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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

Prosecution's response to the "Observations of the Government of Kenya pursuant to the 'Order requesting observations from the Government of Kenya on the Prosecution's leave to appeal request'"

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 observations¹ on the Prosecution's application for leave to appeal² the Trial Chamber's non-compliance decision under article 87(7) of the Rome Statute ("Statute"),³ the Government of Kenya ("GoK") makes no suggestion that the issues raised in the Prosecution's Leave Application do not arise from the Decision or that they do not meet the criteria under article 82(1)(d) of the Statute. These are the questions that the Trial Chamber must consider in deciding whether to grant leave.
2. Instead, the GoK challenges the merits of the issues arising from the Decision. Its Observations also demonstrate that the GoK misunderstands the Decision, which is an additional reason warranting appellate intervention.
3. Finally, the Decision is inconsistent with a recent decision of Pre-Trial Chamber I to refer Libya to the UN Security Council pursuant to article 87(7).⁴ In light of these inconsistencies, immediate intervention by the Appeals Chamber "will settle the matter[s] posing for decision through its authoritative determination".⁵

Submissions

The GoK challenges the merits of the issues

4. Instead of addressing whether the issues raised in the Prosecution's Leave Application meet the criteria under article 82(1)(d), the GoK challenges the merits of those issues⁶ and argues that the Prosecution has not demonstrated any error, which, according to the Court's jurisprudence on the standard of

¹ ICC-01/09-02/11-992-Corr ("Observations").

² ICC-01/09-02/11-985 ("Leave Application").

³ ICC-01/09-02/11-982 ("Decision").

⁴ ICC-01/11-01/11-553.

⁵ ICC-01/04-168 OA3, para.14.

⁶ Observations, paras.6-11, 14.

review on appeal, would merit the corrective intervention by the Appeals Chamber.⁷

5. These submissions on the merits are premature, as 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).⁸ If leave is granted the GoK will be given an opportunity to make these arguments and to participate in the litigation on the merits of the issues in due course. Granting the Prosecution's Leave Application is a precondition for these arguments to be properly raised before the Appeals Chamber.

The GoK misunderstands the Decision

6. The GoK's Observations also demonstrate that it misunderstands the Decision. The Decision addresses the question of the GoK's failure to comply with a request to cooperate pursuant to article 87(7), as well as the consequences of the GoK's failure. Since the Decision is primarily directed at the GoK, the patent misunderstanding of the Decision by the GoK undermines the purpose of the Decision and therefore further necessitates immediate appellate intervention, which would "remov[e] doubts about the correctness of [the Decision and provide] a safety net for the integrity of proceedings."⁹
7. For instance, the GoK submits that the Trial Chamber in its Decision was able to "decipher the Prosecution's claim of non-cooperation and application for a referral [as] a finger-pointing exercise aimed at apportioning blame to the [GoK] for the Prosecution's inability to conduct competent investigations [...]".¹⁰ This is not what the Decision suggests at any point. To the contrary, the Trial Chamber first and foremost concluded

⁷ Observations, paras.7-10.

⁸ ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

⁹ ICC-01/04-168 OA3, para.15.

¹⁰ Observations, paras.12-14.

that “cumulatively, the approach of the [GoK] has reached the threshold of non-compliance required under the first part of Article 87(7) of the Statute”.¹¹ The Chamber also found that “[the GoK’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”.¹²

8. The GoK also incorrectly reiterates that the Prosecution has failed to “provide [it] 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 [...]”¹³ and argues that the Prosecution’s requests for cooperation were too vague for them to be complied with.¹⁴ In so doing, the GoK disregards that these arguments have been dismissed by the Trial Chamber in its Decision, when concluding that the GoK’s non-cooperation “is not simply an issue of capacity, of practical or administrative barriers or a result of insufficient information having been provided by the Prosecution”.¹⁵
9. The GoK’s misunderstanding of the Decision is further evidenced by its submission that the Prosecution “ought not to be [...] manipulating the forum of the [ASP] to outsource the responsibility to investigate its own case to the [GoK]”.¹⁶ This argument disregards the Trial Chamber’s key finding in the Decision that the GoK’s failure to cooperate with the Court “compromised the Prosecution’s ability to thoroughly investigate the charges”.¹⁷

¹¹ Decision, para.78.

¹² Decision, para.79.

¹³ Observations, para.15.

¹⁴ Observations, para.14.

¹⁵ Decision, paras.54, 59, 62, 67, 72.

¹⁶ Observations, para.14.

¹⁷ Decision, para.79.

Inconsistency with a recent decision under article 87(7) by Pre-Trial Chamber I

10. The Trial Chamber, having concluded that the GoK failed to comply with its duty under the Statute and that this prevented the Court from exercising its functions and powers,¹⁸ considered a number of factors that are extraneous or marginally relevant to the question of non-cooperation to determine whether to enter a “formal” or “judicial” finding to that effect and to refer the GoK to the ASP.¹⁹ Conversely, Pre-Trial Chamber I, in a recent decision to refer Libya to the UN Security Council pursuant to article 87(7), held that “a finding of non-compliance under article 87(7) of the Statute only requires an objective failure to comply” and that the provision is to be regarded as “value-neutral”.²⁰ The inconsistency between these two decisions goes to the core of the issues raised by the Prosecution in its Leave Application, namely the questions of whether the Trial Chamber has already made the necessary findings under article 87(7) or, whether in the circumstances of this case, it should have made those findings and referred the GoK to the ASP.²¹
11. The Decision confirmed that compliance of States with requests to cooperate under the Statute is critical to the Court’s ability to exercise its functions and powers.²² Inconsistencies in the legal approaches taken by the various Chambers of the Court to reach findings of non-compliance and to refer the matter to the ASP or the UN Security Council under article 87(7) undermine the Court’s ability to operate effectively as the relevant decisions may confuse the States whose cooperation is sought.
12. Accordingly, immediate intervention by the Appeals Chamber “will settle the matter[s] posing for decision through its authoritative determination”²³

¹⁸ Decision, paras.78-79.

¹⁹ Decision, paras.80-88; see also Leave Application, paras.16-19.

²⁰ ICC-01/11-01/11-553, para.33.

²¹ See Leave Application, para.3.

²² Decision, para.79. See also ICC-01/11-01/11-553, para.26.

²³ ICC-01/04-168 OA3, para.14.

and will move forward the proceedings by ensuring that they “follow the right course”.²⁴

Conclusion

13. For these reasons, the Prosecution reiterates its request that the Trial Chamber grant it leave to appeal the Decision on the two issues identified in its Leave Application.



Fatou Bensouda, Prosecutor

Dated this 6th day of January 2015
At The Hague, The Netherlands

²⁴ ICC-01/04-168 OA3, para.15.