



Promoting the rights  
and interests of victims  
before the International  
Criminal Court

## Kenya Situation and cases August 2014 – August 2015

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## ***Kenyatta case: Charges dropped but non-cooperation proceedings still ongoing***

[Background] Mr Kenyatta was accused of being criminally responsible as indirect co-perpetrator for crimes against humanity (murder, deportation or forcible transfer of population, rape, other inhumane acts, and persecution) allegedly committed towards civilian supporters of the Orange Democratic Movement political party, in or around Nakuru town and Naivasha town in Kenya, on or about 30 December 2007 to 31 January 2008. On 23 January 2012, Pre-Trial Chamber II confirmed these charges.<sup>1</sup> The trial, originally due to start in April 2013, was postponed several times.

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<sup>1</sup> Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>

On 31 March 2014, Trial Chamber V (B) temporarily adjourned the proceedings to give more time to Kenya to comply with a cooperation request from the Prosecution.<sup>2</sup> On 7 and 8 October 2014, the Chamber held status conferences to receive updates on the status of cooperation.<sup>3</sup>

### **Charges are withdrawn**

On 3 December 2014, the Chamber rejected a Prosecution's request for further adjournment of the proceedings until Kenya complies with its co-operation obligations.<sup>4</sup> In light of the presumption of innocence and the insufficiency of available evidence, the Chamber did not consider that it would be in the interest of justice, or the interests of the victims, for the current proceedings to be continued on the speculative basis that the prosecution would obtain further evidence to support the charges. The Chamber also rejected a Defense's request to terminate the proceedings altogether and invited the Prosecutor to withdraw the charges unless she wished to proceed to trial on the basis of the evidence already in her possession.

On 5 December 2014, the Prosecution filed a notice of withdrawal of the charges against Mr Kenyatta.<sup>5</sup> On 13 March 2015, Trial Chamber V(B) formally withdrew the charges against Mr. Kenyatta.<sup>6</sup>

### **Kenya's non-compliance to be reviewed anew**

On 29 November 2013, the Prosecution filed an application for a finding of non-compliance against the Government of Kenya alleging that Kenya had failed to comply with a request from April 2012 to produce financial and other records relating to Mr Kenyatta.

On 3 December 2014, Trial Chamber V (B) refused to enter a formal finding of non-compliance and to refer the matter to the Assembly of States Parties.<sup>7</sup> The Chamber found that the Kenyan Government had "fall[en] short of the standard of good cooperation" required under the Rome Statute and that this had compromised the Prosecution's ability to thoroughly investigate the charges, and impinged upon the Chamber's ability to fulfil its mandate under Article 64. However, the Chamber concluded that referring the matter to the Assembly of States Parties was not justified and might result in further uncertainty and potential delay for the proceedings, which would not be appropriate.

On 9 March 2015, the Prosecutor was allowed to appeal the decision arguing that:

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<sup>2</sup> 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, ICC-01/09-02/11-908, 31 March 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1755190.pdf>

<sup>3</sup> Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters, ICC-01/09-02/11-954, 19 September 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1832323.pdf>

<sup>4</sup> Decision on Prosecution's application for a further adjournment, ICC-01/09-02/11-981, 3 December 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1878156.pdf>

<sup>5</sup> Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983, 5 December 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf>

<sup>6</sup> Decision on the withdrawal of charges against Mr Kenyatta, ICC-01/09-02/11-1005, 13 March 2015, <http://www.icc-cpi.int/iccdocs/doc/doc1936247.pdf>

<sup>7</sup> Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-02/11-982, 3 December 2014, p.45-46 (para.89-90) <http://www.icc-cpi.int/iccdocs/doc/doc1878157.pdf>

- The Trial Chamber, once having found non-compliance, does not have discretion and must automatically refer the State to the Assembly of State Parties;
- In the alternative, even if the Trial Chamber had discretion, it erred in the exercise of its discretion by taking into account extraneous or irrelevant considerations and by failing to take into account or give sufficient weight to relevant considerations.<sup>8</sup>

On 19 August 2015, the Appeals Chamber reversed TC V's decision and ordered the Trial Chamber to rule anew on the issue.<sup>9</sup> The Appeals Chamber found that while a Trial Chamber did have discretion on whether to refer non-cooperation findings to the Assembly of States Parties, in the case at hand it had misapplied such discretion by conflating the non-compliance proceedings against Kenya with the criminal proceedings against Mr Kenyatta. The Appeals Chamber stressed that 'non-compliance proceedings and proceedings against an accused before the Court are distinct proceedings that involve different parties' and that future cooperation by the requested State in relation to other ongoing investigations was a factor to be taken into account when deciding on the appropriateness of a referral. The Appeals Chamber also found that the errors in the original decision had prevented the Trial Chamber from making a conclusive determination on Kenya's non-cooperation.

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## ***Ruto & Sang case: witnesses compelled to testify, admission of prior unsworn statements***

[Background] Mr Ruto is accused of being criminally responsible as an indirect co-perpetrator for the crimes against humanity (murder, deportation or forcible transfer of population, and persecution) allegedly committed towards members of the Kikuyu, Kisii, and Kamba communities, in locations including Turbo town, Kapsabet town, and Nandi Hills town, from, on or about 30 December 2007 to the end of January 2008. Mr Sang is accused of having otherwise contributed to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in relation to the same events by virtue of his influence in his capacity as a radio broadcaster. On 23 January, Pre-Trial Chamber II confirmed the charges against them.<sup>10</sup> Their trial opened on 10 September 2013 and is ongoing.

### **Kenya's cooperation requested to compel witnesses to testify**

On 29 November 2013, the Prosecutor sought the Court's assistance with regards to seven formerly cooperative witnesses who refused to appear to testify. On 17 April 2014, the Trial Chamber ruled by majority<sup>11</sup> (Judge Herrera Carbuccion, dissenting)<sup>12</sup> that:

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<sup>8</sup> Decision on the Prosecution's request for leave to appeal, ICC-01/09-02/11-1004, 9 March 2015, <http://www.icc-cpi.int/iccdocs/doc/doc1919141.pdf>

<sup>9</sup> Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC-01/09-02/11-1032, 19 August 2015, <http://www.icc-cpi.int/iccdocs/doc/doc2034599.pdf>

<sup>10</sup> Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>

<sup>11</sup> Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1771401.pdf>

<sup>12</sup> Dissenting Opinion of Judge Herrera Carbuccion on the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Anx, 17 April 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1757148.pdf>

- The Trial chamber has competence to subpoena witnesses;
- States have a general obligation to compel witnesses at the request of the trial chamber;
- Kenya has the obligation to honour the request to compel the attendance of witnesses.

As a result the Trial Chamber ordered the appearance of the witnesses to testify by video-link or at a location in Kenya. It asked the assistance of the Government of Kenya to ensure the appearance of the witnesses. The decision was appealed by both defence teams.

On 9 October 2014, the Appeals Chamber confirmed the Trial Chamber's decision and concluded that Kenya was under an obligation to cooperate and assist in compelling the witnesses to appear before the Court sitting *in situ* or by way of video-link under article 93(1)(b).<sup>13</sup>

### **Prior unsworn statements of core witnesses to be admitted for the truth of their contents**

On 29 April 2015, the Prosecution requested that the prior unsworn statements of core witnesses be admitted for the truth of their contents.<sup>14</sup> The prosecution claims that there was a scheme to persuade Prosecution witnesses to withdraw or recant their evidence, through a combination of intimidation and bribery. It alleges that not allowing these statements to be part of the record would deny the Chamber the ability to assess the whole of the evidence and would reward an attempt to obstruct justice.

The Defense opposed the request arguing that the application failed to meet the conditions for admission under rule 68 and that the application of rule 68, which was amended after the start of the trial would be detrimental to the accused and impact the fairness of the trial.<sup>15</sup>

On 20 August 2015, Trial Chamber V(a) allowed the previously recorded statements of 5 witnesses who recanted previous declarations or failed to testify, to be admitted as evidence.<sup>16</sup> All judges agreed that though the prior recorded testimonies were not made under oath, they were taken in the ordinary course of the Prosecution investigations, the witnesses were not coerced into making the statements, and a translation was at their disposal. Finally the judges noted that the witnesses were fully aware that their declarations would be presented to the court as evidence. The defence for both accused are seeking leave to appeal the decision.

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<sup>13</sup> Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1598, 9 October 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1847142.pdf>

<sup>14</sup> Public redacted version of "Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses", 29 April 2015, ICC-01/09-01/11- 1866-Conf + Annexes, ICC-01/09-01/11-1886-Red, 21 May 2015, <http://www.icc-cpi.int/iccdocs/doc/doc1979994.pdf>

<sup>15</sup> Public redacted version of "Ruto Defence request to rule inadmissible certain supporting material relied upon in the 'Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses' and to order the Prosecution to re-file its request", 4 May 2015, ICC-01/09-01/11-1872-Conf, <http://www.icc-cpi.int/iccdocs/doc/doc2015752.pdf>; Public Redacted Version of Corrigendum to Sang Defence Response to Prosecution's Request for the Admission of Prior Recorded Testimony of [Redacted] Witnesses, filed on 12 June 2015, ICC-01/09-01/11-1911-Corr-Red, 30 June 2015, <http://www.icc-cpi.int/iccdocs/doc/doc2003399.pdf>

<sup>16</sup> Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Corr-Red2, 28 August 2015, <http://www.icc-cpi.int/iccdocs/doc/doc2044015.pdf>

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## **Situation in Kenya: LRV challenges OTP decision to drop investigations**

On 3 August 2015, Fergal Gaynor, who represented victims participating in the *Kenyatta* case, called on Pre Trial Chamber II to review the Prosecution's decision to temporarily suspend active investigations in Kenya.<sup>17</sup>

Mr Gaynor argues that the Prosecution has failed to ensure the effective investigation and prosecution of the crimes committed against the victims he represents and that the decision to suspend investigations is unlawful. In particular, he advances that the Prosecution failed to make effective use of remedies provided for obstruction of justice in the Statute, or of the evidence-gathering powers conferred upon it by the Statute and that as a result victims' rights to truth, justice and reparation have been violated. Mr Gaynor calls on the Chamber to review the Prosecutor's decision adding that under many domestic legal systems victims are allowed to obtain judicial review of a failure to investigate or prosecute serious crimes.

The Prosecution has opposed the request stating that as no formal decision to close the investigation has been taken, there is no decision for the Chamber to review.

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<sup>17</sup> Victims' request for review of Prosecution's decision to cease active investigation, ICC-01/09-154, 3 August 2015, <http://www.icc-cpi.int/iccdocs/doc/doc2027787.pdf>