

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/09-02/11 OA 4**

**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. FRANCIS KIRIMI MUTHAURA,  
UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI**

**Public document**

**Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai  
Kenyatta 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 Francis Kirimi Muthaura**  
Mr Karim Khan  
Mr Essa Faal

**Legal Representatives of Victims**  
Mr Morris Azuma Anyah

**Counsel for Uhuru Muigai Kenyatta**  
Mr Steven Kay  
Ms Gillian Higgins

#### **REGISTRY**

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**Registrar**  
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Uhuru Muigai Kenyatta and Mr Francis Kirimi Muthaura, 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-01/09-02/11-382-Conf),

After deliberation,

*Renders* unanimously the following

## DECISION

The appeal is rejected.

## REASONS

### I. PROCEEDINGS BEFORE THE PRE-TRIAL CHAMBER

1. On 19 September 2011, Mr Kenyatta filed his “Submissions on Jurisdiction on Behalf of Uhuru Kenyatta”<sup>1</sup> (hereinafter: “Mr Kenyatta’s Challenge to Jurisdiction”), submitting that the Court should decline to exercise jurisdiction over his case.<sup>2</sup> Mr Kenyatta challenged the interpretation of the term ‘organizational policy’<sup>3</sup> 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”<sup>4</sup> (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 Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”<sup>5</sup> (hereinafter: “Summons to Appear Decision”).<sup>6</sup> Moreover, Mr Kenyatta submitted that “the ICC [did] not have jurisdiction to try [the] case as the evidence disclosed by the Prosecution [did] not

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<sup>1</sup> ICC-01/09-02/11-339.

<sup>2</sup> Mr Kenyatta’s Challenge to Jurisdiction, paras 12, 73 74.

<sup>3</sup> Mr Kenyatta’s Challenge to jurisdiction, paras 22-47.

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

<sup>5</sup> 8 March 2011, ICC-01/09-02/11-01.

<sup>6</sup> Mr Kenyatta’s Challenge to Jurisdiction, paras 12, 15-47, 58.

establish an organizational policy to commit the alleged crimes, on either definition provided by the Chamber”.<sup>7</sup> Mr Kenyatta recalled that the Prosecutor, in the case of *Ruto et al.*, had argued that “Defence submissions on organizational policy ‘did not challenge any of the pre-conditions for the exercise of the Court’s jurisdiction’”.<sup>8</sup> Mr Kenyatta disputed this and argued that “a challenge to jurisdiction concerning organizational policy relates directly to the principle of *ratione materiae*”.<sup>9</sup> He requested the Pre-Trial Chamber to “(i) adopt the definition of organizational policy as set out by [Judge Kaul]; (ii) assess the entirety of the evidence at the conclusion of the confirmation hearing; and (iii) in due course, decline to exercise jurisdiction in respect of the case against [Mr Kenyatta]”.<sup>10</sup> Alternatively, he requested that “even if the PTC decide[d] not to adopt the definition of organizational policy as set out by [Judge Kaul], [...] the PTC (i) [should] assess the entirety of the evidence at the conclusion of the confirmation hearing; and (iii) [*sic*] in due course, decline to exercise jurisdiction in respect of the case against [Mr Kenyatta]”.<sup>11</sup>

2. In response, the Prosecutor 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.<sup>12</sup> The victims argued that aspects of the challenge were not jurisdictional and should be rejected.<sup>13</sup>

3. On 23 January 2012, the Pre-Trial Chamber decided to confirm charges against Mr Muthaura and Mr Kenyatta in the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”<sup>14</sup> (hereinafter: “Impugned Decision”). A separate section of that decision was entitled “Jurisdiction and Admissibility”, in which the Pre-Trial Chamber addressed Mr Kenyatta’s Challenge to Jurisdiction.<sup>15</sup> The Pre-Trial Chamber, by majority, Judge Kaul dissenting, recalled its findings in the Summons to Appear Decision, in which it referred to its previous

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<sup>7</sup> Mr Kenyatta’s Challenge to Jurisdiction, para. 59.

<sup>8</sup> Mr Kenyatta’s Challenge to Jurisdiction, para. 13.

<sup>9</sup> Mr Kenyatta’s Challenge to Jurisdiction, para. 13.

<sup>10</sup> Mr Kenyatta’s Challenge to Jurisdiction, para. 73.

<sup>11</sup> Mr Kenyatta’s Challenge to Jurisdiction, para. 74.

<sup>12</sup> “Prosecution’s Response to the Defence Challenges to Jurisdiction”, 14 October 2011, ICC-01/09-02/11-356.

<sup>13</sup> “Victims’ Consolidated Observations on the Kenyatta and Ali Submissions regarding Jurisdiction and/ or Admissibility”, 14 October 2011, ICC-01/09-02/11-357, paras 35-37.

<sup>14</sup> ICC-01/09-02/11-382-Conf. A public redacted version was registered on 26 January 2012 (ICC-01/09-02/11-382-Red). All references herein are to the public redacted version.

<sup>15</sup> Impugned Decision, para. 22.

findings in the Article 15 Decision.<sup>16</sup> The Pre-Trial Chamber agreed with the Prosecutor that the way in which Mr Kenyatta's challenge was framed "clearly indicate[d] that [it was] not jurisdictional in nature but, instead, [was a challenge] on the merits of the Prosecutor's case on the facts".<sup>17</sup> The Pre-Trial Chamber understood Mr Kenyatta's challenge to be based on two points: "(i) the legal definition of 'organization'; and (ii) the lack of sufficient evidence to establish the existence of an 'organization'".<sup>18</sup> The Chamber considered that the two points were not made as independent arguments, "either of which, if upheld, would autonomously establish lack of material jurisdiction in the present case".<sup>19</sup> It considered that Mr Kenyatta was requesting the Chamber to adopt a narrower definition of the term 'organization' and to apply it to the facts as established by the evidence.<sup>20</sup> Only then would the Pre-Trial Chamber, in Mr Kenyatta's view, decline jurisdiction. It stated:

In these circumstances, the Chamber is of the view that, in the way the challenge is framed, the issue related to the definition of the term "organization" cannot be considered as an independent argument to establish the lack of material jurisdiction. In fact, even if the Chamber were to uphold this argument regarding the definition of "organization", it would still be requested to proceed to the second limb of the challenge, and to assess the evidence and determine that the Prosecutor did not provide sufficient evidence to establish that the alleged organization partakes of some characteristics of a State. In this case, however, the Chamber would not dismiss the case as falling outside the scope of the material jurisdiction of the Court, but it would, rather, decline to confirm the charges. Accordingly, since the Defence challenge cannot be answered without an assessment of the facts of the case against the asserted statutory interpretation of the term "organization", the Chamber is not persuaded that the challenge is indeed jurisdictional in nature.<sup>21</sup>

4. With regard to Mr Kenyatta's alternative argument – that even if the Chamber confirmed its previous interpretation of the term 'organization' the Court still would not have jurisdiction to try this case as the Prosecutor's evidence does not establish an organizational policy to commit the alleged crimes on either definition provided by the Chamber – the Pre-Trial Chamber held that this argument "also cannot be considered jurisdictional under article 19 of the Statute, but, conversely, qualif[ies] as a challenge to the sufficiency of the evidence to satisfactorily establish one of the

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<sup>16</sup> Impugned Decision, para. 24.

<sup>17</sup> Impugned Decision, para. 30.

<sup>18</sup> Impugned Decision, para. 33.

<sup>19</sup> Impugned Decision, para. 33.

<sup>20</sup> Impugned Decision, para. 33.

<sup>21</sup> Impugned Decision, para. 33.

constitutive elements of the crimes charged pursuant to article 61 (7) of the Statute, and shall be treated accordingly”.<sup>22</sup> The Pre-Trial Chamber therefore dismissed Mr Kenyatta’s Challenge to Jurisdiction “*in limine* in [its] entirety”.<sup>23</sup> However, it considered that the arguments presented in the challenge would be considered when addressing the merits under article 61 (7) of the Statute.<sup>24</sup> The Chamber concluded this section by stating: “Accordingly, and on the basis of the charges brought by the Prosecutor, the Chamber finds that the requirement of material jurisdiction is also met in the present case and determines that the case against the Suspects falls within the jurisdiction of the Court”<sup>25</sup> and in the operative part of the Impugned Decision specifically decided that it had jurisdiction.<sup>26</sup> It confirmed charges,<sup>27</sup> and in doing so, and as is relevant to this appeal, it considered the issue of ‘organisational policy’, recalling its legal findings in the Article 15 Decision<sup>28</sup> and finding that this element had been proved.<sup>29</sup>

5. Judge Kaul, in his dissent, referred to his “fundamental disagreement with the Majority” on the interpretation of ‘organization’.<sup>30</sup> He cited his legal findings on this issue in his dissenting opinions to the Article 15 Decision and the Summons to Appear Decision,<sup>31</sup> assessed the Prosecutor’s facts in this light<sup>32</sup> and found that the Court lacked subject-matter jurisdiction.<sup>33</sup>

6. Judge Kaul disagreed with how the majority characterised the two issues raised in the challenge as being integrally linked, considering those issues to be “sufficiently independent”.<sup>34</sup> Judge Kaul also addressed whether the interpretation of ‘organisational policy’ “as a matter of law is a part of the jurisdictional challenge”.<sup>35</sup> 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

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<sup>22</sup> Impugned Decision, para. 34.

<sup>23</sup> Impugned Decision, para. 35.

<sup>24</sup> Impugned Decision, para. 36.

<sup>25</sup> Impugned Decision, para. 37.

<sup>26</sup> Impugned Decision, p. 154.

<sup>27</sup> Impugned Decision, para. 429.

<sup>28</sup> Impugned Decision, paras 111-114.

<sup>29</sup> Impugned Decision, paras 227-229.

<sup>30</sup> Impugned Decision. (Dissenting Opinion), para. 7.

<sup>31</sup> Impugned Decision. (Dissenting Opinion), paras 7-8.

<sup>32</sup> Impugned Decision. (Dissenting Opinion), paras 9-20.

<sup>33</sup> Impugned Decision. (Dissenting Opinion), para. 20.

<sup>34</sup> Impugned Decision. (Dissenting Opinion), para. 28.

<sup>35</sup> Impugned Decision. (Dissenting Opinion), para. 28.

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”.<sup>36</sup> As for the Prosecutor’s argument that the Court has jurisdiction because the Prosecutor has charged the crimes, he found this to be “legally and procedurally untenable”.<sup>37</sup> Judge Kaul found that “the issue of fact raised by [Mr Kenyatta] [fell], in principle, under the ambit of this challenge”.<sup>38</sup> He concluded that Mr Kenyatta’s Challenge to Jurisdiction should be granted and jurisdiction denied.<sup>39</sup>

## II. PROCEEDINGS ON APPEAL

7. On 30 January 2012, Mr Muthaura and Mr Kenyatta filed an appeal entitled “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’”<sup>40</sup> (hereinafter: “Appeal”).

8. At paragraph 13 of the Appeal, Mr Muthaura asserts that he submitted his challenge to jurisdiction before the Pre-Trial Chamber at paragraph 110 of his “Final Written Observations on the Confirmation of Charges Hearing”,<sup>41</sup> by adopting in full the previous submissions of Mr Kenyatta on this issue. These observations were filed after the conclusion of the confirmation hearing but before the decision thereon had been rendered. The Impugned Decision refers only to the challenges of Mr Kenyatta and Mr Ali.<sup>42</sup> On appeal, Mr Muthaura submits that if a party challenges his standing to file the appeal, the principle of judicial economy is in favour of him being heard now rather than seeking recourse to the Appeals Chamber at a later date as his challenge is in all material respects identical to the jurisdictional challenge of Mr

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<sup>36</sup> Impugned Decision. (Dissenting Opinion), para. 32.

<sup>37</sup> Impugned Decision. (Dissenting Opinion), para. 39. 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 questions raised respectively under articles 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.”

<sup>38</sup> Impugned Decision. (Dissenting Opinion), para. 44.

<sup>39</sup> Impugned Decision. (Dissenting Opinion), para. 45.

<sup>40</sup> ICC-01/09-02/11-383 (OA4).

<sup>41</sup> ICC-01/09-02/11-374-Conf, 21 November 2011. A public redacted version of this document was filed on 2 December 2011 as 01/09-02/11-374-Red.

<sup>42</sup> Impugned Decision, paras 14, 26-37.

Kenyatta.<sup>43</sup> On appeal, neither the Prosecutor nor the victims have raised any objection to the standing of Mr Muthaura to bring his appeal.

9. At paragraph 30 of the Appeal, Mr Muthaura and Mr Kenyatta requested that the appeals have suspensive effect on the proceedings (hereinafter: “Request for Suspensive Effect”).<sup>44</sup>

10. On 2 February 2012, the Appeals Chamber issued the “Order on the filing of a response to request for suspensive effect”,<sup>45</sup> allowing the Prosecutor to respond to the Request for Suspensive Effect. On the same day, the Appeals Chamber 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”,<sup>46</sup> inviting victims to submit observations on the appeal.

11. On 3 February 2012, the Office of Public Counsel for victims (hereinafter: “OPCV”) filed 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’”<sup>47</sup> (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.<sup>48</sup>

12. Mr Kenyatta responded to the OPCV Request on 8 February 2012.<sup>49</sup>

13. On 9 February 2012, the Prosecutor filed the “Prosecution’s Consolidated Response to Mr Muthaura’s and Mr Kenyatta’s Requests for Suspensive Effect of their Appeals on Jurisdiction (ICC-01/09-02/11-383 OA4)”.<sup>50</sup>

14. On 14 February 2012, Mr Muthaura and Mr Kenyatta filed jointly the “Document in Support of Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the ‘Decision on

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<sup>43</sup> Appeal, para. 19.

<sup>44</sup> Appeal, para. 30.

<sup>45</sup> ICC-01/09-02/11-393 (OA4).

<sup>46</sup> ICC-01/09-02/11-394 (OA4).

<sup>47</sup> ICC-01/09-02/11-395 (OA4).

<sup>48</sup> OPCV Request, p. 5.

<sup>49</sup> “Response on behalf of Uhuru Kenyatta to 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-01/09-02/11-397 (OA4).

<sup>50</sup> ICC-01/09-02/11-398 (OA4).



the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”<sup>51</sup> (hereinafter: “Document in Support of the Appeal”).

15. On 20 February 2012, the Appeals Chamber dismissed the OPCV Request.<sup>52</sup>

16. On 29 February 2012, the Appeals Chamber rejected the Request for Suspensive Effect.<sup>53</sup>

17. On 7 March 2012, the Prosecutor filed the “Prosecution’s Response to ‘Document in Support of 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”’ ICC-01/09-02/11-399 OA4)”<sup>54</sup> (hereinafter: “Response to the Document in Support of the Appeal”).

18. On 13 March 2012, the victims filed the “Observations pursuant to Article 19 (3) of the Rome Statute and Rule 59 (3) of the Rules of Procedure and Evidence”<sup>55</sup> (hereinafter: “Victims’ Observations”). On 19 March 2012, the Prosecutor filed the “Prosecution’s Response to the Victims’ ‘Observations pursuant to Article 19(3) of the Rome Statute and Rule 59 (3) of the Rules of Procedure and Evidence’ ICC-01/09-02/11-408 OA4)”<sup>56</sup> (hereinafter: “Prosecutor’s Response to the Victims’ Observations”). Mr Muthaura and Mr Kenyatta did not file a response to the Victims’ Observations.

19. On 19 March 2012, the victims filed the “Notification regarding the Legal Representation of Participating Victims in these Appeal Proceedings”<sup>57</sup> (hereinafter: “Victims’ Application”) requesting the Appeals Chamber to issue an order appointing legal counsel to represent the victim-participants “*nunc pro tunc* to 9 March 2012

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<sup>51</sup> ICC-01/09-02/11-399 (OA4).

<sup>52</sup> “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-01/09-02/11-400 (OA4).

<sup>53</sup> “Decision on the requests of Mr Kenyatta and Mr Muthaura for suspensive effect”, ICC-01/09-02/11-401 (OA4).

<sup>54</sup> ICC-01/09-02/11-404 (OA4).

<sup>55</sup> ICC-01/09-02/11-408 (OA4). This document was filed on 13 March 2012 and registered on 14 March 2012.

<sup>56</sup> ICC-01/09-02/11-410 (OA4).

<sup>57</sup> ICC-01/09-02/11-409 (OA4).

until the conclusion of the appeals proceedings” or alternatively to direct the Registrar to appoint counsel.<sup>58</sup>

20. On 27 March 2012, and shortly before the Appeals Chamber issued an order seeking submissions from the Registrar,<sup>59</sup> the Registrar filed “The Registrar’s Observations on the ‘Notification regarding the Legal Representation of Participating Victims in these Appeals Proceedings’ dated 19 March 2012”.<sup>60</sup> On 23 April 2012, the Appeals Chamber rejected the Victims’ Application.<sup>61</sup>

21. On 25 April 2012, Mr Muthaura and Mr Kenyatta filed the “Request to Make Oral Submissions on Jurisdiction under Rule 156(3)”,<sup>62</sup> which was rejected by the Appeals Chamber on 1 May 2012.<sup>63</sup>

### III. SUBMISSIONS ON APPEAL

22. On appeal, Mr Muthaura and Mr Kenyatta raise the following grounds:

- a. The Majority erred in law by dismissing *in limine* the jurisdictional challenge brought by the Kenyatta Defence and determining that it was not jurisdictional in nature, but instead, a challenge on the merits of the Prosecutor’s case on the facts. 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; [First Ground]
- b. 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 does not reflect the intention of the drafters of the Statute; [Second Ground]
- c. The Majority erred in fact by fundamentally changing the Prosecutor’s presentation of the facts by finding 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. By

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<sup>58</sup> Victims’ Application, para. 40 (footnote omitted).

<sup>59</sup> “Order on the submission of observations by the Registrar on the ‘Notification regarding the Legal Representation of Participating Victims in these Appeals Proceedings’”, ICC-01/09-02/11-413 (OA4).

<sup>60</sup> ICC-01/09-02/11-412 (OA4).

<sup>61</sup> “Decision on the ‘Notification regarding the Legal Representation of Participating Victims in the Appeal Proceedings’”, ICC-01/09-02/11-416 (OA4).

<sup>62</sup> ICC-01/09-02/11-418 (OA4).

<sup>63</sup> “Decision on the “Request to Make Oral Submissions on Jurisdiction under Rule 156(3)”, ICC-01/09-02/11-421 (OA4).



excluding the Kenyan Police from the ‘organization’, the Majority has removed an essential element of the alleged organizational structure; and rendered the Mungiki as a ‘group’ incapable of satisfying the criteria of ‘organization’ established by the Majority (i.e. capable of performing acts which infringe on basic human values). The Majority erred by not dismissing the case having determined that the Mungiki alone constituted the organization. The Majority erred in law by failing to inform the Suspects of the fundamental re-characterisation of the case and affording them adequate opportunity to respond to the new characterisation; [Third Ground]

- d. The Majority erred in fact by concluding that the Mungiki qualified as an organization within Article 7(2)(a) of the Statute. [Fourth Ground]<sup>64</sup>

23. Mr Muthaura and Mr Kenyatta submit under the first ground of appeal that the substance of their submissions before the Pre-Trial Chamber urged the Chamber to “engage in an assessment of the Prosecutor’s evidence in order to determine whether or not it has jurisdiction over the case, an assessment, however, which should only be made once the correct legal definition of the term in question has been identified. These two processes are separate and independent”.<sup>65</sup> Mr Muthaura and Mr Kenyatta assert that contrary to the Pre-Trial Chamber’s finding that the Defence were engaged in arguing the merits of the case to demonstrate that jurisdiction was not established, the “merits of the case are not in issue at the jurisdiction stage, rather it is the nature of the Prosecutor’s evidence and whether or not it endows the Court with subject matter jurisdiction” that is at issue.<sup>66</sup> They argue that a jurisdictional challenge necessitates an assessment of the facts and evidence relied upon by the Prosecutor.<sup>67</sup>

24. The remaining three grounds of appeal essentially allege legal, factual or procedural errors stemming from the Pre-Trial Chamber’s interpretation of the term ‘organizational policy’ for the purposes of article 7 (2) (a) of the Statute and subsequent application of the facts and evidence to such interpretation. In particular, under ground three, Mr Muthaura and Mr Kenyatta contend that the Pre-Trial Chamber erred in re-characterising the charges as pleaded by the Prosecutor by finding that the Mungiki alone represented the “organization structure”.<sup>68</sup> As a result of this finding, they allege a further error which in their view affects procedural

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<sup>64</sup> Document in Support of Appeal, para. 18 (footnotes omitted).

<sup>65</sup> Document in Support of the Appeal, para. 26 (emphasis omitted).

<sup>66</sup> Document in Support of the Appeal, para. 28.

<sup>67</sup> Document in Support of the Appeal, para. 29.

<sup>68</sup> Document in Support of the Appeal, paras 84-108.

fairness, namely, that the Pre-Trial Chamber erred in not informing them of the “nature, cause and content of the re-characterised charges” and in not allowing them an opportunity to respond to same.<sup>69</sup> Under ground four, Mr Muthaura and Mr Kenyatta reiterate their arguments under ground two insofar as they contend that the Pre-Trial Chamber erroneously defined the term ‘organizational policy’.<sup>70</sup> They proceed to make extensive factual and evidential submissions to argue that the Pre-Trial Chamber erred in fact in determining that there were substantial grounds to believe that the Mungiki constituted an organisation within the meaning of article 7 (2) (a) of the Statute.<sup>71</sup> They argue that the Pre-Trial Chamber based its erroneous conclusion on its finding that there was “sufficient evidence” that the Mungiki possessed various characteristics that the Pre-Trial Chamber had found established.<sup>72</sup>

25. The Prosecutor and the victims submit that these grounds of appeal are without merit and should be dismissed as they do not constitute a challenge to jurisdiction.<sup>73</sup>

#### IV. ANALYSIS

26. The Appeals Chamber notes that Mr Muthaura and Mr Kenyatta bring this appeal pursuant to articles 19 (6) and 82 (1) (a) of the Statute,<sup>74</sup> those provisions covering, *inter alia*, appeals from decisions with respect to jurisdiction.

27. Noting paragraph 8 above, the Appeals Chamber accepts that Mr Muthaura has standing to bring this appeal pursuant to article 82 (1) (a) of the Statute given that the Pre-Trial Chamber ruled that the case as a whole against Muthaura *et al.* falls within the jurisdiction of the Court.<sup>75</sup>

28. 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

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<sup>69</sup> Document in Support of the Appeal, paras 109-123.

<sup>70</sup> Document in Support of Appeal, para. 131.

<sup>71</sup> Document in Support of the Appeal, paras 124 *et seq.*

<sup>72</sup> Document in Support of the Appeal, paras 125-127.

<sup>73</sup> Response to the Document in Support of the Appeal; Prosecutor’s Response to Victims’ Observations, para. 6; Victims’ Observations.

<sup>74</sup> Appeal, para. 16.

<sup>75</sup> Impugned Decision, para. 37 and p. 154.

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 with respect to jurisdiction. The Appeals Chamber also recalls its previous judgment<sup>76</sup> in which it set out the different facets of the jurisdiction of the Court<sup>77</sup> 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".<sup>78</sup>

29. As set out above, in the Impugned Decision, the Pre-Trial Chamber made a specific ruling that the case against Mr Muthaura and Mr Kenyatta fell within the jurisdiction of the Court.<sup>79</sup> In the section entitled "Jurisdiction and Admissibility", the Pre-Trial Chamber recalled its findings in the Summons to Appear Decision in which it referred to its previous findings in the Article 15 Decision.<sup>80</sup> It dismissed Mr Kenyatta's Challenge to Jurisdiction "*in limine* in [its] entirety".<sup>81</sup> However, it considered that the arguments presented in the challenge would be considered when addressing the merits under article 61 (7) of the Statute.<sup>82</sup> Elsewhere in the Impugned Decision, the Pre-Trial Chamber considered the issue of 'organizational policy', recalling its legal findings in the Article 15 Decision<sup>83</sup> and finding that this element had been proved.<sup>84</sup>

30. On appeal, Mr Muthaura and Mr Kenyatta do not question the personal, territorial or temporal jurisdiction of the Court in this case but rather the subject-

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<sup>76</sup> *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").

<sup>77</sup> 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".

<sup>78</sup> Judgment in Lubanga OA4, para. 24.

<sup>79</sup> Impugned Decision, para. 37 and p. 154.

<sup>80</sup> Impugned Decision, para. 24.

<sup>81</sup> Impugned Decision, para. 35.

<sup>82</sup> Impugned Decision, para. 36.

<sup>83</sup> Impugned Decision, paras 111-114.

<sup>84</sup> Impugned Decision, paras 227-229.

matter jurisdiction. This decision therefore relates only to that aspect of jurisdiction insofar as it has been challenged by Mr Muthaura and Mr Kenyatta. In addition, neither Mr Muthaura nor Mr Kenyatta 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 Muthaura or Mr Kenyatta contest that an ‘organizational policy’, which the Prosecutor expressly alleged,<sup>85</sup> and the underlying acts with which they were charged (murder, deportation or forcible transfer of population, rape and other forms of sexual violence, other inhumane acts and persecution),<sup>86</sup> are components of crimes against humanity under article 7 of the Statute.

31. The four grounds of appeal raised by Mr Muthaura and Mr Kenyatta, 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 Muthaura and Mr Kenyatta is phrased in terms of reversing the Pre-Trial Chamber’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 [them] in furtherance of an ‘organizational policy’”.<sup>87</sup> They 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 [them]”.<sup>88</sup>

32. 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.

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<sup>85</sup> “Document Containing the Charges”, 2 September 2011, ICC-01/09-02/11-280-AnxA, (hereinafter: “DCC”), paras 35-49; 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)”, 2 September 2011, ICC-01/09-02/11-280.

<sup>86</sup> DCC, pp. 38-42. *See also* Impugned Decision, para. 21.

<sup>87</sup> Appeal, para. 29; Document in Support of the Appeal, para. 180.

<sup>88</sup> Appeal, para. 29; Document in Support of the Appeal, para. 181.

33. 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 ‘organizational 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 Muthaura and Mr Kenyatta allege should have been carried out on a challenge to jurisdiction was therefore carried out as part of the confirmation process<sup>89</sup> 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 Kenyatta made, and Mr Muthaura purported to join, in his challenge to jurisdiction before the Pre-Trial Chamber could be made as part of the 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”.<sup>90</sup>

34. 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 confirmation proceeding, in which case the jurisdictional challenge shall be decided first<sup>91</sup> – 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.<sup>92</sup>

35. 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

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<sup>89</sup> Impugned Decision, paras 101 *et seq.*

<sup>90</sup> Article 61 (7) of the Statute.

<sup>91</sup> Rule 58 (2) of the Rules of Procedure and Evidence provides, in relevant part, for a Chamber to be able to: “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”.

<sup>92</sup> See article 61 (7) of the Statute.

designed to consider the matters raised on these appeals and filter unmeritorious cases from progressing to trial. To find that the grounds that Mr Muthaura and Mr Kenyatta raise in this appeal relate to jurisdiction would duplicate what was covered by the confirmation process. If the Appeals Chamber were to address the merits of Mr Muthaura and Mr Kenyatta'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 Kenyatta nor Mr Muthaura 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.<sup>93</sup>

36. The Appeals Chamber notes the statement of the dissenting judge in the Pre-Trial Chamber 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 insofar as the Court cannot exercise jurisdiction over the underlying acts in the absence of such contextual elements";<sup>94</sup> and the argument of Mr Muthaura and Mr Kenyatta that the existence of an 'organizational policy' is a jurisdictional element, triggering the competence of the Court to adjudicate the individual acts set out in article 7 (1) of the Statute.<sup>95</sup> 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 Muthaura and Mr Kenyatta 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

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<sup>93</sup> "Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges", 9 March 2012, ICC-01/09-02/11-406; *See also* "Defence Application for Leave to Appeal the 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", 30 January 2012, ICC-01/09-02/11-385; "Defence Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", 30 January 2012, 01/09-02/11-384.

<sup>94</sup> Impugned Decision (Dissenting Opinion), para. 32.

<sup>95</sup> Document in Support of the Appeal, para. 29.



whether the Prosecutor could substantiate a component of the crimes with which Mr Muthaura and Mr Kenyatta 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.

37. 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 Court<sup>96</sup> 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.<sup>97</sup> With respect to legal definitions, the ICTY jurisprudence 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.<sup>98</sup> In the

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<sup>96</sup> See article 21 of the Statute.

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

<sup>98</sup> ICTY, Appeals Chamber, *Prosecutor v. Milutinović and others*, “Decision on Dragoljub 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-95-5118-AR72.1, para. 36.

*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.<sup>99</sup>

This distinction between the existence and the contours of a crime or mode of liability has also been followed in the ECCC jurisprudence.<sup>100</sup> In the present case, the existence of the requirement of an 'organizational policy' as an element of crimes against humanity is clear from the wording of article 7 (2) (a) of the Statute.

38. For all of the above reasons, the Appeals Chamber concludes that the issues that Mr Muthaura and Mr Kenyatta 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 Muthaura and Mr Kenyatta.

39. 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 24<sup>th</sup> day of May 2012

At The Hague, The Netherlands

<sup>99</sup> *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.

<sup>100</sup> 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.