

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/09-02/11 OA 5

Date: 19 August 2015

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
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 document

Judgment

**on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on
Prosecution's application for a finding of non-compliance under Article 87(7) of
the Statute"**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims
Mr Fergal Gaynor

States Representatives
Mr Githu Muigai, SC, Attorney General
of the Republic of Kenya

Amicus Curiae
Africa Centre for Open Governance

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber V(B) entitled “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute” of 3 December 2014 (ICC-01/09-02/11-982),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute” is reversed.

REASONS

I. KEY FINDINGS

1. The scope of a Chamber’s discretion under article 87 (7) of the Statute comprises: (i) whether to make a finding of a failure to comply with a request for cooperation by a State, which prevents the Court from exercising its powers and functions under the Statute; and (ii) a determination of whether it is appropriate to refer the matter to the Assembly of States Parties or Security Council in order to seek external assistance to obtain cooperation with the request at issue or to otherwise address the lack of cooperation by the requested State.

2. It is within a Chamber’s discretion to consider whether a particular factor is relevant for its determination on either a failure to cooperate or whether it is appropriate to refer the matter of non-cooperation, or both. The same factor may be relevant for both aspects and may be taken into account more than once, provided that the factor is assessed in a consistent, non-contradictory manner.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

3. On 29 November 2013, the Prosecutor filed an application (hereinafter: “Prosecutor’s Article 87 (7) Application”),¹ requesting that Trial Chamber V(B) (hereinafter: “Trial Chamber”) make a finding of non-compliance under article 87 (7) of the Statute against the Government of Kenya (hereinafter: “Kenya”) on the ground that Kenya did not comply with the Prosecutor’s April 2012 request for cooperation under article 93 (1) of the Statute (hereinafter: “Records Request”)² to produce records in relation to Mr Uhuru Muigai Kenyatta (hereinafter: “Mr Kenyatta”).³

4. On 9 December 2013, the Trial Chamber invited Kenya to submit observations on the Prosecutor’s Article 87 (7) Application in accordance with regulation 109 (3) of the Regulations of the Court.⁴

5. On 31 March 2014, the Trial Chamber adjourned the commencement date of the trial in order to allow further time for the Prosecutor and Kenya to solve certain cooperation issues.⁵ The Trial Chamber also: (i) instructed the Prosecutor to submit an updated and revised version of the Records Request; (ii) directed the Prosecutor and Kenya to update it on the progress in executing the revised request; and (iii) deferred its determination under article 87 (7) of the Statute regarding Kenya.⁶

¹ “Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya”, ICC-01/09-02/11-866-Conf-Exp, with confidential and *ex parte* annexes A to M. Pursuant to the “[Order on reclassification of ICC-01/09-02/11-866-Conf-Exp](#)”, 12 February 2014, ICC-01/09-02/11-900, p. 5, the [Prosecutor’s Article 87 \(7\) Application](#) was reclassified as public (ICC-01/09-02/11-866), excluding confidential and *ex parte* annexes A to M.

² Annex A of the [Prosecutor’s Article 87 \(7\) Application](#), (ICC-01/09-02/11-866-Conf-Exp-AnxA).

³ [Prosecutor’s Article 87 \(7\) Application](#), para. 1.

⁴ “Decision requesting observations from the Government of Kenya”, ICC-01/09-02/11-870, para. 5, p. 4. Oral submissions were also made by the Prosecutor, Kenya, Mr Kenyatta, and the legal representative of victims at a status conference held on 13 February 2014. See [Transcript of 13 February 2014](#), ICC-01/09-02/11-T-28-ENG ET WT. See also “[Order scheduling a status conference on 13 February 2014](#)”, 6 February 2014, ICC-01/09-02/11-897, para. 5.

⁵ “[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 (hereinafter: “Decision of 31 March 2014”), p. 46.

⁶ [Decision of 31 March 2014](#), para. 100, pp. 46-47. For the complete procedural history in relation to the updates referred to in (ii), see “[Decision on Prosecution’s application for a finding of non-compliance under Article 87\(7\) of the Statute](#)”, ICC-01/09-02/11-982, paras 6-11.

6. On 8 April 2014, the Prosecutor transmitted an updated and revised version of the Records Request to Kenya (hereinafter: “Revised Request”).⁷ On 29 July 2014, the Trial Chamber rendered a decision, in which it found, *inter alia*, that the Revised Request “conform[ed] with the requirements of relevance, specificity and necessity for the purposes of a cooperation request pursuant to Part 9 of the Statute”.⁸

7. On 7 October 2014, the Prosecutor informed the Trial Chamber that consultations on the Revised Request with Kenya were “effectively at an end” and, accordingly, she reverted to her original position in the Prosecutor’s Article 87 (7) Application, namely that the Trial Chamber “should make a finding of non-compliance on the part of [Kenya]”.⁹

8. On 3 December 2014, the Trial Chamber rejected the Prosecutor’s Article 87 (7) Application (hereinafter: “Impugned Decision”).¹⁰

9. Also on 3 December 2014, the Trial Chamber issued a decision rejecting the Prosecutor’s application for a further adjournment of the provisional start of trial date in relation to the case against Mr Kenyatta (hereinafter: “Adjournment Decision”).¹¹

10. On 9 December 2014, the Prosecutor requested leave to appeal two issues that she argued arose from the Impugned Decision (hereinafter: “Request for Leave to Appeal”).¹²

11. On 9 March 2015, the Trial Chamber granted the Prosecutor’s Request for Leave to Appeal the two issues (hereinafter: “Decision Granting Leave to Appeal”),¹³ which it summarized as:

⁷ Correspondence contained in Annex A (ICC-01/09-02/11-911-Conf-AnxA) to “Prosecution application to adjourn until 12 May the provision of the update due on 30 April”, dated 29 April 2014 and registered on 30 April 2014, ICC-01/09-02/11-911-Conf.

⁸ [“Decision on the Prosecution’s revised cooperation request”](#), ICC-01/09-02/11-937, p. 22.

⁹ Transcript of 7 October 2014, ICC-01/09-02/11-T-31-CONF-ENG ET, page 11, lines 16-24. Pursuant to [“Order concerning the public disclosure of confidential information”](#), 21 October 2014, ICC-01/09-02/11-967, pp. 8-9, the [transcript](#) was reclassified as public (ICC-01/09-02/11-T-31-ENG ET WT).

¹⁰ [“Decision on Prosecution’s application for a finding of non-compliance under Article 87\(7\) of the Statute”](#), ICC-01/09-02/11-982, p. 46.

¹¹ [“Decision on Prosecution’s application for a further adjournment”](#), 3 December 2014, ICC-01/09-02/11-981.

¹² [“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, paras 3-4.

(i) Whether the Chamber had already made the requisite findings under [a]rticle 87(7) of the Statute that [Kenya] failed to comply with the Prosecution’s cooperation request, such that it ought to have referred the matter to the Assembly of States Parties (‘ASP’); or in the alternative, if the Chamber’s findings are not considered ‘formal’ or ‘judicial’ findings under [a]rticle 87(7) of the Statute, whether it had any discretion not to enter the required finding under that provision and thus refer the matter to the ASP (‘First Issue’); and

(ii) Even if the Trial Chamber had discretion not to enter ‘formal’ findings under Article 87(7) of the Statute and thereby refer the matter to the ASP, whether it erred in the exercise of its discretion by taking into account or giving weight to extraneous or irrelevant considerations, and/or by failing to consider or accord sufficient weight to relevant considerations (‘Second Issue’).¹⁴

12. In granting leave, the Trial Chamber, taking into account the Prosecutor’s mandate under article 54 (1) of the Statute, found that the Prosecutor’s capacity “to secure future or ongoing cooperation would be significantly affected by whether or not [it] had appropriately exercised its discretion” in not referring the matter to the Assembly of States Parties (hereinafter: “ASP”).¹⁵

B. Proceedings before the Appeals Chamber

13. On 20 March 2015, the Prosecutor filed her appeal (hereinafter: “Document in Support of the Appeal”),¹⁶ raising two grounds of appeal in line with the two issues certified for appeal by the Trial Chamber.¹⁷

14. On 27 March 2015, the legal representative of victims filed a request on behalf of the victims he represents to participate in the appeal proceedings (hereinafter: “Victims” and “Victims’ Request”).¹⁸

15. On 9 April 2015, Kenya filed its response to the Prosecutor’s Document in Support of the Appeal,¹⁹ submitting that the appeal should be dismissed.²⁰

¹³ [“Decision on the Prosecution’s request for leave to appeal”](#), ICC-01/09-02/11-1004, p. 14, paras 25, 29.

¹⁴ [Decision Granting Leave to Appeal](#), para. 9, referring to [Request for Leave to Appeal](#), para. 3.

¹⁵ [Decision Granting Leave to Appeal](#), para. 28.

¹⁶ [“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 (OA 5).

¹⁷ [Document in Support of the Appeal](#), para. 4

¹⁸ [“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 (OA 5).

16. On 24 April 2015, the Appeals Chamber granted the Victims' Request.²¹ On 1 May 2015, the Victims filed their submissions²² with a corrected version filed on 5 May 2015 (hereinafter: "Victims' Submissions"),²³ to which Kenya responded on 15 May 2015 (hereinafter: "Kenya's Response to Victims' Submissions").²⁴

17. On 8 May 2015, after having been granted leave, the Africa Centre for Open Governance filed its observations pursuant to rule 103 of the Rules of Procedure and Evidence (hereinafter: "*Amicus Curiae* Observations").²⁵ On 15 and 21 May 2015, the Victims and Kenya filed their respective responses.²⁶

¹⁹ ["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'"](#), dated 8 April 2015, ICC-01/09-02/11-1013 (OA 5) (hereinafter: "Response to the Document in Support of the Appeal").

²⁰ ["Response to the Document in Support of the Appeal"](#), para. 15.

²¹ ["Decision on the victims' request to participate in the appeal proceedings"](#), ICC-01/09-02/11-1015 (OA 5).

²² ["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'"](#), ICC-01/09-02/11-1019 (OA 5).

²³ ["Corrected version of 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'"](#), ICC-01/09-02/11-1019-Corr (OA 5) and annex, [ICC-01/09-02/11-1019-Corr-Anx \(OA 5\)](#).

²⁴ ["Response of the Government of the Republic of Kenya to 'Corrected version of 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'"](#), dated 14 May 2015, ICC-01/09-02/11-1024 (OA 5). *See also* ["Corrected version of 'Order concerning the filing of a response', 31 March 2015, ICC-01/09-02/11-1011"](#), dated 30 March 2015 and registered on 1 April 2015, ICC-01/09-02/11-1011-Corr (OA 5) and annex ["Corrigendum to ICC-01/09-02/11-1011"](#), ICC-01/09-02/11-1011-Corr-Anx (OA 5). On 11 May 2015, Kenya requested an extension of the time limit to respond, which was granted on 13 May 2015. *See* ["The Government of the Republic of Kenya's Request for extension of time to file its Response to the 'Corrected version of Victims' submissions on the Prosecutor's appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87\(7\)'"](#), ICC-01/09-02/11-1019-Corr dated 5 May 2015", ICC-01/09-02/11-1021 (OA 5); ["Decision on the Government of Kenya's request for an extension of time"](#), ICC-01/09-02/11-1022 (OA 5).

²⁵ ["Amicus Curiae Observations of the Africa Centre for Open Governance pursuant to Rule 103 of the Rules of Procedure and Evidence"](#), ICC-01/09-02/11-1020 (OA 5). *See also* ["Order in relation to the Africa Centre for Open Governance's 'Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence'"](#), 30 April 2015, ICC-01/09-02/11-1018 (OA 5), p. 3. The Appeals Chamber set 29 April 2015 as the deadline for any requests under rule 103 of the Rules of Procedure and Evidence. *See* ["Order on the conduct of the appeal proceedings"](#), ICC-01/09-02/11-1010 (OA 5), p. 5. After the passage of this deadline, the Pan African Forum LTD requested leave to submit *amicus curiae* submissions, which, on 20 May 2015, was rejected for being submitted outside of the deadline. *See* ["Registry Transmission of a submission from the Pan African Forum LTD dated 11 May 2015"](#), 15 May 2015, ICC-01/09-02/11-1025 (OA 5), with Annex 1 to the "Registry Transmission of a submission from the Pan African Forum LTD dated 11 May 2015", 15 May 2015, ICC-01/09-02/11-1025-Conf-Anx1 (OA 5); ["Decision on the Pan African Forum LTD's request for leave to submit amicus curiae observations"](#), ICC-01/09-02/11-1029 (OA 5).

²⁶ ["Victim's response to the Amicus Curiae Observations of the Africa Centre for Open Governance"](#), ICC-01/09-02/11-1026 (OA 5); ["The Government of the Republic of Kenya's Response to the 'Amicus Curiae Observations of the Africa Centre for Open Governance pursuant to Rule 103 of the Rules of Procedure and Evidence'"](#), ICC-01/09-02/11-1030 (OA 5). On 18 May 2015, the Appeals Chamber

III. MERITS

18. The Prosecutor raises two grounds of appeal, submitting that the Trial Chamber erred (i) in law by not referring Kenya to the ASP, when it had made a finding under article 87 (7) of the Statute that Kenya had not complied with the Prosecutor's request for cooperation and that this non-compliance prevented the Court from exercising its functions and powers;²⁷ and alternatively, (ii) if the Trial Chamber had discretion not to refer Kenya to the ASP, it erred in exercising its discretion "by taking into account extraneous or irrelevant considerations and by failing to take into account or give sufficient weight to relevant considerations".²⁸

19. The Prosecutor requests that, in the event that the first ground of appeal is granted, the Appeals Chamber refer Kenya to the ASP pursuant to article 87 (7) of the Statute, on the basis of the Trial Chamber's factual findings in the Impugned Decision.²⁹ In the event that only the second ground of appeal is granted, the Prosecutor requests "the Appeals Chamber to make the requisite findings and refer [Kenya] 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".³⁰

20. Kenya requests that the Appeals Chamber dismiss the Prosecutor's appeal for failing to demonstrate any error in the Trial Chamber's exercise of its discretion.³¹

A. Standard of review

21. This appeal raises the question of the scope of a Chamber's discretion in making a decision pursuant to article 87 (7) of the Statute. In that regard, the Appeals Chamber notes that it has previously addressed discretionary decisions made by Chambers in various contexts, including decisions relating to conditional

granted Kenya an extension of the time limit to file its response. See "[Decision on the Government of Kenya's request for an extension of time to file its response to the observations of the Amicus Curiae](#)", ICC-01/09-02/11-1028 (OA 5), para. 7, p. 3. See also "[Prosecution response to the Government of Kenya's request for extension of time to file its response to the 'amicus curiae' observations of the Africa Centre for Open Governance pursuant to Rule 103 of the Rules of Procedure and Evidence](#)", 15 May 2015, ICC-01/09-02/11-1027 (OA 5).

²⁷ [Document in Support of the Appeal](#), para. 4.

²⁸ [Document in Support of the Appeal](#), para. 4.

²⁹ [Document in Support of the Appeal](#), footnote 72, referring to article 83 (2) (a) of the Statute, which according to the Prosecutor, "provides [...], among others, with the power to 'amend' the appealed decision".

³⁰ [Document in Support of the Appeal](#), para. 38.

³¹ [Response to the Document in Support of the Appeal](#), para. 15.

release,³² the determination of the admissibility of a case on a Chamber's own motion,³³ procedural issues that arise during the course of the proceedings such as whether to hold a hearing³⁴ and sentencing.³⁵

22. The Appeals Chamber recalls that it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling.³⁶ The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made.³⁷ In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion.³⁸ Furthermore, once it is

³² See e.g. *Prosecutor v. Jean-Pierre Bemba Gombo*, "[Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release'](#)", 19 August 2011, ICC-01/05-01/08-1626-Conf (OA 7), with a public redacted version, ICC-01/05-01/08-1626-Red (OA 7), para. 55.

³³ See *Situation in the Democratic Republic of the Congo*, "[Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'](#)", 13 July 2006, ICC-01/04-169 (OA), paras 48, 52-53; *Prosecutor v. Joseph Kony et al.*, "[Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19\(1\) of the Statute' of 10 March 2009'](#)", 16 September 2009, ICC-02/04-01/05-408 (OA 3) (hereinafter: "*Kony et al.* OA 3 Judgment"), paras 78-81.

³⁴ See e.g. *Prosecutor v. William Samoei Ruto et al.*, "[Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute'](#)", 30 August 2011, ICC-01/09-01/11-307 (OA), para. 110; *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, "[Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the 'Demande de mise en liberté provisoire de Maître Kilolo Musamba'](#)", 11 July 2014, ICC-01/05-01/13-558 (OA 2), para. 47.

³⁵ *Prosecutor v. Thomas Lubanga Dyilo*, "[Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'](#)", ICC-01/04-01/06-3122 (A 4 A 6) (hereinafter: "*Lubanga A 4 A 6 Judgment*"), paras 34, 40-44.

³⁶ *Kony et al.* OA 3 Judgment, para. 79; *Lubanga A 4 A 6 Judgment*, para. 41. See also *Prosecutor v. Mathieu Ngudjolo Chui*, "[Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'](#)", 27 February 2015, ICC-01/04-02/12-271 (A) (hereinafter: "*Ngudjolo A Judgment*"), para. 21.

³⁷ See *Kony et al.* OA 3 Judgment, para. 80; *Prosecutor v. Abdallah Banda Abakaer Nourain*, "[Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest'](#)", 3 March 2015, ICC-02/05-03/09-632-Red (OA 5) (hereinafter: "*Banda OA 5 Judgment*"), para. 30; *Prosecutor v. Dominic Ongwen*, "[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'](#)", 17 June 2015, ICC-02/04-01/15-251 (OA 3) (hereinafter: "*Ongwen OA 3 Judgment*"), para. 35.

³⁸ *Kony et al.* OA 3 Judgment, paras 80-81; *Banda OA 5 Judgment*, para. 30; *Ongwen OA 3 Judgment*, para. 35.

established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.³⁹

23. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.⁴⁰

24. With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings.⁴¹ The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts.⁴² Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion.⁴³

³⁹ [Kony et al. OA 3 Judgment](#), para. 80; [Banda OA 5 Judgment](#), para. 30; [Ongwen OA 3 Judgment](#), para. 35.

⁴⁰ See *Prosecutor v. Thomas Lubanga Dyilo*, "[Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#)", 1 December 2014, ICC-01/04-01/06-3121-Conf (A 5) with a public redacted version, ICC-01/04-01/06-3121-Red (A 5) (hereinafter: "*Lubanga A 5 Judgment*"), para. 18; *Prosecutor v. Simone Gbagbo*, "[Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'](#)", 27 May 2015, ICC-02/11-01/12-75-Conf (OA) with a public redacted version, ICC-02/11-01/12-75-Red (OA) (hereinafter: "*S. Gbagbo Admissibility OA Judgment*"), para. 40. See also *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "[Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements \(ICC-02/05-03/09-199\) and additional instructions on translation'](#)", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20.

⁴¹ See *Lubanga A 5 Judgment*, paras 24, 27; *S. Gbagbo Admissibility OA Judgment*, para. 39.

⁴² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "[Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release](#)", 9 June 2008, ICC-01/04-01/07 (OA 4), para. 25; *Ngudjolo A Judgment*, para. 22; *S. Gbagbo Admissibility OA Judgment*, para. 38.

⁴³ *Prosecutor v. Callixte Mbarushimana*, "[Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release'"'](#)", 14 July 2011, ICC-01/04-01/10-283 (OA) (hereinafter: "*Mbarushimana OA Judgment*"), para. 17; *Ngudjolo A Judgment*, para. 22; *S. Gbagbo Admissibility OA Judgment*, para. 38.

It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.⁴⁴

25. In addition, the Appeals Chamber may interfere with a discretionary decision amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable⁴⁵ as to “force the conclusion that the Chamber failed to exercise its discretion judiciously”.⁴⁶ The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.⁴⁷ The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.

26. The above standard of review will guide the analysis of the Appeals Chamber.

⁴⁴ [Mbarushimana OA Judgment](#), para. 17; [Ngudjolo A Judgment](#), para. 22; [S. Gbagbo Admissibility OA Judgment](#), para. 38

⁴⁵ See [Kony et al. OA 3 Judgment](#), para. 81, referring to International Criminal Tribunal for the former Yugoslavia (hereinafter: “ICTY”), Appeals Chamber, *Slobodan Milošević v. Prosecutor*, “[Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel](#)”, 1 November 2004, IT-02-54-AR73.7 (hereinafter: “*Milošević Decision*”); [Ongwen OA 3 Judgment, para. 35](#). The Appeals Chamber notes that the part of the paragraph of the *Milošević Decision* that was cited in the [Kony et al. OA 3 Judgment](#) referred to a decision that was “so unreasonable or plainly unjust”. The Appeals Chamber finds the use of the alternative to be preferable and more consistent with case-law of the ICTY, the International Criminal Tribunal for Rwanda (hereinafter: “ICTR”) and the Special Court for Sierra Leone (hereinafter: “SCSL”). See e.g. ICTY, Appeals Chamber, *Prosecutor v. Slobodan Milošević*, “[Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder](#)”, 18 April 2002, IT-01-50-AR73, para. 6; *Milošević Decision*, para. 10; *Prosecutor v. Radovan Karadžić*, “[Decision on appeal from decision on duration of Defence case](#)”, 29 January 2013, IT-95-5/18-AR73.10 (hereinafter: “*Karadžić Decision*”), para. 7; *Prosecutor v. Vojislav Šešelj*, “[Decision on appeal against decision on continuation of proceedings](#)”, 6 June 2014, IT-03-67-AR15bis (hereinafter: “*Šešelj Decision*”), para. 34; ICTR, Appeals Chamber, *The Prosecutor v. Édouard Karemera et al.*, “[Decision on Interlocutory Appeal Regarding Witness Proofing](#)”, 11 May 2007, ICTR-98-44-AR73.8, para. 3; SCSL, Appeals Chamber, *Prosecutor v. Samuel Hinga Norman et al.*, “[Fofana – Appeal against decision refusing bail](#)”, 11 March 2005, SCSL-04-14-T-371, para. 20. The Appeals Chamber therefore uses the formulation in the alternative in the above text, in place of the conjunctive that the Appeals Chamber has previously used in referring to a decision being “so unfair and unreasonable” (emphasis added).

⁴⁶ See [Milošević Decision](#), para. 10.

⁴⁷ See [Lubanga A 4 A 6 Judgment](#), para. 43; [Kony et al. OA 3 Judgment](#), para. 81, citing [Milošević Decision](#), para. 10. See also ICTY, [Karadžić Decision](#), para. 7; [Šešelj Decision](#), para. 34.

B. Preliminary issue

1. Prosecution's circumvention of the word-count

27. The Appeals Chamber notes that the Prosecutor's Document in Support of the Appeal does not have spaces between certain characters in the footnotes.⁴⁸ This practice undermines the accuracy of the word count that the parties must certify in filings before the Appeals Chamber.⁴⁹ However, in this particular case and in the interests of justice, the Appeals Chamber will not take any action save to instruct the Prosecutor to henceforth observe proper spacing between characters in documents filed before the Appeals Chamber.

2. Amicus Curiae Observations

28. The Appeals Chamber notes that the *Amicus Curiae* Observations advance arguments outside the scope of the issues certified on appeal and are therefore unhelpful for the proper determination of the present appeal. Under these circumstances, the Appeals Chamber will not address the submissions made in the *Amicus Curiae* Observations or in the responses thereto.

C. The Prosecutor's First Ground of Appeal: alleged error of law

29. Under the first ground of appeal, the Prosecutor argues that, once the Trial Chamber made a finding on Kenya's non-compliance with the request for cooperation and that this non-compliance prevented the Court from exercising its functions and powers, the Trial Chamber, having no discretion not to do so, should have automatically referred the matter to the ASP.

1. Relevant part of the Impugned Decision

30. In the Impugned Decision, the Trial Chamber first set out its understanding of the legal framework governing article 87 (7) of the Statute, as follows:

It is apparent, from a plain reading of the provision itself, that the Chamber's power to make a finding of non-compliance under [a]rticle 87(7) of the Statute,

⁴⁸ See e.g. [Document in Support of the Appeal](#), footnotes 3-7. The Appeals Chamber also notes that spaces after the commas have also been omitted. See [Document in Support of the Appeal](#), footnote 53.

⁴⁹ See "[Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'](#)", 24 July 2014, ICC-01/11-01/11-565 (OA 6), para. 32.

and to refer the matter to the ASP or Security Council, 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 [a]rticle 87(7) of the Statute is appropriate in the circumstances. [...]

[...]

[N]on-compliance arising from, *inter alia*, unjustified inaction or delay, or a clear failure to have in place appropriate procedures for effecting the cooperation, as required under [a]rticle 88 of the Statute, constitutes failure to comply under [a]rticle 87(7) of the Statute which may, depending upon the circumstances, warrant a finding of non-compliance and concomitant referral under the same article. The approach of the relevant State during the cooperation process, as well as of the party seeking a finding under [a]rticle 87(7) of the Statute, may be of particular importance in finding whether there has been the standard of good faith cooperation required from State [*sic*] Parties. [...] The determination is case-specific, and determining that a degree of non-compliance has occurred may not, in itself, be sufficient to necessarily trigger a referral. [...]

[...]

[...] [T]he Chamber will first consider the current degree of cooperation in the present proceedings, and whether any non-compliance which may be found to have occurred has prevented the exercise of powers and functions under the Statute. The Chamber will then turn to consideration of other matters which may, in this case, influence its discretion in relation to the making of a referral under [a]rticle 87(7) of the Statute.⁵⁰ [Footnotes omitted.]

31. In line with the approach set out above, the Trial Chamber then proceeded to analyse whether Kenya had complied with the request for cooperation in relation to eight categories of material sought in the Revised Request⁵¹ and, if not, whether that failure to comply with the cooperation request prevented the exercise of its powers and functions under the Statute. In this regard, the Trial Chamber found that:

[t]herefore, and notwithstanding the Chamber's concerns regarding the adequacy of the Prosecution's approach to this litigation, the Chamber finds that, cumulatively, the approach of [Kenya] [...] falls short of the standard of good faith cooperation required under [a]rticle 93 of the Statute. The Chamber

⁵⁰ [Impugned Decision](#), paras 39, 42, 45.

⁵¹ The Trial Chamber analysed the following material: (1) "Company Records"; (2) "Land Transfer Records"; (3) "Tax Records"; (4) "Vehicle Records"; (5) "Bank Records"; (6) "Foreign Transaction Records"; (7) "Telephone Records"; and (8) "Intelligence Records". See [Impugned Decision](#), paras 51-73.

considers that this failure has reached the threshold of non-compliance required under the first part of [a]rticle 87(7) of the Statute.

[...] The Chamber, therefore, finds that [Kenya]'s non-compliance has not only compromised the Prosecut[or]'s ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfil its mandate under [a]rticle 64, and in particular, its truth-seeking function in accordance with [a]rticle 69(3) of the Statute.⁵² [Footnotes omitted.]

32. The Trial Chamber then went on to state that, “[h]aving so found, the Chamber will now consider whether or not making a formal finding of non-compliance pursuant to [a]rticle 87(7) of the Statute is warranted”.⁵³

33. The Appeals Chamber notes that in identifying the issues certified for appeal in the Decision Granting Leave to Appeal, the Trial Chamber stated that:

[i]n the Impugned Decision, the Chamber found that it has discretion over whether or not to make a finding of non-compliance under [a]rticle 87(7) of the Statute, and to refer the matter to the ASP, ‘even where it had been determined that a State has failed to comply with a request for cooperation and this failure has prevented the Court from exercising its functions under the Statute’. The Issues raise questions of whether or not a chamber has such discretion and, if so, the scope of that discretion, and the factors which may be properly considered in exercise of the discretion.⁵⁴ [Footnote omitted].

2. *Submissions of the parties*

34. The Prosecutor submits that the Trial Chamber erred in law “by not automatically referring [Kenya] to the ASP, after having made the requisite factual findings under article 87(7)” of the Statute.⁵⁵ The Prosecutor avers that the plain reading of article 87 (7) of the Statute dictates that, while a Trial Chamber has discretion to assess the facts leading to a determination of whether a State breached its obligations under article 87 (7) of the Statute and that this non-compliance prevented the Court from exercising its functions and powers, once these findings have been made, the Trial Chamber has no further discretion.⁵⁶

⁵² [Impugned Decision](#), paras 78-79.

⁵³ [Impugned Decision](#), para. 80.

⁵⁴ [Decision Granting Leave to Appeal](#), para. 25.

⁵⁵ [Document in Support of the Appeal](#), heading A., paras 6-17.

⁵⁶ [Document in Support of the Appeal](#), paras 12-13. *See ibid.*, para. 6, referring to [Impugned Decision](#), para. 6.

35. The Prosecutor argues that the Trial Chamber erred in adopting a “two-stage analysis”, thereby creating a distinction between its findings on Kenya’s non-compliance and its impact on the Trial Chamber’s ability to exercise its powers and function “from the ‘formal’ or ‘judicial’ findings of non-compliance” under article 87 (7) of the Statute.⁵⁷ She argues that the jurisprudence of the Court, in particular Pre-Trial Chamber I’s decision in the case of the *Prosecutor v. Saif Al-Islam Gaddafi* (hereinafter: “*Gaddafi Article 87 (7) Decision of 10 December 2014 on Libya*”),⁵⁸

support[s] 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.⁵⁹

36. In addition to her legal arguments based on the wording of the provision, the Prosecutor expresses the view that a referral to the ASP or the United Nations Security Council (hereinafter: “UNSC”) in cases of non-compliance is necessary from a policy point of view. Indeed, the Prosecutor contends that the Trial Chamber’s approach would allow States to undertake a similar obstructive course in future cases with respect to cooperation requests and would damage the cooperation structure of the Statute.⁶⁰

37. Finally, the Prosecutor argues, “[i]n the alternative and assuming *arguendo*” that the Trial Chamber’s “two-stage analysis is correct”, given the Trial Chamber’s

⁵⁷ [Document in Support of the Appeal](#), para. 8, referring to [Impugned Decision](#), para. 80.

⁵⁸ [Document in Support of the Appeal](#), para. 15, referring to *Prosecutor v. Saif Al-Islam Gaddafi*, “[Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council](#)”, 10 December 2014, ICC-01/11-01/11-577, paras 24-25, 33-34.

⁵⁹ [Document in Support of the Appeal](#), para. 15 (emphasis in original), referring to *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “[Decision on the Prosecutor’s Request for a Finding of Non-Compliance Against the Republic of the Sudan](#)”, 9 March 2015, ICC-02/05-01/09-227 (hereinafter: “*Al Bashir Article 87 (7) Decision of 9 March 2015 on Sudan*”), paras 18-19; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “[Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court](#)”, 9 April 2014, ICC-02/05-01/09-195 (hereinafter: “*Al Bashir Article 87 (7) Decision of 9 April 2014 on DRC*”), para. 34.

⁶⁰ [Document in Support of the Appeal](#), para. 5.

factual conclusions, “it had no discretion but to enter ‘formal’ findings of non-compliance” and consequently to refer Kenya to the ASP.⁶¹

38. Kenya does not make any arguments in relation to the first ground of appeal. The Victims submit that upon a finding of Kenya’s non-compliance under article 87 (7) of the Statute, the Trial Chamber did not have the discretion not to refer Kenya to the ASP. By failing to refer the matter, the Trial Chamber erred in law.⁶²

3. *Determination of the Appeals Chamber*

39. Article 87 (7) of the Statute contains in its first clause a factual prerequisite that needs to be met for a finding of non-compliance to be made, namely that there is a failure to comply with the cooperation request of a certain gravity:

“[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”.

If that is the situation, the second clause of article 87 (7) of the Statute provides that:

“the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”

40. The Appeals Chamber is of the view that the substantive question that arises is whether, as a matter of law, the scope of a Chamber’s discretion under article 87 (7) of the Statute is: (i) as argued by the Prosecutor, limited to making a finding relevant to the factual determinations of a failure to comply with a request to cooperate which has prevented the Court from exercising its functions and powers under the Statute; or (ii) includes an assessment of whether it is appropriate to refer the matter of the State’s non-compliance to the ASP or to the UNSC.

41. In this regard, the Appeals Chamber notes the use of the term “may” as opposed to the term “shall” to introduce the second clause of article 87 (7) of the Statute, which indicates that a Chamber has discretion to make or not to make a finding of

⁶¹ [Document in Support of the Appeal](#), para. 16.

⁶² [Victims’ Submissions](#), paras 13-20.

non-compliance.⁶³ However, the combination of the terms “may” and the conjunction “and” in the second clause raises the question of whether the term “may” refers to both aspects contained in the second clause (“making a finding to that effect” and “referring the matter”) or whether “may” only applies to the finding of non-compliance, which would result in a referral as a necessary consequence.

42. The Trial Chamber appears to have interpreted this second clause as implying an automatic referral to the ASP or UNSC when a finding of non-compliance is made since it considered it necessary to proceed in two phases in order to retain broad discretion for the Court in this matter. It thus distinguished between the determination of the factual prerequisite of the first clause and the “formal” or “judicial” finding of non-compliance which “may” be made, in accordance with the second clause. The Appeals Chamber considers that all findings by the Court are formal or judicial and that the terminological distinction between findings made by the Trial Chamber is inappropriate. However, the underlying interpretation is indeed a plausible one in the sense that the determination of the factual prerequisite of the first clause is not in itself the finding of non-compliance within the meaning of the second clause, which may or may not be made by the Chamber.

43. An alternative plausible interpretation, which also gives broad discretion to a Chamber, is to consider the introductory term “may” of the second clause to apply to both the finding and the referral. In this interpretation, regardless of whether the Chamber distinguishes between the establishment of the factual prerequisite and the finding of non-compliance, the Court would always retain its discretion as to whether or not to engage external actors to obtain cooperation.

44. The Appeals Chamber is of the view that both interpretations are possible on the basis of the wording of the provision and notes that both have been applied at the Court. In addition to the Trial Chamber, several Pre-Trial Chambers have considered that they have broad discretion under article 87 (7) of the Statute, albeit by using different formulations.

⁶³ In this regard, the Appeals Chamber notes the contrast between the “may” in article 87 (7) of the Statute and the text of regulation 109 (4) of the Regulations of the Court, which provides, in relevant part, that “where a finding under article 87, paragraph 7, has been made, the President *shall* refer the matter” (emphasis added).

45. In this regard, the Appeals Chamber notes that the Prosecutor argues that, in the *Gaddafi* Article 87 (7) Decision of 10 December 2014 on Libya, Pre-Trial Chamber I “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 referred the non-complying State (Libya) to the [UNSC]”.⁶⁴ The Appeals Chamber notes that the Pre-Trial Chamber indeed considered the existence of a failure to comply (together with consultations under regulation 109 of the Regulations of the Court) as a necessary prerequisite of a finding of non-compliance. With regard to the finding of non-compliance under article 87 (7) of the Statute, it held that:

[w]hile a determination of the appropriateness and usefulness of this measure 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 [of the Court], the requested State must be given the opportunity to be heard.⁶⁵

46. However, the Pre-Trial Chamber also clearly stated that the existence of such a prerequisite in no way obliged the Court to make a finding of non-compliance and refer the matter to the ASP or UNSC:

The Chamber considers that a determination on whether to make a finding of non-compliance and decide to refer the matter to the Security Council is discretionary in nature [...] As this Chamber previously held, resort to the measure under article 87(7) of the Statute is not a mandatory course of action that the Chamber is obliged to pursue *in case of a State’s failure to cooperate* with the Court, but one of the tools available to the Court “to use at a certain point in time as a last resort measure or as part of a comprehensive strategy to promote cooperation.”⁶⁶ (Emphasis added).

47. Similarly, in the case of the *Prosecutor v. Omar Hassan Ahmad Al Bashir*, in which Pre-Trial Chamber II addressed the issue of whether to refer Nigeria to the ASP,⁶⁷ the Appeals Chamber notes that, contrary to the Prosecutor’s assertions,⁶⁸

⁶⁴ [Document in Support of the Appeal](#), para. 15, referring to [Gaddafi Article 87 \(7\) Decision of 10 December 2014 on Libya](#), paras 24-25, 33-34.

⁶⁵ [Gaddafi Article 87 \(7\) Decision of 10 December 2014 on Libya](#), para. 24.

⁶⁶ [Gaddafi Article 87 \(7\) Decision of 10 December 2014 on Libya](#), para. 23, quoting [Gaddafi Leave to Appeal Decision](#), para. 24.

⁶⁷ [Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court](#), 5 September 2013, ICC-02/05-01/09-159 (hereinafter: “*Al Bashir* Article 87 (7) Decision of 5 September 2013 on Nigeria”).

⁶⁸ [Document in Support of the Appeal](#), para. 14, referring to [Impugned Decision](#), footnotes 117-118.

the Pre-Trial Chamber stated that it “takes note of the above explanation [regarding why Nigeria did not comply with the request for cooperation] provided by the Nigerian authorities and, in light of its discretionary power by virtue of article 87(7) of the Statute, considers that it is not warranted in the present circumstances to refer the matter to the [ASP] and/or to the [UNSC]”.⁶⁹

48. The Appeals Chamber notes that Pre-Trial Chamber II, in several decisions relevant to a failure to comply with requests regarding the arrest and surrender of Mr Omar Hassan Ahmad Al Bashir, found that it “cannot but refer” such non-compliance to the ASP and UNSC.⁷⁰ The Appeals Chamber observes that the Pre-Trial Chamber used this formulation after recounting the deliberate and consistent refusals of various States to cooperate with the Court.⁷¹ The Appeals Chamber is therefore not persuaded that the use of this formulation was intended to be interpreted to mean that, once the determinations of the first clause of article 87 (7) of the Statute (i.e. a determination that a State has failed to comply with a cooperation request which prevented the Court from exercising its duties and powers under the Statute) had been made, a referral was automatic. Rather, the Appeals Chamber is of the view that the phrase was used to indicate the Pre-Trial Chamber’s consideration that, in the circumstances, no action short of a referral could potentially result in remedying the continuing failure of these States to comply with the Court’s requests for cooperation.

49. In light of this jurisprudence, the Appeals Chamber considers that, it is clear that Pre-Trial Chambers consistently consider the appropriateness of a referral to the ASP or UNSC when deciding upon an application for a finding of non-compliance and referral pursuant to article 87 (7) of the Statute, even when it had already confirmed a failure to comply with a cooperation request. As indicated above, the Appeals Chamber is of the view that these interpretations are supported by the wording of article 87 of the Statute and holds therefore that an automatic referral to

⁶⁹ [Al Bashir Article 87 \(7\) Decision of 5 September 2013 on Nigeria](#), para. 13.

⁷⁰ See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “[Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir](#)”, 26 March 2013, ICC-02/05-01/09-151 (hereinafter: “*Al Bashir Article 87 (7) Decision of 26 March 2013 on Chad*”), para. 23; [Al Bashir Article 87 \(7\) Decision of 9 April 2014 on DRC](#), para. 34; [Al Bashir Article 87 \(7\) Decision of 9 March 2015 on Sudan](#), para. 19.

⁷¹ [Al Bashir Article 87 \(7\) Decision of 26 March 2013 on Chad](#), paras 21, 23; [Al Bashir Article 87 \(7\) Decision of 9 April 2014 on DRC](#), paras 32, 34; [Al Bashir Article 87 \(7\) Decision of 9 March 2015 on Sudan](#), paras 9-13, 15-16, 19.

external actors is not required as a matter of law. Furthermore, the Appeals Chamber is not persuaded that such automatic referral would be beneficial as a matter of policy as contended by the Prosecutor.

50. In this regard, the Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber considered the purpose of referring a matter to the ASP or UNSC and stated that it would “be guided by the object and purpose”⁷² of making a referral in that it would consider “whether such a course of action would promote the functions of the Court and assist a fair trial, including the protection of the rights of the accused, the integrity of the proceedings or the wider interests of justice”.⁷³ It went on to state that “[b]y referring such breach to the ASP, the Court, which has limited powers of sanction, entrusts the matter to the ASP for appropriate action to remedy, or otherwise address, the breach”.⁷⁴

51. The Appeals Chamber is also of the view that it is important to take into account the object and purpose of paragraph 7 of article 87 of the Statute. This paragraph is a part of the system embodied in article 87, which contains the general provisions that govern requests for cooperation and the powers of the Court in this regard. This supports the view of the Trial Chamber that this final provision aims at enhancing the effectiveness of the cooperation regime under Part IX of the Statute, by providing the Court with the possibility of engaging certain external actors to remedy cases of non-cooperation. Since the object and purpose of the provision is to foster cooperation, the Appeals Chamber believes that a referral to those particular actors was not intended to be the standard response to each instance of non-compliance, but only one that *may* be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand.

52. The Appeals Chamber is therefore not persuaded by the Prosecutor’s arguments that the Trial Chamber’s approach, i.e. that it had discretion to determine whether to refer Kenya’s non-cooperation, undermines the Court’s cooperation regime or damage’s the Court’s ability to fulfil its mandate.⁷⁵ A refusal to refer a matter of

⁷² [Impugned Decision](#), para. 80.

⁷³ [Impugned Decision](#), para. 80.

⁷⁴ [Impugned Decision](#), para. 81.

⁷⁵ *See supra* para. 36.

non-cooperation to the ASP or the UNSC does not necessarily imply acceptance of non-cooperation, but may be based on the Chamber's conclusion that such a referral may not be an effective means to address the lack of cooperation in the specific context of the case.

53. Taking the above into account, the Appeals Chamber considers that a Chamber, when deciding whether to refer a matter of non-cooperation to the ASP or UNSC, should consider whether a referral of a State's failure to comply with a request for cooperation is an appropriate measure to either seek assistance from external actors to obtain the requested cooperation or otherwise address the lack of cooperation from the requested State. In this regard, it is important to note that a referral may be value-neutral and not necessarily intended to cast a negative light on the conduct of a State.⁷⁶ Since the ultimate goal is to obtain cooperation, a Chamber has discretion to consider all factors that may be relevant in the circumstances of the case, including whether external actors could indeed provide concrete assistance to obtain the cooperation requested taking into account the form and content of the cooperation; whether the referral would provide an incentive for cooperation by the requested State; whether it would instead be beneficial to engage in further consultations with the requested State; and whether more effective external actions may be taken by actors other than the ASP or the UNSC, such as third States or international or regional organisations. In conclusion, the Appeals Chamber considers that it is clear that, in determining whether a referral is appropriate, a Chamber will often need to take into account considerations that are distinct from the factual assessment of whether the State has failed to comply with a request to cooperate. The Appeals Chamber therefore considers that a referral is not an automatic consequence of a finding of a failure to comply with a request for cooperation, but rather this determination falls within the discretion of the Chamber seized of the article 87 (7) application.

54. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in law by not automatically referring Kenya to the ASP once it had made a factual

⁷⁶ *Gaddafi* Article 87 (7) Decision of 10 December 2014 on Libya, para. 33.

determination of a failure to cooperate that affected the Trial Chamber's ability to exercise its functions and powers under the Statute.

55. In summary, the Appeals Chamber holds that the scope of a Chamber's discretion under article 87 (7) of the Statute comprises: (i) whether to make a finding of a failure to comply with a request for cooperation by a State, which prevents the Court from exercising its powers and functions under the Statute; and (ii) a determination of whether it is appropriate to refer the matter to the ASP or the UNSC in order to seek external assistance to obtain cooperation with the request at issue or to otherwise address the lack of cooperation by the requested State.

56. Accordingly, in light of the above conclusions, the Prosecutor's first ground of appeal is rejected.

D. The Prosecutor's Second Ground of Appeal: alleged error in the exercise of discretion

57. Under the second ground of appeal, the Prosecutor argues that, if the Trial Chamber did have discretion regarding whether to refer the matter, it erred in the exercise of its discretion by considering irrelevant factors and by failing to consider or properly weigh other relevant factors.⁷⁷

58. Kenya submits that the Prosecutor has failed to show the "unreasonableness" of the Trial Chamber's decision not to refer Kenya to the ASP.⁷⁸ Kenya avers that consideration of irrelevant factors "is not a basis for the challenge of a discretionary decision"⁷⁹ and that, in any event, the factors challenged by the Prosecutor were relevant.⁸⁰ Kenya argues that the Prosecutor does not demonstrate that the Trial Chamber failed to consider and properly weigh relevant factors.⁸¹

⁷⁷ [Document in Support of the Appeal](#), paras 4, 18-35.

⁷⁸ [Response to the Document in Support of the Appeal, para. 4.](#)

⁷⁹ [Response to the Document in Support of the Appeal, para. 4.](#)

⁸⁰ [Response to the Document in Support of the Appeal](#), paras 5-12, referring to [Document in Support of the Appeal](#), paras 18, 24, 27, 31.

⁸¹ [Response to the Document in Support of the Appeal](#), paras 13-14, referring to [Document in Support of the Appeal](#), para. 19.

59. The Victims concur with the Prosecutor⁸² and argue that the Trial Chamber erroneously deprived them of “a trigger to initiate State Party action to secure Kenya’s cooperation”.⁸³ In its Response to the Victims’ Submissions, Kenya argues that the Victims do not demonstrate any grounds for “the Appeals Chamber to review the Trial Chamber’s exercise of its discretion”.⁸⁴

1. Relevant part of the Impugned Decision

60. In the Impugned Decision, the Trial Chamber set out the primary rationales for making a finding of non-compliance and referral under article 87 (7) of the Statute as follows:

[...] one of the primary rationales for making such a finding and a referral might be to further the proceedings in the main case, by, for example, securing compliance with the cooperation requests at issue.

[...]

The Chamber also notes that a referral to the ASP under [a]rticle 87 (7) of the Statute could be made regardless of whether or not there is a possibility that action by the ASP would promote compliance with the particular cooperation requests at issue. [...] The Chamber acknowledges that there might be situations where referral as a disciplinary measure is warranted, and that such a referral might also indirectly enhance the work of the Court by, for example, promoting future cooperation or cooperation more generally. Such a referral may be especially warranted when the non-cooperation at issue, and the breach of international obligations, is of a serious nature. Any request for referral on such basis would have to be carefully considered in the context of the circumstances as a whole, considering both the conduct of the party requesting the referral and that of the relevant State.

[...]

The Chamber is also of the view that a referral might, in principle, be warranted when judicial measures have been exhausted.⁸⁵

61. The Trial Chamber then proceeded to analyse whether a finding of non-compliance and a referral under article 87 (7) of the Statute was warranted under any of these rationales. In relation to the rationale of furthering the proceedings in the main case, the Trial Chamber held that:

⁸² [Victims’ Submissions](#), para. 21.

⁸³ [Victims’ Submissions](#), paras 38-51.

⁸⁴ [Kenya’s Response to Victims’ Submissions](#), paras 2, 31. *See also ibid.*, paras 12-30.

⁸⁵ [Impugned Decision](#), paras 82, 84, 89.

It is apparent that such a referral might result in further uncertainty and potential delay for the proceedings. Moreover, considering the Prosecut[or]’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 *[sic]* speculative, the Chamber is not persuaded that a referral to the ASP would facilitate a fair trial or the interests of justice. In any case, in this specific case, the Chamber does not consider it appropriate for the proceedings to be further prolonged under the current circumstances.⁸⁶

62. In relation to a referral as a disciplinary measure that could facilitate future cooperation more generally, the Trial Chamber held that, “while cooperation by States Parties is crucial for the functioning of this Court, the primary responsibility for investigation lies with the Prosecut[or]”.⁸⁷ It went on to state that:

[t]he Chamber considers that the approach adopted by the Prosecut[or] to the cooperation was, in some respects, not reflective of a prosecutorial and investigative body effectively seeking to obtain the requested materials. If the primary objective of pursuing the cooperation request at this time was to actually obtain the requested materials, the Chamber would have expected to see a greater degree of diligence, persistence and, where necessary, flexibility on the part of the Prosecut[or]. [...] In summary, considering the overall interests of justice and integrity of the proceedings, the Chamber does not consider that the requisite burden has been met.⁸⁸

63. In relation to the exhaustion of judicial remedies as a rationale for referral, the Trial Chamber stated that:

[t]he Chamber has determined it appropriate to take a decision on the [Prosecutor’s Article 87 (7) Application] at this stage as it considers that allowing a further adjournment would be contrary to the interests of justice under the circumstances, rather than because the Chamber finds there to be no possibility of further cooperation. Therefore, in terms of the seriousness of the breach of international obligations on the part of [Kenya], while the Chamber noted above serious concerns regarding certain aspects of [Kenya]’s approach to the cooperation, which might make the prospect of further cooperation less probable, the Chamber is also not persuaded that the circumstances warrant referral on the basis of exhaustion of judicial measures at this stage.⁸⁹ [Footnote omitted]

⁸⁶ [Impugned Decision](#), para. 82.

⁸⁷ [Impugned Decision](#), para. 85.

⁸⁸ [Impugned Decision](#), para. 88.

⁸⁹ [Impugned Decision](#), para. 89.

2. *Determination by the Appeals Chamber*

64. The Appeals Chamber recalls that, under its standard of review for discretionary decisions, “the degree of discretion afforded to a Chamber may depend upon the nature of the decision in question”.⁹⁰ The Appeals Chamber considers that determining whether to refer a State’s failure to comply with a request for cooperation to the ASP or UNSC is at the core of the relevant Chamber’s exercise of discretion.⁹¹ As the court of first instance, the Pre-Trial or Trial Chamber is intimately familiar with, *inter alia*, the entirety of the proceedings, including any consultations related to cooperation matters that have taken place, as well as the potential impact of the non-cooperation at issue. Given these factors, the Appeals Chamber considers that the Pre-Trial or Trial Chamber “is endowed with a considerable degree of discretion”⁹² in deciding whether to refer a matter to the ASP or UNSC under article 87 (7) of the Statute.

(a) **Alleged error of considering irrelevant factors**

65. The Prosecutor argues that the Trial Chamber took into account the following irrelevant factors: (i) the impact that the referral would have on Mr Kenyatta’s trial, including his fair trial rights; (ii) the sufficiency of the evidence against Mr Kenyatta and whether the requested cooperation could alter that assessment; (iii) that judicial measures may not have been exhausted and that Kenya’s further cooperation was still possible; and (iv) the Prosecutor’s own conduct.⁹³

66. In its analysis below, the Appeals Chamber will first address the following factors together: (i) the impact that the referral would have on Mr Kenyatta’s trial, including his fair trial rights; (ii) the sufficiency of the evidence and (iii) whether judicial remedies had been exhausted and that Kenya’s further cooperation was still

⁹⁰ See *supra* para. 25.

⁹¹ See, for a similar holding, [Lubanga A 4 A 6 Judgment](#), para. 43, in which the Appeals Chamber stated that, in imposing a sentence under article 76 of the Statute, “the weight given to an individual factor and the balancing of all relevant factors is at the core of a Trial Chamber’s exercise of discretion as the court of first instance”.

⁹² See [Lubanga A 4 A 6 Judgment](#), footnote 73, quoting ICTY, Appeals Chamber, *Prosecutor v. Dragomir Milošević* “[Judgement](#)”, 12 November 2009, IT-98-29/1-A, para. 316: “what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion. The Trial Chamber is endowed with a considerable degree of discretion in making this determination, as well as in deciding how much weight, if any, to be accorded to the mitigating circumstances identified” (footnotes omitted).

⁹³ [Document in Support of the Appeal](#), paras 18, 21-31.

possible with respect to the cooperation request at issue. It will then address the Trial Chamber's consideration of the Prosecutor's conduct.

67. Before addressing the Prosecutor's arguments, the Appeals Chamber will consider Kenya's submission that the consideration of irrelevant factors is not a basis to challenge a discretionary decision.⁹⁴ In this regard, the Appeals Chamber recalls its standard of review for discretionary decisions set out above that it will "consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations" in reaching its decision.⁹⁵ The consideration of irrelevant factors can constitute errors in the exercise of discretion to the extent that they can negatively impact in the decision making process of a Chamber. Therefore, and contrary to Kenya's submission, the Appeals Chamber will assess whether irrelevant factors were considered and, if so, whether they materially impacted the Impugned Decision.

- (i) *The referral's impact on Mr Kenyatta's trial, including his fair trial rights; the sufficiency of the evidence against Mr Kenyatta; and whether judicial remedies had been exhausted*

(a) Participants' submissions

68. With respect to the referral's impact on Mr Kenyatta's trial and the sufficiency of the evidence, the Prosecutor argues that the Trial Chamber conflated two separate proceedings, those against Mr Kenyatta and the "separate non-compliance proceedings".⁹⁶ According to the Prosecutor, the Trial Chamber's approach was contradictory to its previous statements that Mr Kenyatta is not a party to the non-compliance proceedings and, conversely, that Kenya is not a party to the proceedings against Mr Kenyatta.⁹⁷ She submits that the factors related to the criminal proceedings against Mr Kenyatta are irrelevant to "whether [Kenya] should be

⁹⁴ See *supra* para. 58.

⁹⁵ See *supra* para. 25.

⁹⁶ [Document in Support of the Appeal](#), paras 21, 23.

⁹⁷ [Document in Support of the Appeal](#), para. 21, footnote 39, referring to transcripts of status conferences where the different roles of Mr Kenyatta and Kenya in the different proceedings were acknowledged by the Trial Chamber. See [Status Conference of 9 July 2014](#), ICC-01/09-02/11-T-30-ENG ET WT, p. 2, lines 10, 15-17; p. 4, lines 6-9; [Status Conference of 13 February 2014](#), ICC-01/09-02/11-T-28-ENG ET WT, p. 27, lines 2-9; Status Conference of 8 October 2014, ICC-01/09-02/11-T-32-ENG ET WT, p. 3, lines 20-24; [Status Conference of 7 October 2014](#), ICC-01/09-02/11-T-31-ENG ET WT; [Decision Granting Leave to Appeal](#), para. 26.

referred to the ASP”.⁹⁸ Finally, the Prosecutor argues that both of these factors (i.e. the impact on Mr Kenyatta’s trial, including his fair trial rights and the sufficiency of the evidence to meet the burden of proof of beyond reasonable doubt) were considered by the Trial Chamber in the Adjournment Decision and therefore the Trial Chamber erred by also considering these factors “in the context of the non-compliance proceedings”.⁹⁹

69. Regarding the sufficiency of the evidence, the Prosecutor argues that the Trial Chamber erred in considering the “speculative” nature of the impact that the requested cooperation would have in establishing the case against Mr Kenyatta beyond reasonable doubt.¹⁰⁰ She submits that, in so doing, the Trial Chamber “has effectively set an impossible threshold for referring a State to the ASP”, given that the Prosecutor will never be able to demonstrate that the evidence expected from a cooperation request would satisfy that burden of proof, since she will only be able to assess this once the cooperation request has been complied with.¹⁰¹

70. Regarding whether judicial measures had been exhausted, the Prosecutor argues that the Trial Chamber determined that such measures “may not have been exhausted” and that “further cooperation was possible”.¹⁰² She submits that these conclusions are “irrelevant and unfounded” and argues that “[a]ll reasonable judicial measures and cooperation avenues in this case appear to have been exhausted”.¹⁰³

71. Kenya argues that consideration of the sufficiency of evidence against Mr Kenyatta was necessary¹⁰⁴ and that the threshold set by the Trial Chamber for a referral under article 87 (7) of the Statute “will ensure that the Prosecut[or] does not transfer its primary responsibility of investigating and prosecuting to a State Party”.¹⁰⁵ Kenya argues that the Trial Chamber’s consideration that judicial measures may not

⁹⁸ [Document in Support of the Appeal](#), paras 21, 23.

⁹⁹ [Document in Support of the Appeal](#), paras 21-23.

¹⁰⁰ [Document in Support of the Appeal](#), para. 24.

¹⁰¹ [Document in Support of the Appeal](#), para. 24.

¹⁰² [Document in Support of the Appeal](#), para. 31.

¹⁰³ [Document in Support of the Appeal](#), para. 31.

¹⁰⁴ [Response to the Document in Support of the Appeal](#), para. 7.

¹⁰⁵ [Response to the Document in Support of the Appeal](#), para. 10.

have been exhausted is relevant¹⁰⁶ and that the Prosecutor’s claim regarding Kenya’s unlikely future cooperation is “defamatory”.¹⁰⁷

72. The Victims submit that the Trial Chamber erred in declining to refer on the basis of the “likely termination” of Mr Kenyatta’s case and on the basis that the “evidence sought in the revised request might be insufficient in itself to yield a conviction”.¹⁰⁸ They also argue that the Trial Chamber erred in finding that the referral should be denied on the basis of non-exhaustion of judicial measure.¹⁰⁹

(b) Determination of the Appeals Chamber

73. In relation to the conflation of proceedings, the Appeals Chamber notes that non-compliance proceedings and proceedings against an accused before the Court are distinct proceedings that involve different parties (States versus an individual) and have different purposes under the Statute (State cooperation versus individual criminal responsibility). Even where non-compliance proceedings originate in the context of a case against an accused, the interests and rights at stake are not interchangeable between these two.

74. In this regard, the Appeals Chamber notes that, despite its earlier correct statements that Mr Kenyatta was not a party in the non-compliance proceedings against Kenya, the Trial Chamber nonetheless took into account its determination that referring Kenya’s non-compliance would further prolong the criminal proceedings against him. In relation to whether judicial measures had been exhausted and Kenya’s further cooperation was possible, the Trial Chamber stated that it “has determined it appropriate to take a decision on the [Prosecutor’s] Article 87(7) Application at this stage as it considers that *allowing a further adjournment* would be contrary to the interests of justice under the circumstances, *rather than* because the Chamber finds there to be no possibility of further cooperation” (emphasis added).¹¹⁰ Similarly, in considering whether a referral was appropriate in order to “further the proceedings in the main case, by [...] securing compliance with the cooperation requests at issue”,

¹⁰⁶ [Response to the Document in Support of the Appeal](#), para. 12.

¹⁰⁷ [Response to the Document in Support of the Appeal](#), para. 12.

¹⁰⁸ [Victims’ Submissions](#), paras 59-61.

¹⁰⁹ [Victims’ Submissions](#), paras 33-37.

¹¹⁰ [Impugned Decision](#), para. 89, referring to [Impugned Decision](#), para. 44.

the Trial Chamber held that, “in this specific case”, it would not be “appropriate for the proceedings [against Mr Kenyatta] to be further prolonged”.¹¹¹

75. In relation to this latter conclusion, the Appeals Chamber observes that the Trial Chamber ultimately did not hold that the referral would be *inappropriate* to secure cooperation for the proceedings at hand, but instead found that the question of whether the referral would assist in obtaining cooperation was *moot* in the present case. In discussing the Adjournment Decision, the Trial Chamber stated that

[i]n that decision, the Chamber specifically found that the alleged non-compliance by [Kenya] in this case cannot justify an indefinite adjournment of the proceedings. Therefore, *the Chamber considers the question of whether or not a referral might progress cooperation in the context of this case to be moot* [...]. [This is] without prejudice to whether a request for a finding of non-compliance and referral to the ASP may be appropriate in the context of any continuing investigations conducted in the Kenya situation [...]. *However, any such request would need to be dealt with by way of separate procedure before the competent chamber*”.¹¹² [Emphasis added.]

76. However, the Appeals Chamber notes that, in granting the Prosecutor leave to appeal the Impugned Decision, the Trial Chamber again addressed the Adjournment Decision, stating that,

particularly in light of the Chamber’s finding [in the Adjournment Decision] that the *ne bis in idem* principle would not be triggered [...], the withdrawal of charges against Mr Kenyatta does not preclude ongoing investigations. Nor does it relieve [Kenya] of its statutory obligation to comply with any cooperation requests from the Court.¹¹³

77. The Appeals Chamber considers that a referral could have an impact on future cooperation considered more broadly, including for ongoing investigations even if it were to be considered inappropriate for continuing the trial at hand. In this regard, the Appeals Chamber considers that future cooperation by the requested State is indeed a factor to be taken into account when deciding on the appropriateness of a referral. However, contrary to the Trial Chamber’s finding, the Appeals Chamber is of the view that it is for the Trial Chamber and not another Chamber to decide on the matter. Regardless of the Adjournment Decision and the withdrawal of the charges, the

¹¹¹ [Impugned Decision](#), para. 82.

¹¹² [Impugned Decision](#), para. 83.

¹¹³ [Decision Granting Leave to Appeal](#), para. 27, referring to [Adjournment Decision](#), para. 56.

Trial Chamber was and remains competent to decide on whether it would be appropriate to refer Kenya's non-compliance to the ASP either to seek a concrete remedy for the lack of cooperation in the case at hand or to foster cooperation more broadly for the sake of any proceedings arising out of investigations in the situation.

78. Regarding the sufficiency of the Prosecutor's evidence and whether compliance with the cooperation request could change that assessment, the Appeals Chamber recalls that the Trial Chamber held that "[Kenya]'s non-compliance [...] has ultimately impinged upon the Chamber's ability to fulfil its mandate under [a]rticle 64, and in particular, its truth-seeking function in accordance with [a]rticle 69(3)" (emphasis added),¹¹⁴ a statutory provision which, the Appeals Chamber observes, provides that "[t]he parties may submit evidence relevant to the case [...]. The Court shall have the authority to request the submission of all evidence that *it considers necessary for the determination of the truth*" (emphasis added).

79. The Appeals Chamber is of the view that it is within a Chamber's discretion to consider whether a particular factor affects the determination of a failure to comply with a cooperation request or to refer the matter of non-cooperation, or both. However, the factor must be assessed *consistently* throughout the decision.

80. In the Appeals Chamber's view, the Trial Chamber's assessment that the "possibility of obtaining the necessary evidence, *even if the Revised Request was to be fully executed*, is still nothing more than [*sic*] speculative"¹¹⁵ (emphasis added) is clearly contradictory with the Trial Chamber's finding that Kenya's non-cooperation with the Revised Request "ultimately impinged upon the Chamber's ability to fulfil its mandate under [a]rticle 64, and in particular, its truth-seeking function in accordance with [a]rticle 69(3)" (emphasis added).¹¹⁶ Such a patent contradiction makes the first assertion unreasonable and calls into question the second one.

81. Indeed, such contradiction raises the question as to whether the Trial Chamber made a proper determination of a failure to cooperate of a certain gravity, as required

¹¹⁴ [Impugned Decision](#), para. 79.

¹¹⁵ [Impugned Decision](#), para. 82.

¹¹⁶ [Impugned Decision](#), para. 79.

by the first clause of article 87 (7) of the Statute. As indicated above,¹¹⁷ this first clause includes an essential factual prerequisite for any referral, namely a failure to cooperate which prevents the Court from exercising its functions and powers under the Statute. If the Trial Chamber was uncertain about the importance of the evidence, it is unclear why the Trial Chamber concluded that the lack of the requested evidence prevented the Chamber from exercising its functions, as required in that clause. The Appeals Chamber also notes in this regard that the conflation of the trial proceedings against Mr Kenyatta and the non-compliance proceedings appears to have affected the Trial Chamber's consideration of whether judicial remedies had been exhausted, or whether there was still a possibility that Kenya would cooperate. In the view of the Appeals Chamber, the conclusion that a deadlock is reached with regard to a cooperation request is a key factor to determine the existence of a failure to comply with such request. Thus, and contrary to the Prosecutor's arguments,¹¹⁸ the Appeals Chamber considers that the Trial Chamber did not make a clear finding as to whether such remedies had been exhausted. The Trial Chamber explicitly acknowledged in the Impugned Decision that it considered it appropriate to decide on the Prosecutor's Article 87 (7) Application at this stage because "allowing a further adjournment would be contrary to the interests of justice under the circumstances, *rather than because the Chamber finds there to be no possibility of further cooperation*" (emphasis added).¹¹⁹

82. In light of the above, the Appeals Chamber finds that the Trial Chamber erred in the exercise of its discretion by conflating the non-compliance proceedings with the proceedings against Mr Kenyatta. In the Appeals Chamber's view, this resulted in errors in the Trial Chamber's assessment of: (i) whether securing compliance with the cooperation request at issue would further the proceedings; (ii) the impact of the evidence that could be derived from the implementation of the Revised Request; (iii) whether judicial remedies had been exhausted; and (iv) whether further cooperation by Kenya was possible. For the same reasons, it is unclear to the Appeals Chamber as to whether the necessary determination of the factual prerequisite of a referral under article 87 (7) was made by the Chamber.

¹¹⁷ See *supra* para. 39.

¹¹⁸ See *supra* para. 70.

¹¹⁹ [Impugned Decision](#), para. 89, referring to [Impugned Decision](#), para. 44.

*(ii) Prosecutor's own conduct***(a) Participants' submissions**

83. The Prosecutor argues that her own conduct “should have been immaterial to the question of whether to refer [Kenya] to the ASP”.¹²⁰ She asserts that the Trial Chamber incorrectly found prosecutorial delays as she “acted diligently in trying to obtain [Kenya]’s cooperation” through several means.¹²¹ The Prosecutor argues that even if her conduct was a relevant factor to take into consideration when assessing the referral issue, “it could only be relevant to the factual determination of whether [Kenya]’s conduct in the circumstances amounted to a failure to cooperate”.¹²² She avers that the Trial Chamber was wrong to consider her alleged dilatory conduct when deciding on the referral question as it had already taken it into consideration in deciding whether or not Kenya’s failure amounted to non-compliance under article 87 (7) of the Statute.¹²³ She adds that “by considering the Prosecut[or]’s alleged dilatory conduct, the [Trial] Chamber effectively reversed the statutory burden placed on States Parties under article 93(3)” to promptly consult with the Court in case of impossibility to execute a cooperation request.¹²⁴

84. Kenya submits that the Trial Chamber properly took into account the Prosecutor’s dilatory conduct given that “a referral is not an alternative step to cooperation but rather the last resort”.¹²⁵ In this regard, Kenya avers that the Prosecutor “failed to demonstrate diligence [...] in its pursuit of assistance” and therefore did not satisfy the Trial Chamber that a referral was necessary.¹²⁶

85. The Victims argue that the Trial Chamber adopted an approach which contradicted its previous holdings that Kenya’s non-compliance with its obligation to

¹²⁰ [Document in Support of the Appeal](#), para. 25.

¹²¹ [Document in Support of the Appeal](#), para. 26.

¹²² [Document in Support of the Appeal](#), para. 27.

¹²³ [Document in Support of the Appeal](#) para. 27, referring to [Impugned Decision](#), para. 78.

¹²⁴ [Document in Support of the Appeal](#), para. 30, referring to [Impugned Decision](#), para.25.

¹²⁵ [Response to the Document in Support of the Appeal](#), para. 11.

¹²⁶ [Response to the Document in Support of the Appeal](#), para. 11.

cooperate would be referred to the ASP,¹²⁷ and erred in using the refusal to refer as a “means of sanctioning the Prosecutor”.¹²⁸

(b) Determination of the Appeals Chamber

86. The Appeals Chamber recalls that it is within a Chamber’s discretion to consider whether a particular factor is relevant for its determination on either a failure to cooperate or whether it is appropriate to refer the matter of non-cooperation, or both.¹²⁹ As indicated by the Appeals Chamber, the same factor may be relevant for both aspects and may be taken into account more than once, provided that the factor is assessed in a consistent, non-contradictory manner.

87. With regard to the conduct of parties in the proceedings, the Appeals Chamber recalls that the primary obligation to cooperate lies with the requested State and not with the party requesting cooperation. However, the Appeals Chamber is of the view that the conduct of the requesting party, in this case the Prosecutor, may also be a relevant factor if the actions of the requesting party have negatively impacted the requested State’s ability to cooperate.

88. The Appeals Chamber notes that, as submitted by the Prosecutor,¹³⁰ the Trial Chamber indeed took the Prosecutor’s conduct into account in reaching its determination that Kenya had failed to comply with a request to cooperate and explicitly concluded that Kenya had failed to cooperate “notwithstanding the Chamber’s concerns regarding the adequacy of the Prosecut[or’s] approach to the litigation”.¹³¹

89. Taking into account that the Trial Chamber had already determined that the Prosecutor’s conduct had not adversely impacted the obligation of Kenya to cooperate, the Appeals Chamber finds that it was contradictory to later consider the same conduct when rejecting the Prosecutor’s Article 87 (7) Application to refer the matter to the ASP. Accordingly, the Appeals Chamber considers that the Prosecutor’s

¹²⁷ [Victims’ Submissions](#), paras 21-32, referring to [Decision of 31 March 2014](#) and “[Decision on the Prosecution’s revised cooperation request](#)”, 29 July 2014, ICC-01/09-02/11-937.

¹²⁸ [Victims’ Submissions](#), paras 52-53.

¹²⁹ *See supra* para. 79.

¹³⁰ [Document in Support of the Appeal](#), para. 27.

¹³¹ [Impugned Decision](#), para. 78.

conduct was not assessed in a consistent manner throughout the proceedings and therefore the Trial Chamber erred in its assessment of this factor for the determination of whether to make a referral.

(iii) Conclusion

90. The Appeals Chamber finds that the Trial Chamber erred in the exercise of its discretion by conflating the non-compliance proceedings against Kenya with the criminal proceedings against Mr Kenyatta, by failing to address whether judicial measures had been exhausted and by assessing the sufficiency of evidence and the conduct of the Prosecutor in an inconsistent manner. The Appeals Chamber finds that these errors materially affected the Trial Chamber's decision not to refer the matter of Kenya's non-compliance.

91. In addition, the Appeals Chamber is also of the view that these errors also prevented the Trial Chamber from making a conclusive determination on the existence of a failure to comply with a request to cooperate by the Court contrary to the provisions of the Statute, which prevents the Court from exercising its functions and powers under the Statute, as required by the first clause of article 87 (7) of the Statute.

92. The Appeals Chamber notes that the Prosecutor requests that, in the event that only the second ground of appeal is granted, the Appeal Chamber makes the requisite findings and refer Kenya to the ASP or, in the alternative, remand the matter to the Trial Chamber to do so, with appropriate directions.¹³²

93. As already noted, the Appeals Chamber is of the view that the Chamber of first instance, being intimately familiar with the entirety of the proceedings, is generally better placed to identify and assess the relevant facts and circumstances in the context of the case in order to decide whether engaging external actors under article 87 (7) of the Statute would be an effective measure to foster cooperation. Furthermore, for the reasons developed in paragraphs 80 and 81 above, the Appeals Chamber is unable to make the necessary finding on whether or not to refer the matter to the ASP in the

¹³² [Document in Support of the Appeal](#), para. 38.

absence of a conclusive determination by the Trial Chamber of the factual prerequisite for such a referral, which is void of any errors of law.

94. Therefore, the Appeals Chamber considers it appropriate to remand the Impugned Decision for the Trial Chamber to determine whether Kenya has failed to comply with a cooperation request that has prevented the Court from exercising its functions and powers under the Statute and decide, if that is the case, whether or not to refer the matter to the ASP.

95. In determining whether there was a failure to cooperate within the terms of the first clause of article 87 (7), the Trial Chamber should take into account all relevant factors, including the evidence that was required in the cooperation request and the conduct of the parties to the proceedings. The Trial Chamber should avoid conflating the criminal proceedings against Mr Kenyatta with the proceedings under article 87 (7) and determine whether, at the time of the Impugned Decision, judicial measures to obtain the cooperation had been exhausted and consultations had reached a deadlock.

96. If the Trial Chamber concludes that there has been such a failure to comply with a cooperation request, the Trial Chamber should make an assessment of whether a referral of Kenya to the ASP would be an appropriate measure to seek assistance to obtain the requested cooperation or otherwise address the lack of compliance by Kenya, taking into account, *inter alia*, considerations and factors referred to in paragraph 53 above.


97. The Appeals Chamber notes that the remaining arguments advanced by the Prosecutor relate to the Trial Chamber's alleged error of failing to properly weigh relevant factors.¹³³ Having decided to remand the matter for the Trial Chamber to make a new determination, the Appeals Chamber does not need to address these arguments.

¹³³ [Document in Support of the Appeal](#), paras 19, 32-35.

IV. APPROPRIATE RELIEF

98. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, it is appropriate to reverse the Impugned Decision and to remand it for the Trial Chamber to determine, in light of all relevant factors as indicated above, whether Kenya has failed to comply with a cooperation request that has prevented the Court from exercising its functions and powers under the Statute and, if so, to make an assessment of whether it is appropriate to refer Kenya's non-compliance to the ASP.

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



Judge Silvia Fernández de Gurmendi
Presiding Judge

Dated this 19th day of August 2015

At The Hague, The Netherlands