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Original: **English**

No.**: ICC-01/09-02/11**
Date: **7 March 2012**

APPEALS CHAMBER

Before: **Judge Akua Kuenyehia, Presiding Judge**
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA
AND UHURU MUIGAI KENYATTA

Public Document

Prosecution's Response to "Document in Support of Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'" (ICC-01/09-02/11-399 OA4)

Source: **The 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

Counsel for Francis Kirimi Muthaura
Karim A. Khan and Kennedy Ogetto

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

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

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

INTRODUCTION

1. On 23 January 2012, Pre-Trial Chamber II issued its "Decision on the Confirmation of Charges pursuant to Articles 61(7)(a) and (b) of the Rome Statute" (the "Confirmation Decision") in which it rejected (Judge Kaul dissenting) the challenges against the jurisdiction of the Court brought by Mr Kenyatta and Mr Muthaura (the "Appellants").[1] Both Appellants challenge the Decision and claim that the Chamber erred in its determination of the Court's subject-matter jurisdiction.

2. The Appellants raise four grounds of appeal in their Appeal Brief. *First*, that the Majority erred in law when it dismissed Kenyatta's Challenge to the jurisdiction of the Court *in limine*. *Second*, that the Majority erred in law by adopting an incorrect interpretation of the term "organizational" under article 7(2)(a). *Third*, that the Majority erred in fact and law by re-characterizing the facts submitted by the Prosecution without giving the Appellants notice. *Fourth*, that the Majority erred in fact when it considered the Mungiki an "organization" within the terms of article 7(2)(a).

3. The Appellants have failed to show any error in the Majority's reasoning and findings that would merit the intervention of the Appeals Chamber. On the *first ground*, the Majority correctly found that the case presented by the Prosecution fell within the jurisdiction of this Court. The Appellant's arguments, namely the concept of organization and the purported insufficiency of evidence adduced by the Prosecution, are not jurisdictional issues and should be decided at Trial.

[1] Confirmation Decision, pp.1-155.

4. With respect to the *second ground*, the Majority adopted the correct interpretation of "organization" when it found that private groups can constitute an "organization" under the Statute, that the precise structure of the organization will depend on the facts of the case, and that the key criterion is the capacity of the group to commit widespread or systematic attacks against civilians rather than any rigid designation based on its structure.

5. Finally, the *third and fourth grounds* are equally meritless: the Majority did not "re-characterize" the Prosecution's case; rather, its finding that the Mungiki was an organization under the Statute is fully consistent with the Prosecution's submissions at the DCC and at the confirmation hearing.

6. The Prosecution submits that the Appellants have failed to demonstrate the existence of any reversible error and that accordingly the Appeals Chamber should dismiss the four grounds of appeal raised by the Appellants and confirm the impugned decision.

PROCEDURAL BACKGROUND

7. On 26 November 2009, the Prosecutor filed a request for authorization to commence an investigation into the Situation in the Republic of Kenya.[2] On 31 March 2010, pursuant to Article 15 of the Rome Statute, a majority of Pre-Trial Chamber II (the "Majority") authorized an investigation into the Situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009 ("Article 15 Decision").[3] Judge Kaul dissented on the ground that the

[2] ICC-01/09-3.
[3] ICC-01/09-19-Corr.

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) ("Article 15 Dissenting Opinion").[4]

8. On 15 December 2010, the Prosecution filed an application pursuant to article 58 requesting the issuance of summonses to appear for Mr Kirimi Muthaura ("Muthaura"), Mr Uhuru Kenyatta ("Kenyatta") and Mr Mohammed Hussein Ali ("Ali"), (collectively, "the Suspects").[5]

9. On 8 March 2011, the Majority of the Chamber decided that there were reasonable grounds to believe that the Suspects are criminally responsible for the crimes against humanity of murder, forcible transfer, rape, other inhumane acts and persecution and summoned the Suspects to appear before it ("Summons Decision").[6] Judge Kaul again dissented, for the same reasons as in his dissenting opinion to the Article 15 Decision.[7] The three voluntarily appeared on 8 April 2011.[8]

10. On 19 September 2011, Kenyatta and Ali challenged the material jurisdiction of the Court (the "Challenges").[9]

11. On 14 October 2011, the Prosecution filed a consolidated response to the Challenges.[10] The Prosecution argued that the arguments advanced by the two suspects with respect to the concept of "organizational policy" were issues of statutory interpretation and sufficiency of evidence, neither of which had been properly brought in the context of a jurisdictional challenge.

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[4] ICC-01/09-19-Corr, pp.84-163.
[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-T-1-ENG, pp.7, 12-14.
[9] ICC-01/09-02/11-339 ("Submissions on Jurisdiction on behalf of Uhuru Kenyatta") and ICC-01/09-02/11-338 ("[Ali] Challenge to Jurisdiction, Admissibility and Prosecution's failure to meet the requirements of article 54").
[10] ICC-01/09-02/11-356.

12. The Confirmation of Charges hearing commenced on 21 September 2011[11] and concluded on 5 October 2011.[12]

13. In accordance with the Chamber's directions, on 17 November 2011 the Prosecution and the Legal Representative of the Victims filed their written observations.[13] On 17 November (Kenyatta),[14] and on 21 November 2011 (Ali and Muthaura) filed their written observations.[15]

14. In his written observations, Muthaura joined Kenyatta's Challenge to the jurisdiction of the Court and submitted that "the [Prosecution] have failed to establish that the crimes alleged were committed pursuant to or in furtherance of a state or organisational policy to commit such attacks as required by Article 7(2) of the Statute."[16]

15. On 23 January 2012, the Pre-Trial Chamber issued its "Decision on the Confirmation of Charges pursuant to Articles 61(7)(a) and (b) of the Rome Statute" (the "Confirmation Decision"). The Majority confirmed the charges against Kenyatta and Muthaura.[17] Judge Kaul dissented on the same grounds as in the Article 15 Decision and Summons Decision, namely he disagreed with the Majority's interpretation of "organizational policy" under article

[11] ICC-01/09-02/11-T-4-ENG.
[12] ICC-01/09-02/11-T-15-CONF-ENG.
[13] ICC-01/09-02/11-361 (Prosecution), and ICC-01/09-02/11-360-Corr (Victims).
[14] ICC-01/09-02/11-372.
[15] ICC-01/09-02/11-373-Red (Ali) and ICC-01/09-02/11-374-Red (Muthaura).
[16] ICC-01/09-02/11-374-Red, para.110: "The Defence put the OTP to strict proof with regards to all jurisdictional, legal and evidential elements of the charges. The Defence submits that the evidence adduced by the OTP does not satisfy the criteria for "organizational policy" put forward by the majority in the summons decision. In this regard, the Defence of Ambassador Muthaura joins the submissions of the Defence Team of Mr. Kenyatta in its challenge to the sufficiency of the evidence adduced by the OTP on this issue. In short, for the reasons given therein, the Defence submits that the OTP have failed to establish that the crimes alleged were committed pursuant to or in furtherance of a state or organisational policy to commit such attacks as required by Article 7(2) of the Statute." See footnote 250 which refers to Kenyatta's submissions on jurisdiction at ICC-01/09-02/11-372, paras.40-58.
[17] Confirmation Decision, pp.1-155.

7(2)(a).[18] The Chamber was unanimous in declining to confirm the charges against Ali.

16. On 30 January 2012, Muthaura and Kenyatta ("the Appellants") filed their notices of appeal against the Majority's ruling on jurisdiction.[19] The Appellants further requested, pursuant to article 82(3) and rule 156(5), that the pendency of the appeal suspend the proceedings and that the Trial Chamber not be constituted until the appeal is concluded.[20] Muthaura further submitted that "because its challenge to jurisdiction is in all material respects identical to the jurisdictional challenge filed by the Kenyatta Defence, the principle of judicial economy therefore militates in favour of the Muthaura Defence being heard now".[21]

17. On 1 February 2012, the Appellants filed applications for leave to appeal the Confirmation Decision pursuant to article 82(1)(d).[22]

18. On 3 February 2012, the Prosecution filed a consolidated response to the applications for leave to appeal.[23]

19. On 9 February 2012, the Prosecution filed a consolidated response to the Appellants' requests for suspensive effect of their appeals on jurisdiction.[24]

20. On 14 February, the Appellants jointly filed their document in support of appeal pursuant to article 82(1)(a) against the Majority's decision on jurisdiction ("Appeal Brief").[25]

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[18] Confirmation Decision, pp.156-193 ("Dissenting Confirmation Decision").
[19] ICC-01/09-02/11-383OA4.
[20] Ibid., para.30.
[21] Ibid., para.19.
[22] ICC-01/09-02/11-384-Red (Kenyatta) and ICC-01/09-02/11-385-Corr (Muthaura). The parties are still litigating the admissibility of Muthaura's corrigendum. See ICC-01/09-02/11-389 (Prosecution's Request that the Pre-Trial Chamber Disregard the Corrigendum), and Muthaura's response (ICC-01/09-02/11-392).
[23] ICC-01/09-02/11-396. The Single Judge stated that it was the Prosecution's choice to file consolidated responses (ICC-01/09-02/11-91, para. 5).
[24] ICC-01/09-02/11-398OA4.

21. On 29 February 2012, the Appeals Chamber rejected the Appellants' request for suspensive effect.[26]

STANDARD OF REVIEW

22. A jurisdiction determination is a mixed question of fact and law. In relation to factual findings, the Appeals Chamber has held that they are not reviewable unless they are "patently incorrect." The Appeals Chamber's review is corrective in nature and not *de novo*.[27]

23. On questions of law, the Appeals Chamber has recently stated that "[it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law."[28]

24. In addition, the Appeals Chamber requires that for a successful appeal, the error raised by an appellant must have materially affected the impugned decision.[29] Accordingly, "as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially

[25] ICC-01/09-02/11-399OA4.
[26] ICC-01/09-02/11-401OA4.
[27] ICC-02/05-03/09-295OA2, para.20; ICC-01/09-01/11-307OA, para.56; ICC-01/09-02/11-274OA, para.55; ICC-01/04-01/07-572OA6, para.25; ICC-01/05-01/08-323OA, para.52; ICC-01/05-01/08-631-RedOA2, paras.61-63; ICC-01/05-01/08-631-Red, para.62.
[28] ICC-02/05-03/09-295OA2, para.20. This statement is coherent with existing international jurisprudence. For example, the ICTY chambers have stated that where an error of law is found in the impugned decision, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings accordingly. *See Prosecutor v Dragomir Milosevic*, Appeals Judgment, IT-98-29/1-A, 12 November 2009, paras.13-14 and footnotes cited therein.
[29] ICC-01/04-01/07-1497OA8, paras.37-38.

affected the impugned decision."[30] Similarly, an appellant "can not raise errors in assessments made in […] prior decisions as a ground of appeal in challenging the impugned decision".[31]

SUBMISSIONS

25. The Appellants raise four grounds of appeal in their Appeal Brief. *First*, the Appellants argue that the Majority erred in law when it dismissed Kenyatta's Challenge to the jurisdiction of the Court *in limine*. According to the Appellants, the Majority should have distinguished and separately addressed the two arguments raised in their Challenge (the concept of organization and the insufficiency of evidence). However, the Appellants insist that the Majority, in determining the jurisdiction of the Court, needs to examine the facts and evidence relied upon by the Prosecutor.

26. *Second*, the Appellants argue that the Majority erred in law by adopting an incorrect interpretation of the term "organizational" under article 7(2)(a); according to the Appellants, a private entity can be an "organization" under the Statute if it has state-like characteristics, such as territorial control. *Third*, the Appellants submit that the Majority erred in fact and law by re-characterizing the facts submitted by the Prosecution without giving the Appellants notice. *Fourth*, the Majority erred in fact when it considered the Mungiki an "organization" within the terms of article 7(2)(a).

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[30] ICC-02/04-01/05-408OA3, para.48; ICC-01/05-01/08-962OA3, paras.102, 106, 133-134; ICC-01/05-01/08-1019OA4, para.69.
[31] ICC-01/05-01/08-2151-RedOA10, para.29.

27. The Prosecution submits that the Majority correctly determined that the case fell within the jurisdiction of the Court. The Appellants have failed to show any error in the Majority's reasoning and findings that would merit the intervention of the Appeals Chamber. The Prosecution notes that the Appellants' *First Ground* challenges the test applied by the Majority to determine the jurisdiction of the Court. As it will be described below, the Majority correctly found that the case presented by the Prosecution fell within the jurisdiction of this Court. The Appellants' arguments, which address the concept of organization and the purported insufficiency of the evidence adduced by the Prosecution, do not relate to the jurisdiction of the case; on the contrary, those are issues that go to the merits of the case and must be determined at trial.

28. With respect to the *Second Ground*, the Prosecution submits that the Majority adopted the correct interpretation of "organization" when it found that private groups can constitute an "organization" under the Statute, that this determination should be made on a case-by-case basis depending on the facts of the case, and that the key criterion is the capacity of the group to commit widespread or systematic attacks against civilians. Anyhow, this argument raises an issue of statutory interpretation that does not relate to the determination of the Court's jurisdiction and should be decided at trial.

29. The *Third and Fourth Grounds* on appeal are also without merit: the Majority did not "re-characterize" the Prosecution's case; rather, its finding that the Mungiki qualified as an organization under the Statute is fully consistent with the Prosecution's allegations in the DCC and its submissions at the confirmation hearing. Finally, the Majority correctly found that the Mungiki was an organization within the terms of article 7(2)(a) with capacity to commit a widespread or systematic attack on civilians. In any event, the Appellants'

challenges to the Prosecution's evidence in the Fourth Ground are irrelevant for the determination of the Court's jurisdiction; these are matters related to the sufficiency of the evidence that have to be decided at trial.

30. For the foregoing reasons, the Prosecution submits that the Appeals Chamber should dismiss the four grounds of appeal raised by the Appellants and confirm the impugned decision.

First Ground of Appeal: the Majority erred in law by dismissing Kenyatta's jurisdictional Challenge and finding that his challenge was not jurisdictional in nature but, instead, was a challenge on the merits of the Prosecution's case on the facts[32]

(a) The proper scope of a determination of jurisdiction under the Statute

31. At the core of the Appellants' submissions lies a profound misunderstanding of the nature of a determination on jurisdiction under the Statute and in particular of the limited scope of the examination to be undertaken therein.

32. In the Prosecution's view, a challenge to the jurisdiction *ratione materiae* of the Court looks to whether the crime charged is one that, as a matter of law, the ICC may prosecute and punish. The interpretation of the Statute itself, and the question whether the evidence is sufficient to establish that there exists an organization or organizational policy, are not jurisdictional issues, but instead are legal or evidentiary issues to be resolved independently of the Court's threshold obligation to determine whether it has jurisdiction to adjudicate the case at all.

[32] Appeal Brief, paras.19-30.

33. 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*. A challenge to the Court's jurisdiction looks only to whether all of the pre-conditions to the exercise of jurisdiction are met, as set out in articles 11-13 of the Statute. This comprises the fulfilment of temporal jurisdiction in accordance with article 11 or 13(b); geographical and personal jurisdiction in accordance with Article 12 or 13(b); and material jurisdiction in accordance with article 13, with respect to the crimes listed in article 5.[33] A case that falls outside any of those parameters will be dismissed, for example if the alleged conduct is not proscribed as a crime within the jurisdiction of this Court or otherwise took place during a time or in a place or by a person not amenable to the Court's jurisdiction.[34]

34. In this case, the Appellants do not contest personal jurisdiction, territorial jurisdiction, or temporal jurisdiction. Rather, they claim only that the Court lacks subject matter jurisdiction because the alleged organizational policy is not within the jurisdictional reach of the Statute. They do not dispute, however, that the charges as written (and confirmed) allege crimes against humanity in furtherance of an organizational policy, as required by the Statute itself. Their challenge instead is to the determination that their type of organization can be capable of formulating a policy that could give rise to subject matter jurisdiction of this Court.

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[33] And in turn Articles 6-8, ICC Statute. See also ICC–01/04–01/06-772 OA4, para. 21.

[34] The Appeals Chamber has made a clear distinction between the facts pleaded by the Prosecution and any supporting evidence. According to the Chamber, "the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged." See ICC-01/04-01/06-2205 OA15 OA16, footnote 163 (to para. 90)

35. To the extent that the challenge only relates to the question of whether the Court has the authority to prosecute alleged crimes in furtherance of the policy of an organizational entity that is not a State, this is a jurisdictional argument that can be resolved at this stage. Beyond that, however, the arguments that an organization under the Statute must have specific (though statutorily undefined) attributes that are not proven here, or that the evidence adduced at the confirmation hearing did not sufficiently prove the existence of an organizational policy, present non-jurisdictional issues. As such, the Appellants have no right of direct appeal to contest them.

36. This interpretation is firstly supported by the Statute, and in particular the provisions regulating the manner in which jurisdiction must be determined at the trial stage. Article 19(6) permits the Trial Chamber to address jurisdictional challenges, and article 19(4) states that such challenges must be made "prior to or at the commencement of the trial", i.e. before any evidence has been presented. This signifies that jurisdiction is not dependent on proof of particular facts, but instead will be considered without regard to the evidence on the basis of the allegations of the case as pleaded by the Prosecution.[35] Consistency requires that if a Trial Chamber is expected to make its jurisdictional assessment on the basis of the facts pleaded by the Prosecution, the same process is applied by a Pre-Trial Chamber.

37. International jurisprudence also supports this position. For example, in *Prosecutor v. Brdanin*, the Trial Chamber explained that in assessing a claim that it lacks jurisdiction, "the court would examine the facts alleged in the indictment; it would not examine whether there was evidence available to the

[35] The only other conceivable option would be to require the Trial Chamber to make its assessment on the basis of the evidence presented before the Pre-Trial Chamber, This, however, would be illogical. A Chamber cannot be expected to make factual assessments on the basis of evidence filed before another Chamber or to duplicate the latter's factual assessments.

prosecution to establish the truth of those facts so alleged".[36] Other Trial Chambers of the ICTY have consistently refused to treat as jurisdictional matters issues of fact and evidence, holding that they fall outside the proper scope of a jurisdictional challenge and deferring those determinations for the trial stage. For instance, in the *Boskovski* case, the Trial Chamber stressed that the so-called jurisdictional issues raised by the challenging party depended "first and foremost on factual determinations" which could only be made "by a Trial Chamber after having duly examined all the evidence tendered during trial".[37] As another ICTY Trial Chamber explained, "[t]he correct analysis, therefore, for purposes of examining subject-matter jurisdiction is whether the Tribunal has the power to prosecute the crime […] in this case, not whether the mental and physical elements of the underlying forms of commission are established, which is a matter for trial."[38]

38. Similarly, a jurisdictional challenge is not an opportunity to discuss the proper statutory interpretation of the elements of the crimes. Rather, a determination on jurisdiction should be confined to the question of whether the Court is competent to prosecute the crime charged. As one ICTY Trial Chamber stated, "[t]he essence of subject-matter jurisdiction is whether the crime charged is a *type* of crime which the Tribunal is authorised to prosecute and punish".[39] A

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[36] *Prosecutor v. Brdanin*, Decision on Motion to Dismiss Indictment, IT-99-36, 5 October 1999, para. 10 (Trial Chamber II). See also para. 12, referring to the "traditional concept that the jurisdiction of a criminal court is founded upon, and invoked by, the indictment and the indictment alone".
[37] *Prosecutor v. Boskovski and Tarculovski*, "Decision of Johan Tarculovski's Motion Challenging Jurisdiction", IT-04-82-PT, 1 June 2005, para. 11.
[38] *Prosecutor v. Marijacic and Rebic*, "Decision on Motions to Dismiss the Indictment due to lack of Jurisdiction and Order Scheduling a Status Conference", IT-95-14-R77.2, 7 October 2005, p. 5. In the *Seselj* case the Trial Chamber considered that issues such as whether there existed a state of armed conflict in any of the territories mentioned in the Indictment, whether or not any attacks against the civilian population were systematic or collective in nature and whether or not there was a nexus between such attacks and the armed conflict were issues of an "evidentiary character" to be determined at trial. See *Prosecutor v. Seselj*, Decision on Motion by Vojislav Seselj challenging jurisdiction and form of the indictment, IT-03-67-PT, Trial Chamber, 26 May 2004, para. 41.
[39] *Prosecutor v. Marijacic and Rebic*, "Decision on Motions to Dismiss the Indictment due to lack of Jurisdiction and Order Scheduling a Status Conference", IT-95-14-R77.2, 7 October 2005, p. 5 (emphasis added).

Chamber seized with a jurisdiction challenge must determine that the crime charged is one that falls within the jurisdiction of the Court. Beyond that, claims related "to the contours of a substantive crime […] are matters to be addressed at trial".[40]

39. The *Gotovina* case before the ICTY Appeals Chamber is particularly instructive on this point. In resolving an interlocutory appeal purportedly predicated on jurisdiction, that Appeals Chamber confirmed that the alleged non-existence of an armed conflict after a certain military campaign had taken place was not a jurisdictional challenge to the competence of the Tribunal to adjudicate the case, but instead was "a factual determination to be made at trial".[41] In particular, the Appeals Chamber noted that the appellant did not urge that the Tribunal lacked jurisdiction over the crimes against humanity that were charged -- deportation and forcible transfer – but instead argued for a narrow interpretation of the *actus reus* of those crimes, whereby they were limited to displacement from occupied territory. The Appeals Chamber stated that those arguments did not bear on the Tribunal's lack of subject-matter jurisdiction.[42]

40. The Appeals Chamber reached an identical conclusion in relation to the appellant's second claim that the Trial Chamber had erred by concluding that Article 3 common to the 1949 Geneva Conventions, included in two counts of the indictment, could encompass conduct of hostilities violations under Hague Law. According to the appellant, this was "in violation of customary law and the *nullum crimen sine lege* principle, and thus falling outside the Tribunal's

[40] *Prosecutor v. Milutinovic et al*, IT-05-87-PT, Decision on Odjanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, para. 23.
[41] *Prosecutor v. Gotovina, Cermak and Markac*, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, IT-06-90-AR72.1, 6 June 2007, para. 21. The appellant's claim was that after the so-called Operation Storm had been completed all hostilities had ceased, and that the ICTY lacked jurisdiction over acts committed after that operation.
[42] *Gotovina* Decision, para. 15.

jurisdiction *ratione materiae* […]".[43] The Chamber concluded that again the appellant failed to raise a proper jurisdictional challenge. Instead, he contested only the statutory definition of a particular element of a crime but did not more broadly disagree that the Tribunal had jurisdiction over the crimes charged under Articles 3 and 5 of its Statute, or that the element in question was a proper element of such crimes. The appellant's arguments therefore were "properly raised on the merits at trial" and did not demonstrate that the Tribunal lacked subject-matter jurisdiction over the crimes charged and the elements of those crimes.[44]

41. The Prosecution notes that the Appellants in this case *do not* challenge that the Court lacks jurisdiction over the crimes against humanity charged under article 7 of the Statute or dispute that "organizational policy" is a proper element of article 7(2)(a). Their complaint instead is that a particular element of the crimes that are concededly within the Court's jurisdiction should be interpreted in a certain manner. As in *Gotovina*, this claim is not jurisdictional and should be rejected in a jurisdictional appeal.

42. Finally, on this point, the Prosecution notes that the Dissenting Opinion below recognized the *Gotovina* decision but urged that this case was different. The Dissent distinguished between the contextual elements (in this case, the requirement of "organizational policy") and the objective elements of the crimes against humanity charged (or *actus reus*). It then posited that contextual elements do not relate to the merits of the case and therefore the evidence of those elements can and should be examined when determining jurisdiction. According to the Dissent, the objective elements present "an issue of substance relating to the merits of a case which should not, in principle, be

[43] *Gotovina* Decision, para.16.
[44] *Gotovina* Decision, para.18. The appellant claimed that the element "persons taking no active part in the hostilities" in common Article 3 of the Geneva Conventions should be interpreted narrowly to require that such persons be shown to be in the hands of a party to the conflict. See paras.16-18.

prejudged when examining jurisdiction but instead considered with the merits".[45] The basis for that distinction is unclear and the Dissent provides no support. In the Prosecution's view, all elements – objective, subjective and contextual – bear equally on the existence of subject-matter jurisdiction: if the Prosecution charges someone with a crime that is not enumerated in the list contained in Article 7 (1) (a) to (k), then the person charged may validly challenge the subject-matter of the Court on that basis alone, regardless of whether the contextual element is present or not. Beyond essential jurisdictional requirements, however, the sufficiency of proof of contextual, objective, and subjective elements of the crimes *all* relate to the merits of the case and *all* must be established by the evidence adduced at trial; there is no apparent reason why consideration of the contextual elements before trial would be immune from "prejudgment".

(b) The Appellants' challenges are not facial challenges to the jurisdiction of the Court

43. What ultimately lies at the core of the Appellants' position, supported by the Dissenting Opinion, is an attempt to expand the scope of an inquiry into jurisdiction and turn it into an in-depth examination of the correctness and strength of the Prosecution's case. Indeed, the Dissent expressly recognizes this in its statement that the question in this case is whether the contextual elements of crimes against humanity had "been *established*".[46] As demonstrated above, however, a finding of subject matter jurisdiction does not depend on whether the evidence adduced by the Prosecution "established" the elements of a crime under the Statute.

44. Of course, persons charged before the Court may challenge the legal correctness of the underlying interpretation of the crimes charged by the

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[45] Dissenting Confirmation Decision, para.28.
[46] *Ibid*. (emphasis added).

Prosecution or attack the sufficiency of the evidence supporting the charges. But these determinations are entirely different from the ones that a Chamber of the Court is called to make when seized with a challenge to jurisdiction. Though the Appellants urge that "it is […] for the Judges […] to decide on jurisdiction, not the Prosecutor"[47] – a self-evident principle that nobody has questioned – this does not give a Chamber of the Court the authority to expand its inquiry at this stage to embrace other non-jurisdictional issues that the Judges must also decide. Similarly, the fact that a Pre-Trial Chamber has decided to join its determination on jurisdiction with the decision on confirmation of charges does not mean that the former loses its boundaries and is no longer governed by its strict requirements.

45. In sum, the Appellants' factual or statutory arguments did not properly challenge the jurisdiction of the Court. Consequently, their attempt to litigate the Chamber's findings in this direct appeal – permitted on the pretext that their challenge is to the jurisdiction of the Court over the alleged crimes – is unfounded.

(c) The Appellants' specific arguments

46. The Appellants claim that the Majority committed procedural errors in its approach to the jurisdictional claim. They argue that the Majority misinterpreted the substance of their challenge, which involved two separate and independent processes. According to the Appellants, the Chamber should have determined the correct legal definition of the element "organizational policy"; once that operation was concluded, it had to apply the ensuing legal test to the evidence brought by the Prosecution.[48]

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[47] Dissenting Opinion, para.32; Appeal Brief, para.28.
[48] Appeal Brief, paras.26-29.

47. These arguments on their face corroborate that the Appellants' challenge was not and is not jurisdictional. It is clear that their arguments instead concern statutory interpretation and the sufficiency of the evidence. As the cases cited above confirm, challenges to jurisdiction that raise issues of interpretation of the elements of the crimes charged and/or of sufficiency of evidence fall outside the proper scope of a jurisdictional argument and should be rejected on that basis alone.

48. The Appellants also do not demonstrate any procedural error in the Majority's resolution of the merits of their challenge. The Appellants' challenge would have required the Chamber to adopt a narrower definition of organization <u>and</u> to apply this definition to the facts established in this case. As the Majority noted, even if it adopted the dissenting Judge's definition of "organization" (as the Appellants requested), it would still have to proceed to the second limb of the challenge and assess the evidence in order to determine whether, as alleged, the Prosecution had provided sufficient evidence to establish that the alleged organization partook of State characteristics. This is confirmed by the Appellants' own admission that their position required an assessment of the evidence, since, according to them, "the correct identification of the legal test in abstracto […] serves little purpose" and "it is a logical and correct extension of the judicial function that when satisfying itself that it has subject matter jurisdiction, it examines the facts and evidence relied upon by the Prosecutor".[49] Since the challenge depended on the sufficiency of evidence to meet the statutory interpretation of the term organization, the Majority correctly concluded that the challenge was not jurisdictional in nature.[50] The Pre-Trial Chamber's refusal to engage in the assessments

[50] Confirmation Decision, para.33.

requested by the Appellants in deciding subject matter jurisdiction was thus correct.

49. The Prosecution finally notes that the Appellants fail to demonstrate prejudice arising from the purported procedural error. The Pre-Trial Chamber did not refuse to entertain the arguments underlying the Appellants' challenge. On the contrary, the Chamber expressly stated that the arguments advanced by the Appellants in their challenges would be considered in the part of the decision "addressing the merits of the case pursuant to article 61(7) of the Statute".[51] Having obtained the judicial examination on the merits, they cannot complain that the Chamber failed to hear and resolve their claims.

Second Ground of Appeal: the Majority erred in law by applying the wrong test in the determination of jurisdiction by adopting an incorrect interpretation of the term "organizational" within article 7(2)(a) of the Statute[52]

I - Preliminary Observations

(a) The admissibility of the Second Ground on Appeal

50. The Prosecution submits that this ground of appeal should be dismissed *in limine* since the issue raised in this ground is a matter of statutory interpretation that does not relate to the Court's jurisdiction. As noted above, in a challenge to the material jurisdiction, the Court will look at whether the crime charged is one that, as a matter of law, the Court may protect and punish. The meaning of the Statute, including the term "organizational policy",

[51] Confirmation Decision, para. 36.
[52] Appeal Brief, paras.31-77.

is a matter of statutory interpretation that does not bear on the jurisdictional issues. Regardless of whether this can be resolved at the pre-trial stage or is dependent on the proof and therefore must be relegated to the trial itself, it is not a jurisdictional question and therefore cannot be raised in a direct appeal. On these grounds alone, the Appellants' Second Ground should be dismissed.

51. In addition, there is a fundamental question pertaining to the admissibility of this ground of appeal which the Appeals Chamber should resolve before entering into the merits: there is no finding on the proper interpretation of the element "organization" in the impugned Decision. The Appellants challenge the definition of "organization" supposedly endorsed by the Majority in the Confirmation Decision. However, the Majority found that the Appellants' arguments on the application of "organization" in this case related to the merits and were not relevant to the determination of the material jurisdiction of the Court.[53] Accordingly, it dismissed *in limine* the Appellants' jurisdictional Challenges and made no finding on the Appellants' interpretation of "organization".[54]

52. Further, a closer look at the Appellants' submissions shows that they do not refer to the rulings on jurisdiction but to the paragraphs of the Confirmation Decision where the Majority assessed the merits of the parties' submissions, namely, the correct interpretation of "organization" and whether the Prosecution had provided sufficient evidence with respect to the contextual element of "organizational policy".[55] However, those findings do not relate to the issue of jurisdiction and cannot be subject to a direct appeal

[53] Confirmation Decision, paras.30, 34-35.
[54].This is a significant difference with the second case arising from the Kenya situation, where the Pre-Trial Chamber did make a finding on this particular legal element, and in doing so referred back to its prior interpretation (see ICC-01/09-01/11-373, para.34). The Prosecution acknowledges that the Appellants are entitled to appeal as a matter of right the *in limine* rejection, as they have done in Ground 1.
[55] Appeal Brief, paras.31-32 referring to Confirmation Decision, para.114 (on the interpretation of organization) and the fourth ground of appeal, on the purported insufficiency of the Prosecution's evidence.

under article 82(1)(a). Similarly, their Appeal Brief largely focuses on and challenges the Article 15 Decision, which is not and cannot be the object of this appeal. As the Appeals Chamber has recently stated, an appellant cannot raise errors from a prior ruling as a ground of appeal in challenging a different impugned decision.[56]

53. In sum, as the Majority made no ruling on the Appellants' interpretation of "organization" in its jurisdictional determination, this ground of appeal appears to have been improperly placed before the Appeals Chamber. Accordingly, and before entering into an analysis of the merits of this ground the Appeals Chamber should first elucidate whether the ground of appeal is permissible at all. If the Appeals Chamber concludes that it may properly entertain it, then the Prosecution submits that, as it will be demonstrated below, the Appellants fail to show any error invalidating the Confirmation Decision.

(b) The Majority did consider the Appellants' submissions when addressing the merits of the case

54. The Appellants further argue that the Majority failed to consider their arguments on the interpretation of the term "organization".[57] According to the Appellants, the Majority erred when it stated that the Appellants' arguments on the interpretation of "organization" had been addressed in the Article 15 Decision and reiterated its position on the interpretation of "organization" adopted in that decision.[58]

55. As noted above, the Majority found that the Appellants' arguments did in fact address the sufficiency of the evidence and statutory issues, not the

[56] ICC-01/05-01/08-2151-RedOA10, para.29
[57] Appeal Brief, para.32.
[58] Appeal Brief, para.32.

determination of the Court's jurisdiction. But the Majority did not overlook the arguments, instead it addressed them in those contexts.[59] Therefore, the Majority when assessing the existence of the contextual element of "organizational policy" considered at length the Appellants' factual and evidentiary submissions[60] but concluded that the there were substantial grounds to believe that the Mungiki qualified at the relevant time as an "organization" under article 7(2)(a).[61] Similarly, the Majority was not persuaded of the correctness of the Appellants' purported interpretation of the term "organization" under the Statute and endorsed the interpretation presented in the Article 15 Decision.[62] Though clearly disappointed with the Decision, the Appellants cannot rightly complain that their arguments were ignored.

II. The Appellants' Arguments

56. The Appellants challenge the "test formulated by the Majority [that] is satisfied by the existence of a group that 'has the capability to perform acts which infringe on basic human values'".[63]

57. The Appellants advocate for a concept of organization defined by the formal nature of the group and not by its capacity to commit crimes against humanity. According to the Appellants, for the purposes of article 7(2)(a) an organization should have a link to a State or bear State-like characteristics such as control over a territory.[64] Otherwise, the Appellants submit, "serial killers, motorcycle gangs, and small terrorist bands" will be tried before international

[59] Confirmation Decision, paras.36,114.
[60] Confirmation Decision, paras.186-223.
[61] Confirmation Decision, para.228.
[62] Confirmation Decision, paras.113-114.
[63] Appeal Brief, para.40.
[64] Appeal Brief, paras.41,54-55.

Courts.[65] They endorse the Dissent's interpretation of organization[66] and submit that because their alleged organization does not fall within that definition, the charges are outside the material jurisdiction of the Court.

58. The Appellants further argue that the Majority's interpretation of "organization" is not supported by leading academic authors[67] or the jurisprudence of the ad hoc tribunals,[68] and also that it is contrary to the intent of the drafters of the Statute.[69] According to the Appellants, the Majority's concept contravenes the principle of sovereignty by authorizing the ICC to prosecute criminal behavior that it is intended to be subject only to national courts.[70] They contend that the open-ended definition of organization with non-exhaustive and non-mandatory list of criteria contravenes as well the principle of legality and strict construction of penal statutes.[71]

59. These arguments are without merit. First, the Appellants misrepresent the Majority's decision, at the same time distorting its reasoning and conclusions. Second, the Appellants misrepresent and selectively quote the references to the relevant drafting history, scholarly works and jurisprudence in order to bolster their propositions. Third, contrary to the Appellants' contention, the Majority's concept of "organization" under the Statute fully respects the principle of legality and strict construction of penal statutes as well as the principle of complementarity.

60. The Appellants and the Dissenting Judge agree that the concept of crimes against humanity has evolved to capture non-State organizations and that nowadays some private groups may have the capacity to commit widespread

[65] Appeal Brief, para.41.
[66] Appeal Brief, paras.67-72.
[67] Appeal Brief, paras.43-55,73-75.
[68] Appeal Brief, paras.59-62.
[69] Appeal Brief, paras.38-39.
[70] Appeal Brief, paras.41,70-71,76..
[71] Appeal Brief, paras.33-36, 40-41.

or systematic attacks against the civilian population. Yet they also argue that non-State organizations must be "State-like" and possess characteristics of a State, such as control over territory. According to the Appellants, the Majority's interpretation will allow for the international prosecution of any criminal group. Therefore, they advocate for a formalistic approach where the capacity of the group is irrelevant and what matters is the label or structure of the organization.

61. Contrary to the Appellants' arguments, the Majority's position is supported by the drafting history of Article 7(2)(a) the jurisprudence of this Court and that of the *ad hoc* tribunals, and the majority of the academic authorities. Moreover, the Majority's interpretation of organization, when properly understood, does not capture any form of criminal activity that should be prosecuted at domestic level.

III. The Majority's notion of "Organization"

(a) The concept of "Organization" in the Article 15 Decision

62. The Appellants misrepresent the Majority's concept of organization developed in the 31 March 2010 Decision of the Pre-Trial Chamber ("Article 15 Decision")[72] and reiterated in the Summons and Confirmation Decisions. The Appellants improperly characterize the Majority's concept of organization as a "group that 'has the capability to perform acts which infringe on basic human values'"[73] as a concept that encompasses "gangs, serial killers and other forms or organized criminal activity" such as the London riots.[74] Without waiving the primary argument that this is, in effect, an issue of statutory interpretation and not a jurisdictional challenge, the Prosecution responds that the

[72] ICC-01/09-19-Corr.
[73] Appeal Brief, para.40.
[74] Appeal Brief, paras.41,67-69.

Appellants' characterization does not correctly reflect the Majority's Decision, nor does it correspond with the facts of this case.

63. In the Article 15 Decision, the Majority carefully analyzed the statutory requirement of "organizational policy". First, it found that a non-State entity may qualify as an "organization" for the purposes of article 7(2)(a); the Majority correctly noted that "had the drafters of the Statute intended to exclude non-State actors from the concept 'organization', they would have not included this term in article 7(2)(a) of the Statute".[75] The Appellants and the Dissenting Judge agree in this regard.[76]

64. Second, the Majority found that an organization under article 7(2)(a) must have the *capability* to "perform acts which infringe on basic human values".[77] Further, the Majority stated that organizations under the Statute may have the capacity to "elaborate and carry out a policy to commit an attack against a civilian population".[78] The Majority also noted that the determination of whether the alleged group has this capacity to commit crimes against humanity as part of its organizational policy must be made on a case-by-case basis. For this purpose, it sets out a list of guiding criteria.[79]

65. Contrary to the Appellants' submissions, the Majority did not devise an abstract "basic human values test" to expand the definition of organization within the terms of article 7(2)(a). The Majority instead narrowed the definition by requiring something greater than organizational form or structure alone. And it did so by highlighting the seriousness of the crimes against humanity, whose commission was the policy of the organization.[80]

[75] Article 15 Decision, para.92.
[76] Appeal Brief, para.41; Article 15 Dissenting Opinion, paras.51-53.
[77] Article 15 Decision, para.90.
[78] Article 15 Decision, para.92.
[79] Article 15 Decision, para.93.
[80] Article 15 Decision, para.92.

And linking this to the "policy" element, as articulated in article 7(2)(a) of the Statute, ensures that "acts of individuals alone, which are isolated, uncoordinated and haphazard be excluded".[81]

66. The Chamber, in rejecting the suggestion of two commentators that only State-like organizations may qualify as such for the purposes of article 7(2)(a),[82] was persuaded by academic commentators,[83] the International Law Commission[84] and two Chambers of this Court[85] that the *capacity* of the organization to conduct and implement a policy of widespread or systematic attacks against civilian population, rather than the formal structure of the group or its level of organization (i.e., whether it is a "State-like organization"), should be the defining criteria. Thus, its definition of organization and organizational policy is fully consistent with the approach of numerous scholars who, when assessing the conception and evolution of crimes against humanity, also referred to 'human values' or 'humanity', as well as those who additionally require capacity. On the first point, for example, Cassese stated that "[crimes against humanity] are particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more human beings".[86] Kittichaisaree further notes that "[a] crime against humanity is a crime against 'humaneness' that offends certain general principles of law and which becomes the concern of the international community. It has repercussions beyond international frontiers or exceeds in magnitude or savagery any limits tolerated by modern civilization."[87]

[81] Dixon and Hall in Triffterer. O. (ed), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck, Hart, Nomos, 2008), "Article 7", p.236, [91].
[82] Article 15 Decision, para. 90.
[83] Article 15 Decision, paras. 90, footnotes 84, 85, 89.
[84] Article 15 Decision, para. 91, 92.
[85] Article 15 Decision, paras. 84-85.
[86] A. Cassese, International Criminal Law, OUP Oxford; 1 edition (27 Feb 2003), p. 98.
[87] K. Kittichaisaree, "International Criminal Law", Oxford University Press, Oxford (12 July 2001), p. 85. Kittichaisaree further notes that « the expressions 'humanity', 'laws of humanity', and dictates of humanity' were used in, for example, the Preamble to the 1907 Hague Convention IV Respecting the Laws and

Additionally, he notes that "the expressions 'humanity', 'laws of humanity', and 'dictates of humanity' were used in, for example, the Preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land".[88] In sum, by referring to basic human values, the Majority emphasized the particular seriousness and gravity of these crimes.

67. In short, contrary to the position advanced in the Dissenting Opinion, the Majority's analysis does not mean or require a conclusion that any group that commits violent crimes automatically qualifies as an "organization" under the Statute.[89] Therefore, the Appellants' and Dissenting Judge's position - that the Majority's interpretation would expand the Court's jurisdiction to prosecute every serial killer or motorcycle gang - is incorrect. And given the Majority's requirement of criteria to establish both the organization's policy to commit widespread or systematic crimes and its capacity (including resources) to do so, the concerns of some scholars[90] that "organization" may "extend to a general invitation to include any form of organized criminal activity"[91] or "any group of individuals, brought together for whatever purpose [such as] a social club, a charitable organization, a motorcycle gang …" are also misplaced.

68. The Appellants also challenge the fact that the Majority did not provide a rigid definition of organization with mandatory requirements, and in particular that it did not require territorial control.[92] Instead, the Majority 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. The Majority provided further

Customs of War on Land. Paragraph 2 of the Preamble states that the contracting Parties desire to serve even in the case of war, 'the interests of humanity and ever-progressive needs of civilization' ».

[88] Ibid, p.85.

[89] Dissenting Opinion to Article 15 Decision, para.53 quoted in Dissenting Opinion Confirmation Decision, para.8.

[90] See the reference to Bassioni in para. 73 (fn.113) of the Appeal Brief.

[91] See the reference to Schabas in para.75 (fn.115) of the Appeal Brief.

[92] Appeal Brief, paras.63-64.

guidance by listing several non-exhaustive factors that *may* be considered in the assessment of the evidence.[93]

69. These factors are in fact similar to the "quasi-State abilities" or characteristics that could determine the existence of an organisation, as identified by the Dissenting Judge. The Dissent provided a non-exhaustive list of factors comprising, *inter alia*, responsible command and hierarchical structure, as well as capacity and means available to launch a large-scale attack on a civilian population.[94] Notably, the Dissent did not require territorial control. Rather, and contrary to the Appellants' main argument, the Dissent expressly stated that "control over the territory is *not* needed [although it] may serve as an additional factor to be considered."[95]

70. In other words, there is no single factor or series of factors that can define organization. A Chamber may correctly consider an entity's territorial control, its chain of responsibility, its horizontal decision-making structure, its reliance on an established hierarchy, or the fact that it relies on centralized (or even decentralized) cells of power. Though these are very different factors, and the groups that reflect them will necessarily look and operate differently, each is still within the definition of "organization" so long as its structure and/or territorial control gives it the capacity to implement a policy of widespread or systematic attacks against civilians.

71. The Majority further indicated that the policy itself may inform whether the entity is an organization under the Statute: if the group's primary purpose is

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[93] Article 15 Decision, para. 93.
[94] Article 15 Dissenting Opinion, para.51: "These characteristics 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."
[95] Article 15 Dissenting Opinion, fn.56.

the commission of crimes against the civilian population or if the group articulates, explicitly or implicitly, an intention to attack a civilian population, this will provide indicia of the organized nature of the entity. Further, by recognizing that a group may form part of a larger organization, or vice versa, the Chamber recognized that there are several conceivable structural models, including a network of allied groups with a common policy.

72. In sum, under the Statute individuals acting in a private capacity can commit crimes against humanity. It does not require that the organization include or reflect State characteristics. The Majority's Decision is a correct interpretation on the basis of the intentions of the drafters of the Statute, academic commentators, the ordinary meaning of the term "organization", the contextual interpretation of article 7, the object and purpose of the Statute, and the jurisprudence of this Court. Each of these points is addressed below.

(b) The Confirmation Decision

73. The Majority consistently applied the above-described concept of organization to the facts of the case in its Confirmation Decision. As a result, it found that the Mungiki qualified as an organization under the Statute after identifying the following factors: (i) the Mungiki was a hierarchically structured organization under the control of Maina Njenga;[96] (ii) there existed an effective system of ensuring compliance by the members with the rules and orders imposed by higher levels of command;[97] (iii) the Mungiki was a large organization and included a trained quasi-military wing;[98] and (iv) the Mungiki controlled and provided, in certain parts of Kenya, essential social services, including security.[99]

[96] Confirmation Decision, paras.186, 191-206.
[97] Ibid., paras.186, 208-213.
[98] Ibid., paras.186, 204-215.
[99] Ibid., paras.186, 217-219.

IV. The incorrectness of the Appellants' interpretation of "organization"

(a) State-like organizations or control over a territory

74. As noted previously, neither the Dissent[100] nor the Appellants[101] dispute that non-State actors can commit crimes against humanity.[102] However, both would require that non-State entities include or reflect State characteristics. [103] According to the Dissent, organizations that lack characteristics of a State necessarily cannot carry out a policy of widespread or systematic attacks against civilians, but instead must be, *ipso facto*, "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".[104] According to the Appellants, a connection to a State, such as territorial control, is required[105] because crimes against humanity have evolved to capture scenarios when there is reason to doubt that the State will prosecute precisely because the State or State-like organization with control over a territory is complicit in the crimes or controls the judicial apparatus.[106]

75. These arguments are flawed. As it is described below, the concept of crimes against humanity developed at Nuremberg in connection with the crime of aggression, has evolved precisely to capture non-State actors and private entities with the capacity to commit those crimes regardless of their links or connection with a State.[107] Likewise, and contrary to the Dissent, at no point

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[100] Article 15 Dissenting Opinion, paras.51-53.
[101] Appeal Brief, paras.41,67-69.
[102] See below fn. 145.
[103] Appeal Brief, paras.41,54-55; .Article 15 Dissenting Opinion , para.51 quoted in para.8 of Dissenting Opinion Confirmation Decision.
[104] Article 15 Dissenting Opinion , paras.51-52 quoted in para.8 of Dissenting Opinion Confirmation Decision.
[105] Appeal Brief, para.41.
[106] Appeal Brief, para.71.
[107] See below paras. 85 to 94.

did the Majority rule that "any kind of non-state actor may be qualified as an 'organization' within the meaning of article 7(2)(a)".[108]

76. Further, the Dissent and Appellants' arguments that non-organized individuals who perpetrate random criminal acts can fall under the jurisdiction of the Court are false. The Statute requires specific elements: the individuals should constitute an organization with a policy to commit widespread or systematic attacks against the civilian population. Thus, "violence-prone groups of persons formed on an ad hoc basis […] with fluctuating membership and without a structure […]"[109] will not, without more, be subject to prosecution for crimes against humanity before this Court. Nor is that what this case is about.

77. As reality shows, there is not a single and uniform type of non-State organization, and the notion of crimes against humanity has evolved to capture the crimes committed by private organizations, which may be as powerful as States but completely unrelated to them. Al Qaeda's September 11 attacks provide a clear example of this.[110] Thus, the defining criteria are not the group's connection to a State, whether they further a State-policy or whether the group controls a given territory. All those factors may be taken into account to determine the existence of an organization, but none of them are essential. The only necessary requirement is the group's capacity to implement a policy of widespread or systematic attacks against civilians.

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[108] Article 15 Dissenting Opinion , para.53 quoted in para.7 of Dissenting Opinion Confirmation Decision.
[109] A contrario, Article 15 Dissenting Opinion , para.52 quoted in para.7 of Dissenting Opinion Confirmation Decision.
[110] For a discussion on the September 11 attacks as crimes against humanity See H Duffy, *The 'War on Terror' and the Framework of International Law* (CUP, Cambridge 2005), pp. 77 et seq. See also the discussion at para. 99 below.

(b) The resources and capabilities of private entities

78. The Appellants and the Dissent agree in principle that private entities may have the capacity to commit crimes against humanity but nonetheless insist that their members cannot be charged. In particular, they note that private entities have the means and resources to carry out widespread or systematic attacks against civilians.[111] However, they argue that this requirement is not enough, that it will bring before this Court any type of criminal groups[112] and that only States or entities with a defined structure and control system can carry out a "policy" under the Statute.[113] This is a fallacious argument. First, the "policy" requirement would, on its face, exclude random acts and random actors, but it does not exclude – and indeed is paired in the Statute with -- non-State organizations. Second, if non-State actors in an organization have structure, control, means, and capacity, by definition they are capable of implementing a policy of widespread or systematic attacks against civilians within the terms of the Statute. Third, the Majority's interpretation of "organization" sets out safeguards to ensure that isolated criminal actions are not tried before the Court.

(c) State Sovereignty

79. The Appellants highlight the importance of State sovereignty. They argue that the Majority infringed the principle of complementarity with respect to Kenya by not requiring a link between the organization and a State or a State-like organization.[114]

[111] Appeal Brief, para.71; Article 15 Dissenting Opinion , para.66.
[112] Appeal Brief, para.41; Dissenting Opinion Article 15 Decision, paras.51-52 quoted in para.7 of Dissenting Opinion Confirmation Decision.
[113] Appeal Brief, para.41.
[114] Appeal Brief, para.76.

80. This argument is flawed. The Majority's interpretation of organization does not involve a discretionary and unjustified intrusion into States' jurisdiction. As with all crimes and all offenders before this Court, the national authorities retain the primary responsibility, under the doctrine of complementarity, to investigate and prosecute the same persons for the same conduct as that which is before the ICC. In that regard, the Appeals Chamber found that Kenya is not investigating or prosecuting the same cases as that before the Court and that therefore, the case against Kenyatta and Muthaura is admissible.[115]

81. Further, the Appellants appear 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.[116] There is, however, no support for this position. 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 under international law that might otherwise go unpunished domestically.[117] The significant factor is thus the nature of the crime, not the identity or official position of the offender.

V. The Language and Purpose of the Statutory Provision

82. 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 corporation) formed for a common purpose". In

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[115] ICC-01/09-02/11-274OA.
[116] Appeal Brief, para.70.
[117] See H Duffy, *The 'War on Terror' and the Framework of International Law* (CUP, Cambridge 2005), p. 39.

other words, the term requires commonality of purpose but does not require specific State-like attributes.

83. 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."[118] When viewed in light of its context, object, and purpose, article 7 must be read as the Majority construed it.

84. 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.[119] The evil at which article 7 is primarily directed is not a State or quasi-State policy, it is attacks against the civilian population. And the purpose of the provision is to protect *all* civilian populations against massive victimization by organized groups, not to narrowly protect only those civilian populations who are victimized specifically by States or state-like entities.

[118] ICC-01/04-168OA3, para.33 ; ICC-01/04-01/07-522OA3, para.39; ICC-01/04-01/07-573OA6, para.5; ICC-01/04-01/06-1432OA9OA10, para.55; ICC-01/04-01/06-1486OA13, para. 40.

[119] 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.

VI. Evolution of the notion of Crimes against Humanity and the Drafting History

(a) Drafting History

85. Article 18 of the ILC's 1996 Draft Code of Crimes expressly provided that crimes against humanity could be committed by "a Government or by any organization or group". It intended "organization" simply to mean an entity comprised of more than one person. The Commentary to article 18 explains 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."[120] In sum, the Commentary made clear the goal that the Statute would apply to, and the Court would have jurisdiction over, private groups or criminal gangs who commit systematic or mass human rights violations.[121]

86. The concept of "organization" reflected in the 1996 Draft Code as a means of including crimes by gangs or other such groups, while 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 placed 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

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[120] 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 [...]*". See Article 15 Decision, fn.78.

[121] 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.

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."[122] The organizational requirement, together with the need for the attack to be "directed against any civilian population" thorough a "course of conduct", were added to capture both a significant degree of scale and the element of planning and direction.[123] Therefore, as the Majority correctly found, "had the drafters of the Statute intended to exclude non-State actors from the term 'organisation', they would not have included this term in article 7(2)(a) of the Statute".[124]

(b) ICC Jurisprudence

87. By focusing on the capacity of the organization to commit crimes against humanity,[125] the Majority accepted the reasoning adopted in the *Katanga & Ngudjolo* and *Bemba* cases, that a private entity not linked to a State is capable of committing an attack against a civilian population and that the formal nature of a group or its level of organization are not the defining criteria. As the Majority noted, those Chambers focused on the substance or capacity of the non-State actors to commit the most serious crimes against mankind and stated that "a policy may be made either by groups of persons who govern a

[122] 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.
[123] 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. 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.
[124] Article 15 Decision, para.92.
[125] Article 15 Decision, para. 90.

specific territory or *by any organisation with the capability to commit a widespread or systematic attack against a civilian population*".[126]

88. The Appellants argue that these decisions are irrelevant because in those cases the alleged crimes were committed in the context of an armed conflict and not in times of peace.[127] They further submit that those Chambers relied on a different test than the Majority's "capacity to infringe basic human values", namely, that an "organization" may have the capacity to commit widespread or systematic attacks against civilians.[128]

89. The Appellants' arguments are incorrect. First, the Chambers in the *Katanga & Ngudjolo* and *Bemba* cases defined the concept of "organizational policy" under the Statute in general, and without reference to the facts of the cases before them. Thus, the fact that the crimes in those cases were committed in the midst of an armed conflict or that the groups controlled by those accused were military-type or had territorial control is not relevant for the purposes of the concept of organization. Second, all Pre-Trial Chambers (in *Katanga, Bemba* and *Kenya as well in Cote d'Ivoire*[129]) provided the same definition of "organization": they focused on the capacity of the organizations and not on their forms. The Appellants are trying to draw an artificial and non-existent distinction between the cases. If the Article 15 Decision is read in its full context, it is obvious that the Majority and Pre-Trial Chamber I in the *Katanga & Ngudjolo* and *Bemba* cases are referring to the same test: an organization will meet the requirements of article 7(2)(a) if it has the capacity to implement a policy of widespread or systematic attacks against civilians.

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[126] ICC-01/04-01/07-717, para. 396; see also ICC-01/05-01/08-424, para. 81 (emphasis added).
[127] Appeal Brief, para.58.
[128] Appeal Brief, para.56.
[129] ICC-02/11-14-Corr, para.46.

90. The need to avoid narrow or rigid definitions in the context of the type of crimes to be dealt with by the Court is also highlighted 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.[130] Declining to rigidly interpret the gravity threshold for admissibility in article 17(1)(d), this Chamber 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".[131] 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".[132] This reasoning, the Prosecutor submits, is equally applicable to the element of "organizational policy" for crimes against humanity.

(c) Ad hoc Tribunals

91. The Appellants argue that the jurisprudence of the ad hoc tribunals is not relevant because the ICTY and ICTR statutes do not require a State or organizational policy. In addition, the existence of armed conflicts provided a justification for an intervention and intrusion into State sovereignty in those countries. Further, the Appellants argue that in the cases before those tribunals the perpetrators belonged to State-like entities with territorial control.[133]

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[130] ICC-01/04-169.
[131]Ibid., para.76.
[132] *Ibid*., para.77.
[133] Appeal Brief, paras.59-62.

92. The Appellants are correct in noting that the ICTY and ICTR Statutes do not impose a policy requirement. The Majority acknowledged this fact.[134] In addition, the facts of those cases differ from the Kenya cases, as crimes against humanity were mostly committed in the context of an armed conflict by government forces or paramilitary groups acting on behalf of States. That said, the Tribunals' emerging jurisprudence on "policy" and even on "organized armed groups" for the purposes of an armed conflict, although not determinative, provides some guidance. For instance, early ICTY jurisprudence did require a policy element and acknowledged for the possibility that the facts would establish that non-State entities implemented such policy.[135] The Majority's reference to the ICTY case law in the Article 15 Decision should be read in this limited way.[136] For example, when interpreting the phrase "directed against any civilian population", the Trial Chamber in the *Tadic* case confirmed that "there must be some form of a *governmental, organizational or group policy* to commit these acts".[137] Further, in *Blaskic,* the Trial Chamber indicated that individuals "with *de facto* power or organized in criminal gangs are just as capable as State leaders of implementing a large-scale policy of terror and committing mass acts of violence".[138] Contrary to the Appellants' submissions, these criteria are not limited to political authorities

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[134] Article 15 Decision, para.86. Although not expressly stated, the Majority is mindful of the evolution of the policy requirement at the ICTY jurisprudence. See fn.79.

[135] Subsequently, the ICTY Appeals Chamber in the *Kunarac* case- in a footnote and without addressing or acknowledging most of the contrary authorities – took a different approach and concluded that "nothing in the Statute or in customary international law […] required proof of the existence of a plan or policy to commit these crimes" and concluded that there was no need to demonstrate this element before the ICTY courts. *Prosecutor v Kunarac*, Appeals Judgement, 12 June 2002, para.98. The Majority acknowledged this fact in its Article 15 Decision, fn.79.

[136] Article 15 Decision, fns.77,79-80 (when describing policy) and fns.81,85 (when addressing organizational policy).

[137] *Prosecutor v. Tadic*, Opinion and Judgement, No.IT-94-1-T, 7 May 1997, para.644, emphasis added, cited in Robinson D., *Defining 'Crimes against Humanity' at the Rome Conference*, 93 AM. Journal IN'L L., p.49. Robinson D., *Defining 'Crimes against Humanity' at the Rome Conference*, 93 AM. Journal IN'L L., 49, referring to, inter alia, Virginia Morris and Michael Scharf in the Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia. See also Cryer R., et al., 'Crimes against Humanity' in *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd Ed), p.238.

[138] *Prosecutor v. Blaskic*, Trial Judgement, IT-95-14-T, 3 March 2000, para.205.

or military hierarchies with control over a territory; rather, they are equally applicable to private entities without territorial control.[139] In addition, the Chambers issued those rulings independently of the facts of the cases before them, in the context of explaining crimes against humanity and its evolution.

93. Similarly, the Majority's notion of "organization" aligns with recent ICTY jurisprudence on "organized armed groups" for the purposes of an armed conflict. The Dissent acknowledged the similarity between the two concepts.[140] In those cases, Chambers found that territorial control is not a mandatory requirement. For example, in *Boskoski*, the Trial Chamber found that the NLA (National Liberation Army, an Albanian ethnic group operating in Macedonia) was an "organized armed group or force" engaged in an internal armed conflict with the Macedonian police and army. Notably, the Chamber relied on the level of military success achieved by the NLA, its ability to speak with one voice and to recruit and arm its members.[141] The Chamber also found that warring parties in an armed conflict do not necessarily need to be as organized as the armed forces of a State, nor do they need to exercise control over a territory.[142] Like the Majority, the *Boskoski* Trial Chamber set out an indicative list of factors that Trial Chambers have taken into account when assessing the organization of an armed ground, such as, *inter alia*, command structure, the capacity of the group to carry out operations in an organized manner, and

[139] *A contrario*, Appeal Brief, para.59. The Appellants quote para.654 of *Tadic* Trial Judgement to argue that Tadic requires the entity to have territorial control. This is not correct. The Trial Chamber indicated that "the law in relation to crimes against humanity has developed to take into account forces, which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory" (emphasis added). The latter requirement does not entail territorial control and the Mungiki were able to move freely in order to commit crimes against humanity.
[140] Article 15 Dissenting Opinion, fn.55: "[…] Hence, even though an 'organization' may not show a military structure, it should nevertheless have a structure and capacity similar to that of an 'organized armed group'".
[141] *Prosecutor v Boskoski*, IT-04-82-T, 10 July 2008, Trial Judgement, para.290.
[142] *Ibid*., para.197.

factors related to the level of logistics, to the level of discipline and the ability to recruit new members.[143]

94. The *Boskoski* Chamber also rejected the defence argument that the "terrorist" nature of the NLA activities militated against the NLA being considered as a party to the armed conflict. Refusing to reach this categorical conclusion, the Chamber noted that this instead was a factual determination to be made on a case-by-case basis as some terrorist attacks "actually involve a high level of planning and a coordinated command structure for their implementation."[144] This reasoning, endorsed by the ICTY Appeals Chamber, diminishes the need to avoid rigid and over-simplistic formulas for the interpretation of international cases.

VII. Scholarly Interpretations

95. All scholars agree that "organization" includes non-State actors.[145] Similarly, most of them note that a linkage to State action is not required and that the term "organization" was intended to mean that crimes within the jurisdiction of this Court must be committed as part of multiple acts by persons acting collectively, even if they did not necessarily control or have authority over a territory.[146] *Kittichaisaree*, for example, noted the multiple alternative criteria:

[143] *Ibid*., paras.199-203.
[144] *Ibid*., para.204.
[145] "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 'organization': there is nothing in the drafting history to require all the extra requirements posed by the Appellants; 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. Di Filippo, "*Terrorists Crimes and International Co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes*", European Journal of International Law Vol. 19 no. 3, EJIL 2008, p. 567; Y. Jurovic, *Réflexitions sur la spécificité du crime contre l'humanité*, p. 415.
[146] 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.

that "the law regarding crimes against humanity has developed to the extent that [these] crimes … 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".[147]

96. Similarly, scholars indicate that the defining criterion is the capacity of these groups to implement a policy of widespread or systematic attacks against civilian population. For instance, *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.[148] Likewise, *Ratner* and *Abrams* acknowledge the existence of "[non-state] entities … as powerful as state actors [that] would commit such offences" and further note that the prosecution as "crimes against humanity [of] abuses committed by an actor as part of a policy aimed at private gain alone, such as mass killings by a member of an organized crime syndicate or corporation" would be supported by the ICC Statute "based on the teleological view that such private entities are capable of bringing about significant human suffering".[149]

97. Addressing the weight of scholarly authority, the Appellants submit that the Majority only relied on Di Filippo and that the Majority's reference to the remaining scholars was misplaced.[150] This claim is erroneous: the Appellants

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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.

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

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

[149] Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law*, p. 69.

[150] Appeal Brief, paras. 43-45; 50-53.

misrepresent and selectively quote extracts of most of the authorities to support their position.

Di Filippo

98. The Appellants argue that Di Filippo acknowledged that his opinion "that 'core terrorism' *should* be included within crimes against humanity […] does not reflect the intention of the drafters of the Statute and makes the point that it 'looks innovative'".[151]

99. A complete reading of Di Filippo's article shows that the Appellants took his words out of context. Di Filippo noted the diverse scholarly opinions on the interpretation of "organization" for the purposes of article 7(2)(a) and sided with the interpretation that the article includes "private groups, given the latter's acquired capacity to infringe basic human values".[152] He also made the point that "by excluding private criminal organizations from the possible authors of crimes against humanity we could reach the conclusion that inhuman terrorism sponsored by any state fits into the category […], while Al-Qaida actions do not […] This sounds not only illogical, but even contrary to the current position of the international community."[153] He then went further and noted that "the characteristics of core terrorism seem satisfied in as much as the terrorizing features distinguishing these types of conduct […] are owed, inter alia to the presence of an organization which is able to repeat similar acts targeting civilians".[154]

100. Di Filippo at no point "prescribed" what the term "organization" should be, nor did he say that his views are not shared by the drafters of the Statute. Rather, he explained what an "organization" under the Statute was and

[151] Appeal Brief, para.45.
[152] Di Filippo, p.567.
[153] Di Filippo, p.568.
[154] Di Filippo, p.568.

provided support for the proposition that organization includes private entities. The Majority relied on Di Filippo with respect to this latter conclusion - and not for his views on terrorism, which fall outside the scope of the Majority's analysis.

Ratner and Abrams

101. The Appellants argue that "Ratner['s] 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 [...] is a victim-focused interpretation of what the law '*could be*', which he expressly acknowledges does not find any support in the current practice at the ICTY, ICTR, SCSL or ICC".[155]

102. However, as with Di Filippo, Ratner did not opine on what the law should be, he described what the law is. Ratner clearly stated that the Statute and case law of the ICC, the ad hoc tribunals, and domestic jurisdictions "suggest that a linkage to state action – in the sense of the policy of the recognized government of a state – is now outdated. Non-state entities may perpetrate an attack on civilian populations".[156] He clearly explained that "[t]he ICC Statute ... refers in Article 7 to 'a state or organizational policy', a term broad enough to include private entities."[157] Ratner also observed that "in the cases before the ad hoc tribunals those committing the offences are typically part of an organization seeking political control of or influence over a territory, whether as a de facto government, armed insurrection or otherwise".[158] However, this last observation was not a statement that the law required those

[155] Appeal Brief, para.52.
[156] Ratner, Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy, (3rd Ed., Oxford: OUP 2009), p. 69.
[157] *Ibid*., p.68.
[158] *Ibid*., p.69.

organizational attributes; it was instead an acknowledgement of the facts in the cases before those tribunals.

Burns

103. The Appellants similarly mischaracterized the Majority's reference to Burns' article and argue that Burns does not provide any support for the Majority's purported "basic human values test".[159] However, the Majority relied on Burns to support its proposition that "private criminal organizations" are captured by article 7(2)(a) and therefore have the capacity to commit crimes against humanity, a proposition endorsed by Burns.[160]

Robinson

104. Again contrary to the Appellants' submissions, Robinson supports the Majority's interpretation that "organization" also includes private entities that are not affiliated to a State. The Appellants nonetheless argue that "Robinson does not … deal with the question of interpretation in any detail. He refers briefly to the fact that the drafters of article 7(2)(a) 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'. 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."[161]

105. As with Burns, the Majority relied on Robinson to support its proposition that "private criminal organizations" fall within the scope of article 7(2)(a). As Robinson noted, "[t]oday, however, the dominant view among commentators

[159] Appeal Brief, para.50.
[160] Article 15 Decision, para.90.
[161] Appeal Brief, para.51.

is that customary international law has evolved in such a way that reference only to a state policy would be too restrictive…".[162]

106. Further, and as Robinson has written, the State-like approach to organizational policy as adopted in the Dissenting Opinion "focuses on betrayals of the responsibility to protect, i.e. violence directed by structures with state-like power or authority. One could argue that this imports too much of a state-orientation from human rights law, whereas international criminal law has developed separately, encompassing conduct orchestrated by states or non-state actors, and that we must recognize the massive harms that non-state actors can inflict."[163] He continued: "where an organization collectively orchestrates or endorses harm against a civilian population, and the harm reaches the level of 'widespread' or 'systematic' violence, then it is no longer 'normal' crime but something more sinister, coordinated and dangerous, and warrants international concern". Finally, according to Robinson, "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."[164]

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[162] Robinson, Defining "Crimes Against Humanity" at the Rome Conference, The American Journal of International Law 43, 50 (1999).
[163] Darryl Robinson, *Essence of Crimes against Humanity Raised by Challenges at ICC*, EJIL Analysis (27 September 2011); available at http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/#more-3782
[164] *Ibid.*

Dixon and Hall

107. The Appellants argue that Dixon and Hall, cited by the Majority, do not support the 'basic human values test' and require territorial control.[165] This is not correct. As with Burns and Robinson, the Majority relied on these commentators for the proposition that private entities can constitute "organizations" capable of committing crimes against humanity under the Statute.[166] This reliance is correct: the authors clearly state that private entities may commit crimes against humanity, while not suggesting that these entities can only be chargeable if they have control over a territory: "[organizational policy] in the article [article 7(2)(a)] reflects the contemporary position that individuals not linked to a state or its authorities can commit crimes under international law."[167]

Kress

108. The Appellants quote *Kress*, who wrote following the Article 15 Decision, to argue that the Decision is "internally inconsistent" because it simultaneously refers to both "a definition of the concept of organization" and "a 'case-by-case' approach [which] is given preference over a 'rigid definition'". The Prosecution however submits that Kress' reading of the Article 15 Decision is inaccurate and the Majority's interpretation of "organization" is not internally inconsistent. To the contrary, a comprehensive reading of the Article 15 Decision indicates the progressive and logical steps undertaken by the Majority in its reasoning. First, the Chamber addressed the concept of "organizational policy" in general and then noted that private

[165] Appeal Brief, para.53.
[166] Article 15 Decision, para.91, fn.85.
[167] Dixon and Hall in Triffterer.O. (ed), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck, Hart, Nomos, 2008), "Article 7", pp.236-237, [92].

entities are 'organizations' under the Statute.[168] Second, the Majority explained that the formal nature of the group should not be the main defining criterion; on the contrary what matters is the capacity of the organization to commit the most serious crimes -- namely, the organization must have the capacity to "elaborate and carry out a policy to commit an attack against a civilian population".[169] Third, and last, the Majority proposed a non-exhaustive list of factors that may be considered to determine whether the group qualifies as an organisation.[170]

109. The diverse nature of these factors reflects and responds to the various and diverse forms that these non-State organizations may take. Interestingly, the Prosecution notes that these factors are similar to the non-exhaustive list of criteria set out by the Dissenting Judge as "quasi-State abilities" or characteristics that could determine the existence of an "organisation" under the Statute.[171] Moreover, referring to guiding indicators to assess whether the facts of the case satisfy the legal requirements is a common practice in international criminal law.[172]

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[168] Article 15 Decision, paras.91-92.
[169] *Ibid*., paras.90,92.
[170] *Ibid*., para.93.
[171] Article 15 Dissenting Opinion, para.51: "These characteristics 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."
[172] For example, since *Tadic* Trial Judgement, the existence of an armed conflict has been determined on a case-by-case basis in light of the particular evidence available. *Tadic* submitted that armed conflict consists of two criteria (i) the intensity of the conflict; and (ii) the organization to the parties to the conflict (see *Tadic* Trial Judgement, para.562, which has been subsequently followed in *Celebici* Trial Judgement, para.184, *Limaj* Trial Judgement, para.84, *Mrksic* Trial Judgement, para.407, *Boskoski* trial Judgement, para.407). In order to determine that the first element is satisfied, the Chambers have taken into account various indicators, *inter alia*, the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilization and the distribution of weapons among both parties to the conflict, whether the conflict has attracted the attention of the UN Security Council (see *Boskoski* Trial Judgement, para.177 and all the authorities cited therein). Similarly, to determine whether a group constitutes an "organization", the Chambers have required "some degree of organization" (*Boskoski* Trial Judgement, paras.196-197 referring to *Limaj* Trial Judgement) or "[parties] sufficiently organized to confront each other with military means" (*Boskoski* Trial Judgement, para.198 referring to *Haradinaj* Trial Judgement), and then they have sorted to

VIII. The Majority's interpretation of "organization" is not contrary to the principle of legality and the requirement of strict construction of penal statutes.

110. The Appellants argue that the Chamber should have indicated minimum criteria, and that the non-exhaustive list of factors provided are too broad and do not provide any "bright light guidance", thus encouraging legal indeterminacy.[173]

111. The Appellants' arguments are without merit. The Majority's definition is not open-ended; it is flexible, albeit with expressed safeguards. The Majority identified the core essential requirement of an organization under the Statute, namely, its capacity to implement a policy of widespread or systematic attacks against civilians. Then, the Majority assessed and concluded that the crimes alleged by the Prosecution were committed in furtherance of this policy. Thus, whether the particular charged persons can be convicted, will depend on the facts of the case. This is not a circular definition, it instead assumes correctly that the attributes of organizational capacity can be proven by its conduct. Similarly, the common plan (in cases of co-perpetration) can be proven without a formal document, by inferring their existence from the facts of the case, such as through the subsequent concerted action of the co-perpetrators.[174]

112. In addition, the Majority rightly held that the determination of whether a group is an organization under the Statute will be made on a case-by-case basis depending on the facts of the case. Consistent with the jurisprudence of other tribunals,[175] the Majority provided a non-exhaustive list of factors that will inform the organization's capacity to commit the offences under article 7(1). Contrary to the Appellants' submissions, these factors do not expand the

non-exhaustive indicative factors to determine whether this requirement is met. See *Boskoski* Trial Judgement, paras.198-203.

[173] Appeal Brief, paras.63-64.

[174] ICC-01/04-01/06-803, para.345; ICC-01/04-01/07-717, para.523.

[175] See above fn. 172 and below fn. 177 .

concept of organization under the Statute. The Majority did not create new elements of crimes or amended existing ones. Rather, the factors enunciated by the Majority are indicators to assist in determining whether the facts of the case satisfy the legal requirement of an organizational policy. Developing auxiliary tools of this kind is perfectly appropriate and fully compatible with the *nullum crime* principle.

113. Further, resorting to non-exhaustive and guiding lists of factors is a perfectly acceptable and advisable practice to ensure that the provisions in the Statute adequately address different factual scenarios. For example, the ad hoc tribunals have consistently listed a set of indicators to determine the existence of an armed conflict[176] or command responsibility.[177] Similarly, the Pre-Trial Chamber, in the Article 15 Decision, also identified a non-exhaustive list of factors relevant in determining the existence of a policy.[178] This has not been challenged by the Appellant.

114. In sum, and contrary to the Appellants' contention,[179] the position of the Majority respects the principle of legality and strict construction of penal statutes enshrined, *inter alia*, in article 22(2).[180] 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 also true to the purpose that underlines article 7 of protecting civilian populations from crimes by organized criminal groups (regardless of state or quasi-state

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[176] See above fn 172..
[177] *Hadzihasanovic* Trial Chamber has referred to previous jurisprudence and stated that "the indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused has the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators". Then it listed a non-exhaustive list of element "which make possible to establish whether there is effective control". (Trial Judgement, para.82-3)
[178] Article 15 Decision, paras.87-88.
[179] Appeal Brief, paras.35-36, 63-64.
[180] Broomhall in Triffterer, "Article 22", p. 724 [37].

affiliation) who have the capacity to commit the serious crimes enumerated in article 7.[181]

Third Ground of Appeal: the Majority erred in fact by changing the Prosecution's presentation of the facts by finding that the Mungiki alone represented the organization; and by failing to inform the Suspects of this fundamental re-characterization of the case[182]

115. The Appellants identify two alleged errors within the third ground of appeal: first, they argue that the Majority erred in fact by not dismissing the case after having determined that the Mungiki alone, and without the support of the Kenya Police, constituted an organization, and second, the Majority erred in law by failing to inform the suspects of this "re-characterization" of the case. [183]

116. The Prosecution firstly submits that none of the arguments contained in this ground of appeal raise proper jurisdictional issues. Rather, they address alleged deficiencies in the confirmation proceedings and disagreements with the Majority's assessment of the evidence in the Confirmation Decision. Since these matters fall squarely outside the Pre-Trial Chamber's determination on jurisdiction, it follows that the Appellants enjoy no right of direct appeal in relation to them. Accordingly, this ground of appeal should be dismissed on this basis alone.[184]

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[181] 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.
[182] Appeal Brief, paras.78-123.
[183] Appeal Brief, paras.78, 84.
[184] The Prosecution is aware of the fact that the Appeals Chamber has previously accepted that procedural issues may be raised within the context of an appeal on admissibility (ICC-02/04-01/05-408OA3, paras.47,51). However, in that case the procedural matters raised on appeal had arisen in the specific admissibility proceedings. In this ground of appeal, the Appellants are not attacking the procedure followed by the Pre-Trial Chamber to determine jurisdiction, but the wider – and distinguishable - procedure followed

117. Should the Appeals Chamber nonetheless decide to entertain the arguments brought by the Appellants, the Prosecution submits that those arguments are without merit. The Majority's determination that the Mungiki constituted an "organization" under article 7(2)(a) is entirely supportable. Spanning 12 pages of the Decision, the Majority's analysis is comprehensive and methodical. Moreover, its findings are consistent with the Prosecution's theory of the case and are grounded in highly probative evidence provided by four Mungiki insiders with personal knowledge of the organization's characteristics. The Prosecution will develop these arguments below.

<u>I. Alleged error in not dismissing the case having concluded that the Mungiki alone constituted an organization under Article 7(2)(a) as the Mungiki was not, without external support, capable of committing widespread or systematic attacks against a civilian population</u>[185]

118. There is no merit to the Appellants' argument that the Majority's findings regarding the Kenya Police's participation in the attacks "should . . . have been dispositive of the issue as to whether the definition of organization was met" in relation to the Mungiki.[186] The argument's flaw is in its premise: that because the Mungiki and the Kenya Police were alleged to have acted together during the PEV, an insufficiency of evidence in relation to the Police's participation in the attacks necessarily leads to a failure of proof in relation to the Mungiki being an "organization" under the Statute.[187] This is logically and legally incorrect.

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by the Chamber for the purposes of the confirmation of the charges. The fact that the litigation on jurisdiction took place within the context of the confirmation proceedings does not mean that procedural matters <u>not related</u> to jurisdiction may be brought before the Appeals Chamber in a direct appeal pursuant to article 82 (1) (a).

[185] *Ibid*., paras 97-108.

[186] *Ibid*., para.104.

[187] *Ibid*., para.104.

119. The inquiry under article 7(2)(a) is not whether the group under consideration carried out the relevant attack(s) on its own, as opposed to being assisted by others, or whether the group needs to dispose of its own resources and not resort to external assistance. The question is whether the group had the *capacity* to carry out a widespread or systematic attack upon a civilian population.[188] For this reason, the benefit the Mungiki derived from the Kenya Police's conduct in relation to the Nakuru and Naivasha attacks was but one factor for the Pre-Trial Chamber to consider when determining whether the Mungiki possessed the capacity to carry out a widespread or systematic attack.

120. Thus, the Majority's finding that there was insufficient evidence in relation to the Police's involvement was not, as the Appellants argue, "dispositive of the issue as to whether the definition of organization was met" in relation to the Mungiki.[189] Having determined that there was insufficient evidence to support a finding of Police involvement in the attacks, it was entirely appropriate for the Majority to consider whether the evidence demonstrated that the second limb of the *ad hoc* organization – the Mungiki – satisfied the criteria for an "organization" on its own. It is no different from a situation where multiple individuals are charged with committing a crime together as a group and where insufficient evidence is presented with respect to one. In such a scenario, it is plainly permissible for a finder of fact to consider whether the evidence regarding the remaining accused supports the charges against them to the requisite degree. The same holds true in relation to organizations that are alleged to have operated together to carry out coordinated criminal activities.

[188] Article 15 Decision, paras.90,92; Summons Decision, para.21; ICC-01/04-01/07-717, para.396; ICC-01/05-01/08-424, para 81. The authorities cited by the Appellant also support this position.
[189] Appeal Brief, para.104.

121. For these reasons, the Majority was correct – despite its findings in relation to the Kenya Police's involvement in the attacks – to consider whether the Mungiki on its own possessed the requisite characteristics to be considered an "organization" under article 7(2)(a). And as explained in detail below in addressing ground four, the Majority's evidentiary findings on this point were supported by the evidence and were well within its discretion as a finder of fact.

II. Alleged error in failing to inform the suspects of the "fundamental re-characterization of the case and affording them an opportunity to respond".[190]

122. The Appellants argue that the Majority engaged in a "fundamental shift" or "wholesale re-characterization" of the Prosecution's allegations regarding "organizational policy" when it found that the Mungiki alone was an organization, and its head was Maina Njenga.[191] According to the Appellants, this was not the Prosecution's case and the Chamber improperly re-characterized the facts without giving them the opportunity to respond.

123. This is wrong. The Majority's findings are consistent with the Prosecution's allegations regarding the Mungiki's ability to carry out a widespread or systematic attack against civilian population. Nor were the Appellants unfairly taken by surprise; to the contrary, they responded directly to the Prosecution's allegations regarding the Mungiki's organizational characteristics.

124. The Appellants' arguments are therefore premised on, first, a misunderstanding of the role of the Pre-Trial Chamber at the confirmation hearing, and second, a misrepresentation of the Prosecution's submissions as

[190] Appeal Brief, paras.109-123.
[191] Appeal Brief, para.115.

articulated in the Document Containing the Charges ("DCC") and at the confirmation hearing.

(a)The role of the Pre-Trial Chamber at the Confirmation Hearing

125. The Appellants confuse their rights under article 67(1)(a) and (b) – to be informed of the charges and to have adequate time and resources to prepare their case - with the role of the Pre-Trial Chamber at the confirmation hearing. At this stage, the Pre-Trial Chamber will determine what charges can proceed to be litigated at trial, based on the Prosecution's submissions in the DDC and at the confirmation hearing.[192] Thus, the Pre-Trial Chamber – in exercise of its duties under article 61(7) – may decide not to confirm certain charges. This is the purpose of any confirmation hearing. For instance, the Pre-Trial Chambers in the *Katanga* and *Bemba* confirmation decisions did not confirm some charges, which limited the scope of the trial.[193]

126. This is unrelated to the authority of the judges to modify the legal characterization of the facts under regulation 55. Thus, the Appellants' references to *Lubanga*, *Bemba*, *Kupreskic* and ECHR jurisprudence are misplaced. [194] Those cases relied upon by the Appellants indicate only that if a Chamber

[192] At confirmation stage the Pre-Trial Chamber will fix and delimitate the factual and legal scope of the case for the purposes of trial. See Confirmation Decision, para.56.
[193] *A contrario* Appeal Brief Appeal Brief, para.110; ICC-01/04-01/07-717, para 465, p.211, 212; ICC-01/05-01/08-424, paras 209, 212, 291.
[194] Therefore, the authorities cited in paragraphs 117-122 of the Appeal Brief are inapposite. *See* ICC-01/04-01/06-2205OA15OA16, para. 88 (reversing Trial Chamber's decision to give notice that facts may be subject to legal re-characterization under Regulation 55 "based on facts and circumstances . . . not contained in the charges and any amendments thereto") (emphasis added); ICC-01/05-01/08-803, paras 22-23 (stating that article 61(7)(c)(ii) prevents a person being committed to trial "for crimes which would be materially different from those set out in the Document Containing the Charges")(quoting ICC-01/04-01/06-803-tEN, para.203) (emphasis added); ICTY, *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, paras 720-48 (opining, in dicta, on the circumstances under which an accused may be convicted for crimes not charged in the indictment); ECHR, *Pélissier and Sassi v. France*, Application no. 25444/94, Judgment, 25 March 1999, paras 62-64 (finding that defendants' rights under the ECHR were violated because they were found guilty of an offence not charged, and were not provided an opportunity to advance a defence on the new charge); ECHR, *Sadak and others v. Turkey*, Applications nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment, 17 July 2001, paras (same).

wishes to modify the legal characterization in a case, it must provide notice to the defence. This is not the instant situation.

127. Therefore, the Majority when it determined there was insufficient evidence that the Kenya Police participated in the attacks, and that the Mungiki alone was the organization did not modify the Prosecution's characterization of the facts. On the contrary, the Majority complied with its duty as finder of fact under article 61(7) and defined scope of the case for the purpose of trial.

(b) The Majority's findings are consistent with the Prosecution's allegations

128. In addition, the Majority's findings are consistent with the Prosecution's submissions that the Mungiki had the capacity to commit the crimes charged.

129. In an attempt to recast the Prosecution's case to fit their argument, the Appellants suggest that the Prosecution alleged that the Mungiki had "organizational" capacity under article 7(2)(a) only when operating together with the Kenya Police.[195] This is an incorrect and oversimplified reading of the Prosecution's allegations that is not supported by the DCC or the Prosecution's oral submissions.

130. Contrary to the Appellants' suggestion, the Prosecution never alleged that the Mungiki's ability to carry out a widespread or systematic attack on a civilian population was contingent upon its interaction with the Kenya Police. At all times the Prosecution alleged that the Mungiki *itself* possessed the requisite organization, hierarchy and means to carry out such an attack. For example, paragraphs 39-42 of the DCC contain detailed allegations regarding the Mungiki's capacity as an organization:

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[195] Appeal Brief, paras.100, 107, 112.

39. The Mungiki, a criminal organization, is under the leadership of its founder and patron, Maina Njenga. KENYATTA himself is alleged to be a Mungiki leader. The Mungiki is organized into local and regional branches, the leaders of which are directly below the national coordinating committee in the Mungiki structure. The local leader is the executive of the local branch and is also vested with judicial powers in the locality he oversees. All local leaders are bound by the general rules of the Mungiki as well as by instructions issued by the patron. The Mungiki used meetings and mobile phones as their primary means of communication and communicated in Kikuyu language.

40. The Mungiki has a political wing known as the Kenya National Youth Alliance, a political party. It also has a militant wing, sometimes referred to as the Mungiki Defence Council, with radical members who are trained to carry out violent operations, including killings. In order to enforce discipline, dissidents within the organization are severely dealt with. Traitors and defectors are persecuted and killed.

41. Up until the time of the PEV, the Mungiki controlled the public transport system, provided power through illegal electricity connections, demanded a fee for accessing public toilets and sold water to residents in the poorest parts of Central Province and Nairobi. It also provided protection services to businesses and was enlisted by politicians to intimidate opponents.

42. Different sources estimate the number of active Mungiki members to be around 20,000 to 30,000, and 500,000 "oathed" or inactive members or supporters. During the PEV, the Mungiki mobilized additional human resources among local pro-PNU youth through aggressive recruitment before and after the elections.[196]

131. Additional allegations regarding the Mungiki's organizational capacity appear throughout the DCC.[197] Moreover, the Prosecution's oral submissions

[196] ICC-01/09-02/11-280-AnxA, paras.39-42.
[197] ICC-01/09-02/11-280-AnxA, para.58 (alleging involvement by former Mungiki National Coordinator in mobilizing Mungiki for Nakuru attacks and organizing oath-taking ceremonies for newly recruited Mungiki members); para.60 (alleging that Mungiki and pro-PNU youth attacked Nakuru "in a well organized and regimented manner"); para.64 (alleging that "attacks in Naivasha were launched in an orderly and well planned manner", that Mungiki were "mobilized through text messages", and were addressed prior to the attacks by a Mungiki leader); para.65 (alleging that during Naivasha attacks, the "Mungiki were broken up into groups of ten fighters each to be commanded by an experienced Mungiki member of the military wing"); para.66 (alleging that Mungiki employed a choreographed strategy when attacking Naivasha); para.87 (alleging that "the most important decisions of the Mungiki were taken centrally" and that "the Mungiki

at the confirmation hearing were consistent with, and supportive of, the allegations in the DCC regarding the Mungiki's organizational capacity and means to carry out a widespread or systematic attack on a civilian population. Those submissions include the following:

a. "[A]s an organisation, the Mungiki were well-organised into local and regional branches . . . The Mungiki rely on strict discipline . . . the Mungiki controlled the public transport system. They provided water through . . . illegal electricity connections, they demanded a fee for accessing public toilets and sold water to residents in the poorest parts of Central Province and Nairobi."[198]

b. "Both the Mungiki and the Kenya police are hierarchically organised. Both have a functioning internal structure with features such as the centralization of important decision-making and the existence of an effective disciplinary regime."[199]

132. As is evident from the foregoing, the Prosecution did not allege that the Mungiki could be considered an "organization" only when viewed together with the Kenya Police. Rather, the DCC and the Prosecution's oral submissions repeatedly (i) identified the Mungiki as a separate and distinct organization, and explained that it and the Kenya Police – as two independent organizational entities -- came together for a discrete purpose;[200] and (ii) alleged that the Mungiki possessed the organizational capacity to carry out a widespread or systematic attack against a civilian population on its own account.[201]

133. While it is true that the Prosecution argued that the Mungiki and the Kenya Police operated together as one *ad hoc* organization during the PEV,[202] this in

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enforced a brutal and efficient disciplinary regime"); para.93 (alleging that the Mungiki had a "hierarchically organized structure", "effective local structures" and a "disciplinary regime").

[198] ICC-01/09-02/11-T-5-Red-ENG-CT, p.19, ln.6 to p.20, ln.4.

[199] ICC-01/09-02/11-T-6-ENG, p.32, lns.9-13.

[200] *See* ICC-01/09-02/11-T-5-Red-ENG-CT, p.9, ln.25 to p.10, ln.3; p.22, lns.3-9.

[201] See footnotes 196, 197, 198, 199 .

[202] ICC-01/09-02/11-T-5-Red-ENG-CT, p.9, ln.25 to p.10, ln.25; p.17, ln.7 to p.18, ln.4; p.35, lns.18-23.

no way altered or undermined the Prosecution's allegations regarding the Mungiki's organizational ability to carry out a widespread or systematic attack in its own right. As a matter of logic, one cannot conclude that because two organizations are alleged to have joined their forces to undertake certain acts together, each therefore necessarily lacked the capacity to commit those actions independently. The conclusion does not follow from the premise. The Appellants' arguments are based upon this faulty logic, and they fail as a result.[203]

134. In sum, the Prosecution's allegations described in appropriate detail the organizational characteristics that qualified the Mungiki as an "organization" under the Statute. Those allegations were not altered or undermined in any way by the Prosecution's allegations regarding the *ad hoc* co-operation between the Mungiki and the Kenya Police during the PEV. And, as further explained below, the Majority's findings regarding the Mungiki's organizational capacity were consistent with the Prosecution's allegations.[204]

(c) The Appellants were not prejudiced in any way because they had the opportunity to respond to the allegations regarding the Mungiki's organizational capacity, and in fact took that opportunity.

135. The Appellants' "procedural fairness" argument[205] should be dismissed for two reasons. First, as a procedural matter, the argument is inadmissible

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[203] Similarly misplaced is the Appellants' challenge to the Majority's reference to "Maina Njenga as the person with the exclusive control over the Mungiki". Appeal Brief, para.83 (citing Confirmation Decision, para.190). Contrary to the Appellants' assertion, the Majority's findings in relation to Mr Njenga are consistent with the Prosecution's allegations in the DCC. *See* ICC-01/09-02/11-280-AnxA, paras.39, 77 and 78 (alleging that the policy to keep the PNU in power by any means necessary was agreed to and shared by the "Principal Perpetrators, together with Ali, *Mungiki leaders* and other prominent PNU supporters …" and that Maina Njenga is the "founder and patron" of the Mungiki) (emphasis added). The Prosecution notes that this matter is also subject to an application for leave to appeal, currently pending before the Pre-Trial Chamber. *See* ICC-01/09-02/11-385-Corr, para.21 (Muthaura application for leave to appeal); *see also* ICC-01/09-02/11-396, paras 38-39, 42-44 (Prosecution response).

[204] Confirmation Decision, paras.186-222.

[205] Appeal Brief, paras.109-123.

because it fails to comply with the Appeals Chamber's direction that arguments on appeal must "indicate, with sufficient precision, how th[e alleged] error would have materially affected the impugned decision".[206] Here, the Appellants "[do] not make any submissions as to how this alleged [lack of notice and opportunity to respond] materially affected the ruling [on jurisdiction] in the Impugned Decision [and] [do] not even explain how [their] submissions to the Pre-Trial Chamber would have been any different, had it not been for the alleged errors, or which arguments [they were] unable to make because of the alleged [error]".[207] As the Appeals Chamber has held, this deficiency requires that the argument be rejected "*in limine*, without further consideration of the merits".[208]

136. Second, on the merits, the argument fails because, as explained above, the Pre-Trial Chamber's findings regarding the Mungiki as an "organization" are consistent with the Prosecution's allegations. There was no "fundamental shift" or "wholesale re-characterization" as the Appellants claim,[209] which defeats their argument that they lacked adequate notice or an opportunity to respond.

137. The Appellants' assertion that they "understood" the Prosecution's case,[210] to be premised upon the existence of a single, *ad hoc* organization is belied by their final submissions following the confirmation hearing. Kenyatta dedicated four pages of his final submissions to arguing why, in his view, the "Mungiki alone" could not be considered an "organization" under the Statute.[211]

[206] ICC-02/04-01/05-408OA3, para.48.
[207] ICC-02/04-01/05-408OA3, para.51.
[208] ICC-02/04-01/05-408OA3, para.51.
[209] Appeal Brief, paras.115-16.
[210] Appeal Brief, para.97.
[211] ICC-01/09-02/11-372, paras.42-52. Kenyatta also identified two other possible organizations under the prosecution's case theory – "a combination of the Mungiki and the Kenya police" and "pro-[ ] PNU youth" – and asserted arguments as to why neither constituted an "organization" under article 7(2)(a). ICC-01/09-02/11-372, paras 40, 53-58.

Muthaura adopted Kenyatta's submissions in full.[212] In addition, Muthaura asserted his own arguments regarding his supposed lack of control over the Mungiki "as an organization", which challenged the Mungiki's leadership structure and "division and lack of cohesion", among other matters.[213]

138. These arguments – directed at the "Mungiki alone" – demonstrate that the Appellants had notice of the Prosecution's allegations regarding the Mungiki's organizational capacity, understood those allegations and attempted to rebut them at length. In these circumstances, the Appellants cannot credibly claim that they were unfairly surprised by the Majority's findings that the "Mungiki alone" constituted an organization.

Fourth Ground of Appeal: The Majority erred in fact by concluding that the Mungiki qualified as an "organization" within article 7(2)(a) of the Statute[214]

139. Under their fourth ground on appeal, the Appellants argue that the Majority erred when it found that the Mungiki was an "organization" under the terms of the Statute. The Appellants effectively ask the Appeals Chamber to review the Majority's factual findings regarding the Mungiki's organizational characteristics.

140. However, as the Majority noted in the Decision, this is not a matter relevant to the Chamber's determination of the jurisdiction of the Court, it instead goes to the sufficiency of the evidence presented by the Prosecution.[215] This is because, as explained above in relation to ground one, jurisdictional questions are to be determined by reference to the pleadings, not the

[212] ICC-01/09-02/11-374-Red, para.110.
[213] ICC-01/09-02/11-374-Red, paras.103, 106-108.
[214] Appeal Brief, paras.124-179.
[215] Confirmation Decision, para.34. The Appellants are currently seeking leave to appeal this very same issue.

evidentiary record. For this reason, it is unnecessary for the Appeals Chamber to address the fourth ground on the merits. Indeed, it would be inappropriate to do so because it would exceed the proper scope of the jurisdictional inquiry. Accordingly, the Prosecution respectfully submits that the Appellants' fourth ground should be dismissed *in limine*.

141. If, however, the Appeals Chamber decides that the fundamental legal issue of jurisdiction includes an inquiry into whether the factual record supports the Majority's findings as to the existence of an organizational policy, the Prosecution submits that the Appellant's fourth ground of appeal should still be dismissed because the Majority's findings regarding the Mungiki's organizational characteristics are supported by the evidence and are well within its discretion as a finder of fact.

142. The Prosecution will address the issues raised by the Appellants in turn. However, even before addressing them separately, it bears noting that the impugned findings were relied upon by the Majority in the aggregate,[216] rather than individually, as the Appellants challenge them.[217] Thus, even if there were merit to certain of the Appellants' arguments – and there is not – reversal is nonetheless not warranted if the Majority's conclusion could "have reasonably been reached from the [remaining] evidence".

(a)The Mungiki's hierarchical structure

143. Before addressing the Appellants' specific factual challenges, it is useful to consider the Majority's findings and the material they were based upon. Appropriately, the Majority's analysis began with an evaluation of the evidence of four Mungiki insiders, who are well-placed to describe the

[216] Confirmation Decision, paras.186, 228.
[217] Appeal Brief, paras.133-179.

organization's characteristics.[218] The Majority distilled two factual findings from this evidence: (i) at the time of the PEV, the Mungiki was "a hierarchically structured organization"; and (ii) the organization was "under the control of Maina Njenga".[219] The evidence of the four insider witnesses on these two points is consistent and mutually corroborative in all material respects. The Appellants do not dispute this fact.

144. Glossing over the insiders' critical evidence, the Appellants assert that the "Chamber disregarded a wealth of Prosecution evidence" tending to undermine the conclusion that the Mungiki operated as a hierarchical organization with Maina Njenga at the top.[220] However, the "wealth" of evidence is in fact a handful of cherry picked snippets from indirect sources, some of which rely upon other indirect sources.[221] It is unsurprising – and entirely reasonable – that the Majority opted to ascribe greater probative value to the evidence of four insiders who themselves had been part of the Mungiki organization and who possessed personal knowledge of its key characteristics.

145. The Appellants' challenges to the Majority's analysis of Witnesses 9 and 11 are equally unavailing. The Appellants incorrectly assert that the Majority "misstates the evidence of Witness PW-9". According to the Appellants, Witness 9's evidence is that, while Maina Njenga was in prison, there was "a large number of people who also command the people to do certain things so it wasn't just him".[222]

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[218] Confirmation Decision, paras.191-203.
[219] Confirmation Decision, paras.186, 206.
[220] Appeal Brief, para.134.
[221] Appeal Brief, para.134 (citing EVD-PT-OTP-00282 at 0274 (one page press article); EVD-PT-OTP-00275 at 0118 (Immigration and Refugee Board of Canada briefing paper, quoting, in relevant part, reporting by third parties); EVD-PT-OTP-00177 at 0302, 0304 (report produced by Norwegian government agency, citing, in relevant part, third party research); EVD-PT-OTP-00283 (half-page article in political newsletter)); para 135 (citing EVD-PT-OTP-00081 at 0038 (Kenya Human Rights Institute report); EVD-PT-OTP-00002 at 0294 (Human Rights Watch report); para 139 EVD-PT-OTP-00002 at 0294 (Human Rights Watch report)).
[222] Appeal Brief, para 136 (purporting to quote EVD-PT-OTP-00641 (KEN-OTP-0059-0200), at 0209).

146. However, what the quoted passage of Witness 9's statement actually says is:

> [W]e have a large number of people who could also command people to do certain *type [sic] of* things so, it wasn't just him *but he was informed of everything that was being done"*. (emphasis added).[223]

147. With the deliberately omitted words restored, the sentence establishes that during Njenga's imprisonment, certain categories of tasks were assigned to subordinates, while he was kept abreast of "everything". At most, this simply shows that the Mungiki operated with a degree of delegation and decentralization that is common to any large organization.[224] This is not in any sense inconsistent with the Majority's finding regarding Njenga's overarching control over the Mungiki.[225]

148. The Appellants' argument in relation to Witness 11 is similarly without merit. It is irrelevant whether certain Mungiki members were "split" ideologically over whether the organization should support the PNU.[226] The totality of the Prosecution evidence – including that of Witness 11 – is consistent: during the relevant period, Maina Njenga enjoyed ultimate control over, and decision-making authority within, the Mungiki, despite his incarceration and irrespective of any dissent that may have arisen within the

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[223] KEN-OTP-0059-0200, at 0209.

[224] Indeed, evidence relied upon by the Majority demonstrates that Njenga delegated a degree of authority to subordinates even when he was not in prison. See KEN-OTP-0060-0250, at 0260-0262 (Witness 12 explaining that within the Mungiki, sub-national issues could be handled at the "local level[ ]", cited at Confirmation Decision, para.194, fn.345.

[225] It bears noting that this evidence is also consistent with that of Witness 11 – upon which the Majority relied – regarding Maina Njenga's delegation of the Chairmanship to Charles Ndungu Wagacha. Confirmation Decision, para.193.

[226] Appeal Brief, paras.137-138.

organization.[227] This is a central factor underpinning the Majority's finding that "Njenga possessed exclusive control over the Mungiki organization".[228] Because Witness 11's evidence regarding the supposed Mungiki "split" is not inconsistent with this finding, there is no merit to the Appellants' argument that the Majority failed to properly assess his evidence.

149. Similarly, there is no merit to the Appellants' argument that "there was no national forum where the Mungiki leadership sat down and planned the attacks, but that instead, small groups of Mungiki would plan these attacks in their own way".[229] There is nothing unusual about an organization's leader issuing general instructions to subordinates and leaving the manner in which they are implemented to the subordinates' discretion. In reality, this is how most hierarchically structured organizations operate; a practice that does not detract from their institutional cohesion. For this reason, any such evidence is not inconsistent with the Majority's finding that the Mungiki operated at the relevant time as a hierarchically structured organization under the control of Maina Njenga.[230]

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[227] *See, e.g.,* KEN-OTP-0043-0002, at 0012 (Witness 4 stating that "[t]he Mungiki hierarchy works around one main centre of power – Maina Njenga . . . Even when he was in prison, Maina NJENGA was the real leader and he still controlled everything."); KEN-OTP-0059-0200, at 0209 (Witness 9 explaining that when Maina Njenga was imprisoned during the PEV, his subordinates were required to consult with him and "informed [him] on everything that was being done", and that Njenga was the individual who made the "final decision"); KEN-OTP-0052-1433, at 1449 (Witness 11 explaining that "[t]here was a coordination . . . all throughout the time MAINA was in prison", that Maina Njenga's agreement in 2007 that the Mungiki would support the PNU was a "signal" to the Mungiki on the ground, and that "there is no way they [the Mungiki] would have been engaged in post [election violence] without first that [signal]"); KEN-OTP-0060-0226, at 0242-0244 (Witness 12 explaining that when Maina Njenga was in prison, he was represented by Charles Ndungu Wagacha, who received orders directly from Njenga).

[228] Confirmation Decision, paras.190-191 (citing KEN-OTP-0043-0002, at 0012); para.192 (citing KEN-OTP-0059-0200, at 0209); para.194 (citing KEN-OTP-0060-0226, at 0242-0244).

[229] Appeal Brief, para.138.

[230] The Appellants' description of Witness 11's evidence on this point is materially incomplete. The Defence asserts that "Witness PW-11 . . . stated that the Mungiki was divided, that it was only a group of 17 or 20 Mungiki that were involved . . .". Appeal Brief, para.138 (citing KEN-OTP-0052-1305, at 1308, lines 126-129). It is plain from Witness 11's transcript that the "17 or 20" Mungiki in question were not, as the Defence implies, the total number of Mungiki involved in the attacks, but rather a group from Thika recruited for the Naivasha attack. Witness 11 makes clear that other groups were involved in the attacks.

150. Finally, the Appellants are incorrect when they claim that the Majority "failed to consider Defence evidence" in support of its arguments regarding the Mungiki's supposedly "amorphous nature…lack of any identifying features…lack of uniforms and/or coherent purpose of origin or aim".[231] The Majority addressed this evidence and these arguments directly, ultimately concluding that they were not inconsistent with the Prosecution's theory and evidence.[232] This finding was entirely supportable: a group's support for "different religious movements" or shifting "political alliances"[233] do not bear on its ability to carry out a widespread or systematic attack.

151. In sum, the Majority's factual findings in relation to the hierarchical structure of the Mungiki are well-grounded in the evidence and reflect a methodical analysis of the factual record.

(b) The existence, at the relevant time, of an effective system of ensuring compliance by the members of the Mungiki with the rules of the organization.

152. The Majority based its finding that the Mungiki had an effective system of compliance upon three principal factors: (i) the existence of an "oathing" system, through which new members were sworn into the organization;[234] (ii) the harsh punishment for dissenters and defectors, including death;[235] and (iii) the existence of a quasi-judicial system of enforcement of Mungiki rules.[236] The evidence relied upon in relation to each of these three factors came from well-placed Mungiki insiders with personal knowledge on the subject. The Chamber's reliance on this evidence was reasonable and does not constitute clear error.

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[231] Appeal Brief, para.140.
[232] Confirmation Decision, paras.205-206.
[233] Appeal Brief, para.140.
[234] Confirmation Decision, paras.208-209.
[235] Confirmation Decision, paras.210-212.
[236] Confirmation Decision, para.213.

153. For the reasons that follow, the Appellants' challenges to the Majority's findings are without merit. First, the Appellants' critique in relation to the oathing process is factually incorrect and, substantively, misses the point. Factually, the Appellants suggest that the Majority erroneously concluded, based on the evidence regarding the oathing process, "that Mungiki membership was drawn entirely by coercion".[237] This is incorrect. Indeed, the Majority explicitly noted that Witness 9 "*voluntarily* took the Mungiki oath" (emphasis added).[238]

154. Substantively, an oathing process need not be coercive for it to operate as a mechanism for ensuring loyalty and compliance with an organization's rules. The important point is that through the oathing process, Mungiki members are bound together in a commitment to respect the rules of the organization and made to fear the sanctions that will follow if those rules are not obeyed.[239] Thus, regardless of whether the evidence demonstrated that oathing was voluntary or involuntary, or whether there were variations in the ritual, the oathing process acts as a common thread that binds Mungiki members together in allegiance to the organization's rules. For this reason, the Majority properly relied upon the oathing process as a factor supporting its finding that the Mungiki had an effective system of compliance with its rules.

155. Second, the Appellants are incorrect in their assertion that no "Prosecution evidence presented at the Confirmation hearing, demonstrates any instance of a Mungiki member being killed or punished for breaking rules or for defecting from the gang".[240] The evidence cited by the Majority does precisely this. For example, Witness 4 states that he witnessed a Mungiki court session in which

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[237] Appeal Brief, para.145.
[238] Confirmation Decision, para.209.
[239] Confirmation Decision, paras.208-09 (citing witness evidence that the oath obliged Mungiki members to "abide by the rules of the Kikuyu organization", "instill[ed] fear" in new members, and threatened members that they "would be killed if [they] did not respect the oath").
[240] Appeal Brief, para.144.

an individual was sentenced to corporal punishment for an offence.[241] Witness 4 also provides hearsay evidence regarding the killing of "traitors" and "those who disobeyed" or "betrayed the organization".[242] The Majority relied on this evidence at paragraph 210 of the Decision. Similarly, the Majority relied upon Witness 12's evidence that 14 individuals were killed for defecting from the Mungiki.[243] Again, the Majority relied upon this evidence in support of its findings.[244]

156. Third, contrary to the Appellants' assertion,[245] the Majority's finding regarding the existence of "a quasi-judicial system of enforcement of Mungiki rules" supports the conclusion that the Mungiki had an effective system of ensuring compliance at the relevant time. The Appellants are incorrect that Witness 12's evidence regarding the Mungiki court system "clearly refer[s] to what was taking place in this regard in the year 2002". At KEN-OTP-0052-1419, at 1427,[246] Witness 12 discusses the Mungiki court system without reference to a specific time period. The same is true of Witness 4's evidence.[247] Because the evidence of these witnesses relates to the functioning of the Mungiki court system in general and is not time-specific, it supported the Majority's inference that, at the relevant time, the prospect of the "kangaroo courts" meting out punishments to rule-breakers contributed to an effective system of ensuring that Mungiki members complied with the organization's rules.[248]

[241] KEN-OTP-0043-0002, at 0018 (cited at Confirmation Decision, para.210, fn.383).
[242] KEN-OTP-0043-0002, at 0018-19.
[243] KEN-OTP-0060-0250, at 0255.
[244] Confirmation Decision, para.212, fn.386 (citing, *inter alia*, KEN-OTP-0060-0250, at 0255). There is no merit to the Appellants' suggestion that the Majority's findings are undermined by evidence that some "Mungiki members have not been killed or punished for defecting". Appeal Brief, para.147(a). The killing or punishment of defectors need not be universal for a deterrent effect to arise that prompts Mungiki members to comply with the rules of the organization.
[245] Appeal Brief, paras.149-151.
[246] Cited at para.213, fn.388 of the Confirmation Decision.
[247] Confirmation Decision, para.213, fn.387 (citing KEN-OTP-0043-0002, at 0018).
[248] There is no relevance to the Appellants' arguments regarding the Mungiki courts' coverage of "social issues" and their service of "the general population of the slum areas". Appeal Brief, paras.150-151. Whether Mungiki courts served these broader functions is irrelevant to the issue of the effectiveness of the

(c) The Mungiki organization possessed, at the relevant time, quasi-military capabilities.

157. The Majority's findings regarding the Mungiki's quasi-military capabilities are well-supported by evidence from multiple independent sources – in particular, four Mungiki insiders who provided detailed evidence regarding the organization's militant elements, their capabilities and their operations.

158. The Appellants make a half-hearted attempt to challenge the Majority's findings by suggesting that the Majority "overly relied on the fact that Prosecution witnesses state that Mungiki members underwent military-like training to substantiate its finding on this issue", and by asserting that the only detailed evidence on this topic comes from Witness 4.[249] This is incorrect.

159. *First*, even a cursory reading of the relevant section of the Decision demonstrates that the Majority's findings were not "overly reli[ant]" upon evidence regarding quasi-military training; they also took into account the functions and operations of the Mungiki's militant elements, their command, and their weapons capabilities.[250]

160. *Second*, contrary to the Appellants' assertion, Witness 4's evidence regarding training in beheading techniques is not the only "detail[ed]" evidence regarding "military-like training".[251] The witness evidence relied upon by the Majority and referenced in the Decision provides substantial detail regarding the "military-like training" that Mungiki members received,

organization's system of rule compliance. The important point is that the courts also enforced discipline within the Mungiki ranks and contributed to an effective system of compliance with the organization's rules. As explained above, the evidence relied upon by the Majority was sufficient to support that conclusion.

249 Appeal Brief, para.154.

250 Confirmation Decision, para.215.

251 Appeal Brief, para.154.

including locations of the training and the specific skills taught.[252] In sum, the Majority's factual findings are well supported by the evidence it relied upon, thus defeating the Appellants' arguments.

(d)The Mungiki activities approximated those of a public authority in certain slums as well as in Central Province.

161. In an apparent effort to address Judge Kaul's concern that only "State-like" groups can satisfy the "organizational policy" requirements of article 7(2)(a), the Majority considered whether the Mungiki's activities could be said to be "State-like". It found that the Mungiki's activities did "approximat[e]" those of a public authority in certain areas, due to three factors: (i) the Mungiki's court system was applied "to the general population of slum areas where the Mungiki was present";[253] (ii) "the Mungiki provided basic services in the slums, such as security, electricity, water and public toilets";[254] and (iii) "the Mungiki granted protection" to minibus drivers and imposed fees in exchange.[255]

162. The Appellants do not dispute the Majority's findings in relation to the existence of the Mungiki court system.[256] Instead, they argue that (i) the Majority's findings do not "support any of the criteria established by the Majority to determine whether the Mungiki had the ability to infringe basic human values";[257] and (ii) the evidence demonstrates that the Mungiki's

[252] Confirmation Decision, para.215, fn.391 (citing KEN-OTP-0043-0002, at 0017); n.394 (citing KEN-OTP-0059-0097, at 0108); n.395 (citing KEN-OTP-0052-1433, at 1440); n.398 (citing KEN-OTP-0060-0226, at 0228-0233.
[253] Confirmation Decision, para.217.
[254] Confirmation Decision, para.218.
[255] Confirmation Decision, para.219.
[256] As noted above in paragraph 156, the Defence challenges the Majority's reliance on the Mungiki court system as a basis for concluding that, at the relevant time, the Mungiki possessed an effective system of ensuring compliance with the organization's rules. Appeal Brief, paras.149-151. This argument is without merit for the reasons explained in footnote 248.
[257] Appeal Brief, para.156.

"activities constitute criminal extortion but, on any reasonable view, do not constitute evidence of the entity having State-like features".[258]

163. With respect to the Appellants' first argument, the Majority's findings regarding the Mungiki's "State-like" qualities are consistent with the flexible approach it advocated to the article 7(2)(a) inquiry. Indeed, the Majority emphasized that "the determination of whether a group qualifies as an organization under the Statute must be made on a case by case basis" and that the six considerations identified in the Article 15 Decision "do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled".[259] While it may have been possible to determine the Mungiki's capacity to carry out a widespread or systematic attack without considering the above-listed "State-like" qualities, the Majority's consideration of these factors in no way detracted from its conclusions; to the contrary, it supports the flexible and case-by-case approach advocated. As a result, there can be no reversible error.

164. In relation to the Appellants' second argument, the Prosecution submits that the key consideration is not whether the Mungiki undertook its activities for legitimate ends or as part of a regime of "criminal exploitation".[260] The important point is that the Mungiki's activities – irrespective of how they are categorized – establish that the group had the organizational capacity to commit a widespread or systematic attack against a civilian population. Providing basic social services in certain geographic areas and business "protection" – whether for legitimate or criminal ends – demonstrates a level of organizational cohesion that supports the Majority's findings regarding the Mungiki's capacity to carry out such an attack. For this reason, the Majority

[258] Appeal Brief, paras.158-160.
[259] Article 15 Decision, para 93.
[260] Appeal Brief, para.159.

did not err in finding that the Mungiki's "State-like" activities supported the conclusion that the group constituted an "organization" under article 7(2)(a).

(e) The Mungiki has criminal activities against the civilian population as a primary purpose.

165. The Appellants challenge the Majority's statement, at paragraph 220 of the Decision, that the "Mungiki activities must generally be seen as criminal, because they involve acts of violence and extortion of the population in areas of Mungiki activity". According to the Appellants, the crimes committed by the Mungiki should be "of the same genus as the crimes within the jurisdiction of the ICC".[261] The Appellants' submissions on this point are inapposite because the Majority did not rely on this factor in reaching its determination that the Mungiki constituted an organization under the Statute.[262] The discussion in paragraph 220 merely addresses an argument raised by Kenyatta in his final submissions following the confirmation of charges hearing that the "Mungiki as a group does not have criminal activities against the civilian population as a primary purpose".[263] Because the Majority did not consider the Mungiki's "primary purpose" in reaching its determination, the Appellants' arguments on this point should be dismissed *in limine*.

(f) Alleged error by including "Pro-PNU Youth" within the Mungiki.

166. The Majority did not err in its approach to the involvement of "pro-PNU Youth" in the attacks. The Majority's analysis of article 7(2)(a)'s organizational requirement focused on the Mungiki. This was entirely appropriate based on the evidence that the Mungiki was a driving force in the Naivasha and Nakuru attacks. The Majority did not find that "pro-PNU youth" as such constituted

[261] Appeal Brief, paras.162-164.
[262] Confirmation Decision, paras.186, 228 (listing the four factors upon which the Majority based its finding that the Mungiki constituted an "organization" for article 7(2)(a) purposes).
[263] ICC-01/09-02/11-372, para.50, cited at Confirmation Decision, para.220.

an organization under the Statute.[264] It simply proceeded on the basis that pro-PNU youth, who were recruited into the Mungiki during the relevant period became part of that constituted group.[265] This conclusion is entirely supportable: once recruited, "newly recruited members" *were* part of the Mungiki. It is also appropriate: individuals who joined or acted in concert with the Mungiki or its umbrella groups during the attacks may reasonably be considered to have acted as part of that organization for the purpose of the attacks. In sum, the Majority's position does not "broaden[ ] the membership of the group it alleged constituted the 'organization'";[266] it accurately reflects that membership.[267]

[264] Nor did the Majority hold that "pro-PNU youth" did <u>not</u> constitute an organization under article 7(2)(a); it simply did not address either issue.
[265] Confirmation Decision, para.123 (finding that "mobilized and newly recruited members" were part of the Mungiki organization); *see also*, paras 164-167 (cited at para 123, fn.191) (referring to new Mungiki members).
[266] Appeal Brief, para.166.
[267] In support of its argument, the Appellants rely upon certain passages from Judge Kaul's dissent in the Article 15 Decision. Appeal Brief, para.178. The quoted passages are inapposite because Judge Kaul was opining upon an evidentiary record different from – and more limited than – the record upon which the Confirmation Decision was based. Notably, in his Dissenting Opinion to the Confirmation Decision, Judge Kaul did not restate the conclusions he drew in the quoted passages of the Article 15 Dissenting Opinion.

CONCLUSION

167. For the reasons set out above, the Prosecution respectfully requests that the Chamber dismiss the Appellants' document in support of appeal.

Luis Moreno-Ocampo,
Prosecutor

Dated this 7th day of March, 2012
At The Hague, The Netherlands