Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-02/11**
Date: **14 February 2012**

APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI

Public
Document in Support of Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute"

Source: **Defence for Uhuru Muigai Kenyatta**
Defence for Francis Kirimi Muthaura

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

The Office of the Prosecutor
Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirmi Muthaura
Karim A. A. Khan QC, Essa Faal, Kennedy Ogetto & Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta
Steven Kay QC and Gillian Higgins

Legal Representatives of the Victims
Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms. Silvana Arbia, Registrar
Deputy Registrar
Mr. Didier Daniel Preira, Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. On 30 January 2012, pursuant to Article 82(1)(a) of the Rome Statute, (the "Statute"), the Defence for Uhuru Muigai Kenyatta (the "Kenyatta Defence") and the Defence for Francis Kirimi Muthaura (the "Muthaura Defence") submitted their joint notice of appeal[1] against the Majority of Pre-Trial Chamber II's (the "Majority") "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (the "Confirmation Decision"), dated 23 January 2012.[2]

2. The Defence files the present document in support of the appeal, within 21 days of notification of the relevant decision pursuant to Regulation 64(2).

3. In the Confirmation Decision, the Majority ruled on the Kenyatta Defence's "Submissions on Jurisdiction on Behalf of Uhuru Kenyatta" ("Submissions on Jurisdiction"),[3] finding that the requirement of material jurisdiction had been met and that the case against the Suspects fell within the jurisdiction of the Court.[4] The Majority's ruling in the Confirmation Decision reaffirms its previous determination on 31 March 2010 in the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya"[5] (the "Investigation Decision") and on 8 March 2011 in the "Decision on the Prosecutor's Application for Summonses to

[1] ICC-01/09-02/11-383.
[2] The Decision of the Majority of the Pre-Trial Chamber (the "Majority Decision") is found at, ICC-01/09-02/11-382-Conf, pp.1-155; His Honour Judge Kaul's dissenting opinion (the "Dissenting Opinion") is found at pp.156-193. The discussion and subsequent findings as to jurisdiction can be found at paras 23-37 of the Majority Decision.
[3] ICC-01/09-02/11-339.
[4] Majority Decision, ICC-01/09-02/11-382-Conf, para 37.
[5] ICC-01/09-19-Corr. The Majority's legal analysis and findings on the law concerning the contextual elements of crimes against humanity can be found at paras 73-88.

Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" (the "Summons Decision").[6]

4. Contrary to the findings of the Majority, His Honour Judge Kaul has delivered dissenting opinions and consistently held that the case against the Suspects does not fall within the jurisdiction of the International Criminal Court.[7] In his dissenting opinion on 23 January 2012, HHJ Kaul held that he was not satisfied that the crimes were committed pursuant to the policy of a State-like 'organization', which is an indispensable constitutive contextual element of crimes against humanity under Article 7 of the Statute.[8] He held that "without the crimes alleged having been embedded in an 'organizational policy'", the Court does not have "jurisdiction *ratione materiae* over the situation in the Republic of Kenya, including the present case."[9]

II. PROCEDURAL HISTORY: JURISDICTION

5. In the Investigation Decision, the Majority authorised an investigation into the situation in the Republic of Kenya. In reaching its decision, the Majority adopted an impermissibly expansive interpretation of the term 'organization' under Article 7(2)(a) of the Statute. Whilst it accepted that there was a need for an organization behind the policy, it rejected the requirement that such an organization must possess any State-like elements:

> *"[T]he Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have*

[6] ICC-01/09-02/11-01, The Majority adopts its reasoning from the Investigation Decision at para 16.
[7] ICC-01/09-19-Corr, pp. 84-163, paras 33-70; ICC-01/09-02/11-3, paras 9-15.
[8] Dissenting Opinion, ICC-01/09-02/11-382-Conf, para 20.
[9] Dissenting Opinion, ICC-01/09-02/11-382-Conf, para 20.

convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values" (the "Basic Human Values Test").[10]

6. On 31 March 2010, HHJ Kaul issued a dissenting opinion to the Investigation Decision, holding *inter alia* that he did not identify an "attack directed against a civilian population" committed "pursuant to or in furtherance of a State or organizational policy" on the evidence produced by the Prosecutor. He gave a contextual interpretation of the term organizational policy in which he stated the need for a "state-like organization":

"[I] read the provision such that the juxtaposition of the notions 'State' and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State."[11]

7. In the Summons Decision, the Majority ordered the Suspects to appear before the Court for an initial appearance on 8 April 2011. The Majority based its decision on organizational policy upon the same "Basic Human Values Test", stating that it found no reason to reiterate its earlier findings and provide a further detailed assessment of the question of jurisdiction at this stage.[12]

8. On 15 March 2011, HHJ Kaul issued a dissenting opinion to the Summons Decision in which he reiterated his previous arguments from the dissenting

[10] ICC-01/09-19-Corr at para 90.
[11] ICC-01/09-19-Corr, para 51.
[12] ICC-01/09-02/11-01, para 11.

opinion to the Investigation Decision.[13] He held that he failed to see "how an 'organization' could have existed in which the primary actors were the Mungiki gang and the Kenyan Police Forces"[14] and therefore failed to see how the crimes alleged "were embedded in an "organizational policy".[15]

9. On 19 September 2011, the Kenyatta Defence filed its "Submissions on Jurisdiction on Behalf of Uhuru Kenyatta",[16] in which it challenged the Court's jurisdiction to try the case under Article 7 of the Statute (crimes against humanity), on the ground that there was no attack on any civilian population pursuant to a State or 'organizational policy' as disclosed by the evidence of the Prosecution. The Kenyatta Defence challenged the legal and contextual definition of 'organizational' within the meaning of Article 7(2)(a) of the Statute as applied by the Majority in the Investigation Decision and the Summons Decision, and submitted that consideration must be given to the express wording of Article 7 of the Statute, the interpretation of which must not contravene the principle of *nullem crimen sine lege* under Article 22.[17] The Kenyatta Defence further submitted that the "Basic Human Values test" applied by the Majority does not reflect the intentions of the drafters of the Statute.[18] In support of its contention, the Kenyatta Defence averred that the test formulated by HHJ Kaul accurately reflects the intention of the drafters of the Statute as well as leading academic opinion upon the issue, and establishes the correct boundary between national and international crimes.[19]

---

[13] At paragraphs 11-13 of the Dissenting Opinion to the Summons Decision, ICC-01/09-02/11-03, HHJ Kaul recalls the reasoning from his Dissenting Opinion to the Investigation Decision, ICC-01/09-19-Corr, para 51-53.
[14] ICC-01/09- 02/11-03, para 31.
[15] ICC-01/09- 02/11-03, para 35.
[16] ICC-01/09-02/11-339.
[17] ICC-01/09-02/11-339, paras 15-21.
[18] ICC-01/09-02/11-339, paras 22-47.
[19] ICC-01/09-02/11-339, paras 48-58.

10. On 14 October 2011, the "Prosecution's Response to the Defence Challenges to Jurisdiction" and the "Victims' Consolidated Observations on the Kenyatta and Ali Submissions regarding Jurisdiction and/ or Admissibility" were filed with the Registry.[20]

11. The confirmation hearing took place between 21 September and 5 October 2011, during which the Defence made submissions upon the sufficiency of the evidence and called two *viva voce* witnesses as permitted by the Pre-Trial Chamber ("PTC").[21]

12. On 28 October 2011, both the Prosecution and the Victims' Legal Representative submitted their written observations on the Confirmation Hearing.[22]

13. On 17 November 2011, the Kenyatta Defence submitted its written observations on the confirmation hearing.[23] The defence teams for Mr Ali and Mr Muthaura submitted their observations on 21 November 2011.[24]

14. At paragraph 110 of the "Final Written Observations on the Confirmation of Charges Hearing",[25] the Muthaura Defence submitted its challenge to the jurisdiction of the Court pursuant to Article 19 of the Rome Statute. In particular, the Muthaura Defence asserted that the Article 7(2)(a) element of "organizational policy" had not been satisfied.[26] Further, the Muthaura Defence adopted in full the previous submissions of the Kenyatta Defence on this issue[27]

---

[20] ICC-01/09-02/11-356-Conf and ICC-01/09-02/11-357-Conf respectively.
[21] ICC-01/09-02/11-226; ICC-01/09-02/11-242; ICC-01/09-02/11-275.
[22] ICC-01/09-02/11-361 and ICC-01/09-02/11-360 respectively.
[23] ICC-01/09-02/11-372.
[24] ICC-01/09-02/11-373 and ICC-01/09-02/11-374 respectively.
[25] ICC-01/09-02/11-374-Conf.
[26] ICC-01/09-02/11-374-Conf, para 110.
[27] See paragraph 110, footnote 250, ICC-01/09-02/11-374-Conf, which references the Kenyatta Defence's submissions at ICC-01/09-02/11-372, paras 40-58.

and put the Prosecution to strict proof to establish the Court's jurisdiction in the present case.[28]

15. On 23 January 2012, the Majority issued the Confirmation Decision. The Majority confirmed the charges against Mr Kenyatta and Mr Muthaura, and declined to confirm the charges against Mr Ali. HHJ Kaul delivered a dissenting opinion in which he stated that he was not satisfied that the crimes charged amounted to crimes against humanity. He determined that jurisdiction over this case should be denied and that the Defence challenge on jurisdiction "must be fully entertained."[29]

16. On 30 January 2012, the defence teams for Mr Kenyatta and Mr Muthaura submitted their "Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute".[30]

[28] ICC-01/09-02/11-374-Conf, para 110.
[29] Dissenting Opinion, ICC-01/09-02/11-382-Conf, para.45.
[30] ICC-01/09-02/11-383.

III. GROUNDS OF APPEAL

17. In the Confirmation Decision, the Majority erred in determining that "the requirement of material jurisdiction is met in the present case and…the case against the Suspects falls within the jurisdiction of the Court".[31]

18. The grounds of appeal are as follows:

a. The Majority erred in law by dismissing *in limine* the jurisdictional challenge brought by the Kenyatta Defence and determining that it was not jurisdictional in nature, but instead, a challenge on the merits of the Prosecutor's case on the facts.[32] The Majority erred by determining that based on the formulation chosen by the Kenyatta Defence, the issue of the definition of the term 'organization' is not an independent argument, but rather a challenge that cannot be answered without an assessment of the facts of the case, and is not therefore a jurisdictional challenge;[33] [First Ground]

b. The Majority erred in law by adopting an incorrect interpretation of the notion of 'organization' within the meaning of Article 7(2)(a) of the Statute. The definition of 'organization' provided by the Majority does not reflect the intention of the drafters of the Statute; [Second Ground]

c. The Majority erred in fact by fundamentally changing the Prosecutor's presentation of the facts by finding that the Mungiki alone represented the 'organization'. During the confirmation hearing and within the Amended Document Containing Charges, the Prosecution argued that the Mungiki and the Kenyan Police were 'one' organization.[34] By excluding the Kenyan

[31] Majority Decision, ICC-01/09-02/11-382-Conf, para.37.
[32] Majority Decision, ICC-01/09-02/11-382-Conf, paras 30 - 37.
[33] Majority Decision, ICC-01/09-02/11-382-Conf, paras 33 - 34.
[34] ICC-01/09-02/11-280-AnxA, paras 35-36; ICC-01/09-02/11-T-5-RED-ENG CT, p. 10, line 1-15; p. 22, lines 3-5; p. 35, line 19.

Police from the 'organization', the Majority has removed an essential element of the alleged organizational structure;[35] and rendered the Mungiki as a 'group' incapable of satisfying the criteria of 'organization' established by the Majority (i.e. capable of performing acts which infringe on basic human values). The Majority erred by not dismissing the case having determined that the Mungiki alone constituted the organization. The Majority erred in law by failing to inform the Suspects of the fundamental re-characterisation of the case and affording them adequate opportunity to respond to the new characterisation; [Third Ground]

d. The Majority erred in fact by concluding that the Mungiki qualified as an organization within Article 7(2)(a) of the Statute. [Fourth Ground]

IV. FIRST GROUND

19. The Majority erred in law by dismissing *in limine* the jurisdictional challenge brought by the Kenyatta Defence and determining that it was not jurisdictional in nature, but instead, a challenge on the merits of the Prosecutor's case on the facts.[36] The Majority erred by determining that based on the formulation chosen by the Kenyatta Defence, the issue of the definition of the term 'organization' is not an independent argument, but rather a challenge that cannot be answered without an assessment of the facts of the case, and is not therefore a jurisdictional challenge.[37]

[35] Majority Decision, ICC-01/09-02/11-382-Conf, para.226.
[36] Majority Decision, ICC-01/09-02/11-382-Conf, paras 30 - 37.
[37] Majority Decision, ICC-01/09-02/11-382-Conf, paras 33 - 34.

(A) Particulars of the Error

20. The Majority erroneously relied upon the Prosecutor's argument that "neither of the Defence challenges can be qualified as a legal challenge to the Court's jurisdiction, since "[j]urisdiction is a threshold matter to be resolved by courts before proceeding to consider the merits of the case", whilst the Defence is "reversing the process", i.e. "arguing the merits of the case to establish that the threshold requirements of jurisdiction are not established."[38] The Chamber stated that it agreed with "the Prosecutor that the way in which the challenges presented by the two Defence teams are framed clearly indicated that they are not jurisdictional in nature but, instead, are challenges on the merits of the Prosecutor's case on the facts."[39]

21. The Majority characterised the Defence challenge to jurisdiction as based upon two points: "(i) the legal definition of "organization" and (ii) the lack of sufficient evidence to establish the existence of an organization."[40] In precise terms, the Defence had requested the PTC to:

a. adopt the definition of organizational policy as set out by HHJ Kaul in his Dissenting Opinion;
b. assess the entirety of the evidence at the conclusion of the confirmation hearing; and
c. in due course, decline to exercise jurisdiction in respect of the case against Uhuru Muigai Kenyatta.[41]

[38] ICC-01/09-02/11-356, para 3; Majority Decision, ICC-01/09-02/11-382-Conf, para 29.
[39] Majority Decision, ICC-01/09-02/11-382-Conf, para 30.
[40] Majority Decision, ICC-01/09-02/11-382-Conf, para 33.
[41] ICC-01/09-02/11-339, para 73.

22. The Majority erroneously held that the two points raised by the Defence were not presented as independent arguments, either of which if upheld would autonomously establish lack of material jurisdiction in the present case.[42] The Majority thereafter wrongly concluded that "since the Defence challenge cannot be answered without an assessment of the facts of the case against the asserted statutory interpretation of the term "organization", the Chamber is not persuaded that the challenge is indeed jurisdictional in nature."[43]

23. The Defence had submitted in the alternative, that if the PTC decided not to adopt the Defence submissions as to the definition of "organizational policy" and upheld their previously adopted definition of "The Basic Human Values Test", the PTC was requested to:

a. assess the entirety of the evidence at the conclusion of the confirmation hearing; and
b. decline to exercise jurisdiction in respect of the case against Uhuru Kenyatta due to the failure of the Prosecution to establish sufficient evidence to satisfy the PTC's own criteria for jurisdiction of the "Basic Human Values Test".[44]

24. The Majority determined that the alternative request of the Defence was also not jurisdictional in nature, but rather a challenge to the sufficiency of the evidence.[45]

[42] Majority Decision, ICC-01/09-02/11-382-Conf, para 33.
[43] Majority Decision, ICC-01/09-02/11-382-Conf, para 33.
[44] ICC-01/09-02/11-339, para 74.
[45] Majority Decision, ICC-01/09-02/11-382-Conf, para 34.

(B) Defence Submissions

25. The Defence submits that the Majority has fundamentally misinterpreted the substance of the Defence challenge. The issues raised by the Defence are independent and are not formulated so as to bar adjudication of the jurisdiction challenge.

26. Notwithstanding the relief section of the Defence submissions on jurisdiction, in which the Defence requested the PTC to assess the entirety of the evidence at the conclusion of the confirmation hearing and in due course decline to exercise jurisdiction, the intent of the challenge is clear from the body of the submission. The Defence stated expressly that submissions on jurisdiction were made on the basis of the Prosecution's case as presented in the DCC and its supporting material,[46] and that the Defence would provide further evidential submissions in a written brief following the close of the confirmation hearing.[47] The Defence submitted that the evidence disclosed by the Prosecution at this stage does not establish an organizational policy to commit the alleged crimes, on either definition provided by the Chamber.[48] The substance of the Defence submissions urged the PTC to engage in an assessment of the Prosecutor's evidence in order to determine whether or not it has jurisdiction over the case, an assessment, however, which should only be made *once* the correct legal definition of the term in question has been identified. These two processes are separate and independent.

27. The Majority erred in its deliberations by failing to separate out the initial and independent legal question to be answered as to the correct definition of

[46] ICC-01/09-02/11-339, para 61.
[47] ICC-01/09-02/11-339, para 61.
[48] ICC-01/09-02/11-339, para 59.

'organizational policy'. An assessment of the evidence and facts of the case is not a *precondition* to the interpretation and determination of the correct legal definition of "organizational policy". As HHJ Kaul has observed, "any assessment of facts logically implies that the Court interpret the law first".[49] It is the role of the Chamber to identify correctly the legal definition of the crimes and the contextual elements, *independently of the facts of the case*. At the outset, the Court must ensure that it is applying the correct legal test in respect of all contextual elements when satisfying itself that it has jurisdiction in any case brought before it pursuant to Article 19(1) of the Statute. In the absence of one or more of the contextual elements, correctly defined, the Court will not have jurisdiction over the underlying crimes. The argument that the legal definition of contextual elements such as 'organization' does not fall within the jurisdiction test has been described by HHJ Kaul as "astonishing" and "misconceived."[50] It is clear from the terms of Article 7 of the Statute that the existence of an organizational policy is a jurisdictional element which triggers the competence of the court to adjudicate upon the underlying conduct in Article 7(1)(a)-(k) of the Statute.

28. The correct identification of the legal test *in abstracto* however serves little purpose. Thereafter, it is a logical and correct extension of the judicial function, that when satisfying itself that it has subject matter jurisdiction, it examines the facts and evidence relied upon by the Prosecutor. As HHJ Kaul has observed, a "court of law does not address legal questions, including that of jurisdiction, for the sake of having a legal discussion but interprets the law with a view to appraise the facts *sub judice* in light thereof."[51] It is the function of the judges to satisfy themselves that the factual remit of the individual case before it falls

[49] Dissenting Opinion, ICC-01/09-02/11-382-Conf, para 28.
[50] Dissenting Opinion, ICC-01/09-02/11-382-Conf, para 32.
[51] Dissenting Opinion, ICC-01/09-02/11-382-Conf, para 42.

within the subject matter jurisdiction of the Court. This assessment constitutes therefore a two-stage test, not an "inextricably linked" assessment. The Majority has erred by determining that the Defence are engaged in arguing the *merits* of the case in order to demonstrate that the threshold requirements of jurisdiction are not established. The merits of the case are not in issue at the jurisdiction stage, rather it is the nature of the Prosecutor's evidence and whether or not it endows the Court with subject matter jurisdiction – an assessment not undertaken by the Majority in the present case.

29. If the Defence is able to successfully challenge either the legal or factual basis for the existence of an organizational policy, then the Chamber will have no competence over the Prosecution's allegations concerning crimes against humanity. There is no basis under either the Statute or the jurisprudence of the Court to support the introduction of an artificial distinction between legal and factual challenges to the definition of an organizational policy. Some jurisdictional challenges necessarily involve the Chamber in a consideration of the facts and evidence. For example, where the Defence asserts that the conduct relied upon by the Prosecution falls outside the temporal or geographical jurisdiction of the Court, the Chamber must make a factual assessment as to whether this is indeed the case, based upon the Prosecutor's evidence. Similarly, a challenge as to whether the definition of crimes falls outside the subject matter jurisdiction of the Court also necessitates the making of an assessment of the facts and evidence relied upon by the Prosecutor. The first evidential assessment at the jurisdiction stage is limited to the Chamber satisfying itself that it has jurisdiction over the subject matter of the case based on an assessment of the Prosecutor's evidence. A second assessment at the conclusion of the confirmation proceedings will only take place *if* the Chamber has first determined that it possesses jurisdiction. This second assessment is based upon the *entirety of the evidence* in order to determine whether the

Prosecution has produced sufficient evidence to establish substantial grounds to believe that the Suspect has committed the crimes charged pursuant to Article 61(7).

30. Ultimately, the Majority failed to consider the arguments of the Defence on jurisdiction that were submitted for the first time on 19 September 2011.[52] Until that stage, the Majority had only considered submissions from the Prosecution and arrived at its own determination, not having heard or considered alternative submissions from the Defence. This constitutes a failure to treat the Defence with equality and a failure to consider properly the jurisdictional issues in the case.

V. SECOND GROUND

31. The Defence submits that the Majority erred in law by applying the wrong test in the determination of jurisdiction by adopting an incorrect interpretation of the term 'organizational' within Article 7(2)(a) of the Statute. The Majority failed to consider the express wording of Article 7, the interpretation of which must not contravene the principle of *nullen crimen sine lege* under Article 22 of the Statute. The test applied by the Majority, described as the "Basic Human Values Test" arose from an erroneous consideration of the effects of the non-international criminal offence of terrorism[53] and International Law Commission drafts - concepts which were not incorporated into the Statute of the International Criminal Court (the "ICC"). The Defence further submits that the definition of 'organizational' as formulated by HHJ Kaul in his dissenting

[52] Majority Decision, ICC-01/09-02/11-382-Conf, para 114.
[53] The Majority relied upon a text authored by Marcello di Fillipo: "Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", The European Journal of International Law Vol. 19 no 3, 533, (2008).

opinions, accurately reflects the intention of the drafters of the Rome Statute as well as leading academic opinion on the issue and establishes the correct boundary between national and international law.[54]

32. In response to the Kenyatta Defence Submissions on Jurisdiction, the Majority erred when it considered that since it had already analysed the interpretation of 'organizational' in depth in the Investigation Decision, the Kenyatta Defence's "submissions remained entirely within the parameters of the analysis of the contextual elements already conducted by the Chamber".[55] The Majority failed to properly engage with the Kenyatta Defence submissions, and unfairly failed to give them due consideration. The approach of the Majority, in referring to the original passages of the Investigation Decision, which were in fact the subject of the Defence challenge, provides no explanation as to the Majority's opinion on the Kenyatta Defence submissions of the correct interpretation of "organizational". This failure demonstrates an erroneous approach to the issue of the interpretation by the Majority and their unwillingness to consider argument correctly. The Defence sets out its interpretation of Article 7(2)(a) below.

[54] See paragraphs 67-77 below.
[55] Majority Decision, ICC-01/09-02/11-382-Conf, para 114. At footnote 173, the Majority refers to paragraphs 89-93 of the Investigation Decision, ICC-01/09-19-Corr.

(A) The Legal Test Under Article 7(2)(a) of the Statute, the Intention of the Drafters and the Principle of *nullen crimin sine lege*

33. For the purposes of jurisdiction over crimes against humanity under Article 7 of the Statute, paragraph 2(a) states that:

> *"'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."*

34. As a separate constitutive element of an "attack", the Elements of Crimes drafted to assist the Court in the interpretation and application of the Statute, provide that the "policy to commit such attack" requires the State or organization to actively promote or encourage such an attack against a civilian population. [56]

35. Article 22 of the Statute cites the universal principle of criminal law *nullem crimen sine lege* and requires that:

> *"The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."*[57]

36. Accordingly, the term 'organizational policy' must be strictly construed and interpreted in favour of the person being investigated "taking into account that crimes against humanity as defined in article 7 are among the most serious

[56] Article 7(3) of the Elements of Crimes.
[57] Article 22(2) of the Elements of Crimes.

crimes of concern to the international community as a whole."[58] Article 7(2)(a) of the Statute clearly prevents the abandonment of the policy requirement in proceedings brought before the ICC.[59]

37. Article 31(1) of the Vienna Convention on the Law of Treaties requires that the ordinary meaning shall be given to the terms of a Statute. As no definition of the term 'organizational policy' is provided in any of the ICC texts or official drafts, the ordinary meaning provides no clear answer. The next step requires consideration of the context, object and purpose of the term.[60] It is therefore essential to examine the intention of the drafters.

38. A significant number of State Parties were concerned that if the disjunctive "widespread or systematic" test was left unqualified, a number of crimes intended to be kept *outside* the ICC's jurisdiction, including unconnected crime waves, could be brought within it.[61] While other States believed that the term 'attack' was enough to prevent this, an agreement was reached to incorporate into the Statute specific details of an 'attack' including the need for a State or organizational policy.[62] The drafters intended to create a clear boundary between crimes against humanity and national crimes, and for this boundary to be dependent not on the abhorrent nature of the crimes but on the entity and policy behind them.

---

[58] Article 7(1) of the Elements of Crimes.
[59] C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at pp. 869-70.
[60] Article 31(1) Vienna Convention on the Law of Treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
[61] Herman Von Hebel and Darryl Robinson, "Crimes within the Jurisdiction of the Court, in: Roy S Lee (ed): *The International Criminal Court, The making of the Rome Statute, Issues* ***Negotiations*** *Results* (The Hague: Kluwer Law International, 1999), at page 94; Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 American Journal of International Law 43, at pp. 47-8.
[62] Article 7(2) of the Rome Statute.

39. The express words of the Statute are that the entity is to be an 'organization'. The Statute does not refer to 'groups', 'bodies' or other less clearly defined entities as being the object of Article 7. The drafters of the Statute clearly intended the formal nature of a group and the level of its organization to be a defining criterion. As explained by Robinson, the reason for omitting the term 'group' from Article 7 was that "to the extent that there may be a gap between the concept of 'group' and 'organization', it was considered the planning of an attack against a civilian population requires a higher degree of organization, which is consistent with the latter concept."[63].

(B) The Majority's Interpretation is Incorrect and does not Reflect the Intention of the Drafters of the Statute

(i) <u>The Basic Human Values Test</u>

40. The 'organization' test formulated by the Majority is satisfied by the existence of a group that "has the capability to perform acts which infringe on basic human values":

> *"With regard to the term "organizational", the Chamber notes that the Statute is unclear as to the criteria pursuant to which a group may qualify as an "organization" for the purposes of article 7(2)(a) of the Statute. Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining*

[63] D. Robinson "Defining 'Crimes Against Humanity' at the Rome Conference", (1999) 93 Am. J. Int'l L. 43 at footnote 44; Cassese, The Rome Statute of the International Criminal Court: A Commentary, Volume 1, Ed. Cassese, Gaeta and Jones, OUP 2002, Chapter 11.2: Jurisdiction: Crimes Against Humanity pp. 356 et seq.

criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values."[64]

41. The Defence submits that the "Basic Human Values Test" does not reflect the intention of the drafters of the Rome Statute. This expansive new definition of 'organization' encompasses a vaguely defined range of entities, including gangs, serial killers and other forms of organized criminal activity, and extends the scope of the jurisdiction inappropriately to include criminal behaviour that is intended to be subject to national criminal procedure. Article 1 of the Statute clearly states the Court is to exercise jurisdiction "over persons for the most serious crimes of international concern". The Defence submits that the context requires the organization to have a capacity to create policy and therefore is State-like in the sense that it controls territory.[65] The Majority definition ignores the integral requirement of a 'policy' emanating from the organization. An organizational entity that has the ability to produce a policy is in need of a defined structure and control system to carry out its 'policy'. This requirement is lacking from the Majority's definition of "whether a group has the capability to perform acts which infringe on basic human values".[66]

42. For these reasons, the Majority approach fails to demark the boundary between crimes against humanity, over which the ICC has jurisdiction, and those crimes that can and should properly be dealt with in national jurisdictions. At its extreme, the Majority test "takes crimes against humanity to mean all organized

[64] ICC-01/09-19-Corr, at para 90.
[65] W. Schabas "London Riots: Were they Crimes Against Humanity?", 15 August 2011, http://humanrightsdoctorate.blogspot.com/search?updated-max=2011-08-30T19%3A03%3A00%2B01%3A00&max-results=10.
[66] ICC-01/09-19-Corr, at para 90.

acts that are not random."[67] Professor Schabas has observed that such an approach renders it almost impossible to draw a "bright line"[68] between the post election violence in Kenya, and the London riots in August 2011.[69] The sources relied upon by the Majority reflect this error in their consideration of the issue, citing in the Investigation Decision[70] that they took note of the work of the International Law Commission including in particular a Draft Code of 1996 for Crimes Against the Peace and Security of Mankind. This Draft was *not* incorporated into the Treaty of Rome and was *not* accepted by those States that consented to the jurisdiction of the Court.

(ii) Underlying Rationale of the Majority in Relation to the Basic Human Values Test

Di Filippo

43. The Majority definition of organization derives primarily from an academic article written by M. Di Filippo concerning terrorist crimes and international co-operation, [71] in which he suggests the following:

[67] W. Schabas, "London Riots: Were they Crimes Against Humanity?", 15 August 2011, http://humanrightsdoctorate.blogspot.com/search?updated-max=2011-08-30T19%3A03%3A00%2B01%3A00&max-results=10.

[68] W. Schabas "London Riots: Were they Crimes Against Humanity?", 15 August 2011, http://humanrightsdoctorate.blogspot.com/search?updated-max=2011-08-30T19%3A03%3A00%2B01%3A00&max-results=10.

[69] W. Schabas "London Riots: Were they Crimes Against Humanity?", 15 August 2011, http://humanrightsdoctorate.blogspot.com/search?updated-max=2011-08-30T19%3A03%3A00%2B01%3A00&max-results=10.

[70] ICC-01/09-19-Corr, at para 86.

[71] M. Di Filippo, "Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", The European Journal of International Law Vol. 19 no 3, 533, (2008).

"A significant number of commentators stress the need for a link between the perpetrators and a government or, at least, an insurgent movement or territorial authority, acting as a factor increasing the gravity of the material conduct and thus raising concern in the international community.[72] *Other authors go even further pointing out that the associative element and its inherently aggravating effect, could eventually be satisfied by 'purely' private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by 'territorial' entities or by private groups given the latter's acquired capacity to infringe basic human values."*[73]

44. The Majority relies upon Di Filippo's observations that some authors "go even further", pointing out that the term organization "could eventually be satisfied by purely private criminal organizations…given the latter's acquired capacity to infringe basic human values".[74]

45. Di Filippo expressly favours an expansive interpretation of the term 'organization' in support of his proposition that 'core terrorism' *should* be

[72] Dixon, 'Article 7, paragraph 2' in O Triffterer (ed.), commentary on the Rome Statute of the International Criminal Court (1999), at 158, 159; C Bassiouni, Introduction au droit penal international (2002), at 51-53; J-F Roulot, Le Crime Contre l'humanite (2002) at 150-154; Cassese, International Criminal Law (2003), at 64, 83 and 91; Schabas supra not 133,a t 257-260; Gil Gil, 'Los Crimenes contra la hamaanidad y el genocidio en el Estatuto de la Corte Penal Internacional a la luz de 'Los elementos de los Crimines", In K Ambos (ed.), Law nueva justice penal supranaciona: Desarrollos post-roma (2002), at 65, 63-75; C Bassiouni, The Legislative History of the International Criminal Court. Vol. 1 (2005) at 151-152.

[73] M. Di Filippo, "Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", The European Journal of International Law Vol. 19 no 3 (2008) at p.567. In this perspective see Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference", 93 AJIL (1999) 43 at 50; Y Jurovics, Reflexions sur la specificite du crime contre l'humanite (2002), at 415 – 417; K Kittchaisaree, International Criminal Law (2002) at 98; S Ratner and J Abrams, Accountability for Human Rights Atrocities in International Law, Beyond the Nuremburg Legacy (2001), at 69; B Conforti, Diritto Internazionale (2006), at 191; Gioia, Terrorism , crimini di Guerra e crimi conto l'umanita at 62-66; Arnold The ICC as a New Instrument for Repressing Terrorism (2004) at 272-273.

[74] M. Di Filippo, "Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", The European Journal of International Law Vol. 19 no 3 (2008) at p.567.

included within crimes against humanity, a proposition clearly considered and rejected by the drafters of the Rome Statute.[75] Di Filippo notes this point in his article and in doing so acknowledges that his view does not reflect the intention of the drafters of the Statute and makes the point that it "looks innovative".[76]

46. The Defence submits that in adopting the language expressed by Di Filippo, the Majority has erroneously selected a definition that neither reflects existing customary international law nor legitimately interprets the meaning of organization within the intention of the drafters of the Rome Statute. This approach contravenes the requirement of Article 22 of the Statute that the "definition of a crime shall be strictly construed and shall not be extended by analogy." It is evident that Di Filippo's article is a controversial platform from which he seeks to explore the ways in which the law of terrorism *could* be developed beyond its existing parameters, at some point in the future. The language used by Di Filippo clearly demonstrates that, on any view, he was engaged in describing one side of the debate, conceding openly that his approach was both "liberal" and "innovative." [77] Terrorism is not an international crime and Di Filippo effectively acknowledges that his argument is an attempt to argue it into the ICC jurisdiction 'through the back door'.

47. The majority fell into error in confusing the *lex ferenda* and academic opinion as to what the law *should be* with the *lex lata* - the law as it is. This profound error has led to injustice in the present case and has, inherent within it, the potential

[75] See this point discussed by C. Kress, in "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at p. 866.
[76] M. Di Filippo, "Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", The European Journal of International Law Vol. 19 no 3, 533, (2008), at p. 564, 567.
[77] M. Di Filippo, "Terrorist Crimes and International Co-operation: Critical remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", The European Journal of International Law Vol. 19 no 3 (2008) at pp.566-7.

to severely and irredeemably undermine confidence of State parties in the International Criminal Court. Principally, this is because the essential ingredient of legal certainty has been sacrificed in favour of expansionist interpretations of the law, based upon a small selection of academic opinion.

48. Erroneously, the Majority test suggests that the primary goal of the law of crimes against humanity is to protect basic human values. The Defence submits however, that "while it is certainly possible to say that international criminal law has come to be an instrument to protect and enforce (a limited number of fundamental) international human rights, there can be no presumption in favour of a broad teleological interpretation of international criminal law as a back door for a progressive development of human rights law."[78] The International Criminal Court was not established to be an International Court of Human Rights.

49. In a recent article on the concept of organization, Claus Kress explains that international criminal law carries with it the "competence of properly instituted international criminal courts to decide on the genuineness of national criminal proceedings, a presumption against immunities *ratione materiae*, a presumption in favour of universal jurisdiction and a presumption against the power to grant amnesties."[79] In such circumstances, the contextual requirements of crimes against humanity reflect the wishes of states that these "heavy restrictions on their sovereignty **only apply to particular human rights**

[78] C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at pp. 860-1.
[79] C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at p. 861.

violations."[80] The Majority test erroneously downplays the contextual definition of 'organizational policy' in favour of a teleological victim-driven human rights based approach, reflective of inappropriate judicial activism.

Other Academics cited by the Majority

50. The Majority cites Dean Peter Burns QC's article, "Aspects of Crimes Against Humanity and the International Criminal Court".[81] However, Burns does not provide any support for the "Basic Human Values Test", and takes an entirely different position. He argues that an organization fulfils the requirements if its *intention* is to attack the civilian population, and that "the answer to these threshold instances probably turns upon the mental element of the crime."[82] The Defence submits that although the intention of an organization is a consideration in relation to whether or not crimes against humanity have been committed, Burns' observations do not tackle the definitional issues of what constitutes an organization under Article 7 of the Rome Statute.

51. Darryl Robinson's article "Defining Crimes against Humanity at the Rome Conference"[83] is also cited by the Majority. Robinson does not however deal with the question of interpretation in any detail. He refers briefly to the fact that

[80] C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at p. 861.
[81] Dean Emeritus Peter T. Burns Q.C., 'Aspects of Crimes Against Humanity and the International Criminal Court', A Paper prepared for the Symposium on the International Criminal Court, February 3-4, 2007; Beijing, China.
[82] Ibid. at p. 11: "it can undoubtedly include state organs and will extend to para-military units of a state, organized rebel groups within a state, or even unorganized rebel groups so long as there is a sufficient core that develops such a policy for the group. But what of non-military but highly organized and armed groups within a state? [...]The answer to these threshold questions probably turns on the mental element of the crime".
[83] D. Robinson "Defining 'Crimes Against Humanity' at the Rome Conference", (1999) 93 Am. J. Int'l L. 43.

the drafters of Article 7(2)(a) of the Statute were aware of a formulation in the ICTY case law that "leaves open the possibility that other organizations [other than those with territorial control] might meet the test as well".[84] However, his observations on this point provide no assistance in the present case, as the 'policy requirement' was not included in the Statutes of the *ad hoc* Tribunals.

52. Ratner takes the view that the Rome Statute could support a wide interpretation of organizational policy based on a teleological approach that such private entities are capable of bringing about significant harm and suffering. Ratner's approach however is a victim-focused interpretation of what the law '*could be*', which he expressly acknowledges does *not* find any support in the current practice at the ICTY, ICTR, SCSL or ICC.[85]

53. The Defence notes that even commentators who do not necessarily agree with a quasi-State requirement, such as Dixon and Hall, do not support the "Basic Human Values Test", as they stress the need for other requirements, in particular territorial control:

> *"Clearly, the policy need not be one of a State. It can also be an organizational policy. Non-state actors, or private individuals, who exercise de facto power can constitute the entity behind the policy."*[86]

This approach has also been adopted by Cassese in his commentary:

---

[84] D. Robinson "Defining 'Crimes Against Humanity' at the Rome Conference", (1999) 93 Am. J. Int'l L. 43 at p.50.
[85] S Ratner Accountability for Human Rights Atrocities in International Law. Beyond the Nuremburg Legacy 3rd Ed (Oxford OUR 2009) p. 70.
[86] Rodney Dixon revised by Christopher K Hall: "Crimes Against Humanity" in: Otto Triffterer, (ed) 'Commentary on the Rome Statute of the International Criminal Court, observers notes Article by Article'. (C.H.. Beck.Hart.Nomos, 2nd ed) pp.235-236.

> *"One of the most significant of these elements is the fact that such offences must be large-scale or systematic and, at least, tolerated by a State, government or entity. The crimes at issue may also be State-sponsored or at any rate may be part of a governmental policy or that of an entity holding de facto authority over a territory."* [87]

54. The Defence submits that it is clear that the entity, in having such *de facto* control and authority, must be capable through its structure of exercising State-like powers, or at least having the capacity to devise and impose "policy" through its *authority over* a territory. The policy requirement is the delivery mechanism through which the crimes against humanity are committed and requires authority and power over the territory to achieve the same. The test applied by the Majority falls very short of this threshold as indeed does the evidence of the Prosecutor relied upon in support of the argument that the Court has jurisdiction.

55. The Defence underscores the importance of the requirement of *de facto* power and control as the necessary criteria to be met when determining what qualifies as an organization. Without such a requirement, the definition would fall clearly outside the intention of the drafters of the Rome Statute.[88] It must be acknowledged that States parties have submitted a component of their sovereignty to the ICC only upon express terms as defined in the Statute and not to terms that are thereafter artificially determined. The expansion of the definition of 'organizational' as carried out by the Majority and wished for by Di Fillipo is contrary to the principles of international law.

---

[87] The Rome Statute of the International Criminal Court: A Commentary, Volume 1, Ed. Cassese, Gaeta and Jones, OUP 2002, Chapter 11.2: Jurisdiction: Crimes Against Humanity pp. 356 et seq.

[88] Cassese, The Rome Statute of the International Criminal Court: A Commentary, Volume 1, Ed. Cassese, Gaeta and Jones, OUP 2002, Chapter 11.2: Jurisdiction: Crimes Against Humanity pp. 356 et seq.

Katanga and Bemba Cases

56. At paragraphs 84-5 of the Majority Investigation Decision, the Majority refers to the position taken by the Pre-Trial Chambers in the cases of *Bemba* and *Katanga & Ngudjolo* in relation to the policy requirement. Neither of these cases refers to the 'capacity to infringe basic human values'. The test is rather one of 'capability to commit a widespread or systematic attack against a civilian population',[89] an entirely different formulation concerning a case with a different factual background in which *de facto* authority was exercised over territory where the civilian population was located.

57. In respect of the interpretation given by Pre-Trial Chamber I in *Katanga & Ngudjolo,* Professor Schabas has opined that upon mature reflection, judges at the Court "may see the dangers in such an open-ended approach, which encompasses organized crime, motorcycle gangs and perhaps even serial killers within its ambit."[90] It is noteworthy that this interpretation has never been challenged by any Defence team, neither has it been confirmed by any Trial Chamber or Appeals Chamber and does not reflect the law as it currently stands.

58. Both of these cases have different factual circumstances and backgrounds to the situation in the Republic of Kenya. They concern military-type organized armed groups who allegedly committed crimes pursuant to a policy over a prolonged period of time in an armed conflict, in respect of which they were pursuing

[89] Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, at para 81; Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, at para 396.

[90] W. Schabas, 'The International Criminal Court: A Commentary on the Rome Statute', (Oxford Commentaries on International Law), March 2010, at p.150.

clear goals and had *de facto* control over identifiable territory.[91] The circumstances out of which these organizations were created were entirely different to the spontaneous violence in the PEV, for which there was no policy initiative.

ICTY/ICTR Materials

59. The Majority also cites the case law of the ICTY and ICTR in support of its decision.[92] The Defence observes that the ICTY, ICTR and the Special Court for Sierra Leone, unlike the ICC do not have included within their Statutes the express need for an attack upon a civilian population to be pursuant to a State or organizational policy.[93] These UN *ad hoc* Tribunals were created to specifically deal with conflicts that threatened the peace in neighbouring States and had their genesis under Chapter VII of the UN Charter. They were not conflicts arising within the strict terms of the ICC Statute. The *Kunarac* Decision dated 12 June 2002 of the Appeals Chamber of the ICTY, cited by the Majority,[94] did not even include within its extensive citations in the footnote to paragraph

[91] For HHJ Kaul's observations on this point, see his dissenting opinion at ICC-01/09-19-Corr, at para 48.

[92] Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2011, ICC-01/09-19-Corr, paras 86-7.

[93] Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character and directed against any civilian population."; Article 3 of the Statute of the International Criminal Tribunal for Rwanda: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attach against any civilian population on national, political, ethnic, racial or religious grounds"; Article 2 of the Statute of the Special Court for Sierra Leone: "The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population"; see also, ICTY Appeals Chamber, Prosecutor v Kunarac et al., Judgment, 12 June 2002, at para 98.

[94] ICC-01/09-19-Corr, para 86, footnote 79.

98[95] any reference to the ICC Treaty of Rome where there is an explicit State or organizational policy requirement. In that respect, the *Kunarac* Decision must be considered to be defective. The cases before the ICTY involved armed conflicts between States and entities such as Republika Srpska, that were quasi States exerting *de facto* control over territory. As the case of *Tadic* encapsulated, "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising de facto **control** over a particular territory but without international recognition or formal status of a 'de jure' state, or by a terrorist group or organization.[96]

60. Even after the policy requirement was abandoned at the *ad hoc* international criminal tribunals, in *Limaj,* the Chamber acknowledged that "[d]ue to structural factors and organizational and military capabilities, an "attack directed against a civilian population" will most often be found to have occurred at the behest of a State. Being the locus of organized authority within a given territory, able to mobilise and direct military and civilian power, a sovereign State by its very nature possesses the attributes that permit it to organize and deliver an attack against a civilian population; it is States which can most easily and efficiently marshal the resources to launch an attack against a civilian population on a "widespread" scale, or upon a "systematic" basis."[97]

[95] ICTY Appeals Chamber, Prosecutor v Kunarac et al., Judgment, 12 June 2002, para 98. See footnote 114, which relies mainly upon Nuremburg jurisprudence.
[96] Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, para. 654 (May 7, 1997).
[97] ICTY, Prosecutor v Limaj et al., Case No. IT-03-06-T, Judgment, 30 November 200, at para. 191 and 194.

The Chamber in *Limaj* ultimately determined that crimes against humanity had not been committed.[98]

61. Importantly, the *ad hoc* international criminal tribunals have thus far focused on the prosecution of offences committed as part of, or closely affiliated with "an organization seeking political control of or influence over a territory, whether as a *de facto* government, armed insurrection, or otherwise", suggesting that some sort of official action remains associated with the concept.[99]

62. Ultimately, the lack of a policy requirement in the Statutes of the *ad hoc* Tribunals does not support the Majority's rejection of the need for a State or quasi-State organization to be responsible for the crimes at the ICC, given the contextual requirements of the Rome Statute.

(iii) The Six Considerations

63. The six considerations listed by the Majority as factors that *may* be taken into account when determining the existence of the organization are as follows:

a. whether the group is under a responsible command, or has an established hierarchy;
b. whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;
c. whether the group exercises control over part of the territory of a State;

[98] ICTY, Prosecutor v Limaj et al., Case No. IT-03-06-T, Judgment, 30 November 200, at para 228.
[99] See the observations of S. Ratner, in 'Accountability for human Rights Atrocities in International Law, Beyond the Nuremburg Legacy, 3rd ed. (Oxford: OUP, 2009), at page 70; See also ICTY, Prosecutor v Limaj et al., Case No. IT-03-06-T, Judgment, 30 November 2009 at para. 191.

d. whether the group has criminal activities against the civilian population as a primary purpose;
e. whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; and
f. whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[100]

64. The Defence submits that the Majority Decision does not clarify whether any of these considerations constitute minimum criteria, nor does it provide any 'bright light guidance,' clear demarcation or definition as to the types of organizations that fall within the Majority's intended parameters of Article 7(2)(a). The broad nature of these considerations encourages unhelpful legal indeterminacy.

65. The Defence agrees with the observations of Kress who concludes that the Majority's Decision is internally inconsistent.[101] The Majority develops a definition of organization, only to then propose that a case-by-case approach is preferable, while the formulation of the six considerations do not appear "to flow naturally from the general 'capability criterion'.[102]

66. In terms of which criteria the Majority applied in the present case, Kress concludes that "the more demanding criteria of territorial control and a group under responsible command or with an established hierarchy have not been

[100] Pre-Trial Chamber II, The Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, at para 93.
[101] C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at p. 857.
[102] C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at p. 857.

relied on."[103] It is apparent from the development of the case that the Majority's inconsistency and confusion has seen it abandon the original concept that the Mungiki acting with the Kenyan Police constituted the 'organization' with its 'policy', to a point where the Mungiki alone without the authority and power of the State institution have now been determined to be the non-State actor. The obvious weakening of the capacity and authority of the Mungiki without police support drives a chasm through the original assertion of the qualities of the nature of the 'organization'.

(C) Judge Kaul's Interpretation is Correct and Reflects the Intention of the Drafters of the Statute and Leading Academic Opinion

67. The Defence submits that HHJ Kaul's determination that "an organization within the meaning of Article 7(2)(a) of the Statute must partake of the characteristics of the State"[104] is correct and in line with the intention of the drafters. He states that those characteristics eventually turn the private 'organization' into an entity which may act like a State or have quasi State abilities and could involve the following:

> *"(a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available*

[103] C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at p. 858.
[104] Dissenting Opinion, ICC-01/09-19-Corr, para 51.

to attack any civilian population on a large scale."[105]

68. HHJ Kaul determines that non-State actors that do not meet the above requirements are not able to carry out a policy to commit widespread or systematic attacks upon a civilian population.[106] Groups that would therefore fall outside the scope of Article 7(2)(a) include "groups of organized crime, a mob, groups of (armed) civilians or criminal gangs."[107] HHJ Kaul states that:

> *"…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 are not within the ambit of the Statute, even if they engage in numerous serious and organized crimes. Further elements are needed for a private entity to reach the level of an 'organization' within the meaning of article 7 of the Statute. For it is not the cruelty or mass victimization that turns a crime into a delictum iuris gentium but the constitutive contextual elements in which the act is embedded."*[108]

69. The factors set out by HHJ Kaul constitute specific hallmarks which assist a Chamber to determine with precision whether or not an entity has reached the level of an organization within the meaning of Article 7 of the Statute.

70. The Defence endorses HHJ Kaul's observation that "a gradual downscaling of crimes against humanity towards serious crimes … might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute".[109] The exclusion of terrorism and drug

[105] Dissenting Opinion, ICC-01/09-19-Corr, para 51.
[106] Dissenting Opinion, ICC-01/09-19-Corr, para 52.
[107] Dissenting Opinion, ICC-01/09-19-Corr, para 52.
[108] Dissenting Opinion, ICC-01/09-19-Corr, paras 50-52.
[109] Dissenting Opinion, ICC-01/09-19-Corr, para 10.

trafficking crimes from the Rome Statute was largely based upon the "different character of these crimes; the danger of overburdening the Court with relatively less important cases; and the ability of the State to deal effectively with these crimes though international cooperation agreements." [110]

71. The organizational policy requirement ensures that the right balance is struck between State sovereignty and the jurisdiction of the ICC. This requirement is also important as regards those situations where "there is reason to doubt that a judicial response at national level will follow".[111] If the State itself is implicated in committing the crimes then there is good reason to justify an intervention, as it is unlikely that the State will take action. Similarly, if State-like entities, with *inter alia* territorial control are implicated, then it is also likely that such doubts concerning appropriate response could persist.

72. The commission of crimes against humanity also requires significant resources. Although HHJ Kaul recognises that a policy to carry out a widespread or systematic attack against a civilian population could be carried out by a non-State entity, it is clear that such an entity must possess sufficient means and resources.[112]

73. Professor Mahmoud Cherif Bassiouni, who chaired the drafting committee at the Rome Statute, has a similar approach to HHJ Kaul's in relation to the definition of organization. Bassiouni states that:

---

[110] Von Hebel and Robinson, 'Crimes Within the Jurisdiction of the Court' at page 86 referring to '1995 Ad Hoc Committee Report', at paras 82-84 and '1996 PrepCom Report Vol I' at paras 106-107 and 111-113.

[111] C. Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", Leiden Journal of International Law, 23 (2010) 855 at p. 866.

[112] Dissenting Opinion, ICC-01/09-19-Corr, at para 66.

"The reference to State or organizational plan or policy in article 7(2) should probably be construed broadly enough to encompass entities that act like States, even if they are not formally recognised as such. But an interpretation of the word organizational by which it refers to any group of individuals, brought together for whatever purpose, is an absurdity. In a literal sense, an organization could include a social club, a charitable organization, a motorcycle gang, an organized crime syndicate, and a terrorist cell. This is obviously not what article 7(2)(a) contemplates."[113]

74. Bassiouni adopts the position that non-State actors must "partake of the characteristics of state actors in that they exercise some domain or control over territory and people and carry out a policy which has similar characteristics as those of 'state action or policy.'" [114]

75. Professor Schabas concurs with Bassiouni that "the word 'organizational' must be read in its proper context. The definition must not extend to a general invitation to include any form of organized criminal activity. Rather, the organization in question must be either part of the State or 'State-like', in the sense of association with an entity that controls territory."[115]

76. The ICC is intended to be a court of last resort, to intervene only in relation to the most serious crimes of concern to the international community as a whole.[116]

---

[113] M. Cherif Bassiouni, 'The Legislative history of the International Criminal Court' (Ardsley, NY, Transnational Publishers, 2005), at pp. 151 – 152.

[114] M. Cherif Bassiouni, 'Crimes Against Humanity in International Criminal Law, ed. Kluwer Law International (The Hague/London/Boston, 1999 2nd ed), at p. 245; See also: Cassese, The Rome Statute of the International Criminal Court: A Commentary, Volume 1, Ed. Cassese, Gaeta and Jones, OUP 2002, Chapter 11.2: Jurisdiction: Crimes Against Humanity pp. 356 et seq.

[115] W. Schabas "London Riots: Were they Crimes Against Humanity?",15 August 2011, http://humanrightsdoctorate.blogspot.com/search?updated-max=2011-08-30T19%3A03%3A00%2B01%3A00&max-results=10.

[116] Article 1 of the Rome Statute; State Parties have emphasized that "The court is a court of last resort" and that "the principle of complementarity is integral to the functioning of the Rome Statute system

Its jurisdiction complements, but does not in any way supplement, the jurisdiction of national courts. In order to be consistent with the principle of complementarity,[117] the ICC's jurisdiction must respect and protect State sovereignty. As such, the ICC should only intervene in exceptional circumstances as defined in the Statute. In all other circumstances, the fight against impunity must be fought at a national level. The clear message from the texts of Bassiouni, Cassese, Schabas and other leading authorities, is that the definition of "organizational" applied by the Majority in this case is, in fact, a minority view and inconsistent with the intent of the drafters of the Rome Statute. The Majority rely upon commentators wishing to extend the jurisdiction of the Court, which does not reflect either the intended scope of the ICC's jurisdiction within the Treaty of Rome, or customary international law. Such expansionism could work to the detriment of the ICC as States may feel they are unable to predict the scope of the Court's jurisdiction with any degree of certainty. This could lead to States re-evaluating the merits of remaining as parties to the Rome Statute and may militate against those States which are currently not State parties from ratifying the Rome Statute.

77. The Defence submits that for the aforementioned reasons, the definition of organization in the dissenting opinion of HHJ Kaul is accurately reflective of the intention of the drafters of the Rome Statute, customary international law and the jurisdiction of the ICC. His definition does not fall foul of the fundamental principle of *nullem crimen sine lege* as set out in Article 22 of the

---

and its long term efficacy" (Report of the Bureau on stocktaking: Complementarity, ICC-ASP/8/51, 18 March 2010, para 3) In a resolution adopted at the ICC Review Conference in Kampala, the Assembly of State Parties stressed "the primary responsibility of States to investigate and prosecute the most serious crimes of international concern" and recognised "the desirability for States to assist each other in strengthening domestic capacity to ensure that investigation and prosecutions of serious crimes of international concern can take place at the national level" (Resolution RC/Res. 1 adopted at the 9th plenary meeting, 8 June 2010).

[117] Article 17 of the Rome Statute.

Statute and seeks to provide bright line guidance on the issue of the legal meaning of organization.

VI. THIRD GROUND

78. The Majority erred in fact by fundamentally changing the Prosecutor's presentation of the facts by finding that Mungiki alone represented the 'organization'. During the confirmation hearing and within the Amended Document Containing Charges, the Prosecution argued that the Mungiki and the Kenyan Police were 'one' organization. By excluding the Kenyan Police from the 'organization', the Majority removed an essential element of the alleged organizational structure and rendered the Mungiki as a 'group' incapable of satisfying the criteria of 'organization' established by the Majority (i.e. capable of performing acts which infringe on basic human values). The Majority erred by not dismissing the case having determined that the Mungiki alone constituted the organization. The Majority erred in law by failing to inform the Suspects of the fundamental re-characterisation of the case and affording them adequate opportunity to respond to the new characterisation.

(A) Particulars of the Error

79. As HHJ Kaul noted in his dissent:

> *"Whilst the Majority rightly excludes the Kenyan Police from being an integral part of the 'organization', it fundamentally changes and redefines the Prosecutor's*

presentation of the facts by arguing that during the relevant time period, the Mungiki alone represented the 'organization'."[118]

80. The removal of such an *"indispensable and quintessential element of the organization structure"*[119] rendered the significantly whittled down 'group' incapable of satisfying the criteria of 'organization' established by the Majority (i.e. *capable of committing crimes that offend basic human values).*[120]

81. The finding of the Majority that the Kenya Police were not involved in the electoral violence should therefore have been dispositive of the issue whether the definition of 'organization' was met.

82. Indeed as HHJ Kaul correctly noted, *"in light of the Majority's finding excluding the Kenyan Police from the 'organization', I have serious doubts whether, having been deprived of the second pillar in the 'organization' structure, the Mungiki could have launched on their own a widespread or systematic attack against civilians […]."*[121]

83. The Majority ought to have found that the Court has no jurisdiction over the case in view of its finding that the Mungiki alone represented the organization, as the Mungiki clearly did not have the capability to commit widespread or systematic attacks against the civilian population. By excluding the Kenyan Police from the *ad hoc* organization and introducing Maina Njenga as the person with the exclusive control over the Mungiki,[122] it fundamentally changed and redefined the Prosecutor's presentation of the facts. The decision of the Majority to proceed and confirm the charges against Mr. Kenyatta and Mr. Muthaura

[118] Dissenting Opinion, ICC-01/09-02/11-382-Red, para 14.
[119] Dissenting Opinion, ICC-01/09-02/11-382-Red, paras 5-6.
[120] Dissenting Opinion, ICC-01/09-02/11-382-Red, para 112.
[121] Dissenting Opinion, ICC-01/09-02/11-382-Red, para 18.
[122] Majority Decision, ICC-01/09-02/11-382-Red, para 190.

without regard to their procedural rights to be informed of the nature, cause and content of the charges and be given the adequate opportunity to respond to them represents a fundamental violation of their rights under Article 67 of the Statute.

(B) Defence Submissions

84. Essentially, this ground of appeal addresses two fundamental issues: (a) the Majority erred by not dismissing the case having determined that the Mungiki alone constituted the 'organization' as the Mungiki was not, without external support, capable of committing widespread or systematic attacks against a civilian population; and (b) the Majority erred in law by failing to inform the Suspects of the fundamental re-characterisation of the case and affording them adequate opportunity to respond to the new characterisation.

(i) <u>The 'Organization' as pleaded in the Amended Document Containing Charges</u>

85. In the Amended DCC, the Prosecution alleges that Mr. Muthaura and Mr. Kenyatta were the principal perpetrators and together with others agreed to pursue an organizational policy whose aim was to keep the PNU in power[123] and that they pursued this policy by devising a common plan to commit attacks on perceived ODM supporters by two means: penalizing them in retaliatory

[123] Amended DCC, ICC-01/09-02/11-280-AnxA, paras 18, 35, 77: "*The Principal Perpetrators [Muthaura and Kenyatta] together with ALI, Mungiki leaders and other prominent PNU supporters, agreed to pursue an organizational policy keep PNU in power through every means necessary, including by orchestrating a police failure to prevent the commission of crimes"* (para 77).

attacks, and deliberately failing to take action to prevent or stop the retaliatory attacks.[124]

86. The Amended DCC further alleges that Mr. Muthaura and Mr. Kenyatta used existing structures such as Mungiki and the Kenya Police to achieve their goals[125] and that they put them under a responsible command.[126]

87. It is further alleged that the Mungiki and the Kenya Police were hierarchically organized with Mr. Muthaura and Mr. Ali at the apex of the Kenya Police structure, and Muthaura and Kenyatta at the top of the Mungiki hierarchy[127] and that both Mungiki and the Kenya Police had functioning internal structures such as centralization and effective disciplinary systems.[128] The Amended DCC further states that the power hierarchy of the Kenya Police and Mungiki and pro-PNU youth was reinforced by the capacity of Mr. Muthaura and Mr. Kenyatta to "establish a functioning command structure using existing structures of police and Mungiki […] [and] impose order through existing disciplinary regimes of the Kenya Police and the Mungiki."[129] Muthaura and Kenyatta's authority and control over the Mungiki and pro-PNU youth was augmented by their status, wealth and/or position as senior party or government officials.[130]

88. The Amended DCC further states that the Mungiki and pro-PNU youth, including the direct perpetrators of the crimes, and the Kenya Police were all linked through the organizational policy described above. Superiors of the

[124] Amended DCC, ICC-01/09-02/11-280-AnxA, Amended DCC p. 11-12 para. 35; p. 26-27 para. 77.
[125] Amended DCC, ICC-01/09-02/11-280-AnxA, para 36.
[126] Amended DCC, ICC-01/09-02/11-280-AnxA, para 83.
[127] Amended DCC ICC-01/09-02/11-280-AnxA, para 84.
[128] Amended DCC, ICC-01/09-02/11-280-AnxA, para 84.
[129] Amended DCC, ICC-01/09-02/11-280-AnxA, para 85.
[130] Amended DCC, ICC-01/09-02/11-280-AnxA, para 84

direct perpetrators, including Mr. Ali, were linked with Mr. Muthaura and Mr. Kenyatta through the common plan.[131] It is alleged that Mr. Kenyatta and Mr. Muthaura participated in meetings intended to implement the common plan and played a central role in those meetings by directing the activities of the Mungiki and pro-PNU youth, and in the case of the Mr. Muthaura, the Kenya Police through Mr. Ali.[132]

89. The Prosecution maintained that Mr. Muthaura and Mr. Kenyatta were both aware of the factual circumstances that enabled them to exercise joint control over the crimes: (1) they were both "aware of the authority that they had over the Mungiki and pro-PNU youth and the Kenya Police; […] (5) they were aware of the hierarchically organized structure of the Mungiki and pro-PNU youth and the Kenya Police; […] (7) they were aware of the circumstances allowing automatic compliance with their instructions, such as the size, composition and command structures of the Mungiki and the Kenya Police, and the disciplinary regime within the Kenya Police and the Mungiki."[133] The Prosecution alleged further that the "crimes charged were carried out through the Kenya Police and the Mungiki and pro-PNU youth […]"[134]

(ii) The Prosecution's Oral Arguments: A single *Ad hoc* Organization

90. During the confirmation hearing, the Prosecution was clear that the crimes were allegedly committed through a single *ad hoc* organization bringing together the

[131] Amended DCC, ICC-01/09-02/11-280-AnxA, para 86.
[132] Amended DCC, ICC-01/09-02/11-280-AnxA, para 92.
[133] Amended DCC, ICC-01/09-02/11-280-AnxA, para 93.
[134] Amended DCC, ICC-01/09-02/11-280-AnxA, para 96.

Police and the Mungiki and that it was Mr. Muthaura and Mr. Kenyatta who created this organization over which they both exercised command.[135]

91. The Prosecution maintained that by combining the powers and authority of the Mungiki and the Kenya Police, the Suspects in this case created an organization with both government and private resources with the capacity to commit violence.[136]

92. Placing further emphasis on the centrality of this *ad hoc* organization, the Prosecution alleged that Mr. Kenyatta and Mr. Muthaura worked together and co-ordinated the attacks, exercising control over the *ad hoc* organization through their respective contributions to the common plan: Specifically, Mr. Kenyatta had control over the finances and the Mungiki. Mr. Muthaura, as head of public service and, as alleged by the Prosecution, the State's security machinery, purportedly had control over the governmental structure.[137] The Prosecution argued that Mr. Kenyatta and Mr. Muthaura were able to bring together the forces of the police and the Mungiki towards a common goal despite the public antagonism between these two groups.[138]

(iii) The 'Organization' in the Chamber's Decision

93. In its decision, the Chamber abandoned the involvement of the police in the 'ad hoc organization' which the Prosecution alleged committed the crimes

[135] ICC-01/09-02/11-T-5-CONF-ENG, p. 9, line 25; p. 10, lines 1-2; p. 17, lines 18-20; p. 18, lines 2-3.
[136] ICC-01/09-02/11-T-5-CONF-ENG, p. 17, lines 21-24; p. 35, lines 18-23.
[137] ICC-01/09-02/11-T-5-CONF-ENG, p. 21, lines 20-25, p.22 lines 1-2.
[138] ICC-01/09-02/11-T-5-CONF-ENG, p. 22, lines 12-14.

charged.[139] Furthermore, the Chamber introduced Maina Njenga as the person at the top of the Mungiki hierarchy with exclusive control over the Mungiki organization which committed the crimes.[140] This is not only a fundamental change in the theory of the case, it also fundamentally contradicts the Prosecutor's theory that the persons at the head of the organization (Mungiki and Police) committing the crimes were Muthaura and Kenyatta.[141]

94. Drifting further from the organizational structure as pleaded by the Prosecution, the Chamber noted that the Amended DCC contained numerous references to "pro-PNU youth", in the context of the mobilization, recruitment and payment of participants in the attack but that *"upon review of the submissions and the evidence, […] the Chamber considers that the mobilized and newly recruited members formed an integral part of the Mungiki organization at the time and in the context of the events under consideration in the present case''* and for that reason, *"the Chamber does not find any distinction necessary and finds it appropriate to refer to the organization perpetrating the attack simply as the Mungiki."*[142]

95. The Chamber then concluded that the Mungiki alone qualified as an organization within the meaning of Article 7(2)(a) of the Statute at the time of the events under consideration[143] in that: (i) it operated at the relevant time as a hierarchical organization with defined roles for members at different levels and that Maina Njenga possessed exclusive control over the organization; (ii) it has an effective system of ensuring compliance with its rules by its members such

[139] Majority Decision, ICC-01/09-02/11-382-Red, paras 224-226.
[140] Majority Decision, ICC-01/09-02/11-382 para. 186.
[141] Amended DCC, ICC-01/09-02/11-280-AnxA, para 84; ICC-01/09-02/11-T-5-ENG, p. 21, lines 18-25
[142] Majority Decision, ICC-01/09-02/11-382-Red, para 123. The Defence is compelled to note that the Chamber's conclusion that all PNU youth could be considered as Mungiki has no evidential basis in the record and is based on the Chamber's own assumption. Indeed, the Prosecution never alleged at any time that the PNU youth were part of the Mungiki organization or were part of the single ad hoc organization.
[143] Majority Decision, ICC-01/09-02/11-382-Red, para 186.

as taking oaths and sanctions; (iii) the organization has quasi-military capabilities; and (iv) Mungiki activities approximate those of a public authority in certain slums of Nairobi as well as Central Province.[144]

96. With respect to the Prosecutor's allegation of police participation in the attack by way of a deliberate failure to act or a creation of a "free zone", the Chamber concluded that the evidence placed before it did not allow for this allegation to be upheld.[145] The Chamber noted that there was no evidential basis for the conclusion that there existed an identifiable course of conduct within any of the police agencies active in Nakuru and Naivasha at the relevant time, amounting to participation, by way of inaction, in the attack carried out by the Mungiki.[146]

(iv) Submissions

The Majority Erred in Fact by Fundamentally Changing the Prosecutor's Presentation of the Facts by Finding that the 'Organization' was the Mungiki alone as opposed to the Mungiki AND the Kenya Police

97. As demonstrated above, in the Amended DCC and during the confirmation hearing, the Prosecution emphasized that the *ad hoc* organization it pleaded comprised both the Mungiki and the Kenya Police. This is how the Prosecution's case was understood by the Defence.[147] This was also how the Prosecution case was understood by HHJ Kaul: that, in order to achieve their goal, the principle perpetrators used (i) Mungiki; and (ii) the Kenya Police,

[144] Majority Decision, ICC-01/09-02/11-382-Red, paras 186-223.
[145] Majority Decision, ICC-01/09-02/11-382-Red, paras 224.
[146] Majority Decision, ICC-01/09-02/11-382-Red, para 226.
[147] ICC-01/09-02/11-T-7-ENG, p. 59, lines 20-25; ICC-01/09-02/11-T-15-CONF-ENG, p. 36, line 25; p. 37, lines 1-5; ICC-01/09-02/11-372, Defence Submissions on behalf of Uhuru Kenyatta Following the Confirmation of Charges Hearing, paras 47, 53-55.

which together, allegedly constituted "*a single ad hoc organization*", and that Mr. Kenyatta and Mr. Muthaura allegedly exercised control over the *ad hoc* organization.[148]

98. Indeed, according to the Prosecution, the success of the common plan was predicated upon the concerted effort of both the Mungiki and the Kenya Police. As the Prosecution clearly stated during the oral hearings, *"the organizational policy was implemented by one, using the Mungiki to conduct retaliatory attacks; and two, using the police to create a free zone for the Mungiki attacks. Both aspects of the common plan were essential to the plan's success"*.[149] In essence, police facilitation of the attacks was, as recognised by HHJ Kaul, *"almost a conditio sine qua non-for success of their operations"*.[150]

99. The Prosecution added that the free zone "*allowed for the implementation of the common plan"* and that *"for us that is very important."*[151] The Prosecution further argued that in creating the free zone, Mr. Muthaura and Mr. Ali adopted two lines of action: first, they ordered the unhindered movement of the Mungiki and pro-PNU youth from Nairobi and Central Province to Rift Valley; second, despite accurate intelligence, Mr. Ali ensured that the members of the Kenya Police in Naivasha and Nakuru were not adequately resourced to protect perceived ODM supporters during the attacks.[152]

100. Indeed it was evident throughout the confirmation hearing that the police component was essential, if not indispensible, to the attainment of the objectives of the alleged common plan. For instance, in the presentation of its case, the

[148] Dissenting Opinion, ICC-01/09-02/11-382-Red, paras 5-6.
[149] ICC-01/09-02/11-T-6-ENG, p. 14, lines 11-14.
[150] Dissenting Opinion, ICC-01/09-02/11-382-Red, para 17.
[151] ICC-01/09-02/11-T-4-ENG, p. 54, lines 3-5.
[152] ICC-01/09-02/11-T-6-ENG, p. 8, lines 17-23.

Prosecution stated that one of the attributes of the organizational policy was that the organization in question had the capacity to perform acts which infringe on basic human values[153] and that, by combining the powers and authority of the Mungiki and the Kenya Police, the Suspects in this case created an organization with both government and private resources with the capacity, an enormous capacity, to commit violence.[154] The Prosecution further argued that Mr. Muthaura brought with him the Kenya Police, over whom he exercised *de facto* authority and Mr. Kenyatta brought with him the Mungiki and that they combined these forces and together exercised command over this *ad hoc* criminal organization.[155] These two structures, the Kenya Police and the Mungiki, became a single *ad hoc* organization for the purpose of implementing the alleged organizational policy of Mr. Kenyatta and Mr. Muthaura. These two structures co-ordinated their actions and worked together towards the alleged goal of retaliating against ODM supporters.[156]

101. The significance of the Kenya Police in the 'organization structure' postulated by the Prosecutor did not escape the attention of HHJ Kaul who noted in his dissenting opinion that the Prosecutor's presentation of the case in the Amended Document Containing Charges was "*premised on the assumption that the 'organization' in question basically rests on two pillars: the Mungiki and the Kenyan Police*". The Learned Judge further noted that in the Document Containing the Charges and throughout the hearing, the Prosecutor contended that the widespread and systematic attack was made possible by this "alliance" of both stakeholders, forming one 'organization'.[157]

[153] ICC-01/09-02/11-T-5-CONF-ENG, p. 9, lines 8-9.
[154] ICC-01/09-02/11-T-5-CONF-ENG, p. 17, lines 21-24.
[155] ICC-01/09-02/11-T-5-CONF-ENG, p.17, line 25; p.18, lines 1-4.
[156] ICC-01/09-02/11-T-5-CONF-ENG, p. 22, lines 3-5, 7-8.
[157] Dissenting Opinion, ICC-01/09-02/11-382-Red, para 10.

102. Thus, when the Majority found that the Mungiki alone, without the Kenya Police, represented the 'organization structure', the Chamber removed a critical component of the 'organization' that allegedly committed the crimes.

103. In the decision on the summonses, the Majority found that the *"the distinction between "organizations" under article 7(2)(a) of the Statute and other groups that do not amount to such qualification should be drawn on whether the group has the capability to perform acts which infringe on basic human values"*. The Chamber further held that the following criteria may be included in its assessment concerning the definition of an organization: *"(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group has criminal activities against the civilian population as a primary purpose; and (iv) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population"*.[158]

104. The Chamber explicitly endorsed the above legal definition in its decision on the confirmation of charges.[159] Notwithstanding the importance attributed in the summonses decision to the issue as to whether the organization has the capacity to infringe on basic human values, the Majority failed to apply this criterion to the Prosecution evidence in its confirmation decision. This criterion was of particular importance given that the Prosecutor's case, as outlined in the DCC, asserted firstly, that the organization was comprised of Mungiki and the Kenya police, and secondly, that the capacity of this organization to infringe basic values depended on specific actions of the police.[160] The finding of the Chamber that the police forces were *not* involved in the electoral violence

[158] ICC-01/09-02/11-01, para 21.
[159] Majority Decision, ICC-01/09-02/11-382-Red, para 112.
[160] ICC-01/09-02/11-T-6-ENG, p. 14, lines 11-14.

should therefore have been dispositive of the issue as to whether the definition of organization was met.

105. Additionally, clear Prosecution evidence that the Mungiki needed assistance to be transported from Nairobi or Central Province to Nakuru and Naivasha, and to be provided with weapons and uniforms as well as funding suggests that the Mungiki by itself did not have the capability to commit widespread or systematic attacks against a civilian population.[161] Put differently, the Chamber ought to have found that even on its own definition of organization, the group (the Mungiki alone) did not have the capability to perform acts which infringe on basic human values. Clearly therefore, and as correctly stated by HHJ Kaul, having been deprived of the second pillar in the organizational structure, it is doubtful the Mungiki could have launched, on their own, a widespread or systematic attack against a civilian population.[162] Significantly, the 'organization' without the Kenya Police does not satisfy this significant criterion established by the Majority.

106. HHJ Kaul correctly summarized the Prosecution case and evidence placed before the Chamber by the parties in the following terms:

> *"[A]ccording to the Prosecutor, the Mungiki apparently required substantial assistance from others in order to commit the crimes in Naivasha and Nakuru town. They purportedly received funding, uniforms and weapons, and had to be transported to different parts of the country. According to the Prosecutor, the Mungiki benefited from a "free zone", allegedly facilitated by the Kenyan Police, for the purposes of the attack, which was vital - almost a conditio sine*

[161] A few examples of Prosecution evidence are: PW-10, EVD-PT-OTP-00674 at 0552; BBC report, EVD-PT-OTP-00163 at 0186-0187; EVD-PT-OTP-00341 at 2179; PW-12, EVD-PT-OTP-00665 at 0394.
[162] Dissenting Opinion, ICC-01/09-02/11-382-Red, para 18.

> *qua non - for the success of their operations. In this connection, it is noteworthy that the Mungiki apparently successfully negotiated a temporary end to extra-judicial killings of Mungiki members by Government forces in order to perform their activities unhindered. The foregoing leads me to conclude that had the Kenyan Police allegedly not abstained, had the Mungiki not received money, uniforms and weapons, and had they not been transported to different parts of the country, they would not have been able to launch the alleged large-scale attack against Kenyan civilians over a large geographical area. Even if, arguendo, the Mungiki "relied on external funding" in the "commission of particular crimes", their need for financial support, regardless of its extent, shows that they do not have sufficient means to commit crimes on a large scale. Therefore, I am at pains to understand how this 'organization', heavily dependent on outside logistical support, could satisfy the criteria."*[163]

107. Given, therefore, the central place that the police component is supposed to have occupied in the execution and attainment of the objectives of the common plan in respect of the crimes in Nakuru and Naivasha and the apparently indispensible role attributed to it in the commission of the crimes, the Majority erred in finding that the Mungiki alone, without the Kenya Police, satisfied one of the fundamental criteria set by the Chamber itself, namely that the organization in question possessed the means to carry out a widespread or systematic attack against a civilian population.[164]

108. This error invalidates the confirmation decision. The Appeals Chamber is respectfully requested to reverse the decision.

---

[163] Dissenting Opinion, ICC-01/09-02/11-382-Red, paras 17-18.
[164] ICC-01/09-02/11-01, para 21.

The Majority erred in Law by Failing to Inform the Suspects of the Fundamental Re-Characterization of the Case and Affording them Adequate opportunity to Respond to the New Characterization

109. As a preliminary matter, the Defence submits that the Chamber's decision to fundamentally alter the Prosecutor's theory of the organizational policy and his presentation of the facts to conclude that the Mungiki alone represented the 'organization' constitutes a question of procedural fairness and one which the Defence are entitled to challenge within this appeal. As the Appeals Chamber has held, although Article 82(1)(a) of the Statute does not detail the grounds on which an appeal under the provision may be based, this does not preclude a party raising any grounds, either substantive or procedural, that may be germane to the legal correctness or procedural fairness of the Chamber's decision.[165]

110. Article 67(1)(a) of the Statute stipulates that the Accused has a right "to be informed promptly and in detail the nature, cause and content of the charge [...]" It is in this context that Regulation 52(b) of the Regulations of the Court provides that the document containing charges shall include 'a statement of the facts [...] which provides a sufficient legal and factual basis to bring the person or persons to trial including *relevant facts for the exercise of jurisdiction by the court* (emphasis added). In light of these provisions, any proposed amendment of the charges or modification of the legal characterisation of facts must be laid out with adequate notice, specificity, precision and certainty. Only then can the suspect or accused prepare a defence capable of effectively challenging the validity of the charges against him. Moreover, the Chamber would be

[165] *Prosecutor v Kony* et al., Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408 OA 3, paras 46-47.

exceeding its mandate if it departed from the Prosecutor's stated factual basis when assessing jurisdiction without affording the suspect the opportunity to examine and respond to the new factual basis.

111. In all criminal proceedings, fairness demands that the Defence be given reasonable notice of any amendment of charges, re-characterisation or modification of facts. Article 67(1)(b) provides that the Accused must be given *"adequate time and facilities for the preparation of the defence […]"* To permit the amendment and/or re-characterization of charges at any time without reasonable or any notice to the suspect or accused would constitute a gross violation of their rights.

112. In the Amended DCC and throughout the course of the confirmation hearing, the Prosecution's case was predicated on the assumption that "the 'organization' in question rested on two equally indispensible pillars: the Mungiki and the Kenyan Police". The Defence dedicated a great deal of its investigative resources to unearthing evidence to show that the so-called Police-Mungiki alliance was a figment of the Prosecutor's imagination and not borne in reality.[166] Indeed, the Defence expended significant time and resources to

[166] The Defence responded to the Prosecution's case as presented by investigating the existence of the alleged *ad hoc* organization and whether the events in Nakuru and Naivasha were the result of an organizational policy of such an organization within the meaning of article 7(2)(a). The Muthaura defence for instance presented 53 witnesses all of whom gave statements responding to the ad hoc organization and its policy as alleged by the Prosecution. These defence witnesses testified that Mr. Muthaura did not have any *de jure* or *de facto* authority to give any orders the police (see for example D12-3, EVD-PT-D12-00090, para 13-14; D12-4, EVD-PT-D12-00053, paras 16-17, 24-31; D12-5, EVD-PT-D12-00063, paras 6-20; D12-13, EVD-PT-D12-00062, paras 10, 18-19; D12-14, EVD-PT-D12-00038. paras 9-10; D12-18, EVD-PT-D12-00088, paras 4-7, 16-18) and that he actually did not give the alleged orders (see for example D12-42, EVD-PT-D12-00205, paras 4-7; D12-22, EVD-PT-D12-00069, para 7). The Defence also provided the Chamber with NSAC minutes which show the recommendations made by the committee under the chairmanship of Mr. Muthaura disproving the Police-Mungiki alliance theory of the ad hoc organization alleged by the Prosecution (see for example EVD-PT-D12-00016 at 0109). Defence Witnesses also gave testimony showing that the violence in Nakuru and Naivasha was devoid of police complicity (see for example D12-9, EVD-PT-D12-00064, paras 13-19; D12-38, EVD-PT-D12-00052, paras 20-23; D12-21, EVD-PT-D12-00178 at 00013; D12-30, EVD-PT-D12-00105, paras 22-23;

collect evidence on the nature of the Mungiki organization, its membership and its relationship with the police before, during and after the post election violence. These investigations were aimed at showing that the relationship postulated by the Prosecutor was not factual.

113. In addition, during the confirmation hearing and in its written submissions, the Defence responded to allegations on the role of the police in order to show that (i) the police did not create a free-zone for Mungiki crimes, but rather did what it could to protect civilians and prevent crimes; and (ii) that the so-called relationship between the police and Mungiki could not have existed because the police could not have operated with the Mungiki.[167]

114. The Defence also sought to establish that a central tenet of the Prosecution's case – that Mr. Muthaura was in charge of the Kenya police and security apparatus – was completely erroneous. The Prosecution had unequivocally asserted that Mr. Muthaura's essential contribution to the alleged common plan was by virtue of his alleged command of the Kenya police and security apparatus.[168]

115. Furthermore, in the case presented by the Prosecution, the principal players in the *ad hoc* organization are supposed to have been Muthaura and Kenyatta[169] as shown above. Maina Njenga did not feature in the hierarchy of this *ad hoc* organization. In the decision however, besides the abandoning of the police element, the Majority introduced Maina Njenga as the person with the

---

D12-10, EVD-PT-D12-00065, paras 12-43); a fact that Pre-Trial Chamber II agreed with in its Majority Decision.

[167] ICC-01/09-02/11-T-6-ENG, p. 64, lines 3-25; p. 65, lines 1-25; p. 7, lines 1-5; p. 67, lines 2-7; Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing**,** ICC-01/09-02/11-374-Red, paras 86-100.

[168] ICC-01/09-02/11-T-5-CONF-ENG, p. 21, lines 20-25, p. 22 lines 1-2.

[169] ICC-01/09-02/11-T-5-ENG, p. 21, lines 18-25; Amended DCC, ICC-01/09-02/11-280-AnxA, para 84.

exclusive control of the Mungiki which now alone becomes the 'organization' that was used to commit the crimes. The sudden introduction of Maina Njenga as the person with exclusive control over the 'organization', coupled with the amputation of the Kenya Police from the *ad hoc* organizational structure marks a fundamental shift from the case as originally presented and amounts to a wholesale re-characterization that should have obliged the Chamber to afford the defence the opportunity to respond to the new case.

116. The Majority's re-characterisation of the charges, representing as it does, a fundamental shift in redefining the Prosecution case, without informing the Defence as to the nature, cause and content of the re-characterised charges, or affording the Defence the opportunity to respond to them, amounts to a fundamental violation of the rights of the Suspects pursuant to Article 67 of the Statute.

117. Dealing with the issue of modification of the legal characterisation of facts in the course of a trial, the Appeals Chamber in *Prosecutor v. Lubanga Dyilo* ruled that human rights law demands that the modification of the legal characterisation of facts in the course of the trial must not render the trial unfair and that Article 67(1)(b) of the Statute provided for the right of the accused person to "have adequate time and facilities for the preparation of the defence". The Appeals Chamber in this regard cited Regulation 55(2) and (3) which set out several stringent safeguards for the protection of the rights of the accused.[170]

118. Furthermore, the Trial Chamber in *Prosecutor v. Bemba* accepted the *Lubanga* Pre-Trial Chamber's reasoning that the purpose of Article 61(7)(c)(ii) of the

[170] *Prosecutor v. Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2205 OA 15 OA 16, para 85.

Statute is to *"prevent the Chamber from committing a person for a trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence would not have had the opportunity to submit observations at the confirmation hearing"*.[171] It stated further that:

> *[…] The Chamber, as judicial guarantor of the proceedings, has to ensure that both parties are notified of material changes in the document containing the charges which is the subject matter of the proceedings in the present case. In particular the Chamber refers to article 67 (1) (a) of the Statute, which establishes that the accused shall be "informed promptly and in detail of the nature, cause and content of the charge (...)". If the Chamber were to read article 61 (7) (c) (ii) of the Statute in such a manner as to exclude the mode of liability, considerations of fairness would also arise since the Defence would be deprived of its rights to be informed promptly and in detail of the nature, cause and content of charges, in accordance with article 67 (1) (a) of the Statute, and of the opportunity to submit observations thereto.*[172]

119. A similar approach has been taken by the ICTY Appeals Chamber in *Kupreskic*, where the Chamber, ruling on an issue similar in principal to the current circumstances, emphasised the need to safeguard the rights of the accused:

> *"Were the Trial Chamber allowed to convict persons of a specific crime as well as any other crime based on the same facts, of whose commission the Trial Chamber might be satisfied at trial, the accused would not be able to prepare his defence with regard to a well-defined charge. The task of the defence would*

[171] *Prosecutor v. Lubanga Dyilo*, Decision on the Confirmation of charges, ICC-01/05-01/08-803-tEN, para 203.
[172] *Prosecutor v. Bemba*, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, ICC-01/05-01/08-388, para 28.

become increasingly onerous, given the aforementioned uncertainties which still exist in international criminal law. Hence even though the iura novit curia principle is normally applied in international judicial proceedings, under present circumstances it would be inappropriate for this principle to be followed in proceedings before international criminal courts, where the rights of an individual accused are at stake. It would also violate Article 21 (4) (a) of the Statute, which provides than an accused shall be informed "promptly and in detail" of the 'nature and cause of the charge against him.'"[173]

120. The European Court of Human Rights (the "ECHR") has also had occasion to rule on the related issue of re-characterization of a crime. In *Pelissier and Sassi v. France*, the ECHR was urged to overturn the decision of a French court to uphold a lower court's conviction of the Applicants on an alternative charge. It was argued by the Applicants that returning an alternative verdict entailed an obligation for arguments to be heard not only on the facts but also on whether such a verdict was justified, as the rights of the defence could be effectively exercised only if the trial court heard argument on the proposed alternative charge. The ECHR held that as the Applicants had not been able to contest the charge, since it was not decided on until deliberations, the Applicants had not had adequate time and facilities for the preparation of their defence. The ECHR agreed with the applicants arguing that in criminal matters, the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court may adopt in the matter, is an essential pre-requisite for ensuring that the proceedings are fair. In conclusion the court ruled as follows:

[173] *Prosecutor v Kupreskic,* Judgement, Case No. IT-9516-T, 14 January 2000, paras 738-740.

"The Court accordingly considers that in using the right which it unquestionably had to re-characterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. It finds nothing in the instant case capable of explaining why, for example, the hearing was not adjourned for further argument or, alternatively, the applicants were not requested to submit written observations while the Court of Appeal was in deliberation. On the contrary, the material before the Court indicates that the applicants were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the re-characterisation of the facts. Plainly, that was too late.

In the light of the above, the Court concludes that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence were infringed.

Consequently, there has been a violation of paragraph 3 (a) and (b) of Article 6 of the Convention, taken together with paragraph 1 of that Article, which provides for a fair trial."[174]

121. In *Sadak and Others v. Turkey*,[175] the ECHR was again faced with the question as to whether the re-characterisation of the Applicants' offences just before their sentence amounted to a breach of Article 6 of the

[174] *Pelissier and Sassi v. France,* Judgment, 25 March 1999, Application No. 25444/94, paras 61-63.
[175] *Sadak and Others v. Turkey*, Judgment, 17 July 2001, Application Numbers 29900/96, 29901/96, 29902/96 and 29903/96.

European Convention on Human Rights. The Turkish government argued that the National Security Court could not be criticised for making use of its right to reclassify the offences with which the Applicants had been charged to arrive at a characterisation that was less serious for the Applicants than the charge initially preferred by the Prosecution. The Court noted that it was necessary in the instant case to ascertain whether it was sufficiently foreseeable to the Applicants that the characterisation of the offence could be changed from the one of treason against the integrity of the State of which they were initially accused, to that of belonging to an armed organization set up for the purpose of destroying the integrity of the State.

122. The Court then made the following ruling which is relevant to the Majority's decision in the present case:

> *"The hearing on that accusation focused on the question whether the applicants' activities as such were likely to pose a real threat to the integrity of the state. Yet on being accused of belonging to an illegal armed organization the applicants had to convince the National Security Court both that they had not taken up a position within the hierarchical structure of the PKK and not been forced to abide by its disciplinary rules and that they had not been aware of belonging to that organization. In light of the foregoing, the Court considers that belonging to an illegal armed organization did not constitute an element intrinsic to the offence of which the applicants had been accused since the start of the proceedings. The Court therefore considers that in using the right which it unquestionably had to re-characterise facts over which it properly had jurisdiction, the Ankara National Security Court should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner, particularly by giving them the*

necessary time to do so. The case file shows that the National Security Court, which could, for example have decided to adjourn the hearing once the facts had been re-characterised, did not give the applicants the opportunity to prepare their defence to the new charge, which they were not informed of until the last day of trial, just before the judgement was delivered, which was patently too late....the Court concludes that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence were infringed."[176]

123. For all the above reasons, the decision of the Majority to re-characterise the nature of the organization as alleged by the Prosecution, without affording the Defence the opportunity to respond to the re-characterised facts, constitutes an error that invalidates the decision to confirm the charges against Mr. Muthaura and Mr. Kenyatta. The Defence respectfully seeks the intervention of the Appeals Chamber in order to reverse the impugned decision.

[176] *Sadak and Others v. Turkey*, Judgment, 17 July 2001, Application Numbers 29900/96, 29901/96, 29902/96 and 29903/96, paras 57-59.

VII. FOURTH GROUND

124. The Majority erred in fact by concluding that the Mungiki qualified as an 'organization' within Article 7(2)(a) of the Statute.

(A) Particulars of the Error

125. The Majority erroneously found that "there were substantial grounds to believe that the Mungiki qualified, *at the relevant time*, as an organization within the meaning of Article 7(2)(a) of the Statute." The Majority based this decision on its finding that there was sufficient evidence that: (i) the Mungiki was a hierarchically structured organization; (ii) there existed an effective system of ensuring compliance by members with the rules and orders imposed by higher levels of command; (iii) the Mungiki was a large organization and included a trained quasi-military wing; and (iv) it controlled and provided in certain parts of Kenya, essential social services, including security.[177]

126. More particularly, the Majority held that the Mungiki fulfils the requirements of an 'organization' because: (i) the Mungiki operated at the *relevant time* as a hierarchical organization with defined roles for members at different levels with Maina Njenga having exclusive control over the organization;[178] (ii) the existence, at the *relevant time*, of an effective system of ensuring compliance by members of the Mungiki with the rules of the organization;[179] (iii) the Mungiki organization possessed, at the *relevant time*, quasi-military capabilities;[180] (iv) the Mungiki activities [approximate]

[177] Majority Decision, ICC-01/09-02/11-382-Red, para 228.
[178] Majority Decision, ICC-01/09-02/11-382-Red, paras 190-206.
[179] Majority Decision, ICC-01/09-02/11-382-Red, paras 207-213.
[180] Majority Decision, ICC-01/09-02/11-382-Red, para 214.

those of a public authority in certain slums as well as in the Central Province;[181] and (v) that the Mungiki has criminal activities against the civilian population as a primary purpose.[182]

127. The Majority further erred in fact by including 'pro-PNU Youth' within the Mungiki gang.[183]

128. For the reasons detailed above, the Majority found that there were substantial grounds to believe that the Mungiki was indeed an 'organization' as contemplated by the Statute.

(B) Defence Submissions

129. The Defence refers to its submissions above in paragraphs 31 to 77 in respect of the Second Ground of Appeal, and submits that, for the reasons stated therein, the Majority erred in law by adopting an incorrect interpretation of the notion of 'organization' within the meaning of Article 7(2)(a) of the Statute. Notwithstanding the Majority's legal error, the Chamber erred in fact by concluding that the Mungiki qualified as an 'organization', on the basis of its own erroneous definition.

130. The Defence respectfully concurs with and adopts the reasoning of the HHJ Kaul and requests the Appeals Chamber to adopt the factual findings of HHJ Kaul that the Mungiki is nothing more than *"a violent criminal and organised criminal gang operating mainly in the slums of Nairobi, primarily*

[181] Majority Decision, ICC-01/09-02/11-382-Red, paras 216-219.
[182] Majority Decision, ICC-01/09-02/11-382-Red, para 220.
[183] Majority Decision, ICC-01/09-02/11-382-Red, para 123.

engaged in illegal economic activities and organised crime just like any other well-known criminal organization in other countries." The Mungiki does not reach the level of a State-like organization within the meaning of Article 7(2)(a) of the Statute.[184]

131. As argued by the Defence at paragraphs 63 to 66 above, it is submitted that the criteria established by the Majority for the purpose of determining what constitutes an 'organization' under Article 7(2)(a) is flawed and otherwise erroneous. However, even assuming *arguendo* that the Majority articulated the correct criteria for a determination of whether a non-State actor *"has the capability to perform acts which infringe on basic human values"* so as to amount to an 'organization' envisaged by Article 7(2)(a) of the Rome Statute,[185] the Defence submits that the facts relied upon by the Majority and the evidence placed before the PTC did not satisfy the test articulated by the Majority, and do not establish that at the time of the events under consideration the Mungiki qualified as an 'organization' within the meaning of the Rome Statute.

132. To this end, the Defence submits that the Majority failed to assess the evidence before it properly, or in its entirety. The Majority not only failed to assess the Prosecution evidence as a whole on matters relevant to the criteria set out by the Majority Decision, but also improperly dismissed relevant Defence evidence without according it any or any proper consideration.

[184] Dissenting Opinion, ICC-01/09-02/11-382-Red, paras 15-16.
[185] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, paras 90 and 93.

(i) The Mungiki was a hierarchically structured organization

133. The Majority found the Mungiki operated at the *relevant time* as a hierarchical organization with defined roles for members at different levels, with Maina Njenga exercising exclusive control.[186] This was despite the fact that the evidence placed before the Chamber established that the Mungiki was *not* a hierarchically organized structure at the relevant time and that Maina Njenga did *not* have exclusive control thereover. The Defence emphasises that the crucial period in respect of determinations concerning the status, form and command structure of the alleged Mungiki organization is during the PEV.

134. The Chamber disregarded a wealth of Prosecution evidence demonstrating that the Mungiki was still very much a "family affair";[187] that it "did not have a highly centralized organizational structure […] [and] that the group may have sub-organizations that are in competition with each other";[188] that "the sect is described as "amorphous";[189] that "the Government doesn't have a clue how to stop [the Mungiki] because they are dealing with an amorphous group with few known leaders";[190] that the Mungiki is merely a "criminal group";[191] and that it is simply a "loose grouping".[192]

135. The Chamber failed to properly appreciate the significance of the Prosecution evidence of government crackdowns on the Mungiki criminal gang, including the impact of the incarceration of Maina Njenga on

[186] Majority Decision, ICC-01/09-02/11-382-Red, paras 190-206.
[187] EVD-PT-OTP-00282 at 0274.
[188] EVD-PT-OTP-00275 at 0118.
[189] EVD-PT-OTP-00275 at 0119.
[190] EVD-PT-OTP-00275 at 0119.
[191] EVD-PT-OTP-00177 at 0302, 0304.
[192] EVD-PT-OTP-00283 at 0276.

command and control of the members of the gang and the existence of the so-called "hierarchically structured Mungiki organization", which was significantly weakened and virtually non-existent at the time of the PEV. For instance, it was stated in Prosecution evidence *"that the group's involvement in December 2007 electoral process appears insignificant. It will be remembered that by the end of 2007, the group's leadership was on the run following a fierce crackdown by the police."*[193] Further, Human Rights Watch (in a report relied on by the Prosecution and referred to in the Majority Decision) reported that *"in 2002, the Mungiki was a well established group with large numbers of followers but since then "the government has cracked down on them. In 2007, the group was been driven underground and badly weakened."*[194]

136. The Chamber misstates the evidence of Witness PW-9 at paragraph 192 of the Majority Decision. Contrary to the assessment of the Majority, the witness actually states that during the PEV, while Maina Njenga was in prison, he was merely informed about what was going on, but there was a "large number of people who also command the people to do certain things so **it wasn't just him"**.[195] This constitutes clear evidence that Maina Njenga did not have exclusive control over the Mungiki.

137. The Majority did not fairly assess the evidence of Witness PW-11 when deciding to rely on it to support the factual finding that the Mungiki was a hierarchical organization.[196] The Majority failed to consider the evidence of Witness PW-11 in its entirety and failed to consider the most pertinent aspect of the witness's testimony on the issue as submitted by the

[193] EVD-PT-OTP-00081 at 0038.
[194] EVD-PT-OTP-00002 at 0294.
[195] Statement of PW-9, EVD-PT-OTP-00641.
[196] Majority Decision, ICC-01/09-02/11-382-Red, paras 193, 197 199.

Muthaura Defence.[197] This key Prosecution witness stated that the Mungiki was split at the time of the 2007 elections and during the PEV. The Mungiki had no identifiable national leader who was able to issue instructions to others at the time. The Mungiki's recognized leader – Maina Njenga – was in jail. The Prosecution failed to identify any particular individual who was acting in his place. Witness PW-11 also suggested that, as a group, it was hard for the Mungiki to get a 'green light' from their leaders.[198]

138. Witness PW-11 states that although Maina Njenga would usually come up with the ideas and delegate it to Charles Wagacha for execution, this was **not** the case during the period of post election violence relevant to the charges brought against Mr. Muthaura and Mr. Kenyatta. The witness was clear in his evidence in this regard: *"That is the normal way when we can decide something […] but during the PEV the group was divided"* with some supporting the ODM and some supporting the PNU.[199] The Prosecution's own evidence further demonstrated that there was no national forum where the Mungiki leadership sat down and planned the attacks but that instead, small groups of Mungiki would plan these attacks in their own way. Witness PW-11, for example, stated that the Mungiki was divided, that it was only a group of 17 or 20 Mungiki that were involved and *that "every group would plan their attacks in their own way. There was no national platform where Mungiki sat down and planned these things […] [and] the only Mungiki that moved from one location to another to help others were Mungiki from Thika"*.[200]

---

[197] Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing, ICC-01/09-02/11-374, para 106.
[198] EVD-PT-OTP-00309 at 1307, lines 60-65.
[199] EVD-PT-OTP-00318 at 1450, lines 652-662.
[200] EVD-PT-OTP-00309 at 1308, lines 126-129.

139. The Majority additionally failed to consider Prosecution evidence that *"[t]he leadership claims that former Mungiki leader Ndura Wariunge is recruiting "defectors" to a "fake Mungiki" and mobilizing youth to order for politicians and businessmen in the Rift Valley. The distinction between the various Mungiki factions will be an important one for a court to determine when identifying those behind the recent violence, but as far as the victims are concerned, it makes little difference who wielded the machete or threw the match. Victims commonly refer to any group of marauding Kikuyu youth as 'Mungiki'. In fact the over-use and mis-use of the label serves the attackers well since the very name instils terror."*[201]

140. The Majority also failed to consider Defence evidence demonstrating the amorphous nature of the group, the lack of any identifying features of the Mungiki, the lack of uniforms and/or coherent purpose of origin or aim.[202] The Majority further failed to consider Defence evidence that the Mungiki lacked any coherent ideology as evidenced by its transient support for different religious movements and shifting and divided political alliances, with the majority of the Mungiki in fact supporting the ODM.[203] Relying on the evidence presented at an earlier stage of these proceedings, HHJ Kaul correctly noted that *"it appears from the evidence that the Mungiki, an illegal gang of organized crime, has established parallel structures in the poorer parts of the country, notably the slums of Nairobi, where there is no effective State*

[201] EVD-PT-OTP-00002 at 0294.
[202] ICC-01/09-02/11-T-12-CONF-ENG, p. 18, lines 18-20; EVD-PT-D13-00491 at 0475, para 37; EVD-PT-D13-00504 at 0524, para 62 and 0543, para 71; EVD-PT-D13-00547 at 0749–0750, para 4; EVD-PT-D13-00557 at 0861, para 6; EVD-PT-D14-00036; EVD-PT-D14-00056 at 0020; EVD-PT-D14-00059 at 0029; EVD-PT-D14-00065 at 0049; EVD-PT-D14-00066 at 0053; Statement of Witness D12-37, EVD-PT-OTP-00054, para 13.
[203] EVD-PT-D13-00320 at columns 1 and 3; EVD-PT-D13-00344; EVD-PT-D13-00352; EVD-PT-D13-00359; EVD-PT-OTP-00652 at 0115; EVD-PT-OTP-00655 at 0191; EVD-PT-OTP-00656 at 0199; EVD-PT-OTP-00668 at 0458; EVD-PT-OTP-00248 at 0028, para 130; EVD-PT-OTP-00307 at 1285, lines 341-346; EVD-PT-OTP-00178 at 03341; EVD-PT-OTP-00013 at 0058, para 256; EVD-PT-OTP-00677; EVD-PT-OTP-00676; EVD-PT-OTP-00591 at 0073; Statement of Witness D12-48 (EVD-PT-D12-00201, para 11).

authority, and engages in criminal activities. The evidence further suggests that the Mungiki gang has in the past shown a certain degree of flexibility in supporting various political parties as a means to advance its own interests."[204]

141. The Defence submits that if the Majority properly and fairly considered all the evidence before it, it would have found that the Prosecution evidence did not satisfy its own stated criteria, which required it to establish that the Mungiki criminal gang amounted to an 'organization' within the meaning of Article 7(2)(a) of the Rome Statute.

142. Even if, for the sake of argument, the Mungiki did at some point have a hierarchical structure with Maina Njenga in command, the evidence is clear, as submitted above, that this was certainly not the case in 2007 or 2008 during the PEV period. The Defence submits that no reasonable tribunal of fact or law would have found otherwise.

(ii) <u>The existence, at the relevant time, of an effective system of ensuring compliance by the members of the Mungiki with the rules of the organization</u>

143. The Majority has improperly considered the alleged Mungiki oathing process as a mechanism for ensuring compliance by Mungiki members of the edicts of the Mungiki gang.

144. The Majority relies on Prosecution evidence describing the recruitment and oathing process. Apart from the fact that the accounts of the various

[204] Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-3, para 29.

Prosecution witnesses relied on by the Majority on this issue are inconsistent, (Prosecution Witness PW-4 describing a situation where he was forcefully recruited and an oathing ceremony which involved the drinking of blood,[205] Prosecution Witnesses PW-9 and PW-12, who describe having joined voluntarily and Witness PW-12 describing an oathing ceremony which was similar to the baptism process in a church where there was no drinking of any blood or eating of raw meat),[206] none of these witnesses, nor any Prosecution evidence presented at the Confirmation hearing, demonstrates any instance of a Mungiki member being killed or punished for breaking rules or for defecting from the gang. The Majority refers to the Prosecution witnesses as "former" Mungiki members.[207]

145. The Majority has improperly assessed the evidence before it on the issue of the oathing process. If the Majority had properly considered the so-called oathing process, as attested by Prosecution and Defence witnesses, it would not have arrived at a conclusion that such a process was a mechanism demonstrating "an effective system of compliance". It is not a correct characterisation of the evidence to assert that Mungiki membership was drawn entirely by coercion. Indeed, the evidence discloses that whilst some members were coerced, others freely joined because it represented a re-asserting of Kikuyu identity.[208] The Defence submits that this is important because the inference drawn by the Majority was in fact contrary to the evidence. Prosecution Witness PW-9 for instance, describes that at the time he joined the Mungiki gang it was a *"kikuyu youth group […] the people who fought for Kenya […] who don't have anything"* and up till now, the witness still thinks that the Mungiki *"was a good group. Basically,*

[205] Statement of PW-4, EVD-PT-OTP-00248, paras 33, 37.
[206] Majority Decision, ICC-01/09-02/11-382-Red, paras 208-209; Statement of PW-12, EVD-PT-OTP-00648 at 0034-0036.
[207] Majority Decision, ICC-01/09-02/11-382-Red, para 208.
[208] EVD-PT-OTP-00002 at 0294; Statement of PW-9, EVD-PT-OTP-00634 at 0044-0045; EVD-PT-OTP-00081 at 0038-0042.

they were fighting about the Kikuyu people […] so still I would think it was […] a good group to join".[209] In the same vein, Defence Witness D12-37 describes the Mungiki as a movement whose *"objective was to improve the lives of the youth"*.[210] D12-37 joined the Mungiki voluntarily as a result of *"his closeness to the youth"* with whom he was working as part of his community work.[211]

146. In addition to Defence Witnesses D12-37 and D12-48, Prosecution Witness PW-12 also describes the oathing process as a "cleansing process" symbolising spiritual purification and the chasing away of evil. The witnesses explain the process as being similar to what happens during a baptism in a Catholic Church.[212] The religious background of the group involving conversions of the leaders to different faiths underscores the lack of coherence in the structure.

147. Defence evidence on this issue buttresses other core Prosecution evidence regarding the Mungiki gang presented at the confirmation of charges hearing – none of which was properly considered by the Majority. This evidence includes the following:

a. Mungiki members have not been killed or punished for defecting. The Majority acknowledges that Prosecution witnesses are "former" Mungiki members[213] which carries the necessary implication that these individuals have not been killed or punished for leaving the organization. This is corroborated by Defence Witness D12-37;[214]

[209] Statement of PW-9, EVD-PT-OTP-00634 at 0044-0045.
[210] KEN-D12-0001-0412 at 0415, para 18.
[211] KEN-D12-0001-0412 at 0415, para 19.
[212] Statement of PW-12, EVD-PT-OTP-00648 at 0033; Statement of D12-37, EVD-PT-D12-00054, para 19; Statement of D12-48, EVD-PT-D12-00201, para 16.
[213] Majority Decision, ICC-01/09-02/11-382-Red, para 208.
[214] Statement of D12-37, EVD-PT-D12- 00054, para 22.

b. Membership is voluntary – the Majority acknowledges or does not dispute that Witnesses PW-9, PW-10 and PW-12 took the oath voluntarily. Defence witnesses D12-37[215] and D12-48[216] state that they joined the Mungiki voluntarily;

c. The "oathing" process is more of a cleansing process to symbolise spiritual purification;[217]

d. There is no such thing as "secrecy" of the oathing process – the fact that the Prosecution and Defence witnesses who are former Mungiki members have given detailed accounts of the "oathing" process[218] and the fact that the actual baptism/oathing process has been shown on public television and described in public records[219] is clear evidence that there is little or no "secrecy" involved.

148. The fact remains that "oathing" or "cleansing" ceremonies are rituals which are symbolic of many African tribal customs and traditions practiced in Kenya.[220]

149. The Defence submits that the Majority finding that the Mungiki gang had a quasi-judicial system of enforcing its rules at the time of the events is simply not supported by evidence. The Majority has failed to consider whether or not, even if such a system previously existed, it actually existed "at the relevant time" i.e. during the PEV. That Prosecution witnesses were referring to a very different time period is clear from the evidence of Prosecution Witness PW-4 himself, who states "I have seen one Mungiki court session […] sometime in 2003". Similarly, Prosecution Witness PW-11 gives information about the Mungiki

[215] Statement of D12-37, EVD-PT-D12- 00054, para 19.
[216] Statement of D12-48, EVD-PT-D12- 00201, para 10.
[217] D12-37, EVD-PT-D12-00054 at 0415, para 19.
[218] Majority Decision, ICC-01/09-02/11-382-Red, paras 208-209.
[219] EVD-PT-OTP-00616; EVD-PT-D12-00115 at 0115; EVD-PT-D12-00136 at 0182; EVD-PT-OTP-00177 at 0304-0306; EVD-PT-OTP-00208 at 0719; EVD-PT-OTP-00275 at 0117.
[220] Statement of PW-12, EVD-PT-OTP-00660 at 0292 and EVD-PT-OTP-00661 at 0312-0313.

courts in relation to events that were taking place in June 2001.[221] He confirmed that he himself never witnessed these court processes but only heard others speak about them.[222] When Prosecution witness PW-12 provides information about the Mungiki courts and the killing of defectors, he is clearly referring to what was taking place in this regard in the year 2002.[223] There is absolutely no evidence that during the PEV period, such a regime was in existence. Indeed the evidence was that by a confluence of Government action against the Mungiki criminal gang and internal splintering, the Mungiki was, by the time of the PEV, no longer the force it may once have been and certainly not as organized as the Majority determined.

150. The evidence relied on by the Majority in relation to these "kangaroo" courts, demonstrates that they were not simply intended to enforce the rules of Mungiki gang, but covered social issues such as the case of the man who was accused of drinking and beating his wife as described by Witness PW-4.[224] The Majority erred by relying on this evidence[225] as demonstrative of an "effective system of ensuring compliance by members of the Mungiki with the rules of the organization". The Majority had absolutely no evidence before it that during the relevant time period of the PEV, there was in place a mechanism in the form of quasi-judicial systems to ensure compliance with its rules.

151. The Chamber's findings on this issue are contradictory. Whilst on the one hand the Majority states that the existence of this court structure was to ensure enforcement of Mungiki rules[226], thereafter, the Majority seems to suggest that this court structure was in fact to serve the general population in the slum

[221] Statement of PW-11, EVD-PT-OTP-00305 at 1246-1250.
[222] Statement of PW-11, EVD-PT-OTP-00317 at 1430, lines 430-432.
[223] Statement of PW-12, EVD-PT-OTP-00657 at 0220-0221.
[224] EVD-PT-OTP-00248 at 0018-0019, para 8.
[225] Majority Decision, ICC-01/09-02/11-382-Red, para 213.
[226] Majority Decision, ICC-01/09-02/11-382-Red, para 213.

areas.[227] In any event, the Defence submits that that these Mungiki "kangaroo courts", taken at their highest, are no different from fraternities and sororities in universities which have mechanisms for trying their members who violate rules of the group. This does not transform these groupings into organizations capable of coming within the ambit of Article 7(2)(a) of the Rome Statute.

152. The Defence submits that if the Majority had properly assessed the evidence before it, it would not have arrived at the conclusion that there were substantial grounds to believe that at the time of the PEV the Mungiki had an "effective system of ensuring compliance" by its members of its rules. The Majority's erroneous finding in this regard constitutes a further discernable error for which appellate relief is justified.

(iii) The Mungiki organization possessed, at the relevant time, quasi-military capabilities[228]

153. The Defence submits that the Majority erred in fact in finding that, at the relevant time, the Mungiki possessed quasi-military capabilities and in any event, that that was a criteria which was capable of establishing that the Mungiki was an 'organization' as contemplated by the Rome Statute.

154. The Majority appears to have overly relied on the fact that Prosecution witnesses state that Mungiki members underwent military-like training to substantiate its finding on this issue. Interestingly, none of the Prosecution witnesses had themselves undergone such military training. This could, in part, explain why the Chamber did not have before it any evidence of the details of

[227] Majority Decision, ICC-01/09-02/11-382-Red, para 217.
[228] Majority Decision, ICC-01/09-02/11-382-Red, para 214.

the asserted training regime that members of the Mungiki criminal gang underwent, or evidence that it was a 'quasi-military' group. The only evidence giving any semblance of detail of this alleged 'quasi-military' training of the Mungiki originates from Prosecution Witness PW-4[229] – which does not go beyond stating that Mungiki were trained to behead people. In the absence of further evidence, there is nothing unique about members of a criminal gang beheading their victims. Such violence and other repugnant practices are features common to many criminal gangs around the world. Indeed, such debased and brutal acts are well within the capacity of individuals operating alone. The nature of an act such as beheading, however brutal, is an insufficient and inadequate basis from which to draw an inference that any training, let alone quasi-military training must have been required. Taken on its own, this fact and the evidence in this regard, does not add anything to the determination of whether or not the Mungiki was an 'organization' capable of infringing basic human values.

(iv) The Mungiki activities [approximate] those of a public authority in certain slums as well as in Central Province

155. The Defence submits that the Majority erred in fact when it drew a parallel between the criminal activities of the Mungiki and public authorities in Kenya. The Majority has relied on the following facts: (i) that the Mungiki operated a court system which applied not only to its members but to the general population in the slum areas; (ii) the Mungiki provided basic services to the

[229] The Majority relies on evidence of PW-11 (at footnote 395 of the Majority Decision) and PW-12 (at footnote 397 of the Majority Decision), which refer generally to a military group or military wing without any details of military or quasi-military training.

slums, such as security, electricity, water and public toilets; and (iii) the Mungiki granted protection from competing cartels to minibus drivers.[230]

156. It is unclear how the factual findings of the Majority, that the Mungiki activities [approximate] those of a public authority in certain slums as well as in Central Province, would ostensibly support any of the criteria established by the Majority to determine whether the Mungiki had the ability to infringe basic human values. In fact, by so finding the Majority contradicts its own criteria that the Mungiki "has criminal activities against the civilian population as a primary purpose".[231]

157. The Defence agrees with the findings of HHJ Kaul and respectfully requests that the Appeals Chamber be informed by HHJ Kaul's determinations that:

> *"the provision of illegal electricity connections, sanitation and protection in certain slums, however, does not place them on par with a state which provides a broad range of services to its population. Furthermore, so called "Mungiki Courts" cannot be equated in any way with a State's judicial apparatus, which covers all aspects of litigation for the entire population. Moreover the Mungiki are normally subjected to severe crackdowns by the Kenyan Police. Regardless of questions as to their legality, these are police operations as conducted against any criminal gang. In this context, the Mungiki arguably required the extra-judicial killings to cease in order to be able to operate outside their very limited sphere of influence (mainly the slums of Nairobi). This is a further clear indication that their capacity to act is far more limited than that of a State. Consequently, all of the above considerations*

[230] Majority Decision, ICC-01/09-02/11-382-Red, paras 216-219.
[231] This is a view shared by Associate Professor Thomas Obel Hansen: "The Policy Requirement in Crimes Against Humanity: Lessons from and for the Case of Kenya", *The George Washington International Law Review,* Volume 43 (2011).

militate against the assumption that the Mungiki were a State-like organization".[232]

158. The Defence submits that the evidence presented by the parties and placed before the PTC in the present case demonstrates that the Mungiki sought to exploit bus routes and extort money from the drivers of matatu buses.[233] There is also evidence to suggest that the Mungiki criminal gang have exploited the local population by controlling access to certain services.[234] Such activities constitute criminal extortion but, on any reasonable view, do not constitute evidence of the entity having State-like features, a formal requirement pursuant to the correct legal definition of 'organization'.

159. The evidence of Prosecution Witness PW-4 (cited by the Majority to support their findings in paragraph 216 and 219) clearly demonstrates that what the Majority describes as provision of "basic services in the slums" was in fact criminal exploitation of destitute communities by the Mungiki of resources which were already being provided to them by the State. The witness states that "*the Mungiki stole electricity from Kenya Power and Lighting company and sold it to the households. If one has a TV or a fridge the charge is higher*". The Witness states that the Mungiki also sold water and charged the people a fee for accessing public toilets. The evidence of this witness is not that the Mungiki were being paid for services they were properly providing, but that "*people pay because they have no choice. The ones who do not pay are beaten up*". [235]

160. On any view, the evidence of Mungiki activity in the slum areas of Nairobi is a classic example of criminal activities and acts committed by criminal gangs and

[232] Dissenting Opinion, ICC-01/09-02/11-382-Conf, para 16.
[233] EVD-PT-OTP-00081 at 0051; EVD-PT-Dl3-00547 at 0749, para 5; EVD-PT-D13-00557 at 0868, para 34.
[234] EVD-PT-OTP-00081 at 0038, para 1; EVD-PT-OTP-00177 at 0306, paras 6-7.
[235] Statement of PW-4, EVD-PT-OTP-00248, para 86.

cartels operating in impoverished areas in many, if not most, parts of the world. Groups like the Mungiki are not a purely Kenyan phenomenon. To equate such activities of extortion, theft and blackmail and to elevate these activities to those of a public authority is to do gross disservice to the public authorities that operate legitimately.

161. It is notable that the Majority did not draw any parallel with other cases pending before the ICC and other Tribunals. For instance, the Majority did not make any observations about whether or not there were any similarities between the Mungiki on the one hand and the Lord's Resistance Army of Uganda ("LRA"), the Forces Patriotiques pour la Libération du Congo ("FPLC"), Front des Nationalistes et Intégrationnistes ("FNI"), Force de Résistance Patriotique en Ituri ("FRPI") or the Revolutionary United Front of Sierra Leone ("RUF") on the other. The Defence submits that such parallels could simply not be drawn because the characteristics, objectives and motivations of those organizations are fundamentally different from the Mungiki criminal gang operating in certain slums in Kenya. The LRA, FPLC, FNI, FRPI and the RUF, the Defence submits, would be capable of amounting to an "organization" under the Statute, whereas the Mungiki is not.

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

162. The Defence submits that the Majority erred in fact in its findings concerning whether the Mungiki was a group that has criminal activities against the civilian population as a primary purpose, in order to determine whether or not it qualifies as an 'organization' under the Statute. The Majority found that this criteria was satisfied on the basis that "the evidence indicates clearly that

Mungiki activities must generally be seen as criminal, because they involve acts of violence and extortion of the population in areas of Mungiki activity".[236]

163. The Defence submits, even if, for the sake of argument, this was indeed a criteria for determining whether the Mungiki was an 'organization' as envisaged by the Statute, the facts relied on by the Majority do not support its finding on this issue. The Defence submits that to meet the required threshold it must be that the kind of crimes contemplated be of the same genus as the crimes within the jurisdiction of the ICC. If this were not the case, Fagan's group of orphans from Charles Dickens' "Oliver Twist" would arguably come within the jurisdiction of the ICC because they fall under a central command under the exclusive control of Fagan, they pilfered and pick-pocketed within a part of London in an area where the writ of the police was difficult to enforce. Fagan's "welfare home" providing food and shelter to a large number of orphans would be akin to the services provided by the public authority in the absence of a welfare state.

164. There is no factual allegation, let alone evidence before the PTC, that the Mungiki had as its primary purpose the commission of crimes akin to those crimes within the jurisdiction of this Court. Without a proper and disciplined approach to this criteria, the ICC would be transformed into a Court which would have jurisdiction over crimes which are exclusively within the authority of national courts, and as HHJ Kaul warned, this approach may "*expand the concept of crimes against humanity to any infringement of human rights*".[237]

[236] Majority Decision, ICC-01/09-02/11-382-Red, para 220.
[237] Dissenting Opinion, ICC-01/09-02/11-382-Red, para 53.

(vi) The Majority erred in fact by including "Pro-PNU Youth" within the Mungiki gang

165. The Majority attributed the crimes committed in Nakuru and Naivasha to the Mungiki, which it held constitutes an 'organization' within the meaning of Article 7(2)(a) of the Statute.[238]

166. The Defence submits that the Majority erred in finding that 'pro-PNU Youth' were a part of/within the Mungiki entity thereby broadening the membership of the group it alleged constituted the 'organization' within the meaning of Article 7(2)(a). The term "pro-PNU Youth" is not an 'organization' or part of any 'organization'. [239]

167. If the Majority had properly assessed the evidence, it would have been compelled to dismiss the present case for lack of jurisdiction. In addition to the arguments advanced elsewhere in the present appeal document, this combined grouping (Mungiki and 'pro-PNU Youth') does not satisfy the requirements of 'organization' even according to the Majority's own stated test.

Pro-PNU Youth did not Exist as an Identifiable Group and were never part of the Mungiki

168. At the outset, the Defence has centrally disputed the existence of any identifiable group called 'pro-PNU Youth'.[240]

[238] Majority Decision, ICC-01/09-02/11-382-Red, paras 118, 133.
[239] Majority Decision ICC-01/09-02/11-382-Red, para 123.
[240] ICC-01/09-02/11-372, paras 56-58; ICC-01/09-02/11-339, paras 63-64.

169. In paragraph 123 of the Decision, the Majority noted that the Amended DCC contains numerous references to 'pro-PNU youth', in the context of the mobilization, recruitment and payment of participants in the attack. It stated that, "*upon review of the submissions and the evidence, and as explained in greater detail the Chamber considers that the mobilized and newly recruited members formed an integral part of the Mungiki organization at the time and in the context of the events*" in Nakuru and Naivasha. For this reason, the Chamber did "*not find any distinction necessary and finds it appropriate to refer to the organization perpetrating the attack simply as the Mungiki*."[241] The Defence submits that this constitutes a fundamental and fatal error by the Majority which led to the erroneous conclusion that the group(s) that carried out the attacks in Nakuru and Naivasha qualified as an 'organization' within the meaning of the Statute and thus conferred jurisdiction over the case to the Court.

170. Throughout the proceedings and in all the filings before the Court, the Prosecution had always separated the label of 'pro-PNU Youth', notwithstanding the imprecision of its meaning, from the Mungiki as distinct and different. A few illustrations are detailed below:

a. At paragraph 57 of the Amended DCC, the Prosecution stated: *"The attacks entailed a high level of coordination between different Mungiki groups as well as between local and non-resident* ***Mungiki*** *members and* ***pro- PNU youth****. The attacks involved the: (1) distribution of weapons to direct perpetrators; (2) transportation of foreign* ***Mungiki*** *and* ***pro-PNU youth*** *from Central Province and Nairobi to the Rift Valley; (3) identification of perceived ODM supporters by* ***local pro-PNU youth****; (4) non-interference by the police; and (5) perpetration of acts of violence by groups of attackers moving together"*[242] (emphasis added).

[241] Majority Decision, ICC-01/09-02/11-382-red, para 123.
[242] Amended DCC, ICC-01/09-02/11-280-AnxA, para 57.

b. At paragraph 68 of the Amended DCC, the Prosecution states that:

*"The **Mungiki** members worked with **pro-PNU youth** burning, destroying and/or looting the property and businesses of perceived ODM supporters. They targeted and vandalized the houses of persons believed to be hosting or housing ODM supporters. The attackers forced **other PNU supporters** to join in the attacks and accused them of supporting the enemy when they refused"*[243] (emphasis added).

c. At paragraph 69 of the Amended DCC, the Prosecutor asserted:

*"The attackers used slogans saying all Luos should leave Naivasha and that they were going to "finish" the Luo. They forcibly circumcised Luo men. In one incident, a perceived ODM supporter was ambushed by a group of **pro-PNU youth** who cut off his testicles and placed them in his hands before cutting off his penis and putting it in his mouth. The next day, the victim's headless body was found lying on the road. The attackers had mutilated his body in front of his five- year old son"*[244] (emphasis added).

d. At paragraph 70 of the Amended DCC, the Prosecution stated:

*"In another incident, the **Mungiki** and **pro-PNU youth** targeted a house in Naivasha where a perceived ODM supporter was known to live. The targeted tenant had fled his house as soon as he saw the approaching attackers. In fleeing the house, he left women and children alone locked inside. The attackers poured petrol on the house, set it on fire and completely destroyed it. All 19 people who sought refuge inside, including two babies, were killed"*[245] (emphasis added).

171. The above examples clearly demonstrate the distinction made by the Prosecution between the Mungiki and 'pro-PNU Youth', a term never clarified in evidence. It was not alleged at any stage by the Prosecution that 'pro-PNU

[243] Amended DCC, ICC-01/09-02/11-280-AnxA, para 68.
[244] Amended DCC, ICC-01/09-02/11-280-AnxA, para 69.
[245] Amended DCC, ICC-01/09-02/11-280-AnxA, para 70.

Youth' were members of the Mungiki gang, neither is there any evidence to support such a proposition.

172. Whilst there may have been evidence that pro-PNU Youths participated in the attacks, it is clearly wrong to label them Mungiki. They simply were not. It is worth recalling that during the PEV any marauding Kikuyu youths were often referred to as "Mungiki". Indeed Human Rights Watch (a group whose reports were extensively relied upon by the Majority) observed that:

> *"Mungiki are a brutal criminal gang that promotes a violent brand of Kikuyu chauvinism. They emerged in the late eighties as a principally cultural and spiritual movement promoting Kikuyu heritage and culture, but increasingly became involved in organized crime in the slums of Nairobi in the 1990s. By 2002 they were a well established group with large numbers of followers and alleged ties to leading politicians. Since then the government has cracked down on them. In 2007 the group was driven underground and badly weakened through a violent government campaign aimed at its suppression. The Kenyan National Commission on Human Rights alleges that Kenya's police summarily executed at least five hundred suspected Mungiki members in the process. There are many rumors that individuals close to the Kibaki government have been involved in re-activating the Mungiki. But some leaders of the gang told Human Rights Watch that they remain opposed to the government and would not work with the Kibaki administration. The police apparently also believe that, "Mungiki high command are not involved," in recent attacks, but that the violence has, "all the hallmarks of Mungiki operations" The leadership claims that former Mungiki leader Ndura Wariunge is recruiting "defectors" to a "fake Mungiki" and mobilizing youth to order for politicians and businessmen in the Rift Valley. The distinction between the various Mungiki factions will be an important one for a court to determine when identifying those behind the*

recent violence, but as far as the victims are concerned, it makes little difference who wielded the machete or threw the match. Victims commonly refer to any group of marauding Kikuyu youth as 'Mungiki'. In fact the over-use and mis-use of the label serves the attackers well since the very name instils terror[246].

173. In fact, Prosecution Witness PW-9[247] clearly stated that "*most of the people who were registered to fight were not Mungiki*."

The Mungiki and Pro-PNU Youth do not constitute one organization and do not even satisfy the articulated criteria established by the Majority

174. Faced with Prosecution allegations that multiple participants were involved in the crimes alleged in the DCC (i.e. individual Mungiki members, and 'pro-PNU Youth'), the Majority sought to characterise them as one group in order to satisfy the criteria it had postulated in respect of the definition of 'organization' within the meaning of Article 7(2)(a) of the Rome Statute.

175. The Defence has previously submitted that the term 'pro-PNU Youth' is indeterminate, lacking precise meaning. There was no evidence before the Chamber to suggest that an entity known as 'pro-PNU Youth' existed, or that it was hierarchically organized or capable of formulating policy. There was no evidence that 'pro-PNU Youth' had a system of ensuring compliance among its members, or that it had quasi-military capabilities.

176. The evidence, properly considered, discloses that crimes in Nakuru and Naivasha were committed by mobs operating under no identifiable commander

[246] EVD-PT-OTP-00002 at 0294.
[247] EVD-PT-OTP-00643 at 0248.

or authority. While some Mungiki members may have participated in the attacks, they were not "Mungiki attacks" as such and the attackers were *not* one organized group nor did the attackers carry out their activities pursuant to any policy of a group.

177. Defence Witnesses who were on the ground as the events unfolded provided clear evidence explaining the background of the violence which was centered around the influx of Kikuyu IDPs from other parts of the country.[248] The Majority failed to consider this evidence, which is well supported by the Prosecutor's own evidence.[249]

178. In fact, HHJ Kaul, recognized this when he assessed the evidence of the Prosecution in its application for authorization to commence investigations, wherein the learned judge observed:

> *"99. Information available further suggests that the violence in this region must be assessed in context with other parts of the country. It is particularly evidenced by the arrival of non-Kalenjin communities from the North Rift to this region which caused a significant backlash against Luo and Kalenjin communities. For example, in Naivasha, the violence allegedly broke out "as a result of the growing bitterness caused by the massive influx of IDPs from other districts of the North Rift Province." Against this background, it is reported that Kikuyu gangs killed forty people in one day including nineteen members of one Luo family who died in an arson attack on their house.*
>
> *100. The targeted groups were various, such as members of the Kikuyu, Luo,*

[248] Statements of Witness D12-10: EVD-PT-D12-00065, EVD-PT-D12-00066, EVD-PT-D12-00067; Statement of Witness D12-29: EVD-PT-D12-00047, paras 11, 16, 20, 21; Statement of Witness D12-28: EVD-PT-D12-00046, paras 15 and 18.
[249] CIPEV Report, EVD-PT-OTP-00004 at 0490-0491; HRW Report, EVD-PT-OTP-00002 at 0293.

Luhya, Maasai and Kalenjin communities.

101. It is alleged that the police was overwhelmed, lacked the resources to effectively respond to the violence or connived with the gangs, participated in looting or was callous to the events. In Nakuru town, for example, the police arrived to separate arriving parties and created a buffer zone but was seen to be overwhelmed by the sheer numbers of the gangs so that the army was called to assist. On the other hand, there are allegations of partisanship and police complicity in the violence. Moreover, with regard to Naivasha, the Waki Commission points to "breaks in the chain of command and parallel ethnic command structures within the police".

102. Taking the above into consideration, I fail to see that an "attack directed against the civilian population" was committed "pursuant to or in furtherance of a State or organizational policy". I fail to see an 'organization' in Central Rift Valley which satisfies the criteria I have set out in paragraph 51 above. The nature of the violence as described in paragraph 96 above is exemplifying the absence of an 'organization' and is pointing rather to the occurrence of spontaneous, ad hoc events for a passing occasion. This becomes even more apparent in the event that violence is triggered by arriving IDPs in the region. Local politicians using criminal gangs for their own purposes is an indicator of a partnership of convenience for a passing occasion rather than an 'organization' established for a common purpose over a prolonged period of time. In addition, it appears that serious efforts were undertaken to calm the situation. This factor reinforces the impression that actions taken are those of certain individuals trying to take advantage from a period of unrest rather than actions pursuant to or in furtherance of an organizational policy.[250]

[250] Dissenting Opinion, ICC-01/09-19-Corr, paras 99-102.

179. The Defence respectfully submits that these findings by HHJ Kaul are accurate and based on Prosecution evidence. Properly considered the evidence discloses that a variety of combatants in Central Rift Valley, christened 'pro-PNU youth' by the Prosecution and subsequently improperly deemed to be part of the Mungiki criminal gang by the Majority, had absolutely no links with the Mungiki and cannot be factually considered as part of the gang's membership. Consequently, the Majority erred in finding that 'pro-PNU youth' and indeed Kikuyu youth "formed an integral part of the Mungiki organization"[251] so as to satisfy the organizational policy element under 7(2)(a) of the Statute.

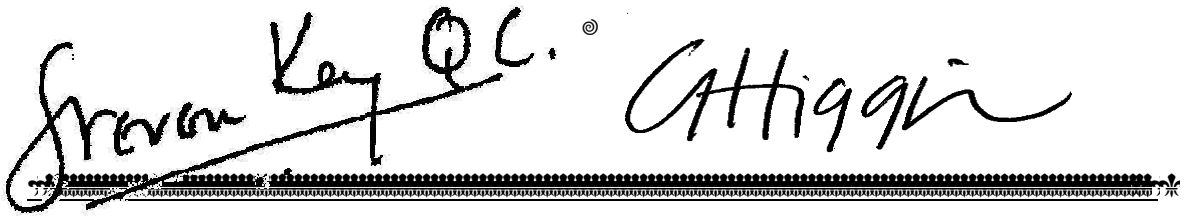
VIII. RELIEF SOUGHT

180. For the reasons detailed in the Defence Notice of Appeal dated 30 January 2012,[252] and expanded upon in the present filing, the Defence of Ambassador Francis Kirimi Muthaura and the Hon. Uhuru Kenyatta respectfully request the Appeals Chamber to allow the appeal and reverse the Majority's definition of 'organizational policy' and its evidentiary finding that the Prosecution has submitted sufficient evidence of substantial grounds to believe that the crimes were committed by Ambassador Muthaura and Hon. Uhuru Kenyatta in furtherance of an 'organizational policy'.

181. Accordingly the Defence requests the Appeals Chamber to declare that the Court does not have jurisdiction in this instance, and reverse the Majority's confirmation of charges against Ambassador Muthaura and Hon. Uhuru Kenyatta.

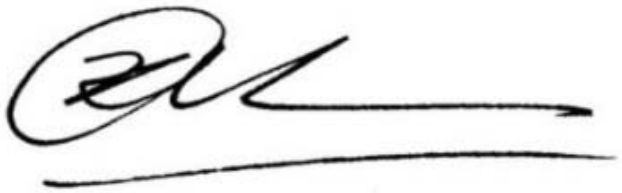
[251] ICC-01/09-02/11-382 para 123, 156.
[252] ICC-01/09-02/11-383.

Respectfully submitted,



Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta



Karim A. A. Khan QC

On behalf of Ambassador Francis Kirimi Muthaura

Dated this 14 February 2012

The Hague, Netherlands