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TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Victims' response to the Prosecution's application for leave to appeal the decision
on non-compliance**

Source: Legal Representative of Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for the Defence

Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Caroline Walter

**The Office of Public Counsel for the
Defence**

States Representative

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. In accordance with regulations 24(2) and 65(3) of the Regulations of the Court and a communication from the Trial Chamber,¹ and on behalf of the victims of this case, the Legal Representative for Victims ('LRV') hereby respectfully submits this response to the '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"'² ('Application').
2. The LRV supports the Application. The Application meets the article 82(1)(d) test, as interpreted by the Chambers of the Court.³ The Trial Chamber's 'Decision on Prosecution's application for a finding of non-compliance under article 87(7) of the Statute'⁴ ('Decision') involves issues which significantly affect the fair and expeditious execution of the Prosecution's collection of evidence in the present proceedings.
3. The Appeals Chamber's immediate resolution will materially advance the proceedings as it would (if the Decision is reversed) enable an article 87(7) referral which would trigger the commencement of the formal procedure of the Assembly of States Parties ('ASP'), which would aim to secure Kenya's cooperation.

The Application affects the personal interests of the victims

4. The Prosecution submits that the Defence and the LRV are not parties to the cooperation request.⁵ While the victims are not a party *per se* to the correspondence between the Government of the Republic of Kenya ('Kenya') and the Prosecution, the Chamber has repeatedly permitted the victims to participate in the litigation

¹ Email from the Trial Chamber to the LRV, copied to the Defence and the Prosecution, 12 December 2014.

² Prosecution's Application for leave to appeal the 'Decision on Prosecution's application for a finding of non-compliance under article 87(7) of the Statute', ICC-01/09-02/11-985, 9 December 2014.

³ *Inter alia*, Trial Chamber I's 'Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's 'Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters', ICC-01/04-01/06-1557, 17 December 2008, paras. 23-24; Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (Appeals Chamber), ICC-01/04-168 OA3, 13 July 2006.

⁴ 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.

⁵ Application, ICC-01/09-02/11-985, para. 25.

concerning co-operation in this case, and has permitted the LRV to make oral and written submissions on non-cooperation.⁶ Similarly, on the same day as the Decision, Pre-Trial Chamber I reaffirmed that victims have a legitimate interest in relation to cooperation and referral issues.⁷

5. The victims of this case have a fundamental interest in having the Government being held accountable for its serial violations of the Rome Statute (the 'Statute'). This arises on a number of levels. First, the victims are Kenyan citizens. Their quest for justice, both in Kenya and before this Court, has been frustrated in many ways over the past seven years by their own government. They have a direct interest in the Court and the ASP taking all steps that they can to secure the Government's compliance with its obligations under the Statute.
6. Furthermore, the victims have a well-recognised right to obtain the truth about the crimes committed against them, and to have those responsible held accountable. Securing compliance by all States Parties with their obligations under the Statute is a central element in delivering truth and accountability to victims.

The Decision raises issues which significantly affect the fair and expeditious conduct of the proceedings

7. The Application sets out two issues which significantly affect the fair and expeditious conduct of the proceedings. The LRV respectfully agrees with both issues. Not only did the Trial Chamber err in the exercise of its discretion by not

⁶ Decision on the Government of Kenya's application for leave to file observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence (TC V), ICC-01/09-02/11-725, 24 April 2013, para. 3: 'The Chamber also considers that the Legal Representative of Victims should be given an opportunity to respond.' See further the Victims' Response to the Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, ICC-01/09-02/11-731, 6 May 2013. *See also* Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters (Trial Chamber V(B)), ICC-01/09-02/11-954, 19 September 2014, para. 13: 'Additionally, given the significance of the issues and their potential impact on the interests of the victims, the LRV may be present at both status conferences.'; Transcripts of the Status Conference held on 7 October 2014, ICC-01/09-02/11-T-31-ENG ET WT; Order requesting observations from the Government of Kenya on the Prosecution's leave to appeal request, ICC-01/09-02/11-986, 10 December 2014.

⁷ Pre-Trial Chamber I's 'Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council', ICC-01/11-01/11-577, 10 December 2014, para. 29.

acknowledging that the factual conclusions revealed in its decision amounted to a finding of non-cooperation, but it erred in not referring Kenya to the ASP as referral was the only lawful and logical consequence of all the factual conclusions entered by the Chamber.⁸

8. The LRV will not duplicate the Prosecution's submissions, but adds the observations below.
9. After the Decision was issued, the Prosecutor withdrew charges against Mr Kenyatta. This does not affect the ongoing duty on Kenya to comply with all outstanding and future requests for assistance from the Court, in accordance with Part 9 of the Statute and the International Crimes Act. In particular, Kenya remains obliged immediately to execute the revised records request of April 2014 ('revised request').
10. Nor does withdrawal of charges affect the Prosecutor's ongoing duty to comply with Article 54(1) of the Statute. This obliges the Prosecutor 'to extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute'.
11. The Prosecutor is at liberty to return to the Pre-Trial Chamber with charges against any person, including Mr Kenyatta, if compliance with the revised request yields investigative leads and evidence sufficient to satisfy the confirmation standard.
12. Kenya's immediate compliance with the revised request is therefore necessary in order for the Prosecution to fulfil its statutory duties and in order for the Court to uncover the truth about the brutal crimes committed in Naivasha and Nakuru in January 2008, and the identities of those responsible.

⁸ In this regard, the LRV fully supports the Prosecution's submission that the Chamber erred in law in the exercise of the discretion foreseen in article 87(7) of the Statute. Once the finding of non-compliance was entered by the Chamber, the Chamber no longer had any discretion not to refer it to the ASP. Regulation 109(4) of the Regulations of the Court further supports this reading. The LRV observes that such a reading of article 87(7) is also compatible with the object and purpose of the Statute which aims at ensuring that the International Criminal Court functions as a court of law, and that its Judges are shielded as much as possible from the political arena. By making a referral automatic when a finding of non-compliance has been entered by a Chamber, the States Parties ensured that the Judges would not be unduly exposed to political pressure in determining whether to refer a State to the ASP after having determined that the State was in serious breach to its obligations as a signatory of the Statute.

13. The Decision meets the article 82(1)(d) test regardless of whether the Trial Chamber considers that these proceedings are now in the investigative or in the case phase.

14. The principle of a fair trial applies during the investigation phase. The Pre-Trial Chamber has held that:

In the case at hand the Chamber views the phase of the proceedings during which the Decision was issued as unique: at issue is the investigation phase of a situation, prior to the case itself, for which there is no defendant as such, given that no individual has been issued with a warrant of arrest or a summons to appear. It is the Chamber's view nonetheless that the principle of a fair trial applies not only to the case phase – on issuance of a warrant of arrest or a summons to appear – but also prior to the case phase.⁹

15. The Pre-Trial Chamber went on to discuss what is meant by the term 'fairness of the proceedings' in the context of the Statute at the investigation stage of a situation. The Chamber held:

In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings). The Chamber also holds that within the context of the Statute, respect for the fairness of the proceedings with regard to the Prosecutor, at the investigation phase of a situation, means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54.¹⁰

16. The Statute incorporates one major mechanism to deal with the problem of non-cooperation by a State Party: an article 87(7) referral. The Pre-Trial Chamber recently emphasised that even where a Government makes a genuine effort to maintain a constructive dialogue with the Court, and where there are difficulties on its territory, an objective failure has to be assessed regardless of the State's underlying motives.

17. The Pre-Trial Chamber found that 'article 87(7) of the Statute is value-neutral, and not designed to sanction or criticise the requested State. The Chamber concurs that this provision makes available to the Court an additional tool so that it may seek assistance to eliminate impediments to cooperation.'¹¹

⁹ Pre-Trial Chamber I's 'Decision on the Prosecution's application for leave to appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS6', ICC-01/04-135-tEN, 20 April 2006, para. 36.

¹⁰ Pre-Trial Chamber I's Decision, ICC-01/04-135-tEN, paras. 39-40.

¹¹ Pre-Trial Chamber I's Decision, ICC-01/11-01/11-577, para. 33.

18. Referral under article 87(7) would trigger the ASP's own formal procedure for securing co-operation. That formal procedure is triggered only on receipt of a formal referral from the Court.¹²
19. The Decision was unfair to the victims because, due to legal and factual errors, the Trial Chamber unfairly declined to use the principal tool available in the Statute to address determined State obstruction of access to evidence: an article 87(7) referral.
20. At the heart of the Application is the question of whether it was reasonably open to the Trial Chamber not to refer Kenya to the ASP. The Decision was given at the conclusion of a six-month period of closely supervised co-operation, requiring bimonthly reports from Kenya and the Prosecution, during which Kenya repeatedly and knowingly failed to comply with the Trial Chamber's directions, as set out in the Trial Chamber's decisions of 31 March 2014 and 29 July 2014.
21. Kenya's repeated non-compliance with the Chamber's express directions during those six months was a poor precedent for a State Party to set. Not to refer Kenya at the conclusion of the six-month period of supervision rewarded Mr Kenyatta's government for its non-cooperation and further damaged the Court's co-operation structure.
22. Kenya's deliberate and systematic failure to comply with Part 9 of the Statute is an internationally wrongful act within the meaning of the Articles on the Responsibility of States for Internationally Wrongful Acts 2001, triggering responsibilities of all States to bring the consequences of Kenya's wrongful act to an end, and to reverse the impact of Kenya's wrongful act. States are required to cooperate to bring to an end through lawful means any a serious breach by another State of an obligation arising under a peremptory norm of general international law.¹³ Non-referral

¹² At its tenth session, the Assembly of States Parties adopted the 'Assembly Procedures relating to non-cooperation'. This provides, *inter alia*, that: 'A formal, and to some extent public, procedure for the Assembly to address occurrences of non-cooperation should only be triggered by a decision of the Court regarding noncooperation addressed to the Assembly. Any such decision should be forwarded to all States Parties without delay. The general public should be informed by way of a press release of the Secretariat of the Assembly of States Parties.' (ICC-ASP/10/Res.5, annex).

¹³ Articles 1-3 and 28-33 of the Articles on the Responsibility of States for Internationally Wrongful Acts (http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf - accessed 15 December 2014). 'A "failure to comply with the request of a Court contrary to the provisions of this Statute" should be

deprived the victims of a trigger which would have encouraged States Parties to cooperate to bring to an end, and reverse the consequences of, Kenya's systematic failure to adhere to Part 9 of the Statute. The consequences are already clear: at this year's ongoing ASP, no discussion has been devoted to Kenya's systematic failure to comply with the revised request.

23. The ASP as a whole, and individual States Parties, have recognised the negative impact that the non-execution of Court requests can have on the ability of the Court to execute its mandate.¹⁴ The Pre-Trial Chamber recently ruled that 'a finding of non-compliance under article 87(7) of the Statute only requires an *objective* failure to comply'.¹⁵ Kenya's non-compliance with the revised request was more than objective: it was deliberate and systematic, and this on its own merited referral under article 87(7) so that the ASP could have an opportunity to consider it. But Kenya's non-compliance was even more egregious given that it took place in the context of a multifaceted campaign by the Government (referred to in other filings by the LRV) to bring this case to an end.

24. The LRV notes the following findings by the Trial Chamber relating to non-compliance with the original and revised requests:

- a. 'there had been substantial unexplained delay on the part of the Kenyan Government in either giving effect to the cooperation request or raising any problems which may have prevented execution of the request';¹⁶

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)

¹⁴ See also the 5 December 2014 Report of the Bureau on non-cooperation: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-40-ENG.pdf (accessed 14 December 2014).

¹⁵ Pre-Trial Chamber I's Decision, ICC-01/11-01/11-577, para. 33 [emphasis added].

¹⁶ Decision, ICC-01/09-02/11-982, para. 46 and Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, 31 March 2014, paras. 45-52.

- b. 'the explanations provided by the Kenyan Government for non-provision of materials, were, in certain cases, framed in an unhelpful manner that did not respond clearly to queries raised';¹⁷
- c. 'it is apparent that - save in the case of Foreign Transaction Records - there has been a complete failure to pursue alternative sources of information';¹⁸
- d. '[d]espite the open language of the Revised Request, which provided the Kenyan Government with a degree of flexibility in how it could be implemented, and the provision of specific suggestions of avenues of potential enquiry from the Prosecution, the Kenyan Government appears to have persisted in a narrow approach which simply repeated the alleged 'impossibility' of one particular method of execution';¹⁹
- e. 'despite the clear terms of the Revised Request, subsequently reiterated by the Prosecution, and the clear terms of the Decision of 29 July 2014, it is apparent that the Kenyan Government has taken no meaningful steps to compel production of the requested materials';²⁰
- f. 'where a State fails to meaningfully take basic steps to obtain requested material, or to provide clear, timely and relevant responses, mere declarations of compliance are insufficient';²¹
- g. 'the Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute';²²

¹⁷ Decision, ICC-01/09-02/11-982, para. 75.

¹⁸ *Idem.*

¹⁹ *Ibidem.*

²⁰ Decision, ICC-01/09-02/11-982, para. 76.

²¹ Decision, ICC-01/09-02/11-982, para. 78.

²² Decision, ICC-01/09-02/11-982, para. 79.

h. ‘cumulatively, the approach of the Kenyan Government [...] falls short of the standard of good faith cooperation required under Article 93 of the Statute. The Chamber considers that this failure has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute’.²³

25. Despite these findings, the Chamber at paragraphs 86-88 of the Decision declined to refer Kenya to the ASP, partly on the basis that the Prosecution was to blame for Kenya’s failure to comply with the revised request. This conclusion was legally and factually erroneous and requires immediate appellate scrutiny.
26. That the Prosecution could have followed up at an earlier stage on the original records request to Kenya is not in dispute. However, on no reasonable interpretation of the events since the Trial Chamber ordered a six-month period of closely supervised co-operation on 31 March 2014 was it open to the Trial Chamber to conclude that the Prosecution was to blame for Kenya’s non-compliance with the revised request.
27. The information before the Trial Chamber (in particular the 2014 correspondence between the Government and the Prosecution) demonstrates that Prosecution showed diligence, professionalism and vigour in pursuing the revised records request in writing, by telephone and in meetings with the Government. Kenya was the only party responsible for non-compliance with the revised request, and any other conclusion, it is respectfully submitted, is unreasonable.
28. Further, the Trial Chamber at paragraph 82 of the Decision erroneously linked the decision not to refer Kenya with its simultaneous decision denying any further adjournment, which resulted in the withdrawal of charges against Mr Kenyatta. This is a significant and appealable error. Kenya’s obligation to comply with the revised request was and remains independent of whether charges are in place against a particular accused.

²³ Decision, ICC-01/09-02/11-982, para. 78.

29. In denying referral, one of the reasons provided by the Trial Chamber was that ‘the possibility of obtaining the necessary evidence, even if the Revised Request was to be fully executed, is still nothing more than speculative.’²⁴ This was also an erroneous reason to decline referral.
30. The word ‘speculative’ – originally used by the Prosecution in these proceedings – is defined by the Oxford English Dictionary as: ‘Engaged in, expressing, or based on conjecture rather than knowledge’.²⁵ ‘Conjecture’ is defined as: ‘An opinion or conclusion formed on the basis of incomplete information’.²⁶
31. It is almost always a matter of speculation and conjecture for the Prosecutor or a Chamber to request a State Party to deliver evidence which is believed to be necessary to uncover the truth. Under article 64(6)(d) of the Statute, the Trial Chamber may order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties. Under article 69(3), the Court may request the submission of all evidence that it considers necessary for the determination of the truth. Under article 93, the Court can request assistance from a State Party for the provision of records and documents, and the execution of searches and seizures.
32. These are all necessarily ‘speculative’ endeavours: neither a Chamber nor the Prosecutor can know the precise relevance or probative value of data or witness testimony which it does not already have.
33. The material sought in the revised records request is of central importance to the investigation into the crimes committed in Naivasha and Nakuru. Swift compliance with it is vital for the proceedings to be fair and expeditious. The material sought is anything but marginal. The Trial Chamber on 29 July 2014 expressly found that the revised request ‘conforms with the requirements of relevance, specificity and necessity for the purposes of a cooperation request pursuant to Part 9 of the

²⁴ Decision, ICC-01/09-02/11-982, para. 82.

²⁵ <http://www.oxforddictionaries.com/us/definition/english/speculative> (accessed 14 December 2014).

²⁶ <http://www.oxforddictionaries.com/us/definition/english/conjecture> (accessed 14 December 2014).

Statute’.²⁷ The Chamber also noted the ‘potential evidentiary significance’ of telephone data sought in the revised request.²⁸

34. It is inconceivable that Kenya’s strategy of non-delivery of the cellphone and financial data sought in the revised request, in defiance of the Trial Chamber’s express directions, was decided upon without a great degree of discussion within the Government. The Government’s persistent determination to hide this data from the Court is itself suggestive of its high probative value. If it were exculpatory or irrelevant, it would have been disclosed years ago.
35. Immediate delivery to the Court of all relevant cellphone and cellsite data is critically important: it will enable investigators to clarify where Mr Kenyatta was during the PEV, who he was speaking to, who his interlocutors were speaking to, and where the interlocutors were. Full delivery of the financial data will clarify the source and destination of flows of funds before and during the PEV.
36. There is no reasonable inference available on the facts of this case other than that the Government’s non-compliance with the revised request has made a significant and material difference to the outcome of this case. It is respectfully submitted that the Trial Chamber’s failure to refer Kenya to the ASP, in the circumstances of this case, and in light of the findings made by the Chamber in the Decision, was unreasonable and erroneous both in fact and in law, and significantly affects the fair and expeditious conduct of these proceedings.

Immediate resolution by the Appeals Chamber will materially advance the proceedings

37. By denying an article 87(7) referral in the face of determined obstructionism by Kenya, and refusing any further adjournment in the *Kenyatta* case, the Chamber incentivised further non-cooperation by Kenya and thereby significantly weakened

²⁷ Decision, ICC-01/09-02/11-937, page 22.

²⁸ Decision, ICC-01/09-02/11-937, para. 45.

the Prosecution's ability to secure compliance by Kenya with the revised request or with future requests for assistance in these proceedings.

38. The Trial Chamber therefore unfairly hampered the Prosecution's ability to discharge the duties set out in article 54(1) of the Statute. Incentivizing further non-co-operation also restricts the Prosecution's ability to secure enough evidence to return to the Pre-Trial Chamber with fresh charges against Mr Kenyatta, an option which the Trial Chamber has expressly recognized.²⁹
39. If the Appeals Chamber reverses the Decision, or if it *proprio motu* refers Kenya to the ASP, this will trigger the ASP's formal procedure and will permit greater diplomatic engagement by the States Parties, with the aim of securing Kenya's compliance with the revised request and delivery of the evidence sought in it.
40. Successful implementation of the ASP's formal procedure to secure co-operation, following an article 87(7) referral, would also likely secure compliance with other outstanding requests in this case. Immediate resolution by the Appeals Chamber therefore will materially advance the proceedings.

Respectfully submitted,



Fergal Gaynor
Common Legal Representative of Victims

Dated this 15th day of December 2014

At New York, United States of America

²⁹ Decision, ICC-01/09-02/11-982, para. 83.