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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

Further submissions on the Prosecution's application for a finding of non-compliance under article 87(7) of the Statute

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The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

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

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

States Representatives

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 19 August 2015, the Appeals Chamber reversed the Trial Chamber's Decision that rejected the Prosecution's request¹ for a finding of non-compliance and referral under article 87(7) ("the Decision").² The Appeals Chamber remanded the matter to the Trial Chamber for a new determination on whether it is appropriate to make a non-compliance finding and, if so, whether to refer the non-compliance of the Government of Kenya ("Kenya") to the Assembly of States Parties ("ASP").³

2. These submissions⁴ are intended to assist the Trial Chamber in its determination and the exercise of discretion under article 87(7), consistent with the guidance of the Appeals Chamber. The Prosecution submits that to resolve the issue before it, the Trial Chamber does not need to make new factual assessments, but it should rely on the facts as found in the Decision and apply the Appeals Chamber's instructions to them. Accordingly, the Chamber should find that Kenya has failed to comply with a request to cooperate under article 87(7) and refer the matter to the ASP.

Submissions

3. Based on its prior factual findings and following the guidance of the Appeals Chamber, the Trial Chamber should first find that Kenya has failed to comply with the Prosecution's 24 April 2012 request under article 93(1) to produce financial and other records relating to Mr Kenyatta,⁵ which prevented the Court from exercising its powers and functions under the Statute. The Chamber should then determine that it is appropriate to refer Kenya's non-compliance to the ASP in order to obtain Kenya's cooperation or to otherwise address the lack of cooperation.⁶

¹ ICC-01/09-02/11-866-Red.

² ICC-01/09-02/11-982.

³ ICC-01/09-02/11-1032 OA5 ("Appeals Judgment").

⁴ The Trial Chamber invited these submissions in its order of 26 August 2015 (ICC-01/09-02/11-1033).

⁵ ICC-01/09-02/11-866-AnxA ("Records Request"); *see also* Decision, para. 1.

⁶ Appeals Judgment, paras. 1, 96, 98.

I. Kenya failed to comply with a request for cooperation, which prevented the Court from exercising its powers and functions under the Statute

4. In its Decision, the Trial Chamber found that “cumulatively, the approach of [Kenya] falls short of the standard of good faith cooperation required under Article 93 of the Statute [and] that this failure reached the threshold of non-compliance required under the first part of article 87(7) of the Statute”.⁷ The Trial Chamber further held that Kenya’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.”⁸ These findings must be considered as the Trial Chamber’s “formal” or “judicial” determinations of non-compliance pursuant to article 87(7).⁹

5. The Prosecution did not seek leave to appeal these findings,¹⁰ nor did the Trial Chamber grant leave to appeal them.¹¹ Accordingly the findings with respect to the first clause of article 87(7) were not the subject of the Prosecution’s appeal.¹² The Appeals Chamber nevertheless held that a particular inconsistency¹³ in the Decision “raises the question as to whether the Trial Chamber made a proper determination of a failure to cooperate of a certain gravity,”¹⁴ and found that the effect of this inconsistency was that the Trial Chamber had made, in its view, no “conclusive determination” in that respect.¹⁵ As a result, the Appeals Chamber remanded the Decision to the Trial Chamber for it to determine, among other things, whether

⁷ Decision, para. 78; *see also* paras. 72, 67, 62.

⁸ Decision, para. 79.

⁹ The Appeals Chamber has held that that “all findings by the Court are formal or judicial and that the terminological distinction between findings made by the Trial Chamber is inappropriate (Appeals Judgment, para. 42). The Appeals Chamber thereby overturned the Trial Chamber’s distinction between factual finding of non-compliance and “formal” or “judicial” findings under article 87(7) (Decision, para. 80).

¹⁰ ICC-01/09-02/11-985, paras. 3-4.

¹¹ ICC-01/09-02/11-1004 (“Leave to Appeal Decision”), p.14, paras. 25-29. The Prosecution did also not seek leave to appeal these findings (ICC-01/09-02/11-985, paras. 3-4).

¹² ICC-01/09-02/11-1006 (“Appeal”), para. 1.

¹³ See para. 7 below.

¹⁴ Appeals Judgment, paras. 80-81, 91.

¹⁵ Appeals Judgment, paras. 91, 93.

Kenya had failed to comply with a cooperation request that has prevented the Court from exercising its functions and powers under the Statute.¹⁶

6. In any event, the Trial Chamber's new determination should come to the same conclusion as its original Decision, namely that Kenya has failed to comply with its duty to cooperate, which has prevented the Court from exercising its functions and powers under the Statute. This is because the inconsistency referred to above can be resolved by applying the Appeals Chamber's guidance, and because other relevant factors which must be considered also lead to the conclusion that the Trial Chamber's prior non-compliance findings must be endorsed.

A. The inconsistency in the Decision can be resolved

7. The Appeals Chamber found that 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"¹⁷ was 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)'¹⁸.¹⁹ According to the Appeals Chamber, such an inconsistency renders the first assertion unreasonable and calls into question the second.²⁰

8. However, applying the Appeals Chamber's guidance correctly, there is no need to alter the Trial Chamber's prior determination of a failure to cooperate, which prevented the Court from exercising its functions and powers.²¹ It did make such a determination, which is not inconsistent with other relevant considerations.

¹⁶ Appeals Judgment, paras. 94, 95, 98.

¹⁷ Decision, para. 82 (emphasis added).

¹⁸ Decision, para. 79 (emphasis added).

¹⁹ Appeals Judgment, para. 80.

²⁰ Appeals Judgment, para. 80.

²¹ Appeals Judgment, para. 81.

9. The Appeals Chamber held that the non-compliance proceedings against Kenya must not be conflated with the criminal proceedings against Mr Kenyatta,²² and that the Trial Chamber's error in that respect affected, among other things, its finding on the impact that the implementation of the Revised Request could have on the evidence.²³ This concerns in particular the Trial Chamber's determination that "it is still nothing more than speculative" that the cooperation request, if implemented would provide the Prosecution with "the necessary evidence" in the case against Mr Kenyatta.²⁴ Accordingly, this latter finding is not relevant for the purposes of a determination of Kenya's non-compliance and should therefore be set aside in the Trial Chamber's new determination. This resolves the apparent contradiction referred to by the Appeals Chamber and allows the Trial Chamber to safely uphold its previous non-compliance findings, which were fully supported by the record before the Chamber.

B. Other relevant factors also lead to the conclusion that the Trial Chamber's prior factual findings must be confirmed

10. The Appeals Chamber identified a number of relevant factors that must be taken into account in determining whether there was a failure to cooperate within the terms of the first clause of article 87(7).²⁵ Consideration of each of these factors leads to the conclusion that Kenya failed to comply with the Prosecution Records Request, which prevented the Court from exercising its functions and powers.

(i) *The evidence that was required in the Prosecution's cooperation request was potentially highly relevant to the Prosecution's investigation.*

11. The "importance of the evidence"²⁶ as a relevant factor for a non-compliance determination must be assessed in relation to an ongoing investigation.²⁷ It need not

²² Appeals Judgment, paras. 90, 95, 73-76; 81.

²³ Appeals Judgment, para. 82(ii).

²⁴ Decision, para. 82.

²⁵ Appeals Judgment, para. 95.

²⁶ Appeals Judgment, para. 81.

²⁷ Appeals Judgment, para. 77

necessarily be focussed on the significance that such evidence may have on a pending case. This is particularly so since withdrawal of charges against Mr Kenyatta has been granted without prejudice. Thus further investigations may result in a renewal of these proceedings or the instigation of new charges.²⁸ Moreover, this criterion must be assessed broadly. As the Appeals Chamber observed, “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”.²⁹

12. To hold otherwise would mean that no State Party could be held in non-compliance for failing to comply with a cooperation request unless the Prosecution had shown that the requested information or evidence would be critical in ensuring that a particular case could satisfy the standard of proof required for trial. By this logic, a State’s failure to cooperate at an early stage of an investigation when the evidence is still being collected, or a State’s failure to cooperate with requests other than by providing key evidence—for instance by failing to arrest and surrender a suspect—could never trigger a non-compliance finding. In addition, as acknowledged by the Trial Chamber in a different decision,³⁰ neither the Prosecution nor the Chamber could ever be certain as to the importance of evidence before seeing it.

13. When investigating crimes committed during the 2007/2008 post-election violence in Kenya, the Prosecution submitted the Records Request, in which it requested Kenya to provide Mr Kenyatta’s tax records, vehicle records, bank records, foreign transaction records, company records, land transfer records and telephone records related to the relevant period of time.³¹ This evidence was of sufficient significance to the Prosecution’s investigation in Kenya to meet the

²⁸ Appeals Judgment, para. 82(ii).

²⁹ Appeals Judgment, para. 77.

³⁰ ICC-01/09-02/11-981, para. 48, noting that “[w]ithout access to material sought in the Revised Request, the Prosecution is necessarily in a position of having to speculate regarding its content.”

³¹ Decision, para. 48.

“relevance” threshold referred to in the Appeals Judgment. The Prosecution sought to obtain this evidence in pursuance of its duties under article 54(1) to investigate effectively and to extend the investigation to cover all relevant facts and evidence. As found by this Chamber, by withholding these documents from the Prosecution, Kenya has compromised the Prosecution’s ability to thoroughly investigate crimes committed during the 2007/2008 post-election violence in Kenya, and ultimately impinged upon the Court’s ability to fulfil its mandate to establish the truth.³²

(ii) *An assessment of the conduct of the Parties to the proceedings leads to a finding of non-compliance*

14. The Appeals Chamber held that the primary obligation to cooperate lies with the State and not with the Prosecution.³³ As a result, it is primarily the conduct of Kenya that should inform the Trial Chamber’s determination on whether to make a non-compliance finding.³⁴ The Chamber has already found that Kenya took no meaningful steps to compel production of the requested materials³⁵ and that its approach fell short of the standard of good faith cooperation required under article 93.³⁶

15. According to the Appeals Chamber, the Prosecution’s conduct is part of a secondary assessment and only relevant to the extent that it negatively impacted on Kenya’s ability to cooperate.³⁷ The Trial Chamber has already determined that the Prosecutor’s conduct did not adversely impact on Kenya’s obligation to cooperate.³⁸ As a result, it is not relevant for the purposes of a finding of non-cooperation and the Trial Chamber should confirm its previous non-compliance finding.

³² Decision, para. 79. *See also* Preamble of the Statute, third and fourth paragraphs; articles 64 and 69(3).

³³ Appeals Judgment, para. 87.

³⁴ The Prosecution further notes that article 87(7) is about the non-compliance of a State and not about the conduct of the Prosecution.

³⁵ Decision, para. 76.

³⁶ Decision, para. 78.

³⁷ Appeals Judgment, para. 87.

³⁸ Decision, para. 78; *see also* Appeals Judgment, paras. 88-89.

- (iii) *The Trial Chamber's conflation of the non-compliance proceedings against Kenya with the criminal proceedings against Mr Kenyatta did not impact on the non-compliance findings*

16. As demonstrated below,³⁹ the Appeals Chamber held that Trial Chamber's erroneous conflation of the non-compliance proceedings and the proceedings against Mr Kenyatta impacted on the Trial Chamber's determination not to refer the matter to the ASP.⁴⁰ However, there is no indication that this conflation affected the Trial Chamber's non-compliance findings, which should therefore be upheld.

- (iv) *At the time of the Decision, judicial measures to obtain cooperation had been exhausted and consultations had reached a deadlock*⁴¹

17. In its Decision, the Trial Chamber did not explicitly find that judicial measures to obtain Kenya's cooperation had been exhausted and that consultations had reached a deadlock.⁴² However, it reached this conclusion implicitly.

18. The Trial Chamber held that the time had come to assess the status of cooperation and to definitively rule upon the Prosecution's article 87(7) application.⁴³ It so concluded after a lengthy process that was intended to ensure Kenya's compliance with the Prosecution's 24 April 2012 Records Request.⁴⁴ As Kenya's cooperation was not forthcoming, the Prosecution seized the Trial Chamber with its application for a finding of non-compliance under article 87(7) on 29 November 2013.⁴⁵ On 31 March 2014, the Trial Chamber allowed Kenya additional time to comply with the Prosecution's request. It also instructed Kenya to raise any problems which could impede or prevent cooperation with the Chamber and required the Prosecution and Kenya to engage in consultations intended to resolve

³⁹ See paras. 23-24 below.

⁴⁰ Appeals Judgment, paras. 90, 95, 73-76; 81.

⁴¹ Appeals Judgment, paras. 81, 90, 95.

⁴² Appeals Judgment, para. 81, referring to Decision, para. 89.

⁴³ Decision, para. 44.

⁴⁴ Decision, para. 1.

⁴⁵ ICC-01/09-02/11-866-red.

any problems which may impede cooperation.⁴⁶ On 3 December 2014—almost one year after the Prosecution applied for a finding of non-compliance and eight months after the Trial Chamber had granted Kenya additional time to comply—the Trial Chamber issued its Decision. It determined that Kenya had taken no meaningful steps to compel production of the requested materials,⁴⁷ and that the approach of Kenya is indicative of a “non-cooperative stance”,⁴⁸ which falls short of the standard of good faith cooperation required under article 93.⁴⁹ On that basis the Trial Chamber concluded that allowing further time for cooperation, without intervention at that stage would be contrary to the interests of justice.⁵⁰

19. As a result of these findings, it is clear that at the time of the Decision, judicial measures to obtain the cooperation of Kenya had been exhausted and consultations had reached a deadlock. Accordingly, it would be correct to conclude that Kenya had failed to comply with a request for cooperation, which prevented the Court from exercising its powers and functions under the Statute.

II. It is appropriate to refer Kenya’s non-compliance to the ASP

20. The Appeals Chamber held that once the Trial Chamber had made a finding of non-compliance, it should determine, under the second clause of article 87(7), whether it is appropriate to refer the matter to the ASP in order to seek external assistance to obtain the requested cooperation or otherwise address the lack of cooperation from Kenya.⁵¹ The Appeals Chamber also provided some guidance for the Trial Chamber’s exercise of discretion.⁵²

⁴⁶ ICC-01/09-02/11-908, p. 46.

⁴⁷ Decision, para. 76.

⁴⁸ Decision, para. 77.

⁴⁹ Decision, para. 78.

⁵⁰ Decision, paras. 44, 87. The Trial Chamber also found that although the Prosecution had provided sufficient information, its requests for at least three of the specified categories of documents (tax records, bank records and telephone records) were not addressed by Kenya (Decision, paras. 62,67,72).

⁵¹ Appeals Judgment, paras. 1, 98.

⁵² Appeals Judgment, paras. 53, 96.

21. The Prosecution submits that the Trial Chamber should first review—in accordance with the Appeals Chamber’s guidance—the relevance of its findings that supported its conclusion not to refer Kenya to the ASP; and second, that it should consider other relevant factors mentioned by the Appeals Chamber. This approach should lead the Trial Chamber to conclude that it is appropriate to refer Kenya’s non-compliance to the ASP.

A. The Trial Chamber should set aside findings that are not relevant to the question of a referral to the ASP

22. The Trial Chamber made a number of findings in support of its conclusion that it was not appropriate to refer the matter to the ASP.⁵³ However, applying the Appeals Chamber’s guidance, these matters are not relevant to the question of whether to refer Kenya’s non-compliance to the ASP. This is particularly so in light of the Appeals Chamber’s determination that the Trial Chamber erred by conflating the non-compliance proceedings with the proceedings against Mr Kenyatta⁵⁴ and by assessing the Prosecution’s own conduct inconsistently throughout the proceedings.⁵⁵

(i) *The Chamber erroneously conflated the non-compliance proceedings against Kenya with the criminal proceedings against Mr Kenyatta*

23. The Appeals Chamber found that the Trial Chamber’s erroneous conflation of the non-compliance proceedings against Kenya with the criminal proceedings against Mr Kenyatta impacted on a number of findings⁵⁶ that the Trial Chamber had made in support of its conclusion that it was not appropriate to refer the matter to the ASP.⁵⁷ In fact, the Trial Chamber expressly held that considerations regarding the case against Mr Kenyatta were the “primary rationales” for its assessment on

⁵³ Decision, paras. 82-90.

⁵⁴ Appeals Judgment, para. 81. See also paras. 73-76, 90, 95.

⁵⁵ Appeals Judgment, para. 89. See also paras. 86-88,

⁵⁶ Appeals Judgment, paras. 82, 74, 77.

⁵⁷ Decision, paras. 82-89.

whether to make a referral.⁵⁸ Irrespective of whether these findings were correct, the Appeals Chamber held that the Trial Chamber erred when relying on them for the purposes of determining the appropriateness of a referral. As a result, they should be set aside by the Trial Chamber when it makes its new determination. This means that the “primary rationales” relied on by the Trial Chamber for not referring Kenya’s non-compliance to the ASP should no longer be applicable.

24. The following are the findings that should now be set aside by the Trial Chamber when it makes its new determination on whether to refer the matter to the ASP:⁵⁹

- (a) *findings that securing compliance with the cooperation request at issue would not further the proceedings against Mr Kenyatta,*⁶⁰ and in particular the Trial Chamber’s conclusions that a referral of the matter to the ASP “might result in further uncertainty and potential delay for the proceedings[against Mr Kenyatta];”⁶¹ that a referral is moot in this case because the Chamber has rejected the Prosecution’s request for a further adjournment and ordered it to either withdraw charges or state that the evidence has improved to proceed to trial;⁶² and that it would be for another Chamber to rule on the appropriateness of a referral in the context of continuing investigations;⁶³
- (b) *findings regarding the impact that the implementation of the Revised Request would have on the evidence,*⁶⁴ and in particular the Trial Chamber’s conclusion that “it is still nothing more than speculative” that the cooperation requests, if implemented would provide the Prosecution with “the necessary evidence” in the case against Mr Kenyatta;⁶⁵ and

⁵⁸ Decision, para. 82.

⁵⁹ Appeals Judgment, paras. 82, 74, 77.

⁶⁰ Appeals Judgment, paras. 82(i), 77, 74; Decision, para. 82.

⁶¹ Decision, para. 82.

⁶² Decision, para. 83, Appeals Judgment, para. 75.

⁶³ Decision, para. 83, Appeals Judgment, para. 75.

⁶⁴ Appeals Judgment, para. 82(ii).

⁶⁵ Decision, para. 82.

- (c) *findings on whether judicial remedies had been exhausted and further cooperation by Kenya was possible,*⁶⁶ and in particular the Trial Chamber's conclusion that a referral of the matter to the ASP was not warranted since it had already rejected the Prosecution's request for a further adjournment of the case against Mr Kenyatta.⁶⁷

(ii) *The Prosecution's own conduct is not relevant to the question of a referral*

25. The Prosecution's conduct was the other main factor relied upon by the Trial Chamber when concluding that it was not appropriate to refer Kenya to the ASP.⁶⁸ Irrespective of the correctness of the Chamber's criticism,⁶⁹ the Appeals Chamber's guidance necessarily leads to the conclusion that the Prosecution's conduct in this case is not relevant to the question of whether to refer Kenya to the ASP. The Trial Chamber should therefore set aside such findings in its new determination. This would also resolve the contradiction in the Decision about this matter that was identified by the Appeals Chamber.⁷⁰

26. The Appeals Chamber held that the primary obligation to cooperate lies with the State and not the Prosecution⁷¹ and that the Prosecution's conduct is only relevant to the extent that it negatively impacted on Kenya's ability to cooperate.⁷²

⁶⁶ Appeals Judgment, paras. 82(iii), 82(iv), 74, 81.

⁶⁷ Decision, para. 89; Appeals Judgment, para. 81.

⁶⁸ Decision, paras. 85-88.

⁶⁹ The Prosecution also notes that the Chamber's findings as to the Prosecution's conduct are factually incorrect. The record demonstrates that with respect to the Revised Request, the Prosecution acted diligently in trying to obtain Kenya's cooperation, including through multiple meetings, timely correspondence and regular reminders when Kenya failed to respond to the Prosecution's correspondence. The Prosecution's efforts to secure Kenya's compliance with the Revised Request are detailed in the Prosecution's submissions of 29 April 2014 (ICC-01/09-02/11-911-Conf), 8 May 2014 (ICC-01/09-02/11-917-Conf), 23 May 2014 (ICC-01/09-02/11-922 and ICC-01/09-02/11-922-Conf-Exp-AnxA), 30 June 2014 (ICC-01/09-02/11-927 and ICC-01/09-02/11-927-Conf-Exp-AnxA), and 29 August 2014 (ICC-01/09-02/11-940, paras. 4-21).

⁷⁰ Appeals Judgment, para. 89: As noted by the Appeals Chamber, the Trial Chamber's determination that the Prosecutor's conduct had not adversely impacted on Kenya's obligation to cooperate is contradictory with the Trial Chamber's decision to later consider the same conduct when rejecting the Prosecutor's application to refer Kenya's non-compliance to the ASP.

⁷¹ Appeals Judgment, para. 87.

⁷² Appeals Judgment, para. 87.

27. In its Decision, the Trial Chamber expressly found that the Prosecution's conduct had not adversely impacted on Kenya's obligation to cooperate.⁷³ In fact, the Trial Chamber held that Kenya had breached its obligations to comply. It found, (a) that Kenya's explanations for not providing the requested materials were "unhelpful" and not responsive; (b) that Kenya had completely failed to pursue alternative sources of information; (c) that Kenya had persisted in repeating the alleged "impossibility" of executing the requests, despite being provided with some flexibility on how to implement the request;⁷⁴ and (d) that Kenya had taken a general "non-cooperative stance" based on inappropriate and irrelevant considerations.⁷⁵

28. The Trial Chamber's error is further demonstrated by the fact that it incorrectly assessed the Prosecution's conduct, in the context of a non-compliance determination, in light of the principle that "the primary responsibility for investigation lies with the Prosecution".⁷⁶ However, the Appeals Chamber stressed that the primary obligation to cooperate lies with the State and not the Prosecution.⁷⁷ By considering the Prosecution's alleged dilatory conduct during its investigations, even though this did not negatively impact on Kenya's ability to cooperate, the Chamber considered extraneous factors that were irrelevant to the discharge of a State's statutory duty under Part 9.

B. Consideration of other relevant factors identified by the Appeals Chamber also leads to the conclusion that the Trial Chamber should now refer Kenya's non-compliance to the ASP

29. The Appeals Chamber provided concrete guidance on the Trial Chamber's exercise of discretion in determining whether Kenya should be referred to the ASP.⁷⁸ Consistent with that guidance, the Trial Chamber may consider the following

⁷³ Decision, para. 78. *See also* para. 90, in which the Trial Chamber found that the Prosecution's conduct does "not excuse the conduct of [Kenya]". *See further*, Appeals Judgment, paras. 88-89.

⁷⁴ Decision, para. 75.

⁷⁵ Decision, para. 77.

⁷⁶ Decision, para. 85.

⁷⁷ Appeals Judgment, para. 87.

⁷⁸ Appeals Judgment, paras. 96. 53.

factors, each of which supports the conclusion that, in the prevailing circumstances, it is appropriate to refer Kenya's non-compliance to the ASP.

30. *First, Kenya is in a position to provide concrete assistance to obtain the requested cooperation.*⁷⁹ The Trial Chamber held that it was not certain whether the identified courses of action by Kenya, would have actually enabled execution of the cooperation requests.⁸⁰ However, such certainty is not required. For the purposes of a referral under article 87(7), it is sufficient that it can be reasonably inferred that Kenya is in a position to provide the requested materials.

31. In this case, the materials requested by the Prosecution⁸¹ are clearly within Kenya's reach. In fact, in respect to four of the categories of materials, Kenya has already partially complied with the cooperation requests.⁸² Moreover, Kenya did not deny having access to the requested materials. It simply argued that the Prosecution had to provide it with further information before it could comply with the cooperation requests⁸³ and invoked legal and procedural impediments.⁸⁴ The Trial Chamber rejected these arguments. It held that Kenya's explanations for not providing the requested materials were "unhelpful" and not responsive⁸⁵ and pointed out that Kenya persisted in repeating the alleged "impossibility" of executing the requests, despite being provided with a degree of flexibility on how to implement the request.⁸⁶ The Trial Chamber concluded that Kenya took a general "non-cooperative stance" based on inappropriate and irrelevant considerations.⁸⁷

32. *Second, a referral would provide Kenya an incentive for cooperation.*⁸⁸ The Appeals Chamber noted that the ultimate goal of a referral to the ASP is to obtain

⁷⁹ Appeals Judgment, para. 53.

⁸⁰ Decision, para. 50.

⁸¹ Mr Kenyatta's tax records, vehicle records, bank records, foreign transaction records, company records, land transfer records and telephone records related to the relevant period of time (see Decision, para.48).

⁸² Decision, para. 48.

⁸³ Decision, para. 43.

⁸⁴ Decision, paras. 75-78.

⁸⁵ Decision, para. 75.

⁸⁶ Decision, para. 75.

⁸⁷ Decision, para. 77.

⁸⁸ Appeals Judgment, paras. 53, 77.

cooperation, but accepted that a referral may also be made to “otherwise” address a State’s non-cooperation.⁸⁹ In fact, the Trial Chamber found that a referral as a disciplinary measure might be warranted under certain circumstances, especially where the breach of a State’s international obligation is of a serious nature.⁹⁰

33. In this case, the Trial Chamber highlighted the “seriousness” of Kenya’s breach of its international obligations.⁹¹ It concluded that Kenya’s non-compliance compromised the Prosecution’s ability to thoroughly investigate, and impinged upon the Chamber’s ability to fulfil its mandate under the Statute.⁹² It also stressed that Kenya is fully responsible for its non-compliance.⁹³ The Prosecution submits that under these circumstances a referral, even if “value-neutral”,⁹⁴ would provide Kenya with an incentive to cooperate, in order to prevent or to mitigate any steps that the ASP may take to remedy, or otherwise address, Kenya’s non-compliance.⁹⁵ In addition, even if Kenya persisted in refusing to cooperate with the Prosecution’s investigation against Mr Kenyatta, a referral is not only intended to obtain the specific information that Kenya has failed to provide in response to the outstanding cooperation requests, but must be considered more broadly, including to foster cooperation for the sake of any proceedings arising out of investigations in the situation.⁹⁶ A referral would therefore also be appropriate by providing Kenya with an incentive to cooperate with regard to future investigations.

⁸⁹ Appeals Judgment, para. 53.

⁹⁰ Decision, para. 84.

⁹¹ Decision, para. 89.

⁹² Decision, para. 79.

⁹³ Decision, paras. 75-78, 90.

⁹⁴ Appeals Judgment, para. 53.

⁹⁵ Article 112(2)(f). *See also* ICC-ASP/10/37, 30 November 2011, paras.6,10, 12-20. This includes formal responses (successive steps by the Bureau and Assembly) and informal responses (using the good offices of the President of the Assembly). *See* Prost, Kimberly, Kreß/Prost, Article 87, in: Triffterer/Ambos, Commentary on the Rome Statute of the ICC, 3rd. Ed. 2015 (March 10, 2015), para.69, noting “that “[t]he ASP is entitled to ask for immediate compliance with the Court’s request and may condemn the State Party’s failure. It may go beyond this and consider the appropriateness of collective countermeasures, such as economic sanctions, against the non-cooperating State.”

⁹⁶ Appeals Judgment, para. 77; *see also* Decision, para. 84.

34. *Third, it would not be beneficial to engage in further consultations with Kenya on the pending Records Request, instead of a referral.*⁹⁷ While the Trial Chamber did not rule on whether there was no possibility for further cooperation,⁹⁸ and whether judicial measures have been exhausted,⁹⁹ it held that the time had come to assess the status of cooperation and to definitively rule upon the Prosecution's article 87(7) application.¹⁰⁰ As demonstrated above,¹⁰¹ more than two and a half years after the Prosecution had requested Kenya to provide certain categories of information, and eight months after the Trial Chamber had given Kenya additional time to comply with that request, the Trial Chamber decided that Kenya's approach fell short of the standard of good faith cooperation required under article 93¹⁰² and concluded that allowing further time for cooperation, without intervention at that stage, was contrary to the interests of justice in the circumstances.¹⁰³ The Prosecution submits that under these circumstances, it would not be beneficial to engage in further consultations with Kenya on the pending Records Request. Instead, Kenya should be referred to the ASP without delay.

35. *Fourth, there is no information on the record as to whether more effective external actions may be taken by actors other than the ASP, such as third States or international or regional organisations.*¹⁰⁴ In particular, during the litigation that preceded the Decision, Kenya never indicated that a third actor could facilitate its compliance with the Prosecution's cooperation requests. To the contrary, Kenya consistently invoked arguments pertaining to a lack of information or other legal and procedural impediments,¹⁰⁵ which the Trial Chamber rejected.¹⁰⁶

⁹⁷ Appeals Judgment, para. 53.

⁹⁸ Decision, para. 89.

⁹⁹ Appeals Judgment, paras. 90, 81. The Trial Chamber merely noted that the Prosecution and the Defence disagree on whether cooperation is at a "deadlock" and whether judicial measures have been exhausted (Decision, para. 89).

¹⁰⁰ Decision, para. 44.

¹⁰¹ See para. 18 above.

¹⁰² Decision, para. 78.

¹⁰³ Decision, paras. 44, 87.

¹⁰⁴ Appeals Judgment, para. 53.

¹⁰⁵ Decision, paras. 75-78.

¹⁰⁶ Decision, paras. 75-78.

36. In sum, consideration of all relevant factors identified by the Appeals Chamber should lead the Trial Chamber to conclude that it is appropriate to refer Kenya's non-compliance to the ASP.

Conclusion

37. For the reasons set out above, the Prosecution requests the Chamber: (i) to confirm its previous finding that Kenya has failed to comply with its Records Request, which prevented the Court from exercising its functions and powers under the Statute; and (ii) to refer Kenya to the ASP.



Fatou Bensouda, Prosecutor

Dated this 14th day of September 2015
At The Hague, The Netherlands