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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul, Judge
Judge Cuno Tarfusser, Judge

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI
KENYATTA AND MOHAMMED HUSSEIN ALI

Public

**Defence Challenge to Jurisdiction, Admissibility and Prosecution's Failure to Meet
the Requirements of Article 54**

Source: Defence for General Mohammed Hussein Ali

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

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A. INTRODUCTION

1. On behalf of Major General Mohammed Hussein Ali, the Defence respectfully submits that the Prosecution's assertions of jurisdiction and admissibility are fatally flawed. Specifically, the Prosecution has failed
 - (i) first, to allege or establish requisite elements of Article 7, depriving this Court of jurisdiction *ratione materiae*;
 - (ii) second, to meet the requisite elements of Article 25(3)(d), depriving this Court of personal jurisdiction;
 - (iii) third, to articulate the requisite "sufficient gravity" required by Article 17(1)(d), thereby rendering this case inadmissible pursuant to Article 17(1)(d); and
 - (iv) fourth, to acknowledge the overwhelming exculpatory weight and value of evidence that it has already submitted to this Court, and has failed to meet its Article 54(1) obligation to "investigate incriminating and exonerating circumstances equally."

B. PROCEDURAL BACKGROUND

2. On 26 November 2009, the Prosecution filed the "Request for Authorization of an Investigation Pursuant to Article 15" into the 2007-2008 post-election violence in the Republic of Kenya.¹
3. In its Decision of 31 March 2010, the Pre-Trial Chamber II found that a reasonable basis existed upon which to investigate allegations of crimes against humanity in Kenya between 1 June 2005 and 26 November 2009, pursuant to Article 15(4) of the Rome Statute.²

¹ "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali," ICC-01/09-3-Conf-Exp and Annexes thereto (26 November 2009) ("Prosecutor's Application").

² Situation in the Republic of Kenya, Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," ICC-01/09-19-Corr, p. 83 (31 March 2010).

4. Judge Hans-Peter Kaul dissented from the majority interpretation of an “organization,” concluding that a narrower interpretation was more appropriate. Judge Kaul further noted the Prosecution’s failure to establish an “attack against any civilian population” that constituted a crime against humanity “pursuant to or in furtherance of a State or organizational policy to commit such attack.”³
5. The Pre-Trial Chamber II in its 8 March 2011 Decision granted the Prosecution’s Application for Summonses for the three suspects.⁴ The Court referred to but did not reiterate its earlier findings of jurisdiction from the 31 March 2010 Decision on jurisdiction, with no further assessment of the issue of jurisdiction.⁵
6. Judge Hans-Peter Kaul dissented from the 8 March 2011 Decision, raising the lack of subject matter jurisdiction and concluding that the crimes alleged did not meet the high standard for crimes against humanity required by Article 7 of the Statute.⁶

C. JURISDICTIONAL REQUIREMENTS

7. As a threshold matter, Article 19(1) requires that the Court satisfy itself that it has jurisdiction in all cases brought before it.⁷ There are four requisite elements of this Court’s jurisdiction: subject matter jurisdiction (*ratione materiae*), personal jurisdiction (*ratione personae*), territorial jurisdiction (*ratione loci*), and temporal jurisdiction (*ratione temporis*).⁸

³ Dissenting Opinion of Judge Hans-Peter Kaul to the “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,” ICC-01/09-19-Corr (“Dissenting Opinion on Investigation Decision”).

⁴ Pre-Trial Chamber II, “Decision on the Prosecution’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,” para. 57 (15 March 2011) (“Summonses to Appear”).

⁵ *Ibid.*, para. 11.

⁶ Dissenting Opinion of Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecution’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,” para. 6 (15 March 2011).

⁷ Rome Statute, Article 19(1).

⁸ See, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, “Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo,” p. 14 (28 July 2006); *Prosecutor v. Thomas*

8. For subject matter jurisdiction to exist the alleged crime must qualify as genocide, a crime against humanity, a war crime, or a crime of aggression as defined in Articles 6, 7, and 8 of the Statute.⁹
9. Furthermore, personal jurisdiction is limited to persons who meet the requirements prescribed in Article 25 of the Statute. A person shall be criminally responsible and liable for punishment for a crime within the Court's jurisdiction only if that person meets one of six possible standards (Articles 25(3)(a) through (f)). General Ali has been charged under Article 25(3)(d), which requires contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose, if such contribution was intentional and was either made to further the group's criminal activity or purposes, or made with knowledge of the group's intent to commit the crime.
10. The Prosecution accuses General Ali of contributing to the commission of crimes against humanity, pursuant to Articles 7 and 25(3)(d) of the Statute, as part of a common plan with Muthaura, Kenyatta, Mungiki, pro-PNU youth, and local politicians and businessmen.¹⁰ However, the alleged actions (or inactions) attributed to General Ali do not constitute crimes against humanity under the Statute, for the four independently sufficient reasons set forth below.
11. Notably, the timing of this motion is vitally important. The Statute requires challenges to jurisdiction and admissibility to be raised early in the case.¹¹ After a

Lubanga Dyilo, ICC-01/04-01/06 (OA4), "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," paras 21-22 (14 December 2006).

⁹ Rome Statute, Article 5(1); *see also 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," paras 21-22.

¹⁰ Document Containing the Charges, ICC-01/09-02/11, para 19.

¹¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rep. of the Preparatory Comm. on the Establishment of an Int'l Crim. Ct.*, June 15-July 17, 1998, U.N. Doc. A/51/22; GAOR, 51st Sess., Supp. No. 22, (Vol. I) at pp. 57 and 58, para. 249 (1996).

decision on a confirmation of charges is filed with the Registry, a case must be considered admissible unless breach of the *ne bis in idem* principle is alleged.¹²

D. THE PROSECUTION HAS FAILED TO ALLEGE OR ESTABLISH THE REQUISITE ELEMENTS OF CRIMES AGAINST HUMANITY UNDER ARTICLE 7.

12. Having charged General Ali with crimes against humanity under Article 7, the Prosecution bears the burden of proving that such crimes were committed, and has failed to do so.

13. Article 7(1) defines a crime against humanity as one of a number of defined acts committed as part of a widespread or systematic attack directed against any civilian population, when committed with knowledge of the attack.¹³ Article 7(2) defines an attack directed against any civilian population as a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, "*pursuant to or in furtherance of a State or organizational policy to commit such attack.*"¹⁴ (emphasis added)

14. The ICC Elements of Crimes further clarify that "[i]t is understood that 'policy to commit such an attack' requires that *the State or organization* actively promote or encourage such an attack against a civilian population."¹⁵ (emphasis added) Clearly, it is necessary that the Prosecution prove both the existence of an "organization" and the existence of an "organizational policy" to begin to satisfy Article 7.

15. Whether any such organization exists must be clear. In its 8 March 2011 decision authorizing the issuance of summonses to appear for Uhuru Kenyatta, Francis

¹² *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1213-tENG, "Reasons for the Oral Decision on the Motion Challenging the Admissibility of a Case (Article 19 of the Statute)," paras. 49-50 (16 June 2009).

¹³ Rome Statute, Article 7(1).

¹⁴ Rome Statute, Article 7(2).

¹⁵ ICC, Elements of Crimes, intro., para. 3, UN Doc. PCNICC/2000/1/Add.2 (2 November 2000).

Muthaura, and General Ali, this Court proposed a six-factor test to determine whether a given group qualifies as an organization under the Statute:¹⁶

- (i) whether the group is under a responsible command, or has an established hierarchy¹⁷;
- (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population¹⁸;
- (iii) whether the group exercises control over part of the territory of a State¹⁹;
- (iv) whether the group has criminal activities against the civilian population as a primary purpose²⁰;
- (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population²¹; and
- (vi) whether the group is part of a larger group, which fulfills some or all of the abovementioned criteria²².

¹⁶ "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", para 93.

¹⁷ "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", para 93, *citing* Cf. Article 1(1) of the Protocol II Additional to the Geneva Conventions of 12 August 1949, 8 June 1977.

¹⁸ "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", para 93, *citing* M. Di Filippo, "Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes", 19 European Journal of International Law 533, 567-568 (2008).

¹⁹ "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", para 93, *citing* Article 1(1) of the Protocol II Additional to the Geneva Conventions of 12 August 1949, 8 June 1977; M. Di Filippo, "Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes", 19 European Journal of International Law 533, 566-567 (2008).

²⁰ "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", para 93, *citing* J. M. Smith, "An international hit job: Prosecuting organized crime acts as crimes against humanity", 97 Georgetown Law Journal 1111, 1133-1134 (2009); P. Burns, "Aspect of Crimes Against Humanity and the International Criminal Court - A paper prepared for the Symposium on the International Criminal Court, February 3 - 4> 2007; Beijing, China" - online, at: <http://www.icclr.law.ubc.ca/Site%20Map/ICC/AspectofCrimesAgainstHumanity.pdf> (consulted on 1 March 2010).

²¹ "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", para 93, *citing* P. Burns, "Aspect of Crimes Against Humanity and the International Criminal Court - A paper prepared for the Symposium on the International Criminal Court, February 3 4, 2007; Beijing, China" - online, at: <http://www.icclr.law.ubc.ca/Site%20Map/ICC/AspectofCrimesAgainstHumanity.pdf> (consulted on 1 March 2010).

²² "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", para 93.

16. The Court's six-factor test establishes that the standard by which a group is deemed an "organization" is more than one of mere capability for wrongdoing. Additional elements are required to elevate a group of people who may or may not have some ties to each other to the level of an Article 7 "organization."
17. This Court concluded in its 8 March 2011 Decision that a "Mungiki organization" existed.²³ Notably, however, the Court did not conclude that any of those named in the Application for Summonses, to include General Ali, were a part of that organization - nor did the Court apply its six-factor test to any alleged organization beyond the Mungiki. Indeed, this Court specifically declined to address further questions related to any alleged organization or its organizational policy.²⁴
18. Yet in its most recent submissions, the Prosecution stepped beyond both the Court's decision and its own evidence to propose the existence of an organization consisting of more than the Mungiki. Complicated by a total lack of clarity and overdependence on *post hoc* reasoning, the Prosecution implies that its alleged "organization" included not only the Mungiki²⁵ but also the PNU,²⁶ the "pro-PNU youth,"²⁷ local businessmen²⁸, the Kenya Police,²⁹ or some undefined combination of these entities. The Prosecution also makes sweeping and wholly unsupported statements that Muthaura and Kenyatta, "together with Ali, Mungiki leaders and other prominent PNU supporters, agreed to pursue an organizational policy to keep the PNU in power."³⁰
19. The "organization" whose existence the Prosecution now alleges differs dramatically from the "organization" envisioned by this Court in its 8 March 2011 Decision. As a result, the Court's six-factor test has not yet been applied to the

²³ Summonses to Appear, para. 22.

²⁴ Summonses to Appear, para. 24.

²⁵ Document Containing the Charges, para. 86.

²⁶ Document Containing the Charges, para. 18.

²⁷ Document Containing the Charges, para. 78.

²⁸ Document Containing the Charges, para. 23.

²⁹ Document Containing the Charges, para. 83.

³⁰ Document Containing the Charges, para. 35.

organization described in the Prosecution's most recent submissions, or indeed to any organization which General Ali allegedly supported or of which General Ali was allegedly a member.

20. Therefore, no matter how this Court has characterized the Mungiki, the Prosecution has not alleged and cannot demonstrate the requisite "State or organizational policy" element of Article 7 without describing, much less providing even a minimal amount of credible evidence as to the existence of an organization. An "organizational policy" cannot exist without an organization. The Prosecution, understandably, has not asserted the existence of or described the character of any "organization" of which General Ali allegedly was a member or whose policies General Ali allegedly supported. Such *post hoc* attempts to recast riotous, chaotic acts of violence as the work of an "organization" comprising more than the Mungiki cannot be squared with the evidence.

21. Simply put, the Prosecution has not yet grappled with the Court's clear, concise and mandatory six-factor test, nor has the Prosecution otherwise satisfied the plain requirements of Article 7.

E. THE PROSECUTION HAS FAILED TO DEMONSTRATE THE EXISTENCE OF AN ORGANIZATION OF WHICH GENERAL ALI WAS A MEMBER OR WHOSE POLICIES GENERAL ALI SUPPORTED

22. First, the Prosecution has not shown, nor can it show, that any alleged group to which General Ali may or may not have belonged or to which he allegedly contributed was under a responsible command, or had an established hierarchy. Though the Prosecution argues that the Mungiki and Kenya Police were each hierarchically organized,³¹ the Prosecution does not allege or prove that any organization of which the Mungiki, the Kenya Police, and other alleged actors were members was hierarchically organized, nor can it credibly do so.

³¹ Document Containing the Charges, para. 84.

23. The Prosecution asks this Court to infer, without explanation, some connection between an alleged procurement of “the services of Mungiki leaders” by Kenyatta and Muthaura on the one hand, and General Ali on the other. Without proof—indeed, without any allegation at all as to the nature of such a connection—the Prosecution has not demonstrated any reasonable grounds to believe that General Ali, the Mungiki, Muthaura, Kenyatta, the Kenya Police, PNU businessmen and politicians, and pro-PNU youth were all a part of a single, cognizable, hierarchal structure featuring various levels of command and a division of duties in the command structure.³²
24. The argument that these disparate entities were part of a unified, hierarchical organization is untenable when viewed against the ways that these groups were completely distinct from one another prior to the post-election violence. Indeed, given the timeline of events, there is no evidence that the various constituent parts of the alleged “organization” acted together or attempted to create any sort of integrated hierarchy or unified command structure.
25. Police officers act *ex officio* on a daily basis and do not require orders to make decisions while working in the field. When orders did come from Kenya Police Headquarters, General Ali, as Commissioner of Police, passed orders³³ to the Provincial Police Officers (PPO) who in turn would pass orders to the Officer Commanding Police Division (OCPD). The OCPDs would then pass orders to the Officer Commanding Station (OCS). It is the OCS who gives the orders to the police officers in the field. Areas of jurisdiction of PPOs, OCPDs and OCSs are geographically defined.
26. At the Provincial Police Office, there is the Provincial Criminal Investigator (PCIO) who is answerable to the PPO, the Director of the Criminal Investigations Division (CID) and the Commissioner of Police. Under the PCIO, the Divisional

³² Summonses to Appear, para. 22 (discussing the Mungiki).

³³ On occasion, General Ali would pass orders to the Senior Deputy Commissioner of Police.

Criminal Investigations Officer is answerable to the PCIO and Advisor to the OCPD on criminal investigations.

27. The Kenya Police are only one part of the larger executive branch of the Kenyan Government, which includes the President (who is head of state and commander-in-chief of the Kenyan Army), the Vice President and the Cabinet. The Ministries of the government—including the Ministry for Provincial Administration and Internal Security—are parts of the Cabinet, and each one is headed by a Minister.³⁴ Executive orders from the President of Kenya are passed through the chain of command to the Ministers of each Ministry. Each Minister is assisted by two Assistant Ministers and a Permanent Secretary. The Kenya Police, in turn, are a department of the Ministry for Provincial Administration and Internal Security, and the Commissioner of Police ranks below the Permanent Secretary.
28. The Mungiki, by contrast, are roving, violent criminals associated with any of a number of distinct “factions,” including the National Coordinating Committee (NCC), the Mungiki Defence Council (MDC), and the Kenya National Youth Alliance (KNYA). The only credible connections between the Mungiki and the Police were the extraordinary efforts of the Kenya Police to investigate and oppose Mungiki violence and criminal activity.³⁵
29. The notion that entities as complex and carefully organized as the Kenya Police and the executive branch of the Kenyan government are intertwined with the violent, scattered Mungiki is improbable enough. Even more improbable is the notion that any network between those actors could be formed without creating so much as a trace of evidence such as a message, order, or instruction.
30. The Prosecution has not submitted even *one* witness statement of any junior or senior police officer professing to have either received or relayed orders to “stand down” from General Ali. It defies all logic that such an organization could unite

³⁴ At the time of the charges, John Mickuki; See, KEN-OTP-0001-0364, Appendix “A”.

³⁵ See KEN-OTP-0046-0110; KEN-OTP-0015-0393; KEN-OTP-0005-4283; KEN-OTP-0060-0608; KEN-OTP-0060-0550; KEN-OTP-0060-0545; KEN-OTP-0060-0250; KEN-OTP-0059-0265; KEN-OTP-0060-0346; KEN-OTP-0052-1487.

tens of thousands of members within a short period of time and effect an “orchestration of failure” without any trace of its existence or activity.

31. In addition to failing to define any alleged “organization,” or group, the Prosecution also has provided no factual basis to conclude that its alleged group possessed the means to carry out a widespread or systematic attack against a civilian population. In sources cited by this Court, it is noted that “the ICC Statute takes a rather restrictive stand: a look at Article 7(2)(a) shows that an element of, at least potential, repetition is required, so leaving aside isolated acts, no matter whether on large scale.”³⁶
32. The Prosecution alleges that widespread attacks were carried out “by the Mungiki and pro-PNU youth,”³⁷ but provides no basis to conclude that these attacks were systemic or coordinated. Nor does the Prosecution purport to connect the perpetrators of these random, disparate acts to General Ali, or otherwise to establish that either the Mungiki or some larger “organization” had the means to carry out widespread attacks. The only reference to this criterion thus far came from this Court, which noted that certain Mungiki (and not General Ali or any “organization) identified targets of attacks by employing local guides or using their native language(s).³⁸ This passing observation made by the Court is not sufficient to satisfy the Prosecution’s obligation to show that its alleged “organization” had the means to carry out widespread or systematic attacks.
33. Third, the Prosecution has failed to allege, much less demonstrate that the alleged group exercised control over part of the territory of a State, as drawn from Additional Protocol II to the 1949 Geneva Conventions.³⁹ Indeed, the Additional

³⁶ M. Di Filippo, “Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes”, 19 *European Journal of International Law* 533, 567-568 (2008) (cited in Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, para 93).

³⁷ Document Containing the Charges- Amended, para. 31.

³⁸ Summonses to Appear, para. 19.

³⁹ “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, para 93, *citing* Article 1(1) of the Protocol II Additional to the Geneva Conventions of 12 August 1949, 8 June 1977; M. Di Filippo, “Terrorist crimes and international co-operation:

Protocol II standard upon which this Court has relied requires that such control “enable (the party) to carry out sustained and concerted...operations.”⁴⁰ Neither the Mungiki nor the alleged, *ad hoc* “organization” possessed any capability that even remotely approached this standard.

34. By contrast, the Prosecution has alleged only that the Mungiki (which is not the “organization” discussed by the Prosecutor in its most recent filings) controlled certain utilities and services in Nairobi. The Prosecution’s allegation is unsupported by the evidence it cites, all of which relates to Nairobi, none of which proves Mungiki control over Kenyan territory, and not one shred of which relates to either Naivasha or Nakuru.⁴¹

35. Mungiki extortion activities in connection with utilities services and transportation systems bear the hallmarks of ordinary street crime, and make no pretense to territorial control contemplated by this standard. Far from having control over Naivasha and Nakuru, the criminal gangs alleged did not even attempt to control the territory, but instead committed their crimes and then fled the scene.

36. Fourth, the Prosecution has failed to prove that the primary purpose of the alleged group was to commit crimes against the civilian population. The Prosecution makes sweeping allegations as to the purpose of the attacks,⁴² but at no point connects General Ali to either such a group or such a purpose.

37. Fifth, the Prosecution has not proved that its alleged group expressed, explicitly or implicitly, any intention to attack a civilian population. This criterion goes wholly unaddressed in the Prosecution’s most recent submission; instead, the

critical remarks on the definition and inclusion of terrorism in the category of international crimes,” 19 European Journal of International Law 533, 566-567 (2008).

⁴⁰ Article 1(1) of the Protocol II Additional to the Geneva Conventions of 12 August 1949, 8 June 1977.

⁴¹ “Document the Charges, para. 41 (citing KEN-OTP-0001-0364 at 0568 (related to Mungiki actions in Nairobi); KEN-OTP-0002-0015 at 0149-0150, para. 719 (describes Mungiki actions in Nairobi and Thika district; KEN-OTP-0046-0128 at 0136 (describes Mungiki actions in Nairobi); KEN-OTP-0033-0297 at 0306-0307 (describes Mungiki actions in Nairobi); KEN-OTP-0046-0116 at 0118 (describes Mungiki actions in Nairobi)).

⁴² Document Containing the Charges, para. 21

Prosecution contents itself to recite in its charges that the alleged and undefined “group” intentionally targeted civilians based on their political affiliation.⁴³

38. Moreover, the Prosecution makes no attempt to substantiate such alleged intent on the part of General Ali. The Prosecution instead makes the bold statement that such intent is “necessarily inferable” from General Ali’s awareness of the violent tendencies of the Mungiki.⁴⁴ General awareness does not constitute intent. The Prosecution is obliged to show more than awareness to link one man, or indeed one alleged group, to crimes against humanity.
39. Sixth, the Prosecution does not even contend that the alleged organization was part of a larger group that fulfills the above criteria. Such allegations are completely missing from the Prosecution’s most recent submission, which lacks any semblance of clarity as to the nature, structure or membership of its purported “organization.”
40. In addition to having failed to demonstrate the existence of any organization, the Prosecution also has failed to demonstrate the existence of any organizational policy. As noted above, “[i]t is understood that ‘policy to commit such an attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population.”⁴⁵ Such a policy must “follow a regular pattern,”⁴⁶ and it must be “planned, directed or organized.”⁴⁷ The standard for what constitutes an “organizational policy” is an exacting one; the idea that the term would refer “to any group of individuals, brought together for whatever purpose, is an absurdity.”⁴⁸

⁴³ “Document the Charges, Count 10.

⁴⁴ Document Containing the Charges, para. 100.

⁴⁵ ICC, Elements of Crimes, intro., para. 3, UN Doc. PCNICC/2000/1/Add.2 (2 November 2000).

⁴⁶ ICC, Elements of Crimes, intro., para. 3, UN Doc. PCNICC/2000/1/Add.2 (2 November 2000) (cited by Pre-Trial Chamber I: *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 398.

⁴⁷ *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 81.

⁴⁸ William A. Schabas, “The International Criminal Court: A Commentary on the Rome Statute,” Oxford University Press (2010), p.152.

41. Yet the Prosecution does not argue that its theoretical organization carried out attacks following a “regular pattern,” and shows no evidence of any “planning, direction or organization” of which General Ali was a part or that General Ali supported. In addition to having failed to prove that Mungiki attacks were attributable to its alleged broader “organization,” the Prosecution also presents no evidence to show that the attacks of its alleged organization involved planning of any kind. The allegation that such a policy exists demands more than a mere inference, particularly where actors such as the Mungiki—roving, violent actors associated with any of a number of distinct “factions”—are alleged to be involved.

42. In sum, the Prosecution has satisfied not one of the criteria this Court requires to prove the existence of both an Article 7 “organization” and an “organizational policy.” This failure demonstrates conclusively that cognizable evidence simply does not exist to support the Prosecution’s sweeping arguments.

F. THE PROSECUTION HAS FAILED TO ALLEGE, MUCH LESS TO ADDUCE, PROBATIVE EVIDENCE AS TO KEY REQUIREMENTS OF INDIRECT CONTRIBUTION UNDER ARTICLE 25(3)(D).

43. To fall within this Court’s jurisdiction, Article 25 of the Statute mandates that certain clear requirements must be satisfied. Having charged General Ali with indirect contribution as set out in Article 25(3)(d), the Prosecution bears the burden of proving the requisite elements therein, and has failed to do so.

44. In the *Mbarushimana Arrest Warrant Decision*, the Pre-Trial Chamber restated the standard for “contribution” to a crime committed by a group of persons, as set out in Article 25(3)(d) of the Statute, which requires that

- (i) a crime within the jurisdiction of the Court is attempted or committed;
- (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose;

(iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute;

(iv) the contribution shall be intentional; and

(v) the contribution shall either (a) be made with the aim of furthering the criminal activity or criminal purpose of the group, or (b) in the knowledge of the intention of the group to commit the crime.⁴⁹

45. First, the Prosecution has failed to allege or to prove that General Ali committed any crime within the jurisdiction of the Court. The Prosecution has no evidentiary support for its allegations that General Ali either through a failure to act or through an active “orchestration” caused the police to allow Mungiki attacks to take.⁵⁰

46. Though the Prosecution alleges that General Ali actively “orchestrated” the failure of the police force, the Prosecution has not presented a single piece of evidence to show that General Ali gave orders to the Kenya Police to allow Mungiki attacks to take place, nor has it presented any evidence of police officers obeying orders from Ali not to obstruct the movement of pro-PNU youth into Naivasha or Nakuru, as discussed in section I., below.

47. The Prosecution’s implications that General Ali caused the failure of the police force through omission are also baseless. The Prosecution has simply failed to provide any evidence whatsoever either that General Ali failed to act in the face of a positive obligation to do so or that such a failure resulted in the failure of the entire Kenya police force. Moreover, even if the Prosecution did have any evidence to support its claims, omissions and failures of action do not constitute crimes against humanity as defined by the Statute. The imposition of liability for a failure to act is “contrary to the visible and material effect of a positive act (because) the effect of an omission cannot be empirically determined with

⁴⁹ Prosecutor v. Mbarushimana, Pre-Trial Chamber I, ICC-01/04-01/10-1, “Decision on the Prosecutor’s Application for Warrant of Arrest against Callixte Mbarushimana” (*Mbarushimana Arrest Warrant Decision*), para. 38.

⁵⁰ See *infra*, Section I.

certainty.”⁵¹ Moreover, liability for omissions is contrary to the intentions of the drafters of the Rome Statute, whose “abstinence from explicit regulation” with respect to omission “cannot be interpreted in any other way than the rejection of individual criminal responsibility for commission by omission.”⁵²

48. Second, the Prosecution has failed to demonstrate that the commission of a crime against humanity was carried out by a group of persons acting with a common purpose. Instead, the Prosecution asks this Court to infer, without evidence to support such an inference, that any possible “common purpose” of the Mungiki is automatically attributable to some broader group that the Prosecution does not adequately define.

49. Indeed, not only has the Prosecution failed to prove any of the requisite elements of an organization, it has not and cannot even describe the makeup of such a group. The Prosecution’s desultory and widely varying descriptions of the structure of the “group” involved are internally inconsistent, rendering it a complete mystery as to whether the group whose common purpose was being advanced included the Mungiki,⁵³ the PNU,⁵⁴ the “pro-PNU youth,”⁵⁵ local businessmen⁵⁶, the Kenya Police,⁵⁷ or some combination of the above. With so little clarity as to the group involved, it is therefore unsurprising that the Prosecutor has similar difficulty articulating that group’s “common purpose.”

50. Third, the Prosecution has failed to prove that General Ali contributed to any alleged crime at all, much less “in any way other than those set out in Article 25(3)(a) to (c) of the Statute,” or that any such alleged contribution by General Ali was “intentional.” As noted in Section D., above, the Prosecution offers no evidence to substantiate such alleged intent on the part of General Ali. Instead,

⁵¹ Kai Ambos, in A. Cassese/P. Gaeto/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, vol. 1 (OUP, 2002), p. 860.

⁵² See Kai Ambos, in A. Cassese/P. Gaeto/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, vol. 1 (OUP, 2002).

⁵³ Document Containing the Charges, para. 86.

⁵⁴ Document Containing the Charges, para. 18.

⁵⁵ Document Containing the Charges, para. 27.

⁵⁶ Document Containing the Charges, para. 27.

⁵⁷ Document Containing the Charges, para. 83.

the Prosecution makes the bold statement that such intent is “necessarily inferable” from General Ali’s awareness of the violent tendencies of the Mungiki.⁵⁸ More than general awareness is required to prove the critical element of intent to commit a crime against humanity.

51. Fourth and finally, the Prosecution has failed to prove that any alleged contribution by General Ali was made either (a) with the aim of furthering the criminal activity or criminal purpose of the group, or (b) in the knowledge of the intention of the group to commit the crime.⁵⁹ These two disjunctive elements of Article 25(3)(d)(v) are discussed in greater detail in Section G., below.

G. THE PROSECUTION HAS FAILED TO MEET ITS ARTICLE 67 OBLIGATIONS TO PROVIDE ADEQUATE NOTICE OF THE CHARGES.

52. Furthermore, the Prosecution has failed to give General Ali any adequate notice of the exact provision of Article 25(3)(d) under which it intends to charge General Ali. Article 25(3)(d)(i) and (ii) create two separate standards by which an intentional contribution could meet the requirements of the provision. The two elements are presented in the disjunctive, and the Prosecution cannot simply accuse General Ali of both.

53. This failure not only endangers General Ali’s ability to mount an effective defense, it constitutes a violation of Article 67(1)(a), which guarantees that the accused shall be given prompt and detailed notice of the charges.⁶⁰ Article 67(1)(a) was designed to “ensure that the accused is not taken by surprise during the proceedings,”⁶¹ and exists to ensure that a party preparing its defense is not forced to guess at the Prosecution’s intent. The Prosecution’s failure to specify the

⁵⁸ “Document Containing the Charges,” para. 100.

⁵⁹ Prosecutor v. Mbarushimana, Pre-Trial Chamber I, ICC-01/04-01/10-1, “Decision on the Prosecutor’s Application for Warrant of Arrest against Callixte Mbarushimana” (*Mbarushimana Arrest Warrant Decision*), para. 38.

⁶⁰ Rome Statute, Article 67(1)(a).

⁶¹ Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Munchen/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, p. 1257 (2008).

exact charge against General Ali forces him to mount a defense without the benefit of full information, in direct contravention of Article 67.

54. If the Prosecution is charging General Ali under Article 25(3)(d)(i), it does so without any evidence to substantiate its claims. Article 25(3)(d)(i) deals with a contribution “made with the aim of furthering the criminal purpose of the group.”⁶² This provision is understood as requiring a “specific intention to promote the practical acts and ideological objectives of the group.”⁶³ However, the Prosecution has not proved such an intention here, nor does the evidence support any such conclusion.

55. Furthermore, any attempt by the Prosecution to charge General Ali under Article 25(3)(d)(ii) – for contributions made “in the knowledge of the intention of the group”⁶⁴ – must be viewed in light of the relevant legal standard and the available evidence. The plain language of 25(3)(d)(ii) makes clear that in order to be charged, the participant must be aware of a specific group’s plan and intention to commit a specific crime.⁶⁵ In addition to its failure to prove the existence of any contribution by General Ali to the commission or attempted commission of any crime, the Prosecution has also provided no evidence whatsoever to show that General Ali had any knowledge of the intention of any group to commit any specific crime.

H. THE PROSECUTION HAS FAILED TO MEET ITS OBLIGATIONS UNDER ARTICLE 17.

56. Article 17(1)(d) of the Rome Statute deems a case inadmissible if it is “not of sufficient gravity to justify further action by the Court.”⁶⁶ Notably, Article 17

⁶² Rome Statute, Article 25(3)(d)(i).

⁶³ Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Munchen/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, p. 759 (2008).

⁶⁴ Rome Statute, Article 25(3)(d)(ii).

⁶⁵ Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Munchen/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, p. 760 (2008).

⁶⁶ Rome Statute, Article 17(1); *Lubanga* Arrest Warrant Decision, para. 42.

imposes a threshold requirement above and beyond the jurisdictional requirements of the Statute.⁶⁷

57. Read in the context of the other Articles of the Statute, Article 17 restricts the Court's consideration to "the most serious crimes of international concern", those "unimaginable atrocities" that "deeply shock the conscience of humanity,"⁶⁸ and that are especially grave.⁶⁹

58. The gravity requirement of Article 17 is exacting. In determining whether a case (and not a specific crime⁷⁰) is of sufficient gravity to be admissible, this Court must consider facts relevant to the alleged perpetrator himself. The *Lubanga* Court has ruled that "the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court."⁷¹

59. One primary function of this Court is to ensure that the most serious crimes of an international nature do not go unpunished. "The retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention."⁷² Such prevention is only possible when the Statute is applied judiciously, thoughtfully, and only to crimes of sufficient gravity.⁷³

60. To date, the Court has not clearly endorsed any particular test designed to determine whether a case meets the gravity threshold. The Court came closest in

⁶⁷ Susana SaCouto and Katherine Cleary, "The Gravity Threshold of the International Criminal Court," 23 Am. U. Int'l. L. Rev. 807, 808 (2007).

⁶⁸ Rome Statute, pmbl.; Rome Statute, art. 6,7,8.

⁶⁹ *Lubanga* Arrest Warrant Decision, para. 46.

⁷⁰ Rome Statute, Article 17(1) ("The Court shall determine that a case is inadmissible where...(d) *the case* is not of sufficient gravity to justify further action by the Court." (emphasis added)).

⁷¹ *Lubanga* para. 41; *see also* *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, "Decision on the Confirmation of Charges", para. 30 (8 February 2010).

⁷² *Lubanga* Arrest Warrant Decision, paras 48-49.

⁷³ Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Munchen/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, p. 8 (2008). Article 53 also gives discretion to the Prosecutor to decline to initiate an investigation or prosecution, where there are "substantial reasons to believe that an investigation would not serve the interests of justice," taking into account the gravity of the crime and the interests of the victims. Rome Statute, Article 53.

Prosecutor v. Lubanga, where the Pre-Trial Chamber identified three questions in determining whether a case is of sufficient gravity pursuant to Article 17(1)(d):⁷⁴

- (i) first, whether the conduct in question was systematic or large-scale, giving due weight to the social alarm the conduct caused in the international community;
- (ii) second, whether the person is one of the “most senior leaders” of the State, organization or armed group to which he belongs; and
- (iii) third, whether the accused fairly could be considered as most responsible for the crimes, considering (a) his individual role in the overall commission of crime and (b) the role that other State entities, organizations or armed groups play in the overall commission of crimes.⁷⁵

61. The Prosecution’s submissions thus far have lacked clarity as to what constitutes the “conduct in question” for the purposes of Article 17. At times the Prosecution appears to suggest that alleged police inaction by General Ali constitutes the “conduct in question”⁷⁶—at other times, the alleged “conduct in question” appears to consist of the Mungiki attacks on the civilian population.⁷⁷

62. Ultimately, despite the Prosecution’s failure to clearly address Article 17, this case lacks sufficient gravity whether the conduct in question is understood to be either the alleged “orchestration” of the failure of the Kenya police or the criminal acts of the Mungiki.

⁷⁴ *Lubanga* Arrest Warrant Decision, para. 64. Although the decision of the Pre-Trial Chamber I was reversed on appeal, the Appeals Chamber based the reversal on the notion that a finding of admissibility is not a prerequisite to the issuance of an arrest warrant under the Statute. For the purposes of an Article 17 motion at the pre-trial phase, no court has addressed what gravity threshold should be used. *Prosecutor v. Ntaganda Dyilo*, Case No. ICC-01/04-169, Judgment on the Prosecutor’s Appeal Against the Decision of the Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58” (13 July 2006) (hereinafter, DRC Appeals Chamber Judgment).

⁷⁵ *Lubanga* Arrest Warrant Decision, para. 64. The Appeals Chamber has called this criterion into question (*Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-186, Judgment on the Prosecutor’s Appeal Against the Decision of the Pre-Trial Chamber Entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58,” ¶ 70 (13 July 2006) [hereinafter *Situation in the DRC*], Judgment on Appeal Against Arrest Warrant Decision). Nevertheless, in the absence of further guidance, we will address the *Lubanga* standards.

⁷⁶ Document Containing the Charges, paras. 23-24, 31, 33-34.

⁷⁷ Document Containing the Charges, paras. 18, 35, 77, 100.

63. If the “conduct in question” is defined as alleged police inaction by General Ali or those under his command, then this case is not one of “sufficient gravity.” As a threshold matter, there is substantial doubt as to whether inaction can, as a matter of law, result in liability and rise to the sufficient level of gravity. Jurists have observed the difficulty in applying liability to omission, noting that, “contrary to the visible and material effect of a positive act, the effect of an omission cannot be empirically determined with certainty”.⁷⁸ In addition, the idea that failing to act can trigger liability – much less rise to the level of sufficient gravity – directly contradicts the intentions of the drafters of the Rome Statute, whose “abstinence from explicit regulation” with respect to omission “cannot be interpreted in any other way than the rejection of individual criminal responsibility for commission by omission.”⁷⁹ Put simply, there is substantial evidence to show that this Court’s treatment of omission with respect to both liability and “sufficient gravity” is a conservative one.

64. Furthermore, as a factual matter, police inaction does not constitute conduct of sufficient gravity when viewed against the three questions set forth by the *Lubanga* court.

65. The first question of the *Lubanga* court’s gravity test must be answered in the negative. Because the Prosecution has provided no evidence to substantiate its claims that there was any “deliberate failure to take action,”⁸⁰ the Prosecution is, unsurprisingly, unable to show that any such failure was “systematic or large-scale.”⁸¹

⁷⁸ K. Ambos, in: A. Cassese/P. Gaeta/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court A Commentary*, vol. 1, (OUP, 2002), p. 860.

⁷⁹ See Kai Ambos, in A. Cassese/P. Gaeta/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, vol. 1 (OUP, 2002).

⁸⁰ Document Containing the Charges, fn. 69.

⁸¹ *Lubanga* Arrest Warrant Decision, para. 64. The Appeals Chamber has called this criterion into question (Situation in the Democratic Republic of Congo, Case No. ICC-01/04-186, Judgment on the Prosecutor’s Appeal Against the Decision of the Pre-Trial Chamber Entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58,” ¶ 70 (13 July 2006) [hereinafter *Situation in the DRC*], Judgment on Appeal Against Arrest Warrant Decision). Nevertheless, in the absence of further guidance, we will address the *Lubanga* standards.

66. The second question—whether a person’s position in a State entity, organization or armed group renders him or her one of the few “most senior leaders” of the situation under investigation—also cannot be answered in the affirmative, because General Ali was not in fact one of the “most senior leaders” in this case.

- (i) As Commissioner of the Kenya Police, General Ali played a major role in the everyday functioning of security in Kenya, a role that was only heightened during the period of extreme violence seen by the country after the 2007 elections.
- (ii) However, the Prosecution has not alleged or provided any evidence to suggest that General Ali was either a policy-maker within the Kenyan Government or an attendee or even invitee to any alleged meetings at the State House, or anywhere else.⁸²
- (iii) Put simply, General Ali never possessed the ability to control Kenyan government policies. Notably, the Prosecution does not suggest otherwise, much less adduce any evidence to support such a position.

67. The third question—whether the accused falls within the category of those most responsible for the crimes, considering (a) his individual role in the crimes within the Court’s jurisdiction, and (b) the role played by other State entities, organizations or armed groups accused of crimes within the Court’s jurisdiction—cannot be answered in the affirmative.

- (i) In *Lubanga v. Prosecutor*, the Court delimited its jurisdiction only to those senior leaders who are suspected of being most responsible.⁸³ As the Prosecutor himself has stated, “gravity” does not attach exclusively to the criminal act, but also to whether or how the accused participated in such an act.⁸⁴
- (ii) It is in the interest of justice for the Court to limit its jurisdiction to those leaders of the State or organization “who bear the greatest responsibility [for the crimes].”⁸⁵ This maximizes the deterrent effect of the Court’s

⁸² See “Document the Charges, paras 20, 21 (Alleging that Kenyatta and Muthaura facilitated a series of pre-election meetings with Mungiki leaders and senior PNU government officials, politicians, and businessmen, for the purpose of obtaining their support in retaliatory attacks against perceived ODM supporters in the Rift Valley).

⁸³ *Lubanga Arrest Warrant Decision*, para. 51.

⁸⁴ ICC-OTP, *Paper on Some Policy Issues before the Office of the Prosecutor*, p. 6 (Sept. 2003).

⁸⁵ *Paper on Some Policy Issues before the Office of the Prosecutor*, p. 7.

decisions, ensuring that only those who played the greatest role in perpetrating crimes are held accountable.⁸⁶

(iii) General Ali has not been accused of being the principal or direct perpetrator of the crimes. Indeed, the evidence overwhelmingly establishes groups of thugs, criminals, and rebellious teens, not General Ali, were directly responsible for the rapes, murders, and other crimes set forth in the Document Containing the Charges.⁸⁷ Nakuru and Naivasha were overrun by widespread looting, destruction of property, and violence against civilians. Some violent acts were deliberately targeted at those belonging to specific tribal or political communities, but many others were perpetrated by gangs of youths taking advantage of the anarchy.⁸⁸

(iv) The Prosecution has not alleged that General Ali was at the core or even a minor part of the development of a policy to injure or kill ODM supporters. Under the broadest reading of the Prosecution's allegations, there is simply no support for the notion that General Ali was one of the parties "most responsible" for the crimes committed in Nakuru and Naivasha.

68. If, in the alternative, the "conduct in question" is understood to be the violent and criminal acts of the Mungiki themselves, the gravity requirements of Article 17 again have not been met.

69. The answer to the first question—whether the relevant conduct is systematic or large-scale, giving due consideration to "social alarm"—is clearly still "no." The crimes contemplated here are violent and abhorrent—but for the reasons set forth below they are not either systematic or large-scale as the Court has interpreted those terms.⁸⁹

(i) The conduct under scrutiny must be systematic or large-scale.⁹⁰ Individual crimes are not enough to constitute such large-scale activity—

⁸⁶ Recognizing the potential for "impunity gaps" by lower level officials, the Prosecutor stressed that alternative means are possible, such as encouraging the facilitating national prosecutions, or providing international assistance. Nonetheless, it focused on national responses to cover the gap, *not* the intervention of the ICC. *Paper on Some Policy Issues before the Office of the Prosecutor*, p. 7.

⁸⁷ Document Containing the Charges, paras 59-75.

⁸⁸ See KEN-OTP-0001-0248; KEN-OTP-0029-0316; KEN-OTP-0033-0511; KEN-OTP-0046-0368; KEN-OTP-0046-0508; KEN-OTP-0033-0514.

⁸⁹ See Dissenting Opinion of Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecution's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", para. 6 (15 March 2011).

⁹⁰ *Lubanga* Arrest Warrant Decision, para. 46.

indeed, the Pre-Trial Chamber held that “if isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-drive selection of the crimes...included within the material jurisdiction of the Court.”⁹¹

- (ii) In its 19 August 2011 Document Containing the Charges, the Prosecution claims that General Ali contributed to implementation of a common plan by (1) securing the non-intervention of the Kenya Police, and (2) failing to punish the main perpetrators of the attacks.⁹² The Prosecution does not charge General Ali with direct responsibility for the crimes committed within the jurisdiction of this Court. Rather, the Prosecution accuses General Ali of “orchestrated” inaction and inadequacy of response.
- (iii) The Prosecution has not presented a shred of evidence to prove that General Ali gave orders to the Kenya Police not to obstruct the movement of the Mungiki, nor has it presented any evidence of police officers obeying any such order from General Ali in Nakuru, Naivasha or elsewhere. Instead, the Prosecution’s evidence confirms that despite their best efforts, the Kenya Police were massively overwhelmed by the scale of post-election violence,⁹³ and often had little to no time to respond to attacks.⁹⁴ The police also seriously lacked critical, basic information as to many of the vicious attacks.⁹⁵ The police were hardly part of an elaborate “orchestration of failure” –rather, the police were often inadequately funded, ill-trained and woefully ill-equipped to respond to or prevent post-election violence.⁹⁶

70. The second and third questions of the *Lubanga* court’s gravity test again must be answered in the negative, for the same reasons set forth in paragraphs 65 and 66, above. The Prosecution has simply failed to satisfy its obligation to show both that General Ali is one of the few “most senior leaders” of the situation under investigation and that General Ali “falls within the category of those most responsible for the crimes.”

⁹¹ *Lubanga* Arrest Warrant Decision, para. 46.

⁹² Document Containing the Charges, para. 26.

⁹³ See KEN-OTP-0052-1680; KEN-OTP-0046-05081; KEN-OTP-0046-0368; KEN-OTP-0042-0044; KEN-OTP-0042-0003; KEN-OTP-0033-0514; KEN-OTP-0026-0240; KEN-OTP-0006-1883; KEN-OTP-0005-4283; KEN-OTP-0001-1057; KEN-OTP-0001-0248; KEN-OTP-0052-2176; KEN-OTP-0033-0297; KEN-OTP-0013-0450; *but see* KEN-OTP-0039-1254 (even despite such overwhelming odds, there was a 13% reduction in all categories of crime in 2006- and 2007, attributed to police action against the Mungiki); KEN-OTP-0052-1953.

⁹⁴ See KEN-OTP-0002-0015.

⁹⁵ See KEN-OTP-0060-0405.

⁹⁶ See KEN-OTP-0030-0307; KEN-OTP-0052-1859.

71. The international stature of the ICC and the intentionally crafted gravity threshold of Article 17(1) compel the conclusion that prosecutorial energy and resources should focus on areas of the world where the crimes are greater than violent acts committed by street criminals and gangs, and on those who bear the greatest fault for that violence. The crimes alleged by the Prosecution do not rise to this level, and even if they did, General Ali does not fall within the category of those most culpable. To hold otherwise runs counter to the logic of the Statute and the interests of international justice.

I. THE PROSECUTION HAS FAILED TO FULFILL ITS ARTICLE 54 OBLIGATION TO INVESTIGATE EXCULPATORY EVIDENCE.

72. The Prosecution's failure to adequately investigate the huge volume of exculpatory evidence violates the Article 54(1) requirement that the Prosecution investigate incriminating and exonerating circumstances equally "in order to establish the truth."⁹⁷ Simply put, Article 54(1) means that the Prosecution "must not abandon (exculpatory evidence) merely because it does not assist in establishing the guilt of the suspect."⁹⁸

73. The plain language of Article 54(1) confirms that the Prosecution is not merely required to *disclose* exculpatory evidence it encounters (an obligation already enshrined in Article 67) – it must, at the outset, *investigate* such evidence as well.

74. The Prosecution's own evidence submitted to this Court sets out a clear and compelling narrative, the exculpatory value of which is overwhelming and demonstrates that General Ali went to great lengths to stop violence in Naivasha, Nakuru and elsewhere in the Rift Valley on numerous occasions.⁹⁹

⁹⁷ Rome Statute, Article 54(1); *see also* *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure Between the Parties," p. 9 (31 July 2008).

⁹⁸ Daniel D. Ntanda Nsereko, "Prosecutorial Discretion Before National Courts and International Tribunals," 2 J. Int'l Crim. Just. 136 (2005).

⁹⁹ *See* KEN-OTP-0061-0054; KEN-OTP-0013-0481; KEN-OTP-0013-0474; KEN-OTP-0013-0468; KEN-OTP-0013-0450; KEN-OTP-0013-0435; KEN-OTP-0013-0427; KEN-OTP-0005-9491; KEN-OTP-0003-0306.

75. The Kenya Police also took innumerable actions to prevent, investigate and respond to violence in Naivasha and Nakuru, including responding to information on forthcoming attacks, increasing patrols, clearing roadblocks and making arrests.¹⁰⁰
76. Kenya Police officers gave shelter and protection to internally displaced persons (IDPs) and other civilians at police stations¹⁰¹ and provided medicine, food and water to IDPs.¹⁰² Even the Prosecution concedes that over 9,000 IDPs were given shelter and protection by the Kenya Police during the operative time frame.¹⁰³ The telltale efforts of so many people seeking police sanctuary constitutes undisputed, conclusive evidence of how the IDPs viewed the reliability of the police.
77. Despite their best and often heroic efforts, the Kenya Police were overwhelmed by the sheer scale of the post-election violence,¹⁰⁴ and had very little time and limited means to respond to many attacks.¹⁰⁵ Evidence confirms that during the post-election violence the police were inadequately funded, trained or equipped to respond¹⁰⁶ and often lacked reliable information as to attacks.¹⁰⁷
78. Having found that the police were dramatically overwhelmed by instances of post-election violence, General Ali sought and received help from the Prison

¹⁰⁰ See KEN-OTP-0054-005; KEN-OTP-0054-0116; KEN-OTP-0052-1680; KEN-OTP-0052-1660; KEN-OTP-0046-0508; KEN-OTP-0046-0368; KEN-OTP-0042-0078; KEN-OTP-0042-0030; KEN-OTP-0026-0240; KEN-OTP-0011-0895; KEN-OTP-0006-3575; KEN-OTP-0006-3560; KEN-OTP-0006-3254; KEN-OTP-0006-1883; KEN-OTP-0006-0493; KEN-OTP-0005-9952; KEN-OTP-0005-9907; KEN-OTP-0005-9899; KEN-OTP-0005-7014; KEN-OTP-0001-0248; KEN-OTP-0052-2176; KEN-OTP-0052-0231; KEN-OTP-0052-1953; KEN-OTP-0052-1915; KEN-OTP-0013-0481; KEN-OTP-0013-0474; KEN-OTP-0013-0468; KEN-OTP-0013-0450; KEN-OTP-0005-9491; KEN-OTP-0005-8554; KEN-OTP-0001-0002. (Notably, the Kenya Police and the Administration Police are very different,¹⁰⁰ as was General Ali did not have control over the latter. See KEN-OTP-0052-1859; KEN-OTP-0052-1842.)

¹⁰¹ See KEN-OTP-0053-0174; KEN-OTP-0053-0054; KEN-OTP-0052-1763; KEN-OTP-0042-0078; KEN-OTP-0042-0030; KEN-OTP-0026-0240; KEN-OTP-0005-7014; KEN-OTP-0005-9491.

¹⁰² See KEN-OTP-0052-0223.

¹⁰³ "Document Containing the Charges", para. 75.

¹⁰⁴ See KEN-OTP-0052-1680; KEN-OTP-0046-0508; KEN-OTP-0046-0368; KEN-OTP-0042-0044; KEN-OTP-0042-0003; KEN-OTP-0033-0514; KEN-OTP-0026-0240; KEN-OTP-0006-1883; KEN-OTP-0005-4283; KEN-OTP-0001-1057; KEN-OTP-0001-0248; KEN-OTP-0052-2176; KEN-OTP-0033-0297; KEN-OTP-0013-0450; *but see* KEN-OTP-0039-1254 (even despite such overwhelming odds, there was a 13% reduction in all categories of crime in 2006- and 2007, attributed to police action against the Mungiki); KEN-OTP-0052-1953.

¹⁰⁵ See KEN-OTP-0002-0015.

¹⁰⁶ See KEN-OTP-0030-0307; KEN-OTP-0052-1859.

¹⁰⁷ See KEN-OTP-0060-0405.

Service.¹⁰⁸ The police also received assistance from the Kenyan military, who helped to clear roads of barricades erected by the population.¹⁰⁹

79. The Kenya Police opposed the violence in Naivasha and Nakuru, and took concrete steps to investigate those responsible. As for the Mungiki in particular, General Ali strongly opposed the Mungiki throughout his time as Commissioner of the Kenya Police, and no evidence presented by the Prosecution calls his vigilance in this regard into question.¹¹⁰

80. Moreover, the Prosecution has produced no evidence to support its unfounded allegation that “(General) Ali instructed the Kenya Police and other security forces that were under his effective control not to obstruct the movement of the Mungiki and pro-PNU youth into the Rift Valley in preparation for the attacks against perceived ODM supporters.”¹¹¹ One document cited by the Prosecution to support this allegation is an NSIS PowerPoint presentation showing nothing more than General Ali’s place in the chain of command of the Kenya Police.¹¹² Another is an uncorroborated witness statement consisting largely of hearsay, containing no claim of any kind that General Ali gave instructions to any police officers to purposefully fail to obstruct the Mungiki.¹¹³ Another piece of evidence is nothing more than a BBC news article that cites the uncorroborated and wholly unverified statement of one anonymous witness.¹¹⁴

81. Furthermore, the experiences and records of police officers who reported to General Ali should be an essential part of the Prosecution’s argument that General Ali “orchestrated the failure” of the Kenya Police. Yet the Prosecution has not taken even minimal steps of interviewing police officers and supervisors or examined contemporaneous police records, which plainly reveal exculpatory

¹⁰⁸ See KEN-OTP-0052-1763; KEN-OTP-0042-0003; KEN-OTP-0005-7014.

¹⁰⁹ See KEN-OTP-0001-0248.

¹¹⁰ See KEN-OTP-0046-0110; KEN-OTP-0015-0393; KEN-OTP-0005-4283; KEN-OTP-0060-0608; KEN-OTP-0060-0550; KEN-OTP-0060-0545; KEN-OTP-0060-0250; KEN-OTP-0059-0265; KEN-OTP-0060-0346; KEN-OTP-0052-1487.

¹¹¹ Document Containing the Charges, para. 99.

¹¹² See KEN-OTP-0002-0172 at 0178-0179.

¹¹³ See KEN-OTP-0043-0002 at 0040 and 0047, paras. 198-200 and 238.

¹¹⁴ See KEN-OTP-0033-0186 at 0186-187.

evidence as to General Ali. The Prosecution offers nothing, either practical or legal, to justify its failure to produce a shred of evidence related to the experience of such police officers.

82. By contrast, the Defence has interviewed a number of Kenya police officials, all of whom reconfirm the record before this court—a total absence of any instructions or “orchestration” by General Ali to either take or refrain from action pursuant to an alleged “common plan or scheme.” The Defence conducted interviews even though, as a practical matter, it lacked the same opportunities to prepare its case that the Prosecution enjoyed.¹¹⁵

83. In sum, it is impermissible to “infer,”¹¹⁶ as the Prosecution does, that instructions were given when not one shred of credible evidence has been presented to support such an inference. Moreover, the inferences that the Prosecution urges of this Court—inferences professed to be sufficient to support charges of crimes against humanity—are even more extraordinary when viewed in light of the Prosecution’s complete failure to meet its Article 54 obligations to fairly investigate both inculpatory and exculpatory evidence.

J. OTHER JURISDICTIONAL LIMITATIONS

84. The Defense respectfully submits the four independently sufficient arguments above on the understanding that this Court is, by design, a court of limited jurisdiction.¹¹⁷ Intervention by the Court is intended to prevent and deter crimes

¹¹⁵ “The experience of the *Ad Hoc* Tribunals shows that the Defence...never has the same or even similar possibilities as the Prosecution to prepare its case.” Kai Ambos, “*International criminal procedure: ‘adversarial,’ ‘inquisitorial’ or mixed?*”, Int’l Crim. L. Rev. 3: 1-37, at 35-36 (2003).

¹¹⁶ Document Containing the Charges, para. 45.

¹¹⁷ Rome Statute of the International Criminal Court, Article 7(1), 17 July 1998, 2187 U.N.T.S. 90 (“Rome Statute”), Article 5(1) (declaring that the “jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole”).

against humanity by States or organizations that control territory, and such crimes are to be “strictly construed.”¹¹⁸

85. These limitations are very much a product of the priority this Court places on state sovereignty.¹¹⁹ Though this Court has declined to grant the requests of the Kenyan government to return this case to Kenyan courts, it must nonetheless be stressed that the crimes alleged here were the product of transitory violence of the sort that has always fallen within the sovereign jurisdiction of the member states. The Defence therefore urges that the majesty and effectiveness of this Court is based upon and enhanced by the careful observance of its special jurisdiction and unique role in the international legal order.

K. CONCLUSION

86. Based on the four independently sufficient reasons set forth above, the Prosecution has failed to prove that this Court has subject matter jurisdiction (jurisdiction *ratione materiae*) over General Ali because the crimes alleged against him do not constitute crimes against humanity under Article 7. The Prosecution also has failed to prove that this Court has personal jurisdiction over General Ali for failure to meet Article 25 requirements. This case also is dismissable for want of sufficient gravity as defined in Article 17. Most important, none of the evidence submitted by the Prosecution supports any of its alleged arguments as to either jurisdiction or admissibility. The Defence will produce further corroborating evidence in support of this submission during the confirmation hearing. It is respectfully submitted that for all the foregoing reasons, the charges presented by the Prosecution should not be confirmed.

¹¹⁸ Rome Statute, Article 22(2).

¹¹⁹ Rome Statute, pmb., para. 10.

Respectfully Submitted,

The image shows two handwritten signatures in black ink. The signature on the left is 'Evans Monari' and the signature on the right is 'Gershom Otachi'. Both are written in a cursive, flowing style.

Evans Monari and Gershom Otachi
On behalf of Mohammed Hussein Ali

Dated this, 19th day of September 2011

At The Hague, The Netherlands