Strengthening the voice of Kenyan victims at the International Criminal Court: judicial review of the prosecutor’s decision to cease active investigation in the case against President Kenyatta

On 3 August 2015, lawyers representing approximately 20,000 Kenyan victims filed an application – the first of its kind – at the International Criminal Court (ICC) challenging the decision by the Office of the Prosecutor (the OTP or ‘Prosecutor’) to cease active investigation in the case against high-ranking Kenyan officials, including President Uhuru Kenyatta. The OTP withdrew charges of crimes against humanity against President Kenyatta late last year following a systematic campaign against the ICC by the Kenyan Government. Kenyatta had been charged with participation in murder, rape, forcible transfer and other crimes committed against thousands of Kenyans during the ethnic violence that engulfed Kenya in the wake of the 2007 general election.

The ICC’s constitutive instrument, the Rome Statute, makes victims active participants in and beneficiaries of the ICC justice process. Kenyan victims of the post-election violence claim that without the ability to seek judicial review of the Prosecutor’s unilateral decision to cease investigating and prosecuting the crimes committed against them, this statutory objective is frustrated. By granting judicial review, the ICC will uphold the victims’ fundamental rights to truth, justice and reparation and further the ICC’s goal of ending impunity.

The authors’ law firm, Bryan Cave, is assisting Fergal Gaynor, the legal representative of the victims (the ‘LRV’), in making this unprecedented application.¹

Judicial review of prosecutorial discretion under the Rome Statute

Judicial review of a decision by the OTP not to investigate or prosecute crimes within the ICC’s jurisdiction – genocide, crimes against humanity, war crimes and aggression – is governed by Article 53 of the Rome Statute. Article 53 permits judicial review at the request of a state party to the Rome Statute that has referred crimes to the ICC or at the request of the UN Security Council in cases where it has made such a referral. Additionally, the ICC’s Pre-Trial Chamber is empowered to initiate a review where the statutory criteria for jurisdiction and admissibility are met and the OTP’s decision not to proceed is made solely ‘in the interests of justice’.

These provisions were successfully invoked for the first time earlier this year by the island nation of Comoros, which referred the Mavi Marmara case to the ICC. In May 2010, the Mavi Marmara, a ship bearing the Comoros flag, was bound for Gaza along with five other civilian ships carrying humanitarian aid when it was boarded by the Israel Defence Forces. Ten activists were killed and many others injured. Having conducted a preliminary examination of the flotilla raid, the OTP determined that although it had a reasonable basis to believe that war crimes were committed on board the Mavi Marmara, it would not proceed with an investigation as the crimes did not satisfy the threshold of gravity required by the Rome Statute. The OTP specifically noted that the Rome Statute permitted Comoros as the referring state to seek judicial review of the OTP’s decision not to proceed.

Comoros, along with Greece and Cambodia as other flag states of ships in the flotilla, applied for judicial review of the OTP’s
decision. On 16 July 2015, the Pre-Trial Chamber issued its decision and articulated a requirement of ‘rigorous’ review of prosecutorial discretion under Article 53. The Pre-Trial Chamber found that the OTP made material errors in evaluating the gravity of the crimes committed in the flotilla raid and required it to reconsider the decision not to initiate an investigation. In this landmark ruling, the Chamber affirmed the need for thorough checks on the OTP’s decision-making.2

Extending the right to seek judicial review to victims

One key issue now faced by the Pre-Trial Chamber is whether the right to seek review of a decision by the OTP not to investigate or prosecute should extend beyond states and the Security Council to victims.

The Kenyan victims have endured a difficult and emotional five-year journey that has left them with little hope of accountability for the crimes committed during the post-election violence. Following an unsuccessful domestic and international effort to encourage prosecutions in Kenya, the victims welcomed referral of the matter to the ICC in 2009. In January 2012, the ICC confirmed charges of crimes against humanity against William Ruto and Joshua Arap Sang (a radio DJ) in one case (Kenya I), and against Francis Muthaura (former Head of Civil Service and Secretary to the Cabinet) and Uhuru Kenyatta in another (Kenya II). Kenyatta and Ruto were elected President and Deputy President of Kenya respectively in March 2013.

However, as Kenya I proceeded against Ruto and Sang, the prosecutions of Muthaura and Kenyatta in Kenya II began to disintegrate. In March 2013, the OTP dropped charges against Muthaura, citing state obstruction of access to evidence and bribery of a key witness. In August 2013, the OTP made detailed allegations of efforts to intimidate key witnesses due to testify against President Kenyatta, after their identities were provided to the defence. In December 2014, the OTP dropped charges against President Kenyatta, following a change in the evidence of a key witness, after a year of litigation focused on the refusal of President Kenyatta’s government to deliver key evidence relevant to the charges against him. The total collapse of Kenya II left victims and their families devastated.

The OTP’s termination of Kenya II is troubling given the obstruction of the investigation and prosecution perpetrated by the Kenyan government, helmed by President Kenyatta. Specific instances of obstruction included the failure to produce Kenyatta’s financial and telephone records, the disregard of an ICC order to freeze Kenyatta’s assets and the refusal to grant access to crucial witnesses. The OTP issued a despairing criticism of Kenya’s flagrant non-cooperation, stating that ‘[t]he individual and cumulative effect of [Kenya’s] actions has been to undermine the investigation in these cases and limit the body of evidence available to the Chamber at trial.’ Even more alarming is the evidence of rampant witness intimidation. The OTP itself described a ‘climate of fear’ which ‘chilled the willingness of individuals with information relevant to the case to come forward.’

Although the OTP came up against exasperating efforts to forestall its investigation and prosecution of Kenya II, the OTP is not without remedies for such behaviour. The Rome Statute empowers the Prosecutor to prosecute individual obstruction of justice through Article 70 and to report state obstructionism to the UN Security Council or the ICC’s Assembly of States Parties through Article 87(7). The OTP decided to cease its investigation following the collapse of the prosecutions against all accused in Kenya II, having made only one Article 87(7) request in respect of one element of Kenya’s non-cooperation. It has publicly released no charges for obstruction of justice by any individual.

The OTP’s decision is distressing for the victims who are the most aggrieved by the withdrawal of all charges. More than 1,100 Kenyans were killed and tens of thousands maimed, raped and expelled from their homes in attacks taking place over just a few weeks in early 2008. Given that Kenyan authorities refuse to prosecute the crimes domestically, victims are left with little prospect of accountability, no formal declaration of truth and no reparations.

The Kenyan victims’ application for judicial review

As yet, there is no established manner for victims to challenge a decision of the Prosecutor to discontinue investigating or prosecuting a case, despite their central role in the ICC justice process. Assisted by Bryan Cave’s International Pro Bono Program,
the LRV has asked the Pre-Trial Chamber to correct this apparent gap in ICC procedure with his recent request on behalf of Kenyan victims for review of the OTP’s decision to cease investigating and prosecuting crimes committed during the post-election violence. The LRV claims that the OTP failed to ensure an effective investigation and prosecution as required by Article 54(1) and requests that the ICC direct the OTP to take all appropriate measures to comply with its investigative and prosecutorial obligations under that provision.

The application makes four key arguments to support the conclusion that the victims have a right to seek judicial review of the Prosecutor’s decision to terminate the Kenyatta prosecution and cease further active investigation of the crimes charged.

First, a review is necessary because the OTP violated its positive obligations under Article 54(1) by failing to undertake an effective investigation and prosecution of the crimes charged in _Kenyatta II_, including through the neglect of its explicit duty to ‘respect the interests and personal circumstances of victims.’ Although fulfilling these obligations was made more difficult by the Kenyan government’s ongoing obstruction of justice, these obligations continue to bind the OTP.

Second, the victims have a right to an effective remedy for prosecutorial error. This right is consistent with the Rome Statute, including Article 68(3) which requires the ICC to permit victims’ views and concerns to be presented and mandates that they be considered. It is also grounded in international law, which is applicable under Article 21. Where, as here, there is an apparent gap in the Rome Statute, the ICC must derive a general principle of law from national legal systems under Article 21(1) (c) and confirm that any such principle is consistent with internationally recognised human rights under Article 21(3).

The application drew from legal research into the national law of nearly 70 countries and the jurisprudence of regional human rights courts in arguing that Kenyan victims are entitled to challenge the OTP’s decision not to continue with the case.

Third, the ICC may independently review the OTP’s decision not to investigate or prosecute under Article 53(3)(b), much like it did in the _Mavi Marmara_ case. The Rome Statute makes clear that the only basis on which the OTP may cease investigating and prosecuting a jurisdictionally sound and admissible case is where such an outcome would serve the ‘interests of justice’. The reason offered by the OTP to cease active investigation appears to be based on the absence of genuine cooperation by the Kenyan government. Given that a decision to cease investigation on this basis is not foreseen by the Rome Statute, the victims invite the ICC to find that this is a de facto decision to discontinue the case in the interests of justice and to review it of its own initiative, including by assessing whether the OTP should have done more to challenge the obstructionism that led to the collapse of the case.

Lastly, several other factors demand a review of the OTP’s decision, including the role that President Kenyatta’s position of power as Head of State and Head of Government had on Kenya’s response to requests from the ICC in connection with the case, and the Rome Statute’s directive to vigorously pursue investigations and prosecutions of sexual and gender-based crimes, which were a key component of the post-election violence.

**Conclusion**

Through the commitment of resources by a large international law firm, Bryan Cave’s International Pro Bono Program has supported and continues to support the LRV’s work to give victims their day in court and strengthen their voices in challenging the Prosecutor’s cessation of its investigation against President Kenyatta and other high-ranking Kenyan officials. Our firm’s assistance to the LRV has encompassed legal research and drafting as well as consultation on litigation strategy. Particular contributions that ‘big law’ has been well placed to provide have included an analysis of prosecutorial discretion under the national laws of nearly 70 countries worldwide and a review of two decades of international human rights jurisprudence on judicial review for failures to investigate and prosecute serious crimes.

We hope that the ICC will uphold the victims’ right to seek judicial review of the OTP’s decision to cease investigation and prosecution of crimes committed during the post-election violence so that ordinary Kenyans may see justice done. Thousands of victims of crimes against humanity were led to believe in a justice process at the ICC for over five years, to endure three failed prosecutions without a single day of trial, and then to face the further anguish of learning that the OTP has decided not to proceed with further investigation or prosecution of the crimes committed against them – a decision driven by the obstructionism of the Kenyan government and allegations.
of witness interference implicating President Kenyatta himself. In keeping with the ICC’s goal of ending impunity for the most serious crimes of concern to the international community, the case should not end here.

Notes
1 In addition to the authors, the Bryan Cave pro bono team includes Bieta Andemariam and Daniel Lewkowicz.
2 On 27 July 2015, the OTP filed an appeal of the Pre-Trial Chamber’s decision before the ICC’s Appeals Chamber.