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

Date: 30 January 2012

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO,
HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG

PUBLIC

Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Sang on Jurisdiction

Source: Defence for Mr. Joshua Arap Sang

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for William Ruto

Kioko Kilukumi Musau, David Hooper
QC, Joseph Kipchumba Kigen-Katwa

Counsel for Henry Kosgey

George Odinga Oraro, Julius Kemboy
and Allan Kosgey

Counsel for Joshua Sang

Joseph Kipchumba Kigen-Katwa, Joel
Kimutai Bosek and Philemon K.B. Koech

Legal Representatives of the Victims

Sureta Chana

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

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Pereira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. Pursuant to Articles 19(6) and 82(1)(a), Rule 154 of the Rules and Regulation 64 of the Regulations of the Court, the Defence for Mr. Joshua Arap Sang (“the Defence”) hereby appeals the Majority’s determination that the Court has jurisdiction *ratione materiae* over the situation in Kenya, including the case against Mr. Sang.
2. On 23 January 2012, Pre-Trial Chamber II issued its *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* (“Confirmation Decision”).¹ As part of the Confirmation Decision, the Majority adjudicated the *Defence Challenge to Jurisdiction*.² Specifically, the Majority determined that the Court has jurisdiction over the suspects because they belonged to an ‘organization’ or adhered to an ‘organizational policy’ in accordance with Article 7(2)(a) of the Statute.³ In so finding, the Majority endorsed the interpretation of the term ‘organizational policy’ as it had developed extensively in its 31 March 2010 Authorization of an Investigation into the situation in Kenya⁴ and as reiterated in its Decision on Summons to Appear⁵.
3. In a series of dissenting opinions, Judge Hans-Peter Kaul has concluded that the Court’s jurisdiction over the situation in Kenya should be denied. He has consistently disagreed with the Majority as to the interpretation of what constitutes an ‘organization’ within the meaning of Article 7(2)(a) of the Statute.⁶ In particular, in his Dissenting Opinion to the Confirmation Decision, the learned Judge stated that he is:

“not satisfied to the 'degree of certainty' that the crimes were committed pursuant to the policy of a State-like 'organisation', which is an indispensable constitutive contextual element and inherent characteristic of crimes against humanity under article 7 of the Statute. Without the crimes alleged having been embedded in an "organizational policy" ... the Court has no

¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012 (“Confirmation Decision”); appended to the Confirmation Decision is the Dissenting Opinion by Judge Han-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” , 23 January 2012 (“Dissenting Opinion to the Confirmation Decision”).

² ICC-01/09-01/11-305.

³ Confirmation Decision, paras 33-34; See full discussion and determination of the jurisdictional challenge in Confirmation Decision, paras 23-38.

⁴ Situation in Republic of Kenya, ICC-01/09-19-Corr, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010 (“Authorization of an Investigation”).

⁵ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-1, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011 (“Decision on Summons to Appear”).

⁶ Most recently in the Dissenting Opinion to the Confirmation Decision.

jurisdiction *ratione materiae* over the situation in the Republic of Kenya, including in the present case.”⁷

II. Procedural Background

4. In its Decision of 31 March 2010 Authorization of an Investigation,⁸ Pre-Trial Chamber II found, by a majority, that there were reasonable grounds to believe that the threshold requirements of crimes against humanity were met.⁹ In reaching this conclusion, a wide interpretation was given to the requirement, under Article 7(2)(a), that the crimes were committed as part of an attack, directed against a civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.¹⁰ The Chamber found that, in light of the information presented by the Prosecutor, there were reasonable grounds to believe that the crimes were committed pursuant to or in furtherance of an organizational policy. This was on the basis that the attacks were planned, financed, directed or organized by various groups including local leaders, businessmen and politicians, amongst others, associated with the Orange Democratic Movement (“ODM”).¹¹ According to the Majority view, an organizational policy requires an organization behind the policy but does not require any State-like elements.¹²
5. In a separate opinion, the dissenting Judge articulated a classical, i.e. narrower, interpretation to the term ‘organizational policy’ and held that such a policy must stem from a State-like organization.¹³
6. In its *Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, issued on 8 March 2011 (“Decision on Summons to Appear”),¹⁴ Pre-Trial Chamber II, again by a majority, considered it unnecessary to reiterate its earlier finding or to provide any further detailed assessment of the question of jurisdiction.¹⁵ Instead, the Majority referred to its previous decision of 31 March 2010, the Authorization of an Investigation, and found that it had jurisdiction to adjudicate the case against Mr. Ruto, Mr. Kosgey and Mr. Sang.¹⁶

⁷Dissenting Opinion to the Confirmation Decision, para 13.

⁸ ICC-01/09-19-Corr, Authorization of Investigation.

⁹ *Ibid*, paras 72-138.

¹⁰ *Ibid*, paras 83-93.

¹¹ *Ibid*, paras. 115-128.

¹² *Ibid*, para. 90; footnote 82.

¹³ Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09-19-Corr , paras 50-52.

¹⁴ ICC-01/09-01/11-1.

¹⁵ *Ibid*, paras. 10, 11

¹⁶ *Ibid*, para 11

7. In a second dissenting opinion, the learned Judge reiterated his initial dissenting position as to ‘organizational policy’ and held that the Prosecution had failed to establish reasonable grounds to believe that there was an organization within the context of Article 7(2)(a) of the Statute.¹⁷
8. On 30 August 2011, pursuant to Article 19 of the Statute, the Defence filed its *Defence Challenge to Jurisdiction*,¹⁸ wherein it submitted that the Court did not have subject matter jurisdiction over the case, in that the Majority of Pre-Trial Chamber II had drawn an erroneous conclusion by adopting a liberal and too wide a definition of ‘organizational policy’. The Defence concurred with the dissenting Judge’s finding, which the Defence submitted reflects the intention of the drafters of the Statute, the view of a majority of leading scholars, and the current status of customary international law.¹⁹

III. Applicable Law

9. The Defence hereby files this appeal against the Majority’s finding on jurisdiction, pursuant to Articles 19(6) and 82(1)(a) of the Statute, Rule 154(1) of the Rules of Procedure and Evidence, and Regulation 64 of the Regulations of the Court.

IV. Submissions on the Defence’s Right to Appeal Jurisdiction

10. The Defence notes that the Majority is of the view that the Defence has forfeited its right to appeal jurisdiction by not lodging an appeal after its Decision on the Summons to Appear, which reiterated the same legal findings of the 31 March 2010 Authorization of an Investigation.²⁰ Furthermore the Majority opines that the issue which the Defence wishes to appeal does not fall within the ambit of a jurisdictional challenge.²¹ In this regard, the Defence acknowledges and adopts Judge Kaul’s comment in his Dissent to the Confirmation Decision to the effect that such an approach is “as astonishing as it is misconceived.”²²

¹⁷ Public Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-2, 15 March 2011, in particular, para. 12

¹⁸ ICC-01/09-01/11-305.

¹⁹ *Ibid*, para 7

²⁰ Confirmation Decision, para 34.

²¹ Confirmation Decision, para 35.

²² Dissenting Opinion to the Confirmation Decision, para 25.

11. Article 19, subsections (4) and (6), affords the Defence an explicit right to challenge jurisdiction at first instance before either the Pre-Trial Chamber or Trial Chamber, and an independent right to appeal. The Appeals Chamber has previously indicated that the Pre-Trial Chambers should not pre-determine Article 19 issues without the full participation of the Defence.²³ The fact that the Defence did not appeal the Decision on Summons is therefore irrelevant to the issue as to whether the Defence has a right to challenge it subsequently.
12. The Defence is mindful of the interpretation of Article 19 as articulated by Pre-Trial Chamber I in the *Mbarushimana* case, wherein Pre-Trial Chamber I clearly underlined the importance of the unique nature of the remedy provided to a suspect by that provision:

“The Chamber observes that a suspect’s right to challenge the jurisdiction of the Court is a special remedy enshrined in article 19 of the Statute, as such autonomous and independent from any other remedy which the suspect might have by virtue of other statutory provisions”.²⁴
13. As Judge Kaul notes, the above finding “highlights the general importance of the jurisdictional challenges under article 19 of the Statute which should not be diminished. Hence, the function of article 19 of the Statute must not be significantly reduced by excluding matters of jurisdiction *rationae materiae*.”²⁵
14. Consequently, the Defence’s right to appeal the portion of the Confirmation Decision asserting the Court’s subject matter jurisdiction over Mr. Sang should not be curtailed.

V. Relief Sought

15. The Defence therefore submits this appeal against the exercise of the Court’s jurisdiction *ratione materiae* over the situation in Kenya, including the case against Mr. Sang. The Defence requests that the Appeals Chamber reverse the Majority’s definition of ‘organizational policy’ as well as its evidentiary finding that the Prosecution has submitted sufficient evidence to establish substantial grounds to believe that the crimes

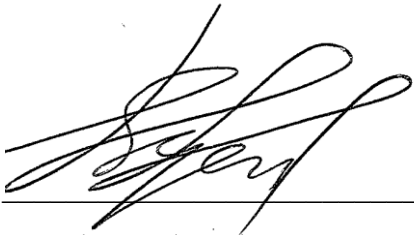
²³ *Situation in the Democratic Republic of the Congo*, Appeals Chamber, ICC-01-04-169, Judgement on the Prosecutor’s Appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, 13 July 2006, paras 47-50.

²⁴ *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, ICC-01/04-01/10-451, Decision on the Defence Challenge to the Jurisdiction of the Court, para 11.

²⁵ Dissenting Opinion on Confirmation Decision, paras 33 and 34.

were committed in furtherance of an ‘organizational policy’. The ultimate relief requested by the Defence is for the Appeals Chamber to decline to exercise its jurisdiction over the situation in Kenya and for the case against Mr. Sang to be dismissed.

16. Furthermore, pursuant to Article 82(3) of the Statute and Rule 156(5) of the Rules of Procedure and Evidence, the Defence requests that this appeal have suspensive effect on the proceedings and that a Trial Chamber not be constituted, if at all, until this appeal has been concluded.



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 30th day of January 2012
In Nairobi, Kenya