Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **8 March 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
AND JOSHUA ARAP SANG

Public Document

Corrigendum to Prosecution's Consolidated Response to Mr Ruto's and Mr Sang's Documents in Support of Articles 19(6) and 82(1)(a) Appeal
(ICC-01/09-01/11-388 OA3 - ICC-01/09-01/11-389 OA4)

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor

Counsel for Mr William Ruto
Mr. Kioko Kilukumi Musau,
Mr. Joseph Kipchumba Kigen-Katawa,
Mr. David Hooper QC,
Counsel for Mr Joshua Arap Sang
Mr. Mr. Philemon K.B. Koech

Legal Representatives of the Victims
Ms. Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms. Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms. Silvana Arbia
Deputy Registrar
Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

INTRODUCTION

1. On 23 January 2012, Pre-Trial Chamber II issued its "Decision on the Confirmation of Charges pursuant to Article 61(7) of the Rome Statute" ("Confirmation Decision")[1] in which it rejected (Judge Kaul dissenting) the jurisdictional challenges brought by Ruto and Sang (the "Appellants").[2] Both Appellants challenge the Decision and claim that the Chamber erred in its determination of the Court's subject-matter jurisdiction.

2. The Appellants raise four grounds of appeal in their Appeal Brief. *First*, that the Majority erred in procedure and/or in law by placing on the Appellants the burden of persuading the Chamber to revisit its prior definition of "organization". *Second*, that the Majority erred in procedure and/or in law when it did not conduct a factual analysis of the Prosecution's evidence to determine the jurisdiction of the Court. *Third*, that the Majority erred in law in defining "organization" under the Statute. *Fourth*, that the Majority erred in law and/or in fact when it found that the "Network" was an "organization" under the Statute.

3. All four grounds advanced by the Appellants are meritless. First, the Appellants overlook the critical fact that as the challenging parties, they have the burden of persuasion. The Appellant's complaint about the Chamber's refusal to embark on a factual analysis is premised on a profound misunderstanding of the nature of a determination on subject-matter jurisdiction under the Statute, which is confined to the crimes as charged by the Prosecution. In turn, the proper scope of the concept of "organization" is a matter of statutory interpretation that shall be discussed at trial and not a jurisdictional issue. In addition, the Appellant's have failed

[1] ICC-01/09-01/11-373.
[2] ICC-01/09-01/11-373, pp.1-139.

to demonstrate any legal error in the Chamber's approach to this element. Finally, the Appellants' arguments related to the sufficiency of evidence relate to the merits of the case. Accordingly, they are not jurisdictional issues and should be left for trial.

PROCEDURAL BACKGROUND

4. On 26 November 2009, the Prosecutor filed a request for authorization to commence an investigation into the Situation in the Republic of Kenya.[3] On 31 March 2010, pursuant to article 15 of the Rome Statute, a majority of Pre-Trial Chamber II (the "Majority") authorized an investigation into the Situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009 ("Article 15 Decision").[4] Judge Kaul dissented on the ground that the post-election violence in Kenya cannot be charged as crimes against humanity because the crimes were not committed pursuant to an organizational policy, as is required by article 7(2)(a) of the Statute ("Article 15 Dissenting Opinion").[5]

5. On 15 December 2010, the Prosecution filed an application pursuant to Article 58 requesting the issuance of summonses to William Somoei Ruto ("Ruto"), Joshua Arap Sang ("Sang") and Henry Kiprono Kosgey ("Kosgey"), (collectively, "the Suspects").[6]

6. On 8 March 2011, the Majority of the Chamber decided that there were reasonable grounds to believe that the Suspects are criminally responsible

[3] ICC-01/09-3.
[4] ICC-01/09-19, 31 March 2010.
[5] ICC-01/09-19, pp.84-163.
[6] ICC-01/09-30-Red.

for the crimes against humanity of murder, forcible transfer of population and persecution and summoned the Suspects to appear before it ("Summons Decision").[7] Judge Kaul again dissented, for the same reasons as in his dissenting opinion to the Article 15 Decision.[8] The three voluntarily appeared on 7 April 2011.[9]

7. On 30 August 2011, Ruto, Sang and Kosgey challenged the material jurisdiction of the Court pursuant to article 19(2)(a) on the basis that the alleged crimes do not meet the criteria for crimes against humanity under article 7 of the Statute ("the Challenges").[10]

8. On 16 September 2011, the Prosecution filed a consolidated response to the Challenges to the Court's Jurisdiction.[11] The Prosecution argued that the arguments advanced by the two suspects with respect to the concept of "organizational policy" were issues of statutory interpretation and sufficiency of evidence, neither of which had been properly brought in the context of a jurisdictional challenge.

9. The confirmation of charges hearing commenced on 1 September 2011[12] and concluded on 8 September 2011[13].

10. On 30 September 2011, the Prosecution[14] and the Legal Representative of the Victims[15] filed their written observations following the confirmation

[7] ICC-01/09-01/11-1.
[8] ICC-01/09-01/11-2.
[9] ICC-01/09-01/11-T-1-ENG.
[10] ICC-01/09-01/11-305 (Ruto and Sang) and ICC-01/09-01/11-306 (Kosgey), respectively. The Defence team for Mr Kosgey made oral submissions on its challenge to jurisdiction: See 1 September 2011, ICC-01/09-01/11-T-5-ENG ET at pp.30-52.
[11] ICC-01/09-01/11-334.
[12] ICC-01/09-01/11-T-5-ENG.
[13] ICC-01/09-01/11-T-12-ENG.
[14] ICC-01/09-01/11-345.
[15] ICC-01/09-01/11-344.

hearing. Likewise, on 24 October 2011, Ruto,[16] Kosgey[17] and Sang[18] filed their written observations.

11. On 23 January 2012, Pre-Trial Chamber II issued its "Decision on the Confirmation of Charges pursuant to Article 61(7) of the Rome Statute" ("Confirmation Decision")[19]. The Majority confirmed all the charges against Ruto and Sang.[20] Judge Kaul dissented on the same grounds as in the Article 15 Decision and Summons Decision, namely he disagreed with the Majority's interpretation of "organizational policy" under article 7(2)(a).[21] The Chamber was unanimous in declining to confirm the charges against Kosgey.

12. On 30 January 2012, Ruto and Sang ("the Appellants") filed their notices of appeal against the Majority's ruling on jurisdiction.[22] The Appellants further requested, pursuant to article 82(3) and rule 156(5), that the pendency of the appeal suspend the proceedings and that the Trial Chamber not be constituted until the appeal is concluded.[23]

13. On 30 January 2012, the Appellants filed separate applications for leave to appeal the Confirmation Decision pursuant to article 82(1)(d) of the Rome Statute.[24]

14. On 3 February 2012, the Prosecution filed a consolidated response to the applications for leave to appeal.[25]

[16] ICC-01/09-01/11-355.
[17] ICC-01/09-01/11-353.
[18] ICC-01/09-01/11-354.
[19] ICC-01/09-01/11-373.
[20] ICC-01/09-01/11-373, pp.1-139.
[21] ICC-01/09-01/11-373, pp.140-173 (« Dissenting Opinion Confirmation Decision »).
[22] ICC-01/09-01/11-374, ICC-01/09-01/11-375.
[23] ICC-01/09-01/11-374, para.16 and ICC-01/09-01/11-375 para.16.
[24] ICC-01/09-01/11-377, ICC-01/09-01/11-376.

15. On 8 February 2012, the Prosecution filed its consolidated response to the Appellants' requests for suspensive effect of their appeals on jurisdiction[26].

16. On 14 February 2012, the Appellants separately filed their documents in support of appeal pursuant to article 82(1)(a) against the Majority's Decision on jurisdiction.[27]

17. On 29 February 2012, the Appeals Chamber rejected the Appellants' request for suspensive effect.[28]

18. For the benefit of the Chamber the Prosecution responds herewith to the Appellant's Appeal Briefs in a consolidated response as Ruto and Sang raised the same arguments.[29]

STANDARD OF REVIEW

19. A jurisdiction determination is a mixed question of fact and law. In relation to factual findings, the Appeals Chamber has held that they are not reviewable unless they are "patently incorrect." The Appeals Chamber's review is corrective in nature and not *de novo*.[30]

20. Further, a jurisdiction determination is a mixed question of fact and law. In relation to factual findings, the Appeals Chamber has held that they are not

---

[25] ICC-01/09-01/11-385. The Single Judge stated that it was the Prosecution's choice to file consolidated responses (ICC-01/09-01/11-381, para.5).
[26] ICC-01/09-01/11-387OA3 OA4.
[27] ICC-01/09-01/11-388OA3 ("Ruto Brief") and ICC-01/09-01/11-389OA4 ("Sang Brief").
[28] ICC-01/09-01/11-391OA3 OA4.
[29] The text of the two briefs is the same. There are only some minor differences in Ground Four: paras.113-117 in Ruto Brief and paras.113-121 in Sang Brief. In both instances, however, the Appellants challenge the Majority's reliance on Prosecution's anonymous witnesses.
[30] ICC-02/05-03/09-295OA2, para.20; ICC-01/09-01/11-307OA, para.56; ICC-01/09-02/11-274OA, para.55; ICC-01/04-01/07-572OA6, para.25; ICC-01/05-01/08-323OA, para.52; ICC-01/05-01/08-631-RedOA2, paras.61-63; ICC-01/05-01/08-631-Red, para.62.

reviewable unless they are "patently incorrect." The Appeals Chamber will "not review the findings of the Pre-Trial Chamber *de novo*".[31]

21. On questions of law, the Appeals Chamber has recently stated that "[it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law."[32]

22. In addition, the Appeals Chamber requires that for a successful appeal, the error raised by an appellant must have materially affected the impugned decision.[33] Accordingly, "as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision."[34] Similarly, an appellant "can not raise errors in assessments made in […] prior decisions as a ground of appeal in challenging the impugned decision".[35]

SUBMISSIONS

23. The Appellants advance four grounds on appeal. *First*, the Appellants argue that the Majority erred in procedure and/or in law by placing on the Appellants the burden of persuading the Chamber to revisit its prior

[31] ICC-01/09-01/11-307OA, para.56; ICC-01/09-02/11-274OA, para.55; ICC-01/04-01/07-572OA6, para.25; ICC-01/05-01/08-323OA, para.52; ICC-01/05-01/08-631-RedOA2, paras.61-63; ICC-01/05-01/08-631-Red, para.62.
[32] ICC-02/05-03/09-295OA, para.20. This statement is coherent with existing international jurisprudence. For example, the ICTY chambers have stated that where an error of law is found in the impugned decision, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings accordingly. *Prosecutor v Dragomir Milosevic*, Appeals Judgment, IT-98-29/1-A, 12 November 2009, paras.13-14 and authorities cited therein.
[33] ICC-01/04-01/07-1497OA8, paras.37-38.
[34] ICC-02/04-01/05-408OA3, para.48; ICC-01/05-01/08-962OA3, paras.102,106,133-134; ICC-01/05-01/08-1019OA4, para.69.
[35] ICC-01/05-01/08-2151-RedOA10, para.29.

definition of "organization". This is wrong. As in any challenge to the jurisdiction or admissibility of the Court, the Appellants, as the challenging parties, bear the burden to persuade the relevant Chamber of the Court of the correctness of their position. In addition, the Majority did consider the Appellants' submissions but it decided to dismiss them and revert to the concept of "organization" previously defined in the Article 15 and Summons Decisions. *Second*, the Appellants submit that the Majority also erred in procedure and/or in law when it did not conduct a factual analysis of the Prosecution's evidence to determine the jurisdiction of the Court. This ground is similarly without merit. It is premised on a profound misunderstanding of the nature of a determination on jurisdiction. The Prosecution will address below the proper scope of a determination of jurisdiction under the Statute.

24. *Third*, the Appellants argue that the Majority erred in law in defining "organization" under the Statute. The Prosecution submits that the concept of organization is a matter of statutory interpretation that shall be discussed at trial. As the Prosecution will develop below, the Majority adopted a correct interpretation of organization: the Chamber found that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, a group will constitute an "organization" within the terms of article 7(2)(a) if it has the *capacity* to commit widespread or systematic attacks on civilians. This effective interpretation of organization is supported by the literal, contextual and teleological interpretation of article 7(2)(a), the drafting history, the majority of the scholars as well as the evolution of the notion of crimes against humanity.

25. *Fourth*, the Appellants submit that the Majority erred in law and/or in fact when it found that the "Network" was an "organization" under the Statute.

The Appellants' arguments in this ground on appeal do not relate to the Chamber's determination of the Court's jurisdiction; rather, the Appellants raise arguments related to the sufficiency of evidence. The Appellants' submissions relate to the merits of the case and whether the Prosecution has presented enough evidence to prove its case under the applicable threshold, namely, substantial grounds at confirmation stage or beyond reasonable doubt at trial.

First Ground: the Majority erred in procedure and/or in law in adopting its prior definition of "organization" while finding that the Defence had the burden of persuading the Chamber to revisit its previous finding[36]

26. The Appellants claim that the Pre-Trial Chamber erred by allegedly placing on the Appellants the burden of persuading the Chamber to revisit its prior determination on jurisdiction. In particular, they allege, quoting Judge Kaul's dissent, that the Pre-Trial Chamber erred in procedure and/or law "in failing to provide the Defence an effective opportunity to be heard at first instance" and instead "employing a threshold approach that is similar to the remedy of reconsideration".[37]

27. The Appellants' arguments misrepresent the Decision. At no point did the Majority place on the Appellants a duty to seek reconsideration of the Chamber's prior determination on jurisdiction. Nor did the Majority deny the Appellants a proper opportunity to be heard on the issue of jurisdiction. On the contrary, the Appellants were given a proper opportunity to challenge the jurisdiction of the Court over their cases, and their arguments

[36] Ruto Brief, paras.15-29; Sang Brief, paras.15-29.
[37] Ruto Brief, paras.15-16; Sang Brief, paras.15-16.

were duly considered by the Pre-Trial Chamber. The Appellants are confusing their failure to persuade the Pre-Trial Chamber that the Court lacked jurisdiction over their cases with a non-existing imposition of a duty to show that the Chamber's prior determination had to be reconsidered.

28. The Pre-Trial Chamber was duty-bound to assess the jurisdiction of the Court under article 19 (1) in relation to the cases that could be brought before it. The language of article 19 (1) is clear: the Court "*shall* satisfy itself that it has jurisdiction in any case brought before it". This is a significant difference with admissibility, where, as the Appeals Chamber has noted, the Statute vests Chambers of the Court with discretion as to whether they should make an admissibility determination of a case on their own motion.[38] The Pre-Trial Chamber made its initial determination on jurisdiction in its Article 15 Decision.[39] This was perfectly appropriate, since article 15 (4) requires that the Pre-Trial Chamber verifies "that the case appears to fall within the jurisdiction of the Court" prior to any authorization to commence an investigation is given. This initial assessment of jurisdiction is made, as the same provision mandates, "without prejudice to subsequent determinations by the Court with regard to the jurisdiction [...] of a case". Thus, the Chamber did in this case precisely what the Statute requires Chambers of this Court to do in relation to the determination of jurisdiction. It also follows that the Appellants' reliance on the ruling of the Appeals Chamber in *Ntaganda*, which dealt with the issue of admissibility, not jurisdiction, is misplaced.[40]

29. The Prosecution stresses that nothing in the Article 15 Decision or in the subsequent rulings made by the Pre-Trial Chamber suggests that the

[38] See ICC-01/04-169OA, para.48.
[39] Article 15 Decision, paras.36 et seq and 70 et seq.
[40] ICC-01/04-169OA, paras.46-53

Chamber viewed this initial assessment of jurisdiction as a final determination that would only be revisited in exceptional circumstances. On the contrary, in its Article 15 ruling, the Pre-Trial Chamber emphasized that its affirmative finding on jurisdiction *ratione materiae* was entered without prejudice to any future determinations by the Chamber at later stages of the proceedings in the context of the Kenya situation.[41]

30. Further, in the Confirmation Decision, the Pre-Trial Chamber expressly stated that since the Appellants were challenging the *ratione materiae* jurisdiction of the Court, the Chamber had to "first rule on said challenges before proceeding with an examination of the merits of the case".[42] It then proceeded to discuss the Appellants' arguments before stating that it had not been persuaded that it should revisit its prior finding on the question and that it remained "in favour of providing an effective interpretation to article 7(2)(a) of the Statute".[43] Thus, the Chamber analyzed the Appellants' submissions underlying the challenge and rejected them as unpersuasive. In this sense, the Prosecution stresses that Chamber did not impose any burden on the Appellants beyond the ordinary burden of persuasion. In particular, it did not impose a burden to demonstrate that those findings ought to be "reconsidered", in the sense of requiring a showing that the findings in question were "manifestly unsound" and their consequences "manifestly unsatisfactory"; [44] nor did the Chamber suggest that it was bound by its prior determination and would depart from it only if the exceptional circumstances justifying reconsideration were shown.[45] Thus,

[41] Article 15 Decision, para.74. See Summons Decision, paras.10-12.
[42] Confirmation Decision, para.28.
[43] Ibid., paras.33-34.
[44] The words are taken from the test developed by Trial Chamber I in the *Lubanga* case. See ICC-01/04-01/06-2705, para.18.
[45] Confirmation Decision, paras.33-34.

the Appellants' claim that the Pre-Trial Chamber adopted "a threshold approach that is similar to the remedy of reconsideration"[46] does not hold.

31. What the Appellants are effectively claiming is that the Pre-Trial Chamber should have *completely ignored* its first assessment of jurisdiction once the Appellants made their challenge to the jurisdiction of the Court. Through a legally unsupported parallel with challenges to detention made under article 60 of the Statute, the Appellants appear to suggest that if a challenge to jurisdiction is made this should lead to the fresh determination from the Chamber, wholly divorced from any earlier rulings. Further, according to the Appellants, in such a situation the Prosecution, and not the challenging party, would bear the burden of showing that the Court has jurisdiction. These arguments are misconceived. First, under the existing jurisprudence of the Court, it is the challenging party that bears the burden of proof.[47] The position that an accused person need only raise a challenge against the jurisdiction of the Court for the burden to shift to the Prosecution is not supported by any legal authority. In addition, it is perfectly appropriate for a Chamber of the Court to revert back to its prior decisions on the same matter when entering a new decision. A Chamber may consider doing that for reasons of judicial economy alone. In the instant case, the Chamber had already provided a reasoned opinion on the issue of jurisdiction in its article 15 ruling. It was within the discretion of the Chamber to maintain that ruling in the absence of new facts or new arguments warranting that the

---

[46] Ruto Brief, para.16; Sang Brief, para.16.
[47] ICC-01/05-01/08-802, paras.201-202. Trial Chamber III has noted in relation to the decision rendered by the Appeals Chamber in the admissibility appeal filed in the *Katanga* case (ICC-01/04-01/07-1497OA8) that there is no suggestion in that judgment "that the prosecution bore the burden of proving that the proceedings were admissible" during the challenge to admissibility lodged by the Defence; see ICC-01/05-01/08-802, para.202, citing ICC-01/04-01/07-1497OA8, paras.85,111. The Prosecution further notes that the language in rule 58 requiring that a request or application filed under article 19 must "contain the basis for it" also supports the conclusion that the challenging party bears the burden to prove its argument.

Chamber revisited and modified its earlier findings. The Prosecution further notes that other Chambers of this Court have followed an identical approach in the context of jurisdiction determinations without any criticism being levelled at them.[48]

32. Finally, the Appellants' complaints against an alleged statement by the Majority that the Appellants should have sought to exercise their appellate rights against the Chamber's Summons Decision are misguided. First, the Majority only stated that it was "rather notable" that the Appellants had failed to appeal that decision. More importantly, and regardless of whether that particular statement was correct, the Majority stressed that this *was not determinative of the issue*.[49] The Majority did not reject the challenge due to the Appellants' failure to appeal the Summons Decision. Rather, the Chamber entered into the merits of the legal issue raised by the Appellants, i.e. the correct interpretation of "organizational policy". This is expressly recognized by the dissenting Judge.[50] Thus, the portion of the Decision challenged by the Appellants is, at most, *dicta*; even if the Chamber's statement had been erroneous, the error was inconsequential and does not justify any intervention by the Appeals Chamber.

---

[48] See Pre-Trial Chamber II's decision on confirmation of charges in the *Bemba* case (ICC-01/05-01/08-424), where the Chamber ruled that in the absence of any changes in circumstances negating its earlier findings on either jurisdiction or admissibility it was appropriate for the Chamber to conclude that the case continued to fall within the jurisdiction of the Court and remained admissible (paras.25-26). See also ICC-02/05-03/09-121-Corr-Red, paras.25-26; ICC-01/04-01/06-796-Conf-tEN, paras.164-166.

[49] Dissenting Opinion Confirmation Decision, para.34.

[50] Dissenting Opinion, para.23: "[a]lthough I disagree with the Majority's finding to reject this part of the challenge, I note that this first issue *has been decided on the merits*" (emphasis added).

Second Ground: the Majority erred in procedure and/or in law in not conducting a factual analysis of the Prosecution's evidence when deciding on the jurisdiction ratione materiae[51]

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

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

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

35. The Appeals Chamber has identified four facets of jurisdiction: "subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction – jurisdiction *ratione loci* - and lastly jurisdiction *ratione temporis*.. A challenge to the Court's jurisdiction looks only to whether all of the pre-conditions to the exercise of jurisdiction are met, as set out in Articles 11-13 of the Statute. This comprises the fulfilment of temporal jurisdiction in accordance with Article 11 or 13(b); geographical and personal jurisdiction in accordance with

[51] Ruto Brief, paras.30-44; Sang Brief, paras.30-44.

Article 12 or 13(b); and material jurisdiction in accordance with Article 13, with respect to the crimes listed in Article 5.[52] A case that falls outside any of those parameters will be dismissed, for example if the alleged conduct is not proscribed as a crime within the jurisdiction of this Court or otherwise took place during a time or in a place or by a person not amenable to the Court's jurisdiction.[53]

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

37. To the extent that the challenge only relates to the question whether the Court has the authority to prosecute alleged crimes in furtherance of the policy of an organizational entity that is not a State, this is a jurisdictional argument that can be resolved at this stage. Beyond that, however, the arguments that an organization under the Statute must have specific (though statutorily undefined) attributes that are not proven here, or that the evidence adduced at the confirmation hearing did not sufficiently prove

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

53 The Appeals Chamber has made a clear distinction between the facts pleaded by the Prosecution and any supporting evidence: "the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged." See ICC-01/04-01/06-2205OA15OA16, fn.163.

the existence of an organizational policy present non-jurisdictional issues. As such, the Appellants have no right of direct appeal to contest them.

38. This interpretation is firstly supported by the Statute, and in particular the provisions regulating the manner in which jurisdiction must be determined at the trial stage. Article 19(6) permits the Trial Chamber to address jurisdictional challenges and Article 19(4) states that such challenges must be made "prior to or at the commencement of the trial", i.e. before any evidence has been presented. This signifies that jurisdiction is not dependent on proof of particular facts, but instead will be considered without regard to the evidence on the basis of the allegations of the case as pleaded by the Prosecution. [54] Consistency requires that if a Trial Chamber is expected to make its jurisdictional assessment on the basis of the facts pleaded by the Prosecution, the same process is applied by a Pre-Trial Chamber.

39. International jurisprudence also supports this position. For example, in *Prosecutor v. Brdanin*, the Trial Chamber explained that in assessing a claim that it lacks jurisdiction, "the court would examine the facts alleged in the indictment; it would not examine whether there was evidence available to the prosecution to establish the truth of those facts so alleged".[55] Other Trial Chambers of the ICTY have consistently refused to treat as jurisdictional matters issues of fact and evidence, holding that they fall outside the proper scope of a jurisdictional challenge and deferring those determinations for the trial stage. For instance, in the *Boskovski* case, the Trial Chamber stressed

---

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

[55] *Prosecutor v. Brdanin*, Decision on Motion to Dismiss Indictment, IT-99-36, 5 October 1999, para.10. See also para.12, referring to the "traditional concept that the jurisdiction of a criminal court is founded upon, and invoked by, the indictment and the indictment alone".

that the so-called jurisdictional issues raised by the challenging party depended "first and foremost on factual determinations" which could only be made "by a Trial Chamber after having duly examined all the evidence tendered during trial".[56] As another ICTY Trial Chamber explained, "[t]he correct analysis, therefore, for purposes of examining subject-matter jurisdiction is whether the Tribunal has the power to prosecute the crime [...] in this case, not whether the mental and physical elements of the underlying forms of commission are established, which is a matter for trial."[57]

40. Similarly, a jurisdictional challenge is not an opportunity to discuss the proper statutory interpretation of the elements of the crimes. Rather, a determination on jurisdiction should be confined to the question of whether the Court is competent to prosecute the crime charged. As one ICTY Trial Chamber stated, "[t]he essence of subject-matter jurisdiction is whether the crime charged is a *type* of crime which the Tribunal is authorised to prosecute and punish".[58] A Chamber seized with a jurisdiction challenge must determine that the crime charged is one that falls within the jurisdiction of the Court. Beyond that, claims related "to the contours of a substantive crime [...] are matters to be addressed at trial".[59]

---

[56] *Prosecutor v. Boskovski and Tarculovski*, "Decision of Johan Tarculovski's Motion Challenging Jurisdiction", IT-04-82-PT, 1 June 2005, para.11.

[57] *Prosecutor v. Marijacic and Rebic*, "Decision on Motions to Dismiss the Indictment due to lack of Jurisdiction and Order Scheduling a Status Conference", IT-95-14-R77.2, 7 October 2005. In the *Seselj* case the Trial Chamber considered that issues such as whether there existed a state of armed conflict in any of the territories mentioned in the Indictment, whether or not any attacks against the civilian population were systematic or collective in nature and whether or not there was a nexus between such attacks and the armed conflict were issues of an "evidentiary character" to be determined at trial. See *Prosecutor v. Seselj*, Decision on Motion by Vojislav Seselj challenging jurisdiction and form of the indictment, IT-03-67-PT, Trial Chamber, 26 May 2004, para.41.

[58] *Prosecutor v. Marijacic and Rebic*, "Decision on Motions to Dismiss the Indictment due to lack of Jurisdiction and Order Scheduling a Status Conference", IT-95-14-R77.2, 7 October 2005, p.5 (emphasis added).

[59] *Prosecutor v. Milutinovic et al*, IT-05-87-PT, Decision on Odjanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, para.23.

41. The *Gotovina* case before the ICTY Appeals Chamber is particularly instructive on this point. In resolving an interlocutory appeal purportedly predicated on jurisdiction, that Appeals Chamber confirmed that the alleged non-existence of an armed conflict after a certain military campaign had taken place was not a jurisdictional challenge to the competence of the Tribunal to adjudicate the case, but instead was "a factual determination to be made at trial".[60] In particular, the Appeals Chamber noted that the appellant did not urge that the Tribunal lacked jurisdiction over the crimes against humanity that were charged -- deportation and forcible transfer – but instead argued for a narrow interpretation of the *actus reus* of those crimes, whereby they were limited to displacement from occupied territory. The Appeals Chamber stated that those arguments did not bear on the Tribunal's lack of subject-matter jurisdiction.[61] The Appeals Chamber reached an identical conclusion in relation to the appellant's second claim that the Trial Chamber had erred by concluding that Article 3 common to the 1949 Geneva Conventions, included in two counts of the indictment, could encompass conduct of hostilities violations under Hague Law. According to the appellant, this was "in violation of customary law and the *nullum crimen sine lege* principle, and thus falling outside the Tribunal's jurisdiction *ratione materiae* […]".[62] The Chamber concluded that again the appellant failed to raise a proper jurisdictional challenge. Instead, he contested only the statutory definition of a particular element of a crime but did not more broadly disagree that the Tribunal had jurisdiction over the crimes charged under Articles 3 and 5 of its Statute, or that the element in

[60] *Prosecutor v. Gotovina, Cermak and Markac*, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, IT-06-90-AR72.1, 6 June 2007, para.21. The appellant's claim was that after the so-called Operation Storm had been completed all hostilities had ceased, and that the ICTY lacked jurisdiction over acts committed after that operation.
[61] *Gotovina* Decision, para.15.
[62] *Gotovina* Decision, para.16.

question was a proper element of such crimes. The appellant's arguments therefore were "properly raised on the merits at trial" and did not demonstrate that the Tribunal lacked subject-matter jurisdiction over the crimes charged and the elements of those crimes.[63]

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

43. Finally, on this point, the Prosecution notes that the Dissenting Opinion below recognized the *Gotovina* decision but urged that this case was different. The Dissent distinguished between the contextual elements (in this case, the requirement of "organizational policy") and the objective elements of the crimes against humanity charged (or *actus reus*). It then posited that contextual elements do not relate to the merits of the case and therefore the evidence of those elements can and should be examined when determining jurisdiction; in contrast, the objective elements present "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".[64] The basis for that distinction is unclear and the Dissent provides no support. In the Prosecution's view, all elements – objective and contextual – bear equally on the existence of subject-matter jurisdiction: if

[63] *Gotovina* Decision, para.18. The appellant claimed that the element "persons taking no active part in the hostilities" in common Article 3 of the Geneva Conventions should be interpreted narrowly to require that such persons be shown to be in the hands of a party to the conflict. See paras.16-18.
[64] Dissenting Opinion Confirmation Decision, para.28; Ruto Brief, para.42; Sang Brief, para.42.

the Prosecution charges someone with a crime that is not enumerated in the list contained in Article 7 (1) (a) to (k), then the person charged may validly challenge the subject-matter of the Court on that basis alone, regardless of whether the contextual element is present or not. Beyond essential jurisdictional requirements, however, the sufficiency of proof of contextual, objective, and subjective elements of the crimes *all* relate to the merits of the case and *all* must be established by the evidence adduced at trial; there is no apparent reason why consideration of the contextual elements before trial would be immune from "prejudgment".

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

44. What ultimately lies at the core of the Appellants' position, supported by the Dissenting Opinion, is an attempt to expand the scope of an inquiry into jurisdiction and turn it into an in-depth examination of the correctness and strength of the Prosecution's case. Indeed, the dissent expressly recognizes this in its statement that the question in this case is whether the contextual elements of crimes against humanity had "been *established*".[65] As demonstrated above, however, a finding of subject matter jurisdiction does not depend on whether the evidence adduced by the Prosecution "established" the elements of a crime under the Statute.

45. Of course, persons charged before the Court may challenge the legal correctness of the underlying interpretation of the crimes charged by the Prosecution or attack the sufficiency of the evidence supporting the charges. But these determinations are entirely different from the one that a Chamber of the Court is called to make when seized with a challenge to jurisdiction. Though the Appellants urge that "it is […] for the Judges […] to decide on

[65] Dissenting Confirmation Decision, para.28 (emphasis added).

jurisdiction, not the Prosecutor"[66] – a self-evident principle that nobody has questioned – this does not give a Chamber of the Court the authority to expand its inquiry at this stage to embrace other non-jurisdictional issues that the judges must also decide. Similarly, the fact that a Pre-Trial Chamber has decided to join its determination on jurisdiction with the decision on confirmation of charges does not mean that the former loses its boundaries and is no longer governed by its strict requirements.

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

(c) The Appellants' specific arguments

47. The Appellants argue that, just as Chambers of the Court must make factual determinations when determining if charges fall within the Court's temporal or geographical jurisdiction, they are also required to make factual determinations based on the evidence underlying the crime when analyzing subject-matter jurisdiction.[67] This argument is misconceived.

48. First, even for the threshold determination of temporal or geographic jurisdiction, the initial basis for finding jurisdiction will be the charges themselves – which will identify the time and place of the crime -- not the evidence. To be sure, the Chamber may also need to consider additional facts, but those facts will not be evidence as to the elements of the crimes themselves. The Chamber rather will consider whether the territory where

[66] Dissenting Confirmation Decision, para.32, relied upon by Sang Brief para.36; Ruto Brief para.36.
[67] Ruto Brief, para.36; Sang Brief, para.36.

the crimes allegedly occurred belongs to a State that accepted the jurisdiction of the Court, and whether the acceptance of jurisdiction covers crimes occurring when these crimes were alleged to take place. Such consideration is completely different from an inquiry into whether the evidence adduced by the Prosecution supports the elements of the particular charged offense. Further, and in a significant difference with the other facets of jurisdiction, subject-matter jurisdiction directly relates to the crimes charged; thus allowing for a factual inquiry into the existence of those crimes in the context of an admissibility determination would effectively intrude into areas that the Statute has reserved for the confirmation or trial proceedings.

49. Second, the Appellants' claim that the Pre-Trial Chamber should have applied the standard of "substantial grounds to believe" 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*"[68] misconstrues the decision. In fact, the Chamber found that (a) alleged crimes against humanity committed in furtherance of an organizational policy qualify as crimes within the subject matter jurisdiction of the Court, and (b) there were substantial grounds to believe that the Appellants were criminally liable for the crimes alleged here in furtherance of the organizational policy alleged in the charges. That the latter conclusion was reached in its sufficiency analysis, and not as part of a jurisdictional determination, does not diminish that the Appellants received exactly the judicial examination that they claim was wrongly denied.

50. What the Appellants, at bottom, seek is that the sufficiency finding be construed as a jurisdictional decision to permit them to contest that factual

[68] Ruto Brief, para.40; Sang Brief, para.40 (emphasis added).

finding in the instant interlocutory appeal. But, as stated at length above, no court considers the sufficiency of evidence to establish all the elements of a charged crime to be jurisdictional or requires that this purported jurisdictional issue be resolved in advance of trial. Instead, courts are uniform in holding that a determination on jurisdiction *ratione materiae* is not an evidentiary inquiry into the merits of the Prosecution's case, including the question of whether crimes against humanity were committed. Thus, a determination on subject-matter jurisdiction is not subject to *any* evidentiary standard. This does not change only because the challenge has been made and/or decided at the confirmation stage. If the Appellants' proposition was accepted, this would lead to the absurd consequence that a challenge to the jurisdiction of the Court made at the beginning of the trial would require a factual determination by the Trial Chamber under the "beyond a reasonable doubt" standard, independent of that Trial Chamber's separate determination of the guilt or innocence of the accused.

51. Finally, the Prosecution notes that the Appellants claim that the Pre-Trial Chamber "refused to acknowledge" the jurisdictional relevance of the element "organization".[69] This is plainly untrue. The Pre-Trial Chamber examined the challenge brought by the Appellants and concluded first, that there was no reason to depart from its earlier decision on the term "organization"; and second, that the remainder of the Appellants' arguments were challenges to the merits of the Prosecution's case which fell outside the proper scope of a jurisdictional challenge.[70] At no point did the Chamber refused to recognize that the contextual element of crimes against

[69] Ruto Brief, paras.41-42; Sang Brief, paras.41-42.
[70] Confirmation Decision, para.35.

humanity was relevant for the purposes of its determination on jurisdiction.[71]

Third Ground: the Majority erred in law in its definition of "organization" under article 7(2)(a)[72]

I.The Appellants' Third Ground of Appeal should be summarily rejected

52. The Prosecution submits that this ground of appeal should be dismissed *in limine* since the issue raised in this ground is a matter of statutory interpretation that does not relate to the Court's jurisdiction. As noted above, in a challenge to the material jurisdiction, the Court will look at whether the crime charged is one that, as a matter of law, the Court may protect and punish. The meaning of the Statute, including the term "organizational policy", is a matter of statutory interpretation that does not bear on the jurisdictional issues. Regardless whether this can be resolved at the pre-trial stage or is dependent on the proof and therefore must be relegated to the trial itself, it is not a jurisdictional question and therefore cannot be raised in a direct appeal. On these grounds alone, the Appellants' Third Ground should be dismissed.

53. Should the Appeals Chamber consider that the merits of the arguments raised in this ground of appeal should be nonetheless entertained by the Chamber, the Prosecution submits that, as it will demonstrate below, those arguments are flawed and fail to establish any reversible error by the Pre-Trial Chamber.

[71] The Prosecution notes that the Appellants rely on Judge Kaul's efforts to distinguish their case from the ICTY *Gotovina* precedent (Ruto Brief, para.42; Sang Brief, para.42).The flaws of these efforts have been demonstrated above (para. 43). *A contrario*, Dissenting Opinion Confirmation Decision, para.32.
[72] Ruto Brief, paras.45-103; Sang Brief, paras.45-103.

II. The Appellants' Arguments

54. The Appellants argue that the Majority erred in law in its interpretation of "organizational policy" under article 7(2)(a) because "[the Majority did] not require [the organization to have] a link to a State or even State-like characteristics but encompass any group which has the capability to perform acts which infringe on basic human values, or private individuals with de facto power or organised in criminal gangs on groups and that such may be assessed on a case-by-case basis."[73]

55. The Appellants advocate for a concept of organization defined by the formal nature of the group and not by its capacity to commit crimes against humanity. According to the Appellants, for the purposes of article 7(2)(a) an organization should have a link to a State or bear State-like characteristics such as control over a territory.[74] Otherwise, the Appellants submit, "serial killers, motorcycle gangs, and small terrorist bands" will be tried before international Courts.[75]

56. The Appellants further argue that the Majority's interpretation of "organization" is not supported by leading academic authors[76] and the jurisprudence of the ad hoc tribunals,[77] and also that it is contrary to the intent of the drafters of the Statute.[78] According to the Appellants, the Majority's concept contravenes the principle of sovereignty and non-intervention in domestic affairs by authorizing the ICC to prosecute criminal behavior that it is intended to be subject only to national courts.[79]

[73] Ruto Brief, para.46; Sang Brief, para.46.
[74] Ruto Brief, para.93; Sang Brief, para.93.
[75] Ruto Brief, fn.110; Sang Brief, fn.110.
[76] Ruto Brief, paras.49-70; Sang Brief, paras.49-70.
[77] Ruto Brief, paras.78-81,89; Sang Brief, paras.78-81,89.
[78] Ruto Brief, paras.90-94; Sang Brief, paras.90-94.
[79] Ruto Brief, paras.71-77, 82-89; Sang Brief, paras.71-77, 82-89.

They contend that the open-ended definition of organization with non-exhaustive and non-mandatory list of criteria contravenes as well the principle of legality and strict construction of penal statutes.[80]

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

58. The Appellants and the Dissenting Judge agree that the concept of crimes against humanity has evolved to capture non-State organizations and that nowadays some private groups may have the capacity to commit widespread or systematic attacks against the civilian population. Yet they also argue that non-State organizations must be "State-like" and partake characteristics of a State, such as control over a territory. According to them, the Majority's interpretation will allow for the international prosecution of any criminal group. Therefore, they advocate for a formalistic approach where the capacity of the group is irrelevant and what matters is the label or structure of the organization.

59. Contrary to their argument, the Majority's position is supported by the drafting history of the provision the jurisprudence of this Court and that of the *ad hoc* tribunals, and the majority of the academic authorities. Moreover, the Majority's interpretation of organization, when properly understood,

[80] Ruto Brief, paras.95-103; Sang Brief, paras.95-103.

does not capture any form of criminal activity that should be prosecuted at domestic level.

III. The Majority's notion of "Organization"

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

60. The Appellants misrepresent the Majority's concept of organization developed in the 31 March 2010 Decision of the Pre-Trial Chamber ("Article 15 Decision")[81] and reiterated in the Summons and Confirmation Decisions. The Appellants improperly characterize the Majority's concept of organization as a "group that 'has the capability to perform acts which infringe on basic human values'"[82] as a concept that encompasses "serial killers, mafias, motorcycle gangs, and small terrorist bands".[83] Without waiving the primary argument that this is, in effect, an issue of statutory interpretation and not a jurisdictional challenge, the Prosecution responds that the Appellant's characterization does not correctly reflect the Majority's Decision, nor does it correspond with the facts of this case.

61. In the Article 15 Decision, the Majority carefully analyzed the statutory requirement of "organizational policy". First, it found that a non-State entity may qualify as an "organization" for the purposes of article 7(2)(a); the Majority correctly noted that "had the drafters of the Statute intended to exclude non-State actors from the concept 'organization', they would have not included this term in article 7(2)(a) of the Statute".[84] The Appellants and the Dissenting Judge agree in this regard.[85]

[81] ICC-01/09-19-Corr.
[82] Ruto Brief, para.46; Sang Brief, para.46.
[83] Ruto Brief, fn.110; Sang Brief, fn.110.
[84] Article 15 Decision, para.92.
[85] Ruto Brief, paras.88,90-93; Sang Brief, paras.88,90-93; Article 15 Dissenting Opinion, paras.51-52 quoted in para.8 of Dissenting Confirmation Decision.

62. Second, the Majority found that an organization under article 7(2)(a) must have the *capability* to "perform acts which infringe on basic human values".[86] Further, the Majority stated that organizations under the Statute may have the capacity to "elaborate and carry out a policy to commit an attack against a civilian population".[87] The Majority also noted that the determination of whether the alleged group has this capacity to commit crimes against humanity as part of its organizational policy must be made on a case-by-case basis. For this purpose, it set out a list of guiding criteria.[88]

63. Contrary to the Appellants' submissions, the Majority did not devise an abstract "basic human values test" to expand the definition of organization within the terms of article 7(2)(a). The Majority instead narrowed the definition by requiring something greater than organizational form or structure alone. And it did so by highlighting the seriousness of the crimes against humanity, whose commission was the policy of the organization.[89] And linking this to the "policy" element, as articulated in the Statute, ensures that "acts of individuals alone, which are isolated, uncoordinated and haphazard be excluded".[90]

64. The Chamber, in rejecting the suggestion of two commentators that only State-like organizations may qualify as such for the purposes of article 7(2)(a),[91] was persuaded by academic commentators,[92] the International Law Commission[93] and two Chambers of this Court[94] that the *capacity* of the

[86] Article 15 Decision, para.90.
[87] Article 15 Decision, para.92.
[88] Article 15 Decision, para.93.
[89] Article 15 Decision, paras.90,92.
[90] Dixon and Hall in Triffterer. O. (ed), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck, Hart, Nomos, 2008), "Article 7", p.236, [91].
[91] Article 15 Decision, para.90.
[92] Article 15 Decision, para.90, fns.84,85,89.
[93] Article 15 Decision, paras.91,92.
[94] Article 15 Decision, paras.84-85.

organization to conduct and implement a policy of widespread or systematic attacks against civilian population, rather than the formal structure of the group or its level of organization (i.e., whether it is a "State-like organization"), should be the defining criteria. Thus, its definition of organization and organizational policy is, moreover, fully consistent with the approach of numerous scholars who, when assessing the conception and evolution of crimes against humanity, also referred to 'human values' or 'humanity', as well as those who additionally require capacity. On the first point, for example, Cassese stated that "[crimes against humanity] are particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more human beings".[95] Kittichaisaree further notes that "[a] crime against humanity is a crime against 'humaneness' that offends certain general principles of law and which becomes the concern of the international community. It has repercussions beyond international frontiers or exceeds in magnitude or savagery any limits tolerated by modern civilization."[96] Additionally, he notes that "the expressions 'humanity', 'laws of humanity', and 'dictates of humanity' were used in, for example, the Preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land".[97] In sum, by referring to basic human values, the Majority emphasized the particular seriousness and gravity of these crimes.

65. In short, contrary to the Dissenting Opinion, the Majority's analysis does not mean or require a conclusion that any group that commits violent

---

[95] A. Cassese, *International Criminal Law*, OUP Oxford, 2003, p. 98.
[96] K. Kittichaisaree, *International Criminal Law*, Oxford University Press, Oxford, 2001, p.85. Kittichaisaree further notes that « the expressions 'humanity', 'laws of humanity', and dictates of humanity' were used in, for example, the Preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. Paragraph 2 of the Preamble states that the contracting Parties desire to serve even in the case of war, 'the interests of humanity and ever-progressive needs of civilization' ».
[97] Ibid, p.85.

crimes automatically qualifies as an "organization" under the Statute.[98] Therefore, the Appellants' and Dissenting Judge's arguments - that the Majority's interpretation would expand the Court's jurisdiction to prosecute every serial killer or motorcycle gang - is incorrect. And given the Majority's requirement of criteria to establish both the organization's policy to commit widespread or systematic crimes and its capacity (including resources) to do so, the concerns of some scholars that organizational policy may improperly broaden the definition of international crimes are also misplaced.[99]

66. The Appellants also challenge the fact that the Majority did not provide a rigid definition of organization with mandatory requirements, and in particular that it did not require territorial control.[100] Instead, the Majority held that the determination whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. The Majority provided further guidance by listing several non-exhaustive factors that *may* be considered in the assessment of the evidence.[101]

67. These factors are similar to the "quasi-State abilities" or characteristics that could determine the existence of an organisation, as identified by the Dissenting Judge. The Dissent provided a non-exhaustive list of factors comprising, *inter alia*, responsible command and hierarchical structure, as well as capacity and means available to launch a large-scale attack on a civilian population.[102] Notably, the Dissent did not require territorial

---

[98] Article 15 Dissenting Opinion, para.53 quoted in Dissenting Confirmation Decision, para.8.
[99] See Bassiouni and Schabas quoted in Ruto Brief, paras.84-85; Sang Brief, paras.84-85.
[100] Ruto Brief, paras.99-101; Sang Brief, paras.99-101.
[101] Article 15 Decision, para.93.
[102] Article 15 Dissenting Opinion, para.51: "These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy

control. Rather, and contrary to the Appellants' main argument, the Dissent expressly stated that "control over the territory is *not* needed [although it] may serve as an additional factor to be considered."[103]

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

69. The Majority further indicated that the policy itself may inform whether the entity is an organization under the Statute: if the group's primary purpose is the commission of crimes against the civilian population or if the group articulates, explicitly or implicitly, an intention to attack a civilian population, that will provide indicia of the organized nature of the entity. Further, by recognizing that a group may form part of a larger organization, or vice versa, the Chamber recognized that there are several conceivable structural models, including a network of allied groups with a common policy.

70. In sum, under the Statute individuals acting in a private capacity can commit crimes against humanity. It does not require that the organization include or reflect State characteristics. The Majority's Decision is a correct

---

on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale."

[103] Article 15 Dissenting Opinion, fn.56.

interpretation on the basis of the intentions of the drafters of the Statute, academic commentators, the ordinary meaning of the term "organization", the contextual interpretation of article 7, the object and purpose of the Statute, and the jurisprudence of this Court. Each of these points is addressed below.

(b) The Confirmation Decision

71. The Majority consistently applied the above-described concept of organization to the facts of the case in its Confirmation Decision. It first noted that not all private groups are organizations under the Statute;[104] then the Majority highlighted the distinctiveness and *raison d'être* of crimes against humanity, in particular, the protection of basic human values.[105] And it noted the defining criterion of an organization under the Statute, namely, its capacity to implement a policy to commit an attack against a civilian population.[106]

72. From these legal principles, the Majority then assessed whether the facts of the case established relevant factors that would justify finding the existence of an organization.[107] After a thorough assessment of the evidence, the Majority found that the Network had responsible command and established hierarchy with Ruto as the designated leader;[108] that the Network possessed the means to carry out a widespread or systematic attack against civilian population as its members had access to and used a considerable amount of capital, weapons and manpower;[109] and that the Network had as its primary

[104] Confirmation Decision, para.184.
[105] Idem.
[106] Idem.
[107] Ibid., paras.185-186.
[108] Confirmation Decision, para.197.
[109] Ibid., para.200.

purpose the commission of crimes against civilians and articulated its intention to attack the civilian population.[110]

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

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

73. As noted previously, neither the Appellants[111] nor the Dissent[112] dispute that non-State actors can commit crimes against humanity.[113] However, both would require that non-State entities include or reflect State characteristics.[114] According to the Dissent, organizations that lack characteristics of a State necessarily cannot carry out a policy of widespread or systematic attacks against civilians, but instead must be, *ipso facto*, "violence-prone groups of persons formed on an ad hoc basis, randomly, spontaneously, for a passing occasion, with fluctuating membership and without a structure and level to set up a policy".[115] According to the Appellants, a connection to a State, such as territorial control, is required[116] because crimes against humanity have evolved to capture scenarios when there is reason to doubt that the State will prosecute precisely because the State or State-like organization with control over a territory is complicit in the crimes or controls the judicial apparatus.[117]

74. These arguments are without merit. As it is described below, the concept of crimes against humanity developed in Nuremberg in connection with the crime of aggression, has evolved precisely to capture non-State actors and

[110] Ibid., para.207.
[111] Ruto Brief, paras.87-88, 90-93; Sang Brief, paras.87-88, 90-93.
[112] Article 15 Dissenting Opinion, paras.51-52 quoted in para.8 of Dissenting Confirmation Decision.
[113] See below fn. 172.
[114] Article 15 Dissenting, para.51 quoted in para.8 of Dissenting Opinion Confirmation Decision.
[115] Article 15 Dissenting, paras.51-52 quoted in para.8 of Dissenting Opinion Confirmation Decision.
[116] Ruto Brief, paras.92-93; Sang Brief, paras.92-93.
[117] Ruto Brief, paras.75-76,82-84; Sang Brief, paras.75-76, 82-84.

private entities with the capacity to commit those crimes regardless of their links or connection with a State.[118] Likewise, and contrary to the Dissent, at no point did the Majority rule that "any kind of non-state actor may be qualified as an 'organization' within the meaning of article 7(2)(a)".[119]

75. Further, the Dissent and Appellants' arguments that non-organized individuals who perpetrate random criminal acts can fall under the jurisdiction of the Court are false. The Statute requires specific elements: the individuals should constitute an organization with a policy to commit widespread or systematic attacks against the civilian population. Thus, "violence-prone groups of persons formed on an ad hoc basis […] with fluctuating membership and without a structure […]"[120] will not, without more, be subject to prosecution for crimes against humanity. Nor is that what this case is about.

76. As reality shows, there is not a single and uniform type of non-State organization, and the notion of crimes against humanity has evolved to capture the crimes committed by private organizations, which may be as powerful as States but completely unrelated to them. Al-Qaeda's September 11 attacks provide a clear example of this.[121] Thus, the defining criteria are not the group's connection to a State, whether they further a State-policy or whether the group controls a given territory. All those factors may be taken into account to determine the existence of an organization, but none of them are essential. The only necessary requirement is the group's capacity to implement a policy of widespread or systematic attacks against civilians.

---

[118] See below paras. 83 to 96.
[119] Article 15 Dissenting, para.53 quoted in para.8 of Dissenting Confirmation Decision.
[120] *A contrario*, Article 15 Dissenting, paras.51-52 quoted in para.8 of Dissenting Confirmation Decision.
[121] For a discussion on the September 11 attacks as crimes against humanity See H Duffy, *The 'War on Terror' and the Framework of International Law* (CUP, Cambridge 2005), pp. 77 et seq. See also the discussion at para. 99 below.

(b) The resources and capabilities of private entities

77. The Appellants and the Dissent agree in principle with that private entities may have the capacity to commit crimes against humanity but nonetheless insist that they cannot be charged. For example, the Appellants acknowledge that States are no longer the sole entity that can finance and organize mass atrocities.[122] However, they illogically argue that even if this requirement is met, the entities' acts will be random and isolated.[123] This is a fallacious argument. First, the "policy" requirement would, on its face, exclude random acts and random actors, but it does not exclude – and indeed is paired in the Statute with -- non-State organizations. Second, if non-State actors in an organization have structure, control, means, and capacity, by definition they are capable to implement a policy of widespread or systematic attacks against civilians within the terms of the statute. Third, the Majority's interpretation of "organization" sets out safeguards to ensure that isolated criminal actions are not tried before the Court.

(c) Sovereignty and principle of non-intervention

78. The Appellants highlight the importance of State sovereignty and the principle of non-intervention. They argue that the Majority infringed the principle of complementarity with respect to Kenya by not requiring a link between the organization and a State or a State-like organization.[124]

79. The Appellants refer to Brownlie and to article 2(7) of the UN Charter,[125] suggesting that they confirm that only States, and not this Court, can

[122] Ruto Brief, paras.87-88; Sang Brief, paras.87-88.
[123] Ruto Brief, fn.110; Sang Brief, fn.110; Article 15 Dissenting, paras.51-52 quoted in para.8 of Dissenting Opinion Confirmation Decision.
[124] Ruto Brief, paras.71-73; Sang Brief, paras.71-73.
[125] Ruto Brief, para.73; Sang Brief, para.73.

exercise jurisdiction to prosecute organizations that lack State attributes, and that this Court's exercise of jurisdiction offends the rights and interests of States. Their reliance on these authorities is misplaced. The Majority's interpretation of organization does not involve a discretionary and unjustified intrusion into States' jurisdiction. As with all crimes and all offenders before this Court, the national authorities retain the primary responsibility, under the doctrine of complementarity, to investigate and prosecute the same persons for the same conduct as that which is before the ICC. In that regard, the Appeals Chamber found that Kenya is not investigating or prosecuting the same cases as that before the Court and that therefore, the case against Ruto and Sang is admissible.[126] Nor does Brownlie support the Appellants' insistence on national exclusivity. Brownlie emphasizes the importance of the principle of non-intervention in general, without any reference to its application to international criminal law or the Rome Statute, but also expressly recognizes that "[…] in particular contexts, international law may place restrictions on the 'internal' territorial competence of states as a consequence of treaty obligations […]."[127] Similarly, Chapter VII of the UN Charter authorizes the UN Security Council to intervene in the territory of UN member States to maintain and restore international peace and security.

V. The Language and Purpose of the Statutory Provision

80. The concept of "organization" as set out by the Majority aligns with the ordinary meaning of the term. The Oxford English Dictionary defines an organization as "an organized body of people with a particular purpose". The MacMillan Dictionary defines it as "a group of people who have a

[126] ICC-01/09-01/11-307OA.
[127] Brownlie, *Principles of Public International Law*, Oxford University Press, 2003, p.191.

particular shared purpose or interest". Black's Law Dictionary defines it as "a body of persons (such as a union or corporation) formed for a common purpose". In other words, the term requires commonality of purpose but does not require specific State-like attributes.

81. In addition, the Appeals Chamber has stated that a statutory provision should be read "[…] in context and light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of a law as a whole read in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty."[128] When viewed in light of its context, object, and purpose, article 7 must be read as the Majority construed it.

82. Article 7(1) and 7(2)(a), read together, require multiple acts as part of a widespread or systematic attack done knowingly and deliberately pursuant to an organizational policy.[129] The evil at which article 7 is primarily directed is not a State or quasi-State policy, it is attacks against the civilian population. And the purpose of the provision is to protect *all* civilian populations against massive victimization by organized groups, not to narrowly protect only those civilian populations who are victimized specifically by States or State-like entities.

[128] ICC-01/04-168OA3, para.33 ; ICC-01/04-01/07-522OA3, para.39; ICC-01/04-01/07-573OA6, para.5; ICC-01/04-01/06-1432OA9OA10, para.55; ICC-01/04-01/06-1486OA13, para.40.
[129] For example, an attack need not necessarily be widespread (as requiring large-scale activity involving a great number of victims), but it must at least have some scale, affecting multiple victims. On the other hand, an attack need not necessarily be "systematic" (as requiring methodical organization or orchestration), but it must at least be pursuant to or in furtherance of some sort of plan or policy of a State organization. See Robinson D., in Lee *et al.* (ed.), The Elements of Crimes against Humanity, in "*ICC: Elements of Crimes and Rules of Procedure and Evidence*", and Robinson D., *Defining 'Crimes against Humanity' at the Rome Conference*, 93 AM. Journal IN'L L., p. 51.

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

(a) Preliminary Observations

83. The common understanding that non-State actors may perpetrate crimes against humanity is reflected in the work of the International Law Commission ("ILC"),[130] relied upon by the Majority in accordance with article 21(2) of the Statute.[131] The requirement of State participation in crimes against humanity, first explicitly rejected in the 1951 Draft Code's definition, was subsequently incorporated in article 2 of the 1954 Draft Code's revision. Article 21 of the 1991 Draft Code, which sought to update article 2 by incorporating developments in international law, again eliminated the requirement and indicated that "private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article".[132] The Appellants argue that this wording is not relevant, as the provision does not expressly refer to crimes against humanity.[133] However, the text of the article (which expressly indicates that it seeks to update article 2 of the 1954 Draft Code on crimes against humanity),[134] together

[130] Robinson D. and Von Hebel H., in Lee R.S. (ed.), "Crimes within the Jurisdiction of the Court" in The International Criminal Court The Making of the Rome Statute, p.96; Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, pp.48-49.
[131] Article 15 Decision, fn.78, para.91.
[132] *Yearbook of the International Law Commission* 1991, Volume 2, Part 2, A/CN.4/SER.A/1991/Add.l (Part 2) (1991), p.103; Article 15 Decision, para.91.
[133] Ruto Brief, paras.50-52; Sang Brief, paras.50-52. As an example of the misguiding nature of the Appellants' submissions, it is significant that in the extract quoted in paragraph 50 they failed to highlight and fully quote the relevant section, which reads "it is important to point out that the draft article does not confine possible perpetrators to public officials or representatives alone". See Ruto Brief, para.50; Sang Brief, para.50.
[134] See ILC commentary on article 21 of the 1991 Draft; *Yearbook of the International Law Commission* 1991, Volume 2, Part 2, A/CN.4/SER.A/1991/Add.l (Part 2) (1991), p.103: In reconsidering this provision, which was not exhaustive in the 1954 draft Code, the Commission deemed it necessary, while keeping the bulk of the crimes it included, to update it in form and in substance and to take account of developments in international law in recent decades".

with the systematic and mass-scale criteria reflected,[135] makes clear that this provision intended to capture the evolution of crimes against humanity up to 1991.

84. Similarly, article 18 of the ILC's 1996 Draft Code of Crimes expressly provided that crimes against humanity could be committed by "a Government or by any organization or group". It intended "organization" to simply mean an entity comprised of more than one person. The Commentary to article 18 explains that "[t]his alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity."[136] In sum, the Commentary made clear the goal that the Statute would apply to, and the Court would have jurisdiction over, private groups or criminal gangs who commit systematic or mass human rights violations.[137]

85. The Appellants try to undermine the plain terms of this provision by arguing that, notwithstanding the commentary, the 1996 Draft intended to define crimes against humanity in a consistent manner with the jurisprudence of Nuremberg and subsequent developments that, according to the Appellants, required State participation or a State-directed policy.[138]

---

[135] Hwang, P., "Defining Crimes Against Humanity", 22 Fordham Intl L. J., 1998-1999, p.465, footnote 55.
[136] See Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No.10, at pp. 93, 95-96, UN Doc. A/51/10 (1996) (hereinafter "1996 draft code"). The chapeau paragraph of article 18 reads: "*A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (a) murder; (b) extermination […]* ". See Article 15 Decision, fn.78.
[137] S.Ratner and J.Abrams in "Crimes against Humanity and the Inexactitude of Custom", *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy* (Oxford University Press, 2001), p.68, fn.133.
[138] Ruto Brief, para.53; Sang Brief, para.53.

This is not correct. It was precisely by not requiring a State-directed policy that article 18 of the ILC Draft Code incorporated the developments on international law since Nuremberg, such as the principle underlying the German industrialist cases, where no nexus with a State policy was required.[139] Equally unavailing is any reliance on the jurisdiction of the International Military Tribunals (IMT),[140] which is critically different from the ICC jurisdiction precisely because the Rome Statute expressly identifies "State" and "organizational" as two different and alternative entities.[141]

---

[139] In the cases of German industrialists who took advantage of Nazi policies for financial advantage, the American Zone courts found defendants guilty based on their conduct *per se* towards victims, without requiring a connection between those crimes and state policy. Ratner and Abrams in "Crimes against Humanity and the Inexactitude of Custom", *Accountability for Human Rights Atrocities in International Law*, p. 67. In the Flick case, the IMT stated that "[i]t cannot longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals." The Tribunal further added that, "International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality….The application of international law to individuals is no novelty. (See The Nuremberg Trial and Aggressive War by Sheldon Glueck, ch. V, pp. 60-67, inch, and cases there cited.)". See *United States v. Friedrich Flick et. al*, US Military Tribunal Nuremberg, Judgment of 22 December 1947, pp.5 -6, http://werle.rewi.hu-berlin.de/Flick-Case%20Judgment.pdf .

[140] See article 6 of the IMT Charter: "The Tribunal established by the Agreement referred to Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes […]". The Appellants further ignore the fact that the IMT German industrialist cases adopted a loser standard, finding the defendants guilty based on the conduct per se toward victims, and not requiring any connection with state policy. See above fn. 139.

[141] *A contrario*, Ruto Brief, para.54; Sang Brief, para.54. The Prosecution notes that the Appellants' reference to the SA case in paragraph 55 is misplaced and the extract quoted does not reflect neither the facts of the case nor the extent of the court's findings. First, the SA was not a private organization, but rather was an organization founded in 1921 for political purposes and organized on military lines. Second, the court distinguished between two periods and indicated that, during the first period (before 1934) crimes were committed by individuals but not as part of a policy or specific plan to wage an aggressive war. After 1934, the Court found that only in specific instances some units of the SA were used for the commission of war crimes and crimes against humanity but it could not be said that its members generally participated. Thus, if the SA was not considered an organization for the purposes of article 9 of the Charter, it was for reasons other the lack of a connection with a State – and indeed it had such connection -- but because the crimes were either not committed in pursuance of a criminal policy or not committed by SA members. In addition, the arguments by Appellants Ruto and Sang in paragraphs 74 to 76 that the IMT Charter required a nexus to armed conflict in order to justify international intervention are irrelevant. The Rome Statute does not require that crimes against humanity be committed in the context of armed conflict. Likewise, their argument that Control Council Law n10 (Ruto Brief, para.77; Sang Brief, para.77) eliminated this nexus but still required state participation is misplaced. This law sought to permit domestic prosecution of crimes subject to IMT jurisdiction, if committed by German nationals. It did not provide a general definition of crimes against humanity, much less one that

(b) ICC Jurisprudence

86. By focusing on the capacity of the organization to commit crimes against humanity,[142] the Majority accepted the reasoning adopted in the *Katanga & Ngudjolo* and *Bemba* cases, that a private entity not linked to a State is capable of committing an attack against a civilian population and that the formal nature of a group or its level of organization are not the defining criteria. As the Majority noted, those Chambers focused on the substance or capacity of the non-State actors to commit the most serious crimes against mankind and stated that "a policy may be made either by groups of persons who govern a specific territory or *by any organisation with the capability to commit a widespread or systematic attack against a civilian population*".[143]

87. The Appellants argue that these decisions are irrelevant because in those cases the alleged crimes were committed in the context of an armed conflict and not in times of peace.[144] They further submit that those Chambers relied on a different test than the Majority's "capacity to infringe basic human values", namely, that an "organization" may have the capacity to commit widespread or systematic attacks against civilians.[145]

88. The Appellants' arguments are wrong. First, the Chambers in the *Katanga & Ngudjolo* and *Bemba* cases defined the concept of "organizational policy" under the Statute in general, and without reference to the facts of the cases before them. Thus, the fact that the crimes in those cases were committed in the midst of an armed conflict or that the groups under the control of those accused were military-type or had territorial control is not relevant for the

must be applied in all future domestic and international instruments. Thus, the modifications in this text should be understood in this context.

[142] Article 15 Decision, para.90.
[143] ICC-01/04-01/07-717, para.396; see also ICC-01/05-01/08-424, para.81 (emphasis added).
[144] Ruto Brief, para.65; Sang Brief, para.65.
[145] Ruto Brief, para.66; Sang Brief, para.66.

purposes of the concept of organization. Second, all Pre-Trial Chambers (in *Katanga*, *Bemba* and in *Kenya – as well as in Cote d'Ivoire*[146]) provided the same definition of "organization" for the purposes of article 7(2)(a), focusing on the capacity of the organizations and not on their forms. This is what the Majority did in this case. Contrary to the Appellants' contention, the Majority's reference to the group's "capability to perform acts which infringe on basic human values" in paragraph 90 of the Article 15 Decision is identical to the group's capacity to "elaborate and carry out a policy to commit an attack against a civilian population" in paragraph 92 of the same Decision. In fact, the Majority in the Confirmation Decision referred to both terms in an interchangeable manner when applying the law to the facts of the case.[147]

89. In the Confirmation Decision, the Majority noted that its interpretation of organizational policy was endorsed by Pre-Trial Chamber III in its decision authorizing the investigation in Cote d'Ivoire.[148] The Appellants however argue that such decision does not support the Majority's interpretation, as the facts in both cases differ (the relevant organization in Cote d'Ivoire was an armed group) and Pre-Trial Chamber III declined to opine on whether the Kenya Article 15 definition was correct.[149]

90. The Appellants' arguments are once more misplaced. Regardless of the facts of that case, Pre-Trial Chamber III acknowledged that non-State actors may qualify as organizations and that the determination of organization under the Statute must be made on a case-by-case basis.[150] In addition, the Chamber, in determining the existence of an organizational policy,

[146] ICC-02/11-14-Corr, para.46.
[147] Confirmation Decision, para.184.
[148] Confirmation Decision, para.33 and fn.66 referring to ICC-02/11-14-Corr, paras.45-46.
[149] Ruto Brief, paras.68-69; Sang Brief, paras.68-69.
[150] ICC-02/11-14-Corr, paras.45-46.

expressly required that the relevant group "possessed the means to carry out a widespread or systematic attack against the civilian population",[151] thus endorsing the capacity test conceived by the Majority.[152]

91. The need to avoid narrow or rigid definitions in the context of the type of crimes to be dealt with by the Court is also highlighted in the Appeals Chamber's judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I on an application for warrants of arrest in the *Ntaganda* case.[153] Declining to rigidly interpret the gravity threshold for admissibility in article 17(1)(d), this Chamber stated that "the particular role of a person, or for that matter, an organization, may vary considerably depending on the circumstances of the case and should not be exclusively assessed or predetermined on excessively formalistic grounds".[154] The Appeals Chamber further held that a rigid interpretation of those most responsible "ignore[s] the highly variable constitutions and operations of different organizations and could encourage any future perpetrators to avoid criminal responsibility before the ICC simply by ensuring that they are not a visible part of the high-level decision-making process".[155] This reasoning, the Prosecutor submits, is equally applicable to the element of "organizational policy" for crimes against humanity.

(c) Ad hoc Tribunals

92. The Appellants argue that the jurisprudence of the ad hoc tribunals is not relevant because the ICTY and ICTR statutes do not require a State or

[151] ICC-02/11-14-Corr, para.98.
[152] Note that Ruto and Sang reference to FRCI forces "ability to plan and carry out military operations for a prolonged period of time" is misleading (para.69). The Chamber made that finding in the context of war crimes when determining the existence of an armed conflict and not when assessing the existence of an organizational policy: see ICC-02/11-14, para.127.
[153] ICC-01/04-169.
[154] Ibid., para.76.
[155] Ibid., para.77.

organizational policy. In addition, the existence of armed conflicts provided a justification for an intervention and intrusion into State sovereignty in those countries. Further, the Appellants argue that in the cases before those tribunals the perpetrators belonged to State-like entities with territorial control.[156]

93. The Appellants are correct in noting that the ICTY and ICTR Statutes do not impose a policy requirement. The Majority acknowledged this.[157] In addition, the facts of those cases differ from the Kenya cases, as crimes against humanity were mostly committed in the context of an armed conflict by government forces or paramilitary groups acting on behalf of States. That said, the Tribunals' emerging jurisprudence on "policy" and even on "organized armed groups" for the purposes of an armed conflict, although not determinative, provides some guidance. For instance, early ICTY jurisprudence did require a policy element while also acknowledging the possibility that the facts would establish that non-State entities implemented such policy.[158] The Majority's reference to the ICTY case law should be read in this limited way.[159] For example, when interpreting the phrase "directed against any civilian population", the Trial Chamber in the *Tadic* case confirmed that "there must be some form of a *governmental, organizational or group policy* to commit these acts".[160] Further, in *Blaskic*, the

[156] Ruto Brief, paras.57,78-81; Sang Brief, paras.57,78-81.
[157] Article 15 Decision, para.86. Although not expressly stated, the Majority is mindful of the evolution of the policy requirement at the ICTY jurisprudence. See fn.79.
[158] Subsequently, the ICTY Appeals Chamber in the *Kunarac* case- in a footnote and without addressing or acknowledging most of the contrary authorities – took a different approach and concluded that "nothing in the Statute or in customary international law […] required proof of the existence of a plan or policy to commit these crimes" and concluded that there was no need to demonstrate this element before the ICTY courts. *Prosecutor v Kunarac*, Appeals Judgement, 12 June 2002, para.98. The Majority acknowledged this fact in its Article 15 Decision, fn.79.
[159] Article 15 Decision, fns. 77, 79 and 80 (when describing policy) and fns. 81 and 85 (when addressing organizational policy).
[160] *Prosecutor v. Tadic*, Opinion and Judgement, No.IT-94-1-T, 7 May 1997, para.644, emphasis added, cited in Robinson D., *Defining 'Crimes against Humanity' at the Rome Conference*, 93 AM. Journal IN'L L., p.49. Robinson D., *Defining 'Crimes against Humanity' at the Rome Conference*, 93 AM.

Trial Chamber indicated that individuals "with *de facto* power or organized in criminal gangs are just as capable as State leaders of implementing a large-scale policy of terror and committing mass acts of violence".[161] Contrary to the Appellants' submissions, these criteria are not limited to political authorities or military hierarchies; rather, they are equally applicable to private entities without territorial control.[162] In addition, the Chambers issued those rulings independently of the facts of the cases before them, in the context of explaining crimes against humanity and its evolution.

94. Similarly, the Majority's notion of "organization" aligns with recent ICTY jurisprudence on "organized armed groups" for the purposes of an armed conflict. The Dissent acknowledged the similarity between the two concepts.[163] In those cases, Chambers found that territorial control is not a mandatory requirement. For example, in *Boskoski*, the Trial Chamber found that the NLA was an "organized armed group or force" engaged in an internal armed conflict with the Macedonian police and army. Notably, the Chamber relied on the level of military success achieved by the NLA, its ability to speak with one voice and to recruit and arm its members.[164] The Chamber also found that warring parties in an armed conflict do not

---

Journal IN'L L., 49, referring to, *inter alia*, Virginia Morris and Michael Scharf in the Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia. See also Cryer R., et al., 'Crimes against Humanity' in *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd Ed), p.238.

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

[162] *A contrario*, Ruto Brief, paras.57,79; Sang Brief, paras.57,79. The Appellants quote para. 654 of Tadic Trial Judgement to argue that Tadic requires the entity to have territorial control. This is not correct. The Trial Chamber indicated that "the law in relation to crimes against humanity has developed to take into account forces, which, although not those of the legitimate government, have de facto control over, <u>or are able to move freely within, defined territory</u>" (emphasis added). The latter requirement does not entail territorial control and the members of the Network were able to move freely in order to commit crimes against humanity.

[163] Article 15 Dissenting, fn.55: "[…] Hence, even though an 'organization' may not show a military structure, it should nevertheless have a structure and capacity similar to that of an 'organized armed group'".

[164] *Prosecutor v Boskoski*, IT-04-82-T, 10 July 2008, Trial Judgement, para.290.

necessarily need to be as organized as the armed forces of a State, nor do they need to exercise control over a territory.[165] Like the Majority, the *Boskoski* Trial Chamber set out an indicative list of factors that Trial Chambers have taken into account when assessing the organization of an armed ground, such as, *inter alia*, command structure, the capacity of the group to carry out operations in an organized manner, and factors related to the level of logistics, to the level of discipline and the ability to recruit new members.[166]

95. The *Boskoski* Chamber also rejected the defence argument that the "terrorist" nature of the NLA activities militated against the NLA being considered as a party to the armed conflict. Refusing to reach this categorical conclusion, the Chamber noted that this instead was a factual determination to be made on a case-by-case basis as some terrorist attacks "actually involve a high level of planning and a coordinated command structure for their implementation."[167] This reasoning, endorsed by the ICTY Appeals Chamber, diminishes the need to avoid rigid and over simplistic formulas for the interpretation of international cases.

(d) Drafting History

96. The concept of "organization" reflected in the 1996 Draft Code as a means of including crimes by gangs or other such groups, exempting crimes committed by lone actors, is further reflected, directly and inferentially, in the deliberations leading to the Rome Statute. During the negotiations on crimes against humanity, the focus was placed on excluding random or isolated acts by individuals, not on excluding non-States or non-State-like

[165] Ibid., para.197.
[166] Ibid., paras.199-203.
[167] Ibid., para.204.

organizations.[168] As one commentator explained, "[t]he underlying direction, instigation or encouragement by a State or organization is what unites otherwise unrelated inhumane acts, so that they may be accurately described as an 'attack', considered collectively, rather than a mere crime wave or other domestic criminal behavior."[169] The organizational requirement together with the need for the attack to be "directed against any civilian population" thorough a "course of conduct" were added to capture both a significant degree of scale and the element of planning and direction.[170] Therefore, as the Majority correctly found "had the drafters of the Statute intended to exclude non-State actors from the term 'organisation', they would not have included this term in article 7(2)(a) of the Statute".[171]

[168] Kress comment that "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" should be understood in this context (Ruto Brief. para.90, fn.121; Sang Brief, para.90, fn.121). In addition, Kress does not distinguish between the policy element or the widespread or systematic requirement.

[169] Robinson, in Lee et al. (ed.), *The Elements of Crimes against Humanity*, p.64; Robinson D. and Von Hebel H., in Lee R.S. (ed.), "Crimes within the Jurisdiction of the Court", p.97, quoted in Ruto and Sang Challenge, para.18.

[170] Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*. The debate focused primarily on whether the attacks must be widespread *and* systematic, versus widespread *or* systematic. Some delegations noted that requiring only a "widespread" commission of crimes would imply that a common "crime wave" of individuals acting on their own could be crimes against humanity, even where there was no connection between the individual crimes. Dixon, "Article 7 [4]", in Triffterer (ed.), p. 169. As part of the compromise between the differing views, the drafters adopted the disjunctive ("widespread or systematic") but added that the attack must be "directed against any civilian population" through "a course of conduct" pursuant to State or organizational policy (Article 7(2)(a)) to capture both a significant degree of scale and the element of planning and direction. Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, pp.47-48.

[171] Article 15 Decision, para.92.

VII. Scholarly Interpretations

97. All scholars agree that "organization" includes non-State actors.[172] Similarly, most of them note that a linkage to State action is not required and that the term "organization" was intended to mean that crimes within the jurisdiction of this Court must be committed as part of multiple acts by persons acting collectively, even if they did not necessarily control or have authority over a territory.[173] *Kittichaisaree*, for example, noted the multiple alternative criteria: that "the law regarding crimes against humanity has developed to the extent that [these] crimes … can be committed on behalf of entities with *de facto* control over a particular territory [or] by a terrorist group or organization [or] private individuals with the aforesaid *de facto* power or organized in criminal gangs or groups".[174]

98. Similarly, scholars indicate that the defining criterion is the capacity of these groups to implement a policy of widespread or systematic attacks against civilian population. For instance, *Werle* notes that the relevant criteria is whether the group has at its disposal, in material and personnel, the

[172] "State or organizational policy" [is] a term broad enough to include private entities". See Ratner and Abrams in "Crimes against Humanity and the Inexactitude of Custom", *Accountability for Human Rights Atrocities in International Law*, p.68. Robinson notes that delegates considered that the term 'organization' should be interpreted "flexibly" and that while the entity might have to be more than a group [i.e. more that spontaneous mobs and crime waves], an entity would qualify as long as it can be described as an 'organization'. Thus, the dividing line was between entities that can only be called 'groups' and those that could be called 'organization': there is nothing in the drafting history to require all the extra requirements posed by the Appellants; Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, p.50, fn.44; Cryer R. *et al.*, 'Crimes against Humanity' in *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd Ed.), p. 238. "*Terrorists Crimes and International Co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes*", European Journal of International Law Vol. 19 no. 3, EJIL 2008, p. 567 ("Di Filippo"); Y. Jurovic, *Réflexitions sur la spécificité du crime contre l'humanité*, p. 415.

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

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

potential to commit a widespread or systematic attack on a civilian population.[175] Likewise, *Ratner* and *Abrams* acknowledge the existence of "[non-state] entities … as powerful as state actors [that] would commit such offences" and further note that the prosecution as "crimes against humanity [of] abuses committed by an actor as part of a policy aimed at private gain alone, such as mass killings by a member of an organized crime syndicate or corporation" would be supported by the ICC Statute "based on the teleological view that such private entities are capable of bringing about significant human suffering".[176]

99. Addressing the weight of scholarly authority, the Appellants submit that the Majority only relied on Di Filippo and that the Majority's reference to the remaining scholars was misplaced.[177] This claim is erroneous: the Appellants misrepresent and selectively quote extracts of some of the authorities to support their position.

Di Filippo

100. The Appellants argue that "Di Filippo was not providing a definition of an organization as relevant to the 'organisational policy' in Article 7(2)(a). What Di Filippo was doing was describing <u>one</u> side of a controversial debate as to this definition".[178] They also allege 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."[179]

[175] Werle G., in "Part Four: Crimes against Humanity" in Principles of International Criminal Law (TMC, Asser Press, The Hague 2005), p. 228.
[176] Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law*, p.69.
[177] Ruto Brief, paras.58-64; Sang Brief, paras.58-64.
[178] Ruto Brief, para.59; Sang Brief, para.59.
[179] Ibid.

101. A complete reading of Di Filippo's article shows that Appellants misleadingly took his words out of context. Di Filippo noted the diverse scholar opinions on the interpretation of "organization" for the purposes of article 7(2)(a) and sided with the interpretation that includes "private groups, given the latter's acquired capacity to infringe basic human values".[180] He also made the point that "by excluding private criminal organizations from the possible authors of crimes against humanity we could reach the conclusion that inhuman terrorism sponsored by any state fits into the category [...], while Al-Qaida actions do not [...] This sounds not only illogical, but even contrary to the current position of the international community."[181] He then went further and noted that "the characteristics of core terrorism seem satisfied in as much as the terrorizing features distinguishing these types of conduct [...] are owed, inter alia to the presence of an organization which is able to repeat similar acts targeting civilians".[182]

102. Di Filippo at no point "prescribed" what the term "organization" should be, nor did he say that his views are not shared by the drafters of the Statute. Rather, he explained what an "organization" under the Statute was and provided support for the proposition that "organization" includes private entities. The Majority relied on Di Filippo with respect to this latter conclusion - and not for his views on terrorism, which fall outside the scope of the Majority's analysis.

[180] Di Filippo, p.567.
[181] Di Filippo, p.568.
[182] Di Filippo, p.568.

Ratner and Abrams

103. The Appellants' reference to Ratner again wrongly misrepresents these scholars' opinions. The Appellants quote Ratner to indicate that in the jurisprudence of the ad hoc tribunals "some sort of official action remains associated with the concept [of organization]."[183]

104. However, as with Di Filippo, Ratner did not opine on what the law should be, he described what the law is. Ratner clearly stated that the statutory and caselaw of the ICC, the ad hoc tribunals, and domestic jurisdictions "suggest that a linkage to state action – in the sense of the policy of the recognized government of a state – is now outdated. Non-state entities may perpetrate an attack on civilian populations".[184] He clearly explained that "[t]he ICC Statute … refers in Article 7 to 'a state or organizational policy', a term broad enough to include private entities."[185] Ratner also observed that "in the cases before the ad hoc tribunals those committing the offences are typically part of an organization seeking political control of or influence over a territory, whether as a de facto government, armed insurrection or otherwise".[186] However, that observation was not a statement that the law required those organizational attributes, it was instead an acknowledgement of the facts in the cases before those tribunals.

Burns

105. The Appellants mischaracterized the Majority's reference to Burns' article. For example, they argue that "[Burns'] description of the nature of

[183] Ruto Brief, para.63; Sang Brief, para.63.
[184] Ratner, *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy*, 3rd Ed., Oxford: OUP, 2009, p.69.
[185] Ibid., p.68.
[186] Ibid., p.69.

an organization is exclusively directed to military organizations, 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). He takes no definitive position on organizations acting in a peace-time scenario".[187]

106. This is false on several fronts. Burns did not indicate that "organization" is limited to military organizations, neither did he say that they must be affiliated with a State or try to wrest power from it. On the contrary, he referred to organizations in peacetime and argued that non-State actors like narco-terrorists groups who terrorize civilian population may commit crimes against humanity.[188]

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

107. The Appellants argue that the Majority's "open-ended definition" of crimes against humanity and the non-exhaustive list of criteria determining the existence of an organization under the Statute contravene the principle of legality.[189] They further argue that the "capacity" test is circular, since once the Prosecution has established that the organisation has committed any of the offences under article 7(1), the Prosecution will have demonstrated that the organization possesses the capability required by the Majority.[190]

108. The Appellants' arguments are without merit. The Majority's approach in defining "organization" under the Statute is consistent with the text of

[187] Ruto Brief, para.62; Sang Brief, para. 62.
[188] Burns P., "Aspect of Crimes Against Humanity and the International Criminal Court", paper prepared for the Symposium on the International Criminal Court, February 3-4 2007, Beijing, China, p. 11.
[189] Ruto Brief, paras.98-99, 101-102; Sang Brief, paras.98-99, 101-102.
[190] Ruto Brief, para.100; Sang Brief, para.100.

the Statute, the jurisprudence of this Court and other relevant international jurisprudence. The Majority's definition is not open-ended, it is flexible, albeit with expressed safeguards. The Majority identified the core essential requirement of an organization under the Statute, namely, its capacity to implement a policy of widespread or systematic attacks against civilians. Then, the Majority noted that whether the crimes were committed in furtherance of this policy. Thus, whether the particular charged persons can be convicted, will depend on the facts of the case. This is not a circular definition, it instead assumes correctly that the attributes of organizational capacity can be proven by its conduct. So too, the existence of a common plan (in cases of co-perpetration) can be proved without a formal document, by inferring their existence from the facts of the case, such as through the subsequent concerted action of the co-perpetrators.[191]

109. In addition, the Majority rightly held that the determination of whether a group is an organization under the Statute will be made on a case-by-case basis depending on the facts of the case. Consistent with the jurisprudence of other tribunals,[192] the Majority provided a non-exhaustive list of factors that will inform the organization's capacity to commit the offences under article 7(1). Contrary to the Appellants' submissions, these factors do not expand the concept of organization under the Statute. The Majority did not create new elements of crimes or amend existing ones. Rather, the factors enunciated by the Majority are indicators to assist in determining whether the facts of the case satisfy the legal requirement of an organizational policy. Developing auxiliary tools of this kind is perfectly appropriate and fully compatible with the *nullum crime* principle.

[191] ICC-01/04-01/06-803, para.345; ICC-01/04-01/07-717, para.523.
[192] See below fn. 194 .

110. Further, resorting to non-exhaustive and guiding lists of factors is a perfectly acceptable and advisable practice to ensure that the provisions in the Statute adequately address different factual scenarios. For example, the ad hoc tribunals have consistently listed a set of indicators to determine the existence of an armed conflict[193] or command responsibility.[194] Similarly, the Pre-Trial Chamber, in the Article 15 Decision, also identified a non-exhaustive list of factors relevant in determining the existence of a policy.[195] This has not been challenged by the Appellants.

111. In addition, the Appellants' reliance on the Bemba Appeals Judgment OA5 and OA6 is misplaced. In that case, the Appeals Chamber found that in exercising their discretion as to the relevance and/or admissibility of evidence, they have to provide adequate reasons in light of the factors expressly listed in article 69(4).[196] That decision does not foreclose the resort to factors in the absence of specific statute language. If it did, however, all that would mean is that the Chamber need only determine if there is an organization under article 7(2)(a), and additional consideration of the

[193] For example, since *Tadic* Trial Judgement, the existence of an armed conflict has been determined on a case-by-case basis in light of the particular evidence available. *Tadic* submitted that armed conflict consists of two criteria (i) the intensity of the conflict; and (ii) the organization to the parties to the conflict (see *Tadic* Trial Judgement, para.562, which has been subsequently followed in *Celebici* Trial Judgement, para.184, *Limaj* Trial Judgement, para.84, *Mrksic* Trial Judgement, para.407, *Boskoski* trial Judgement, para.407). In order to determine that the first element is satisfied, the Chambers have taken into account various indicators, *inter alia*, the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilization and the distribution of weapons among both parties to the conflict, whether the conflict has attracted the attention of the UN Security Council (see *Boskoski* Trial Judgement, para.177 and all the authorities cited therein). Similarly, to determine whether a group constitutes an "organization", the Chambers have required "some degree of organization" (*Boskoski* Trial Judgement, paras.196-197 referring to *Limaj* Trial Judgement) or "[parties] sufficiently organized to confront each other with military means" (*Boskoski* Trial Judgement, para.198 referring to *Haradinaj* Trial Judgement), and then they have sorted to non-exhaustive indicative factors to determine whether this requirement is met. See *Boskoski* Trial Judgement, paras.198-203.
[194] *Hadzihasanovic* Trial Chamber has referred to previous jurisprudence and stated that "the indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused has the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators". Then it listed a non-exhaustive list of element "which make possitlbe to establish whether there is effective control". (Trial Judgement, para.82-3)
[195] Article 15 Decision, paras.87-88.
[196] ICC-01/05-01/08-1386OA5OA 6, paras.37,59.

factors set forth by the Pre-Trial Chamber – which benefit the charged person – is beyond the capacity of the Court.

112. In sum, and contrary to the Appellants contention,[197] the position of the Majority respects the principle of legality and strict construction of penal status enshrined, *inter alia*, in article 22(2).[198] The construction advanced by the Majority is true to the statutory language, which does not narrowly define "organization", and true to the common meaning of that word. It is also true to the purpose that underlines article 7 of protecting civilian populations from crimes by organized criminal groups (regardless of State or quasi-State affiliation) who have the capacity to commit the serious crimes enumerated in article 7.[199]

Fourth Ground: the Majority erred in law and/ or in fact in finding that the Network constituted an "organization" under article 7(2)(a)[200]

113. Under its fourth ground of appeal, the Appellants ask the Appeals Chamber to review the Majority's factual findings regarding the Network's organizational characteristics and policy. As explained above in relation to ground two, jurisdictional questions are to be determined by reference to the pleadings, not the evidentiary record. Therefore, the Appellants' arguments in this ground do not relate to the question of jurisdiction but to the merits of the case and the sufficiency of evidence presented by the Prosecution at the confirmation hearing. For this reason, it is unnecessary for the Appeals Chamber to address the fourth ground on the merits.

[197] Ruto Brief, para.95; Sang Brief,para.95.
[198] Broomhall in Triffterer, "Article 22", p.724 [37].
[199] Di Filippo, p.568, fn.143.
[200] Ruto Brief, paras.104-120; Sang Brief, paras.104-124.

Indeed, it would be inappropriate to do so because it would exceed the proper scope of the jurisdictional inquiry. Accordingly, the Prosecution respectfully submits that the Appellants' fourth ground should be dismissed *in limine*.

114. If, however, the Appeals Chamber decides that the fundamental legal issue of jurisdiction includes an inquiry into whether the factual record supports the Majority's findings as to the existence of an organizational policy, the Prosecution submits that the Majority's findings regarding the Network's organizational characteristics are supported by the evidence.

115. Before addressing the Appellants' specific challenges, it is useful to consider the Majority's findings and the material they were based upon. The Majority's "organizational policy" analysis, which spans 17 pages of the Decision, is comprehensive and methodical. The Majority's findings – that the Network constituted an "organization" under article 7(2)(a) and had a policy to commit an attack against perceived PNU supporters – are well-grounded in the evidence set out in the DCC, the Prosecution's List of Evidence, and material presented at the confirmation hearing. In particular, the Majority's findings are supported by the highly probative statements and interviews of five Network insiders who, in the Majority's words, "provided the Chamber with a thorough insider's view" via their "considerable" – and "corroborat[ive]" – evidence regarding the Network's establishment, development and policy.[201] The conclusions the Majority ultimately reached on the basis of this and other evidence were well within its discretion as a finder of fact.

[201] Confirmation Decision, paras.186,217,218.

116. The Appellants assert a number of challenges to the Majority's factual findings, each of which fails for the reasons explained below.

(a) Alleged error regarding the Network's hierarchy and Ruto's leadership.

117. The Appellants challenge the Majority's finding "that the Network was under responsible command and had an established hierarchy, with Mr. Ruto as the designated leader",[202] arguing that the Majority "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 over perceived subordinates".[203]

118. The Appellants do not identify a single instance in which the Majority "conflates" evidence regarding Ruto's political popularity with evidence demonstrating his leadership role within the Network. Thus, the Appellants fail to comply with the Appeals Chamber's jurisprudence and satisfy the minimum requirements of regulation 64(2) of the Regulations of the Court. The Appeals Chamber has repeatedly indicated that Appellants need to set out with precision the alleged error and how this error materially affected the impugned decision.[204] In this vein, regulation 64(2) obliges an appellant to identify, in the document in support of the appeal, "the finding or ruling challenged in the decision, with specific reference to the page and paragraph number", as well as "the relevant part of the record or any other document or source of information as regards to any factual issue". Due to this deficiency, the argument may be dismissed *in limine*.

[202] Confirmation Decision, para.197.
[203] Ruto Brief, para.107; Sang Brief, para.107.
[204] ICC-02/04-01/05-408OA3, paras.48,51; ICC-01/05-01/08-962OA3, paras.102,106,133-134; ICC-01/05-01/08-1019OA4, para.69.

119. In the event the Appeals Chamber decides to consider the argument on the merits, it fails for the simple reason that the Majority did not "conflate evidence". The evidence relied upon by the Majority speaks to Ruto's leadership role within the Network, not merely his "political popularity", as the Appellants contend. By way of illustrative examples, the Majority relied upon the following items of evidence in concluding that Ruto was the Network's designated leader:

- KEN-OTP-0052-0946, at 0969-0970 (Witness 8 explaining that within the Network, "the commands were from Ruto himself").[205]

- KEN-OTP-0044-0003, at 0027 (Witness 6 explaining that Ruto was a principal planner of the Network's military strategy and was responsible for the Network's operations "for the entire Rift Valley");[206]

- KEN-OTP-0055-0188, at 0192-0196 (Witness 2 explaining that the Network's commander for the North Rift Valley region was Ruto's subordinate).[207]

- KEN-OTP-0052-0729, at 0752 (Witness 8 stating that at a meeting of Network members, Ruto undertook "to lead this war by [sic] the front").[208]

- KEN-OTP-0052-0821, at 0846 (Witness 8 stating that at a meeting of Network members, the attendees promised to comply with Ruto's instructions to "kill . . . [t]he Kikuyus and the Kisiis and the Kambas

[205] Confirmation Decision, para.197, fn.345.
[206] Ibid.
[207] Ibid.
[208] Confirmation Decision, para.190, fn.302.

in vicinity [sic]", to "distruct [sic] whatever property you find in your way", and to "displace these people from our land").[209]

120. As the above examples demonstrate, the Majority's finding regarding Ruto's leadership role in the Network is grounded in evidence that speaks to that specific issue, and not merely his "political popularity". For this reason, and because the Appellants have failed to identify any instances to the contrary, their argument must fail.

(b) Alleged error regarding the Network's capacity to carry out a widespread or systematic attack.

121. The Appellants challenge the Majority's conclusion in paragraphs 200-206 of the Decision regarding the Network's capacity to carry out a widespread or systematic attack.[210]

122. Notably, the Appellants do *not* dispute the Majority's factual findings that the Network had access to "a considerable amount of capital, guns, crude weapons and manpower".[211] The Appellants' challenge is limited to the conclusion that the Majority drew from those findings – namely, that "the Network possessed the means to carry out a widespread or systematic attack".[212]

123. The Appellants' position – that absent a "link to the resources and power structure of the Kenyan Government" the Network's financing, weapons and manpower is insufficient to demonstrate the capacity to carry out a

[209] Confirmation Decision, para.193, fn.323.
[210] Ruto Brief, paras.108-109; Sang Brief, paras.108-109.
[211] Confirmation Decision, para.200.
[212] Ibid.

widespread and systematic attack[213] – is simply a rehash of their argument that a group must possess "State-like" characteristics to constitute an "organization" under article 7(2)(a).[214] This position is incorrect as a matter of law for the reasons discussed above in relation to ground three.

124. The argument gains no support from the authority cited by the Appellants – portions of Judge Kaul's dissent to the Summons Decision.[215] The cited portions of Judge Kaul's Summons Dissent are inapposite because they concern a different – and more limited – evidentiary record than that available to the Pre-Trial Chamber at the confirmation stage.[216] The Appellants' argument is also flawed on a factual level. The factors identified by the Majority – financing, weapons and manpower – are key elements in any group's capacity to carry out a widespread or systematic attack. Indeed, it is difficult to identify elements that are more probative of such capacity. For this reason, the Majority's finding that the Network had access to "a considerable amount" of financing, weapons and manpower was a proper basis for determining the Network's capacity to carry out a widespread or systematic attack.[217]

125. Similarly, there is no merit to the Appellants' contention that the Majority's analysis is "impermissibly circular".[218] Contrary to the Appellants' assertion, the Majority did not "use[ ] evidence that a

[213] Ruto Brief, para.109; Sang Brief, para.109.
[214] Ruto Brief, paras.105,106; Sang Brief, paras.105,106; Ruto Brief, para.108, Sang Brief, para.108.
[215] Ruto Brief, para.108, fns.141-142; Sang Brief, para.108, fns.141-142.
[216] The Appellants' reliance on Judge Kaul's Summons Dissent as support for additional arguments under ground four is misplaced for the same reason. Ruto Brief, para.107, fn.140, para.111, fn.147; Sang Brief, para.107, fn.140, para.111, fn.147.
[217] There is no merit to the Appellants' argument that "the Majority erred by failing to consider the impact that external factors … played in igniting and inflaming the violence": Ruto Brief, para.109; Sang Brief, para.109. In addition to being inconsistent with the Appellants' "circularity" argument, it focuses on the wrong question. The inquiry under article 7(2)(a) is concerned not with *causation* (*i.e.*, the Network vs. any "external factors"), but with organizational *capacity*: Article 15 Decision, paras.90-93; Summons Decision, para.21; ICC-01/04-01/07-717, para.396; ICC-01/05-01/08-424, para.81.
[218] Ruto Brief, para.109; Sang Brief, para.109.

widespread and systematic attack was committed … to prove that [the Network] was an 'organisation' which had the means to conduct the attack".[219] The Majority based its conclusion regarding the Network's capacity on the group's access to financing, weapons and manpower, and its use of the same,[220] not on the fact that the attacks actually took place. In these circumstances, there is no issue of "circular[ity]".

(c) Alleged error in not concluding that the Network had "purely political objectives".

126. The Appellants challenge the Majority's findings regarding the existence of an "organizational policy" to commit an attack, arguing that because the Network was "comprised of eminent ODM political representatives" and other notables, "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".[221]

127. The problem with this argument is simple: it completely ignores the evidentiary record. Given the evidence presented at the confirmation hearing, the Majority could not reasonably have concluded that the Network had solely political objectives. In addition, the Appellants incorrectly focus on the organization's "primary purpose". The "policy" limb of article 7(2)(a) does not require that the "policy to commit such attack" be a "primary purpose" of the State or organization under consideration; it simply must be *a* policy of State or organization.

128. In finding that "the Network promoted a policy aimed at targeting members of the civilian population supporting the PNU, in order to punish

[219] *Ibid*.
[220] Confirmation Decision, para.200.
[221] Ruto Brief, paras.110-111; Sang Brief, paras.110-111.

them and evict them from the Rift Valley",[222] the Majority placed particular emphasis on evidence regarding a series of preparatory meetings held between December 2006 and December 2007.[223] As the Majority correctly concluded, this evidence demonstrates that at the preparatory meetings, so-called "eminent ODM political representatives"[224] and others "discuss[ed], organize[d] and arrange[d] the modalities" of the Network's policy to attack perceived PNU supporters.[225] This included "the purchase of weapons", "the transportation of the perpetrators to and from the target locations", and the establishment of payment schemes "to motivate the perpetrators to kill and displace the largest number of persons belonging to the target communities".[226] These are not "purely pro-ODM political objectives" as the Appellants suggest;[227] they are actions clearly directed at a policy to carry out an attack against a civilian population. In light of this evidence, the Majority could not reasonably have determined that the Network had solely "political objectives". The Appellants' argument to the contrary – which fails to cite to the evidentiary record at all – amounts to a plea that the evidence should be ignored. It must fail as a result.

(d) Alleged failure to assess the evidence "in a reasonable and consistent manner".

129. The Appellants challenge the "factual sufficiency of the evidence" the Majority relied upon in concluding that an "organization" existed, arguing that the Majority did not assess the evidence "in a reasonable and consistent manner".[228]

[222] Confirmation Decision, para.216.
[223] Confirmation Decision, paras.216-220.
[224] Ruto Brief, para.111; Sang Brief, para.111.
[225] Confirmation Decision, para.217; see also, paras.216, 219 and the evidence cited therein.
[226] Confirmation Decision, para.219.
[227] Ruto Brief, para.111; Sang Brief, para.111.
[228] Ruto Brief, paras.112-120; Sang Brief, paras.112-124.

130. First and foremost, and as acknowledged by the Appellants,[229] their challenges to the Majority's assessment of evidence are currently being litigated in the context of their applications for leave to appeal the Confirmation Decision.[230] Indeed, the arguments in paragraphs 112-123 of Sang's brief and paragraphs 112-119 of Ruto's brief are carbon copies of those advanced in their applications for leave to appeal.[231] By raising the same arguments with the Appeals Chamber directly, the Appellants are circumventing the procedure, laid out in article 82(1)(d), for seeking leave to appeal decisions for which there is no appeal as of right. The arguments should be dismissed on this basis alone. That said, the Appellants' challenges to the Majority's approach are substantively without merit and should be disregarded for the reasons explained below.

131. There is no merit to the Appellants' challenge to the Majority's reliance on evidence from anonymous witnesses and its "use of anonymous witnesses to corroborate other anonymous witnesses".[232] The Court's legal framework permits the use of anonymous and summary evidence at the confirmation stage[233] and proscribes any legal requirement of corroboration.[234] In any event, the Majority took steps in this case to minimize any disadvantage to the Appellants by deciding to afford lower probative value to anonymous witness statements and summaries as compared to those of witnesses whose identity was disclosed.[235]

---

[229] Ruto Brief, para.112, fn.148; Sang Brief, para.112, fn.148.
[230] See ICC-01/09-01/11-376 (Sang); ICC-01/09-01/11-377 (Ruto).
[231] Compare ICC-01/09-01/11-376, paras.27-37 with Sang Brief, paras.112-120; compare *also* ICC-01/09-01/11-377, paras.35-42 with Ruto Brief, paras.112-117.
[232] Ruto Brief para.117; see also paras.113-117; Sang Brief, paras.113-120.
[233] Articles 61(5) and 68(5) and rule 81(4); see ICC-01/04-01/06-773OA5, para.40. See also ICC-01/09-01/11-345, paras.12-31.
[234] Rule 63(4).
[235] Confirmation Decision, para.78.

132. Having put in place this safeguard, the Majority's assessment of the evidence of anonymous Prosecution witnesses was entirely reasonable. As the Majority correctly noted, the evidence from these witnesses was generally detailed, coherent, consistent (both within and between witnesses' evidence) and based upon personal knowledge.[236] In such circumstances, it was a proper exercise of the Majority's discretion to prefer the evidence of these witnesses to certain evidence presented by the Appellants, which was found to be unauthenticated, self-serving, vague or lacking in credibility.[237]

133. Contrary to the Appellant's assertion,[238] the dispute over Sang's presence at the 2 September 2007 Sirikwa Hotel meeting demonstrates that the Majority took an entirely reasonable approach to conflicting evidence presented by the parties.[239] As the Majority correctly observed, Prosecution Witnesses 1 and 8 provided detailed evidence regarding the meeting, which was materially consistent and included substantial detail on the precise matters discussed by the participants.[240] This evidence was corroborated by the accounts of other prosecution witnesses in relation to similar meetings.[241] In contrast, two *viva voce* witnesses called by the Appellants were alleged to have been key players within the Network and were implicated in the crimes charged. As the Chamber observed, this gave them

[236] Confirmation Decision, paras.120,125 (regarding the level of detail, "consistency and clarity" in evidence provided by Witness 8, and the corroborative nature of evidence from other witnesses on similar issues), paras.130,139,146 (regarding the detail and consistency in evidence provided by Witnesses 1 and 8 and the corroborative nature of evidence from Witnesses 2, 4 and 6 on similar issues), para.149 (regarding the level of detail provided by Witness 6 and the corroborative nature of evidence from Witnesses 1, 2, 4 and 8 on similar issues), para.154 (regarding the consistency between the evidence of Witnesses 2 and 8), para 160 (regarding the "detail and coheren[ce]" of evidence provided by Witness 4 and its consistency with evidence concerning the same topics from Witnesses 1, 2 and 8).
[237] Confirmation Decision, paras.123,136,155,160 (regarding unauthenticated video material), para.118 (regarding the interests the two Defence *viva voce* witnesses had in denying their involvement and the impact this had on the probative value of their testimony), paras.356,361-362 (regarding the boilerplate nature and lack of precision in the written statements and other indirect evidence presented by the Sang Defence); ICC-01/09-01/11-345, paras.28-31,51,56-57,64-66.
[238] Sang Brief, paras.116-119.
[239] Confirmation Decision, paras.126-132.
[240] Confirmation Decision, paras.126,130-131 and the evidence cited therein.
[241] Confirmation Decision, para.131.

"an interest in denying [their] presence in the meeting", which diminished the probative value of their testimony.[242] The written statements of Sirikwa Hotel employees were similarly unavailing because they were based not upon the employees' personal knowledge, but a mere "perusal" of the hotel's records.[243]

134. After examining each item of evidence individually and the total mix of evidence collectively, it was reasonable for the Majority to ascribe greater probative value to the Prosecution's evidence and to conclude that it was sufficient to establish substantial grounds to believe that the meeting took place and that Sang attended.[244] By synthesizing the evidence in this manner, the Majority was not "revers[ing] … the burden of proof",[245] "plac[ing] an undue burden" on the Appellants "to undermine Prosecution evidence",[246] or requiring the Appellants "to disprove possible inferences".[247] It was simply performing the evaluation required of it as the finder of fact. The same is true with respect to the Majority's analysis of the conflicting evidence presented regarding the 15 April 2007 oathing ceremony and the 2 November 2007 meeting at Ruto's house.[248]

135. Ruto's reliance on the *Lubanga* Confirmation Decision in support of his argument[249] is misplaced. In that case, the Pre-Trial Chamber simply cautioned against the use of anonymous *hearsay* evidence on its own as

[242] Confirmation Decision, para.118.
[243] KEN-D11-0005-0042, at 0044 (Hotel Sirikawa General Manager identifying the basis of his knowledge as "Hotel Sirikawa records"); KEN-D11-0005-0085, at 0087 (Hotel Sirikawa Front Office Manager stating that her knowledge comes from perus[ing] hotel records"); KEN-D11-0005-0140 at 0140-0142 (another Hotel Sirikawa employee stating the same).
[244] Confirmation Decision, para.132.
[245] Sang Brief, para.114.
[246] Sang Brief, para.118.
[247] Idem.
[248] Confirmation Decision, paras.120-125,133-141; Sang Brief, para.120 (Sang challenging the Majority's findings on the same).
[249] Ruto Brief, para.115.

proof of certain facts.[250] This in no way suggests "that it is inherently unfair to rely on anonymous evidence to corroborate other anonymous evidence", which is the blanket rule for which Appellants argue.[251] In fact, this case shows why reliance on certain evidence from anonymous witnesses is not "inherently unfair".[252] As stated above, the Majority counterbalanced any disadvantage that the use of anonymous evidence might have caused to the Appellants by according such evidence a lower probative value, and the Appellants were able to challenge anonymous evidence relied upon by the Prosecution, which they did by presenting their own evidence and by attacking the Prosecution evidence on the merits.[253]

136. Finally, the Appellants are incorrect in their contention that the Majority determined that an organization existed solely on the basis of the preparatory meetings.[254] The Majority did not hold that preparatory meetings, in and of themselves, qualify a group as an organization under article 7(2)(a). Rather, the Majority found that all the evidence, viewed as a whole, established that the Network: (i) was under responsible command and had an established hierarchy; (ii) possessed the means to carry out a widespread and systematic attack against the civilian population; and (iii) had criminal activities against the civilian population as its primary purpose and articulated an intention to attack the civilian population.[255] That the Network's preparatory meetings buttress these factual findings is simply a function of the manner in which the group developed and operated. It was

[250] ICC-01/04-01/06-803-tEN, para.106.
[251] Ruto Brief, para.116.
[252] The disclosure of a witness' identity does not automatically increase the probative value of his or her evidence – any number of factors guides the Chamber in its assessment of the relevance and probative value of each item of evidence (Confirmation Decision, paras.68-75).
[253] Confirmation Decision, paras.105-160 (considering the Appellants' alibi evidence and their challenges to Prosecution evidence regarding the preparatory meetings) and paras.84-92 (addressing the Appellants' challenges to Prosecution evidence).
[254] Ruto Brief, para.119; Sang Brief, para.123.
[255] Confirmation Decision, paras.184-208.

what the preparatory meetings revealed about the Network – and not simply the fact that the meetings were held – that the Majority relied upon in reaching its findings.

137. In sum, each of the factual challenges raised by the Appellants fails. The Majority's findings regarding the Network's organizational characteristics and policy are grounded in the evidence presented at the Confirmation Hearing and are well within its discretion as a finder of fact. As a result, the Appellants' fourth ground of appeal should be dismissed.

CONCLUSION

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

Luis Moreno-Ocampo, Prosecutor

Dated this 8th day of March 2012

At The Hague, the Netherlands