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PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

Public

**Victims' response to Prosecution's application to dismiss *in limine*
the Victims' request for review**

Source: Legal Representative of Victims

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Introduction

1. The Prosecution has determined not to proceed, for an indefinite period, with its active investigation in the Kenya II case¹ in the Situation in the Republic of Kenya.² This determination has no express legal basis in the Rome Statute (the 'Statute'), the Rules of Procedure and Evidence (the 'Rules'), or any other of the Court's legal texts.
2. To the extent that a valid legal basis exists, it is either article 53(1)(c) or 53(2)(c). This is because the Prosecution has, in effect, determined that there is no reasonable basis to proceed because, taking into account the gravity of the crimes and the interests of victims, there are nonetheless substantial reasons to believe that active investigation at this time would not serve the interests of justice. The Pre-Trial Chamber (the 'Chamber') has confirmed that article 53(1)(c) is applicable in article 15 situations.
3. The Chamber retains discretion under article 53(3)(b) to review a determination under article 53(1)(c) or 53(2)(c), whether or not victims request it to do so. The participating victims of Kenya II (the 'Victims') have sufficient personal interest to confer standing to request the Chamber to exercise its power to review. A determination not to proceed in the interest of justice is inherently 'temporary'. Its inherently temporary nature does not prevent article 53(3)(b) review.
4. If the Chamber concludes that the Statute and the Rules do not provide any conclusive legal basis for the indefinite suspension of an investigation, it must apply article 21(1)(b)-(c) and 21(3). The principles, norms and standards which thereby apply compel the Chamber to conclude *inter alia* that the power to judicially review prosecutorial inaction is widely recognised; the Prosecution has a duty to take all reasonable measures to ensure that its investigation is prompt and thorough; and victims of serious crimes have a right to an effective remedy for prosecutorial

¹ Kenya II concerned all attacks during the post-election violence against perceived Orange Democratic Movement supporters, in particular those to avenge prior attacks against the Kikuyu and perceived supporters of the Party of National Unity. Reports of three sets of extensive police killings were also referred to by the Chamber when authorizing the investigation: 'from June to October 2007, the police summarily executed at least five hundred suspected Mungiki members. Throughout 2008, hundreds of people were reportedly killed in the context of a government campaign against the [Sabaot Land Defence Force]. With regard to the time frame between 27 December 2007 and 28 February 2008, it is reported that 405 of the recorded deaths resulted from police shootings.' (ICC-01/09-19, para. 134.). The Prosecution applied for confirmation of charges against Mr Kenyatta, Mr Ali and Mr Muthaura for crimes committed from 27 December 2007 to 29 February 2008 in Kisumu, Kibera, Naivasha and Nakuru. (ICC-01/09-31-Red2 04-04-2011, pages 17-19).

² The Chamber refused to limit the temporal scope of the Kenya situation to December 2007 to February 2008 because: 'Such a limitation would be inconsistent with: (i) the purpose behind investigating an entire situation as opposed to subjectively selected crimes and; (ii) the Prosecutor's duty to establish the truth by extending the investigation to cover all facts and evidence pursuant to article 54(1) of the Statute.' (ICC-01/09-19, para. 208).

inaction. The Chamber should dismiss the Prosecution's Application, and invite the Prosecution to respond to the entirety of the Victims' Request.

Procedural background

5. On 3 August 2015, the Legal Representative of Victims (the 'LRV') filed the 'Victims' request for review of the Prosecution's decision to cease active investigation' (the 'Victims' Request'), seeking judicial review of a decision by the Prosecution to indefinitely suspend active investigation in the Kenya II case.³
6. On 25 August 2015, the Prosecution filed the 'Prosecution's application to dismiss *in limine* the Victims' request for review of the Prosecution's decision to cease active investigation' (the 'Prosecution's Application'), in which it responded to the merits of many arguments in the Victims' Request, and clarified that it has indefinitely suspended active investigation in relation to the entire Kenya situation.⁴

I. The Victims have standing

A. The Victims have sufficient personal interest to confer standing

7. The Prosecution argues that the victims may not seek or trigger the Chamber's review of the Prosecution's decision to indefinitely suspend active investigation because they lack standing.⁵ However, the Victims have standing to request relief from a Chamber if the Chamber applies the standard previously identified by the Prosecution itself:

Standing refers to the interest a person must have in order to obtain the right to participate in a particular step in a proceeding. The interest must be sufficient and it must be real rather than hypothetical. It also requires a recognized procedural status in the case.⁶

8. The Prosecution relied⁷ on the test in *Lujan v. Defenders of Wildlife*, which is:

The irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly. . . trace[able] to

³ ICC-01/09-154.

⁴ ICC-01/09-156, paras. 1, 4, 28.

⁵ Prosecution's Application, paras. 19-26.

⁶ ICC-01/04-01/06-2930 01-10-2012, para. 34. This arose in the context of standing of victims to participate in an appeal concerning the principles and procedures to be applied to reparations in the *Lubanga* case.

⁷ ICC-01/04-01/06-2930 01-10-2012, para. 35.

the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court." Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.⁸

9. The Victims have recognized status as participating victims, and satisfy all elements of the *Lujan* test: First, they suffered serious crimes during the PEV,⁹ and at issue are their rights to truth, to justice, and to reparation.¹⁰ Prosecutorial inaction represents a concrete, actual threat to those interests which is not conjectural or hypothetical: without active investigation by the Prosecution, it is highly unlikely that there will be any trial; that those responsible for the crimes will be held accountable; that the Court will make a declaration of truth at the conclusion of trial; or that reparations will be paid. Second, the injury to the Victims' rights to truth, justice and reparation is fairly traceable to the inaction of the Prosecution. It is *only* through active investigation by the Prosecution that there will be a realistic prospect of trial and reparation. Third, a favourable decision for the Victims would require the Prosecution to use all powers conferred upon it in order to ensure an effective investigation and prosecution, which is the only avenue for redress available, given the unwillingness of the Kenyan Government to prosecute PEV crimes.
10. Furthermore, an application by or on behalf of victims to a Chamber to take action to protect their interests is consistent with the centrality of the victims in the Statute and Rules, which afford the Chamber broad discretion in matters relating to victim participation. The Chamber under Article 68(3) 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. Under Rule 93, a Chamber may seek the views of participating victims or their legal representatives on *any* issue.¹¹ That victims have a strong interest in decisions by the Prosecutor not to

⁸ United States Supreme Court, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), available at: <https://supreme.justia.com/cases/federal/us/504/555/case.html> Internal citations omitted.

⁹ As the Prosecution noted, the attackers in Naivasha and Nakuru committed scores of crimes, 'many of which – such as forcible circumcision, rape and hacking victims with pangas – were chosen for their barbarity and capacity to instil fear. The attacks left hundreds dead and wounded, thousands displaced, and countless victims with severe physical and mental injuries.' ICC-01/09-02/11-796-AnxA-Red, para. 2.

¹⁰ See further Victims' Request, para. 93.

¹¹ Rule 93 reads : 'A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.'

proceed is reflected in the reference in Rule 93 to Rules 107 and 109, which concern prosecutorial decisions not to investigate or prosecute.¹²

B. The Chamber may exercise article 53(3)(b) discretion even if Victims do not request it to do so

11. Article 53(3)(b) grants the Chamber the power to review, on its own initiative, a decision of the Prosecutor not to proceed. This provision does not expressly provide that victims may request the Chamber to exercise its power to review, nor does it expressly prohibit such a request. The Victims' Request cannot prevent the Chamber from exercising its article 53(3)(b) discretion. Nor is notification by the Prosecution under Rule 105 or 106 a necessary prerequisite to the exercise of this discretion: ultimately it is the Chamber that decides whether a decision not to proceed has been taken in the interests of justice.¹³
12. The right to request relief under the Statute is not always explicit. For example, nothing in article 87(7) or in the Rules expressly permits the Prosecution, the Defence or any other person to apply to a Chamber for a finding of non-cooperation by a State Party. However, this cannot and should not prevent the Prosecution from making such an application, as it has in the present case.
13. The Statute is a living document, and its object and purpose as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.¹⁴ The Kenya Situation alone has already given rise to procedural mechanisms not expressly contemplated by the Statute, including the 'no-case-to-answer' procedure;¹⁵ the power to compel witnesses to appear before a Chamber;¹⁶ and the power of a Chamber to excuse an

¹² In addition, under Rule 86, the Chamber and the Prosecution, 'in performing their functions under the Statute or the Rules, shall take into account the needs of all victims'. Where the Prosecutor decides not to proceed 'in the interests of justice' under article 53(1)(c) or 53(2)(c), the Prosecution is required to take into account 'the interests of victims'. Detailed arguments relating to the right of victims to seek and obtain judicial review of prosecutorial decisions are set out at paragraphs 118-139 of the Victims' Request.

¹³ See Victims' Request, para. 148

¹⁴ See, *inter alia*, the judgements of the European Court of Human Rights in *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, p. 34, para. 87, and *Loizidou v. Turkey* (Preliminary Objections) judgment of 23 March 1995, Series A no. 310, p. 27, para. 72; *McCann v. United Kingdom*, para. 146.

¹⁵ ICC-01/09-01/11-1334.

¹⁶ ICC- 01/09-01/11-1598. The Appeals Chamber's key findings were (a) article 64 (6) (b) of the Statute gives Trial Chambers the power to compel witnesses to appear before it, thereby creating a legal obligation for the individuals concerned ; and (b) Under article 93 (1) (b) of the Statute the Court may request a State Party to compel witnesses to appear before the Court sitting *in situ* in the State Party's territory or by way of video-link.

accused from attending large parts of his trial, despite article 63(1)'s requirement that '[t]he accused shall be present during the trial.¹⁷ Nothing in the Statute prevents the victims from requesting the Chamber to exercise its article 53(3)(b) power to review.

C. The Victims' Request is not an attempt to participate in the investigation

14. The Prosecution argues that the Victims' Request is 'an impermissible attempt by the LRV to participate in the Prosecution's investigation in the Kenya Situation.'¹⁸
15. This is misconceived. The Victims' Request is not, implicitly or explicitly, a request to participate in the investigation. The Victims seek judicial review of the Prosecutor's decision to indefinitely suspend its active investigation. Judicial review is a judicial proceeding affecting an investigation, while 'an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible.'¹⁹ The Appeals Chamber has said: '*it must be clarified that victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution.*'²⁰ As discussed above, the Victims' personal interests are clearly affected by the Prosecution's decision to indefinitely suspend active investigation.

D. The Chamber is required to apply articles 21(1)(b)-(c) and 21(3)

16. The Prosecution submits: 'Given the clarity of the Statute on the matter, there is no need to resort to alternative means of statutory interpretation under articles 21(1)(b)-(c) or 21(3).'21 However, the Prosecution's decision to indefinitely suspend active investigation raises a number of critical issues on which the Statute provides little or no clarity, and where the Court's legal framework does not provide a conclusive legal basis.²² In particular:
 - a. Article 53 of the Statute permits the Prosecutor to decide not to proceed with an investigation or prosecution, and article 16 provides for a 12-

¹⁷ ICC-01/09-01/11-1066.

¹⁸ Prosecution's Application, para. 24.

¹⁹ ICC-01/04-556 19-12-2008, para. 45.

²⁰ <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>, ICC-01/04-556 19-12-2008, para. 56. Emphasis added.

²¹ Prosecution's application, para. 26.

²² See Prosecution's application, para. 50.

month suspension of investigation at the request of the Security Council, but no provision permits the Prosecutor to indefinitely suspend an active investigation.

- b. The Statute does not permit the Prosecution to indefinitely suspend an incomplete investigation on the ground that the State Party on whose territory the crimes were committed is unlikely to cooperate.
- c. The Statute is silent on remedies for victims where the Prosecution has failed to comply with article 54(1).
- d. Article 54(1)(b) of the Statute compels the Prosecution to take 'appropriate measures to ensure that its investigation and prosecution are effective'. It does not address whether 'passive' investigation (*i.e.* to 'continue to monitor the situation, listen carefully to people who come forward with evidence and make further applications for warrants of arrest or summonses to appear if circumstances change and the necessary evidence emerges'²³) fulfils this obligation.²⁴
- e. The Statute does not address what should happen when all charges against all suspects in a case are withdrawn before trial takes place.

17. Due to the silence of the Statute, Rules and Elements of the Crimes on the questions raised above, the Chamber is required to apply article 21(1)(b) and (c) and 21(3). Sources of law identified in article 21(1)(b) and (c) ('principles and rules of international law', 'general principles of law derived by the Court from national laws and legal systems of the world', 'the national laws of' Kenya, which 'would normally exercise jurisdiction over the crime', 'internationally recognized norms and standards' and 'internationally recognized human rights') provide guidance to the Chamber on the questions above.
18. As argued in detail at paragraphs 42-49 and 118-139 of the Victim's Request, the Chamber is invited to conclude that: (a) the power to judicially review prosecutorial inaction is widely recognised; (b) once authorized by the Chamber under article 15 to commence an investigation, the Prosecution has a duty to take all reasonable

²³ Prosecution's application, para. 30.

²⁴ The Victims submit that this form of investigation does not fulfil the Prosecution's duty under article 54(1). In particular, it is inconsistent with the duty to 'take appropriate measures to ensure the effective investigation and prosecution of crimes' and with the aim of the Court, as reflected in the Statute's Preamble, to end impunity for those responsible for grave crimes.

measures in order to ensure that its investigation is prompt, thorough and effective; (c) the Prosecution cannot indefinitely suspend active investigation until it has taken such measures; (d) victims of serious crimes have a right to an effective remedy for prosecutorial inaction which results in denial of their fundamental rights to truth, justice and reparation.

II. The Prosecution's decision can be characterized only as a decision not to proceed in the interests of justice

A. The Prosecution's reliance on the *Lubanga* decision is inapposite

19. The Prosecution submits that its 'temporary suspension of investigations due to an uncondusive investigative environment does not amount to a decision under article 53(1)(c) or 53(2)(c).'²⁵ It relies on a decision in the *Lubanga* case that is of limited relevance. In that decision, the Pre-Trial Chamber said that 'the Prosecutor informed the Chamber that he temporarily suspended the investigation in relation to other potential charges against Thomas Lubanga Dyilo'.²⁶ The Chamber also noted 'that the Prosecution continues to investigate in the DRC Situation' and that 'the Prosecution has declared that he has only temporarily suspended the investigation of further crimes allegedly committed by Thomas Lubanga Dyilo due to the precarious security conditions in the DRC, and in particular in the region of Ituri.'²⁷
20. The present circumstances differ in three material respects. First, the Prosecution here has decided to 'temporarily suspend active investigations' in the Kenya situation,²⁸ whereas it was continuing its investigation in the DRC situation. Second, the Prosecution has here decided to suspend its investigation in respect of *all* charges against *all* suspects in the Kenya II case (although it continues to litigate State non-cooperation in Kenya II²⁹) whereas in the *Lubanga* decision, the Prosecution suspended the investigation only in relation to 'other potential charges' against *one* accused who was tried (and later convicted) on other charges. Third, the Prosecution's reason for suspension in the *Lubanga* decision (a deterioration in

²⁵ Prosecution's Application, para. 29.

²⁶ ICC-01/04-399, page 2.

²⁷ ICC-01/04-399, page 5.

²⁸ Prosecution's Application, para. 1. Emphasis added.

²⁹ ICC-01/09-02/11-1034.

security conditions in the region of Ituri in DRC) does not apply here: no region of Kenya of relevance to the investigation is currently in a state of internal unrest or insecurity that would prevent on-the-ground inquiries.

B. The ‘temporary’ nature of the suspension of investigation merits close scrutiny

21. The Prosecution places great weight on the ‘temporary’ nature of the suspension of its investigation, and uses the terms ‘temporary suspension’; ‘temporarily suspend’; and ‘temporarily suspending’ to describe the status of its investigation.³⁰ The use of these terms merits rigorous scrutiny. Apart from the ongoing article 87(7) litigation, there appears to have been little active investigation in Kenya II for over 18 months. From the perspective of any reasonable observer, a decision to ‘suspend’ active investigation indefinitely, with no indication of when it might restart, must at some stage constitute a decision not to proceed under Article 53.
22. The drafters of the Statute cannot have intended that the Prosecution would be permitted to avoid review under article 53(3) by keeping a ‘temporarily suspended’ investigation open indefinitely. Furthermore, while no statute of limitations applies to the crimes to be investigated, international human rights law requires that an investigation into serious crimes be carried out *promptly*.³¹
23. Further, the precise status of the investigation in Kenya II, and in the Kenya situation in general, have not always been easy to discern:
 - a. On 5 December 2014, when withdrawing charges against Mr Kenyatta, the Prosecution said that it ‘will assess what further steps it can realistically and meaningfully take at this point in time in relation to the crimes committed in Nakuru and Naivasha.’³²
 - b. On 2 April 2015, in response to an inquiry from the LRV, the Prosecution informed the LRV that the OTP had not decided not to proceed in the Kenya II case concerning violence in Nakuru and Naivasha, but had decided not to conduct any further active investigations at present.³³

³⁰ *E.g.* Prosecution’s Application, paras. 1 and 28-38.

³¹ See paragraphs 43 to 48 of the Victims Application and appendix 3 thereto.

³² Statement of the Prosecutor on the withdrawal of charges against Mr. Kenyatta, 5 December 2014.

³³ Confidential Annex 2 to the Victims’ Request, para. 20.

- c. On 7 August 2015, the Prosecution said: ‘Cases which *can be considered closed* – such as where verdicts have been pronounced or where *proceedings have been definitively halted*, also continue to create some ‘hibernation type’ activities (e.g.: exit strategy, response to acts of retaliation).’ The three cases cited include ‘KEN2’.³⁴ In addition, the Prosecution provided a list of ‘investigations’ and ‘hibernated investigations’. ‘KEN2’ does not appear in either list.³⁵
- d. On 25 August 2015, the Prosecution said that it had temporarily suspended active investigations in the Kenya *situation*.³⁶ It continues to prosecute the two accused in Kenya I, and to litigate State Party non-cooperation in Kenya II.

C. A decision by the Prosecution ‘not to proceed’ is inherently temporary, and cannot shield the Prosecution from review by the Chamber

- 24. A determination by the Prosecution not to proceed under article 53(1) or 53(2) is inherently ‘temporary’: the Prosecution cannot be prevented from reconsidering a decision not to investigate or prosecute, should the circumstances change. This particularly applies to decisions not to proceed in the interests of justice. As the Prosecution has noted, ‘any decision not to proceed based on the interests of justice can be revisited in the light of new facts or information’ (see article 53(4)).³⁷ For example, a decision not to prosecute due to the infirmity of the alleged perpetrator under article 53(2)(c) can be revisited if the perpetrator receives medical treatment which restores his or her health.
- 25. Almost every decision by the Prosecution ‘not to proceed’ in the interests of justice under article 53 necessarily will be of indefinite duration. The inherently ‘temporary’ nature of the Prosecution’s power not to proceed under article 53 does not shield the Prosecution from article 53(3) review in appropriate cases.

³⁴ Report of the Court on the Basic Size of the Office of the Prosecutor, 7 August 2015, ICC-ASP/14/21, para 68 and footnote 23.

³⁵ Report of the Court on the Basic Size of the Office of the Prosecutor, page 27.

³⁶ Prosecution’s Application, para. 1. Emphasis added.

³⁷ OTP Policy Paper on the Interests of Justice, page 9.

D. The *ne bis in idem* argument does not address the reality that the necessary evidence is unlikely to emerge absent active investigation

26. The Prosecutor relies on the fact that the *ne bis in idem* principle does not apply in respect of Mr Kenyatta or Mr Muthaura³⁸ and argues that '[d]epending on the evidence that might emerge in the future, the Prosecution could prosecute any person(s) responsible for crimes against humanity committed in Kenya [...]'.³⁹
27. These assertions are undisputed, but they do not address the central problem: that it is unlikely that sufficient evidence 'might emerge in the future' unless the Prosecution carries out an active, on-the-ground investigation, making full use of all powers conferred upon it by the States Parties to interview witnesses (including reluctant witnesses) and to search for and seize documentary evidence.⁴⁰

E. The possibility that circumstances in the investigative environment may change does not preclude review

28. The Prosecution's Application states that the arguments presented on behalf of the Victims 'disregard the possibility that circumstances may change, allowing the Prosecution to resume effective investigations and prosecutions'.⁴¹
29. This statement merits a number of observations. First, the Victims obviously would welcome a positive change in circumstances, and, as argued in the Victims' Request, more frequent and earlier use of the article 87(7) mechanism by the Prosecution would have provided other States with a clear legal basis for countermeasures with the aim of securing Kenya's prompt cooperation.⁴²
30. Second, the Victims contest the view that effective on-the-ground inquiries are currently impossible in Kenya. Further, where a State Party on whose territory the crimes were committed is unlikely to provide full cooperation to the Prosecution, this does not constitute a valid basis for the Prosecution to indefinitely suspend investigation. Further submissions on this issue appear at paragraphs 33-40 below.
31. Third, there is a significant likelihood that there will be little material difference in the general investigative environment in Kenya in the foreseeable future, or that

³⁸ Prosecution's Application, paras. 5, 30, 32.

³⁹ Prosecution's Application, para. 31.

⁴⁰ See further Victims' Request, para. 37.

⁴¹ Prosecution's Application, para. 38.

⁴² Victims' Request, paras. 58-62.

there will be a deterioration in that environment. The current presidential term lasts until 2017. The next presidential term will run from 2017 to 2022. If either Mr Kenyatta or Mr Ruto is elected President of Kenya in 2017, this could mean that there will be no real improvement in the investigative environment until, at the earliest, 2022. Victory for Mr Kenyatta in 2017 and for Mr Ruto in 2022 could mean that the investigative environment would be essentially unchanged until 2027, and potentially later. The 'temporary' suspension of the Prosecution's investigation could last until 2022 or 2027. It is, at the very least, desirable for the Chamber to scrutinize the legal basis for a lengthy and indefinite suspension of a major investigation that it has authorized under article 15.

32. Fourth, not all active investigation requires cooperation from the Government of Kenya. It is likely that there are categories of communications or other documentary evidence that are not under its control. Should other States have relevant information which they might be reluctant to provide on national security grounds, article 72(5)-72(7) set forth a mechanism to ensure that all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor and the relevant Chamber, in order to resolve the matter by cooperative means.

F. A decision not to actively investigate due to State non-cooperation is inconsistent with the Statute and with practice at the *ad hoc* international tribunals

33. The primary reason put forth for the suspension of active investigation is the absence of genuine cooperation from Kenya.⁴³ Other than article 16, which does not apply here, there is no basis in the Statute for temporary suspension of an investigation.
34. Paragraphs 34-37 of the Prosecution's Application contain submissions arguing that the Prosecution's obligation to ensure effective investigations under article 54(1) permits the Prosecution to temporarily suspend active investigation on the basis of State non-cooperation. Those paragraphs cite in support no provision of Court's legal texts, and no international or domestic jurisprudence or statutory provisions.
35. Where a State Party on whose territory the crimes were committed is unlikely to provide full cooperation to the Prosecution, this does not constitute a valid basis under the Statute for the Prosecution to cease investigation until the State Party

⁴³ Prosecution's Application, paras. 1, 17, 35.

provides full cooperation. To do so is inconsistent with the requirement to take ‘appropriate measures to ensure the effective investigation and prosecution’ of crimes under article 54(1), and with the purpose of the Court as set out in the Statute’s preamble: ‘to put an end to impunity for the perpetrators of these crimes’.

36. It must be recalled that the Prosecution is at liberty to investigate *only* when the State where the crimes were committed is itself unable or unwilling to do so,⁴⁴ and *only* in respect of crimes which by their very nature often result in instability and insecurity on the territory where the crimes were committed: genocide, crimes against humanity, war crimes and aggression.⁴⁵
37. Further, the Court continues to have an operational field office in Nairobi, and Kenya has not barred access to its territory to Court staff. No part of Kenya of relevance to the Kenya II investigation is in a state of internal unrest or conflict that would prevent the conduct of an active, on-the-ground investigation.
38. The Prosecutor’s decision to temporarily suspend its investigation in the Kenya situation due to State non-cooperation is strikingly different from the approach of Prosecutors at the ICTY and ICTR.
39. It contrasts, in particular, with the ICTY Prosecutor’s approach in respect of non-cooperation by Serbia and Croatia. The ICTY began active investigations into Serbia-based individuals shortly after its inception in May 1993⁴⁶ and active investigations continued without any suspension during many years of serious non-cooperation from Serbia (then the Federal Republic of Yugoslavia). Slobodan Milošević, for example, was indicted in May 1999. As late as 2004, cooperation from Serbia in respect of access to evidence was described by the President of the Tribunal as ‘virtually non-existent’.⁴⁷ The ICTY did not suspend active investigation at any time, and did not wait until Serbia delivered full cooperation to the ICTY nearly twenty years after the ICTY’s creation. Similarly, the ICTY actively investigated Croatia-

⁴⁴ Statute, article 17(1).

⁴⁵ Statute, article 5(1). Further legal submissions on the duty to investigate serious crimes promptly and thoroughly are contained in Part F of the Victims’ Request.

⁴⁶ Security Council Resolution 827 (1993), available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf

⁴⁷ ‘cooperation by Serbia and Montenegro with respect to the arrest of fugitives, access to evidence, and the granting of waivers of immunity to enable witnesses to provide statements or testify before the Tribunal is virtually non-existent.’

http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_24_may2004_en.pdf

based crimes and individuals continually from its earliest days, even though Croatia did not provide full cooperation until October 2005.⁴⁸ The ICTR Prosecutor never ceased active investigation of crimes committed in Rwanda, despite reporting instances of Rwanda's non-cooperation to the UN Security Council.⁴⁹

40. No two investigative situations are identical, and different considerations apply in all of them. Nevertheless, State non-cooperation as a reason to cease active investigation (a) has no basis in the legal framework of the Court; and (b) is inconsistent with the practice of the *ad hoc* international criminal tribunals. Where, as here, obstruction of access to relevant evidence has been a significant factor behind the withdrawal of charges against all accused in a case, the lawfulness of indefinite suspension of investigation as a remedy warrants judicial scrutiny.

III. The Chamber has the power to review the Prosecution's decision

A. Article 53(1)(c) applies to article 15 situations

41. Article 53(1)(c) permits the Prosecutor not to proceed with an investigation for this reason: 'Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'.⁵⁰
42. The Prosecution submits that 'article 53(1) is not applicable to the situation in Kenya, because in the absence of a State or Security Council referral in that situation, the Prosecution had no power to "initiate an investigation" pursuant to that provision'.⁵¹
43. However, the Chamber has confirmed that article 53(1)(c) applies to an article 15 investigation.⁵² The Chamber found that 'a review of this requirement is unwarranted in the present decision, taking into consideration that the Prosecutor has not determined that an investigation "would not serve the interests of justice", which would prevent him from proceeding with a request for authorization of an

⁴⁸ <http://www.icty.org/sid/8535>

⁴⁹ For example: 'The Prosecutor is deeply concerned by the withdrawal of cooperation by the Rwandan authorities. Their position has manifested itself in different forms in recent months, and has hardened in the last weeks.' Report of the Prosecutor of the International Criminal Tribunal for Rwanda, August 2002. Available at: http://repository.un.org/bitstream/handle/11176/28989/S_2002_938-EN.pdf?sequence=3&isAllowed=y

⁵⁰ The introductory wording of the article provides that this test applies when deciding whether to *initiate* an investigation. However, this remains the closest basis in the Statute for the Prosecution's decision to suspend its investigation. The only article that expressly contemplates suspension of an investigation is article 16, which does not apply here.

⁵¹ Prosecution's Application, footnotes 41 and 68.

⁵² ICC-01/09-19-Corr, para. 63.

investigation. Instead, such a review may take place in accordance with article 53(3)(b) of the Statute if the Prosecutor decided not to proceed with such a request on the basis of this sole factor.⁵³

44. Furthermore, Rule 105(2), governing the *proprio motu* authority of the Prosecution, appears within a section of the Rules entitled 'Decision of the Prosecutor regarding the initiation of an investigation under article 53, paragraphs 1 and 2'.

B. The Prosecution's action amounts to a decision not to proceed in the interests of justice

45. The Prosecution argues that it has made no decision 'not to proceed', and if it has, it has not been on the basis of 'the interests of justice'.⁵⁴
46. Kenya II meets all statutory criteria for active investigation and prosecution (i.e. all jurisdictional and admissibility criteria are met). The Prosecution has nevertheless decided to indefinitely suspend active investigation on the ground that further investigative efforts would be futile and an inappropriate use of limited investigative resources. This *de facto* constitutes a decision that, taking into account the gravity of the crimes and the interests of victims, there are nonetheless substantial reasons to believe that active investigation at this time would not serve the interests of justice.⁵⁵
47. This conclusion flows from the reasons offered by the Prosecution. The absence of genuine cooperation from the Government of Kenya⁵⁶ is the core reason provided for indefinite suspension of investigation. This decision was made in the context of competition for limited prosecutorial resources.
48. On 8 July 2015, the Prosecution in its draft strategic plan for 2016-2018 said:
- 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 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.

⁵³ ICC-01/09-19 31-03-2010, para. 63.

⁵⁴ Prosecution's Application, paras. 28 to 44.

⁵⁵ The Prosecution accepts that it is for the Chamber ultimately to determine if a decision has been made 'in the interests of justice'. See Victims' Request, para. 148.

⁵⁶ Prosecution's Application, paras. 1 and 17.

The positive results were achieved by focusing on the quality of the work *rather than trying to meet all the demands placed on the Office*. Unforeseeable events like the dramatic increase in Article 70 cases, the surrender of Bosco Ntaganda, the transfer of Charles Blé Goudé, the need to open new investigations in the Central African Republic, and the recent transfer of Dominic Ongwen, *have all obliged the Office to adjust its resource planning. This has been at the expense of other urgently needed activities.*⁵⁷

49. On 7 August 2015, in a report on the basic size of the OTP, the Prosecution referred to ‘the present unsustainable practice of repeatedly postponing new investigations which must be pursued in accordance with the Office’s mandate, or *constantly stripping ongoing activities of critical resources* so as to staff the highest prioritised activities.’⁵⁸ The Prosecution added:

[T]o cope with the unexpected surrenders of Bosco Ntaganda, Charles Blé Goudé and Dominic Ongwen, the Office has *deprived ongoing investigations of essential resources*, halted bringing hibernated investigations to a trial-ready state, and postponed new activities (such as new investigations in Côte d’Ivoire, Mali, Libya or Darfur). This vividly demonstrates that, even with the current staffing level and the new prosecutorial strategy, *the Office is in fact still insufficiently resourced to adequately discharge its mandate under the Rome Statute* and to meet the most pressing demands for the exercise of its jurisdiction.⁵⁹

50. On 25 August 2015, in the Prosecution’s Application, the Prosecution said:

[T]he Prosecution cannot be precluded from temporarily suspending its investigations until a time when it considers the conditions to allow the conduct of an effective investigation with a *reasonable prospect of success*. Indeed, the Prosecution’s obligation to ensure effective investigations under article 54(1) requires it to *suspend investigative activities in appropriate circumstances if it cannot investigate effectively*. Any other reading would lead to an *ineffective discharge of its investigative resources* to the possible detriment of victims and witnesses who may be put at risk in circumstances where there is no reasonable prospect of a successful prosecution.’⁶⁰

51. The Prosecution also said: ‘Ineffective investigations with no real prospect of success would not serve the interests of the victims’.⁶¹
52. These statements compel the conclusion that there are two main reasons for the indefinite suspension of active investigation in Kenya II. The first is non-cooperation by Kenya. As submitted at paragraphs 35-40 *supra*, this is in itself not a valid reason to cease active investigation. The second concerns the shortage of resources,

⁵⁷ Draft Strategic Plan 2016-2018, paras. 17-18. Emphasis added.

⁵⁸ Report of the Court on the Basic Size of the Office of the Prosecutor, para. 3. Emphasis added.

⁵⁹ Report of the Court on the Basic Size of the Office of the Prosecutor, footnote 2. Emphasis added.

⁶⁰ Prosecution’s Application, para. 34.

⁶¹ Prosecution’s Application, para. 37.

requiring the Prosecution to deprive ongoing investigations of essential resources, and preventing it from adequately discharging its mandate under the Statute.

53. These two reasons, whether taken separately or combined, lead to a *de facto* decision by the Prosecution that, taking into account the gravity of the crimes and the interests of victims, there are nonetheless substantial reasons to believe that active investigation at this time would not serve the interests of justice. The closest legal basis in the Statute for this determination is article 53(1)(c) (or, albeit to a lesser extent, article 53(2)(c)) and the Chamber retains discretion to review this determination under article 53(3)(b). Alternatively, the Chamber might conclude that there is no express basis in the Statute for this determination, and the Chamber must therefore apply article 21(1)(b)-(c) and 21(3).⁶²
54. The Prosecution's assertion that 'the LRV incorrectly conflates the *consequences* of a decision to temporarily suspend investigations in the Kenya Situation with the *reason* underpinning the Prosecutor's determination' is misconceived.⁶³ The Victims have invited 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.'⁶⁴ It is plain from the Victims' Request that the Victims invite the Chamber to infer that the sole *reason* for the cessation of investigation in Kenya II is one based on the interests of justice.⁶⁵

C. The Chamber may assess whether the Prosecution has complied with its article 54(1) duties

55. The Prosecution argues that 'the LRV's submissions regarding the nature of effective investigations and the alleged violation by the Prosecution of its duties under article 54(1) are speculative'.⁶⁶ The Prosecution cites to paragraphs 31-54 and 55-86 of the Victims' Request: a total of 55 paragraphs. Those 55 paragraphs present (a) detailed legal research concerning the nature of effective investigations; and (b) substantiated factual assertions relating to the thoroughness of the investigation in Kenya II. The submissions raise serious questions, merit a substantive response from the

⁶² See further paragraphs 42-49, 105 and 118-139 of the Victim's Request, and Annexes 3 and 4 thereto.

⁶³ Prosecution's Application, para. 44.

⁶⁴ Victims' Request, para. 152.

⁶⁵ Victims' Request, paras. 141 to 152.

⁶⁶ Prosecution's Application, para. 49.

Prosecution, and cannot reasonably be dismissed as ‘speculative’.

56. The Prosecution also argues that the Victims’ submissions ‘are based on the erroneous assumption that an investigation that does not ultimately lead to a prosecution and conviction constitutes a violation of the Prosecution’s duties under article 54(1)’.⁶⁷ This is also misconceived. This assumption forms no part of the submissions presented on behalf of the Victims.⁶⁸
57. The Victims’ arguments focus on two points. First, that the Kenya II investigation was not effective. All charges against all persons charged in Kenya II were withdrawn before a day of trial was heard, in a case infected by extensive obstruction of access to evidence. The conclusion that the investigation and prosecution of crimes within the jurisdiction of the Court in Kenya II was not effective is a conclusion with which no reasonable observer can disagree.
58. Second, the Victims argue that the Prosecution’s duty under article 54(1) requires it to use all powers conferred upon it by the States Parties in order to gain access to all relevant evidence.⁶⁹ Judicial review of whether the Prosecution took all reasonable steps to gain access to relevant evidence is a necessary element of determining whether its decision to subsequently suspend active investigation was lawful.

D. The Chamber’s review of whether the Prosecution has carried out an ‘effective’ investigation is a permissible exercise of judicial power

59. The Prosecution suggests that the Pre-Trial Chamber will, by inquiring into whether the Prosecution has complied with its article 54(1) duties in Kenya II, trespass onto the exclusive functions of the Prosecutor.⁷⁰ This is incorrect, for several reasons.
60. As the Prosecution notes, in the context of an article 53 review of a decision that there is not a sufficient basis for a prosecution, ‘the Pre-Trial Chamber may assess, against the relevant standard of proof, whether the Prosecution has complied with its duties under article 54(1)(a) and (b) to ensure that the investigations were effective and

⁶⁷ Prosecution’s Application, para. 49.

⁶⁸ In particular, the Victims do not argue that a thorough investigation that does not result in prosecution, or an acquittal following a thorough investigation, *per se* indicate a failure to comply with article 54(1). In any event, neither circumstance exists here.

⁶⁹ Victims’ Request, paras. 33-39.

⁷⁰ Prosecution’s Application, para. 47.

covered all relevant facts and evidence.⁷¹ Such an assessment is plainly not an unlawful trespass on the exclusive functions of the Prosecutor. Further, when the Chamber carries out an article 53(3)(b) review, it is necessary that its review be informed. This is reflected in regulation 48(1) of the Regulations of the Court.⁷²

61. Likewise, Victims here request the Chamber to assess whether the Prosecution has complied with its duties under article 54(1)(a) and (b) to ensure that the investigations were effective and covered all relevant facts and evidence. Such an assessment must be informed, and is a permissible exercise of judicial power to review a determination of the Prosecutor not to proceed as contemplated by article 53. It is not an impermissible determination by the Chamber 'on each of the Prosecution's investigative choices'⁷³, nor is it a trespass on the exclusive functions of the Prosecutor to investigate and prosecute under the Statute.⁷⁴

Relief sought

62. For the foregoing reasons, the Victims respectfully request the Chamber to deny the Application and to invite the Prosecution to submit, within a reasonable time, a response to the entirety of the Victims' Request.

Respectfully submitted,



Fergal Gaynor

Common Legal Representative of Victims

Dated this 15th day of September 2015

At Dublin, Ireland

⁷¹ Prosecution's Application, para. 48.

⁷² 'The Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 (b).'

⁷³ Application, para. 48.

⁷⁴ Prosecution's Application, para. 47.