

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **1 May 2015**

**APPEALS CHAMBER**

**Before:** Judge Silvia Fernández de Gurmendi, Presiding  
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**

**Victims' submissions on the Prosecutor's appeal against the  
'Decision on Prosecution's application for a finding of non-compliance under  
Article 87(7) of the Statute'**

**Source: Legal Representative of Victims**

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

**The Office of the Prosecutor**

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Mr James Stewart

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Mr Uhuru Muigai Kenyatta

**Legal Representative of Victims**

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**States Representatives**

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**REGISTRY**

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**Registrar**

Mr Herman von Hebel

## Introduction

1. On behalf of the victims, the Legal Representative for Victims ('LRV') respectfully submits these observations on the 'Prosecution appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"' ('Prosecution's Appeal').<sup>1</sup> The LRV agrees with the relief sought at paragraphs 36-38 of the Prosecution's Appeal.

## Procedural history

2. On 3 December 2014, the Trial Chamber issued its 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute' ('Impugned Decision'), in which the Chamber rejected the Article 87(7) Application.<sup>2</sup>
3. On 9 December 2014, the Prosecution filed its application for leave to appeal the Impugned Decision.<sup>3</sup>
4. On 9 March 2015, the Trial Chamber granted the Prosecution's request for leave to appeal.<sup>4</sup>
5. On 20 March 2015, the Prosecution filed the Prosecution's Appeal.
6. On 27 March 2015, the LRV submitted a request to participate in the appeal.<sup>5</sup>
7. The same day, the Appeals Chamber ordered Mr Kenyatta and the Government of the Republic of Kenya ('Government') to file any response to the Prosecution's Appeal by 8 April 2015, and invited any request under Rule 103 of the Rules of Procedure and Evidence ('Rules') to be filed by 29 April 2015.<sup>6</sup>

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<sup>1</sup> 'Prosecution appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'', ICC-01/09-02/11-1006, 20 March 2015.

<sup>2</sup> 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', Trial Chamber V(B), ICC-01/09-02/11-982, 3 December 2014 ('Impugned Decision').

<sup>3</sup> '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, 9 December 2014.

<sup>4</sup> 'Decision on the Prosecution's request for leave to appeal', Trial Chamber V(B), ICC-01/09-02/11-1004, 9 March 2015.

<sup>5</sup> 'Victims' request to participate in the Prosecutor's appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'', ICC-01/09-02/11-1009, 27 March 2015.

<sup>6</sup> 'Order on the conduct of the proceedings', ICC-01/09-02/11-1010, 27 March 2015.

8. On 9 April 2015, the Government filed its response to the Prosecution's Appeal.<sup>7</sup>
9. On 24 April 2015, the Appeals Chamber granted the victims leave to submit written observations limited to their views and concerns with respect to their personal interests in the issues raised in this appeal.<sup>8</sup>

### **Submissions**

10. The LRV incorporates by reference the arguments raised on behalf of the victims before the Trial Chamber in relation to the cooperation issues in the present case.<sup>9</sup>
11. If not corrected, the errors committed by the Trial Chamber in the Impugned Decision will reinforce to the Government, to other States Parties, and to other States, a message that has already weakened the carefully-balanced model of State cooperation set out in Part 9 of the Rome Statute. That message is that serial non-cooperation with valid requests by the Prosecution, followed up by non-compliance with directions by a Trial Chamber, is a viable and successful strategy to employ by those who wish to block the Court's search for the truth. The damage to the Court's cooperation structure caused by the Impugned Decision must be remedied.
12. In almost all of the 49 meetings the LRV held with victims in Kenya in 2013 and 2014, victims expressed directly to the LRV their frustration and disquiet at their own government's action and inaction: that it was not fully cooperating with the Court; was not providing assistance to the victims in Kenya; and was blocking the domestic criminal justice process regarding crimes during the 2007-2008 post-election violence ('PEV'). In the aftermath of the collapse of the *Kenyatta* case, victims have expressed outrage at the fact that the Government, and Mr Kenyatta, appear to have been richly rewarded for following a policy of ruthless obstruction. Many have expressed

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<sup>7</sup> '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"', ICC-01/09-02/11-1013, 9 April 2015.

<sup>8</sup> 'Decision on the victims' request to participate in the appeal proceedings', ICC-01/09-02/11-1015 OA5, 24 April 2015, para. 12.

<sup>9</sup> The LRV's submissions on cooperation issues before the Trial Chamber were presented on 6 May 2013 (ICC-01/09-02/11-731), 5 February 2014 (ICC-01/09-02/11-T-27-ENG ET WT), 13 February 2014 (ICC-01/09-02/11-T-28-ENG ET WT), 19 February 2014 (ICC-01/09-02/11-904-Corr), and 9 July 2014 (ICC-01/09-02/11-T-30-ENG ET WT).

surprise that the Court appears to be so powerless in the face of clear obstruction of justice, and have expressed the view that the Court must deal more firmly with it.<sup>10</sup>

**On the first ground of appeal:**

**The Trial Chamber erred in law by not automatically referring the Government to the Assembly of States Parties ('ASP'), after having made the requisite factual findings under Article 87(7)**

13. The Chamber erred in law in the exercise of the discretion foreseen in Article 87(7) of the Rome Statute. A Chamber has discretion to reject an Article 87(7) request if it finds that (a) the State Party has complied with its obligations; or (b) that the State Party's non-compliance has not prevented the Court from exercising its functions and powers. But once a Chamber has found that a State Party has not complied with its obligations, and that non-compliance has prevented the Court from exercising its functions and powers, the Chamber has no discretion not to refer the State Party.<sup>11</sup>
14. Regulation 109(4) of the Regulations of the Court further supports this reading: 'When a finding under Article 87, paragraph 7 has been made, the President shall refer the matter to the Assembly [...]'.<sup>11</sup>
15. This reading of Article 87(7) is also compatible with the object and purpose of the Statute which aims at ensuring that the Court functions as a court of law, supported by prompt assistance by the States Parties in accordance with the Part 9 framework, and that its Judges are shielded as much as possible from the political arena.
16. By making a referral automatic when the requisite finding has been entered by a Chamber, the States Parties ensured that the Judges would not be unduly exposed to

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<sup>10</sup> After the withdrawal of charges against Mr Kenyatta, victims contacted by the LRV's field staff communicated a range of reactions, indicating frustration both with the Court and with the Government. For example: a/8805/11 (F): 'I am still shocked by what Bensouda announced. We had pegged all our hopes on the Court and the Court should not have allowed Bensouda to make that statement. ICC should avail all the means they have so that the accused faces those charges.' a/9362/11 (F): 'Government of Kenya deserted us and now ICC has failed to help us.' a/9140/11 (M): 'I feel hopeless. The Government of Kenya has not in any way helped us and now that ICC has withdrawn the charges, who will help us?' a/8614/11 (F): 'I do not think Bensouda and ICC have exhausted all avenues in as far as getting the much-needed evidence is concerned.' a/9086/11 (F): 'It is possible to get the evidence that Bensouda is looking for. The head of State should be made to produce this evidence.' a/9297/11 (M): 'Why is the Court letting the accused go scot free? Why is the Court being lenient on Kenya and on the accused? The court should look for other ways of gathering this evidence. Non-cooperation with the Court should be an offense in itself and the accused should be charged for this.'

<sup>11</sup> See the Court jurisprudence referred to in the Prosecution's Appeal at footnotes 20 and 22.

political pressure in determining whether to refer a State to the ASP after having determined that the State was in serious breach of its obligations as a signatory of the Statute. The Court's practice supports this interpretation.<sup>12</sup>

17. In the present case, the Trial Chamber found that Kenya had not complied with its obligations, and it found that non-compliance has prevented the Court from exercising its functions and powers. The Chamber found in particular that:

- a. 'there had been substantial unexplained delay on the part of the Kenyan Government in either giving effect to the cooperation request or raising any problems which may have prevented execution of the request';<sup>13</sup>
- b. 'the explanations provided by the Kenyan Government for non-provision of materials, were, in certain cases, framed in an unhelpful manner that did not respond clearly to queries raised';<sup>14</sup>
- c. 'it is apparent that - save in the case of Foreign Transaction Records - there has been a complete failure to pursue alternative sources of information';<sup>15</sup>
- d. '[d]espite the open language of the Revised Request, which provided the Kenyan Government with a degree of flexibility in how it could be implemented, and the provision of specific suggestions of avenues of potential enquiry from the Prosecution, the Kenyan Government appears to have persisted in a narrow approach which simply repeated the alleged 'impossibility' of one particular method of execution';<sup>16</sup>

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<sup>12</sup> 'Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan', Pre-Trial Chamber II, ICC-02/05-01/09-227, 9 March 2015; 'Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council', Pre-Trial Chamber I, ICC-01/11-01/11-577, 10 December 2014, para. 25; 'Decision on the "Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision" filed by the Defence of Saif Al Islam Gaddafi', Pre-Trial Chamber I, ICC-01/11-01/11-556, 10 June 2014, para. 24.

<sup>13</sup> Impugned Decision, para. 46 and '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', ICC-01/09-02/11-908, 31 March 2014, paras. 45-52.

<sup>14</sup> Impugned Decision, para. 75.

<sup>15</sup> *Idem.*

<sup>16</sup> *Ibidem.*

- e. 'despite the clear terms of the Revised Request, subsequently reiterated by the Prosecution, and the clear terms of the Decision of 29 July 2014, it is apparent that the Kenyan Government has taken no meaningful steps to compel production of the requested materials';<sup>17</sup>
- f. 'where a State fails to meaningfully take basic steps to obtain requested material, or to provide clear, timely and relevant responses, mere declarations of compliance are insufficient';<sup>18</sup>
- g. 'cumulatively, the approach of the Kenyan Government [...] falls short of the standard of good faith cooperation required under Article 93 of the Statute. The Chamber considers that this failure has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute'; and<sup>19</sup>
- h. 'The Chamber will now turn to the issue of whether the Kenyan Government's non-compliance has affected the exercise of the Court's functions and powers under the Statute, as a prerequisite to determining whether to make a finding under Article 87(7) of the Statute. [...] The Chamber therefore finds that the Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged on 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'.<sup>20</sup>

18. At this point, the Trial Chamber had made the finding required by Article 87(7) and was bound to refer Kenya to the ASP. The Trial Chamber no longer had discretion not to refer. However, the Chamber then said: '*Having so found, the Chamber will now consider whether or not making a formal finding of non-compliance pursuant to Article 87(7)*

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<sup>17</sup> Impugned Decision, para. 76.

<sup>18</sup> Impugned Decision, para. 78.

<sup>19</sup> Impugned Decision, para. 78.

<sup>20</sup> Impugned Decision, para. 79.

of the Statute is warranted'.<sup>21</sup> This was an abuse of the Trial Chamber's discretion under Article 87(7).

19. The Trial Chamber's reliance on the term 'judicial finding' is unclear. It said 'a formal finding of non-cooperation amounts to a judicial finding that a State has breached its international obligations under the Statute'.<sup>22</sup> The Trial Chamber relied upon a passage in *Blaškić*, in which the ICTY Appeals Chamber distinguished between non-judicial findings made by UN bodies and judicial findings made by an international tribunal established by the UN Security Council.<sup>23</sup>
20. Applying the *Blaškić* model, all of the findings made by the Chamber (including those summarised at paragraph 17 above) are judicial findings. The Trial Chamber erred by not acknowledging that its finding of non-compliance and its finding that non-compliance had affected the exercise of the Court's functions and powers under the Statute were judicial findings which mandated referral. It also erred in not referring Kenya to the ASP as referral was the only lawful and logical consequence of the conclusions entered by the Chamber, as prescribed by Article 87(7).

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<sup>21</sup> Impugned Decision, para. 80.

<sup>22</sup> Impugned Decision, para. 81.

<sup>23</sup> The passage reads in relevant part: 'It is appropriate at this juncture to illustrate the power of the International Tribunal to make such a judicial finding. When faced with an allegation of non-compliance with an order or request issued under Article 29, a Judge, a Trial Chamber or the President must be satisfied that the State has clearly failed to comply with the order or request. This finding is totally different from that made, at the request of the Security Council, by a fact-finding body, and *a fortiori* from that undertaken by a political or quasi-political body. Depending upon the circumstances the determination by the latter may undoubtedly constitute an authoritative Statement of what has occurred in a particular area of interest to the Security Council; it may set forth the views of the relevant body on the question of whether or not a certain State has breached international standards. In addition, the conclusions of the bodies at issue may include suggestions or recommendations for action by the Security Council. By contrast, the International Tribunal (i.e., a Trial Chamber, a Judge or the President) engages in a judicial activity proper: acting upon all the principles and rules of judicial propriety, it scrutinises the behaviour of a certain State in order to establish formally whether or not that State has breached its international obligation to cooperate with the International Tribunal.' ICTY Appeals Chamber, *Prosecutor v Blaškić*, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14, 29 October 1997 (<http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>, accessed 1 May 2015) ('*Blaškić*').

**On the 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**

21. The LRV supports the Prosecution's arguments and adds the observations below.

*a. The Impugned Decision was directly contradictory to the approach adopted by the Trial Chamber in its decisions of 31 March 2014 and 29 July 2014*

22. In the 31 March 2014 decision, the Trial Chamber crafted a framework of closely-supervised co-operation to take place over six months, with 'the specific purpose of providing an opportunity for compliance by the Kenyan Government with the outstanding cooperation request.'<sup>24</sup> The Trial Chamber said that it 'considers it appropriate to take all reasonable judicial measures to ensure cooperation by States Parties in furtherance of the truth-seeking function of the Court *before making a finding of non-compliance and referring the matter to the ASP for its ultimate consideration*'.<sup>25</sup> It added that 'the Chamber has an obligation to ensure that there is an opportunity for the Kenyan Government to comply with its obligations, *failing which the matter would be referred*'.<sup>26</sup>

23. The message was clear: unless the Kenyan Government complied with its obligations, the Trial Chamber would refer the matter to the ASP.

24. In accordance with the Trial Chamber's order, the Prosecution sent a revised records request to the Government in April 2014 ('revised request'), and diligently and frequently engaged with the Government in an effort to secure delivery of the information sought in the revised request.<sup>27</sup>

25. The Trial Chamber then received numerous oral and written submissions from the Government, Mr Kenyatta's representatives, the Prosecution and the LRV concerning the objections raised by the Government to justify its refusal to disclose the material requested.

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<sup>24</sup> Decision ICC-01/09-02/11-908, *supra* footnote 13, para 2(a).

<sup>25</sup> *Idem*, para. 91.

<sup>26</sup> *Ibidem*, para. 92.

<sup>27</sup> See Prosecution's Appeal, para. 26 and the Government/Prosecution correspondence cited in footnote 51.

26. It dealt with all those objections in its decision of 29 July 2014, in which it expressly endorsed the relevance, specificity and necessity of the revised request.<sup>28</sup> It also rejected the view that the information sought could only be provided with the accused's consent, and set forth its expectation 'that additional steps, pursuant to ordinary domestic investigative channels – utilising compulsory measures where appropriate – ought to be undertaken in parallel and in a timely manner'.<sup>29</sup>
27. No criticism can possibly be levelled either at the Trial Chamber or at the Prosecution regarding their efforts during the six-month period of April to October 2014 to give the Government a fair opportunity to comply with its obligations.<sup>30</sup>
28. Notwithstanding the diligent efforts of the Chamber and the Prosecution to secure access to evidence which is crucially important for the case against Mr Kenyatta, the Government repeatedly and knowingly refused to facilitate access to it. In particular, it failed to hand over financial and cell phone evidence which lies at the heart of this case. This was in blatant violation of the Trial Chamber's directions, as set out in its decisions of 31 March 2014 and 29 July 2014.
29. At the conclusion of the six-month period of carefully supervised co-operation, it was clear to all that the Government was determined not to provide the core material sought, and had carried out no domestic steps utilising compulsory measures.
30. In short, it had failed to comply with its Part 9 obligations and with the Chamber's directions. The failure of the Government to do so was squarely the responsibility of the Government. No other party can be blamed for it.
31. At that stage, it was imperative for the Trial Chamber to follow through on its earlier unambiguous message that continued non-compliance would be met with referral, as prescribed by Article 87(7). Instead, the Trial Chamber declined to refer.

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<sup>28</sup> 'Decision on the Prosecution's revised cooperation request', Trial Chamber V(B), ICC-01/09-02/11-937, 30 July 2014, para. 22.

<sup>29</sup> *Idem*, pages 21-22.

<sup>30</sup> The LRV reserves the right to seek appropriate relief from, the Pre-Trial Chamber (and, if necessary, the Appeals Chamber) concerning the extent to which the Prosecutor is presently complying with its obligations under Article 54 in respect of Kenya case 2. However, that does not affect the LRV's position that the Prosecution's effort to secure the Government's compliance with the revised request has been diligent.

32. In declining to refer after making it clear that continued non-compliance would be met with referral, the Trial Chamber incentivised further non-cooperation by Kenya in this case, and by other States in future cases. This was an abuse of the Trial Chamber's discretion, which must be remedied with an immediate Article 87(7) referral.

*b. The Trial Chamber's finding that referral should be denied due to non-exhaustion of judicial measures was erroneous*

33. Article 87(7) does not require exhaustion of judicial measures. It requires (a) non-compliance; and (b) that the non-compliance has prevented the Court from exercising its functions and powers. The Trial Chamber cited no authority in support of its finding that 'exhaustion of judicial measures'<sup>31</sup> is a prerequisite for referral, did not indicate to the parties what other judicial measures it had in mind, and did not define what constitutes 'exhaustion'.

34. In the present case, the Trial Chamber in its 31 March 2014 Decision, noted the 'substantial unexplained delay' in complying with the original records request, and made it clear to the Government that it was granting an adjournment 'of fixed duration and for the specific purpose of providing an opportunity for compliance by the Kenyan Government with the outstanding cooperation request'<sup>32</sup> failing which a referral would ensue.

35. The Chamber was making it plain that the Government had one final opportunity to show its intention to comply. At the end of the six-month adjournment, all could see that the Government did not intend to comply. If the exhaustion of judicial measures is a prerequisite to referral, all reasonable efforts had already been made both by the Prosecution and the Trial Chamber by the time of the Impugned Decision to secure the Government's voluntary compliance with its obligations. It was an abuse of discretion to refuse to refer on this basis.

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<sup>31</sup> Impugned Decision, para. 89.

<sup>32</sup> Decision ICC-01/09-02/11-908, *supra* footnote 13, paras. 2 and 51.

36. Kenya remains obliged immediately to execute the revised request. It has not done so. Should the Appeals Chamber harbour any doubt regarding the Government's current intention to execute the request (in its consideration of whether all reasonable measures to secure compliance have now been exhausted) those doubts will perhaps be put to rest by consideration of the following remarks following the withdrawal of charges against Mr Kenyatta:

- a. Mr Kenyatta: 'As they say, one down, two to go. We are nearly there. And I am sure that they will also do their part to engage';<sup>33</sup> 'We will not stop or relent until we see the end of the remaining cases.'<sup>34</sup>
- b. The Cabinet Secretary for Foreign Affairs: 'The Prosecutor has dismissed the charges [*applause*] against His Excellency the President, but the road is still long, we still have other cases in court, and with the same determination, with the same passion, and with the same commitment, we will continue working with the other two cases.'
- c. The Attorney-General: 'I also proudly congratulate H.E The President of the Republic of Kenya, Uhuru Kenyatta for being exculpated. Victoria Ascerta';<sup>35</sup> 'One of my high moments in 2014 was the withdrawal of the ICC criminal case against Uhuru'.<sup>36</sup>

37. These statements have been made despite the continuing duty of Kenya under Part 9 of the Statute and under the International Crimes Act 2008 to comply with requests from the Court (including the revised request),<sup>37</sup> and Mr Kenyatta's continuing duty under the Constitution of Kenya<sup>38</sup> as President to ensure that Kenya complies with its international obligation promptly to execute the revised request.

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<sup>33</sup> *Finally, it is over: two to go*, State House Kenya, 5 December 2014, available at: <https://www.youtube.com/watch?v=diuDXMGfyT0#t=20> [accessed 30 April 2015].

<sup>34</sup> The Twitter feed of the Presidential Strategic Communications Unit (PCSU) on 7 December 2014 attributed to Mr Kenyatta this statement.

<sup>35</sup> This statement on the Twitter account of the Attorney General (<https://twitter.com/agmuigai>) was accessed on 3 January 2015. It appears to have been widely 'retweeted' and this Twitter account has since been taken down.

<sup>36</sup> See <https://twitter.com/ktnkenya/status/550354150446620672>.

<sup>37</sup> Decision ICC-01/09-02/11-1004, *supra* footnote 4, para. 27.

<sup>38</sup> The President has an obligation to uphold the Constitution, and to ensure that Kenya's 'international obligations are fulfilled through the relevant Cabinet Secretaries'. He is also obliged to ensure the protection of

*c. The Trial Chamber erroneously deprived the victims of a trigger to initiate State Party action to secure Kenya's cooperation*

38. The Statute incorporates one major mechanism to deal with the problem of non-cooperation by a State Party: an Article 87(7) referral. Although States Parties, individually or collectively, do not require an Article 87(7) referral in order to take countermeasures against a State Party for violation of Rome Statute obligations, it is difficult to see how any State Party would initiate countermeasures absent referral.
39. This is illustrated by the fact that, at the December 2014 ASP meeting, which took place shortly after the Trial Chamber's refusal to refer Kenya to the ASP, no discussion was devoted to Kenya's non-compliance with requests from the Court.
40. As argued below, Kenya's obligation to comply with requests from the Court is not merely an obligation to the Court: it is an obligation to all States Parties. All of them have an interest in securing Kenya's compliance with its obligations. The role of an Article 87(7) referral as a means to facilitate action by other States was illustrated in a recent decision of Pre-Trial Chamber I, referring Libya under Article 87(7) to the UN Security Council. The Chamber emphasised that even where a Government makes a genuine effort to maintain a constructive dialogue with the Court, and where there are difficulties on its territory, an objective failure has to be assessed regardless of the State's underlying motives. Sensitive to the difficulties faced by the Government of Libya and its need to focus efforts and resources on other essential internal issues, the Chamber said that it 'cannot ignore its own responsibilities in the proceedings and its duty to deploy all efforts to protect the rights of the parties and the interests of victims.'<sup>39</sup> A referral for non-compliance can be made despite the 'genuine efforts' made by a State to 'maintain a constructive dialogue with the Court'.<sup>40</sup>
41. The Chamber made an Article 87(7) referral despite the State's engagement in proceedings before the Court and its explicit acknowledgment of its obligations to

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human rights and fundamental freedoms and the rule of law. See Articles 131(2)(a), 131(2)(e) and 132(5) of the Constitution of Kenya. (<https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> accessed 30 April 2015)

<sup>39</sup> Decision ICC-01/11-01/11-577, *supra* footnote 12, para. 32.

<sup>40</sup> *Idem*.

cooperate with the Court. The Chamber said: ‘This engagement does not however cure the objective failure on the part of Libya to comply with the Court’s two requests for cooperation that are still pending and which concern obligations of extreme importance.’<sup>41</sup> The Chamber found that ‘Article 87(7) of the Statute is value-neutral, and not designed to sanction or criticise the requested State. The Chamber concurs that this provision makes available to the Court an additional tool so that it may seek assistance to eliminate impediments to cooperation.’<sup>42</sup>

42. In essence, therefore, an Article 87(7) referral of a State Party provides a clear legal basis for other State Parties to take robust action to address deliberate or non-deliberate non-compliance with requests from the Court. The Impugned Decision was unfair to the victims because the Chamber erroneously deprived them of a trigger to encourage States Parties to take diplomatic and political steps, including countermeasures – individually or collectively – aimed at securing Kenya’s compliance. Whether the States Parties take any action, or succeed in any action that they do take, is not for the Chamber to prejudge: its duty was solely to refer Kenya.
43. A referral would also trigger the operation of Kenya’s obligations under the Articles on the Responsibility of States for Internationally Wrongful Acts. Non-compliance with the Statute is an internationally wrongful act<sup>43</sup> entailing the international responsibility of Kenya, in accordance with Articles 1<sup>44</sup> and 2<sup>45</sup> of the Articles.
44. Under the Articles, Kenya remains under a duty to perform its obligations under the Statute.<sup>46</sup> It is obliged to cease its non-compliance with the Statute, and ‘to offer

<sup>41</sup> Decision ICC-01/11-01/11-577, *supra* footnote 12, para. 31.

<sup>42</sup> Decision ICC-01/11-01/11-577, *supra* footnote 12, para. 33.

<sup>43</sup> ‘A “failure to comply with the request of a Court contrary to the provisions of this Statute” should be construed as being tantamount to an internationally wrongful act in the sense of the ILC Articles on States responsibility.’ (O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court. Observers’ Notes, Article by Article*, Second Edition, 2008, Article 87, p. 1529)

<sup>44</sup> International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 (‘ASRIWA’), ([http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf) accessed 29 April 2015), Article 1: ‘Every internationally wrongful act of a State entails the international responsibility of that State.’

<sup>45</sup> ASRIWA, Article 2: ‘There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.’

<sup>46</sup> ASRIWA, Article 29.

appropriate assurances and guarantees of non-repetition'.<sup>47</sup> It is also obliged 'to make full reparation for the injury caused by the internationally wrongful act.'<sup>48</sup> 'Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.'<sup>49</sup> Kenya 'may not rely on the provisions of its internal law as justification for failure to comply'.<sup>50</sup>

45. Kenya's gross and systematic failure to deliver evidence relevant to an investigation concerning crimes against humanity – in violation of the Rome Statute and the Vienna Convention of the Law of Treaties<sup>51</sup> – is self-evidently a serious breach of an international obligation.
46. Kenya's obligation to comply is not only to the Court: it is an obligation *erga omnes partes*.<sup>52</sup> The ICTY Appeals Chamber ruled that a State's obligation to comply with a request for cooperation under the ICTY Statute is *erga omnes partes*:

[T]he obligation set out - in the clearest of terms - in Article 29<sup>53</sup> is an obligation which is incumbent on every Member State of the United Nations *vis-à-vis* all other Member States. The Security Council, the body entrusted with primary responsibility for the maintenance of international peace and security, has solemnly enjoined all Member States to comply with orders and requests of the International Tribunal. The nature and content of this obligation, as well as the source from which it originates, make it clear that Article 29 does not create bilateral relations. Article 29 imposes an obligation on Member States towards all other Members or, in other words, an "obligation *erga omnes partes*".<sup>54</sup>

<sup>47</sup> ASRIWA, Article 30.

<sup>48</sup> ASRIWA, Article 31(1).

<sup>49</sup> ASRIWA, Article 31(2).

<sup>50</sup> ASRIWA, Article 32. The Articles also contain provisions requiring reparation (Article 34), restitution (Article 35), compensation (Article 36) and satisfaction (Article 37).

<sup>51</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 ('VCLT'), Article 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' VCLT, Article 27: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

<sup>52</sup> International Court of Justice, Judgement, *Barcelona Traction*, 5 February 1970 (<http://www.icj-cij.org/docket/files/50/5387.pdf>, accessed 29 April 2015), page. 32, para. 33: 'an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'.

<sup>53</sup> Article 29 of the ICTY Statute is analogous to Articles 86 and 93 of the Rome Statute and provides in relevant part: '1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: [...] (b) the taking of testimony and the production of evidence'.

<sup>54</sup> *Blaškić*, *supra* footnote 23, para. 26.

47. Similarly, Kenya's non-compliance with the original request and the revised requests is a violation of its obligations towards all other States Parties.
48. It is difficult to see how States Parties could realistically take *any* action to oblige Kenya to bring to an end its non-compliance absent an Article 87(7) referral. The ASP has recognised the negative impact that the non-execution of Court requests can have on the ability of the Court to execute its mandate and has indicated willingness to improve the implementation of the procedures on non-cooperation.<sup>55</sup> But the ASP's own formal procedure for securing cooperation is triggered *only* if it receives a formal Article 87(7) referral from the Court.<sup>56</sup>
49. Pre-Trial Chamber I recently ruled that 'a finding of non-compliance under Article 87(7) of the Statute only requires an *objective* failure to comply'.<sup>57</sup> Kenya's non-compliance with the original and revised requests was more than objective: it was deliberate and systematic, and has lasted over three years.
50. But Kenya's non-compliance was even more egregious given that it took place in the context of a pattern of steps indicating a desire by the Government to impede justice and genuine reparation proceedings at the ICC, and in particular to avoid at all costs the emergence of the truth regarding participation of Mr Kenyatta and other high-level persons in the PEV. The means employed by the Government (referred to in other filings by the LRV<sup>58</sup>) included failing to facilitate access to critically important witnesses and key documents in a manner which is tantamount to interfering with the collection of evidence.

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<sup>55</sup> See also the 5 December 2014 Report of the Bureau on non-cooperation ([http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP13/ICC-ASP-13-40-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-40-ENG.pdf) accessed 14 December 2014). The report says: 'The focal points and the President engaged in consultations with several stakeholders to improve the implementation of the procedures on non-cooperation. The focal points held several consultations with the Office of the Prosecutor with a view to develop internal tools to monitor, compile and react systematically to potential or confirmed instances of non-cooperation.' However, implicit in this promise of taking more effective measures is the fact that the ASP cannot act if non-cooperation is not referred to it.

<sup>56</sup> At its tenth session, the Assembly of States Parties adopted the 'Assembly Procedures relating to non-cooperation'. This provides, *inter alia*, that: 'A formal, and to some extent public, procedure for the Assembly to address occurrences of non-cooperation should only be triggered by a decision of the Court regarding non-cooperation addressed to the Assembly. Any such decision should be forwarded to all States Parties without delay. The general public should be informed by way of a press release of the Secretariat of the Assembly of States Parties.' ICC-ASP/10/Res.5, annex.

<sup>57</sup> Decision ICC-01/11-01/11-577, *supra* footnote 12, para. 33 [emphasis added].

<sup>58</sup> These have been raised in many oral and written submissions by the LRV during this case, including for example ICC-01/09-02/11-904-Corr, para. 44 and ICC-01/09-02/11-879-Red, paras. 15-20 and 35-36.

51. The Trial Chamber's erroneous failure to refer deprived the victims of a trigger which would have encouraged States Parties to cooperate to bring to an end, and reverse the consequences of, Kenya's systematic failure to adhere to the Statute.

*d. To decline to refer as a means of sanctioning the Prosecutor was erroneous*

52. The Trial Chamber's refusal to refer Kenya to the ASP appears to have been intended in part to sanction the Prosecution for what the Trial Chamber perceived to be the Prosecutor's investigative shortcomings.<sup>59</sup> The Trial Chamber thereby erroneously conflated the question of the Prosecution's general approach towards investigation and the question of State Party cooperation.

53. If the Trial Chamber had specific concerns regarding the sufficiency of the Prosecution's investigation in this case, whether during 2014 or previously, it should have addressed these concerns by way of oral or written admonition or (if it considered that the Prosecution had failed to comply with an order) through Article 71 and Rule 171.<sup>60</sup> It was unfair to the victims to deprive them of the principal statutory remedy for State obstruction of justice – referral pursuant to Article 87(7) – as a means of sanctioning the Prosecution. To decline to refer as a means of sanctioning the Prosecution was an error in law and an abuse of discretion.

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<sup>59</sup> Impugned Decision, paras. 85-88.

<sup>60</sup> The Appeals Chamber has previously held: 'Given their specific inclusion in the Statute and Rules of Procedure and Evidence, sanctions under article 71 and rule 171 are the normal and proper means to bring about compliance in the face of refusals to follow the orders of a Chamber. Recourse to sanctions enables a Trial Chamber, using the tools available within the trial process itself, to cure the underlying obstacles to a fair trial, thereby allowing the trial to proceed speedily to a conclusion on its merits.', 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU"', ICC-01/04-01/06-2582, 8 October 2010, paras 59-60. The LRV is unaware of any refusal by the Prosecution to comply with an order of a Chamber in this case.

- e. To decline referral was an abuse of discretion in light of its accepted negative impact on the Prosecutor's ability to carry out effective investigations*

54. The Chamber found that the Prosecution may continue investigations conducted in the Kenya situation and potentially bring new charges.<sup>61</sup> It found in the Impugned Decision that non-referral 'might make the prospect of further cooperation less probable'.<sup>62</sup> When granting leave to appeal, it accepted 'the likelihood that the Prosecution's investigations would be significantly affected by the Chamber's exercise of discretion in not making a referral' and that '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'.<sup>63</sup>
55. Withdrawal of charges does not affect the Prosecutor's ongoing duty 'to extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute'<sup>64</sup> and to take measures to ensure that its investigation and prosecution of crimes is 'effective'.<sup>65</sup>
56. The Prosecutor is at liberty to return to the Pre-Trial Chamber with charges against any person, including Mr Kenyatta, if compliance with the revised request yields investigative leads and evidence sufficient to satisfy the confirmation standard.
57. Kenya's compliance with the revised request is therefore necessary in order for the Prosecution to fulfil its Article 54 duty to carry out an 'effective' investigation.
58. The Chamber recognised (a) the Prosecution's duty to continue to investigate; (b) that non-referral would likely 'make the prospect of further cooperation less probable', thereby accepting that non-referral would negatively impact on the Prosecution's ability to effectively investigate; (c) that both requirements of Article 87(7) had been met. It nevertheless declined to refer Kenya. Cumulatively, this was grossly unreasonable to the victims, and an abuse of discretion.

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<sup>61</sup> 'Decision on Prosecution's application for a further adjournment', ICC-01/09-02/11-981, 3 December 2014, para. 56.

<sup>62</sup> Impugned Decision, para. 89.

<sup>63</sup> Decision ICC-01/09-02/11-1004, *supra* footnote 4, para. 28.

<sup>64</sup> Article 54(1) of the Rome Statute.

<sup>65</sup> Article 54(2) of the Rome Statute.

*f. To decline referral on the basis of the likely termination of the Kenyatta case was erroneous*

59. The Trial Chamber at paragraph 82 of the Decision erroneously linked the decision not to refer Kenya with its simultaneous decision denying any further adjournment, which resulted in the withdrawal of charges against Mr Kenyatta. This is a significant error constituting an abuse of discretion. Kenya's obligation to comply with the revised request was and remains independent of whether charges are in place against a particular accused.

*g. To decline referral on the basis that the evidence sought in the revised request might be insufficient in itself to yield a conviction was erroneous*

60. In denying referral, one of the reasons provided by the Trial Chamber was that 'the possibility of obtaining the necessary evidence, even if the Revised Request was to be fully executed, is still nothing more than speculative.'<sup>66</sup> This was an erroneous reason to decline referral. It is almost always a matter of speculation and conjecture<sup>67</sup> for the Prosecutor or a Chamber to request a State Party to deliver evidence which is believed to be necessary to uncover the truth.<sup>68</sup>

61. The Trial Chamber on 29 July 2014 noted the 'potential evidentiary significance' of telephone data sought in the revised request,<sup>69</sup> and found that the revised request 'conforms with the requirements of relevance, specificity and necessity for the

<sup>66</sup> Impugned Decision, para. 82.

<sup>67</sup> The word 'speculative' is defined as: 'Engaged in, expressing, or based on conjecture rather than knowledge'. <http://www.oxforddictionaries.com/us/definition/english/speculative> (accessed 29 April 2015). 'Conjecture' is defined as: 'An opinion or conclusion formed on the basis of incomplete information' <http://www.oxforddictionaries.com/us/definition/english/conjecture> (accessed 29 April 2015).

<sup>68</sup> Under Article 64(6)(d) of the Rome Statute, the Trial Chamber may order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties. Under Article 69(3), the Court may request the submission of all evidence that it considers necessary for the determination of the truth. Under Article 93, the Court can request assistance from a State Party for the provision of records and documents, and the execution of searches and seizures. These are all necessarily 'speculative' endeavours: neither a Chamber nor the Prosecutor can know the precise relevance or probative value of data or witness testimony which it does not already have.

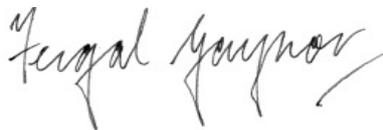
<sup>69</sup> Decision ICC-01/09-02/11-937, *supra* footnote 28, para. 45. The material sought in the revised records request is of central importance to the investigation into the crimes committed in Naivasha and Nakuru. The material sought is anything but marginal. Immediate delivery to the Court of all relevant cell phone and cell site data is critically important: it will enable investigators to clarify where Mr Kenyatta was during the PEV, who he was speaking to, who his interlocutors were speaking to, and where the interlocutors were. Full delivery of the financial data will clarify the source and destination of flows of funds before and during the PEV.

purposes of a cooperation request pursuant to Part 9 of the Statute'.<sup>70</sup> In light of this finding, it was an abuse of discretion to deny referral on the ground that the material sought might not in itself be sufficient to deliver a conviction. This, as the Prosecution has submitted,<sup>71</sup> creates an impossible threshold for any Article 87(7) application relating to State obstruction of access to evidence to succeed.

### Conclusion

62. Where there are credible indications of State interference in the collection of evidence, the State should be referred without delay under Article 87(7) of the Statute. Robust use of Article 87(7) is vital to reduce the systemic risk of obstruction at the ICC. Inaction carries with it a real risk of contagion. If State interference with the collection of evidence emerges as a viable strategy in this case, this will almost certainly increase the likelihood that it will infect other cases. Left unrestrained, State obstruction of justice can and will defeat the Rome Statute's structure of investigation and prosecution. This cannot be permitted to stand. The Trial Chamber declined to refer Kenya for reasons which are invalid. The Appeals Chamber should vacate the Impugned Decision and refer Kenya to the ASP pursuant to Article 87(7).

Respectfully submitted,



Fergal Gaynor  
Common Legal Representative of Victims

Dated this 1<sup>st</sup> day of May 2015  
At Cambridge (Massachusetts), United States of America

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<sup>70</sup> Decision ICC-01/09-02/11-937, *supra* footnote 28, page 22.

<sup>71</sup> Prosecution's Appeal, para. 24.

It is certified that this document contains a total of 4,878 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.