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No.: ICC-01/09-02/11
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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. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI
KENYATTA AND MOHAMMED HUSSEIN ALI
Public**

Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”

Source: Defence for Uhuru Muigai Kenyatta
Defence for Francis Kirimi Muthaura

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

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Mr. Morris Anyah

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

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Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. Pursuant to Article 82(1)(a) of the Rome Statute (the “Statute”), the Defence for Uhuru Muigai Kenyatta (the “Kenyatta Defence”) and the Defence for Francis Kirimi Muthaura (the “Muthaura Defence”) respectfully submit their appeal against the Majority of Pre-Trial Chamber II’s (the “Majority”) “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (the “Confirmation Decision”), dated 23 January 2012.¹
2. In the Confirmation Decision, the Majority ruled on the Kenyatta Defence’s “Submissions on Jurisdiction on Behalf of Uhuru Kenyatta”,² finding that the requirement of material jurisdiction had been met and that the case against the Suspects fell within the jurisdiction of the Court.³ The Majority’s ruling in the Confirmation Decision therefore reaffirms its previous determination on 31 March 2010 in the “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”⁴ (the “Investigation Decision”) and on 8 March 2011 in the “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “Summons Decision”).⁵
3. Contrary to the findings of the Majority, His Honour Judge Kaul has dissented and consistently held that the case against the Suspects does not fall within the jurisdiction of the International Criminal Court.⁶ In his Dissenting Opinion on 23 January 2012, HHJ Kaul held that he was not satisfied that the crimes were committed pursuant to the policy of a State-like ‘organization’, which is an indispensable constitutive contextual element of crimes against humanity under Article 7 of the Statute.⁷ He held that “without the crimes alleged having been embedded in an ‘organizational policy’”,

¹ The Decision of the Majority of the Pre-Trial Chamber (the “Majority Decision”) is found at, ICC-01/09-02/11-382-Conf, pp.1-155; His Honour Judge Kaul’s dissenting opinion (the “Dissenting Opinion”) is found at pp.156-193. The discussion and subsequent findings as to jurisdiction can be found at paras 23-37 of the Majority Decision.

² ICC-01/09-02/11-339.

³ Majority Decision, ICC-01/09-02/11-382-Conf, para 37.

⁴ ICC-01/09-19-Corr. The Majority’s legal analysis and findings on the law concerning the contextual elements of crimes against humanity can be found at paras 73-88.

⁵ ICC-01/09-02/11-01, The Majority adopts its reasoning from the Investigation Decision at para 16.

⁶ ICC-01/09-19-Corr, pp. 84-163, paras 33-70; ICC-01/09-02/11-3, paras 9-15.

⁷ Dissenting Opinion, ICC-01/09-02/11-382-Conf, para 20.

the Court does not have “jurisdiction *ratione materiae* over the situation in the Republic of Kenya, including the present case.”⁸

II. PROCEDURAL BACKGROUND

4. In the Investigation Decision, the Majority authorised an investigation into the situation in the Republic of Kenya. In reaching its decision, the Majority adopted an expansive interpretation of the term ‘organization’ under Article 7(2)(a) of the Statute. Whilst it accepted that there was a need for an organization behind the policy, it rejected the requirement that such an organization must possess any State-like elements:

“[T]he Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values” (the “Basic Human Values Test”).⁹

5. On 31 March 2010, HHJ Kaul issued a Dissenting Opinion to the Investigation Decision, holding *inter alia* that he did not identify an “attack directed against a civilian population” committed “pursuant to or in furtherance of a State or organizational policy” on the evidence produced by the Prosecutor. He gave a contextual interpretation of the term organizational policy in which he stated the need for a “state-like organization”:

“[I] read the provision such that the juxtaposition of the notions ‘State’ and ‘organization’ in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those ‘organizations’ should partake of some characteristics of a State.”¹⁰

6. In the Summons Decision, the Majority ordered the Suspects to appear before the Court for an initial appearance on 8 April 2011. The Majority based its decision on organizational policy upon the same “Basic Human Values Test”, stating that it found

⁸ Dissenting Opinion, ICC-01/09-02/11-382-Conf, para 20.

⁹ ICC-01/09-19-Corr at para 90.

¹⁰ ICC-01/09-19-Corr at para 51.

no reason to reiterate its earlier findings and provide a further detailed assessment of the question of jurisdiction at this stage.¹¹

7. On 15 March 2011, HHJ Kaul issued a Dissenting Opinion to the Summons Decision in which he reiterated his previous arguments from the Dissenting Opinion to the Investigation Decision.¹² He held that he failed to see “how an ‘organization’ could have existed in which the primary actors were the Mungiki gang and the Kenyan Police Forces” and therefore failed to see how the crimes alleged “were embedded in an “organizational policy””.¹³

8. On 19 September 2011, the Kenyatta Defence filed its “Submissions on Jurisdiction on Behalf of Uhuru Kenyatta”,¹⁴ in which it challenged that the Court had jurisdiction to try the case under Article 7 of the Statute for crimes against humanity, on the ground that there was no attack on any civilian population pursuant to a State or ‘organizational policy’ as disclosed by the evidence of the Prosecution. The Kenyatta Defence challenged the legal and contextual definition of ‘organizational’ within the meaning of Article 7(2)(a) of the Statute as applied by the Majority in the Investigation Decision and the Summons Decision and submitted that consideration must be given to the express wording of Article 7 of the Statute, the interpretation of which must not contravene the principle of *nullem crimen sine lege* under Article 22. The Kenyatta Defence further submitted that the “Basic Human Values test” of the Majority does not reflect the intentions of the drafters of the Statute. In support of its contention, the Kenyatta Defence averred that the test formulated by HHJ Kaul accurately reflects the intention of the drafters of the Statute as well as leading academic opinion upon the issue, and establishes the correct boundary between national and international crimes.

9. On 14 October 2011, the “Prosecution’s Response to the Defence Challenges to Jurisdiction” and the “Victims’ Consolidated Observations on the Kenyatta and Ali Submissions regarding Jurisdiction and/ or Admissibility” were filed with the Registry.¹⁵

¹¹ ICC-01/09-02/11-01, at para 11.

¹² ICC-01/09-19-Corr.

¹³ ICC-01/09-02/11-03, para 35.

¹⁴ ICC-01/09-02/11-339.

¹⁵ ICC-01/09-02/11-356-Conf and ICC-01/09-02/11-357-Conf respectively.

10. The Confirmation Hearing took place between 21 September and 5 October 2011, during which the Defence for Mr Kenyatta made submissions upon the sufficiency of the evidence and called two *viva voce* witnesses as permitted by the Pre-Trial Chamber.¹⁶
11. On 28 October 2011, both the Prosecution and the Victims' Legal Representative submitted their written observations on the Confirmation Hearing.¹⁷
12. On 17 November 2011, the Defence for Mr Kenyatta submitted its written observations on the Confirmation Hearing.¹⁸ The defence teams for Mr Ali and Mr Muthaura submitted their observations on 21 November 2011.¹⁹
13. At paragraph 110 of its "Final Written Observations on the Confirmation of Charges Hearing",²⁰ the Muthaura Defence submitted its challenge to the jurisdiction of the Court pursuant to Article 19 of the Rome Statute. In particular, the Muthaura Defence asserted that the Article 7(2)(a) element of "organizational policy" had not been satisfied. Further, the Muthaura Defence adopted in full the previous submissions of the Kenyatta Defence on this issue.²¹
14. On 23 January 2012, the Majority issued the Confirmation Decision. The Majority confirmed the charges against Mr Kenyatta and Mr Muthaura, and declined to confirm the charges against Mr Ali. His Honour Judge Kaul delivered a dissenting opinion in which he stated that he was not satisfied that the crimes charged amounted to crimes against humanity. He determined that jurisdiction over this case should be denied and that the Defence challenge on jurisdiction "must be fully entertained."²²

III. RELEVANT LEGAL PROVISIONS

15. Pursuant to Article 19(1) of the Statute, the Court shall satisfy itself that it has jurisdiction over any case brought before it. Article 19(4), states that the jurisdiction of the Court may be challenged only once by any person in respect of whom a summons to

¹⁶ ICC-01/09-02/11-226; ICC-01/09-02/11-242; ICC-01/09-02/11-275.

¹⁷ ICC-01/09-02/11-361 and ICC-01/09-02/11-360 respectively.

¹⁸ ICC-01/09-02/11-372.

¹⁹ ICC-01/09-02/11-373 and ICC-01/09-02/11-374 respectively.

²⁰ ICC-01/09-02/11-374-Conf.

²¹ ICC-01/09-02/11-372, paras 40-58.

²² Dissenting Opinion, ICC-01/09-02/11-382-Conf, para.45.

appear has been issued pursuant to Article 58 and that challenge shall take place prior to, or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a later time than the commencement of the trial. Article 19(6) provides that prior to the confirmation of the charges, challenges to the jurisdiction of the court shall be referred to the Pre-Trial Chamber.

16. The Defence teams for Mr Kenyatta and Mr Muthaura file this appeal pursuant to Articles 19(6) and 82(1)(a) of the Statute and in accordance with Rule 154(1) of the Rules of Procedure and Evidence (the “Rules”).
17. Under Article 82(1)(a), a party is entitled to appeal “a decision with respect to...jurisdiction.”
18. Under Rule 154(1), “An appeal may be filed under ... article 82, paragraph 1 (a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision.” Regulation 64(2) states “the appellant shall file a document in support of the appeal, with reference to the appeal, within the 21 days of notification of the relevant decision.”
19. In the event that a party or participant challenges the standing of the Muthaura Defence to file this Appeal, the Muthaura Defence additionally submits that because its challenge to jurisdiction is in all material respects identical to the jurisdictional challenge filed by the Kenyatta Defence, the principle of judicial economy therefore militates in favour of the Muthaura Defence being heard now based upon the reasoning of the impugned decision, rather than seeking recourse to the Appeals Chamber at a later date, should that be necessary. The Prosecution and Legal Representatives of Victims are in no way prejudiced by the Article 82(1)(a) appeal submitted by the Muthaura Defence as both parties submitted observations on the Kenyatta Defence jurisdictional challenge, which, as stated above, the Muthaura Defence adopted in full.

IV. APPEAL UNDER ARTICLE 82(1)(a)

20. In the Confirmation Decision, the Majority erred in determining that “the requirement of material jurisdiction is met in the present case and...the case against the Suspects falls within the jurisdiction of the Court”.²³
21. The Majority erred in law by dismissing *in limine* the jurisdictional challenge brought by the Kenyatta Defence and in determining that it was not jurisdictional in nature, but instead, a challenge on the merits of the Prosecutor’s case on the facts.²⁴ The Majority erred by determining that based on the formulation chosen by the Kenyatta Defence, the issue of the definition of the term ‘organization’ is not an independent argument, but rather a challenge that cannot be answered without an assessment of the facts of the case, and is not therefore a jurisdictional challenge.²⁵
22. The Majority erred in law by adopting an incorrect interpretation of the notion of ‘organization’ within the meaning of Article 7(2)(a) of the Statute. The definition of ‘organization’ provided by the Majority is not consistent with customary international law and does not reflect the intention of the drafters of the Statute.
23. The Majority erred in fact by fundamentally changing the Prosecutor’s presentation of the facts by arguing that the Mungiki alone represented the ‘organization’. During the Confirmation Hearing and within the Amended Document Containing Charges, the Prosecution argued that the Mungiki and the Kenyan Police were ‘one’ organization.²⁶ By excluding the Kenyan Police from the ‘organization’, the Majority has removed an essential element of the organizational structure.²⁷
24. The Majority erred in fact by concluding that the Mungiki qualified as an organization within Article 7(2)(a) of the Statute, which upon a correct interpretation requires a level of State-like organisation.

²³ Majority Decision, ICC-01/09-02/11-382-Conf, para.37.

²⁴ Majority Decision, ICC-01/09-02/11-382-Conf, paras 30 - 37.

²⁵ Majority Decision, ICC-01/09-02/11-382-Conf, paras 33 - 34.

²⁶ ICC-01/09-02/11-280-AnxA, paras 35-36; ICC-01/09-02/11-T-5-RED-ENG CT, p. 10, line 1-15; p. 22, lines 3-5; p. 35, line 19.

²⁷ Majority Decision, ICC-01/09-02/11-382-Conf, para.226.

V. SUBMISSIONS ON THE DEFENCE'S RIGHT TO APPEAL JURISDICTION

25. The Defence for Mr Kenyatta challenged the jurisdiction of the Court for the first time before the Pre-Trial Chamber pursuant to Articles 19(4) and (6) on 19 September 2011.²⁸ This challenge was to the legal and contextual definition of 'organizational' within the meaning of Article 7(2)(a) of the Statute as applied by the Majority in the Investigation Decision and the Summons Decision.
26. Articles 19(4) and (6) do not require the Defence to challenge the jurisdiction of the Court upon issuance of a summons. The challenge as envisaged by the drafters of the Statute shall be made prior to or at the commencement of the trial.²⁹ The limitation of the right to challenge jurisdiction indicates that it is a matter to be carefully considered by the Defence and is a special remedy autonomous and independent from any other remedy available under the Statute.³⁰ The challenge by the Kenyatta Defence was taken at a stage when the Prosecution had completed disclosure of evidence for the purpose of the Confirmation Hearing. This enabled the Kenyatta Defence to raise its jurisdictional challenge not only upon the correct legal definition of the word "organizational" but also in respect of the application of the definition as determined by the Majority to the disclosed evidence.
27. By defining the Kenyatta Defence's submissions as a challenge to the "merits of the Prosecutor's case on the facts" rather than a challenge to jurisdiction, the Majority has committed a fundamental error. His Honour Judge Kaul has observed that the argument that the correct legal definition of the contextual element of 'organization' does not fall "within the ambit of the 'jurisdiction test' but concerns matters of substance relating to the merits of the case is as astonishing as it is misconceived."³¹ In his Dissenting Opinion, HHJ Kaul highlights the general importance of jurisdictional challenges brought under Article 19 of the Statute, stating that the function of the provision "must not be significantly reduced by excluding matters of jurisdiction *ratione materiae*".³² HHJ Kaul asserts his "firm view" that the "Defence challenge must be fully

²⁸ ICC-01/09-02/11-372.

²⁹ Article 19 of the Rome Statute.

³⁰ *Mbarushimana*, Pre-Trial Chamber I, Decision on the 'Defence Challenge to the Jurisdiction of the Court', ICC-01/04-01/10-451, para. 11.

³¹ Dissenting Opinion, ICC-01/09-02/11-382-Conf, para.32.

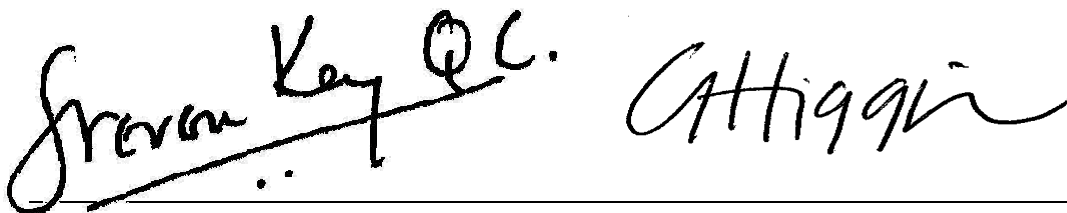
³² Dissenting Opinion, ICC-01/09-02/11-382-Conf, para.40.

entertained.”³³ The Majority’s approach prevents the Kenyatta Defence’s legitimate challenge to the fundamental issue of whether the ICC has jurisdiction over this case.

28. In the circumstances, the Majority erred in law by failing to give full and proper consideration to the issues of jurisdiction raised on behalf of the Kenyatta Defence.

V. RELIEF

29. The Defence for Mr Kenyatta and Mr Muthaura respectfully request the Appeals Chamber to reverse the Majority’s definition of ‘organizational policy’ and its evidentiary finding that the Prosecution has submitted sufficient evidence of substantial grounds to believe that the crimes were committed by Mr Kenyatta and Mr Muthaura in furtherance of an ‘organizational policy’. Both defence teams request the Appeals Chamber to declare that the Court does not have jurisdiction in this instance and reverse the Majority’s confirmation of charges against Uhuru Kenyatta and Francis Muthaura.
30. Furthermore, pursuant to Article 82(3) of the Statute and Rule 156(5) of the Rules of Procedure and Evidence, the Kenyatta Defence and the Muthaura Defence request that this appeal has suspensive effect on the proceedings and that a Trial Chamber not be constituted, if at all, until this appeal has been concluded.

The image shows two handwritten signatures in black ink. The first signature, on the left, is 'Steven Kay QC.' and the second, on the right, is 'Gillian Higgins'. Both signatures are written in a cursive, flowing style. A horizontal line is drawn across the page below the signatures.

Steven Kay QC and Gillian Higgins
On behalf of Uhuru Kenyatta

³³ Dissenting Opinion, ICC-01/09-02/11-382-Conf, para 45.

A handwritten signature in black ink, consisting of a large, stylized initial 'K' followed by a horizontal line that extends to the right and then curves slightly downwards.

Karim Khan QC
On behalf of Francis Muthaura

Dated this 30 January 2012
Nairobi, Kenya