Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **14 February 2012**

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. WILLIAM SAMOEI RUTO,
HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG

PUBLIC

Document in Support of Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Ruto on Jurisdiction

Source: **Defence for Mr. William Samoei Ruto**

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

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I. INTRODUCTION

1. In accordance with Regulation 64(2) of the Regulations of the Court, the Defence for Mr. William Ruto files this document in support of the *Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Ruto on Jurisdiction* filed on 30 January 2012.[1] The Defence appeals the Majority's determination that the Court has jurisdiction *ratione materiae* over the situation in Kenya, including the case against Mr. Ruto.

2. On 30 August 2011, the Defence for Mr. Ruto and the Defence for Mr. Sang had submitted an Article 19 *Defence Challenge to Jurisdiction,* questioning the basis of the Court's subject matter jurisdiction.[2] The Defence hereby adopts and reiterates all of the arguments and averments advanced in its Challenge to Jurisdiction as originally filed.[3]

3. At the crux of the Challenge to Jurisdiction was the interpretation of Article 7(2)(a) of the Statute. In the context of crimes against humanity, this provision defines, an "attack directed against any civilian population" as "a course of conduct involving the multiple commission of acts referred to in [Article 7(1)] against any civilian population, **pursuant to or in furtherance of a State or organisational policy** to commit such attack". The interpretation of 'organisational policy' materially affects the Chamber's decision on jurisdiction given that the 'organisation' as alleged by the Prosecution is not part of a State apparatus nor does it contain any State-like elements.

4. The Defence submitted that the Majority of Pre-Trial Chamber II, in its Authorization of an Investigation[4] and in its Summons to Appear[5] had drawn an erroneous conclusion by adopting a liberal and too wide a definition of 'organisational policy'. The Defence concurred with the dissenting opinion of Judge Hans-Peter Kaul as articulated on both

[1] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-374, Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Ruto on Jurisdiction, 30 January 2012.
[2] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-305, Defence Challenge to Jurisdiction, 30 August 2011 ("Challenge to Jurisdiction").
[3] As part of its Challenge to Jurisdiction, the Defence attached ten annexes of authorities. In the interest of efficiency and conservation, those annexes have not been reproduced and attached hereto, but they remain available in the record of the case. In addition, the Defence incorporates the brief submissions made in relation to its Challenge to Jurisdiction during the first day of the confirmation of charges hearing on 1 September 2011 [Transcript, p. 27-28]. The submissions were curtailed, however, by the Chamber's preference that the matter of jurisdiction be addressed primarily through written pleadings.
[4] *Situation in Republic of Kenya*, ICC-01/09-19-Corr, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010 ("Authorization of an Investigation").
[5] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-1, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011 ("Summons to Appear"); ICC-01/09-01/11-2 ("Dissenting Opinion to Summons to Appear").

occasions, which the Defence submitted reflects the current status of customary international law, the intention of the drafters of the Statute, and the view of a majority of leading scholars.[6]

5. Following the confirmation of charges hearing (which took place from 1 to 8 September 2011), the Prosecution[7] and the Common Legal Representative for the Victims[8] filed responses to the Challenge to Jurisdiction.

6. The Pre-Trial Chamber subsequently dealt with the decision on the Challenge to Jurisdiction as part of its 23 January 2012 decision on the confirmation of charges ("Decision").[9] The Majority determined that the Court has jurisdiction over the suspects, and it confirmed the charges against Mr. Ruto and Mr. Sang. Specifically, the Majority determined that there was sufficient evidence to provide substantial grounds to believe that Mr. Ruto and Mr. Sang committed crimes against humanity while belonging to an 'organisation' or adhering to an 'organisational policy'.[10] The Majority accepted the Prosecution theory of a Network of perpetrators belonging to the Kalenjin community with a policy to punish and expel from the Rift Valley those perceived to support PNU, namely Kikuyu, Kamba and Kisii civilians, which was established by December 2007.[11]

7. In so finding, the Majority endorsed the interpretation of the term 'organisation' as it had developed extensively in its 31 March 2010 Authorization of an Investigation into the Situation in Kenya and as reiterated in its Decision on Summons to Appear. The Majority refused to "revisit" this definition.[12]

8. As to whether or not the evidence adduced by the Prosecution was sufficient to provide a substantial reason to believe that an organisation existed, the Majority found that it was inappropriate to consider the merits of the Prosecutor's case on the facts and thus

[6] *Ibid*, para 7.
[7] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-334, Prosecution's Response to the Defence Challenges to Jurisdiction, 16 September 2012.
[8] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-332, Observations of the Victim's Representative on the Defence Challenges to Jurisdiction, 16 September 2012.
[9] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012 ("Decision" or "Confirmation Decision"); appended to the Confirmation Decision is the Dissenting Opinion by Judge Han-Peter Kaul to Pre-Trial Chamber II's "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012 ("Dissenting Opinion to the Confirmation Decision").
[10] Confirmation Decision, paras 33-34; See full discussion and determination of the jurisdictional challenge in Confirmation Decision, paras 23-38.
[11] Confirmation Decision, para. 186.
[12] Confirmation Decision, para. 34.

dismissed these considerations *in limine*.[13] Instead, the Majority addressed the factual aspects underpinning the existence of an organisation in paras 184-208 of its Decision, as part of its analysis as to the sufficiency of the evidence.

9. Judge Kaul concluded that the Court did not have subject matter jurisdiction over the Situation in Kenya and therefore could not exercise jurisdiction over the suspects. He noted that:

> "the 'degree of certainty' which it can only logically satisfy by assessing facts presented by the Prosecutor. As the 'jurisdiction test' consists of four requirements... an assessment of facts must necessarily extend to all those four requirements, including jurisdiction *ratione materiae*."[14]

10. Throughout a series of dissenting opinions, Judge Kaul has consistently disagreed with the Majority as to the interpretation of what constitutes an 'organisation' within the meaning of Article 7(2)(a) of the Statute.[15] In particular, in his Dissenting Opinion to the Confirmation Decision, the learned Judge stated that he is:

> "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. Without the crimes alleged having been embedded in an "organisational policy" ... the Court has no jurisdiction *ratione materiae* over the situation in the Republic of Kenya, including in the present case."[16]

II. GROUNDS OF APPEAL

11. The Defence advances four grounds of appeal which individually and/or collectively have materially affected the Decision:

i. Ground One: 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;[17]

[13] Confirmation Decision, para. 35.
[14] Dissenting Opinion to the Confirmation Decision, para. 38.
[15] Most recently in the Dissenting Opinion to the Confirmation Decision.
[16] Dissenting Opinion to the Confirmation Decision, para 13.
[17] Confirmation Decision, para. 33.

ii. Ground Two: 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*;

iii. Ground Three: 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,[18] or private individuals with *de facto* power or organised in criminal gangs or groups,[19] and that such may be assessed on a case-by-case basis with no predictable legal definition or criteria which need be exhaustively fulfilled;[20]

iv. Ground Four: 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.[21]

III. APPLICABLE LAW

12. Neither the Statute nor the Rules explicitly provides for what grounds of appeal may be raised on an appeal pursuant to Article 82(1)(a) of the Statute. But the Appeals Chamber has determined that the "absence of statutory grounds does not preclude a party from raising any grounds, either substantive or procedural, that may be germane to the legal correctness or procedural fairness of the Chamber's decision".[22] Appeals Chamber jurisprudence has incorporated the categories of appeal specified in Article 81(1)(a) and (b) of the Statute into categories of appeal applicable under Article 82(1)(a) as well.

[18] Authorization to Investigate, para. 90, as adopted in Confirmation Decision, para. 184.
[19] Authorization to Investigate, para. 91.
[20] Authorization to Investigate, para 93, as adopted in Confirmation Decision, para. 185.
[21] Confirmation Decision, paras 186-208.
[22] *Prosecutor v. Kony et al*, ICC-02/04-01/05-408 OA3, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19(1) of the Statute" of 10 March 2009, 16 September 2009, para. 46.

These categories include procedural errors, errors of law, errors of fact, and any other ground that affects the fairness or reliability of the proceedings or decision.[23]

13. The Appeals Chamber has also held that the right to appeal admissibility decisions as of right extends to a right to raise legal, factual or procedural errors, which were germane to the Chamber's ultimate determination.[24] In so doing, the Appeals Chamber confirmed that the grounds for appeal under article 81(1)(a) could also be applied to appeals as of right concerning jurisdiction and admissibility.[25] Here, the Pre-Trial Chamber was obliged to satisfy itself under Article 19(1) that it possessed competence over the case, which it did. The Defence should therefore have the right to raise any legal, factual, or procedural errors concerning the Chamber's finding that it possessed subject-matter jurisdiction over the case.

14. Regulation 64(2), which requires an appellant to "set out the grounds of appeal and shall contain the legal/factual reasons in support of each ground of appeal", shall be read in light of Appeals Chamber jurisprudence stipulating that the Chamber will use its power, provided by Rule 158 of the Rules, to reverse an impugned decision only if the decision was "materially affected by an error".[26] An appellant is also obliged, as part of his reasons in support of a ground of appeal, to "not only set out the alleged error, but to indicate, with sufficient precision, how this error would have materially affected the impugned decision".[27]

IV. LEGAL AND FACTUAL ARGUMENTS ON GROUNDS OF APPEAL

<u>GROUND ONE:</u> 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.

[23] Ibid, quoting ICC-01/04-01/06-568, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, para. 19; see also Judge Pikis' dissenting (separate on this point) opinion, making article 81(1)(a) and (b) applicable to all appeals under article 82(1) (para. 24 of the dissenting opinion).
[24] Prosecutor v. Kony et al, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408 at para. 46-47.
[25] At para. 47.
[26] Ibid, para. 48.
[27] Ibid, para. 48.

15. The Majority erred in finding that the Defence, as part of its Challenge to Jurisdiction, had the burden of putting forth a persuasive reason for the Pre-Trial Chamber to revisit its previous finding from the Summons to Appear (which reiterated the same jurisdictional findings of its 31 March 2010 Authorization of an Investigation) on the question of how to define 'organisational policy'.[28] It stated:

> 33. Turning to the first part of the challenges concerning the legal definition of the term 'organisation', the Chamber endorses the interpretation of the term 'organisational policy' as developed extensively in the 31 March 2010 Decision. This interpretation was recently followed by Pre-Trial Chamber III in its decision authorizing the commencement of an investigation in the situation of Côte d'Ivoire.
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> 34. Thus, **the majority does not find a persuasive reason to revisit its previous finding on the question or to reverse its original approach**, given that the majority remains in favour of providing an effective interpretation to article 7(2)(a) of the Statute. Moreover, the Chamber observes that the Defences' submissions disputing the legal findings of the 31 March 2010 Decision are actually an attempt to obtain a right to appeal on this point of law and at this stage of the proceedings. In this respect, although not determinative of the issue under examination, the Chamber finds it rather notable that the Suspects failed to avail themselves of the right to appeal the Decision on Summons to Appear, which reiterated the same legal findings of the 31 March 2010 Decision, pursuant to article 82(l)(a) of the Statute and rule 154(1) of the Rules. Accordingly, the Chamber rejects this part of the Defences' jurisdictional challenges.

16. In this regard, the Defence acknowledges and adopts Judge Kaul's comment, in his Dissent to the Confirmation Decision, to the effect that such an approach is "as astonishing as it is misconceived."[29] The Majority erred in procedure and/or in law in failing to provide the Defence an effective opportunity to be heard at first instance. Rather, the Majority appears to have employed a threshold approach that is similar to the remedy of reconsideration; namely, the Chamber required the Defence to demonstrate the existence of circumstances that would warrant a consideration of the Defence arguments. The conclusory statement by the Majority that it "does not find a persuasive reason to revisit its previous findings" indicates that the Majority did not consider the Defence's substantive arguments on jurisdiction.

17. There are other instances articulated by the Rome Statute where a Pre-Trial Chamber may initially have to make a determination on an issue without input from the defence. Yet this does not bar the defence from subsequently challenging the basis of those decisions; nor does it leave the defence with only a remedy of reconsideration with respect to those decisions. For instance, a Pre-Trial Chamber necessarily rules on a host of legal issues

[28] Confirmation Decision, para 34.
[29] Dissenting Opinion to the Confirmation Decision, para 25.

contained in a Prosecutor's Article 58 application for summons or arrest without hearing from the defence. This does not mean that the defence then bears the burden of persuasion at the confirmation of charges hearing, to show that legal or factual aspects of the Article 58 decision should be reconsidered.

18. Rather, a challenge to jurisdiction is more analogous to initial challenges to detention under Article 60(2), which marks the first time that a suspect is heard in relation to the issue. This is different from reviews of decisions on detention under Article 60(3), wherein the defence must demonstrate the existence of a change in circumstances.[30] On the contrary, the jurisprudence clearly states that the burden falls on the Prosecution to demonstrate that the criteria under Article 58 are met at all times.[31]

19. The Appeals Chamber has previously indicated that the Pre-Trial Chambers should be wary of pre-determining Article 19 issues without the full participation of the Defence.[32] In the context of admissibility, the Appeals Chamber underscored the importance of providing the defence with an effective opportunity to submit a challenge under Article 19(2) at first instance, as opposed to a right, which is rendered illusory by predeterminations.[33] In the *Kony et al* case, the Pre-Trial Chamber further elaborated that the relevance and validity of arguments considered by the Chamber in connection with a *proprio motu* Article 19(1) decision, in which the defendant was not participating, should be confined to that particular assessment, and "should not prejudice the arguments which the defence may put forward at a later stage".[34] Article 67(1)(i) also sets out the right of

[30] *Prosecutor v. Bemba*, ICC-01/05-01/08-1019, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, para. 56.

[31] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-330, Decision on the powers of the Pre-Trial Chamber to review proprio motu the pretrial detention of Germain Katanga, 18 March 2008, p. 6:

> "according to article 60 (2) of the Statute, a person subject to a warrant of arrest, shall continue to be detained only if "the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met;" and that therefore, the Single Judge is of the view that, according to the ordinary meaning of article 60(2) of the Statute, the burden of proof in relation to the continuing existence of the conditions set forth in article 58(1) of the Statute during the time a person is under pre-trial detention lies with the Prosecution;

[32] *Situation in the Democratic Republic of the Congo*, ICC-01-04-169, Appeals Chamber, Judgement on the Prosecutor's Appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', 13 July 2006, paras 47-50.

[33] *Prosecutor v. Ntaganda*, ICC-01/04, Judgement on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', 13 July 2006, paras 50-51.

[34] *Prosecutor v. Kony et al.*, ICC-02/04-01/05-377, Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, para. 32.

the defence not to have imposed on him or her any reversal of the burden of proof or onus of rebuttal.

20. The Majority's treatment of the Defence's jurisdiction challenge as one that required a justified request for reconsideration is erroneous. The Majority should have considered the challenge on the merits anew, ie. in the first instance. The fact that the Defence did not appeal the Decision on Summons to Appear, which made a jurisdictional finding, is therefore irrelevant to the question as to whether the Defence has a right to challenge jurisdiction subsequently.

21. The Majority thus erred in suggesting that the Defence was acting in bad faith by filing an Article 19 Challenge to Jurisdiction at this stage, instead of having appealed directly the Majority's findings on jurisdiction in the Summons to Appear. Yet Article 19, subsections (4) and (6), affords the Defence an explicit right to challenge jurisdiction at first instance before either the Pre-Trial Chamber or Trial Chamber, and an independent right to appeal a decision therefrom. As found by the Pre-Trial Chamber in the *Kony et al* case, the defendant's right to challenge admissibility (and by extension, jurisdiction) under Article 19(2) exists independently of any decision by the Chamber under Article 19(1):[35]

> "[t]the existence of a plurality of parties vested with the power to raise challenges in matters of admissibility per se entails that, during proceedings in a given case, the Court may need to address the issue of the admissibility of the case more than once, including as a result of multiple challenges brought by different parties at different points in time. Article 19(4), second sentence explicitly allows for a challenge to jurisdiction or admissibility to be brought "more than once" prior to the commencement of the trial, on leave to be granted by the Court "in exceptional circumstances". Furthermore, no provision is made for a compulsory joinder of challenges to admissibility by different parties. On the basis of the foregoing, **it appears beyond controversy that the accused will always be entitled to raise a challenge under article 19(2) of the Statute, whether or not the Chamber has exercised its powers under article 19(1)**."

22. The Defence is also mindful of the interpretation of Article 19 as articulated by Pre-Trial Chamber I in the *Mbarushimana* case, wherein Pre-Trial Chamber I clearly underlined the importance of the unique nature of the remedy provided to a suspect by that provision:

> "The Chamber observes that a suspect's right to challenge the jurisdiction of the Court is a special remedy enshrined in article 19 of the Statute, as such autonomous and independent from any other remedy which the suspect might have by virtue of other statutory provisions".[36]

[35] *Ibid.*, para. 26.
[36] *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, ICC-01/04-01/10-451, Decision on the Defence Challenge to the Jurisdiction of the Court, 26 October 2011, para 11.

23. As Judge Kaul notes, the above finding "highlights the general importance of the jurisdictional challenges under article 19 of the Statute which should not be diminished. Hence, the function of article 19 of the Statute must not be significantly reduced by excluding matters of jurisdiction *rationae materiae.*"[37]

24. In any event, the Majority's suggestion that the Defence should have, pursuant to Article 82(1)(a), appealed its definition of 'organisation' after it issued its Summons to Appear is simply not practical, if not impossible, given the timing of such decision. Such a requirement would have rendered the Defence's right to challenge jurisdiction illusory. As the Prosecution's Article 58 Application was *ex parte*,[38] the Summons to Appear was the first time that the suspects knew with certainty that they were wanted in connection to the Situation in Kenya. Prior to the issuance of the Summons to Appear, there was no reason for most of the suspects to retain lawyers, to become *au fait* with International Criminal Court rules and regulations, etc. It would be procedurally unreasonable therefore to expect that within five days of that decision, a defence team would be in place, which could adequately challenge such intricacies of international criminal law and procedure. It is distinctly unfair and unreasonable for the Majority to punish the Defence for its failure or inability to avail itself of a statutory remedy at a certain stage of the proceedings, where such is not circumscribed in law. Consequently, the suspect's choice as to timing of the Challenge to Jurisdiction should have no impact on the contours and content of the suspect's statutory right to challenge jurisdiction.

25. The Decision infringes on the procedural fairness of the proceedings, to the detriment of the suspect. As stated in the Dissenting Opinion:

> "such an approach means that the suspect makes his first submissions on jurisdiction before the Appeals Chamber. Moreover, from a practical point of view, such an approach also compels the Defence to exercise an important remedy - which according to article 19(4) of the Statute can be made only once by any person, unless leave is granted by the Chamber to bring a challenge more than once - at an early stage of the proceedings in the absence of knowledge of the material relied upon in the decision. It is important to recall that initially the suspect is served only with a warrant of arrest or a summons to appear. No supporting documentation is attached thereto. In order to effectively challenge jurisdiction it must be ensured that the suspect has been granted access to documents that are essential for the preparation of his or her defence."[39]

[37] Dissenting Opinion on Confirmation Decision, paras 33 and 34.
[38] It is notable that the Defence were explicitly denied the opportunity to participate in connection with the Article 58 Applications in the Situation in Kenya. See for example, ICC-01/09-42, Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)", 11 February 2011; ICC-01/09-47, Decision on Application for Leave to Participate under Articles 58, 42(5), (7)-(8)(a) of the Rome Statute and Rule 34(l)(d) and (2) of the Rules of Procedure and Evidence, 18 February 2011.
[39] Dissenting Opinion to the Confirmation Decision, para. 35.

26. The Majority made reference to Pre-Trial Chamber III's purported "adoption" of the Pre-Trial Chamber II's definition of 'organisation'. The value and relevance of this reference is unclear, but the Defence makes the following submissions. There is no binding doctrine of precedent at the ICC, particularly as concerns preliminary 'situation' decisions, which are issued in a non-adversarial context. Little is to be gained by citing one non-binding, non-persuasive decision issued in a different situation and it cannot justify the wholesale disregard of the merits of the Defence's substantive arguments and the failure to provide reasons in support of the ultimate disposition.

27. Furthermore, as a matter of law, the Majority also erred in finding that the Pre-Trial Chamber III decision provided independent support for the Majority position. In defining an organisational policy, Pre-Trial Chamber III approved the Kenya Majority approach only insofar as it agreed that the assessment should be made on a case-by-case basis.[40] Pre-Trial Chamber III noted the criteria relied upon by the Kenya Majority, without explicitly determining whether this position was correct in law.[41] To the contrary, when considering the application of the organisational policy requirement to non-government forces, Pre-Trial Chamber III:

> "**notes that there is disagreement within the jurisprudence of the Court on the criteria required for a group to constitute an organisation for purposes of Article 7 of the Statute**. In the present case, the FRCI fulfils the criteria for an organised armed group as a party to a non-international armed conflict, and so inevitably it qualifies as an organisation within the context of Article 7 of the Statute. Therefore, it is unnecessary to consider this issue further. "[42]

28. Essentially, Pre-Trial Chamber III side-stepped the determinative issue facing the Kenya Majority, ie whether a loosely defined group, which was not operating in the theatre of an armed conflict, constituted an 'organisation' for the purposes of Article 7(2)(a).

29. The Majority's refusal to consider the Defence's Challenge to Jurisdiction on the merits materially affected the decision. It resulted in the Pre-Trial Chamber using a definition of 'organisation' with which the Defence did not agree and which the Defence had been unable to challenge at first instance. Had the Pre-Trial Chamber entertained the challenge and adopted the correct definition of 'organisation', it would have been unable to

[40] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, ICC-02/11-14, para. 46.
[41] *Ibid.*, para. 46.
[42] *Ibid.*, para. 99.

characterize the alleged 'Network' as an 'organisation' for purposes of Article 7(2)(a) of the Statute and could not have exerted jurisdiction over the suspects.[43]

GROUND TWO: 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*.

30. The Majority opines that the question of how to factually define 'organisation' as a component of jurisdiction *ratione materiae* does not fall within the ambit of a jurisdictional challenge.[44] The Majority stated:

> 35. With regard to the second point presented by the Defence teams of the Suspects and after examining the Prosecutor's as well as the Legal Representative of victims' observations on the Defences' jurisdictional challenges, **the Chamber is of the view that the Defences' second point cannot be qualified as a jurisdictional challenge under article 19(2)(a) of the Statute**, despite the Defences' arguments expressed in their Final Written Observations. It is clear from the Defences' submissions that the essence of this part of their filings is to challenge the merits of the Prosecutor's case on the facts. In the Chamber's opinion, this part of the Defences' submissions is in effect an evidentiary challenge under article 61(5) and (6) of the Statute which, in principle, should be resolved pursuant to the standard provided for in article 61(7) of the Statute in the relevant part of the decision, namely, under the section concerning the contextual elements of the crimes against humanity. Moreover, although the Chamber initially invited the Prosecutor and the Legal Representative of victims to submit written observations pursuant to rule 58(3) of the Rules, this does not necessarily mean that, at the time, it had decided to treat the Defences' applications as challenges under article 19 of the Statute. Rather, the rationale behind such an invitation was to receive all the necessary information in order for the Chamber to be in a position to arrive at an informed decision by way of determining the actual nature of the challenge.
>
> 36. Having said the above, the Chamber therefore considers that this second part of the Defences' challenges to jurisdiction of the Court, based on the merits of the case, should be dismissed *in limine*.
>
> 37. In light of the above, the Chamber does not find an impediment concerning its jurisdiction and remains competent to adjudicate the case *sub judice*.

31. The Majority erred in procedure and/or in law in deciding that the interpretation of the contextual elements of 'organisational policy' is not part of the Challenge to Jurisdiction and could not be adjudicated as such. The Majority dismissed *in limine* the Defence's argument that the Prosecution had not adduced sufficient evidence to provide substantial grounds to believe that an organisation (and thus an organisational policy) existed as required by Article 7(2)(a) of the Statute. The Majority erred in procedure and/or in law

[43] See, Defence Challenge to Jurisdiction, ICC-01/09-01/11-305, paras 62-81
[44] Confirmation Decision, para 35.

by deciding that an evaluation of the facts necessarily went to the merits of the case, ie to whether or not the charges could be confirmed, and therefore could not be assessed as part of its determination of whether the Court had subject matter jurisdiction.

32. This error materially affected the Decision in that it precluded the Pre-Trial Chamber from taking into account necessary criterion before assuring itself that it had subject matter jurisdiction and was therefore competent to hear the case on the merits.

33. As acknowledged by the Appeals Chamber in *Lubanga*, there are four facets of jurisdiction, which find expression in the Statute.[45] These are: subject-matter jurisdiction (Articles 5, 6, 7, and 8), personal jurisdiction (Articles 12 and 26), territorial jurisdiction (Article 12 and 13(b)), and temporal jurisdiction (Article 11). Article 5 limits the subject matter jurisdiction of the ICC to genocide, crimes against humanity, war crimes, and the crime of aggression. Article 5(1) further explicitly states that this subject matter jurisdiction must be construed "in accordance with this Statute". Article 7 of the Statute provides further particulars of the definition of crimes against humanity, and *inter alia*, specifies that they must have been committed pursuant to an organisational policy. The Defence submits that the full extent of each of these facets must be satisfied before the Court can assure itself with any degree of certainty that there is no hurdle to the exercise of jurisdiction.

34. The suspects were charged with committing crimes against humanity pursuant to Article 7(2)(a), requiring that the alleged crimes be committed pursuant to a State or organisational policy. The organisational requirement is not simply a matter of substance relating to the merits of the case. To so find would, in the words of Judge Kaul, disregard "the inseparable, two-fold nature of contextual elements which are both elements of the crimes as stated in the Elements of Crimes relating to the merits and jurisdictional insofar as the Court cannot exercise jurisdiction over the underlying acts in the absence of such contextual elements".[46] The Court's competence to adjudicate the underlying conduct prohibited in Article 7(1)(a) to (k) is not triggered if the contextual elements relating to, *inter alia*, 'organisational policy' in Article 7(2)(a) are not satisfied. From the outset, and certainly prior to proceeding to analyse a case on the merits, the Court must in accordance

[45] *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, paras 21 and 22.
[46] Dissenting Opinion to the Confirmation Decision, para. 25.

with Article 19(1), "attain a degree of certainty" that the jurisdictional parameters of the Statute have been met.[47]

35. In contrast to the suggestion of the Prosecution, the mere fact that Mr. Ruto is charged with committing crimes against humanity which fall under Article 7 of the Statute does not automatically vest the Pre-Trial Chamber with jurisdiction *ratione materiae* over the case. Rather, some jurisdictional challenges necessary involve a consideration of the facts and evidence.

36. For example, if the Defence asserts that the conduct relied upon by the Prosecution falls outside the temporal or geographical jurisdiction of the Court, the Chamber would be required to make a factual assessment as to whether this is the case, based on the evidence. Similarly, the issue as to whether the definition of certain crimes fall outside the subject matter jurisdiction of the Court can also be interlinked to findings concerning the evidence underlying the crime. As Judge Kaul stated, such power does not belong to the Prosecution, but to the Pre-Trial Chamber:

> "The charges, which imply jurisdiction, are merely presented by the Prosecutor. Again, it is ultimately for the Judges of this Court to decide on jurisdiction, not the Prosecutor. Were it otherwise, the Prosecutor could label any crime as a crime within the jurisdiction of the Court thus removing the subject-matter jurisdiction (ratione materiae) from the scope of article 19(1), first sentence, of the Statute and limiting any challenges or questions raised respectively under article 19(2) and 19(3) of the Statute to jurisdiction ratione temporis and ratione loci/ratione personae. In my opinion, such an interpretation would render articles 19(1), 19(2) and 19(3) of the Statute largely ineffective."[48]

37. Indeed, when the Pre-Trial Chamber first considered the issue of jurisdiction, it first set out the legal definition of 'organisational policy' and then assessed the facts to consider whether they matched that definition. It looked at similar issues as did the Defence in its *Challenge to Jurisdiction*, namely the extent to which the crimes were organised and funded. It made its assessment on a "reasonable grounds to believe" standard and found, "bearing in mind the nature of the present proceedings, the low threshold, as well as the object and purpose of this decision", that crimes against humanity had been committed on Kenyan territory. It made this finding "without prejudice to any further submission by the Prosecutor or finding by the Chamber to be made pursuant to a different threshold at a later stage of the proceedings in the context of the situation in Kenya."

[47] Dissenting Opinion to the Confirmation Decision, para. 26.
[48] Dissenting Opinion to the Confirmation Decision, para. 32.

38. The Prosecution itself has followed the same approach – it analysed subject-matter jurisdiction, including the contextual elements of the crimes allegedly committed, when determining whether there is a "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed" pursuant to article 53(1)(a) of the Statute". Judge Kaul at paragraph 30 points to the example wherein the Prosecution declined to initiate an investigation into the situation in Venezuela on the basis that crimes against humanity did not appear to have taken place on the basis of the information available, explaining:

> "(...) In order to constitute a crime against humanity. Article 7(1) of the Rome Statute provides that particular acts must have been committed as part of a widespread or systematic attack directed against any civilian population. **This test creates a stringent threshold. Even on a generous evaluation of the information provided**, the available information did not provide a reasonable basis to believe that the requirement of a widespread or systematic attack against any civilian population had been satisfied" (emphasis added).[49]

39. Two conclusions can be drawn from this reasoning and these examples: first, that evidentiary submissions, as part of a jurisdiction challenge, are not only allowed but also necessary to demonstrate that the organisational policy requirement has not been met; and second, that it is still open to the Chamber to reach a different conclusion at the confirmation stage given the higher standard of proof which it has to apply to the issues raised before it.

40. At the time of the Defence's Challenge to Jurisdiction, the Pre-Trial Chamber had to determine whether the case before it should proceed to trial. This being the case, the Defence submits that the higher standard of "substantial grounds to believe" should have been applied to the evidentiary assessment necessary to determine whether the crimes charged were committed pursuant to an organisational policy and thus qualify as crimes under the jurisdiction of the Court. This makes sense, as the evidentiary assessment does not go to the guilt of the suspects charged with crimes against humanity; but to whether crimes against humanity were committed.

41. As the Defence noted in the Ruto Confirmation Brief at paragraph 185, both Pre-Trial Chamber II in the Kenya cases, and Pre-Trial Chamber III in the Situation in Cote

[49] See pages 3-4 of the Prosecutor's response to the communications received concerning the situation in Venezuela, available at: http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf (last visited on 14 February 2012). I also note that in this response the Prosecutor appears to have gone even so far as to examine, based on the communications received, the specific elements of the crime of persecution pursuant to article 7(l)(h) of the Statute, concluding that "[m]any of the allegations of persecution did not appear to satisfy the elements for the crime of persecution", see p. 3.

d'Ivoire, have treated the analysis of 'organisation' as being directly relevant to the assessment of whether the allegations fall within the jurisdiction *ratione materiae* of the Court.[50] It seems a significant error then that the same Pre-Trial Chamber refuses to acknowledge the jurisdictional nature of something it has previously analysed under the guise of asserting jurisdiction.

42. The Prosecution has attempted to rely on an ICTY Appeals Chamber decision in *Gotovina*[51] in support of his argument that the issues raised by the Defence are not proper challenges to jurisdiction. The Prosecution argues that the ICTY, when "faced with an almost identical defence argument in the *Gotovina* case, refused to consider the claim as one addressing jurisdiction".[52] As Judge Kaul notes,[53] however:

> "A careful review of the Appeals Chamber decision concerned compels me to conclude that the Prosecutor misrepresents the issues at stake. In that decision, the *sub judice* matter raised by the defence for Ante Gotovina was whether or not the objective elements of the crimes of deportation and forcible transfer, cruel treatment and inhumane acts had been established. Indeed, the establishment of the *actus reus* component of a specific crime, the underlying act, is an issue of substance relating to the merits of a case which should not, in principle, be prejudged when examining jurisdiction but instead considered with the merits. The question in the present case is wholly different: have the *contextual* elements of crimes against humanity been established? As elaborated above, I believe this matter to fall squarely under the 'jurisdiction test' since these contextual elements confer jurisdiction on the Court when established."

Consequently, there is no persuasive authority to suggest that the Pre-Trial Chamber should not have satisfied itself that all the contextual elements of crimes against humanity had been legally satisfied before assuring itself that it had jurisdiction over the Situation in Kenya.

[50] In the table of contents in the Kenya Investigation Decision (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), the element of 'organisational policy' along with the other elements of Article 7 is listed under 'A. Whether there is a reasonable basis to believe that crimes against humanity within the jurisdiction of the Court have been committed', and under the further sub-title 'Jurisdiction ratione materiae'. In the Côte d'Ivoire Decision, Pre-Trial Chamber III indicated that it would "first examine whether i) there is a reasonable basis to believe that the alleged crimes committed in Côte d'Ivoire fall within one or more categories of crimes referred to in Article 5 of the Statute (jurisdiction ratione materiae)..." (para. 22). The Chamber, then in a section entitled 'B. Jurisdiction Ratione Materiae', sub-titled '1. Crimes Against Humanity', set out the contextual elements of crimes against humanity (including, naturally, the requirement of "organisational policy") (para. 29) and proceeded to analyse the alleged acts, "both with regard to contextual elements and underlying acts" in order to reach a determination of whether the acts fell within the jurisdiction ratione materiae of the Court.

[51] *Prosecutor v. Ante Gotovina et al*., IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007.

[52] ICC-01/09-01/11-334-Corr, para. 14.

[53] Dissenting Opinion to the Confirmation Decision, para. 28.

43. Furthermore, and as explained further in relation to Ground Three, the prosecution of crimes against humanity is, by definition, an intrusion into state sovereignty. This motivated a cautious approach by the State Parties to the Rome Statute to ensure that the crimes committed were of a nature which required international intervention.[54] Accordingly, as was pointed out by Bassiouni, the 'policy' requirement is jurisdictional in that it "transforms crimes that would be national crimes into international ones".[55] Judge Kaul affirmed this reasoning, stating that the presence of contextual elements is what differentiates the crimes within the jurisdiction of the Court from ordinary crimes.[56]

44. In sum, the fact that the Majority failed to consider all of the contextual elements of crimes against humanity materially affected the decision, in that it allowed the Majority to assert jurisdiction where it did not have competence to do so. If the Prosecution fails to provide sufficient evidence to meet whatever applicable evidentiary threshold is appropriate at the time a challenge to jurisdiction is brought, then the Chamber should decline to exercise jurisdiction over the case. There is therefore no legal basis under either the Statute, the Court's prior jurisprudence, or the rationale behind assessing jurisdiction, to introduce an artificial distinction between legal and factual challenges to the definition of an organisational policy – they are inevitably intertwined.

<u>GROUND THREE:</u> 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,[57] or private individuals with *de facto* power or organised in criminal gangs or groups,[58] and that such may be assessed on a case-by-case basis with no predictable legal definition or criteria which need be exhaustively fulfilled.

45. The Majority set forth the following definition and criteria of what constitutes an 'organisation' for the purposes of Article 7(2)(a):

> 184. The Chamber deems it appropriate to briefly recall its legal analysis of the meaning of the term 'organisation' under article 7(2)(a) of the Statute, as established in the 31 March 2010 Decision. In that instance, the Chamber, by majority, stated that "a distinction should be drawn on whether a group has the capability to perform acts which

[54] Ruto Confirmation Brief, para. 185 and Defence Challenge to Jurisdiction, paras. 23, 27, 38.
[55] M. Cherif Bassiouni, Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text, 2nd Ed., p. 150-151.
[56] Dissenting Opinion to Confirmation Decision, para. 25, Dissenting Opinion to Authorization to Investigate, para. 18.
[57] Authorization to Investigate, para. 90, as adopted in Confirmation Decision, para. 184.
[58] Authorization to Investigate, para. 91.

> infringe on basis human values. Accordingly, it determined that "organisations 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".
>
> 185. 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 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.

46. 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,[59] or private individuals with *de facto* power or organised in criminal gangs or groups,[60] and that such may be assessed on a case-by-case basis with no predictable legal definition or criteria which need be exhaustively fulfilled. The definition adopted by the Majority is not supported by its own authorities. Nor is it consistent with customary international law, the intention of the drafters of the Rome Statute, or the object and purpose of punishing people for crimes against humanity at the international level. As a result, the Majority's open-ended and variable definition of 'organisation' contravenes the principle of legality.

47. This error has materially affected the Majority's decision because had the Majority adopted and applied the correct definition of 'organisation', it could not have found that the 'Network' constituted an organisation and therefore could not have found that the Court has jurisdiction *ratione materiae* in the case against Mr. Ruto.

48. Therefore, the Defence will go into considerable detail below, demonstrating the errors of the Majority definition. The Defence also incorporates all arguments made in this respect in its Challenge to Jurisdiction at paragraphs 41 to 61.

The Definition Adopted by the Majority is Not Supported by its own Authorities

[59] *Ibid.*, para. 90, as adopted in Confirmation Decision, para. 184.
[60] *Ibid.*, para. 91.

49. In the Authorization to Investigate, the Majority arrived at its definition of organisation after considering precedents from the International Law Commission ("ILC"), the *Katanga and Ngudjolo*, and *Bemba* cases, extracts from a trial judgement from the *Blaskic* case, and a handful of academic scholars.[61] For the reasons developed below, these purported authorities were either quoted out of context, fail to support the majority position, or are not authoritative statements of law for the purposes of Article 21 of the Statute.

50. In terms of the work of the ILC, the Majority refer to an earlier Commentary to the Draft Code adopted in 1991 to the effect that it was important not to:

> "confine possible perpetrators of the crimes to public officials or representatives alone. Admittedly, they would, **in view of their official position, have far-reaching factual opportunity to commit the crimes** covered by the draft article; yet the article does not rule out the possibility that private individuals with de facto power or organised in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code". [62]

51. Notably, the 1991 Draft Code did not include a specific provision on crimes against humanity:

> "Article 21, defining "systematic or mass violations of human rights," bore the closest resemblance to this crime. The definition of "systematic or mass violations of human rights", however, differs from the 1954 Draft Code definition of crimes against humanity in a number of significant ways. Because the ILC did not indicate that this crime was intended as a substitute for crimes against humanity, it's significant in reflecting the development of crimes against humanity in international law is limited."[63]

52. The quotation relied upon by the Majority is therefore of very little relevance to the legal construction of the crimes against humanity provisions. In addition, the overall 1991 formulation for 'systemic or mass violations of human rights' generated criticism from delegates, who were concerned that there would be blurring with ordinary crimes,[64] or that the purview of the Code should be restricted to crimes:

> "committed by persons enjoying the protection or authorization of a State […] The seriousness of a crime which justified inclusion in the Code lay precisely in the fact that **it**

[61] Authorization to Investigate, paras 35-38.
[62] Yearbook of the International Law Commission 1991, Volume 2, Part 2, A/CN.4/SER.A/1991/Add.l (Part 2) (1991), p. 103.
[63] P. Hwang, 'Defining Crimes Against Humanity', 22 Fordham Int'l L. J., 1998-1999, p. 465-466.
[64] William A. Schabas, 'Punishment of non-State actors in non-international armed conflicts', 26 FORDHAM INT'L L.J. 907, 2002-2003, p. 912.

> **was committed by someone enjoying protection or the consent of the State** to kill, enforced disappearances or torture."[65]

53. The Majority's reliance on the 1996 Draft ILC Code does not support their definition. In the commentary to Article 18 of the ILC Code, the ILC stated that its purpose was to define crimes against humanity in a manner which was consistent with the jurisprudence of Nuremburg, taking into account subsequent developments in international law.[66] As will be elaborated below, both the International Military Tribunal and its subsequent developments emphasised the requirement of State or State-directed policy. In support of its finding that the policy could be directed by States, organisations, or groups, the ILC expressly cited the fact that the "The Nuremberg Tribunal declared the criminal character of several organisations which were established for the purpose of and used in connection with the commission of crimes against peace, war crimes or crimes against humanity. The Charter and the Judgment of the Nuremberg Tribunal recognized the possibility of criminal responsibility based on the membership of an individual in such a criminal organisation."[67]

54. Although the IMT penalized membership of criminal organisations, its overall jurisdiction was restricted to offenders who had been "acting in the interests of the European Axis countries";[68] that is, persons who had been acting pursuant to State policy. The groups, which were declared criminal by the IMT, were all part of or acting on behalf of the government apparatus, and their objectives were to further the policy of the Nazi government.

55. In contrast, the "SA", a voluntary, political organisation, was not declared criminal, because the IMT found that, although it had participated in Nazi outrages, it had not done so pursuant to the specific plan to wage aggressive war. Rather it had done so because its members were largely "ruffians and bullies".[69] Moreover, "[a]lthough in specific instances some units of the SA were used for the commission of war crimes and crimes against humanity, it cannot be said that its members generally participated in or even knew of the

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[65] *Summary Records of the 2384th Meeting*, [1995] Y.B. Int'l L. Comm'n 33, U.N. Doc. A/CN.4/SER.A/1995 (statement of Carreno) cited in B. Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', 37 COLUM. J. TRANSNAT'L L. 787, 1998-1999), at p. 825.
[66] Draft Code of Crimes against the Peace and Security of Mankind with Commentaries , 1996, Report of the International Law Commission on the work of its forty-eighth session, p. 47 para 3. http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf
[67] *Ibid.*
[68] Article VI of the International Military Tribunal Charter.
[69] IMT judgement: The Accused Organisations, http://avalon.law.yale.edu/imt/judorg.asp

criminal acts." [70] Therefore, if the SA failed to meet the definition of an organisation under the IMT Charter, then it is clear that the ODM, which was a voluntary, legitimate political party, would also not meet this definition under the ICC Statute.

56. The ILC also referred to the examples of Streicher and von Schirach.[71] Streicher and von Schirach exemplify the situation of persons or organisations, which are not part of the State apparatus, but which act in accordance with State policy, and within the overarching context of this policy. This is consistent with Bassiouni's argument that the term 'organisation' refers to either organisations within the overall Government infrastructure or organisations acting for or on behalf of the State.[72]

57. The Majority's citation to and reliance on the *Blaskic* case is inapposite. There, the ICTY Trial Chamber did not make any explicit pronouncements as to whether the plan needed to emanate from a State or State-like entity. The criteria delineated by the Chamber are, nonetheless, expressly tailored to either political authorities or military hierarchies, which exercised control and authority over the civil population. The criteria would therefore only be met in connection with organisations which were part of the State apparatus or acting on behalf of a State (i.e. the HVO in Lasva valley, which were acting for Croatia), or which had quasi-State characteristics (i.e. Republika Srpska).

58. With respect to the Majority's reliance on academic commentary, the primary source relied upon by the Majority is an article written by M. Di Filippo, "Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes".[73] Di Filippo states, at page 576, "the associative element, and its inherently aggravating effect, could eventually be satisfied by 'purely' private criminal organisations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by 'territorial' entities or by private groups, given the latter's acquired capacity to infringe basic human values."

59. It is of relevance that Di Filippo was not providing – and was not intending to provide – a definition of an organisation as relevant to the 'organisational policy' in Article 7(2)(a).

[70] IMT judgement: The Accused Organisations, http://avalon.law.yale.edu/imt/judorg.asp
[71] Draft Code of Crimes against the Peace and Security of Mankind with Commentaries , 1996, Report of the International Law Commission on the work of its forty-eighth session, at fn 31.
[72] M C. Bassiouni, Crimes Against Humanity. Historical Evolution and Contemporary Application, (Cambridge University Press, 2011) p. 41.; M. C. Bassiouni Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text (Vol. 1) (Transnational Publishers 2005) at p. 152.
[73] M. Di Filipo, 'Terrorist Crimes and International Co-operation', The European Journal of International Law Vol. 19 No. 3, 2008, p. 533-567.

What Di Filippo was doing was describing one side of a controversial debate as to this definition. The two sentences preceding the one cited above read:

> "In legal literature, it is not easy to find the univocal treatment of such a topic. A significant number of **commentators stress the need for a link between the perpetrators and a government or, at least, an insurgent movement or territorial authority**, acting as a factor increasing the gravity of the material conduct, and thus raising concern in the international community."[74]

60. In stating that he subscribed to the broader definition of an 'organisation', Di Filippo noted that "[t]hough... [it]... can look innovative, I deem it as the natural evolution of the category of crimes against humanity".[75] Di Filippo is well-aware of the controversial nature of his position, stating "it must be conceded that a certain tension arises between the traditional conception of crimes against humanity and the emerging notion of core terrorism as far as the issue of possible perpetrators is concerned".[76] It is clear that what Di Filippo is doing is *prescribing*, not describing. Since his position falls squarely within the realm of *de lege ferenda*, the Majority erred by citing as a source of law for the purposes of Article 21 of the Statute.

61. Moreover, Di Filippo's article is, as its title suggests, directed towards the inclusion of terrorism in the category of international crimes, noting that the drafters of the Rome Statute deliberately excluded terrorism from the Statute's ambit.[77] Di Filippo's writing is informed by his belief that crimes against humanity should be extended to include crimes committed by groups such as Al Qaeda who commit crimes without exercising territorial control or having a formal hierarchy. He writes, "I deem it possible to accommodate terrorism in the framework of crimes against humanity, provided that a liberal reading of the nature of possible perpetrators is adopted and a wide interpretation of the magnitude threshold is followed".[78] The Majority thus failed to give any consideration to the fact that the crime of terrorism is a crime committed against States, which is prosecuted by States. States are therefore much more willing to accept broad definitions of this crime, as it serves to enhance rather than diminish state sovereignty. In contrast, as will be developed in below, crimes against humanity constitute a significant intervention into state sovereignty, and their object and purpose differs fundamentally from terrorism.

[74] *Ibid*, p. 567.
[75] *Ibid*, p. 567.
[76] *Ibid*, p. 568.
[77] *Ibid*, p. 564.
[78] *Ibid.*, p. 566.

62. With respect to the commentary of Burns, his description of the nature of an organisation is exclusively directed to military organisations, which are either affiliated to a State, or which are attempting to wrest power from a State (and which therefore mirror the qualities and capabilities of a government).[79] He takes no definitive position on organisations acting in a peace-time scenario, commenting that it might depend on intent.

63. The Ratner article also does not provide support for the Majority position. Although he notes that the requirement of State action is no longer reflected in the case law of the ad hoc Tribunals and the Rome Statute, the practice of these courts nonetheless

> "suggest that some sort of 'official' action remains associated with the concept. In particular, those committing the offences typically are part of, or closely affiliated with, an organisation seeking political control of or influence over a territory, whether as a de facto government, armed insurrection, or otherwise (although some have claimed such an affiliation to carry out crimes for personal motives)."[80]

64. Ratner's argument that the ICC Statute *could*, potentially, support a prosecution for private actors pursuing private gain is only supported by his reference to WWII German industrialist cases. However, in relying upon these precedents, Ratner overlooks the fact that, as noted above, the IMT's jurisdiction over these organisations was triggered by the fact that they were acting in furtherance of State-centric Nazi policy: there is a clear distinction between motive and policy.

65. In relying upon the definitions employed in the *Katanga and Ngudjolo*, and *Bemba* cases, the Majority failed to give due consideration to the fact that the Kenya situation is the first situation before the ICC to address the alleged commission of crimes against humanity in a peace-time context. The existence of an armed conflict in these situation countries (DRC and CAR) both provides a justification for the infringement of state sovereignty (which diminishes the need to demonstrate a State or organisational policy), and imbues the armed groups operating in this territory with the same authority over civilians as would normally be possessed by the State or State-like structures.

66. The *Katanga and Ngudjolo* and *Bemba* definition of an organisation was restricted to "groups of persons who govern a specific territory or by any organisation with the

[79] Burns QC, 'Aspects of Crimes Against Humanity and the International Criminal Court', A Paper prepared for the Symposium on the International Criminal Court, February 3-4, 2007; Beijing, China.
[80] S. Ratner , Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy' 3rd ed. (Oxford: OUP, 2009). [Available at Defence Challenge to Jurisdiction, Annex 10], page 70

capability to commit a widespread or systematic attack against a civilian population".[81] The first limb of this definition would be restricted to organisations, which possess State-like qualities. The second is entirely circular and therefore meaningless: if a crime against humanity is committed by an organisation, then the organisation possesses the capability of committing a crime against humanity. This aspect of the definition has no precedential value as it denudes the requirement of an organisational policy of any meaning or content. Accordingly, to the extent that it provides any assistance in defining the parameters of an organisation policy, the prior case law of the ICC supports the position of Judge Kaul, and not the Majority.

67. Finally, the Majority argued that "had the drafters of the Statute intended to exclude non-State actors from the term 'organisation', they would not have included this term in article 7(2)(a) of the Statute. The Chamber thus determines that organisations 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."[82] In so doing, the Majority failed to take into consideration the drafting history cited by Bassiouni, to the effect that the term 'organisation' was explicitly incorporated into the Statute in order to encompass lower echelons of government or regional authorities, who were not, *stricto sensu*, otherwise covered by provisions of the Statute.

68. As noted in the discussion of Ground One above, in the Decision on the Confirmation of Charges, the Majority also relied upon the Cote d'Ivoire Authorization to Investigate to justify their refusal to reconsider their definition of 'organisation'. In addition to the fact that Pre-Trial Chamber III explicitly declined to rule on the correctness of the Kenya definition, it is also notable that the definition relied upon by Pre-Trial Chamber III does not support the Majority position. Pre-Trial Chamber III found that by virtue of the fact that the alleged organisation satisfied the definition of an armed group, under Article 8 of the Statute, it should also be considered as an organisation for the purposes of Article 7 of the Statute. [83] Irrespective as to whether this approach is legally correct, it is arguable that the attributes of an armed group operating in the theatre of war resemble those of a quasi-State like entity. The laws of warfare were extended to non-State actors out of recognition

[81] *Prosecutor v. Germain Katanga and Matthieu Ngudgolo Chui*, ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the confirmation of charges, para. 396; Pre-Trial Chamber II, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 81.
[82] Authorization to Investigate, para. 92.
[83] ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 99.

that during armed conflicts, these groups were exercising the same power and authority vis-a-vis prisoners of war, and civilians in their area of operations as State sponsored military groups.[84] The recognition that such armed groups exercising quasi-State like qualities is reflected in the fact that Article 8(2)(c) of the Statute requires these non-State actors have the capacity to carry out sentences and judgments by regularly constituted courts. Similarly, Article 8(2)(e) grants such armed groups the power to take certain actions, where required for the security of civilians or military necessity.[85] The State does not vest such duties or powers in private organisations or political parties.

69. Finally, Pre-Trial Chamber III found that in order to qualify as an organised armed group, the group needed to possess the "the ability to plan and carry out military operations for a prolonged period of time".[86] Since the Majority found that the Network only met the definition of an organisation as of December 2007,[87] and was involved in activities for a mere couple of weeks, it is clear that this Network would not have fulfilled the definition employed by Pre-Trial Chamber III.

70. The fact that the Majority's definition of 'organisation' is not well-supported by its own authorities results in a material error. Furthermore, the Majority's definition is not consistent with the *raison d'être* of crimes against humanity as developed in customary international law.

Development of Crimes Against Humanity in the Context of Customary International Law

71. The Majority definition is not consistent with the object and purpose of prosecuting crimes against humanity at an international level. This is because the definition does not require a link between the State or even a State-like organisation, and a loosely defined group with a policy of committing crimes against humanity. The definition is contrary to how the prosecution of crimes against humanity came about in the context of customary

[84] See for example, the following pre-condition for the application of IHL to non-international armed conflicts, which was proposed at the working group at the 1949 Stockholm Diplomatic Conference:
"that the adverse party possesses an organised civil authority exercising de facto governmental functions over the population of a determinate portion of the national territory, an organised military force under the direction of the above civil authority, and the means of enforcing the Convention and the other laws and customs of war; application of the Convention in these circumstances shall in no wise depend on the legal status of the Parties to the conflict." Cited in ICRC Commentary to the Geneva Convention (1), Article 3
http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument
[85] For example, article 8(2)(e)(viii), and (xii).
[86] ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 127.
[87] Confirmation Decision, para. 185.

international law. As such, the Majority erred in law by adopting and applying its definition.

72. As a principle of customary international law, the right to prosecute nationals or crimes occurring on the territory of a State goes to the very heart of state sovereignty.[88] Crimes against humanity have, nonetheless, evolved out of recognition that States may be reluctant to prosecute criminals in their own courts either because they perpetrated the atrocities or, at least, were complicit in their commission.[89]

73. Non-intervention in domestic affairs is an established principle of customary international law. Article 2(7) of United Nations Charter establishes, "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII". Article 2(7) encompasses the principle of non-intervention described as a "master principle" of international law.[90] The notion of another State or organisation interfering with the domestic affairs of a State is generally antithetical to the structure upon which the international legal order is based. According to Brownlie, "the corollary of the independence and equality of sates is the duty on the part of states to refrain from intervention in the internal or external affairs of

[88] William A. Schabas. 'Punishment of non-State actors in non-international armed conflicts', 26 FORDHAM INT'L L.J. 907, 2002-2003, p. 912 ("The duty of States resulting from international human rights law to prosecute crimes committed on their territory corresponds to another general principle of public international law by which States exercise criminal law jurisdiction over their own territory and nationals".); J. STIGEN, 'The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes' in - (M. Bergsmo ed.) Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes (FICHL Publication Series No. 7 Torkel Opsahl Academic EPublisher and Peace Research Institute Oslo (PRIO), 2010) p. 133-4 "From a sovereignty perspective, a state's right to exercise criminal jurisdiction over acts committed in its territory and elsewhere by its citizens is, although not amounting to a prerogative, an undisputed part of its sovereignty, and the exercise of jurisdiction in a bystander state can be seen as undue interference and create dangerous friction. Domestic prosecutions are also in line with liberal international law theories which argue that the primary function of public international law is to influence and improve the functioning of domestic institutions."

[89] *Ibid.*, p. 912 ("all too often national courts are (…) resistant to this responsibility **[of prosecuting international crimes]**, usually because the authorities involved in prosecution are complicit with the perpetrators themselves."); William A. Schabas. 'State Policy as an Element of International Crimes', in *The Journal of Criminal Law & Criminology, Vol. 98 No. 3* (2008), p. 974 ("Over the decades a principal rationale for prosecuting crimes against humanity as such has been the fact that such atrocities generally escape prosecution in the State that normally exercises jurisdiction, under the territorial or active personality principles, because of the State's own involvement or acquiescence. International atrocity crimes, and crimes against humanity in particular, were created so that such acts could be punished elsewhere, and therefore so that impunity could be addressed effectively.") (footnote omitted)

[90] I. Brownlie, Principles of Public International Law, Oxford University Press, 2003, p. 290.

other states."[91] Therefore, the interpretation of what constitutes crimes against humanity should be carefully construed so as to not violate this principle of non-intervention.

74. The concept of crimes against humanity had their genesis in the World War II prosecutions. However, the International Military Tribunal ("IMT") Charter required a strict nexus to armed conflict in order to justify international intervention.[92] This subset of crimes was added to the Charter because it was feared that under the traditional formulation of war crimes, many of the defining acts of the Nazis would go unpunished.[93]

75. The exercise of jurisdiction by the IMT was the only way to combat impunity, but it did so at the cost of the sovereignty of Germany.[94] In order to justify this violation of a country's sovereignty, the IMT was only authorized to prosecute the newly formulated crimes against humanity carried out in execution or connection of any other crime within the jurisdiction of the Court (war crimes and crimes against the peace).[95] The underlying objective of creating this sub-section of crimes was also directed at the fact that "individuals have international human rights which State action cannot jeopardize and that State authorization provides no cover for individuals who violate the human rights of others".[96] The *raison d'être* of crimes against humanity was thus intrinsically linked to the

[91] *Ibid.*, p. 290.
[92] M.C. Bassiouni, Crimes Against Humanity in International Criminal Law (Kluwer law 2nd ed. 1999), p. 85 ("The first characteristic was the linkage between "crimes against humanity" and "crimes against peace" and "war crimes" referred to above. The link was developed to provide legitimacy to this new category of crimes in respect of the principle of legality.").
[93] *Ibid.*, at p. 74 "The crimes [Crimes Against Humanity] were punishable on the basis of the same basis of war crimes. The logic of that jurisdictional extension is clear conduct which constitutes punishable war crimes when victims and violators are not of the same nationality cannot be deemed lawful only because the nationality of victims and violators is the same." In this sense Bassiouni quotes the Chief Prosecutor Hartley Shawcross at IMT "Normally international law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction. And although the Social and Economic Council of the United Nations Organisation is seeking to formulate a Charter of the Rights of Man, the Covenant of the League of Nations and the Charter of the United Nation Organisation does recognize that general position. Yet International Law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unite of all law, is not disentitled to the protection of mankind when the Sate tramples upon his rights in a manner which outrages the conscience of mankind." Speeches of the Chief Prosecutors at the Close of the Case Against the Individual defendants (Published under the Authority of H.M/ Attorney General by H.M. Stationery Office) (Command Papers 6964).
[94] Beth Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', 37 Colum. J. Transnat'l L. 787, 1998-1999, p. 791 ("the prohibition of crimes against humanity at Nuremberg had the potential to irretrievably pierce the trope of sovereignty-'a rule of international law which provides that no state shall intervene in the territorial and personal sphere of validity of another national legal order'").
[95] *Ibid.*, p. 791 ("the Charter's drafters and the Nuremberg Tribunal itself considered the war nexus necessary to justify the extension of international jurisdiction into what would otherwise be acts within the domestic jurisdiction of a state."); K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity, Criminal Law Forum 13 (2002), p. 4 ("Another reason for the requirement of the war nexus was the fear that, without such a nexus, any concept of crimes against humanity would infringe on the principle of non-intervention.").
[96] J. Nyamuya Maogoto, International Sovereignty and International Criminal Law: Versailles to Rome (Trasnational Publishers Inc., 2003), p.108.

role of the State in perpetrating or authorising the crimes in question. The intention was to provide recourse to civilians who would not otherwise find protection in the machinery of the State.

76. This nexus with war crimes engendered a concern regarding the potential lacuna regarding ordinary crimes committed in peace time in circumstances in which the victims were not able to vindicate their rights in a domestic forum due to the fact that the crimes were committed by the persons in charge of the apparatus responsible for enforcing the rights of the victims. As the concept of crimes against humanity evolved so did the need to eliminate this link. This attempt was met with opposition from other parties who wished to halt any further erosion of state sovereignty.[97]

77. In this evolutionary process, Control Council Law No. 10 eliminated the requirement of the war nexus.[98] However, the Tribunal applying the law still felt it was necessary to distinguish crimes against humanity from normal crimes.[99] It did so by adding additional elements to the crime.[100] In the words of the Tribunal "[a]s we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organised or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds."[101] The additional element of the conduct being part of a State policy was thus suggested to distinguish crimes against humanity from normal crimes and to allow the prosecution of these crimes by an international tribunal instead of national courts. This has led some authors to refer to crimes against humanity as 'state crimes'.[102]

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[97] B. Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', p. 793.
[98] W. J. Fenrick, 'Should Crimes Against Humanity Replace War Crimes?', *Columbia Journal of Transnational Law* (37 Colum. J. Transnat'l L. 767, 1998-1999), p. 775.
[99] B. Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', p. 811 ("In discussing crimes against humanity more generally, the Tribunal recognized that the war nexus operated to distinguish crimes against humanity from ordinary crimes.").
[100] *Ibid.*, p. 811 ("It suggested an alternative mechanism when it formulated its own definition of the offense. This definition emphasized that it must be proven that the defendant consciously participated in a systematic attack manifesting some government involvement against a population group.")
[101] Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 982 cited in Beth Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', p. 811.
[102] Richard Falk, 'Telford Taylor and the Legacy of Nuremberg'. p. 722 (*"*There is also the possibility of empowering domestic courts to hear charges against those accused of **crimes of a state**. (…) It seems evident that individual accountability for **crimes of state** is an integral part of any adequate conception of a just world order."); Court of Cassation, Judgment of 20 December 1985, 78 ILR at 146 cited in Micaela Frulli, 'Are Crimes against Humanity More Serious than War Crimes?', *European Journal of International Law, Vol. 12 No. 2* (2001), p. 347 (*"*Crimes against humanity are to war crimes what assassination is to murder. The premeditation involved is simply of another order. **On one hand stands not simply an individual but a State with all its resources. On the other side is not merely a single victim but humanity**").

78. Although the Statutes of the *ad hoc* Tribunals did not require a link with State or organisational policy, the existence of armed conflicts in these countries provided the justification for intervention in state sovereignty, which rendered the existence of such an explicit requirement superfluous. The factual makeup of these conflicts also rendered it unnecessary for the Tribunals to consider the application of crimes against humanity to organisations which did not possess State-like qualities. The crimes against humanity committed in the former Yugoslavia were committed by State forces, or municipal authorities acting under the control or with the complicity of State forces. The ICTR has also focussed solely on prosecuting crimes committed by militia or persons pursuant to a government policy.

79. In the first case before the ICTY (*Tadic*), the Trial Chamber found that "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory."[103] The Chamber's reference to 'forces', which have the capacity to move freely within a defined territory, implies that the force in question possesses, at the very least, *de facto* authority within this defined territory in the sense that they have successfully asserted their right to utilise violence (which is the sole prerogative of the State) in this particular area.

80. Similarly, in the *Kupreskic* case, while noting that the jurisprudence of the ICTY had held that the existence of a State or organisational policy was not an explicit requirement, the Trial Chamber nonetheless observed that the concept of crimes against humanity implied a policy requirement.[104] The Trial Chamber also cited contemporary State practice, which underscored the requirement of a nexus with the policies of States or entities exercising de facto authority over a territory.[105] In terms of the latter, the Trial Chamber noted that:

[103] *Prosecutor v. Tadic*, IT-94-1-T, Judgment, May 7, 1997, para. 654.
[104] *Prosecutor v. Kupreskic*, Trial Judgement, 14 January 2000, at para. 551.
[105] *Ibid.*, at paras. 552-554. At footnote 812, the Trial Chamber observes that "The Court held in both *Barbie*, (French Court of Cassation (Criminal Chamber), 3 June 1988, 100 ILR 331 at 336) and the *Touvier* (France, Court of Appeal of Paris, First Chamber of Accusation, 13 April 1992); Court of Cassation (Criminal Chamber), 27 Nov. 1992, 100 ILR 338 at 351), that crimes against humanity are acts performed in a systematic manner in the name of a State practising by those means a policy of ideological hegemony." The Trial Chamber also cited the following quote from the Canadian Supreme Court in *R. v. Finta* that "The central concern in the case of crimes against humanity is with such things as state-sponsored or sanctioned persecution, not the private individual who has a particular hatred against a particular group or the public generally." *R v. Finta* [1994] 1 S.C.R. 701 at 733.

> "While crimes against humanity are normally perpetrated by State organs, i.e. individuals acting in an official capacity such as military commanders, servicemen, etc., there may be cases where the authors of such crimes are individuals having neither official status nor acting on behalf of a governmental authority. The available case-law seems to indicate that **in these cases some sort of explicit or implicit approval or endorsement by State or governmental authorities is required**, or else that it is necessary for the offence to be clearly encouraged by a general governmental policy or to clearly fit within such a policy."[106]

81. Although the *Kunarac* appeals judgment held that the ICTY Statute did not require demonstration of a plan or policy in connection with crimes against humanity,[107] in light of the fact that the crimes in that case were committed by perpetrators associated with a quasi-State entity (Republika Srpska), which was supported by a State, the absence of a formal requirement concerning the existence of such a policy would not detract from the crimes against humanity nature of the offences. The Appeals Chamber's findings are therefore essentially hypothetical as they were addressing a factual situation in which the State or State-like policy element was in fact met.

82. Whereas with international humanitarian law there was a need to create new substantive laws to address the particularities of armed conflict, crimes against humanity evolved due to the need to provide a remedy for ordinary domestic crimes which would not be prosecuted in domestic courts due to the action or complicity of the entities controlling the legal and judicial sphere. As a result, the fact that a crime falls within the definition of a crime against humanity triggers special consequences as concerns *inter alia*, the jurisdiction of other States and international tribunals to prosecute the offence, the immunities of state officials in relation to such offences, and the elimination of statutory limitations, which prevent future governments from investigating crimes perpetrated or endorsed by the former regime. As opined by Schabas:

> *"*Indeed, **the existence of a State policy may be the best criterion in distinguishing between individual crimes that belong to national justice systems, and international crimes** with their special rules and principles concerning jurisdiction, immunities, statutory limitations and defenses."[108]

83. 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

[106] *Ibid.*, at para. 555.
[107] *Prosecutor v. Kunarac et al.*, Appeals Judgement, 12 June 2002, para. 98.
[108] William A. Schabas, 'State Policy as an Element of International Crimes', The Journal of Criminal Law & Criminology, Vol. 98 No. 3 (2008), p. 982.

circumstances in which the organisation exercises state-like characteristics vis-a-vis the victims themselves. It is not sufficient to demonstrate that the perpetrators could impact upon general, basic values of persons who may have no link to the charges. The organisation must also have control over the ability of the victims to obtain redress for the commission of ordinary crimes. As observed by Ambos and Wirth:[109]

> "At present, there is no doubt that the entity behind the policy does not have to be a state in the sense of public international law. It is **sufficient that the entity be an organisation which exercises *de facto* power in a given territory** […] It may be noted that the above definition does not include an organisation which, while being able to exercise a certain power, is not the *de facto* authority over a territory because there is a higher or more powerful entity which controls it. **The relevant authority is rather the entity which exercises the *highest de facto* authority in the territory and can – within limits – control all other holders of power and all individuals**. Thus, a criminal organisation in a state which still exercises the power over the territory (*e.g.*, through normal police forces) where the organisation is active would not qualify as the entity behind the policy. If such an organisation, according to its policy, commits multiple crimes, this, as such, will not turn these crimes into crimes against humanity. The situation will be different, however, if the highest *de facto* authority over the territory, for example the state, at least tolerates these crimes in pursuance of its policy."

84. 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. Moreover, as averred by Bassiouni, the watering down of the definition of State or organisational policy as a contextual requirement could ultimately be deleterious to the protection of victims:[111]

> "The political consequence will be the opposition of states to such an approach, thus reducing the already limited political willingness to cooperate in the apprehension, prosecution and extradition of persons accused or charged with the commission of such crimes. It may also deter states from ratifying the ICC treaty. The policy implications would be to reduce the standing of "crimes against humanity" from its present standing of *jus cogens* to a lesser category of international crimes. This would be the case for two reasons. The first is that this new approach to "crimes against humanity" would have far less than universal recognition, and the second is that it would be much less "shocking to the conscience of humanity"."

85. This concern is further echoed by Schabas:

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[109] K. Ambos and S. Wirth, The Current Law of Crimes Against Humanity, Criminal Law Forum 13 (2002), p. 27

[110] *Ibid.*, p. 960 ("Eliminating the State plan or policy element from crimes against humanity has the potential to make the concept applicable to a wide range of criminal acts that go beyond those that are merely random or isolated. Instead of insisting upon a State plan or policy, the contextual element for crimes against humanity comes to depend solely on their "widespread or systematic" nature, but this has the potential to make crimes against humanity applicable to serial killers, mafias, motorcycle gangs, and small terrorist bands.")

[111] M.C. Bassiouni, Crimes Against Humanity in International Criminal Law (Kluwer law 2nd ed. 1999), pp. 245-6.

> "Concerns that requiring a State policy will leave a so-called impunity gap are misplaced. Most so-called non-State actors find themselves more than adequately challenged by various national justice systems. The needs in prosecution are not a broadening of the definitions of international crimes, but rather a strengthening of international judicial cooperation mechanisms so as to facilitate bringing offenders to book for 'ordinary' crimes. Mainly, it is when perpetrators commit heinous acts precisely because they are acting on behalf of a State, and in pursuit of its policies that we require international justice to step in."[112]

86. The dissenting opinion in the present case acknowledged the notion of state sovereignty in the development of the notion of crimes against humanity and 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.[113]

87. Furthermore, in order to organise the commission of heinous crimes against a civilian population on a large scale, significant resources are needed. Traditionally, primarily only the State would have the means available to run an organisation capable of carrying out serious atrocities on a large scale directed against a civilian population. Indeed, as argued in the dissenting opinion, the principal reason to recognize crimes against humanity as crimes punishable under international law was the threat to "humanity and fundamental values of mankind" by "mass crimes committed by sovereign states against the civilian population, sometimes the state's own subjects, according to a plan or policy, involving large segments of the state apparatus".[114]

88. In modern society, the State is no longer the sole or necessarily the predominant entity that can finance and organise mass atrocity. A policy to carry out serious crimes against a civilian population on a large scale can also be adopted and implemented by private entities. This was acknowledged by the dissenting Judge. However, the learned Judge was not persuaded that any kind of non-State entity may be able to carry out an organisational policy within the meaning of Article 7(2)(a) of the Statute.[115] In his opinion, this can only be the case if sufficient means and resources are available to such an entity "to reach the gravity of systemic injustice in which parts of the civilian population find themselves.[116]

89. This view finds support in the jurisprudence from the *ad hoc* international criminal tribunals, even after the policy requirement was abandoned. For instance, in the *Limaj* case, the

[112] William A. Schabas, 'State Policy as an Element of International Crimes', p. 982.
[113] Dissenting Opinion to Authorization of Investigation, para. 63-64.
[114] *Ibid.*, para. 59.
[115] Dissenting Opinion to Authorization of Investigation, para. 53, see also pars 38-40.
[116] *Ibid.*, para. 66.

Chamber acknowledged that "[d]ue to structural factors and organisational and military capabilities, an "attack directed against a civilian population" will most often be found to have occurred at the behest of a State. Being the locus of organised authority within a given territory, able to mobilise and direct military and civilian power, a sovereign State by its very nature possesses the attributes that permit it to organise and deliver an attack against a civilian population; it is States which can most easily and efficiently marshal the resources to launch an attack against a civilian population on a "widespread" scale, or upon a "systematic" basis."[117] In the *Limaj* case, the attack against a civilian population was allegedly perpetrated by "a non-state actor with extremely limited resources, personnel and organisation". [118] That Chamber ultimately found that crimes against humanity were not committed.[119]

Crimes Against Humanity as Intended by Drafters of the Rome Statute

90. The question of how to resolve the interplay between State sovereignty and international intervention, and the need to distinguish crimes against humanity from normal crimes, continued to be at the forefront of drafting negotiations by Preparatory Committee on the Establishment of an International Criminal Court (PrepCom),[120] and thereby resulted in the retention of the requirement of a State or organisational policy. As noted by Claus Kress:

> "The existence of sovereignty interests which militate in favor of confining the use of the international criminal law instrument to certain forms and constellations of human rights violations is rather obvious. International criminal law *stricto sensu* implies far more significant restrictions on state sovereignty than international human rights law as such. International criminal law *stricto sensu* carries with it the competence of properly instituted international criminal courts to decide on the genuineness of national criminal proceedings, a presumption against immunities *ratione materiae*, a presumption in favour of universal jurisdiction, and a presumption against the power to grant amnesties. The contextual requirement of crimes against humanity reflects the wish of states that these (and other) rather heavy restrictions on their sovereignty only apply in particular instances of human rights violations. This cautions against a downplaying of the significance of this contextual requirement on the basis of an international human-rights-law-inspired teleological interpretation."[121]

[117] *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Judgement, 30 November 2005, para. 191. See also para. 194, stating that "the existence of an attack is most clearly evident when a course of conduct is launched on the basis of massive state action. This can be seen from a number of examples. ..."
[118] *Ibid*, para. 191.
[119] *Ibid*, para. 228.
[120] Beth Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', p. 841 ("Delegates noted the need to identify 'general criteria for crimes against humanity to distinguish such crimes from ordinary crimes under national law and to avoid interference with national court jurisdiction with respect to the latter.").
[121] C. Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision' in *Leiden Journal of International Law*, 23 (2010), p. 861

91. Bassiouni opines that the inclusion of an organisational policy in the Rome Statute was not intended to widen the scope of application to non-State actors, but rather "refers to the policy of an organisation within the state. For example, if the military, police, or intelligence organs of a state formulate a separate policy that does not include the overall policy of the state".[122] Further to ILC Principles of State Responsibility, an organisational policy could also include "non-state actors acting for and on behalf of a state".[123]

92. Bassiouni concedes that the scope of crimes against humanity may need to evolve though the ICC's jurisprudence beyond state-related structures in order to address the changing morphology of the international system, namely, due to civil wars or weak state structures, the infrastructure within traditional state models can be dominated by quasi-State structures.[124] This extension should nonetheless be confined to non-state actors, which have some of the characteristics of a state "such as *de facto* control of a defined territory and its population, and exercise dominion and control over some territory and population", and they must act pursuant to an organisational policy.[125] Bassiouni justifies the latter restriction by reference to the evolution of international humanitarian law, and the historical dependence of crimes against humanity on IHL, and further argues that this evolution was driven by the need to address the same type of victimization as WWII:[126]

> "Just as the extension of crimes against humanity was made in Article 6 (c) of the charter as an emanation of war crimes so was the extension of crimes against humanity from state actors to non-state actors in Post-Charter developments. The first of these extensions, article 6(c) was the application of extant norms of the law of armed conflicts to civilians who are nationals of the perpetrating state, the second extension from the Article 6 (c) formulation to those of Article 4 of the ICTY Statute Article 4 of ICTY Statute, Article 3 of the ICTR Statute and Article 7 of the ICC Statute, was even narrower, as it only extended the application of the proscribing norm from state actors to non-state actors. While the latest extension was driven by the new realities of violent conflicts in the post-WWII era, it was nevertheless a more limited and more predictable extension than the one made in arriving at the Article 6(c) formulation. The legal rationale for the latest extension was by analogy to the same legal element of "state action or policy".

93. The non-state actors who are now covered by that extension are those who have the same legal characteristic of state actor. Thus, these non-state actors must have some of the

[122] M.C. Bassiouni, Crimes Against Humanity. Historical Evolution and Contemporary Application, (Cambridge University Press, 2011), p. 41.
[123] M.C. Bassiouni Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text (Vol. 1) (Transnational Publishers 2005), p. 152.
[124] M.C. Bassiouni, Crimes Against Humanity. Historical Evolution and Contemporary Application, (Cambridge University Press, 2011), p. 42.
[125] *Ibid*.
[126] M.C. Bassiouni, Crimes Against Humanity in International Criminal Law, (Kluwer Law, 2nd ed., 1999), pp. 274-5.

characteristics of state actors, which as the exercise of dominion or control over the territory or people, or both, and the ability to carry out a 'policy' similar in nature to that of 'State policy."

94. The notion of State sovereignty appears to have partly motivated the dissenting Judge to insist on keeping a clear distinction between crimes against humanity, punishable under the ICC Statute, and other serious crimes punishable under national law. Indeed, the learned Judge held that "a gradual downscaling of crimes against humanity towards serious crimes... might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute".[127]

Majority Definition is Too Broad and thus Contravenes Principle of Legality

95. At the ICC, the Elements of Crimes state that the constitutive elements of 'crimes against humanity' under Article 7 of the ICC Statute "must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole" (Art. 7(1) Elements of Crimes). Similarly, Article 22(2) of the ICC Statute provides that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

96. During the drafting of Article 7, the State Parties decided that there should be detailed descriptions of the crimes in order to respect the principle of legality. As observed by Olasolo:

> "Besides, the definitions of the crimes provided for in the RS have been developed in the Elements of the Crimes (hereinafter EC), which, though not being binding on the Chambers of the Court, will surely constitute a key element in assisting them in the interpretation and application of the definitions of the crimes. Furthermore, the drafters made an effort not to resort to the legislative technique of defining the crimes by way of general referrals to other customary or conventional norms of international law. They also tried to avoid excessively broad as well as open-ended definitions of a residual nature."[128]

97. Furthermore, paragraph 1 to the Introduction to the Crimes Against Humanity in the Elements of the Crimes specifies that:

[127] Dissenting Opinion on Investigation Decision, paras 9-10.
[128] H. Olasolo, "International Criminal Court and International Tribunals: Substantive and Procedural Aspects" in Carlos Jimenez Piernas (ed.) *The Legal Practice in International Law and European Community Law: A Spanish Perspective*, Martinus Nijhoff Publishers, 2007, Leiden, The Netherlands, p. 180.

> "Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world."

98. For the reasons set out above, since crimes against humanity constitute an exception to the principle of state sovereignty, it is even more important that such exceptions be defined with sufficient precision and certainty. This is further supported by the objectives of the ICC. The jurisdiction of the ICC complements, but in no way supplements, the jurisdiction of domestic courts. The ICC ostensibly holds state sovereignty in high regard, which is reflected not only in the complementarity principle,[129] but also in the fact that the ICC deals with the most serious crimes only.[130] The Majority erred by applying an open-ended definition, which can be moulded by the Chamber to fit the contours of Prosecution evidence. This approach is highly detrimental to the right of the defence to be informed of the nature of the charges, and to be able to prepare their defence.

99. In the Summons to Appear, the Majority found that "there are reasonable grounds to believe that the network had the capability to perform acts which infringe on basic human values."[131] The Chamber further held that the following criteria may be included in its assessment concerning the definition of an organisation: (i) whether the group is under a responsible command, or has an 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 has criminal activities against the civilian population as a primary purpose; and (iv) whether the group articulates, explicitly or implicitly, an

[129] This means that the ICC can only try individuals if the domestic State is unwilling or unable to carry out genuine investigations. See Article 17 ICC Statute. See further the language of the Preamble to the Rome Statute, encouraging domestic States to take measures to prosecute serious crimes: The States Parties to this Statute,
... Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
... Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
... Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, Resolved to guarantee lasting respect for and the enforcement of international justice, Have agreed as follows:[…]

[130] See Preamble of the ICC Statute; also Dissenting Opinion on Investigation Decision, para. 54. Charles Chernor Jalloh, 'International Criminal Court—jurisdiction—prosecutor's *proprio motu* power to initiate investigations—contextual elements of crimes against humanity—state or organisational policy— complementarity', 540 American Journal of International Law 105 (2011) 540, p. 547.

[131] *Prosecutor v Ruto et al*, ICC-01/09-01/11-01, Summons to Appear, para 23

intention to attack a civilian population.[132] The Chamber explicitly endorsed the above legal definition in its Confirmation Decision.[133]

100. Rather than being specific, the overarching test proposed by the Majority is circular: if the Prosecution is able to establish that the organisation committed any of the underlying acts in Article 7(1), then the Prosecution would have demonstrated that the organisation possesses the capability required by the Majority. To so define an organisation is to denude the term of any meaning and to undermine the drafters' intention in inserting the 'organisational policy' requirement into the Statute. Since the Rome Statute is, in effect, a treaty, its provisions should be interpreted in accordance with the principle of effective interpretation: as the parties must have intended that each provision have a certain effect, a provision should not be given an interpretation that leaves it meaningless or without effect. This principle is of particular importance regarding the construction of provisions in criminal statutes, which give effect to rights or regulate the fairness of the proceedings.

101. The criterion delineated by the Chamber does not provide any further substance to the definition. To the contrary, the list of criteria provided by the Chamber is not exhaustive, and, as will be elaborated below, the Chamber did not consider itself bound to apply any or all of these criteria. The Appeals Chamber has held in connection with non-exhaustive criteria in the Statute that the Chamber has no discretion not to consider criteria which are expressly listed.[134] For example, Article 69(4) provides that the "Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness". The Appeals Chamber found that although the Chamber had discretion as to when it renders a determination on admissibility, it was obliged by the terms of Article 69(4) to, at a minimum, take into consideration the relevance, probative value and prejudice that the admission of such evidence could cause.[135] In line with these findings, even if the criteria are not cumulative, the Pre-Trial Chamber should have taken into consideration the impact of the Prosecution's failure to comply with a particular criterion on its overall assessment, and provided reasoning as to the impact of a failure to comply with certain criteria upon its overall assessment as to whether the Network met the definition of an organisation.

[132] Summons to Appear, para 23-24
[133] Ruto et al Confirmation decision at para. 33.
[134] *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011.
[135] *Ibid.*, para. 37.

102. Open-ended definitions of criminal offences are in general, contrary to the principle of legality, which requires that such laws must be defined within "clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter sentence."[136] The Inter-American Court concurs that a crimes must be "classified and described in precise and unambiguous language that narrowly defines the punishable offence, thus giving full meaning to the principle of *nulla crimen nulla poena sine lege praevia* in criminal law" specifying further that ambiguity in describing crimes creates doubts and the opportunity for abuse of power "particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behaviour with penalties that exact their toll on the things that are the most precious, such as life and liberty."[137] The Majority of the Pre-Trial Chamber indeed recognised that the use of open-ended language in criminal instruments, such as the charges, violated the right of the defence to be informed of the nature of the charges in a clear and precise manner.[138]

103. On the basis of the forgoing, the Defence submits that it was erroneous for the Majority to adopt and apply a definition of 'organisation' which did not comport with customary international law, the intention of the drafters of the Rome and which contravenes the principle of legality.

<u>GROUND FOUR</u>: 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.

104. Based on the facts presented during the confirmation of charges hearing, the Majority determined that a network of perpetrators ('the Network') belonging to the Kalenjin community constituted an organisation. Further, that it operated pursuant to a policy to punish and expel from the Rift Valley those perceived to support the PNU, namely, Kikuyu, Kamba and Kisii civilians.[139] The Majority stated:

[136] Human Rights Committee, General Comment No. 29, "States of Emergency (Article 4)"; UN Doc CCPR/C/21/Rev.1/Add.11 of 31 August 2001.
[137] Judgment of 30 May 1999, *Castillo Petruzzi et al Case* para 121 (cited in the Koufa report).
[138] Confirmation Decision, para. 99.
[139] Confirmation Decision, para. 181.

> 186. Having reviewed the evidence, the Chamber is of the view that there are substantial grounds to believe that as **of late December 2006, Mr. Ruto, together with others, began establishing the Network referred to above and that, by December 2007, such Network qualified as an organisation within the meaning of article 7(2)(a) of the Statute**. This is supported by the evidence of Witnesses 1, 2, 4, 6 and 8. All these witnesses provided evidence about crucial steps in the development of the Network and their statements in that regard corroborate each other.

105. The Majority relied on evidence of three factors to determine the existence of an 'organisation': 1) an established hierarchy, 2) the means to carry out a widespread or systematic attack, and 3) an articulated intention to attack the civilian population as its primary purpose.

> 197. In light of the above [analysis of alleged preparatory meetings], the Chamber considers that the evidence presented indicates that there are substantial grounds to believe that the first 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.
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> 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.
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> 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.

106. The Defence submits that the Majority erred in fact in determining that these three factors, in light of the alleged planning meetings, were sufficiently evidenced to the degree of certainty required to determine that an 'organisation' existed. Additionally, the Defence submits that the Majority erred in law in determining that these three factors would satisfy the 'organisational' criterion it laid out. Moreover, when these facts are applied to the

'organisational' test requiring a showing of State-like elements, it is not possible for the Chamber to conclude that crimes against humanity were committed in furtherance of an organisational policy.

107. The Majority found that Mr. Ruto was the designated leader of the Network's established hierarchy, with a responsible chain of command. Yet the Majority determination conflates evidence tending to show Mr. Ruto's political popularity and respect within the Kalenjin community with the ability to have a degree of command and control authority over perceived subordinates.[140]

108. The Majority found that the Network possessed the means to carry out a widespread and systematic attack against the civilian population, as its members had access to a "considerable amount" of capital, guns, crude weapons, and manpower. Yet, as the dissenting Judge noted, it is difficult to see how the distribution of money by politicians, and fundraising events related to election campaigns, can be considered a financial pillar of a State-like 'organisation' or any 'organisation' within the meaning of Article 7(2)(a).[141] Furthermore, there was no link to the Kenyan Army or the State's military apparatus, despite Prosecution allegations that a handful of retired or former officers were part of the Network.[142]

109. The Majority attached these discrete factual findings to the cobble together an 'organisation' which had the capacity to affect basic human values in the context of an attack on a civilian population. The Defence, however, submits that even the cumulative effect of an unspecified amount of money, a few retired military personnel, and a collection of crude weapons, without any link to the resources and power structure of the Kenyan Government, does not provide sufficient grounds to believe that the Network possessed the means to carry out a widespread and systematic attack against the civilian population for the purposes of Article 7. Admittedly, there were grave atrocities committed as part of the post-election violence in Kenya. However, the Majority erred by failing to consider the impact that external factors (ie, factors other than the role of the Network) played in igniting and inflaming the violence. Furthermore, the Majority argument is impermissibly circular – it uses evidence that a widespread and systematic

[140] See, for a general analysis of the "Political" Branch, the Dissenting Opinion to Summons to Appear, paras 18-22.
[141] Dissenting Opinion to Summons to Appear, paras 30-33 (analysis of "Financial" Branch).
[142] Dissenting Opinion to Summons to Appear, paras 30-29 (analysis of "Military" Branch).

attack was committed and that basic human values were infringed to prove that it was an 'organisation' which had the means to conduct the attack.

110. The Prosecution had advanced two policy objectives of the alleged Network – the policy "to punish and expel from the Rift valley those perceived to support PNU, namely, Kikuyu, Kamba and Kisii civilians"[143] (which was adopted by the Majority) and the policy to "gain power and create a uniform ODM voting block"[144] (which was disregarded by the Majority as being the motive for committing the attack, rather than part of the policy to commit the attack).[145] In determining that the second part of the policy was political in nature and may not aim at committing an attack against the civilian population,[146] the Majority disregarded those aspects of the policy which did not fit the criteria. This is an incorrect approach to the evidence, which materially affected its determination as to what may have been the primary purpose of the alleged Network.

111. Given that the Majority acknowledged that the Network as alleged by the Prosecution was comprised of eminent ODM political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders, and local leaders, the Majority could equally have found that this collection of people had purely pro-ODM political objectives as its primary purpose, rather than punishment of the PNU opposition. The dissenting Judge frames this as purely a Tribal (Kalenjin) issue.[147] Consequently, the Majority erred by not considering the acknowledged political objective as a primary purpose of the 'organisation' which was non-criminal in nature. This approach would have materially affected its decision on whether this criterion of organisation was met.

112. With regard to the factual sufficiency of the evidence supporting each of the three criteria, the Defence submits that the Majority failed properly to corroborate anonymous witness testimony relied upon in support of these criterion. In its request for leave to appeal aspects of the Confirmation Decision, the Defence raised numerous concerns with the Majority's approach to the assessment of evidence generally.[148]

[143] ICC-01/09-01/11-261-AnxA, para. 41.
[144] ICC-01/09-01/11-261-AnxA, para. 41.
[145] Confirmation Decision, paras 212-213.
[146] Confirmation Decision, para. 213.
[147] Dissenting Opinion to Summons to Appear, paras 41-44.
[148] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-377, Defence Application for Leave to Appeal the Decision on the Confirmation of Charges, 30 January 2012, para. 9 (setting out several issues, including: Whether the Majority erred in finding that the failure of the Prosecution to conduct proper investigations (including the failure to follow up on exculpatory leads and issues of reliability) has no consequences for the confirmation hearing independent of its assessment of the overall quality and sufficiency of the evidence presented; Whether the Majority erred by relying on anonymous evidence alone or in corroboration with other anonymous evidence,

113. To start, throughout the Confirmation Decision, the Majority relied on the evidence of either a single anonymous witness or of two anonymous witnesses corroborating each other, in order to find substantial grounds to believe that key "planning" meetings occurred. It was on the basis of allegations of what transpired in these planning meetings that the charges were confirmed. In more egregious instances, the Majority relied on the evidence of a single uncorroborated anonymous Witness 6[149] or Witness 8[150] to find that key preparatory meetings had occurred in December 2006 and April 2007. Further, one allegation by Witness 6 (whose uncorroborated evidence was found insufficient to confirm the charges against Henry Kosgey), pertaining to meetings allegedly held at Cheramboss' house (who testified to the contrary during the confirmation hearing) on a non-disclosed dates in December 2007, was deemed sufficiently reliable. This is despite the fact that since the date was redacted, the Defence had no ability to adduce its own alibi evidence. There was therefore a complete absence of counterbalancing measures to enable the Defence to challenge the allegation properly. Yet the Majority made a finding that Mr. Ruto was present.[151]

114. In other instances, the Majority based conclusions concerning fundamental aspects of the Prosecution case on the testimony of anonymous Witnesses 1 and 8 in tandem.[152] Although the Chamber states that the content of Witnesses 1 and 8's testimony is corroborated by the testimony of additional anonymous witnesses concerning other meetings, there is no direct corroboration for the existence of the meeting in question (at Sirikwa Hotel on 2 September 2007), and of the presence of the Mr. Ruto. It clearly should not be presumed that a suspect was at a particular meeting just because there is anonymous evidence that he was present at another.

115. The Appeals Chamber has established the strict injunctive that the non-disclosure of the identity of Prosecution witnesses, or key information from witness statements, can only be approved if the Chamber takes appropriate measures to ensure the fairness and adversarial

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while failing to implement adequate counterbalancing measures in order to minimize prejudice to the Defence; and Whether the Majority erred by failing to apply its evidentiary principles in a reasonable and consistent manner to Defence and Prosecution witnesses, and with due consideration for the impact of the witness's anonymity on their weight).

[149] See, for example, Confirmation Decision, paras 194-195 (Witness 6 alone regarding an alleged series of preparatory meetings held between 14 and 22 December 2007).

[150] See, for example, Confirmation Decision, paras 187-188 (Witness 8 alone regarding an alleged meeting at Mr Ruto's home on 30 December 2006 and an oathing ceremony at the Molo Milk Plant on 15 April 2007).

[151] See Confirmation Decision, paras 148-150.

[152] See, for example, Confirmation Decision, paras 126-130 and also paras 189-191.

nature of the proceedings.[153] In *Lubanga*, the Trial Chamber held, in respect of anonymous statements, hearsay and summaries, that "mindful of the difficulties that such evidence may present to the Defence in relation to the possibility of ascertaining its truthfulness and authenticity, the Chamber decides that, as a general rule, it will use such anonymous hearsay evidence only to corroborate other evidence" (emphasis added).[154]

116. This suggests that it is inherently unfair to use anonymous evidence to corroborate other anonymous evidence, much less on its own. It is clear that the fact that an anonymous witness can corroborate another anonymous witness does not counterbalance the fundamental handicap faced by the Defence in contesting anonymous testimony – that it cannot test the accuracy, reliability or credibility of such testimony. If the entire Prosecution case on a certain point is founded on anonymous testimony, then the right of the Defence under article 61(6) to challenge the Prosecution evidence becomes illusory. In the absence of details concerning the witnesses and the foundation for their testimony, the Defence is forced into merely making a blanket and unsupported denial. It also cannot be presumed that the reliability of the allegations are bolstered by virtue of the fact that the testimony is corroborated by other anonymous testimony, as there could have been collusion between witnesses (indeed, the witnesses could be related or could live together), or they could have both been subjected to misinformation. Since the Defence does not possess any information concerning the witnesses, it was precluded from exploring these possibilities.

117. Accordingly, by deviating from these principles, the Majority's use of anonymous witnesses to corroborate other anonymous witnesses significantly impacted on the right of the Defence to challenge Prosecution evidence at the confirmation hearing, and has eliminated any procedural safeguards concerning the potential lack of reliability and credibility of such witnesses.

118. Suffice to say, the Majority's approach to the evidence has materially affected the decision, in that the Majority made factual findings with regard to aspects of jurisdiction *ratione materiae* without a sufficient evidentiary basis. Had the Majority applied the

[153] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-475, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008.
[154] ICC-01/04-01/06-803, Decision on the confirmation of charges, 29 January 2007, para 106. The *Lubanga* approach was subsequently adopted in the *Katanga* confirmation hearing: ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, paras 119, 140, and 160.

correct evidential standards, the Majority could not have determined that the Network existed, with an established hierarchy, the means to carry out a widespread and systematic attack, and with the primary purpose of attacking the civilian population. The Majority's own test must fail when coupled with the factual analysis.[155]

119. Additionally, and contrary to the Majority position, the fact that meetings to organise violence may have been held (a fact disputed by the Defence), does not mean that there existed a *per se* 'organisation'. As expressed in the dissenting opinion, "the mere act of planning and organising violence will not alone determine whether an "organisational policy" exists pursuant to article 7(2)(a) of the Statute. What is of crucial importance is that the attack directed against the civilian population is attributable to a state-like 'organisation', the intellectual author that established or at least endorsed a policy to commit such an attack."[156]

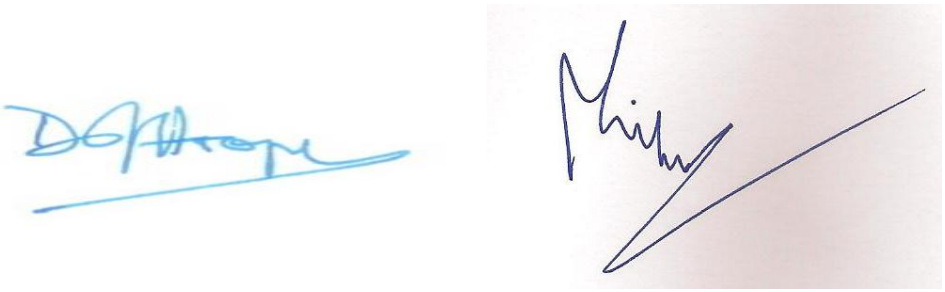
120. Certainly, if the Majority had adopted a definition of 'organisation' as suggested by the Defence, i.e. one that requires State-like elements, the Majority could not have found that the Network constituted an 'organisation' on the basis of the facts before it. An organisation which partakes of some characteristics of the State would be more permanent in nature and operate over a prolonged period of time,[157] and have the ability to exercise authority over persons within its sphere of control, including preventing the victims to seek redress through the national criminal justice system.[158] The Defence notes the nature of the alleged Network organisation, which even according to the Majority was transitory and only existed for little more than a month,[159] does not meet the criteria of semi-permanence which is a component of organisations with State-like characteristics. Furthermore, the Network has not been shown to have influence or authority over the people who were the subject of the attacks. Therefore, the analysis in the dissenting opinion aptly described the Prosecution's notion of the 'Network' as "essentially an amorphous alliance" of "coordinating members of a tribe [the Kalenjin] with a

[155] See also the evidentiary analysis in Challenge to Jurisdiction, paras 62-80.
[156] Dissenting Opinion to the Summons to Appear, para. 49.
[157] Dissenting Opinion to the Authorization to Investigate, para. 51. Article 2 of the UN Convention Against Transnational Organised Crime defines 'organisation' as "any structured group of three or more persons, **existing for a period of time** and acting in concert with the aim of committing one or more serious crimes".
[158] C. Kress, 'On the Outer Limits of Crimes against Humanity: the Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision', LEIDEN JOURNAL OF INT'L LAW, 23 (2010) ('Kress'), p. 855-873 at p. 866 (stating that the rationale for piercing the veil of state sovereignty will only apply to non-state entities when the entities have "established so powerful a presence in a given state that it can prevent the exercise of criminal jurisdiction in that state").
[159] Confirmation Decision, para. 186.

predisposition toward violence with fluctuating membership" which existed temporarily for a specific purpose.[160]

V. RELIEF SOUGHT

121. The Defence therefore submits this document in support of its appeal against the exercise of the Court's jurisdiction *ratione materiae* over the situation in Kenya, including the case against Mr. Ruto. The Defence requests that the Appeals Chamber reverse the Majority's definition of 'organisational policy' as well as its evidentiary finding that the Prosecution has submitted sufficient evidence to establish substantial grounds to believe that the crimes were committed in furtherance of an 'organisational policy'. The ultimate relief requested by the Defence is for the Appeals Chamber to decline to exercise its jurisdiction over the situation in Kenya and for the case against Mr. Ruto to be dismissed.



David Hooper, QC and Kioko Kilukumi
On behalf of William Samoei Ruto
Dated this 14th day of February 2012
In The Hague and In Nairobi

[160] Dissenting Opinion to the Confirmation Decision, para. 12, reiterating his findings from the Dissenting Opinion to the Summons to Appear, para. 47.