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Court

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No. ICC-01/09-02/11 OA 4
Date: 29 February 2012

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI

Public document

Decision on the request of Mr Kenyatta and Mr Muthaura for suspensive effect

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for Francis Kirimi Muthaura
Mr Karim Khan
Mr Essa Faal

Legal Representative of Victims
Mr Morris Azuma Anyah

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Uhuru Muigai Kenyatta and Mr Francis Kirimi Muthaura, pursuant to article 82 (1) (a) of the Statute, against the decision of Pre-Trial Chamber II entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" of 23 January 2012 (ICC-01/09-02/11-382-Conf),

Having before it the "Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'" of 30 January 2012 (ICC-01/09-02/11-383), in which a request for suspensive effect is made,

After deliberation,

Renders unanimously the following

DECISION

The request for suspensive effect is rejected.

REASONS

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

A. Proceedings before the Pre-Trial Chamber

1. On 19 September 2011, Mr Kenyatta filed the "Submissions on Jurisdiction on Behalf of Uhuru Kenyatta".[1] On 14 October 2011, the Prosecutor filed the "Prosecution's Response to the Defence Challenges to Jurisdiction"[2] and the legal representative of victims filed the "Victims' Consolidated Observations on the Kenyatta and Ali Submissions regarding Jurisdiction and/or Admissibility",[3] opposing the defence challenge to jurisdiction. In his appeal, Mr Muthaura states that he submitted his challenge to jurisdiction at paragraph 110 of his final written

[1] ICC-01/09-02/11-339.
[2] ICC-01/09-02/11-356.
[3] ICC-01/09-02/11-357.

observations on the confirmation of charges hearing,[4] asserting that the "organizational policy" element of article 7 (2) (a) of the Statute had not been satisfied and adopting in full the previous submissions of Mr Kenyatta on this issue.[5]

2. On 23 January 2012, Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber") rendered the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute"[6] (hereinafter: "Confirmation Decision"). In that decision, the Pre-Trial Chamber, by majority, dismissed the challenge of Mr Kenyatta *in limine* in its entirety as not being jurisdictional in nature[7] and determined that the case against all three suspects fell within the jurisdiction of the Court.[8] The Pre-Trial Chamber proceeded thereafter, *inter alia*, to confirm the majority of the charges presented against Mr Kenyatta and Mr Muthaura and decided to commit them to a Trial Chamber for trial on the charges that had been confirmed.[9]

B. Proceedings before the Appeals Chamber

3. On 30 January 2012, Mr Kenyatta and Mr Muthaura filed an appeal[10] pursuant to article 82 (1) (a) of the Statute in relation to the Confirmation Decision, in which they appeal the finding of the majority of the Pre-Trial Chamber that "the requirement of material jurisdiction had been met and that the case against the Suspects fell within the jurisdiction of the Court".[11] Mr Kenyatta and Mr Muthaura request the Appeals Chamber to reverse the definition of the majority of the Pre-Trial Chamber of the term "organizational policy" within article 7 (2) (a) of the Statute as well as its evidentiary finding that the Prosecutor "had submitted sufficient evidence of substantial grounds to believe that the crimes were committed" by them in furtherance of an

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[4] "Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing", 21 November 2011, ICC-01/09-02/11-374-Conf. A public redacted version was filed on 2 December 2011, ICC-01/09-02/11-374-Red.
[5] "Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", 30 January 2012, ICC-01/09-02/11-383, para. 13.
[6] ICC-01/09-02/11-382-Conf. A public redacted version of the Confirmation Decision was also issued, ICC-01/09-02/11-382-Red.
[7] Confirmation Decision, paras 33-35.
[8] Confirmation Decision, paras 23-37 and p. 154. At the time of the Confirmation Decision, the case consisted of three suspects – Mr Kenyatta, Mr Muthaura and Mr Ali. In the Confirmation Decision, the Pre-Trial Chamber declined to confirm the charges presented against Mr Ali.
[9] *See* Confirmation Decision, p. 154.
[10] "Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'" (hereinafter: "Appeal"), ICC-01/09-02/11-383.
[11] Appeal, para. 3. See also Appeal, paras 20-24.

"organizational policy".[12] Mr Kenyatta and Mr Muthaura "request the Appeals Chamber to declare that the Court does not have jurisdiction in this instance and reverse the Majority's confirmation of charges" against them.[13]

4. In the final paragraph of their Appeal, Mr Kenyatta and Mr Muthaura make the following request:

> Furthermore, pursuant to Article 82(3) of the Statute and Rule 156(5) of the Rules of Procedure and Evidence, the Kenyatta Defence and the Muthaura Defence request that this appeal has suspensive effect on the proceedings and that a Trial Chamber not be constituted, if at all, until this appeal has been concluded.[14]

5. Mr Kenyatta and Mr Muthaura do not provide any further reasoning behind, nor submissions supporting, their request for suspensive effect.

6. On 9 February 2012, further to an order issued by the Appeals Chamber on 2 February 2012,[15] the Prosecutor filed the "Prosecution's Consolidated Response to Mr Muthaura's and Mr Kenyatta's Requests for Suspensive Effect of their Appeals on Jurisdiction (ICC-01/09-02/11-383 OA4)" (hereinafter: "Prosecutor's Response").[16] At paragraph 4 of the Prosecutor's Response, it is stated that:

> The Prosecution considers that the Appellants have not met the very specific criteria established by this Court for suspensive effect. However, the Prosecution also notes that in light of the exceptional circumstances of the Kenya case – the fundamental nature of the issue being appealed and the significant and complicated need to implement witness protection measures – the Presidency or a Trial Chamber might nonetheless deem it to be in the interest of justice not to start the trial proceedings before the Appeals Chamber makes a final determination on whether this case falls within the jurisdiction of the Court.

7. By reference to previous jurisprudence of the Appeals Chamber in the *Bemba* case in respect of an appeal relating to a challenge to admissibility,[17] the Prosecutor,

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[12] Appeal, para. 29.
[13] Appeal, para. 29.
[14] Appeal, para. 30.
[15] "Order on the filing of a response to request for suspensive effect", ICC-01/09-02/11-393.
[16] ICC-01/09-02/11-398.
[17] *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges'", 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 11.

in opposing the request for suspensive effect,[18] points out that Mr Kenyatta and Mr Muthaura fail to demonstrate that the commencement of the trial proceedings "could lead to irreversible prejudice to themselves or potentially defeat the purpose of the appeal".[19] However, the Prosecutor notes that the "interests of justice" in these particular circumstances may favour a postponement of the commencement of the trial until the ruling of the Appeals Chamber and that therefore "the appellants or the Prosecution, or both, may in the alternative request the Presidency to delay constituting a Trial Chamber or may request a constituted Trial Chamber itself to delay commencement of further proceedings".[20] The Prosecutor proceeds to set out two factors that he submits may favour delaying the trial in the interests of justice. First, that the issue should be resolved prior to the trial itself in light of the nature of the jurisdictional challenge made;[21] and second, that postponement would serve the interests of prospective witnesses.[22] In addition, given that Mr Kenyatta and Mr Muthaura were not in detention and had themselves requested suspensive effect there was, in the submission of the Prosecutor, "no countervailing interest pressing for the prompt commencement of trial proceedings".[23]

II. MERITS

8. The Appeals Chamber has previously explained:

> Article 82 (3) of the Statute provides that an appeal shall not have suspensive effect "unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence." [...] The decision on such a request is within the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances.[24]

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[18] Prosecutor's Response, para. 10.
[19] Prosecutor's Response, paras 5 and 6.
[20] Prosecutor's Response, para. 6.
[21] Prosecutor's Response, para. 7.
[22] Prosecutor's Response, para. 8.
[23] Prosecutor's Response, para. 8.
[24] *See*, among other Appeals Chamber authorities, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Prosecutor's request to give suspensive effect to the appeal against Trial Chamber I's oral decision to release Mr Thomas Lubanga Dyilo", 23 July 2010, ICC-01/04-01/06-2536 (OA 17), para. 7 (citing *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges'", 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 6 and the footnotes referred to therein).

9. The Appeals Chamber further recalls the following relevant passage in its previous ruling in the *Bemba* OA 3 appeal,[25] in which the Appeals Chamber rejected Mr Bemba's request for suspensive effect in relation to an appeal brought under article 82 (1) (a) of the Statute against a decision with respect to admissibility. Having previously recalled that the decision on a request for suspensive effect was within the discretion of the Appeals Chamber, which would consider the specific circumstances of the case,[26] it considered that granting suspensive effect was not necessary in the circumstances of that case, continuing as follows:

> In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) "would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant",[27] (ii) would lead to consequences that "would be very difficult to correct and may be irreversible",[28] or (iii) "could potentially defeat the purpose of the [...] appeal".[29] In the present appeal, Mr Bemba submits that commencing the hearing of evidence would be an inadequate use of the Court's resources, but he does not put forward any arguments that support the conclusion that the implementation of the Impugned Decision could lead to an irreversible situation or could potentially defeat the purpose of the appeal. As stated above, in the Impugned Decision the Trial Chamber decided that the case against Mr Bemba is admissible. Even if the trial proceedings continue, this would neither lead to an irreversible situation nor defeat the purpose of the appeal, since the Appeals Chamber is able to reverse, confirm or amend the Impugned Decision irrespective of whether the proceedings before Trial Chamber III continue. In addition, if the Appeals Chamber eventually decides to grant Mr Bemba's appeal, any ongoing proceedings could be discontinued at that time.[30]

10. In exercising its discretion in the present case, the Appeals Chamber finds very similar considerations to apply. The implementation of the finding in the Confirmation Decision that the Chamber had jurisdiction with respect to the case

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[25] *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges'", 9 July 2010, ICC-01/05-01/08-817 (OA 3) (hereinafter: "Decision in *Bemba* OA 3").
[26] Decision in *Bemba* OA 3, para. 6.
[27] Decision in *Lubanga* OA 11, para. 8. [*Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008", 22 April 2008, ICC-01/04-01/06-1290 (OA 11), para. 8.]
[28] *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008", 22 May 2008, ICC-01/04-01/06-1347 (OA 9, OA 10), para. 23. *See* also paras 19-20.
[29] *Prosecutor v. Thomas Lubanga Dyilo*, "Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the 'Decision on the release of Thomas Lubanga Dyilo'", 22 July 2008, ICC-01/04-01/06-1444 (OA 12), para. 10. [...]
[30] Decision in *Bemba* OA 3, para. 11.

would not lead to an irreversible situation that could not be corrected were the Appeals Chamber eventually to find in favour of Mr Kenyatta and/or Mr Muthaura. Nor could it potentially defeat the purpose of the appeal. Indeed, neither Mr Kenyatta nor Mr Muthaura have put forward any argument that it could do so; or any other argument in support of their request. In the Confirmation Decision, the Pre-Trial Chamber dismissed the defence challenge to jurisdiction and found that the case fell within the jurisdiction of the Court. The Appeals Chamber, in addressing the appeal of Mr Kenyatta and Mr Muthaura, is able to confirm, reverse or amend the Impugned Decision in relation to its findings in respect of jurisdiction – and any such determination will be able to be implemented – irrespective of whether the proceedings continue. If the Appeals Chamber eventually decides to grant the appeal, any ongoing proceedings could be discontinued at that time. As such, and in the absence of any other compelling reason, the Appeals Chamber does not deem it necessary to order that the appeal have suspensive effect.

11. The Appeals Chamber notes that the Prosecutor has stated that either he or Mr Kenyatta and Mr Muthaura or both may request the Presidency to delay constituting a Trial Chamber or may request a constituted Trial Chamber to postpone the commencement of further proceedings. The Appeals Chamber deems it neither necessary nor appropriate to comment on the merits of any such future application that may be made.

12. The Appeals Chamber emphasises that the present decision is concerned only with the request for suspensive effect, without in any way prejudging or touching upon any other matters that the Appeals Chamber may address subsequently in respect of the present appeal.

13. For the above reasons, the request for suspensive effect is rejected.

Done in both English and French, the English version being authoritative.

Judge Akua Kuenyehia
Presiding Judge

Dated this 29th day of February 2012

At The Hague, The Netherlands