

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-02/11  
Date: 9 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**

**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 )**

**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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**Unrepresented Victims**

**Unrepresented Applicants  
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Victims**

**The Office of Public Counsel for the  
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**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

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**Victims Participation and Reparations  
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## Introduction

1. On 19 September 2011 the Defence for Mr Kenyatta and Mr Ali filed challenges to the jurisdiction of the Court in the Kenya case.<sup>1</sup> The Prosecution responded on 14 October 2011.<sup>2</sup>
2. On 23 January 2012 and in the context of the Confirmation Decision, the Majority of Pre-Trial Chamber II dismissed the Defence challenges and found that the crimes attributed to the suspects were within the jurisdiction of Court.<sup>3</sup> Judge Kaul dissented; in his view, the crimes attributed to the suspects do not fall within the jurisdiction of the ICC.
3. On 30 January 2012, Mr Muthaura and Mr Kenyatta (“the Appellants”) filed their notices of appeal against the Majority’s ruling on jurisdiction and requested, pursuant to article 82(3) and rule 156(5), that the pendency of the appeal suspend the proceedings and that the Trial Chamber not be constituted until the appeal is concluded.<sup>4</sup>
4. 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.

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<sup>1</sup> ICC-01/09-02/11-339 and ICC-01/09-02/11-338.

<sup>2</sup> ICC-01/09-02/11-356.

<sup>3</sup> ICC-01/09-02/11-382-Red.

<sup>4</sup> ICC-01/09-02/11-383OA4.

## Submissions

5. The Prosecution recalls the Appeals Chamber's judgment on a similar request in the *Bemba* case for suspensive effect pending the defence challenge to the admissibility of the case. In that instance, the Appeals Chamber held that "[e]ven 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."<sup>5</sup>
6. Applying that narrow criteria, the Appellants fail to assert, much less show, that the commencement of the trial proceedings could lead to irreversible prejudice to themselves or potentially defeat the purpose of the appeal.<sup>6</sup> The Prosecution however notes that the interests of justice in this particular case may militate in favour of postponing commencement of trial until the Appeals Chamber rules.<sup>7</sup> Thus, the appellants or the Prosecution, or both, may in the alternative request the Presidency to delay constituting a Trial

<sup>5</sup> ICC-01/05-01/08-817OA3, para.11.

<sup>6</sup> Ibid. See in particular authorities cited in fn.25-27.

<sup>7</sup> Jurisprudence of the *ad hoc* Tribunals, while not binding, is instructive in this regard. It is noteworthy that the concept of "the interest of justice" has been given a broad scope in the jurisprudence of these courts. For example, in the *Seselj* case, the Chamber held that this concept "includes the right to a fair trial, which is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy" (*Prosecutor v. Vojislav Seselj*, IT-03-67-PT, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence", 9 May 2003, para.21). This concept has also been applied by the chambers to separate and joint cases (*Prosecutor v. Kamuhanda*, ICTR-99-54-T, Decision on the Defence motion for severance and separate trial filed by the accused, 7 November 2000; *Prosecutor v. Bagasora*, ICTR-96-7, Decision on the Prosecutor's Motion for Joinder, 29 June 2000, para.142) and to temporarily halt the proceedings even if its application is not expressly envisaged in the provisions: e.g. in the *Karadzic* case, the Chamber suspended the proceedings "in the interest of justice" to provide to the Defence enough time to review material newly disclosed by the Prosecution (*Prosecutor v. Karadzic*, IT-95-5/18-I, transcript of 3 November 2010, page 8907, lns.4-14).

Chamber or may request a constituted Trial Chamber itself to delay commencement of further proceedings.

7. There are two factors that persuade the Prosecution that the interest of justice may favour delaying the trial. First, there is a dissent in this case on a fundamental underlying legal issue, the definition of “organizational policy” within the meaning of article 7(2)(a).<sup>8</sup> In this sense, the Prosecution recalls Judge Fulford’s words before the start of the *Bemba* trial and after the defence had challenged the admissibility of that case:

“Our view is that it is undoubtedly *in the interests of justice for this challenge to be resolved prior to the commencement of the trial itself*. Given that the accused is saying that this case should not be taking place in this court, we are of the view that that issue should be dealt with prior to the commencement of a trial which, it is suggested, should not be taking place. Therefore, in as expeditious a way as possible, we intend to resolve this application prior to the commencement of the trial itself.”<sup>9</sup>

8. In addition, postponement of the trial proceedings will serve the interests of prospective witnesses, who otherwise would have to be identified – thus implicating their security and triggering the need for greater protective measures – before there is certainty that the trial will proceed. Moreover, as the Appellants are not in detention and do not oppose delay pending appellate resolution (having requested suspensive effect), there is no countervailing interest pressing for the prompt commencement of trial proceedings.

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<sup>8</sup> ICC-01/09-02/11-382-Red, Dissenting Opinion, para.2. Judge Kaul dissented on the same grounds when the Majority of Pre-Trial Chamber II authorized the Prosecutor to commence his investigations in Kenya (ICC-01/09-19-Corr), when it issued six summonses to appear (ICC-01/09-01/11-2 and ICC-01/09-02/11-2) and when it confirmed the charges of four of the six suspects (ICC-01/09-01/11-373 and ICC-01/09-02/11-382-Red).

<sup>9</sup> ICC-01/05-01/08-T-20-Red-EN, p.14, lns.11-18 (emphasis added).

## Conclusion

9. For the reasons set out above, the Prosecution considers that the Appellants' request for suspensive effect does not meet the existing criteria established by the Appeals Chamber.
10. Notwithstanding the Prosecution's opposition, however, it agrees that the interest of justice might exceptionally justify delaying the initiation of trial proceedings and may make a request to that effect, or support a Defence request, or both, to the Presidency or to a to-be-appointed Trial Chamber.<sup>10</sup>



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Luis Moreno-Ocampo, Prosecutor

Dated this 9<sup>th</sup> day of February 2012

At The Hague, The Netherlands

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<sup>10</sup> The Prosecution notes that the Appeals Chamber has no authority to suspend the proceedings before another chamber outside the terms of article 82(3) and rule 156(5).