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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

Submissions on Jurisdiction on Behalf of Uhuru Kenyatta

Source: Defence

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:
Karim A.A. Khan QC and Kennedy
Ogetto
Counsel for Uhuru Muigai Kenyatta:
Steven Kay QC and Gillian Higgins
Counsel for Mohammed Hussein Ali:
Evans Monari and Gershom Otachi

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

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Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Mr. Uhuru Muigai Kenyatta (the “Defence”) hereby challenges the jurisdiction of the International Criminal Court (the “ICC”) to try this case on the ground that there was no attack on any civilian population pursuant to a state or ‘organizational policy’ under Article 7 of the Rome Statute (the “Statute”).

II. PROCEDURAL HISTORY

2. On 31 March 2011, the Pre-Trial Chamber (the “PTC”) authorised, by a majority, an investigation into the situation in the Republic of Kenya (the “Majority Investigation Decision”).¹ In reaching its decision, the Majority adopted a wide interpretation of the term “organization” under Article 7(2)(a) of the Statute. While it accepted that there was a need for an organization behind the policy, it rejected the requirement that such an organization must possess any State-like elements:

“the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values” (the “Basic Human Values Test”).²

3. On 31 March 2011, His Honour Judge Hans-Peter Kaul issued a Dissenting Opinion, holding *inter alia* that he failed to identify an “attack directed against a civilian population” committed “pursuant to or in furtherance of a State or organizational policy” on the evidence produced by the Prosecutor. He gave a

¹ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2011, ICC-01/09-19-Corr.

² Ibid. at para. 90.

contextual interpretation of the term organizational policy in which he stated the need for a “state-like organization”:

“[I] read the provision such that the juxtaposition of the notions ‘State’ and ‘organization’ in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those ‘organizations’ should partake of some characteristics of a State.”³

4. Accordingly, he concluded that he was unable to authorize an investigation into the situation (the “Dissenting Investigation Opinion”).
5. On 8 March 2011, the PTC issued, by the same majority, a summons to appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (the “Majority Summons Decision”).⁴ It based its decision on organizational policy upon the same Basic Human Values Test, stating that it found no reason to reiterate its earlier findings and provide a further detailed assessment of the question of jurisdiction at this stage.⁵
6. On 15 March 2011, His Honour Judge Hans-Peter Kaul issued his dissent in which he reiterated his Dissenting Investigation Opinion. He held that he failed to see “how an ‘organization’ could have existed in which the primary actors were the Mungiki gang and the Kenyan Police Forces” and therefore failed to see how the crimes alleged “were embedded in an “organizational policy” (the “Dissenting Summons Opinion”).⁶

³ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2011 ICC-01/09-19-Corr at para 51.

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01.

⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01, at para 11.

⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 March 2011, ICC-01/09-02/11-03.

7. On 30 August 2011, the Single Judge issued her “Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing”.⁷
8. On 2 September 2011, the Defence filed its “Defence Observations for the Purposes of Establishing the Final Schedule of the Confirmation Hearing” in which it indicated that it intends to raise challenges concerning both jurisdiction and admissibility.⁸
9. On 13 September 2011, the Single Judge issued her “Decision on the Schedule for the Confirmation of Charges Hearing”, in which she decided that any challenges by the Defence teams to jurisdiction and/or admissibility shall be brought in writing by no later than Monday 19 September 2011.⁹
10. The Defence notes Articles 5, 7, 17, 21, of the Statute, Rule 58 and 122 of the Rules of Procedure and Evidence (the “Rules”).
11. The Defence provides submissions on the issue of jurisdiction only at this stage.

⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing, 30 August 2011, ICC-01/09-02/11-272.

⁸ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Observations for the Purposes of Establishing the Final Schedule of the Confirmation Hearing, 2 September 2011, ICC-01/09-02/11-278, at para. 8.

⁹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Schedule for the Confirmation of Charges Hearing, 13 September 2011, ICC-01/09-02/11-321, at p.10.

III. OUTLINE OF SUBMISSIONS

12. The Defence submits that the ICC does not have jurisdiction to try this case under Article 7 of the Statute for crimes against humanity, on the ground that there was no attack on any civilian population pursuant to a State or 'organizational policy' as disclosed by the evidence of the Prosecution. The Defence submits the following:

- a. Consideration must be given to the express wording of Article 7 of the Rome Statute, the interpretation of which must not contravene the principle of *nullem crimen sine lege* under Article 22;
- b. The Majority's interpretation (the Basic Human Values Test and six considerations) is incorrect and does not reflect the intention of the drafters of the Statute;
- c. The test formulated by His Honour Judge Kaul in his dissenting opinion accurately reflects the intention of the drafters of the Statute as well as leading academic opinion upon the issue, and establishes the correct boundary between national and international crimes; and
- d. Even if the Majority is not persuaded that an organization under Article 7 of the Statute should partake of some characteristics of a State, this case does not meet the criteria set out in the Majority Investigation Decision. Accordingly, the PTC should determine it has no jurisdiction following a review of the evidence submitted by the parties during the confirmation hearing.

13. The Defence notes at the outset that the Prosecution has argued in the case of *Ruto et al*, that Defence submissions on organizational policy "did not challenge any of the pre-conditions for the exercise of the Court's jurisdiction".¹⁰ The Defence rejects this argument and submits that a challenge to jurisdiction

¹⁰ Pre-Trial Chamber II, Prosecutor v Ruto et al., Prosecution's Response to the Defence Challenges to Jurisdiction, 16 September 2011, ICC-01/09-01/11-334, at paras 2 and 9-15.

concerning organizational policy relates directly to the principle of *ratione materiae*, as held by Judge Kaul in his Dissenting Summons Opinion.¹¹ HHJ Kaul explained that the Prosecution must establish “the *ratione materiae* jurisdiction of the Court, including the contextual elements of crimes against humanity. It is the establishment of these elements of crimes against humanity that triggers the jurisdiction of the Court [and] elevates the acts concerned, which would otherwise fall exclusively under the responsibility of national jurisdictions, to international crimes and sets aside considerations of State sovereignty.”¹²

14. This jurisdictional challenge analyses the constitutive contextual element of “organizational policy” and concludes that this essential component has not been satisfied in the present case.

IV. THE LEGAL TEST UNDER ARTICLE 7(2)(a) OF THE STATUTE, THE INTENTION OF THE DRAFTERS AND THE PRINCIPLE OF *NULLEM CRIMEN SINE LEGE*

15. For the purpose of jurisdiction over crimes against humanity under Article 7 of the Statute, paragraph 2(a) states that:

“[an] Attack directed against any civilian population means 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.”

16. As a separate constitutive element of an “attack”, the Elements of Crimes drafted to assist the Court in the interpretation and application of the Statute, state that the “policy to commit such attack” requires that the State or

¹¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 March 2011, ICC-01/09-02/11-03, at para 18.

¹² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 March 2011, ICC-01/09-02/11-03, at para 18.

organization actively promote or encourage such an attack against a civilian population.¹³

17. Article 22 of the Statute cites the universal principle of criminal law *nullem crimen sine lege* and requires that:

“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”¹⁴

18. Accordingly, the term “organizational policy” must be strictly construed and interpreted in favour of the Suspects “taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole.”¹⁵ Article 7(2)(a) of the Statute clearly prevents the abandonment of the policy requirement in proceedings brought before the ICC.¹⁶

19. Article 31(1) of the Vienna Convention on the Law of Treaties requires that when interpreting Article 7(2)(a) of the Statute, the ordinary meaning of the term should first be considered. As no definition of ‘organizational policy’ is provided in any of the ICC texts or official drafts, the ordinary meaning provides no clear answer. The next step is therefore, to consider the context, object and purpose of the term.¹⁷ In this regard, it is essential to examine the intention of the drafters.

¹³ Article 7(3) of the Elements of Crimes.

¹⁴ Article 22(2) of the Elements of Crimes.

¹⁵ Article 7(1) of the Elements of Crimes.

¹⁶ C. Kress, “On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision”, *Leiden Journal of International Law*, 23 (2010) 855 at pp. 869-70.

¹⁷ Article 31(1) Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

20. The term “organizational policy” was included in the ICC Statute pursuant to a suggestion by Canada,¹⁸ to prevent the ICC from prosecuting singular atrocities not part of a widespread or systematic attack.¹⁹ A significant number of State Parties were concerned that if the disjunctive “widespread or systematic” test was left unqualified, a number of crimes intended to be kept outside the ICC’s jurisdiction, including unconnected crime waves, could be brought within it.²⁰ While other States believed that the term ‘attack’ was enough to prevent this, an agreement was reached to incorporate into the Statute specific details of an ‘attack’ including the need for a State or organizational policy.²¹ The drafters intended to create a clear boundary between crimes against humanity and national crimes, and for this boundary to be dependent not on the abhorrent nature of the crimes but on the entity and policy behind them.
21. The express words of the Statute are that the entity is to be an “organization”. The Statute does not refer to “groups”, “bodies” or other less clearly defined entities as being the object of Article 7. The drafters of the Statute clearly intended the formal nature of a group and the level of its organization to be a defining criterion. As explained by Robinson, the reason for omitting the term ‘group’ from Article 7 was that “to the extent that there may be a gap between the concept of ‘group’ and ‘organization’, it was considered the planning of an attack against a civilian population requires a higher degree of organization,

¹⁸ Committee of the whole, A/CONF.183/C.1/L.44, 7 July 1998, page 2 and Committee of the whole, A/CONF.183/C.1/L.59, 10 July 1998, page 2.

¹⁹ OTR ICC Vol. 1, Issue 11, On the Record: Your link to the Rome conference for the establishment of an International Criminal Court, July 2, 1998: “[...] In an effort to satisfy Britain, the United States, and France, the Canadian delegation has proposed a definition of “crimes against humanity” that could prevent the court from prosecuting singular atrocities not part of a widespread or systematic attack. Experts say that the Canadian proposal, which was discussed Wednesday [so the 1 July 1998] and returns to informal discussions, could also rule out the murder of unarmed soldiers who have thrown away their arms, the starvation of isolated communities, and even acts of sexual violence during war. An angry statement by the Women’s Caucus pointed out that acts of sexual violence in war are often spontaneous and impossible to link to any “governmental or organizational policy,” as required by the Canadian text. “[This] effectively writes sexual violence out of the jurisdiction of the ICC under crimes against humanity,” said the statement. Canada’s proposal is aimed at bridging one of the widest, and most serious, disagreements before the Rome Conference. Crimes against humanity are one of the three core crimes proposed under the ICC jurisdiction. Many governments, including the five permanent members of the Security Council, have been trying to whittle down the definition in an attempt to limit the court’s scope.

²⁰ Herman Von Hebel and Darryl Robinson “Crimes within the Jurisdiction of the Court, in: Roy S Lee (ed): *The International Criminal Court, The making of the Rome Statute, Issues Negotiations Results* (The Hague: Kluwer Law International, 1999), at pages 94-; Darryl Robinson, ‘Defining “Crimes Against Humanity” at the Rome Conference’ (1999) 93 *American Journal of International Law* 43, at pp. 47-8

²¹ Article 7(2) of the Rome Statute.

which is consistent with the latter concept.”²² The drafters were concerned to ensure that any interpretation given to the constitutive elements were in line with customary international law.

V. THE MAJORITY’S INTERPRETATION IS INCORRECT AND DOES NOT REFLECT THE INTENTION OF THE DRAFTERS OF THE STATUTE

(A) The Basic Human Values Test

22. The ‘organization’ test formulated by the Majority is satisfied by the existence of a group that “has the capability to perform acts which infringe on basic human values”:

“With regard to the term "organizational", the Chamber notes that the Statute is unclear as to the criteria pursuant to which a group may qualify as an "organization" for the purposes of article 7(2)(a) of the Statute. Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values.”²³

23. The Defence submits that the Basic Human Values Test does not reflect the intention of the drafters of the Rome Statute and is teleologically driven towards the end goal of protecting human values. The expansive new definition of organization is capable of encompassing a vaguely defined range of entities, including gangs, serial killers and other forms of organized criminal activity. The Defence submits that the term in context requires that the organization is

²² D. Robinson “Defining ‘Crimes Against Humanity’ at the Rome Conference”, (1999) 93 Am. J. Int’l L. 43 at footnote 44; Cassese, *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1, Ed. Cassese, Gaeta and Jones, OUP 2002, Chapter 11.2: Jurisdiction: Crimes Against Humanity pp. 356 et seq

²³ Pre-Trial Chamber II, *The Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2011, ICC-01/09-19-Corr, at para 90.

either part of the State or State-like in the sense that it has an association with an entity that behaves like a State, e.g. that controls territory.²⁴ Furthermore, the Majority definition ignores the integral requirement of a 'policy' emanating from the organization. An organizational entity that has the ability to produce a policy is in need of a defined structure and control system to carry out its policy. This concept is lacking from the definition of "whether a group has the capability to perform acts which infringe on basic human values".²⁵

24. For these reasons, the Majority approach fails to demark the boundary between crimes against humanity, over which the ICC has jurisdiction, and those crimes that can properly be dealt with in national jurisdictions. At its extreme, the Majority test "takes crimes against humanity to mean all organized acts that are not random."²⁶ Professor Schabas has observed that such an approach renders it almost impossible to draw a "bright line"²⁷ between the post election violence in Kenya, and the London riots in August 2011.²⁸

²⁴ W. Schabas "London Riots: Were they Crimes Against Humanity?", 15 August 2011, <http://humanrightsdoctorate.blogspot.com/search?updated-max=2011-08-30T19%3A03%3A00%2B01%3A00&max-results=10>.

²⁵ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2011, ICC-01/09-19-Corr, at para 90.

²⁶ W. Schabas, "London Riots: Were they Crimes Against Humanity?", 15 August 2011, <http://humanrightsdoctorate.blogspot.com/search?updated-max=2011-08-30T19%3A03%3A00%2B01%3A00&max-results=10>.

²⁷ W. Schabas "London Riots: Were they Crimes Against Humanity?", 15 August 2011, <http://humanrightsdoctorate.blogspot.com/search?updated-max=2011-08-30T19%3A03%3A00%2B01%3A00&max-results=10>.

²⁸ W. Schabas "London Riots: Were they Crimes Against Humanity?", 15 August 2011, <http://humanrightsdoctorate.blogspot.com/search?updated-max=2011-08-30T19%3A03%3A00%2B01%3A00&max-results=10>.

(B) Underlying Rationale of the Majority in Relation to the Basic Human Values Test

(i) Di Filippo

25. The Majority definition of organization derives primarily from an academic article written by M. Di Filippo concerning terrorist crimes and international co-operation,²⁹ in which he suggests the following:

“A significant number of commentators stress the need for a link between the perpetrators and a government or, at least, an insurgent movement or territorial authority, acting as a factor increasing the gravity of the material conduct and thus raising concern in the international community.”³⁰

Other authors go even further pointing out that the associative element and its inherently aggravating effect, could eventually be satisfied by ‘purely’ private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by ‘territorial’ entities or by private groups given the latter’s acquired capacity to infringe basic human values.”³¹

²⁹ M. Di Fililippo, “Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes”, *The European Journal of International Law* Vol. 19 no 3, 533, (2008).

³⁰ Dixon, ‘Article 7, paragraph 2’ in O Triffterer (ed.), commentary on the Rome Statute of the International Criminal Court (1999), at 158, 159; C Bassiouni, *Introduction au droit penal international* (2002), at 51-53; J-F Roulot, *Le Crime Contre l’humanite* (2002) at 150-154; Cassese, *International Criminal Law* (2003), at 64, 83 and 91; Schabas *supra* not 133, at 257-260; Gil Gil, ‘Los Crimenes contra la hamaanidad y el genocidio en el Estatuto de la Corte Penal Internacional a la luz de ‘Los elementos de los Crimines’’, In K Ambos (ed.), *Law nueva justice penal supranaciona: Desarrollos post-roma* (2002), at 65, 63-75; C Bassiouni, *The Legislative History of the International Criminal Court*. Vol. 1 (2005) at 151-152.

³¹ M. Di Fililippo, “Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes”, *The European Journal of International Law* Vol. 19 no 3 (2008) at p.567. In this perspective see Robinson, ‘Defining “Crimes Against Humanity” at the Rome Conference’, 93 *AJIL* (1999) 43 at 50; Y Jurovics, *Reflexions sur la specificite du crime contre l’humanite* (2002), at 415 – 417; K Kittchaisaree, *International Criminal Law* (2002) at 98; S Ratner and J Abrams, *Accountability for Human Rights Atrocities in International Law, Beyond the Nuremburg Legacy* (2001), at 69; B Conforti, *Diritto Internazionale* (2006), at 191; Gioia, *Terrorism , crimini di Guerra e crimi conto l’umanita* at 62-66; Arnold *The ICC as a New Instrument for Repressing Terrorism* (2004) at 272-273.

26. The Majority relies upon Di Filippo's observations that some authors "go even further", pointing out that the term organization "could eventually be satisfied by purely private criminal organizations...given the latter's acquired capacity to infringe basic human values".³²
27. Crucially, Di Filippo expressly favours an expansive interpretation of the term organization in support of his proposition that terrorism *should* be included within crimes against humanity, a proposition clearly considered and rejected by the drafters of the Rome Statute.³³ Di Filippo notes this point in his article and in doing so acknowledges that his view does not reflect the intention of the drafters of the Statute.³⁴
28. The Defence submits that in adopting the language expressed by Di Filippo, the Majority has erroneously selected a definition that neither reflects existing customary international law nor legitimately interprets the meaning of organization within the intention of the drafters of the Rome Statute. This approach contravenes the requirement of Article 22, namely that the "definition of a crime shall be strictly construed and shall not be extended by analogy." It is evident that Di Filippo's article is a controversial platform from which he seeks to explore the ways in which the law of terrorism could be developed beyond its existing parameters, at some point in the future. The language used by Di Filippo clearly demonstrates that he was engaged in describing one side of the debate, conceding openly that his approach was both "liberal" and "innovative."³⁵

³² M. Di Fililippo, "Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", *The European Journal of International Law* Vol. 19 no 3 (2008) at p.567.

³³ See this point discussed by C. Kress, in "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", *Leiden Journal of International Law*, 23 (2010) 855 at p. 866.

³⁴ M. Di Fililippo, "Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", *The European Journal of International Law* Vol. 19 no 3, 533, (2008), at p. 564.

³⁵ M. Di Fililippo, "Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", *The European Journal of International Law* Vol. 19 no 3 (2008) at pp.566-7.

29. Erroneously, the Majority test suggests that the primary goal of the law of crimes against humanity is to protect basic human values. The Defence submits however, that “while it is certainly possible to say that international criminal law has come to be an instrument to protect and enforce (a limited number of fundamental) international human rights, there can be no presumption in favour of a broad teleological interpretation of international criminal law as a back door for a progressive development of human rights law.”³⁶ The International Criminal Court was not established to be an International Court of Human Rights.
30. In a recent article on the concept of organization, Claus Kress explains that international criminal law carries with it the “competence of properly instituted international criminal courts to decide on the genuineness of national criminal proceedings, a presumption against immunities *ratione materiae*, a presumption in favour of universal jurisdiction and a presumption against the power to grant amnesties.”³⁷ In such circumstances, the contextual requirements of crimes against humanity reflect the wishes of States that these “heavy restrictions on their sovereignty **only apply to particular human rights violations.**”³⁸ The Majority test erroneously downplays the contextual definition of organizational policy in favour of a teleological victim-driven human rights based approach, reflective of inappropriate judicial activism.

³⁶ C. Kress, “On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision”, *Leiden Journal of International Law*, 23 (2010) 855 at pp. 860-1.

³⁷ C. Kress, “On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision”, *Leiden Journal of International Law*, 23 (2010) 855 at p. 861.

³⁸ C. Kress, “On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision”, *Leiden Journal of International Law*, 23 (2010) 855 at p. 861.

(ii) *Other Academics cited by the Majority*

31. The Majority cites Dean Peter Burns QC's article, "Aspects of Crimes Against Humanity and the International Criminal Court".³⁹ However, Burns does not provide any support for the Basic Human Values Test, and takes an entirely different position. He argues that an organisation fulfils the requirements if the organization's *intention* is to attack the civilian population, and that "the answer to these threshold instances probably turns upon the mental element of the crime."⁴⁰ The Defence submits that although the intention of an organisation is a consideration in relation to whether or not crimes against humanity have been committed, these observations do not tackle the definitional issues of what constitutes an organization under Article 7 of the Rome Statute.
32. Darryl Robinson's article "Defining Crimes against Humanity at the Rome Conference"⁴¹ is also cited by the Majority. Robinson does not however deal with the question of interpretation in any detail. He refers briefly to the fact that the drafters of Article 7(2)(a) of the Statute were aware of a formulation in the ICTY case law that "leaves open the possibility that other organizations [other than those with territorial control] might meet the test as well".⁴² However, his observations on this point provide no assistance in the present case, as the 'policy requirement' was not included in the Statutes of the *ad hoc* Tribunals.
33. Ratner takes the view that the Rome Statute could support a wide interpretation of organizational policy based on a teleological approach that such private entities are capable of bringing about significant harm and suffering. Ratner's approach however is a victim-focused interpretation of what the law '*could be*',

³⁹ Dean Emeritus Peter T. Burns Q.C., 'Aspects 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.

⁴⁰ Ibid. at p. 11: "it can undoubtedly include state organs and will extend to para-military units of a state, organized rebel groups within a state, or even unorganized rebel groups so long as there is a sufficient core that develops such a policy for the group. But what of non-military but highly organized and armed groups within a state? [...]The answer to these threshold questions probably turns on the mental element of the crime".

⁴¹ D. Robinson "Defining 'Crimes Against Humanity' at the Rome Conference", (1999) 93 Am. J. Int'l L. 43.

⁴² D. Robinson "Defining 'Crimes Against Humanity' at the Rome Conference", (1999) 93 Am. J. Int'l L. 43 at p.50.

which he expressly acknowledges does not find any support in the current practice at the ICTY, ICTR, SCSL or ICC.⁴³

34. The Defence notes that even commentators who do not necessarily agree with a quasi-State requirement, such as Dixon and Hall, do not support the Basic Human Values Test, as they stress the need for other requirements, in particular territorial control:

“Clearly, the policy need not be one of a State. It can also be an organizational policy. Non-state actors, or private individuals, who exercise *de facto* power can constitute the entity behind the policy.”⁴⁴

This approach has also been adopted by Professor Cassese in his commentary in which he explains that:

“One of the most significant of these elements is the fact that such offences must be large-scale or systematic and, at least, tolerated by a State, government or entity. The crimes at issue may also be State-sponsored or at any rate may be part of a governmental policy or that of an entity holding *de facto* authority over a territory.”⁴⁵

35. The Defence submits that it is clear that the entity, in having such *de facto* control and authority, must be capable through its structure of exercising State-like powers, or at least having the capacity to devise and impose “policy”. The policy requirement is the delivery mechanism through which the crimes against humanity are committed and requires authority and power over the territory to achieve the same.

⁴³ S Ratner Accountability for Human Rights Atrocities in International Law. Beyond the Nuremburg Legacy 3rd Ed (Oxford OUP 2009 p. 70.

⁴⁴ Rodney Dixon revised by Christopher K Hall: “Crimes Against Humanity” in: Otto Triffterer, (ed) ‘Commentary on the Rome Statute of the International Criminal Court, observers notes Article by Article’. (C.H.. Beck.Hart.Nomos, 2nd ed) pp.235-236.

⁴⁵ The Rome Statute of the International Criminal Court: A Commentary, Volume 1, Ed. Cassese, Gaeta and Jones, OUP 2002, Chapter 11.2: Jurisdiction: Crimes Against Humanity pp. 356 et seq.

36. The Defence endorses the importance of the requirement of *de facto* power and control as necessary criteria to be met when determining what qualifies as an organization. Without such a requirement, the definition would fall clearly outside the intention of the drafters of the Rome Statute.⁴⁶

(iii) *Katanga and Bemba Cases*

37. At paragraphs 84-5 of the Majority Investigation Decision, the Majority refers to the position taken by the Pre-Trial Chambers in the cases of *Bemba* and *Katanga & Ngudjolo* in relation to the policy requirement. Neither of these cases refers to the 'capacity to infringe basic human values'. The test is rather one of 'capability to commit a widespread or systematic attack against a civilian population',⁴⁷ an entirely different formulation.
38. In relation to the interpretation given by Pre-Trial Chamber I in *Katanga & Ngudjolo*, Professor Schabas has observed that upon mature reflection, judges at the Court "may see the dangers in such an open-ended approach, which encompasses organized crime, motorcycle gangs and perhaps even serial killers within its ambit."⁴⁸ It is noteworthy that this interpretation has never been challenged by any Defence team, neither has it been confirmed by any Trial Chamber or Appeals Chamber and does not reflect the law as it currently stands. Rather, it reflects the mere opinion of previous Pre-Trial Chambers.
39. Furthermore, both cases have entirely different factual circumstances and backgrounds to the situation in the Republic of Kenya. Both cases concern military-type organized armed groups who allegedly committed crimes pursuant to a policy over a prolonged period of time in an armed conflict, in

⁴⁶ Cassese, *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1, Ed. Cassese, Gaeta and Jones, OUP 2002, Chapter 11.2: Jurisdiction: Crimes Against Humanity pp. 356 et seq.

⁴⁷ Pre-Trial Chamber II, 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, ICC-01/05-01/08-424, at para 81; Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, at para 396.

⁴⁸ W. Schabas, 'The International Criminal Court: A Commentary on the Rome Statute', (Oxford Commentaries on International Law), March 2010, at p.150.

respect of which they were pursuing clear goals.⁴⁹ The circumstances out of which their organizations were created were entirely different to the spontaneous violence in the PEV, for which there was no policy initiative.

(v) *ICTY/ICTR Materials*

40. The Majority also cites the case law of the ICTY and ICTR in support of its decision.⁵⁰ The Defence observes that the ICTY, ICTR and the Special Court for Sierra Leone, unlike the ICC do not have included within their Statutes the express need for an attack upon a civilian population to be pursuant to a State or organizational policy.⁵¹ Their jurisprudence on this issue is therefore not relevant by virtue of their composition to deal with discreet conflicts upon defined territories. Neither however does the lack of a policy requirement in the Statutes of the *ad hoc* Tribunals support the Majority's rejection of the need for a State or quasi-State organization to be responsible for the crimes at the ICC, given the contextual requirements of the Rome Statute.

41. Even after the policy requirement was abandoned at the *ad hoc* international criminal tribunals, in *Limaj*, the Chamber acknowledged that "[d]ue to structural factors and organizational and military capabilities, an "attack directed against a civilian population" will most often be found to have occurred at the behest of a State. Being the locus of organized authority within a given territory, able to mobilise and direct military and civilian power, a

⁴⁹ For HHJ Kaul's observations on this point, see Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2011 ICC-01/09-19-Corr, at para 48.

⁵⁰ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2011, ICC-01/09-19-Corr, paras 86-7.

⁵¹ Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character and directed against any civilian population."; Article 3 of the Statute of the International Criminal Tribunal for Rwanda: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"; Article 2 of the Statute of the Special Court for Sierra Leone: "The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population"; see also, ICTY Appeals Chamber, Prosecutor v Kunarac et al., Judgment, 12 June 2002, at para 98.

sovereign State by its very nature possesses the attributes that permit it to organize and deliver an attack against a civilian population; it is States which can most easily and efficiently marshal the resources to launch an attack against a civilian population on a “widespread” scale, or upon a “systematic” basis.”⁵² The Chamber in *Limaj* ultimately determined that crimes against humanity had not been committed.⁵³

42. Importantly, the *ad hoc* international criminal tribunals have thus far focused on the prosecution of offences committed as part of, or closely affiliated with “an organization seeking political control of or influence over a territory, whether as a de facto government, armed insurrection, or otherwise suggesting that some sort of official action remains associated with the concept.”⁵⁴

(C) The Six Considerations

43. The six considerations listed by the Majority as factors that *may* be taken into account when determining the existence of the organization are as follows:
- (i) whether the group is under a responsible command, or has an established hierarchy;
 - (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;
 - (iii) whether the group exercises control over part of the territory of a State;
 - (iv) whether the group has criminal activities against the civilian population as a primary purpose;
 - (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; and

⁵² ICTY, Prosecutor v Limaj et al., Case No. IT-03-06-T, Judgment, 30 November 200, at para. 191 and 194.

⁵³ ICTY, Prosecutor v Limaj et al., Case No. IT-03-06-T, Judgment, 30 November 200, at para 228.

⁵⁴ See the observations of S. Ratner, in ‘Accountability for human Rights Atrocities in International Law, Beyond the Nuremburg Legacy, 3rd ed. (Oxford: OUP, 2008), at page 70; See also ICTY, Prosecutor v Limaj et al., Case No. IT-03-06-T, Judgment, 30 November 200, at para. 191.

(vi) whether the group is part of a larger group, which fulfills some or all of the abovementioned criteria.⁵⁵

44. The Defence submits that the Majority Decision does not clarify whether any of these considerations constitute minimum criteria, nor does it provide any bright light guidance as to the types of organizations that fall within the Majority's intended parameters of Article 7(2)(a). The broad nature of these considerations encourages unhelpful legal indeterminacy.
45. The Defence agrees with the observations of Kress who concludes that the Majority's Decision is internally inconsistent.⁵⁶ The Majority develops a definition of organization, only to then propose that a case-by-case approach is preferable, while the formulation of the six considerations does not appear "to flow naturally from the general 'capability criterion'".⁵⁷
46. In terms of which criteria the Majority applied in the present case, Kress concludes that "the more demanding criteria of territorial control and a group under responsible command or with an established hierarchy have not been relied on."⁵⁸
47. The Defence respectfully requests the Majority to reconsider its approach to the definition of organization under Article 7(2)(a) at this stage, in light of the submissions it has now received from the Defence in the Kenya situation in order to ensure that the definition adopted reflects the current state of customary international law which provides that a non-State entity possesses State-like qualities.

⁵⁵ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2011, ICC-01/09-19-Corr, at para 93.

⁵⁶ C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at p. 857.

⁵⁷ C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at p. 857.

⁵⁸ C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at p. 858.

VI. JUDGE KAUL'S INTERPRETATION IS CORRECT AND REFLECTS THE INTENTION OF THE DRAFTERS AND LEADING ACADEMIC OPINION

48. The Defence submits that Judge Kaul's determination that "an organization within the meaning of Article 7(2)(a) of the Statute must partake of the characteristics of the State" is correct and in line with the intention of the drafters. He states that those characteristics eventually turn the private 'organization' into an entity which may act like a State or have quasi State abilities and could involve the following:

"(a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale."⁵⁹

49. Judge Kaul determines that non-State actors that do not meet the above requirements are not able to carry out a policy to commit widespread or systematic attacks upon a civilian population.⁶⁰ Groups that would therefore fall outside the scope of Article 7(2)(a) include "groups of organized crime, a mob, groups of (armed) civilians or criminal gangs."⁶¹ Judge Kaul states that:

"...violence-prone groups of persons formed on an ad hoc basis, randomly, spontaneously, for a passing occasion, with fluctuating membership and without a structure and level to set up a policy are not

⁵⁹ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2011 ICC-01/09-19-Corr at para 51.

⁶⁰ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2011 ICC-01/09-19-Corr at para 52.

⁶¹ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2011 ICC-01/09-19-Corr at para 52.

within the ambit of the Statute, even if they engage in numerous serious and organized crimes. Further elements are needed for a private entity to reach the level of an 'organization' within the meaning of article 7 of the Statute. For it is not the cruelty or mass victimization that turns a crime into a *delictum iuris gentium* but the constitutive contextual elements in which the act is embedded.”⁶²

50. The factors set out by HHJ Kaul constitute specific hallmarks that assist a Chamber to determine with precision whether or not an entity has reached the level of an organization within the meaning of Article 7 of the Statute.
51. The Defence endorses Judge Kaul’s observation that “a gradual downscaling of crimes against humanity towards serious crimes ... might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute”.⁶³ The exclusion of terrorism and drug trafficking crimes from the Rome Statute was largely based upon the “different character of these crimes; the danger of overburdening the Court with relatively less important cases; and the ability of the State to deal effectively with these crimes through international cooperation agreements.”⁶⁴
52. The organizational policy requirement ensures that the right balance is struck between State sovereignty and the jurisdiction of the ICC. This requirement is also important as regards those situations where “there is reason to doubt that a judicial response at national level will follow”.⁶⁵ If the State itself is implicated in committing the crimes then there is good reason to justify an intervention, as it is unlikely that the State will take action. Similarly, if State-like entities, with

⁶² Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2011 ICC-01/09-19-Corr at paras 50-52.

⁶³ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2011 ICC-01/09-19-Corr, at para 10.

⁶⁴ Von Hebel and Robinson, ‘Crimes Within the Jurisdiction of the Court’ at page 86 referring to ‘1995 Ad Hoc Committee Report’, at paras 82-84 and ‘1996 PrepCom Report Vol I’ at paras 106-107 and 111-113.

⁶⁵ C. Kress, “On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision”, *Leiden Journal of International Law*, 23 (2010) 855 at p. 866.

inter alia territorial control are implicated, then it is also likely that such doubts concerning appropriate response could persist.

53. The commission of crimes against humanity also requires significant resources. Although Judge Kaul recognises that a policy to carry out a widespread or systematic attack against a civilian population *could* be carried out by a non-State entity, it is clear that such an entity must possess sufficient means and resources.⁶⁶
54. Mahmoud Cherif Bassiouni, who chaired the drafting committee at the Rome Statute, has a similar approach to His Honour Judge Kaul's in relation to the definition of organisation. Bassiouni states that:

“The reference to State or organizational plan or policy in article 7(2) should probably be construed broadly enough to encompass entities that act like States, even if they are not formally recognised as such. But an interpretation of the word organizational by which it refers to any group of individuals, brought together for whatever purpose, is an absurdity. In a literal sense, an organization could include a social club, a charitable organization, a motorcycle gang, an organized crime syndicate, and a terrorist cell. This is obviously not what article 7(2)(a) contemplates.”⁶⁷

55. Bassiouni adopts the position that non-State actors must “partake of the characteristics of state actors in that they exercise some domain or control over territory and people and carry out a policy which has similar characteristics as those of ‘state action or policy’”.⁶⁸

⁶⁶ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2011 ICC-01/09-19-Corr, at para 66.

⁶⁷ M. Cherif Bassiouni, ‘The Legislative history of the International Criminal Court’ (Ardsley, NY, Transnational Publishers, 2005), at pp. 151 – 152.

⁶⁸ M. Cherif Bassiouni, ‘Crimes Against Humanity in International Criminal Law, ed. Kluwer Law International (The Hague/London/Boston, 1999 2nd ed), at p. 245; See also: Casese, The Rome Statute of the International Criminal Court: A Commentary, Volume 1, Ed. Casese, Gaeta and Jones, OUP 2002, Chapter 11.2: Jurisdiction: Crimes Against Humanity pp. 356 et seq.

56. Professor Schabas concurs with Bassiouni that the word 'organizational' must be read in its proper context. The definition must not extend to a general invitation to include any form of organized criminal activity. Rather, the organization in question must be either part of the State or 'State-like', in the sense of association with an entity that controls territory.⁶⁹
57. The ICC is intended to be a court of last resort, to intervene only in relation to the most serious crimes of concern to the international community as a whole.⁷⁰ Its jurisdiction complements, but does not in any way supplement, the jurisdiction of national courts. In order to be consistent with the principle of complementarity,⁷¹ the ICC's jurisdiction must respect and protect State sovereignty. As such, the ICC should only intervene in exceptional circumstances as defined in the Statute. In all other circumstances, the fight against impunity must be fought at a national level.
58. The Defence submits that for the aforementioned reasons, the definition of organization in the Dissenting Opinion of His Honour Judge Kaul is accurately reflective of the intention of the drafters of the Rome Statute, customary international law and the jurisdiction of the ICC. His definition does not fall foul of the fundamental principle of *nullem crimen sine lege* as set out in Article 22 of the Statute and seeks to provide bright line guidance on the issue of the legal meaning of organization.

⁶⁹ W. Schabas "London Riots: Were they Crimes Against Humanity?", 15 August 2011, <http://humanrightsdoctorate.blogspot.com/search?updated-max=2011-08-30T19%3A03%3A00%2B01%3A00&max-results=10>.

⁷⁰ Article 1 of the Rome Statute; State Parties have emphasized that "The court is a court of last resort" and that "the principle of complementarity is integral to the functioning of the Rome Statute system and its long term efficacy" (Report of the Bureau on stocktaking: Complementarity, ICC-ASP/8/51, 18 March 2010, para 3) In a resolution adopted at the ICC Review Conference in Kampala, the Assembly of State Parties stressed "the primary responsibility of States to investigate and prosecute the most serious crimes of international concern" and recognised "the desirability for States to assist each other in strengthening domestic capacity to ensure that investigation and prosecutions of serious crimes of international concern can take place at the national level" (Resolution RC/Res. 1 adopted at the 9th plenary meeting, 8 June 2010).

⁷¹ Article 17 of the Rome Statute.

VII. NO JURISDICTION ON THE FACTS OF THIS CASE

59. The Defence submits that even if the PTC is not persuaded that an organization under Article 7(2)(a) must possess State-like elements, the ICC does not have jurisdiction to try this case as the evidence disclosed by the Prosecution does not establish an organizational policy to commit the alleged crimes, on either definition provided by the Chamber.
60. The Defence submits that the Prosecution's reliance on independently proven unreliable witnesses⁷² and anonymous witness summaries containing un-sourced hearsay, fails to establish sufficient evidence of substantial grounds to support the existence of an organizational policy.
61. For the purpose of the present challenge to jurisdiction, the Defence makes its initial submissions on the basis of the Prosecution's case as presented in the Document Containing the Charges (the "DCC") and its supporting material. The Defence will provide further evidential submissions in a written brief following the close of the confirmation hearing.
62. The DCC alleges *inter alia* that:

"Muthaura and Kenyatta, as the Principle Perpetrators, ALI, Mungiki Leaders and other prominent PNU supporters agreed to pursue an organizational policy."⁷³

⁷² Witness 52 and 60 see Defence materials: KEN-D13-0006-0001; KEN-D13-0006-0003; KEN-D13-0006-0013; KEN-D13-0006-0019; KEN-D13-0006-0024; KEN-D13-0006-0027; KEN-D13-0006-0029; KEN-D13-0006-0071; KEN-D13-0006-0031; KEN-D13-0006-0031; KEN-D13-0006-0039; KEN-D13-0006-0045; KEN-D13-0006-0056; KEN-D13-0006-0059; KEN-D13-0006-0062; KEN-D13-0006-0063; KEN-D13-0006-0065; KEN-D13-0007-0001; KEN-D13-0007-0007; KEN-D13-0007-0012; KEN-D13-0007-0015; KEN-D13-0007-0017; KEN-D13-0007-0081; KEN-D13-0007-0019; KEN-D13-0007-0021; KEN-D13-0007-0027; KEN-D13-0007-0052; KEN-D13-0007-0059; KEN-D13-0007-0062; KEN-D13-0007-0069; KEN-D13-0007-0072; KEN-D13-0007-0073; KEN-D13-0007-0075; KEN-D13-0007-0001; KEN-D13-0008-0013; KEN-D13-0008-0001; KEN-D13-0008-0002; KEN-D13-0008-0014; KEN-D13-0008-0004; KEN-D13-0008-0012; see also Pre-Trial Chamber II, Prosecutor v Muthaura et al., Annex 1 to the Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration of their Selected Viva Voce Witnesses, 2 September 2011, ICC-01/09-02/11-281+Conf-Exp-Anx1.

⁷³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Document Containing the Charges, 2 September 2011, ICC-01/09-02/11-280-AnxA, at para 18.

63. The Defence submits that the DCC is highly ambiguous as to the structure and membership of the alleged organization, and in particular, as to whether there is one organization comprised of Mungiki, police and a group referred to as the 'PNU youth', or three separate organizations. His Honour Judge Kaul observes that the "PNU politicians and wealthy PNU supporters" mentioned by the Prosecution as being part of an 'organizational policy' are presented as financiers and resource providers to the Mungiki and pro-PNU youth and as such ...do not appear to be an independent component within the proposed 'organization'.⁷⁴ The structure and interrelationship between the three entities is entirely unclear.
64. Moreover, the Prosecution has failed to produce *any* evidence to substantiate the allegation that 'PNU youth' ever existed as an organization or entity in its own right. There is insufficient evidence to show that the PNU youth constituted an organization with a policy from which it can control subordinates, order them to commit crimes and sanction them if orders were not obeyed. Such a command and control system that would be required in order to achieve almost unquestioning obedience to orders, with an enforcement structure and hierarchy, is absent from the evidence.
65. In respect of the Mungiki, the Defence submits that it does not constitute an organization under either of the Chamber's definitions. The Defence will assess in outline the broader requirements of the Majority's definition in the context of the six considerations.

⁷⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 March 2011, ICC-01/09-02/11-03, at para 28.

(i) Whether the group is under a responsible command, or has an established hierarchy

66. The Mungiki is far from being under a responsible command with an established hierarchy.⁷⁵ The Mungiki is no more than an amorphous group with disparate aims, shifting politically, as its changing aspirations dictate. The Prosecution's evidence does not establish that Uhuru Kenyatta had any ability to command, discipline, or even sanction as a means of controlling any part of this entity.

67. The Mungiki and the Kenyan Police do not share a common hierarchy. They are separate entities. In fact, there is clear evidence of a longstanding bitter and extreme conflict between the two groups. Neither is there any evidence of an operational relationship between them during the post election violence.

(ii) Whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population

68. The Mungiki clearly did not have the means at its disposal to commit a large-scale attack directed against a civilian population. Indeed the Prosecution's case is that the group relied on external funds and logistics provided by individuals and groups, demonstrating the *ad hoc* manner of the alleged arrangements which are contested by the Defence:

“Relying on a network of loyal pro-PNU government officials, businessmen and local politicians, MUTHAURA and KENYATTA provided funding transportation, accommodation, uniforms, weapons and logistical support to the Mungiki and pro-PNU youth to carry out coordinated attacks in specific locations⁷⁶”

⁷⁵ KEN-D13-0003-0004; KEN-D13-0003-0008; KEN-D13-0003-0009; KEN-D13-0003-0011; KEN-D13-0003-0026; KEN-D13-0003-0036; KEN-D13-0003-0044; KEN-D13-0003-0063; KEN-D13-0003-0202, KEN-D13-0003-0231; KEN-OTP-0008-0029.

⁷⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Document Containing the Charges, 2 September 2011, ICC-01/09-02/11-280-AnxA, at para 23.

69. None of these individuals or groups can be included within the organization the Prosecution attempts to establish.

(iii) Whether the group exercises control over part of the territory of a State

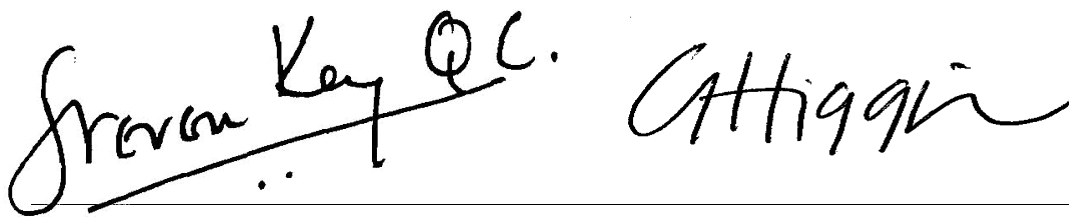
70. The activities of the Mungiki remain limited in nature and are territorially restricted, in particular to the slums of Nairobi. The evidence clearly demonstrates that the Mungiki seek to exploit bus routes and extort money from the drivers of matatu buses. There is also some evidence to suggest that they exploit the local population by controlling access to certain services. Such activities are criminal extortion and cannot be considered evidence of the entity having *de facto* control over territory so as to be endowed with a capability to provide an organizational policy.

(iv) Whether the group has criminal activities against the civilian population as a primary purpose; (v) Whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; and (vi) Whether the group is part of a larger group, which fulfills some or all of the abovementioned criteria.

71. The issues arising under (iv), (v) and (vi) are concerned with the conduct of the Mungiki and in the submission of the Defence take the matter no further as regards the capacity of the group to constitute an organization under Article 7 of the Rome Statute.

VIII. CONCLUSION

72. The Defence submits that the Prosecution has failed to adduce sufficient evidence of substantial grounds of the existence of an 'organizational policy' behind the crimes charged.
73. The Defence requests the PTC to (i) adopt the definition of organizational policy as set out by His Honour Judge Kaul in his Dissenting Opinion, (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 Uhuru Muigai Kenyatta.
74. In the alternative, even if the PTC decides not to adopt the definition of organizational policy as set out by His Honour Judge Kaul in his Dissenting Opinion, the Defence requests that the PTC (i) 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 Uhuru Muigai Kenyatta.

The image shows two handwritten signatures in black ink. The signature on the left is 'Steven Kay QC.' with a horizontal line drawn underneath it. The signature on the right is 'G Higgins'.

Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta

Dated this, Monday, 19 September 2011

At London, UK