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THE 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

**Observations pursuant to Article 19 (3) of the Rome Statute and Rule 59 (3) of the
Rules of Procedure and Evidence**

Source: Victims' Legal Representative

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

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I. INTRODUCTION

1. Two hundred and thirty-three victims were authorised to participate in the Confirmation of Charges Hearing and related proceedings in this case, pursuant to the Single Judge's Decision of 26 August 2011.¹ The undersigned Legal Representative was appointed in common to all participating victims by virtue of that decision.²

2. These observations are brought on behalf of the participating victims through the Legal Representative, pursuant to Article 19 (3) of the *Rome Statute* and Rule 59 (3) of the *Rules of Procedure and Evidence*, and in compliance with directions given by this Chamber on 2 February 2012.³ They are in respect of the "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'," and the response thereto by the Office of the Prosecutor.⁴

II. PROCEDURAL HISTORY

3. On 31 March 2010, the Prosecutor was authorized by a Majority of Pre-Trial Chamber II to open an investigation into the situation in the Republic of Kenya.⁵ Summonses to appear were issued to Francis Kirimi Muthaura, Uhuru Muigai

¹ "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings," ICC-01/09-02/11-267, 26 August 2011.

² *Ibid.*, page 46, para. (e)

³ "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," ICC-01/09-02/11-394 OA 4, 2 February 2012.

⁴ See, respectively, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute," ICC-01/09-02/11-382-Conf., 23 January 2012 (the victims are privy to only the public, redacted version of this decision. Cf., ICC-01/09-02/11-382-Red., 23 January 2012) ("Confirmation Decision"); "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, 14 February 2012 ("Appellants' Brief"); and "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 OA 4)," ICC-01/09-02/11-404 OA 4, 7 March 2012 ("Prosecution's Response").

⁵ "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," ICC-01/09-19-Corr, 31 March 2010 ("Investigation Decision"); see *ibid.*, pages 84 – 163, for the *Dissenting Opinion of Judge Hans-Peter Kaul* ("Dissenting Investigation Decision").

Kenyatta, and Mohammed Hussein Ali by the same Majority on 8 March 2011,⁶ with Judge Hans-Peter Kaul dissenting.⁷ The suspects voluntarily appeared and the Initial Appearance was held on 8 April 2011.⁸

4. The Document Containing the Charges (“DCC”) was filed by the Prosecutor on 19 August 2011⁹ and amended on 2 September 2011.¹⁰

5. On 19 September 2011, Messrs Kenyatta and Ali filed respective challenges to the jurisdiction of the Court over the crimes alleged in the DCC.¹¹ On 5 October 2011, the victims and the Prosecution were invited to submit observations to the said jurisdictional challenges, in light of the provisions of Rule 58.¹² A response by the Prosecution¹³ and observations by the victims¹⁴ were consequently filed on 14 October 2011.

6. The Confirmation of Charges Hearing¹⁵ was held between 21 September and 5 October 2011.¹⁶ At the invitation of the Pre-Trial Chamber (“PTC”),¹⁷ written

⁶ “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,” ICC-01/09-02/11-01, 8 March 2011.

⁷ “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,’” ICC-01/09-02/11-3, 15 March 2011 (“Dissenting Summons Decision”).

⁸ See, ICC-01/09-02/11-T-1-ENG ET WT 08-04-2011, 1/23 PV PT.

⁹ “Prosecution’s Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis Chart of Evidence Included in the List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3),” ICC-01/09-02/11-257, 19 August 2011. See, also, Article 61(3)(a), Rome Statute of the International Criminal Court (“the Statute”).

¹⁰ “Prosecution’s Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), (4) and (5),” ICC-01/09-02/11-280, 2 September 2011. All references herein to the “DCC” are to the amended version.

¹¹ “Submissions on Jurisdiction on Behalf of Uhuru Kenyatta,” ICC-01/09-02/11-339, 19 September 2011 (the “Kenyatta Jurisdictional Challenge”); and “Defence Challenge to Jurisdiction, Admissibility and Prosecution’s Failure to Meet the Requirements of Article 54,” ICC-01/09-02/11-338, 19 September 2011.

¹² ICC-01/09-02/11-T-15-CONF-ENG, 5 October 2011, page 88, lines 5 – 8.

¹³ “Prosecution’s Response to the Defence Challenges to Jurisdiction,” ICC-01/09-02/11-356, 14 October 2011.

¹⁴ “Victims’ Consolidated Observations on the Kenyatta and Ali Submissions regarding Jurisdiction and/ or Admissibility,” ICC-01/09-02/11-357, 14 October 2011 (“Victims’ Jurisdictional Observations”).

¹⁵ Hereinafter “the Hearing.”

¹⁶ See Annex A to “Decision on the Schedule for the Confirmation of Charges Hearing,” ICC-01/09-02/11-321, 13 September 2011. See, also, ICC-01/09-02/11-T-4-ENG ET WT 21-09-2011, 1/121 PV PT and ICC-01/09-02/11-T-15-CONF-ENG ET 05-10-2011, 1/90 SZ PT.

¹⁷ ICC-01/09-02/11-T-15-CONF-ENG ET 05-10-2011, 1/90 SZ PT, page 2, lines 4 – 7 and page 88, lines 14 – 17.

observations were filed by the victims, in respect of the Hearing,¹⁸ in addition to written submissions filed by the parties regarding the Hearing.¹⁹

7. In the Confirmation Decision, the Majority of the PTC concluded that the case falls within the jurisdiction of the Court and confirmed the charges presented under Counts 1, 3, 7, and 9, and the charge of rape presented under Count 5 of the DCC against Messrs Muthaura and Kenyatta,²⁰ and committed the Appellants to a Trial Chamber for trial on the charges as confirmed.²¹ The Majority of the PTC declined to confirm any of the charges in the DCC against Mr. Ali.²²

8. The Appellants commenced this appeal on 30 January 2012.²³

III. SUBMISSIONS REGARDING THE GROUNDS OF APPEAL

a. First Ground of Appeal

9. An error of law is alleged by the Appellants as their first ground of appeal – to wit: the Majority of the PTC erred in dismissing, “*in limine*[,] the jurisdictional challenge brought by the Kenyatta Defence and determining that it was not jurisdictional in nature, but instead, a challenge on the merits of the Prosecutor’s case on the facts.”²⁴ The Appellants contend the error was occasioned by a determination that the Kenyatta Jurisdictional Challenge, as formulated, could not be

¹⁸ See, “Corrigendum to *Victims’ Observations in relation to the Confirmation of Charges Hearing*,” ICC-01/09-02/11-360-Corr, 31 October 2011.

¹⁹ See, “Prosecution’s Written Submissions Following the Hearing on the Confirmation of the Charges,” ICC-01/09-02/11-361, 28 October 2011; “Defence Submissions on behalf of Uhuru Kenyatta Following the Confirmation of Charges Hearing,” ICC-01/09-02/11-372, 17 November 2011; “General Mohammed Hussein Ali’s Final Submissions on the Confirmation of Charges Hearing,” ICC-01/09-02/11-373, 21 November 2011; and “Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing,” ICC-01/09-02/11-374, 21 November 2011 (the “Muthaura Final Submission”).

²⁰ The “Appellants.”

²¹ See, Confirmation Decision, page 154, paras. (a), (b) and (e).

²² See, Confirmation Decision, page 154, para. (d). See, also, Dissenting Opinion by Judge Hans-Peter Kaul in the Confirmation Decision, pages 156 to 193 (“Dissenting Confirmation Decision”).

²³ “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-01/09-02/11-383 OA 4, 30 January 2012 (“Notice of Appeal”).

²⁴ Appellants’ Brief, paras. 18(a) and 19.

independently evaluated without an assessment of the facts of the case, and was consequently not jurisdictional in nature.²⁵

10. The victims find no error in the Majority's interpretation, characterization, evaluation and/ or disposition of the Kenyatta Jurisdictional Challenge. The victims submit that it was proper for the Majority to conclude that the Kenyatta Jurisdictional Challenge, as framed, could not be resolved without an assessment of the facts of the case against the Defence's asserted interpretation of the term "organization," implicating thereby two interdependent arguments and explicating the non-jurisdictional nature of the challenge.²⁶ Furthermore, and assuming, *arguendo*, that there was any error in characterizing the Kenyatta Jurisdictional Challenge as non-jurisdictional and dismissing it *in limine*,²⁷ such error does not invalidate the determination that the Court has jurisdiction *ratione materiae*, inasmuch as the Majority complied with the requirements of Article 19 (1) in satisfying itself – independent of any challenges by the parties – that the Court has jurisdiction over the subject-matter of the case and any alleged error did not materially affect the Confirmation Decision.²⁸ The Appellants' first ground of appeal should consequently be dismissed.

11. Discerning the precise nature of the Kenyatta Jurisdictional Challenge is the starting point of the inquiry. At the time it was lodged, there was an admitted awareness that the Prosecution had argued in the *Ruto et al.* case that defence submissions regarding the "organizational policy" requirement in Article 7(2)(a)

²⁵ Ibid.

²⁶ Confirmation Decision, paras. 33 and 34.

²⁷ Confirmation Decision, para., 35.

²⁸ See, e.g., DRC Situation, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution's Application for Warrants of Arrest, article 58'," ICC-01/04-169, 13 July 2006, paras. 34-35: *Appeals Chamber may amend, reverse [...] a decision only if the error has materially affected the impugned decision*; and Uganda Situation, ICC-02/04-01/05-408, para. 48: *the Chamber will use its power ex Rule 158 only if a decision was materially affected by an error*; "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07-1497, 25 September 2009, paras. 37 - 38.

were not jurisdictional in nature, inasmuch as they did not implicate any of the pre-conditions for the exercise of the Court's jurisdiction.²⁹ More specifically, and in response to challenges that were virtually identical to those of the Kenyatta Jurisdictional Challenge, the Prosecution had argued in *Ruto et al.*, that though described as jurisdictional in nature, the defence challenges presented two categories of issues: "(i) a legal question regarding the interpretation of the statutory phrase 'organizational policy' in article 7(2)(a); and (ii) the clarity and completeness of the charges and the sufficiency of the Prosecution's evidence to prove that there existed an organizational policy to attack civilians."³⁰

12. The Defence at bar were thus on notice that challenges to the definition of "organizational policy" which implicated the sufficiency of the Prosecution's evidence could be characterized as non-jurisdictional in nature. And yet, a plain reading of the Kenyatta Jurisdictional Challenge discloses that, indeed, the PTC was being requested to engage in an interdependent exercise to "reconsider its approach to the definition of organization under Article 7(2)(a),"³¹ and "adopt the definition... set out by His Honour Judge Kaul,"³² on the one hand, and assess the evidence at the close of the Hearing in light of Judge Kaul's definition and decline to exercise jurisdiction *ratione materiae*, on the other hand.³³ The Kenyatta Jurisdictional Challenge concludes with the submission that "the Prosecution has failed to adduce *sufficient evidence* of substantial grounds of the existence of an 'organizational policy' behind the crimes charged (emphasis added)."³⁴

13. In the face of a plain reading of the arguments and averments in the Kenyatta Jurisdictional Challenge, it is entirely unreasonable to suggest that the PTC

²⁹ See, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "Prosecution's Response to the Defence Challenges to Jurisdiction," ICC-01/09-01/11-334, 16 September 2011, paras. 1-2, 9 and 13; see, Kenyatta Jurisdictional Challenge, para. 13.

³⁰ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "Prosecution's Response to the Defence Challenges to Jurisdiction," ICC-01/09-01/11-334, 16 September 2011, paras. 1

³¹ Kenyatta Jurisdictional Challenge, para. 47.

³² Kenyatta Jurisdictional Challenge, para. 73.

³³ Kenyatta Jurisdictional Challenge, paras. 73, 74 and 12.

³⁴ Kenyatta Jurisdictional Challenge, para. 72.

mischaracterized (i) the interdependent nature of the arguments, (ii) the nature or contours of the judicial exercise they call for (i.e., the adoption and application of a new definition of “organizational policy,” followed by an assessment of the sufficiency of the relevant evidence), and (iii) the consequences of the manner in which they were framed (i.e., their non-jurisdictional character).

14. In rejecting the import of the Prosecution’s submissions in *Ruto et al.*, the Kenyatta Jurisdictional Challenge averred that “a challenge to jurisdiction concerning organizational policy relates directly to the principle of *ratione materiae*,” as held by Judge Kaul in his “Dissenting Summons Opinion” [sic].³⁵ Of significance in this regard is the fact that the Majority has never held that the legal definition of the contextual elements of crimes against humanity (the “organizational policy” requirement in this instance) does not fall within the test of jurisdiction *ratione materiae*. To the contrary, in the Investigation Decision, the Majority engaged in the legal analysis of the contextual elements of crimes against humanity (including the “organizational policy” requirement) in order to determine whether there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed in the Kenyan territory in the time-frame identified by the Prosecutor in its request.³⁶

15. Similarly, in the Confirmation Decision, the Majority incorporated by reference its jurisdictional determinations in both the Investigation Decision and the Summons Decision, with a view towards satisfying the requirement of Article 19 (1) that, “[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it.”³⁷ Despite concluding that the Kenyatta Jurisdictional Challenge was, *de facto*, not

³⁵ The Kenyatta Jurisdictional Challenge, at paragraph 13, incorrectly cites to Judge Kaul’s “Dissenting Summons Decision” when the language that it quotes and excerpts is to be found at paragraph 18 of Judge Kaul’s “Dissenting Investigation Decision.” Also, the language that it places in quotation marks is not a verbatim reproduction of language that appears in paragraph 18 of Judge Kaul’s Dissenting Investigation Decision. See, Kenyatta Jurisdictional Challenge, para. 13; *Cf.*, Dissenting Investigation Decision, para. 18; *Cf.*, Dissenting Summons Decision, para. 18.

³⁶ Investigation Decision, paras. 72 – 93, esp., paras. 83 – 93.

³⁷ Confirmation Decision, paras. 22 – 24.

jurisdictional in nature and should consequently be dismissed, *in limine*, the Majority nonetheless considered and addressed the challenge “in the part of [the] decision addressing the merits of the case pursuant to article 61(7) of the Statute.”³⁸

16. The Confirmation Decision makes clear that the *manner* (emphasis added) in which the challenge to the legal definition of “organization” was formulated by the Defence rendered the challenge non-jurisdictional in nature, since it could only be answered through engaging in an assessment of the evidence. To be sure, it is not for the PTC to assist the parties in the framing of proper jurisdictional challenges. And, significantly, the Majority’s approach and conclusion in respect of the Kenyatta Jurisdictional Challenge is consistent with those of other courts/ tribunals, in circumstances where purported jurisdictional challenges necessarily require an assessment of the sufficiency of the evidence and/ or the specificity of the charging instrument.³⁹ An illustrative example of another court’s approach to a markedly similar issue can be found at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).

17. Article 5 of Chapter II of the *Law on the Establishment of the ‘Extraordinary Chambers⁴⁰ in the Courts of Cambodia’* (hereinafter “ECCC”) confers jurisdiction upon the ECCC to try crimes against humanity occurring between the period 17 April 1975 to 6 January 1979, and defines “crimes against humanity” as “any acts committed as part of a widespread or systematic attack directed against any civilian population, on

³⁸ Ibid., para. 36 and 35; See also, paras. 186 – 223.

³⁹ See, e.g., *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR72.1, “Decision on Interlocutory Appeal on Jurisdiction,” 22 July 2005, para. 13; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR72, Decision on the Outcome of the Proceedings, 8 December 2005, para. 11; *Prosecutor v. Ante Gotovina, et al.*, Case No. IT-06-90-AR72.1, “Decision on Ante Gotovina’s Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction,” 6 June 2007 (“*Gotovina* Decision on Jurisdiction”), paras., 15 and 18; and *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, “Decision on Six Preliminary Motions Challenging Jurisdiction,” 28 April 2009, paras. 30 – 32, upheld on appeal by *Prosecutor v. Radovan Karadžić*, Case Nos. IT-95-5/18-AR72.1, IT-95-5/18-AR72.2, IT-95-5/18-AR72.3, “Decision on Radovan Karadžić’s Motions Challenging Jurisdiction (Omission Liability, JCE III – Special Intent Crimes, Superior Responsibility),” 25 June 2009, paras. 33 – 37, esp. Para. 36 (“*Karadžić* Consolidated Decision on Jurisdiction”).

⁴⁰ See, *Law on the Establishment of the Extraordinary Chambers*, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). Hereinafter, the “*Law on the Establishment of the Extraordinary Chambers*”.

national, political, ethnical, racial or religious grounds.”⁴¹ Article 2 of the a Agreement between the United Nations and the Royal Government of Cambodia regarding the ECCC incorporates that jurisdictional mandate and definition by reference, but amplifies it in Article 9 by adding that “The subject-matter jurisdiction of the ECCC shall be the crime of... crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court.”⁴² In consequence of these provisions, the Defence for IENG Sary appealed an alleged error by the Office of the Co-Investigating Judges (OCIJ) to the Pre-Trial Chamber, arguing that the OCIJ “erred by failing to include the existence of a State or organizational policy as an element of crimes against humanity at the ECCC” in its “Closing Order” and that “the OCIJ has therefore assumed jurisdiction on the basis of an incorrect assessment of the applicable law.”⁴³

18. In declining to find error in the finding below, the ECCC Pre-Trial Chamber concluded that the “Co-Lawyers’ argument [was] related to the contours of elements of the crime and therefore to the pleading practice and [did] not represent a jurisdictional challenge.”⁴⁴ Dissatisfied with this finding and in response to directions from the Trial Chamber regarding preliminary objections,⁴⁵ the Defence exercised its right to raise the issue with the Trial Chamber by indicating that the question of “whether the scope of crimes against humanity constitutes a jurisdictional challenge” was among the issues it wished to file further submissions on.⁴⁶ But despite the request, as formulated by the Defence, the Trial Chamber did not find it necessary to receive further submissions, nor to address the question before the commencement of

⁴¹ See, Law on the Establishment of the Extraordinary Chambers, Chapter II, Article 5.

⁴² See, Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003, Articles 2 And 9.

⁴³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), IENG Sary’s Appeal Against the Closing Order, 25 October 2010, D427/1/6, para. 190.

⁴⁴ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D47/1/30, para. 86.

⁴⁵ *Case of IENG Sary*, Directions to parties concerning Preliminary Objections and related issues, 5 April 2011, E51/7, para. 2.

⁴⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Request for Immediate Resolution of and Reasoned Decisions on Outstanding Issues Prior to the Commencement of Trial, 16 November 2011, E139, para. 10.

the trial on the basis of the following considerations: “The Chamber has prioritized and since issued all preliminary objections with implications for trial management, and disposition of the small number of remaining preliminary objections was not considered by the Chamber to constitute a barrier to the commencement of the trial of the substance in Case 002 on 21 November 2011.”⁴⁷

19. The victims aver that the ECCC’s approach to much the same issue is consonant with the Majority’s conclusion that the Kenyatta Jurisdictional Challenge was non-jurisdictional in nature. That conclusion is *a fortiori* warranted, inasmuch as the determination on subject-matter jurisdiction constitutes a prerequisite to the decision on the confirmation of charges and must be made against the charges *as pleaded by the Prosecutor* (emphasis added). In *Banda and Jerbo*, for example, the PTC established its jurisdiction *ratione materiae* by considering that, “the factual allegations of the Prosecutor in the application, *if proven*, w[ould] give rise to criminal responsibility for war crimes” under the Statute (emphasis added).⁴⁸ Indeed, the Majority at bar acknowledged as much when it held that, “*on the basis of the charges brought by the Prosecutor*, the Chamber finds that the requirement of material jurisdiction is also met in the present case” (emphasis added).⁴⁹ To hold otherwise and attempt to answer the “jurisdictional” challenge raised by the Defence would have involved exercising its power as provided under Article 61 (7), i.e., to assess whether there was sufficient evidence to establish substantial grounds to believe that the contextual element of “organization” as understood by the Defence had been satisfied.

⁴⁷ *Case of IENG Sary*, Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011, 17 November 2011, E141, p. (PAGE) 6; *Case of IENG Sary*, Notice of Trial Chamber's disposition of remaining pre-trial motions (E20, E132, E134, E135, E124/8, E124/9, E124110, E136 and E139) and further guidance to the Civil Party Lead Co-Lawyers, 29 November 2011, E145.

⁴⁸ *Prosecutor v. Banda and Jerbo*, “Second Decision on the Prosecutor’s Application under Article 58,” ICC-02/05-03/09-1, 27 August 2009, para. 2.

⁴⁹ Confirmation Decision, para. 37

20. The victims submit that further support for the Majority's conclusion that the Kenyatta Jurisdictional Challenge was, in reality, non-jurisdictional in nature can be discerned from the Muthaura Final Submissions. Setting aside for a moment the question of whether or not Ambassador Muthaura sufficiently adopted the Kenyatta Jurisdictional Challenge in the manner now being asserted, paragraph 110 of the Muthaura Written Submissions explicate an understanding of the import of the Kenyatta Jurisdictional Challenge that is consonant with the Majority's findings. It could not but be referring to an analysis of the sufficiency of the evidence when, citing paragraphs 40 through 58 of the Kenyatta Jurisdictional Challenge with approval, it states that: "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*" (emphasis added).

21. The victims further submit that even if the *in limine* dismissal of the Kenyatta Jurisdictional Challenge were found to constitute error by this Chamber, the occasioned error would not materially affect the impugned decision and, therefore, this Chamber should not invalidate the Confirmation Decision. It is well settled in the jurisprudence of the Court that the Appeals Chamber will use its power, pursuant to Rule 158, to reverse an impugned decision, only if it finds that the error has materially affected the impugned decision so that the decision would have been substantially different had the error not been committed.⁵⁰ Indeed, and despite its conclusion that the Kenyatta Jurisdictional Challenge was not jurisdictional in nature and should consequently be dismissed, *in limine*, the Majority nevertheless considered and addressed the challenge "in the part of [the] decision addressing the merits of the case pursuant to article 61(7) of the Statute."⁵¹

⁵⁰ See *supra* note 28, DRC Situation, ICC-01/04-169, paras. 34 and 35; Uganda Situation, ICC-02/04-01/05-408, para. 48; Prosecutor v. Germain Katanga, ICC-01/04-01/07-1497, paras. 37 - 38.

⁵¹ Ibid., para. 36 and 35; See also, paras. 186 – 223.

22. For all of the foregoing reasons, the victims submit that the Appellants' first ground of appeal is entirely without merit and should consequently be dismissed.

b. Second Ground of Appeal

23. As their second ground of appeal, the Appellants allege that the Majority of the PTC erred in law by adopting an incorrect interpretation of the notion of "organization" within the meaning of Article 7 (2) (a) of the Statute – one that is inconsistent with the intention of the drafters of the Statute.⁵² More specifically, they allege that the Majority failed to consider the express wording of Article 7 (2) (a) of the Statute and its jurisdictional finding(s) therefore violate the principle of *nullum crimen sine lege* (Article 22 of the Statute).⁵³ They contend that the definition of organization, as articulated by Judge Kaul in his dissenting opinion, is the correct one, given its consistency with intention of the drafters, as well as with leading academic opinion ; further, it establishes the correct boundaries between national and international crimes.⁵⁴ The "Basic Human Values Test" which the Majority is said to have adopted is alleged to be contrary to the intention of the drafters of the Statute⁵⁵ and consequently, "the Majority approach fails to demark the boundary between crimes against humanity, over which the ICC has jurisdiction, and those crimes that can and should properly be dealt with in national jurisdictions."⁵⁶

24. The victims have previously addressed the core issues which are raised by this ground of appeal in the Victims' Jurisdictional Observations. The relevant portions are worth reiterating herein.

25. Crimes against humanity must, as a preliminary threshold, be targeted against a collectivity of persons. The Majority followed the well-established view that crimes

⁵² Appellants' Brief, paras. 31, 40 – 49.

⁵³ Ibid.

⁵⁴ Appellants' Brief, paras. 67-77.

⁵⁵ Appellants' Brief, para. 41.

⁵⁶ Appellants' Brief, para. 42.

against humanity must be targeted against groups based on “nationality, ethnicity or other distinguishing features.”⁵⁷ The specific collective characteristic targeted in this case was “perceived political affiliation with the ODM,”⁵⁸ for which ethnicity was taken as a proxy during the bloody events of January 2008.

26. This approach is reflected in the plain wording of Article 7(1) of the ICC Statute, which requires that the attack be against a “civilian population,” not “civilians.” Article 7(1) requires that crimes be “committed as part of a widespread or systematic attack directed against *any civilian population*,” before they can be considered as a crime against humanity. The term “civilian population” is repeated in Article 7(2), which elaborates that an “‘attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against *any civilian population*, pursuant to or in furtherance of a State or *organizational policy to commit such an attack*.”

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

As mentioned above the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts. As explained by the Netherlands *Hoge Raad* in *Public Prosecutor v. Menten*:

The concept of “crimes against humanity” also requires – although this is not expressed in so many words in the above definition [Article 6(c) of the Nurnberg Charter] – that the crimes in question form a part of a system based on terror or

⁵⁷ Investigation Decision, para. 81.

⁵⁸ Summons Decision, para. 18. See, also, ICC-01/09-02/11-T-4-ENG, 21 September 2011, page 53, lines 19 – 25 and page 54, line 1.

constitute a link in a consciously pursued policy directed against particular groups of people.

Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the act occurs on a widespread or systematic basis, that demonstrates a policy to commit those acts, whether formalized or not. Although some doubt the necessity of such a policy the evidence in this case clearly establishes the existence of such a policy.⁵⁹

28. The “policy” requirement is therefore inherent in systematic group targeting. Indeed, the ICTY subsequently decided that the “organizational policy” element did not constitute a distinct legal requirement, but was subsumed within the requirement of a “systematic” attack against a civilian population – i.e., group targeting. Furthermore, the very judgment that subsumed the organizational policy requirement in this way expressly defined “systematic” as “the organized nature of the acts of violence.”⁶⁰ The settled law is now that “[t]he existence of a plan or policy can be indicative of the systematic character of the attack but it is not a distinct legal element.”⁶¹ The demotion of the policy requirement from a legal to a factual test has had no discernible impact on the jurisprudence of the *ad hoc* tribunals, but reflects the primary importance of the nature of the attack, of which the organization may be indicative.

29. A leading participant in those negotiations has remarked, unsurprisingly in this context, that the express inclusion of “organizational policy” was not understood by the majority of delegates as substantially raising, if at all, the existing threshold definition of crimes against humanity. On the contrary, Darryl Robinson states that the use of the word “organization” was intended to reflect the opposite:

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

⁵⁹ *The Prosecutor v. Tadic*, Trial Judgement, 7 May 1997, para. 653.

⁶⁰ *The Prosecutor v. Kunarac*, Appeals Judgement, 12 June 2002, paras. 94, 98.

⁶¹ *The Prosecutor v. Haradinaj et al.*, Trial Judgement, 3 April 2008, para. 105.

these developments, the delegations at the Rome Conference made reference to a state or organizational policy.⁶²

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

As long as an entity has sufficient institutional hallmarks to be called an "organization", then we have a collective dimension as opposed to individuals acting on their own. It is also supported by contextual interpretation, in that the structure of Article 7 features the disjunctive but high-threshold requirements of "widespread" or "systematic", coupled with the conjunctive but low-threshold requirements of "multiple" and "policy". To pack substantial additional content into the "policy" requirement would arguably undermine the schema of Article 7. Finally, with respect to drafting history, the policy element was very controversial and was unpopular with many delegations. Many delegations reluctantly agreed on the element in order to rule out crime waves of unconnected crimes, and accepted the element on the understanding that it was a modest threshold that could be inferred from the circumstances. It would arguably be unfortunate to impose a significantly higher threshold in the name of fidelity to drafters' intent, if an intent to insist on state-like entities has not been shown.⁶³

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

⁶² D. Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference," [1999] 93 Am. J. Intl. L. 43, 50.

⁶³ D. Robinson, "Essence of Crimes Against Humanity Raised by Challenges at ICC," 27 September 2011, <http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/> (last accessed on 10 March 2012).

as “groups distinguished by nationality, ethnicity or other distinguishing features.”⁶⁴ Where such a group attack occurs, then it is highly likely – if not inherent in the attack itself – that the group attack is a reflection of an organizational policy. The Basic Human Values test appropriately asks whether the organization in question was capable of engaging in such a collectively targeted attack. In other words, the definition of the Human Values test cannot be read in isolation, but works together with the Majority’s definition of “attack.”⁶⁵

32. The victims submit, on the basis of the foregoing, that while it is accurate to say that the element of organizational policy was included in order to ensure that unconnected crimes would not be brought within the jurisdiction of the Court, the conclusion drawn by the Defence that the drafters intended the formal nature of the group to be a defining criterion is without sufficient legal or factual basis. The legal definition of organization adopted by the Majority does not lead to the inclusion of a vague range of crimes within the jurisdiction of the Court, since the contextual element of organizational policy must be read together in conjunction with the requirement of a “widespread or systematic attack against any civilian population.” Such a reading will lead to identify very precise characteristics for crimes to be elevated to crimes against humanity, being the distinguishing criterion the nature of the attack which is a reflection of the existence of an organizational policy.

33. For these reasons, it is submitted that the Appellants’ second ground of appeal should be dismissed.

c. Third Ground of Appeal

34. Under the third ground of appeal the Defence identifies one error of fact and one error of law. Concerning the former the Common Legal Representative submits

⁶⁴ Investigation Decision, para. 81.

⁶⁵ Investigation Decision, paras. 80-82; Summons Decision, paras. 18-19.

that the arguments articulated by the Defence in support of this alleged error are not inherently jurisdictional but go to the manner in which the Majority has exercised its legally established judicial function to discretionarily assess the evidence before it and to conform the facts to the evidence. Accordingly the Defence was not entitled to appeal these issues as of right pursuant to article 82 (1) (a). It follows that also the error of law identified under this ground of appeal is without merits. The Majority cannot have violated its obligation to inform the suspects of the fundamental re-characterization of the case and to afford them adequate opportunity to respond to the new characterization as embodied under article 67 of the Statute through evaluating the evidence and conforming the facts to the evidence.

35. The Majority's findings are consistent with the Prosecution's case. For instance the Prosecutor, contrary to the Defence's contention, has held both in the amended DCC and at the Confirmation Hearing that Maina Njenga was the leader of the Mungiki.⁶⁶ As the Majority stated in the Confirmation Decision "for the purposes of the determination of contextual elements of crimes against humanity, the attack within the meaning of article 7 (2) (a) of the Statute need not, as a matter of law, be attributed to the person charged, neither does the person charged be the leader of the organization within the meaning of the same provision".⁶⁷ The role of Kenyatta and Muthaura with respect to the Mungiki relates to the question of their individual criminal responsibility. Furthermore, concerning the Defence's argument that the suspects were not afforded the opportunity to respond to the "new characterization of the facts", the Common Legal Representative wishes to point out that the Defence used twelve paragraphs of its submissions on the confirmation of charges hearing to

⁶⁶ Prosecutor, "Document Containing the Charges" (amended), ICC-01/09-02/11-280, 2 September 2011, para. 39; ICC-01/09-02/11-T-5-CONF-ENG ET 22-09-2011, p. 27, lines 22-25 and p. 28, line 1.

⁶⁷ Pre-Trial Chamber, "Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute", ICC-01/09-02/11-382-Red, 23 January 2012, para. 223.

challenge the fact that the Mungiki constituted an organization for the purposes of article 7 (2) (a).⁶⁸

36. On the basis of the foregoing the Common Legal Representative submits to the Appeals Chamber that the third ground of appeal is without merits and should be dismissed *in limine*.

d. Fourth Ground of Appeal

37. The Common Legal Representative submits to the Appeals Chamber that all arguments advanced by the Defence in support of the fourth ground of appeal are not jurisdictional in nature but go to the manner in which the Majority used its judicial power to discretionarily evaluate the evidence. The Defence is actually challenging the Majority's assessment of the evidence and factual findings in relation to the Mungiki organization. Accordingly the Common Legal Representative submits to the Appeals Chamber that this ground of appeal should be dismissed *in limine*.

IV. CONCLUSION AND RELIEF REQUESTED

38. For all of the foregoing reasons the Common Legal Representative requests the Appeals Chamber to reject the Appellants' challenge to subject-matter jurisdiction of the Court.

⁶⁸ "Defence Submissions on behalf of Uhuru Kenyatta following the Confirmation of Charges Hearing", ICC-01/09-02/11-372, 17 November 2011, paras. 40-52.

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 13th day of March 2012

At The Hague, The Netherlands.