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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

**Prosecution's application to dismiss *in limine* the Victims' request for review of
Prosecution's decision to cease active investigation**

Source: The Office of the Prosecutor

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

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Introduction

1. The Prosecution informed the Legal Representative of Victims (“LRV”) by letter that it had decided to temporarily suspend active investigations in the situation in the Republic of Kenya (“Kenya Situation”) because it had concluded that, absent genuine cooperation from the Government of Kenya (“Kenya”) there is no immediate prospect of strengthening the evidence already gathered.¹ The LRV now seeks review of this decision (“Request”).²

2. The Request should be dismissed *in limine* on one or more of the following grounds: (i) the LRV has no standing to make the Request; (ii) the Prosecution has not decided “not to proceed” for the purpose of article 53(2) of the Rome Statute (“Statute”); and (iii) even if, *arguendo*, the Prosecution had so decided, the Pre-Trial Chamber II (“Chamber”) has no power under article 53(3)(b), or under article 54(1) read together with articles 21(1)(b)-(c), 21(3) and 68, to review that decision.

3. Should the Chamber reject this application to dismiss the Request *in limine*, the Prosecution reserves its right to respond on the merits to the allegations pertaining to the conduct of the Prosecution’s investigation.

4. This application is based on the jurisprudence of the Appeals Chamber and other Chambers of the Court, and it is made in full acknowledgment of the victims’ rights under the Statute, which are not diminished by the Prosecution’s position in this application.³ When deciding to temporarily suspend active investigations in the Kenya Situation, the Prosecution took into consideration the interests and personal circumstances of victims and witnesses pursuant to article 54(1)(b).⁴ As acknowledged by the LRV, the Prosecution’s “transparency to the victims [was]

¹ ICC-01/09-154-Conf-Anx2, para.20.

² ICC-01/09-154.

³ *Contra* Request, paras.87-117.

⁴ ICC-01/04-556 OA4 OA5 OA6, para.54.

exemplary”.⁵ In addition, although victims may not “participate” in the Prosecution’s investigation, the Appeals Chamber has stressed that there is ample scope within the statutory scheme for victims with relevant information to transmit it to the Prosecutor. Victims may thus make representations to the Prosecutor on any matter pertaining to the investigations and to their interests.⁶ The Prosecution will continue its dialogue with the victims, and as stated in its letter to the LRV, it will continue to monitor the Kenya Situation, listen carefully to anyone who comes forward with evidence, and file further applications for warrants of arrest or summonses to appear if circumstances change and the necessary evidence emerges.⁷

5. The Prosecution shares the victims’ frustration caused by the delay in giving full effect to their right to justice.⁸ However, there is no time period under the Statute to commence a prosecution, and crimes within the jurisdiction of the Court are not subject to any statute of limitations⁹ either at this Court or before relevant national authorities. In addition, as noted by Trial Chamber V(B) when terminating the case against Uhuru Muigai Kenyatta, the principle of *ne bis in idem* does not apply and the Prosecution may bring new charges against him at a later date, based on the same or similar factual circumstances, should it obtained sufficient evidence.¹⁰

6. It is respectfully submitted that while robust advocacy is an obligation of any responsible counsel to his or her client(s), hyperbole, overly aggressive language and unfounded insinuations¹¹ that bring the reputation of this Office, and the Court more

⁵ Request, footnote 94, referring to the Prosecution’s filing of 31 January 2014 (ICC-01/09-01/11-892-AnxA-Red), in which the Prosecution provided answers to 14 questions asked of it by the LRV and noting that the Senior Trial Lawyer volunteered to accompany the LRV on his recent mission to meet victims in Kenya. The LRV nevertheless argues that the Prosecution should have provided the victims with more insight into its investigative strategy (Request, paras.107-110).

⁶ ICC-01/04-556 OA4 OA5 OA6, para.53.

⁷ ICC-01/09-154-Conf-Anx2, para.20.

⁸ Request, paras.87-117.

⁹ Article 29.

¹⁰ ICC-01/09-01/11-981, para.56; ICC-01/09-02/11-1005, para.9.

¹¹ See for instance, the LRV’s suggestion that the Prosecutor’s decision to charge or to withdraw charges may be driven by “external influences” and that the Prosecutor may “operate [...] with implicit deference to the interests of great powers” (Request, para.173).

generally, into disrepute are unbecoming and should not be permitted to distract from the real matters at issue.

Relevant Facts

7. On 26 November 2009, the Prosecution requested the Chamber to authorise an investigation into the Kenya Situation in relation to the post-election violence of 2007-2008, under article 15(3) of the Statute.¹²

8. On 31 March 2010, the Chamber, by majority, authorised the Prosecution to investigate crimes against humanity committed in Kenya between 1 June 2005 and 26 November 2009, pursuant to article 15(4) of the Statute.¹³

9. On 8 March 2011, the Chamber, by majority, summonsed, *inter alia*, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court, having found that there are reasonable grounds to believe that they are responsible for crimes against humanity committed in Nakuru and Naivasha between 24 January 2008 and 31 January 2008.¹⁴

10. On 23 January 2012, the Chamber, by majority, confirmed charges against Francis Kirimi Muthaura and Uhuru Muigai Kenyatta ("Kenya 2 Case").¹⁵ It declined to confirm the charges against Mohammed Hussein Ali.¹⁶ The Kenya 2 Case focused on violence which took place at the end of January 2008 in Nakuru and Naivasha.

11. On 11 March 2013, the Prosecution withdrew the charges against Francis Kirimi Muthaura.¹⁷ The Prosecution submitted that the evidence remaining available at that time was insufficient to prove the charges against Mr Muthaura, and that there was no reasonable prospect of securing such evidence in a reasonable time. It noted, among other considerations, that Kenya was providing only limited cooperation,

¹² ICC-01/09-3.

¹³ ICC-01/09-19-Corr.

¹⁴ ICC-01/09-02/11-1, para.56.

¹⁵ ICC-01/09-02/11-382-Red.

¹⁶ ICC-01/09-02/11-382-Red, p.154.

¹⁷ ICC-01/09-02/11-687.

and had failed to assist the Prosecution in uncovering evidence that would have been crucial in the case against Mr Muthaura.¹⁸ Accordingly, Trial Chamber V terminated the proceedings against Francis Kirimi Muthaura on 18 March 2013.¹⁹

12. On 19 December 2013, in the trial against Uhuru Muigai Kenyatta, the Prosecution requested an adjournment of the then provisional trial date for three months to enable the following further measures to take place: (i) the possibility of carrying out certain additional investigative activities, detailed in a confidential annex; (ii) the adjudication of the Prosecution's pending application for a finding of non-compliance against Kenya in relation to the production of critical records²⁰; and (iii) the possibility of determining conclusively whether another key witness was willing to testify.²¹

13. On 31 January 2014, the Prosecution informed the Trial Chamber that while the first and third avenues had not proven fruitful, the case should not be terminated pending adjudication of the non-compliance application.

14. On 3 December 2014, Trial Chamber V(B) rejected the Prosecution's request to adjourn the start of the trial against Uhuru Muigai Kenyatta until Kenya had complied with its cooperation obligations under the Statute.²²

15. On 5 December 2014, the Prosecution filed a motion seeking to withdraw the charges against Uhuru Muigai Kenyatta because the evidence remaining available to the Prosecution was insufficient to prove his guilt beyond reasonable doubt. This resulted from the admission by a number of key witnesses that they had made assertions which were untrue, or that they were no longer willing to testify. The Prosecution stressed that its decision was *without prejudice* to the possibility of bringing new charges at a later date.²³

¹⁸ ICC-01/09-02/11-687, paras.10-11.

¹⁹ ICC-01/09-02/11-696.

²⁰ ICC-01/09-02/11-866-Red.

²¹ ICC-01/09-02/11-875.

²² ICC-01/09-02/11-981, paras.43-57.

²³ ICC-01/09-02/11-983.

16. On 13 March 2015, Trial Chamber V(B) terminated the proceedings against Uhuru Muigai Kenyatta,²⁴ without prejudice to any “new charges” being brought against him at a later date, based on the same or similar factual circumstances.²⁵

17. On 2 April 2015, following the LRV’s request,²⁶ the Prosecution confirmed that it had not determined “not to proceed” in the Kenya 2 Case concerning violence in Nakuru and Naivasha within the meaning of article 53. It explained that the Prosecution is not conducting any further active investigations “at present” because, absent genuine cooperation from Kenya, there is no immediate prospect of strengthening the evidence already gathered.²⁷ The Prosecution reaffirmed its view that a prosecution in the Kenya Situation would be very much in the interests of justice,²⁸ and that it would continue to monitor the situation, listen carefully to people who may come forward with evidence, and make further applications for warrants of arrest or summonses to appear if circumstances change and the necessary evidence emerges.²⁹

18. On 3 August 2015, the LRV filed the Request asking the Chamber to review the Prosecution’s decision to cease active investigations pursuant to article 54(1) as read together with articles 21 and 68(1), and to direct the Prosecution to take such measures as necessary to ensure the effective investigation and prosecution.³⁰ In the alternative, the LRV requests the Chamber to review the Prosecution’s decision to cease active investigations pursuant to the Chamber’s review powers in article 53(3)(b), and to decline to confirm the Prosecution’s decision until the Chamber is satisfied that the Prosecution has taken such measures as necessary to ensure the effective investigation and prosecution in accordance with article 54(1)(a).³¹

²⁴ ICC-01/09-02/11-1005.

²⁵ ICC-01/09-02/11-1005, para.9, reiterating its prior finding: ICC-01/09-01/11-981, para.56.

²⁶ ICC-01/09-154-Conf-Anx2, pp.1-3.

²⁷ ICC-01/09-154-Conf-Anx2, para.20.

²⁸ ICC-01/09-154-Conf-Anx2, para.28.

²⁹ ICC-01/09-154-Conf-Anx2, para.20.

³⁰ Request, para.181.

³¹ Request, para.182.

Submissions

I. The Request should be dismissed *in limine* for lack of standing

19. The LRV lacks standing to make the Request,³² either under article 53(3) or under article 54(1) read together with articles 21(1)(b)-(c), 21(3) and 68. As result, the Request should be dismissed *in limine*.

A. Victims may not seek or trigger the Pre-Trial Chamber's review under article 53(3)(b)

20. The Statute and the Rules of Procedure and Evidence ("Rules") exhaustively regulate how the Pre-Trial Chamber's power of review under article 53(3)(b) may be triggered. These statutory texts do *not* provide the victims with any right to so trigger the Pre-Trial Chamber's article 53(3)(b) review. Rather, article 53(3)(b) envisages that the Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed.

21. Rule 92(2) provides that the Court shall *notify* victims of an article 53 decision of the Prosecutor not to investigate or prosecute. The scope of this notification is different from the notification given to a referring State, the Security Council and the Pre-Trial Chamber under rules 105 and 106. While the latter is intended to enable the relevant authorities to exercise their powers to trigger review of such decisions under article 53(3), notification by the Court to victims under rule 92(2) is given for a more limited purpose—"allow[ing] victims to apply for participation in the proceedings in accordance with rule 89".³³

22. It is apparent from these provisions that victims may only make submissions before the Pre-Trial Chamber in article 53(3) review proceedings when such proceedings are pending. In these circumstances, they may apply to participate in any such pending proceedings. However, in this instance, there are no such

³² *Contra* Request, paras.87-95.

³³ Rule 92(2).

proceedings on foot. Neither has a referring State, the UN Security Council, nor the Pre-Trial Chamber itself asked for or initiated any review proceedings under article 53(3) before the Chamber.

23. Further, participants should not be permitted to circumvent the rules on standing by asserting a general right to request a Chamber to take action *proprio motu*. This would generally allow victims an open-ended right to make legal submissions on any topic in the absence of a judicial proceeding, provided those submissions are couched as a request for a Chamber to intervene.

B. Victims do not have the right to seek or trigger the Pre-Trial Chamber's review of the Prosecution's conduct of investigations or any investigative decisions pursuant to article 54(1) read together with articles 21(1)(b)-(c), 21(3) and 68.

24. No other provision of the Statute or Rules gives the LRV the necessary standing. To the contrary, the Request is an impermissible attempt by the LRV to participate in the Prosecution's investigation in the Kenya Situation. In particular, the LRV overlooks the fact that a temporary suspension of active investigations due to adverse circumstances that currently prevent effective investigations is itself a decision relating to the conduct of investigations, which falls within the Prosecution's broad discretion.³⁴

25. The Appeals Chamber has rejected the notion that victims may participate in such matters. It has held that it is the Prosecutor's prerogative under articles 42 and 54 to conduct investigations,³⁵ and that victims have no standing to participate in investigations.³⁶ According to the Appeals Chamber, victims may only participate in "judicial proceedings" and an investigation is not a judicial proceeding.³⁷ While victims may be granted the right to *participate* in judicial proceedings arising out of

³⁴ See further paras.45-53 below.

³⁵ ICC-01/04-556 OA4 OA5 OA6, para.52; ICC-01/04-01/06-2205 OA15 OA16, para.94.

³⁶ ICC-01/04-556 OA4 OA5 OA6, para.52.

³⁷ ICC-01/04-556 OA4 OA5 OA6, paras.45, 54, 59; *see also*, ICC-02/04 OA and ICC-02/04-01/05 OA2-371, para.12. Diss. Op.

an investigation,³⁸ they may not *initiate* or *trigger* such proceedings. Since victims cannot participate in an investigation, they cannot request the Pre-Trial Chamber to invoke its *proprio motu* powers under article 53(3)(b).

26. 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). The Request should therefore be rejected without further consideration.³⁹

II. The Prosecutor has not decided “not to proceed” in the Kenya Situation under article 53(2)

27. In addition, the Request must be dismissed *in limine* because it is manifestly unfounded. It depends entirely⁴⁰ on the erroneous premise that the Prosecutor has decided “not to proceed” with any prosecution of a case arising from the Kenya Situation under article 53(2).⁴¹ As demonstrated below, the Prosecution has made no such determination, nor was it required in the circumstances to do so.

A. The Prosecution has not decided “not to proceed” under article 53(2)

28. As previously noted,⁴² the Prosecution informed the LRV by letter that in the Prosecutor’s view, there is insufficient evidence to substantiate any further prosecution in the Kenya Situation at this time,⁴³ and that the Prosecution is not conducting further active investigations “at present” because, absent genuine cooperation from Kenya in relation to the pending cooperation requests,⁴⁴ there is no immediate prospect of strengthening the evidence already gathered.⁴⁵

³⁸ ICC-01/04-556 OA4 OA5 OA6, paras.56-57.

³⁹ See para.50 below.

⁴⁰ See for instance, Request, paras.4-5, 10, 87-106, 165-180.

⁴¹ Article 53(1) is not applicable to the Request, as in the Kenya Situation the Prosecution has already commenced an investigation after the Pre-Trial Chamber authorised it to do so pursuant to article 15(4) (ICC-01/09-19-Corr). Therefore, in the Kenya Situation a “decision not to proceed” for the purposes of article 53(3) could only be considered to be a conclusion under article 53(2) “that there is not a sufficient basis for a prosecution”.

⁴² See paras.17 above. See also ICC-01/09-02/11-382-Red, p.154; ICC-01/09-02/11-687; ICC-01/09-02/11-983.

⁴³ Request, Annex2, para.28.

⁴⁴ See for instance ICC-01/09-02/11-866.

⁴⁵ Request, Annex2, para.20.

29. This communication, described by the LRV as the Prosecution's "Decision",⁴⁶ cannot be considered a determination under article 53(2). Trial Chamber I has found that the Prosecution's 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).⁴⁷

30. The Prosecution's letter to the LRV does not state that the Prosecution has permanently terminated investigations in the Kenya Situation or that it has concluded "not to proceed" with a prosecution against Mr Kenyatta for the purpose of article 53(2). To the contrary, in its letter, the Prosecution stressed that it would 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.⁴⁸ This statement is consistent with the Prosecution's earlier stated position that the withdrawal of the charges against Mr Kenyatta was without prejudice to the possibility of bringing new charges against him at a later date;⁴⁹ a position which was equally and unequivocally made clear through the Prosecutor's press release "on the withdrawal of charges" against Mr Kenyatta on 5 December 2014, in which the challenges faced by the Office in the investigation of the case were outlined.⁵⁰ It is also consistent with Trial Chamber V(B)'s finding that the principle of *ne bis in idem* does not apply in this context.⁵¹

⁴⁶ Request, para.4. The Request also refers to it as the Prosecution's "decision to cease active investigation" (see, for instance, the title of the Request), rather than a decision to temporarily suspend active investigations.

⁴⁷ ICC-01/04-399, p.5. In that case, the Prosecution temporarily suspended active investigations "due to the precarious security conditions in the DRC, and in particular in the region of Ituri".

⁴⁸ ICC-01/09-154-Conf-Anx2, para.20.

⁴⁹ ICC-01/09-02/11-983, paras.1-3.

⁵⁰ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta, 5 December 2014, available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx (last accessed on 25 August 2015).

⁵¹ ICC-01/09-01/11-981, para.56; ICC-01/09-02/11-1005, para.9.

31. For the same reasons, the letter does not reflect any final determination by the Prosecutor not to investigate and/or prosecute persons other than Mr Kenyatta.⁵² Depending on the evidence that might emerge in the future, the Prosecution could prosecute any person(s) responsible for crimes against humanity committed in Kenya between 1 June 2005 and 26 November 2009.⁵³

32. The lack of any decision by the Prosecution “not to proceed” under article 53(2) is further evidenced by the fact that the Prosecution has not given any notifications pursuant to rule 106 or 92(2).⁵⁴ Indeed, by litigating to preserve the non-applicability of the *ne bis in idem* principle and to maintain the withdrawal of charges as being without prejudice to future proceedings for the same or different conduct,⁵⁵ the Prosecutor has expressly foreshadowed an intention *to proceed* when circumstances will enable effective investigations.

33. Unless the Chamber has “reason to disbelieve”⁵⁶ the Prosecution’s statement that it has made no decision not to proceed with respect to further prosecutions in the Kenya Situation, there is no relevant determination for the Chamber to review under article 53(3)(b). The LRV cannot create a decision that has not been made.

B. The Prosecution was not required, in the circumstances, to make a decision under article 53(2)

34. The LRV is incorrect in his further argument that the Statute does not allow the Prosecution to temporarily suspend active investigations on the basis of non-cooperation by a State,⁵⁷ and the Prosecution must therefore be considered to have made a determination under article 53(2).⁵⁸ To the contrary, the Prosecution cannot

⁵² For instance, the Prosecution would also not be precluded from bringing new charges against Mr Muthaura and according to article 61(8), the Prosecution could bring new charges against Mr Ali, as long as a request to that effect were supported by additional evidence.

⁵³ A positive decision by the Prosecutor to prosecute certain persons for certain crimes cannot be viewed as a negative decision not to prosecute other crimes or other persons: ICC-01/04-399, p.5; ICC-01/04-373, para.5.

⁵⁴ See Request, para.161.

⁵⁵ ICC-01/09-02/11-983.

⁵⁶ ICC-01/04-582, pp.4-5.

⁵⁷ Request, paras.7, 144.

⁵⁸ Request, para.145.

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.

35. As noted in its letter to the LRV, the Prosecution has temporarily suspended active investigations in the Kenya Situation in the absence of genuine cooperation from Kenya⁵⁹ and the resulting lack of an immediate prospect of strengthening the evidence already gathered.⁶⁰ The LRV does not dispute that Kenya failed to cooperate with the Court on a number of pending cooperation requests and that this compromised the Prosecution's ability to thoroughly investigate.⁶¹

36. The Prosecutor makes her decision to temporarily suspend active investigations on a case-by-case determination, and based on all relevant information she has at hand. In a situation like this, where the relevant factors that informed the Prosecutor's decision lie outside her control, it would be unsound if she were required to have immediately made, or to be considered to have made, a decision not to proceed under article 53(2). This outcome would neither serve the interests of justice nor the interests of victims, as it would prevent the Prosecutor from exercising her mandate to establish the truth. It could also be seen as "rewarding" individuals, groups or States who seek to interfere with or to resist the lawful operations of the Court. Moreover, if the LRV's approach were to be adopted, each time a case is terminated for evidentiary reasons (such as withdrawal of

⁵⁹ See also para.12 above.

⁶⁰ Request, Annex2, para.20. In addition, the Prosecution notes that Trial Chamber V(A) has recently held in the case against Mr Ruto and Mr Sang that at least five Prosecution witnesses have been improperly interfered with, which led to their failure to give evidence (see ICC-01/09-01/11-1938-Red-Corr, paras.55, 79, 96, 109, 126.

⁶¹ Request, paras.30(e), 57, 73, 79.

charges, non-confirmation or acquittal), interested persons (including victims) could move the Pre-Trial Chamber to review the Prosecution's discretion in determining how best to proceed next. This would be an unreasonable and unworkable interpretation of the Statute, as it would 'second-guess' the Prosecution's strategic investigative decisions.

37. It would be counterproductive to require the Prosecution to continue active investigations, no matter how ineffective, as the Request suggests.⁶² Ineffective investigations with no real prospect of success would not serve the interests of the victims. Although the LRV concedes that he is not privy to the Prosecution's internal investigative plans,⁶³ he suggests a number of investigative steps that he believes the Prosecution could take.⁶⁴ Yet, despite accepting that Kenya's non-cooperation compromised the Prosecution's ability to investigate,⁶⁵ he fails to explain how an order to the Prosecution to ensure effective investigations and prosecutions could be implemented.

38. Finally, given the temporary nature of the Prosecution's suspension of investigative activities, the LRV's arguments disregard the possibility that circumstances may change, allowing the Prosecution to resume effective investigations and prosecutions. For instance, in the context of the *Kenyatta* case, the Appeals Chamber recently held that "a referral [of a State to the Assembly of States Parties for failing to comply with its duty to cooperate under article 87(7)] could have an impact on future cooperation".⁶⁶ Whether Kenya did fail to cooperate within the terms of article 87(7) and, if so, whether it is appropriate to refer Kenya to the Assembly of States Parties, is a matter that is currently before the Trial Chamber.⁶⁷

⁶² Request, para.181(c).

⁶³ Request, para.55.

⁶⁴ Request, paras.57-86.

⁶⁵ Request, paras.30(e), 57, 73, 79.

⁶⁶ ICC-01/09-02/11-1032 OA5, para.77. Trial Chamber V(B) also accepted that a referral of Kenya to the Assembly of States Parties pursuant to article 87(7) could significantly impact on the Prosecution's ability to conduct investigations in the Kenya Situation (ICC-01/09-02/11-1004, para.28).

⁶⁷ ICC-01/09-02/11-1032 OA5, para.98.

III. In any event, the Pre-Trial Chamber has no power to review any purported decision, even if one had been made

39. Even if, *arguendo*, the Prosecution's letter to the LRV could be considered a decision "not to proceed" under article 53(2), the Pre-Trial Chamber has no power under article 53(3)(b), or under article 54(1) read together with articles 21(1)(b)-(c), 21(3) and 68, to review such a decision.

A. *The Pre-Trial Chamber has no review power under article 53(3)(b) because any conclusion not to proceed would not have been made on the basis of "the interests of justice" under article 53(2)(c)*

40. Article 53(3)(b) restricts the Pre-Trial Chamber's review powers to decisions that are based *solely* on a conclusion by the Prosecutor, under articles 53(1)(c) or 53(2)(c), that an investigation or prosecution is not in the interests of justice. Review of other decisions under article 53, including those that are in part based on interests of justice considerations, can only be triggered by a referring State Party or the UN Security Council.

41. Even assuming, *arguendo*, that the Prosecution had concluded "that there is not a sufficient basis for a prosecution" in the Kenya Situation, it cannot be considered to have made a determination under article 53(2)(c) that "a prosecution is not in interests of justice".⁶⁸ If anything, such a conclusion might have been reached under article 53(2)(a), namely, that "there is not a sufficient legal or factual basis to seek a warrant or summons under article 58". In any event, the Prosecution recalls its view that there is presently insufficient evidence to substantiate a prosecution with a realistic prospect of conviction against Mr Kenyatta⁶⁹ and that, absent genuine

⁶⁸ See ICC-01/04-582, p.4. Contra, Request, paras.141-153. As mentioned at footnote 41 above, 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. In addition, with the leave of the Pre-Trial Chamber, the Prosecution has already commenced an investigation in that situation. In any event, the Decision could not be interpreted as a conclusion that a further investigation would not serve the interests of justice.

⁶⁹ Request, Annex2, para.28.

cooperation from Kenya, there is no immediate prospect of strengthening the evidence already gathered.⁷⁰

42. This decision was not even *in part* motivated by the view that a prosecution is not in the interests of justice. To the contrary, as the Prosecution has informed the LRV, its position is that a prosecution would be very much in the interests of justice.⁷¹ Moreover, the Prosecution has so far initiated prosecutions in the Kenya Situation for article 5 crimes against six persons and it has also considered prosecuting additional persons, including other senior PNU operatives and prominent Kikuyu politicians and businessmen.⁷² At present, however, there is insufficient evidence to successfully prosecute the two persons formerly charged in the Kenya 2 Case or other individuals.⁷³

43. The LRV's arguments that the Prosecution has determined "not to prosecute" under article 53(2)(c) are unsupported. In fact, no such conclusion can reasonably be inferred from the Prosecution's determination that there is no immediate prospect of strengthening the evidence already gathered in light of Kenya's non-cooperation.⁷⁴

44. Moreover, 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.⁷⁵ Although the Prosecution accepts that deciding not to proceed pursuant to any ground under article 53(2) may well have the consequence of affecting the interests of the victims, this is not equivalent to a decision not to proceed under article 53(2)(c), because a prosecution is not in the interests of justice. As demonstrated above, the Prosecution has not made any such a determination.

⁷⁰ Request, Annex2, para.20.

⁷¹ Request, Annex2, para.28.

⁷² ICC-01/09-02/11-892-AnxA-Red, p.9, item 13; see also Request, para.166.

⁷³ Request, Annex2, para.28. This determination excludes the individuals currently at trial in the Kenya 1 case (ICC-01/09-01/11).

⁷⁴ *Contra*, Request, paras.10, 145-147.

⁷⁵ Request, paras.147-152.

B. The Pre-Trial Chamber has no power under article 54(1), read together with articles 21(1)(b)-(c), 21(3) and 68, to review the Prosecution's conduct of investigations or any of its investigative decisions

45. The Pre-Trial Chamber has no further power to review the Prosecution's conduct of investigations or its investigative decisions under article 54(1), either expressly or through articles 21 and 68.

(i) *The Chamber has no power under article 54(1) to review the Prosecution's conduct of investigations or its investigative decisions*

46. As confirmed by the Appeals Chamber, the Prosecutor has the prerogative under articles 42 and 54 to conduct investigations.⁷⁶ An investigation is a process "directed towards the identification of evidence that can eventually be presented in open court, in order to establish the truth and to assess whether there is criminal responsibility under the Statute."⁷⁷

47. Article 54(1) does not include any express or implied power of the Pre-Trial Chamber to review the Prosecutor's conduct of investigations, including any interim decision taken by the Prosecutor to ensure that investigations are effective and cover all relevant facts and evidence within the terms of articles 54(1)(a) and (b).⁷⁸ As held by the Appeals Chamber, to extend a Chamber's power to the role assigned to the Prosecutor under the Statute "would be contrary to the distribution of powers under the Statute."⁷⁹ Similarly, Judge Fernández has stressed (in the context of an article 15(4) decision) that the Pre-Trial Chamber should not trespass on "the exclusive functions of the Prosecutor to investigate and prosecute under the Statute".⁸⁰

⁷⁶ ICC-01/04-556 OA4 OA5 OA6, para.52 ; ICC-01/04-01/06-2205 OA15 OA16, para.94.

⁷⁷ ICC-01/04-01/06-1486 OA13, para.41.

⁷⁸ *Contra*, Request, paras.12-13. The LRV acknowledges that the Statute is siling on remedies for victims where the Prosecution has failed to effectively investigate and prosecute, but incorrectly submits that it leaves a lacuna that needs to be filled by resort to article 21 (Request, para.118).

⁷⁹ ICC-01/04-01/06-2205 OA15 OA16, para.94.

⁸⁰ ICC-02/11-15, Separate Opinion of Judge Fernández de Gurmendi, para.10. *See also* paras.16 (noting "the distinct mandates and competences of the Chamber and the Prosecutor respectively"); 19 (the "analysis by the Prosecutor" to determine whether to initiate an investigation "is a preliminary but inseparable part of his [or her] exclusive investigative functions").

48. While the Pre-Trial Chamber may not review the Prosecution's *conduct* of an investigation, it may review the *result* of its investigations under specific circumstances. In particular, the Pre-Trial Chamber has the power to determine whether there is sufficient evidence to issue a warrant of arrest or summons to appear under article 58 or to confirm charges under article 61(7). In addition, the Pre-Trial Chamber may, when notified under rule 106, review the Prosecutor's decision that there is not a sufficient basis for a prosecution pursuant to article 53(3). In the context of any of such review, 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 covered all relevant facts and evidence. Similarly, the Chamber's review power over the Prosecution's obligation to "investigate incriminating and exonerating circumstances equally" under article 54(1)(a) is limited to ensuring the fairness of any pending judicial proceedings. However, as held by Trial Chamber I, this does not mean that it is appropriate for a Chamber, at either the confirmation of charges or trial stage, to make determinations on each of the Prosecution's investigative choices.⁸¹

49. In any event, the LRV's submissions regarding the nature of effective investigations⁸² and the alleged violation by the Prosecution of its duties under article 54(1)⁸³ are speculative. As acknowledged by the LRV, he "is not privy to the details of the Prosecution's internal investigative plans [and he is] therefore unable to conduct a comprehensive review of the adequacy of the Prosecution's investigation".⁸⁴ At best, the LRV disagrees with how the Prosecution conducted its investigations and his submissions are based on the erroneous assumption that an

⁸¹ ICC-02/05-03/09-535-Red, para.50

⁸² Request, paras.31-54.

⁸³ Request, paras.55-86.

⁸⁴ Request, para.55; see also paras.76, 78.

investigation that does not ultimately lead to a prosecution and conviction constitutes a violation of the Prosecution's duties under article 54(1).⁸⁵

(ii) *Articles 21 and 68 cannot be used to create a power of the Pre-Trial Chamber to review a prosecutorial decision not to proceed with a prosecution outside the scope of article 53, or to review the Prosecution's conduct of investigations*⁸⁶

50. The lack of an express review mechanism in article 54(1) was a deliberate legislative choice by the drafters of the Statute. Thus, it cannot be read as a *lacuna* that may be filled through articles 21(1)(b)-(c) and 21(3).⁸⁷ Article 21(1)(a) provides that the Court shall apply "in the first place, [the] Statute, Elements of Crimes and its Rules of Procedure and Evidence". As repeatedly held by the Appeals Chamber, where "the Court's legal framework provides for a conclusive legal basis" for ascertaining the law on a particular matter, it is incorrect to have "recourse to other sources of law".⁸⁸

51. Article 57 defines the functions and powers of the Pre-Trial Chamber. These are limited to the functions therein set out, "unless otherwise provided in the Statute".⁸⁹ The Pre-Trial Chamber's power to review prosecutorial decisions on whether to proceed with a prosecution is limited to the review procedure set out in article 53(3). Moreover, as noted above,⁹⁰ beyond articles 53(3), 58 and 61(7), the Pre-Trial Chamber is not empowered to review the Prosecution's conduct of investigations, nor to ensure that the Prosecution's investigations were effective and covered all relevant facts and evidence pursuant to article 54(1).

52. Since the Statute does not "otherwise" provide the Pre-Trial Chamber with a power to review the Prosecution's conduct of investigations, the drafters' intention is clear. Accordingly, there is no need to resort to alternative means of statutory

⁸⁵ *Contra*, Request, para.34.

⁸⁶ *Contra*, Request, paras.118-139.

⁸⁷ *Contra*, Request, para.118.

⁸⁸ ICC-01/09-01/11-1598 OA7 OA8, para.105; ICC-01/04-168 (OA3), para.23.

⁸⁹ Article 57(1).

⁹⁰ See para.48 above.

interpretation under articles 21(1)(b)-(c). For similar reasons, the duty under article 21(3) to apply and interpret the law consistent with internationally recognised human rights and in a non-discriminatory way, cannot be used to create a judicial power that is inconsistent with the language of the Statute and the clear intention of its drafters.

53. Finally, the LRV's reference to article 68(1) is irrelevant in the context of the Request,⁹¹ as it sets out the Court's duty to protect persons cooperating with it. In fact, the LRV does not elaborate on the relevance of this provision to the Request.

Conclusion

54. For the reasons set out above, the Prosecution requests the Chamber to dismiss the Request *in limine*. Alternatively, should the Chamber reject this motion, it should set a timetable for the Prosecution to respond to the allegations in the Request on the merits.



Fatou Bensouda, Prosecutor

Dated this 25th day of August 2015
At The Hague, The Netherlands

⁹¹ Request, paras.9, 181(a).