

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **20 March 2015**

APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi
Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Prosecution appeal against the “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute”

Source: Office of the Prosecutor

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Introduction

1. This appeal concerns the Trial Chamber's failure to refer the Government of Kenya ("GoK") to the Assembly of States Parties ("ASP"), pursuant to article 87(7) of the Rome Statute ("Statute"), despite having found that the GoK was in breach of its State Party obligations under the Statute.¹

2. In its "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute" ("Decision"),² the Trial Chamber found that "cumulatively, the approach of the [GoK] falls short of the standard of good faith cooperation required under Article 93 of the Statute." It found that this failure reached the threshold of non-compliance required under the first part of article 87(7) of the Statute" (*i.e.*, "fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute").³ It also found that "the [GoK's] non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute,"⁴ thereby fulfilling the second part of the test under article 87(7) ("prevent[s] the Court from exercising its functions and powers"). These findings were sufficient to warrant a referral.

3. Yet, the Trial Chamber proceeded to "exercise[e] its discretion [as to] whether or not [...] a *formal* finding of non-compliance pursuant to Article 87(7) of the Statute [was] warranted".⁵ It concluded that the Prosecution had failed to satisfy its burden to demonstrate that the GoK's conduct warranted such a finding and

¹ Although the Trial Chamber recently terminated the proceedings in this case, this termination is conditioned by the resolution of this appeal (see ICC-01/09-02/11-1005, para.11). It does therefore not affect the present appeal proceedings.

² ICC-01/09-02/11-982.

³ Decision, para.78; *see also* paras.72, 67, 62.

⁴ Decision, para.79.

⁵ Decision, para.80 (emphasis added).

consequential referral under article 87(7) of the Statute,⁶ and accordingly decided that it was not “appropriate to make a referral of the matter to the ASP on this occasion”.⁷ In this respect, it erred.

4. The Decision involves the following errors:⁸

- a) The Trial Chamber erred in law by not automatically referring the GoK to the ASP, after having made the requisite findings under article 87(7) that the GoK had failed to comply with the Prosecution’s request to cooperate and thereby prevented the Court from exercising its functions and powers under the Statute (“First Ground of Appeal”); and
- b) In the alternative, even if the Trial Chamber had discretion not to refer the GoK to the ASP (notwithstanding its prior factual findings), it erred in the exercise of its discretion by taking into account extraneous or irrelevant considerations and by failing to take into account or give sufficient weight to relevant considerations (“Second Ground of Appeal”).

5. The Chamber’s failure to refer, if not corrected by the Appeals Chamber, would allow the GoK (and indeed other States Parties) to follow a similar obstructive course in future cases. Even though the Chamber concluded that the GoK had failed to cooperate with the Court, thus preventing the Court from exercising its functions and powers under the Statute, it refused to take the next step envisaged under article 87(7) and refer the GoK to the ASP. As commentators have noted, the approach in the Decision “appears to make non-cooperation acceptable in certain contexts ... [T]he damage to the cooperation structure of the Rome Statute, which is central to the Court’s mandate to establish the truth and

⁶ Decision, paras.80 and 88.

⁷ Decision, para.90.

⁸ See ICC-01/09-02/11-1004 (“Decision on the Prosecution’s request for leave to appeal”), paras.9, 25-29, granting the Prosecution’s request for leave to appeal the two identified Issues.

to put an end to impunity for the perpetrators of the most serious crimes, will be extensive.”⁹

Submissions

A. First Ground of Appeal: The Trial Chamber erred in law by not automatically referring the GoK to the ASP, after having made the requisite factual findings under article 87(7)

6. Article 87(7) provides that “[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [...]” According to the express wording of this provision, the Trial Chamber, having found that the GoK failed to comply with the Prosecution’s requests to cooperate, and having found that such failure impinged upon the Chamber’s ability to fulfil its mandate under article 64,¹⁰ had no discretion but to refer the GoK to the ASP. It erred in law by not doing so.

i. The Chamber applied an erroneous two-stage analysis to findings under article 87(7)

7. The Trial Chamber held that a decision to refer a State Party to the ASP “is a discretionary one. Therefore, even where it has been determined that a State has failed to comply with a request for cooperation and that this failure has prevented the Court from exercising its functions under the Statute, the Chamber has to consider whether making a finding pursuant to Article 87(7) of the Statute is appropriate in the circumstances.”¹¹

⁹ Prost, Kimberly, Kreß/Prost, Article 87, in: Triffterer/Ambos, Commentary on the Rome Statute of the ICC, 3rd. Ed. 2015 (March 10, 2015) (“Kreß/Prost”), paras.65, 67 (available at: <http://ssrn.com/abstract=2576455>).

¹⁰ Decision, paras.78-79; *see also* para.2 above.

¹¹ Decision, para.39. Accordingly, the Trial Chamber anticipated that it will first make “an assessment in accordance with Article 87(7) [as to] whether any non-compliance which may be found to have occurred has prevented the exercise of powers and functions under the Statute [and that it will] “then turn to consideration of

8. The Trial Chamber determined as a matter of fact that the GoK had failed to cooperate with the Court and that this had prevented the Court from exercising its functions and powers under the Statute.¹² Notwithstanding these findings, it did not proceed to refer the GoK to the ASP. Instead, the Trial Chamber applied a two-stage analysis to article 87(7). It acknowledged the findings that it had made (i.e. as to the GoK's non-cooperation and the negative effect this had on the Court's functions), but distinguished these from the "formal"¹³ or "judicial"¹⁴ findings of non-compliance which it asserted it needed to make for a referral. As for the latter findings, it stated that it would "consider whether or not making a formal finding of non-compliance pursuant to Article 87(7) of the Statute is warranted [by] exercising its discretion in this regard".¹⁵ Ultimately, the Chamber concluded that it was not "appropriate to make a referral of the matter to the ASP on this occasion"¹⁶ because the Prosecution had failed to satisfy its burden to demonstrate that the conduct of the GoK warranted a finding and referral under article 87(7) of the Statute.¹⁷ It thus declined to refer the GoK to the ASP.
9. The Chamber's reasoning shows that despite its earlier unambiguous factual conclusions, it considered that it still had discretion not to enter "formal" or "judicial" findings of non-compliance so as to require it, as a matter of law, to refer the GoK to the ASP.¹⁸ In doing so, it erred in law.

other matters which may, in this case, influence its discretion in relation to the making of a referral under Article 87(7) of the Statute" (Decision, para.45).

¹² Decision, paras.78-79; *see also* para.2 above.

¹³ Decision, para.80.

¹⁴ Decision, para.81: "In the Chamber's view, a *formal* finding of non-cooperation under Article 87(7) of the Statute amounts to a *judicial* finding that a State has breached its international obligations under the Statute" (emphasis added).

¹⁵ Decision, para.80.

¹⁶ Decision, para.90.

¹⁷ Decision, paras.80 and 88.

¹⁸ Decision, paras.42, 80.

- ii. *Referral to the ASP is a mandatory consequence of the Chamber's factual findings*
10. The Trial Chamber made the necessary factual findings to trigger a referral under article 87(7), namely: that the GoK had failed to comply with a request to cooperate by the Court, and that this had prevented the Court from exercising its functions and powers under the Statute. The Chamber was thereby bound to refer the GoK to the ASP.
11. The Trial Chamber itself accepted that a referral to the ASP would, as a matter of law, be the inevitable consequence of a "formal" or "judicial" finding of non-compliance. This can be seen in its reference to such findings and their "concomitant referral to the ASP".¹⁹ In addition, Pre-Trial Chamber I has repeatedly held that once there is a finding of non-compliance that impacts on the Court's ability to exercise its functions and powers, the Chamber "cannot but refer the matter to the [ASP]".²⁰
12. The Prosecution agrees with the Trial Chamber that "[n]ot every instance of non-compliance with a cooperation request will constitute a failure to comply under [article 87(7)]".²¹ Similarly, not every instance of non-compliance will prevent the Court from exercising its powers and functions under the Statute. Chambers have discretion to evaluate the facts so as to determine whether, in the circumstances, it is appropriate to find that a State is in breach of its obligations under article 87(7) and that this has prevented the Court from exercising its functions and powers under the Statute.²² This is clear from the term "may" in article 87(7) of the Statute itself.

¹⁹ See Decision, para.80. See also Decision, para.90 where the Chamber entered a direct conclusion as to the appropriateness of a referral, as opposed to findings of non-compliance. In so doing, the Chamber implicitly found that once it entered a finding of non-compliance, it is appropriate to refer the GoK to the ASP.

²⁰ See ICC-02/05-01/09-195, para.34; ICC-02/05-01/09-227, para.19; See also ICC-01/11-01/11-577, paras.19, 34.

²¹ Decision, para.40.

²² ICC-01/11-01/11-577, paras.23-24: "While a determination of the appropriateness and usefulness of [the] measure [under article 87(7)] remains in the hands of the Chamber, it is necessary that prior to such determination two conditions are met. There must be an objective failure on the part of the State to comply with a cooperation request and, pursuant to regulation 109(3) of the Regulations, the requested State must be given the opportunity to be heard." See also ICC-01/11-01/11-556, para. 24; ICC-02/05-01/09-159, paras.10, 13.

13. However, when—as here—a Chamber has already exercised its discretion and made such findings, there is no further discretion for it to exercise. The findings it has made must be considered as the necessary findings to ground an ASP referral under article 87(7). Chambers of this Court generally do not make “informal” or “non-judicial” findings, whose effect would be unclear. The Chamber was incorrect to adopt a two-stage analysis distinguishing “formal” findings of non-compliance (leading to a referral) from its other factual findings under article 87(7).
14. The Trial Chamber’s reliance on a precedent in the *Bashir* case, where Pre-Trial Chamber II did not refer Nigeria to the ASP, is inapposite.²³ In that case, the Chamber did find that Nigeria had not carried out the request to arrest Mr Al-Bashir. However, it did not find that Nigeria failed to comply because the Nigerian authorities were “considering the necessary steps to be taken” to achieve compliance, but had been prevented from doing so by “the sudden departure of President Al-Bashir prior to the official end of the AU Summit.”²⁴ In contrast, the Trial Chamber in the present case had already exercised its discretion and made the necessary findings that the GoK had failed to comply with its obligations under the Statute and that this failure had prevented the Court from exercising its functions and powers.
15. Other decisions from this Court on article 87(7) likewise do not distinguish “formal” findings required for referral from other factual findings on non-compliance. Chambers have referred a State to the ASP or to the UN Security Council after entering a single finding of non-compliance.²⁵ Pre-Trial Chamber I recently held that “a finding of non-compliance under article 87(7) of the Statute only requires an objective failure to comply,” and having so found, automatically

²³ Decision, footnotes 117 and 118, relying on ICC-02/05-01/09-159, para.13.

²⁴ ICC-02/05-01/09-159, para.12.

²⁵ ICC-02/05-01/09-195, para.34; ICC-02/05-01/09-227, paras.18-19; ICC-01/11-01/11-577, paras.25, 34.

referred the non-complying State (Libya) to the Security Council.²⁶ These authorities support the view that once a Chamber has found that a State has failed to comply with a request to cooperate with the Court, and that this failure prevented the Court from exercising its functions and powers under the Statute, the Chamber has no further discretion on whether or not to enter an *additional* finding on non-compliance in order to refer the State to the ASP.

16. In the alternative, and assuming *arguendo* that the Trial Chamber's two-stage analysis is correct, given the nature and scope of the Trial Chamber's factual conclusions that the Chamber made in this case, it had no discretion but to enter "formal" findings of non-compliance and thereby refer the GoK to the ASP. A finding of non-compliance under article 87(7) must follow from a Chamber's factual determination that a State Party has failed to comply with its obligations in a manner that has impeded the Court in carrying out its functions and powers. While a Chamber has the discretion to make the necessary factual determinations about the State's non-cooperation and whether this has negatively impacted on the Court's functions, once these have been made, a "formal" or "judicial" finding corresponding to those determinations should be a matter of judicial formality. Anything else would lead to arbitrariness and inconsistencies in a decision.
17. As shown above, the Trial Chamber erred in law by not automatically referring the GoK to the ASP, after having entered the necessary factual findings pursuant to article 87(7). As a result, the Appeals Chamber should grant the First Ground of Appeal.

²⁶ ICC-01/11-01/11-577, para.33, *see also* para.24.

B. Second Ground of Appeal: Assuming *arguendo* that the Trial Chamber had discretion to deny the ASP referral, the Trial Chamber erred in its exercise of such discretion.

18. As demonstrated under the First Ground of Appeal, having made the requisite factual findings, the Trial Chamber had no discretion to deny the Prosecution's request to refer the GoK to the ASP. However, assuming *arguendo* that it did have such discretion, the Chamber erred in the exercise of such discretion by denying the ASP referral. In particular, the Chamber took into account several irrelevant factors that ought not have been considered, including:

- (i) the impact such a referral would have on Mr Kenyatta's trial, including his fair trial rights;²⁷
- (ii) the sufficiency of the evidence against Mr Kenyatta (as assessed by the Prosecution) and whether the requested cooperation could alter that assessment;²⁸
- (iii) the Trial Chamber incorrectly considered the Prosecution's own conduct when deciding whether to refer the GoK to the ASP;²⁹ and
- (iv) the possibility that the GoK would cooperate in the future, even without a referral to the ASP.³⁰

19. At the same time, the Chamber neglected to consider or gave insufficient weight to several relevant factors which should have led it to refer the GoK to the ASP. These include:

- (i) the GoK's proven serious breach of its international obligations and lack of good faith;³¹
- (ii) the Chamber's own acknowledgement that the object and purpose of an ASP referral is "to promote the functions of the Court";³² and

²⁷ Decision, paras.80, 82.

²⁸ Decision, para.82. While it appears the Chamber considered this as part of "the right to fair trial", the Prosecution argues this as a separate factor because of its egregiousness and for clarity of its submissions.

²⁹ Decision, paras.84-88.

³⁰ Decision, para.89.

³¹ Decision, para.78.

(iii) the Chamber’s recognition that the Prosecution is entitled to continue its investigations.³³

20. The Chamber’s abuse of discretion—in considering irrelevant factors and in failing to consider or properly weigh relevant factors—should be corrected on appeal. The Appeals Chamber’s functions extend “to reviewing the exercise of discretion by the [Trial Chamber] to ensure that the Chamber properly exercised its discretion.”³⁴ The Appeals Chamber has held that a Trial Chamber’s weighing and balancing of the relevant factors may be unreasonable, and thus amount to an abuse of discretion.³⁵ The Trial Chamber in this case did just that.

a) The Chamber abused its discretion by considering irrelevant factors

i. The Chamber incorrectly considered the impact of any referral on Mr Kenyatta’s trial, including his fair trial rights³⁶

21. The Chamber wrongly considered that a referral of the GoK to the ASP would not “facilitate a fair trial.”³⁷ In the same vein, it observed that a referral would “result in further uncertainty and potential delay in the proceedings [against Mr Kenyatta].”³⁸ However, consideration of how a referral would impact Mr Kenyatta’s trial and his fair trial rights should only be relevant in the criminal proceedings against him. These issues should have no bearing on the independent question of whether the GoK should be referred to the ASP, a matter being determined in the separate non-compliance proceedings against

³² Decision, para.80.

³³ Decision, para.83.

³⁴ The Appeals Chamber will intervene when “that determination [is] vitiated by an error of law, an error of fact, or a procedural error.” Such error must “materially affect” the Decision. Accordingly, the Appeals Chamber will intervene *inter alia* when a Trial Chamber’s decision is so unfair and unreasonable as to constitute an abuse of discretion: ICC-01/04-01/06-3122 A4 A6, para.41; ICC-02/04-01/05-408 OA3, paras.79-80 ; ICC-01/09-01/11-307 OA, paras.89-90. *See also* ICC-01/04-02/12-271 A, paras.18-21.

³⁵ *See* ICC-02/04-01/05-408 OA3, paras.79-81; *See also* ICC-01/04-01/06-3122 A4 A6, paras.43-44. Albeit in the context of a sentencing appeal and the factors to determine an appropriate sentence under rule 145, the Appeals Chamber has held that the same standard of review applies to discretionary decisions under article 82(1) and sentencing decisions. (paras.41-42).

³⁶ Decision, paras.80, 82.

³⁷ Decision, paras.80, 82.

³⁸ Decision, para.82.

that State. By doing so, the Chamber conflated these two proceedings, which—albeit within the same case—are against different persons/entities,³⁹ and involve different assessments. Certain cooperation issues were limited to the GoK and the Prosecution. At the same time, the GoK was not a party to the proceedings against Mr Kenyatta.

22. In fact, the Chamber had already appropriately and adequately considered various fair trial issues, including Mr Kenyatta’s rights to a fair trial, in the separate Adjournment Decision.⁴⁰ As a result, the Chamber rejected the Prosecution’s request to further adjourn the proceedings⁴¹ and directed the Prosecution to either withdraw the charges against Mr Kenyatta or proceed to trial.⁴² The Prosecution then withdrew its charges, and the Chamber terminated the proceedings against Mr Kenyatta.⁴³ The non-compliance proceedings, however, continued. The Trial Chamber erred by considering these issues again in the context of the non-compliance proceedings.

³⁹ See ICC-01/09-02/11-T-30-ENG, p.2, ln.10-p.4, ln.9, where certain co-operation issues addressed in these proceedings are limited to the GoK and the Prosecution, and are *ex parte* to the Kenyatta Defence; ICC-01/09-02/11-T-30-ENG, p.4, lns.6-9, where the Trial Chamber stated “[w]e are aware that the Defence and Legal Representative were not party to that co-operation request, or, save to the extent that counsel to the provision of certain items may have been requested from the accused, to any of the discussions that have subsequently taken place in relation to it.”; ICC-01/09-02/11-T-28-ENG, p.27, lns.2-9 (Status Conference of 13 February 2014), where the GoK confirmed that it was not a party to proceedings against Mr Kenyatta; ICC-01/09-02/11-T-32-ENG (Status Conference of 8 October 2014), p.3, lns.20-24, where the Trial Chamber confirmed Mr Kenyatta’s presence as a private individual, and not as the head of state of a State Party. On this basis, the Chamber conducted separate hearings on several occasions. See ICC-01/09-02/11-T-30-ENG, p.2, lns.15-17 (Status Conference of 9 July 2014, referring to separate *ex parte* hearings between the Prosecution and the GoK on co-operation matters); See generally ICC-01/09-02/11-T-31-ENG, Status Conference in the case against Mr Kenyatta (7 October 2014); ICC-01/09-02/11-T-32-ENG, Status conference in the case against Mr Kenyatta (8 October 2014). See also Decision on the Prosecution’s request for leave to appeal, para.26, where the Chamber acknowledged that “the current litigation between the Prosecution and the Kenyan Government regarding the latter’s non-compliance with statutory obligations” was different from “any judicial proceedings arising out of the relevant investigations in the Republic of Kenya more generally.”

⁴⁰ ICC-01/09-02/11-981 (“Adjournment Decision”), paras.43-55, noting *inter alia* “the presumption of innocence”, “the accused’s right to be tried without undue delay” and that the lack of any concrete prospect of obtaining sufficient evidence to meet the standard required for trial “should now weigh compellingly in favour of not prolonging these proceedings.”

⁴¹ Adjournment Decision, paras.48-50, 55.

⁴² Adjournment Decision, p.26.

⁴³ See ICC-01/09-02/11-983; ICC-01/09-02/11-1005.

- ii. *The Chamber incorrectly considered the sufficiency of the evidence against Mr Kenyatta (as assessed by the Prosecution) and whether the requested cooperation could alter that assessment*
23. In deciding whether to refer the GoK to the ASP, the Chamber was wrong to consider the sufficiency of the evidence against Mr Kenyatta (as assessed by the Prosecution), and whether the requested information, if provided, would allow the Prosecution to establish Mr Kenyatta's guilt beyond reasonable doubt.⁴⁴ The sufficiency of the evidence against Mr Kenyatta is only relevant to his trial. It was therefore properly considered in the Adjournment Decision.⁴⁵ Any assessment of the sufficiency of the evidence against Mr Kenyatta is, however, irrelevant and unwarranted in the context of the separate question of whether a State should be referred to the ASP for non-compliance with cooperation requests.
24. In addition, by considering the predicted impact of the requested cooperation on the Prosecution's ability to establish its case beyond reasonable doubt, the Chamber erred in three further respects. First, when the information is not yet in hand and is in fact the subject of a non-compliance proceeding, the Prosecution will always only be in a position to speculate as to its content, as the Chamber had itself noted.⁴⁶ Second, in any event, given that the information sought by the Prosecution in this case was likely to relate directly to Mr Kenyatta's conduct, and therefore to a critical aspect of the Prosecution's case, the Chamber was wrong to consider that the "possibility of obtaining the evidence ... [was] still nothing more than speculative."⁴⁷ Third, the Chamber has effectively set an impossible threshold for referring a State to the ASP. No State Party could ever be referred to the ASP for failing to comply with a cooperation request unless the

⁴⁴ Decision, para.82. "[C]onsidering the Prosecution's concession that the evidence fell below the standard required for trial and that the possibility of obtaining the necessary evidence, even if the Revised Request was to be fully executed, is still nothing more than speculative."

⁴⁵ See e.g., Adjournment Decision, paras.45-52.

⁴⁶ See Adjournment Decision, para.48, noting that "[w]ithout access to material sought in the Revised Request, the Prosecution is necessarily in a position of having to speculate regarding its content."

⁴⁷ Decision, para.82.

Prosecution had shown that the requested information or evidence would be critical in ensuring that the case could satisfy the standard of proof required for trial. By this logic, a State's failure to cooperate at an early stage of an investigation when the evidence is still being collected, or a State's failure to cooperate with requests other than by providing key evidence—however egregious—could not trigger a referral.

*iii. The Chamber incorrectly considered the Prosecution's own conduct when deciding whether to refer the GoK to the ASP*⁴⁸

25. The Chamber further abused its discretion by considering whether the Prosecution had followed up its request "expeditiously, thoroughly and meaningfully."⁴⁹ The Prosecution's own conduct should have been immaterial to the question of whether to refer the GoK to the ASP, and the Chamber erred in taking this factor into account.

26. First, the Chamber's findings on prosecutorial delay in relation to its Revised Request⁵⁰ are incorrect. The record demonstrates that with respect to the Revised Request, the Prosecution acted diligently in trying to obtain the GoK's cooperation, including through multiple meetings, timely correspondence and regular reminders when the GoK failed to respond to the Prosecution's correspondence.⁵¹ Even the Chamber's own findings on whether the Prosecution acted diligently are riddled with contradictions. On the one hand, the Chamber confirmed that, as a matter of principle and law, the Prosecution had satisfied its

⁴⁸ Decision, paras.84-88.

⁴⁹ Decision, para.85. *See also* paras.86-88.

⁵⁰ *See e.g.* Decision, para.87, noting that the Prosecution should have "taken, at an earlier point, decisive steps to resolve difficulties" arising with respect to the execution of its requests for cooperation; para.88, noting the Prosecution's approach to cooperation "was, in some respect, not reflective of a prosecutorial and investigative body effectively seeking to obtain the requested materials".

⁵¹ The Prosecution's efforts to secure the GoK's compliance with the Revised Request are detailed in the Prosecution's submissions of 29 April 2014 (ICC-01/09-02/11-911-Conf), 8 May 2014 (ICC-01/09-02/11-917-Conf), 23 May 2014 (ICC-01/09-02/11-922 and ICC-01/09-02/11-922-Conf-Exp-AnxA), 30 June 2014 (ICC-01/09-02/11-927 and ICC-01/09-02/11-927-Conf-Exp-AnxA), and 29 August 2014 (ICC-01/09-02/11-940, paras.4-21).

obligations in respect of the cooperation request.⁵² For example, it found that although the Prosecution had provided sufficient information, its requests for at least three of the specified categories of documents (tax records, bank records and telephone records)⁵³ were not addressed by the GoK. At the same time, however, it faulted the Prosecution for not having taken “decisive steps” at an earlier point.⁵⁴

27. Additionally, when deciding on the referral question, the Chamber was wrong to consider the Prosecution’s allegedly dilatory conduct when it had already taken that aspect into account in considering whether or not the GoK had failed to cooperate. Even if prosecutorial conduct were a relevant consideration to the referral question, it could only be relevant to the factual determination of whether the GoK’s conduct in the circumstances amounted to a failure to cooperate. The Chamber had already noted that the GoK’s failure reached the threshold of non-compliance required under the first part of article 87(7)—*notwithstanding the Chamber’s concerns regarding the adequacy of the Prosecution’s approach to this litigation.*⁵⁵ There was no reason to do so again in the context of the referral decision. As commentators have noted, “[a]s this discretionary assessment takes place after determinations that a request for cooperation was properly made, a State has failed to comply and non-compliance has prevented the Court exercising its functions and powers, it is difficult to perceive how the conduct of the party seeking referral could have any possible relevance to the referral decision under article 87(7).”⁵⁶

28. Further, the Chamber’s speculation that the “primary objective of pursuing the cooperation request” may have been anything else but to “actually obtain the

⁵² Decision, para.87.

⁵³ Decision, paras.62,67,72.

⁵⁴ Decision, para.87. In support, the Chamber offers one example of not seising the Chamber of the clear dispute in May 2014 (*see* fn.192). In fn.193, however, the Chamber noted two follow up letters sent by the Prosecution on 3 July 2014 (ICC-01/09-02/11-940-Conf-AnxA) and 27 August 2014 (ICC-01/09-02/11-940-Conf-AnxF).

⁵⁵ Decision, para.78 (emphasis added).

⁵⁶ *See* Kreß/Prost, para.65.

requested materials”⁵⁷ is as irrelevant as it is unsupported. Moreover, in this regard, the Chamber contradicted itself since it had previously found that the GoK’s non-compliance had compromised the Prosecution’s ability to thoroughly investigate the charges.⁵⁸

29. Second, the issue of any purported prosecutorial delay bears relevance—if at all—only to Mr Kenyatta’s rights as an accused.⁵⁹ It should be extraneous to the question of whether to refer the GoK to the ASP for non-compliance.⁶⁰ Yet again, the Chamber failed to distinguish between the two sets of proceedings.

30. Third, by considering the Prosecution’s alleged dilatory conduct, the Chamber effectively reversed the statutory burden placed on States Parties under article 93(3).⁶¹ If the GoK believed that it was unable to execute a request for cooperation, it was obliged to follow up “promptly” and consult with the Court to resolve the matter. Instead, the Chamber unfairly penalised the Prosecution for its purported delay to follow up on cooperation requests, while simultaneously failing to address the GoK’s proven failure to cooperate with the Court.

iv. The Chamber incorrectly considered the possibility that the GoK would cooperate in the future, even without a referral to the ASP

31. The Chamber also wrongly considered—as a reason to decline the referral request—that judicial measures may not have been exhausted. It suggested,

⁵⁷ Decision, para.88.

⁵⁸ Decision, para.79. *See* ICC-01/04-02/12-271 A, para.256 and ICC-01/04-02/12-271-Anx1 A, paras.5, 6, 12, 14 emphasising *inter alia* the Prosecution’s mandate to establish the truth under article 54(1)(a).

⁵⁹ *See* Adjournment Decision, paras.50-52, considering the diligence of the prosecuting authority.

⁶⁰ *Contra* Decision, para.84, noting “[r]eferral for the purpose of sanction should not be seen as compensating for any deficiency on the part of the Prosecution in fully investigating and prosecuting the crimes under the jurisdiction of the Court.”

⁶¹ *See e.g.*, Decision, para.25, noting that the GoK submitted *inter alia* that the Revised Request was “impractical, impossible, irregular” to execute, there is “no procedure that allows [it] to bypass the regulatory framework” and that it has no “extralegal or extrajudicial measures”.

without substantiation, that further cooperation was possible.⁶² This factor is both irrelevant and unfounded given the GoK's serial non-compliance with the Prosecution's requests. The Chamber simply failed to acknowledge the reality of the situation. Following the withdrawal of the charges against Mr Kenyatta, any further cooperation with the GoK on the requests that are the subject of the Decision is highly improbable at this late stage. Indeed, the GoK now lacks any further incentive to cooperate with respect to those requests—a fact reinforced by the Chamber's own recognition of the GoK's proven track record of sub-standard co-operation. All reasonable judicial measures and cooperation avenues in this case appear to have been exhausted. A referral of the GoK to the ASP remains the only effective method to sanction the GoK and elicit further cooperation in this case. Moreover, even if further cooperation were theoretically possible without a referral, it would be extraneous to the remedy sought. A referral of the GoK to the ASP is still needed to sanction the GoK's prior non-compliance, and cannot be reserved only for when no further cooperation—however theoretical—is possible.

b) The Chamber abused its discretion by failing to consider and properly weigh relevant factors

i. The Chamber incorrectly disregarded the GoK's proven serious breach of its international obligations and lack of good faith

32. In deciding whether an ASP referral was justified, the Chamber ignored the core finding that the GoK had seriously breached its international obligations and exhibited a lack of good faith in these proceedings. While this factor should have been central in steering the referral, the “seriousness of the breach of [the GoK's] international obligations” received only passing mention, in the context of the

⁶² Decision, para.89. *See also* para.50, noting that “[the Chamber] is not in a position to be certain whether the courses of action identified would have actually enabled execution of the requests.”

Chamber's reasoning that judicial remedies may not yet have been exhausted.⁶³ While considering that this "might make the prospect of further cooperation less probable", the Chamber failed to assign this pivotal factor appropriate weight. If the Chamber had properly considered and weighed its previous findings as to the GoK's sub-standard cooperation,⁶⁴ the Chamber could not but have sanctioned the GoK by referring it to the ASP.

ii. *The Chamber incorrectly weighed its own acknowledgement that the object and purpose of an ASP referral is "to promote the functions of the Court"*⁶⁵

33. The Chamber further failed to properly consider and weigh the fact that an ASP referral is a critical way to promote the Court's functions, and would have done so in this case. The Chamber correctly recognised that the Court "entrusts the matter to the ASP for appropriate action to remedy, or otherwise address, the breach [of a State's international obligations under the Statute]."⁶⁶ Equally, it was mindful that it was for the ASP to decide on the appropriate remedy.⁶⁷ It failed, to recognise, however, that an ASP referral was the only *effective* remedy available to the Court in the face of the GoK's unrelenting non-compliance.⁶⁸ It also failed to properly consider and weigh the range of different remedies—both political and diplomatic—available at the ASP's disposal.⁶⁹ Foreclosing a proper consideration of the ASP's remedies to address the GoK's non-compliance was fatal to the Decision.

⁶³ Decision, para.89.

⁶⁴ *See e.g.*, para.77 and fn.172, noting "with concern certain submissions of the Kenyan Government which are indicative of a non-cooperative stance premised on factors which the Chamber considers are inappropriate and irrelevant considerations in the sole context of the cooperation."

⁶⁵ Decision, paras.80-81.

⁶⁶ Decision, para.81.

⁶⁷ Decision, para.81.

⁶⁸ Emphasis added.

⁶⁹ *See* Article 112(2)(f), Statute. *See also* ICC-ASP/10/37, 30 November 2011, paras.6,10, 12-20. This includes formal responses (successive steps by the Bureau and Assembly) and informal responses (using the good offices of the President of the Assembly). *See* Kreß/Prost, para.69, noting "that "[t]he ASP is entitled to ask for immediate compliance with the Court's request and may condemn the State Party's failure. It may go beyond this and consider the appropriateness of collective countermeasures, such as economic sanctions, against the non-cooperating State."

iii. *The Chamber incorrectly weighed its own recognition that the Prosecution is entitled to continue investigations*

34. The Chamber failed to properly weigh the fact—reflected in its own finding—that despite the withdrawal of the current charges, the Prosecution is entitled to continue its investigations.⁷⁰ Without an immediate ASP referral, however, this finding remains illusory only. The Chamber failed to appropriately consider that only an ASP referral can elicit the necessary cooperation from the GoK to enable the Prosecution to continue its investigations.
35. As shown above, by taking into account irrelevant considerations and by failing to take into account or appropriately weigh relevant factors, the Trial Chamber exercised its discretion in an unfair and unreasonable manner. Had it properly applied these factors, it would have referred the GoK to the ASP. The Second Ground of Appeal should therefore be granted.

Conclusion

36. For the reasons set out above, the Prosecution requests the Appeals Chamber to overturn the Decision to the extent that it held that it was not “appropriate to make a referral of the matter to the ASP on this occasion”.⁷¹
37. If the Appeals Chamber grants the First Ground of Appeal, and based on the factual findings entered by the Trial Chamber, the Prosecution requests the Appeals Chamber to refer the GoK to the ASP pursuant to article 87(7).⁷²
38. If the Appeals Chamber only grants the Prosecution’s Second Ground of Appeal, the Prosecution requests the Appeals Chamber to make the requisite findings

⁷⁰ See Decision, para.83. See also Adjournment Decision, para.56, stating that “[w]here the Prosecution withdraws charges prior to the commencement of the trial the principle of *ne bis in idem* would not attach.”; Decision on the Prosecution’s request for leave to appeal, para.27.

⁷¹ Decision, para.90.

⁷² See article 83(2)(a), which provides the Appeals Chamber, among others, with the power to “amend” the appealed decision.

and refer the GoK to the ASP pursuant to article 87(7), or in the alternative, remand the matter to the Trial Chamber to do so, with appropriate directions.



Fatou Bensouda, Prosecutor

Dated this 20th day of March 2015

At The Hague, the Netherlands

Word Count:5,982⁷³

⁷³ It is certified that this document contains the number of words specified and complies in all respects with the requirements of regulation 36 of the RoC. This statement (51 words), not itself included in the word count, follows the Appeals Chamber's direction to "all parties" appearing before it: ICC-01/11-01/11-565 OA6, para.32.