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No.: **ICC-01/09-01/11**
Date: **13 March 2012**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public Document

Consolidated observations on the documents in support of the Articles 19(6) and 82(1)(a) appeals and on the Prosecution responses thereto

Source: **Victims' Representative**

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

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Introduction

1. The present observations are filed pursuant to the Appeals Chamber's "Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence",[1] in which the Appeals Chamber ordered that the victims representative may submit consolidated observations on the documents in support of the appeals and on the responses thereto within five days of the notification of the responses.

2. The present observations are accordingly observations with respect to:

   a. the "Document in Support of Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Ruto on Jurisdiction", filed by the Defence for Mr Ruto on 14 February 2012 (the "**Ruto Document**");[2]

   b. the "Document in Support of Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Sang on Jurisdiction", filed by the Defence for Mr Sang on 14 February 2012 (the "**Sang Document**");[3] and

   c. the "Corrigendum to Prosecution's Consolidated Response to Mr Ruto's and Mr Sang's Documents in Support of Articles 19(6) and 82(1)(a) Appeal (ICC-01/09-01/11-388 OA3 – ICC-01/09-01/11-389 OA4)", filed by the Prosecution on 8 March 2012 (the "**Prosecution Observations**").[4]

3. The Ruto Document and Sang Document are in materially identical terms, and are referred to below collectively as the "**Defence Documents**". Mr Ruto and Mr Sang are referred to collectively as the "Accused".

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[1] ICC-01/09-01/11-383, 2 February 2012.
[2] ICC-01/09-01/11-388.
[3] ICC-01/09-01/11-389.
[4] ICC-01/09-01/11-397-Corr, being a corrected version of the previous "Prosecution's Consolidated Response to Mr Ruto's and Mr Sang's Documents in Support of Articles 19(6) and 82(1)(a) Appeal (ICC-01/09-01/11-388 OA3 – ICC-01/09-01/11-389 OA4)" ICC-01/09-01/11-397.

4. The Defence Documents seek to appeal against the finding of the Pre-Trial Chamber that the Court has jurisdiction in this case. That finding was most recently reiterated by the Pre-Trial Chamber in its decision on the confirmation of charges pursuant to article 61 of the Statute (the "**Confirmation of Charges Decision**").[5] That finding on jurisdiction was also made by the Pre-Trial Chamber in its in its "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" of 31 March 2010 (the "**31 March 2010 decision**"),[6] and in its decision to issue summonses in this case.[7]

5. The Pre-Trial Chamber's decision on jurisdiction was a majority view, in respect of which Judge Kaul dissented.

6. The Defence Documents advance four grounds of appeal, which are dealt with separately below. However, it is submitted that primarily the Defence are seeking to argue that the view taken by the majority of the Pre-Trial Chamber was wrong, and that the dissenting view taken by Judge Kaul was correct and should prevail.

7. The Defence Documents (at paragraph 10) rely in particular on the finding of Judge Kaul at paragraph 13 of his dissenting opinion in the Confirmation of Charges decision that:

> I am not satisfied to the 'degree of certainty' that the crimes were committed pursuant to the policy of a State-like 'organisation', which is an indispensable constitutive contextual element and inherent characteristic of crimes against humanity under article 7 of the Statute.

[5] ICC-01/09-01/11-373, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", Pre-Trial Chamber II, 23 January 2012 (the "Confirmation of Charges Decision").
[6] ICC-01/09-19-Corr.
[7] Ruto and Sang Application, paras 2-4, referring to ICC-01/09-01/11, Prosecutor v Ruto, Kosgey and Sang, "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", Pre-Trial Chamber II, 8 March 2011 ("Summons Decision"), at especially para 11: "[The Pre-Trial Chamber] finds no need to reiterate its finding and provide a further detailed assessment of the question of jurisdiction of the case arising from that situation at this stage".

8. In so finding, it appears that Judge Kaul differed from the majority in his interpretation of Article 7(2)(a) of the Statute, given that the majority considered that:

> organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population.[8]

9. However, it is submitted that it is not clear to what extent, if any, there was any substantial difference of view between the majority and Judge Kaul on this particular issue (although Judge Kaul considers at paragraph 8 of his dissenting opinion to the Confirmation of Charges Decision that he is in "fundamental disagreement" with the majority). Judge Kaul said that:

> I read the provision such that the juxtaposition of the notions 'State' and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities. 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.[9]

10. At paragraph 184 of the Confirmation of Charges Decision, the majority said (repeating what it had said at paragraph 93 of the 31 March 2010 decision) that:

> The Chamber also recalls that the determination of whether a given group qualifies as an organisation under the Statute must be made on a case-by-case basis. In making its determination, the Chamber may take into account a number of factors, inter alia: (i) whether the group is under a responsible command, or has an

[8] Confirmation of Charges Decision, para 184.
[9] Confirmation of Charges Decision, paragraph 13 of the dissenting opinion of Judge Kaul, quoting paragraph 51 of his dissenting opinion to the 31 March 2010 decision.

established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria. Lastly, the Chamber stresses that, while the above factors may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled. [Footnotes omitted.]

11. It is submitted that it is questionable whether the above legal test of Judge Kaul and the above legal test of the majority would lead to significantly different results in practice. It is submitted that the difference of view between Judge Kaul and the majority was in this case to a significant degree one concerning their views on the evidence and facts of the case, rather than their views on the law. Judge Kaul found, on the evidence in the case that:

> … the "Network", as portrayed, is "essentially an amorphous alliance" of "coordinating members of a tribe with a predisposition towards violence with fluctuating membership" which existed temporarily for a specific purpose. The "Network", characterized by the ethno-political affiliation of its members, emerged only in connection with the 2007/2008 postelection violence and, in my opinion, was "created ad hoc solely to assist, admittedly in an abhorrent way, the community's aspiring and existing political leaders in gaining or maintaining political power in the Rift Valley on the occasion of the 2007 presidential elections". Nevertheless, I maintain my view that "members of a tribe [...] do not form a state-like 'organisation', unless they meet additional prerequisites. By the same token, those members of a tribe who instigated violence cannot alone constitute an 'organisation'". Lastly, I maintain that the planning and coordination of violence in a series of meetings during the time period relevant to this case "does not transform an ethnically-based gathering of perpetrators into a State-like organization".[10]

12. In contrast, the majority found on the evidence before it that:

> 197. … the Chamber considers that the evidence presented indicates that there are substantial grounds to believe that the first

[10] Confirmation of Charges Decision, paragraph 12 of the dissenting opinion of Judge Kaul.

factor to prove the existence of an organisation is met. The evidence reveals that the Network was under responsible command and had an established hierarchy, with Mr. Ruto as the designated leader, in charge of securing the establishment and efficient functioning of the Network as well as the pursuit of its criminal purposes. The evidence available to the Chamber establishes substantial grounds to believe that the hierarchical structure of the Network was comprised of three commanders (or generals), in charge of the attack in the North Rift Valley, Central Rift Valley and South Rift Valley, as well as four divisional commanders, who were responsible for the execution of the attack in the field. According to the evidence available, the three generals and the four divisional commanders all reported to Mr. Ruto. Subordinate to the divisional commanders, other members of the Network who acted as coordinators were tasked with more specific functions, such as organizing the material perpetrators on the ground, identifying the targets during the attack. …
200. With respect to the second factor to prove the existence of an organisation, there are also substantial grounds to believe that, by December 2007, the Network possessed the means to carry out a widespread or systematic attack against the civilian population, as its members had access to and utilised a considerable amount of capital, guns, crude weapons and manpower as explained in the previous paragraphs. …
207. Finally, regarding the third factor considered in demonstrating the existence of an organisation, the Chamber finds that there are substantial grounds to believe that the Network identified the criminal activities against the civilian population as its primary purpose, and that it articulated an intention to attack the civilian population. More specifically, as the Chamber will elaborate in greater detail below, Mr. Ruto and others established the Network for the sole purpose of committing criminal activities, namely to plan the attack against PNU supporters in connection with the 2007 presidential elections.
208. For these reasons, the Chamber is of the view that there is sufficient evidence to establish substantial grounds to believe that the Network qualifies as an organisation within the meaning of article 7(2)(a) of the Statute. ... [11]

13. It is submitted that in this appeal, the Defence seeks to challenge the Pre-Trial Chamber's conclusions of law and fact on the issue of whether there was an "organizational policy" within the meaning of article 7(2)(a) of the Statute. The challenge is in reality primarily directed to the majority's views on the evidence in the case. To the extent that the challenge relates to the majority's

[11] Confirmation of Charges Decision, paras 197-208.

conclusions of law, it relates to issues of *substantive* law, rather than to issue of law going to the Court's *jurisdiction*. In effect, the Defence seeks to challenge the *merits* of the Confirmation of Charges Decision.

14. Aside from issues of jurisdiction, the Defence are only able to appeal against the Confirmation of Charges Decision with the leave of the Pre-Trial Chamber, pursuant to article 82(1)(d) of the Statute. The Pre-Trial Chamber has refused the Accused leave to appeal against the Confirmation of Charges Decision.[12] It is submitted that an Accused cannot circumvent the need for the Pre-Trial Chamber's permission to appeal against the Pre-Trial Chamber's findings in respect of facts, evidence, and questions of substantive law, by seeking to characterise those findings as issues of "jurisdiction". In relation to matters where the Statute and Rules of Procedure and Evidence provide no right of interlocutory appeal, a party cannot artificially generate a right of interlocutory appeal merely by referring to the matter as a "challenge to jurisdiction". For this reason in particular, the victims' representative submits that the Defence challenges to jurisdiction should be dismissed.

Legal framework

15. The Court's jurisdiction is established by its Statute.

16. The Court's subject-matter jurisdiction (jurisdiction *ratione materiae*) is dealt with primarily in Articles 5 to 8*bis* of the Statute, which set out the crimes within the jurisdiction of the Court.

17. The Court's personal jurisdiction (jurisdiction *ratione personae*) and territorial jurisdiction (jurisdiction *ratione loci*) are dealt with primarily in Article 25(1) and Article 12 of the Statute.

18. Article 25(1) states that the Court has jurisdiction over "natural persons".

[12] ICC-01/09-01/11-399, 9 March 2003.

19. Article 12 indicates that the Court has jurisdiction over any natural person who is a national of a State which is a Party to the Statute in respect of a crime committed anywhere (whether or not on the territory of a State which is a Party), or over any natural person (whether or not a national of a State which is a Party) in respect of a crime committed on the territory of, or on an aircraft or vessel the State of registration of which is, a State which is a Party.

20. It is noted that the title to Article 12 is "Preconditions to the exercise of jurisdiction", suggesting that the provisions of Article 12 do not define the limits of the Court's personal and temporal *jurisdiction*, but simply impose limits on the circumstances in which the Court's jurisdiction will be *exercised*. However, this distinction is not material to the Defence challenges to jurisdiction, and is not further addressed in these observations.

21. The Court's temporal jurisdiction (jurisdiction *ratione temporis*) is dealt with primarily in Article 11.

22. As noted above, Article 5 of the Statute lists the crimes within the subject-matter jurisdiction of the Court. These crimes are then dealt with individually in Articles 6 to 8*bis*. Not all elements of Articles 6 to 8*bis* are jurisdictional provisions; these provisions also contain element dealing with the *substantive law* of the crimes within the jurisdiction of the Court. In particular, Article 7(1) of the Statute contains a list of crimes against humanity that are within the subject-matter jurisdiction of the Court. Article 7(2) then elaborates *substantive* elements of these crimes, or *substantive* elements of contextual requirements of crimes against humanity (most notably, the substantive elements of the contextual requirement of an "attack directed against any civilian population" in Article 7(2)(a)). Article 7(2) of the Statute contains *substantive legal elements*, not *jurisdictional requirements*.

23. Part 3 (Articles 22 to 33) of the Statute is entitled "General Principles of Criminal Law". Although (as noted above) Article 25(1) is a jurisdictional provision (defining the personal jurisdiction of the Court), the provisions of

Part 3 generally do not deal with the jurisdiction of the Court. Rather, Part 3 contains provisions of *substantive law* that the Court is to apply in exercise of its jurisdiction. These provisions constitute the "general part" of the substantive criminal law applied by the Court.

The circumstances of the present case

24. In the Confirmation of Charges Decision, the Pre-Trial Chamber stated in the dispositive part of its decision that it:

> e) CONFIRMS the charges presented against Mr. Ruto under Counts 1, 3 and 5 of the Amended Document Containing the Charges, to the extent specified in paragraph 349 of the present Decision;
> f) CONFIRMS the charges presented against Mr. Sang under Counts 2, 4 and 6 of the Amended Document Containing the Charges, to the extent specified in paragraph 367 of the present Decision;

25. The counts referred to in the Confirmation of Charges Decision are in Part VII of the Amended Document Containing the Charges,[13] as follows:

> **Count 1 (RUTO and KOSGEY)**
> **Murder constituting a crime against humanity**
> (Article 7(1)(a) and Article 25(3)(a) of the Rome Statute)
> From on or about 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO and HENRY KIPRONO KOSGEY committed or contributed to the commission of crimes against humanity in the form of murder in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute.
>
> **Count 2 (SANG)**
> **Murder constituting a crime against humanity**
> (Article 7(1)(a) and Article 25(3)(d) of the Rome Statute)
> From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG, as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of murder in locations including

[13] ICC-01/09-01/11-261.

Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(a) and 25(3) (d) of the Rome Statute.

Count 3 (RUTO and KOSGEY)
Deportation or forcible transfer of population constituting a crime against humanity
(Article 7(1)(d) and Article 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO and HENRY KIPRONO KOSGEY as co-perpetrators, committed or contributed to the commission of crimes against humanity in the form of deportation or forcible transfer of population in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya in violation of Articles 7(1)(d) and 25(3)(a) of the Rome Statute.

Count 4 (SANG)
Deportation or forcible transfer of population constituting a crime against humanity
(Article 7(1)(d) and Article 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of deportation or forcible transfer of population in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya in violation of Articles 7(1)(d) and 25(3)(d) of the Rome Statute.

Count 5 (RUTO AND KOSGEY)
Persecution as a crime against humanity
(Article 7(1)(h) and Article 25(3)(a) of the Rome Statute)

From 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO, and HENRY KIPRONO KOSGEY as co-perpetrators, committed or contributed to the commission of crimes against humanity in the form of persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, torture, and deportation or forcible transfer of population, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic

> of Kenya, in violation of Articles 7(1)(h) and 25(3)(a) of the Rome Statute.
>
> **Count 6 (SANG)**
> **Persecution as a crime against humanity**
> (Article 7(1)(h) and Article 25(3)(d) of the Rome Statute)
> From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG, as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of persecution, when coperpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, torture, and deportation or forcible transfer of population, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(d) of the Rome Statute.

26. The qualification in paragraph 349 of the Confirmation of Charges Decision was that:

> 349. For these reasons, the Chamber finds sufficient evidence to establish substantial grounds to believe that:
>
> a. On 31 December 2007 Mr. Ruto jointly with other members of the organisation committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, pursuant to articles 7(l)(a), (d) and (h) of the Statute;
> b. Between 1 January 2008 and 4 January 2008 Mr. Ruto jointly with other members of the organisation committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in the greater Eldoret area, pursuant to articles 7(l)(a), (d) and (h) of the Statute;
> c. Between 30 December 2007 and 16 January 2008 Mr. Ruto jointly with other members of the organisation committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Kapsabet town, pursuant to article 7(l)(a), (d) and (h) of the Statute;
> d. Between 30 December 2007 and 2 January 2008 Mr. Ruto jointly with other members of the organisation committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or

forcible transfer of population and persecution in Nandi Hills town, pursuant to articles 7(l)(a), (d) and (h) of the Statute.

27. The qualification in paragraph 367 of the Confirmation of Charges Decision was that:

> 367. In conclusion, the Chamber is satisfied that there are substantial grounds to believe that:
>
> a. On 31 December 2007 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, pursuant to articles 7(l)(a), (d) and (h) of the Statute;
>
> b. Between 1 January 2008 and 4 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in the greater Eldoret area, pursuant to articles 7(l)(a), (d) and (h) of the Statute;
>
> c. Between 30 December 2007 and 16 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Kapsabet town, pursuant to articles 7(l)(a), (d) and (h) of the Statute;
>
> d. Between 30 December 2007 and 2 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Nandi Hills town, pursuant to articles 7(l)(a), (d) and (h) of the Statute.

28. Typically, a challenge to the jurisdiction of the Court would contend that the qualification of the crimes charged are not of a kind within the subject-matter jurisdiction of the Court, or that place and time of the alleged crimes puts them outside the geographic or temporal jurisdiction of the Court, or that the Court lacks personal jurisdiction over the suspect or accused. However, in the present case, it is evident, and apparently not disputed by either of the Accused, that:

   a. each of the confirmed charges is a charge of a crime within the *subject-matter jurisdiction* of the Court, namely a crime specifically enumerated in Article 7(1)(a), (d) or (h) of the Statute;

b. each Accused is a natural person who is a national of Kenya, a State that is Party to the Statute, and each of the crimes in the confirmed charges is alleged to have been committed within the territory of Kenya, such that each of the charges is within the *personal jurisdiction* and *territorial jurisdiction* of the Court;

c. each of the crimes in the confirmed charges is alleged to have been committed in December 2007 or January 2008, which is after the Statute entered into force for Kenya (on 1 June 2005[14]), such that the crimes are within the *temporal jurisdiction* and *territorial jurisdiction* of the Court.

29. All of the confirmed charges charge the Accused with crimes against humanity. The requirements of crimes against humanity as set out in Article 7 of the Statute, including the requirement in Article 7(1) that the act be "part of a widespread or systematic attack", and the requirement in Article 7(2)(a) that the attack be "pursuant to or in furtherance of a State or organizational policy to commit such attack" are not *jurisdictional* requirements. They are requirements of the *substantive law* that is applied by the Tribunal in exercise of its jurisdiction.

30. At the trial in this case, the Trial Chamber will be called upon to determine whether crimes were committed as charged in the confirmed charges (including whether crimes committed satisfied the substantive legal requirements referred to above). If the Trial Chamber were to answer that question in the negative, the consequence would not be a finding by the Court that it *lacks jurisdiction*. Rather, the consequence would be a finding by the Court that the accused are *not guilty*. Questions of the interpretation and

[14] Kenya deposited its instrument of ratification to the Rome Statute on 15 March 2005 (http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/Kenya.htm; http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en). Pursuant to Article 126(2) of the Statute, it entered into force for Kenya on the first day of the month after the 60th day following the deposit by Kenya of its instrument of ratification, that is, on 1 June 2005.

application of Article 7 and Article 25(3) are thus issues that are part of the *merits* of the present case. They are not issues of *jurisdiction*.

The Pre-Trial Chamber's findings on jurisdiction

31. The Pre-Trial Chamber's finding of law on the expression "organizational policy" in Article 7(2)(a) of the Statute is set out at paragraph 10 above. The Pre-Trial Chamber did not deal with that question as part of its analysis of the Court's jurisdiction. Rather, its findings in this respect were contained (correctly it is submitted) in the part of the Confirmation of Charges Decision dealing with the merits of the case and with the question of whether the evidence was sufficient for the charges to be confirmed.

32. The Pre-Trial Chamber's findings with respect to jurisdiction are contained in paragraphs 23-37 of the Confirmation of Charges Decision.

33. These paragraphs of the Confirmation of Charges decision dealt with two arguments concerning jurisdiction that were raised by the Defence before the Pre-Trial Chamber.

34. The first of these Defence arguments was that the Pre-Trial Chamber had adopted an overly broad interpretation of the expression "organisational policy" in Article 7(2)(a) of the Statute. In respect of this argument, the Pre-Trial Chamber adopted its findings with respect to the meaning of the expression "organisation" in the 31 March 2010 decision.

35. The victims' representative submits that it is immaterial for purposes of the present challenge to jurisdiction whether or not the Pre-Trial Chamber's conclusion in this paragraph on the legal definition of an "organisation" for purposes of Article 7(2)(a) of the Statute was correct. The question whether or not the Pre-Trial Chamber was correct in this respect is a question of substantive law, which goes to the legal *merits* of the case, rather than to *jurisdiction*. The critical finding of the Pre-Trial Chamber was that the

document containing the charges, and the charges as now confirmed, allege that there was a relevant "organisational policy" for purposes of Article 7(2)(a) of the Statute. It is evident that the determination of the merits of that allegation that there was a relevant "organisational policy" is a matter within the jurisdiction of the Court, to be determined at trial.

36. The second of the Defence arguments considered in the Confirmation of Charges Decision was an argument that "The facts relied upon by the Prosecutor 'do not amount to substantial grounds to believe that the defendants acted within an organisation in the context of Article 7(2)(a) of the Statute'". The Pre-Trial Chamber found, and it is submitted that it is self-evidently correct, that this was not a jurisdictional challenge, but rather a challenge to the merits of the Prosecution case on the facts.

The Defence grounds of appeal

37. The Defence documents now advance four grounds of appeal against the decision with respect to jurisdiction in the Confirmation of Charges Decision. These are set out at paragraph 11 of the respective Defence Documents, as follows:

> … The Majority erred in procedure and/or in law in adopting its prior definition of "organisation" while finding that the Defence had the burden of persuading the Pre-Trial Chamber to revisit its previous finding on the question or to reverse its original approach [("**Defence Ground One**")];
>
> … The Majority erred in procedure and/or in law in deciding that there was no basis for the Pre-Trial Chamber to conduct a factual analysis of the Prosecution's evidence as part of a comprehensive evaluation of whether the Chamber could satisfy itself to a degree of certainty that it possessed jurisdiction *ratione materiae* [("**Defence Ground Two**")];
>
> … The Majority erred in law in deciding that the definition of "organisation" does not require a link to a State or even State-like characteristics, but may encompass any group which has the capability to perform acts which infringe on basic human values,

> or private individuals with *de facto* power or organised in criminal gangs or groups, and that such may be assessed on a case-by-case basis with no predictable legal definition or criteria which need be exhaustively fulfilled [("**Defence Ground Three**")];
>
> … The Majority erred in law and/or in fact in deciding that an organisation called the "Network" existed, and which had the capacity to affect basic human values based on the fact that it had: an established hierarchy, the means to carry out a widespread or systematic attack, and an articulated intention to attack the civilian population as its primary purpose [("**Defence Ground Four**")].

38. The victims' representative submits that none of these grounds constitutes a challenge to jurisdiction for purposes of articles 19(6) or 82(1)(a) of the Statute.

39. Alternatively, to the extent that any of the Defence grounds does constitute a challenge to jurisdiction, it is submitted that the each of such grounds should be dismissed for the reasons below.

Defence Ground One: Legal definition of "organization"

40. Article 7(2)(a) is one of the provisions of the Statute setting out the substantive law that is to be applied by the Court. In the exercise of its jurisdiction, the Court will be routinely called upon to determine questions of substantive law. In determining a point of substantive law, the Court is *exercising* its jurisdiction, rather than deciding whether or not it has jurisdiction.

41. The victims' representative submits that the meaning of "organizational policy" in Article 7(2)(a) of the Statute is a point of law that falls within the jurisdiction of the Court to decide. In the 31 March 2010 decision, the Pre-Trial Chamber did not treat this question as one that went to its jurisdiction. At paragraph 73 of the 31 March 2010 decision, the Pre-Trial Chamber concluded that "Upon examination of the available information, ... the Chamber finds that the information available provides a reasonable basis to believe that crimes against humanity have been committed on Kenyan territory". That was a conclusion on the *merits* of what the Pre-Trial Chamber

had to decide at that stage of the proceedings, rather than a decision on the Court's jurisdiction. At paragraph 76, the Pre-Trial Chamber indicated that this conclusion was based, *inter alia*, on its analysis of "... the contextual elements of crimes against humanity in section II.A.l.a [of the Investigation Decision]". Paragraph 93 of the 31 March 2010 decision (quoted above) was one of the paragraphs of section II.A.l.a analysing the contextual elements of crimes against humanity.

42. Again, in the Confirmation of Charges Decision itself, the Pre-Trial Chamber gave lengthy consideration at paragraphs 181-221, which were part of the decision on the merits of the confirmation, to the issue of whether there was an "organisational policy" for purposes of Article 7(2)(a) of the Statute. At paragraph 208, the Pre-Trial Chamber expressly was of the view that "there is sufficient evidence to establish substantial grounds to believe that the Network qualifies as an organisation within the meaning of article 7(2)(a) of the Statute".

43. The Pre-Trial Chamber thus found on a preliminary view of the evidence and on a preliminary view of the applicable principles of substantive law that there were "substantial grounds to believe" that certain crimes charged had been committed. Whether all elements of the crimes charged (including the requirement in article 7(2)(a) for a "State or organisational policy") are proved becomes a matter for the Trial Chamber to determine at the conclusion of the trial.

44. For these reasons, the victims' representative submits that the Defence Ground One, despite purporting to be a challenge to jurisdiction, is in fact *not* a challenge to jurisdiction. It is a submission which addresses the merits of issues in the case. The Defence can address the merits of this issue at trial. In the event of an adverse judgement, the Defence can bring a post-judgment appeal against the Trial Chamber's decision on issues of law or issues of fact under Article 81 of the Statute. However, the points taken in Defence Ground

One are not a challenge to jurisdiction, and should not be treated as if they were.

45. This being the case, there is no occasion at this point of time to consider the Defence argument that the Pre-Trial Chamber "erred in procedure and/or in law in failing to provide the Defence an effective opportunity to be heard at first instance" or that the Pre-Trial Chamber "required the Defence to demonstrate the existence of circumstances that would warrant a consideration of the Defence arguments". However, there is no substance to this Defence argument in any event. The Pre-Trial Chamber did consider the Defence arguments, and issued a decision on those Defence arguments as part of its Confirmation of Charges Decision.

46. When the majority of the Pre-Trial Chamber said at paragraph 34 of the Confirmation of Charges Decision that it "does not find a persuasive reason to revisit its previous finding on the question or to reverse its original approach", this should not be understood as meaning that the Pre-Trial Chamber was refusing to consider the Defence arguments. It should be understood as meaning that the Pre-Trial Chamber had considered the Defence arguments, and that having considered them, the majority remained of the view that its earlier decision in this respect was correct.

47. What must be emphasised is that the Pre-Trial Chamber was only deciding this issue for purposes of deciding whether or not to confirm the charges. The Confirmation of Charges Decision does not prevent the Defence from fully arguing all issues of law and fact (including legal issues concerning the correct interpretation of Article 7(2)(a) of the Statute) before the Trial Chamber, or before the Appeals Chamber in a post-judgment appeal. The Confirmation of Charges Decision does not deprive the Defence of a full opportunity to advance all of their arguments, and to have these considered.

48. Rather, what is in issue in the present case is whether the Defence are entitled to have an issue of law determined prior to any trial, as a legal issue of

jurisdiction, or whether the Defence must raise the legal issue in the course of the trial process itself. The victims' representative submits that the principles are clear. Issues of substantive law must be raised in trial process itself. Issues of law can only be determined prior to trial as a jurisdictional challenge only where they are issues of law that genuinely go to jurisdiction. Arguments as to the correct interpretation of the substantive law of the Court (including Article 7(2)(a)) are arguments going to the merits of a case, and not to jurisdiction.

49. The Trial Chamber's reference to a decision of Pre-Trial Chamber III in the Situation in the Republic of Côte d'Ivoire at paragraph 33 of the Confirmation of Charges Decision was not an indication that the Pre-Trial Chamber in the present case was treating that other decision as a binding authority. The Pre-Trial Chamber was merely taking into consideration a decision of another Pre-Trial Chamber, something that it was quite entitled to do.

Defence Ground Two: Alleged failure to conduct a factual analysis

50. The victims' representative submits that Defence Ground Two is not a challenge to jurisdiction, for reasons similar to those given above.

51. It is highly unusual for findings of fact to be required to be made in determining whether a matter falls within the jurisdiction of a court. Findings of fact are made *in exercise of* the court's jurisdiction. Before the trial, the court is faced with an issue, or a question or an allegation. It is almost always a question of law only whether that issue or question or allegation is one that falls within the jurisdiction of the court to determine.

52. For instance, suppose that in a particular case, the Prosecution alleges that a particular crime was committed after entry into force of the Statute. Suppose that the Defence denies that the crime was committed at all, but also argues that if the crime was committed, it was committed prior to entry into force of

the Statute, such that it falls outside the temporal jurisdiction of the Court under article 11(1) of the Statute.

53. In such a case, the allegation made by the Prosecution is that a crime was committed after entry into force of the Statute. It is submitted that it is within the jurisdiction of the Court to adjudicate upon that allegation. It would be absurd to suggest that the Court would be required to conduct a trial of the facts at the pre-trial stage, to determine whether any such crime was committed after entry into force of the Statute, in order to determine whether it has jurisdiction to conduct such a trial.

54. The test to be applied by the Pre-Trial Chamber in determining whether to confirm charges in article 61(7) of the Statute is "whether there is sufficient evidence to establish substantial grounds to believe that the person committed" the crime charged. In the example above, the Pre-Trial Chamber would determine whether on the evidence there are substantial grounds for believing that a crime was committed at all, and if so, whether there are substantial grounds for believing that the crime was committed after entry into force of the Statute. If the answer to both questions is affirmative, the charge would be confirmed, and the Trial Chamber would have jurisdiction to try the charge. Of course, if at the end of the trial the Trial Chamber found either that the crime had not been committed at all, or that any such crime was committed prior to entry into force of the Statute, it could not convict the accused. Defence Ground Two suggests that prior to the trial, the Court must conduct a trial of the facts, in order to determine whether one of the substantive elements of a crime can be proved (the requirement of a "State or organizational policy in Article 7(2)(a)), for purposes of determining whether the Court has jurisdiction to decide whether the substantive elements of the crime have been proved. It is submitted that this argument is circular and illogical, and that it should be rejected.

55. In effect, the Defence documents make submissions in relation to the *merits* of the confirmation of charges hearings, while erroneously stating that these submissions are a challenge to *jurisdiction*.

56. Aside from issues of jurisdiction, the Defence are only able to appeal against the Confirmation of Charges Decision with the leave of the Pre-Trial Chamber, pursuant to article 82(1)(d) of the Statute. The Pre-Trial Chamber has refused the Accused leave to appeal against the Confirmation of Charges Decision.[15] It is submitted that an Accused cannot circumvent the need for the Pre-Trial Chamber's permission to appeal against the Pre-Trial Chamber's findings in respect of facts, evidence, and questions of substantive law, by seeking to characterise those findings as issues of "jurisdiction". In relation to matters where the Statute and Rules of Procedure and Evidence provide no right of interlocutory appeal, a party cannot artificially generate a right of interlocutory appeal merely by referring to the matter as a "challenge to jurisdiction".

Defence Ground Three: The legal definition of an "organization"

a. General

57. Defence Ground Three takes issue with the Pre-Trial Chamber's view of the legal definition of an "organization" for purposes of Article 7(2)(a) of the Statute, and in particular, with what the Pre-Trial Chamber stated at paragraphs 184-185 of the Confirmation of Charges Decision.

b. This argument is not a challenge to jurisdiction

58. For the reasons given above, this ground is also not a jurisdictional challenge. Questions of interpretation of Article 7 of the Statute are questions of *substantive law* that fall within the jurisdiction of the Court to decide. If a Pre-

[15] ICC-01/09-01/11-399, 9 March 2003.

Trial Chamber or Trial Chamber errs in its interpretation of an element of Article 7, that is an error of law within the jurisdiction of the Court. It is not a jurisdictional error having the effect of depriving the Court of jurisdiction.

59. Thus, as stated above, if the Defence considers that the Pre-Trial Chamber has erred in its interpretation of Article 7, it can so argue at trial before the Trial Chamber, and if necessary, before the Appeals Chamber in a post-judgment appeal. However, it cannot secure a preliminary ruling by the Appeals Chamber on an issue of substantive law, merely by purporting to characterise this issue of substantive law as jurisdictional.

c. This argument should in any event be rejected on its merits

60. In any event, it is submitted that the Defence argument should not be accepted. Paragraph 83 of the Defence Documents state that:

> The definition of crimes against humanity is therefore directly linked to the notion of the identity of the perpetrators, and the fact that their control of the public sphere renders it impossible for victims to obtain a domestic remedy. This control is only met in circumstances in which the organisation exercises state-like characteristics vis-a-vis the victims themselves.

61. At paragraph 84 of the Defence documents, it is added that:

> This distinction would allow the court to draw a logical, bright line between crimes committed by organisations such as the mafia, which can and should be prosecuted domestically,[110] and those crimes committed by organisations such as the Taliban, or local militia in control of significant geographic areas, which can only be redressed in a non-domestic fora.

62. Paragraph 86 of the Defence documents further argue (with reference to the dissenting opinion of Judge Kaul in the 31 March 2010 decision) that "if the State is directly or indirectly implicated in committing the crimes, then there is good cause for intervention as it is unlikely that the same State will investigate and prosecute its own crimes in good faith".

63. The apparent logic of the Defence argument is that if the State is not itself implicated in crimes, there is no reason why the State would not itself prosecute those crimes in good faith. Rather, it is suggested that it is only where the State (or its Government) is implicated in crimes that the State cannot be relied upon to prosecute in good faith, so that it is necessary to rely on the international criminal justice system.

64. The victims' representative submits that this is a false logic, given that governments of States can change over time. Even where the State itself is involved in the commission of crimes, if there is a subsequent change of government in that State, the new regime may well have a good faith interest in prosecuting members of the former regime who were responsible.

65. Conversely, where crimes are committed, not by a State or its government, but by an opposition group aspiring to *become* the government of that State, the State may have no interest in prosecuting the crimes once that opposition group succeeds in becoming the government, or part of the government. The government of a State would have no interest in prosecuting its own members and supporters, particularly in respect of acts that were committed in order to contribute to bringing that government into power.

66. It is submitted that it must therefore be the case that, for purposes of Article 7(2)(a) of the Statute, an attack directed against a civilian population can be committed pursuant to an organisational policy to commit such an attack of a group aspiring to become the government of the state. Such a group aspiring to become the government of a state might include a rebel insurgency group which is a party to an internal armed conflict in which government forces are the opposing party to the armed conflict. However, crimes against humanity under article 7 of the Statute are not confined to circumstances of armed conflicts. Crimes against humanity could be committed by a group aspiring to become the government of a state, even where there is no armed conflict.

67. Once it is accepted that crimes against humanity can be committed by a group aspiring to become the government of a state, it must be immaterial whether or not that group ever succeeds in that aspiration.

68. Any other conclusion would lead to the irrational result that where there is a struggle between an incumbent government and a group struggling to overthrow and replace the government, crimes committed by agents of or supporting the government could be crimes against humanity, but crimes committed by the opposition group could not, even if the opposition group ultimately succeeded in becoming the government.

69. This leads to the further conclusion that it was not the intention of the drafters of the Statute that only an organization akin to a State organization would be captured by Article 7(2)(a) of the Statute.

70. In particular, ethnic divisions have historically been a major driver of conflicts and attacks against civilian populations that has claimed millions of victims of crimes under international law throughout the world. The background events of the crimes within the jurisdiction of the ICTY and ICTR are powerful examples. The Holocaust in the Second World War, expressly mentioned by Judge Kaul in paragraph 59 of his dissenting opinion to the 31 March 2010 decision is an especially powerful example.

71. Judge Kaul in his dissenting opinion to the 31 March 2010 decision refers to "mass crimes against civilian populations of unimaginable magnitude and atrocity" which "were made possible only by virtue of an existing State policy followed in a planned and concerted fashion by various segments of public power targeting parts of the civilian population who were deprived totally and radically of their basic fundamental rights" (at paragraphs 59-60). He suggests that Article 7(2)(a) of the Statute must be read as confined to crimes of this description. However, paragraph 7(2)(a) of the Statute refers expressly to a "State *or organizational* policy", not merely to a "State policy". Furthermore, the scale of the crime in question is reflected in the words

"widespread or systematic" in Article 7(1), rather than in the words "attack against the civilian population" as defined in Article 7(2)(a). There is no reason to read the words "State or organisational policy" as being in any way intended to confine Article 7 to crimes of a minimum level of magnitude.

72. There is nothing in Article 7 to restrict crimes against humanity to crimes committed pursuant to a State policy or "State-like" policy. There is also no basis for the assumption that an attack against a civilian population will be of a limited magnitude unless it is driven by a State policy or "State-like" policy. For instance, estimates of the death toll in the ethnic violence that accompanied the partition of India and Pakistan in 1947 range from several hundred thousand to a million.[16]

73. Furthermore, Article 7 of the Statue does not restrict or define the characteristics of an organisation or organisational policy for the simple reason that a "one-size fits all" interpretation of an organisational policy cannot adequately address the realities of each Situation. That groups without state-like characteristics not only have a history of committing crimes against humanity but also have the capability of doing so. These capabilities should be the focus of international criminal justice. To fail to recognize this aspect would be to create a lacuna in international criminal justice.

74. The interpretation apparently contended for by the Defence would deprive the concept of crimes against humanity of much of its scope and effectiveness. It would exclude from the scope of Article 7 crimes which could in practice be of the same severity to crimes committed pursuant to a "State policy", merely because the force driving them is not a state or an entity akin to a State.

75. It is also questionable what is meant by "State-like", under the test proposed by Judge Kaul. It would appear that the learned Judge takes a western perspective to the issue of ethnicity and fails to appreciate the complexities of African power and political systems. Tribal influences, identities and

[16] http://en.wikipedia.org/wiki/Partition_of_India.

affiliations determine how power is exercised in Africa as opposed to western democracies. The evolving nature of conflict in Africa is also a consideration that must be taken into account.

76. The background to events in Kenya illustrates the difficulties of seeking to apply the restrictive jurisdictional test as proposed by Jugde Kaul. (For the avoidance of doubt, it is emphasised that the factual material that follows is relied upon as published material in support of, and illustrative of, an argument of law. The victims' representative is not seeking to introduce what follows as evidence of fact in the case).

77. There is no dispute that there have been previous instances of election violence in Kenya in 1992 and 1997.

78. In relation to the ethnic clashes in 1992, which affected Rift Valley, Western and Nyanza Provinces, a report of the National Council of Churches in Kenya (NCCK) indicated that a group of young men, calling themselves the Nandi Warriors, had been threatening members of the Luo community living in Muhoroni, Fort Tenana and Chemilil to vacate the area, as they were considered to be members of the political party, Forum for the Restoration of Democracy (FORD) which was an opposition party to the Ruling party KANU headed by President Moi.[17]

79. It was originally thought that the clashes begun in Nandi and Kisumu district under the guise of a boundary dispute. However, as the violence spread to Kisii, Kericho and Kakamega district it became increasingly clear that the violence was not spontaneous.[18] The report indicates that the police refused or declined to intervene and protect the victims of violence. Indeed, it is alleged

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[17] National Council of Churches in Kenya (1992) *The Cursed Arrow: A report on Organised violence against Democracy in Kenya* Vol. 1 page 8.

[18] National Council of Churches in Kenya (1992) *The Cursed Arrow: A report on Organised violence against Democracy in Kenya* Vol. 1 page 19.

that when members of the victim community tried to retaliate, the police prevented them from doing so.[19]

80. In June 1992, the National Council of Churches of Kenya published another report on the violence that stated that "There is evidence that there were cordial interaction between the warriors, security and administration officers. Evidence has been received that homes and farms of senior government official, political leaders and administrative officer have and are being used as hideouts for warriors, depots for weaponry, sanctuaries… where warriors return in the event of facing resistance".[20]

81. Justice Akiwumi was given a mandate in 1998 to investigate the violence that occurred during the 1992 and 1997 general elections. The report highlighted that the attacks were well organised and coordinated. The attacks were barbaric, callous and calculated to drive out the targeted groups from their farms, to cripple them economically and to psychologically traumatise them. Many of the victims were forced to camp in schools, church compounds, and shopping centres.[21] The Report remarked that people in the Rift Valley Province generally tended to follow what their tribal leaders and more particularly, elected leaders, would tell them and would not normally follow any counsel, however wise it may be, from any other quarter if it conflicted with what their leaders had propounded.[22]

82. The historical use of tribal militia is a reality[23]. The Kikuyu have the Mungiki[24] as their militia arm. Similarly, the Maasai and Kisii leaders have, since 1992,

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[19] *Ibid*.
[20] National Council of Churches of Kenya (1992) *Report of Task Force* Nairobi, June
[21] Akiwumi A. (1993) Report of the Judicial Commission appointed to inquire into Tribal Clashes in Kenya page 2 Available at: http://www.scribd.com/doc/2204752/Akiwumi-Report-Rift-Valley-Province Last Accessed on 9th March, 2012
[22] Ibid.
[23] See Kimani Njogu, Kabiri Ngeta, Mary Wanjau, *Ethnic Diversity in Eastern Africa; Opportunities and Challenges*, African Books Collective (2010)) Pg 43
[24] Murunga Godwin, Shadrack Nangoso, *Kenya: the Struggle for Democracy*, Codesira in association with Zed books (2007) pg 68 - 84

have their tribal "militia" ("Moran" and "Chinkororo", respectively).[25] It is noteworthy that even when a politician has the state machinery at his or her disposal they opt to use tribal "militia" either on its own or in conjunction with the state machinery.

83. The tribal leaders therefore have the ***de facto*** authority and capability to influence and command the militia to commit crimes against humanity.

84. These views were also reiterated by some of the victims represented by the legal representative. Victim a/8897/11 echoed this understanding when he stated "Every leader uses the community warriors. It's practical, it's there, it's very open. Whoever wants to understand, they understand." Victim a/8730/11, in agreement, informed that every powerful leader had tribal support including a tribal military. For instance, the Kisii community has the "Chinkororo" and the Luhya have the "Msumbiji". Victim a/0063/10 remarked further how he had perceived that these balkanized ethnic communities had developed some form of "parallel intelligence service".

85. This demonstrates that tribal leaders have influence and control over their tribal militia. The capacity of these tribal leaders to commit international crimes depends not only on the *de jure* state power that they may possess but also on the *de facto* power and influence over long standing tribal support structures over which they wield much sway and control.

86. The victims' representative also incorporates by reference what was stated in paragraphs 53-59 of the Observations of the Victims' Representative on the Defence challenges to jurisdiction, filed before the Pre-Trial Chamber on 16 September 2009.[26]

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[25] See Kagwanja Mwangi, Kenya Human Rights Commission, *Killing the vote: state sponsored violence and flawed elections in Kenya*, Kenya Human rights Commission (1992), pg 44 – 50; Rutten, Mazrui and Grignon, *Out for the count: the 1997 general elections and prospects for democracy in Kenya*, Fountain Publishers 2010, pg 94 -96 on the use of tribal militia during the 1997 elections.

[26] ICC-01/09-01/11-332.

Defence Ground Four: The Pre-Trial Chamber's findings of fact

87. It is submitted that Defence Ground Four cannot be characterised as anything other than a disagreement with the Pre-Trial Chamber's views of the evidence. This cannot on any view be characterised as a challenge to jurisdiction. It is an attempt to appeal against the merits of the Pre-Trial Chamber's Confirmation of Charges Decision.

Conclusion

88. For the reasons above, the Defence challenges to jurisdiction should be rejected.

Sureta Chana

Legal Representative

Dated this 13th day of March 2012

At Nairobi, Kenya