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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 Document

Victims' Consolidated Observations on the Kenyatta and Ali Submissions regarding Jurisdiction and/ or Admissibility

Source: **Victims' Legal Representative**

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

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I. INTRODUCTION

1. The Chamber has received evidence that thousands of Luo, Kalenjin, and Luhya civilians, perceived as being ODM supporters, were viciously attacked in various locations throughout Kenya in January 2008 with particular intensity in the central and southern Rift Valley. The Prosecution relies on evidence, which does not appear to have been contested by the Defense, that more than 150 people were killed in Naivasha and Nakuru alone, and that many hundreds more were seriously brutalized, some so severely as to convey a message of terror to the Luo, Luhya, and Kalenjin communities. The climate of fear and intimidation, which continued in the following weeks, forced hundreds of thousands of Luo, Luhya, and Kalenjin to flee their homes and re-settle in distant locations starting in early February 2008.

2. The Defenses' claim that these were not crimes against humanity is based on an unduly narrow approach to the "organizational policy" requirement. The phrase is part of, and must be read in conjunction with, the requirement of a "widespread or systematic attack against any civilian population." Such an attack, as the Majority held in its previous decisions on jurisdiction, must be collectively targeted, based on some group characteristic such as ethnicity or ethnic affiliation. The "organizational policy" requirement, viewed in this context, is properly understood as assisting in determining whether an attack was indeed targeted in this manner – a fact on which the Pre-Trial Chamber has now received overwhelming evidence.

3. The Defenses' assertions that the previous decisions of the Pre-Trial Chamber open the door to random acts of looting or organized crime are specious. The attack must be targeted and carried out against a defined group on the basis of that group characteristic. Neither street violence nor organized crime has that characteristic. On the other hand, such violence by such groups against identifiable ethnic groups could, depending on their widespread scale or systemic nature, so qualify. The

critical issue is the nature of the violence, which is itself usually the clearest indicator of an organizational policy.

4. Most of the arguments presented in the Ali submissions are not jurisdictional, relating instead to whether Mr. Ali was criminally associated through the police with the widespread or systematic attack as alleged by the Prosecution; whether the conditions of criminal liability under Art. 25(3)(d) are satisfied; and whether the Prosecutor has complied with his obligations under Art. 54(1). These arguments are irrelevant to jurisdiction and should be rejected *in limine*.

II. PROCEDURAL CONTEXT

5. The Pre-Trial Chamber, on 31 March 2010, authorized the Prosecution, by a majority (the "Majority"), to open an investigation into the situation in the Republic of Kenya.[1] Summonses were issued to the suspects in the present case by the same Majority on 8 March 2011,[2] with Judge Hans-Peter Kaul again dissenting (the "Dissent").[3]

6. On 19 September 2011, Messrs Kenyatta and Ali filed respective challenges to the jurisdiction of the Court over the crimes alleged in the Document Containing the Charges[4] and/ or the admissibility of the case, pursuant to Article 17 of the ICC Statute.[5]

[1] "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, 31 March 2010 (the "Investigation Decision"); See ibid., pages 84 – 163, for the *Dissenting Opinion of Judge Hans-Peter Kaul*.
[2] "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali," ICC-01/09-02/11-01, 8 March 2011 (the "Summons Decision").
[3] "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,'" ICC-01/09-02/11-3, 15 March 2011.
[4] "Prosecution's Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), (4) and (5), ICC-01/09-02/11-280, 2 September 2011.
[5] "Submissions on Jurisdiction on Behalf of Uhuru Kenyatta," ICC-01/09-02/11-339, 19 September 2011 (the "Kenyatta Submission"); "Defence Challenge to Jurisdiction, Admissibility and Prosecution Failure to Meet the Requirements of Article 54," ICC-01/09-02/11-338, 19 September 2011 (the "Ali Submission").

7. The Confirmation of the Charges hearing was commenced on 21 September 2011 and concluded on 5 October 2011.

8. Two-hundred and thirty-three victims are participating in the confirmation proceedings through their common legal representative, pursuant the Single Judge's Decision.[6] The present submissions are made pursuant to Article 19(3) and the Pre-Trial Chamber's order of 5 October 2011.[7]

1. SUBMISSIONS

(i) The Structure and Origins of Article 7(1) Demonstrates that Collective Targeting and "Organizational Policy" are Correlatives, not Isolated Criteria

9. Kenyatta and Ali's submissions improperly isolate the "Basic Human Values" test from its broader analysis of the requirements of an "attack directed against any civilian population."

10. Crimes against humanity must, as a preliminary threshold, be targeted against a collectivity of persons. The Majority followed the well-established view that crimes against humanity must be targeted against groups based on "nationality, ethnicity or other distinguishing features."[8] The specific collective characteristic targeted in this case was "perceived political affiliation with the ODM,"[9] for which ethnicity was taken as a proxy during the bloody events of January 2008.

11. This approach is reflected in the plain wording of Article 7(1) of the ICC Statute, which requires that the attack be against a "civilian population," not

[6] "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings," ICC-01/09-02/11-267, 26 August 2011.
[7] ICC-01/09-02/11-T-15-CONF-ENG, 5 October 2011, page 88, lines 5 – 8.
[8] Investigation Decision, para. 81.
[9] Summons Decision, para. 18. See, also, ICC-01/09-02/11-T-4-ENG, 21 September 2011, page 53, lines 19 – 25 and page 54, line 1.

"civilians." Article 7(1) requires that crimes be "committed as part of a widespread or systematic attack directed against *any civilian population*," before they can be considered as a crime against humanity. The term "civilian population" is repeated in Article 7(2), which elaborates 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 an attack*."

12. The requirement that an attack be collective in nature is expressly reflected in the ICTR Statute, which defines crimes against humanity as those committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[10] The essence of the crime is not the actual identity of individual victims, but the nature of the targeting. Thus, anyone who is victimized as part of such a collectively-directed attack is a victim of a crime against humanity, regardless of whether they happen to share the characteristic being targeted. Hutus killed as part of mass targeting of Tutsis were deemed to be victims of crimes against humanity,[11] as were soldiers who were *hors de combat* at the time of an attack directed against a civilian population in the *Martic* case.[12] Conversely, the collective nature of an attack may be questionable where individuals sharing a common characteristic are attacked, but for reasons unrelated to their membership in that group.[13] Thus, it is the collective nature of the targeting that is essential to the existence of a crime against humanity.

13. Collective targeting is of particular concern to the international community because it tends to lead to consequences that spill beyond national borders or shock

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[10] Art. 3, ICTR Statute.
[11] *The Prosecutor v. Muhimana*, Appeal Judgement, 21 May 2007, para. 174; *The Prosecutor v. Bagosora et al.*, Trial Judgement, 18 December 2008, para. 2171
[12] *The Prosecutor v. Martic*, Appeal Judgement, 8 October 2008, paras. 313-314.
[13] *The Prosecutor v. Haradinaj*, Trial Judgement, 3 April 2008, para. 122 ("The Trial Chamber also finds that some of the victims were singled out primarily for reasons pertaining to them individually, such as their real or perceived connection with the Serbian authorities or for other reasons, rather than being members of the civilian population.")

the conscience of humanity. If the logic of the targeting is group identification, then that logic continues to apply until the group is driven out of the country, or wiped out of existence. Mass migration can ensue, or intervention by neighboring States where, for example, the ethnic group attacked is in the majority. Group targeting is therefore particularly likely to evoke a group response, which can lead eventually to internal or international armed conflicts that disturb international peace and security.

14. Collective targeting, particular when it is "systematic," as is required in the jurisprudence of the *ad hoc* tribunals and now set out expressly in Article 7 of the ICC Statute, already implies a level of organization. ICTY jurisprudence has explicitly linked these two elements of "systematic" attack and "organizational policy":

> As mentioned above the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts. As explained by the Netherlands *Hoge Raad* in *Public Prosecutor v. Menten*:
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> > The concept of "crimes against humanity" also requires – although this is not expressed in so many words in the above definition [Article 6(c) of the Nurnberg Charter] – that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.
>
> Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the act occurs on a widespread or systematic basis, that demonstrates a policy to commit those acts, whether formalized or not. Although some doubt the necessity of such a policy the evidence in this case clearly establishes the existence of such a policy.[14]

15. The "policy" requirement is therefore inherent in systematic group targeting. Indeed, the ICTY subsequently decided that the "organizational policy" element did

[14] *The Prosecutor v. Tadic*, Trial Judgement, 7 May 1997, para. 653.

not constitute a distinct legal requirement, but was subsumed within the requirement of a "systematic" attack against a civilian population – i.e., group targeting. Furthermore, the very judgment that subsumed the organizational policy requirement in this way expressly defined "systematic" as "the organized nature of the acts of violence."[15] The settled law is now that "[t]he existence of a plan or policy can be indicative of the systematic character of the attack but it is not a distinct legal element."[16] The demotion of the policy requirement from a legal to a factual test has had no discernible impact on the jurisprudence of the *ad hoc* tribunals, but reflects the primary importance of the nature of the attack, of which the organization may be indicative.

16. These passages demonstrate that, as early as 1997 when the *Tadic* Trial Judgement was issued, there was a clear understanding that "organizational policy" was integrally a part of the "systematic" targeting test. The main jurisprudential issue at that time was whether "organizational policy" added anything at all to this test.

17. This was the jurisprudential context in which the negotiations for Article 7 of the ICC Statute took place. A leading participant in those negotiations has remarked, unsurprisingly in this context, that the express inclusion of "organizational policy" was not understood by the majority of delegates as substantially raising, if at all, the existing threshold definition of crimes against humanity. On the contrary, Darryl Robinson states that the use of the word "organization" was intended to reflect the opposite:

> The *Tadic* opinion and judgement acknowledges that the entity behind the policy could be an organization with *de facto* control over territory, and leaves open the possibility *that other organizations might meet the test as well*. To reflect

[15] *The Prosecutor v. Kunarac*, Appeals Judgement, 12 June 2002, paras. 94, 98.
[16] *The Prosecutor v. Haradinaj et al.*, Trial Judgement, 3 April 2008, para. 105.

> these developments, the delegations at the Rome Conference made reference to a state or organizational policy.[17]

18. What matters is not so much the mechanism by which such attacks occur, but whether the mechanism is sufficiently co-ordinated as to be able to genuinely target collectively, on a widespread or systematic basis, a civilian population. The nature of the organization that could meet such a threshold is a factual matter, and not one to be defined according to *a priori* labels or characteristics. Mr. Robinson argues persuasively on the basis of the text of Article 7 as a whole, as well as its drafting history, that the Majority's "capacity" test is the correct interpretation:

> As long as an entity has sufficient institutional hallmarks to be called an "organization", then we have a collective dimension as opposed to individuals acting on their own. It is also supported by contextual interpretation, in that the structure of Article 7 features the disjunctive but high-threshold requirements of "widespread" or "systematic", coupled with the conjunctive but low-threshold requirements of "multiple" and "policy". To pack substantial additional content into the "policy" requirement would arguably undermine the schema of Article 7. Finally, with respect to drafting history, the policy element was very controversial and was unpopular with many delegations. Many delegations reluctantly agreed on the element in order to rule out crime waves of unconnected crimes, and accepted the element on the understanding that it was a modest threshold that could be inferred from the circumstances. It would arguably be unfortunate to impose a significantly higher threshold in the name of fidelity to drafters' intent, if an intent to insist on state-like entities has not been shown.[18]

19. The Majority's so-called "Basic Human Values" test is correct because it is designed to determine whether there has genuinely been collective targeting of a civilian population, which must also be systematic or widespread. The Majority made clear, even before discussing "organizational policy," that a crime against humanity must involve "an attack directed against any civilian population," defined

[17] D. Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference," [1999] 93 Am. J. Intl. L. 43, 50.
[18] D. Robinson, "Essence of Crimes Against Humanity Raised by Challenges at ICC," 27 September 2011, http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/ (last accessed on 12 October 2011).

as "groups distinguished by nationality, ethnicity or other distinguishing features."[19] Where such a group attack occurs, then it is highly likely – if not inherent in the attack itself – that the group attack is a reflection of an organizational policy. The Basic Human Values test appropriately asks whether the organization in question was capable of engaging in such a collectively targeted attack. In other words, the definition of the Human Values test cannot be read in isolation, but works together with the Majority's definition of "attack."[20]

20. Activities of "gangs, serial killers and other forms of organized criminal activity"[21] would not normally meet this threshold because they do not normally target groups, as such. Widespread riots reflecting discontent with society in general are not an attack against a "civilian population," though they might well cause damage to a large number of individuals. Consequently, the Majority's interpretation of "attack" already excludes most cases easily recognizable as domestic crime without even reaching the issue of "organizational policy." None of the examples cited in the Kenyatta Submission would even reach the threshold of an attack, much less a "widespread or systematic" attack.

21. Incidentally, the Dissent and the Majority do not differ markedly as to the criteria for identifying an "organizational policy."[22] The difference is whether there is an *a priori* conclusion as to the results that those criteria should yield. The Dissent asserts that such organizations must be "state-like," or one that has "quasi-State abilities."[23] The Majority imposes no such *a priori* conclusion, affirming that the function of the test is to determine whether "the group has the capability to perform acts which infringe on basic human values."[24]

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[19] Investigation Decision, para. 81.
[20] Investigation Decision, paras. 80-82; Summons Decision, paras. 18-19.
[21] Kenyatta Filing, para. 23.
[22] Investigation Decision, para. 93; Investigation Decision Dissent, para. 51.
[23] Investigation Decision Dissent, paras. 51, 66.
[24] Investigation Decision, para. 90; Summons Decision, para. 21.

22. The Majority's reference to "human values," it is respectfully submitted, should be read in the context of its whole analysis. The Majority clearly did not intend to say, as the Kenyatta Submission maintains, that any crime violating a human value is a crime against humanity. The "Human Values" test arises in a particular context: determining whether there has been collective targeting of a group based on ethnicity or some other characteristic. The criteria enumerated by the Majority, in fact, correlate directly to its definition of collective attack against a civilian population. That is to say, the criteria are defined so as to determine whether the attack in question was genuinely targeted against a group, which necessitates a level of organization.

23. The "Human Values" test could be just as aptly be named the "ability to carry out a group attack" test. The two tests – for defining group targeting and organizational policy – are thus correlatives. The test adopted cannot (as the Kenyatta Submission does) be interpreted in isolation from the other half of the Majority's definition of an "attack directed against a civilian population" – namely, that the population must be targeted on the basis of ethnicity or some other group characteristic. The flexible, non-categorical definition heeds Robinson's caution that investing the term with a robust, independent content would unbalance the schema of Article 7.[25]

24. This reflects the intention of the drafters of the ICC Statute, which is yet another reason underpinning the correctness of the Majority's approach. The drafters undoubtedly understood the relationship between collective targeting and organizational policy. Those drafters were undoubtedly aware, based on ICTY jurisprudence, that the two concepts were closely intertwined if not practically indistinguishable. The inclusion of the "organizational policy" requirement cannot be

[25] D. Robinson, "Essence of Crimes Against Humanity Raised by Challenges at ICC," 27 September 2011, http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/ (last accessed on 12 October 2011) ("To pack substantial additional content into the "policy" requirement would arguably undermine the schema of Article 7.")

interpreted as a codification that only certain types of organizations could engage in collective targeting of civilians, particularly since that viewpoint had already been rejected in the jurisprudence at the ICTY just as the ICC Statute was being negotiated. Indeed, Mr. Robinson's view is the precise opposite: that the word "organization" was inserted so as not to exclude any particular type of organization, provided that there genuinely was an attack (which would of course also have to be at least systematic) targeting a civilian population based on ethnicity or some other characteristic.

(ii) The Primary Indicator of the Requisite Level of Organization is the Nature of the Attack Itself

25. The best indicator of a crime against humanity is not the nature of the perpetrators, or the mechanism of their inter-relationship, but the collective nature of the crime they perpetrate. As the *Tadic* Trial Judgement stated, a policy to attack a group need not be formalized, and "can be deduced from the way in which the acts occur."[26] No clearer evidence of an attack against a civilian population, targeted on the basis of ethnicity, is likely to be available than the nature of the victims.[27] The organizational policy may be most clearly evidenced in the nature of the attack, particularly where the perpetrators have done everything possible to conceal their crimes. Indeed, a crime against humanity could be adjudicated to have taken place even in the absence of any evidence at all about the internal workings or motivations of an organization, provided that the evidence of group targeting was sufficient to lead to the inference of such a policy of collective targeting.

26. The Majority correctly adopted this approach in the Investigation and Summons decisions, respectively. In considering whether there was an attack against

[26] The Prosecutor v. Tadic, Trial Judgement, 7 May 1997, para. 653.
[27] See e.g. The Prosecutor v. Bagosora et al., Trial Judgement, 18 December 2008, para. 2167 ("The Chamber has considered the totality of the evidence, in particular concerning the ethnic composition of the individuals who sought refuge at various sites as well as the actual or perceived political leanings of many of those killed out singled out at roadblocks").

a civilian population, the Majority first took account of "the information relevant to the status of the victims, their ethnic and political affiliation as well as the methods used during the attacks."[28] The conclusion of this analysis, as relevant to this case, was that "the attacks were directed mainly against the non-Kikuyu communities, including in particular people of Kalenjin, Luo and Luhya ethnicity, perceived as affiliated with the ODM."[29] The attackers in some cases "thoroughly identified the members of these groups."[30] The Majority also found that the violence was "large-scale" and "widespread," and that the attack "by the Mungiki in Nakuru and Naivasha was organized," "systematic" and was based on "perceived political affiliation" which "was largely rooted in ethnic divisions."[31]

27. Only on the basis of these findings did the Majority then proceed to consider the "State or organizational policy" requirement. It is in this context that the "Basic Human Values" test arises. The clear evidence, as in this case, of an attack targeting a group on the basis of ethnicity or perceived affiliation with that ethnicity, already raises an implication that there was some organizational force behind them. The capacity to carry out such an attack against a civilian population must be the primary purpose of any test of "organizational policy."

28. The Dissent is to be commended for a legitimate concern to ensure that crimes against humanity are kept within proper bounds, as reflected in the language in the ICC Statute.[32] However, it is submitted that a categorical assertion that an organization committing a crime against humanity must have "State-like abilities" goes too far. Firstly, scholarly opinion does not support such a restriction.[33] Secondly, the passage cited above from Darryl Robinson (a participant in the drafting of the provision) demonstrates that the drafters did not intend to impose any such

[28] Investigation Decision, para. 108.
[29] Investigation Decision, para. 111.
[30] Investigation Decision, para. 113.
[31] Summons Decision, para. 18-19.
[32] Investigations Decision Dissent, para. 63.
[33] See sources cited in "Prosecution's Response to the Defence Challenges to Jurisdiction," ICC-01/09-01/11-334, 16 September 2011, para. 26.

restriction – and that, indeed, they intended the opposite.[34] Thirdly, drawing inferences based on the "juxtaposition" of words from a list of only two words – "State or organizational policy" – arguably is tantamount to a creative form of statutory interpretation.[35] Fourthly, none of the examples cited in the Dissent – such as "violence-prone groups of persons formed on an ad hoc basis, randomly, spontaneously, for a passing occasion"[36] – would reach the threshold of collective targeting set out by the Majority. Fifthly, there are clear examples of group-targeting that would be a matter of concern to the international community, according to the Dissent,[37] but that would nevertheless not qualify as "State-like."

29. For example, the Rwandan *Interahamwe* were not themselves a quasi-State actor, and yet there can be little doubt that assuming they carried out the crimes they committed without any coordination from the Rwandan State, they would nevertheless have committed crimes against humanity of a vast scale. Requiring co-ordination between such entities and the State as a jurisdictional matter – an issue that is engaged in the present case – would improperly expand the jurisdictional inquiry to matters that are properly a matter of proof at trial.

30. In the final analysis, it is submitted that what matters is not whether organizations committing crimes control utilities or transportation services prior to the violence, but that they are sufficiently organized so as to orchestrate and target violence against a collectivity, based on ethnicity, on a sufficiently widespread or systematic scale.

[34] D. Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference," [1999] 93 Am. J. Intl. L. 43, 50.
[35] Investigation Decision Dissent, para. 51 ("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.")
[36] Investigation Decision Dissent, para. 52.
[37] Investigations Decision Dissent, para. 66 ("Such policy may also be adopted by private entities. However, it follows from the above that the private entity must have the means and resources available to reach the gravity of systemic injustice in which parts of the civilian population find themselves.")

a. The Test Adopted by the Majority does not Violate Nullem Crimen Sine Lege, Nor does it Induce the ICC to Indiscriminately Intervene in Domestic Criminality

31. Reliance in the Kenyatta Submission on *nullem crimen sine lege* is misplaced. Firstly, and as argued above, the Majority has approached "organizational policy" correctly, both in accordance with the language of Article 7 of the Statute and customary international law. Secondly, the suspect cannot reasonably suggest that he was not fully aware that his conduct was prohibited by national and international criminal norms. Lack of clarity as to whether jurisdiction would fall within one sphere or the other is not a proper basis for claiming lack of notice.

32. Jurisdictional issues do, however, need to be assessed carefully in light of the overall purpose and scope of the Statute. The primary restriction on the definition of crimes against humanity remains that a group be targeted collectively, and that the targeting be widespread or systematic. The "Human Values" test in no way diminishes these requirements. Furthermore, and unlike the *ad hoc* tribunals where jurisdiction is automatic upon a showing of subject-matter jurisdiction, the ICC Statute has the added safeguard of complementarity. The prospect of the ICC officiously intervening in random violence against individuals is therefore illusory, insofar as States which have not themselves colluded in such violence have an abiding interest in suppressing it.

(d) The Alleged Lack of Evidence or Specificity Concerning the Mungiki Organization and its Alleged Allies in the Attack is no Bar to Assuming Jurisdiction

33. The Kenyatta Submission argues that the evidence is deficient regarding the precise structure of the Mungiki and, consequently, that the requirement of an "organizational policy" has not been satisfied.[38]

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[38] Kenyatta Submission, paras. 65-71.

34. There is an abundance of evidence – even amongst the small sub-set of evidence available to the victims – that large numbers of Luo, Kalenjin and Luhya in Nakuru and Naivasha were targeted by the Mungiki. Some level of organization was required to (i) initiate the attack; (ii) coordinate the attack; (iii) identify targets; (iv) move attackers from place to place; (v) stay in specific places long enough to besiege the many thousands of people hiding in homes or fleeing to police stations or prisons; and (vi) resist, according to the Defense itself, the counter-measures of the police to induce them to disperse and go home. The fact that some attackers may well have joined opportunistically does not diminish the orchestration involved. As stated in *Tadic*, the attack on a civilian population "need not be formalized."[39]

(e) Numerous Issues Raised by Kenyatta and Ali are not Jurisdictional in Nature

35. The Kenyatta and Ali submissions both argue that the precise relationship between the Mungiki and other groups who may have been participating with them in the attacks against a civilian population have not been defined with specificity.[40] This is not a jurisdictional challenge. The Defense may seek to challenge the specificity of the Document Containing the Charges on this basis, but it does not undermine the basis for asserting jurisdiction, namely that an attack against a civilian population had been committed in furtherance of, or pursuant to, an organizational policy of the Mungiki.[41] The relationship of other groups to the Mungiki, such as the police or political groups, is a matter that goes to the responsibility of the suspects, rather than whether the crimes meet the jurisdictional threshold of a crime against humanity.

36. The Ali Submission argues in paragraph 20, and from paragraphs 22 through 51, that Mr. Ali's criminal participation (either directly or through the police) with the Mungiki or other perpetrators of the post-election violence has not been

[39] The Prosecutor v. Tadic, Trial Judgement, 7 May 1997, para. 653.
[40] Kenyatta Submissions, paras. 61-65; Ali Submissions, para. 18.
[41] Summons Decision, para. 20.

established. This is a factual, rather than a jurisdictional issue. The Majority found that the Mungiki alone had perpetrated an attack against a civilian population, and that this attack had been carried out pursuant to an organizational policy. Any *de facto* cooperation or tacit encouragement by the police of their activities was not essential to the jurisdictional finding and is, therefore, irrelevant.

37. The argument in the Ali Submission that the Prosecutor has failed to comply with his obligations under Article 54[42] is also wholly irrelevant to any possible issue of jurisdiction and should be rejected *in limine*.

(e) The Crimes are of Sufficient Gravity to Justify Action by this Court

38. The claim in the Ali Submission that crimes cannot be committed in international law through omission is fundamentally flawed. Both commission by omission[43] and aiding and abetting[44] by (culpable) omission have been recognized at the *ad hoc* tribunals. Furthermore, tacit approval and encouragement can be conveyed to perpetrators of crimes when individuals in authority stand by and permit crimes to be perpetrated. Crimes committed in this way have attracted substantial sentences at the *ad hoc* tribunals, belying the claim that crimes committed in this way are inherently of low gravity.

39. The alleged inadequacy of the Prosecution's evidence does not relate to the scale of the crimes, but rather to General Ali's involvement in those crimes. This again does not affect the gravity of "the case" at the admissibility stage. Issues regarding the extent of General Ali's participation do not affect the gravity of the case; they pertain instead to his liability under Article 25.

[42] Ali Submissions, paras. 72-83.
[43] *The Prosecutor v. Blaskic*, Appeal Judgement, 29 July 2004, para. 663-666; *The Prosecutor v. Ntagerura et al.*, Appeal Judgement, 7 July 2006, paras. 331-335.
[44] *The Prosecutor v. Mrksic et al.*, Appeal Judgement, 5 May 2009, para. 150.

V. CONCLUSION AND RELIEF REQUESTED

40. Groups that are systematically targeted by widespread or systematic attacks, whatever the nature of the perpetrators, are protected by international criminal law. Nothing in Article 7 of the ICC Statute says the contrary. The threshold issue is whether the attacks have been genuinely targeted against a group, and whether that targeting is systematic or widespread. The existence of an organizational policy is an inherent aspect of collective targeting, but such a policy need not be adopted by any particular type of organization. Article 7 offers no support for such a conclusion, and no support for such a conclusion is to be found in contemporary customary international law. The drafters of the ICC Statute had no intention to incorporate any such restriction on the definition of crimes against humanity. Adopting a formal definition of "organizational policy," as advocated here by the Defense, would mark an unprecedented departure from the course of customary international law charted at the *ad hoc* tribunals and an unjustifiable departure from the wording of the ICC Statute.

41. The challenges to jurisdiction and/ or the admissibility of the case should accordingly be denied.

Respectfully submitted,

Morris Anyah

Victims' Legal Representative

Dated this 14th day of October 2011

At The Hague, The Netherlands.