Cour Pénale Internationale

International Criminal Court

Original: English

No. ICC-01/09-02/11 OA 4
Date: 20 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 "Observations on the 'Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence'"

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

AS

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

Legal Representative of Victims
Mr Morris Azuma Anyha

The Office of Public Counsel for Victims
Ms Paolina Massidda

Counsel for Francis Kirimi Muthaura
Mr Karim A. Khan
Mr Essa Faal

Counsel for Mr Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins

REGISTRY

Registrar
Ms Silvana Arbia

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, under 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 "Observations on the 'Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence'" of 3 February 2012 (ICC-01/09-02/11-395),

Renders the following

DECISION

The "Observations on the 'Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence'" are rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 30 March 2011, Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber") rendered the "First Decision on Victims' Participation in the Case"[1] (hereinafter: "First Victim Participation Decision"), *inter alia* appointing the Office of Public Counsel for victims (hereinafter: "OPCV") as legal representative of those individuals who had applied to participate as victims in the case and who had not yet appointed a legal representative, "until such time [as] a legal representative is chosen by the victim or is appointed by the Chamber".[2]

2. On 26 August 2011, the Pre-Trial Chamber rendered the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in Related Proceedings"[3] (hereinafter: "Second Victim Participation Decision"), *inter alia* admitting certain

[1] ICC-01/09-02/11-23.
[2] First Victim Participation Decision, p. 13.
[3] ICC-01/09-02/11-267.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

victims "as participants at the confirmation of charges hearing and in the related proceedings", appointing Mr Morris Azuma Anyah as their common legal representative (hereinafter: "Legal Representative") and rejecting the requests for participation of other individuals.[4]

3. On 19 September 2011, Mr Uhuru Muigai Kenyatta (hereinafter: Mr Kenyatta) filed the "Submissions on Jurisdiction on behalf of Uhuru Kenyatta"[5] (hereinafter: "Jurisdictional Challenge") before the Pre-Trial Chamber. The Registry notified the principal counsel of the OPCV, as well as other staff of the OPCV, of the Jurisdictional Challenge on that day.[6]

4. On 21 September 2011, the Pre-Trial Chamber ordered the Registrar to transmit the Jurisdictional Challenge to the Prosecutor and the Legal Representative and set a time limit for them to respond to the Jurisdictional Challenge.[7]

5. On 14 October 2011, the victims represented by the Legal Representative filed the "Victims' Consolidated Observations on the Kenyatta and Ali Submissions regarding Jurisdiction and/or Admissibility".[8] OPCV did not submit observations on the Jurisdictional Challenge, nor did it seek leave from the Pre-Trial Chamber to do so.

6. On 23 January 2012, the Pre-Trial Chamber rendered the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute"[9] (hereinafter: "Impugned Decision"), *inter alia* deciding that the case falls within the jurisdiction of the Court.[10]

7. On 30 January 2012, Mr Francis Kirimi Muthaura (hereinafter: Mr Muthaura) and Mr Kenyatta filed the "Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the 'Decision on

---

[4] Second Victim Participation Decision, pp. 45-46.
[5] ICC-01/09-02/11-339.
[6] *See* the notification email sent by the Court Management Section of the Registry on 30 August 2011.
[7] ICC-01/09-02/11-T-4-ENG, 21 September 2011, p. 16.
[8] ICC-01/09-02/11-357.
[9] ICC-01/09-02/11-382-Conf.
[10] Impugned Decision, p. 154.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'"[11] (hereinafter: "Appeal").

8. On 2 February 2012, the Appeals Chamber issued the "Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence"[12] (hereinafter: "Directions"). The Appeals Chamber invited the victims represented by the Legal Representative to make observations on the appeals within five days of notification of the responses to the documents in support of the appeals, or, in the event that no such responses were filed, the effluxion of the time stipulated for that purpose.[13]

9. On 3 February 2012, the OPCV filed the "Observations on the 'Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence'"[14] (hereinafter: "OPCV Request"). The OPCV submits that under rule 59 (1) (b) and (3) of the Rules of Procedure and Evidence, "victims who have already communicated with the Court in relation to their case or their legal representatives" are entitled to make submissions to the relevant Chamber.[15] In the view of the OPCV, this includes victim-applicants, who have submitted their application forms to the Court or who should otherwise be considered as having communicated with the Court.[16] The OPCV recalls that the Appeals Chamber, in previous cases, "systematically invited victim-applicants represented by the OPCV and victims having communicated with the Court to submit observations pursuant to article 19(3) of the Statute and rule 59(3) of the Rules of Procedure and Evidence".[17] The OPCV requests the Appeals Chamber, "on behalf of victim-applicants in this case and generally on behalf of victims who have communicated with the Court", to find that the OPCV may make observations before the Appeals Chamber.[18]

---

[11] ICC-01/09-02/11-383.
[12] ICC-01/09-02/11-394.
[13] Directions, p. 3.
[14] ICC-01/09-02/11-395.
[15] OPCV Request, para. 8.
[16] OPCV Request, para. 9.
[17] OPCV Request, para. 10.
[18] OPCV Request, p. 5.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

10. On 8 February 2012, Mr Kenyatta filed the "Response on behalf of Uhuru Kenyatta to the 'Observations on the "Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence"'"[19] (hereinafter: "Mr Kenyatta's Response"). Mr Kenyatta submits that the OPCV Request should be rejected.[20] He argues that "there is no provision within Rule 59 which affords the OPCV any right to participate in appeal proceedings in connection with a matter in respect of which it did not participate at first instance", underlining that "the OPCV did not participate in the jurisdiction challenge at any stage".[21] He further notes that the OPCV "does not specify which applicants it seeks to represent nor does it provide any information about their status", stating that there are no victims' applications pending since the Pre-Trial Chamber ruled on all the applications and appointed the Legal Representative.[22]

II. DETERMINATION BY THE APPEALS CHAMBER

11. At the outset, the Appeals Chamber notes that it renders this decision, having received Mr Kenyatta's Response, but in the absence of any submissions from the Prosecutor and Mr Muthaura. The Appeals Chamber recalls that it did not invite responses to the OPCV Request. It did not consider it necessary to receive submissions from the parties prior to ruling on the OPCV Request, given that the OPCV was merely requesting the Appeals Chamber to find that it is entitled to make observations. As the Appeals Chamber is rejecting the OPCV Request based on previous practice, seeking submissions would not have been in the interest of judicial economy.

12. Without in any way prejudging or touching upon the question of whether the appeals at hand are admissible, the Appeals Chamber notes that they are brought under articles 19 (6) and 82 (1) (a) of the Statute against a "decision with respect to jurisdiction". Article 19 (3), second sentence, provides that "[i]n proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court". Rule 59 of the Rules of Procedure and Evidence, entitled "Participation in proceedings under

---

[19] ICC-01/09-02/11-397.
[20] Mr Kenyatta's Response, para. 14.
[21] Mr Kenyatta's Response, para. 9.
[22] Mr Kenyatta's Response, para. 10.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

article 19, paragraph 3", sets out aspects of the procedure to be followed for victim participation. It reads as follows:

> 1. For the purpose of article 19, paragraph 3, the Registrar shall inform the following of any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19, paragraphs 1, 2 and 3:
>
> (a) Those who have referred a situation pursuant to article 13;
>
> (b) The victims who have already communicated with the Court in relation to that case or their legal representatives.
>
> 2. The Registrar shall provide those referred to in sub-rule 1, in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged.
>
> 3. Those receiving the information, as provided for in sub-rule 1, may make representation in writing to the competent Chamber within such time limit as it considers appropriate.

13. The legal instruments of the Court do not set out any specific procedure regarding the participation of victims in appeals brought under articles 19 (6) and 82 (1) (a) of the Statute. Therefore, the Appeals Chamber has adopted a scheme for such participation in the first jurisdictional and admissibility appeals that the Chamber has heard.[23] Under this scheme, only those victims who have made observations on the question of jurisdiction or admissibility in the proceedings before the Pre-Trial or Trial Chamber are invited to make observations before the Appeals Chamber, within a time limit set under rule 59 (3) of the Rules of Procedure and Evidence. This may include individuals whose victim status has not yet been determined (so-called "victim applicants"), as long as they have made observations before the first-instance Chamber. In the view of the Appeals Chamber, this scheme for victim participation in appeals under articles 19 (6) and 82 (1) (a) of the Statute appropriately gives effect to participatory rights of victims under article 19 (3), takes account of the specificities of that participatory regime (if compared to the general regime under article 68 (3) of the Statute), and avoids inefficiency in the appellate process.

---

[23] Notably, the appeals in *Prosecutor v. Thomas Lubanga Dyilo* (OA 4); *Prosecutor v. Joseph Kony et al.* (OA 3); *Prosecutor v. Jean-Pierre Bemba Gombo* (OA 3); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (OA 8); *Prosecutor v. William Samoei Ruto et al.* (OA); *Prosecutor v. Francis Kirimi Muthaura et al.* (OA).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

14. The Appeals Chamber does not see any reason to depart from the participatory scheme described above. The OPCV was not invited to make observations in respect of the present appeal as it had not submitted any observations on the Jurisdictional Challenge before the Pre-Trial Chamber. The fact that the OPCV has been invited to make observations in previous appeals in relation to a decision on jurisdiction or admissibility is not relevant to the present appeal as it is explained by the fact that in the proceedings leading up to those appeals, the OPCV had submitted observations before the relevant Pre-Trial or Trial Chamber. Thus, in those cases the Appeals Chamber simply applied the participatory scheme; it did not establish any general right of the OPCV to make submissions on jurisdictional or admissibility appeals.

15. Furthermore, in the present appeal, the Appeals Chamber does not see any reason to permit the OPCV to make observations on an exceptional basis. The Appeals Chamber notes that the Court Management Section of the Registry formally notified the OPCV of the Jurisdictional Challenge on 19 September 2011. Thus, while the Pre-Trial Chamber did not order the Registrar to transmit the Jurisdictional Challenge to the OPCV or set a time limit for the OPCV to respond to it (as it did in relation to the Prosecutor and the Legal Representative),[24] the OPCV was aware of the Jurisdictional Challenge. However, it does not appear that the OPCV thereafter requested the Pre-Trial Chamber for leave to make observations on the Jurisdictional Challenge.

16. As a final point, the Appeals Chamber notes that the OPCV Request does not specify on behalf of which victims or victim-applicants it is filed. Future filings should do so, so as to clarify who the OPCV represents. While, in the First Victim Participation Decision, the Pre-Trial Chamber appointed OPCV as legal representative for all unrepresented victim-applicants, the Pre-Trial Chamber, in the Second Victim Participation Decision, appointed the Legal Representative for all victims allowed to participate in the confirmation proceedings and related proceedings and rejected a number of other applications.

17. For the above reasons, the OPCV Request is rejected.

---

[24] *See* ICC-01/09-02/11-T-4-ENG, 21 September 2011, p. 16.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Judge Song appends a separate opinion to this decision.

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

Judge Akua Kuenyehia
Presiding Judge

Dated this 20th day of February 2012

At The Hague, The Netherlands

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Separate Opinion of Judge Sang-Hyun Song

1. I agree with the majority that the OPCV Request should be rejected on the basis that the so-called "victim-applicants" represented by the OPCV neither participated in nor were invited to participate in the proceedings before the Pre-Trial Chamber in relation to the Jurisdictional Challenge. However, I append this separate opinion to clarify my understanding of the appropriate legal reasoning underpinning this conclusion.

2. I disagree both with the majority's contention that the legal instruments of the Court do not set out any specific procedure regarding the participation of victims in appeals brought under articles 19 (6) and 82 (1) (a) of the Statute and with the majority's understanding that the Appeals Chamber has adopted a scheme for victim participation in such appeals which is not provided for in the relevant legal instruments. For the reasons which follow, I believe that the relevant legal instruments do set out such a procedure, that the Appeals Chamber's previous jurisprudence and the present decision are fully consistent with this procedure and that it is therefore unnecessary to adopt any scheme not provided in the legal instruments of the Court.

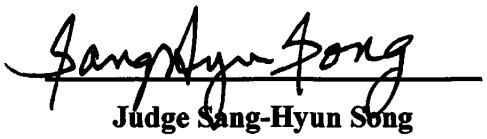
3. Rules 154 and 156 of the Rules of Procedure and Evidence and regulation 64 of the Regulations of the Court set out a clear, specific and comprehensive procedure for appeals under article 82 (1) (a) of the Statute, including for the participation of victims therein. In particular, regulation 64 (4) of the Regulations of the Court provides that, in an appeal brought under article 82 (1) (a) of the Statute, "a participant may file a response" to the document in support of the appeal. As consistently expressed since my first dissenting opinion to the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" of 13 February 2007,[25] I am of the view that the term "participant" in regulations 64 and 65 of the Regulations of the Court includes all those who participated in the proceedings giving rise to the appeal. This includes those victims

[25] ICC-01/04-01/06-138, pp. 55 to 57.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

who are accorded a general right to participate in the relevant proceedings by the Pre-Trial or Trial Chamber. In the case of appeals pursuant to articles 19 (6) and 82 (1) (a) of the Statute, it may also include other victims pursuant to article 19 (3) of the Statute and rule 59 of the Rules of Procedure and Evidence, provided that they participated in the proceedings in relation to the challenge to jurisdiction or admissibility.

4. In the present appeals, the Appeals Chamber invited those victims who were authorised to participate, and did participate, in the Pre-Trial proceedings to submit observations within five days of notification of the responses to the documents in support of the appeals or, in the event that no such responses were filed, the effluxion of the time stipulated for that purpose.[26] In my view, such victims had a right to submit a response pursuant to regulation 64 (4) of the Regulations of the Court. The Directions of the Appeals Chamber merely adjusted the time limit for this filing. The victim-applicants were neither authorised generally to participate in proceedings nor did they participate, on the basis of article 19 (3) of the Statute and rule 59 of the Rules of Procedure and Evidence, in the specific proceedings related to the Jurisdictional Challenge. They are thus not "participants" within the meaning of regulation 64 (4) of the Regulations of the Court, and they therefore have no right to participate in the present appeals.



Judge Sang-Hyun Song

Dated this 20th day of February 2012

At The Hague, The Netherlands

[26] Directions, p. 3.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm