



Original: English

**No. ICC-01/09-02/11 OA 5
Date: 27 March 2015**

THE APPEALS CHAMBER

Before:
Judge Silvia Fernández de Gurmendi
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofma ski
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR v. UHURU MUIGAI KENYATTA

Public document

**Order
on the conduct of the appeal proceedings**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Ms Helen Brady

Counsel for the Defence
Mr Steven Kay
Ms Gillian Higgins

States Representatives
Mr Githu Muigai, SC, Attorney General
of the Republic of Kenya

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber V (B) entitled “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute”, of 3 December 2014 (ICC-01/09-02/11-982),

Issues the following

ORDER

1. Mr Uhuru Muigai Kenyatta and the Government of Kenya may file a response, if any, to the “Prosecution appeal against the “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute” of 20 March 2015 (ICC-01/09-02/11-1006). The deadline for the response, if any, of the Government of Kenya is extended to 8 April 2015 by 16.00pm.
2. Any request for leave under rule 103 of the Rules of Procedure and Evidence to make observations on the appeal must be filed by 16h00 on 29 April 2015.

REASONS

1. On 29 November 2013, the Prosecutor filed the “Prosecution application for a finding of non-compliance pursuant to Article 87(7) of the Statute against the Government of Kenya” (hereinafter: “Prosecutor’s Article 87 (7) Application”).¹ On 3 December 2014, Trial Chamber V(B) (hereinafter: “Trial Chamber”) issued the “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute”² (hereinafter: “Impugned Decision”).

¹ ICC-01/09-02/11-866-Conf-Exp. A public redacted version was filed on 2 December 2013, ICC-01/09-02/11-866-Red.

² 3 December 2014, ICC-01/09-02/11-982.

2. On 9 March 2015, the Trial Chamber granted the Prosecutor leave to appeal the Impugned Decision.³

3. On 20 March 2015, the Prosecutor filed her document in support of the appeal against the Impugned Decision⁴ (hereinafter: “Document in Support of the Appeal”).

4. The Appeals Chamber notes that regulation 65 (5) of the Regulations of the Court, relevant to situations when leave to appeal has been granted, provides that “[p]articipants may file a response within 10 days of the notification of the document in support of the appeal”.

5. The Appeals Chamber also notes that, in the proceedings leading up to the Impugned Decision, the Government of Kenya (hereinafter: “Kenya”) was invited to submit observations on the Prosecutor’s Article 87 (7) Application pursuant to regulation 109 (3) of the Regulations of the Court, which requires that the relevant Chamber ‘hear from the requested State’ before making any finding pursuant to Article 87 (7) of the Statute.⁵ However, the Appeals Chamber also notes that Kenya was not treated as a participant in the proceedings leading up to the decision granting leave to appeal the Impugned Decision, but rather was invited by the Trial Chamber to file observations on the Prosecutor’s request for leave to appeal pursuant to rule 103 of the Rules of Procedure and Evidence.⁶ The Appeals Chamber is therefore of the view that, while in the ordinary course Mr Kenyatta is a participant within the meaning of regulation 65 (5) of the Regulations of the Court, this may not be as clear with respect to Kenya. In particular, Kenya may not be aware of whether it should file a response as a participant or if it should wait to be invited by the Appeals Chamber to submit observations.

6. The Appeals Chamber, noting the fact that regulation 109 (3) of the Regulations of the Court requires (“shall”) that the concerned State be heard from before a finding is made pursuant to article 87 (7) of the Statute and taking into account the subject

³ ICC-01/09-02/11-1004, “Decision on the Prosecution’s request for leave to appeal”.

⁴ “Prosecution appeal against the “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute”, ICC-01/09-02/11-1006.

⁵ “Decision requesting observations from the Government of Kenya”, 9 December 2013, ICC-01/09-02/11-870.

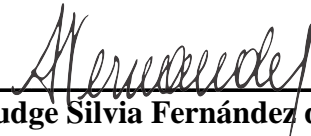
⁶ “Order requesting observations from the Government of Kenya on the Prosecution’s leave to appeal request”, 10 December 2014, ICC-01/09-02/11-986.

matter of the appeal, considers that Kenya is a participant to the appellate proceedings and may file a response to the Prosecutor's Document in Support of the Appeal pursuant to regulation 65 (5) of the Regulations of the Court.

7. In these circumstances, the Appeals Chamber also considers it appropriate to extend the deadline for Kenya to file any response to 8 April 2015 by 16.00pm.

8. Finally, in the interests of ensuring the efficient management of these proceedings, the Appeals Chamber considers it appropriate to set a deadline of 29 April 2015 for any requests for leave to make observations on the appeal under rule 103 of the Rules of Procedure and Evidence.

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



Judge Silvia Fernández de Gurmendi
Presiding Judge

Dated this 27th day of March 2015

At The Hague, The Netherlands