

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **10 June 2014**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR

v. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

Prosecution Response to Mr Ruto's Request for Suspensive Effect

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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Introduction

1. On 5 June 2014, the Defence of Mr Ruto (“Defence”) filed an appeal (“Mr Ruto’s Appeal”)¹ against the “Decision on Prosecutor’s Application for Witness Summonses and resulting Requests for State Party Cooperation” (“Decision”),² requesting, among other things, that the Appeals Chamber suspend implementation of parts of the Decision (“Request for Suspensive Effect”).³ Specifically, the Defence requested that the Appeals Chamber suspend the Decision insofar as it orders the Government of Kenya (“GoK”) to compel the attendance of specified witnesses.

2. The Prosecution opposes the Request for Suspensive Effect. Implementation of the Decision, pending the appeal, would not result in an irreversible situation, lead to consequences that would be very difficult to correct, or defeat the purpose of the appeal. Accordingly, suspension of the Decision should not be granted.

Submissions

3. The decision to order a suspension pending appeal is a discretionary one, which the Appeals Chamber has held should only be granted where immediate implementation of the Decision “would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant,” or “would lead to consequences that would be very difficult to correct and may be irreversible or “could potentially defeat the purpose of the appeal”.⁴ The Defence has not met this test in this case.⁵

¹ ICC-01/09-01/11-1345 OA8.

² ICC-01/09-01/11-1274-Corr2.

³ Mr Ruto’s Appeal, paras.50-54.

⁴ ICC-01/-9-01/11-862 OA5, para.6.

⁵ See also Mr Ruto’s Appeal, para.50, citing ICC-01/-9-01/11-862 OA5, para.6; and ICC-01/04-01/07-3344 OA13, para.6.

4. The Defence's primary arguments, that implementation of the Decision by the GoK prior to the resolution of the appeal will cause potentially irreversible harm to the eight witnesses⁶ and that compelling witnesses to testify before the Court before an appeal judgment is rendered will defeat the purpose of the appeal,⁷ are unfounded and should be dismissed. The Defence's argument that implementation of the Decision would lead to "the eight witnesses [being] compelled to testify under pain of, as yet unspecified, penalties," and that if the Decision is reversed, the witnesses will have suffered "considerable psychological stress and anxiety" and "may have been subjected to detention and/or fines under an unregulated criminal process"⁸ are largely speculative. Accordingly, they do not meet the test for suspensive effect. As for the claim that if witnesses are compelled to testify before a judgment is rendered in this appeal then the purpose of the appeal will be defeated, this is an unsupported argument which cannot meet the test for suspensive effect and should be dismissed *in limine*.

5. Given that the GoK already has the necessary legislation to implement the Decision,⁹ the Defence has not explained why immediate action by the GoK to put in place the practical and legal steps required to provide the assistance ordered by the Decision will lead to witnesses being compelled to testify "under pain of, as yet unspecified, penalties," including even detention or fines "under an unregulated criminal process". As such, these arguments lack merit and should be dismissed.

6. In addition, the Defence's arguments are also speculative because they assume that the eight witnesses who will be served with the summonses will not only continue to refuse to give evidence (and thus will need to be compelled to testify), but also that the potential of their being subjected to "unspecified penalties" will cause them psychological stress and anxiety. However, the consequences that

⁶ Mr Ruto's Appeal, para 51

⁷ Mr Ruto's Appeal, para.52.

⁸ Mr Ruto's Appeal, para.51.

⁹ See Prosecution's submission: ICC-01/09-01/11-1202, paras.21-24.

implementation of the Decision will have on these eight witnesses are far from clear. For example, the witnesses might ultimately decide to cooperate, since the prospect of the GoK taking compulsive measures may suffice to ensure their appearance.¹⁰ And even if some or all of them do not cooperate, the Defence has not explained why the penalties they may face would be “unspecified” or made a clear link to their potential for psychological stress or anxiety. The Appeals Chamber should not be persuaded by such hypothetical claims.

7. The Defence’s additional arguments that suspension of the Decision is needed because otherwise the GoK would be required to make efforts “in pursuit of an incorrect decision” and that “no government should be required to act illegally and contrary to the Statute and, crucially, its own Constitution,”¹¹ are likewise misplaced. First, by enforcing the Decision by using Kenyan legislation already in place, the GoK would not be acting illegally. Rather, it would be acting in accordance with an ICC judicial decision that interprets the applicable legal provision, including the relevant Kenya law.¹² The Decision is legally binding on the GoK regardless of the hypothetical possibility that it might be overturned on appeal. If the Defence’s argument were correct, no decision could ever be enforced as long as a party or participant believed it to be incorrect and *any potential* appellate remedy remained outstanding. Such a practice would be contrary to the Appeals Chamber’s case law emphasising that “[s]uspensive effect is not automatic”.¹³ Second, even if, *arguendo*, the Decision would require the GoK to act “illegally” and/or contrary to its own Constitution, the Defence has not demonstrated that enforcement would create an irreversible situation or potentially defeat the purpose of the appeal in the event that

¹⁰ See Decision, Disposition, third paragraph, item (ii): “[The Chamber] REQUESTS the assistance of the Government of Kenya [...] to facilitate, *by way of compulsory measure as necessary*, the appearance of the indicated witnesses for testimony before the Trial Chamber [...]” (emphasis added).

¹¹ Mr Ruto’s Appeal, para.51.

¹² Decision, paras.157-179.

¹³ ICC-01/04-02/12-12 OA, para.20.

the appeal is granted.¹⁴ Ultimately, any acts taken by the GoK could simply be nullified if the Decision was overturned by the Appeals Chamber.

8. In sum, the Defence's request for suspensive effect of the Decision should be rejected. However, if the Appeals Chamber were to grant suspensive effect, the Prosecution reserves the right to make submission in relation to the Defence's and the GoK's proposal to limit the GoK's conduct *"to locat[ing] and serv[ing] [all summonses issued by the Court on] the eight witnesses"* in order that *'any witness who is found and served and who indicates he/she is now, in light of the subpoena or otherwise, ready and willing to testify, will be availed to the Court without delay.'*¹⁵ At this stage it is premature for the Prosecution to comment on this proposal pending a decision on the Request for Suspensive Effect.

Conclusion

9. For the reasons set out above, the Defence has not met the test for suspensive effect and accordingly the Request for Suspensive Effect should be rejected.



Fatou Bensouda, Prosecutor

Dated this 10th day of June 2014

At The Hague, The Netherlands

¹⁴ ICC-01/-9-01/11-862 OA5, para.6; ICC-01/04-01/07-3344 OA13, para.6.

¹⁵ Mr Ruto's Appeal, para.53 and footnote 116.