

**Cour  
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**International  
Criminal  
Court**

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

Date: 8 April 2015

**THE APPEALS CHAMBER**

**Before:** Judge Silvia Fernández de Gurmendi  
Judge Sanji Mmasenono Monageng  
Judge Howard Morrison  
Judge Piotr Hofmański  
Judge Bertram Schmitt

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF**

***THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

**Public**

**Response of the Government of the Republic of Kenya to 'Prosecution appeal  
against the "Decision on Prosecution's application for a finding of non-  
compliance under Article 87 (7) of the Statute"'**

**Source:** The Government of the Republic of Kenya

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

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## I. INTRODUCTION

1. On 27 March 2015 the Appeals Chamber of the International Criminal Court ('the Appeals Chamber') issued '*Order on the conduct of the appeal proceedings*'<sup>1</sup> allowing the Government of the Republic of Kenya to file a response to the '*Prosecution appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"*'<sup>2</sup> ('Prosecution's Appeal') by 8 April 2015.
2. The Government of the Republic of Kenya wishes to point out, that contrary to what the Prosecution's Appeal postulates, the power of the Appeal Chamber to interfere with the exercise of the discretion of the Trial Chamber by exercising the power of review is precise and limited to very few and particular circumstances, as demonstrated by the law and jurisprudence of the Court. In particular, more recently the Appeals Chamber in the case of the *Prosecutor v. Thomas Lubanga Dyilo*<sup>3</sup> restated this settled position as follows:

'41. In respect of discretionary decisions, the Appeals Chamber has held in relation to appeals raised pursuant to article 82 (1) of the Statute:

"The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.

...the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position...'

<sup>1</sup> ICC-01/09-02/11-1010, 27 March 2015.

<sup>2</sup> ICC-01/09-02/11-1006, 20 March 2015.

<sup>3</sup> (Public) ICC-01/04-01/06-3122, 1 December 2014, para. 41.

As the Government of the Republic of Kenya will demonstrate the Prosecution's Appeal has failed to meet the standard set out above required for the review of the exercise of the discretion of the Trial Chamber.

## II. PROCEDURAL HISTORY

1. On 9 March 2014, Trial Chamber V(B) ('the Trial Chamber ') issued '*Decision on Prosecution's request for leave to appeal*'<sup>4</sup> granting the request of the Prosecution to appeal the Trial Chamber's '*Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*'<sup>5</sup> ('Trial Chamber Decision of 3 December 2014') in which it rejected the application of the Office of the Prosecutor ('Prosecution') for a finding, pursuant to **Article 87(7)** of the Rome Statute, that the Republic of Kenya 'has failed to comply with the Prosecution's request to produce financial and other records of the Accused'<sup>6</sup> and thereby requested the Trial Chamber to refer the matter to the Assembly of States Parties ('the Assembly').
3. On 20 March 2015 the Prosecution filed '*Prosecution appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"*'<sup>7</sup>

## III. RESPONSE

4. The Government of the Republic of Kenya reiterates that the power of the Appeals Chamber of review of the Trial Chamber's exercise of discretion is limited. The Appeals Chamber focus in review of the Trial Chamber's exercise of discretion is not in determining the correctness of the Trial Chamber decision and ultimately supplanting the decision of the Trial Chamber with

<sup>4</sup> (Public) ICC-01/09-02/11-908, 31 March 2014.

<sup>5</sup> (Public) ICC-01/09-02/11-982, 3 December 2014.

<sup>6</sup> (Public) ICC-01/09-02/11-866, 2 December 2013.

<sup>7</sup> See note 2 above.



what the Appeals Chamber believes should have been the correct and proper decision, but rather it is to consider 'whether the Trial Chamber has correctly exercised its discretion in reaching that decision'<sup>8</sup>. Precisely, the Appeals Chamber in reviewing the discretionary decision of the Trial Chamber ought to lean more on the process of arriving at a decision rather than the outcome, that is, the actual decision, irrespective of whether the Appeals Chamber agrees with the decision, unless the decision 'was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously'<sup>9</sup>

As such the Prosecution's argument at paragraph 18 of the Prosecution's Appeal that '...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...' does not demonstrate the Trial Chamber's error in the process of arriving at the discretionary decision but rather it is an attack on the actual decision.

Moreover, in attacking the actual decision, that is, the Trial Chamber Decision of 3 December 2014, in which the Chamber rejected the Prosecution's application to have the Government of the Republic of Kenya referred to the Assembly of States Parties ('the Assembly'), the Prosecution failed to meet the prerequisite of demonstrating the unreasonableness of the decision, which is required to prove that the Trial Chamber failed to exercise its decision judiciously. In particular, the following statement in the Prosecution's Appeal fails to demonstrate unreasonableness of the decision required to challenge the discretionary decision of the Trial Chamber:

'...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.'

Further, the Government of the Republic of Kenya submits that contrary to what the Prosecution states, as set out above, consideration of irrelevant

<sup>8</sup> *Slobodan Milosevic v. Prosecutor, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel*, IT-02-54-AR 73.7, para. 10.

<sup>9</sup> See note 8 above.

factors is not a basis for the challenge of a discretionary decision. As stated hereinabove, unreasonableness of the discretionary decision is the basis on which a party may seek the review of the actual discretionary decision.

The Government of the Republic of Kenya submits that 'consideration of irrelevant factors and 'unreasonableness', are independent grounds of judicial review which have distinct elements that a party seeking review is required to demonstrate in an application for review.

For the sake of clarity, the Government of the Republic of Kenya wishes to unpack the grounds of 'unreasonableness' and 'consideration of irrelevant factors' as developed by domestic courts adjudicating over matters of judicial review.

*i. Unreasonableness*<sup>10</sup>

The ground 'crystallised' in the House of Lords of England decision of Lord Greene MR in the case of *Associated Provisional Picture Houses Ltd v. Wednesbury Corporation*<sup>11</sup>, where the notable legal expression 'Wednesbury unreasonableness' was derived.

In this case, the ground was restricted to capturing decisions so unreasonable that no person could ever have come to them. However, subsequent practice of the courts resulted in the expansive interpretation of this ground which netted other grounds of judicial review and posed a challenge in determining precision in the pleading of this ground.

The domestic courts have since provided a scope of the ground, stating that where it is pleaded its scope must be limited. For instance, the Federal Court of Australia in the case of *City Botany Bay Council v Minister for Transport and Regional Development*<sup>12</sup> has stated that:

<sup>10</sup> Administrative Review Council, *The Scope of Judicial Review: Discussion Paper*, (2003), p. 54. Sourced at <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/TheScopeofJudicialReviewDiscussionPaper2003.aspx>,

<sup>11</sup> [1948] 1 KB 223.

<sup>12</sup> (1999) 58 ALD 628, 637



'We must again stress the limited nature of judicial review on the ground of unreasonableness. That ground is not available as a vehicle to obtain the judgment of the court on matters that in the end are not concerned with the legality of a decision but with contested views about its wisdom or substantive fairness – judgments about matters of that nature are to be made elsewhere by the community and its political representatives; the concern of the court is only with the legality of decisions.'

ii. Consideration of irrelevant factors<sup>13</sup>

Pleading this ground usually involves also demonstrating related ground that the court failed to take into account relevant considerations that is ought to have taken into account.

In the Australian case of *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd*<sup>14</sup> the High Court of Australia noted the following features of the related grounds of failing to take into account relevant considerations and taking into account irrelevant considerations:

- a) the ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he or she is bound to take into account in making that decision; and
- b) what factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act.

• In setting out the parameters of what the decision-maker, in this case the Trial Chamber, was 'bound' to do and what the indications of obligations are, the court in *Re Peko-Wallsend* noted as follows:

<sup>13</sup> See note 11 above.

<sup>14</sup> (1986) 162 CLR 24, 40-41.

'The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

It follows that in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.'<sup>15</sup>

As such, from the foregoing analysis, the instances of consideration of irrelevant factors that the Prosecution sets out at paragraph 20 of the Prosecution's Appeal cannot be used as bases for challenging the actual decision of the Trial Chamber as the Prosecution has erroneously proceeded to do.

5. However, even if the Prosecution was right in pleading the ground of 'consideration of irrelevant factors' in support of its application for review, the Government of the Republic of Kenya will demonstrate that the Prosecution does not grasp what constitutes 'irrelevant factors' since almost all the instances that the Prosecution states constitute irrelevant factors are actually relevant factors that the Trial Chamber rightfully took into account in arriving at the decision of 3 December 2014 of not referring the Government of the Republic of Kenya to the Assembly of States Parties.

*I. Prosecution's postulations that the Trial Chamber considered irrelevant factors*

6. In particular, the Government of the Republic of Kenya takes exception with the Prosecution's postulation that the Trial Chamber took into account the following irrelevant factors:<sup>16</sup>
  - (i) the sufficiency of the evidence against Mr Kenyatta (as assessed by the Prosecution) and whether the requested cooperation could alter that assessment;

<sup>15</sup> (1986) 162 CLR 24, 40-41.

<sup>16</sup> Prosecution's Appeal, para. 18.



- (ii) the Trial Chamber incorrectly considered the Prosecution's own conduct when deciding whether to refer the GoK to the ASP; and
- (iii) the possibility that the GoK would cooperate in the future, even without a referral to the ASP.

With respect to each of the above listed factors that the Prosecution states were irrelevant and that the Trial Chamber ought not to have considered them, the Government of the republic of Kenya submits as follows:

- (i) 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

7. The Trial Chamber properly directed itself in considering the sufficiency of the evidence against Mr. Kenyatta and taking into account the impact of the cooperation the Prosecution sought from the Government of the Republic of Kenya by its request for assistance of 8 April 2014 ('Revised Request'), which was created from the amendment of its request for assistance of 27 April 2012 ('Records Request'),<sup>17</sup> pursuant to the directions of the Trial Chamber in '*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*'<sup>18</sup> ('Trial Chamber Decision of 31 March 2014').

The Government of the Republic of Kenya submits that considering the sufficiency of the evidence was necessary for the Trial Chamber in making its factual findings. In this regard, the observations of the Appeals Chamber in the case of *The Prosecutor v. Mathieu Ngudjolo Chui*<sup>19</sup> are instructive. In particular, the Appeals Chamber stated as follows:

'23. The Appeals Chamber notes that in assessing an alleged error of fact, the Appeals Chambers of the *ad hoc* tribunals apply a standard of reasonableness, thereby according a similar margin of deference to the Trial Chamber's

<sup>17</sup> Revised Request is request for assistance referenced OTP/KEN/KEN-84/TL/JCCD-sm; Records Request is request for assistance referenced OTP/KEN/KEN-45/TL/JCCD-sm.

<sup>18</sup> (Public) ICC-01/09-02/11-908, 31 March 2014.

<sup>19</sup> (Public) ICC-01/04-02/12-271, 27 February 2015.

findings as that established by the Appeals Chamber in appeals pursuant to article 82 of the Statute. The rationale for this deferential approach to factual findings is that

“[t]he Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness’[s] testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber’s duty to provide a reasoned opinion.”<sup>20</sup>

8. Moreover, the Government of the Republic of Kenya submits that it was necessary for the Trial Chamber to consider the sufficiency of the evidence against Mr. Kenyatta as the Prosecution’s insistence on cooperation in implementation of a request for assistance whose full implementation the Prosecution admitted would not assist its case and readiness for trial,<sup>21</sup> is an abuse of the process of the court.
9. Further, the Prosecution’s own admission that it was unable to assess the value or relevance of the evidence, requested in its request for assistance, in establishing its case beyond a reasonable doubt demonstrates the imprudence and incompetence of the Prosecution, considering its numerous claims previously that it required the evidence requested in proceeding to trial of the case.
10. Furthermore the Government of the Republic of Kenya takes exception to the Prosecution’s assertion at paragraph 24 of the Prosecution’s Appeal that ‘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 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.’

<sup>20</sup> See note 20 above, para. 23.

<sup>21</sup> Trial Chamber’s Decision of 3 December 2014, para. 82.



The Government of the Republic of Kenya submits that the 'threshold' supposedly set by the Trial Chamber is a necessary safeguard to ensure respect of the text of the treaty and it is also aimed at ensuring that the Prosecution diligently discharges its obligations under the Rome Statute of effectively and sufficiently investigating its case in the first place and only resorting to State party cooperation for assistance, pursuant to **Article 86** of the Rome Statute, in conducting the investigations and prosecutions of crimes in the relevant case. This will ensure that the Prosecution does not transfer its primary responsibility of investigating and prosecuting to a State Party, as it has sought to do on the Republic of Kenya, by making requests for assistance which are incapable of implementation as they offend the framework of cooperation as set out in the Rome Statute and the national procedures of the relevant State Party requested to execute the requests for assistance.

- (ii) the Trial Chamber incorrectly considered the Prosecution's own conduct when deciding whether to refer the GoK to the ASP

11. The Government of the Republic of Kenya takes exception with the following statement at paragraph 27 of the Prosecution's Appeal:

'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.'

The Government of the Republic of Kenya submits that contrary to what the prosecution alleges, the Trial Chamber properly directed itself in taking into account the Prosecution's dilatory conduct since a referral is not an alternative step to cooperation but rather the last resort. The Prosecution had failed to demonstrate diligence and seriousness in its pursuit of assistance and hence not satisfied the Trial Chamber that a referral of the Republic of Kenya to the Assembly of States Parties was necessary.

- (iii) the possibility that the GoK would cooperate in the future, even without a referral to the ASP.

12. The Government of the Republic of Kenya takes exception with the assertions of the prosecution at paragraph 31 of the Prosecution Appeal that:

‘The Chamber also wrongly considered – as a reason to decline the referral request – that judicial measures may not have been exhausted. It suggested, without substantiation, that further cooperation was possible. 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 subject of the Decision is highly improbable at this late stage...

The Government of the Republic of Kenya submits that the Trial Chamber observation that judicial measures may not have been exhausted is relevant considering that the Trial Chamber observation of the Prosecution’s dilatory conduct, lack of flexibility in its pursuit of assistance and lack of demonstrable diligence in pursuit of its requests, which prevented the Prosecution from exhausting all judicial measures of cooperation.<sup>22</sup>

Moreover, the Government of the Republic of Kenya takes exception with the serious and unfounded claim that following ‘the withdrawal of the charges against Mr. Kenyatta, any further cooperation with the GoK on the requests that are subject of the decision is highly improbable at this late stage’. The Government of the Republic of Kenya finds this claim to be defamatory since it is on record that the Government of the Republic of Kenya has taken adequate steps under the Rome Statute and pursuant to its domestic national procedures to implement the Revised Request, and where additional and specific information was required from the Prosecution, this was promptly sought, but in most cases it was not provided by the Prosecution, hence the reason why the assistance sought by Revised Request could not be fully provided.

In this regard, the Government of the Republic of Kenya draws the attention of the Appeals Chamber to the *Proposed Public redacted version of ‘The*

<sup>22</sup> Trial Chamber Decision of 3 December 2014, para. 88.



*Government of the Republic of Kenya's Update to the Trial Chamber pursuant to the "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 of 31 March 2014" (ICC-01/09-02/11-941-Conf-Exp) dated 29 August 2014'*<sup>23</sup>

The Prosecution's defamatory comment is unsupported by proof that the Government of the Republic of Kenya has failed to cooperate with the Prosecution after the withdrawal of charges against Mr. Kenyatta. The Government of the Republic of Kenya asserts that it continues to cooperate with the Prosecution in the present case and in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*.

II. Prosecution's postulations that the Trial Chamber failed to consider and properly weigh relevant factors

13. The Government of the Republic of Kenya takes exception with the Prosecution's assertions at paragraph 19 of the Prosecution's Appeal that the Trial Chamber 'neglected to consider or gave insufficient weight to several relevant factors which should have led it to refer the GoK to the ASP' which include:

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

In this instance the Government of the Republic of Kenya reiterates its submissions at paragraph 4 (ii) above, where it referred to the instructive observations of the Australian court *Re Peko-Wallsend Ltd*, that where the text of the statute, in this case the silence of **Article 87** of the Rome Statute and ICC Rules of Procedure, does not provide any indication of the weight to be

<sup>23</sup> (Public) ICC-01/09-02/11-941, 29 October 2014.

given to the various considerations, it is for the Trial Chamber in this case to determining the appropriate weight to be given to the matters which are required to be taken into account.

14. Moreover, on the assertion of the prosecution that the Government of the Republic of Kenya had breached its international obligations and exhibited a lack of good faith in the proceedings, the Government of the Republic of Kenya wishes to submit that the treaty law principle of good faith (*pacta sunt servanda*) does not include implementing treaty obligations beyond the scope of the text of the treaty.

The provision of the assistance sought by the Prosecution's Revised Request as currently drafted would have involved the Government of the Republic of Kenya violating its laid down procedures and its obligations under the Rome Statute in seeking to implement a request for assistance that fails to provide all the required and specific information as required by the Rome Statute and the Republic of Kenya's implementing legislation, contrary to the expectation created by the principle of good faith .

In this regard, the Government of the Republic of Kenya wishes to align itself with the observations of Michael Alstine who stated as follows:

'This does not mean that the notion of good faith interpretation somehow confers on courts a hidden power to craft substantive treaty commitments. There is substantial merit in the formalist point that courts do not have authority, through citation of "good faith" or otherwise, to create new treaty obligations under the guise of interpretation'<sup>24</sup>


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<sup>24</sup> M. P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a call for Resurrection*, (2005) 93 Georgetown L.J., p.1926.

#### IV. RELIEF REQUESTED

15. In light of the foregoing, the Government of the Republic of Kenya respectfully requests that the Appeals Chamber to dismiss the Prosecution's Appeal for failing to demonstrate the essential requirements for review of the Trial Chamber's exercise of discretion.

Respectfully Submitted,



Githu Muigai, SC  
Attorney General of the Republic of Kenya

Dated 8 April 2015  
At Nairobi, Kenya