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

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. FRANCIS KIRIMI MUTHAURA
AND UHURU MUIGAI KENYATTA***

Public Document

**Prosecution's Response to the Victims' "Observations pursuant to Article
19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and
Evidence"**

(ICC-01/09-02/11-408 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 Articles 61(7)(a) and (b) of the Rome Statute” (the “Confirmation Decision”) in which it rejected the challenges against the jurisdiction of the Court brought by Mr Kenyatta and Mr Muthaura (the “Appellants”).¹ Judge Kaul dissented. He disagreed with the Majority’s interpretation of “organizational policy” under article 7(2)(a). The Chamber was unanimous in declining to confirm the charges against Ali.
2. On 30 January 2012, the Appellants filed their notices of appeal against the Majority’s ruling on jurisdiction.² On 14 February, the Appellants jointly filed their document in support of appeal pursuant to article 82(1)(a) against the Majority’s decision on jurisdiction (“Appeal Brief”).³
3. On 7 March 2012, the Prosecution filed its response to the Appellants’ document in support of the appeal (“Prosecution’s Response”).⁴
4. On 13 March 2012, the victims represented by Mr Morris Azuma Anyah filed their observations to the Appellants’ document in support of the appeal and the Prosecution’s Response (“Victims’ Observations”).⁵
5. The Prosecution herewith responds to the Victims Observations pursuant to the Appeals Chamber’s directions.⁶

¹ ICC-01/09-02/11-382-Red (“Confirmation Decision”), pp.1-155.

² ICC-01/09-02/11-383OA4.

³ ICC-01/09-02/11-399OA4.

⁴ ICC-01/09-02/11-404OA4.

⁵ ICC-01/09-02/11-408OA4.

⁶ ICC-01/09-02/11-394OA4.

SUBMISSIONS

6. The Prosecution agrees with the Victims in that the Appellants' First and Second Ground of Appeal, namely the Chamber's determination of the Court's jurisdiction and the concept of "organization" under article 7(2)(a), respectively, should be summarily dismissed.⁷ As the Prosecution submitted in its response, the Appellants' arguments do not relate to jurisdictional issues, but to substantive matters that should be decided at trial. The Prosecution further agrees with the Victims in that the Third and Fourth grounds should be equally dismissed. With respect to the Third Ground, and contrary to the Appellants' submissions, the Confirmation Decision was consistent with the Prosecution's factual and legal submissions.⁸ In their Fourth Ground of Appeal, the Appellants are challenging the Majority's assessment of the evidence and its factual findings. This is not a matter relevant to the Chamber's determination of the jurisdiction of the Court and should be therefore dismissed *in limine*.⁹

7. With respect to the Second Ground of Appeal, namely the interpretation of "organization" under the Statute, the Victims submit that the Majority's test "appropriately asks whether the organization in question was capable of engaging in such a collectively targeted attack".¹⁰ They further argue that while it is accurate to say that the element of "organizational policy" was included in the Statute to ensure that unconnected crimes would not fall within the Court's jurisdiction, the drafters never intended the formal nature of the group to be the defining criterion.¹¹

⁷ See Victims Observations, paras.9-22 (First Ground) ; 23-33 (Second Ground).

⁸ Ibid., paras.34-36.

⁹ Ibid., para.37.

¹⁰ Victims' Observations, para.31.

¹¹ Ibid., para.32. See Prosecution's Response, paras.85-86.

8. The Prosecution agrees with the Victims' Observations in this regard. The Majority correctly found in its Article 15 Decision that the capacity of the organization to commit widespread or systematic attacks on civilian population was the determinative criterion.¹² The Majority advanced a flexible concept of "organization" albeit with expressed safeguards that would avoid the inclusion of vague range of crimes within the jurisdiction of the Court. The Majority first 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.¹³ Then, the Majority rightly held that the determination of whether a group is an organization under the Statute should 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).¹⁴
9. The Prosecution further notes that Trial Chamber I in the recent Lubanga Judgment essentially followed the same 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

¹² See Prosecution's Response, paras.62-73 (on the concept of «organization» endorsed by the Majority); paras.74-78 (on the resources and capabilities of private entities and the irrelevance of the organizations' control over a territory). The Prosecution has argued in its Response that the Chamber dismissed *in limine* the Appellants' arguments on the interpretation of "organization" and therefore did not rule on the concept of "organization" in its determination of the Court's jurisdiction at the Confirmation Decision (Prosecution's Response, paras.51-53). When assessing the merits of the case, the Majority referred to and applied the concept of organization advanced in ICC-01/09-19-Corr or "Article 15 Decision" (see Confirmation Decision, paras.114, 186-219).

¹³ Article 15 Decision, paras.90,92.

¹⁴ Article 15 Decision, para.93. See the Majority's assessment of the factors in light of the facts of the case in paras.186-219 of the Confirmation Decision.

some degree of organisation, and the ability to plan and carry out sustained military operations.¹⁵

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. 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'".¹⁶ The Chamber added that "it is unnecessary for the prosecution to establish that the relevant armed groups exercised control over part of the territory of the State". In addition, it is not necessary that the groups are "under responsible command". It suffices that the groups have a "sufficient degree of organisation, in order to enable them to carry out protracted armed violence".¹⁷

11. In sum, 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. Then, it set out a non-exhaustive list of factors that may assist the Chambers in its determination of an "organised armed group". The Majority essentially followed the same approach in defining "organization" under article 7(2)(a). These factors do not expand the concept of "organization" or "organised armed group" under the Statute. Rather, the factors are indicators to assist in determining

¹⁵ ICC-01/04-01/06-2842 ("Lubanga Trial Judgment"), para.535.

¹⁶ Lubanga Trial Judgment, para.537 (emphasis added).

¹⁷ Ibid, para.536.

whether the facts of the case satisfy these legal requirements. Developing auxiliary tools of this kind is perfectly appropriate and fully compatible with the *nullum crime* principle.

CONCLUSION

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



Luis Moreno-Ocampo,
Prosecutor

Dated this 19th day of March, 2012
At The Hague, The Netherlands