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

Date: **19 March 2012**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

*IN THE CASE OF
 THE PROSECUTOR V. WILLIAM SAMOEI RUTO
 AND JOSHUA ARAP SANG*

Public Document

Prosecution's Response to the Victims' "Consolidated observations on the documents in support of the Articles 19(6) and 82(1)(a) appeals and the Prosecution responses thereto"
 (ICC-01/09-01/11-401 OA3 OA4)

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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BACKGROUND

1. On 23 January 2012, Pre-Trial Chamber II issued its “Decision on the Confirmation of Charges pursuant to Article 61(7) of the Rome Statute” (“Confirmation Decision”) in which it rejected the jurisdictional challenges brought by Mr Ruto and Mr Sang (the “Appellants”).¹ Judge Kaul dissented. He disagreed with the Majority’s interpretation of “organizational policy” under article 7(2)(a).² The Chamber was unanimous in declining to confirm the charges against Kosgey.
2. On 30 January 2012, the Appellants filed their notices of appeal against the Majority’s ruling on jurisdiction.³ On 14 February 2012, the Appellants separately filed their documents in support of appeal pursuant to article 82(1)(a) against the Majority’s Decision on jurisdiction.⁴
3. On 7 March 2012, the Prosecution filed its consolidate response to the Appellants’ documents in support of appeal (“Prosecution’s Response”).⁵
4. On 13 March 2012, the victims represented by Ms Sureta Chana filed their consolidate observations to the Appellants’ documents in support of appeal and the Prosecution’s Response (“Victims’ Observations”).⁶
5. The Prosecution herewith responds to the Victims’ Observations pursuant to the Appeals Chamber’s directions.⁷

¹ ICC-01/09-01/11-373, pp.1-139.

² ICC-01/09-01/11-373, pp.140-173 (“The Dissent”).

³ ICC-01/09-01/11-374, ICC-01/09-01/11-375.

⁴ ICC-01/09-01/11-388OA3 (“Ruto Brief”) and ICC-01/09-01/11-389OA4 (“Sang Brief”).

⁵ On 8 March the Prosecution filed a corrigendum. See ICC-01/09-01/11-397-Corr OA3 OA4.

⁶ ICC-01/09-01/11-401 OA3 OA4.

⁷ ICC-01/09-01/11-383 OA3 OA4.

SUBMISSIONS

6. The Prosecution agrees with the Victims in that the Appellants' Third Ground of Appeal, namely the concept of "organization" under the Statute, is not a jurisdictional issue and accordingly the ground should be summarily dismissed. The Victims correctly note that this is a matter of statutory interpretation that should be litigated at trial, and if necessary, before the Appeals Chamber in a post-judgment appeal.⁸

7. The Victims further note that the Appellants' reliance on the concept of "organization" adopted in the Dissenting Opinion is misplaced. According to the Victims, there is no substantial difference between the position of the Majority and the Dissent. Both the Majority and the Dissent list a non-exhaustive list of factors that should be considered in order to determine whether a group constitutes an organization under the Statute.⁹ The difference between Majority and Dissent rather rested on their views on the evidence and the facts of the case, and not on their views on the law.¹⁰ It follows that the use of indicators as a mechanism to determine in each case whether a given legal provision is appropriate, and no error can be attributed to the Decision in this regard.

8. In this sense, the Prosecution also agrees with the Victims that the provision of a non-exhaustive list of potentially relevant factors necessarily entails a flexible concept and case-by-case determination of what constitutes an "organization" under the Statute. Article 7 does not restrict or define the characteristics of an organization or organizational policy because a "one-

⁸ Victims' Observations, paras.58-59. See Prosecution's Response, para.52.

⁹ Victims' Observations, paras.7-9.

¹⁰ Ibid., para.11.

size fits all” interpretation cannot adequately address the realities of each situation.¹¹ As the Victims point out not all societies and conflicts are alike and the concept of “organization” has to be flexible enough to capture the particularities of each case.¹²

9. The Prosecution further notes that Trial Chamber I in the recent Lubanga Judgment followed the same flexible approach as the Majority in determining whether a body qualified as an organised armed group for the purposes of determining whether an armed conflict was of an international character or not. First, it set out some general parameters that would allow for a conflict to be characterised as an armed conflict not of an international character. In particular it required the involvement of armed groups with some degree of organisation, and the ability to plan and carry out sustained military operations.¹³
10. Second, and in order to determine whether a body qualified as an organised armed group, the Chamber set out a non-exhaustive list of factors which are potentially relevant to this determination, such as the group’s internal hierarchy, its military equipment, the ability to plan military operations, inter alia.¹⁴ The Chamber further noted that “[n]one of these factors are individually determinative. The test, along with these criteria, should be applied *flexibly* when the Chamber is deciding whether a body was an organised armed group, given the limited requirement in Article 8(2)(f) of the Statute that the armed group was ‘organized’”.¹⁵ The Chamber added that “it is unnecessary for the prosecution to establish that the relevant

¹¹ Victims’ Observations, para.73.

¹² Victims’ Observations, paras.75-76.

¹³ ICC-01/04-01/06-2842 (“Lubanga Trial Judgment”), para.535.

¹⁴ Lubanga Trial Judgment, para.537

¹⁵ Ibid. (emphasis added).

armed groups exercised control over part of the territory of the State”.¹⁶ In addition, it is not necessary that the groups are “under responsible command”.¹⁷ It suffices that the groups have a “sufficient degree of organisation, in order to enable them to carry out protracted armed violence”.¹⁸ Like the Majority when defining “organization”, Trial Chamber I considered that the defining criterion of an “organised armed group” was the *capacity* of the group to carry out protracted armed violence and not its formal nature.

11. In the instant case, the Majority essentially followed the same method: it identified the core essential requirement of an “organization” under the Statute, namely, its capacity to implement a policy of widespread or systematic attacks against civilians.¹⁹ Then, the Majority rightly held that the determination of whether a group is an organization under the Statute will be made on a case-by-case basis depending on the facts of the case. Consistent with the jurisprudence of other tribunals, the Majority provided a non-exhaustive list of factors that should inform the Chambers’ assessment of the organization’s capacity to commit the offences under article 7(1).²⁰

12. In sum, and contrary to the Appellants’ submissions, these factors do not expand the concept of “organization” under the Statute. The Majority did not create new elements of crimes or amend existing ones. Rather, the factors enunciated by the Majority are indicators to assist in determining whether the facts of the case satisfy the legal requirement of an

¹⁶ Ibid., para.536.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Confirmation Decision, para.184 referring to ICC-01/09-19-Corr (or “Article 15 Decision”), paras.90,92.

²⁰ Confirmation Decision, para.185, referring to Article 15 Decision, para.93.

organizational policy. Developing auxiliary tools of this kind is perfectly appropriate and fully compatible with the *nullum crime* principle.²¹

CONCLUSION

13. For the reasons set out above, the Prosecution respectfully requests that the Chamber entertain the Victims' Observations and dismiss the Appellants' documents in support of appeal.



Luis Moreno-Ocampo, Prosecutor

Dated this 19^h day of March 2012

At The Hague, the Netherlands

²¹ See Prosecution Response, paras.107-112. See also paras.73-77.