Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No. ICC-01/09-02/11 OA 4
Date: 1 May 2012

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Erkki Kourula
Judge Anita Ušacka

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 to Make Oral Submissions on Jurisdiction under Rule 156(3)"

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

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims
Mr Morris Anyah

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 "Request to Make Oral Submissions on Jurisdiction under Rule 156(3)" of 25 April 2012 (ICC-01/09-02/11-418),

Renders unanimously, the following

DECISION

The "Request to Make Oral Submissions on Jurisdiction under Rule 156(3)" is rejected.

REASONS

I. PROCEDURAL HISTORY

1. 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"[1] (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[2] and determined that the case against all three suspects fell within the jurisdiction of the Court.[3]

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[1] 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.
[2] Confirmation Decision, paras 33-35.
[3] 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.

2. On 30 January 2012, Mr Kenyatta and Mr Muthaura filed an appeal,[4] pursuant to article 82 (1) (a) of the Statute in relation to the Confirmation Decision, in which they appeal the finding 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".[5]

3. On 14 February 2012, Mr Kenyatta and Mr Muthaura filed their "Document in Support of 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'"[6] (hereinafter: "Document in Support of the Appeal"), requesting "the Appeals Chamber to declare that the Court does not have jurisdiction in this instance, and reverse the Majority's confirmation of charges"[7] against them.

4. On 13 March 2012, the victims participating in the proceedings filed the "Observations pursuant to Article 19 (3) of the Rome Statute and Rule 59 (3) of the Rules of Procedure and Evidence"[8] (hereinafter: "Victims' Observations"). On 19 March 2012, the Prosecutor responded to the Victims' Observations[9], however, Mr Kenyatta and Mr Muthaura did not respond.

5. On 25 April 2012, Mr Kenyatta and Mr Muthaura filed the "Request to Make Oral Submissions on Jurisdiction under Rule 156(3)"[10] (hereinafter: "Request for an Oral Hearing"). In support of their request for the Appeals Chamber to permit and schedule an oral hearing, Mr Kenyatta and Mr Muthaura advance three main arguments.

6. First, they submit that "an oral hearing will serve to guarantee the public nature of the proceedings, particularly given the intense public interest in this case in Kenya,

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[4] "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.
[5] Appeal, para. 2. *See also* Appeal, paras 20-24.
[6] ICC-01/09-02/11-399.
[7] Document in Support of the Appeal, para. 181.
[8] ICC-01/09-02/11-408.
[9] "Prosecution's Response to the Victims' 'Observations pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence'", ICC-01/09-02/11-410 (hereinafter: "Prosecutor's Response to Victims' Observations").
[10] ICC-01/09-02/11-418.

Africa and the wider international community".[11] In particular, Mr Kenyatta and Mr Muthaura cite provisions in Kenya's Constitution of 2010 and the Criminal Procedure Code, which safeguards the right to be heard and the right to a public hearing.[12] They argue that the Appeals Chamber is obliged under the Statute to "apply the national laws of States that would normally exercise jurisdiction over the crime" and therefore proper weight should be accorded to the relevant provisions of the Kenyan Constitution and Criminal Procedure Code when the Appeals Chamber is considering their request.[13]

7. Second, Mr Kenyatta and Mr Muthaura submit that granting an oral hearing would not cause delay but rather "complement the ongoing deliberations of the Appeals Chamber, and assist in respect of any issue which may require further clarification".[14] Furthermore, they submit that since the trial in their case has not commenced "no delay will be caused by oral argument taking place as part of the appeal".[15]

8. Third, Mr Kenyatta and Mr Muthaura aver that notwithstanding their written submissions challenging the jurisdiction of the court before the Pre-Trial Chamber and the Appeals Chamber "an oral hearing is the most effective method of scrutinizing the substantive merits of the parties' submissions". [16]

II. MERITS

9. Rule 156 (3) of the Rules of Procedure and Evidence provides that:

> The appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing.

10. The Appeals Chamber has had occasion to interpret rule 156 (3) of the Rules of Procedure and Evidence, most notably, in its "Decision on the 'Request for an Oral

[11] Request for an Oral Hearing, para. 16.
[12] Request for an Oral Hearing, para. 17.
[13] Request for an Oral Hearing, para. 18.
[14] Request for an Oral Hearing, para. 19.
[15] Request for an Oral Hearing, para. 19.
[16] Request for an Oral Hearing, para. 20.

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Hearing Pursuant to Rule 156(3)'"[17] (hereinafter: "Decision of 17 August 2011") where the Appeals Chamber held that:

> This rule establishes as a norm that proceedings on appeal such as the present should be conducted by way of written submissions. The rule nonetheless also vests the Appeals Chamber with discretion to convene a hearing. However, for the Appeals Chamber to exercise its discretion and to depart from this norm it must be furnished with cogent reasons that demonstrate why an oral hearing *in lieu* of, or in addition to, written submissions is necessary. In considering whether or not to exercise its discretion, the Appeals Chamber must also take into account the possible delay that the holding of an oral hearing might cause, given the requirement under rule 156 (4) of the Rules of Procedure and Evidence that "[t]he appeal shall be heard as expeditiously as possible". [Footnotes omitted].[18]

11. In the case at hand, the Appeals Chamber is not persuaded that an oral hearing is necessary. In particular, Mr Kenyatta and Mr Muthaura's argument that the Appeals Chamber is obliged to show deference to the cited Kenyan legal instruments when deciding on their request is unconvincing. Article 21 (1) of the Statute provides that the Court shall, in the first place, apply the Statute, Rules of Procedure and Evidence and Elements of the Crimes (sub-paragraph (a)), in the second place, applicable treaties and the principles and rules of international law (sub-paragraph (b)), and, "failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards" (sub-paragraph (c)). In this regard, it must be noted that article 21 (1) (c) vests the Court with power to apply general principles of law, derived from national laws, but not to apply national laws directly; that general principles of law under article 21 (c) of the Statute are a subsidiary source of law to which resort may be had if the sources of law listed in article 21 (1) (a) and (b) do not regulate the issue at hand;[19] and, finally, that, as expressed by the words "as appropriate", article 21 (1) (c) of the Statute vests the Court with discretion to derive such general principles also from the national laws of States that would normally

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[17] 17 August 2011, ICC-01/09-02/11-251 (OA).
[18] Decision of 17 August 2011, para. 10.
[19] *See Situation in the Democratic Republic of the Congo,* "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168 (OA 3), paras 23 *et seq.*

exercise jurisdiction over the crime, but does not require the Court to do so. Accordingly, and contrary to Mr Kenyatta and Mr Muthaura's argument, the Appeals Chamber is not obliged to apply Kenyan law and finds no reason in the present case to deviate from the norm established in rule 156 (3) of the Rules of Procedure and Evidence. Regarding Mr Kenyatta and Mr Muthaura's submission that an oral hearing will serve to guarantee the public nature of the proceedings, the Appeals Chamber notes that the submissions in this appeal are public and that the publicity of the proceedings is therefore guaranteed.

12. With respect to Mr Kenyatta and Mr Muthaura's submission that an oral hearing at this stage of the appellate proceedings would not cause delay, the Appeals Chamber cannot but disagree. The Request for an Oral Hearing was made several weeks after the last filing on the merits of the appeal – the Prosecutor's Response to the Victims' Observations – had been filed; in the Appeals Chamber's view, to convene an oral hearing now would not only be unnecessary but would unduly affect the expeditious resolution of the appeal.

13. Finally, with respect to Mr Kenyatta and Mr Muthaura's third submission, the Appeals Chamber is not convinced that "an oral hearing is the most effective method of scrutinizing the substantive merits of the parties' submissions". As acknowledged by Mr Kenyatta and Mr Muthaura, the submissions on the jurisdictional challenges before the Pre-Trial Chamber, as well as the submissions in this regard on appeal, are voluminous and detailed. Therefore, in the Appeals Chamber's view, further oral submissions are not required. The Request for an Oral Hearing is therefore rejected.

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

Judge Akua Kuenyehia
Presiding Judge

Dated this 1st day of May 2012

At The Hague, The Netherlands