

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 8 February 2012

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

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’”

Source: Defence for Uhuru Muigai Kenyatta

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirmi Muthaura

Mr. Karim A. A. Khan QC, Mr. Essa Faal,
Mr. Kennedy Ogetto & Ms. Shyamala
Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali:

Mr. Evans Monari, Mr. Gershom Otachi, Mr.
Gregory Kehoe & Mr. John Philpot

Legal Representatives of the Victims

Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL HISTORY

1. On 19 September 2011, the Defence for Uhuru Muigai Kenyatta (the “Kenyatta Defence”) filed its “Submissions on Jurisdiction on Behalf of Uhuru Kenyatta”.¹
2. On 14 October 2011, the “Prosecution’s Response to the Defence Challenges to Jurisdiction” and the “Victims’ Consolidated Observations on the Kenyatta and Ali Submissions regarding Jurisdiction and/ or Admissibility” were filed with the Registry.²
3. On 23 January 2012, Pre Trial Chamber II issued the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute.”³
4. On 30 January 2012, the Kenyatta Defence and the Defence for Francis Kirimi Muthaura (the “Muthaura Defence”) submitted a notice of appeal pursuant to Articles 19(6) and 82(1)(a) of the Rome Statute (the “Statute”).⁴
5. On 2 February 2012, the Appeals Chamber issued “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”, whereby the Chamber invited Mr. Morris Azuma Anyah, acting as Legal Representative of victims, to submit observations on the documents in support of the appeals and on the responses thereto within five days of the notification of the responses or, in the event that no response is filed, the effluxion of the time stipulated for that purpose.⁵
6. On 3 February 2012, the Office of Public Counsel for Victims (the “OPCV”) filed its “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.”⁶ The OPCV acting on behalf of victim-applicants in this case and generally on behalf of victims who have communicated with the Court in the present case, requested the Appeals Chamber to find that the OPCV is entitled to submit observations on

¹ ICC-01/09-02/11-339.

² ICC-01/09-02/11-356-Conf and ICC-01/09-02/11-357-Conf respectively.

³ ICC-01/09-02/11-382-Conf.

⁴ ICC-01/09-02/11-383.

⁵ ICC-01/09-02/11-394.

⁶ ICC-01/09-02/11-395.

jurisdiction pursuant to Article 19(3) of the Statute and Rule 59(3) of the Rules of Procedure and Evidence (the “Rules”) on behalf of the aforementioned categories of victims.

II. LEGAL SUBMISSIONS

7. The Kenyatta Defence objects to the contention of the OPCV that it should be entitled to submit observations on jurisdiction on behalf of victim-applicants in this case and victims who have communicated with the Court.⁷
8. Rule 59(1)(b) of the Rules provides that the Registrar shall inform “victims who have already communicated with the Court in relation to that case or their legal representatives” of any question or challenge of jurisdiction or admissibility which has arisen pursuant to Article 19, paragraphs 1, 2 and 3. The Registry must provide these victims or their legal representative with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged. Rule 59(3) provides that those receiving the information may make representations in writing to the competent Chamber within such time limit as it considers appropriate.
9. In the instant case, the OPCV did not provide submissions at first instance on the issue of jurisdiction, following the filing of submissions by the Kenyatta Defence on 19 September 2011. 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. Unlike the position of the OPCV in respect of the Government of Kenya’s admissibility challenge, in respect of which the office filed submissions at first instance,⁸ on appeal,⁹ and in response,¹⁰ the OPCV did not participate in the jurisdiction challenge at any stage.

⁷ Victims who have applied to participate in the proceedings by submitting the standard application form duly filed in the case record by the relevant sections of the Registry.

⁸ ICC-01/09-02/11-74,

⁹ ICC-01/09-02/11-177.

¹⁰ ICC-01/09-02/11-228

10. Furthermore, the PTC has rendered decisions on all those victim-applicants initially represented by OPCV, which have been brought before the Chamber.¹¹ There are no further applications pending.¹² Those individuals who have been classified as victims and who have been granted the right to participate are now represented by the Legal Representative of Victims, who has been given permission to file submissions in respect of the appeal concerning jurisdiction. The OPCV does not specify which applicants it seeks to represent nor does it provide any information about their status. The request of the OPCV appears to attempt to invoke an unspecified group of individuals in order to obtain a right to participate in the appeal, independent of the Legal Representative of Victims. The Kenyatta Defence submits that such an attempt must be rejected as it would be contrary to the interests of justice and the integrity of the proceedings to permit the OPCV to make submissions on behalf of individuals who have no established link with the case, and who did not participate at first instance through the OPCV, on such a fundamental issue before the Appeals Chamber.
11. The Appeals Chamber has generally refused to allow victim-applicants to participate in interlocutory appeals, given that they have not yet been granted the right to participate in the proceedings.¹³
12. In *Katanga and Ngudjolo*, although applicants and victims who had communicated with the court were granted the right to participate in the appeal, this right was restricted to applicants and victims who had already participated in proceedings before the Trial Chamber.¹⁴
13. The Defence submits that a ‘victim’s’ personal interests will only be impacted by a subject matter jurisdictional challenge if they have suffered harm as a result of the alleged crimes set out in the charges. In the absence of any prior determination that the applicants represented by OPCV meet the definition of a victim for the purposes of this case, it cannot be concluded that their interests would be affected by the jurisdiction

¹¹ ICC-01/09-02/11-267; ICC-01/09-02/11-267-Conf-Anx.

¹² On 30 March 2011, the Chamber ordered the VPRS to submit compete applications for participation in the case by 8 July 2011. The Chamber and the parties received transmissions of victims’ applications on 31 May 2011 (ICC-01/09-02/11-97; ICC-01/09-02/11-98; ICC-01/09-02/11-99-Conf-Exp) and 28 July 2011 (ICC-01/09-02/11-199; ICC-01/09-01/11-200; ICC-01/09-01/11-201-Conf-Exp).

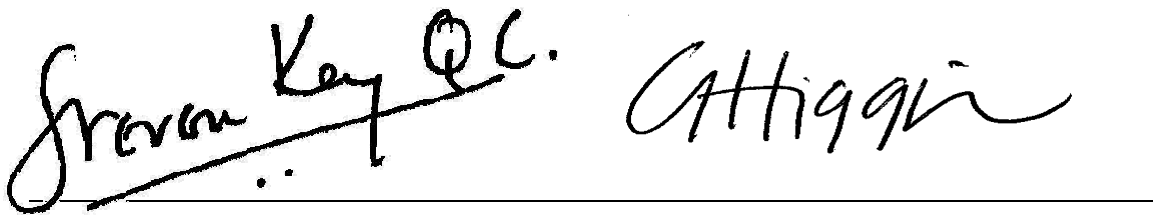
¹³ ICC-01/04-01/06-1335 16 May 2008, para 39-40; ICC-01/04-503, 30 June 2008, para 93.

¹⁴ ICC-01/04-01/07-1295.

appeal. It is notable that in the only prior appeal concerning jurisdiction, the Appeals Chamber restricted the filing of observations to three victims who had participated in pre-confirmation hearings.¹⁵

III. RELIEF

14. For the foregoing reasons, the Defence respectfully requests the Appeals Chamber to reject the OPCV request to submit observations on jurisdiction pursuant to Article 19(3) of the Statute and Rule 59(3) of the Rules on behalf of victim-applicants and those victims who have communicated with the Court in the present case.



Steven Kay QC and Gillian Higgins

On behalf of Uhuru Kenyatta

Dated this 8 February 2012

Nairobi, Kenya

¹⁵ ICC-01/04-01/06-569. This request from the Appeals Chamber permitted observations from three victims who had participated in the pre-confirmation process.