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THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. UHURU MUIGAI KENYATTA

Public

Response of the Government of the Republic of Kenya to 'Corrected version of Victims' submissions on the Prosecutor's appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'

Source: The Government of the Republic of Kenya

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

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I. INTRODUCTION

1. On 5 May 2015 the Legal Representative of Victims (LRV) filed '*Corrected version of Victims' submissions on the Prosecutor's appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7)"*¹ ('Corrected Victims' Submissions').
2. The Government of the Republic of Kenya will demonstrate that the Corrected Victims' Submissions misguided and untenable since they totally fail to establish the grounds required to move the Appeals Chamber to review the Trial Chamber's exercise of its discretion.

II. RELEVANT PROCEDURAL HISTORY

3. On 9 March 2015, Trial Chamber V(B) ('the Trial Chamber ') issued '*Decision on Prosecution's request for leave to appeal*'² granting the request of the Prosecution to appeal the Trial Chamber's '*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 Accused'⁴ and thereby requested the Trial Chamber to refer the matter to the Assembly of States Parties ('the Assembly').

¹ (Public) ICC-01/09-02/11-1019-Corr, 5 May 2015.

² (Public) ICC-01/09-02/11-1004, 9 March 2015.

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

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

4. On 20 March 2015 the Prosecution filed *'Prosecution appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"*⁵.
5. On 27 March 2015 the Legal Representative of Victims filed *'Victims' request to participate in the Prosecutor's appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"*⁶ (Victims' Request).
6. On 1 April 2015 the Appeals Chamber of the International Criminal Court ('the Appeals Chamber') issued *'Corrected version of "Order concerning the filing of a response", 31 March 2015, ICC-01/09-02/11-1011"*⁷ ('Order of 1 April 2015') inviting Mr. Uhuru Muigai Kenyatta and the Government of the Republic of Kenya to file a response to the Victims' Request.
7. On 2 April 2015 the Prosecution filed *'Prosecution Response to Victims' request to participate in the Prosecutor's appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"*⁸.
8. On 15 April 2015 the Government of the Republic of Kenya filed *Response of the Government of the Republic of Kenya to 'Victims' request to participate in the Prosecutor's appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute"*⁹.
9. On 24 April 2015 the Appeals Chamber of the International Criminal Court ('the Appeals Chamber') issued *'Decision on the victims' request to participate in the appeal proceedings"*¹⁰ ('Decision of 24 April 2015') granting the victims' request to participate in the Prosecution's appeal.

⁵ (Public) ICC-01/09-02/11-1006, 20 March 2015.

⁶ (Public) ICC-01/09-02/11-1009, 27 March 2015.

⁷ (Public) ICC-01/09-02/11-1011-Corr, 1 April 2015.

⁸ (Public) ICC-01/09-02/11-1012, 2 April 2015.

⁹ (Public) ICC-01/09-02/11-1014, 15 April 2015.

¹⁰ (Public) ICC-01/09-02/11-1015, 24 April 2015.

10. On 1 May 2015 the LRV filed *'Victims' submissions on the Prosecutor's appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"*¹¹ ('Victims' submissions').

11. Subsequently on 5 May 2015 the LRV filed Corrected Victims' Submissions'.

III. SUBMISSIONS

12. The Government of the Republic of Kenya submits that the Corrected Victims' Submissions is untenable and misinformed since it fails to satisfy the requirements for the Appeal's Chamber review of the Trial Chamber's exercise of its discretionary power.

- i. *'On the first ground of appeal: The Trial Chamber erred in law by not automatically referring the Government to the Assembly of States Parties (ASP), after having made the requisite factual findings under Article 87(7)'*

13. This relates to arguments made at paragraphs 13 to 20 of the Corrected Victims' Submissions.

14. As the Government of the Republic of Kenya had earlier pleaded in the *Response of the Government of the Republic of Kenya to 'Prosecution appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'*¹² ('Government's Response to Prosecution's Appeal'), the decision of a Chamber to refer a State to the Assembly of States Parties ('Assembly') pursuant to **Article 87(7)** of the Rome Statute ('the Statute') is a discretionary one as established in the jurisprudence of the Court particularly in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* where Pre-Trial Chamber II issued *'Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and*

¹¹ (Public) ICC-01/09-02/11-1019, 1 May 2015.

¹² (Public) ICC-01/09-02/11-1013, 9 April 2015.

*Surrender to the Court*¹³. In that decision, particularly at paragraph 13, the Pre-Trial Chamber stated thus in regard to the discretionary power of the Court to refer a State, in that case being the Republic of Nigeria, to the Assembly pursuant to **Article 87(7)** of the Statute:

'13. The Chamber takes note of the above explanation provided by the Nigerian authorities and, in light of its discretionary power by virtue of article 87(7) of the Statute, considers that it is not warranted in the present circumstances to refer the matter to the Assembly of State Parties and/or to the Security Council.'

In particular, **Article 87(7)** of the Statute states as follows:

'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.'

15. Moreover, as the Government of the Republic of Kenya had stated in its Response, 'the power of the Appeals Chamber to interfere with the exercise of the discretion of the Trial Chamber by exercising the power of review is precise and limited to very few and particular circumstances, as demonstrated by the law and jurisprudence of the Court. In particular, more recently the Appeals Chamber in *Re Lubanga Dyilo*¹⁴ restated this settled position as follows:

'41. In respect of discretionary decisions, the Appeals Chamber has held in relation to appeals raised pursuant to article 82 (1) of the Statute:

"The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.

¹³ (Public) ICC-02/05-01/09-159, 5 September 2013.

¹⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, (Public) ICC-01/04-01/06-3122, 1 December 2014, para. 41.

...the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position...¹⁵

16. Similarly, as the Government of the Republic of Kenya had earlier pleaded in its Response to the Prosecution's Appeal, the 'Appeals Chamber focus in review of the Trial Chamber's exercise of discretion is not in determining the correctness of the Trial Chamber decision and ultimately supplanting the decision of the Trial Chamber with what the Appeals Chamber believes should have been the correct and proper decision, but rather it is to consider "whether the Trial Chamber has correctly exercised its discretion in reaching that decision". Precisely, the Appeals Chamber in reviewing the discretionary decision of the Trial Chamber ought to lean more on the process of arriving at a decision rather than the outcome, the actual decision, irrespective of whether the Appeals Chamber agrees with the decision, unless the decision "was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously".¹⁶

17. Thereby, the Corrected Victims' Submissions at paragraphs 13 to 20 are invalid because they attack the decision of the Trial Chamber, which even if the Appeals Chamber were to disagree with and be inclined to oppose, it would not do so in the present case since the Appeals Chamber, as has been demonstrated hereinabove, has no power to vacate a discretionary decision of the Trial Chamber except on the establishment that the process of arriving at the discretionary decision was erroneous and as such the decision arrived at "was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously"¹⁷

18. Moreover, paragraphs 13 to 16 of the Corrected Victims' Submissions

¹⁵ See note 12, para. 2.

¹⁶ See note 12, para. 4.

¹⁷ Para. 14.

constitute a flawed reading of **Article 87(7)** of the Rome Statute ('the Statute') and **Regulation 109(4)** of the Regulations of the Court. **Article 87(7)** of the Statute states that the Court 'may' make a finding and 'refer the matter' to the Assembly of States Parties ('the Assembly'). This means that the Court has discretion to make a finding on the alleged non-compliance of a State, and then Court will consider whether, based on the circumstances of the case, it is appropriate to refer the matter of the non-complying State to the Assembly. The Court is under no obligation whatsoever to act in a particular way as the Corrected Victims' Submissions implies at paragraph 13 that once a finding has been made then the Court is obliged to make a referral to the Assembly. If that was the case then the relevant wording of **Article 87(7)** of the Statute would have been '...the Court may make a finding to that effect and shall refer the matter to the Assembly...'

ii. *'On the second ground of appeal: Assuming arguendo that the Trial Chamber had discretion to deny the ASP referral, the Trial Chamber erred in its exercise of such discretion*

19. This relates to arguments made at paragraphs 21 to 61 of the Corrected Victims' Submissions.

20. The Government of the Republic of Kenya submits that the arguments at paragraphs 21 to 32 of the Corrected Victims' Submissions are misplaced since they fail to demonstrate the error in the Trial Chamber's process of reaching its Decision of 3 December 2014, which is a required demonstration where a party seeks review of the Trial Chamber's exercise of its discretion.

21. In addition, the claim made out at paragraphs 22 to 32 of the Corrected Victims' Submissions, that the Trial Chamber reneged on its promise allegedly made in the '*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*'¹⁸ ('Decision of 31 March 2014'), that 'non-compliance would be met with referral'¹⁹ does not satisfy the requirements set out herein above to merit the Appeals Chamber review of the exercise of the Trial

¹⁸ (Public) ICC-01/09-02/11-908, 31 March 2014.

¹⁹ Corrected Victims' Submissions, para. 31.

Chamber's discretion.

22. Moreover, contrary to the assertions in the Corrected Victims' Submissions, particularly at paragraphs 33 to 35, that the Trial Chamber erred in the exercise of its discretion by denying the referral of the matter to the Assembly owing to non-exhaustion of judicial measures, the Government of the Republic of Kenya submits that it was imperative for the Trial Chamber to consider the non-exhaustion of judicial measures. This is because, **Article 87(7)** referral is a measure of last resort which is applied when all else, starting with exhaustion of all available judicial measures, has been effectively pursued and tried but ultimately resulted in failure.

In this regard, the Trial Chamber correctly observed that judicial measures may not have been exhausted owing to the 'Prosecution's dilatory conduct, lack of flexibility in its pursuit of assistance and lack of demonstrable diligence in pursuit of its requests, which prevented the Prosecution from exhausting all judicial measures of cooperation'²⁰. In particular, the Trial Chamber stated thus:

'88. ...As indicated above, the Chamber was dissatisfied by the Prosecution's somewhat complaisant approach towards the explanations provided by the Kenyan Government in relation to certain of the eight categories of requested materials. It is especially so with regard to the Company Records, which provide the basis for requests for other materials. The Chamber considers that the approach adopted by the Prosecution to the cooperation was, in some respects, not reflective of a prosecutorial and investigative body effectively seeking to obtain the requested materials. If the primary objective of pursuing the cooperation request at this time was to actually obtain the requested materials, the Chamber would have expected to see a greater degree of diligence, persistence and, where necessary, flexibility on the part of the Prosecution. The Chamber does not accept that the Prosecution has no independent means of taking such an approach. It ought to be pursued both throughout the course of the cooperation and when ultimately seeking to persuade the Chamber that a finding under Article 87(7) of the Statute is warranted. In summary, considering the overall interests of justice and integrity of the proceedings, the Chamber does not consider that the requisite burden has been met.'²¹

²⁰ Government's Response to Prosecution's Appeal, p. 12.

²¹ Decision of 3 December 2014, para. 88.

23. Regarding paragraphs 36 and 37 Corrected Victims' Submissions, the Government of the Republic of Kenya submits that these are pessimistic speculations. The LRV has not furnished proof to establish that the Government of the Republic of Kenya has received any request for assistance from the Court and failed to cooperate with the Court, subsequent to the Trial Chamber's '*Decision on Prosecution's application for a further adjournment*'²² ('Decision on Adjournment').
24. The Government of the Republic of Kenya further submits that paragraphs 38 to 53 of the Corrected Victims' Submissions are misinformed as they fail to demonstrate the pre-requisites, set out hereinabove at paragraphs 15 and 16, for the Appeals Chamber review of a Trial Chamber's exercise of discretion.
25. Regarding paragraph 54 of the Corrected Victims' Submissions, the Government of the Republic of Kenya takes concern with the LRV's deliberate biased paraphrasing of what the Trial Chamber stated in its Decision of 3 December 2014. In particular, concern arises over the following statement:

'54. The Chamber found that the Prosecution may continue investigations conducted in the Kenya situation and potentially bring new charges. It found that aspects of the Government's approach to cooperation "might make the prospect of further cooperation less probable".

This unfortunate claim of the LRV of what the Trial Chamber apparently stated is untrue and misleading owing to deceitful contextualisation. Actually, the Trial Chamber stated as follows:

'89. The Chamber is also of the view that a referral might, in principle, be warranted when judicial measures have been exhausted. The Chamber notes, in this regard, the disagreement between the Prosecution and the Kenyan Government as to whether the cooperation is at a 'deadlock'. As mentioned above, the Chamber has determined it appropriate to take a decision on the Article 87(7) Application at this stage as it considers that allowing a further adjournment would be contrary to the interests of justice under the circumstances, rather than because the Chamber finds there to be no possibility of further cooperation. Therefore, in terms of the seriousness of the breach of international obligations on the part of Kenyan Government, while the Chamber noted above serious concerns regarding certain aspects of the Kenyan Government's approach to the cooperation, which *might make the prospect of further cooperation less probable* [emphasis added], the

²² (Public) ICC-01/09-02/11-981, 3 December 2014.

Chamber is also not persuaded that the circumstances warrant referral on the basis of exhaustion of judicial measures at this stage.

90. While the factors considered above do not excuse the conduct of the Kenyan Government, they have influenced the Chamber in the exercise of its discretion under Article 87(7) of the Statute. The Chamber emphasises that each application must be considered in its own particular context and, for the reasons described above, the Chamber does not consider it appropriate to make a referral of the matter to the ASP on this occasion.'

Contrary to what the LRV claims, the Trial Chamber made the disputed statement, as an 'observation' and not a 'finding'. An 'observation' and a 'finding' of the Court are not synonymous but rather different terminologies with distinct legal effects.

26. Additionally, paragraph 59 is another instance of unfortunate and misleading paraphrasing of the Trial Chamber's statement. In particular, paragraph 59 of the Corrected Victims' Submissions in part reads as follows:

'59. The Trial Chamber at paragraph 83 of the Decision erroneously linked the decision not to refer Kenya with its simultaneous decision denying any further adjournment, which resulted in the withdrawal of charges against Mr Kenyatta. This is a significant error constituting an abuse of discretion...'

27. At this juncture, the Government of the Republic of Kenya will properly set out the context in which the Trial Chamber made reference to the Decision on Adjournment. The Trial Chamber made reference to the Decision on Adjournment in the process of demonstrating why a referral was inappropriate in the circumstances of the case. The Trial Chamber made the point that it would be flawed for one to assume that referrals to the Assembly are made simply because that would be the next step subsequent to a Trial Chamber making a finding of non-compliance. Instead, a referral to the Assembly is aimed at further assisting the Court in its work of truth seeking and pursuit of justice. In this regard, the Trial Chamber observed that 'one of the primary rationales for making such a finding and a referral might be to further proceedings in the main case, by, for example, securing compliance with the cooperation requests at issue.'²³

28. However, the Trial Chamber considered the 'Prosecution's concession that the

²³ Decision of 3 December 2014, para. 82.

evidence fell below the standard required for trial and that the possibility of obtaining the necessary evidence, even if the Revised Request was to be fully executed, is still nothing more [than] speculative'. The Trial Chamber was not persuaded that a referral to the Assembly would have facilitated a fair trial or the interests of justice, and thereby did not find it appropriate to further and unnecessarily prolong the proceedings.

29. In that connection, the Trial Chamber referred to the Decision on Adjournment and noted the Prosecution's allegation of the Government of the Republic of Kenya's non-compliance could not justify an indefinite adjournment of proceedings, since this would not be right in the interests of justice, in just the same way that a referral of the matter to the Assembly in a situation where the Prosecution concedes that even if the Revised Request was fully executed its evidentiary standard would not be improved, would be contrary to the interests of justice and an unjustifiable prolongation of proceedings in the matter.
30. Lastly, the Government of the Republic of Kenya takes exception to the assertion at paragraph 69 of the Corrected Victims' Submissions which reads in part thus:

'61. ... In light of this finding, it was an abuse of discretion to deny referral on the ground that the material sought might not in itself be sufficient to deliver a conviction. This, as the Prosecution has submitted, creates an impossible threshold for any Article 87(7) application relating to State obstruction of access to evidence to succeed.'

In response to the LRV allegation that the Trial Chamber's decision not refer the Government of the Republic of Kenya set an impossible threshold, the Government reiterates its submissions in the Government's Response to Prosecution's Appeal wherein the Government of the Republic of Kenya stated as follows:

'The Government of the Republic of Kenya submits that the 'threshold' supposedly set by the Trial Chamber is a necessary safeguard to ensure respect of the text of the treaty and it is also aimed at ensuring that the Prosecution diligently discharges its obligations under the Rome Statute of effectively and sufficiently investigating its case in the first place and only resorting to State party cooperation for assistance, pursuant to Article 86 of

the Rome Statute, in conducting the investigations and prosecutions of crimes in the relevant case. This will ensure that the Prosecution does not transfer its primary responsibility of investigating and prosecuting to a State Party, as it has sought to do on the Republic of Kenya, by making requests for assistance which are incapable of implementation as they offend the framework of cooperation as set out in the Rome Statute and the national procedures of the relevant State Party requested to execute the requests for assistance.²⁴

IV. RELIEF REQUESTED

31. In light of the foregoing submissions, the Government of the Republic of Kenya respectfully requests that the Appeals Chamber to dismiss the Corrected Victims' Submissions because they fail to demonstrate the essential requirements for Appeals Chamber review of the Trial Chamber's exercise of discretion.

Respectfully Submitted,

A large, stylized handwritten signature in dark ink, consisting of several loops and a long horizontal stroke, is written over the printed name and title.

Githu Muigai, SC
Attorney General of the Republic of Kenya

Dated 14 May 2015
At Nairobi, Kenya

²⁴ Government's Response to Prosecution's Appeal, p. 11.