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Pénale
Internationale**



**International
Criminal
Court**

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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

**Second decision on Prosecution's application for a finding of non-compliance
under Article 87(7) of the Statute**

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 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

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 34, 54, 64, 69, 86-88, 93, 96-97, 99 and 112 of the Rome Statute ('Statute') and Regulations 108-109 of the Regulations of the Court ('Regulations'), issues the following 'Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'.

I. Procedural history

1. On 3 December 2014, the Chamber rendered its 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute' ('Impugned Decision'),¹ in which it rejected an Office of the Prosecutor ('Prosecution') application for a finding of non-compliance under Article 87(7) of the Statute against the Government of the Republic of Kenya ('Kenyan Government') ('Application').²
2. On 9 December 2014, the Prosecution filed a request for leave to appeal the Impugned Decision,³ which was granted by the Chamber on 9 March 2015.⁴
3. On 19 August 2015, the Appeals Chamber reversed the Impugned Decision and remanded it to the 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

¹ ICC-01/09-02/11-982.

² Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute against the Government of Kenya, 29 November 2013, ICC-01/09-02/11-866-Conf-Exp. A public redacted version was filed on 2 December 2013 (ICC-01/09-02/11-866-Red).

³ 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.

⁴ Decision on the Prosecution's request for leave to appeal, ICC-01/09-02/11-1004.

case, whether or not to refer the matter to the [Assembly of States Parties ('ASP')]' ('Appeals Judgment').⁵

4. Having been invited to do so by the Chamber,⁶ the Prosecution,⁷ Legal Representative of Victims ('Legal Representative')⁸ and Kenyan Government⁹ each filed further submissions on the Application, in light of the Appeals Judgment.

II. Applicable framework

5. As confirmed by the Appeals Chamber,¹⁰ the scope of a chamber's discretion under Article 87(7) of the Statute comprises both: '(i) whether to make a finding of 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] [...] 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'.¹¹

⁵ 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", ICC-01/09-02/11-1032 OA5, *see especially* paras 90-91 and 94.

⁶ Order inviting further submissions on the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, 27 August 2015, ICC-01/09-02/11-1033.

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

⁸ Victims' further submissions on the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, 15 October 2015, ICC-01/09-02/11-1035 ('Legal Representative Further Submissions').

⁹ Further submissions of the Government of the Republic of Kenya pursuant to the Trial Chamber's 'Order inviting further submissions on the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', 15 October 2015, ICC-01/09-02/11-1036 ('Kenyan Government Further Submissions').

¹⁰ Appeals Judgment, ICC-01/09-02/11-1032 OA5, paras 1, 39-44 and 55. *See also* Impugned Decision, ICC-01/09-02/11-982, para. 39.

¹¹ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 1.

6. In making these determinations, a chamber has discretion to consider whether a particular factor is relevant, and may take a factor into account more than once, provided it is assessed in a consistent manner throughout.¹²
7. The first clause of Article 87(7) of the Statute contains a ‘factual prerequisite’ that needs to be met in order for a finding of non-compliance to be made, namely the chamber must be satisfied that there is a ‘failure to comply with the cooperation request of a certain gravity’.¹³ In making this determination the Chamber should consider ‘all relevant factors, including the evidence that was required in the cooperation request and the conduct of the parties to the proceedings.’¹⁴ The Appeals Chamber, in particular, found that whether or not a deadlock has been reached with respect to the cooperation request is a ‘key factor’ in determining the existence of a failure to comply.¹⁵
8. The Appeals Chamber found that the object and purpose of Article 87(7) of the Statute is to ‘foster cooperation’.¹⁶ Factors which may be relevant in determining whether or not it is appropriate to refer the matter to the ASP, pursuant to Article 87(7), may therefore include: (i) whether external actors could provide concrete assistance to obtain the cooperation requested; (ii) whether the referral would provide an incentive for cooperation; (iii) whether further consultations with the requested State would instead be beneficial; and (iv) whether more effective actions could be taken by actors other than the ASP, such as third states or regional or international organisations.¹⁷
9. The Chamber is further guided by the Appeals Chamber’s findings regarding, in particular, the need to: (i) avoid conflation of the non-compliance

¹² Appeals Judgment, ICC-01/09-02/11-1032 OA5, paras 2 and 79.

¹³ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para 39.

¹⁴ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para 95.

¹⁵ Appeals Judgment, ICC-01/09-02/11-1032 OA5, paras 81 and 95.

¹⁶ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 51. *See also* para. 53 (describing the ‘ultimate goal’ as being to obtain cooperation).

¹⁷ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 53.

proceedings against the Kenyan Government with the (since-terminated) criminal proceedings against Mr Kenyatta; and (ii) ensure consistency in its assessment of each relevant factor.¹⁸

III. Submissions and analysis

10. Although not all submissions are summarised in this decision, the Chamber has considered all submissions received throughout the course of the litigation on the Application, as well as underlying documents and correspondence as annexed to various filings, to the extent relevant. The Chamber will first consider whether there has been a failure to comply with a cooperation request, of the requisite gravity, before turning to the appropriateness of a referral to the ASP.

a. Failure to comply with a request for cooperation, which prevents the Court from exercising its powers and functions under the Statute

Submissions

11. The Prosecution requests the Chamber to rely upon its prior factual findings and the guidance of the Appeals Chamber in determining that the Kenyan Government failed to comply with a request to cooperate, which has prevented the Court from exercising its powers and functions under the Statute.¹⁹ The Prosecution submits that the ‘particular inconsistency’²⁰ identified by the Appeals Chamber can be resolved by applying the Appeals Chamber’s guidance.²¹ In this regard, the Prosecution submits that the Chamber’s finding that it is ‘speculative’ whether the cooperation request, if implemented, would provide the Prosecution with the necessary evidence to

¹⁸ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 90.

¹⁹ Prosecution Further Submissions, ICC-01/09-02/11-1034, paras 2-6.

²⁰ Prosecution Further Submissions, ICC-01/09-02/11-1034, para. 5.

²¹ Prosecution Further Submissions, ICC-01/09-02/11-1034, para. 6.

bring the case against Mr Kenyatta to trial arises from a conflation of the proceedings, and therefore is irrelevant to the determination of Kenya's non-compliance.²²

12. The Prosecution further submits that other relevant factors - including the potential high relevance of the requested material,²³ an assessment of the conduct of the parties to the proceedings,²⁴ and the fact that judicial measures to obtain cooperation had been exhausted and consultations had reached a deadlock²⁵ - lead to the conclusion that the Chamber's prior factual finding of a failure to comply should be confirmed.²⁶
13. As a preliminary matter, the Kenyan Government submits that references in the Prosecution Further Submissions to the Prosecution's cooperation request of 24 April 2012, rather than the revised cooperation request issued in accordance with the Decision of 31 March 2014 ('Revised Request'),²⁷ constitute a 'dishonest attempt' to reopen a matter that had been previously settled by the Chamber.²⁸
14. The Kenyan Government maintains that the Chamber should affirm its earlier determination that the sufficiency of the requested material for the Prosecution's case is nothing more than speculative, which it notes arises from the Prosecution's own admission.²⁹ By reference to the Chamber's findings in the Impugned Decision, the Kenyan Government contests the Prosecution's submission that judicial measures have been exhausted and

²² Prosecution Further Submissions, ICC-01/09-02/11-1034, para. 9.

²³ Prosecution Further Submissions, ICC-01/09-02/11-1034, paras 11-13.

²⁴ Prosecution Further Submissions, ICC-01/09-02/11-1034, paras 14-15.

²⁵ Prosecution Further Submissions, ICC-01/09-02/11-1034, paras 17-19.

²⁶ Prosecution Further Submissions, ICC-01/09-02/11-1034, para. 10.

²⁷ 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, 31 March 2014, ICC-01/09-02/11-908 ('Decision of 31 March 2014').

²⁸ Kenyan Government Further Submissions, ICC-01/09-02/11-1036, paras 11-12 and 15.

²⁹ Kenyan Government Further Submissions, ICC-01/09-02/11-1036, paras 14 and 16.

consultations had reached a deadlock.³⁰ The Kenyan Government further submits that the Prosecution's conduct in failing to 'properly investigate' the case should be considered as it resulted in a cooperation request which 'did [not] assist the Court's work' or 'the progress of proceedings to trial'.³¹

15. The Legal Representative contends that the requested material 'remains critically important'.³² In that regard, the Legal Representative notes, *inter alia*, that the Chamber had previously found the Revised Request to meet the requirements of relevance, specificity and necessity.³³ The Legal Representative submits that this finding remains unaffected by the withdrawal of charges against Mr Kenyatta and the Prosecution's decision to 'temporarily suspend active investigation' in the Kenya situation.³⁴ The Legal Representative further contends that at the time of the Impugned Decision, consultations had reached a deadlock and judicial measures had been exhausted.³⁵ He submits that engaging in further consultations with the Kenyan Government would not be 'beneficial' as Kenya has had 'ample time' to provide good faith cooperation to the Court, and has not done so.³⁶

Analysis

16. The Chamber recalls that it considered the status of cooperation relating to the eight individual categories of material sought in the Revised Request, in detail, in the Impugned Decision. The Chamber hereby incorporates by reference its factual findings in paragraphs 48 to 78 of the Impugned Decision, noting that these findings remain unaffected by the Appeals Judgment. The Chamber would like to confirm, in this regard, that these findings were made

³⁰ Kenyan Government Further Submissions, ICC-01/09-02/11-1036, para. 18.

³¹ Kenyan Government Submissions, ICC-01/09-02/11-1036, para. 19.

³² Legal Representative Further Submissions, ICC-01/09-02/11-1035, para. 4.

³³ Legal Representative Further Submissions, ICC-01/09-02/11-1035, para. 6.

³⁴ Legal Representative Further Submissions, ICC-01/09-02/11-1035, paras 6-7.

³⁵ Legal Representative Further Submissions, ICC-01/09-02/11-1035, para. 10.

³⁶ Legal Representative Further Submissions, ICC-01/09-02/11-1035, para 12.

despite the Chamber's reservation regarding the manner in which the Prosecution pursued the individual cooperation request,³⁷ noting that such conduct did not negatively impact the ability of the Kenyan Government to cooperate.

17. In line with the Appeals Chamber's guidance,³⁸ the Chamber also considers whether judicial remedies had been exhausted and consultations had reached a deadlock. The Chamber recalls that in the Impugned Decision it did not specifically address this question.³⁹ In doing so now, the Chamber finds it appropriate to note certain of the procedural background. First, the Chamber recalls that the Prosecution initially sought the Kenyan Government's cooperation in relation to the requested materials in April 2012.⁴⁰ The Chamber has found that there was 'a 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 that request.⁴¹ The Kenyan Government's subsequent conduct continued to be marked by unjustifiable delay, in contravention of specific directions from the Chamber.⁴²

18. Moreover, the Chamber recalls its findings as to, *inter alia*: the 'unhelpful manner' in which certain of the Kenyan Government's explanations were framed;⁴³ the 'complete failure' on the part of the Kenyan Government to pursue alternative sources of information, despite these having been identified to it by both the Prosecution and the Chamber;⁴⁴ the lack of any

³⁷ See, for example, Impugned Decision, ICC-01/09-02/11-982, paras 52, 57, 59, 61 and 63.

³⁸ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 95.

³⁹ Impugned Decision, ICC-01/09-02/11-982, para. 89. *See also* paras 43-44.

⁴⁰ See Decision of 31 March 2014, ICC-01/09-02/11-908, para. 50.

⁴¹ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 51; Impugned Decision, ICC-01/09-02/11-982, para. 46.

⁴² See, for example, Impugned Decision, ICC-01/09-02/11-982, para. 77.

⁴³ Impugned Decision, ICC-01/09-02/11-982, para. 75.

⁴⁴ Impugned Decision, ICC-01/09-02/11-982, para. 75. *See also* paras 53 and 58.

‘meaningful steps to compel production of the requested materials’;⁴⁵ and submissions by the Kenyan Government, throughout the course of the cooperation litigation, which the Chamber found to be ‘indicative of a non-cooperative stance’.⁴⁶

19. Finally, the Chamber notes that the Kenyan Government’s submissions that cooperation was not at a deadlock were primarily based on the assertion that it could further the implementation of the Revised Request only if the Prosecution furnished it with additional information.⁴⁷ However the Chamber has determined that the status of the cooperation was not the result of insufficient information having been provided by the Prosecution.⁴⁸

20. A chamber is not required to wait indefinitely where there is a failure ‘to meaningfully take basic steps to obtain the requested material or to provide clear, timely and relevant responses’.⁴⁹ In the circumstances, noting that this situation had persisted even following a period of active judicial supervision, the Chamber concludes that judicial remedies had been exhausted and that the cooperation proceedings had reached a deadlock.

21. It is additionally noted that, despite the passage of a further 18 months and notwithstanding the Kenyan Government’s continuing statutory obligation to comply with any cooperation request from the Court,⁵⁰ it appears that no further progress has been made in implementation of the Revised Request.

22. Having so found, the Chamber now considers whether the failure to cooperate is such as to prevent the Court from exercising its functions and

⁴⁵ Impugned Decision, ICC-01/09-02/11-982, para. 76. *See also* Decision on Prosecution’s revised cooperation request, 29 July 2014, ICC-01/09-02/11-937 (‘Decision of 29 July 2014’), para. 47.

⁴⁶ Impugned Decision, ICC-01/09-02/11-982, para. 77.

⁴⁷ Impugned Decision, ICC-01/09-02/11-982, para. 43.

⁴⁸ Impugned Decision, ICC-01/09-02/11-982, paras 54, 59, 62, 67, 72 and 78.

⁴⁹ Impugned Decision, ICC-01/09-02/11-982, para. 78.

⁵⁰ Decision on the Prosecution’s request for leave to appeal, 9 March 2015, ICC-01/09-02/11-1004, para. 27.

powers under the Statute.⁵¹ The Chamber recalls, in this regard, its finding that the Kenyan Government's failure to comply with the Revised Request compromised *both*: (i) the Prosecution's ability to thoroughly investigate the charges; and (ii) the Chamber's ability to fulfil its mandate under Articles 64 and 69 of the Statute.⁵² While the Chamber referred to the Prosecution's statement on the speculative nature of its cooperation request in paragraph 79 of the Impugned Decision, the Chamber confirms that its finding was made on independent bases and therefore was not materially affected by such statement.

23. The Chamber notes in this connection that the use of the word 'Court' in Article 87(7) of the Statute implies that it is not only the functions and powers of a chamber which are being referred to. The word 'Court' is used four times in Article 87(7) of the Statute⁵³ and, although it is not necessary for present purposes to consider each of those usages, it is important from an interpretative perspective to recognise that the usage may not refer to the same entity across the article, or indeed across the Statute. For example, as the Chamber has previously noted,⁵⁴ Article 34 of the Statute provides a definition which enumerates the constituent organs of 'the Court' and, notably, includes the Prosecution. Therefore a uniform interpretation of 'Court' across the Statute in a manner which interprets it as referring only to a 'chamber' cannot be sustained. In these circumstances, the Chamber considers that the context in which the word is used is particularly important.⁵⁵

⁵¹ Article 87(7) of the Statute.

⁵² Impugned Decision, ICC-01/09-02/11-982, para. 79.

⁵³ Article 87(7): 'Where 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, 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.'

⁵⁴ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 26. *See also* generally paras 26 -31 and 33 (where the Chamber similarly considered the use of the word 'Court' in the context of Article 93 of the Statute).

⁵⁵ The Chamber additionally notes that the drafting history of Article 87(7) of the Statute is suggestive that the drafters were aware of certain ambiguity in the construction of the article, but chose not to address that. *See, for*

24. In the context of Article 87(7) of the Statute the first and second usages of the word 'Court' are referring to the request for cooperation itself made by the 'Court' and the impact on the 'Court' of a failure to comply with that request for cooperation. Consistent with its previous analysis, which the Chamber incorporates by reference,⁵⁶ the Chamber considers that the statutory framework clearly envisages requests for cooperation being made independently by the Prosecution. Further, the Prosecution has an express mandate of 'conducting investigations and prosecutions',⁵⁷ which is reiterated in the Prosecution's statutory duties in Article 54(1) of the Statute. In the Chamber's view, the failure of the Kenyan Government to comply with the Revised Request prevented the Prosecution from exercising its statutory functions, including, in particular, under Article 54(1)(a) and (b) of the Statute.
25. Moreover, the Chamber notes that a trial chamber must necessarily exercise its powers and functions, as relevant, including under Article 64 of the Statute, from the point in time at which proceedings are transmitted to it by the Presidency.⁵⁸ In line with its fact-finding mandate, the Chamber has an independent interest in the nature, quality and scope of evidence presented to it. A failure of State cooperation, in particular under Article 93 of the Statute, would prevent the Chamber from exercising its functions in the sense of Article 87(7) of the Statute.
26. In this instance, it is recalled that the Chamber established a regime of judicial oversight, which included the Chamber directing the production of the Revised Request by the Prosecution, directing compliance with the Revised Request and furnishing of the requested information by the Kenyan Government, and ruling on the Revised Request's compliance with the

example, Committee of the Whole, Report of the drafting Committee to the Committee of the Whole, 13 July 1998, A/CONF.183/C.1/L.68, pages 2-3, especially footnote on page 3.

⁵⁶ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 24-30 and 33.

⁵⁷ Article 42(1) of the Statute.

⁵⁸ Article 61(11) of the Statute.

requirements of relevance, specificity and necessity.⁵⁹ In the circumstances, the Chamber found that the failure by the Kenyan Government to comply with the request for cooperation prevented the Court from exercising its functions and powers under the Statute.

27. In light of the guidance in the Appeals Judgment, and based on the findings above, the Chamber confirms that the Kenyan Government has failed to comply with a cooperation request that has prevented the Court from exercising its functions and power under the Statute. The Chamber now turns to a consideration of whether it is appropriate to refer the matter to the ASP.

b. Appropriateness of a referral to the ASP

Submissions

28. The Prosecution submits that in deciding whether to refer the matter to the ASP the Chamber should set aside findings which, applying the Appeals Chamber's guidance, are 'not relevant' to the question of whether or not to make a referral, including, in particular: (i) findings based on a conflation of the cooperation proceedings with those against Mr Kenyatta; and (ii) the Chamber's findings regarding the Prosecution's own conduct.⁶⁰

29. The Prosecution argues that a consideration of the relevant factors leads to the conclusion that it is 'appropriate to refer Kenya's non-compliance to the ASP'.⁶¹ These factors include that: (i) Kenya is in a position to provide concrete assistance;⁶² (ii) a referral would provide Kenya with an incentive for cooperation, including in respect of future investigations;⁶³ (iii) in the circumstances, noting the length of time for which the cooperation requests have been outstanding, it would not be 'beneficial' to engage in further

⁵⁹ Decision of 31 March 2014, ICC-01/09-02/11-908, see especially para. 100; Decision of 29 July 2014, ICC-01/09-02/11-937.

⁶⁰ Prosecution Further Submissions, ICC-01/09-02/11-1034, paras 22-28.

⁶¹ Prosecution Further Submissions, ICC-01/09-02/11-1034, paras 21 and 29.

⁶² Prosecution Further Submissions, ICC-01/09-02/11-1034, paras 30-31.

⁶³ Prosecution Further Submissions, ICC-01/09-02/11-1034, paras 32-33.

consultations, rather than making a referral to the ASP;⁶⁴ and (iv) there is no indication that more effective external actions could be taken by actors other than the ASP.⁶⁵

30. The Kenyan Government submits that where a State is found to be non-compliant in relation to a particular request, it would be 'unjust and prejudicial' for a referral to the ASP to be made for the purpose of ensuring cooperation 'in future in other unrelated trials'.⁶⁶ The Kenyan Government additionally contests the Appeals Chamber's finding that a referral may be value-neutral.⁶⁷ Finally, the Kenyan Government states that, throughout the period in which the issue of cooperation has been pending, it has continued to cooperate with the Court and that the case is therefore not 'fit and proper for referral'.⁶⁸

31. The Legal Representative submits that there are no third states, or international or regional organisations, better placed than the ASP and likely to 'meaningfully' contribute to obtaining cooperation.⁶⁹ The Legal Representative argues that the 'formal procedure' at the ASP is the 'most effective option available to the Court to secure Kenya's cooperation'.⁷⁰ He further contends that the Kenyan Government's refusal to cooperate is a '*serious* violation of its international obligations'⁷¹ and that a referral would 'provide an incentive for cooperation by Kenya'.⁷²

⁶⁴ Prosecution Further Submissions, ICC-01/09-02/11-1034, para. 34.

⁶⁵ Prosecution Further Submissions, ICC-01/09-02/11-1034, para. 35.

⁶⁶ Kenyan Government Further Submissions, ICC-01/09-02/11-1036, paras 23-24.

⁶⁷ Kenyan Government Further Submissions, ICC-01/09-02/11-1036, paras 21-22.

⁶⁸ Kenyan Government Further Submissions, ICC-01/09-02/11-1036, para. 25.

⁶⁹ Legal Representative Further Submissions, ICC-01/09-02/11-1035, paras 15-21.

⁷⁰ Legal Representative Further Submissions, ICC-01/09-02/11-1035, paras 21-22.

⁷¹ Legal Representative Further Submissions, ICC-01/09-02/11-1035, para. 24.

⁷² Legal Representative Further Submissions, ICC-01/09-02/11-1035, paras 25-26.

Analysis

32. The Chamber finds the following guidance by the Appeals Chamber of particular relevance in determining the appropriateness of a referral either ‘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’:⁷³ (i) that there was a ‘patent contradiction’⁷⁴ in the Chamber’s findings in the Impugned Decision regarding the ‘importance of the evidence’,⁷⁵ and that the Chamber has to ensure consistency in its assessment of the sufficiency of evidence;⁷⁶ (ii) that the Chamber erred in its assessment of the conduct of the Prosecution⁷⁷ for the determination of whether to make a referral;⁷⁸ (iii) that the Chamber should avoid conflation of the non-compliance proceedings against the Kenyan Government with the criminal proceedings against Mr Kenyatta;⁷⁹ and (iv) that it is for this Chamber to decide on the appropriateness of referral, regardless of the withdrawal of the charges, in order 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*’ (emphasis added).⁸⁰

33. With regard to the first guidance, the Chamber notes that its reference to the Prosecution’s concession in paragraph 82 of the Impugned Decision was made in considering whether the referral would facilitate a fair trial in the case against Mr. Kenyatta, rather than in its consideration of the relevance itself of such evidence in the said case. The Chamber therefore finds that the first guidance is subsumed in substance in the third guidance. Likewise, with

⁷³ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 1.

⁷⁴ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 80.

⁷⁵ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 81.

⁷⁶ Appeals Judgment, ICC-01/09-02/11-1032 OA5, paras 80 and 90. The Chamber notes that footnote 115 of the Appeals Judgment refers to the part of the Impugned Decision analysing the appropriateness of the referral, rather than the factual prerequisite.

⁷⁷ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 90.

⁷⁸ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 89.

⁷⁹ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 90.

⁸⁰ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 77.

regard to the second guidance, the Chamber notes that its assessment of the conduct of the Prosecution in paragraphs 86 to 88 of the Impugned Decision was made for the specific purpose of considering whether referral for the purpose of sanction may be seen as compensating for any deficiency on the part of the Prosecution, rather than whether such conduct excused the non-cooperation on the part of the Kenyan Government.⁸¹

34. In line with the Appeals Chamber's first, second and third guidance above, the Chamber notes that such factors as the Prosecution's statement on the speculative nature of the cooperation request in the case against Mr Kenyatta, any potential delay of the proceedings against Mr Kenyatta caused by the referral, and its impact on a fair trial and the rights of the accused, as mentioned in paragraphs 82 to 88 of the Impugned Decision, would not be relevant considerations in assessing the appropriateness of referral. Likewise, the prosecution's conduct will not be considered adversely in this regard.⁸² Further, in line with the fourth guidance, and noting that the case against Mr. Kenyatta has been already terminated, the Chamber will consider the appropriateness of referral for the purpose of fostering cooperation more broadly for the sake of any ongoing and/or future investigations and proceedings in the Kenyan situation.⁸³

35. While the Chamber's acknowledgement of the relevance of the requested materials was solely with regard to the already terminated case against Mr. Kenyatta, the Chamber has no reason to deny its relevance for any of the ongoing and/or future investigations in the Kenyan situation. Indeed, considering the relevance of the materials sought in the Revised Request to the case against Mr. Kenyatta,⁸⁴ it is likely that such request would also be

⁸¹ Impugned Decision, ICC-01/09-02/11-982, para. 90.

⁸² Appeals Judgment, ICC-01/09-02/11-1032 OA5, para.89.

⁸³ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 77.

⁸⁴ Impugned Decision, ICC-01/09-02/11-982, para. 79

relevant for current or future investigation in the cases arising from the same situation. In any case, the Chamber finds that, in general, the lack of *bona fide* cooperation by the Government of a situation country, as shown by the Kenyan Government in this instance, may have a serious impact on the functioning of the Court in future proceedings. Therefore, notwithstanding the passage of time, and having regard to the nature of the non-cooperation at issue, the Chamber finds it appropriate for the lack of cooperation in this case to be further addressed.

36. With regard to the concrete measures to address such non-cooperation, the Chamber is guided by the above-mentioned findings of the Appeals Chamber on the factors to be considered when deciding whether to refer a matter to the ASP.⁸⁵

37. First, the Chamber acknowledges that the nature of the material sought in the Revised Request is such that external actors may not be in a position to provide concrete, practical assistance to the Kenyan Government to facilitate its provision. On the other hand, as indicated by the Chamber's finding above that judicial measures had been exhausted and the cooperation had reached a deadlock, the Chamber does not consider that oversight of further consultations with the Kenyan Government would be beneficial at this stage. The Chamber further notes that there are no particular circumstances which indicate that, in this particular case, external actors, other than the ASP, are likely to take effective actions.

38. Therefore, considering its finding above on the deadlock reached in cooperation and noting the statutory framework, in which the ASP is specifically mandated to consider questions relating to non-cooperation,⁸⁶ and in light of the guidance in the Appeals Judgment, the Chamber considers that

⁸⁵ Appeals Judgment, ICC-01/09-02/11-1032 OA5, para. 53

⁸⁶ Articles 87(7) and 112(2)(f) of the Statute.

the ASP would be best placed to address the lack of cooperation, in order to provide an incentive for the Kenyan Government to cooperate with the Court, in relation both to the Revised Request and more generally.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

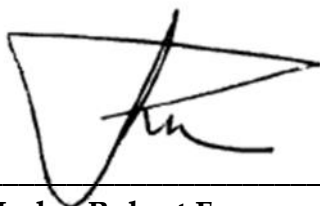
FINDS that, under Articles 86, 87(7), 93, 96 and 97 of the Statute, the Republic of Kenya has failed to: (i) comply with its statutory obligations to consult with the Court, including by not raising challenges to the legal basis of a request for cooperation within a reasonable timeframe; and (ii) take all reasonable steps to execute a request for cooperation from the Court, including by not providing clear, relevant and timely responses or taking any meaningful steps to compel production of requested information; and

TRANSMITS this decision to the President of the Court for referral pursuant to Regulation 109 of the Regulations.

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



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Date 19 September 2016

At The Hague, The Netherlands