Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **16 September 2011**

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

Prosecution's Response to the Defence Challenges to Jurisdiction

Source: **Office of the Prosecutor**

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

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

Counsel for the Defence
Mr. Kioko Kilukumi Musau, Mr. Joseph Kipchumba Kigen-Katawa, Mr. David Hooper QC, Mr. Kithure Kindiki, Mr. George Odinga Oraro, Mr. Julius Kipkosgei Kemboy, Mr. Allan Kosgey, Mr. Joel Kimutai Bosek and Mr. Philemon K.B. Koech

Legal Representatives of the Victims

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
Deputy Registrar
Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

INTRODUCTION

1. On 30 August 2011 the Defence for Mr Ruto and Mr Sang and the Defence for Mr Kosgey ("the Applicants") filed challenges to the jurisdiction of the Court in the Kenya cases. Though described as jurisdictional challenges, in fact they raise two categories of issues: (i) a legal question regarding the interpretation of the statutory phrase "organizational policy" in article 7(2)(a); and (ii) the clarity and completeness of the charges and the sufficiency of the Prosecution's evidence to prove that there existed an organizational policy to attack civilians.

2. The Applicants' Challenges must be dismissed. First, the Prosecution submits that notwithstanding the self-characterisation of their arguments, these are not legal challenges to the Court's subject matter jurisdiction. They should be raised opportunely; they cannot be thrown into a jurisdictional challenge in order to avoid having to include them in a post-confirmation brief.

3. Second, the factual issues raised by the Applicants -- that the charges fail to allege, or the Prosecution's evidence fails to prove, the existence of an organizational policy –are also inappropriately argued as jurisdictional challenges. They too can be raised in post-confirmation briefs. As noted previously, however, the Chamber should not allow these applications to raise the issues so as to circumvent page limitations applicable to the post-confirmation filings.

PROCEDURAL BACKGROUND

4. On 31 March 2010, pursuant to Article 15 of the Rome Statute, a majority of Pre-Trial Chamber II authorized an investigation into the Situation in the Republic of Kenya.[1] Judge Kaul dissented on the ground that the post-election violence in Kenya cannot be charged as crimes against humanity because the crimes were

[1] ICC-01/09-19, 31 March 2010.

not committed pursuant to an organizational policy, as is required by Article 7(2)(a) of the Statute.[2]

5. On 15 December 2010, the Prosecution filed an application pursuant to Article 58 requesting the issuance of summonses to Willaim Ruto, Joshua Sang and Henry Kirpono Kosgey, to answer charges that they committed crimes against humanity from 30 December 2007 through January 2008.[3]

6. On 15 March 2011, the Majority of the Chamber issued the requested summonses.[4] Judge Kaul again dissented, for the same reasons as in his dissenting opinion dated 31 March 2010.[5] The three appeared on 7 April 2011.

7. On 30 August 2011, the Defence for William Ruto and Joshua Sang and the Defence for Henry Kiprono Kosgey filed challenges to jurisdiction pursuant to Article 19 of the Statute on the basis that the alleged crimes do not meet the criteria for crimes against humanity under Article 7 of the Statute.[6]

BURDEN AND STANDARD OF PROOF

8. With respect to admissibility, Chambers of the Court have allocated the burden of proof to the challenging party.[7] Ultimately, however, the allocation of the burden of proof is not significant since, as has further been held with respect to

---

[2] ICC-01/09-19, pp.84-163.
[3] ICC-01/09-30-Red.
[4] ICC-01/09-01/11-1.
[5] ICC-01/09-01/11-2.
[6] ICC-01/09-01/11-305 and ICC-01/09-01/11-306, respectively. The Defence team for Mr Kosgey made oral submissions on its challenge to jurisdiction: See 1 September 2011, ICC-01/09-01/11-T-5-ENG ET at pp. 30-52.
[7] ICC-01/05-01/08-802, paras. 201-202. As Trial Chamber III observed, although this issue was not directly addressed in the Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, the Appeals Chamber similarly "approached the appeal throughout on the basis of whether the accused had 'persuaded' the Chamber by his arguments", and noting "[t]here was no suggestion raised in counsel's arguments or in the judgment that the prosecution bore the burden of proving that the proceedings were admissible"; ICC-01/05-01/08-802, para. 202, citing ICC-01/04-01/07-1497, paras. 85 and 111. Rule 58 further provides that a request or application under Article 19 must "contain the basis for it", which suggests that the challenging party bears the burden to prove its argument.

admissibility challenges, the standard of proof during article 19 proceedings is "balance of probabilities".[8]

SUBMISSIONS

I - The Applicants' Challenges are not proper challenges to jurisdiction

9. As a preliminary matter, the Prosecution submits that the legal issues posed by the Applicants are not properly brought in the context of a jurisdictional challenge, since they do not challenge any of the pre-conditions for the exercise of the Court's jurisdiction. The Applicants' Challenges therefore should be dismissed on this ground.

10. The Appeals Chamber has identified four facets of jurisdiction: "subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction – jurisdiction *ratione loci* - and lastly jurisdiction *ratione temporis*."[9]

11. The Applicants do not contest personal jurisdiction, territorial jurisdiction, or temporal jurisdiction. The jurisdiction claim thus appears to be predicated on an argument that the Court lacks subject matter jurisdiction because the charges fall outside the category of cases that this Court is authorized to try.

12. The Suspects are charged with committing crimes against humanity, which the Statute defines as acts "committed as part of a widespread or systematic attack directed against any civilian population […]".[10] Article 7(2)(a) defines an attack directed against any civilian population to mean "a course of conduct involving the multiple commission of acts […] pursuant to or in furtherance of a State or

[8] ICC-01/05-01/08-802, paras. 203-204
[9] *Prosecutor v. Lubanga,* Judgment on Jurisdiction Appeal, ICC–01/04–01/06-772 OA4 of 14 December 2006, para. 21.
[10] Article 7(1).

organizational policy to commit such attack". The Defence appears to argue that the organization alleged cannot, as a matter of law, be capable of devising an organizational policy as is required in Article 7.

13. The Prosecution submits that this claim, which at its heart is an issue of statutory construction, is wrongly argued as a jurisdictional challenge. The Court has jurisdiction because the crimes against humanity alleged under Article 7 are within the Court's subject matter jurisdiction. Whether Article 7 applies on its face to particular acts, however, is a matter of statutory interpretation, not jurisdiction. And whether the evidence establishes the predicate elements of the crime, including, as here, the element of an organizational policy to commit attacks against the civilian population, is a sufficiency issue, not jurisdiction.

14. The ICTY Appeals Chamber, faced with an almost identical defence argument in the *Gotovina* case, refused to consider the claim as one addressing jurisdiction. It explained (emphasis added):

> "The Appeals Chamber finds that the Appellant fails to raise a proper jurisdictional challenge pursuant to Rule 72(D)(iv) of the Rules […]or to demonstrate that the Trial Chamber erred in dismissing his argument as to "occupied territory" being a necessary requirement for the crimes of deportation and forcible transfer as crimes against humanity. *Here, the Appellant is not contesting that the International Tribunal has jurisdiction over these crimes under Article 5 of the Statute*, which are charged in the Joint Indictment according to their definitions and elements under customary international law as set out in the jurisprudence of the International Tribunal. Rather, he argues that the interpretation of the definition for the *actus reus* of these crimes should be narrow and limited to displacement from occupied territory. As such, the Appellant may bring these arguments

before the Trial Chamber to be considered on the merits at trial; however, *they do not demonstrate the Tribunal's lack of subject-matter jurisdiction*."[11]

15. For the same reason, the Prosecution submits that the Pre-Trial Chamber should summarily dismiss these "jurisdictional" challenges. Though they purport to argue that the Court lacks jurisdiction over the crimes charged, in fact they raise issues of statutory interpretation or sufficiency that do not go to the core competence of the Chamber to adjudicate this case. That is not to say that the Defence cannot make the challenges, since of course they can, but simply that they are not jurisdictional challenges. The issue should be raised and considered like other issues of statutory interpretation or sufficiency, in the course of the confirmation hearing and, if charges are confirmed, during trial proceedings.

II - The Chamber has Correctly Decided that the Charges Sufficiently Allege the Requirement of an Organizational Policy under Article 7(2)(a)

A. The Majority correctly interpreted 'organization'

16. Should the Chamber decide to consider the issue, the Prosecution submits that in accordance with previous decisions the element of an organizational policy contains three requirements: (i) there must be an organization with the capacity to commit the crimes; (ii) the organization must have an implicit or explicit policy to attack a civilian population; and (iii) the organization must

[11] See ICTY Appeals Chamber, *Prosecutor v. Ante Gotovina*, Decision on Ante Gotovina's Interlocutory Appeal against decision on several motions challenging jurisdiction, 6 June 2007, para. 15 (hereinafter, *Gotovina* Appeal). Under the same rationale, the Court also rejected a second claim that another statutory element – that the crimes be "committed against persons taking no active part in the hostilities" -- should similarly be interpreted narrowly. The Court reiterated that those arguments "are properly raised on the merits at trial and do not demonstrate that the International Tribunal lacks subject-matter jurisdiction over the crimes and the elements of those crimes under Counts 8 and 9 of the Joint Indictment"; *Gotovina* Appeal, para. 18

conduct the attack pursuant to or in furtherance of its policy to commit such attack. [12]

17. The Majority's analysis was correct and cannot to be reconsidered as a jurisdictional challenge. The Majority, in accordance with the Statute and previous interpretations by other Chambers, rejected the suggestion that only State-like organizations may qualify and in accordance with the decisions of the Court held that the defining criteria is the purpose and the capacity of the organization to perform acts that infringe on basic human values. It thus rejected an interpretation that requires a formal structure of the group or a concrete level of organization.[13]

18. The Majority also rightly held that the determination whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. It provided further guidance by listing several indicators to clarify its interpretation and application of the term "organizational policy". The factors are related to the facts; they are not required in all instances nor are they intended to exclude other possible factors. Instead, the Majority expressly stated that its list of considerations is not a rigid legal definition, is not exhaustive, and need not be proved in all instances.[14]

19. In the Prosecution's view, the Majority's resolution of the issue was correct. It accords with the plain language and purpose of the Rome Statute, the drafting history, and the views of observers and scholars. It is consistent with decisions of this Court. It is also consistent with the principle that criminal statutes be strictly construed and ambiguities resolved in favour of the Accused.

---

[12] *Prosecutor v Katanga & Ngudjolo*, ICC-01/04-01/06-717, Decision on the Confirmation of Charges, 26 September 2008, para.396; *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, 15 June 2009, para.81.

[13] ICC-01/09-19, 31 March 2010, para. 90.

[14] ICC-01/09-19, 31 March 2010, para. 93.

B. The Language and Purpose of the Statutory Provision

20. The concept of "organization" as set out by the Majority aligns with the ordinary meaning of the term. The Oxford English Dictionary defines an organisation as "an organized body of people with a particular purpose". The MacMillan Dictionary defines it as "a group of people who have a particular shared purpose or interest". Black's Law Dictionary defines it as "a body of persons (such as a union or corporation) formed for a common purpose". In other words, the term requires commonality of purpose but not require formality of structure or other State-like attributes.

21. In addition, the Appeals Chamber has stated that a statutory provision should be read "[…] in context and light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of a law as a whole read in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty."[15] When viewed in light of its context, object, and purpose, Article 7 must be read as the Majority construed it.

22. Article 7(1) and 7(2)(a), read together, require multiple acts as part of a widespread or systematic attack done knowingly and deliberately pursuant to an organizational policy.[16] The evil to which Article 7 is directed is not "State policy" or quasi-State policy, it is attacks against civilians. And its purpose is,

[15] ICC-01/04-168 OA3, para. 33 ; ICC-01/04-01/07-522 OA3, para. 39; ICC-01/04-01/07-573 OA6, para. 5; ICC-01/04-01/06-1432OA9 OA10, para. 55; ICC-01/04-01/06-1486 OA13, para. 40.

[16] For example, an attack need not necessarily be widespread (as requiring large-scale activity involving a great number of victims), but it must at least have some scale, affecting multiple victims. On the other hand, an attack need not necessarily be "systematic" (as requiring methodical organization or orchestration), but it must at least be pursuant to or in furtherance of some sort of plan or policy of a State organization. See Robinson D., in Lee et al. (ed.), The Elements of Crimes against Humanity, in *"ICC: Elements of Crimes and Rules of Procedure and Evidence"*, and Robinson D., *Defining 'Crimes against Humanity' at the Rome Conference*, 93 AM. Journal IN'L L., p. 51.

broadly, to protect all civilian populations against victimization by organized groups and not, narrowly, to protect only civilian populations who are victimized specifically by States or state-like entities.

C. Drafting history and scholarly interpretations

23. The Majority's Decision is confirmed by the evolution of the concept of crimes against humanity and the drafting history of Article 8. The Applicants' submissions are flawed and grounded on an incorrect interpretation of the drafters' intentions.

24. It is beyond dispute that non-State actors can commit crimes against humanity. This common understanding is reflected in the work of the International Law Commission ("ILC"), the decisions of the ICTY, and the writings of jurists and commentaries.[17] Article 18 of the 1996 ILC's draft Code of Crimes, for example, expressly provided that crimes against humanity could be committed by "a Government or by any organisation or group". It intended "organization" to mean, simply, an entity comprised of more than one person. The Commentary to article 18 explained that "[t]his alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organisation. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity."[18] The Commentary

[17] Robinson D. and Von Hebel H., in Lee R.S. (ed.), "Crimes within the Jurisdiction of the Court" in The International Criminal Court The Making of the Rome Statute, p. 96; Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, pp. 48-49.

[18] See Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No.10, at pp. 93, 95-96, UN Doc. A/51/10 (1996) (hereinafter "1996 draft code"). The chapeau paragraph of article 18 reads: "*A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group: (a) murder; (b) extermination […]*". As Jurovics has noted, the 1996 draft code expanded the concept of the entity behind the policy specifically to reflect that

made clear the desire to cover private groups or criminal gangs who commit systematic or mass human rights violations.[19]

25. This concept of "organization" as a means of including crimes by gangs or other such groups, exempting crimes committed by lone actors, is further reflected, directly and inferentially, in the deliberations leading to the Rome Statute. During the negotiations on crimes against humanity, the focus was on excluding random or isolated acts by individuals, not on excluding non-States or non-state-like organisations. As one commentator explained, "[t]he underlying direction, instigation or encouragement by a State or organization is what unites otherwise unrelated inhumane acts, so that they may be accurately described as an 'attack', considered collectively, rather than a mere crime wave or other domestic criminal behavior."[20] The organizational requirement was included to provide context for the requirement that crimes collectively, be widespread or systematic.[21]

26. In addition, and as the Applicants acknowledge and scholars point out, all agree that "organization" includes non-State actors.[22] However, the Applicants

---

armed groups can carry out a criminal policy - a position that Article 7 of the Rome Statute endorses. Y. Jurovic, *Réflexitions sur la spécificité du crime contre l'humanité* (2002), p. 416.

[19] S. Ratner and J. Abrams in "Crimes against Humanity and the Inexactitude of Custom", *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy* (Oxford University Press, 2001), p. 68, fn. 133.

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

[21] Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*. The debate focused primarily on whether the attacks must be widespread *and* systematic, versus widespread *or* systematic. Some delegations noted that requiring only a "widespread" commission of crimes would imply that a common "crime wave" of individuals acting on their own could be crimes against humanity, even where there was no connection between the individual crimes. See also *Prosecutor v. Duško Tadić*, Trial Judgment, IT-94-1-T (7 May 1997), para. 648; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T (2 September 1998), para. 579. Dixon, "Article 7 [4]", in Triffterer (ed.), p. 169. As part of the compromise between the differing views, the drafters adopted the disjunctive ("widespread or systematic") but added that the attack must be "directed against any civilian population" through "a course of conduct" pursuant to State or organizational policy (Article 7(2)(a)) to capture both a significant degree of scale and the element of planning and direction. Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, pp. 47-48.

[22] "State or organizational policy" [is] a term broad enough to include private entities". See Ratner and Abrams in "Crimes against Humanity and the Inexactitude of Custom", *Accountability for*

submit that most scholars require a State-like organization.[23] This claim is erroneous. Numerous scholars agree that "organization" was instead intended to signify that crimes within the jurisdiction of this Court must be done as part of multiple acts by persons acting collectively.[24] Werle noted that the relevant criteria is whether the group has at its disposal, in material and personnel, the potential to commit a widespread or systematic attack on a civilian population.[25] Kittichaisaree further notes that "the law regarding crimes against humanity has developed to the extent that crimes against humanity can be committed on behalf of entities with *de facto* control over a particular territory [or] by a terrorist group or organisation [or] private individuals with the aforesaid *de facto* power or organized in criminal gangs or groups".[26]

27. The Applicants also seem to argue that the exclusion of terrorism or drug trafficking offences from the jurisdiction of the Court signifies an intent to exclude non-State actors.[27] There is, however, no support for that position. Rather, the negotiating history reflects that the drafters included only crimes of

---

Human Rights Atrocities in International Law, p. 68. Robinson notes that delegates considered that the term 'organization' should be interpreted "flexibly" and that while the entity might have to be more than a group [i.e. more that spontaneous mobs and crime waves], an entity would qualify as long as it can be described an 'organization'. Thus, the dividing line was between entities that can only be called 'groups' and those that could be called 'organization': there is nothing in the drafting history to require all the extra requirements posed by the Applicants; Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, p. 50, fn. 44; Cryer R. et al., 'Crimes against Humanity' in *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2nd Ed), p. 238. Ruto Challenge, para. 52 referring to Di Filippo, "*Terrorists Crimes and International Co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes*", European Journal of International Law Vol. 19 no. 3, EJIL 2008, p. 567; Y. Jurovic, *Réflexitions sur la spécificité du crime contre l'humanité*, p. 415.

[23] Ruto and Sang Challenge, para. 58.

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

[25] Werle G., in "Part Four: Crimes against Humanity" in Principles of International Criminal Law (TMC, Asser Press, The Hague 2005), p. 228.

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

[27] Ruto and Sang Challenge, paras. 34-35; Kosgey Challenge, para. 51.

genocide, crimes against humanity, and war crimes so as to focus on the core crimes that might otherwise go unpunished domestically.[28] The significant factor is the nature of the offense, not the identity or official position of the offender.

28. The Ruto/Sang Challenge, for example, mistakenly gives undue weight to Kress's use of the term "(non-state) terrorism". Kress explained that "one reason for not including a (peacetime) crime of (non-state) terrorism in the list of crimes within the jurisdiction of the Court was the conviction that such a crime can be dealt with satisfactorily at the national level". The omission of so-called 'treaty crimes' reflected the intent to focus on the 'core crimes' ultimately adopted, leaving to national systems and international extradition regimes the responsibility for other transnational criminal activity.[29]

D. Relevant ICC Jurisprudence regarding the interpretation of organizational policy

29. The Majority recognized and adopted jurisprudence from other Chambers: the Majority adopted the reasoning in the case against *Katanga & Ngudjolo* and in the case against *Jean-Pierre Bemba*[30] that a private entity not linked to a State is capable of committing an attack against a civilian population and that the formal nature of a group or its level of organization are not the defining criteria.[31]

---

[28] See H Duffy, *The 'War on Terror' and the Framework of International Law* (CUP, Cambridge 2005), p. 39.

[29] Report of the Preparatory Committee on the Establishment of an International Criminal Court Volume I (Proceedings of the Preparatory Committee during March-April and August 1996) General Assembly Official Records, Fifty-first Session Supplement No.22, UN. Doc. A/51/22; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an international Criminal Court Rome, 15 June - 17 July 1998 Official Records Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, UN. Doc. A/CONF.183/13

[30] ICC-01/04-01/07-717, para. 396; see also ICC-01/05-01/08-424, para. 81.

[31] ICC-01/09-19, para. 90.

30. The avoidance of a narrow or rigid definition is also signified in the Appeals Chamber's judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I on an application for warrants of arrest in the *Ntaganda* case.[32] Declining to rigidly interpret the gravity threshold for admissibility in Article 17(1)(d), it stated that "the particular role of a person, or for that matter, an organization, may vary considerably depending on the circumstances of the case and should not be exclusively assessed or predetermined on excessively formalistic grounds".[33] The Appeals Chamber further held that a rigid interpretation of those most responsible "ignore[s] the highly variable constitutions and operations of different organisations and could encourage any future perpetrators to avoid criminal responsibility before the ICC simply by ensuring that they are not a visible part of the high-level decision-making process".[34]

E. This interpretation is not contrary to the principle of strict construction of penal statutes.

31. Contrary to the Ruto and Sang Challenges,[35] the position of the Majority respects the principle of strict construction of penal status enshrined, *inter alia*, in Article 22(2).[36]

32. The construction advanced by the Majority is true to the statutory language, which does not narrowly define "organization", and true to the common meaning of that word. It is true to the purpose that underlines Article 7 and the whole Statute, including to the specific purpose of protecting civilian populations from crimes by organized criminal groups (regardless of state or quasi-state affiliation) who have the capacity to commit the serious crimes

[32] ICC-01/04-169.
[33] ICC-01/04-169, para. 76.
[34] ICC-01/04-169, para. 77.
[35] Ruto and Sang Challenge, paras. 21-22; see also ICC-01/09-01/11-T-5-ENG, p. 34, lns. 34-35.
[36] Broomhall in Triffterer, "Article 22", p. 724 [37].

enumerated in Article 7.[37] Nor is there ambiguity in the statutory language that would require the Chamber to interpret the Statute in the light most favourable to the Suspects.

III - The jurisdictional challenges inappropriately contest the sufficiency of the evidence, the specificity of the charges, and the admissibility of the case

33. Both Challenges include a number of allegations against the sufficiency of the evidence underpinning the charges, as well as the manner in which those charges have been pleaded. The Ruto and Sang Challenge devotes 20 paragraphs to the strength of the evidence supporting the Prosecution's claim that the Suspects acted within an organization "in the context of Article 7 (2) (a) of the Statute".[38] This section attempts to demonstrate, through arguments addressing the sufficiency of the evidence as well as its probative value, that the Prosecution failed to establish substantial grounds to believe that the Suspects "acted pursuant to or in furtherance of a State or organizational policy to commit an attack against a civilian population".[39] The Kosgey Challenge contains a section entitled "Submissions on the Prosecution allegations",[40] in which the Applicant advances arguments highlighting instances of purported vagueness,[41] inconsistency[42] or incompleteness[43] of the charges.

34. The Prosecution submits that those allegations fall squarely outside the proper scope of a jurisdictional challenge and should be accordingly dismissed *in limine*. These arguments can be raised by the Applicants in their closing

[37] Di Filippo, "*Terrorrist Crimes and International Co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes*", p. 568, fn. 143.
[38] Ruto and Sang Challenge, paras. 62-81.
[39] *Ibid*,, para. 80.
[40] See Kosgey Challenge, paras. 70-97.
[41] *Ibid*., para. 74, para. 86, para. 90.
[42] *Ibid*., para. 89.
[43] *Ibid*., para. 84.

arguments or at the trial if charges are confirmed.[44] If inclusion of the arguments in the Jurisdictional challenges is intended to circumvent page restrictions in the closing arguments, that effort should be disallowed.

35. Discussions as to whether the facts are properly pleaded or are sufficiently supported by the evidence, however, can have no place in a jurisdictional challenge. Rather, the necessary factual determinations related the charges must be left for the confirmation decision – within the limited terms of the Article 61 scrutiny of the charges – and, if charges are confirmed, for the trial.[45]

36. Finally, in its oral submissions the Kosgey Defence appeared to link its jurisdictional challenge to complementarity, by suggesting that the term organization somehow bears on an assessment whether "the state will not act".[46] This argument itself is not clear. However, it is clear that complementarity and admissibility may bear on the Court's exercise of jurisdiction as a court of first resort but are irrelevant to a discussion of subject matter jurisdiction or to an interpretation of the constituent elements of the crimes under the Statute.

---

[44] See ICTY, *Prosecutor v. Brdanin & Talic*, Decision on motions by Momir Talic (1) to dismiss the indictment, (2) for release, and (3) for leave to reply to response of prosecution to motion for release, 1 February 2000, para. 3-4: the jurisdiction of the Tribunal "depends upon whether the indictment has pleaded sufficient material facts to establish a prima facie case against the accused in relation to the charge or charges against him. It does not depend upon whether the supporting material provided by the Prosecutor to the confirming judge supports that charge. A challenge to the jurisdiction of the Tribunal upon the basis that the supporting material did not support that charge must therefore fail."

[45] See *Gotovina* Appeal, para. 18 (ruling that the issue whether an armed conflict existed during the entire period covered by the charges is "a factual determination to be made at trial").

[46] ICC-01/09-01/11-T-5-ENG ET WT 01-09-2011, page 35, lines 8-14: "It is, therefore, our humble submission that the term 'organization' in Article 7(2) taken in the context of the principle of complementarity which is the cornerstone for establishment of this Court can only have been intended to encompass the scope of such crimes as are of extremely grave threat to basic human values as enshrined in the preamble to the Statute and anticipate situations where there is a reason to doubt that judicial response at national level will not follow".

CONCLUSION

37. For the reasons set out above, the Prosecution respectfully requests that the Chamber dismiss the Applicants' Challenges to Jurisdiction.

Luis Moreno-Ocampo, Prosecutor

Dated this 16th day of September 2011

At The Hague, the Netherlands