

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 9 March 2015

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public

Decision on the Prosecution's request for leave to appeal

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Government of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta* ('Kenyatta case') having regard to Articles 54(1) and 82(1)(d) of the Rome Statute ('Statute'), Rule 155 of the Rules of Procedure and Evidence ('Rules') and Regulation 65 of the Regulations of the Court renders the following 'Decision on the Prosecution's request for leave to appeal'.

I. Procedural History

1. On 29 November 2013, the Office of the Prosecutor ('Prosecution') filed the 'Prosecution application for a finding of non-compliance pursuant to Article 87(7) of the Statute against the Government of Kenya' ('Article 87(7) Application').¹ On 31 March 2014, in its 'Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date' ('Decision of 31 March 2014')² the Chamber, *inter alia*, deferred its decision on the Article 87(7) Application to allow further time for the resolution of certain cooperation matters between the Government of the Republic of Kenya ('Kenyan Government') and the Prosecution.³ On 7 October 2014, the Prosecution stated that it maintained its Article 87(7) Application.⁴

2. On 3 December 2014, the Chamber rendered its 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute' ('Impugned Decision'),⁵ in which it rejected the Article 87(7) Application.

¹ ICC-01/09-02/11-866-Conf-Exp. A public redacted version was filed on 2 December 2013 as ICC-01/09-02/11-866-Red. Pursuant to an order of the Chamber (ICC-01/09-02/11-900), the Article 87(7) Application was reclassified as public on 12 February 2014.

² ICC-01/09-02/11-908.

³ Decision of 31 March 2014, ICC-01/09-02/11-908, pages 46-47.

⁴ Transcript of hearing on 7 October 2014, ICC-01/09-02/11-T-31-CONF-ENG, page 11, lines 16-25. Reclassified as public pursuant to the Chamber's direction (ICC-01/09-02/11-967).

⁵ ICC-01/09-02/11-982.

3. On 9 December 2014, the Prosecution filed a request for leave to appeal the Impugned Decision ('Request').⁶
4. On 10 December 2014, the Chamber invited observations on the matter from the Kenyan Government, pursuant to Rule 103(1) of the Rules.⁷
5. On 15 December 2014, the Legal Representative of Victims ('LRV') filed a response to the Request on behalf of the victims ('Victims' Response to Request').⁸
6. On 22 December 2014, the Kenyan Government filed its observations ('Observations').⁹
7. On 5 January 2015, the LRV filed a response to the Observations ('Victims' Response to the Observations').¹⁰
8. On 6 January 2015, the Prosecution filed its response to the Observations ('Prosecution Response').¹¹

II. Submissions

Request

9. The Prosecution seeks leave to appeal the following two issues ('Issues') which it states arise from the Impugned Decision:

⁶ Prosecution's application for leave to appeal the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC-01/09-02/11-985.

⁷ Order requesting observations from the Government of Kenya on the Prosecution's leave to appeal request, ICC-01/09-02/11-986.

⁸ Victims' response to the Prosecution's application for leave to appeal the decision on non-compliance, ICC-01/09-02/11-989.

⁹ Observations of the Government of the Republic of Kenya pursuant to 'Order requesting observations from the Government of Kenya on the Prosecution's leave to appeal request', ICC-01/09-02/11-992. On 5 January 2014, a corrigendum was filed as ICC-01/09-02/11-992-Corr.

¹⁰ Victims' response to the observations of the Government of the Republic of Kenya on the Prosecution's leave to appeal request, ICC-01/09-02/11-993.

¹¹ Prosecution's response to the "Observations of the Government of Kenya pursuant to the 'Order requesting observations from the Government of Kenya on the Prosecution's leave to appeal request'", ICC-01/09-02/11-994. A corrigendum was filed later that day as 01/09-02/11-994-Corr.

- (i) Whether the Chamber had already made the requisite findings under Article 87(7) of the Statute that the Kenyan Government failed to comply with the Prosecution's cooperation request, such that it ought to have referred the matter to the Assembly of States Parties ('ASP'); or in the alternative, if the Chamber's findings are not considered 'formal' or 'judicial' findings under Article 87(7) of the Statute, whether it had any discretion not to enter the required finding under that provision and thus refer the matter to the ASP ('First Issue'); and
- (ii) Even if the Trial Chamber had discretion not to enter 'formal' findings under Article 87(7) of the Statute and thereby refer the matter to the ASP, whether it erred in the exercise of its discretion by taking into account or giving weight to extraneous or irrelevant considerations, and/or by failing to consider or accord sufficient weight to relevant considerations ('Second Issue').¹²

10. The Prosecution submits that the First Issue arises from the Impugned Decision and is appealable within the meaning of Article 82(1)(d) of the Statute¹³ as it involves the question of whether the Chamber 'adopted an incorrect two-stage analysis' in the Impugned Decision by drawing a distinction between 'informal' findings of non-compliance on the part of the Kenyan Government and 'formal' or 'judicial' findings.¹⁴ The Prosecution avers that, while the Chamber 'has some discretion as to whether or not to enter findings of non-compliance that frustrate the Court's ability to exercise its functions and powers', once such findings are made, they must be 'considered to be the formal findings which ground an ASP referral under Article 87(7)'.¹⁵ The Prosecution argues that, by declining to make a 'formal'

¹² Request, ICC-01/09-02/11-985, para. 3.

¹³ Request, ICC-01/09-02/11-985, para. 4.

¹⁴ Request, ICC-01/09-02/11-985, para. 7.

¹⁵ Request, ICC-01/09-02/11-985, para. 10.

finding in respect of the Kenyan Government's non-compliance, in its view, the Chamber erroneously avoided a referral to the ASP 'which would otherwise have been the inevitable consequence of its findings'.¹⁶

11. In the alternative, the Prosecution argues that, even if the Chamber's findings did *not* constitute 'the requisite findings under Article 87(7) [of the Statute]', the question arises as to whether the Chamber must necessarily have made a finding under Article 87(7) as a natural consequence of its factual determination that the Kenyan Government failed to comply with its duties, thus 'imped[ing] the Court in carrying out its functions and powers'.¹⁷
12. The Prosecution submits that the Second Issue also arises from the Impugned Decision and is appealable within the meaning of Article 82(1)(d) of the Statute.¹⁸ It avers that, assuming the Chamber did have the discretion to make an 'informal' finding of non-compliance, the Second Issue entails the question of whether the Chamber erred in the exercise of its discretion by relying on a number of irrelevant factors, including some of which the Prosecution argue to be unsupported,¹⁹ and by failing to take into account or give sufficient weight to relevant factors,²⁰ in determining whether a 'formal' finding under Article 87(7) of the Statute was in fact warranted.²¹

¹⁶ Request, ICC-01/09-02/11-985, para. 7.

¹⁷ Request, ICC-01/09-02/11-985, para. 12.

¹⁸ Request, ICC-01/09-02/11-985, para. 4.

¹⁹ Request, ICC-01/09-02/11-985, paras 16-19. These alleged factors include: (i) fair trial rights and the integrity of the proceedings; (ii) the speculative nature of whether the requested information would, if furnished, allow the guilt of the accused to be established beyond reasonable doubt; (iii) the notion that the 'seriousness of the breach' of the Kenyan Government's international obligations might reduce the prospect of future cooperation; and (iv) the Chamber's view that the Prosecution failed to thoroughly follow up its cooperation request, which the Prosecution argues, *inter alia*, is unsupported.

²⁰ Request, ICC-01/09-02/11-985, para. 20. These alleged factors include: (i) the Kenyan Government's lack of good faith throughout the cooperation proceedings; (ii) failure to consider whether a referral would promote, *inter alia*, the functions of the Court; and (iii) the impact of a referral on future investigations in relation to the accused.

²¹ Request, ICC-01/09-02/11-985, para. 14.

13. The Prosecution argues that both Issues meet the criteria for leave to appeal on the basis that the Chamber's decision not to make a finding under Article 87(7) of the Statute will impact upon the current, and any future, cooperation requests to the Kenyan Government, and therefore immediate resolution of the issues is required by the Appeals Chamber to 'verify the correctness of the legal basis' relied upon by the Chamber.²²
14. The Prosecution submits further that both the Issues 'significantly affect the fair and expeditious conduct of the proceedings'.²³ Specifically, the Prosecution argues that 'the proceedings' for the purposes of its Article 87(7) Application are those between the Prosecution and the Kenyan Government concerning the latter's 'failure to comply with its statutory obligations', which are separate to the proceedings in the *Kenyatta* case in which the charges have now been withdrawn.²⁴ Accordingly, the Prosecution argues that the Impugned Decision has a significant impact upon both the present cooperation proceedings, and any future cooperation proceedings, by disincentivising any further cooperation from the Kenyan Government.²⁵ The Prosecution argues that, in the absence of any other available remedy to resolve the 'pending stalemate' between the Kenyan Government and the Prosecution on cooperation matters, the failure to refer the matter to the ASP, *inter alia*, also impacts upon the expeditiousness of proceedings.²⁶
15. The Prosecution also avers that immediate resolution of the Issues by the Appeals Chamber would 'materially advance the cooperation proceedings'²⁷ as any error of law made by the Chamber in the Impugned Decision will not

²² Request, ICC-01/09-02/11-985, para. 22.

²³ Request, ICC-01/09-02/11-985, paras 23-28.

²⁴ Request, ICC-01/09-02/11-985, para. 24.

²⁵ Request, ICC-01/09-02/11-985, para. 26.

²⁶ Request, ICC-01/09-02/11-985, para. 28.

²⁷ Request, ICC-01/09-02/11-985, para. 29.

only 'escalate the [Kenyan Government's] degree of non-compliance but also erode the statutory basis for State Party cooperation'.²⁸ The Prosecution avers further that, absent a determination by the Appeals Chamber, the proceedings 'will not be advanced but on the contrary set back' insofar as any future cooperation-related or further proceedings against the accused will be hampered by continued non-compliance on the Kenyan Government's part.²⁹

Victims' Response to the Request

16. The LRV indicates that he supports the Request and opines that it meets the test under Article 82(1)(d) of the Statute.³⁰ The LRV submits that the Request affects the personal interests of victims on the basis that, *inter alia*, the victims in the case have a fundamental interest in having the Kenyan Government being held to account for its 'serial violations of the [Statute]' through a referral to the ASP, particularly in light of the inability of the victims to otherwise secure justice in Kenya or before the Court.³¹

17. The LRV concurs that the Impugned Decision raises issues which significantly affect the fairness and expeditiousness of proceedings.³² Specifically, the LRV supports the Prosecution's submission that the Chamber erred in the exercise of its discretion³³ based on the Chamber's findings in relation to the deficiencies in the Kenyan Government's approach to cooperation, and that it therefore ought to have made a finding under Article 87(7) of the Statute.³⁴ The LRV argues that, notwithstanding the withdrawal of the charges against Mr Kenyatta, the duty remains (i) on the part of the Kenyan Government 'to comply with all outstanding and future requests for assistance from the

²⁸ Request, ICC-01/09-02/11-985, para. 30.

²⁹ Request, ICC-01/09-02/11-985, paras 31-32.

³⁰ Victims' Response to Request, ICC-01/09-02/11-989, paras 2-3.

³¹ Victims' Response to Request, ICC-01/09-02/11-989, paras 4-6.

³² *See generally* Victims' Response to Request, ICC-01/09-02/11-989, paras 7-36.

³³ Victims' Response to Request, ICC-01/09-02/11-989, para. 7.

³⁴ *See generally* Victims' Response to Request, ICC-01/09-02/11-989, paras 24-27.

Court’;³⁵ and (ii) on the part of the Prosecution to comply with Article 54(1) of the Statute.³⁶ The LRV avers further that the Kenyan Government’s obligation to comply with the cooperation request is independent of the charges against the accused, and that the Chamber erroneously tethered the two factors in declining to make a finding under Article 87(7) of the Statute.³⁷

18. The LRV submits that the proceedings will also be materially advanced by an Appeals Chamber determination insofar as, if the Impugned Decision is reversed, a referral to the ASP will occur, ‘triggering the ASP’s formal procedure’ with the aim of securing compliance by the Kenyan Government with the outstanding request, as well as the ‘delivery of the evidence sought in it’.³⁸

Observations

19. The Kenyan Government argues that the Request is premised on ‘an erroneous interpretation of the jurisdiction of the Court as set out in the Statute and [the Rules]’.³⁹ It avers that the discretion of the Chamber to make a referral to the ASP in relation to non-compliance of a State Party is to be independently-exercised and is ‘totally unfettered by the Statute and the Rules’, and that the Chamber is not required to ‘confer with any other organ of the Court’ in ruling upon an application for a finding under Article 87(7) of the Statute.⁴⁰ The Kenyan Government argues further that the Prosecution has failed to establish any particular error in the exercise of discretion by the Chamber in issuing the Impugned Decision.⁴¹ It avers that the Impugned Decision affirms that the Prosecution’s Article 87(7) Application was, *inter*

³⁵ Victims’ Response to Request, ICC-01/09-02/11-989, para. 9.

³⁶ Victims’ Response to Request, ICC-01/09-02/11-989, para. 10.

³⁷ Victims’ Response to Request, ICC-01/09-02/11-989, para. 28. *See generally* paras 28-36.

³⁸ Victims’ Response to Request, ICC-01/09-02/11-989, para. 28. *See generally* paras 37-40.

³⁹ Observations, ICC-01/09-02/11-992-Corr, para. 5.

⁴⁰ Observations, ICC-01/09-02/11-992-Corr, para. 6.

⁴¹ Observations, ICC-01/09-02/11-992-Corr, paras 7-8 and 10.

alia, a ‘finger-pointing exercise’ to try to apportion blame to the Kenyan Government for deficiencies in the Prosecution’s investigations.⁴²

20. The Kenyan Government also contests the Prosecution’s assertion that the Chamber considered ‘irrelevant factors’ in the Impugned Decision, arguing that the nature of the evidence in the proceedings against Mr Kenyatta was indeed a relevant consideration in adjudicating the Article 87(7) Application.⁴³ The Kenyan Government avers that the reasoning of the Impugned Decision was correct insofar as it would have constituted ‘an abuse of process’ to engage the Court’s resources in a case that has fallen below the required evidentiary threshold, and further, that the ASP should not be misused ‘to present frivolous complaints for solutions...that the Prosecution has stated will not assist it’s [sic] case in any way’.⁴⁴ Finally, the Kenyan Government submits that ‘every litigation should come to an end’ and that the Request ought to be rejected as ‘an abuse of the process of the Court’.⁴⁵

Responses to the Observations

21. The Prosecution argues that the Request should be upheld, on the basis that the Kenyan Government’s Observations (i) address the merits of the issues arising from the Impugned Decision rather than the criteria under Article 82(1)(d) of the Statute; and (ii) misunderstand the Impugned Decision, thus providing ‘an additional reason warranting appellate intervention’.⁴⁶ The Prosecution avers further that the reasoning in the Impugned Decision runs counter to a recent decision by Pre-Trial Chamber I⁴⁷ which held, in the

⁴² Observations, ICC-01/09-02/11-992-Corr, paras 11-13.

⁴³ Observations, ICC-01/09-02/11-992-Corr, para. 14.

⁴⁴ Observations, ICC-01/09-02/11-992-Corr, para. 14.

⁴⁵ Observations, ICC-01/09-02/11-992-Corr, para. 16.

⁴⁶ Prosecution Response, 01/09-02/11-994-Corr, paras 1-2.

⁴⁷ *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, 10 December 2014, ICC-01/11-01/11-577 (‘Libya Decision’).

context of making a finding under Article 87(7) of the Statute, that such a finding ‘only requires an objective failure to comply’ rather than the additional factors considered by the Chamber that were ‘extraneous or marginally relevant to the question of non-cooperation’.⁴⁸

22. The LRV also argues that the Request should be upheld, on the basis that the Kenyan Government’s Observations: (i) do not address the test under Article 82(1)(d) of the Statute and instead ‘largely contain arguments on the merits of the appeal’;⁴⁹ (ii) contain arguments relating to the Chamber’s judicial autonomy that are misconceived;⁵⁰ (iii) contain arguments relating to the relevance, specificity and necessity of the outstanding cooperation request, which has already been adjudicated upon;⁵¹ and (iv) appear to dispute the Kenyan Government’s ongoing obligation to comply with the outstanding cooperation request.⁵²

III. Applicable Law

23. Article 82(1)(d) of the Statute sets the requirements applicable to the granting of a request for leave to appeal, as follows:

A. whether the decision involves an issue that would significantly affect:

i. the fair and expeditious conduct of proceedings; or

ii. the outcome of the trial; and

B. whether in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

⁴⁸ Prosecution Response, 01/09-02/11-994-Corr, para. 10. *See also* para. 3.

⁴⁹ Victims’ Response to the Observations, ICC-01/09-02/11-993, paras 4-5.

⁵⁰ Victims’ Response to the Observations, ICC-01/09-02/11-993, paras 6-8.

⁵¹ Victims’ Response to the Observations, ICC-01/09-02/11-993, paras 9-10.

⁵² Victims’ Response to the Observations, ICC-01/09-02/11-993, paras 11-18.

24. The Chamber recalls that, for the purposes of the first prong of the test, the Appeals Chamber has defined an ‘issue’ as ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.⁵³ The Chamber further notes that no automatic right of appeal is conferred by Article 82(1)(d) of the Statute. A right of appeal will arise only if, in the Chamber’s opinion, the impugned decision ‘must receive the immediate attention of the Appeals Chamber’.⁵⁴

IV. Analysis

25. The Chamber is of the view that both of the Issues identified by the Prosecution in the Request arise from the Impugned Decision and constitute appealable issues within the meaning of Article 82(1)(d) of the Statute. In the Impugned Decision, the Chamber found that it has discretion over whether or not to make a finding of non-compliance under Article 87(7) of the Statute, and to refer the matter to the ASP, ‘even where it had been determined that a State has failed to comply with a request for cooperation and this failure has prevented the Court from exercising its functions under the Statute’.⁵⁵ The Issues raise questions of whether or not a chamber has such discretion and, if so, the scope of that discretion, and the factors which may be properly considered in exercise of the discretion. The Chamber will therefore turn to consideration of the remaining criteria under Article 82(1)(d) of the Statute.
26. As a preliminary matter, the Chamber does not consider that the ‘proceedings’ for the purposes of Article 82(1)(d) of the Statute should be narrowly construed as comprising only the current litigation between the Prosecution and the Kenyan Government regarding the latter’s non-compliance with statutory

⁵³ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (‘*DRC OA 3 Judgment*’), para. 9.

⁵⁴ *DRC OA 3 Judgment*, ICC-01/04-168, para. 20.

⁵⁵ See e.g. Impugned Decision, ICC-01/09-02/11-982, para. 39.

obligations. In interpreting Article 82(1)(d) of the Statute, the Appeals Chamber has held that the term 'proceedings' is not 'confined to the proceedings in hand but extends to proceedings prior and subsequent thereto'.⁵⁶ Further, in analysing the term 'fair' as used in Article 82(1)(d) of the Statute, the Appeals Chamber noted that '[t]he principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime'.⁵⁷ Therefore, the Chamber considers that, notwithstanding the fact that the charges against Mr Kenyatta have been withdrawn,⁵⁸ the 'fair and expeditious conduct of the proceedings' prong of the test, for the purposes of the Request, extends to any judicial proceedings arising out of the relevant investigations in the Republic of Kenya more generally.⁵⁹

27. On this basis, the Chamber is persuaded that the Issues would significantly affect the fair and expeditious conduct of the proceedings. Particularly in light of the Chamber's finding that the *ne bis in idem* principle would not be triggered in the present circumstances,⁶⁰ the Chamber notes that the withdrawal of charges against Mr Kenyatta does not preclude ongoing investigations. Nor does it relieve the Kenyan Government of its statutory obligation to comply with any cooperation requests from the Court.
28. Having regard to the Prosecution's mandate under Article 54(1) of the Statute, the Chamber accepts the likelihood that the Prosecution's investigations would be significantly affected by the Chamber's exercise of discretion in not making a

⁵⁶ *DRC OA 3 Judgment*, ICC-01/04-168 (OA 3), para. 12.

⁵⁷ *DRC OA 3 Judgment*, ICC-01/04-168 (OA 3), para. 11.

⁵⁸ Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, 5 December 2014, ICC-01/09-02/11-983.

⁵⁹ See 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. See also Situation in the Democratic Republic of Congo, Judgment on victim participation in the investigation stage of 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, ICC-01/04-556, para. 45 (interpreting 'proceedings' as judicial proceedings, albeit in the context of Article 68(3) of the Statute).

⁶⁰ Decision on Prosecution's application for a further adjournment, 3 December 2014, ICC-01/09-02/11-981, para. 56.

referral of the matter to the ASP. The Chamber notes that Article 87(7) of the Statute provides a specific mechanism for referral of instances of non-cooperation, *inter alia*, in order to facilitate political and diplomatic efforts to promote cooperation with the Court.⁶¹ The Chamber recalls its finding that the Kenyan Government's conduct had fallen 'short of the standard of good faith cooperation required under Article 93 of the Statute'.⁶² In this context, in particular, the capacity of the Prosecution to secure future or ongoing cooperation would be significantly affected by whether or not the Chamber had appropriately exercised its discretion in this instance.

29. For the reasons indicated above, the Chamber is also satisfied that an immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

GRANTS the Request.

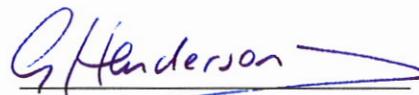
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 9 March 2015

At The Hague, The Netherlands

⁶¹ Impugned Decision, ICC-01/09-02/11-982, para. 81.

⁶² Impugned Decision, ICC-01/09-02/11-982, para. 78.