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No.: ICC-01/09

Date: 5 November 2015

**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**

**Decision on the “Victims’ request for review of Prosecution’s decision to  
cease active investigation”**

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

**The Office of the Prosecutor**

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**Counsel for the Defence**

**Legal Representatives of the Victims**

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**Unrepresented Victims**

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**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Pre-Trial Chamber II** issues the present decision on the “Victims’ request for review of Prosecution’s decision to cease active investigation” (“Victims Request”),<sup>1</sup> filed on 3 August 2015 by the common legal representative of the victims participating in the proceedings in the case of *The Prosecutor v. Uhuru Muigai Kenyatta* (“Victims”).

## **I Procedural history**

1. The Victims request the Chamber to: (i) “[f]ind 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”; (ii) “[r]eview pursuant to articles 21 and 68(1)” the Prosecutor’s decision not to conduct any further active investigation at present; (iii) “[d]irect 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”. Alternatively, the Victims request the Chamber to: (i) find that the Prosecutor’s decision not to conduct any further active investigation at present constitutes a decision not to proceed based on article 53(1)(c) or 53(2)(c); (ii) “[i]nvite the Prosecution to provide a formal notification of the Decision and the reasons for it, in accordance with article 53 and rules 105-106”; (iii) “[i]nvite 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)”; (iv) “[r]eview pursuant to article 53(3)(b) the Decision”; and (v) “[d]ecline 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

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<sup>1</sup> [ICC-01/09-154](#) and annexes attached thereto.

ensure the effective investigation and prosecution of crimes committed against the Victims”.

2. On 25 August 2015, the Prosecutor submitted the “Prosecution’s application to dismiss *in limine* the Victims’ request for review of Prosecution’s decision to cease active investigation”,<sup>2</sup> in which she argues alternatively: (i) that the Victims lack standing; (ii) that she has not taken a decision not to proceed within the meaning of article 53(2) of the Rome Statute (“Statute”); and (iii) that the Chamber has no power to review any purported decision, even if one had been made. On these grounds, she requests that the Chamber dismiss the Victims’ Request *in limine*.

3. On 15 September 2015, the Victims filed the “Victims’ response to Prosecution’s application do dismiss *in limine* the Victims’ request for review”.<sup>3</sup>

## II Applicable law

4. The Chamber notes articles 21, 53, 54(1) and 68 of the Statute, rules 105-109 of the Rules of Procedure and Evidence (“Rules”) and regulation 24(1) and (5) of the Regulations of the Court (“Regulations”).

## III Preliminary issue

5. At the outset, the Chamber considers that the Prosecutor’s filing of 25 August 2015, while presented as a “request” is, in effect, a response, within the meaning of regulation 24(1) of the Regulations, to the Victims’ Request. In turn, the Victims’ filing of 15 September 2015 constitutes a reply within the meaning of regulation 24(5) of the Regulations for which leave of the Chamber is required. As the Chamber considers itself sufficiently informed on

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<sup>2</sup> ICC-01/09-156.

<sup>3</sup> [ICC-01/09-157](#).

the issues *sub judice*, the Chamber shall not consider the Victims' Response any further.

#### IV Analysis

##### A. Victims' standing to bring the Request

6. The Chamber notes the Prosecutor's argument that the Victims' request should be dismissed *in limine* for lack of standing.

7. The Chamber recalls the Appeals Chamber's holding 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".<sup>4</sup> To this effect, and contrary to the submissions of the Prosecutor, the Chamber considers that one of the valid forms of victims' participation in the proceedings of a situation is to prompt the Chamber to consider exercising its *proprio motu* powers with respect to a specific issue affecting the victims' personal interests. Indeed, specifically with regard to the participation of victims in the situation in the Republic of Kenya, this Chamber explicitly recognized the possibility "to being seized of a request emanating from victims of the situation who have filed an application for participation in the proceedings".<sup>5</sup>

8. In the present case, the Chamber recognises that the Victims have a personal interest that those responsible for the alleged crimes against humanity committed in Nakuru between 24 and 27 January 2008 and in

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<sup>4</sup> Appeals Chamber, "Judgment on Victims' participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007", 19 December 2008, [ICC-01/04-556](#), para 56.

<sup>5</sup> Pre-Trial Chamber II, "Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya", 3 November 2010, [ICC-01/09-24](#), para. 15.

Naivasha between 27 and 28 January 2008 and which gave rise to the harm they allegedly suffered be held accountable.

9. Therefore, the Chamber considers it appropriate to entertain the merits of the request, at least to the extent required to determine whether the circumstances at hand warrant judicial proceedings within the context of the present situation.

### *B. Merits of the Victims' Request*

10. The Victims put forward a number of interrelated requests all of which revolve around the extent of judicial oversight over the Prosecutor's activities regarding her investigation in the situation in the Republic of Kenya.

11. The Victims first raise the issue of the Prosecutor's failure to properly investigate in accordance with article 54 of the Statute, requesting the Chamber to find that the Prosecutor has failed to comply with her obligations under that article and to direct the Prosecutor to take measures to ensure the effectiveness of her investigation.<sup>6</sup> In addition, the Victims propose two different legal bases for judicial review of the Prosecutor's decision not to conduct further investigation into the situation in the Republic of Kenya, the first being a combined, constructive reading of articles 21 and 68(1) of the Statute<sup>7</sup> and the second, which is presented in the alternative, article 53(1)(c) or 53(2)(c) in combination with article 53(3)(b) of the Statute.<sup>8</sup>

12. The Chamber will address in turn, to the extent necessary, those three sets of arguments.

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<sup>6</sup> Victims' Request, paras 31 to 86, and para. 181 point c).

<sup>7</sup> *Ibid.*, paras 118 to 139, and para. 181 point b).

<sup>8</sup> *Ibid.*, paras 140 to 163, and para. 182.

i. Arguments presented in relation to article 54 of the Statute

13. The Chamber notes that article 54(1)(a) of the Statute mandates that the Prosecutor, in order to establish the truth, extends the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute, while paragraph (b) of the same article requires that the Prosecutor take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court. As repeatedly held, neither article 54 of the Statute nor any other provision provide for judicial oversight of the Prosecutor's compliance with article 54(1) as such.<sup>9</sup> Accordingly, the Chamber is not competent to intervene in the Prosecutor's activities carried out within the ambit of article 54(1) of the Statute. This is without prejudice to the Chamber taking into account, as an issue of fact, the proper conduct of the Prosecutor's investigation, when exercising its powers under articles 53(3), 58 or 61 of the Statute.

14. At the same time, the Chamber agrees with the argument put forward by the Victims to the effect that the "obligation to investigate under article 54(1) continues as long as evidence exists which is relevant to criminal liability – it has no mandated end".<sup>10</sup> In this regard, the Chamber emphasizes that the temporary suspension of active investigations in the situation, as presented by the Prosecutor,<sup>11</sup> does not mean that the investigation authorized by the Chamber is closed or terminated. Rather, this situation of temporary suspension of the investigation, which is only due to the absence of genuine cooperation by the Government of Kenya, does not affect the Prosecutor's powers and obligations with respect to investigation and prosecution, also in

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<sup>9</sup> See e.g. Pre-Trial Chamber I, "Decision on the Confirmation of Charges", 8 February 2010, [ICC-02/05-02/09-243-Red](#), para. 48; Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, [ICC-01/09-02/11-382-Red](#), para. 63.

<sup>10</sup> Victims' Request, para. 32.

<sup>11</sup> ICC-01/09-156.

light of the fact that crimes within the jurisdiction of the Court are not subject to any statute of limitations.

15. With regard to the request made on numerous occasions in the Victims' Request concerning the Prosecutor's alleged failure to "make effective use of article 87(7) to counter state non-cooperation", the Chamber notes that this issue is currently dealt with by Trial Chamber V(B) and will therefore not entertain it any further. With regard to the Victims' argument concerning the Prosecutor's alleged failure to "make any or effective use of article 70 to counter bribery or intimidation", it is sufficient to observe that the Chamber – while it can communicate information to the Prosecutor on the basis of which the latter may initiate and conduct investigations – has no competence to review Prosecutor's decisions in this regard as article 53 of the Statute, in accordance with rule 165(2) of the Rules, is not applicable to investigation and prosecution of offences under article 70 of the Statute.

ii. Arguments presented in relation to articles 21 and 68 of the Statute

16. As recalled above, the Victims argue that the Chamber shall review "under articles 21 and 68(1)" of the Statute the Prosecutor's decision not to conduct any further active investigation at present.<sup>12</sup> In addition, the Victims argue that judicial review of a failure to investigate or prosecute is possible under a general principle of law applicable by virtue of article 21(1)(c) of the Statute and it is also consistent with internationally recognised human rights under article 21(3) of the Statute.

17. The Chamber recalls that the purpose of article 21 of the Statute is to regulate the sources of law the Court and establishes a hierarchy within those sources of law. Article 21(1)(a) of the Statute explicitly refers to the Statute as

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<sup>12</sup> Victims' Request, paras 118 to 139.



the first source of law. Recourse to the subsidiary sources of law referred to in article 21(1)(b) and (c) of the Statute is only possible when, as established by the Appeals Chamber,<sup>13</sup> there is a lacuna in the Statute or the Rules.

18. The Chamber observes that the Statute, in article 53, regulates in detail the Pre-Trial Chamber's competence to review the Prosecutor's exercise of her powers with respect to investigation and prosecution, as well as the boundaries of the exercise of any such competence. Therefore, the Chamber does not consider that there exists a lacuna in this respect which would need to be filled by reference to subsidiary sources of law referred to in article 21(1)(b) and (c) of the Statute or through constructive interpretation of other provisions of the Statute (such as the combined reading of article 21 and 68(1) of the Statute proposed by the Victims).

iii. Arguments presented in relation to article 53 of the Statute

19. As already observed, judicial review of the Prosecutor's decisions not to investigate or not to prosecute is governed by article 53(3) of the Statute. In the present decision, the Chamber must examine whether a review under 53(3) of the Statute is possible. This is precisely the core argument of the Victims' Request.

20. In this context, the Chamber first observes that article 53(3)(a) of the Statute is not applicable, considering that the investigation into the situation in the Republic of Kenya took place following an authorisation by the Chamber under article 15. Accordingly, only article 53(3)(b) of the Statute is potentially applicable as it is a *proprio motu* power of the Chamber which may be exercised irrespective of the way the Court's jurisdiction was triggered under article 13 of the Statute. Under this provision, the Chamber may, on its

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<sup>13</sup> Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, [ICC-01/04-168](#), para. 34.

own initiative, review a decision of the Prosecutor not to proceed when such a decision is based solely on article 53(1)(c) or (2)(c) of the Statute – *i.e.* on the grounds that an investigation or a prosecution would not be or are not in the interests of justice.

21. The Chamber must therefore ascertain whether, upon investigation, the Prosecutor has taken a decision not to prosecute based on article 53(2)(c) of the Statute. The Chamber notes that the Victims' Request makes reference also to article 53(1)(c) of the Statute, but considers the provision inapplicable in the present circumstances where an investigation has been initiated.

22. It is recalled that on 31 March 2010, the Chamber authorised the commencement of an investigation into the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009.<sup>14</sup> Cases against nine persons have arisen from this situation: three warrants of arrest for offences against administration of justice remain unexecuted pending cooperation by Kenya; for two persons this Chamber declined to confirm the charges; proceedings against two other persons were terminated by the Trial Chamber prior to the start of the trial; and two persons are currently being tried in a joint case.

23. More specifically, the Chamber recalls that the Prosecutor prosecuted Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali for crimes against humanity committed in Nakuru between 24 and 27 January 2008 and in Naivasha between 27 and 28 January 2008. The Chamber declined to confirm the charges against Mohammed Hussein Ali.<sup>15</sup> Charges against Francis Kirimi Muthaura, charges were withdrawn on 18

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<sup>14</sup> Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, [ICC-01/09-19-Corr.](#)

<sup>15</sup> Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, [ICC-01/09-02/11-382-Red.](#)

March 2013,<sup>16</sup> as, on 13 March 2015, the charges against Uhuru Muigai Kenyatta were equally withdrawn.<sup>17</sup> Accordingly, prosecutions against those three persons were all terminated within the context of judicial proceedings as a result of decisions by this Chamber or the competent Trial Chamber. In these circumstances, the Chamber considers inapposite the Victims' claim that a "decision not to prosecute" within the meaning of article 53(2) of the Statute has been taken, at least with respect to the prosecution of these three cases.

24. Regarding the overall situation of violence in Nakuru and Naivasha, the Chamber notes the information provided to the common legal representative in a letter sent by a Senior Trial Lawyer of the Office of the Prosecutor on 2 April 2015,<sup>18</sup> wherein it is stated, *inter alia*:

[T]he OTP considers that it has not made a decision "not to proceed" in the Kenya 2 case concerning violence in Nakuru and Naivasha. The OTP has decided not to conduct any further investigations at present because it has concluded that, in the absence of genuine cooperation from the Government of Kenya, there is no immediate prospect of strengthening the evidence. The OTP will continue to monitor the situation, listen carefully to people who come forward with evidence and to analyse any records which may become available. A further application for warrants of arrest or summonses might still be made if circumstances change and the necessary evidence emerges.

25. It is apparent from the text of the letter and the specific circumstances of this situation that a decision not to prosecute has not been taken by the Prosecutor, and that the reason for the decision "not to conduct any further investigations at present" is, in any case, not a result of the Prosecutor's conclusion that a prosecution is not in the interests of justice, but it is due to an objective circumstance of temporary nature, namely the absence of genuine cooperation from Kenya with the resulting lack of an immediate prospect of

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<sup>16</sup> Trial Chamber V, "Decision on the withdrawal of charges against Mr Muthaura, 18 March 2013, [ICC-01/09-02/11-696](#).

<sup>17</sup> Trial Chamber V(B), "Decision on the withdrawal of charges against Mr Kenyatta, 13 March 2015, [ICC-01/09-02/11-1005](#).

<sup>18</sup> ICC-01/09-154-Conf-Anx2.

strengthening the evidence already gathered. As this Court cannot operate without the cooperation of States in accordance with Part 9 of the Statute, in particular of the State on the territory of which the concerned crimes have allegedly been committed, this lack of genuine cooperation has crucial consequences for the Court and its ability to properly investigate.

26. The Chamber takes also note of the fact that the Victims' Request encompasses not only the events in Nakuru and Naivasha but also events in relation to crimes, such as murders and rapes, allegedly committed by the police or others in places such as Mombasa, Kisumu, Kibera, Mathare and Kericho.<sup>19</sup> However, victims applying to the Chamber in the present instance are only those who have suffered harm as a result of the events in Nakuru and Naivasha.

27. Finally, the Chamber notes that the record of the situation contains no notification by the Prosecutor under rule 106 of the Rules of a decision not to prosecute. To the contrary, the Prosecutor, as recently as in her response to the request under consideration, reiterated in unequivocal terms that no such decision has been taken. While, as explained above, there are currently no judicial proceedings before the Court with respect to the alleged crimes against humanity committed in Nakuru and Naivasha, there exists no reason or information available to the Chamber to conclude that an investigation into these alleged crimes has been closed preventing the bringing of any further prosecution. It is also recalled in this regard, that in principle the cases against Muthaura, Kenyatta and Ali could be brought again by the Prosecutor, as no judgment of acquittal was issued with respect to any of the three individuals.<sup>20</sup> Likewise, the Prosecutor may also bring any other case against any other individual believed to be criminally responsible for the crimes in

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<sup>19</sup> Victims' Request, paras 69, 74 and 99.

<sup>20</sup> Cf. article 20(1) and, as far as Ali is concerned, also article 61(8) of the Statute.

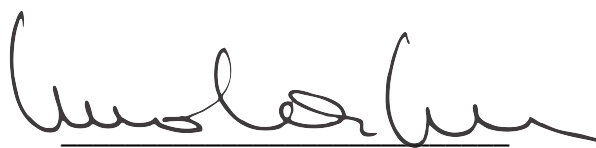
Nakuru and Naivasha or the other alleged crimes described in the Victims' Request.

28. In these circumstances, the Chamber concludes that a decision under article 53(2) of the Statute has not been taken. Consequently, no review under article 53(3) of the Statute can be instituted.

**FOR THESE REASONS, THE CHAMBER**

**REJECTS** the request.

Done in both English and French, the English version being authoritative.



**Judge Cuno Tarfusser**  
**Presiding Judge**



**Judge Marc Perrin de Brichambaut**



**Judge Chang-ho Chung**

Dated this 5 November 2015

At The Hague, The Netherlands