



Original: English

No.: ICC-01/09-02/11
Date: 9 December 2014

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

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"

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Steven Kay
Gillian Higgins

Legal Representatives of Victims

Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States Representatives

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

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. In its “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute” (“Decision”),¹ the Trial Chamber found that “cumulatively, the approach of the Kenyan Government, as outlined above, falls short of the standard of good faith cooperation required under Article 93 of the Statute.” The Chamber considered that this failure had reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute” (*i.e.*, “fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute”).² Turning to the next limb of the test under Article 87(7) (“prevent[s] the Court from exercising its functions and powers”), the Chamber found that “the Kenyan Government’s non-compliance has not only compromised the Prosecution’s ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber’s ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute”.³
2. Despite these findings, the Chamber concluded that the Prosecution had failed to satisfy its burden to demonstrate that the conduct of the Government of Kenya (“GoK”) warranted a finding and referral under Article 87(7) of the Statute.⁴ It concluded that it was not “appropriate to make a referral of the matter to the [Assembly of States Parties (“ASP”)] on this occasion”.⁵
3. The Prosecution seeks leave to appeal the Decision on the following two issues (“Issues”):

¹ ICC-01/09-02/11-982.

² Decision, para.78; see also paras.72, 67, 62.

³ Decision, para.79.

⁴ Decision, paras.80 and 88.

⁵ Decision, para.90.

- (a) Whether the Trial Chamber had already made the requisite findings under Article 87(7) that the GoK failed to comply with the Prosecution's request to cooperate and thereby prevented the Court from exercising its functions and powers under the Statute, such that it ought to have referred the GoK to the ASP. In the alternative, in the event that the Trial Chamber's findings did not amount to "formal" or "judicial" findings under Article 87(7), whether it had any discretion not to enter the required finding under Article 87(7) and thereby refer the GoK to the ASP ("First Issue"); and
- (b) Even if the Trial Chamber had discretion not to enter "formal" findings under Article 87(7) and thereby refer the GoK to the ASP, whether it erred in the exercise of its discretion by taking into account or giving weight to extraneous or irrelevant considerations, and/or by failing to take into account or give sufficient weight to relevant considerations ("Second Issue").
4. These Issues arise from the Decision and meet the criteria for leave to appeal under Article 82(1)(d). As acknowledged by the Trial Chamber itself, a finding of non-cooperation under Article 87(7) is "concomitant" with a referral of the non-cooperating State to the ASP.⁶ As such, the Issues significantly impact on the fair and expeditious conduct of the cooperation proceedings between the Prosecution and the GoK. In addition, the immediate resolution of the Issues by the Appeals Chamber will materially advance the proceedings.

⁶ Decision, paras.42, 80; see also ICC-02/05-01/09-195, para.34.

Submissions

5. The correctness of a decision is irrelevant to an application for leave to appeal. The sole question is whether the Issues meet the criteria set out in Article 82(1)(d).⁷ The Prosecution refers to the merits of the Issues only to the extent necessary to demonstrate that they arise from the Decision and meet the criteria for leave to appeal.

(i) *The Issues are appealable issues that arise from the Decision*

a. *The First Issue arises from the Decision*

6. The First Issue arises from the Decision, because it relates to whether the Chamber in fact made, or was obliged to have made, findings of non-compliance under Article 87(7), and having done so, it should have proceeded to refer the GoK to the ASP. Article 87(7) provides that “[w]here 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 State Parties [...].”
7. Under Article 87(7), the Trial Chamber’s findings referred to in paragraph 1 above necessitated a referral to the ASP. Instead of making such a referral, however, the Trial Chamber adopted an incorrect two-stage analysis. It drew a distinction between the findings which it had made (which it implicitly characterised as “informal” and “non-judicial”) and “formal”⁸ or “judicial”⁹ findings to the same effect, which it declined to make. The Trial Chamber thereby avoided the automatic referral to the ASP which would

⁷ ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

⁸ Decision, para.80.

⁹ Decision, para.81: “In the Chamber’s view, a *formal* finding of non-cooperation under Article 87(7) of the Statute amounts to a *judicial* finding that a State has breached its international obligations under the Statute” (emphasis added).

otherwise have been the inevitable consequence of its findings. Instead, the Trial Chamber continued its analysis by declaring that it would “consider whether or not making a formal finding of non-compliance pursuant to Article 87(7) of the Statute is warranted [in] exercising its discretion in this regard”.¹⁰ Eventually, the Chamber concluded that the Prosecution had failed to satisfy its burden to demonstrate that the conduct of the GoK warranted a finding and referral under Article 87(7) of the Statute.¹¹ It concluded that it was not “appropriate to make a referral of the matter to the ASP on this occasion”.¹²

8. The necessary implication of this conclusion is that the Chamber was of the view that, despite its earlier conclusions of fact, it was at liberty not to enter “formal” or “judicial” findings (of non-compliance and frustration of the Court’s ability to exercise its functions and powers), which would have required the Chamber, as a matter of law, to refer the matter to the ASP.¹³ Therefore, the First Issue arises from the Decision.
9. If leave to appeal is granted, the Prosecution will argue that the Trial Chamber cannot resile from the fact that it has already made all necessary findings for the purposes of Article 87(7), namely: that the GoK failed to comply with a request to cooperate by the Court and that this prevented the Court from exercising its functions and powers under the Statute. It was thereby bound to refer the GoK to the ASP. The Chamber itself accepted that such a referral would be, as a matter of law, the inevitable consequence of a “formal” or “judicial” finding of non-compliance.¹⁴ The consequence of its

¹⁰ Decision, para.80.

¹¹ Decision, paras.80 and 88.

¹² Decision, para.90.

¹³ Decision, paras.42, 80.

¹⁴ See Decision, paras.42 and 80. Note in particular the Chamber’s reference to a finding of non-compliance and the “concomitant referral to the ASP”. See also Decision, para.90 where the Chamber entered a direct conclusion as to the appropriateness of a referral, as opposed to findings of non-compliance. See further ICC-02/05-01/09-195, para.34, where Trial Chamber found that in the event of a finding of non-compliance, it cannot but refer the matter to the ASP.

error was that, having made the necessary findings, it decided not to refer the matter to the ASP.

10. The Prosecution agrees with the Chamber that “[n]ot every instance of non-compliance with a cooperation request will constitute a failure to comply under [Article 87(7)]”.¹⁵ In particular, “where the non-compliance in question is technical or trivial in nature, such non-compliance [...] would not materially prevent the Court from exercising its function and powers under the Statute [and therefore] reach the threshold of non-compliance required by Article 87(7)”.¹⁶ As a result, the Chamber also correctly found that it has some discretion as to whether or not to enter findings of non-compliance that frustrate the Court’s ability to exercise its functions and powers.¹⁷ However, when, as in the present case, a Chamber does make such findings, then that Chamber must be considered to have already exercised its discretion. In such a case, these findings must be considered to be the formal findings which ground an ASP referral under Article 87(7). Chambers of this Court do not enter informal or non-judicial findings in their decisions.

11. The Chamber’s reliance on a precedent in the *Bashir* case, where the Pre-Trial Chamber did not refer Nigeria to the ASP, is inapposite.¹⁸ In that case, the Pre-Trial Chamber did not make a finding of non-compliance (even though the request for cooperation to arrest Mr Al-Bashir had not been complied with) because it found that the Nigerian authorities were “considering the necessary steps to be taken” to achieve compliance, but had been prevented from doing so by “the sudden departure of President Al-Bashir prior to the official end of the AU Summit.”¹⁹ In contrast, in the

¹⁵ Decision, para.40.

¹⁶ Decision, para.40.

¹⁷ Decision, para.39.

¹⁸ Decision, footnotes 117 and 118, relying on ICC-02/05-01/09-159, para.13.

¹⁹ ICC-02/05-01/09-159, para.12.

present case, the Trial Chamber, in exercising its discretion, made the necessary determinations that the GoK had failed to comply with its duties under the Statute without good excuse and that it was this failure that prevented the Court from exercising its functions and powers.

12. In the alternative, and assuming *arguendo* that the Trial Chamber's findings did not amount to the requisite findings under Article 87(7), the Prosecution will argue that, given the nature and scope of the Trial Chamber's factual conclusions in this case, the Chamber had no discretion but to enter such "formal" findings of non-compliance and thereby refer the GoK to the ASP. A finding of non-compliance under Article 87(7) naturally flows from the factual determinations that a State Party has failed to comply with its duties which impedes the Court in carrying out its functions and powers. While a Chamber has discretion to make the necessary factual determinations of non-compliance, once they are made, a "judicial" or "formal" finding corresponding to those determinations should be a matter of judicial formality. Anything else would lead to arbitrariness and inconsistencies in a decision.

b. The Second Issue arises from the Decision

13. The Second Issue also arises from the Decision. It assumes, *arguendo*, that the Trial Chamber had discretion not to enter "formal" or "judicial" findings under Article 87(7) and thereby refer the GoK to the ASP. The Second Issue involves the question of whether the Trial Chamber erred in the exercise of its discretion by taking into account or giving weight to extraneous or irrelevant considerations, and/or by failing to take account or give sufficient weight to relevant considerations.
14. The Chamber exercised its discretion in considering "whether or not making a formal finding of non-compliance pursuant to Article 87(7) of the Statute is

warranted”.²⁰ In paragraphs 80 to 89 of the Decision, it analysed a number of factors and concluded that the Prosecution had failed to satisfy its burden to demonstrate that the conduct of the GoK warranted a finding and referral under Article 87(7) of the Statute.²¹

15. If leave to appeal is granted, the Prosecution will demonstrate that the Trial Chamber erred in the exercise of any discretion it may have had under Article 87(7).²² Most, if not all, of the factors that informed the Chamber’s exercise of discretion are irrelevant. It also erred by not taking into account or giving appropriate weight to factors which should have been highly relevant to its decision. As shown below, the Chamber’s error in the exercise of its discretion affects the fairness of the proceedings.

Irrelevant factors the Trial Chamber considered or weighed

16. First, the Chamber considered whether a referral would “assist in a fair trial, including the protection of the rights of the accused [and] the integrity of the proceedings”.²³ These considerations are irrelevant because they relate to the proceedings against Mr Kenyatta and his rights in that case. They were duly taken into account in that case when the Trial Chamber rejected the Prosecutor’s request for a further adjournment and asked the Prosecution to either withdraw the charges or to commence the trial immediately, irrespective of the GoK’s non-compliance.²⁴ An ASP referral of the GoK, whose conduct the Chamber found fell below the standard of good faith cooperation expected from State Parties,²⁵ is a matter independent of the Kenyatta proceedings. This is also confirmed by the Chamber’s findings that “the question of whether or not a referral might progress cooperation in the

²⁰ Decision, para.80.

²¹ Decision, paras.80 and 88.

²² See decision of the Appeals Chamber setting out the required standard for such an error: ICC-02/04-01/05-408 OA3, para.81.

²³ Decision, paras.80, 82.

²⁴ ICC-01/09-02/11-981.

²⁵ Decision, paras.78, 72, 67, 62.

context of this case [is] moot in the circumstances”,²⁶ and that the matter may be referred to the ASP at a later stage independently of any new charges against Mr Kenyatta.²⁷

17. Second, the Chamber also wrongly considered that it is “nothing more than speculative” that the requested information, if provided, would allow the Prosecution to establish the guilt of Mr Kenyatta beyond reasonable doubt. This factor is irrelevant, chiefly because under this standard no State Party could ever be referred to the ASP for non-compliance of a cooperation request seeking information or evidence unless the specific information or evidence requested was known before the State has provided it—something which is not practical or feasible in most cases. In addition, this factor also wrongly suggests that a referral to the ASP would only be justified if the requested information or evidence in and of itself would allow the Prosecution to meet the beyond reasonable doubt threshold. If this were true, any failure to cooperate at the beginning of an investigation or with requests to cooperate other than by providing key evidence—however egregious—would not result in a referral.

18. Third, the Chamber erroneously took into consideration that the “seriousness of the breach” of the GoK’s international obligations “might make the prospect of further cooperation less probable.”²⁸ The logic of this factor is counter to the previous one. According to this logic, only minor breaches could be referred to the ASP, while a State Party such as the GoK, responsible for serious breaches, would be spared the consequences of its non-compliance so long as it stresses that it does not intend to cooperate even if referred to the ASP. This consideration undermines the Chamber’s

²⁶ Decision, para.83.

²⁷ Decision, para.83.

²⁸ Decision, para.89.

own finding that a referral as a disciplinary measure might be warranted, especially in cases of serious breaches of a State's international obligations.²⁹

19. Fourth, the Trial Chamber erred in considering that the Prosecution failed to expeditiously, effectively and thoroughly follow up with the GoK authorities on its request for cooperation.³⁰ This factor was equally irrelevant to the Chamber's determination on whether to refer the GoK to the ASP, as demonstrated by the following five points:

- *Unsupported findings of prosecutorial delay:*³¹ The record demonstrates that the Prosecution acted with diligence in trying to obtain the GoK's cooperation, including through multiple meetings, timely correspondence and regular reminders when the GoK failed to respond to the Prosecution's correspondence.³²
- *Impact on the "interests of justice and the integrity of the proceedings"*³³ on the *Kenyatta proceedings has been remedied:* any purported delay by the Prosecution relates primarily to the proceedings against Mr Kenyatta, which was adequately addressed in the Chamber's separate decision that rejected the Prosecution's request for a further adjournment.³⁴ Therefore, it should not have been considered a reason not to refer the GoK to the ASP.
- *Impact on the cooperation proceedings is irrelevant to the question of referral:* Any purported prosecutorial delay is only relevant to a factual determination on whether the conduct of the GoK actually amounts to a

²⁹ Decision, para.84.

³⁰ Decision, paras.85-88.

³¹ Decision, paras.87-88.

³² The Prosecution's efforts to secure the GoK'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-01/09-02/11-911-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 22 September 2014 (ICC-01/09-02/11-940, paras.4-21).

³³ Decision, para.88.

³⁴ ICC-01/09-02/11-981.

failure to cooperate.³⁵ However, once non-cooperation was established, it is irrelevant to the question of referral. Non-referral of the GoK to the ASP cannot be a remedy for any such delay as it addresses neither the purported delay's cause nor its consequence. The Decision has the absurd result that while the Prosecution is penalised for its purported delay in following up legitimate cooperation requests, the GoK's established failure to cooperate with those requests remains unaddressed.

- *Reversal of the burden under Article 93(3):* By giving this factor any weight, the Trial Chamber effectively reversed the burden under Article 93(3). Under that provision, a requested State that believes that it is unable to execute a request for cooperation must follow up "promptly" and consult with the Court to try to resolve the matter. However, according to the Decision, it is the Prosecution who must follow up in the most expeditious and effective way to ensure that its cooperation request can be executed with all its force, including through a potential referral under Article 87(7).
- *The Chamber's unsupported and contradicted speculation:* The Chamber's speculation that the "primary objective of pursuing the cooperation request" may have been anything else but to "actually obtain the requested materials"³⁶ is unsupported and indeed contradicted by the Trial Chamber's findings elsewhere in the Decision.³⁷

Relevant factors that the Trial Chamber did not properly consider or weigh

20. If leave to appeal is granted, the Prosecution will also argue that the Trial Chamber in exercising its discretion failed to consider or to give appropriate

³⁵ The Trial Chamber reached this conclusion at paragraphs 78, 72, 67 and 62 of the Decision.

³⁶ Decision, para.88.

³⁷ See for instance, Decision, para.79.

weight to a several critical and relevant factors. These include the fact that the Chamber accepted that the GoK did not act in good faith throughout the cooperation proceedings.³⁸ The Chamber likewise failed to properly assess the question of whether a referral “would promote the functions of the Court”³⁹ and “the wider interests of justice”.⁴⁰ These factors should have been assessed differently given the Chamber’s own findings elsewhere in the Decision⁴¹ and the fact that the GoK’s non-cooperation remained unaddressed in this part of the Chamber’s analysis. Finally, when deciding not to refer the GoK to the ASP, the Chamber did not properly consider its finding that the Prosecution can continue the investigations and bring new charges against Mr Kenyatta,⁴² and accordingly what would be required to enable the Prosecution to do so.

(ii) The two appealable Issues meet the criteria for leave to appeal:

21. Both Issues hinge on the Chamber’s denial of the ASP referral and cumulatively meet the Article 82(1)(d) criteria.
22. At stake here are the cooperation proceedings against the GoK. The Trial Chamber’s failure to immediately refer the GoK to the ASP compromises the fairness and expedition of these proceedings: it has the effect of turning a blind eye to the GoK’s established sub-standard conduct in executing the Prosecution’s co-operation requests and therefore compounding the GoK’s dilatory and obstructive tactics in executing all future co-operation requests. Likewise, the Appeals Chamber’s immediate resolution of these Issues is essential to verify the correctness of the legal basis relied upon by the Trial Chamber to deny the ASP referral. Further, an appellate determination of

³⁸ Decision, para.78.

³⁹ *Contra*, Decision, para.80.

⁴⁰ *Contra*, Decision, paras.80, 88.

⁴¹ See for instance, Decision, para.79.

⁴² Decision, para.83.

the need for an ASP referral at this stage will help prevent the GoK's continued non-compliance, and its repercussions on the proceedings.

- a. The two Issues significantly affect the fair and expeditious conduct of the proceedings*

23. The Trial Chamber in the Decision acknowledged the unfairness of the proceedings to the Prosecution and the Court in general. Following a cumulative assessment of the GoK's consistent and ongoing failure to co-operate, the Chamber found that the GoK's non-compliance "compromised the Prosecution's ability to thoroughly investigate the charges" and "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."⁴³ This unfairness has a deleterious impact on the ongoing cooperation proceedings.

The Cooperation Proceedings

24. It would be incorrect to argue that "the proceedings" for the purpose of this appeal is the now-withdrawn prosecution of Mr Kenyatta. The relevant proceedings for this appeal are those between the Prosecution and the GoK concerning the GoK's failure to comply with its statutory obligations. Those proceedings are separate and apart from the case against Mr Kenyatta and are unaffected by the withdrawal of the charges against him. As the Decision recognises, the outcome of the Kenyatta prosecution does not prevent litigation regarding the GoK's failure to comply with its obligations to the Court.⁴⁴ Accordingly, any argument suggesting that leave to appeal cannot be granted because the case against Mr Kenyatta has now been withdrawn is incorrect.

⁴³ Decision, para.79.

⁴⁴ Decision, para.83.

25. The cooperation proceedings between the Prosecution and the GoK are significantly affected by the impugned Decision. Certain co-operation issues addressed in these proceedings are limited to the GoK and the Prosecution, and are *ex parte* to the Kenyatta Defence.⁴⁵ The Trial Chamber has clarified that the Kenyatta Defence and the Legal Representatives for the Victims are not a party to the co-operation request.⁴⁶ Neither is the GoK a party to the case against Mr Kenyatta in which Mr Kenyatta appeared as a private citizen accused of crimes, preserving the distinct nature of the two proceedings.⁴⁷ Indeed, on this basis, the Chamber has conducted separate hearings for the cooperation proceedings and the judicial proceedings against Mr Kenyatta on several occasions.⁴⁸ Further, it has acknowledged as much in its Decision. It found that the decision on the referral was “without prejudice to whether a request for a finding of non-compliance and referral to the ASP may be appropriate in the context of any continuing investigations conducted in the Kenya situation [...]”, which would be dealt with by way of “separate procedure before the competent chamber.”⁴⁹
26. The two Issues and the resulting denial of an immediate ASP referral significantly affect the fairness of these cooperation proceedings. While the Chamber recognised that a referral could “enhance the work of the Court by, for example, promoting future cooperation, or cooperation more generally,” it failed to properly consider the impact of the GoK’s continuing

⁴⁵ See ICC-01/09-02/11-T-30-ENG, p.2 line 10-p.4 line 9.

⁴⁶ See ICC-01/09-02/11-T-30-ENG, p.4 lines 6-9, where the TC stated “[w]e are aware that the Defence and Legal Representative were not party to that co-operation request, or, save to the extent that counsel to the provision of certain items may have been requested from the accused, to any of the discussions that have subsequently taken place in relation to it.”

⁴⁷ See ICC-01/09-02/11-T-28-ENG, p.27 lines 2-9 (Status Conference of 13 February 2014), where the GoK confirmed that it was not a party to proceedings against Mr Kenyatta.; ICC-01/09-02/11-T-32-ENG (Status Conference of 8 October 2014), p.3 lines 20-24, where the Trial Chamber confirmed Mr Kenyatta’s presence as a private individual, and not as the head of state of a State Party.

⁴⁸ See ICC-01/09-02/11-T-30-ENG, p.2 lines 15-17 (Status Conference of 9 July 2014, referring to separate *ex parte* hearings between the Prosecution and the GoK on co-operation matters); See generally ICC-01/09-02/11-T-31-ENG, Status Conference in the case against Mr Kenyatta (7 October 2014); ICC-01/09-02/11-T-32-ENG, Status conference in the case against Mr Kenyatta (8 October 2014)

⁴⁹ Decision, para.83.

non-cooperation despite its unanimous finding of the egregious nature of the GoK's sub-standard conduct.⁵⁰ Failing to report the GoK to the ASP now effectively creates a significant disincentive for it to co-operate with the Court and substantially diminishes any possibility that any such cooperation will be forthcoming. Essentially, the failure to refer to the ASP gives an unintended fillip to the GoK's unrelenting non-cooperation, defeating the very purpose of the present and future cooperation proceedings. The Decision fails to recognise that the ASP referral is the only effective remedy available to the Court in the face of persistent non-cooperation in the *Kenya* situation. In doing so, it unintentionally emboldens the GoK in its obstruction of the proceedings and deprives the Prosecution of any remedy. Indeed, the Chamber was itself seriously concerned that certain aspects of the GoK's approach to co-operation "might make the prospect of further co-operation less probable."⁵¹

27. Therefore, although the Chamber recognised the possibility of future ASP referrals in the *Kenya* situation "without prejudice",⁵² this finding is in vain when the prejudice to the Prosecution remains tangible and significant. Equally, the Chamber's failure to refer the GoK's sub-standard and demonstrated lack of good faith conduct to the ASP dilutes and negates the statutory framework for co-operation (Part 9 of the Statute) and denies the Court, and the State Parties who negotiated and put this framework into place, a remedy to preserve and protect the Statute.

28. Denying the ASP referral also significantly impacts the expedition of the cooperation proceedings. The pending stalemate between the Prosecution and the GoK on cooperation matters, despite the Prosecution's compliance

⁵⁰ Decision, paras.78-79, 84.

⁵¹ Decision, para.89. See also *inter alia* Decision, para.77, where the Chamber noted the GoK's "non-cooperative stance premised on factors which the Chamber considers inappropriate and irrelevant considerations in the sole context of the co-operation."

⁵² Decision, para.83.

and the Chamber's own directions,⁵³ can only now be overcome by reporting the matter to the ASP. Article 112(f) empowers the ASP to consider questions relating to non-cooperation pursuant to Articles 87(5) and (7).⁵⁴ The ASP has a range of political and diplomatic measures at its disposal to respond to situations of non-cooperation,⁵⁵ while the Court likely has no further measures to effectively combat the GoK's dilatory, obstructionist and obfuscatory tactics. Foreclosing consideration of the ASP's remedies negatively impacts the expedition of the proceedings.⁵⁶ The Trial Chamber's findings of the GoK's sub-standard conduct, non-cooperative stance and "less probable" further co-operation⁵⁷ only demonstrates the impact on the expedition of the proceedings.

b. The Appeals Chamber's immediate resolution of the two Issues may materially advance the proceedings

29. The Appeals Chamber's immediate resolution of the two Issues would materially advance the cooperation proceedings.

30. An appellate determination of the matter is required at this stage because "a wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process."⁵⁸ Determining the correct application of Article 87(7) is critical to the cooperation proceedings. Any error on the applicable law will not only escalate the GoK's degree of non-compliance, but also erode the statutory basis for State Party co-operation. The Appeals Chamber is required to

⁵³ See for example, Decision, para.77, where the GoK failed to obey the Trial Chamber's directions and displayed a non-cooperative stance on several occasions.

⁵⁴ Article 112(f), Statute.

⁵⁵ 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).

⁵⁶ ICC-02/04-01/05-20-US-Exp, para.36, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

⁵⁷ Decision, paras.74-79, 89.

⁵⁸ ICC-01/04-168, para.16.

concretely determine the extent of the Chamber's discretion, if any in this case, to make an Article 87(7) finding, particularly when the GoK's non-compliance falling below the threshold for good faith co-operation and frustration of the proceedings has been proven. In these circumstances, absent an appellate determination, the proceedings will not be advanced but on the contrary will be set back."⁵⁹

31. An appellate resolution of the matter is also imperative to give teeth to the Trial Chamber's own findings. Although the Chamber found that further cooperation proceedings and the bringing of fresh charges against Mr Kenyatta were "without prejudice", these findings are rendered futile by the GoK's persistent non-compliance.⁶⁰ In the circumstances, any cooperation proceedings are all but precluded, or at least hampered to such a degree that they are likely ineffective. Both Issues require an immediate appellate determination to avoid the pernicious repercussions of the Trial Chamber's erroneous decision, i.e., the continued non-compliance on the GoK's part absent an immediate referral to the ASP.

32. Finally, corrective action by the Appeals Chamber will also ensure that any derivative or subsequent proceedings in the Kenya situation follow the right course,⁶¹ and are guided by clear principles as to the cooperation duties of any State Party and the legal consequences of non-compliance. As the Appeals Chamber has held, "[t]he term 'proceedings' [...] is not confined to the proceedings at hand but extends to proceedings prior and subsequent thereto."⁶² For all these reasons, the Appeals Chamber's immediate resolution of the two Issues would materially advance the proceedings.

⁵⁹ ICC-01/04-168, para.16.

⁶⁰ See paras.25-27 above.

⁶¹ ICC-01/04-168 OA3, para.15.

⁶² ICC-01/04-168 OA3, para.12.

Relief Sought

33. For these reasons, the Prosecution requests the Trial Chamber to grant it leave to appeal the Decision on the above two Issues.



Fatou Bensouda, Prosecutor

Dated this 9th day of December, 2014
At The Hague, The Netherlands