

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-02/11

Date: 5 January 2015

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Corrected version of
'Observations of the Government of the Republic of Kenya pursuant to
"Order requesting observations from the Government of Kenya on the
Prosecution's leave to appeal request" dated 22 December 2014, ICC-01/09-
02/11-992**

Source: Government of the Republic of Kenya

Document to be notified in accordance with Regulation 31 of the
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I. INTRODUCTION

1. The Government of the Republic of Kenya hereby humbly makes the following observations to the *'Prosecution's application for leave to appeal the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"'*¹ ('Request for leave') pursuant to Trial Chamber V(B)'s invitation for observations from the Government of the Republic of Kenya as particularly set out in the *'Order requesting observations from the Government of Kenya on the Prosecution's leave to appeal request'*² ('the Chamber's Order of 10 December 2014').

II. RELEVANT BACKGROUND

2. On 3 December 2014 Trial Chamber V (B) ('the Trial Chamber / 'Chamber ') issued its *'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'*³ ('Decision of 3 December 2014') in which it rejected the application of the Office of the Prosecutor ('Prosecution') for a finding, pursuant to **Article 87(7)** of the Rome Statute, that the Republic of Kenya 'has failed to comply with the Prosecution's request to produce financial and other records of the

¹ (Public) ICC-01/09-02/11-985, 9 December 2014.

² (Urgent Public) ICC-01/09-02/11-986, 10 December 2014.

³ (Public) ICC-01/09-02/11-982, 3 December 2014.

Accused'⁴ and thereby requested the Trial Chamber to refer the matter to the Assembly of States Parties ('the Assembly').

3. On 9 December 2014 the Prosecution filed its Request for leave to appeal the Trial Chamber's Decision of 3 December 2014.
4. On 10 December 2014 the Trial Chamber issued its Order inviting the Government of the Republic of Kenya to make observations, if it so wished, on the Prosecution's Request for leave.⁵

III. OBSERVATIONS

5. At the outset, the Government of the Republic of Kenya observes that the Prosecution's Request for leave, in as it relates to the Trial Chamber's exercise of its discretion under **Article 87(7)** of the Rome Statute ('the Statute') is based on an erroneous interpretation of the jurisdiction of the Court as set out in the Statute and the International Criminal Court (ICC) Rules of Procedure and Evidence ('the Rules').
6. The discretion of the Trial Chamber to make a referral of the matter to the Assembly is totally unfettered by the Statute and the Rules. In particular, **Article 87(7)** of the Statute is abundantly clear and reads thus:

'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,

⁴ (Public) ICC-01/09-02/11-866, 2 December 2013.

⁵ Chamber's Order of 10 December 2014, p. 3.

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'

At no point does the above-set out provision make it a condition for the Court, that is, the Chamber, in exercising its discretion to refer a matter to the Assembly, to confer with any other organ of the Court.

7. It is clear from a plain reading of the Statute that its drafters intended that the Trial Chamber should enjoy judicial autonomy to make its decision free of external influence (including that from other organs of the Court) and exercise its discretion independently only subject to the lawful limits set in order to curb mischief and uphold justice and the rule of law.

International law jurisprudence on the exercise of judicial discretion is now well established and the Government of the Republic of Kenya wishes to draw the attention of the Trial Chamber to the judgement of the ICC Appeals Chamber ('Appeals Chamber'), that is, '*Judgement on the appeal of the Defence against the "Decision on the admissibility of the case under article 19(1) of the Statute" of 10 March 2009*'⁶. In this judgment the Appeals Chamber, referring to a Pre-Trial Chamber's exercise of discretion under the Statute, stated that '*the Appeals Chamber will interfere with a discretionary decision only under limited conditions*'.

⁶ The Prosecutor v. Joseph Kony, Vincent Oti, Okot Odhiambo, Dominic Ongwen, *Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19(1) of the Statute" of 10 March 2009* (Public) ICC-02/04-01/05-408, 16 September 2009,

In determining whether the Trial Chamber correctly exercised its discretion, the Appeals Chamber will consider whether the Trial Chamber decision was:⁷

- i. 'based on an erroneous interpretation of the law';
- ii. based on a 'patently incorrect conclusion of fact'; or
- iii. 'so unfair or unreasonable as to constitute an abuse of discretion'.

The ICTY Appeals Chamber noted that '*[a]bsent an error of law or a clearly erroneous factual finding, then, the scope of appellate review is quite limited.*'

It is the submission of the Government of the Republic of Kenya that the Prosecution, in the present circumstances, has not demonstrated any of the foregoing three elements.

8. Moreover, the Appeals Chamber set out the standard of review as established in the International Criminal Tribunal of the Former Yugoslavia (ICTY) case of *Prosecutor v. Slobodan Milosevic*⁸ wherein the ICTY Appeals Chamber stated that in reviewing the exercise of discretion, 'the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but rather "whether the Trial Chamber has correctly exercised its discretion in reaching that decision"⁹.

⁷ See note 6, para. 80.

⁸ *Slobodan Milosevic v. Prosecutor, Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Counsel*, (Public) Case No. IT-02-54-AR 73.7, 1 November 2004.

⁹ See note 6, para. 81.

9. The Prosecution's contention that 'the Chamber had no discretion but to enter such "formal" findings of non-compliance and thereby refer the GoK to the ASP'¹⁰ is totally unsupported by the evidence or the law, and disregards the independence of the Court as a judicial organ and its broad discretionary mandate to make orders on a case by case basis that meet the ends of justice.

10. The Government of the Republic of Kenya submits that in arriving at its Decision of 3 December 2014, the Trial Chamber exercised its discretion, that is, in opting not refer the matter of cooperation by the Republic of Kenya on requests by the Prosecution to the Assembly, legally and judiciously and that the Prosecution's Request for leave is untenable and unmeritous as the Prosecution has failed to demonstrate any illegality or irregularity in the exercise of the Court's discretion.

11. The Trial Chamber properly directed itself to the evidence and the law in finding that the Prosecution was unprepared and unable to competently, diligently and timeously conduct a credible prosecution five years after the commencement of proceedings.

¹⁰ Request for leave, para. 12.

12. The Trial Chamber was quickly able to decipher the Prosecution's claim of non-cooperation and application for a referral of the Republic of Kenya to the Assembly for what it really was, that is, a finger-pointing exercise aimed at apportioning blame on the Republic of Kenya for the Prosecution's inability to conduct competent investigations and commence trial after spending several years and immense resources in the conduct of the proceedings in the present case.

13. The Chamber's Decision of 3 November 2014 simply put to rest the unending charades of the Prosecution and time-buying tactics framed as allegations of non-cooperation by the Republic of Kenya. In addition, the Decision of 3 November 2014 spared the Assembly of the agony and loss of invaluable and irrecoverable time in engaging in the resolution of a matter masked as an issue of cooperation while in reality is a ploy for buying more time for the Prosecution to contemplate and make its way out of the mess it put itself in through shoddy investigations, by heaping the blame for the collapse of its case on the Republic of Kenya. In so doing, the Prosecution seems to hope for vindication in its expenditure of immense time and resources generously allocated by the Assembly, which Kenya is a complaint member of, in its incompetent conduct of proceedings in the present case.

14. Moreover, the Government of the Republic of Kenya wishes to observe that the Prosecution's claim that the Trial Chamber

considered irrelevant factors in arriving at its Decision of 3 November 2014, is baseless and devoid of any truth or merit. Particular reference is made to the following claims:

'17. ...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 [Assembly] 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.

19. ...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. This factor was equally irrelevant to the Chamber's determination on whether to refer the GoK to the [Assembly]...'

In this respect, the Government of the Republic wishes to observe that, contrary to the Prosecution's assertions, it was relevant and even essential for the Trial Chamber to consider the relevance and importance of the evidence the Prosecution sought from the Government of the Republic of Kenya for the following reasons:

Firstly, it is unjust, unfair and an abuse of process to keep engaged the time and resources of the Court around a case, which on the Prosecution's own recorded admission,¹¹ has no prospects even with the implementation of all items in the Revised Request, of proceeding

¹¹ Decision of 3 November 2014, paras. 20 and 82.

to trial owing to the fact that it is weak and remains below the required evidentiary threshold of criminal cases almost five years after investigations were commenced; and almost four years after charges were confirmed. Moreover, it is an abuse of the Court process and a waste of the Court's time for the Prosecution to insist on cooperation from the Government of the Republic of Kenya in implementing requests that are vague owing to the Prosecution's inability to specifically ascertain the relevance and necessity of the Revised Request. This is even after the Trial Chamber specifically directed the Prosecution to revise its request in tandem with the tripartite principles of relevance, specificity and necessity as set out in its decision of 31 March 2014.¹²

Secondly, the Prosecution should not be allowed to misuse the forum of the Assembly to present frivolous complaints for solutions, that is, what the Decision of 3 December 2014 refers to as full execution of the Revised Request,¹³ that the Prosecution has stated will not assist its case in any way. Considering that the Prosecution has been 'competently' and 'diligently' investigating the case for almost five years, by this time, it ought to have a case ready for trial, and not the numerous adjournments it has previously sought; and firmly established the particular relevance and necessity of the information and records sought in the Revised Request. The Prosecution ought not

¹² The Prosecutor v. Uhuru Muigai Kenyatta, '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' (Public) ICC-01/09-02/11-908, 31 March 2014.

¹³ Decision of 3 December 2014, para. 82.

to be trading blame or making a last minute effort aimed at manipulating the forum of the Assembly to outsource the responsibility to investigate its own case to the Government of the Republic of Kenya. The primary responsibility to investigate and ready a case for trial, which the Prosecution by its own admissions above has failed to do, lies with the Prosecution.

15. Moreover, what the Prosecution refers to as 'persistent non-cooperation in the *Kenya* situation' at paragraph 26 of its Request for leave are the repeated relentless and specific requests to the Prosecution to provide the Government of the Republic of Kenya with sufficient information as per the law and procedures in Kenya in order for it to execute the Revised request in accordance with national law and procedures of the Republic of Kenya in keeping with **Article 93(1)** of the Rome Statute, which requests were not met with specific responses but with further generalities.

IV. RELIEF REQUESTED

16. The Government of the Republic of Kenya submits that every litigation should come to an end and that the issue of cooperation between the Government of the Republic of Kenya and the Prosecution has been substantially ventilated by both parties with numerous documents and extensive oral arguments before the Trial Chamber and the Trial Chamber has arrived on a final decision on

the issue that it is mandated by law to determine in its utmost discretion.

Consequently, the Government of the Republic of Kenya requests the Trial Chamber to dismiss the Prosecution's Request for leave as it is frivolous, vexatious, unwarranted and an abuse of the process of the Court.

Respectfully submitted



Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 5 January 2015

at Nairobi, Kenya