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TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Victims' further submissions on the 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:

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Introduction

1. In accordance with an order of the Trial Chamber of 26 August 2015,¹ and on behalf of the victims of this case ('Victims'), the Legal Representative for Victims ('LRV') respectfully sets out herein further submissions on the Prosecution's application for a finding of non-compliance under article 87(7) of the Rome Statute ('Statute').
2. The Victims support the submissions filed by the Prosecution on 14 September 2015.²
3. Applying the factors identified by the Appeals Chamber in its Judgment of 19 August 2015 ('Appeals Judgement'),³ the Victims set out below further submissions in support of the view that an article 87(7) referral, which would trigger the commencement of the formal procedure of the Assembly of States Parties ('ASP'), is 'the most effective means to address the lack of cooperation in the specific context of the case'.⁴

The evidence sought in the cooperation request remains relevant and necessary to shed light on the truth about the crimes committed

4. The Appeals Chamber has ruled that the Trial Chamber 'should take into account all relevant factors, including evidence that was required in the cooperation request'.⁵
5. That evidence remains critically important: it will *inter alia* assist in revealing the truth about the location of key individuals during the post-election violence, the times of contact between them and others, and the flows of funds of central relevance to the crimes committed in Naivasha and Nakuru. Compliance with the cooperation request will also likely yield cooperation in respect of other outstanding areas which is necessary to ensure that the truth emerges regarding the crimes committed during the post-election violence, and the identities of those responsible.

¹ Order inviting further submissions on the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, Trial Chamber V(B), ICC-01/09-02/11-1033, 26 August 2015, page 4.

² Further submissions on the Prosecution's application for a finding of noncompliance under article 87(7) of the Statute, ICC-01/09-02/11-1034, 14 September 2015 ('Prosecution's Submissions').

³ 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", Appeals Chamber, ICC-01/09-02/11-1032 OA5, 19 August 2015 ('Appeals Judgement'), paras. 95-96.

⁴ Appeals Judgement, para. 52.

⁵ Appeals Judgement, para. 95.

6. The Trial Chamber has already confirmed, following consideration of detailed arguments submitted by the Prosecution, the Defence, the Government of the Republic of Kenya ('Kenya') and the Victims, that the cooperation 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'.⁶ The fact that charges have since been withdrawn against Mr Kenyatta does not affect that finding.
7. Nor does the Prosecution's decision to temporarily suspend active investigation in relation to the Kenya situation⁷ affect that finding. The Prosecution's position is that the suspension of active investigation is itself due to the absence of genuine cooperation of Kenya. It has also said that '[d]epending on the evidence that might emerge in the future, the Prosecution could prosecute any person(s) responsible for crimes against humanity committed in Kenya'.⁸ Furthermore, the Prosecution has noted that the *ne bis in idem* principle does not apply in respect of the former accused.⁹
8. While the Victims have applied for judicial review of the Prosecution's decision to suspend active investigation due to Kenya's non-cooperation, that application¹⁰ (pending before the Pre-Trial Chamber) does not affect the relevance of the material sought in the cooperation request. Nor does it affect the need to secure Kenya's compliance with outstanding cooperation requests, as a State Party bound by the provisions of the Statute.

The consultations had reached a deadlock

9. The Appeals Chamber ruled: '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

⁶ Decision on the Prosecution's revised cooperation request, ICC-01/09-02/11-937, 29 July 2014, p. 22.

⁷ Prosecution's application to dismiss in limine the Victims' request for review of Prosecution's decision to cease active investigation, ICC-01/09-156, 25 August 2015, paras. 1, 4, 28 ('Prosecution's Application').

⁸ Prosecution's Application, para. 31.

⁹ Prosecution's Application, paras. 5, 30, 32.

¹⁰ Victims' request for review of Prosecution's decision to cease active investigation, ICC-01/09-154, 3 August 2015.

determine the existence of a failure to comply with such request'.¹¹ It also ruled: '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.'¹²

10. At the time of the Trial Chamber's decision to decline to refer Kenya to the ASP,¹³ judicial measures to obtain the cooperation had been exhausted and consultations had reached a deadlock.¹⁴
11. Moreover, Kenya's unwillingness to cooperate in respect of the delivery of evidence relevant to the *Kenyatta* case is confirmed by statements by Mr Kenyatta, the Cabinet Secretary for Foreign Affairs and the Attorney-General in December 2014, following the withdrawal of charges against Mr Kenyatta. Those statements confirm that it was the policy of the Government of Kenya to secure the termination of the case against Mr Kenyatta, as well as the cases against Mr Ruto and Mr Sang. In Mr Kenyatta's words, 'We will not stop or relent until we see the end of the remaining cases.'¹⁵
12. The Victims submit that it would not be beneficial for the Trial Chamber to engage in further consultations with Kenya, given that Kenya plainly does not support domestic or international investigation of those responsible for the crimes at issue, and given that a lengthy period of time has passed since (a) the information sought in the cooperation request was first requested (April 2012); and (b) the Trial Chamber expressly confirmed that the cooperation 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' (29 July 2014).¹⁶ Kenya therefore has had

¹¹ Appeals Judgement, para. 81.

¹² Appeals Judgement, para. 95.

¹³ Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-02/11-982, 3 December 2014.

¹⁴ Prosecution's Submissions, paras. 17-19.

¹⁵ See Victims' response to the 'Prosecution's notice of withdrawal of the charges against Uhuru Muigai Kenyatta', ICC-01/09-02/11-984, 9 December 2014, paras. 23-32 and footnote 11 of Victims' response to the observations of the Government of the Republic of Kenya on the Prosecution's leave to appeal request, ICC-01/09-02/11-993, 5 January 2015.

¹⁶ Decision on the Prosecution's revised cooperation request, ICC-01/09-02/11-937, 29 July 2014, p. 22.

ample time to provide good faith cooperation to the Court in respect of the cooperation request, and has chosen not to provide that cooperation.

Referral of Kenya to the ASP would be an appropriate measure to seek assistance to obtain the requested cooperation

13. The Appeals Chamber ruled that the scope of a Chamber's discretion under article 87(7) includes '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.'¹⁷

14. In particular, the Appeals Chamber said:

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.¹⁸

15. The LRV is also unaware of any third States or international or regional organisations that are better placed than the ASP to consider and act upon Kenya's ongoing failure to comply with its international obligations.

16. The three most relevant regional organisations of which Kenya is a member are the African Union ('AU'), the East African Community ('EAC') and the Southern African Development Community ('SADC'). All EAC and SADC members are members of the AU. Of these three, the AU has been the most involved in issues relating to cooperation with this Court.

¹⁷ Appeals Judgement, para. 1.

¹⁸ Appeals Judgement, para. 53.

17. Regrettably, however, it appears unlikely that the AU will contribute in any meaningful way to the ultimate goal of obtaining Kenya's cooperation. This is because AU efforts in respect of the Court are currently focused on securing the termination or suspension of proceedings against those who occupy senior government positions, rather than securing justice for victims. In particular, the AU is currently engaged in a campaign to secure the end of the trial of William Ruto and the suspension of the proceedings against Omar Al Bashir.
18. At the 25th Ordinary Session of the AU Assembly on 14–15 June 2015, the AU Assembly adopted a 'Decision on the Update of the Commission on the Implementation of Previous Decisions on the International Criminal Court.'¹⁹ That Decision focuses on ways to assist William Ruto and Omar Al Bashir, rather than to assist victims or to facilitate cooperation by Kenya and Sudan.²⁰
19. According to a 30 September 2015 press report in the *Daily Nation*, an AU Committee at a meeting in New York on 26 September 2015 adopted recommendations which included: 'The chairperson of the African Union and President of Republic of Zimbabwe should request the United Nations Security Council to inscribe on its agenda, the request for the deferral of the proceedings against President Omar Hassan Bashir of the Sudan and Deputy President William Ruto of Kenya.'²¹
20. While it is unclear how many AU members support the AU's approach, as set out in the foregoing declarations, there appears to be no reasonable likelihood that the AU will be able or willing to attempt to obtain the cooperation of Kenya in respect of the delivery of material sought in the cooperation request.

¹⁹ Assembly/AU/Dec.586(XXV). This declaration is available at page 39 of: [http://summits.au.int/en/sites/default/files/Assembly%20AU%20Dec%20569%20-%20587%20\(XXV\)%20_E_0.pdf](http://summits.au.int/en/sites/default/files/Assembly%20AU%20Dec%20569%20-%20587%20(XXV)%20_E_0.pdf) [15 October 2015].

²⁰ The Assembly recalled that it had previously 'requested the ICC to terminate or suspend the proceedings against Deputy President William Samoei Ruto of Kenya until the African concerns and proposals for amendments of the Rome Statute of the ICC are considered' and that it had also 'requested the suspension of proceedings against President Omar Al Bashir and to urge the UN Security Council to withdraw the referral case in the Sudan', and in which it issued a fresh request 'that the African Union Commission join in the Application under Rule 68 by the Prosecutor of ICC against the Deputy President of the Republic of Kenya as an interested party for purposes of placing before the Court all the relevant material arising out of the negotiations'. *Ibid.* paras. 2 and 6.

²¹ *Kenya Seeks UN Security Council Support to Drop Ruto's ICC Case*, Daily Nation, 30 September 2015 (<http://allafrica.com/stories/201509301471.html> [15 October 2015]).

21. Further, it appears that the AU does not have any particular procedure in place with the aim of securing cooperation by States with the Court. The ASP – to the contrary and as foreseen in the Statute – has such a mechanism in place: the ‘formal procedure’ reproduced below. This contains a series of steps with the ultimate aim of obtaining cooperation. The formal procedure is triggered *only* on receipt of a formal referral from the Court.
22. Specifically, the formal procedure (a) permits the Bureau of the ASP to seek the views of the requested State; (b) encourages States Parties to raise the matter in bilateral contacts with the requested State; (c) permits the President of the ASP to use his good offices to resolve the matter; (d) permits the appointment of ‘a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter’. Initiation of this mechanism is now the most effective option available to the Court to secure Kenya’s cooperation. It is set out in full below:

Subsequent to the Court decision, several steps could be undertaken to address the issue, bearing in mind that the good offices by the President of the Assembly may also continue as described below:

- (a) Emergency Bureau meeting: where the matter is such that urgent action by the Assembly may still bring about cooperation, a meeting of the Bureau could be convened at short notice. The meeting would be an opportunity to receive the oral report from the President on any action taken, and to decide on what further action would be required.
- (b) Open letter from the President of the Assembly, on behalf of the Bureau, to the State concerned, reminding that State of the obligation to cooperate and requesting its views on the matter within a specified time limit of no more than two weeks. The President of the Assembly could send a copy of the letter to all States Parties, encouraging them to raise the matter in bilateral contacts with the requested State, where appropriate.
- (c) Upon expiration of the time limit or upon receipt of a written response, a meeting of the Bureau could be held (at the ambassadorial level), at which a representative of the State concerned would be invited to present its views on how it would cooperate with the Court in the future.
- (d) Subsequently, and provided the next session of the Assembly is scheduled to take place more than three months after the Bureau meeting referred to under (c), the Bureau could request the New York Working Group to hold a public meeting on the matter to allow for an open dialogue with the requested State. This would include the participation of States Parties, observers and civil society representatives as currently provided under the Rules of Procedure of the Assembly of States Parties.

(e) Subsequently, a Bureau report on the outcome of this dialogue could be submitted to the next (or ongoing) session of the Assembly, including a recommendation as to whether the matter requires action by the Assembly.

(f) At the next (or ongoing) session of the Assembly, the report could be discussed in plenary session of the Assembly under the agenda item on cooperation. Furthermore, the Bureau could, if necessary, appoint a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter.²²

23. Despite the setbacks in this case, the Victims wish the Chamber to do whatever it can within its power to bring justice to the Victims. Referral by the Trial Chamber will enable the ASP to initiate the formal procedure set out above, which will permit greater diplomatic engagement by the President of the ASP, and by individual States Parties, with the aim of securing Kenya's prompt compliance with its international obligations. Plainly, the multiple possibilities for dialogue set out in the formal procedure set out above provide ample opportunity for Kenya to indicate its willingness to comply with its international obligations.

24. It is important to recall the gravity of Kenya's current state of non-compliance with its obligations under the Statute, and in particular with the Trial Chamber's directions of 31 March 2014 and 29 July 2014. Kenya's deliberate obstruction of access to evidence in an investigation into crimes against humanity is self-evidently a *serious* violation of its international obligations. Kenya's non-compliance with the Statute is also a violation of multiple other provisions of international law. It is a breach of the Vienna Convention on the Law of Treaties.²³ It is also an internationally wrongful act entailing the international responsibility of Kenya, in accordance with Articles 1²⁴ and 2²⁵ of the Articles on the Responsibility of States for Internationally

²² Footnotes omitted. At its tenth session, the ASP adopted the 'Assembly Procedures relating to non-cooperation' (ICC-ASP/10/Res.5, annex). The procedures are also reproduced in an Appendix to 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 [8 October 2015] and are cited at footnote 95 of the Prosecution's Submissions.

²³ 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.'

²⁴ Articles on the Responsibility of States for Internationally Wrongful Acts (http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf [15 October 2015]) ('Articles on State Responsibility'), Article 1: 'Every internationally wrongful act of a State entails the international responsibility of that State.'

Wrongful Acts, which enjoy customary status.²⁶ Kenya ‘may not rely on the provisions of its internal law as justification for failure to comply’.²⁷ Kenya remains under a continued duty to perform its obligations under the Statute²⁸ and is responsible for bringing to an end its state of non-cooperation.²⁹ Kenya’s obligation to comply is not only to the Court: it is an obligation *erga omnes partes*.³⁰

25. If the dialogue set out in the formal procedure fails to achieve cooperation, the States Parties may take individual or collective countermeasures in order to bring to an end Kenya’s ongoing violation of its international obligations. A credible threat of countermeasures can act as an incentive for a State to comply with its international obligations: that is the purpose of countermeasures.
26. For these reasons, the Victims submit that referral would provide an incentive for cooperation by Kenya; that it would not be beneficial to engage in further consultations with Kenya; that it is highly unlikely that more effective external actions may be taken by actors other than the ASP; and therefore that referral to the ASP is appropriate.

²⁵ Article 2 of the Articles on State Responsibility: ‘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.’

²⁶ ‘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)

²⁷ Article 32 of the Articles on State Responsibility. This is also reflected in VCLT, Article 27: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’

²⁸ Article 29 of the Articles on State Responsibility.

²⁹ International Court of Justice, *Namibia Advisory Opinion (Legal Consequences for States of the continued presence of South Africa in Namibia)* (<http://www.icj-cij.org/docket/files/53/5595.pdf>) [15 October 2015], para. 118: ‘South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia. By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation.’

³⁰ International Criminal Tribunal for the former Yugoslavia, *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, para. 26. International Court of Justice, Judgment, *Barcelona Traction*, 5 February 1970 (<http://www.icj-cij.org/docket/files/50/5387.pdf>, [15 October 2015]), page 32, para. 33.

Conclusion

27. For the foregoing reasons, the Victims respectfully request the Trial Chamber to make a finding that Kenya has failed to comply with a cooperation request that has prevented the Court from exercising its functions and powers under the Statute and to refer Kenya's non-compliance to the ASP.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Fergal Gaynor', with a stylized, cursive script.

Fergal Gaynor
Common Legal Representative of Victims

Dated this 15th day of October 2015

At Phnom Penh, Cambodia