Cour Pénale Internationale

International Criminal Court

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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

Response to Consolidated Observations on the documents in support of the Articles 19(6) and 82(1)(a) appeals and on the Prosecution responses thereto

Source: **Defence for Mr. William Samoei Ruto**

Defence for Mr. Joshua Arap Sang

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

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I. INTRODUCTION

1. The Defence for Mr. Ruto and the Defence for Mr. Sang file this joint response to the Victims' Representative's *Consolidated Observations on the documents in support of the Articles 19(6) and 82(1)(a) appeals and on the Prosecution responses thereto* ("Observations"),[1] filed on 13 March 2012. This response is filed in accordance with the Appeals Chamber's *Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence*.[2]

2. The Defence submits that the Observations do not detract from the forcefulness of the original arguments made in its *Challenge to Jurisdiction*[3] and *Documents in Support of Articles 19(6) and 82(1)(a) appeals on Jurisdiction.*[4] The Defence addresses the merits of the Observations below but reiterates its request that the Appeals Chamber find that the International Criminal Court does not have jurisdiction over Mr. Ruto and Mr. Sang as the alleged crimes were not committed pursuant to an 'organisational policy' as required by Article 7(2)(a) of the Statute.

II. RESPONSE TO OBSERVATIONS ON GROUNDS OF APPEAL

3. For clarity and emphasis, the following primary propositions undergird the Defence's position in respect of its four grounds of appeal:
    a. The Majority made a determination as to the definition of 'organisational policy';
    b. The Majority definition was reached without adequately taking into consideration the submissions of the Defence;
    c. The Majority definition is incorrect as it does not comply with customary international law nor comport with the intention of the drafters of the Rome Statute and the views of respected scholars;
    d. Even if the Majority definition is applied to the facts as outlined by the Prosecution in its Amended Document Containing the Charges ("DCC"),[5] the alleged facts do not demonstrate the existence of an organisation;
    e. The definition espoused by the Dissenting Opinion, requiring that an organisation have State-like characteristics, is correct;

[1] ICC-01/09-01/11-401.
[2] ICC-01/09-01/11-383.
[3] ICC-01/09-01/11-305.
[4] ICC-01/09-01/11-388; ICC-01/09-01/11-389.
[5] ICC-01/09-01/11-261.

f. Even if the Dissenting Opinion definition is applied to the facts as outlined by the Prosecution in the DCC, the alleged facts do not demonstrate the existence of an organisation;
g. Given that the Pre-Trial Chamber had the benefit of evaluating the Prosecution and Defence evidence during the Confirmation of Charges hearing, ie at the same time as it was determining whether the jurisdictional components of the case were satisfied, this evidence should have been taken into consideration; and
h. If the evidence adduced at the Confirmation of Charges hearing was taken into consideration, the Pre-Trial Chamber should have found that it did not amount to substantial grounds to believe that the crimes were committed pursuant to an 'organisational policy'.

<u>Ground One</u>: The Majority erred in procedure and/or in law in adopting its prior definition of 'organisation' while finding that the Defence had the burden of persuading the Pre-Trial Chamber to revisit its previous finding on the question or to reverse its original approach[6]

4. The Victims' Representative's core argument in response to this ground is that a question as to the legal definition of the term 'organizational policy' as used in Article 7(2)(a) of the Statute cannot be the basis for a jurisdictional challenge. The Victims' Representative frames the issue of organizational policy as one going to issues of substantive law (to be resolved on a final appeal), rather than as an aspect of jurisdiction to be determined at the outset of the case.[7]

5. However, in so arguing, the Victims' Representative raises an issue which is not a subject of this appeal. The Pre-Trial Chamber, in its Confirmation of Charges Decision, did not find that the legal definition of 'organizational policy' was not a jurisdictional issue. Rather, as part of its jurisdictional analysis, it addressed the question and reaffirmed its previous decision as to how 'organisational policy' should be defined.[8] Neither the Prosecution nor the Defence filed an appeal regarding whether the legal definition of 'organisational policy' was properly adjudicated as part of the Defence's Challenge to Jurisdiction; the Defence's challenge was against the Majority's definition of 'organisational policy' and the Majority's refusal to consider the Defence's arguments

[6] Confirmation Decision, ICC-01/09-01/11-373, para. 33.
[7] For example, Observations, paras 13, 22, and 28-9.
[8] Confirmation Decision, para. 34.

regarding the definition and whether and to what extent the factual and/or evidentiary aspects of 'organisational policy' should also be considered in the analysis of jurisdiction *ratione materiae*. Thus, the Victims' Representative has no standing to suggest in its Observations that the legal definition of 'organisational policy' is not part of a jurisdictional challenge; it is not a live issue on appeal.

6. In any event, should the Appeals Chamber entertain this question, the Defence submits that a finding that the legal definition of 'organisational policy', which is a clear component of jurisdiction, should only be resolved on a final appeal,[9] would negatively impact the fairness of the proceedings. Simply put, it would be unfair to subject a suspect to a lengthy trial before the ICC when it is questionable as to whether the suspect is properly before the court at all according to the statutory provisions.

7. The Dissenting Opinion to the Confirmation of Charges Decision recognizes that being committed to trial has "enormous consequences" for the person charged and that the filtering function of the confirmation process should ensure that the person not be subjected to unnecessary public stigmatization and other negative consequences over the lifespan of a trial.[10]

8. The *Tadic* Jurisdiction Appeal Decision also acknowledges that to do so would be unfair. In *Tadic*, the Appeals Chamber quoted the Prosecutor's arguments to the effect that:

> "[The Rule allowing an automatic appeal on jurisdiction] is a provision which achieves justice because but for it, one could go through, […] one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason. So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place.
>
> [. . .]
>
> So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole".[11]

[9] This is the approach suggested by the Victims' Representative in its Observations, para. 44 ("In the event of an adverse judgement, the Defence can bring a post-judgement appeal against the Trial Chamber's decision on issues of law or issues of fact under Article 81 of the Statute"). See also Observations, paras 47 and 59.
[10] Dissenting Opinion, Confirmation Decision, para. 56.
[11] *Prosecutor v. Tadic*, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 5 (quoting Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, p. 4).

9. Thus, the observations by the Victims' Representative that a determination of jurisdiction *ratione materiae* does not encompass the legal definition of 'organizational policy' would lead to an unfair result which is not in the interests of justice.

10. Furthermore, it is clear that questions of statutory construction and the legal basis for finding that someone is subject to the jurisdiction *ratione materiae* are squarely within the ambit of a usual jurisdiction challenge. For instance, at the ICTY, the Appeals Chamber has interpreted provisions of the statute when adjudicating challenges to jurisdiction. In *Hadzihasanovic et al*, it determined the differences between the notion of 'responsible command' versus 'command responsibility' when adjudicating a defence challenge to jurisdiction.[12]

11. It cannot therefore be correct, as argued by the Victims' Representative, that "it is immaterial for purposes of the present challenge to jurisdiction whether or not the Pre-Trial Chamber's conclusion in this paragraph [34] on the legal definition of an 'organization' for purposes of Article 7(2)(a) of the Statute was correct".[13] Consequently, the Defence's challenge to the Majority's overly broad definition of 'organizational policy' must be allowed as part of its jurisdictional appeal.

<u>Ground Two</u>: The Majority erred in procedure and/or in law in deciding that there was no basis for the Pre-Trial Chamber to conduct a factual analysis of the Prosecution's evidence as part of a comprehensive evaluation of whether the Chamber could satisfy itself to a degree of certainty that it possessed jurisdiction *ratione materiae*

12. The Victims' Representative argues that the Defence's second ground of appeal is not a challenge to jurisdiction, since it is unusual for findings of fact to be made when determining whether a matter falls within the jurisdiction of the court.[14] The Victims' Representative cites no case law in support of its position, however, it can be presumed that this is an indirect reference to the practice of the *ad hoc* tribunals.

[12] *Prosecutor v. Hadzihasanovic et al*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, http://www.icty.org/x/cases/hadzihasanovic/acdec/en/030716.htm.
[13] Observations, para. 35.
[14] Observations, paras 50-51.

13. The ICC Statute requires that the Court "shall satisfy itself" that it has jurisdiction in any case brought before it (Article 19(1)).The Defence submits that jurisdictional challenges at the ICC are different in some respects from those at the *ad hoc* tribunals, due to the very existence of the Pre-Trial Chamber and the confirmation of charges process itself. Assuming *arguendo*, that it is unusual at the *ad hoc* tribunals to conduct any factual assessment as to whether a charge falls within the jurisdiction of the court, the Defence submits that that is because the Trial Chambers were not well-placed to conduct any evidentiary evaluation. Conversely, at the ICC, the Pre-Trial Chamber has a significant amount of Prosecution evidence before it upon which it could conduct a preliminary assessment to ensure that it does in fact have jurisdiction over the case.

14. At the ICC, the Prosecution's Article 58 Application and subsequently the Document Containing the Charges ("DCC") (rather than an indictment) set out the crimes alleged by the Prosecution. At the stage in which the Defence submitted its Challenge to Jurisdiction, the Pre-Trial Chamber was in possession of the DCC. It was on the basis of the DCC that the Pre-Trial Chamber had to satisfy itself that it has jurisdiction over the suspects. The Pre-Trial Chamber stated that it had to "attain a degree of certainty" in this respect.[15] The Defence submits that at the confirmation of charges stage, the appropriate degree of certainty is the "substantial grounds to believe" threshold.

15. Even in the absence of the Prosecution's actual evidence, the DCC contained alleged facts relevant to the chapeau elements of Article 7 in paragraphs 37 to 64. At paragraphs 65 to 97, the DCC also contained alleged facts relevant to individual crimes charged, which included details as to alleged preparatory meetings which were deemed essential to connecting the suspects to an 'organizational policy'. The Pre-Trial Chamber thus would have been remiss not to consider whether the factual details supplied in the DCC satisfied all of the jurisdictional elements required. As argued above, it would be unfair (and certainly not expeditious) to commit a suspect to trial if the Pre-Trial Chamber is not satisfied as far as possible on the information before it that the court has jurisdiction over the case. As repeated on several occasions, the confirmation of charges process is to act as a filter to keep those cases which are not properly founded from continuing to trial.[16]

[15] Confirmation Decision, para. 25.
[16] ICC-01/09-01/11-T-5, 1 September 2011, p. 9, ln. 10-18.

16. The Defence has submitted that because the Defence brought its Challenge to Jurisdiction in conjunction with the confirmation of charges hearing, the requisite standard to which the Pre-Trial Chamber should have satisfied itself on jurisdiction is that of "substantial grounds to believe". Contrary to the Victims' Representative's claims,[17] this analysis does not impinge on the merits of the confirmation of charges hearing such that it cannot also be part of the jurisdiction analysis and challenge.

17. The Pre-Trial Chamber should have considered all of the relevant information available to it when satisfying itself of jurisdiction. Had it done so, the Majority could not have found, neither on the facts as alleged in the DCC nor on the evidence presented at the confirmation of charges hearing, that the required 'organisational policy' existed.

<u>Ground Three:</u> The Majority erred in law in deciding that the definition of 'organisation' does not require a link to a State or even State-like characteristics, but may encompass any group which has the capability to perform acts which infringe on basic human values,[18] or private individuals with *de facto* power or organised in criminal gangs or groups,[19] and that such may be assessed on a case-by-case basis with no predictable legal definition or criteria which need be exhaustively fulfilled[20]

18. The definition of 'organisational policy' is a substantive question of law which affects the Court's ability to assert jurisdiction over the case. If 'organisational policy' is not properly defined in conformity with customary international law and the intention of the drafters of the Rome Statute at the outset, and the case proceeds to trial on a faulty legal basis, it would defy the filtering function of jurisdictional challenges and the confirmation process.

19. The Observations suggest that if the Chamber adopted the definition articulated by Judge Kaul, which required that an 'organisation' have some State-like characteristics, this would not make a difference to the Majority's ultimate decision that there was an 'organisational policy'. However, this is not true. Neither the Orange Democratic Movement as a political party (with Mr. Ruto in a leadership position), nor the Kalenjin ethnic community, nor the Kass FM radio station as a media platform (with Mr. Sang as a broadcaster), nor a few financiers of a political movement, nor a few retired generals,

[17] Observations, para. 55.
[18] Authorization to Investigate, para. 90, as adopted in Confirmation Decision, para. 184.
[19] Authorization to Investigate, para. 91.
[20] Authorization to Investigate, para 93, as adopted in Confirmation Decision, para. 185.

demonstrate characteristics of State-like entities.[21] Even when these components are considered collectively, in the manner that the Prosecution has attempted to demonstrate the loose affiliation of a "Network", there are no State-like characteristics present. The 'organisation', however defined by the Majority,[22] had no control over territory, no official authority over the victims, etc. Therefore, had the Majority adopted the test requiring State-like characteristics, it could have not found that an organisational policy existed.

20. The Victims' Representative over-emphasises the Defence's focus on the historical evolution of crimes against humanity. The Defence did not suggest that only when the State is implicated will it not prosecute;[23] there may be many reasons why a State will not or cannot prosecute. In either event, international structures have been put into place to address the resulting 'impunity gap'. The issue here is what should be addressed by these international structures. The Defence submits that the Court should look for features that come closer to the clear model of a State acting with impunity against its people; that is not the situation in the case against Mr. Ruto and Mr. Sang, who were allegedly part of an opposition 'organisation' which did not and does not have any control over the State then or now.

21. Furthermore, the capability of armed organised groups to commit significant crimes is irrelevant. The Defence has never suggested that the mass victimization of civilians is not a serious concern. Rather the Defence advocates a clear test to delineate what should properly be labelled crimes against humanity and thus the concern of the international community versus what should properly be treated as serious matters of domestic criminal investigation and prosecution. The Statute of the ICC simply defines the jurisdiction for this forum. The fact that something does not fall under the jurisdiction of the ICC does not mean that it is not a grave crime.

22. The Defence has argued in previous briefs, that the drafters of the Statute did not want the ICC to be inundated by every atrocity, despite their horrific nature; only those crimes which could be effectively prosecuted by the ICC and which are unlikely to be prosecuted

[21] See generally, Dissenting Opinion to Summons to Appear , paras 18-44.
[22] The Defence notes that throughout the Confirmation Decision, the Majority alternates between referring to the 'organisation' as a political party (the ODM) or an ethnic group (the Kalenjin). In any event, the Defence recalls that the ODM nor the PNU (the opposition party) were in existence at the time alleged by the Prosecution; the two did not come into existence until August 2007. See, Confidential Exhibit, EVD-PT-D10-00106 at 78 and 84.
[23] See, Jurisdiction Appeal, paras 83 and 88.

elsewhere should be brought before the Court. Crimes committed by organisations without State-like characteristics can, typically, be effectively prosecuted under other mechanisms and in other fora.

<u>Ground Four</u>: The Majority erred in law and/or in fact in deciding that an organisation called the "Network" existed, and which had the capacity to affect basic human values based on the fact that it had: an established hierarchy, the means to carry out a widespread or systematic attack, and an articulated intention to attack the civilian population as its primary purpose.[24]

23. The Victims' Representative simply argues that this goes to the merits of the confirmation decision. Therefore, the Defence relies primarily on its earlier briefs. In addition, the Defence notes that as the Pre-Trial Chamber has stated the DCC should be read in conjunction with the underlying evidence supporting the charges,[25] this is further support for the Defence position that the Pre-Trial Chamber should have done a comprehensive and fair analysis of the evidence provided by the Prosecution in its effort to demonstrate the existence of a "Network" with an 'organisational policy'.

III. CONCLUSION

24. The Defence therefore submits this document in support of its appeal against the exercise of the Court's jurisdiction *ratione materiae* over the situation in Kenya, including the cases against Mr. Ruto and Mr. Sang. The Defence requests that the Appeals Chamber reverse the Majority's definition of 'organisational policy' as well as its evidentiary finding that the Prosecution has submitted sufficient evidence to establish substantial grounds to believe that the crimes were committed in furtherance of an 'organisational policy'. The ultimate relief requested by the Defence is for the Appeals Chamber to decline to exercise ICC's jurisdiction over the situation in Kenya and for the case against Mr. Ruto and Mr. Sang to be dismissed.

[24] Confirmation Decision, paras 186-208.
[25] Confirmation Decision, para. 98.

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Dated this 19th day of March 2012
In The Hague and In Nairobi

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