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PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO,
HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG

PUBLIC
With Annexes 1-10

Defence Challenge to Jurisdiction

Source: **Defence for Mr. William Ruto and Mr. Joshua Sang**

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

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I. Introduction

1. The Defence, on behalf of Mr. William Ruto and Mr. Joshua Sang, ("the Defence") hereby challenge the jurisdiction of the Court on the ground that the level of organization and structure in which the defendants allegedly orchestrated the crimes charged does not reach the requisite level to meet the threshold criteria of crimes against humanity punishable under Article 7 of the ICC Statute.

2. In its Decision of 31 March 2010 ("Investigation Decision"),[1] Pre-Trial Chamber II found, by a majority, that there was a reasonable basis, pursuant to Article 15(4) of the ICC Statute, to proceed with an investigation into crimes against humanity allegedly committed in the Republic of Kenya between 1 June 2005 and 26 November 2009.

3. By its decision the Chamber found that there were reasonable grounds to believe that the threshold requirements of crimes against humanity were met.[2] In reaching this conclusion a wide interpretation was given to the requirement, under Article 7(2)(a), that the crimes be committed as part of an attack, directed against a civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.[3] The Chamber found that, in light of the information presented by the Prosecutor, there were reasonable grounds to believe that the crimes were committed pursuant to or in furtherance of an organizational policy. This on the basis that the attacks were planned, financed, directed or organized by various groups including local leaders, businessmen and politicians, amongst others, associated with the Orange Democratic Movement ("ODM").[4] In the majority view, an organizational policy requires an organization behind the policy but does not require any State-type elements.[5]

[1] Situation in Republic of Kenya, Pre-Trial Chamber II, Public 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 ("Investigation Decision").
[2] *Ibid*, paras 72-138.
[3] *Ibid*, paras 83-93.
[4] *Ibid*, paras. 115-128.
[5] *Ibid*, para. 90 ; footnote 82.

4. In his separate opinion the dissenting judge gave a classical and contextual, ie narrower, interpretation to the term 'organizational policy' and held that such a policy must stem from a State-like organization.[6]

5. In its *Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, issued on 8 March 2011 ("Summons Decision"),[7] Pre-Trial Chamber II, again by a majority, considered it unnecessary to reiterate its earlier finding and provide a further detailed assessment of the question of jurisdiction.[8] The Chamber referred to its previous majority decision of 31 March 2010 and found that "it has jurisdiction to adjudicate the case which is the subject of the Prosecutor's Application".[9]

6. In a dissenting opinion the learned judge reiterated his initial dissenting position on 'organizational policy' and held that the Prosecution had failed to establish reasonable grounds to believe that there was an organization within the context of Article 7(2)(a) of the ICC Statute.[10]

7. The Defence submits that the Majority of Pre-Trial Chamber II drew an erroneous conclusion by adopting a new, liberal and too wide a definition of 'organizational policy'. The Defence submits that the dissenting Judge's finding on this issue reflects the intention of the drafters of the Statute, the view of a majority of leading scholars, and the current status of customary international law.

8. Even if the Majority remains unpersuaded by the Defence submission on the law, it is submitted that there are no substantial grounds to believe that the defendants, on the Prosecution evidence, were operating in a sufficiently organized and structured fashion to meet the organizational level necessary for the ICC to exercise jurisdiction in respect of the alleged crimes.

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[6] Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09-19-Corr ("Dissenting Opinion on Investigation Decision"), paras. 50-52.
[7] ICC-01/09-01/11-1.
[8] *Ibid*, paras. 10, 11.
[9] *Ibid*, para. 11.
[10] Public Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-2, 15 March 2011, in particular, para. 12.

9. Accordingly, the Defence requests the Pre-Trial Chamber to decline jurisdiction on the ground that no crimes against humanity have been committed in the Republic of Kenya between 1 June 2005 and 26 November 2009 that can be linked to either suspect. The arguments in support of this request are set out below.

II. Interpretation of contextual element 'organizational policy'

10. The chapeau of Article 7(1) of the Statute provides:

> For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...)

11. Article 7(2)(a) of the Statute defines an 'attack directed against any civilian population' as "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."

12. The focus of the debate is what definition should be given to 'organizational policy'. In line with Article 21(1) of the ICC Statute, first and foremost, the Statute, Elements of Crimes and the Rules of Procedure and Evidence should be examined to look for an answer. In case of ambiguity, the Court may apply "treaties and the principles and rules of international law, including the established principles of the international law of armed conflict" (Art. 21(1)(b)); or, failing that, "general principles of law derived by the Court from national laws of legal systems of the world" (Art. 21(1)(c)).

13. In accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, in interpreting the legal provisions in the Statute or other legal instruments of the Court, first, the ordinary meaning of the terms should be considered.[11] In this case, this does not assist because none of the ICC legal instruments provide a straightforward answer. There is no definition of the term 'organizational policy' provided in any of the official draft Statutes, the Statute itself, the Elements of Crimes, nor in the Rules of Procedure and Evidence.

[11] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, page 331. At: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
See Article 31 General rule of interpretation:
1. 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.

14. If the plain reading of the provisions in the Statute or other legal instruments of the Court does not provide a clear answer, as is the case here, the context, object and purpose of the term in question must be considered.[12] Thus, in the absence of any clarity of the term 'organizational policy' from the plain reading of the Statute or the other ICC legal instruments, its teleological interpretation should be considered in light of the object and purpose of the ICC Statute. For this, it is essential to examine the intention of the drafters.

15. The phrase "a State or organizational policy" was introduced through a Canadian proposal in the course of the preparations of the ICC Statute.[13] This expression was introduced and adopted to prevent the Court from prosecuting singular atrocities not part of a widespread or systematic attack.[14]

16. Indeed, it is clear from the debates on the test of widespread or systematic that a significant number of States were concerned that an unqualified disjunctive test would be so broad so as to lead to the absurd consequence that crimes against humanity would encompass an unconnected "crime wave" which they clearly intended to keep outside the jurisdiction of the ICC. Like-minded States were less concerned holding that unrelated crimes would be excluded as not being part of the "attack". Eventually, the States were able to come to an agreement by incorporating specific details of an "attack" in Article 7(2) including that such attack must be committed pursuant to or in furtherance of a State or organizational policy.[15] Thus, it is evident that the drafters intended to set clear boundaries to the types of crimes that may qualify as crimes against humanity, which is not dependent on their abhorrent nature but on their inter-connection and whether there was a State or organizational policy behind them.

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[12] *Ibid*.
[13] United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, Committee of the whole, A/CONF.183/C.1/L.53, 6 July 1998; A/CONF.183/C.1/L.44, 7 July 1998, page 2; A/CONF.183/C.1/L.59, 10 July 1998, page 2 : " Discussion Paper Bureau Part 2. Jurisdiction, Admissibility and Applicable Law" Article 5 Crimes within the jurisdiction of the Court". At: http://www.un.org/icc/pressrel/017dsum.htm
[14] OTR ICC Vol. 1, Issue 11, July 2, 1998, at: http://www.advocacynet.org/resource/367.
[15] 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 pages 94-95 (Von Hebel and Robinson, 'Crimes within the Jurisdiction of the Court'); Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 American Journal of International Law 43, at pages 47-48 (Robinson, 'Defining "Crimes Against Humanity"'), at pages 47-48: "Subparagraph 2(a) draws upon various authorities to meet the legitimate concerns raised by affirming that an "attack directed against any civilian population" involves some degree of scale, as well as a policy element".

17. There is a commonly held view that the inclusion of the term 'organizational policy' added an element to crimes against humanity over and above the element of widespread or systematic. Cassese[16], Schabas[17], and Robinson[18] each hold that it is a separate, constitutive element of the attack. This view is supported by a plain reading of Article 7 and of the related Elements of Crimes (Art. 7(3)), defining a policy to commit such an attack as requiring « that the State or organization actively promote or encourage such an attack against the civilian population ».

18. According to Robinson, one of the drafters of Article 7 of the ICC Statute, "[t]he policy element of crimes against humanity – the underlying direction, instigation or encouragement by a State or organization – is what unites otherwise unrelated inhumane acts, so that they may be accurately described as an "attack", considered collectively, rather than a mere crime wave or domestic criminal behavior."[19]

19. In other international tribunals, there is no explicit mentioning of 'organizational policy' or any 'policy' as being part of the constitutive elements of crimes against humanity. Yet, in earlier ICTY and ICTR jurisprudence, the policy element was considered to be a requisite element of 'systematic'. The reason for including a policy requirement was well explained in *Tadic*:

> As mentioned above the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts.[20]

20. To the dismay of some observers,[21] the policy requirement for crimes against humanity has been abandoned by the ICTY and ICTR.[22] The constitutive elements of crimes against

[16] Antonio Cassese, 'Crimes Against Humanity', in Antonio Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1 (Oxford: Oxford University Press, 2002), 376.
[17] William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, Third Edition, 2007), 102 (Schabas, 'Introduction to ICC').
[18] Darryl Robinson, 'The Elements of Crimes Against Humanity", in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York: Transnational Publishers Inc., 2001), 63, 64 (Robinson, 'Elements of Crimes Against Humanity').
[19] *Ibid*, 63-64.
[20] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, 7 May 1997, para. 653.
[21] See, in particular, William A. Schabas, 'State Policy as an Element of International Crimes' (2008) 98 Journal of Criminal law and Criminology, 953, 960 (Schabas, 'State Policy as Element of International Crimes'); Schabas, 'Introduction to ICC', 102-104; William A. Schabas: London Riots: Were they Crimes Against Humanity? At: http://humanrightsdoctorate.blogspot.com/2011/08/london-riots-were-they-crimes-against.html; C. Kress, 'On the Outer Limits of Crimes against Humanity: the Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision', Leiden Journal of International Law, 23 (2010) 855, at page 870 (Kress, 'Concept of Organisation within Policy Requirements').

humanity have, however, been defined differently in the ICC Statute when compared with the ICTY and ICTR Statutes, explicitly requiring a State or organizational policy. . According to a number of scholars, the policy requirement equally remains a requirement under customary international law and they regret its abandonment in the *ad hoc* international tribunals.[23] The ICC definition of 'crimes against humanity' is therefore not affected by the jurisprudence of the ICTY and ICTR on this issue.

21. This is in line with the Elements of Crimes stating that the constitutive elements of 'crimes against humanity' under Article 7 of the ICC Statute "must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole" (Art. 7(1) Elements of Crimes).

22. Similarly, Article 22(2) of the ICC Statute provides that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

23. This is further supported by the objectives of the ICC. The jurisdiction of the ICC complements, but in no way supplements, the jurisdiction of domestic courts. The ICC holds State sovereignty in high regard, which is reflected not only in the complementarity principle,[24] but also in the fact that the ICC deals with the most serious crimes only.[25]

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[22] *Prosecutor v. Kunarac et al*. Case No. IT-96-23 & IT-96-23/1-A, Appeals Judgment, 12 June 2002, para. 98; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgment, 29 November 2002, para. 36; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Judgment, 31 March 2003, para. 234; *Prosecutor v. Semanza*, Case No. ICTR;97-20-T, Judgment, 15 May 2003, para. 329.

[23] Kress, 'Concept of Organisation within Policy Requirement', page 870; Schabas, 'State Policy as Element of International Crimes', page 960; Schabas, 'Introduction to ICC', 102-104; R. Cryer et al., 'An Introduction to International Criminal Law and Procedure', (2007) 197 (Cambridge: Cambridge University Press 2007); M. Halling, 'Push the Envelope – Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity", Leiden Journal of International Law, 23 (2010) 827, at pages 830-831.

[24] This means that the ICC can only try individuals if the domestic State is unwilling or unable to carry out genuine investigations. See Article 17 ICC Statute. See further the language of the Preamble to the Rome Statute, encouraging domestic States to take measures to prosecute serious crimes:

The States Parties to this Statute,

…

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

…

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

…

Emphasizing that the International Criminal Court established under this Statute shall be complementary to

Anything less should be prosecuted on a domestic level. Whilst the fight against impunity is one of the principal objectives of the ICC, ideally this fight is fought at the domestic level. The ICC seeks to encourage domestic prosecutions of serious crimes and will intervene only in exceptional circumstances clearly defined in the Statute.[26].

24. It is further the case that the ICC Statute does not intend to create new law but to codify customary international law. Any interpretation given to the terms should therefore also be in line with principles recognised by State practice and *opinio juris.*[27]

25. If these principles are kept in mind when considering the correct definition of 'organizational policy', then it becomes clear that the dissenting analysis is most appropriate.

III. Analysis of, and Support for the Dissenting View

26. The notion of State sovereignty appears to have partly motivated the dissenting Judge to insist on keeping a clear distinction between crimes against humanity, punishable under the ICC Statute, and other serious crimes punishable under national law.[28] Indeed, the learned Judge held that "a gradual downscaling of crimes against humanity towards serious crimes... might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute".[29]

27. The reasoning to be found in the dissenting opinion appears to be two-fold. First, the recognition of crimes against humanity is, by definition, an intrusion into State sovereignty, which has motivated States to adopt a cautious approach to ensure that the crimes committed required international intervention. If the State is directly or indirectly

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national criminal jurisdictions,
Resolved to guarantee lasting respect for and the enforcement of international justice,
Have agreed as follows:

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

[26] *Ibid*.

[27] See Article 38(1)(b) of the ICJ Statue. According to Robinson, the desire of the drafters not to go beyond customary international law motivated them to include the term 'organizational' in Article 7(2)(a). See Robinson, 'Defining "Crimes Against Humanity", page 50.

[28] Dissenting Opinion on Investigation Decision, para. 9.

[29] *Ibid*, para. 10.

implicated in committing the crimes, then there is good cause for intervention as it is unlikely that the same State will investigate and prosecute its own crimes in good faith.[30]

28. Second, in order to organize the commission of heinous crimes against a civilian population on a large scale, significant resources are needed. Traditionally, primarily the State would have the means available to run an organization capable of carrying out serious atrocities on a large scale directed against a civilian population. Indeed, according to the learned Judge, the principal reason to recognise crimes against humanity as crimes punishable under international law was the threat to "humanity and fundamental values of mankind' by 'mass crimes committed by sovereign states against the civilian population, sometimes the state's own subjects, according to a plan or policy, involving large segments of the state apparatus".[31]

29. In modern society, the State is no longer the sole or necessarily the predominant entity that can finance and organize mass atrocity. A policy to carry out serious crimes against a civilian population on a large scale can also be adopted and implemented by private entities. This was acknowledged by the dissenting Judge. However, the learned judge is not persuaded that any kind of non-State entity may be able to carry out an organizational policy within the meaning of Article 7(2)(a) of the Statute.[32] In his view, this can only be the case if sufficient means and resources are available to such an entity "to reach the gravity of systemic injustice in which parts of the civilian population find themselves.[33]

30. This view finds support in the jurisprudence from the *ad hoc* international criminal tribunals, even after the policy requirement was abandoned. For instance, in *Limaj*, the Chamber acknowledged that "[d]ue to structural factors and organisational and military capabilities, an "attack directed against a civilian population" will most often be found to have occurred at the behest of a State. Being the locus of organised authority within a given territory, able to mobilise and direct military and civilian power, a sovereign State by its very nature possesses the attributes that permit it to organise and deliver an attack against a civilian population; it is States which can most easily and efficiently marshal the resources to launch an attack against a civilian population on a "widespread" scale, or

[30] *Ibid*, para. 63-64.
[31] *Ibid*, para. 59.
[32] *Ibid*, para. 53; also see paras. 38-40.
[33] *Ibid*, para. 66.

upon a "systematic" basis."[34] In this case, the attack against a civilian population was allegedly perpetrated by "a non-state actor with extremely limited resources, personnel and organisation".[35] The Chamber ultimately found that crimes against humanity were not committed.[36]

31. In light of this, the Defence agrees with the learned Judge's conclusion that an organization within the meaning of Article7(2)(a) of the Statute must,

> [p]artake of some characteristics of the State. Those characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.[37]

32. Accordingly, in his dissenting opinion, the learned Judge considered that an 'organization' under Article 7(2)(a) of the ICC Statute should have some elements of a State or quasi-State abilities. This definition should not be extended to mafia-type groups, mobs, groups of (armed) civilians or criminal gangs because crimes committed by such groups should be dealt with by the State itself. The learned Judges stated 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."[38]

33. The Defence respectfully agrees and adopts the learned Judge's reasoning and definition and submits that it is in line with the intention of the drafters, contemporary customary law, and the views of respected scholars.

[34] *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Judgement, 30 November 2005, para. 191. See also para. 194, stating that "the existence of an attack is most clearly evident when a course of conduct is launched on the basis of massive state action. This can be seen from a number of examples. …"
[35] *Ibid*, para. 191.
[36] *Ibid*, para. 228.
[37] *Ibid*, para. 51.
[38] *Ibid*, para. 52.

34. As a starting point it is clear, from the 'travaux preparatoires' for Article 7 of the ICC Statute, that the inclusion of the phrase 'state or organizational policy' was intended to provide a jurisdictional demarcation between crimes against humanity, that could come within the jurisdiction of the ICC, and other serious crimes to be dealt with in national jurisdictions. The issue of State sovereignty was evidently on the minds of the various countries' delegations to the negotiations.[39]

35. This is further evidenced by the deliberate omission from the ICC Statute of the crime of (non-State) terrorism committed in peace time, indicating that the drafters believed that acts of terrorism, and the organisations perpetrating such acts, are best dealt with by national jurisdictions.[40] Similarly, the inclusion of drug trafficking crimes was considered but firmly rejected by the majority of State representatives during the preparatory process of the Statute. The main reasons advanced for excluding crimes of terrorism and drug trafficking were "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 through international cooperation agreements".[41] These three considerations would also caution against an expanded definition of organization under Article 7.

36. Given that the term 'state or organizational policy' was inserted with a dual function in mind: to "ensure the scope of the application of crimes against humanity remains confined to extremely grave threats to basic human values, and....to describe a situation where there is a reason to doubt that a judicial response at the national level will follow",[42] the Defence submits that it is inappropriate to expand the scope of what qualifies as an 'organization' as the majority has done.

37. M. Cherif Bassiouni, who chaired the drafting committee at the Rome Statute, expressed a view similar to that found in the dissenting opinion. Bassiouni does not favour applying Article 7 to non-State actors.[43] In his view, the term 'organizational policy' only

[39] Robinson, 'Defining "Crimes Against Humanity" pages 47-48.
[40] Kress, 'Concept of Organisation within Policy Requirement', page 866. See also H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', at page 86.
[41] Von Hebel and Robinson, 'Crimes within the Jurisdiction of the Court' at page 86, referring to: 1995 Ad Hoc Committee Report, paras. 82-84 and 1996 PrepCom Report, Vol. I, paras. 106-107 and 111-113.
[42] Kress, 'Concept of Organisation within Policy Requirement', page 866.
[43] M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (New York: Transnational Publishers, Vol. 1, 2005), 151-152: "Contrary to what some advocates advance, Article 7 does not bring a new development to crimes against humanity, namely, its applicability to non-state actors. If that were the case, the mafia, for example, could be charged with such crimes before the

encompasses non-State actors which "partake of the characteristics of state actors in that they exercise some dominion or control over territory and people, and carry out a "policy" which has similar characteristics as those of "state action or policy".[44]

38. This is consistent with the intention of a large number of the State representatives that participated in the drafting of Article 7 as expressed above. It is also supported by respected scholars, like May who noted that "[t]he actions of States, or State-like actors, have given the international community its clearest rationale for entry into what would otherwise be a domestic legal matter".[45]

39. Professor Schabas is of the view that the word 'organizational' should be read in its context and not "as 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 behaves like a state, that controls territory, etc".[46] He is not in favour of expanding the definition of crimes against humanity under the ICC Statute in a manner done by the Majority, which brings it closer to the expanded ICTY definition of crimes against humanity, no longer requiring the demonstration of a policy.[47] If no limits are set, crimes against humanity could include acts committed by gangsters, motorcycle gangs, serial killers or terrorists. The ICC may then even be allowed to exercise jurisdiction in respect of something like the London riots, which in Professor Schabas's view, differs only marginally from the Kenya postelection violence in terms of the organizational level behind the crimes.[48]

40. In light of the foregoing, the Defence submits that the opinion of the dissenting judge is most closely aligned with that of the drafters of the Rome Statute and scholars and thus ought to be the approach adopted by the Pre-Trial Chamber as a whole.

ICC, and that is clearly neither the letter nor the spirit of Article 7. [...] The text [of Article 7(2)] clearly refers to state policy, and the words 'organisational policy' do not refer to the policy of an organisation, but the policy of a state. It does not refer to non-state actors ».

[44] M. Cherif Bassiouni, *Crimes against humanity in International Criminal Law*, ed. Kluwer Law International (The Hague/London/Boston, 1999 2nd ed), page 245 (Bassiouni, *Crimes Against Humanity*).

[45] L. May, 'Crimes against Humanity: A Normative Account', (Cambridge: Cambridge University Press, 2005), page 88.

[46] William A. Schabas: London Riots: Were they Crimes Against Humanity? At: http://humanrightsdoctorate.blogspot.com/2011/08/london-riots-were-they-crimes-against.html

[47] Schabas, 'Introduction to ICC' pages 102-104.

[48] William A. Schabas: London Riots: Were they Crimes Against Humanity? At: http://humanrightsdoctorate.blogspot.com/2011/08/london-riots-were-they-crimes-against.html "There may be some distinctions between the post-electoral violence in Kenya and the London riots, but they are nuances, matters of degree. One cannot draw a bright line between them".

IV. Analysis of, and Lack of Support for the Majority View

41. The majority of the Chamber declined to adopt a rigid legal definition and held instead that the determination of whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis, considering factors such as:

> (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[49]

42. Yet none of these factors are acknowledged as minimum conditions to accepting that there was an 'organization' within the meaning of Article 7(2)(a). They are also non-exhaustive, which means that a Chamber may rely on entirely different factors to conclude that there was an organization. Relying principally on M. Di Filippo, according to whom any purely private criminal organisation may qualify under Article 7(2)(a) of the ICC Statute, the Majority decision held that the main distinguishing feature between groups that can, and groups that cannot be prosecuted under Article 7 of the ICC Statute, is "whether a group has the capability to perform acts which infringe on basic human values".[50]

43. The Defence respectfully submits that, unless some of the above factors would in fact be minimum requirements, this definition is too wide. The Majority Decision does not set any boundaries to the types of organizations that can fall under Article 7(2)(a). Its definition contains a great deal of elasticity, not excluding any group of people or private entity, thereby downgrading the demarcation between crimes against humanity and other serious crimes. It makes the focus of the test not the nature or structure of the organization but 'whether a group has the capability to perform acts which infringe on basic human values'.

44. Kress has criticised the definition for being internally inconsistent, saying that "[w]hile the reference to the 'capability to perform acts which infringe on basic human values'

[49] Investigation Decision, Majority Opinion, para. 93.
[50] *Ibid*, para. 90; 84 referring to: M. Di Filippo, "Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes", 19 European Journal of International Law 533, 567 (2008) (Di Filippo, 'Terrorist crimes and international co-operation').

reads like the attempt to come up with a definition of the concept of organization, only three paragraphs later a 'case-by-case' approach is given preference over a 'rigid definition'."[51]

45. Kress continues,

> [T]he 'considerations' which are to 'assist' in the suggested casuistic process of judicial concretization do not appear to flow naturally from the general 'capability criterion' and one wonders why the Decision did not simply adopt the wide formulation contained in Article 2 of the United Nations Convention against Transnational Organized Crime.[52] Apart from that, the list of considerations drawn up by the majority is not particularly homogenous. For example, the criterion of territorial control points in quite a different direction from that of the primary purpose to attack any civilian population. Perhaps not entirely surprisingly, a closer look at the judicial determination in the present situation reveals a measure of uncertainty as regards the criterion or the combination of criteria on which the decision eventually rests. It is only possible to state with some confidence that the more demanding criteria of territorial control and a group under responsible command or with an established hierarchy have not been relied on.[53]

46. The Defence agrees with Kress that the definition is too vague and uncertain. Such an open-ended definition clearly goes beyond the intention of the drafters of the Statute, who, as aforementioned, explicitly excluded certain crimes such as terrorist and narcotic crimes from the jurisdiction of the ICC. In addition, the drafters had considered including the term 'group' in the definition but left it out in the final wording of Article 7(2)(a). The reason for omitting 'group', according to Robinson, 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".[54] Thus, contrary to the position taken in the Majority Decision, it appears that the drafters of the Rome Statute did consider "the formal nature of a group and the level of its organization" to be a defining criterion.[55]

47. The Defence therefore shares Jalloh's view that "the majority lowered the threshold as much as possible by glossing over what type of organizations and persons could develop

[51] Kress, 'Concept of Organisation within Policy Requirement', at page 857.
[52] An organization is 'any structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes', with a structured group defined as being not 'randomly formed… and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure'.
[53] Kress, 'Concept of Organisation within Policy Requirement', page 858.
[54] Robinson, 'Defining "Crimes Against Humanity"' fn 44 (Emphasis added).
[55] Investigation Decision, Majority Opinion, para. 90.

such a policy".[56] Jalloh refers to the interpretation given by the Majority to 'organizational policy' as a novel interpretation, which appears to be inconsistent with the Elements of Crimes and dilutes the concept by extending too widely the scope of crimes against humanity.[57]

48. The Majority decision purports to rely on previous ICC jurisprudence. The Majority cites with approval the *Katanga & Ngudjolo* and *Bemba* confirmation decisions, where it was held that the 'policy' requirement,

> ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion.[58]

49. The Majority copied the idea that any organisation with the capability to commit a widespread or systematic attack against a civilian population could qualify as an organisation within the meaning of Article 7(2)(a). However, the condition formulated by the Majority that a group must have "the capability to perform acts which infringe on basic human values" is clearly broader than the condition of having the capability to commit a widespread or systematic attack against a civilian population. In order to have the capability to commit a widespread or systematic attack against a civilian population, a clear structure, *de facto* control and the ability to punish is essential.

50. Reference is made in the dissenting opinion to the *Katanga & Ngudjolo* and *Bemba* findings in the light of the factual background of the cases – that is, the fact that it concerned military-type organized armed groups who allegedly committed crimes pursuant to a policy over a prolonged period of time in an armed conflict.[59] The factual circumstances of the current case are clearly very different.

[56] Jalloh: 'contextual elements of crimes against humanity' page 545.
[57] *Ibid*, 545, 547.
[58] *Prosecutor v. Katanga and Ngudjolo*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, para. 396; see also: *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 81.
[59] Dissenting Opinion on Investigative Decision, para. 48.

51. It should additionally be noted that the *Katanga & Ngudjolo* definition, as repeated in *Bemba*, has been adopted without any challenge from the Defence and has currently not been confirmed by a Trial or Appeals Chamber. This definition, therefore, does not reflect the law but simply the view of another Pre-Trial Chamber.

52. Even M Di Filippo, the Majority's principal source, acknowledges that "[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."[60]

53. Whilst noting that the drafters of the Rome Statute deliberately excluded terrorism from the Statute's ambit,[61] Di Filippo proposes a more liberal reading of the contextual requirements of crimes against humanity under the Statute so as to include terrorism. He is thereby inspired by his belief that crimes against humanity should be extended to include crimes committed by groups such as *Al Qaeda* who commit crimes without exercising territorial control or having a formal hierarchy. He writes, "I deem it possible to accommodate terrorism in the framework of crimes against humanity, provided that a liberal reading of the nature of possible perpetrators is adopted and a wide interpretation of the magnitude threshold is followed".[62]

54. Di Filippo clearly goes far further than most. In stating that he subscribes to a broader definition of an 'organization' than generally is accepted, Di Filippo notes that "[t]hough..[it]... can look innovative, I deem it as the natural evolution of the category of crimes against humanity".[63] Di Filippo is well-aware of the controversial nature of his position, stating "it must be conceded that a certain tension arises between the traditional conception of crimes against humanity and the emerging notion of core terrorism as far as the issue of possible perpetrators is concerned".[64] Thus, clearly, Di Filippo's reading of the Statute does not reflect the intention of the drafters as he himself acknowledges. He describes, not what the law is, but what he would like it to be. It is therefore respectfully submitted that it is unwise to rely predominantly on Di Filippo's view, which neither

[60] Di Filippo, 'Terrorist crimes and international co-operation', page 567.
[61] *Ibid*, page 564.
[62] *Ibid*, page 566.
[63] *Ibid*, page 567.
[64] *Ibid*, page 568.

reflects customary law nor the generally accepted view on the interpretation of Article 7 of the ICC Statute.

55. The other academic sources on which the Majority's adopted definition of 'organizational policy' is based, while potentially allowing for a wider range of entities to be qualified as an 'organization' within the meaning of Article 7(2)(a) than does the dissenting judge, do not, in fact, support the open-ended interpretation adopted by the Majority. These academic sources define minimum conditions for private entities to qualify as an organization behind the policy under Article 7(2)(a); or they do not seek to provide a definition at all.[65]

56. Other cited academics, like Ratner, express the view that the ICC Statute could support a wide interpretation of 'organizational policy' so as to include mafia-type mass killings "based on the teleological interpretation that such private entities are capable of bringing about significant human suffering". However, Ratner does not express what the correct interpretation of 'organizational policy' is, but merely what it could be and acknowledges that this 'could-be' interpretation does not find any support in the current practice at the ICTY, ICTR, SCSL or ICC. These international 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."[66]

57. Also other scholars, like Dixon and Hall, who give a less restrictive interpretation to Article 7(2)(a) than that found in the learned dissenting judge's opinion, do not support

[65] For instance, Robinson provides an analysis of the various issues that were discussed during the negotiations surrounding the drafting of Article 7 but does not attempt to define the term 'organizational policy'. See Robinson, 'Defining "Crimes Against Humanity"'; Robinson, ' Elements of Crimes Against Humanity'. See further P. Burns QC, 'Aspects of Crimes Against Humanity and the International Criminal Court', A Paper prepared for the Symposium on the International Criminal Court, February 3-4, 2007; Beijing, China, stating that organizations "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." At: http://www.icclr.law.ubc.ca/Site%20Map/ICC/AspectofCrimesAgainstHumanity.pdf

[66] S. Ratner, *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy*, 3rd ed. (Oxford: OUP, 2009), page 70. Indeed, see above *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Judgement, 30 November 2005, para. 191.

the Majority View in that they require that the entity behind the policy exercises *de facto* power.[67]

58. Accordingly, the Majority decision is unsupported by academic scholarship, with the notable exception of Di Filippo's wishful-thinking in extending the concept. While Di Filippo is searching for a way to bring terrorist groups inside the threshold requirement of Article 7(2)(a), the Pre-Trial Chamber is focussed on ensuring that the threshold's umbrella is wide enough to cover alleged crimes committed by a vaguely defined range of entities. The definition provided by the Chambers, such as it is, is a virtual guarantee that no entity, State or non-State, would automatically be shut out from ICC jurisdiction. This allows for crimes to be qualified as crimes against humanity, not because they were committed as part of a proper organization behind the policy but because the crimes were so abhorrent. In this way, the focus shifts from a legal, unemotional analysis of the organization to a far more emotive victim-focused view of what the organization is said to have done and how. Bassiouni warns against such an approach as it would "eliminate the international or jurisdictional element that is presently required for international crimes".[68]

59. This is not at all what the drafters had in mind, something the Majority decision does not refer to at all. The drafters intended to set some clear limits to the types of crimes that could be prosecuted by the ICC by incorporating Article 7(2)(a), explicitly requiring that the crimes be committed pursuant to a State or organizational policy.

60. Based on all these arguments, the Defence submits that the learned judge's dissenting interpretation of 'organizational policy' is correct. But even if one considers the narrower interpretation too restrictive, the Majority adopted a definition that is too wide and open-ended, thereby disregarding the ability of a State to investigate and prosecute such non-State actors, and not clearly distinguishing serious crimes of a domestic nature from international crimes. Even if some non-State actors could qualify as 'organization' within the context of Article 7(2)(a), a number of clearly defined limits should be adopted. It is submitted that such an 'organization' should, as a minimum, exercise a level of *de facto* control over territory or have a clear structure with a formal hierarchy and the ability to

[67] Rodney Dixon revised by Christopher K. Hall: Crimes Against Humanity, in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (C.H. Beck, Hart, and Nomos, Second Edition, 2008), p.235-236.
[68] Bassiouni, *Crimes Against Humanity*. page 245.

punish, as well as sufficient means to organize crimes against a civilian population on a wide scale. Nor should the duration of the existence of the organization be overlooked.

61. The wide definition adopted by the Majority reflects a novel view rather than customary law, which is not supported by the intention of the drafters of the Statute. Until today, there is no State practice suggesting any agreement that purely private entities which fall within the Majority's test of possessing 'the capability to perform acts which infringe on basic human values' can be tried in international courts. It may be that in the future, State practice will evidence a willingness to have organizations which have no State-like characteristics (for example, having no *de facto* territorial control and no formal hierarchy) tried by international courts rather than domestic courts. Should this occur, it may well be that the Majority's view that "the formal nature of the group and the level of organization should not be the defining criterion" may become true and the focus will shift to the group's "capability to perform acts which infringe on basic human values". If this is to happen this should be the result of State practice rather than judicial initiative. Notably, in this instance, the Kenyan situation was brought to the Court *propio motu* by the Prosecutor and not as a result of State initiative. It is presently too early for such a drastic departure from customary law.

V. No Substantial Grounds to Believe the Defendants acted within an Organization

62. It is submitted that, irrespective of whether one accepts the minority or majority test, or an alternative test, the facts on which the Prosecution relies do not amount to substantial grounds to believe that the defendants acted within an organization in the context of Article 7(2)(a) of the Statute.

63. In seeking to establish the constitutive element of 'organizational policy', the Prosecution relies a great deal on its theory of the existence of a "multi-faceted Network", allegedly headed by Mr. Ruto, consisting of a political, military, media, tribal and financial branch. According to the Prosecution, each of these branches existed and had legitimate purposes prior to the post-election violence in 2007/2008, but were then absorbed into a newly created Network which was purposefully and specifically developed by the defendants with a criminal purpose to commit violence against non-Kalenjins.[69]

[69] Document Containing the Charges ("DCC"), ICC-01/09-01/11-261-AnxA, 15 August 2011, paras. 25, 43-44.

64. It is respectfully submitted that there is insufficient evidence supporting the prosecution assertion that there was an organization, sufficient to meet the structural criteria necessary. The Prosecution has assigned its own name, "The Network" to an ill defined, amorphous grouping with only a handful of private individuals. The Prosecution has, the Defence submits, failed to provide sufficient detail about the operation, purpose, structure and membership of "The Network".

65. Although the Prosecution appears to suggest that it was created in December 2006,[70] the 'Network' is alleged to have had its hand in five specified attacks that occurred in the period between 30 December 2007 and 31 January 2008. All the attacks charged took place immediately following the announcement of the election results on 30 December 2007. Various places were attacked that day, the day following or on 1 January 2008.[71] The time span in which "The Network" was allegedly implicated in events was therefore of very brief duration.

66. The allegations on the existence of an organization are contradictory. Witnesses give varying accounts, particularly concerning the hierarchy of the organization. Some witnesses allege that the organization spread throughout the entire country, while others allege it was confined to the Rift Valley.

67. The Prosecutor alleges that "The Network" used the ODM party's structure to plan and organise the attacks on civilians, mainly on the grounds that Mr. Ruto and Mr. Kosgey were authoritative ODM figures, that meetings of "The Network" were held within the ODM context, and that ODM members of parliament gave financial support to "The Network".[72] At best, the evidence seeks to demonstrate that individual ODM political figures were implicated in the planning of crimes against non-Kalenjin civilians. It does not suggest that the ODM national political structure had any direct involvement in "The Network" or any of the alleged crimes. In this regard, it is noteworthy that many of the alleged meetings took place before the ODM or even "The Network" was created; and that, apparently, "The Network" existed before the ODM.[73]

[70] DCC, para. 25.
[71] DCC, paras. 71-97.
[72] DCC, para. 48.
[73] According to the DCC, para. 9, the ODM was established in 2007; and according to the DCC, para. 25, the Network came into being by the end of 2006, which would then be before the ODM was created. Many meetings are alleged to have taken place in 2006, see further below, para 78.

68. The Prosecutor alleges that the military branch of "The Network" comprised former police and military officers who gave military-strategic advice to Mr. Ruto, allegedly the 'head of the military branch'. The military branch is said to have mobilised Kalenjin men to participate in fighting, trained them and gave them weapons.[74] However, only three unnamed retired military officials, not in any way representing the Kenyan Army, were allegedly involved in "The Network". Even if these three retired officers helped coordinate the activities of the alleged perpetrators, which is disputed, this itself is no evidence of the existence of a sufficiently structured 'organization'. The evidence rather suggests that any coordination was done on an *ad hoc* basis and as a reaction to the widespread violence in the country; and that the actual perpetrators, most of whom converged spontaneously and needed little encouragement or assistance to participate and organise themselves.[75]

69. The Prosecutor alleges that the media branch was led solely by Mr. Sang on radio network Kass FM. Mr. Sang allegedly used his call-in radio show on Kass FM to support the ODM party and politicians during the 2007 presidential election campaign; and allegedly spread propaganda by using 'coded language' instigating violence against non-Kalenjin civilians.[76] The DCC does not provide any details as to what coded words Mr. Sang actually used and what they allegedly indicated. The main allegation is that Mr. Sang allowed persons, mostly unidentified, to use the radio network to spread inciting messages and to advertise meetings of the network.[77] Even these details are scanty. It is noteworthy that, in alleging this, the Prosecution principally relies on anonymous witnesses who contradict themselves and whose statements are contradicted by the transcripts of the actual broadcasts thus far disclosed.[78] Thus, the evidence in support of this allegation is very thin even at the stage of confirmation.

70. In the Defence submission, even in the event that the evidence of the Prosecution witnesses is accepted for the purpose of confirmation, it is insufficient to demonstrate an 'organizational policy'. On the Prosecution evidence, the spreading of propaganda

[74] DCC, paras. 57-64.
[75] See, for instance, Waki Report, EVD-PT-OTP-00004, pages 74-75; 'The Social Institutions of the Kalenjin People', KEN-D09-0012-0007; also Dissenting Opinion on Summons Decision, para. 38.
[76] DCC, paras. 49-52.
[77] DCC, para. 52.
[78] See summaries of translated transcripts of Kass FM broadcasts apparently obtained by the Prosecution from BBC Monitoring, EVD-PT-OTP-00471. While these amount to approximately 150 pages of summarized and translated transcripts, there is nothing in these messages that supports the Prosecution's theory. Furthermore, the Prosecution has failed to obtain any actual broadcasts from Kass FM demonstrating the coded language, criminal statements by Mr. Sang, etc.

messages through radio appears to have been by individuals rather than by an organized network using its radio to reach the alleged perpetrators. Messages were mostly spread by word of mouth.[79] Therefore, any messages broadcasted on Kass FM do not go to prove the existence of an organization behind them.

71. The tribal branch of "The Network" allegedly consisted of tribal elders, unnamed in the DCC, who influence political, social and economic matters affecting the Kalenjin community in the Rift Valley. The Prosecutor alleges that some of these tribal elders participated in meetings of "The Network" where the violence was planned and coordinated, and performed traditional ceremonies on the alleged perpetrators before commencing the battle.[80] Whilst is it a common feature of many ethnic communities to have influential leaders, there is insufficient evidence to suggest that any of the tribal leaders were part of "The Network" or acted in an organised fashion to assist the violence.

72. The 'financial branch' referred to by the Prosecution appears to consist of the Emo Foundation and a handful of businessmen, including Mr. Ruto, Mr. Kosgey and otherwise unidentified ODM supporters, who financed Kalenjin interests.[81] There is nothing criminal about financing political or ethnic interests. In any event, the Emo Foundation was only registered as an organization in December 2010.[82]

73. The Defence refutes any suggestion that Mr. Ruto or any associate personally provided weapons, telephones, fuel or transport for attacks; or of having used his personal funds to sponsor criminal activity.[83] The Defence notes that the Prosecution relies on anonymous witnesses only in support of these allegations. It has failed to produce any tangible evidence, such as pictures, transaction or purchase receipts notwithstanding that the collection of such evidence should be within the Prosecution's investigative ability, if it in fact exists.

74. In any event, evidence in support of such allegations does not demonstrate an 'organization' within the context of Article 7(2)(a) of the ICC Statute. At best, the

[79] This was noted by the dissenting judge in Dissenting Opinion on Summons Decision, para. 28.
[80] DCC, para. 56.
[81] DCC, para. 53.
[82] KEN-D11-0001-0034.
[83] DCC, paras. 54, 62.

evidence demonstrates that there was *ad hoc* financial support from a number of private individuals for the Kalenjin cause.[84]

75. The Prosecutor failed to demonstrate any real link, coordination or hierarchy between the five branches grouped together in what he terms "The Network". Some or parts of these branches existed, prior to the alleged creation of "The Network", in order to support the Kalenjin community in a lawful and *bona fide* manner. The DCC does not name the alleged members of any of the five branches apart from the three defendants in this case. Only a handful of additional individuals are identified by the Prosecution witnesses as having played a role. The so-called Network has not given itself an identity or name and has no clear membership criteria. Given the limited number of names mentioned in the evidence and the vague description of the functions and structure of 'The Network', there remain a series of question marks as to what this organization was, who was part of it, how it operated, and when, why and by whom it was created.

76. In conclusion, it is submitted that there is insufficient evidence that "The Network" existed as an organization. The Defence adopts the dissenting judge's finding that, on the Prosecution evidence, "The Network", cannot be described as anything more than an *ad hoc* "amorphous alliance for coordinating members of a tribe with a predisposition towards violence with membership of its different branches fluctuating."[85]

77. The Prosecutor relies on evidence, whose reliability and credibility will be substantially disputed by the defence, which can go no further than asserting that the suspects were among a handful of private individuals taking advantage of a situation provoked by fears of a corrupt election. The post-election violence, in which many ethnic groups participated, and which occurred at several disparate places, took place over a very limited period of time. Many viewed the violence as spontaneous.[86] Its spontaneity and limited duration further undermines the Prosecution's theory that there was an organizational policy behind it. Such violence may have involved planning to some degree but not, it is submitted, planning by an organisation or structure that satisfies the criteria to qualify as a crime against humanity.

[84] Dissenting Opinion on Summons Decision, paras. 31-33.
[85] *Ibid*, para. 46. See also para. 47: "1 therefore conclude that the "Network" was created ad hoc solely to assist, admittedly in an abhorrent way, the community's aspiring and existing political leaders in gaining or maintaining political power in the Rift Valley on the occasion of the 2007 presidential elections"; and para. 48 for a similar definition.
[86] Waki Report, EVD-PT-OTP-00004, pages 42-49, 53-58, 74-75; KEN-OTP-0014-0177; KEN-OTP-0049-0004.

78. In alleging that the crimes were planned and organised, the Prosecution relies heavily on evidence relating to meetings attended by the suspects that were held as early as 2006.[87] However, is it not far fetched to suggest that Mr. Ruto and others planned post-election violence so far in advance? The nature of the election result, and the feelings it generated, would have been extremely difficult to anticipate. It is also noteworthy that, throughout the entire period of violence, Mr. Ruto was in Nairobi and regularly called for peace and condemned the violence.[88] The level of coordination of the crimes by "The Network" is seriously questionable when the alleged principal Network leader is not even close to the events.

79. However, even if the Pre-Trial Chamber finds that there are substantial grounds to believe that the violence was planned and coordinated, this on its own "does not transform an ethnically-based gathering of perpetrators into a state-like 'organisation'".[89]

80. Thus, on the basis of the evidence presented by the Prosecution, it cannot be concluded that there are substantial grounds to believe the defendants acted pursuant to or in furtherance of a State or organizational policy to commit an attack against a civilian population. This is so irrespective of the test that is applied, given that the Majority held that an organizational policy requires that there is an organization behind the policy.[90] The evidence does not sufficiently demonstrate that there was an 'organization' with a formal structure or other quasi-State features behind the attacks on non-Kalenjin civilians. Nor does "The Network", on a "substantial grounds to believe standard", meet any of the more explicitly defined non-exhaustive criteria set out by the Majority, such as a responsible command, an established hierarchy, territorial control, criminal activities against a civilian population as a primary purpose or articulated intent.[91]

81. The Defence is cognizant that the Pre-Trial Chamber already assessed the evidence and reached a different conclusion. Indeed, the Majority was satisfied that there was an 'organizational policy' within the context of Article 7(2)(a) of the ICC Statute. However,

[87] DCC, paras. 65-70; See, particularly, Witness 1 who refers to meetings between 2005 and 2008, see: KEN-OTP-0028-0389_R01; KEN-OTP-0028-0495_R01; KEN-OTP-0028-0556_R01; KEN-OTP-0028-0604_R01; KEN-OTP-0028-0659_R01; Witness 4 who refers to meeting in Mr. Ruto's house: KEN-OTP-0031-0085_R01.
[88] KEN-OTP-0033-0100; KEN-OTP-0038-0083; KEN-OTP-0042-0224; KEN-OTP-0061-0051; KEN-OTP-0061-0057.
[89] *Ibid*, para. 49.
[90] Investigation Decision, Majority Opinion, para. 90 ; footnote 82.
[91] Investigation Decision, Majority Opinion, para. 93; cited above, at para. 48.

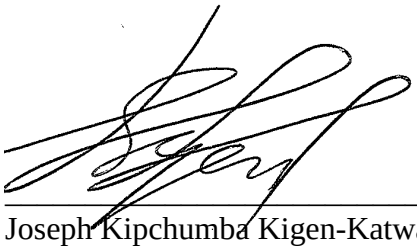
they conducted their assessment on the standard of 'reasonable grounds to believe', which is significantly lower than 'substantial grounds to believe'. It also reached this conclusion in the absence of Defence evidence. The Defence therefore requests the Pre-Trial Chamber to re-evaluate the evidence on the issue of whether there was an 'organizational policy' with the higher standard of 'substantial grounds to believe' in mind.

VI. Conclusion

82. On the grounds set out above, the Defence submits that the Prosecution has failed to produce sufficient evidence to establish all contextual elements of crimes against humanity under Article 7 of the ICC Statute. Notably, the Prosecution failed to establish on a 'substantial grounds to believe' standard, the existence of an 'organizational policy' behind the crimes charged. The Defence will produce further evidence in support of this submission in the course of the confirmation hearing.

83. Accordingly, the Defence requests that the Pre-Trial Chamber declines to exercise jurisdiction in respect of the case against Mr. Ruto and Mr. Sang.

Respectfully submitted,



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 30th day of August 2011

At Nairobi, Kenya