

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09-01/11 OA3 OA4

Date: 24 May 2012

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public document

**Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang
against the decision of Pre-Trial Chamber II of 23 January 2012 entitled
“Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of
the Rome Statute”**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for William Samoei Ruto
Mr Kioko Kilukumi Musau
Mr David Hooper

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek

Legal Representatives of Victims
Ms Sureta Chana

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang, pursuant to article 82 (1) (a) of the Statute, against the decision of Pre-Trial Chamber II entitled “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” of 23 January 2012 (ICC-01/09-01/11-373),

After deliberation,

Renders unanimously the following

DECISION

The appeals are rejected.

REASONS

I. PROCEEDINGS BEFORE THE PRE-TRIAL CHAMBER

1. On 30 August 2011, Mr Ruto and Mr Sang filed the “Defence Challenge to Jurisdiction”¹ (hereinafter: “Joint Defence Challenge to Jurisdiction”), submitting that the Court should decline to exercise jurisdiction over their case.² Mr Ruto and Mr Sang challenged the interpretation of the term ‘organizational policy’³ as a component of crimes against humanity under article 7 (2) (a) of the Statute, which the Pre-Trial Chamber had adopted, by majority, Judge Kaul dissenting, in its “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”⁴ (hereinafter: “Article 15 Decision”) and which it had reiterated, Judge Kaul dissenting, in its “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”⁵ (hereinafter: “Summons to Appear Decision”). Moreover, they submitted that “irrespective of whether one accepts the [minority or majority’s interpretation of ‘organizational policy’], or an alternative test, the facts on which the Prosecution

¹ ICC-01/09-01/11-305.

² Joint Defence Challenge to Jurisdiction, paras 9, 83.

³ Joint Defence Challenge to Jurisdiction, paras 10-61.

⁴ ICC-01/09-19-Corr, dated 31 March 2010 and registered on 1 April 2010.

⁵ 8 March 2011, ICC-01/09-01/11-01.

relie[d] [did] not amount to substantial grounds to believe that the defendants acted within an organization in the context of Article 7(2)(a) of the Statute”.⁶

2. In response, the Prosecutor⁷ and the victims⁸ essentially argued that these issues were not jurisdictional because they went to the merits of the case and that the Court had jurisdiction because crimes against humanity had been charged.

3. On 23 January 2012, the Pre-Trial Chamber decided to confirm charges against Mr Ruto and Mr Sang in the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”⁹ (hereinafter: “Impugned Decision”). A separate section of that decision was entitled “Jurisdiction and Admissibility”, in which the Pre-Trial Chamber addressed the Joint Defence Challenge to Jurisdiction.¹⁰ The Pre-Trial Chamber, by majority, Judge Kaul dissenting, endorsed its interpretation of ‘organizational policy’ as developed in its Article 15 Decision¹¹ and did “not find a persuasive reason to revisit its previous finding on the question or to reverse its original approach”.¹² On this basis, it dismissed the part of the Joint Defence Challenge to Jurisdiction relating to the interpretation of the term ‘organizational policy’.¹³ As to the part of the Joint Defence Challenge to Jurisdiction relating to the presentation of the facts by the Prosecutor in support of this definition, the Pre-Trial Chamber found that it “[could not] be qualified as a jurisdictional challenge under article 19(2)(a) of the Statute”¹⁴ and considered that it was clear “that the essence of this part of [Mr Ruto and Mr Sang’s] filings [was] to challenge the merits of the Prosecutor’s case on the facts”.¹⁵ It found that “this part of the [...] submissions [was] in effect an evidentiary challenge under article 61(5) and (6) of the Statute which, in principle, should be resolved pursuant to the standard provided for in article 61(7) of the Statute in the relevant part of the decision, namely, under the

⁶ Joint Defence Challenge to Jurisdiction, para. 62.

⁷ “Corrigendum to ‘Prosecution’s Response to the Defence Challenges to Jurisdiction’ filed 16 September 2011”, ICC-01/09-01/11-334-Corr, dated 19 September 2011 and registered on 20 September 2011, para. 13.

⁸ “Observations of the Victims’ Representative on the Defence challenges to jurisdiction”, 16 September 2011, ICC-01/09-01/11-332, para. 21.

⁹ ICC-01/09-01/11-373.

¹⁰ Impugned Decision, paras 23-37.

¹¹ Impugned Decision, para. 33.

¹² Impugned Decision, para. 34.

¹³ Impugned Decision, para. 34 and p. 138.

¹⁴ Impugned Decision, para. 35.

¹⁵ Impugned Decision, para. 35.

section concerning the contextual elements of the crimes against humanity”.¹⁶ Accordingly, it dismissed this part of the Joint Defence Challenge to Jurisdiction *in limine*.¹⁷ In the operative part of the Impugned Decision, the Pre-Trial Chamber specifically decided that it had jurisdiction.¹⁸ It decided to confirm the charges¹⁹ and, as is relevant to this appeal, it considered the issue of ‘organizational policy’,²⁰ recalling its legal findings in the Article 15 Decision²¹ and concluded that this element had been proved.²²

4. Judge Kaul, in his dissent, referred to his “fundamental disagreement with the Majority” on the interpretation of ‘organization’.²³ He cited his legal findings on this issue in his dissenting opinions to the Article 15 Decision and the Summons to Appear Decision,²⁴ assessed the Prosecutor’s facts in this light²⁵ and found that the Court lacked subject-matter jurisdiction.²⁶ He also addressed whether the interpretation of ‘organizational policy’ “as a matter of law [was] a part of the jurisdictional challenge”.²⁷ He found that the contextual elements were both elements of the crimes relating to the merits and “jurisdictional in nature insofar as the Court cannot exercise jurisdiction over the underlying acts in the absence of such contextual elements. The presence of contextual elements differentiates the crimes within the jurisdiction of the Court from ordinary crimes”.²⁸ As for the Prosecutor and the victims’ argument that the Court has jurisdiction because the Prosecutor has charged crimes against humanity under article 7 of the Statute, he found this to be “legally and procedurally untenable”.²⁹ Judge Kaul found that an assessment of facts must be

¹⁶ Impugned Decision, para. 35.

¹⁷ Impugned Decision, para. 36 and p. 138.

¹⁸ Impugned Decision, p. 138.

¹⁹ Impugned Decision, p. 138.

²⁰ Impugned Decision, paras 181 *et seq.*

²¹ Impugned Decision, paras 184-185.

²² Impugned Decision, paras 208-221.

²³ “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, Dissenting Opinion of Judge Hans-Peter Kaul, 23 January 2012, ICC-01/09-01/11-373 (hereinafter: “Impugned Decision (Dissenting Opinion)”), para. 8.

²⁴ Impugned Decision (Dissenting Opinion), paras 8-9.

²⁵ Impugned Decision (Dissenting Opinion), paras 10-13.

²⁶ Impugned Decision (Dissenting Opinion), paras 2, 13.

²⁷ Impugned Decision (Dissenting Opinion), para. 22.

²⁸ Impugned Decision (Dissenting Opinion), para. 25.

²⁹ Impugned Decision (Dissenting Opinion), para. 32. He stated: “The charges, which imply jurisdiction, are merely *presented* by the Prosecutor. Again, it is ultimately for the Judges of this Court to decide on jurisdiction, not the Prosecutor. Were it otherwise, the Prosecutor could label any crime as a crime within the jurisdiction of the Court thus removing the subject-matter jurisdiction (*ratione materiae*) from the scope of article 19(1), first sentence, of the Statute and limiting any challenges or

included in an assessment of jurisdiction *ratione materiae*.³⁰ He concluded that the Joint Defence Challenge to Jurisdiction should be granted and jurisdiction denied.³¹

II. PROCEEDINGS ON APPEAL

5. On 30 January 2012, Mr Ruto filed an appeal, entitled “Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Ruto on Jurisdiction”³² (hereinafter: “Mr Ruto’s Appeal”). On the same day, Mr Sang also filed an appeal, entitled “Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Sang on Jurisdiction”³³ (hereinafter: “Mr Sang’s Appeal”). Apart from appealing against the Impugned Decision,³⁴ both Mr Ruto and Mr Sang also requested that the appeals have suspensive effect on the proceedings³⁵ (hereinafter: “Requests for Suspensive Effect”).

6. On 2 February 2012, the Appeals Chamber issued an “Order on the filing of a response to requests for suspensive effect”,³⁶ allowing the Prosecutor to respond to the Requests for Suspensive Effect. It also issued “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”,³⁷ inviting victims to submit observations on the appeals.

7. On 3 February 2012, the Office of Public Counsel for Victims (hereinafter: “OPCV”) filed “Observations on the ‘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’”³⁸ (hereinafter: “OPCV Request”), requesting leave to submit observations on jurisdiction on behalf of victim-applicants in the case and victims who had communicated with the Court in the case.³⁹

questions raised respectively under article 19(2) and 19(3) of the Statute to jurisdiction *ratione temporis* and *ratione loci/ratione personae*. In my opinion, such an interpretation would render articles 19(1), 19(2) and 19(3) of the Statute largely ineffective”.

³⁰ Impugned Decision (Dissenting Opinion), paras 38-39.

³¹ Impugned Decision (Dissenting Opinion), para. 40.

³² ICC-01/09-01/11-374 (OA 3).

³³ ICC-01/09-01/11-375 (OA 4).

³⁴ Mr Ruto’s Appeal, para. 15; Mr Sang’s Appeal, para. 15.

³⁵ Mr Ruto’s Appeal, para. 16; Mr Sang’s Appeal, para. 16.

³⁶ ICC-01/09-01/11-382 (OA 3 OA 4).

³⁷ 2 February 2012, ICC-01/09-01/11-383 (OA 3 OA 4).

³⁸ ICC-01/09-01/11-384 (OA 3 OA 4).

³⁹ OPCV Request, p. 5.

8. On 8 February 2012, Mr Ruto and Mr Sang responded to the OPCV Request.⁴⁰
9. On 9 February 2012, the Prosecutor filed the “Prosecution’s Consolidated Response to Mr Ruto’s and Mr Sang’s Requests for Suspensive Effect of their Appeals on Jurisdiction (ICC-01/09-01/11-374OA3 - ICC-01/09-01/11-375OA4)”.⁴¹
10. On 14 February 2012, Mr Ruto and Mr Sang, respectively, filed the “Document in Support of Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Ruto on Jurisdiction”⁴² (hereinafter: “Mr Ruto’s Document in Support of the Appeal”) and the “Document in Support of Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Sang on Jurisdiction”⁴³ (hereinafter: “Mr Sang’s Document in Support of the Appeal”).
11. On 20 February 2012, the Appeals Chamber dismissed the OPCV Request.⁴⁴
12. On 29 February 2012, the Appeals Chamber rejected the Requests for Suspensive Effect.⁴⁵
13. On 7 March 2012, the Prosecutor filed the “Prosecution’s Consolidated Response to Mr Ruto’s and Mr Kenyatta’s Documents in Support of Articles 19(6) and 82(1)(a) Appeal (ICC-01/09-01/11-388 OA3 – ICC-01/09-01/11-389 OA4)”⁴⁶ (hereinafter: “Response to the Documents in Support of the Appeals”).

⁴⁰ “Response to OPCV ‘Observations on the “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””, ICC-01/09-01/11-386 (OA 3 OA 4).

⁴¹ ICC-01/09-01/11-387 (OA 3 OA 4).

⁴² ICC-01/09-01/11-388 (OA 3).

⁴³ ICC-01/09-01/11-389 (OA 4).

⁴⁴ “Decision on the ‘Observations on the “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””, ICC-01/09-01/11-390 (OA 3 OA 4).

⁴⁵ “Decision on the requests of Mr Ruto and Mr Sang for suspensive effect”, ICC-01/09-01/11-391 (OA 3 OA 4).

⁴⁶ ICC-01/09-01/11-397 (OA3 OA4). A corrigendum to this filing was registered on 8 March 2011 as “Corrigendum to Prosecution’s Consolidated Response to Mr Ruto’s and Mr Sang’s Documents in Support of Articles 19(6) and 82(1)(a) Appeal (ICC-01/09-01/11-388 OA3 – ICC-01/09-01/11-389 OA4)”, ICC-01/09-01/11-397-Corr (OA 3 OA 4).

14. On 13 March 2012, the victims filed the “Consolidated observations on the documents in support of the Articles 19(6) and 82(1)(a) appeals and on the Prosecution responses thereto”⁴⁷ (hereinafter: “Victims’ Observations”).

15. On 19 March 2012, the Prosecutor filed the “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)”⁴⁸ (hereinafter: “Prosecutor’s Response to the Victims’ Observations”). On the same day, Mr Ruto and Mr Sang filed a joint “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”⁴⁹ (hereinafter: “Mr Ruto and Mr Sang’s Response to the Victims’ Observations”).

16. On 23 March 2012, the victims filed the “Application of the Victims’ Representative pursuant to Article 83 of the Regulations”⁵⁰ (hereinafter: “Victims’ Application”) requesting the Appeals Chamber to review the Registrar’s decision concerning the mandate and scope of legal assistance paid to the Legal Representative.⁵¹ On 23 April 2012, the Appeals Chamber, after affording an opportunity⁵² to the Registrar to submit her observations,⁵³ rejected the Victims’ Application.⁵⁴

III. SUBMISSIONS ON APPEAL

17. On appeal, Mr Ruto and Mr Sang raise the following grounds:

- a) 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

⁴⁷ ICC-01/09-01/11-401 (OA 3 OA 4).

⁴⁸ ICC-01/09-01/11-402 (OA 3 OA 4).

⁴⁹ ICC-01/09-01/11-403 (OA 3 OA 4). A corrigendum to this filing was registered on 20 March 2012 as ICC-01/09-01/11-403-Corr (OA 3 OA 4).

⁵⁰ ICC-01/09-01/11-404 (OA 3 OA 4).

⁵¹ Victims’ Application, para. 3.

⁵² “Order on the submission of observations by the Registrar on the ‘Application of the Victims’ Representative pursuant to Article 83 of the Regulations’”, 27 March 2012, ICC-01/09-01/11-405 (OA 3 OA 4).

⁵³ “Observations in accordance with the ‘Order on the submission of Observations by the Registrar on the ‘Application of the Victims’ Representative pursuant to Article 83 of the Regulations’” dated 27 March 2012”, 3 April 2012, ICC-01/09-01/11-408 (OA 3 OA 4).

⁵⁴ “Decision on the ‘Application of the Victims’ Representative pursuant to Article 83 of the Regulations’”, ICC-01/09-01/11-409 (OA 3 OA 4).

persuading the Pre-Trial Chamber to revisit its previous finding on the question or to reverse its original approach;

b) 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*;

c) 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, or private individuals with *de facto* power or organised in criminal gangs or groups, and that such may be assessed on a case-by-case basis with no predictable legal definition or criteria which need be exhaustively fulfilled;

d) 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.⁵⁵

18. Mr Ruto and Mr Sang submit under the second ground of appeal that to resolve what they refer to as an assessment of 'jurisdiction' in the present case, it is necessary to consider both law and evidence.⁵⁶ They argue that the mere fact that they were charged with committing crimes against humanity did not automatically vest the Pre-Trial Chamber with subject-matter jurisdiction over the case.⁵⁷ They assert that "[i]f the Prosecution fails to provide sufficient evidence [...], then the Chamber should decline to exercise jurisdiction over the case".⁵⁸ The remaining three grounds of appeal essentially allege legal, factual or procedural errors in the manner in which the Pre-Trial Chamber determined their jurisdictional challenges and interpreted the term 'organization'. In particular, ground three deals extensively with the alleged errors in the Pre-Trial Chamber's definition of 'organizational policy',⁵⁹ with ground four stating that the Pre-Trial Chamber erred in determining that an 'organization' existed

⁵⁵ Mr Ruto's Document in Support of the Appeal, para. 11; Mr Sang's Document in Support of the Appeal, para. 11 (footnotes omitted).

⁵⁶ Mr Ruto's Document in Support of the Appeal, para. 44; Mr Sang's Document in Support of the Appeal, para. 44.

⁵⁷ Mr Ruto's Document in Support of the Appeal, para. 35; Mr Sang's Document in Support of the Appeal, para. 35.

⁵⁸ Mr Ruto's Document in Support of the Appeal, para. 44; Mr Sang's Document in Support of the Appeal, para. 44.

⁵⁹ Mr Ruto's Document in Support of the Appeal, paras 45-103; Mr Sang's Document in Support of the Appeal, paras 45-103.

“[b]ased on the facts presented during the confirmation of charges hearing”.⁶⁰ Referring to findings that the Pre-Trial Chamber made during the course of its substantive determination of whether to confirm the charges, Mr Ruto and Mr Sang submit that the Pre-Trial Chamber erred in finding that there were sufficient facts or evidence to establish the existence of an ‘organizational policy’ on the basis of the interpretation of that term by either the majority or the minority of the Pre-Trial Chamber.⁶¹ They assert that the Pre-Trial Chamber took an “incorrect approach to the evidence”⁶² and, with respect to the “factual sufficiency of the evidence”,⁶³ they submit, *inter alia*, “that the Majority failed properly to corroborate anonymous witness testimony” in determining that an organisation existed.⁶⁴

19. The Prosecutor and the victims submit that Mr Ruto and Mr Sang’s grounds are without merit and should be dismissed as they do not constitute a challenge to jurisdiction.⁶⁵

IV. ANALYSIS

20. The Appeals Chamber notes that Mr Ruto and Mr Sang bring these appeals pursuant to articles 19 (6) and 82 (1) (a) of the Statute, those provisions covering, *inter alia*, appeals from decisions with respect to jurisdiction.

21. Under article 19 (1) of the Statute, “[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it.” In addition, issues of jurisdiction may be raised under article 19 (2) and (3). Article 19 and rules 58 and 59 of the Rules of Procedure and Evidence include specific provisions regulating these proceedings. Decisions on jurisdiction can be appealed without requiring leave of the Pre-Trial or Trial Chambers (articles 19 (6) and 82 (1) (a) of the Statute). This specific procedural framework highlights the importance that the Court’s legal texts give to decisions

⁶⁰ Mr Ruto’s Document in Support of the Appeal, p. 39 and para. 104; Mr Sang’s Document in Support of the Appeal, p. 39 and para. 104.

⁶¹ Mr Ruto’s Document in Support of the Appeal, paras 104-106, 118-120; Mr Sang’s Document in Support of the Appeal, paras 104-106, 122-124.

⁶² Mr Ruto’s Document in Support of the Appeal, para. 110; Mr Sang’s Document in Support of the Appeal, para. 110.

⁶³ Mr Ruto’s Document in Support of the Appeal, para. 112; Mr Sang’s Document in Support of the Appeal, para. 112.

⁶⁴ Mr Ruto’s Document in Support of the Appeal, paras 112-118; Mr Sang’s Document in Support of the Appeal, para. 112; *See also*, the evidentiary arguments made in this respect in Mr Sang’s Document in Support of the Appeal, paras 113-121.

⁶⁵ Response to the Documents in Support of the Appeal; Prosecutor’s Response to Victims’ Observations, para. 6; Victims’ Observations.

with respect to jurisdiction. The Appeals Chamber also recalls its previous judgment⁶⁶ in which it set out the different facets of the jurisdiction of the Court⁶⁷ and further found that “[j]urisdiction under article 19 of the Statute denotes competence to deal with a criminal cause or matter under the Statute”.⁶⁸

22. As set out above, in the Impugned Decision, the Pre-Trial Chamber made a specific ruling that the case against Mr Ruto and Mr Sang fell within the jurisdiction of the Court.⁶⁹ In the section entitled “Jurisdiction and Admissibility”,⁷⁰ the Pre-Trial Chamber endorsed its interpretation of ‘organizational policy’ as developed in its Article 15 Decision⁷¹ and rejected this part of the Joint Defence Challenge to Jurisdiction.⁷² It dismissed the second part of the challenge *in limine*,⁷³ finding that it was clear “that the essence of this part of [Mr Ruto and Mr Sang’s] filings [was] to challenge the merits of the Prosecutor’s case on the facts”.⁷⁴ Elsewhere in the Impugned Decision, the Pre-Trial Chamber assessed whether the Prosecutor’s evidence established substantial grounds to believe that there was an ‘organizational policy’.⁷⁵

23. On appeal, Mr Ruto and Mr Sang do not question the personal, territorial or temporal jurisdiction of the Court in this case but rather the subject-matter jurisdiction. This decision therefore relates only to that aspect of jurisdiction insofar as it has been challenged by Mr Ruto and Mr Sang. In addition, neither Mr Ruto nor

⁶⁶ *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006”, 14 December 2006, ICC-01/04-01/06-772 (OA 4) (hereinafter: “Judgment in Lubanga OA4”).

⁶⁷ Paragraphs 21 and 22 of the Judgment in Lubanga OA4 provided:

“21. The jurisdiction of the Court is defined by the Statute. The notion of jurisdiction has four different facets: subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction – jurisdiction *ratione loci* – and lastly jurisdiction *ratione temporis*. These facets find expression in the Statute.

22. The jurisdiction of the Court is laid down in the Statute: Article 5 specifies the subject-matter of the jurisdiction of the Court, namely the crimes over which the Court has jurisdiction, sequentially defined in articles 6, 7, and 8. Jurisdiction over persons is dealt with in articles 12 and 26, while territorial jurisdiction is specified by articles 12 and 13 (b), depending on the origin of the proceedings. Lastly, jurisdiction *ratione temporis* is defined by article 11”.

⁶⁸ Judgment in Lubanga OA4, para. 24.

⁶⁹ Impugned Decision, para. 37 and p. 138.

⁷⁰ Impugned Decision, para. 23.

⁷¹ Impugned Decision, para. 33.

⁷² Impugned Decision, para. 34 and p. 138.

⁷³ Impugned Decision, para. 36 and p. 138.

⁷⁴ Impugned Decision, para. 35.

⁷⁵ Impugned Decision, paras 181 *et seq.*

Mr Sang contest that the Court has jurisdiction, in principle, over the crimes with which they have been charged – namely, crimes against humanity under article 5 of the Statute. Nor do Mr Ruto or Mr Sang contest that an ‘organizational policy’, which the Prosecutor expressly alleged,⁷⁶ and the underlying acts with which they are charged (murder, deportation or forcible transfer of population, and persecution),⁷⁷ are components of crimes against humanity under article 7 of the Statute.

24. The four grounds of appeal raised by Mr Ruto and Mr Sang, as set out above, relate to, or are premised on, the Pre-Trial Chamber’s interpretation of the term ‘organizational policy’ pursuant to article 7 (2) (a) of the Statute, as well as its decision that an organisation existed in the present case. The relief sought by Mr Ruto and Mr Sang is consistently phrased in terms of reversing the Pre-Trial Chamber’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’”.⁷⁸ They ultimately request the Appeals Chamber “to decline to exercise [...] jurisdiction over the situation in Kenya and for the case against [them] to be dismissed”.⁷⁹

25. In light of the above, the issue that the Appeals Chamber needs to address is whether, in the context of this case, the interpretation and existence of an ‘organizational policy’ are matters relating to subject-matter jurisdiction and are therefore appropriately before the Appeals Chamber pursuant to articles 19 (6) and 82 (1) (a) of the Statute.

26. As a preliminary point, the Appeals Chamber recalls that, in Mr Ruto and Mr Sang’s Response to the Victims’ Observations, they argue that the issue as to whether the interpretation of ‘organizational policy’ is a matter of jurisdiction or one relating

⁷⁶ “Document Containing the Charges”, 15 August 2011, ICC-01/09-01/11-261-AnxA (hereinafter: “DCC”) paras 41-64; note that this is an amended version of the Document Containing the Charges as amended by “Prosecution’s Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rules 121(3), (4) and (5)”, 15 August 2011, ICC-01/09-01/11-261.

⁷⁷ DCC, pp 36-39. *See also*, Impugned Decision, para. 22.

⁷⁸ Joint Defence Challenge to Jurisdiction, para. 15; Mr Ruto’s Document in Support of the Appeal, para. 121; Mr Sang’s Document in Support of the Appeal, para. 125; Mr Ruto and Mr Sang’s Response to the Victims’ Observations, para. 24.

⁷⁹ Mr Ruto’s Appeal, para. 15; Mr Sang’s Appeal, para. 15; Mr Ruto’s Document in Support of the Appeal, para. 121; Mr Sang’s Document in Support of the Appeal, para. 125; Mr Ruto and Mr Sang’s Response to the Victims’ Observations, para. 24.

to the merits of the case is “not a live issue on appeal”.⁸⁰ The Appeals Chamber notes that this issue was argued by both the Prosecutor⁸¹ and the victims⁸² before the Pre-Trial Chamber and in these appeals;⁸³ and that Mr Ruto and Mr Sang did, in fact, respond directly to the arguments raised by the victims on this issue in these appellate proceedings.⁸⁴

27. In determining whether, in the context of this case, the interpretation and existence of an ‘organizational policy’ are matters relating to subject-matter jurisdiction, the Appeals Chamber notes that the question as to whether the Prosecutor has been able to establish, both in law and by producing sufficient evidence, that an ‘organisational policy’ existed was a question pertaining to the merits of the case. It was one of the questions before the Pre-Trial Chamber at the confirmation hearing for the purposes of assessing whether or not to confirm the charges in the present case pursuant to article 61 of the Statute. The enquiry that Mr Ruto and Mr Sang allege should have been carried out on a challenge to jurisdiction was therefore carried out as part of the confirmation process⁸⁵ as, indeed, it had to be. Pursuant to article 61 (6) of the Statute, at the confirmation hearing a suspect may contest both matters of statutory interpretation and evidential aspects of the Prosecutor’s case. The arguments that Mr Ruto and Mr Sang made in the Joint Defence Challenge to Jurisdiction could be made as part of their case during the confirmation proceedings. The Pre-Trial Chamber was thereafter required, pursuant to article 61 (7) of the Statute, to “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.⁸⁶

28. In this context, the Appeals Chamber notes the provisions of rule 58 (2) of the Rules of Procedure and Evidence. Challenges to jurisdiction may be joined to a

⁸⁰ Mr Ruto and Mr Sang’s Response to the Victims’ Observations, para. 5.

⁸¹ “Corrigendum to ‘Prosecution’s Response to the Defence Challenges to Jurisdiction’ filed 16 September 2011”, ICC-01/09-01/11-334-Corr, dated 19 September 2011 and registered on 20 September 2011, paras 1-3, 9-15, 33-35.

⁸² “Observations of the Victims’ Representative on the Defence challenges to jurisdiction”, 16 September 2011, ICC-01/09-01/11-332, paras 22-26, 33-45, 57.

⁸³ Response to the Documents in Support of the Appeals, paras 3, 23-25, 33-51; Prosecutor’s Response to the Victims’ Observations, para. 6; Victims’ Observations, paras 13-14, 55-56 and 58-59.

⁸⁴ Mr Ruto and Mr Sang’s Response to the Victims’ Observations, paras 6-11.

⁸⁵ Impugned Decision, paras 181 *et seq.* The Pre-Trial Chamber had previously addressed Mr Ruto and Mr Sang’s arguments about the legal interpretation of ‘organizational policy’ in the Joint Defence Challenge to Jurisdiction at paras 28-34 of the Impugned Decision, albeit under the heading of “Jurisdiction and Admissibility”.

⁸⁶ Article 61 (7) of the Statute.

confirmation proceeding, in which case the jurisdictional challenge shall be decided first⁸⁷ – the scenario which occurred in the present case. It would make little sense to consider and determine, for the purposes of ‘jurisdiction’, the interpretation of ‘organizational policy’ and whether the Prosecutor had submitted sufficient evidence to establish substantial grounds to believe that the crimes were committed in furtherance of such a policy prior to holding a confirmation hearing designed to resolve precisely the same issues.⁸⁸

29. In light of the above, and in the context of this case, treating the interpretation and existence of ‘organizational policy’ as jurisdictional matters conflates the separate concepts of jurisdiction and the confirmation process; yet it is the latter that is designed to consider the matters raised on these appeals and filter unmeritorious cases from progressing to trial. To find that the grounds that Mr Ruto and Mr Sang raise in these appeals relate to jurisdiction would duplicate what was covered by the confirmation process. If the Appeals Chamber were to address the merits of Mr Ruto and Mr Sang’s grounds of appeal any further, it would, in fact, be assessing the correctness of the decision to confirm the charges against them, insofar as it related to the existence of an ‘organizational policy’. Yet neither Mr Ruto nor Mr Sang sought leave from the Pre-Trial Chamber to appeal the interpretation of ‘organizational policy’, nor was leave granted in relation to certain evidential challenges that they sought to raise, pursuant to article 82 (1) (d) of the Statute.⁸⁹

30. The Appeals Chamber notes the statement of the dissenting judge in the Pre-Trial Chamber,⁹⁰ relied upon by Mr Ruto and Mr Sang,⁹¹ that the requirement for an organisation to be present is a contextual element of article 7 (1) of the Statute which is both an element of the crime relating to the merits and “jurisdictional in nature

⁸⁷ Rule 58 (2) of the Rules of Procedure and Evidence provides, in relevant part, that a Chamber may “join the challenge or question [concerning its jurisdiction] to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first”.

⁸⁸ See, article 61 (7) of the Statute.

⁸⁹ “Decision on the Defence’s Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant [sic] to Article 61(7) (a) and (b) of the Rome Statute”, 9 March 2012, ICC-01/09-01/11-399; See also, “Defence Application for Leave to Appeal the Decision on the Confirmation of Charges”, 30 January 2012, ICC-01/09-01/11-377; “Defence Application for Leave to Appeal the Decision on the Confirmation of Charges”, 30 January 2012, ICC-01/09-01/11-376.

⁹⁰ Impugned Decision (Dissenting Opinion), para. 25.

⁹¹ Mr Ruto’s Document in Support of the Appeal, para. 34, See also, in particular, paras 42-44; Mr Sang’s Document in Support of the Appeal, para. 34, See also, in particular, paras 42-44.

insofar as the Court cannot exercise jurisdiction over the underlying acts in the absence of such contextual elements”.⁹² These arguments do not affect the conclusion of the Appeals Chamber that the interpretation and existence of an ‘organizational policy’ relate to the substantive merits of this case as opposed to the issue of whether the Court has subject-matter jurisdiction to consider such questions. As the Prosecutor has expressly alleged crimes against humanity, including the existence of an ‘organizational policy’, the Appeals Chamber finds that the Court has subject-matter jurisdiction over the crimes with which Mr Ruto and Mr Sang have been charged. Whether the Prosecutor can establish the existence of such a policy, in law and on the evidence, is a question to be determined on the merits. At this stage of the proceedings, it was a question of whether the Prosecutor could substantiate a component of the crimes with which Mr Ruto and Mr Sang had been charged to the standard required during the confirmation process. Even if the Trial Chamber were not to find, in law or on the evidence, that there was an ‘organizational policy’ this would not mean that the Court did not have jurisdiction over the case but rather that crimes against humanity were not committed.

31. Furthermore, in considering the issues at hand, the Appeals Chamber has had regard to the scope of jurisdictional challenges as interpreted by the International Criminal Tribunal for the former Yugoslavia (hereinafter: “ICTY”), the International Criminal Tribunal for Rwanda (hereinafter: “ICTR”) and the Extraordinary Chambers in the Courts of Cambodia (hereinafter: “ECCC”). While bearing in mind the different statutory provisions that apply to those tribunals, the non-binding nature of their jurisprudence upon this Court⁹³ and the fact that the Statute sets out in detail the crimes over which this Court has jurisdiction, the Appeals Chamber nevertheless notes that the general approach taken in the ICTY and ICTR jurisprudence has been that factual and evidentiary issues are to be considered at trial, not as part of pre-trial jurisdictional challenges.⁹⁴ With respect to legal definitions, the ICTY jurisprudence

⁹² Impugned Decision (Dissenting Opinion), para. 25.

⁹³ See article 21 of the Statute.

⁹⁴ See ICTY, Appeals Chamber, *Prosecutor v. Ante Gotovina and others*, “Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction”, 6 June 2007, IT-06-90-AR72.1, para. 21; *Prosecutor v. Zdravko Tolimir*, “Decision on Tolimir's ‘Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal’”, 25 February 2009, IT-05-88/2-AR72.1, para. 10; *Prosecutor v. Rasim Delić*, “Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal”, 8 December 2005, IT-04-83-AR72, paras 10-11; ICTR, Trial Chamber, *Prosecutor v. Hassan Ngeze*, “Decision on

has distinguished – in particular, in its more recent case-law – between whether a crime or mode of liability existed under customary international law, which falls within the scope of a jurisdictional challenge, from challenges relating to the contours or elements of crimes or modes of liability, which are matters for trial.⁹⁵ In the *Ojdanić* jurisdictional appeal, the ICTY Appeals Chamber explained why the *existence* of a crime falls within the scope of a challenge to subject-matter jurisdiction:

The scope of the Tribunal’s jurisdiction *ratione materiae* may [...] be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal’s power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed. [Footnote omitted.]⁹⁶

This distinction between the existence as opposed to the contours of a crime or mode of liability has also been followed in the ECCC jurisprudence.⁹⁷ In the present case, the existence of the requirement of an ‘organizational policy’ as a component of crimes against humanity is clear from the wording of article 7 (2) (a) of the Statute.

32. In Mr Ruto and Mr Sang’s Response to the Victims’ Observations, they cite the *Hadžihasanović* jurisdictional appeal in support of their argument 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”.⁹⁸ However, this appeal was specifically assessing whether a particular

the Defence’s Motion to Dismiss the Indictment *in toto* for Lack of Subject Matter Jurisdiction and for Lack of Fundamental Fairness for the Accused”, 10 May 2000, ICTR-97-27-I, p. 2.

⁹⁵ ICTY, Appeals Chamber, *Prosecutor v. Milan Milutinović and others*, “Decision on Ojdanić’s Motion Challenging Jurisdiction: Indirect Co-Perpetration”, 22 March 2006, IT-05-87-PT, para. 23; *Prosecutor v. Ante Gotovina and others*, “Decision on Ante Gotovina’s Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction”, 6 June 2007, IT-06-90-AR72.1, paras 15, 18 24; *Prosecutor v. Zdravko Tolimir*, “Decision on Tolimir’s ‘Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal’”, 25 February 2009, IT-05-88/2-AR72.1, para. 10; *Prosecutor v. Radovan Karadžić*, “Decision on Radovan Karadžić’s Motions Challenging Jurisdiction (Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility)”, 25 June 2009, IT-95-5/18-AR72.1, paras 35-36.

⁹⁶ *Prosecutor v. Milan Milutinović and others*, “Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise”, 21 May 2003, IT-99-37-AR72, para. 9.

⁹⁷ Pre-Trial Chamber, *Case 002*, “Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE)”, 20 May 2010, paras 23-25; “Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order”, 15 February 2011, paras 60-68; “Decision on Ieng Sary’s Appeal against the Closing Order”, 11 April 2011, paras 44-47.

⁹⁸ Mr Ruto and Mr Sang’s Response to the Victims’ Observations, para. 10, citing ICTY, Appeals Chamber, *Prosecutor v. Enver Hadžihasanović and others*, “Decision on Interlocutory Appeal



mode of liability, namely command responsibility for acts committed prior to assuming the role of commander, existed under customary international law in order to satisfy the principle of legality.⁹⁹ This can be distinguished from determining the legal interpretation of ‘organizational policy’ as it appears in the Statute and Elements of Crimes, and the sufficiency of supporting evidence in relation to it.

33. For all of the above reasons, the Appeals Chamber concludes that the issues that Mr Ruto and Mr Sang raise on appeal, namely that the Pre-Trial Chamber erred in its interpretation of ‘organizational policy’ within the meaning of article 7 (2) (a) of the Statute and its conclusion that such a policy existed, are not issues of subject-matter jurisdiction for the purposes of articles 19 (6) and 82 (1) (a) of the Statute and these issues are not properly before the Appeals Chamber under article 82 (1) (a) of the Statute. These issues instead relate to whether the Pre-Trial Chamber erred when it confirmed the charges in respect of Mr Ruto and Mr Sang.

34. Accordingly, the appeals as a whole must be rejected.

Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge

Dated this 24th day of May 2012

At The Hague, The Netherlands

Challenging Jurisdiction in Relation to Command Responsibility”, 16 July 2003, IT-01-47-AR72 (hereinafter: “Hadžihasanović Jurisdictional Appeal”).

⁹⁹ Hadžihasanović Jurisdictional Appeal, paras 44, 51.