



Original: English

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

Date: 2 May 2014

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR

v. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

**Prosecution's Response to the Government of the Republic of Kenya's Request for
an Extension of Time and/or Leave to Appeal the Decision on Prosecutor's
Application for Witness Summonses and resulting Request for State Party
Cooperation**

Source: Office of the Prosecutor

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

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Introduction

1. The Government of Kenya is not a party to these proceedings in the sense of Article 82(1)(d) of the Statute, and does not have standing to seek leave to appeal the decision of the Trial Chamber.¹

2. Should a party seek leave to appeal the Decision,² and leave then be granted by the Trial Chamber, it may be appropriate for the Appeals Chamber to invite the Government of Kenya to file any relevant submission under Rule 103(1) of the Rules of Procedure and Evidence. At the present time, however, the Government of Kenya's proposed submission is unlikely to assist the Trial Chamber in deciding any application made by a party under Article 82(1)(d). The Motion should therefore be denied.

Procedural Background

3. On 17 April 2014, the Trial Chamber, by majority, decided to summons eight witnesses to testify, and requested the Government of Kenya ("GoK") to ensure the witnesses' presence.³ The GoK was expressly requested to use all means available under the laws of Kenya, including such compulsory measures as may be necessary.

4. The GoK now argues that it is a party to the proceedings for the purpose of Article 82(1)(d) and therefore has standing to appeal the Decision.⁴ It submits that it was entitled to receive formal notification of the Decision, since it participated in the underlying proceedings before the Trial Chamber and the Decision significantly affects its interests.⁵ In the alternative, the GoK requests the Trial Chamber to invite its submissions as *amicus curiae* on the issues which merit review by the Appeals

¹ *Contra* ICC-01/09-01/11-1277 ("Motion"), para.7.

² ICC-01/09-01/11-1274-Corr ("Decision").

³ Decision, Disposition. *See also* ICC-01/09-01/11-1274-Anx.

⁴ Motion, paras.6-7.

⁵ Motion, paras.3-4, 6, 11.

Chamber.⁶ In either case, it requests a period of ten days in which to file its submissions.⁷

Submissions

The Applicant is not a party to the proceedings

5. The Statute does not expressly define a “party” entitled to seek leave to appeal a decision of the Trial Chamber for the purpose of Article 82(1)(d). However, the term should mean only the Prosecution and the Defence. The GoK properly concedes that “the plain language of Article 82(1)(d) may be read strictly so as to preclude participants other than the ‘parties’—defined only as the Prosecution and Defence—from filing requests for leave to appeal”.⁸

In the practice of the Court, the only parties are the Prosecution and the Defence

6. Nothing in the Statute establishes that a State is a party, such that it has standing to seek leave to appeal a decision made by the Trial Chamber.⁹ Nor does the GoK make any serious effort to show the contrary.¹⁰ Its interest in the Decision does not justify a distortion of the plain terms of Article 82(1)(d).¹¹

7. The Appeals Chamber has repeatedly affirmed that “the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely

⁶ Motion, paras.5, 9-10.

⁷ Motion, para.11.

⁸ Motion, para.9.

⁹ See also ICC-01/09-01/11-798, para.12 (“The Chamber has already [...] ruled that, as the Kenyan Government is not a party to or participant in the proceedings, it required leave pursuant to Rule 103(1) of the Rules to file submissions”); ICC-01/09-01/11-725, para.2 (“the Government of Kenya is not a party to or participant in the current proceedings”); ICC-01/09-01/11-31, para.11 (“the fact that the Government of Kenya is a party to the article 19 proceedings does not mean *per se* that it is a party to the criminal proceedings against the suspects”); ICC-01/09-86, para.12 (finding it unnecessary to decide the question “whether the GoK might be considered as a party within the meaning of the *chapeau* of article 82(1) of the Statute”).

¹⁰ See Motion, para.7.

¹¹ Even the Trial Chamber’s view of the desirability of an interlocutory appeal does not justify departure from the procedural requirements of the Statute: see e.g. ICC-01/04-01/06-2799 OA19, para.8 (leave should not be granted for appeals based on grounds other than those in the Statute, even where granting leave may seem “desirable or even necessary” to the Chamber).

decisions of the Pre-Trial or Trial Chambers”.¹² It has admonished as “*ultra vires*”, for example, the grant of leave to appeal to States seeking clarification of the scope of their obligations under the Statute.¹³

8. The plain language of the Statute supports a strict reading of the term “parties”. The term should be afforded its natural meaning. In particular, Article 82(1) begins with the words “[e]ither party”, suggesting a dualist understanding of the concept to include solely the Prosecutor and the Defence.¹⁴ Where Article 82 refers to a participant other than the Prosecution or the Defence, it does so expressly.¹⁵ Consistent with this interpretation, the Appeals Chamber found that the term “parties”—at least for the purpose of the submission of evidence under Article 69(3)—is limited to the Prosecutor and the Defence.¹⁶

The GoK previously participated at the invitation of the Trial Chamber, and not as a party

9. The GoK mistakenly assumes that its previous participation “in the underlying proceedings at the request of the Chamber” gave it the status of a party.¹⁷ Rather, the Trial Chamber expressly invited the GoK to submit its previous observations under Rule 103(1).¹⁸ The Chamber issued this invitation for the limited purpose of advising the Chamber “whether or not the relief sought by the Prosecution is prohibited by national law”,¹⁹ and not because the GoK had any

¹² See ICC-01/04-01/07-3424 OA14, para.28; ICC-01/04-01/06-2799 OA19, para.7; ICC-01/04-168 OA3, para.39.

¹³ See ICC-01/04-01/06-2799 OA19, para.3. The Trial Chamber had granted leave to appeal to the Netherlands and the DRC “on an exceptional basis”, purportedly under Article 64(6)(f) of the Statute. See also ICC-01/04-01/07-3424 OA14, paras.30-31 (noting this authority, and further declining to expand the Appeals Chamber’s “limited subject-matter appellate jurisdiction under the Statute, beyond the scope of the powers vested in it by the States Parties”).

¹⁴ See also ICTY, Rules of Procedure and Evidence, Rule 2. See further ICTR, Rules of Procedure and Evidence, Rule 2; STL, Rules of Procedure and Evidence, Rule 2; SCSL, Rules of Procedure and Evidence, Rule 2. Cf. ECCC, Internal Rules, Glossary (“‘Party’[...] refers to the Co-Prosecutors, the Charged Person/Accused and Civil Parties”).

¹⁵ See Articles 82(2) and 82(4).

¹⁶ ICC-01/04-01/06-1432 OA9 OA10, paras.3, 93. See also ICC-01/04-01/07-675, Dissenting Opinion of Judge Pikis, para.4.

¹⁷ *Contra* Motion, para.6.

¹⁸ ICC-01/09-01/11-1165, para.8.

¹⁹ ICC-01/09-01/11-1165, para.8.

entitlement to participate in the proceedings. There is a clear distinction between the roles of an *amicus curiae* and that of a party.

10. The Trial Chamber's election not to list the GoK as a party to be notified of its decision²⁰—nor even of Judge Herrera Carbuccion's dissenting opinion, released *after* the Motion brought the supposed "oversight" to the Chamber's attention—underlines the conclusion that the Chamber did not consider the GoK to be a party in these proceedings. This is consistent with its previous practice.²¹

Submissions by the GoK under Rule 103 are unlikely to assist the Trial Chamber

11. The Court's discretion under Rule 103(1) to invite or grant leave to a State, among others, to submit "any observation on any issue that the chamber deems appropriate" is well established.²² However, nothing in the Motion shows that the GoK's proposed submissions would be necessary or even desirable for the proper determination of any request for leave to appeal under Article 82(1)(d).

12. The matters proposed by the GoK for its submissions under Rule 103(1)—"outlining the issues which merit review by the Appeals Chamber" and especially "whether the [Trial] Chamber correctly analysed the issues relating to national law in its Decision"²³—are not directed to the questions which the Trial Chamber must decide in relation to any Article 82(1)(d) application, which are of a more technical nature and should be party-driven, namely:

²⁰ See Motion, para.2. Rather, the Trial Chamber simply directed the Registry "to prepare and transmit" the "necessary cooperation request to the relevant authorities of the Republic of Kenya [...] in accordance with this decision": Decision, Disposition.

²¹ E.g. ICC-01/09-01/11-798, para.12 ("Given that the Kenya[n] Government is not a party or participant to the present proceedings, the notice requirement does not apply to it as a general matter").

²² ICC-01/04-01/06-1289 OA11, para.8; ICC-02/05-01/09-51 OA, para.7; ICC-01/09-01/11-942 OA5, para.9; ICC-01/09-01/11-988 OA5, para.11.


²³ See Motion, paras.9-10.

- (i) whether an “appealable issue”²⁴ arises from the decision which significantly affects “either a.) ‘the fair and expeditious conduct of the proceedings’ or b.) ‘the outcome of the trial’”;²⁵ and
- (ii) whether immediate resolution by the Appeals Chamber of the appealable issue may materially advance the proceedings.²⁶

13. The correctness of the Decision is a matter only for the Appeals Chamber,²⁷ if leave to appeal is granted to a party. While the GoK’s views on the correct analysis of its own national law may therefore assist the Appeals Chamber—if leave to appeal is sought and granted—they are unlikely to assist the Trial Chamber at the present time in its determination of the issues under Article 82(1)(d). The GoK’s request under Rule 103(1) might be appropriately filed before the Appeals Chamber, if the necessity arises.

Relief Sought

14. For the reasons set out above, the Prosecution requests that the Trial Chamber deny the Motion.



Fatou Bensouda, Prosecutor

Dated this 2nd day of May 2014

At The Hague, The Netherlands

²⁴ See ICC-01/04-168 OA3, para.9 (“a subject the resolution of which is essential for the determination of matters arising in the judicial caused under examination”).

²⁵ ICC-01/04-168 OA3, paras.10-13.

²⁶ ICC-01/04-168 OA3, paras.14-19.

²⁷ ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to ICC-02/04-01/05-52.