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible; (c) to identify possible witnesses and obtain statements from them concerning the death; (d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death; (e) to distinguish between natural death, accidental death, suicide and homicide; (f) *to identify and apprehend the person(s) involved in the death*; (g) *to bring the suspected perpetrator(s) before a competent court established by law*." Emphasis added.

³¹ See e.g., ICC-01/04-01/06-8-Corr. (analyzing ECtHR and IACHR jurisprudence relating to the right to liberty); ICC-01/04-01/06-773, paras. 20, 50, (analyzing ECtHR jurisprudence regarding use of anonymous witness testimony during confirmation of charges stage); see also STAHN & SLUITER at 301 (The Court "has relied heavily on the jurisprudence of regional courts such as the European Court of Human Rights and the Inter American Court of Human Rights.").

prohibition on torture, the right to a fair trial, the right to judicial protection and the right to an effective remedy.³² For example, the ECtHR has found that a prosecuting or investigating body's failure to provide an adequate investigation into an alleged crime is in itself a violation of the European Convention on Human Rights ('European Convention'), notably of article 13 which guarantees the right to an effective remedy.³³ Inadequate investigations that violate human rights have included investigations that failed to meet minimum required formalities,³⁴ and decisions against opening formal investigations despite evidence of human rights abuses.³⁵

47. *McCann v. United Kingdom* was the first in a long line of ECtHR decisions requiring effective investigations of lethal use of force.³⁶ The court set out its expectation that States would carry out 'thorough, impartial and careful examination of the circumstances surrounding the killings.'³⁷ A State Party to the European Convention is not obliged to follow a particular procedure, but it is obliged to conduct an investigation that is effective 'in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible'.³⁸ What constitutes an 'effective' investigation was summarised by the ECtHR in *Jordan v United Kingdom*:

The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of *effective* official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the *effective* implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. [...] *The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, [...] Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.* A requirement of promptness and reasonable expedition is implicit in this context [...] *there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.* The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be

³² A summary of relevant case law is attached as Annex 4.

³³ *Aksoy v. Turkey* (1996); *Khashiyev and Akayev v. Russia* (2005).

³⁴ *Kasya v. Turkey* (1998); *Akkum and Others v. Turkey* (2005).

³⁵ *Aksoy v. Turkey* (1996); *Biser Kostov v. Bulgaria* (2012)

³⁶ *McCann v. United Kingdom* (1995), para. 161.

³⁷ *McCann v. United Kingdom* (1995), para. 163.

³⁸ *Kelly and others v. United Kingdom* (2001), para. 96.

involved in the procedure to the extent necessary to safeguard his or her legitimate interests.³⁹

48. Similarly, the IACtHR has held that the failure to conduct an adequate investigation violates the American Convention of Human Rights, particularly article 8 (right to a fair trial) and article 25 (right to judicial protection). Inadequate investigations that violate human rights have included deficiencies in the manner in which the investigation was carried out,⁴⁰ and excessive delays in investigating and prosecuting crimes.⁴¹
49. At least two decades of international human rights jurisprudence establishes the right of a victim of serious crimes to timely and robust investigation and prosecution.

F.3 Article 54(1) requires the Prosecution to continue to investigate and prosecute despite an ongoing obstruction of justice

50. The Statute provides remedies for individual and State obstruction of justice. For individual acts of obstruction of justice—including ‘corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence’—the remedy lies in article 70. For State obstruction of justice—including efforts by the State to block access to relevant documentary evidence and witnesses, as well as State inaction regarding asset-freezing—the remedy lies in article 87(7).
51. The Statute does not foresee indefinite suspension of an investigation as an acceptable response to unlawful interference by a State or an individual with the collection of evidence leading to withdrawal of charges. Rather, the Prosecution remains bound under article 54(1)(b) to continue to take appropriate measures in order to ensure that its investigation and prosecution are effective.

³⁹ *Jordan v. United Kingdom* (2001) paras 106-109. Emphasis added. Internal citations omitted. The case arose from the fatal shooting of a man by a police officer in Northern Ireland. The Court found a violation of article 2 of the European Convention in respect of failings in the investigative procedures concerning the death. See in respect of the duty to investigate under the European Convention: Roe Ariav, ‘National Investigations of Human Rights: Between National and International Law’, *Goettingen Journal of International Law* 4 (2012) 3, 853-871.

⁴⁰ *Landeta Mejias Brothers et al. v. Venezuela* (2014); *Massacres of El Mozote and Nearby Places v. El Salvador* (2012); *Case of Gudiel Alvarez et al v. Guatemala* (2012).

⁴¹ *Gomez-Palomina v. Peru* (2005); *Laneta Mejias Brothers et al. v. Venezuela* (2014); *Massacres of El Mozote and Nearby Places v. El Salvador* (2012); *Case of Gudiel Alvarez et al v. Guatemala* (2012); *Gonzalez Medina and Family v. Dominican Republic* (2012).

F.4 Article 54(1) requires the Prosecution to continue to investigate and prosecute even in environments uncondusive to those functions

52. The Statute does not foresee that the Prosecution may decide to abandon an investigation on the basis that the environment in a State is not conducive to investigation. It foresees the opposite.
53. The Court deals exclusively with crimes of the utmost seriousness—genocide, crimes against humanity, war crimes and aggression.⁴² It can exercise jurisdiction over such crimes only where the State that has jurisdiction over them is unwilling or unable genuinely to carry out an investigation or prosecution.⁴³ The Statute recognises that in many—if not most—cases, the Court will be required to carry out investigations in challenging and risky environments, where the State itself might not be able or willing to assist. For example, article 27 envisages prosecutions of serving Heads of State or Government; article 56 foresees that unique opportunities to take evidence will arise, which may not be available subsequently; article 57(3)(d) envisages investigations on the territory of a failed state; and article 87(7) foresees and provides a remedy for State non-cooperation.
54. The Prosecution’s article 54(1) duty is clear: it must carry out effective investigations on the territory of a State Party—even if that State Party is often obstructive—if those investigations are necessary to establish the truth. As the Appeals Chamber has pointed out, the Prosecution’s article 54(1)(a) obligation is specifically linked to the Prosecution’s responsibility to establish the truth.⁴⁴

G. The Prosecution failed to carry out a thorough and effective investigation and prosecution in violation of article 54(1)

55. The LRV is not privy to the details of the Prosecution’s internal investigative plans. He is therefore unable to conduct a comprehensive review of the adequacy of the Prosecution’s investigation, including its response to state obstructionism and efforts to bribe and intimidate key witnesses. It nevertheless appears that the Prosecution accepts that its investigation was inadequate and, as a result, ineffective and has amended its internal strategies as a result.⁴⁵

⁴² Statute, Article 5.

⁴³ Statute, Article 17(1).

⁴⁴ ICC-01/04-01/06-568, para. 52.

⁴⁵ ‘In its 2012-2015 Strategic Plan, the Office committed itself to managing cases developed on the basis of its previous prosecutorial policy to the best of its ability. During this period, the Kenya situation gave rise to particular challenges for the Office. Several factors led the Prosecutor to withdraw the case against Uhuru Kenyatta and Francis Muthaura: the limited availability of evidence due to the specific nature of the case; the Prosecutor’s limited access to evidence due to non-cooperation; and the lack of alternative investigative avenues to substitute for key evidence, which was ultimately eroded and found to be unreliable. The shift in prosecutorial

56. Further arguments that the Prosecutor's investigation and prosecution in Kenya II has been ineffective for the purposes of article 54(1) are set out below. This is by no means exhaustive. There are other areas—such as the 'identification, tracing and freezing' of assets 'for the ultimate benefit of victims'⁴⁶—where the Prosecution's action also fell far short of that required by article 54(1).

G.1 Prosecution failed to make effective use of article 87(7) to counter state non-cooperation

57. State obstruction of justice is the principal reason for the collapse of the case against all three accused, and it required a firm response that the Prosecution failed to provide.

58. Kenya has a well-known problem of impunity for the powerful.⁴⁷ By bringing charges against six high-level Kenyan suspects, the Prosecution necessarily accepted that Kenya was unable or unwilling to effectively investigate and prosecute those most responsible for PEV crimes. Even if it was not reasonably foreseeable that Mr Kenyatta would be elected President of Kenya in 2013, it was reasonably foreseeable from the outset of the Kenya II investigation that the OTP would face state obstruction of access to evidence against powerful persons in Kenya. One would have expected the Prosecution to have seised the relevant Chamber early and often with applications relating to state obstruction. It failed to do so. This is surprising, given that state obstruction threatens to undermine the entire Statute as well as the ordered progress of international justice generally.⁴⁸

policy heralded in the Office's Strategic Plan (June 2012-2015), emphasising the need to be trial- ready as early as possible, building cases upwards where necessary and increased reliance on varied forms of evidence, will help avoid the recurrence of such challenging situations.' Draft OTP Strategic Plan 2016 – 2018, p. 10. *See also* p. 41.

⁴⁶ Article 57(3)(e) and 93(1)(k) of the Statute. The LRV has communicated privately with the Prosecution and the Registrar on the serious inadequacy of the measures undertaken to effectively identify and freeze assets.

⁴⁷ This is documented extensively in the final report of Kenya's Truth, Justice and Reconciliation Commission, published in May 2013. The report is based to a large extent on information which already was in the public domain in 2010, when the OTP commenced its investigation in Kenya.

⁴⁸ Kenya's systematic violation of its international obligations by repeatedly obstructing an investigation into crimes against humanity threatens the viability of the international order generally. As the International Court of Justice said in *United States of America v. Iran*, Judgment of 24 May 1980, at page 43: 'Therefore in recalling yet again the extreme importance of the principles of law which it is called upon to apply in the present case, the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.'

59. The Prosecution repeatedly acknowledged, particularly in its 8 May 2013 and 31 January 2014 filings, the serious impact of Government non-cooperation, from the pre-confirmation stage, on its cases against Mr Ali, Mr Muthaura and Mr Kenyatta.⁴⁹
60. But the Prosecution failed to make any article 87(7) request until November 2013, after the cases against Mr Ali and Mr Muthaura had already collapsed.
61. It is irrelevant whether repeated article 87(7) referrals would in fact have secured the Government's genuine cooperation. It is also irrelevant what reasons lay behind the Prosecution's failure to use article 87(7)—for example, whether the failure arose from a well-intentioned strategy to incentivize Government cooperation by refraining from filing article 87(7) applications or as a result of a lack of capacity at the OTP.⁵⁰
62. The Prosecution's obligation under article 54(1) was to do what it could to ensure an effective investigation. This includes using its powers under the Statute to ensure that the States Parties were properly seised with the full extent of Kenya's non-cooperation so that they had a clear legal basis on which to take whatever action, including individual or collective countermeasures, that they considered appropriate.
63. The Prosecution's failure to file any article 87(7) request until November 2013, and its failure to file any request since then in respect of numerous outstanding areas of state non-cooperation,⁵¹ contravene the requirement to take appropriate measures to secure an effective investigation and prosecution under article 54(1)(b).

G.2 The Prosecution failed to make any or effective use of article 70 to counter bribery and intimidation

64. The Prosecution has not publicly instituted any prosecutions relating to bribery or intimidation of witnesses in this case. This problem clearly undermined the Court's search for the truth in respect of the allegations against Mr Kenyatta and Mr Muthaura. In both cases, the Prosecution publicly cited interference with witnesses before it withdrew charges; yet it did not file any public applications under article 70 to deal with the serious problems it had identified.

⁴⁹ ICC-01/09-02/11-733-Red and ICC-01/09-02/11-892-Red-AnxA.

⁵⁰ The OTP says: 'too many requests for assistance remain pending for too long a time even though the [Jurisdiction, Complementarity and Cooperation Division] staff is working hard to deal with all of them.' OTP Strategic Plan June 2012 – 2015, para. 64.

⁵¹ See ICC-01/09-02/11-892-AnxA-Conf, which sets out numerous areas, as of 31 January 2014, in which the Government was being deliberately obstructive.

65. The Prosecution has provided no follow-up to the information it provided on 31 January 2014 regarding its intention to prosecute article 70 cases.⁵²
66. The Prosecution had previously made serious and detailed allegations of participation in witness interference by those holding themselves out as representatives of Mr Kenyatta.⁵³ The Prosecution has not resiled from those very troubling allegations but has publicly initiated not a single article 70 prosecution in respect of them.
67. This is striking, given the gravity of the witness-tampering in the Kenya cases. The ASP amended Rule 68 in part to deal with what the Prosecution has described as ‘unprecedented levels of tampering and anti-witness activity’ in the Kenya cases.⁵⁴ The Prosecution frequently referred to the climate of fear in Kenya and to fears held by witnesses in Kenya II, which was a significant reason for witness withdrawal.⁵⁵ Non-prosecution of those responsible for bribery and intimidation of witnesses weakens the Court’s ability to deter such activity, and encourages those who commit it to carry on. Furthermore, inaction and its consequence, impunity, following witness interference, including after the widely-reported abduction and murder of Meshak Yebei in Kenya I, exacerbate the feelings of insecurity in large parts of the victim population.⁵⁶

⁵² The OTP said: ‘Individuals attempted to persuade Witnesses 4, 11 and 12 to recant their testimony and/or to withdraw their cooperation with the Prosecution. On some occasions, money was offered to them. While the Prosecution ultimately withdrew Witnesses 4 and 12 from its witness list for reasons unrelated to the bribery attempts, those attempts required the Prosecution to expend considerable resources to investigate the bribery and to ensure the safety of its witnesses. The Prosecution is considering prosecuting the individuals concerned for offences against the administration of justice’. ICC-01/09-02/11-892-AnxA-Red, p. 3.

⁵³ For example, in its 26 August 2013 pre-trial brief, a public version of which was released on 19 January 2015, the Prosecution stated: ‘Shortly after the Prosecution disclosed [to the Defence] the identities of Witnesses 11 and 12 in August 2012, the witnesses informed the Prosecution that purported Kenyatta intermediaries were attempting to locate them to offer a “deal” for them to agree not to testify. One of the intermediaries was Ferdinand Waititu, a sitting Member of Parliament and an associate of Mr Kenyatta. In a series of controlled telephone conversations recorded by the Prosecution with the witness’s consent, Mr Waititu told Witness 12 that he wanted to meet with him to discuss assisting Mr Kenyatta to “solve this fight” and the “lump of money to be given”. Mr Waititu indicated that he had spoken about the scheme to Mr Kenyatta and was keeping him informed of its progress. He explained that Mr Kenyatta wanted to avoid “direct” involvement because he was worried about getting caught tampering with evidence.’ ‘Public Redacted Version of “Second updated Prosecution pre-trial brief”’, ICC-01/09-02/11-796-AnxA-Red, para .95. *See also* para.92: “[A]t each stage of the judicial process, the Accused’s intermediaries have attempted to bribe witnesses to shield the Accused from responsibility for his role in the PEV”.

⁵⁴ ICC-01/09-02/11-708-Red, para. 38.

⁵⁵ ICC-01/09-02/11-874, para. 1; ICC-01/09-02/11-773-Red paras 4, 5 and 8.

⁵⁶ During the May-June 2015 mission in Kenya, numerous Victims put questions regarding Mr Yebei’s murder to the LRV, and asked what the Court intended to do about it.

G.3 The investigation and prosecution of murder and rape committed by the police during the PEV was ineffective

68. Many Victims consider a grave injustice the non-prosecution of the Kenyan police—which enjoys ongoing and notorious impunity within Kenya for extrajudicial executions and other crimes⁵⁷— for its involvement in the PEV. Despite information that police shot and killed at least 400 people during the PEV, shot and injured over 500 others, and raped an unknown multitude of women,⁵⁸ not a single police officer has been convicted for killings or rapes during the PEV.
69. The OTP charged Mr Ali—head of the police during and after the PEV—with crimes committed *only* in the towns of Nakuru and Naivasha,⁵⁹ despite the existence of much credible material concerning police killings and rapes (and failure to prevent those crimes or punish those responsible) in many parts of Kenya during the PEV.
70. The Chamber declined to confirm charges against Mr Ali, on the basis that ‘the evidence placed before it does not provide substantial grounds to believe that the Kenya Police participated in the attack in or around Nakuru and Naivasha, i.e. that there existed an identifiable course of conduct of the Kenya Police amounting to a participation, by way of inaction, in the attack perpetrated by the Mungiki in or around Nakuru and Naivasha’⁶⁰ and that it was ‘not satisfied that the historical events alleged by the Prosecutor took place’.⁶¹
71. This conclusion is difficult for the Victims to accept. It is a striking indicator of the OTP’s failure to carry out an effective investigation and prosecution into extensive and near-simultaneous police killings and rapes across Kenya during the PEV.
72. The Prosecution’s charging also raises serious questions. The Prosecution charged Mr Ali under article 25 (individual responsibility), and declined to charge him under article 28 (superior responsibility), despite the fact that he must have known or had reason to know rapes and killings were about to be or had been committed by police officers under his effective control during the PEV, and failed to take necessary and reasonable measures within his capacity to prevent or punish those crimes. The Prosecution’s decision not to bring charges under article 28, combined with its focus

⁵⁷ The impunity continues under the present government. *See, for example, Inside Kenya’s Death Squads*, Al Jazeera English, first broadcast in December 2014 and available at: <https://www.youtube.com/watch?v=IUjOdjdH8Uk&feature=youtu.be>.

⁵⁸ Commission of Inquiry into the Post-Election Violence report, pp. 311, 342, 343. These crimes took place despite the undoubted fact that some police officers (often of the same tribe as the victims they tried to help) took courageous measures to protect the innocent.

⁵⁹ ICC-01/09-02/11-280, Amended Document containing the charges, counts 2, 4, 6, 8, 10.

⁶⁰ ICC-01/09-02/11-382-Red, para. 425

⁶¹ ICC-01/09-02/11-382-Red, para. 426.

on Naivasha and Nakuru only, demonstrate a failure to effectively investigate and prosecute PEV police crimes.

73. Furthermore, the Government prevented the Prosecution from accessing key police figures during its investigation, while Defence teams were able to tender 39 statements taken from police at the confirmation stage.⁶² The Prosecution made no article 87(7) application in relation to this obvious example of state obstruction of justice, thereby failing to take measures to ensure the effectiveness of its investigation.
74. The Prosecution should have done much more to bring evidence at the confirmation stage concerning the geographic scope of crimes by sections of the police during the PEV in many parts of Kenya, including Mombasa, Kisumu, Kibera, Mathare and Kericho. In addition to demonstrating the true extent of police crimes, this would have facilitated proving to the confirmation standard the failure of the police leadership either to prevent the crimes taking place or to punish those responsible.
75. The Prosecution has not rectified the multiple failures of its investigation into police crimes, despite a willingness expressed by the Chamber at the pre-confirmation stage to receive further submissions as to the appropriate mode of liability to be pleaded and as to the crimes in Kisumu and Kibera.⁶³ Following the confirmation decision (which resulted *inter alia* in the non-confirmation of charges against Mr Ali and thereby the removal of police crimes from the charges), the then Prosecutor said: ‘We will keep investigating Kosgey⁶⁴ and the activities of the police as well as crimes allegedly committed in Kibera and Kisumu.’⁶⁵
76. The Victims are unaware of the outcome of that investigation, or the extent to which it has been carried out. In the absence of indicators to the contrary, the Chamber is invited to conclude that the Prosecution’s investigation into, in particular, PEV crimes committed by the police has not been effectively carried out.

⁶² ICC-01/09-02/11-733-Red, paras. 20-24. In particular, at para. 24, the Prosecution referred to the court order in Kenya which prevented it from interviewing key Kenyan police officers and said: ‘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.’

⁶³ ICC-01/09-02/11-01, paras. 31-33 and 52.

⁶⁴ Charges against Mr Kosgey, the third suspect in Kenya I, were not confirmed at the confirmation stage.

⁶⁵ ‘Statement by the Prosecutor of the International Criminal Court on Kenya ruling’, 24 January 2012.

G.4 The prosecution of Mr Muthaura was ineffective

77. The reason provided by the Prosecution on 11 March 2013 when withdrawing charges against Mr Muthaura centred on state obstruction of access to evidence and efforts to bribe a critical witness.⁶⁶ As mentioned, the Prosecution had by then brought no applications under article 87(7) or article 70 to deal with the problems it had identified. As noted by Judge Eboe-Osuji at the time, the Prosecution's decision to withdraw charges against Mr Muthaura in these circumstances sent to others a powerful message that State non-cooperation and interference with witnesses was a viable 'passport to impunity'.⁶⁷
78. The Victims are unaware of any further investigative steps by the Prosecution to remedy the deficiency of evidence concerning Mr Muthaura's involvement in the PEV. The prosecution of Mr Muthaura was therefore ineffective.

G.5 The prosecution of Mr Kenyatta was ineffective

79. The principal reason provided by the Prosecution on 19 December 2013 for the inadequacy of its evidence against Mr Kenyatta concerned the presence of one insider witness at one meeting.⁶⁸ This was a slender but not necessarily unreasonable link on which to base a major prosecution; full cooperation by the Government undoubtedly would have enabled the Prosecution to fortify its evidence against Mr Kenyatta.⁶⁹ Yet it was unreasonable for the Prosecution so quickly to abandon its efforts to strengthen its case after that slender link had been severed.
80. On 13 December 2013, the Prosecution filed a notice stating that it was unable to proceed for trial. On 19 December 2013, the Prosecution requested a three-month adjournment in order for it to take additional investigative steps in accordance with

⁶⁶ '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 cooperation 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.' ICC-01/09-02/11-T-23-ENGETWT11-03-20131-28NBT, p. 4.

⁶⁷ ICC-01/09-02/11-698, 'Concurring Separate Opinion Of Judge Eboe-Osuji (to the Decision of the Majority dated 18 March 2013)', para. 4: 'In my view, where there is credible evidence connecting a defendant to the sort of conducts emphasised above, the consequence should not be withdrawal of the charges against him. Lest, other defendants begin to view those conducts as passports to impunity.'

⁶⁸ ICC-01/09-02/11-875, para. 15.

⁶⁹ Mr Kenyatta's determination to prevent the emergence of the truth concerning his activities during the PEV through ensuring non-delivery by his government of key evidence against him to the Court – and instead to present himself as the innocent victim of racism and neo-colonialism – is the subject of numerous submissions by the LRV in the proceedings concerning non-cooperation by the Government and will not be repeated here.

its article 54(1) duties.⁷⁰ The Prosecution listed its proposed investigative steps in a confidential annex.⁷¹

81. However, the Prosecution abandoned these efforts little more than a month later. It said on 31 January 2014 that it considered that it would be unable to obtain the material it had in mind, as the witnesses in question had declined to be interviewed. It did not specify any additional investigative steps that would be taken.⁷²
82. It appears that key defence witnesses, contacted through Mr Kenyatta's lawyers, were the Prosecution's final port of call in its investigation of Mr Kenyatta, and those witnesses were permitted to exercise a veto over whether or not they wished to assist the Prosecution in its search for the truth. This is highly regrettable. By then, Mr Kenyatta was President of Kenya. His informal influence within Kenya, already considerable, had reached new heights. His lawyers defended the witnesses' refusal to be interviewed.⁷³ Why the Prosecution was unwilling to undertake further investigative efforts remains unexplained.
83. On 31 March 2014, the Trial Chamber noted its 'serious concerns regarding the timeliness and thoroughness of Prosecution investigations in this case'.⁷⁴ The Victims have also repeatedly expressed to the LRV their concern regarding the thoroughness of the Prosecution's work. The fact that the Prosecution's case against Mr Kenyatta rested to such an extent—with such devastating consequences—on the evidence of one insider witness concerning his presence at one meeting is an indicator that the Prosecution should have taken greater efforts at an earlier stage to bolster its case.
84. It is for this reason that it has been so important for the Prosecution to gain access to

⁷⁰ ICC-01/09-02/11-875, para. 3.

⁷¹ The LRV was notified only of a confidential redacted version, which does not reveal all proposed investigative steps: ICC-01/09-02/11-875-Conf-AnxA-Red.

⁷² 'In the week beginning 20 January 2014, the Prosecution received information that led it to conclude that it would not be able to obtain the material discussed in paragraphs 1-10 of the Annex. The Prosecution no longer considers there to be a prospect of obtaining the material. Since the adjournment application was filed, the individuals listed in paragraphs 11-16 of the Annex have reneged on their previous agreements to be interviewed by the Prosecution. The Prosecution disagrees with the Defence's assertion that '[e]ach individual has provided pertinent reasons' for their change of position. The Prosecution has given the individuals assurances regarding their rights under the Statute and the purpose of the proposed interviews. Each individual has provided evidence to the Defence and there is no supportable basis for their refusal to meet with the Prosecution. Nevertheless, the Prosecution acknowledges that the hostile stance of these individuals makes it unlikely that they will provide information useful to a prosecution of the Accused'. ICC-01/09-02/11-892, paras. 7-8.

⁷³ 'Notwithstanding attempts by the Defence to assist the Prosecution in their requests to interview [REDACTED], all of these individuals have communicated their position to the Prosecution that they do not wish to be interviewed. Each individual has provided pertinent reasons, and their letters are contained in Annex E. In general, the Defence notes that these individuals were moved to withdraw their cooperation as a result of their mistrust of the Prosecution's conduct of the case to date. The Prosecution appears to take the misguided view that it can advance its discredited case theory through defence witnesses who give exculpatory accounts.' ICC-01/09-02/11-878-Red, para. 34.

⁷⁴ ICC-01/09-02/11-908, para. 88.

the critical cellphone and financial data that lies at the heart of the litigation currently before the Appeals Chamber, and which Mr Kenyatta is so thoroughly determined unlawfully to withhold from this Court. But his determination to do so should result in greater, rather than lesser, vigour in the Prosecution's work, using other possible avenues of investigation.

85. The Prosecution made diligent efforts during 2014 to secure Kenya's cooperation in relation to that financial and cellphone data. But those efforts should never have prevented the Prosecution from continuing other investigative efforts, in particular on-the-ground inquiries in Kenya, during 2014 and to the present.
86. Subject to any *ex parte* applications that the Prosecution has made and to which LRV does not have access, and subject to any further information which the Prosecution might choose to share with the Chamber,⁷⁵ the LRV invites the Chamber to conclude that the Prosecution has not made reasonably exhaustive use of the evidence-collecting measures available to it under the Statute and the Rules, and has therefore failed to comply with its article 54(1)(b) duty to take such measures as are required in order to ensure that its investigation and prosecution are effective.

H. Review of the Prosecution's failure to ensure an effective investigation and prosecution is consistent with the Victims' right to an effective remedy

87. The Victims must have standing to challenge a prosecutorial decision that renders nugatory their rights to truth, justice and reparation if the validity of the decision is materially affected by an error of procedure, an error of law, or an error of fact.
88. In the present case, thousands of victims of crimes against humanity were led to believe in a justice process at the Court for over five years, to endure three failed prosecutions without a single day of trial, and to then face the further anguish of learning that the Prosecutor has decided to cease to actively investigate.
89. The framers of the Statute cannot have intended victims to be without recourse in such a situation. To the contrary, the Statute places the victims at the centre of the justice process. Victims at the Court are actors of international justice rather than its passive subjects.⁷⁶ Victims have a right to a just process, and to be treated fairly, at all stages of the proceedings, including the investigation phase.⁷⁷

⁷⁵ If the Chamber concludes that the Prosecutor *de facto* has made a decision not to proceed with the Kenya II investigation as it would not serve the interests of justice, it can request the OTP to submit such information 'that the Chamber considers necessary for the conduct of the review': Rule 107(2).

⁷⁶ The Court-wide strategy in relation to victims notes: 'By providing victims with an opportunity to articulate their views and concerns, enabling them to be part of the justice process and by ensuring that consideration is given to their suffering, it is hoped that they will have confidence in the justice process and view it as relevant to

90. The States Parties intended the victims to have an effective remedy for violation of their rights. The Court's legal texts reflect this. Victims must be promptly informed of a Prosecutor's decision not to investigate or prosecute, and the reasons for that decision.⁷⁸ Victims may (and the Victims here did) make representations to the Chamber concerning an article 15 request for authorization of an investigation.⁷⁹ The Court must permit victims to present their views and concerns at stages of the proceedings determined to be appropriate by the Court, and the Court is required to consider their position.⁸⁰
91. Under rule 93, '[a] Chamber may seek the views of victims or their legal representatives participating pursuant to Rules 89 to 91 on *any issue*' (emphasis added). It is indisputable that victims have a strong interest in decisions by the Prosecutor not to investigate or to prosecute, as reflected, for example, in Rules 107 and 109 which expressly mention the 'interests of the victims' in connection with review of such decisions.
92. Moreover, rule 86 provides that both the Prosecution and the Chamber (and other organs of the Court) 'in performing their functions under the Statute or the Rules, shall take into account *the needs of all victims* [...] in particular [...] victims of sexual or gender violence' (emphasis added).
93. Without the ability to present an informed challenge to a decision by the Prosecution not to actively investigate, following an ineffective investigation, there can be no effective remedy for the violation of the Victims' rights. The Court's jurisprudence recognises that victims have three principal rights: (i) to have a declaration of truth

their day to day existence rather than as remote, technical and irrelevant. It is also hoped that their participation will contribute to the justice process of the Court.' Report of the Court on the strategy in relation to victims, para. 46.

⁷⁷ 'In the case at hand [...] at issue is the investigation phase of a situation, prior to the case itself, for which there is no defendant as such, given that no individual has been issued with a warrant of arrest or a summons to appear. It is the Chamber's view nonetheless that the principle of a fair trial applies not only to the case phase – on issuance of a warrant of arrest or a summons to appear – but also prior to the case phase [...] fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims'. ICC-01/04-135-tEN 20-04-2006, paras. 36 and 39-40.

⁷⁸ Rule 92(2) requires the Court to notify victims participating in the proceedings concerning the Prosecutor's decision not to investigate or prosecute pursuant to article 53. Rules 105(3), 105(5) and 106(2) contain obligations on the Prosecutor to give reasons for its decisions not to investigate or prosecute. Rule 105(2), by reference to rule 49, provides for notification to those who have submitted information to the Prosecutor regarding a decision not to seek an authorization under article 15. The provision clearly contemplates that the those who provided information might then have an opportunity to provide further information. Together, these reflect that (a) the victims have a right to know the reasons why the Prosecutor has taken a decision not to actively investigate a case; and (b) the Prosecutor in any event should be transparent about the reasons for its decisions not to investigate or not to prosecute.

⁷⁹ Article 15(3) and rules 50(3) and (4).

⁸⁰ Article 68(3).

by a competent body (right to truth); (ii) to have those who victimized them identified and prosecuted (right to justice); and (iii) the right to reparation.⁸¹ In the present case, not one of these rights has been realized. Not one person responsible for the crimes of Kenya II has been effectively investigated or prosecuted. Not a day of trial has been heard. No formal declaration of truth following a trial has been issued by the Court. As nobody has been convicted, no reparation can be made.

94. Consistent with the principle of *ubi jus ibi remedium*, there must be a remedy for this comprehensive breach of the Victims' rights. As noted above, the Basic Principles, which encapsulate relevant conventional and customary international law, recognise that investigations into crimes against humanity must be carried out effectively, promptly and thoroughly, and victims must have equal access to an effective judicial remedy.⁸²
95. Against this backdrop of applicable international human rights law, it would be an absurd result to interpret the Statute as depriving victims of an effective means of challenging a decision by the Prosecution to cease to actively investigate following an ineffective investigation.

H.1 The Prosecution raised legitimate expectations which it failed to fulfil

96. Through its public statements, the Prosecution raised legitimate expectations in the Victims, which have not been fulfilled. In a judgement recently relied upon by the High Court of Zimbabwe, Lord Justice Laws summarized how, arising from the doctrine of legitimate expectation, an abuse of power may be established.⁸³

⁸¹ ICC-02/05-02/09-121, para. 3. *See also* ICC-01/04-01/07-474, paras 31-44.

⁸² The Basic Principles also recognize that: 'In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.' (Article 3). States are also obliged to 'provide judicial assistance and other forms of cooperation in the pursuit of international justice.' (Article 4). Therefore, even for non-States Parties to the Rome Statute, there is an emerging obligation to cooperate to ensure effective investigation and prosecution of gross violations of international human rights and humanitarian law. In respect of victims' access to justice, Article 11 of the Basic Principles provides *inter alia* that: 'Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (a) *Equal and effective* access to justice; (b) *Adequate, effective and prompt reparation* for harm suffered.' Article 12 guarantees that victims 'shall have equal access to an *effective* judicial remedy as provided for under international law'.

⁸³ 'The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any

97. The Prosecution has said that it ‘will continue to make every effort to ensure effective interaction through public notice of its preliminary examination and its investigative activities’.⁸⁴ It has failed to provide public notice of its investigative activities in Kenya II.
98. The Prosecution has undertaken to conduct a dialogue with the Victims in respect of decisions to investigate and prosecute.⁸⁵ Regrettably, however, the Prosecution carried out no dialogue with the Victims prior to the Decision. The Decision was taken despite both public and confidential appeals by the LRV to the Prosecution to intensify, rather than to abandon, the investigation.
99. As noted above, the former Prosecutor made a public, verbal undertaking following the confirmation decision in Kenya II to continue to investigate activities of the police as well as crimes allegedly committed in Kibera and Kisumu; that undertaking appears not to have been effectively fulfilled.
100. Perhaps the Prosecution’s most poignant and unacceptable failure is in respect of victims of sexual and gender-based crimes (‘SGBC’) in Kenya. Its decision not to actively investigate followed years during which legitimate expectations of justice at the ICC were raised in the minds of those victims. The Prosecution has profoundly failed to fulfil those expectations.
101. The Statute contains a broad range of provisions intended to ensure the effective investigation and prosecution of SGBC. Article 54(1)(b), for example, requires that, in ensuring the ‘effective investigation and prosecution of crimes within the jurisdiction of the Court,’ the Prosecutor must ‘take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.’⁸⁶

promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power.’ *In Re (Bhatt Murphy) v Secretary of State for the Home Department* (2008), cited by the High Court of Zimbabwe in *Goba v ZIMRA and another* (2015).

⁸⁴ OTP Policy Paper on Victims’ Participation, page 14.

⁸⁵ ‘In attempting to ascertain the interests of victims, the Prosecutor will conduct a dialogue with the victims themselves as well as representatives of local communities. The Office of the Prosecutor considers that seeking the views of other actors involved in the situation will also be crucial in order to assess the impact for the interests of victims of investigations and prosecutions.’ OTP, Policy Paper on the Interests of Justice, p. 6.

⁸⁶ The Statute also requires States Parties, when nominating and electing the Court’s judges, to ‘take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.’ (Article 36(8)(b)). The Prosecutor and the Registrar are to consider the importance of legal expertise on violence against women in hiring staff within their respective organs. (Article 44(2)). The Prosecutor must appoint ‘advisers with legal expertise on specific issues, including . . . sexual and gender violence,’ (article 42(9)) while the Victims and Witnesses Unit must include staff with expertise in ‘trauma related to crimes of sexual violence.’ (Article 43(6)). In determining appropriate protective measures, the Court

102. The Prosecution's Policy Paper on SGBC builds on those provisions. In it, the Prosecution made ambitious promises regarding the prosecution of SGBC, almost none of which have been fulfilled in Kenya II.⁸⁷ The OTP says it has elevated 'the effective investigation and prosecution of sexual and gender-based crimes, [...] to one of its key strategic goals in its Strategic Plan 2012-2015. ... It will increasingly seek opportunities for effective and appropriate consultation with victims' groups and their representatives to take into account the interests of victims'. The Prosecution has emphasised 'thorough investigation of sexual and gender-based crimes'.⁸⁸
103. There is a vast gap between, on the one hand, the Statute's goals and the Prosecution's ambitions regarding SGBC and, on the other, the Prosecution's practice in Kenya II. The present inaction in Kenya II despite the existence of a significant body of evidence of rape is inconsistent with the Prosecution's undertaking to bring charges whenever there is sufficient evidence to do so.⁸⁹ The Prosecution's failure to effectively prosecute *anyone*, whether high, middle or low-ranking, for PEV SGBC is also inconsistent with its policy concerning middle and low-ranking offenders.⁹⁰
104. The LRV and his team have met a considerable number of victims of PEV SGBC, very few of whom, it appears, were interviewed by the OTP. As the Chamber will appreciate, it is exceptionally difficult to explain to even one victim of multiple rapes that the ICC Prosecutor has decided to abandon the case against those responsible for the crimes against her for lack of evidence, when the OTP has not even interviewed that victim.
105. The ECtHR, when ordering financial compensation to the survivors of a man killed

is required to take into account 'the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.' (Article 68(1)).

⁸⁷ 'Notwithstanding a serious and systematic underreporting of sexual and gender-based violence, as well as of the crimes committed against children, the OTP has prioritised these crimes and will continue to do so by paying special attention to them from the stage of preliminary examinations, through to its case selection. These crimes are considered as one of the factors in the determination of gravity. Bearing in mind the many challenges that face the Office with regard to the investigation and prosecution of these crimes, the Office will continue to be innovative in its evidence collection and presentation of these charges in Court.' OTP Strategic Plan June 2012 – 2015, paras. 58-59.

⁸⁸ OTP SGBV Policy Paper, para. 49. Emphasis added.

⁸⁹ 'Building on the preliminary examination and the substantive and detailed investigations and collection of evidence, the Office will ensure that charges for sexual and gender-based crimes are brought wherever there is sufficient evidence to support such charges.' OTP SGBV Policy Paper, para. 71. Emphasis added.

⁹⁰ 'The Office will generally investigate and prosecute those most responsible for the most serious crimes, based on the evidence collected during an investigation. In certain circumstances, the Office will also prosecute middle- or even low-ranking officers or individuals, the extent of whose participation and responsibility for particularly serious or notorious crimes, including sexual and gender-based crimes, justifies prosecution, in order to give full effect to the object and purpose of the Statute and maximise the deterrent impact of the Court's work.' OTP SGBV Policy Document, para. 23.

by security forces, recognised that the failure to carry out a prompt and effective investigation can itself be a cause of distress and anxiety which merits financial compensation.⁹¹

106. The same effect can be observed here. Some Victims began participating in this case in 2010. Their hopes were high. A significant proportion continue to suffer psychological effects of sexual violence; or of being hacked or burned nearly to death; or of having to watch their loved ones raped or beheaded during the PEV; or of not being able to find and bury the bodies of their missing children.⁹² Many have reported directly to the LRV their additional stress and anxiety at the Prosecution's failure to effectively investigate and prosecute, and to keep the promises it made.⁹³

H.2 The Prosecution failed to provide sufficient transparency to the Victims

107. The Prosecution has taken some welcome initiatives in the direction of transparency towards victims.⁹⁴ Overall, however, its approach falls short of that in place in other jurisdictions, where victims can obtain judicial review of a failure by a prosecutor to give adequate reasons for a decision not to prosecute.⁹⁵

⁹¹ In ordering financial compensation, the Court said: 'the Court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. The applicant must thereby have suffered feelings of frustration, distress and anxiety.' *Jordan v. United Kingdom*, (2001), para. 170.

⁹² As the TFV's website has noted, the general assistance mandate of the TFV 'serves as a very immediate response to the urgent needs of victims and their communities who have suffered from the worst crimes in international law.' The TFV has provided no support, whether material or psychosocial, to any Kenyan victim.

⁹³ Regulation 35(3) of the Regulations of the OTP requires the Prosecutor to avoid retraumatisation of the victims. Yet retraumatisation is perhaps not an unreasonable term to apply to the state of many of the victims who have followed with bewildered disbelief news of the Prosecutor's serial inability to carry out an effective prosecution, and have expressed real anger when informed that the Prosecutor has decided, in effect, to give up following a determined campaign of attrition by Mr Kenyatta's government.

⁹⁴ In an annex attached to the Prosecution's filing of 31 January 2014 (ICC-01/09-02/11-892-AnxA-Red), the Prosecution provided answers to 14 questions put to the Prosecution by the LRV, in an exemplary effort by the OTP to provide transparency to the victims in the present case. The Senior Trial Lawyer for the OTP in the present case volunteered to accompany the LRV on his recent mission to meet victims in Kenya. For security reasons beyond his control, his presence regrettably was not possible.

⁹⁵ For example, the United Kingdom. In a set of answers to the Committee of Ministers of the European Convention, the UK Government explained the remedies available to victims if the prosecution service fails to give reasons for a decision not to prosecute lethal use of force: 'Judicial review is possible under two heads. Firstly, a freestanding challenge to a failure to give detailed reasons for a decision not to prosecute would be possible under the Human Rights Act, based on the failure to conduct an Article 2-compliant investigation. The possibility to bring such a challenge existed independently of any Code for Prosecutors. Secondly, in accordance with a well developed doctrine in domestic law in the United Kingdom, if a public body states that it will follow a given policy, this creates a legitimate expectation that the body will follow that policy unless there exist compelling reasons not to do so. Judicial review is possible on the basis of this legitimate expectation and is therefore possible on the basis of legitimate expectations arising out of the Code. On a judicial review of a decision by the Prosecution Service in respect of the giving of reasons for not prosecuting, the court will review whether the reasons given in that case were in accordance with the Code for Prosecutors and were capable of supporting the decision not to prosecute. [...] It is open to the court to conclude that the reasons given are manifestly bad reasons and that the maker of the decision for no prosecution had failed to take relevant matters

108. As argued earlier, Government obstruction of justice has been a critical factor behind the ineffectiveness of the Kenya II investigation.* Even if the extensive nature of that obstruction is accepted, and even if it is accepted that the Prosecutor operates with resources that are unequal to its mandate, this does not justify the Prosecutor's present inaction. The Prosecution chose to investigate in Kenya. It cannot simply cease to actively investigate in order to devote resources to other investigations. The Victims deserve a clear and reasoned explanation.
109. The Prosecution has yet to provide to the Victims a sufficiently reasoned explanation of what its overall investigative strategy (including its strategy to deal with state obstruction) was and why it failed.* In particular, in none of the filings or public statements to date has the Prosecution clearly identified (a) the sequence of steps which led to its reliance to such a devastating extent on the oral evidence of one insider witness concerning one meeting in the case against Mr Kenyatta, and one insider witness upon whom the Prosecution can no longer rely in the case against Mr Muthaura; or (b) its reluctance to make adequate use of the remedies for state and individual obstruction of justice under articles 70 and 87(7).
110. Where the Prosecution takes a decision not to actively proceed with an investigation or a prosecution, it is imperative that victims be assured that the Prosecution's reasons not to proceed are in conformity with the Statute and applicable law, just and based on general principles of universal application. The reasons must be clearly articulated so that the merits of the decision can, where appropriate, be contested by the victims and scrutinized by the relevant Chamber.

into account or had taken irrelevant matters into account. In such circumstances the court would almost certainly grant an order of certiorari. The effect of such an Order is to quash the original decision for no prosecution. This would require the Prosecution to reconsider the case and come to a fresh decision on prosecution' *See* attachment to Interim Resolution CM/ResDH (2007) 73 'Action of the Security Forces in Northern Ireland (Case of McKerr against the United Kingdom and five similar cases)'.

⁹⁶ It is abundantly clear that the OTP's investigation and prosecution were frustrated by conduct which amounts to systematic and deliberate obstruction of justice by the Government, in particular under Mr Kenyatta's presidency. Furthermore, as the Prosecution's pre-trial brief in the *Kenyatta* case notes, attempts were allegedly made to bribe and to intimidate the most important witnesses due to give evidence against Mr Kenyatta. The brief also notes the extrajudicial execution of senior Mungiki, in the aftermath of the PEV, who were in a position to provide evidence about Mr Kenyatta's involvement.

⁹⁷ On 9 December 2014, the LRV said: 'if the Prosecution intends not to further investigate the present case, the victims are entitled to a public, reasoned statement to that effect, as soon as possible'. Victims' response to Prosecution's notification of the withdrawal of charges against Uhuru Muigai Kenyatta, para. 59. The Victims have received no notification which even approaches the level of detail contained in the Prosecution's 6 November 2014 decision not to investigate in the Comoros case (ICC-01/13-6-AnxA), and supplemented in the Prosecution's subsequent filings in that case (for example, ICC-01/13-14-Red). Recently, the Prosecution publicly and very briefly alluded to its failed investigative strategy in Kenya II, which appears to be the result of a now-abandoned policy. The Prosecution made reference to a 'shift' in strategy and prosecutorial policy in recent years, but did not identify the reasons for what it described as its 'lack of alternative investigative avenues' in Kenya II. *See* Draft OTP Strategic Plan 2016 – 2018, pp.10 and 41.

H.3 The proceedings have been unfair to the Victims and violated their rights to truth, justice and reparation

111. It is incontestable that these proceedings have been unfair to the Victims. They received no justice in Kenya. At the ICC, the cases against all three accused collapsed before a single day of trial. The Victims' rights under the Statute to truth, justice and reparation have proved wholly illusory.
112. Pre-reparation assistance has been also been absent: the Government has not provided compensation to the vast majority of the Victims, and the TFV has provided no assistance to any Kenyan victim under its 'general assistance' mandate.⁹⁸
113. The Victims have been denied both by the Government and by the Court all five of the forms of reparation described in principles 19-23 of the Basic Principles and recognized by international human rights law (namely, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition).
114. With no active investigations by the Kenyan authorities or the Prosecution, the current prospects for truth, justice or reparation in respect of PEV crimes are nil. The Victims' rights have been defeated by the Prosecution's inaction in the face of state obstruction and interference. No reasonable person can consider to be fair an outcome where an accused, as Head of State of a State Party, systematically, deliberately and unlawfully fails to ensure that the State Party complies with its Part 9 obligation to deliver relevant evidence, and where this is followed by a decision of the Prosecution to withdraw charges against that Head of State and to cease active investigation of the serious crimes of which he is accused. Yet that is what has happened here.
115. The Statute does not expressly permit the Prosecutor to cease to effectively investigate on the ground that denying justice to some victims is offset by a greater good in the aggregate.⁹⁹ The Prosecution has, in effect, led one group comprising tens of thousands of victims of mass atrocities for years to believe that they will receive justice at this Court, and then decided to deny justice to them in order to shift

⁹⁸ A minority of the victims who the LRV has met received from the Government of Kenya a single payment of 10,000 KES in the immediate aftermath of the PEV and nothing since. It is a matter of serious concern that the TFV has yet to carry out even a preliminary examination in Kenya, and has provided help under its general assistance mandate to not one victim in Kenya. The LRV has communicated several times with the TFV on this matter, and accepts that it the TFV is not under the control of the OTP or the Chamber.

⁹⁹ Victims enjoy a presumption of equal access to an effective judicial remedy. Article 11 of the Basic Principles: 'Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (a) *Equal and effective* access to justice' Article 12 guarantees that victims 'shall have *equal access to an effective judicial remedy* as provided for under international law'. Emphasis added.

resources to the delivery of justice to other groups of victims.¹⁰⁰ This is a decision the legitimacy of which requires reasoned justification and should be subject to the most rigorous judicial scrutiny.

H.4 The Victims have exhausted all other avenues to secure an effective investigation and prosecution

116. Should the Chamber consider judicial review to be a remedy to be used only when all other avenues are exhausted, the LRV submits that the Victims have exhausted all avenues reasonably open to them in order to try to persuade the Prosecution not to abandon its investigation of Kenya II. As well as repeatedly calling for more rigorous investigation in public written submissions,¹⁰¹ the LRV sent a confidential 20-page letter to the Prosecution on 5 July 2014 calling *inter alia* for a more rigorous investigation, and met representatives of the Prosecution shortly afterwards.
117. The Victims' quest for justice in Kenya and at this Court has been wholly frustrated. No effective means of redress are now available other than the present application.

I. The Chamber may review the Decision under articles 68 and 21

118. The Statute is silent on remedies for victims where the Prosecution has failed to effectively investigate and prosecute the crimes committed against them. In the case of a *lacuna* in the Statute, the Court shall apply under article 21(1)(c) of the Statute general principles of law derived by the Court from 'national laws of legal systems of the world', as well as the law of the State that would normally exercise jurisdiction.
119. The Court's approach to the interpretation of article 21 should be guided by the fact that the object and purpose of the Statute as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.¹⁰² Furthermore, interpretation of the Statute must also be consonant with the central role afforded to the victims in it, to the greatest extent possible without unfairly prejudicing the rights of the accused.

¹⁰⁰ The 2016-2018 OTP Strategy Document at pages 6, 7, 9, 10 and 16 refers to the inadequacy of the resources currently allocated to the OTP. The OTP notes at page 10, for example, that recent arrests and other events 'obliged the Office to adjust its resource planning. This has been at the expense of other urgently needed activities such as making the hibernated cases "trial-ready"'.

¹⁰¹ See in particular ICC-01/09-02/11-879-Red, paras. 25-31 and 43 to 50. The LRV expressly noted that it was premature at that time 'to litigate fully the extent and exercise of the Prosecutor's discretion in the present case' and informed the parties that he wished to 'reserve the right to make, at the appropriate moment, full written submissions on ... the extent to which the Prosecution has fulfilled its statutory duties.' *Id.*, para. 43 and footnote 35. See also ICC-01/09-02/11-984, paras. 33-62.

¹⁰² See, *inter alia*, the ECtHR judgements in *Soering v. United Kingdom*, (1989), para. 87; *Loizidou v. Turkey* (1995), para. 72; and *McCann v. United Kingdom* (1995), para. 146.

120. The President of the Special Tribunal for Lebanon ('STL') has said, when finding implicit in the STL statute a right for victims to seek interlocutory appeal in special circumstances:

Justice requires meticulous protection of the lawful rights of persons suspected or accused of crimes. But, subject only to that absolute requirement, the law should take care to protect those who have been victimized by crime. That indeed is the *raison d'être* both of the criminal law and of this Tribunal. The Statute of the Tribunal stipulates measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. That is a policy which, within the limits of a fair and expeditious trial, should receive full effect in decision-making. It is consistent with the reaffirmation in the United Nations Charter of fundamental human rights and of the dignity and worth of the human person, which must have particular resonance for victims of the grave crimes that have resulted in the Tribunal's creation under Chapter VII [of the UN Charter]. Failure to apply such a policy would risk re-victimizing victims.¹⁰³

121. Article 21(1)(c) serves 'as an invitation [to the Court] to consult comparative criminal law as a subsidiary source of norms.'¹⁰⁴ Based on the examination of nearly 70 national legal systems across the world, a general principle of law exists that victims have the right to challenge or seek judicial intervention in respect of a prosecutor's decision not to investigate or prosecute, especially in cases involving serious crimes. Further, Kenya—the State which should normally exercise jurisdiction—accords victims the right to seek judicial review of a prosecutor's decision not to investigate or prosecute.

122. Under article 21(3), the Chamber must ensure that its application and interpretation of Statute is consistent with internationally recognized human rights. The Court has interpreted article 21(3) in a broad and expansive manner,¹⁰⁵ holding that it pertains to all articles of the Statute and constitutes a general principle of interpretation that must be applied when 'interpreting the contours' of the statutory framework.¹⁰⁶

I.1 Judicial review of a failure to investigate or prosecute is a general principle of law under article 21(1)(c) and is consistent with internationally recognized human rights under article 21(3)

123. The derivation of general principles of law from domestic legal systems is a long-established practice in international law, one that international tribunals—such as

¹⁰³ STL-II-OIPT/AC/AR126.3 Concurring opinion of Judge Baragwanath, para. 2.

¹⁰⁴ William Schabas, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, 2010), p. 393.

¹⁰⁵ Carsten Stahn and Göran Sluiter, *The Emerging Practice of the International Criminal Court*, (Brill, 2009), p.301, [hereinafter Stahn and Sluiter].

¹⁰⁶ ICC-01/04-141, para. 38. ("Like every other Article of the Statute, Article 82 must be interpreted and applied in accordance with internationally recognized human rights, as declared in Article 21 (3) of the Statute."); ICC-01/04-01/06, paras. 6-7; *see also*, Stahn and Sluiter at p. 674.

this Court—are uniquely suited and accustomed to undertaking.¹⁰⁷ Ascertaining general principles from various national laws is a flexible exercise rather than ‘a mechanical system of borrowing from domestic law after a census of domestic systems.’¹⁰⁸ As Professor Brownlie explained:

[I]nternational tribunals have employed elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process . . . An international tribunal chooses, edits, and adapts elements from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law.¹⁰⁹

124. There is no strict formula used to determine a general principle.

The legal principles which find a place in all or most of the various national systems of law naturally commend themselves to states for application in the international legal system, as being almost necessarily inherent in any legal system within the experience of states[.]¹¹⁰

125. Consequently, a general principle should embody a general consensus among national systems regarding a procedural or substantive legal principle such that the principle may be considered part and parcel of a quintessential legal system.

126. The elucidation of a general principle is grounded in qualitative rather than quantitative analysis. As Professor Bassiouni affirmed, ‘the number of national legal systems that need to be consulted within the world’s major legal systems will depend upon the type of inquiry and the degree of identity or similarity of findings that may emerge from the research.’¹¹¹ Thus, ‘[b]y its very nature, a broad “General Principle” does not require sameness in terms of its specific normative formulation’.¹¹²

127. In contrast to civil law jurisdictions, judicial oversight of decisions not to prosecute was previously only narrowly available in common law jurisdictions. However, it is now widely accepted in the common law world that a court may judicially review a decision of the prosecution service – often called the ‘Director of Public Prosecutions (the ‘DPP’) – not to prosecute, as well as a decision of the prosecution to withdraw charges (*nolle prosequi*).

¹⁰⁷ See Statute of the International Court of Justice, Art. 38(1)(c); see also M. Cherif Bassiouni, ‘A Functional Approach to ‘General Principles of International Law’, 11 MICH. J. INT’L LAW 768, 768-70 (1990) [hereinafter Bassiouni].

¹⁰⁸ Ian Brownlie, *Principles of Public International Law*, (Oxford University Press, 6th edition, 2003)

¹⁰⁹ *Id.*

¹¹⁰ Robert Jennings and Arthur Watts, *Oppenheim's International Law*, Volume 1 (9th ed. 1992), pp. 36-7.

¹¹¹ Bassiouni, p. 813.

¹¹² *Id.* p. 814. The Prosecution has previously advocated this very approach to Article 21(1)(c): ‘[T]he principle of interpretation is the following: when a survey of jurisdictions representing the main legal systems results in the identification of a common rule or set of rules, i.e. the survey shows a degree of comparative equivalence sufficient to ensure a broad consensus, then the judge or chamber engaging in the interpretation may extract the principle underpinning those rules and subsequently apply the principle to the case at bar. Resort to relevant policy considerations is also appropriate’. ICC-01/04-141, para. 20.

128. For example, the Supreme Court of Fiji recognised the power to judicially review a *nolle prosequi*. Its decision was referred to, quoted and approved by the Judicial Committee of the Privy Council¹¹³ on three occasions: one on appeal from Mauritius¹¹⁴, another on appeal from Trinidad and Tobago¹¹⁵ and a third on appeal from Jamaica.¹¹⁶ It was also cited and applied in 2008 in the High Court of Justice in Northern Ireland¹¹⁷ and, in 2009, in a decision of the House of Lords.¹¹⁸ In England and Wales, a decision by the DPP not to prosecute is generally susceptible to judicial review.¹¹⁹ In Ireland, a failure by the DPP to perform his statutory duties can be the subject of a *mandamus*—a mandatory order to prosecute.¹²⁰
129. The position in a representative sample of the world’s legal systems is summarized below, grouped according to the United Nations Regional Groups. The sample includes legal systems based on common law, civil law and Islamic law. It comprises 12 States in Africa, 14 States in the Asia-Pacific, 8 States in the Middle East, 9 States in Eastern Europe, 14 States in Latin America and the Caribbean, and 12 States in the Western Europe and Others category.¹²¹

I.1.1 Africa

130. In Ethiopia, Kenya, South Sudan, Mauritius, Tanzania, and Zambia, victims may seek judicial review of a prosecutor’s decision not to prosecute or otherwise compel prosecution.¹²² In Botswana, Namibia, Rwanda, South Africa, Tunisia, and Zimbabwe, victims may commence a private prosecution against the alleged perpetrator.¹²³

¹¹³ This acts as a final court of appeal for several common law countries and territories around the world.

¹¹⁴ *Mohit v Director of Public Prosecutions of Mauritius* (2006).

¹¹⁵ *Sharma v Brown-Antoine* (2007).

¹¹⁶ *Leonie Marshall v Director of Public Prosecutions* (2007).

¹¹⁷ *Re Hammel's Application* (2008).

¹¹⁸ *R (Corner House Research) v Director of Serious Fraud Office* (2009).

¹¹⁹ *R v Director of Public Prosecution, ex parte Manning* (2001). Recently, for example, the England and Wales High Court ordered a judicial review of a decision by the DPP not to initiate a prosecution for rape and/or sexual assault. The claimant was the victim of the alleged rape and sexual assault. The Court found that the DPP’s principal legal adviser’s conclusion that there was no realistic prospect of conviction for any offence was erroneous, as she had applied a legal test relating to consent which had subsequently been modified. See *The Queen (on the application of F) v. DPP*, (2013). The bench included Judge Adrian Fulford, formerly of this Court. Applications for judicial review of decisions not to prosecute have been successful in *R v DPP, ex p. C* (1995); *R v DPP, ex p. Jones (Timothy)* (2000); *R v DPP, ex p. Treadaway* (1997); *R v DPP, ex p. Manning* (2001); *R (on the application of Joseph) v DPP* (2001); *R (on the application of Peter Dennis) v DPP* (2006).

¹²⁰ See Annex 3, p. 7.

¹²¹ The sample below, as detailed in Annex 3, is representative only, and is not intended to be an exhaustive list of the jurisdictions in which victims enjoy effective remedies for a prosecutorial failure to effectively investigate or prosecute.

¹²² See Annex 3 pp. 1-2.

¹²³ See *id.*

I.1.2 Asia-Pacific

131. China, Japan, Fiji, Laos, Mongolia, the Philippines, Singapore, South Korea, and Uzbekistan grant victims the right to challenge or seek judicial review of prosecutorial decisions not to prosecute.¹²⁴ The United Nations Transitional Administration in East Timor enshrined in its Transitional Rules of Criminal Procedure the right of victims to petition for judicial review of a prosecutorial decision not to pursue a case.¹²⁵ Kazakhstan requires the victims' approval of a prosecutor's decision not to prosecute or to terminate an existing prosecution.¹²⁶ In Cambodia and Thailand, victims may commence a private prosecution against the alleged perpetrator.¹²⁷

I.1.3 Eastern Europe

132. Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Latvia, Russia, and Serbia grant victims the right to challenge, appeal, or seek judicial review of prosecutorial decisions not to prosecute.¹²⁸

I.1.4 Latin America and the Caribbean

133. Chile, Colombia, Jamaica, Nicaragua, Paraguay, Trinidad and Tobago, and Venezuela permit victims to challenge or seek judicial review of prosecutorial decisions. Guatemala and Peru require that the victims grant consent for termination of prosecution.¹²⁹ Argentina, Bolivia, and Brazil allow victims to pursue private prosecutions where the prosecutor declines to prosecute.¹³⁰

I.1.5 Middle East

134. In Bahrain, Iraq, Israel, Qatar, Turkey, and the United Arab Emirates, victims can challenge, appeal, or seek judicial review of prosecutorial decisions not to prosecute.¹³¹

I.1.6 Western Europe and Others

135. Belgium, Canada, France, Germany, Ireland, Italy, Netherlands, Switzerland, and the United Kingdom grant victims the right to challenge, appeal, or seek judicial review

¹²⁴ *See id.* pp. 2-3.

¹²⁵ *See id.* p. 2.

¹²⁶ *See id.* pp. 2-3.

¹²⁷ *See id.*

¹²⁸ *See id.* pp. 4-5.

¹²⁹ *See id.* pp. 5-6.

¹³⁰ *See id.* p. 5.

¹³¹ *See id.* pp. 3-4.

of prosecutorial decisions not to prosecute.¹³² The European Commission requires all 29 EU Member States to:

[E]nsure that at least victims of serious crime have the right to a review of a decision not to prosecute, in accordance with procedural rules determined by national law. ... A decision ending criminal proceedings should include situations where a prosecutor decides to withdraw charges or discontinue proceedings. ... The review must be carried out by a person or authority other than whoever made the original decision.¹³³

I.2 Kenyan law accords victims the right to seek judicial review of a prosecutor's decision not to investigate or prosecute

136. Article 21(1)(c) directs the Court, in deriving general principles of law, to consider the law of Kenya, which is the situs of the crimes and the State of nationality of perpetrators and victims. The Kenyan legal system provides victims with several safeguards against unfettered prosecutorial discretion. Notably, if the DPP decides not to prosecute, victims are empowered under the Constitution to seek High Court review of the DPP's decision.¹³⁴

137. Kenyan case law affirms that victims can seek judicial review and that the court may compel prosecution where it is in the interests of justice. For example, in *C.K. et al. v. Commissioner of Police et al.*, the High Court held that the failure to investigate and prosecute was a violation of the victims' rights and compelled the police and the DPP to investigate and prosecute the defilement, sexual violence, and child abuse suffered by the 11 victims.¹³⁵ The Court held that '[t]he respondents have failed in their fundamental duties as stated under Article 21 [of the Kenyan Constitution] in failing to observe, respect, protect, promote and fulfill the petitioners' fundamental rights

¹³² See *id.* pp. 6-7. See also Carsten Stahn, 'Judicial review of prosecutorial discretion: Five years on', in Stahn and Sluiter, pp. 253-254.

¹³³ *DG Justice guidance document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, December 2013. Directive 2012/29/EU, Article 11 requires Member States to 'ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute'.

¹³⁴ See Kenya Constitution (2010) Art. 23(1) ("The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."); Art. 47(1) ("Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."); Art. 48 ("The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.").

¹³⁵ *C.K. (a child) through Ripples International as her guardian and Next friend & others v Commissioner of Police/Inspector General of the National Police Service & others* (2013) K.L.R. (H.C.K.) (Kenya). Domestic lawsuits to compel prosecutions for police killings and SGBV crimes are pending before the Kenyan courts. In particular, *Coalition on Violence against Women & others v The Attorney General of the Republic of Kenya & others* (Constitutional Petition No. 122 of 2013) and *Citizens Against Violence, IMLU and others v. The Attorney General of the Republic of Kenya & others* (Constitutional Petition No. 18 of 2014) are pending before the Constitutional and Human Rights Division of the High Court of Kenya. The Government's responses have been dilatory and evasive. The existence of a right in the Kenyan legal system to challenge the Government's failure to investigate and prosecute PEV crimes has not translated into effective prosecutions in Kenya.

and freedoms'.¹³⁶ The Court further expressed concern that the 'failure [by the Police and the DPP] to ensure criminal consequence through proper and effective investigation and prosecution of these crimes has created a "climate of Impunity" for commission of sexual offences and in particular defilement.'¹³⁷

138. In the present case, the Court similarly faces a plea from Kenyan victims to review a prosecutorial decision not to actively investigate serious crimes. The general principle of law permitting judicial intervention at the request of victims, which is derived not only from Kenyan law but also from the national laws of jurisdictions around the world, must equally be applied here.
139. The global legal research referred to above is applicable not only to the Chamber's application of article 21(1)(c) but also to its application of article 21(3). It shows that a prosecutor's decision not to prosecute is generally challengeable by victims of serious crime who may proceed in one of three ways: (a) by seeking judicial review of the prosecutor's decision, (b) by denying permission for the prosecutor to discontinue the case, or (c) by commencing a private prosecution notwithstanding the prosecutor's decision. Interpreting the Statute to permit an effective remedy for prosecutorial inaction is entirely consistent with the internationally recognized rights of victims of serious crimes under the Basic Principles, and under international human rights law generally (as submitted at paragraphs 43-48 *supra*) to an prompt and thorough investigation and to an effective remedy for violation of their fundamental rights.

J. The Chamber may also review the Decision under article 53(3)(b)

140. The Chamber can and should, on its own initiative, review the Decision pursuant to article 53(3)(b). It should not confirm the Decision unless it is satisfied that the Prosecution has taken all steps reasonably available to it under the Statute to ensure access to all the evidence necessary to uncover the truth.

J.1 The Decision amounts to a decision not to proceed in the interests of justice

141. The Prosecution cannot argue that no decision susceptible to judicial scrutiny has been made. A decision to cease active investigation following three failed prosecutions, before even a single day of trial, *de facto* amounts to a decision not to proceed and requires a clear statutory basis.
142. The Prosecution cannot be permitted to immunize itself against judicial review by, in

¹³⁶ Annex 3 at p. 7.

¹³⁷ *Id.*

effect, deciding not to proceed *sine die* and then (a) denying that it has decided not to proceed; and (b) claiming that its decision not to proceed is not based on the interests of justice. Rather, the Statute's drafters appear to have intended the Prosecution *either* to rigorously and actively investigate and prosecute the cases before it until the conclusion of the trial or appeal, as appropriate, *or* to make a determination not to proceed under article 53.

143. The Prosecution in the *Comoros* litigation 'agrees that it must exercise its duties in a rational, fair, and reasonable way'¹³⁸.
144. A reasonable interpretation of the Statute allows the Prosecution to cease to actively collect inculpatory evidence in any of three scenarios: (a) the Prosecution has collected all relevant evidence under article 54(1) and the case is trial-ready but the accused is at large; (b) the Security Council has suspended the investigation pursuant to article 16; (c) the Prosecution has invoked its article 53(4) power to reconsider a decision to investigate or prosecute. None of these applies in Kenya II.
145. The Chamber is therefore compelled to conclude that the only valid statutory basis for the Prosecution's decision to cease to actively investigate the present case is either article 53(1)(c) or 53(2)(c). That is, that the Prosecutor has concluded that further investigation or prosecution would not be in the interests of justice.
146. The Prosecution, however, states that it has come to the conclusion that a prosecution would be very much in the interests of justice, but that there is insufficient evidence to substantiate any such prosecution.¹³⁹ As noted above, the Victims submit that Prosecution's inadequate efforts to collect sufficient evidence to substantiate a prosecution violate article 54(1).
147. The Prosecution appears to recognize the inadequacy of its investigation but has determined that the expenditure of further resources on Kenya II would be futile, and has decided to suspend work on the investigation in view of the other demands on its resources.¹⁴⁰ This in essence is a determination not to proceed in the interests of

¹³⁸ ICC-01/13-14-Red, para. 15.

¹³⁹ Confidential annex 2, Letter from OTP to LRV, para. 28.

¹⁴⁰ The Draft OTP Strategic Plan 2016 – 2018 refers to nine currently 'hibernated' investigations (Draft OTP Strategic Plan 2016 – 2018, page 10, footnote 5), none of which is Kenya II. Pages 6, 7, 9, 10 and 16 refer to the inadequacy of the resources currently allocated to the OTP. The OTP notes at page 10, for example, that recent arrests and other events 'obliged the Office to adjust its resource planning. This has been at the expense of other urgently needed activities such as making the hibernated cases "trial-ready"'.

justice, regardless of whether the Prosecution characterizes it as such, and is reviewable under article 53.¹⁴¹

148. Article 53(3)(b) does not bind the Chamber to the Prosecution's interpretation of the term 'interests of justice'. The Chamber can apply its own analysis as to when a decision not to proceed in the 'interests of justice' has been made. The Prosecution accepts that its determination of whether a decision is in the 'interests of justice' is not final: 'The interpretation and application of the interests of justice test may lie in the first instance with the Prosecutor, but is subject to review and judicial determination by the Pre Trial Chamber'.¹⁴²

149. There is a presumption in favour of investigation and prosecution where the statutory criteria are satisfied. As the Prosecution notes, article 53 entails a 'presumption in favour of investigation or prosecution wherever the criteria established in article 53 (1) (a) and (b) [...] have been met'.¹⁴³ The Prosecution adds that the Prosecutor 'shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time'.¹⁴⁴

150. The Prosecution's policy paper on the interests of justice test notes:

[T]here is no clear guidance on what the content of the idea is. The phrase 'in the interests of justice' appears in several places in the ICC Statute and Rules of Procedure and Evidence but it is never defined. Thorough reviews of the preparatory works on the treaty also offer no significant elucidation.¹⁴⁵

151. The 'interests of justice' category is therefore residual. It applies to any exercise of prosecutorial discretion where the Prosecutor has made a deliberate choice not to investigate or prosecute a case which otherwise satisfies all statutory criteria for investigation and prosecution.

152. The Victims therefore invite the Chamber to conclude that the Decision amounts to a decision by the Prosecution not to proceed because further investigation or prosecution would not serve the interests of justice.

153. Pursuant to article 53(3)(b), the Chamber may, on its own initiative, review the Decision. As a preliminary step, the Chamber might invite the Prosecution to formally notify it of its conclusion and the reasons for the conclusion so that the

¹⁴¹ The more obvious situations in which an investigation or prosecution might not be in the interests of justice (e.g. where the accused is terminally ill or has been the subject of abuse amounting to serious human rights violations) obviously do not apply here.

¹⁴² OTP Policy Paper on the Interests of Justice, p. 3.

¹⁴³ OTP Policy Paper on the Interests of Justice, p. 1.

¹⁴⁴ OTP Policy Paper on the Interests of Justice, p. 3.

¹⁴⁵ OTP Policy Paper on the Interests of Justice, p. 2.

Chamber can formally review that conclusion.¹⁴⁶

J.2 Article 53(2) and (3) apply to cases which have their origin in article 15

154. The Prosecution takes the view that articles 53(2) and (3) have no application to situations and cases that have their origin in article 15 and thus no application to the present case.¹⁴⁷ The Victims contest this interpretation.

155. A plain reading of the Statute envisages the following sequence where the Prosecution decides not to proceed following article 15 authorization:

(a) the Prosecution concludes that there is a reasonable basis to proceed with an investigation and submits to the Chamber a request for authorization of an investigation under article 15(3);

(b) the Chamber authorizes the commencement of the investigation under article 15(4);

(c) the Prosecution subsequently concludes under article 53(1)(c) or 53(2)(c) that the interests of justice do not favour further investigation or prosecution;

(d) the Chamber may review under article 53(3) that conclusion.

156. Furthermore, it would be an absurd interpretation of the Statute to conclude that, having been expressly authorized by the Chamber under article 15 to initiate an investigation, the Prosecution is at liberty to drop the investigation for any or no reasons, including reasons that are arbitrary or irrational, with no remedy whatsoever.

157. As submitted above, where a fundamental right is violated, international human rights law requires that there be an effective remedy. The Victims' fundamental rights to truth, justice and reparation have been violated by the Prosecution's cessation of the investigation in this case. To interpret and apply article 54(1)(b)'s imperative that the Prosecution shall take 'appropriate measures to ensure the effective investigation and prosecution of crimes' consistently with internationally recognized human rights demands that a remedy be provided to the Victims for the failure to effectively investigate or prosecute.

J.3 Prosecutorial inaction resulting in denial of fundamental rights is subject to rigorous review

158. The Pre-Trial Chamber in the *Comoros* case identified the standard for article 53 review: 'Upon review, the Chamber must request the Prosecutor to reconsider her

¹⁴⁶ Article 53(2)(c).

¹⁴⁷ Annex 2, OTP-LRV letter, paras. 24-25.

decision not to investigate if it concludes that the validity of the decision is materially affected by an error, whether it is an error of procedure, an error of law, or an error of fact.’¹⁴⁸ In applying this standard, no margin of prosecutorial error can be tolerated.

The Pre-Trial Chamber said:

[T]here is also no valid argument for the proposition that in order not to encroach on the independence of the Prosecutor, the Chamber should knowingly tolerate and not request reconsideration of decisions under article 53(1) of the Statute which are erroneous, but within some field of deference. The role of the Chamber in the present proceedings is to exercise independent judicial oversight.¹⁴⁹

159. Well-established principles of judicial review also require a court to intervene if the decision is patently unreasonable, took into account irrelevant considerations, or failed to take into account relevant factors. As noted in *Manning*, a leading case on judicial review of a prosecutorial discretion not to prosecute:

[T]he standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.¹⁵⁰

160. Judicial review of a decision concerning denial of fundamental rights will require the denier of those rights to provide full justification.¹⁵¹ Here, the Decision denies fundamental rights (to truth, justice and reparation) to tens of thousands of people. It must be subject to rigorous scrutiny.¹⁵²

J.4 No time bar yet applies to review under article 53(3)(b)

161. Rule 109(1) imposes a 180-day period following a notification given under rule 105 or 106 within which the Chamber may decide to review a decision of the Prosecution taken solely under article 53(1)(c) or 53(2)(c). As the Prosecution has provided no formal notification pursuant to rule 105 or 106, the Victims submit that this time period has not yet started to run.¹⁵³ The Victims submit that the time limit should

¹⁴⁸ ICC-01/13-34 16-07-2015, para 12.

¹⁴⁹ ICC-01/13-34 16-07-2015, para. 15

¹⁵⁰ *R v Director of Public Prosecutions, ex p Manning* (2001) (United Kingdom), para. 23.

¹⁵¹ ‘The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable [...].’ *R v Ministry of Defence, ex p Smith* (1996) para 554D-G. Bingham LJ in *R v Secretary of State for the Home Department, ex p Sittampalam Thirukumar* (1989) paras. 402, 414 said that asylum decisions were: ‘decisions [...] of such moment that only the highest standards of fairness will suffice.’

¹⁵² *R v Shayler* (2002) UKHL 11 (2003) para 33: ‘in any application for judicial review alleging [a] violation of a [European] Convention right the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible’.

¹⁵³ If the Chamber deems that the confidential letter from the Prosecution to the LRV of 2 April 2015 (attached in Annex 2) constitutes notification under rule 105 or 106, the time limit for the Chamber to exercise its discretion to review expires in early October 2015. The Chamber may extend this time limit under regulation 35(2) of the RoC if good cause is shown. In the present circumstances, the Prosecution’s failure to file a notification under rule 105 or 106 constitutes good cause.

begin to run once the Prosecution has provided formal notification of the Decision to the Chamber pursuant to rule 105 or 106.

K. Other factors favour the exercise of the Chamber’s discretion to review

162. The circumstances of the present case favour the exercise of the Chamber’s discretion to review the Decision. The Victims have exhausted all efforts to persuade the Prosecution to carry out an effective investigation. There are numerous indicators that its investigation in Kenya II has not been thorough. All factors explicitly or implicitly contained in the Statute (personal, territorial, subject-matter and temporal jurisdiction; gravity; the requirement that the State is unable or unwilling genuinely to prosecute; the interest of the victims; the existence of evidence against identified persons; deterrence of crimes against humanity; deterrence of individual and state obstruction of justice; ending impunity for the powerful for horrific crimes against the powerless) weigh heavily in favour of continued, active, on-the-ground investigation.
163. In order to form a more informed view regarding the contours and adequacy of the Kenya II investigation, the Victims urge the Chamber to request the Prosecution, pursuant to regulation 48(1) of the RoC, to provide such additional information, documents or summaries thereof that the Chamber considers necessary in order to exercise the functions and responsibilities set out in article 53(3). For example, the Chamber might wish to request the Prosecution to submit to it (on an *ex parte* basis if necessary) further details concerning its internal investigative strategy for Kenya II, and in particular the most recent versions of its evidence collection and cooperation plans.¹⁵⁴
164. Other factors, which demonstrate that the Decision is unreasonable and which weigh in favour of review, are listed below.

K.1 The Prosecution has evidence against identified, living persons for crimes against the Victims

165. The pre-trial brief in the *Kenyatta* case sets out the Prosecutor’s evidence against Mr Kenyatta. It is clear from those parts of the brief from which the Prosecutor has not resiled that the Prosecutor possesses a considerable quantity of evidence concerning the participation of several living persons in the attacks in Nakuru and Naivasha,

¹⁵⁴ These plans are required to be submitted to the OTP’s Executive Committee for approval and to be ‘updated and amended on a continuous basis taking into consideration the evidence collected’: Regulation 35(1) and 35(4) of the Regulations of the OTP.

and the clean-up operation following those attacks to conceal the involvement of those involved.¹⁵⁵

166. The Prosecution has acknowledged this, and has previously indicated that it was considering prosecutions against those persons.¹⁵⁶ Having collected a significant quantity of reliable evidence against them, it is highly unreasonable for the Prosecution not to pursue the leads and knowledge which it has already built up, and is a violation of its article 54(1) obligation to effectively investigate and prosecute.

K.2 Particularly determined prosecution is necessary where the accused is Head of State and Head of Government

167. This is a particularly inappropriate case for the Prosecution to decide not to actively investigate. As argued in detail in the litigation concerning the Government's non-cooperation, Kenya's refusal to allow the Prosecution access to key financial, cellphone and other data relevant to the case against Mr Kenyatta was undoubtedly approved of by Mr Kenyatta. Mr Kenyatta's failure to secure that cooperation is a violation of Kenya's constitution and of international law. The Trial Chamber ruled: 'Heads of state or relevant government organs therefore have to give effect to the obligations and ultimately have responsibility to ensure State compliance with their treaty obligations.'¹⁵⁷

168. Kenya is responsible for having created and maintained a state of non-cooperation which the Trial Chamber has declared to be unlawful; it is also responsible for bringing to an end that state of non-cooperation.¹⁵⁸ This does not release the Prosecutor from its obligation to do all that it can to reverse the consequences of Kenya's non-cooperation.

169. Mr Kenyatta and his government have paid no price for their involvement in the unlawful obstruction of access to evidence. Instead, Mr Kenyatta has benefited handsomely from it. For the Prosecution to abandon the investigation of the case against Mr Kenyatta following a campaign of attrition against the Court will encourage other heads of state and other high-level accused facing charges now or in

¹⁵⁵ The Prosecution has clarified which allegations in its pre-trial brief it currently considers to be unsustainable, and, by implication, those that are sustainable. *See* ICC-01/09-02/11-997, para. 5. The parts of paragraphs 27-87 of the brief that the Prosecution currently considers to be sustainable contain detailed allegations concerning the involvement of several named and living individuals in crimes committed during the Naivasha and Nakuru attacks.

¹⁵⁶ ICC-01/09-02/11-892-AnxA-Red.

¹⁵⁷ ICC-01/09-02/11-908, para. 93.

¹⁵⁸ ICJ *Namibia* Judgement, para. 118.

the future to use the state machinery at their disposal to defeat the ICC.

170. The OTP's failure to prosecute offences against the administration of justice committed during the Kenya II investigation under article 70 compounds the damage. Non-prosecution of these offences will encourage their recurrence.

171. In a broader sense, the Prosecution's inaction threatens to weaken rather than to strengthen the Court's deterrent effect in respect of state terror. Withdrawing charges against Mr Muthaura against a backdrop of obstruction of justice was an unfortunate precedent to set. The Prosecution then reinforced the damage. By withdrawing charges against a sitting head of state in the face of obstruction of justice by the government that he controls, and then deciding to no longer actively investigate his case, the Prosecution amplified the message, no doubt heard by others seeking to defeat the Court's search for the truth, that obstruction of justice works. The Prosecution's current inaction in the present case significantly dilutes the Court's deterrent effect and will tend to strengthen rather than end impunity for serious crimes.¹⁵⁹

K.3 The Prosecution's inaction undermines complementarity

172. The purpose of the Court is in part to present a credible probability of effective prosecution at the international level unless State Parties genuinely investigate and prosecute at the domestic level: that is the essence of complementarity. The Prosecution should do everything that it can to encourage complementarity and deter obstructionism. By walking away from the Kenya II investigation in the face of determined state obstruction in a State Party which is not carrying out credible investigations or prosecutions, the Prosecution is incentivizing state obstruction rather than domestic accountability.

K.4 Cessation of active investigation risks feeding a misperception that the Prosecution is not sufficiently independent

173. The Victims are entitled to total transparency regarding the Prosecution's cessation of its investigation, not least because a considerable number of Victims have already been forced to conclude that the Prosecutor is acting with deference to outside

¹⁵⁹ A Pre-Trial Chamber may under article 61(7)(c) request the Prosecutor to consider 'providing further evidence or conducting further investigation with respect to a particular charge' prior to confirmation. The Court may under article 69(3) 'request the submission of all evidence that it considers necessary for the determination of the truth'. These powers reflect the overall aim of the Statute: to put an end to impunity, an aim which finds expression in declaration by the States Parties in the Statute's preamble that they are '[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.

interests.¹⁶⁰ The Victims are well aware of Kenya's security challenges, in particular the threat posed by Al Shabaab¹⁶¹ and western support for Kenya's military intervention in Somalia. Some Victims have volunteered the view that the Prosecution's decision not to prosecute Mr Kenyatta following his election as president was driven by external influences.¹⁶² The perception that the Prosecution operates with implicit deference to the interests of great powers has been expressed by informed observers.¹⁶³

174. The Prosecution itself has identified 'six strategic risks which could undermine the results it aims to achieve with its Strategic Plan (2016 – 2018)', one of which is '[t]rust in the Office diminishing due to misperceptions that it is insufficiently independent or impartial'.¹⁶⁴
175. By ceasing the investigation and prosecution of an accused following his election as Head of State and Head of Government of a strategically important country which supports western security objectives in an unstable region, others might form the misperception that the Prosecution's inaction has been influenced by powerful states.
176. It is in the interests of the Prosecution and the Court as a whole for the Chamber transparently to review the Decision to ensure that this is not the case.

K.5 The Statute envisages that the Prosecutor will not abandon victims of sexual violence

177. The PEV involved an unknown number, very likely in the thousands, of SGBC against women, girls, men and boys. The Kenya I charges do not include SGBC.

¹⁶⁰ A large number of Victims volunteered to the LRV during the May-June 2015 mission in Kenya their view that the Prosecutor must have ceased investigation following external pressure. A significant minority raised questions concerning whether the Prosecutor could be replaced or removed from office. *See* Annex 1.

¹⁶¹ One of the Victims who attended a meeting in June 2015 with the LRV managed to send her daughter to university at Garissa University College. There, on 2 April 2015, her daughter was one of 147 people executed by Al Shabaab.

¹⁶² Numerous victims have expressed to the LRV their concerns that the charges against Mr Kenyatta were withdrawn following the Government's high-profile and widely-publicized campaign against the ICC at the African Union, the UN Security Council and the ASP, and Kenya's bilateral lobbying of certain States. Some Victims also raised in May and June 2015 the recent improvement in ties between the Kenya and the United States of America, and media coverage of President Obama's anticipated visit to Kenya. President Obama's visit in July 2015, his discussions in Kenya with Mr Kenyatta, and media reports of increased United States military assistance to Kenya following that visit inevitably will increase the possibility of uninformed speculation and misperception concerning the real reason for the cessation of the Kenya II investigation.

¹⁶³ For example, David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, OUP (2014), concludes following a detailed examination of the OTP's activities: 'There is strong circumstantial evidence that the court has used its discretion in opening investigations to avoid entanglement with major powers and to reassure them about the court's intentions' (p.85) and: 'the overall pattern strongly suggests that the prosecutor's office has, to this point, used its discretion on where to open investigations strategically' (p.86).

¹⁶⁴ Draft OTP Strategic Plan 2016 – 2018, p. 37.

Therefore, the SGBC charges in Kenya II represented the sole avenue for accountability, whether in Kenya or elsewhere, for PEV rape victims.

178. A recent international protocol on SGBC notes:

In addition to the extreme physical and psychological trauma suffered by survivors/witnesses, sexual violence may engender and aggravate ethnic, sectarian and other divisions in communities. This engrains conflict and instability and undermines peace-building and stabilisation efforts. [...] The lack of accountability of those who commit crimes of sexual violence in conflict exacerbates impunity.¹⁶⁵

179. The Prosecution's total failure to effectively prosecute SGBC in its Kenya I and Kenya II investigations has inevitably exacerbated Kenya's longstanding tradition of impunity for such crimes.

180. Deterrence of vicious crimes of sexual violence committed during conflict against defenceless small girls and boys, and adult women and men, requires that a systematic campaign of obstruction of justice will be met by a vigorous and revitalized investigation and prosecution of those who commissioned the atrocities and oversaw the campaign of obstruction, and not by surrender and inaction.

L. Relief sought

181. For the foregoing reasons, the Victims respectfully request the Pre-Trial Chamber, pursuant to articles 21(1)(b)-(c), 21(3), 53(3)(b), 54(1), 57, 68 and 69(3) of the Statute, rules 86, 105 and 106 of the Rules of Procedure and Evidence and regulation 48(1) of the Regulations of the Court to:

- a. Find that the Prosecutor has failed to take, under article 54(1)(b), appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court in Kenya II;
- b. Review pursuant to articles 21 and 68(1) the Decision; and
- c. Direct the Prosecutor to take, in accordance with article 54(1), such measures as are necessary to ensure the effective investigation and prosecution of those crimes.

182. Alternatively, the Victims respectfully request the Pre-Trial Chamber to:

- a. Find that the Decision constitutes a decision not to proceed based on article 53(1)(c) or 53(2)(c);
- b. Invite the Prosecution to provide a formal notification of the Decision and the reasons for it, in accordance with article 53 and rules 105-106;

¹⁶⁵ International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 6.

- c. Invite the Prosecution to submit to the Chamber, on an *ex parte* basis if necessary, further details concerning its investigative strategy for Kenya II, and in particular the most recent versions of its evidence collection and cooperation plans and such additional information, documents or summaries thereof that the Chamber considers necessary in order to exercise the functions and responsibilities set out in article 53(3);
- d. Review pursuant to article 53(3)(b) the Decision; and
- e. Decline to confirm the Decision until the Chamber is satisfied that the Prosecution has taken, in accordance with article 54(1)(a), such measures as are necessary to ensure the effective investigation and prosecution of crimes committed against the Victims.

Respectfully submitted,



Fergal Gaynor
Common Legal Representative of Victims

Dated this 3rd day of August 2015

At Vence, France