

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/11
Date: 25 September 2013

APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP
SANG

Public Redacted version

Prosecution Response to the “Defence request for reconsideration of the ‘Decision on the request for suspensive effect’ and variation of time limits pursuant to Regulation 35 of the Regulations of the Court” (ICC-01/09-01/11-977)

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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Trial Chamber V(a)

Introduction

1. The Prosecution opposes the Defence's 23 September 2013 "request for reconsideration of the 'Decision on the request for suspensive effect' and variation of time limits pursuant to Regulation 35 of the Regulations of the Court" ("Request").¹ The new facts raised in the Request have no bearing on the Appeals Chamber's reasons for granting suspensive effect. If the trial continues without Mr Ruto and the appeal succeeds, the results will be difficult to correct and the consequences may be irreversible. Therefore, the Request should be rejected.

Background

2. On 20 August 2013, the Prosecution's request for suspensive effect ("Appeal")² of the Trial Chamber V(a)'s "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial" ("Decision")³ was granted by the Appeals Chamber ("Suspension").⁴ The Appeals Chamber found that "the consequences of implementing the [...] Decision prior to the issuance of the judgment on the Prosecutor's Appeal, would be difficult to correct and may be irreversible".⁵

Submissions

3. The exceptional circumstances that permit Chambers to reconsider their prior decisions are not present in the instant case.⁶ The information and

¹ ICC-01/09-01/11-977.

² ICC-01/09-01/11-831, paras 40-42.

³ ICC-01/09-01/11-777.

⁴ ICC-01/09-01/11-862.

⁵ ICC-01/09-01/11-862, para. 10.

⁶ Trial Chamber I accepted the possibility of reconsidering decisions in exceptional circumstances (ICC-01/04-01/06-2705, paras 13-19). Pre-Trial Chamber II concluded that there is no express statutory authority to reconsider rulings (ICC-02/04-01/05-60, para. 18). The Appeals Chamber has affirmed the ability of this Court to exercise inherent judicial powers, e.g., its authority to issue a permanent stay of proceedings even though no article or rule allows it (ICC-01/04-01/06-772 OA4, paras 36-39).

arguments in the Request, including the tragic events in Kenya that led the Trial Chamber V(a) to allow an adjournment,⁷ do not change the reasoning of the Appeals Chamber's Suspension: namely, to avoid irreparably tainting the proceedings by holding a trial on an incorrect legal basis and avoid the difficulties that may arise should witnesses who testify in Mr Ruto's absence be unwilling or unable to testify again, if the Decision is reversed.⁸

4. Although the Defence claims that the Suspension has resulted in "unsatisfactory and unintended consequences such as delays in proceedings or interruptions to the testimony of witnesses",⁹ these are not grounds that merit reconsideration. Furthermore, any reconsideration of the Suspension will have *exactly* this effect if the Decision is reversed and witnesses who testify in the absence of the Accused have to be recalled.
5. As to the instant circumstances of this case, [REDACTED]¹⁰ [REDACTED],¹¹ [REDACTED].
6. Further, the Request appears to be an attempt to lead policy arguments on the merits of the appeal after the opportunity for submissions has closed. For example, the Defence states that "Mr. Ruto's excusal is warranted in the circumstances";¹² it uses the *Bemba* case as an authority for its proposition that "proceedings can continue in the absence of an accused without serious consequences for the integrity of proceedings";¹³ and the Defence even re-states that "Mr. Ruto has provided a detailed and unequivocal

⁷ ICC-01/09-01/11-T-37.

⁸ ICC-01/09-01/11-862, para.10.

⁹ ICC-01/09-01/11-977, para.6.

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² ICC-01/09-01/11-977, para. 7.

¹³ ICC-01/09-01/11-977, para. 9.

waiver”,¹⁴ despite the Appeals Chamber expressly declining to address this issue in the Suspension on the basis that it “forms part of the subject matter of the appeal”.¹⁵ These arguments have been argued previously by the Defence,¹⁶ and are inappropriately raised in this litigation.

7. Finally, the Prosecution notes that Mr Ruto is not here voluntarily, but on compulsion of a summons, and risks arrest if he defaults. He is an accused person before the Court and, while presumed innocent, cannot expect that life will continue as normally. The effect of the confirmation of charges is that a trial will ensue in the normal course and the accused, if not in custody, will have to make the necessary arrangements to attend that trial.

Confidentiality

8. This filing is submitted as “confidential” since it discusses contact with the witness currently testifying, who is the subject of protective measures put in place by the Trial Chamber. A public redacted version will be filed simultaneously.

¹⁴ ICC-01/09-01/11-977, para. 9.

¹⁵ ICC-01/09-01/11-862, para.10.

¹⁶ See ICC-01/09-01/11-846, paras.2, 3, 21, 23-25, 32, 36, 37, 40.

Conclusion

9. The conditions that led the Appeals Chamber to order suspensive effect of the Decision have not changed. Hence, the Prosecution requests the Appeals Chamber to dismiss the Request.



Fatou Bensouda, Prosecutor

Dated this 25th day of September 2013
At The Hague, The Netherlands