

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. Uhuru Muigai Kenyatta - ICC-01/09-02/11
5 Presiding Judge Silvia Fernández de Gurmendi
6 Appeals Chamber Judgment
7 Wednesday, 19 August 2015
8 (The hearing starts in open session at 9.59 a.m.)
9 THE COURT USHER: All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Good morning. The Court is
13 in session.
14 Would the court officer please call the case.
15 THE COURT OFFICER: Thank you, Madam President.
16 The situation in the Republic of Kenya, in the case of The Prosecutor versus Uhuru
17 Muigai Kenyatta, case reference ICC-01/09-02/11. We are in open session.
18 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: May I ask the parties to
19 introduce themselves for the record, starting with the Prosecutor, please.
20 MS BRADY: Good morning, your Honour. Helen Brady, senior appeals counsel,
21 appearing on behalf of the Prosecution. And I'm here today with Mr Reinhold
22 Gallmetzer and Ms Priya Narayanan, both appeals counsel. Thank you.
23 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you.
24 The representatives of Kenya, please.
25 MS MUCHIRI: Thank you, your Honour. Good morning. My name is Rose

1 Makena Muchiri, Ambassador of Kenya to The Netherlands, representing the
2 Government of Kenya. With me is Ms Caroline Wamaitha, who is a State Counsel in
3 the Office of the Attorney-General. Thank you.

4 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I'm sorry. I am Judge
5 Fernández, Presiding Judge of this appeal. Today I will read the summary of the
6 Appeals Chamber's judgment on the Prosecutor's appeal against Trial Chamber V(b)'s
7 decision on the Prosecutor's application for a finding of non-compliance under Article
8 87(7) of the Statute against the Government of Kenya.

9 In today's summary, I will refer to the Trial Chamber's decision as the "Impugned
10 Decision." I will refer to the Assembly of States Parties as the "ASP" and to the
11 Government of Kenya as "Kenya."

12 Please note that only the written judgment is authoritative. The judgment will be
13 notified to the parties shortly after this hearing.

14 I will start by briefly recalling the procedural history of this appeal.

15 On 29 November 2013, the Prosecutor requested that the Trial Chamber make a
16 finding of non-compliance under Article 87(7) of the Statute against Kenya on the
17 ground that Kenya had not complied with her request for cooperation regarding the
18 production of records in relation to Mr Kenyatta.

19 On 31 March 2014, the Trial Chamber adjourned the commencement date of the trial
20 in order to allow further time for the Prosecutor and Kenya to solve certain
21 cooperation issues. In that decision, the Trial Chamber also instructed the
22 Prosecutor to submit an updated and revised version of the request for records and
23 deferred its determination under Article 87(7) of the Statute.

24 On 7 October 2014, following the submission of the revised request and further
25 consultations between the Prosecutor and Kenya, the Prosecutor informed the Trial

1 Chamber that she was renewing her request for a finding of non-compliance against
2 Kenya.

3 On 3 December 2014, the Trial Chamber issued the Impugned Decision, in which it
4 rejected the Prosecutor's Article 87(7) request for a finding of non-compliance against
5 Kenya.

6 In the Impugned Decision, the Trial Chamber determined that Kenya had failed to
7 comply with the request for cooperation and that this failure prevented the Trial
8 Chamber from exercising its functions and powers under the Statute. However, the
9 Trial Chamber found that even having made these factual determinations, it retained
10 discretion over whether or not to make a finding of non-compliance under Article 87
11 of the Statute and to refer the matter to the ASP. After considering certain factors it
12 considered relevant, the Trial Chamber decided not to refer the matter to the ASP and
13 rejected the request.

14 On that same day, 3 December 2014, the Trial Chamber also rejected the Prosecutor's
15 request for a further adjournment of the start of the trial date in relation to the case
16 against Mr Kenyatta. I will refer to this decision in today's summary as the
17 "Adjournment Decision."

18 On 9 December 2014, the Prosecutor requested leave to appeal the Impugned
19 Decision, which the Trial Chamber granted on 9 March 2015.

20 On 20 March 2015, the Prosecutor filed her document in support of the appeal, to
21 which Kenya responded on 9 April 2015.

22 On 24 April 2015, the Appeals Chamber granted a request on behalf of the victims in
23 the case against Mr Kenyatta to participate in the appeal proceedings. The victims
24 filed their submission on 5 May 2015.

25 Finally, on 8 May 2015, after having granted leave, the Africa Centre for Open

1 Governance filed observations on the appeal, to which the victims and Kenya also
2 responded.

3 Mr Kenyatta did not participate in the appeal proceedings.

4 I will now turn to the merits of the Prosecutor's appeal.

5 The Prosecutor raises two grounds of appeal.

6 First, she argues that the Chamber does have discretion in reaching its factual
7 determination of whether a State has breached its obligations under Article 87(7) of
8 the Statute and whether this non-compliance prevented the Court from exercising its
9 functions and powers. However, she argues, once these finding have been made, the
10 Chamber has no further discretion.

11 Accordingly, the Prosecutor submits that the Trial Chamber erred in law by not
12 automatically referring Kenya to the ASP when -- after having made the requisite
13 factual findings in the Impugned Decision.

14 Under the second ground of appeal, the Prosecutor argues that, if the Trial Chamber
15 had discretion not to refer Kenya to the ASP, it erred in exercising its discretion by
16 taking into account extraneous or irrelevant factors and by failing to take into account
17 or give sufficient weight to relevant factors.

18 For the reasons that follow, the Appeals Chamber grants the Prosecutor's second
19 ground of appeal and accordingly reverses the Impugned Decision and remands the
20 matter to the Trial Chamber.

21 Regarding the first ground of appeal, the Appeals Chamber considers that the
22 question to be answered is whether, as a matter of law, the scope of a Chamber's
23 discretion under Article 87(7) of the Statute is: (i) as argued by the Prosecutor,
24 limited to making a finding relevant to the factual determinations of a failure to
25 comply with a request to cooperate which has prevented the Court from exercising its

1 functions and powers under the Statute; or (ii) whether it also includes an assessment
2 or whether it is appropriate to refer the matter of the State's non-compliance to the
3 ASP or to the UN Security Council.

4 The Prosecutor submits that her interpretation of the scope of the Chamber's
5 discretion under Article 87(7) of the Statute is correct based on a plain reading of the
6 text of the provision. She also argues that policy reasons support this interpretation,
7 submitting that the Trial Chamber's approach would damage the Court's cooperation
8 structure and implies that the Court accepts non-cooperation by States.

9 The Appeals Chamber is not persuaded by the Prosecutor's arguments.

10 First, regarding the wording of Article 87(7) of the Statute, the Appeals Chamber
11 notes that this provision contains two clauses. The first clause contains a factual
12 prerequisite that must be met for a finding of non-compliance to be made, namely
13 that there is a failure to comply with a request for cooperation that is of a certain
14 gravity. In other words, there must be a failure to comply by a State and this failure
15 must be of such a degree that it prevents the Court from exercising its functions and
16 powers under the Statute.

17 If this factual prerequisite is met, the second clause of Article 87(7) of the Statute
18 provides in the relevant part that "the Court may make a finding to that effect and
19 refer the matter to the ASP."

20 At the outset, the Appeals Chamber notes the second clause of Article 87(7) of the
21 Statute is introduced by the term "may" as opposed to the term "shall." In the
22 Appeals Chamber's view, this indicates that the Chamber has discretion of whether to
23 make or not to make a finding of non-compliance under the second clause.

24 However, the Appeals Chamber notes that the combination of the terms "may" and
25 the conjunction "and" in the second clause raises the question of whether the term

1 "may" only applies to the finding of non-compliance, which would result in a referral
2 as a necessary consequence, or whether "may" refers to both aspects of the second
3 clause, which is to say that it refers to "making a finding to that effect" and "referring
4 the matter."

5 The Appeals Chamber considers that both interpretations are plausible and that,
6 under either interpretation, the Chamber retains broad discretion in its determination
7 pursuant to the second clause.

8 In this regard, the Appeals Chamber considers that, under the first interpretation, the
9 determination of the factual prerequisite of the first clause is not in itself the finding of
10 non-compliance within the meaning of the second clause, which remains at the
11 discretion of the Chamber.

12 Similarly, under the second interpretation, regardless of whether a Chamber
13 distinguishes between establishment of the factual prerequisite and the finding of
14 non-compliance, the Chamber also retains its discretion as to whether or not to
15 engage external actors to obtain cooperation by referring the matter.

16 The Appeals Chamber notes that both interpretations have been applied by different
17 Chambers in the Court. These Chambers have consistently found that they have
18 discretion under Article 87(7) of the Statute to consider the appropriateness of a
19 referral, even when they have already found that the prerequisite of the first clause
20 has been met.

21 As I have already explained, the Appeals Chamber is of the view that these
22 Chambers' interpretations are supported by the wording of Article 87 of the Statute.
23 The Appeals Chamber therefore holds that an automatic referral to external actors, in
24 this case the ASP, is not required as a matter of law.

25 The Appeals Chamber is also not persuaded by the Prosecutor's policy arguments.

1 In this regard, the Appeals Chamber considers that it is important to take into account
2 the object and purpose of paragraph 7 of Article 87 of the Statute. This paragraph is
3 a part of the system embodied in Article 87, which contains the general provisions
4 that govern requests for cooperation and the Court's powers in this respect.

5 In the Appeals Chamber's view, this final provision aims to enhance the effectiveness
6 of the cooperation regime under Part IX of the Statute, by providing the Court with
7 the possibility of engaging external actors to remedy cases of non-cooperation. Since
8 the object and purpose of the provision is to foster cooperation, the Appeals Chamber
9 considers that a referral to those particular actors was not intended to be the standard
10 response to each instance of non-compliance, but only one that may be sought when
11 the Chamber concludes that it is the most effective way of obtaining cooperation in
12 the concrete circumstances at hand.

13 Accordingly, the Appeals Chamber considers that a refusal to refer a matter of
14 non-cooperation to the ASP or the UN Security Council does not, as argued by the
15 Prosecutor, imply acceptance of non-cooperation, but may be based on a Chamber's
16 conclusion that a referral would not be an effective means to address the lack of
17 cooperation in the context of that case.

18 In conclusion, the Appeals Chamber holds that the scope of a Chamber's discretion
19 under Article 87(7) of the Statute comprises: (i) whether to make a finding of a
20 failure to comply with a request for cooperation by a State, which prevents the Court
21 from exercising its powers and functions under the Statute; and (ii) a determination of
22 whether it is appropriate to refer the matter to the ASP or the UN Security Council in
23 order to seek external assistance to obtain cooperation with the request at issue or to
24 others address the lack of cooperation by the requested State.

25 Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in law by

1 not automatically referring Kenya to the ASP once it had made a factual
2 determination of a failure to cooperate that affected the Trial Chamber's ability to
3 exercise its functions and powers under the Statute.
4 The Prosecutor's first ground of appeal is therefore rejected.
5 I will now turn to the Prosecutor's second ground of appeal.
6 Under the second ground of appeal, the Prosecutor argues that, if the Trial Chamber
7 did have discretion regarding whether to refer the matter to the ASP, it erred in the
8 exercise of its discretion by considering irrelevant factors and by failing to consider or
9 properly weigh other relevant factors.
10 More specifically, the Prosecutor argues that the Trial Chamber conflated the
11 proceedings against Mr Kenyatta with the non-compliance proceedings against
12 Kenya, which led it to take into account the following irrelevant factors: (i) the
13 impact that the referral would have on Mr Kenyatta's trial; (ii) the sufficiency of the
14 evidence against Mr Kenyatta and whether the requested cooperation could alter that
15 assessment; (iii) that judicial measures may not have been exhausted and that Kenya's
16 further cooperation was still possible; and (iv) the Prosecutor's own conduct.
17 Kenya submits that the Prosecutor has failed to show that the Trial Chamber's
18 decision not to refer Kenya to the ASP was unreasonable and argues that all of the
19 factors considered by the Trial Chamber were relevant.
20 Regarding the conflation of the two proceedings, the Appeals Chamber notes that
21 non-compliance proceedings and proceedings against an accused before the Court are
22 distinct proceedings that involve different parties, being States versus an individual
23 and have different purposes under the Statute, being State cooperation versus
24 individual criminal responsibility. Even where non-compliance proceedings
25 originate in the context of a case against an accused, the interests and rights at stake

1 are not interchangeable between these two proceedings.

2 In this regard, the Appeals Chamber notes that, despite previously correctly stating
3 that Mr Kenyatta was not a party in the non-compliance proceedings against Kenya,
4 the Trial Chamber took into account its determination that referring Kenya's
5 non-compliance would prolong the criminal proceedings against him.

6 In this regard, the Appeals Chamber notes that, in considering whether a referral was
7 appropriate in order to "further the proceedings in the main case, by securing
8 compliance with the cooperation request at issue," the Trial Chamber held that it
9 would not be "appropriate for the proceedings against Mr Kenyatta to be further
10 prolonged."

11 However, the Appeals Chamber observes that the Trial Chamber did not hold that the
12 referral would be inappropriate to secure cooperation, but instead found that the
13 question of whether the referral would assist in obtaining cooperation was moot due
14 to its determination in the Adjournment Decision not to further postpone the start of
15 the trial against Mr Kenyatta.

16 In discussing that decision, the Appeals Chamber notes that the Trial Chamber stated
17 that its decision not to refer Kenya was, quote, "without prejudice to whether a
18 request for a finding of non-compliance and referral to the ASP may be appropriate in
19 the context of any continuing investigations conducted in the Kenya situation," end of
20 quote. The Trial Chamber held, however, that "any such request would need to be
21 dealt with by way of a separate procedure before the competent Chamber."

22 The Appeals Chamber considers that a referral could have an impact on future
23 cooperation, including for ongoing investigations even if it is considered
24 inappropriate for purposes of continuing criminal proceedings.

25 Accordingly the Appeals Chamber considers that future cooperation by a requested

1 State is a relevant factor to be taken into account when deciding on the
2 appropriateness of a referral.

3 However, in the present situation, the Appeals Chamber is of the view that it is for the
4 Trial Chamber and not another Chamber to decide on the matter. Regardless of the
5 Adjournment Decision and the subsequent withdrawal of the charges against
6 Mr Kenyatta, the Appeals Chamber considers that the Trial Chamber was and
7 remains competent to decide on whether it would be appropriate to refer Kenya's
8 non-compliance to the ASP.

9 Regarding the sufficiency of the Prosecutor's evidence and whether compliance with
10 the cooperation request could change that assessment, the Appeals Chamber recalls
11 that the Trial Chamber held, when considering whether to refer the matter, that the
12 "possibility of obtaining the necessary evidence, even if the Revised Request was to be
13 fully executed, is still nothing more than speculative."

14 However, in the context of reaching its factual determination under the first clause of
15 Article 87(7), the Trial Chamber held that Kenya's non-compliance impinged upon its
16 "ability to fulfil its mandate under Article 64, and in particular, its truth-seeking
17 function in accordance with Article 69(3)."

18 The Appeals Chamber notes that Article 69(3) provides in the relevant part that "the
19 Court shall have the authority to request the submission of all evidence that it
20 considers necessary for the determination of the truth."

21 The Appeals Chamber is of the view that it is within a Chamber's discretion to
22 consider whether a particular factor affects the determination of a failure to comply
23 with a cooperation request or to refer the matter of non-cooperation, or both.

24 However, the factor must be assessed consistently throughout the decision.

25 The Appeals Chamber considers that the Trial Chamber's assessment that the impact

1 of any evidence that would be derived from the full implementation of the revised
2 request was "nothing more than speculative" clearly contradicts its finding that
3 Kenya's non-cooperation with the revised request impinged upon its truth-seeking
4 function in accordance with Article 69(3). In the Appeals Chamber's view, this
5 patent contradiction makes the first assertion unreasonable and calls into question the
6 second one.

7 Indeed, the Appeals Chamber considers that these contradictory findings raise the
8 question as to whether the Trial Chamber made a proper determination of a failure to
9 cooperate of a certain gravity, as required by the first clause of Article 87(7) of the
10 Statute. In this respect, the Appeals Chamber considers that, if the Trial Chamber
11 was uncertain about the importance of the potential evidence, it is unclear why it
12 concluded that the lack of the requested evidence prevented it from exercising its
13 functions.

14 Second, the Appeals Chamber also considers that the Trial Chamber's conflation of
15 the trial proceedings against Mr Kenyatta and the non-compliance proceedings
16 affected its consideration of whether judicial remedies had been exhausted, or
17 whether there was still a possibility that Kenya could cooperate.

18 The Appeals Chamber considers that the Trial Chamber did not make a clear finding
19 as to whether judicial remedies had been exhausted. In this regard, the Appeals
20 Chamber recalls that the Trial Chamber stated that it considered it appropriate to
21 decide on the Prosecutor's request because, quote, "allowing a further adjournment
22 would be contrary to the interests of justice under the circumstances, rather than
23 because the Chamber finds there to be no possibility of further cooperation," end of
24 quote.

25 The Appeals Chamber considers that the conclusion that a deadlock is reached with

1 regard to a cooperation request is a key factor to determine the existence of a failure
2 to comply with such a request.

3 Regarding the Prosecutor's own conduct, the Appeals Chamber considers that the
4 conduct of the requesting party, in this case the Prosecutor, may be a relevant factor if
5 the actions of the requesting party have negatively impacted the requested State's
6 ability to cooperate.

7 Furthermore, the Appeals Chamber reiterates that it is within a Chamber's discretion
8 to consider whether a particular factor is relevant for its determination on either a
9 failure to cooperate or whether it is appropriate to refer the matter of non-cooperation,
10 or both. The same factor may be relevant for both aspects and may be taken into
11 account more than once provided that the factor is assessed in a consistent,
12 non-contradictory manner.

13 In this regard, the Appeals Chamber notes that the Trial Chamber took the
14 Prosecutor's conduct into account in reaching its determination that Kenya had failed
15 to comply with a request to cooperate under the first clause of Article 87(7) of the
16 Statute. Indeed, the Trial Chamber determined that Kenya had failed to cooperate
17 "notwithstanding the Chamber's concerns regarding the adequacy of the Prosecutor's
18 approach to litigation."

19 Given that the Trial Chamber had already determined that the Prosecutor's conduct
20 had not adversely impacted the obligation of Kenya to cooperate, the Appeals
21 Chamber finds that it was contradictory for the Trial Chamber to later consider the
22 same conduct when rejecting the application to refer the matter to the ASP.

23 Accordingly, the Appeals Chamber considers that the Prosecutor's conduct was not
24 assessed in a consistent manner and the Trial Chamber therefore erred in its
25 assessment of this factor for the determination of whether to make a referral.

1 In conclusion, the Appeals Chamber finds that the Trial Chamber erred in the exercise
2 of its discretion by conflating the non-compliant proceedings -- non-compliance
3 proceedings against Kenya with the criminal proceedings against Mr Kenyatta, by
4 failing to address whether judicial measures had been exhausted and by assessing the
5 sufficiency of evidence and the conduct of the Prosecutor in an inconsistent manner.

6 The Appeals Chamber finds that these errors materially affected the Trial Chamber's
7 decision not to refer the matter of Kenya's non-compliance.

8 The Appeals Chamber is also of the view that these errors prevented the Trial
9 Chamber from making a conclusive determination on the existence of a failure to
10 comply with a request to cooperate by the Court -- to cooperate by the Court, which
11 prevents the Court from exercising its functions and powers under the Statute, as
12 required by the first clause of Article 87(7) of the Statute.

13 Accordingly, the Prosecutor's second ground of appeal is granted.

14 Having found that the Trial Chamber erred in the exercise of its discretion and
15 granted the Prosecutor's second ground of appeal, I will now turn to the requested
16 relief.

17 The Appeals Chamber notes that the Prosecutor requests that, if the second ground is
18 granted, the Appeals Chamber either make the required findings and refer the matter
19 to the ASP itself or remand the matter to the Trial Chamber with instructions.

20 The Appeals Chamber considers that, as a general matter, Chambers of first instance,
21 who are familiar with the entirety of the proceedings, are better placed to identify and
22 assess the relevant facts and circumstances in order to decide whether engaging
23 external actors under Article 87(7) of the Statute would be an effective measure to
24 foster cooperation. Furthermore, in the circumstances of the present appeal, the
25 Appeals Chamber is not able to make the necessary finding on whether or not to refer

1 the matter to the ASP in the absence of a conclusive determination by the Trial

2 Chamber of the factual prerequisite for such a referral.

3 The Appeals Chamber therefore considers it appropriate to remand the Impugned

4 Decision for the Trial Chamber to determine whether Kenya has failed to comply with

5 a cooperation request that has prevented the Court from exercising its functions and

6 powers under the Statute and decide, if that is the case, whether or not to refer the

7 matter to the ASP.

8 The Appeals Chamber has provided further instructions to the Trial Chamber in this

9 regard in its written judgment, which I will not summarise here today.

10 This concludes the summary of the Appeals Chamber's reasons for reversing the Trial

11 Chamber's decision on the Prosecutor's request for a finding of non-compliance under

12 Article 87(7) of the Statute against Kenya.

13 This also concludes today's hearing.

14 My last task is to thank the interpreters and court reporters.

15 The session is now closed.

16 THE COURT USHER: All rise.

17 (The hearing ends in open session at 10.32 a.m.)