Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: **ICC-01/09-02/11**
Date: **14 October 2011**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Prosecution's Response to the Defence Challenges to Jurisdiction

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor Luis Moreno-Ocampo, Prosecutor Fatou Bensouda, Deputy Prosecutor Adesola Adeboyejo	**Counsel for Francis Kirimi Muthaura:** Karim Khan and Kennedy Ogetto **Counsel for Uhuru Muigai Kenyatta:** Steven Kay QC and Gillian Higgins **Counsel for Mohammed Hussein Ali:** Gregory Kehoe and Evans Monari
Legal Representatives of Victims Morris Azuma Anyah	**Legal Representatives of Applicants**
Unrepresented Victims	**Unrepresented Applicants for Participation/Reparation**
The Office of Public Counsel for Victims	**The Office of Public Counsel for the Defence**
States Representatives	**Amicus Curiae**

REGISTRY

Registrar Silvana Arbia, Registrar Didier Preira, Deputy-Registrar	**Defence Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

INTRODUCTION

1. On 19 September 2011 the Defence of Mr Uhuru Muigai Kenyatta ("Mr Kenyatta") and the Defence of Mr Mohammed Hussein Ali ("Mr Ali") ("the Applicants") filed challenges to the jurisdiction of the Court. The Prosecution responds to both filing jointly.

2. Though described as jurisdictional challenges, the Applicants raise four categories of non-jurisdictional issues: (i) a legal question regarding the interpretation of the statutory phrase "organizational policy" in article 7(2)(a); (ii) the clarity and completeness of the charges and the sufficiency of the Prosecution's evidence to prove that there existed an organizational policy to attack civilians and, with respect to Mr Ali, that he contributed indirectly to the commission of the crimes under Article 25(3)(d); (iii) that because Mr Ali's alleged responsibility is characterised as common purpose liability, the case against him *ipso facto* fails to meet the gravity threshold under Article 17(1)(d); and (iv) a complaint regarding the adequacy of the Prosecution's investigation and a related argument by Mr Ali that the evidence is insufficient to establish the charges against him.

3. The Prosecution submits that these are not legal challenges to the Court's jurisdiction. Jurisdiction is a threshold matter to be resolved by courts before proceeding to consider the merits of the case. As is clear from these submissions, the Defence is reversing the process – they are arguing the merits of the case to establish that the threshold requirements of jurisdiction are not established. The Defence's reliance on the evidence at the confirmation hearing to establish Mr Ali's claim that

"the charges presented by the Prosecution should not be confirmed"[1] demonstrates that these are not jurisdictional or admissibility challenges but are arguments that the Court should consider in closing submissions at the end of the confirmation hearing.

4. Accordingly, the Prosecution submits that these purported jurisdictional or admissibility challenges should be dismissed. Further, the Chamber should clarify that such arguments cannot be mischaracterized as a jurisdictional or admissibility challenge in order to circumvent page limitations for the post-confirmation briefs or to guarantee an automatic right of appeal.[2]

PROCEDURAL BACKGROUND

5. On 31 March 2010, pursuant to Article 15 of the Rome Statute, a majority of Pre-Trial Chamber II authorized an investigation into the Situation in the Republic of Kenya.[3] Judge Kaul dissented on the ground that the post-election violence in Kenya cannot be charged as crimes against humanity because the crimes were not committed pursuant to an organizational policy, as is required by Article 7(2)(a) of the Statute.[4]

6. On 15 December 2010, the Prosecution filed an application pursuant to Article 58 requesting the issuance of summonses to Mr Kenyatta and Mr Ali, to answer charges

[1] ICC-01/09-02/11-338, para. 86.
[2] Cf. ICC-01/04-01/10-438 OA2, para. 17, where the Appeals Chamber found an appeal, purportedly from an order denying release, to be inadmissible because "it is the nature or character of a decision and not its implications or effects which determine whether a party is entitled to bring an appeal pursuant to article 82 (1)(b) of the Statute". See also ICC-01/09-78 OA, paras. 11 and 17, where the Appeals Chamber stated that "it is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a) of the Statute." The approach – that it is the *nature* (i.e., the substance) that determines whether it is within the category of matters appealable as of right - is applicable with equal force here.
[3] ICC-01/09-19.
[4] ICC-01/09-19, pages 84 - 163.

that they committed crimes against humanity from 27 December 2007 through 29 February 2008.[5]

7. On 8 March 2011, the Majority of the Chamber issued the requested summonses.[6] Judge Kaul again dissented, for the same reasons as in his dissenting opinion dated 31 March 2010.[7] The three appeared on 8 April 2011.

8. On 19 September 2011, the Defence of Mr Kenyatta and the Defence of Mr Ali filed challenges to jurisdiction pursuant to Article 19 of the Statute on the basis that the alleged crimes do not meet the criteria for crimes against humanity under Article 7 of the Statute. The Defence of Mr Ali also alleges that the Prosecution's evidence fails to show that he meets the requirements for indirect contribution under Article 25(3)(d).[8] In addition, Mr Ali purports to challenge the admissibility of the case based on the allegation that the case is not sufficiently grave as required by Article 17 because he is charged with common purpose liability. Included in the filing is also a complaint that the Prosecution failed to discharge its obligations under Article 54.

BURDEN AND STANDARD OF PROOF

9. With respect to admissibility, Chambers of the Court have allocated the burden of proof to the challenging party.[9] Under the existing jurisprudence on admissibility

[5] ICC-01/09-31-Red.
[6] ICC-01/09-02/11-1.
[7] ICC-01/09-02/11-3.
[8] ICC-01/09-02/11-339 and ICC-01/09-02/11-338, respectively.
[9] ICC-01/05-01/08-802, paras. 201-202. As Trial Chamber III observed, although this issue was not directly addressed in the Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, the Appeals Chamber similarly "approached the appeal throughout on the basis of whether the accused had 'persuaded' the Chamber by his arguments", and noting "[t]here was no suggestion raised in counsel's arguments or in the judgment that the prosecution bore the burden of proving that the proceedings were admissible"; ICC-01/05-01/08-802, para. 202, citing ICC-01/04-01/07-1497, paras. 85 and 111. Rule 58 further provides that a request or

challenges, the standard of proof during article 19 proceedings is "balance of probabilities".[10]

SUBMISSIONS

1. Challenges to the Jurisdiction *Ratione Materiae*

I - The Applicants' Challenges are not proper challenges to jurisdiction

10. The Prosecution submits that the legal issues framed by the Applicants are not properly brought in the context of a jurisdictional challenge, because they do not challenge the pre-conditions for the exercise of the Court's jurisdiction. The Applicants' Challenges therefore should be dismissed on this ground.

11. The Appeals Chamber has identified four facets of jurisdiction: "subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction – jurisdiction *ratione loci* - and lastly jurisdiction *ratione temporis*."[11]

12. The Applicants' challenge to the jurisdiction *ratione materiae* appears to be predicated on an argument that the Court lacks subject matter jurisdiction because the charges fall outside the category of cases that this Court is authorized to try. That claim is incorrect.

---

application under Article 19 must "contain the basis for it", which suggests that the challenging party bears the burden to prove its argument.

[10] ICC-01/05-01/08-802, paras. 203-204.

[11] *Prosecutor v. Lubanga,* Judgment on Jurisdiction Appeal, ICC–01/04–01/06-772 OA4 of 14 December 2006, para. 21.

13. The Suspects are charged with committing crimes against humanity, which the Statute defines as acts "committed as part of a widespread or systematic attack directed against any civilian population […]".[12] Article 7(2)(a) defines an attack directed against any civilian population to mean "a course of conduct involving the multiple commission of acts […] pursuant to or in furtherance of a State or organizational policy to commit such attack".

14. The Defence appears to argue that the organization alleged cannot, as a matter of law, be capable of devising an organizational policy as is required in Article 7. The Prosecution submits that this claim, at its heart, is an issue of statutory construction and not a jurisdictional challenge. The Court has jurisdiction because the crimes against humanity alleged under Article 7 are within the Court's subject matter jurisdiction. Whether Article 7 applies on its face to particular acts, however, is a matter of statutory interpretation, not jurisdiction. And whether the evidence establishes the predicate elements of the crime, including, as here, the element of an organizational policy to commit attacks against the civilian population, is a sufficiency issue, not a jurisdictional one.

15. The ICTY Appeals Chamber, faced with an almost identical defence argument in a case before it, refused to consider the claim as one addressing jurisdiction. It explained (emphasis added):

> "The Appeals Chamber finds that the Appellant fails to raise a proper jurisdictional challenge pursuant to Rule 72(D)(iv) of the Rules […] or to demonstrate that the Trial Chamber erred in dismissing his argument as to "occupied territory" being a necessary requirement for the crimes of deportation and forcible transfer as crimes against humanity. *Here, the Appellant is not contesting that the International Tribunal has jurisdiction over these crimes under*

[12] Article 7(1).

Article 5 of the Statute, which are charged in the Joint Indictment according to their definitions and elements under customary international law as set out in the jurisprudence of the International Tribunal. Rather, he argues that the interpretation of the definition for the *actus reus* of these crimes should be narrow and limited to displacement from occupied territory. *As such, the Appellant may bring these arguments before the Trial Chamber to be considered on the merits at trial; however, they do not demonstrate the Tribunal's lack of subject-matter jurisdiction*."[13] (emphasis added)

16. For the same reason, the Prosecution submits that the Pre-Trial Chamber should summarily dismiss these subject matter jurisdictional challenges. Though they purport to argue that the Court lacks jurisdiction over the crimes charged, in fact these arguments are dependent on the particular facts of this case regarding the nature of the charged organization. They thus raise issues of statutory interpretation or sufficiency that do not go to the core competence of the Chamber to adjudicate this case. That is not to say that the Defence cannot make the challenges, since of course they can, but simply that they are not jurisdictional challenges. The issue should be raised and considered like other issues of statutory interpretation or sufficiency, in the course of the confirmation hearing and, if charges are confirmed, during trial proceedings.

[13] See ICTY Appeals Chamber, *Prosecutor v. Ante Gotovina*, Decision on Ante Gotovina's Interlocutory Appeal against decision on several motions challenging jurisdiction, 6 June 2007, para. 15 (*Gotovina* Appeal). Under the same rationale, the ICTY Appeals Chamber also rejected a second "jurisdictional" claim that another statutory element – that the crimes be "committed against persons taking no active part in the hostilities" -- should similarly be interpreted narrowly. The Appeals Chamber reiterated that those arguments "are properly raised on the merits at trial and do not demonstrate that the International Tribunal lacks subject-matter jurisdiction over the crimes and the elements of those crimes under Counts 8 and 9 of the Joint Indictment"; *Gotovina* Appeal, para. 18.

II - The Chamber has Correctly Decided that the Charges Sufficiently Allege the Requirement of an Organizational Policy under Article 7(2)(a)

A. The Majority correctly interpreted 'organization'

17. Should the Chamber decide to consider the issue, the Prosecution submits that in accordance with previous decisions the element of an organizational policy contains three requirements: (i) there must be an organization with the capacity to commit the crimes; (ii) the organization must have an implicit or explicit policy to attack a civilian population; and (iii) the organization must conduct the attack pursuant to or in furtherance of its policy to commit such attack. [14]

18. The Majority's legal analysis and conclusions, which were recently adopted by Pre-Trial Chamber III,[15] are correct. The Majority, in accordance with the Statute and previous interpretations by other Chambers, rejected the suggestion that only State-like organizations may qualify and in accordance with the decisions of the Court held that the defining criteria is the purpose and the capacity of the organization to perform acts that infringe on basic human values. It thus rejected an interpretation that requires a formal structure of the group or a concrete level of organization.[16]

19. The Majority also rightly held that the determination of whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. It provided further guidance by listing several indicators to clarify its interpretation

---

[14] *Prosecutor v Katanga & Ngudjolo*, ICC-01/04-01/06-717, Decision on the Confirmation of Charges, 26 September 2008, para.396; *Prosecutor v Bemba*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para.81.

[15] ICC-02/11-14, paras. 42 - 46.

[16] ICC-01/09-19, para. 90, ICC-01/09-02/11-1, para. 21. Nor did the Chamber establish that the standard by which a group is deemed an "organization" is more than one of mere capability for wrongdoing, as alleged by the Defence of Mr Ali (ICC-01/09-02/11-338, para. 16).

and application of the term "organizational policy". The factors are related to the facts. Contrary to what the Defence of Mr Ali alleges,[17] these factors are not exhaustive. Instead, the Majority expressly stated that its list of considerations is not a rigid legal definition, is not exhaustive, and need not be proved in all instances.[18] As mentioned, Pre-Trial Chamber III agreed with the majority decision of this Chamber and reiterated that the determination of whether a group qualifies as an "organisation" under the Statute must be made on a case-by-case basis, and that the factors identified by this Chamber could, *inter alia*, be taken into account in such determination.[19]

20. In the Prosecution's view, the Majority's resolution of the issue, as confirmed by Pre-Trial Chamber III, was correct. It accords with the plain language and purpose of the Rome Statute, the drafting history, and the views of observers and scholars. It is consistent with decisions of this Court. It is also consistent with the principle that criminal statutes be strictly construed and ambiguities resolved in favour of the Accused.

B. The Language and Purpose of the Statutory Provision

21. The concept of "organization" as set out by the Majority aligns with the ordinary meaning of the term. The Oxford English Dictionary defines an organization as "an organized body of people with a particular purpose". The MacMillan Dictionary defines it as "a group of people who have a particular shared purpose or interest". Black's Law Dictionary defines it as "a body of persons (such as a union or

---

[17] ICC-01/09-02/11-338, para. 21.
[18] ICC-01/09-19, para. 93. In addition, also contrary to the Defence of Mr. Ali, ICC-01/09-02/11-338, paras. 5 and 17, the Chamber made findings on the organization and organizational policy. See, .e.g., ICC-01/09-02/11-1, paras. 20 - 24.
[19] ICC-02/11-14, para. 46.

corporation) formed for a common purpose". In other words, the term requires commonality of purpose but does not require formality of structure or other State-like attributes.

22. In addition, the Appeals Chamber has stated that a statutory provision should be read "[…] in context and light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of a law as a whole read in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty."[20] When viewed in light of its context, object, and purpose, Article 7 can only be read as the Majority construed it.

23. Article 7(1) and 7(2)(a), read together, require multiple acts as part of a widespread or systematic attack done knowingly and deliberately pursuant to an organizational policy.[21] The evil to which Article 7 is directed is not "State policy" or quasi-State policy, it is attacks against civilians. And its purpose is, broadly, to protect all civilian populations against victimization by organized groups and not, narrowly, to protect only civilian populations who are victimized specifically by States or state-like entities. The narrow interpretation proffered by the Applicants is an artificial construct that is not required by the statutory language and defeats the spirit and intent of the drafters of the Rome Statute.

---

[20] ICC-01/04-168 OA3, para. 33 ; ICC-01/04-01/07-522 OA3, para. 39; ICC-01/04-01/07-573 OA6, para. 5; ICC-01/04-01/06-1432OA9 OA10, para. 55; ICC-01/04-01/06-1486 OA13, para. 40.

[21] For example, an attack need not necessarily be widespread (as requiring large-scale activity involving a great number of victims), but it must at least have some scale, affecting multiple victims. On the other hand, an attack need not necessarily be "systematic" (as requiring methodical organization or orchestration), but it must at least be pursuant to or in furtherance of some sort of plan or policy of a State organization. See Robinson D., in Lee et al. (ed.), The Elements of Crimes against Humanity, in *"ICC: Elements of Crimes and Rules of Procedure and Evidence"*, and Robinson D., *Defining 'Crimes against Humanity' at the Rome Conference*, 93 AM. Journal IN'L L., p. 51.

C. Drafting history and scholarly interpretations

24. The Majority's Decision is confirmed by the evolution of the concept of crimes against humanity and the drafting history of Article 7. The submissions of the defence of Mr Kenyatta are flawed and grounded on an incorrect interpretation of the drafters' intentions.

25. It is beyond dispute that non-State actors can commit crimes against humanity. This common understanding is reflected in the work of the International Law Commission ("ILC"), the decisions of the ICTY, and the writings of jurists and commentaries.[22] Article 18 of the 1996 ILC's draft Code of Crimes, for example, expressly provided that crimes against humanity could be committed by "a Government or by any organization or group". It intended "organization" to mean, simply, an entity comprised of more than one person. The Commentary to Article 18 explained that "[t]his alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity."[23] The

[22] Robinson D. and Von Hebel H., in Lee R.S. (ed.), "Crimes within the Jurisdiction of the Court" in The International Criminal Court The Making of the Rome Statute, p. 96; Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, pp. 48-49.

[23] See Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No.10, at pp. 93, 95-96, UN Doc. A/51/10 (1996) (hereinafter "1996 draft code"). The chapeau paragraph of article 18 reads: "*A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (a) murder; (b) extermination […]*". As Jurovics has noted, the 1996 draft code expanded the concept of the entity behind the policy specifically to reflect that armed groups can carry out a criminal policy - a position that Article 7 of the Rome Statute endorses. Y. Jurovic, *Réflexitions sur la spécificité du crime contre l'humanité* (2002), p. 416.

Commentary made clear the desire to cover private groups or criminal gangs who commit systematic or mass human rights violations.[24]

26. This concept of "organization" as a means of including crimes by gangs or other such groups, exempting crimes committed by lone actors, is further reflected, directly and inferentially, in the deliberations leading to the Rome Statute. During the negotiations on crimes against humanity, the focus was on excluding random or isolated acts by individuals, not on excluding non-States or non-state-like organizations. As one commentator explained, "[t]he underlying direction, instigation or encouragement by a State or organization is what unites otherwise unrelated inhumane acts, so that they may be accurately described as an 'attack', considered collectively, rather than a mere crime wave or other domestic criminal behavior."[25] The organizational requirement was included to provide context for the requirement that crimes collectively, be widespread or systematic.[26]

---

[24] S. Ratner and J. Abrams in "Crimes against Humanity and the Inexactitude of Custom", *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy* (Oxford University Press, 2001), p. 68, fn. 133.

[25] Robinson, in Lee et al. (ed.), *The Elements of Crimes against Humanity*, p. 64; Robinson D. and Von Hebel H., in Lee R.S. (ed.), "Crimes within the Jurisdiction of the Court", p. 97, quoted in the challenge by Mr Kenyatta, ICC-01/09-02/11-339, para. 20.

[26] Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*. The debate focused primarily on whether the attacks must be widespread *and* systematic, versus widespread *or* systematic. Some delegations noted that requiring only a "widespread" commission of crimes would imply that a common "crime wave" of individuals acting on their own could be crimes against humanity, even where there was no connection between the individual crimes. See also *Prosecutor v. Duško Tadić,* Trial Judgment, IT-94-1-T (7 May 1997), para. 648; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T (2 September 1998), para. 579. Dixon, "Article 7 [4]", in Triffterer (ed.), p. 169. As part of the compromise between the differing views, the drafters adopted the disjunctive ("widespread or systematic") but added that the attack must be "directed against any civilian population" through "a course of conduct" pursuant to State or organizational policy (Article 7(2)(a)) to capture both a significant degree of scale and the element of planning and direction; Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, pp. 47-48.

27. In addition, it is not disputed that "organization" includes non-State actors.[27] However, the Defence of Mr Kenyatta submits that most scholars require a State-like entity or at least an entity holding *de facto* control over the territory.[28] This claim is erroneous. Numerous scholars agree that "organization" is instead intended to signify that crimes within the jurisdiction of this Court must be done as part of multiple acts by persons acting collectively.[29] Werle notes that the relevant criteria is whether the group has at its disposal, in material and personnel, the potential to commit a widespread or systematic attack on a civilian population.[30] Kittichaisaree further notes that "the law regarding crimes against humanity has developed to the extent that crimes against humanity can be committed on behalf of entities with *de facto* control over a particular territory [or] by a terrorist group or organization [or] private individuals with the aforesaid *de facto* power or organized in criminal gangs or groups".[31]

---

[27] "State or organizational policy [is] a term broad enough to include private entities". See Ratner and Abrams in "Crimes against Humanity and the Inexactitude of Custom", *Accountability for Human Rights Atrocities in International Law,* p. 68. Robinson notes that delegates considered that the term 'organization' should be interpreted "flexibly" and that while the entity might have to be more than a group [i.e. more that spontaneous mobs and crime waves], an entity would qualify as long as it can be described as an 'organization'. Thus, the dividing line was between entities that can only be called 'groups' and those that could be called 'organizations': there is nothing in the drafting history to require the extra requirements posed by the Applicants. See Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, p. 50, fn. 44; Cryer R. et al., 'Crimes against Humanity' in *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd Ed), p. 238. ICC-01/09-02/11-339, paras. 34 - 36.

[28] ICC-01/09-02/11-339, paras. 34 - 36, 54 - 56.

[29] See for instance, Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, p. 50; Y. Jurovic, *Réflexitions sur la spécificité du crime contre l'humanité*, at pp. 415-417, K. Kittichaisaree. *International Criminal law* (Oxford University Press, 2001), p. 98; Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law*, p. 69; Gioia A., "Terrorismo, crimini di Guerra e crimini contro l'umanità, *Rivista di diritto internazionale* (2004) 5, pp. 62-66; B. Conforti, *Diritto internazionale* (2006) p. 191; Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004), pp. 272-273.

[30] Werle G., in "Part Four: Crimes against Humanity" in Principles of International Criminal Law (TMC, Asser Press, The Hague 2005), p. 228.

[31] Kittichaisaree, "Crimes against Humanity" in *International Criminal Law* (Oxford University Press, 2001), p. 98.

28. The Defence of Mr Kenyatta also seems to argue that the exclusion of terrorism or drug trafficking offences from the jurisdiction of the Court signifies an intent to exclude non-State actors.[32] There is, however, no support for that proposition. It is also logically unsound: the exclusion of certain crimes by the drafters cannot lead to the assumption that it was to prevent the prosecution of non-State actors or organizations. If their intent had been to exclude non-State actors, they would have said so explicitly.

29. Rather, the negotiating history reflects that the drafters included only crimes of genocide, crimes against humanity, and war crimes so as to focus on the core crimes that might otherwise go unpunished domestically.[33] The significant factor is the nature of the offense, not the identity or official position of the offender. The omission of so-called 'treaty crimes' reflected the intent to focus on the 'core crimes' ultimately adopted, leaving to national systems and international extradition regimes the responsibility for other transnational criminal activity.[34]

D. Relevant ICC Jurisprudence regarding the interpretation of organizational policy

30. The Majority recognized and adopted jurisprudence from other Chambers: it adopted the reasoning in the case against *Katanga & Ngudjolo* and in the case against *Jean-Pierre Bemba*[35] that a private entity not linked to a State is capable of committing

[32] ICC-01/09-02/11-339, para. 51.
[33] See H Duffy, *The 'War on Terror' and the Framework of International Law* (CUP, Cambridge 2005), p. 39.
[34] Report of the Preparatory Committee on the Establishment of an International Criminal Court Volume I (Proceedings of the Preparatory Committee during March-April and August 1996) General Assembly Official Records, Fifty-first Session Supplement No.22, UN. Doc. A/51/22; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an international Criminal Court Rome, 15 June - 17 July 1998 Official Records Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, UN. Doc. A/CONF.183/13
[35] ICC-01/04-01/07-717, para. 396; see also ICC-01/05-01/08-424, para. 81.

an attack against a civilian population and that the formal nature of a group or its level of organization are not the defining criteria.[36]

31. The avoidance of a narrow or rigid definition is also signified in the Appeals Chamber's judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I on an application for warrants of arrest in the *Ntaganda* case.[37] Declining to rigidly interpret the gravity threshold for admissibility in Article 17(1)(d), it stated that "the particular role of a person, or for that matter, an organization, may vary considerably depending on the circumstances of the case and should not be exclusively assessed or predetermined on excessively formalistic grounds".[38] The Appeals Chamber further held that a rigid interpretation of those most responsible "ignore[s] the highly variable constitutions and operations of different organizations and could encourage any future perpetrators to avoid criminal responsibility before the ICC simply by ensuring that they are not a visible part of the high-level decision-making process".[39]

32. As mentioned above in paragraphs 19 to 21, Pre-Trial Chamber III recently confirmed the findings of the Majority.[40]

E. This interpretation is not contrary to the principle of strict construction of penal statutes.

33. Contrary to what the Applicants advance,[41] the position of the Majority respects the principle of strict construction of penal status enshrined, *inter alia*, in Article 22(2).[42]

---

[36] ICC-01/09-19, para. 90.
[37] ICC-01/04-169.
[38] ICC-01/04-169, para. 76.
[39] ICC-01/04-169, para. 77.
[40] ICC-02/11-14, paras. 42 - 46.

34. The construction advanced by the Majority is true to the statutory language, which does not narrowly define "organization", and true to the common meaning of that word. It is true to the purpose that underlines Article 7 and the whole Statute, including to the specific purpose of protecting civilian populations from crimes by organized criminal groups (regardless of state or quasi-state affiliation) who have the capacity to commit the serious crimes enumerated in Article 7.[43] Nor is there ambiguity in the statutory language that would require the Chamber to interpret the Statute in the light most favourable to the Suspects.

III - The jurisdictional challenges inappropriately contest the sufficiency of the evidence

35. The Applicants include a number of allegations against the sufficiency of the evidence underpinning the charges, as well as the manner in which those charges have been pleaded. The Defence of Mr Kenyatta and of Mr Ali respectively devote 13 and 21 paragraphs to contesting the strength of the evidence supporting the Prosecution's claim that the Suspects acted within an organization "in the context of Article 7 (2) (a) of the Statute".[44] They attempt to demonstrate, through arguments addressing the sufficiency of the evidence as well as its probative value, that the Prosecution failed to establish substantial grounds to believe that there existed an organisational policy pursuant to which they would have acted.[45]

36. The Prosecution submits that those allegations fall squarely outside the proper scope of a jurisdictional challenge and should be accordingly dismissed *in limine*. These

[41] ICC-01/09-02/11-339 para. 28 and ICC-01/09-02/11-338, para. 84.
[42] Broomhall in Triffterer, "Article 22", p. 724 [37].
[43] Di Filippo, "*Terrorrist Crimes and International Co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes*", p. 568, fn. 143.
[44] ICC-01/09-02/11-339 paras. 22 - 42 and ICC-01/09-02/11-338, paras. 59 - 71.
[45] ICC-01/09-02/11-339 para. 72 and ICC-01/09-02/11-338, para.42.

arguments can be raised by the Applicants in their closing arguments or at the trial if charges are confirmed.[46]

37. Discussions as to whether the facts are properly pleaded[47] or are sufficiently supported by the evidence, however, can have no place in a jurisdictional challenge.[48] As admitted by the Defence of Mr. Kenyatta[49], the necessary factual determinations related to the charges must be left for the confirmation decision – within the limited terms of the Article 61 scrutiny of the charges – and, if charges are confirmed, for the trial.[50]

2. Challenges to the Jurisdiction *Ratione Personae*

38. As with the challenge to the jurisdiction *ratione materiae*, the Prosecution submits that the factual issues posed by the Defence of Mr Ali in respect of the jurisdiction *ratione personae* are not properly brought in the context of a jurisdictional challenge, because he does not challenge any of the pre-conditions for the exercise of the Court's jurisdiction.

---

[46] See ICTY, *Prosecutor v. Brdanin & Talic*, Decision on motions by Momir Talic (1) to dismiss the indictment, (2) for release, and (3) for leave to reply to response of prosecution to motion for release, 1 February 2000, paras. 3-4: the jurisdiction of the Tribunal "depends upon whether the indictment has pleaded sufficient material facts to establish a prima facie case against the accused in relation to the charge or charges against him. It does not depend upon whether the supporting material provided by the Prosecutor to the confirming judge supports that charge. A challenge to the jurisdiction of the Tribunal upon the basis that the supporting material did not support that charge must therefore fail."

[47] It should also be noted that the Defence of Mr Ali unfoundedly stresses that the Prosecution only recently alleged that the organization consisted of more groups than just the Mungiki (ICC-01/09-02/11-338, para. 18.). The Prosecution included such submissions in its "Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" of 15 December 2010 (ICC-01/09-31, paras. 57 - 59).

[48] If the arguments are not subsequently presented in the post-confirmation brief, and the Chamber agrees that they are not proper jurisdictional arguments, the Prosecution submits that the Chamber should decline to address the merits. To do otherwise would reward circumvention of the page restrictions in the closing arguments and encourage future efforts to avoid limitations.

[49] ICC-01/09-02/11-339 para. 73.

[50] See *Gotovina* Appeal, para. 18 (ruling that the issue whether an armed conflict existed during the entire period covered by the charges is "a factual determination to be made at trial").

39. The claim appears to be predicated merely on an argument that (i) the evidence does not support the role attributed to Mr Ali under Article 25(3)(d); and (ii) the Prosecution has not provided sufficient notice.

40. Though the Statute does not specifically set out the conditions under which personal jurisdiction may be established, it does require that the person be charged with a crime within the Court's jurisdiction and also be a national of or committed the crime within the territory of a State Party or a State that accepted the Court's jurisdiction.[51] The Defence for Mr Ali contests *in personam* jurisdiction on the ground that the Prosecution has not adequately proven criminal liability under Article 25. But, to the extent that it bears on jurisdiction, Article 25 requires only that the accused be a "natural person" who commits a crime within the jurisdiction of the Court.[52] Whether the evidence permits a finding of criminal responsibility and punishment (i.e., whether it permits the Chamber to confirm charges and thereafter to convict the person) based on the proven mode of liability – as opposed to whether there is jurisdiction to adjudicate criminal liability -- is a wholly separate sufficiency issue, not a jurisdictional one.

41. Thus, for the reasons set out above, the Prosecution submits that the Pre-Trial Chamber should summarily dismiss this aspect of the "jurisdictional" challenge. Though the Defence of Mr Ali purports to argue that the Court lacks jurisdiction over Mr Ali, in fact he raises issues of sufficiency that do not go to the core competence of the Chamber to adjudicate this case. The issue should be raised and

[51] Article 12(2).

[52] Article 25(1),(2). Cf. *Prosecutor v. Seselj*, Decision on the Accused's Requests for a Ruling of the International Court of Justice over Nationals of the Federal Republic of Yugoslavia, IT-03067-PT, (21 April 2005),rejecting challenge to personal jurisdiction on the ground that the ICTY cannot try nationals of the Federal Republic of Yugoslavia for crimes committed in the territory of the former Yugoslavia, court noted that the Statute authorized prosecution of persons responsible for serious violations of international law in the former Yugoslavia since 1991 and that it also authorized *in personam* jurisdiction over "natural persons" without regard to the State of nationality.

considered like other issues of sufficiency, in the course of the confirmation hearing and, if charges are confirmed, during trial proceedings.

42. In respect of the lack of notice, the Prosecution firstly notes that alleged defects in the form of the charges also are a completely separate matter to that of jurisdiction, and accordingly cannot form a proper basis for a challenge under Article 19. Second, the Prosecution notes once more that in the Document Containing the Charges, the Prosecution has detailed its position, by indicating under paragraph 100 that Mr Ali *"contributed to the crimes charged with the aim of furthering the criminal activity or criminal purpose of the group"*.[53] It is therefore sufficiently clear that Mr Ali is charged under Article 25(3)(d)(*i*).

<u>3. Other challenges filed by the Defence of Mr Ali</u>

<u>I - The admissibility challenge ignores Appeals Chamber jurisprudence and is unfounded</u>

43. Mr Ali argues that the current case is inadmissible because the case is not sufficiently grave under Article 17(1)(d). The argument mixes an incorrect assessment of gravity with an attack on the sufficiency of the evidence to prove the responsibility of the suspect for the crimes charged. On both counts, the current challenge must fail.

44. First, the Applicant relies entirely on a gravity test that has been rejected by the Appeals Chamber as flawed and erroneous in law.[54] It is wholly inappropriate for the Defence of Mr Ali to misstate and then promptly ignore[55] the Appeals Chamber

---

[53] ICC-01/09-02/11-257-AnxA, page 39.

[54] ICC-01/04-169, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrant of Arrest, Article 58'", 13 July 2006, reclassified as Public on 23 September 2008.

[55] ICC-01/09-02/11-338, footnotes 74 and 75. In footnote 74, the Defence of Mr Ali cites the Lubanga Arrest Warrant Decision, para. 64 and wrongly states: "Although the decision of the Pre-Trial Chamber I was reversed on appeal, the Appeals Chamber based the reversal on the notion that a finding of admissibility

jurisprudence on this issue and to urge the Pre-Trial Chamber to accept the Lubanga Pre-Trial Chamber's test, notwithstanding that it was unambiguously overturned. Indeed, the Appeal Chamber underscored that "the Pre-Trial Chamber's interpretation of article 17(1)(d) of the Statute contains errors which, if not addressed now, could lead to future cases being declared inadmissible on grounds that are incorrect".[56]

45. The Appeals Chamber rejected the Pre-Trial Chamber's interpretation that gravity is met only (i) when the conduct in question is systematic or large-scale or causes social alarm, (ii) when the person is one of the most senior leaders, and (iii) when the suspect is the most responsible for the crimes considering his individual role in the commission of crimes and the role of other State entities, organizations or armed groups in the commission of crimes.[57] The Applicant's inexplicable insistence on these reversed criteria must be rejected in full.

46. Moreover, the Appeals Chamber's analysis of the Pre-Trial Chamber's erroneous test undermines the points raised by the Applicant. The Appeals Chamber held that in requiring, for gravity, conduct that is either systematic or large-scale (the first prong of the erroneous test),[58] the Pre-Trial Chamber incorrectly blurred the distinction between admissibility and the jurisdictional requirements for war crimes and crimes

is not a prerequisite to *the issuance of an arrest warrant* under the Statute". This is incorrect: the Appeals Chamber squarely stated its third key finding that "the Pre-Trial Chamber erred in law in its interpretation of "sufficient gravity" under article 17(1)(d) of the Statute" (ICC-01/04-01/06-169, paras. 3, 68-82). Subsequently, in footnote 75, the Defence of Mr Ali states: "The Appeals Chamber has called this criteria into question […]. Nevertheless, in the absence of further guidance, we will address the *Lubanga* standards."

[56] ICC-01/04-169, para. 54.

[57] ICC-01/-04-169, paras. 68-82.

[58] ICC-01/09-02/11-338, paras. 61-65.

against humanity.[59] Further, the Appeals Chamber found that "social alarm" is an inappropriate criteria.[60]

47. As for the erroneous requirements set by the Pre-Trial Chamber that the person be one of the most senior leaders and most responsible (second and third prongs of the flawed test),[61] the Appeals Chamber held that, logically, the deterrent effect of the Court should be highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court.[62] It went on to find that "the imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved".[63] This automatic exclusion of perpetrators through the use of an inflexible standard such as that set by the Pre-Trial Chamber could "severely hamper the preventive, or deterrent, role of the court".[64]

48. Finally, issues of gravity and admissibility must be addressed on a case-by-case basis. In clearly rejecting any predetermination of admissibility on rigid grounds because it could lead to the automatic exclusion of a perpetrator, the Appeals Chamber held:

> The particular role of a person or, for that matter, an organization, may vary considerably depending on the circumstances of the case

[59] ICC-01/-04-169, para. 71. The Defence argument that there is "substantial doubt as to whether inaction can, as a matter of law, result in liability" (para. 63) is unfounded. The Elements of Crimes, Article 7, footnote 6 expressly states that "Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of a policy cannot be inferred solely from the absence of governmental or organizational action". The last sentence « does not mean that it is necessary to prove action by a State or organization. This would have been completely unacceptable to the majority of the delegations, as it would have obliterated the point of including the 'inaction' test » : Robinson, D., "The elements of crimes against humanity", in Lee, R.S. (ed) *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., (2001), p.76.
[60] ICC-01/-04-169, para. 72.
[61] ICC-01/09-02/11-338, paras. 66-71.
[62] ICC-01/-04-169, para. 73.
[63] ICC-01/-04-169, para. 74.
[64] ICC-01/-04-169, para. 75.

> and should not be exclusively assessed or predetermined on excessively formalistic grounds. Criteria considered by the Pre-Trial Chamber […] ignore the highly variable constitutions and operations of different organizations and could encourage any future perpetrators to avoid criminal responsibility before the International Criminal Court simply by ensuring that they are not a visible part of the high-level decision-making process. Also, individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of very serious crimes.[65]

49. Accordingly, the challenge to admissibility on the basis that the Applicant was not one of the most senior leaders,[66] considering his role and the role of others, must be dismissed. The Applicant's challenge appears to argue that only a principal or direct perpetrator of the crimes can be held accountable,[67] without any legal support. Not only is this contrary to the express inclusion in the Statute of responsibility based on accessory liability, it would render the inclusion of such forms of responsibility in the Statute meaningless.

50. Nor does the Statute address at all the gravity of the offender; the Statute instead requires that "the case" be of sufficient gravity to justify the Court's involvement.[68] In effect, the interpretation proffered by the Applicant would lead to the absurd result that charging a person with grave crimes, but under the "wrong" mode of liability, would convert the otherwise grave (and thus admissible) case into one that is necessarily inadmissible. Such an argument – that the case is not grave enough if the mode of liability is based on accessorial conduct -- also disregards this Chamber's holding that in assessing gravity, it will consider the existence of aggravating factors

[65] ICC-01/-04-169, para. 76-77.
[66] ICC-01/09-02/11-338, para. 66.
[67] ICC-01/09-02/11-338, para. 67.
[68] Article 17(1)(d).

that will render the crimes grave.[69] In this regard, the Chamber opined that useful guidance lies in the factors concerning sentencing in Rule 145(1)(c) and (2)(b)(iv), such as (i) the scale of the alleged crimes; (ii) the nature of the unlawful behaviour or of the alleged crimes; (iii) the manner of commission of the crimes; and (iv) the impact of the crimes and the harm caused to victims and their families.[70]

51. Moreover, this Chamber found gravity at the situation stage in relation to the same subject-matter which forms the focus of the present proceedings.[71] The case before this Chamber is similarly of sufficient gravity to warrant continued action by the Court. The crimes alleged to have been committed against hundreds of persons include murder, persecution, rape and sexual violence, forcible displacement and inhumane acts. The suspects, including Mr Ali, are accused of having played essential organizational and supporting roles in ensuring that the crimes were committed: the principal perpetrators, using the Kenyan police and the Mungiki, created an ad hoc organization which they deployed to carry out and implement their policy to retain PNU's power at all cost; and in Nakuru and Naivasha, the organization penalized perceived ODM supporters and consolidated PNU's power through murder, rape, forced evictions, physical assaults, forced circumcision, looting, burning of property and persecution.

52. As its second form of attack on admissibility, the Applicant includes allegations against the sufficiency of the evidence underpinning the charges, as well as the

---

[69] ICC-01/09-19, para. 62. See also Regulations of the Office of the Prosecutor, Reg. 29(2) which states that "in order to assess the gravity of the crimes allegedly committed, the Office shall consider various factors including their scale, nature, manner of commission and impact".

[70] ICC-01/09-19, para. 62. The Pre-Trial Chamber in the *Abu Garda* case also held that in assessing gravity, the nature, manner and impact of the attack are critical considerations in determining the qualitative dimension of the crime and similarly cited factors in Rule 145(1)(c). *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para. 32.

[71] ICC-01/09-19, paras. 188-200.

manner in which those charges have been pleaded.[72] The Prosecution reiterates its position articulated above in paragraphs 36 to 38 that those allegations fall outside the proper scope of an admissibility challenge and should be accordingly dismissed.

<u>II - The challenge to the objectivity of the investigation is not a proper challenge to jurisdiction or admissibility</u>

53. The Defence of Mr Ali alleges that the Prosecution failed to comply with its obligations under Article 54 of the Statute. It is not clear – because the challenge fails to address it – how this assertion impacts on either jurisdiction or admissibility. In the Prosecution's view, a complaint about the conduct of the investigation (or, as it also appears to be in part, a repackaged attack on the sufficiency of the evidence (see paras. 74-83)) is not a proper challenge to jurisdiction or admissibility and, like the previous improperly-framed arguments, should be dismissed *in limine*.

54. Nor is the adequacy of the Prosecution's pursuit of allegedly exculpatory evidence otherwise a relevant consideration for the Pre-Trial Chamber at the confirmation stage, unless it impacts on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the "substantial grounds to believe" threshold.[73] As this Chamber itself has already recognized, "The Chamber doesn't have the power to direct the Prosecutor's investigation. We have only to assess the quality of evidence."[74]

55. That said, and without prejudice to its position that this is not a proper issue for determination at this stage of the proceedings, the Prosecution makes the following

[72] ICC-01/09-02/11-338, paras. 61-70.
[73] ICC-02/05-02/09-243-Red, para. 48.
[74] ICC-01/09-01/11-T-12-ENG ET p. 75, line 25 to p. 76, line 2.

limited submissions in response to the Defence argument that the Prosecution inadequately investigated exculpatory information.

56. First, the Applicant fails to establish any breach of Article 54(1). The Prosecution has discharged, and continues to discharge, its obligations to investigate incriminating and exonerating circumstances equally. The Prosecution has collected, explored and disclosed potentially exonerating information. The fact that the challenge relies exclusively on information obtained and disclosed by the Prosecution for its arguments reveals that the Prosecution has taken this obligation seriously and has both obtained and duly disclosed exonerating information and material that may assist the preparation of the defence.[75]

57. Second, it must be underscored that the Prosecution's obligations under Article 54(1) are to investigate fairly and without prejudice and to pursue all credible and relevant lines of inquiry, including those that may assist the Defence.[76] That does not, however, mean that the Prosecution must interview every potentially incriminating and exonerating witness, otherwise investigations would be endless. The Prosecution is equally not obliged to interview every witness the Defence views as relevant. And in many instances it is not able to do so; in many cases, witnesses who might offer information favourable to one of the suspects are unwilling to speak to the Prosecution. Finally, with respect to the Applicant's unfounded assertion that "the Prosecution has not taken even minimal steps of interviewing police officers

---

[75] ICC-01/09-02/11-338, footnotes 99-102, 104-110, 112-114.

[76] "[T]he Prosecutor's ordinarily unfettered duty to disclose must necessarily be based, inter alia, on the Prosecutor's understanding of the case as a whole, including what is known or anticipated about possible defence(s). The fact that the Prosecutor is required "to investigate incriminating and exonerating circumstances equally", pursuant to article 54(1)(a) of the Statute, means that the Prosecutor will be aware, during the course of his investigations, of material that may be of assistance to the defence." *Prosecutor v. Lubanga*, Judgment on Appeal against Oral Disclosure, ICC-01/04-01/06-1433 OA11, 11 July 2008, para. 36.

and supervisors or examined contemporaneous police records",[77] this is incorrect; the Prosecution took active steps to interview senior members of the Kenyan police force until the process was stalled by a Court order.[78]

CONCLUSION

58. For the reasons set out above, the Prosecution respectfully requests that the Chamber dismiss the Applicants' challenges.

Luis Moreno-Ocampo

Prosecutor

Dated this 14th day of October 2011

At The Hague, The Netherlands

[77] ICC-01/09-02/11-338, para. 81.

[78] The Prosecution sent eight requests for assistance to Kenyan authorities to interview five provincial police officers and five provincial commissioner, heads of the provincial security committees but was blocked at every turn. To overcome the obstacles the Prosecution conducted more than eight missions to Nairobi. The efforts were finally stalled when a High Court Justice suspended the taking of any statements.