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International
Criminal
Court

Original: **English**

No.: **ICC-01/09-02/11**
Date: **23 January 2012**

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. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI

Public Redacted Version

Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute

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

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

Counsel for Francis Kirimi Muthaura
Karim Khan, Essa Faal, Kennedy Ogetto, Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohamed Hussein Ali
Evans Monari, John Philpot and Gershom Otachi Bw'omanwa

Legal Representatives of the Victims
Morris Azuma Anyah

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

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PRE-TRIAL CHAMBER II (the "Chamber") of the International Criminal Court (the "Court"), by majority, hereby renders this decision on the confirmation of charges pursuant to article 61(7)(a) and (b) of the Rome Statute (the "Statute").

I. PROCEDURAL HISTORY

1. On 26 November 2009, the Prosecutor filed a request for authorization to commence an investigation into the situation in the Republic of Kenya.[1] On 31 March 2010, the Chamber authorized, by majority, the commencement of an investigation into the situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009 (the "31 March 2010 Decision").[2]

2. On 15 December 2010, the Prosecutor submitted an application requesting the Chamber to issue summonses to appear for Francis Kirimi Muthaura ("Mr. Muthaura"), Uhuru Muigai Kenyatta ("Mr. Kenyatta"), and Mohammed Hussein Ali ("Mr. Ali") (collectively "the Suspects").[3]

3. On 8 March 2011, the Chamber, by majority, decided that there were reasonable grounds to believe that the Suspects are criminally responsible for the crimes against humanity of murder, forcible transfer of population, rape, other inhumane acts and persecution, and summoned the Suspects to appear before it (the "Decision on Summonses to Appear").[4]

4. Pursuant to this decision, the Suspects voluntarily appeared before the Court at the initial appearance held on 8 April 2011. During the initial appearance, in accordance with articles 60 and 61 of the Rome Statute (the "Statute") and rule 121 of the Rules of Procedure and Evidence (the "Rules"), the Chamber, *inter alia*, satisfied

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[1] ICC-01/09-3 and annexes.
[2] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr.
[3] ICC-01/09-31-Conf-Exp and annexes.
[4] Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01, p. 23.

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itself that the Suspects had been informed of the charges against them and of their rights under the Statute and set the date of the commencement of the confirmation of charges hearing for 21 September 2011.[5]

5. Since the initial appearance of the Suspects, the Chamber has been seized of a variety of procedural and legal issues, of which only the most important are outlined in the following sections. In total, the Chamber has received over 280 filings and has issued 90 decisions, including the present decision.

A. The Government of the Republic of Kenya's challenge to the admissibility of the case

6. On 31 March 2011, the Government of the Republic of Kenya filed the "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute", wherein it requested the Chamber to find that the case against the Suspects is inadmissible.[6] On 21 April 2011, the Government of the Republic of Kenya filed 22 annexes of additional material, amounting to over 900 pages, with which it sought to buttress its initial challenge.[7]

7. On 30 May 2011, the Chamber issued the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", wherein it determined that the case against the Suspects is admissible.[8] On 30 August 2011, this decision was upheld by the Appeals Chamber.[9]

B. Disclosure of evidence

8. With the aim of proactively managing the disclosure of evidence and its communication to the Chamber prior to the confirmation of charges hearing, the Chamber, on 6 April 2011, issued the "Decision Setting the Regime for Evidence

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[5] ICC-01/09-02/11-T-1-ENG, pp. 7, 12-14.
[6] ICC-01/09-02/11-26 and annexes.
[7] ICC-01/09-02/11-67 and annexes.
[8] Pre-Trial Chamber II, ICC-01/09-02/11-96.
[9] Appeals Chamber, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", ICC-01/09-02/11-274.

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Disclosure and Other Related Matters".[10] It established a principled approach to disclosure, wherein the parties were encouraged to disclose items of evidence in advance of the minimum requirements stipulated in rule 121(3) to (6), and (9) of the Rules. Subsequently, on 20 April 2011, the Chamber issued a decision establishing a calendar for disclosure.[11] It set a series of time-limits, which accommodated the estimated volume of evidence to be disclosed by the parties, as well as the Defence right to have adequate time and facilities to prepare, in accordance with article 67(1)(b) of the Statute.

9. As part of the disclosure process, the Chamber issued a number of decisions on the Prosecutor's requests for redactions under rule 81(2) and (4) of the Rules. On 8 July 2011, the Chamber issued the "First Decision on the Prosecutor's Requests for Redactions and Related Requests",[12] wherein it, *inter alia,* outlined the principled approach of the Chamber with respect to the Prosecutor's proposals for redactions as well as *proprio motu* redactions pursuant to rule 81(4) of the Rules. From 3 June 2011 to 23 August 2011, the Prosecutor submitted 7 filings proposing redactions to evidence.[13] The Defence teams sought no redactions to their evidence. Following the first decision on redactions, the Chamber issued five further decisions concerning redactions between 19 July 2011 and 20 September 2011.[14]

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[10] Pre-Trial Chamber II, ICC-01/09-02/11-48 and annexes.

[11] Pre-Trial Chamber II, "Decision on the "Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge" and Establishing a Calendar for Disclosure Between the Parties", ICC-01/09-02/11-64.

[12] Pre-Trial Chamber II, ICC-01/09-02/11-165-Conf-Red.

[13] ICC-01/09-02/11-101-Conf-Exp; ICC-01/09-02/11-136-Conf-Exp; ICC-01/09-02/11-174-Conf-Exp; ICC-01/09-02/11-191-Conf-Exp; ICC-01/09-02/11-203-Conf-Exp; ICC-01/09-02/11-225-Conf-Exp; ICC-01/09-02/11-337-Conf-Exp.

[14] Pre-Trial Chamber II, "Second Decision on the Prosecutor's Requests for Redactions", ICC-01/09-02/11-178-Conf-Exp; Pre-Trial Chamber II, "Third Decision on the Prosecutor's Requests for Redactions", ICC-01/09-02/11-205-Conf-Exp; Pre-Trial Chamber II, "Fourth Decision on the Prosecutor's Requests for Redactions", ICC-01/09-02/11-236-Conf-Exp; Pre-Trial Chamber II, "Fifth Decision on the Prosecutor's Request for Redactions", ICC-01/09-02/11-254-Conf-Exp; Pre-Trial Chamber II, "Sixth Decision on the Prosecutor's Request for Redactions", ICC-01/09-02/11-341-Conf-Exp.

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10. On 19 August 2011, the Prosecutor filed the Document Containing Charges, together with the List of Evidence,[15] and on 2 September 2011 an amended version thereof (the "Amended DCC").[16] On 5 September 2011, the Defence teams of the Suspects each filed their Lists of Evidence.[17] Together the parties have placed before the Chamber 14,640 pages of evidence for the purpose of making a determination under article 61(7) of the Statute.

C. Participation of victims in the proceedings

11. On 30 March 2011, the Chamber issued the "First Decision on Victims' Participation in the Case",[18] with a view to regulating the submission to the Chamber of victims' applications to participate in the proceedings.

12. The Chamber received and assessed 249 victims' applications for participation in the present proceedings.[19] On 26 August 2011, the Chamber issued the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", wherein it, *inter alia,* admitted 233 victims as participants at the confirmation of charges hearing and in the related proceedings, appointed the Common Legal Representative, and specified the scope of participatory rights of victim participants to be exercised, through the legal representative, during the confirmation of charges hearing.[20]

D. Preparation for the confirmation of charges hearing

13. In preparation for the confirmation of charges hearing, the Chamber issued a number of case management decisions. Though the Prosecutor elected not to call live witnesses, the Defence teams initially proposed to call a maximum of 24 witnesses.[21] The Chamber, in light of the limited purpose and scope of the confirmation of

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[15] ICC-01/09-02/11-257 and confidential annexes.
[16] ICC-01/09-02/11-280 and confidential annexes.
[17] ICC-01/09-02/11-293 and confidential annexes; ICC-01/09-02/11-300 and confidential annex; ICC-01/09-02/11-301 and confidential annexes.
[18] Pre-Trial Chamber II, ICC-01/09-02/11-23.
[19] ICC-01/09-02/11-98 and annexes; ICC-01/09-02/11-199 and annexes.
[20] Pre-Trial Chamber II, ICC-01/09-02/11-267.
[21] ICC-01/09-02/11-215 and confidential annex; ICC-01/09-02/11-216 and confidential annex; ICC-01/09-02/11-219 and confidential annexes.

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charges hearing, instructed the Defence teams to call a maximum of 2 live witnesses per suspect.[22] On 13 September 2011, the Chamber established the schedule for the confirmation of charges hearing, taking into account the observations of the parties, with a view to regulating the presentation of evidence, submissions, and witnesses.[23]

14. Pursuant to the decision on the schedule, on 19 September 2011, the Defence of Mr. Kenyatta filed its submissions on jurisdiction,[24] and the Defence of Mr. Ali filed its "Defence Challenge to Jurisdiction, Admissibility and Prosecution's Failure to Meet the Requirements of Article 54".[25]

15. In compliance with the Chamber's oral directions,[26] on 14 October 2011, the Prosecutor[27] and the Legal Representative of Victims[28] submitted their written observations on the Defence filings dated 19 September 2011.

E. The confirmation of charges hearing

16. The confirmation of charges hearing commenced on 21 September 2011 and concluded on 5 October 2011. The parties first presented their submissions regarding procedural matters and then presented their respective cases, with each Defence team calling two *viva voce* witnesses. On the first day of the hearing, during the opening statement of his Defence team, Mr. Muthaura exercised his right under article 67(1)(h) of the Statute, to make an unsworn oral statement. During the presentation of his case, Mr. Kenyatta gave a sworn statement and was questioned by the parties and the Legal Representative of Victims. Further, consistent with the Chamber's ruling in its first decision on victims, the Chamber entertained and granted oral requests from the Legal Representative to question witnesses.

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[22] Pre-Trial Chamber II, "Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses", ICC-01/09-02/11-226.
[23] Pre-Trial Chamber II, "Decision on the Schedule for the Confirmation of Charges Hearing", ICC-01/09-02/11-321 and annex.
[24] ICC-01/09-02/11-339.
[25] ICC-01/09-02/11-338.
[26] ICC-01/09-02/11-T-4-ENG, p. 16, lines 13-17.
[27] ICC-01/09-02/11-356.
[28] ICC-01/09-02/11-357.

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17. Furthermore, at the close of the confirmation of charges hearing, the Chamber granted the parties and the Legal Representative of Victims the opportunity to make final written submissions and set time-limits for this purpose.[29]

18. In accordance with the Chamber's directions, the Legal Representative of Victims[30] and the Prosecutor[31] filed their final written observations on 28 October 2011. The Defence of Mr. Kenyatta filed its final written observations on 17 November 2011.[32] On 21 November 2011, the Defence of Mr. Ali[33] and the Defence of Mr. Muthaura[34] filed their final written observations.

F. Additional judicial matters

19. During the initial stages of proceedings the Chamber received[35] and rejected three applications for leave to submit *amicus curiae* observations.[36] Further, the Chamber has on two occasions decided upon Defence concerns regarding public statements by the Prosecutor,[37] wherein, although it rejected the requests, the Chamber cautioned the parties from making public statements which might erode the integrity of proceedings.[38]

20. On 28 June 2011, the Chamber sought observations from the Prosecutor and the Registry, in light of concerns of a possible impediment to the appointment of a

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[29] ICC-01/09-02/11-T-15-Red-ENG, p. 88, lines 14-19.
[30] ICC-01/09-02/11-360-Corr.
[31] ICC-01/09-02/11-361.
[32] ICC-01/09-02/11-372.
[33] ICC-01/09-02/11-373-Red and annexes.
[34] ICC-01/09-02/11-374-Red and confidential annexes.
[35] ICC-01/09-02/11-45; ICC-01/09-02/11-75; ICC-01/09-02/11-112.
[36] Pre-Trial Chamber II, "Decision on the 'Request by Ms. Moraa Gesicho to Appear as Amicus Curiae'", ICC-01/09-02/11-54; Pre-Trial Chamber II, "Decision on the 'Request for leave to submit Amicus Curiae Observations on behalf of the Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence'", ICC-01/09-02/11-87; Pre-Trial Chamber II, "Decision on the 'Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence'", ICC-01/09-02/11-118.
[37] ICC-01/09-02/11-20; ICC-01/09-02/11-359.
[38] Pre-Trial Chamber II, "Decision on the Defence 'Application for Order to the Prosecutor Regarding Extrajudicial Comments to the Press'", ICC-01/09-02/11-83; Pre-Trial Chamber II, "Decision on the 'Application by the Defence of Ambassador Francis K. Muthaura in Relation to Public Statement of the Prosecutor'", ICC-01/09-02/11-370.

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member of the Defence team of Mr. Muthaura, Mr. Essa Faal.[39] Following observations from the parties and the Registry, the Chamber decided, on 20 July 2011, that no such impediment existed.[40] The Prosecutor sought[41] and was granted[42] leave to appeal this decision. On 10 November 2011, the Appeals Chamber issued its Judgment wherein it reversed the impugned decision and remitted the matter to the Chamber.[43]

II. THE CHARGES

21. In the Amended DCC, the Prosecutor charges Mr. Muthaura, Mr. Kenyatta and Mr. Ali as follows:

Count 1 (MUTHAURA and KENYATTA)

Murder constituting a crime against humanity

(Articles 7(1)(a) and 25(3)(a) of the Rome Statute)

> From on or about 30 December 2007 to 31 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA as co-perpetrators, committed or contributed to the commission of crimes against humanity, namely the murder of civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute.

Count 2 (ALI)

Murder constituting a crime against humanity

(Articles 7(1)(a) and 25(3)(d) of the Rome Statute)

> From on or about 30 December 2007 to 31 January 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose committed or contributed to the commission of crimes against

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[39] Pre-Trial Chamber II, "Order to the Prosecutor and the Registrar to Submit Observations Regarding a Potential Impediment to Defence Representation", ICC-01/09-02/11-138-Conf.

[40] Pre-Trial Chamber II, "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", ICC-01/09-02/11-185.

[41] ICC-01/09-02/11-195.

[42] Pre-Trial Chamber II, "Decision on the "Prosecution's Application for Leave to Appeal the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)'", ICC-01/09-02/11-253.

[43] Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence'", ICC-01/09-02/11-365.

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humanity, namely the murder of civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(d) of the Rome Statute.

Count 3 (MUTHAURA and KENYATTA)

Deportation or forcible transfer of population constituting a crime against humanity

(Articles 7(1)(d) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA as co-perpetrators committed or contributed to the commission of crimes against humanity, namely the deportation or forcible transfer of civilian population supporting the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(d) and 25(3)(a) of the Rome Statute.

Count 4 (ALI)

Deportation or forcible transfer of population constituting a crime against humanity

(Articles 7(1)(d) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose committed or contributed to the commission of crimes against humanity, namely the deportation or forcible transfer of civilian population supporting the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(d) and 25(3)(d) of the Rome Statute.

Count 5 (MUTHAURA and KENYATTA)

Rape and other forms of sexual violence constituting a crime against humanity

(Articles 7(1)(g) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed or contributed to the commission of crimes against humanity, namely rape and other forms of sexual violence against civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley

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Province), Republic of Kenya, in violation of Articles 7(1)(g) and 25(3)(a) of the Rome Statute.

Count 6 (ALI)

Rape and other forms of sexual violence constituting a crime against humanity

(Articles 7(1)(g) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose committed or contributed to the commission of crimes against humanity, namely rape and other forms of sexual violence against civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(g) and 25(3)(d) of the Rome Statute.

Count 7 (MUTHAURA and KENYATTA)

Other inhumane acts constituting a crime against humanity

(Articles 7(1)(k) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA as co-perpetrators committed or contributed to the commission of crimes against humanity, namely the inflicting of great suffering and serious injury to body or to mental or physical health by means of inhumane acts upon civilian supporters of the Orange Democratic Movement civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(k) and 25(3)(a) of the Rome Statute.

Count 8 (ALI)

Other inhumane acts constituting a crime against humanity

(Articles 7(1)(k) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose, committed or contributed to the commission of crimes against humanity, namely the inflicting of great suffering and serious injury to body or to mental or physical health by means of inhumane acts upon civilian supporters of the Orange Democratic Movement party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(k) and 25(3)(d) of the Rome Statute.

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Count 9 (MUTHAURA and KENYATTA)

Persecution as a crime against humanity

(Articles 7(1)(h) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA as co-perpetrators committed or contributed to the commission of crimes against humanity, namely persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, rape and other forms of sexual violence, other inhumane acts and deportation or forcible transfer, in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(a) of the Rome Statute.

Count 10 (ALI)

Persecution as a crime against humanity

(Articles 7(1)(h) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 31 January 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose, committed or contributed to the commission of crimes against humanity, namely persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, rape and other forms of sexual violence, other inhumane acts and deportation or forcible transfer, in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(d) of the Rome Statute.

III. JURISDICTION AND ADMISSIBILITY

22. Article 19(1) of the Statute provides that "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17".

A. Jurisdiction

23. According to article 19 of the Statute, the Chamber's determination as to whether it has jurisdiction over the case against Mr. Muthaura, Mr. Kenyatta and Mr. Ali is a prerequisite for its decision, pursuant to article 61(7) of the Statute, on the confirmation of the charges against the Suspects. Furthermore, the Chamber

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considers that the phrase "satisfy itself that it has jurisdiction" also entails that the Court must "attain the degree of certainty" that the jurisdictional parameters under the Statute have been met.[44]

24. In this regard, the Chamber recalls its previous finding:

> In the 31 March 2010 Decision, the Chamber has examined the different facets of jurisdiction in terms of place (*ratione loci, i.e.* in the Republic of Kenya), time (*ratione temporis, i.e.* crimes allegedly committed after 1 June 2005), and subject-matter (*ratione materiae, i.e.* crimes against humanity). It has also defined the scope of the Prosecutor's investigation with respect to the situation under consideration in view of the above-mentioned three jurisdictional prerequisites, namely the territorial, temporal and material parameters of the situation. It found that all the requirements have been met which led it to authorise the Prosecutor to commence an investigation into the situation in the Republic of Kenya in relation to "crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009". [The Chamber] is of the view that, since the Prosecutor has adhered to the Court's territorial, temporal and material parameters defining the situation as confirmed in its 31 March 2010 Decision, it finds no need to reiterate its finding and provide a further detailed assessment of the question of jurisdiction of the cases arising from that situation at this stage.[45]

25. The Chamber notes that the Defence teams have not challenged the territorial or the temporal jurisdiction of the Court over the present case. In light of this, and on the basis of the charges as presented by the Prosecutor in the Amended DCC, the Chamber considers that the Court's territorial and temporal parameters are still satisfied, and accordingly, that there is no reason to repeat its previous finding on these two aspects of jurisdiction.

26. With respect to the Court's material jurisdiction, the Chamber recalls that the Defence teams of Mr. Ali and Mr. Kenyatta purport to challenge this particular facet of jurisdiction in their filings dated 19 September 2011.[46]

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[44] Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-1, para. 9; Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 24.

[45] Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-1, paras 10-11.

[46] ICC-01/09-02/11-338; ICC-01/09-01/11-339.

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27. The Defence of Mr. Kenyatta argues that the Court does not have jurisdiction over the present case "on the ground that there was no attack on any civilian population pursuant to a State or 'organizational policy' as disclosed by the evidence of the Prosecut[or]".[47] In particular the Defence of Mr. Kenyatta contends that the interpretation of the term "organization" within the meaning of article 7(2)(a) of the Statute, as advanced by the Chamber in the 31 March 2010 Decision, is incorrect since it is inconsistent with the intention of the drafters of the Statute and customary international law.[48] Accordingly, the Defence requests the Chamber: (i) to find that an "organization" within the meaning of article 7(2)(a) of the Statute must partake of the characteristics of the State; and (ii) in light of such narrower definition, to assess at the conclusion of the confirmation hearing the entirety of the evidence presented and "decline to exercise jurisdiction" in the present case.[49] Furthermore, the Defence of Mr. Kenyatta avers that, even if the Chamber is not persuaded that an "organization" should partake of some characteristics of a State, the present case does not meet the criteria set out in the 31 March 2010 Decision and the Chamber should determine it has no jurisdiction following a review of the evidence.[50] In light of the arguments presented, the Defence of Mr. Kenyatta concludes that, regardless of whether the Chamber finally adopts a traditional definition or an "expansive new definition"[51] of "organization", "the Prosecut[or] has failed to adduce sufficient evidence of substantial grounds of the existence of an 'organizational policy' behind the crimes charged"[52] and, therefore, the Court lacks material jurisdiction over the present case.[53]

28. The Defence of Mr. Ali challenges the jurisdiction of the Court over the present case asserting that "the Prosecut[or] has failed [...] to allege or establish

[47] ICC-01/09-02/11-339, para. 12.
[48] ICC-01/09-02/11-339, paras 15-58.
[49] ICC-01/09-02/11-339, para. 74.
[50] ICC-01/09-02/11-339, para. 12.
[51] ICC-01/09-02/11-339, para. 23.
[52] ICC-01/09-02/11-339, para. 72.
[53] ICC-01/09-02/11-339, para. 12.

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requisite elements of [a]rticle 7" of the Statute.[54] Specifically, the Defence of Mr. Ali argues that "[h]aving charged [Mr.] Ali with crimes against humanity under [a]rticle 7 [of the Statute], the Prosecut[or] bears the burden of proving that such crimes were committed, and has failed to do so".[55] In particular, the Defence of Mr. Ali, relying on the factors that the Chamber identified as relevant to determining whether a group qualifies as an "organization" under the Statute, submits that the Prosecutor "has provided no factual basis to conclude that [the] alleged group possessed the means to carry out a widespread and systematic attack against the civilian population".[56]

29. The Prosecutor responds that neither of the Defence challenges can be qualified as a legal challenge to the Court's jurisdiction, since "[j]urisdiction is a threshold matter to be resolved by courts before proceeding to consider the merits of the case" whilst the Defence is "reversing the process", *i.e.* "arguing the merits of the case to establish that the threshold requirements of jurisdiction are not established".[57] Accordingly, the Prosecutor submits that the challenges presented by both Defence teams should be dismissed in their entirety and further requests the Chamber "to clarify that such arguments cannot be mischaracterized as a jurisdictional [...] challenge in order to circumvent page limitations for the post-confirmation briefs or to guarantee an automatic right of appeal".[58]

30. The Chamber agrees with the Prosecutor that the way in which the challenges presented by the two Defence teams are framed clearly indicates that they are not jurisdictional in nature but, instead, are challenges on the merits of the Prosecutor's case on the facts.

31. In particular, the challenge presented by the Defence of Mr. Ali is based on the Prosecutor's asserted failure to establish to the requisite threshold that the alleged crimes were committed pursuant to or in furtherance of a policy attributable to an

[54] ICC-01/09-02/11-338, para. 1.
[55] ICC-01/09-02/11-338, para. 12.
[56] ICC-01/09-02/11-338, para. 31.
[57] ICC-01/09-02/11-356, para. 3.
[58] ICC-01/09-02/11-356, para. 4.

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"organization" within the meaning of article 7(2)(a) of the Statute. In fact, as recalled above, the Defence of Mr. Ali provides an analysis of the evidence in the present case in order to demonstrate that the "organization" alleged by the Prosecutor does not meet the factors previously identified by the Chamber as relevant to the determination of whether a group qualifies as an "organization" within the meaning of article 7(2)(a) of the Statute.[59] In this respect, the Chamber considers that the Defence submission falls in its entirety within the ambit of exercise of the rights accorded to the Defence pursuant to article 61(5) and (6) of the Statute. Accordingly, the Defence submission cannot be qualified as a challenge to the jurisdiction of the Court over the present case, but conversely, shall be addressed pursuant to the standard provided for in article 61(7) of the Statute in the relevant part of the decision, namely in the section concerning the contextual elements of the crimes against humanity charged.

32. The Chamber considers that the same conclusion applies to the submission of the Defence of Mr. Ali to the effect that the Court is deprived of jurisdiction with respect to the present case, because the Prosecutor has failed to prove the requirements prescribed by article 25(3)(d) of the Statute.[60]

33. Likewise, according to the Chamber, the challenge presented by the Defence of Mr. Kenyatta is not jurisdictional in nature. In fact, the Defence challenges the jurisdiction of the Court over the present case on the basis of two points: (i) the legal definition of "organization"; and (ii) the lack of sufficient evidence to establish the existence of an "organization". The Chamber however notes that these two points are not presented by the Defence as independent arguments, either of which, if upheld, would autonomously establish lack of material jurisdiction in the present case. To the contrary, the Defence clearly requests the Chamber to adopt a narrower definition of "organization" and to apply this definition to the facts of the case, as established by the evidence. In the Defence submission, it is only after conducting both steps that

[59] ICC-01/09-02/11-338, paras 22-42.
[60] ICC-01/09-02/11-338, paras 1, 9, 43-51.

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the Chamber should decline to exercise jurisdiction over the present case.[61] In these circumstances, the Chamber is of the view that, in the way the challenge is framed, the issue related to the definition of the term "organization" cannot be considered as an independent argument to establish the lack of material jurisdiction. In fact, even if the Chamber were to uphold this argument regarding the definition of "organization", it would still be requested to proceed to the second limb of the challenge, and to assess the evidence and determine that the Prosecutor did not provide sufficient evidence to establish that the alleged organization partakes of some characteristics of a State. In this case, however, the Chamber would not dismiss the case as falling outside the scope of the material jurisdiction of the Court, but it would, rather, decline to confirm the charges. Accordingly, since the Defence challenge cannot be answered without an assessment of the facts of the case against the asserted statutory interpretation of the term "organization", the Chamber is not persuaded that the challenge is indeed jurisdictional in nature.

34. The Chamber considers that the same conclusion should be reached *a fortiori* with respect to the alternative request advanced by the Defence of Mr. Kenyatta in case the Chamber confirms its previous interpretation of the term "organization" within the meaning of article 7(2)(a) of the Statute. In this respect, the Defence of Mr. Kenyatta submits that "even if the [Chamber] is not persuaded that an organization under [a]rticle 7(2)(a) must possess State-like elements, the [Court] does not have jurisdiction to try this case as the evidence disclosed by the Prosecut[or] does not establish an organizational policy to commit the alleged crimes, on either definition provided by the Chamber".[62] This request in the alternative, and the arguments advanced in its support, also cannot be considered jurisdictional under article 19 of the Statute, but, conversely, qualify as a challenge to the sufficiency of the evidence to satisfactorily establish one of the constitutive elements of the crimes charged pursuant to article 61(7) of the Statute, and shall be treated accordingly.

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[61] ICC-01/09-02/11-339, para. 73.
[62] ICC-01/09-02/11-339, para. 59.

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35. In light of the above, the Chamber considers that the purported jurisdictional challenges presented by the Defence of Mr. Kenyatta and the Defence of Mr. Ali must be dismissed *in limine* in their entirety.

36. However, the Chamber is of the view that, in the present circumstances, the arguments advanced by the Defence teams in their challenges shall be considered in the part of this decision addressing the merits of the case pursuant to article 61(7) of the Statute. In fact, the Chamber notes that, upon receipt of the Defence filings, the Chamber invited the Prosecutor and the Legal Representative of Victims to submit observations thereto pursuant to rule 58 of the Rules. Although the rationale of this invitation was to receive all the necessary information to arrive to an informed decision – including as to the actual nature of the alleged jurisdictional challenge – the Chamber considers that the principle of fairness of the proceedings mandates that the arguments advanced by the Defence teams in their filings under consideration not be disregarded but shall be addressed in the part on the merits of the present decision.

37. Accordingly, and on the basis of the charges brought by the Prosecutor, the Chamber finds that the requirement of material jurisdiction is also met in the present case and determines that the case against the Suspects falls within the jurisdiction of the Court.

B. Admissibility

38. Regarding admissibility, the second sentence of article 19(1) of the Statute implies that, in the absence of a challenge by any of the parties referred to in article 19(2) of the Statute, an admissibility determination on the case by the Chamber is not mandatory but is, in principle, discretionary. The Chamber observes that, pursuant to the Statute, the assessment as to the admissibility of a case is to be conducted with respect to two different limbs, the first relating to the existence of national proceedings and the second as to the gravity of the case.

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39. With respect to the former, the Chamber notes that no Defence team challenged the admissibility of the case on the basis of the existence of national proceedings. Accordingly, the Chamber does not find it necessary to conduct a determination of the admissibility of the case with respect to this limb of the admissibility test.

40. Turning to the gravity of the case as the second component of admissibility in accordance with article 17(1)(d) of the Statute, the Chamber notes that the Defence of Mr. Muthaura and the Defence of Mr. Kenyatta did not raise any challenge in this respect. Conversely, the Defence of Mr. Ali alleges that the case against Mr. Ali does not rise to the level of sufficient gravity and, therefore, submits that it must be declared inadmissible.[63]

41. In particular, the Defence of Mr. Ali asserts that "[i]f the 'conduct in question' is defined as alleged police inaction by [Mr.] Ali or those under his command, then this case is not one of 'sufficient gravity'" both as a matter of law and as a matter of fact. From the first viewpoint, the Defence states that "there is substantial doubt as to whether inaction can, as a matter of law, result in liability and rise to the sufficient level of gravity" because in this sense the "Court's treatment of omission [...] is a conservative one".[64] Furthermore, the Defence avers that, as a factual matter, the police inaction for which Mr. Ali is alleged to be criminally responsible does not constitute conduct of sufficient gravity in light of the gravity test articulated by Pre-Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, because: (i) no evidence has been provided by the Prosecutor to substantiate his claim that there was any deliberate failure to act on the side of the Kenya Police and, thus, that any such failure was "systematic or large-scale";[65] (ii) Mr. Ali did not control the Kenyan government policies at the relevant time and therefore he was not one of the "most senior leaders";[66] and (iii) Mr. Ali does not fall into the category of those most

[63] ICC-01/09-02/11-338, paras 56-71.
[64] ICC-01/09-02/11-338, para. 63.
[65] ICC-01/09-02/11-338, para. 65.
[66] ICC-01/09-02/11-338, para. 66.

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responsible for the crimes, as he has not been accused of being a principal or direct perpetrator.[67]

42. The Prosecutor responds that the challenge to the admissibility of the case must fail, as it "mixes an incorrect assessment of gravity with an attack on the sufficiency of the evidence".[68] He states that the Defence of Mr. Ali "relies entirely on a gravity test that has been rejected by the Appeals Chamber as flawed and erroneous in law".[69] The Prosecutor further contends that the Defence of Mr. Ali appears to be attempting to use the rules of admissibility to limit accountability under the Statute to principals and direct perpetrators, without any legal support.[70] Finally, the Prosecutor states that the Defence of Mr. Ali wrongly includes allegations against the sufficiency of the evidence underpinning the charges as a second form of attack on admissibility, asserting that such allegations fall outside the proper scope of an admissibility challenge and should be accordingly dismissed.[71]

43. In its final written observations, the Defence of Mr. Ali recognizes that the decision of Pre-Trial Chamber I was reversed on appeal but states that the "OTP neglects to note that the decision was reversed on other grounds".[72] The Defence avers that the "OTP must acknowledge that the Appeals Chamber provided no alternate test" and that "no court in the interim has addressed what gravity threshold should be used".[73] The Defence continues that even if the Court applies the "sentencing guidelines cited [...] in its 31 March 2010 decision", one of these guidelines, which relates to "the nature of the unlawful behaviour or of the crimes allegedly committed" is unsatisfied.[74]

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[67] ICC-01/09-02/11-338, para. 67.
[68] ICC-01/09-02/11-356, para. 43.
[69] ICC-01/09-02/11-356, para. 44.
[70] ICC-01/09-02/11-356, para. 49.
[71] ICC-01/09-02/11-356, para. 52.
[72] ICC-01/09-02/11-373-Red, para. 125, footnote 275.
[73] ICC-01/09-02/11-373-Red, para. 125.
[74] ICC-01/09-02/11-373-Red, para. 126.

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44. At the outset, the Chamber observes that the gravity test articulated by Pre-Trial Chamber I in its "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58",[75] and relied upon by the Defence of Mr. Ali, has been explicitly found to be "flawed" by the Appeals Chamber.[76] The determination as to whether the case against Mr. Ali meets the statutory gravity threshold therefore cannot be based on such test as originally articulated. Nevertheless, this cannot lead to the automatic rejection of the Defence challenge, and the Chamber must address in substance the arguments presented by the Defence of Mr. Ali under an appropriate interpretation of article 17(1)(d) of the Statute.

45. The Chamber notes that the Defence of Mr. Ali states, in the abstract, that the case against Mr. Ali is not of sufficient gravity: (i) because it concerns an alleged omission; and, independently, (ii) because Mr. Ali is not being charged as a principal or a direct perpetrator. The Chamber is not persuaded by either of these contentions for the following reasons.

46. With respect to the former, the Chamber considers that Mr. Ali's contention that a case concerning omission does not, as a matter of law, rise to the level of sufficient gravity is untenable. In fact, there is nothing in the Statute that can be interpreted to exclude acts by omission from the purview of the Court, and it would be contrary to its object and purpose to interpret article 17(1)(d) of the Statute in a way which would reduce, as a matter of law, the subject-matter jurisdiction of the Court. In any case, the Chamber notes that Mr. Ali is primarily alleged to have taken positive steps to ensure the inaction of the Kenya Police during and for the purpose of the commission of the crimes charged; [77] no allegations of omission are thus brought against Mr. Ali in this respect.

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[75] Pre-Trial Chamber I, ICC-01/04-520-Anx2, para. 64.
[76] Appeals Chamber, "Judgment of the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", ICC-01/04-169, para. 82.
[77] Amended DCC, para. 99.

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47. As concerns the argument that only cases brought against principals or direct perpetrators are of sufficient gravity to justify action by the Court, the Chamber considers that this argument is legally unfounded, for the reason that it would, as a matter of principle, deprive article 25(3)(d) of the Statute of any meaning..

48. The Chamber further observes that the argument of the Defence of Mr. Ali is largely predicated on the lack of evidence in support of the Prosecutor's allegations that there was a deliberate failure on the part of the Kenya Police during the attack in Nakuru and Naivasha and that such a failure should be attributed to Mr. Ali, thus grounding his individual criminal responsibility under article 25(3)(d) of the Statute. Insofar as this is the case, the argument does not relate to the admissibility of the case, but rather to its merits. Therefore, the Chamber shall not address it within this section but as part of the comprehensive examination of the sufficiency of the evidence underpinning the charges against Mr. Ali.

49. Having addressed these arguments, the Chamber now turns to the question of whether the case against Mr. Ali is of sufficient gravity to warrant further action by the Court. The Chamber observes that the crimes with which Mr. Ali is charged, in his official capacity as Commissioner of Police, were allegedly committed in two locations over the course of a number of days and resulted in numerous deaths and brutal injuries, massive displacement and sexual violence.[78] The alleged manner of commission of the crimes featured particular brutality, such as beheading victims and also burning victims alive.[79]

50. Considering that, in determining the gravity of the case, factors such as the scale, nature and manner of commission of the alleged crimes, their impact on victims, and the existence of any aggravating circumstances, together with others, listed in rule 145(1)(c) of the Rules relating to the determination of sentence, are of particular

[78] Amended DCC, paras 32-33, 59-60, 62-64, 68-71, 74.
[79] Amended DCC, paras 59, 70.

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relevance,[80] the Chamber is satisfied that the alleged crimes meet the gravity threshold of article 17(1)(d) of the Statute.

IV. PROCEDURAL MATTERS

A. *Purpose and scope of the present decision*

(i) Evidentiary threshold under article 61(7) of the Statute

51. In the present decision, the Chamber shall determine, pursuant to article 61(7) of the Statute, whether there is sufficient evidence to establish substantial grounds to believe that the Suspects committed each of the crimes alleged in the Amended DCC.

52. The Chamber notes that the drafters of the Statute established progressively higher evidentiary thresholds in articles 15, 58(1), 61(7) and 66(3) of the Statute.[81] The evidentiary threshold applicable at the present stage of the proceedings (*i.e.* substantial grounds to believe) is higher than the one required for the issuance of a warrant of arrest or summons to appear but lower than that required for a final determination as to the guilt or innocence of an accused. The Chamber concurs with the definition of the term "substantial" within the meaning of article 61(7) of the Statute as articulated in the previous jurisprudence of the Court, according to which, in order to meet the requisite threshold, the Prosecutor "must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations".[82] The Chamber further adheres to the existing jurisprudence of the Court to the effect that the purpose of the determination under article 61(7) of the Statute is primarily to protect the suspect against wrongful prosecution and ensure

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[80] See Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-02/09-243-Red, para. 32; Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 188.

[81] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 27.

[82] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 29; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 65; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/06-803-tEN, para. 39.

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judicial economy by distinguishing between cases that should go to trial and those that should not.[83]

53. In making this determination the Chamber will be guided by the principle of *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage.

54. Based on the determination as to the sufficiency of the evidence to establish substantial grounds to believe that the Suspects committed each of the crimes charged, the Chamber shall: (i) confirm the charges pursuant to article 61(7)(a) of the Statute; (ii) decline to confirm the charges pursuant to article 61(7)(b) of the Statute; or (iii) adjourn the hearing and request the Prosecutor, pursuant to article 61(7)(c) of the Statute, to consider (a) providing further evidence or conducting further investigation with respect to a particular charge; or (b) amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

55. In performing its functions under article 61(7) of the Statute, the Chamber relies on the evidence disclosed between the parties and further communicated to the Chamber in compliance with rule 121(2)(c) of the Rules and the Chamber's decisions.[84]

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[83] Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-01/04-01/10-465-Red, para. 41; Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, para. 31; Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-02/09-243-Red, para.39; Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 28; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 63; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/06-803-tEN, para. 37.

[84] Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-02/11-48; Pre-Trial Chamber II, "Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties", ICC-01/09-02/11-64.

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(ii) Scope of the assessment of facts

56. The purpose of the present decision is confined to determining whether sufficient evidence has been placed before the Chamber to meet the requisite threshold for the confirmation of the charges presented. In this respect, the Chamber observes that in line with article 74(2) of the Statute a "charge" is composed of the facts and circumstances underlying the alleged crime as well as of their legal characterisation. In order to determine the scope of the required assessment of facts in the decision on the confirmation of charges, the Chamber wishes to clarify its understanding with respect to the nature of such decision as setting the factual subject matter of the trial. In fact, the charges confirmed fix and delimit, to a certain extent, the scope of the case for the purposes of the subsequent trial.[85]

57. This clearly emerges from the said article 74(2) of the Statute, which mandates that "the decision at trial shall not exceed the facts and circumstances described *in the charges* and any amendments to the charges" (emphasis added). In the same vein, according to regulation 55 of the Regulations of the Court (the "Regulations"), the Trial Chamber is vested with the authority to modify the legal characterisation of facts "without exceeding the facts and circumstances described *in the charges* and any amendments to the charges" (emphasis added).

58. The "facts described in the charges" have been defined by the Appeals Chamber as those "factual allegations which support each of the legal elements of the crime charged".[86] Furthermore, according to the Appeals Chamber, the facts described in the charges shall be distinguished from "the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document

[85] See Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, para. 34.

[86] Appeals Chamber, "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", ICC-01/04-01/06-2205, para. 90, footnote 163.

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containing the charges or the confirmation decision does not support the legal elements of the crime charged".[87]

59. In light of the above, the Chamber observes that, among the different facts placed before the Chamber for its consideration, a distinction must be made between the facts underlying the charges – *i.e.* the "facts described in the charges", which, as such, are the only ones that cannot be exceeded by the Trial Chamber once confirmed by the Pre-Trial Chamber – and facts or evidence that are subsidiary to the facts described in the charges, serving the purpose of demonstrating or supporting their existence. Notably, subsidiary facts, although referred to in the document containing the charges or in the decision on the confirmation of charges, are of relevance only to the extent that facts described in the charges may be inferred from them.[88]

60. In order to confirm the charges pursuant to article 61(7)(a) of the Statute, the Chamber shall be satisfied that the evidence establishes to the requisite threshold each of the facts described in the charges. If the charges are then confirmed, article 74(2) of the Statute and regulation 55 of the Regulations, as noted above, make clear that the factual subject matter of the case will be settled for the purposes of the trial in light of the confirmed charge(s) and, therefore, in light of the facts and circumstances described therein. Conversely, given the nature of the subsidiary facts the Chamber will not engage in an examination of each and every subsidiary fact which is mentioned in the document containing the charges and upon which the Prosecutor relies to prove the existence of one or more facts described in the charges. More appropriately, the Chamber shall analyze subsidiary facts only to the extent that this is necessary, in light of the parties' submissions or the Chamber's own assessment, to ascertain whether the facts described in the charges are sufficiently established to the threshold required at this stage of proceedings. In the

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[87] Appeals Chamber, "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", ICC-01/04-01/06-2205, para. 90, footnote 163.
[88] See Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, para. 36.

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understanding of the Chamber, this does not prevent the Prosecutor from relying on these or other subsidiary facts in the future, in the same way that the parties are not precluded from relying at trial upon new or additional evidence from that presented at the pre-trial stage of the case.

(iii) Defence challenge to the conduct of the investigation

61. At this juncture, the Chamber finds it appropriate to address an argument raised by all three Defence teams that directly relates to the scope and purpose of the present decision. Specifically, the Defence teams raised the issue of the Prosecutor's alleged failure to comply with his investigative obligations in accordance with article 54(1) of the Statute.[89]

62. In his final written observations, the Prosecutor responds that the purpose of the confirmation of charges hearing is not to assess whether he has fulfilled his duty under article 54(1) of the Statute,[90] and that, in any case, he took all reasonable steps to follow up on exculpatory lines of enquiry, in particular, by questioning its witnesses for exculpatory information.[91]

63. The Chamber accepts the argument of the Prosecutor that his alleged investigative failure does not fall within the scope of the Chamber's determination pursuant to article 61(7) of the Statute. In fact, the Chamber recalls that the Statute clearly delimits the roles and the functions of the different organs of the Court. In particular, the Chamber's role at the current stage of the proceedings is to determine whether sufficient evidence has been adduced to establish substantial grounds to believe that the Suspects committed the crimes charged.[92] Such evidence adduced is in fact the outcome of the Prosecutor's investigations. If he has failed to investigate properly, this will certainly have a bearing on the quality and sufficiency of the

[89] ICC-01/09-02/11-338, paras 72-83; ICC-01/09-02/11-T-4-ENG, p. 88, lines 15-22; ICC-01/09-02/11-T-15-Red-ENG, p. 58, line 8, to p. 59, line 6; p. 65, lines 9-17; ICC-01/09-02/11-374-Red, paras 69-72.
[90] ICC-01/09-02/11-361, para. 29.
[91] ICC-01/09-02/11-361, para. 31; ICC-01/09-02/11-T-4-ENG, p. 45, lines 4-9.
[92] See Pre-Trial Chamber II, "Decision on the 'Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims'", ICC-01/09-01/11-371, para. 16.

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evidence presented and the matter will be finally decided by way of an examination of the said evidence pursuant to article 61(7) of the Statute. Therefore, under no circumstances will a failure on the part of the Prosecutor to properly investigate automatically justify a decision of the Chamber to decline to confirm the charges, without having examined the evidence presented. In other words, the scope of determination under article 61(7) of the Statute relates to the assessment of the evidence available and not the manner in which the Prosecutor conducted his investigations.

64. This is also in line with the view expressed by Pre-Trial Chamber I, according to which:

> [A]t this stage of the proceedings, the Defence's objections to the manner in which the investigations were conducted can only be viewed in the context of the purpose of the confirmation hearing, and should thus be regarded as a means of seeking a decision declining to confirm the charges. It follows, therefore, that the Defence's objection raised in this instance cannot in itself cause the Chamber to decline to confirm the charges on the basis of an alleged investigative failure on the part of the Prosecution. Rather, this objection may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the "substantial grounds to believe" threshold.[93]

65. Accordingly, the Chamber will not address any of the complaints in this regard and will exclusively conduct an assessment of the evidence proffered by the parties in order to determine whether the evidentiary threshold required by article 61(7) of the Statute for confirmation of the charges brought against the Suspects has been met or not.

B. Admissibility, relevance and probative value of evidence

66. In this part, the Chamber will set out a number of general evidentiary principles underpinning the present decision in light of articles 21, 64, 67 and 69 of the Statute, and rules 63, 64, 68, 70, 71, 76 to 78, 121 and 122 of the Rules. The Chamber recalls its previous interpretation of the evidentiary principles[94] as well as internationally

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[93] Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-02/09-243-Red, para. 48.
[94] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, paras 32-62.

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recognized human rights standards as provided for in article 21(2) and (3) of the Statute.

67. Initially, the Chamber notes that the Prosecutor asserts that:

> [F]or purposes of confirmation, the Pre-Trial Chamber should accept as dispositive the Prosecution's evidence, so long as it is relevant. It should avoid attempting to resolve contradictions between the Prosecution and Defence evidence, because such resolution is impossible without a full airing of the evidence from both sides and a careful weighing and evaluation of the credibility of the witnesses. That will occur at trial.[95]

68. In support of his argument, the Prosecutor also relies on the jurisprudence of the *ad hoc* tribunals concerning the review of mid-trial motions for acquittal, asserting that the latter is a "comparable, albeit more comprehensive screening of the case", and submitting that the *ad hoc* tribunals, "in evaluating a Rule 98*bis* motion for acquittal, [do] not assess the reliability or credibility of the evidence presented in the case-in-chief, nor [do they] give lesser weight to the evidence that [they deem] 'suspect, contradictory or in any other way unreliable'".[96]

69. The Defence of Mr. Kenyatta responds that "the Prosecutor's approach fundamentally contravenes the intent and express language of Article 69(4) of the Statute" [97] and it "is unsupported by either Rule 63(2) or 64" of the Rules.[98] Further, the Defence submits that "[t]he Prosecut[or] fails to address the fact that reliability is a fundamental component of an admissibility assessment under Article 69(4)" of the Statute.[99] Lastly, the Defence contends that "[t]he underlying purpose of the Rule 98*bis* procedure at the ICTY and ICTR is not analogous to the confirmation hearing at the ICC".[100]

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[95] ICC-01/09-02/11-361, para. 5.
[96] ICC-01/09-02/11-361, para. 6.
[97] ICC-01/09-02/11-372, para. 3.
[98] ICC-01/09-02/11-372, para. 7.
[99] ICC-01/09-02/11-372, para. 7.
[100] ICC-01/09-02/11-372, paras 16.

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70. The Defence of Mr. Ali contends that "the OTP is manifestly wrong"[101] and that the "OTP's assertions [...] are legally incorrect".[102] The Defence further submits that the "confirmation of charges hearing does not 'accord with the procedures of other international tribunals'"[103] and that "[t]o determine whether "substantial grounds" to confirm charges exist, the Chamber must examine the relevance, probative value and weight of both OTP and Defence evidence".[104]

71. The Defence of Mr. Muthaura asserts that the Prosecutor's submission "is unsupported by law", "inconsistent with Article 69(4)" of the Statute and "defies the established jurisprudence of this Chamber".[105] The Defence further argues that "the OTP's submissions in this regard amount to an attempt to lower the standard of scrutiny required at this stage of the proceedings".[106]

72. The Chamber does not accept the argument of the Prosecutor. At the outset, the Chamber emphasizes, as previously held by Pre-Trial Chamber I, that the jurisprudence of the *ad hoc* tribunals concerning mid-trial motions of acquittal cannot guide the Chamber in determining the scope of the evidentiary analysis to be undertaken for the purposes of confirmation of charges, due to the fundamentally incomparable nature of the two procedural regimes.[107]

73. The Chamber further recalls the paramount principle of free assessment of evidence as enshrined in article 69(4) of the Statute and rule 63(2) of the Rules and observes that these provisions are equally applicable at the pre-trial and trial stages

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[101] ICC-01/09-02/11-373-Red, para. 6.
[102] ICC-01/09-02/11-373-Red, para. 10.
[103] ICC-01/09-02/11-373-Red, para. 11.
[104] ICC-01/09-02/11-373-Red, para. 10.
[105] ICC-01/09-02/11-374-Red, para. 10.
[106] ICC-01/09-02/11-374-Red, para. 5.
[107] See also Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-01/04-01/10-465-Red, para. 45.

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of the proceedings.[108] As stated by Pre-Trial Chamber I, this principle is "a core component of judicial activity both at the pre-trial stage of the case and at trial".[109]

74. At the same time, the Chamber recalls that its discretion in line with the principle of free assessment of evidence is limited to determining, pursuant to article 69(4) and (7) of the Statute, the admissibility, relevance and probative value of the evidence placed before it.[110]

75. Thus, in determining whether there are substantial grounds to believe that the Suspects committed each of the crimes charged, the Chamber is not bound by the parties' characterization of the evidence. Rather, the Chamber will make its own independent assessment of each piece of evidence.[111] Moreover, the Chamber will assess the relevance and probative value of the evidence, regardless of its kind or which party relied upon it.

(i) Admissibility of evidence

76. With respect to the admissibility of evidence, the Chamber notes that neither the Statute nor the Rules provide that a certain type of evidence is *per se* inadmissible. Depending on the circumstances, the Chamber is vested with discretion or statutorily mandated to rule on the admissibility of the evidence. On the one hand, the Chamber *may*, pursuant to article 69(4) of the Statute, "rule on the [...] admissibility of any evidence". On the other hand, the Chamber *shall*, pursuant to article 69(7) of the Statute and rule 63(3) of the Rules, rule on the admissibility of the evidence on an application of a party or on its own motion, if grounds for inadmissibility appear to exist.

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[108] See rule 122(9) [of the Rules] and the heading of Chapter 4 of the Rules.
[109] Pre-Trial Chamber I, "Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, para. 8.
[110] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, paras 61-62.
[111] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 42.

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77. The Chamber notes that the Defence teams of Mr. Muthaura and Mr. Kenyatta challenged at the hearing the admissibility of summaries of statements of persons who testified before entities other than the Court ("non-ICC witnesses"), arguing that these individuals had not consented to their statements being used in the proceedings before the Court.[112] In support of such contention, the Defence relies on a decision of Pre-Trial Chamber I, where the latter held that "the first and foremost measure required under article 68(1) of the Statute and rule 86 of the Rules is to inform each prospective witness of the fact that a party intends to rely on his or her statement [...] for the purpose of the confirmation hearing in a specific case" and that, when this is not done, "their statements [...] must be ruled inadmissible".[113]

78. The Chamber considers that the jurisprudence relied upon by the Defence is not applicable to the present circumstances as it relates to "witnesses of the Court". Conversely, in the present case, the Defence challenges the use of summaries of statements provided by individuals who have not been interviewed by the Prosecutor. The Chamber does not find any grounds in the statutory documents precluding the use of such documentary evidence, nor is there any indication that this evidence is otherwise inadmissible. Accordingly, the Chamber concludes that the summaries of the statements provided by non-ICC witnesses are admissible as evidence in the present case.

(ii) Relevance and probative value of evidence

79. Relevance requires a nexus between the specific piece of evidence and a charge or a fact of the case to be proven, in the sense that a piece of evidence is relevant to the Chamber's determination of a specific fact if it tends to make the existence of such fact more or less probable.[114] Therefore, in assessing the relevance of the evidence, the

[112] ICC-01/09-02/11-T-4-ENG, p. 33, line 14 to p. 34, line 24; ICC-01/09-02/11-372, para. 15; ICC-01/09-02/11-374-Red, para. 11.
[113] Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/06-803-tEN, para. 59.
[114] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 41.

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Chamber shall establish the extent to which this evidence is rationally linked to the fact that it tends to prove or to disprove.[115]

80. Furthermore, the Chamber will also assess whether each piece of evidence has probative value. The determination of the probative value of a piece of evidence requires a qualitative assessment. In this respect, the Chamber recalls the general principle of free assessment of evidence as enshrined in article 69(4) of the Statute and rule 63(2) of the Rules. Accordingly, the Chamber shall give each piece of evidence the weight that it considers appropriate.

81. The Chamber takes a case-by-case approach in assessing the relevance and probative value of each piece of evidence.[116] In doing so, the Chamber is guided by various factors, such as the nature of the evidence, its credibility, reliability, and source as well as the context in which it was obtained and its nexus to the charges of the case or the alleged perpetrator. Indicia of reliability such as voluntariness, truthfulness, and trustworthiness are considered.[117] In this respect, the Chamber wishes to clarify that it is not the amount of evidence presented but its probative value that is essential for the Chamber's final determination on the charges presented by the Prosecutor.[118]

82. The Chamber identifies the evidence either as direct or indirect, the latter encompassing hearsay evidence, reports of international and non-governmental organizations (NGOs), as well as reports from national agencies, domestic intelligence services and the media. Pursuant to rule 76 of the Rules, evidence may also be oral, in particular when it is rendered by witnesses called to testify, or written, such as copies of witness statements or material covered by rule 77 of the

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[115] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 41.
[116] See Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 58.
[117] Trial Chamber I, "Decision on the admissibility of four documents", ICC-01/04-01/06-1399, paras 28-29.
[118] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 60.

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Rules, such as books, documents emanating from various sources, photographs, and other tangible objects, including but not limited to video and/or audio recorded evidence.

83. On the other hand, direct evidence provides first-hand information. Regardless of the party that presented it, direct evidence that is both relevant and trustworthy has a high probative value. It follows that a single piece of direct evidence may be decisive for the Chamber's determination in the present decision.[119]

84. In this respect, the Chamber observes that in the present case all the parties adduced, *inter alia,* eyewitness testimonies emanating from known or anonymous witnesses or presented summaries of witness statements. The Defence teams also relied on live witnesses during the confirmation hearing.

85. In relation to the testimony of *viva voce* witnesses, in the present case called by the three Defence teams, the Chamber recalls its earlier findings, whereby it clarified that "the fact that witnesses' testimonies are elicited through oral questioning does not *per se* entail that they be attached a higher probative value than that they would be given if provided in writing".[120] In this regard, the Chamber underlines that an oral testimony can have a high or low probative value in light of the Chamber's assessment, *inter alia* as a result of the questioning, of the witness' credibility, reliability, accuracy, trustworthiness and genuineness. The final determination on the probative value of the live testimony will thus depend on the Chamber's assessment on a case-by-case basis and in light of the evidence as a whole.

86. With respect to indirect evidence, the Chamber is of the view that, as a general rule, such evidence must be accorded a lower probative value than direct evidence.

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[119] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 49.
[120] Pre-Trial Chamber II, "Decision on the Defence Applications for Leave to Appeal the Single Judge's Order to Reduce the Number of Viva Voce Witnesses", ICC-01/09-02/11-275, paras 26-27. See also Pre-Trial Chamber II, "Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses", ICC-01/09-02/11-226, para. 18.

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The Chamber highlights that, although indirect evidence is commonly accepted in the jurisprudence of the Court, the decision on the confirmation of charges cannot be based solely on one such piece of evidence.[121]

87. In considering indirect evidence, the Chamber follows a two-step approach. First, as with direct evidence, it will assess its relevance and probative value. Second, it will verify whether corroborating evidence exists, regardless of its type or source. The Chamber is aware of rule 63(4) of the Rules, but finds that more than one piece of indirect evidence, which has low probative value, is preferable to prove an allegation to the standard of substantial grounds to believe. In light of this assessment, the Chamber will then determine whether the piece of indirect evidence in question, when viewed within the totality of evidence, is to be accorded a sufficient probative value to substantiate a finding of the Chamber for the purposes of the decision on the confirmation of charges.[122]

88. At this juncture, the Chamber will address a number of issues that have been raised by the parties and that directly relate to the probative value to be accorded to certain pieces of evidence adduced in the present case.

a) Anonymous and/or summary evidence

89. The Chamber notes that the Defence teams argue that a lower probative value should be accorded to evidence emanating from anonymous witnesses and/or provided in a summary of a witness statement.[123]

90. The Chamber notes that the use of anonymous witness statements and summaries is permitted at the pre-trial stage pursuant to article 61(5) and 68(5) of the Statute and rule 81(4) of the Rules. However, the Chamber shares the view, adopted

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[121] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 51.
[122] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 52.
[123] ICC-01/09-02/11-T-4-ENG, p. 19, lines 5-9; p. 85, line 24 to p. 86, line 1; ICC-01/09-02/11-T-10-ENG, p. 27, line 12 to p. 28, line 21; ICC-01/09-02/11-T-13-ENG, p. 22, line 1-2; ICC-01/09-02/11-372, paras 9-14; ICC-01/09-02/11-373-Red, paras 86-89; ICC-01/09-02/11-374-Red, paras 7-9.

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in other pre-trial decisions,[124] that the use of evidence emanating from anonymous sources or from summaries of witnesses statements – regardless of its direct or indirect nature – may impact on the ability of the Defence to challenge the credibility of the source and the probative value of such evidence. Therefore, to counterbalance the disadvantage that this might cause to the Defence, such evidence is considered as having a lower probative value than that attached to the statements of witnesses whose identity is known to the Defence and for which a full statement has been made available to it. The Chamber will thus analyze anonymous witness statements and summaries on a case-by-case basis and evaluate them for the purposes of the present decision taking into account whether there is corroboration by other evidence.[125]

b) Inconsistencies in the evidence

91. The Chamber observes that the Defence teams have on several occasions drawn attention to alleged inconsistencies in specific items of evidence relied upon by the Prosecutor at the confirmation of charges hearing, in particular with respect to Witness OTP-4.[126]

92. The Chamber is aware of possible inconsistencies within one or amongst several pieces of evidence and considers that inconsistencies may have an impact on the probative value to be accorded to the evidence in question. However, inconsistencies do not lead to an automatic rejection of the particular piece of evidence and thus do

[124] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 50; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 119; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/06-803-tEN, para. 106.
[125] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, paras 50-51; Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, para. 41; Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-02/09-243-Red, para. 52; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 160.
[126] ICC-01/09-02/11-T-15-Red-ENG, p. 50, lines 18-22; ICC-01/09-02/11-T-10-ENG, p. 21, lines 12-14, p. 47, lines 18-22; ICC-01/09-02/11-T-13-ENG, p. 6, lines 3-7; p. 10, lines 13-19; ICC-01/09-02/11-372, paras 26-33; ICC-01/09-02/11-374-Red, paras 25, 31-32, 39, 49-50; ICC-01/09-02/11-373-Red, paras 63-74, 79-82.

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not bar the Chamber from using it.[127] The Chamber will assess whether potential inconsistencies cast doubt on the overall credibility and reliability of the evidence and, therefore, affect the probative value to be accorded to such evidence.[128] The said assessment must be conducted with respect to the nature and degree of the individual inconsistency as well as to the specific issue to which the inconsistency pertains. In fact, inconsistencies in a piece of evidence might be so significant as to bar the Chamber from using it to prove a specific issue, but might prove immaterial with regard to another issue, which, accordingly, does not prevent the Chamber from using it regarding that issue.

c) Challenge to the credibility of Witnesses OTP-11 and OTP-12

93. The Chamber observes that at the confirmation of charges hearing, the Defence of Mr. Kenyatta mounted a comprehensive challenge to the credibility of Witnesses OTP-11 and OTP-12, demanding that the Chamber disregard the statements of these two witnesses in their entirety.[129] In essence, the substance of the challenge is that the two witnesses, who have been in contact with the Defence of Mr. Kenyatta, are "criminals" and "extortionists", who gave a "fully inculpatory account to the Prosecutor after having given a wholly exculpatory account to the Defence".[130] In support of this argument, the Defence of Mr. Kenyatta relies on a series of documents chronicling its contact with two individuals whom it alleges to be anonymous Witnesses OTP-11 and OTP-12.

94. The Chamber recalls that, as held by the Appeals Chamber, it is not required, as a matter of principle, to fully test the reliability of every piece of evidence relied upon

[127] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 55; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 116.
[128] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 55.
[129] ICC-01/09-02/11-T-10-ENG, p. 15, line 11, to p. 21, line 8; ICC-01/09-02/11-372, paras 21-25.
[130] ICC-01/09-02/11-T-10-ENG, p. 17, lines 13-14.

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by the Prosecutor for the purpose of the confirmation of charges hearing.[131] For instance, in the opinion of the Chamber it is an inherent consequence of protective measures under rule 81(4) of the Rules that in individually justified cases, the Defence's ability to raise, and the Chamber's ability to address in its decision, certain questions pertaining to the reliability of witnesses are limited.

95. Having established this general point, the Chamber nevertheless believes that the challenge to the credibility of Witnesses OTP-11 and OTP-12 can be addressed in substance on the basis of the available evidence. As explained below, the Chamber is not persuaded by the Defence argument, as the evidence presented manifestly does not support its allegations.

96. First, while the Defence of Mr. Kenyatta alleges that it is in possession of previous fully exculpatory statements which it attributes to Witnesses OTP-11 and OTP-12, the Chamber notes that no such witness statements have been presented by the Defence. Instead, the Defence of Mr. Kenyatta relies upon undated, unsigned, unverified, incomplete notes, which on their surface appear to be notes taken during meetings with the individuals alleged by the Defence to be Witnesses OTP-11 and OTP-12.[132] Further, an analysis of these notes and the other relevant documents relied on by the Defence of Mr. Kenyatta reveals that the two individuals did not provide the Defence with "fully exculpatory" information, as there are references in the documents to the individuals informing the Defence of their knowledge of Mungiki implication in the crimes under consideration in the present case,[133] of Mungiki links with Mr. Kenyatta,[134] and even directly of Mr. Kenyatta's involvement in the crimes.[135]

97. Second, the Chamber finds that the documents do not reveal any extortion or extortion attempt. In the ordinary language, extortion is defined as "the practice of

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[131] Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", ICC-01/04-01/06-774, para. 47.
[132] KEN-D13-0006-0013; KEN-D13-0007-0001.
[133] KEN-D13-0006-0065, at 0070; KEN-D13-0007-0001, at 0004; KEN-D13-0007-0027, at 0036, 0037, 0043.
[134] KEN-D13-0006-0003, at 0006; KEN-D13-0006-0013, at 0015; KEN-D13-0007-0001, at 0002.
[135] KEN-D13-0007-0027, at 0029.

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obtaining something, especially money, through force or threats".[136] Having carefully reviewed in detail the relevant documents, and in particular the excerpts cited during the hearing,[137] the Chamber concludes that no such extortion attempt occurred, since neither request of money or other demand, nor any form of threat emerges from the evidence presented. Further, the Defence relies on the statement of Lewis Nguyai (D13-26), who testified before the Chamber that he received threatening messages demanding money from one of the individuals in question.[138] However, since the fact to be determined by the Chamber is whether an extortion attempt occurred *vis-à-vis* the Defence of Mr. Kenyatta, the Chamber considers the testimony of Lewis Nguyai (D13-26) to be of no relevance. In any case, the Chamber finds the witness' testimony in this respect inconsistent with his confirmed relationship with one of the individuals in question, which involved voluntary money transfers from the witness to the individual.[139]

98. Third, the Chamber finds it significant that, despite allusions to the contrary by the Defence of Mr. Kenyatta at the hearing,[140] it was not the Defence who broke contact with the individuals alleged to be Witnesses OTP-11 and OTP-12. In fact, even on the basis of the Defence's own notes of the meetings allegedly held with the individuals after the Defence, in March 2011, came into possession of a document which it asserts reveals possible expectations of payment for their services,[141] it is clear that the Defence of Mr. Kenyatta did not confront the witnesses and did not reject them. Instead, the Defence instructed one of the individuals on how to contact it in the future.[142] The intention of the Defence to continue co-operating with the individuals in question also emerges from the notes of a meeting held between the Defence of Mr. Kenyatta and the Victims and Witnesses Unit on 14 April 2011.[143]

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[136] Oxford Dictionary of English (OUP, 3rd ed., 2010).
[137] ICC-01/09-02/11-T-10-ENG, p. 17, line 19 to p. 18, line 5.
[138] ICC-01/09-02/11-T-12-Red-ENG, p. 44, lines 6-10.
[139] ICC-01/09-02/11-T-12-Red-ENG, p. 41, lines 18-23.
[140] ICC-01/09-02/11-T-10-ENG, p. 19, lines 2-7.
[141] KEN-D13-0006-0039; KEN-D13-0007-0052.
[142] KEN-D13-0007-0052, at 0056.
[143] KEN-D13-0006-0062.

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99. Fourth, the Chamber also finds it significant that Lewis Nguyai (D13-26) testified at the hearing that it was he himself who initially brought the witnesses in contact with the Defence.[144] Furthermore, the documents relied upon by the Defence reveal clearly that the Defence used the individuals to arrange for interviews of at least four other witnesses.[145] These are, in the opinion of the Chamber, circumstances militating against the conclusion that the two individuals were extortionists with sinister aims, who exploited the Defence of Mr. Kenyatta.

100. These defects in the argument put forward by the Defence make it, in the view of the Chamber, unnecessary to entertain the matter any further. The Chamber will, therefore, not disregard in their entirety the statements of Witnesses OTP-11 and OTP-12. Nonetheless, the Chamber emphasizes its responsibility to determine, upon proper examination individually and within the whole system of evidence placed before it, the relevance and probative value of all the evidence, including that provided by Witnesses OTP-11 and OTP-12.

V. CONTEXTUAL ELEMENTS OF CRIMES AGAINST HUMANITY

101. The Chamber will hereunder advance its analysis as to whether or not the Prosecutor has provided sufficient evidence to establish substantial grounds to believe that the contextual elements common to all crimes against humanity are fulfilled. Only if there is an affirmative finding, the Chamber will proceed to examine the specific elements concerning each of the crimes charged.

A. Allegations of the Prosecutor

102. The Prosecutor alleges "coordinated attacks that were perpetrated by the Mungiki and pro-Party of National Unity ('PNU') youth in different parts of Nakuru and Naivasha and encouraged and abetted by the failure of the Kenya Police to intervene".[146] According to the Prosecutor, "[t]hese attacks were not random

[144] ICC-01/09-02/11-T-12-Red-ENG, p. 43, line 24 to p. 44, line 5.
[145] KEN-D13-0007-0052, at 0058; KEN-D13-0006-0065, at 0065-0066.
[146] Amended DCC, para. 31.

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occurrences but were targeted at perceived Orange Democratic Movement ('ODM') supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language".[147] The Prosecutor asserts that "[t]he attacks affected a large number of civilian victims over a large geographical area."[148] Further, the Prosecutor alleges that Mr. Muthaura and Mr. Kenyatta, "together with Ali, Mungiki leaders and other prominent PNU supporters, agreed to pursue an organizational policy to keep the PNU in power through every means necessary, including by orchestrating a police failure to prevent the commission of crimes."[149]

103. The Prosecutor submits that Mr. Muthaura and Mr. Kenyatta "activated and utilized pre-existing structures, such as the Mungiki to perpetrate the widespread and systematic attacks and the Kenya Police to ensure that the Mungiki operations were not interfered with".[150] He alleges further that the Mungiki is a criminal organization under the leadership of Maina Njenga,[151] and that it is organized into local and regional branches.[152] According to the Prosecutor, in order to enforce discipline, dissidents within the organization are severely dealt with.[153] The Prosecutor avers that "[u]p until the time of the [post-election violence], the Mungiki controlled the public transport system, provided power through illegal electricity connection, demanded a fee for accessing public toilets and sold water to residents in the poorest parts of Central Province and Nairobi. It also provided protection services to businesses and was enlisted by politicians to intimidate opponents."[154]

104. In relation to Nakuru, the Prosecutor asserts that "[t]he most serious wave of violence [...] erupted during the night of 24 January and lasted until 27 January 2008".[155] He submits that "this wave of violence was launched by the Mungiki and

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[147] Amended DCC, para. 31.
[148] Amended DCC, para. 32.
[149] Amended DCC, para. 35.
[150] Amended DCC, para. 36.
[151] Amended DCC, para. 39.
[152] Amended DCC, para. 39.
[153] Amended DCC, para. 40.
[154] Amended DCC, para. 41.
[155] Amended DCC, para. 59.

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pro-PNU youth",[156] who attacked in a well-organized and regimented manner.[157] The Prosecutor also alleges that "[a]s part of their contribution to the attacks, the Kenya Police granted Mungiki members and pro-PNU youth being transported from other provinces unhindered passage into Nakuru town. The response by the Kenya Police to the attacks was notably weak and inadequate."[158]

105. With respect to Naivasha, the Prosecutor asserts that the attacks were launched in an orderly and well-planned manner on the morning of 27 January 2008.[159] He states that "[t]he Mungiki members worked with pro-PNU youth burning, destroying and/or looting the property and businesses of perceived ODM supporters."[160] According to the Prosecutor, "[t]he attacks lasted until 28 January 2008".[161] Finally, the Prosecutor submits that "[t]he evidence shows that the Kenya Police under Ali's leadership obeyed instructions to ensure that the Police did not interfere with pro-PNU youth being transported to the Rift Valley" and that "[a]s in the Nakuru incident, the Police response was inadequate [...] despite having had prior knowledge of the attacks and being well-informed of the situation on the ground".[162]

106. On the basis of the totality of the Prosecutor's submissions in the Amended DCC and at the confirmation of charges hearing, the Chamber does not believe that the use of the expression "in or around locations including Nakuru and Naivasha" in the text of the charges is to be understood to include any other locations than "in or around Nakuru" and "in or around Naivasha". Therefore, the Chamber will only assess the evidence with respect to the events that, according to the Prosecutor's allegations, took place in these locations.

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[156] Amended DCC, para. 59.
[157] Amended DCC, para. 60.
[158] Amended DCC, para. 61.
[159] Amended DCC, para. 64.
[160] Amended DCC, para. 68.
[161] Amended DCC, para. 71.
[162] Amended DCC, para. 71.

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107. In addition, regardless of the broader temporal parameters of the charges, the events of relevance in the present case are exclusively those for which the Prosecutor alleges the individual criminal responsibility of the Suspects, *i.e.* those that form part of the attack by the Mungiki on the perceived ODM supporters between 24 and 28 January 2008 in or around Nakuru and Naivasha.[163]

B. The applicable law

108. Article 7(1) of the Statute requires that crimes against humanity be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 7(2)(a) of the Statute further specifies that "attack against any civilian population" means "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".

109. The Chamber will not engage in an in-depth discussion of the interpretation of contextual elements of crimes against humanity, as it considers that they are well settled in the jurisprudence of the Court.[164] The Chamber will address only those aspects of the interpretation that are subject to dispute between the parties or are otherwise significant for the present decision.

110. First, the Chamber notes that the qualifier "any civilian population" has been previously interpreted to mean "groups distinguishable by nationality, ethnicity or other distinguishing features".[165] In the view of the Chamber, the civilian population targeted can include a group defined by its (perceived) political affiliation.

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[163] Amended DCC, paras 31-33, 58-75; ICC-01/09-02/11-T-5-Red-ENG, p. 49, lines 10-14.

[164] See Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, paras 77-99; Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, paras 73-88; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, paras 390-402.

[165] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 81; Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the

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111. With respect to the requirement that the attack take place pursuant to a "policy", the Chamber recalls that it has been held previously that "an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion".[166]

112. Further, as concerns the proper interpretation of the term "organization", this Chamber has held previously that "the formal nature of a group and the level of its organization should not be the defining criterion. Instead, [...] a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values".[167] In addition, the Chamber recalls its previous finding that "had the drafters intended to exclude non-State actors from the term 'organization', they would not have included this term in article 7(2)(a) of the Statute".[168]

113. The Defence of Mr. Kenyatta asserts that this interpretation "is incorrect and does not reflect the intention of the drafters of the Statute".[169] In particular, the Defence argues that under the principle of *nullum crimen sine lege* enshrined in article 22 of the Statute, the term "organizational policy" must be strictly construed.[170] It submits that the drafters of the Statute "intended to create a clear boundary between crimes against humanity and national crimes, and for this boundary to be dependent not on the abhorrent nature of the crimes but on the entity and policy behind them".[171] Further, the Defence avers that because the Statute refers to an 'organization' and not to "'groups', 'bodies' or other less clearly defined entities", the drafters of the Statute "clearly intended the formal nature of the group and the level

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Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 76; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 399.

[166] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, paras 84-85; Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 81; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 396.

[167] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 90.

[168] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 92.

[169] ICC-01/09-02/11-339, para. 12.

[170] ICC-01/09-02/11-339, paras 17-18, 29-30.

[171] ICC-01/09-02/11-339, para. 20.

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of its organization to be a defining criterion".[172] The Defence of Mr. Kenyatta, thus, requests the Chamber to adopt a narrower interpretation of the term "organization" and to determine, upon examination of the evidence presented against such narrow definition, that the statutory requirement at issue is not met in the present case.

114. The Chamber notes that the legal arguments to the same effect as those advanced by the Defence for the purposes of the confirmation of charges hearing have already been analyzed in depth by the Chamber in the 31 March 2010 Decision.[173] Accordingly, since the Defence submissions remain entirely within the parameters of the analysis of the contextual elements of crimes against humanity already conducted by the Chamber, the Chamber does not find it necessary that this analysis be reiterated for the purposes of the present decision and will therefore assess the evidence presented to determine whether the alleged organization qualifies as such in light of the interpretation of the term "organization" previously advanced.

C. Findings of the Chamber

115. The Chamber finds that there are substantial grounds to believe that between 24 and 28 January 2008, the Mungiki carried out an attack against the civilian population in or around Nakuru and Naivasha, specifically the residents identified as belonging to those ethnic groups perceived as supporting the ODM. The Chamber is satisfied to the requisite threshold that the attack was widespread and systematic.

116. Hereinafter, the Chamber will set out its analysis of the evidence which it considers sufficient to establish, to the requisite threshold, the contextual elements of the crimes charged. In light of the specificities of the present case, the Chamber does not find it useful to conduct its analysis in accordance with the Prosecutor's characterization of the evidence as proving one or another legal element; rather, the Chamber will set out in a structured manner the relevant facts which based on a

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[172] ICC-01/09-02/11-339, para. 21.

[173] See Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, paras 89-93.

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comprehensive analysis of the evidence available, it deems to be satisfactorily established. After such analysis, the Chamber will provide its conclusions with respect to the different contextual elements of the crimes.

(i) The events in or around Nakuru and Naivasha

a) Nakuru – 24 - 27 January 2008

117. At the outset, the Chamber notes that the evidence before it reveals extensive violence in or around Nakuru in the period following the announcement of the results of the presidential election on 30 December 2007. The violence appears to have been brought about by actors on all sides of the political and ethnic divides.[174] However, as clarified above, the events of relevance in the present case are only those relating to the attack by the Mungiki on the perceived ODM supporters between 24 and 27 January 2008. Consequently, any such items of evidence which relate to violent events outside the scope of the charges will not be considered by the Chamber.

118. The Chamber is of the view that the evidence placed before it shows that an eruption of violence occurred in or around Nakuru on 24 January 2008, and lasted until 27 January 2008. These violent acts can be attributed to the Mungiki, and were directed at the perceived ODM supporters residing in or around Nakuru. The Chamber's conclusion is based on the following considerations.

119. Witness OTP-12 was a member of the Mungiki and was present in Nakuru during the attack.[175] The witness clearly identifies the attackers as the Mungiki,[176] and their targets as those who were "against the Kikuyu", namely the Kalenjin and the

[174] KEN-OTP-0001-0002, at 0093; KEN-OTP-0001-0248, at 0299-0302; KEN-OTP-0001-0364, at 0476.
[175] Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0127; KEN-OTP-0060-0511, at 0514.
[176] Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0126.

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Luo.[177] Witnesses OTP-4 and OTP-11 also state that the attack in Nakuru was carried out by the Mungiki.[178]

120. Furthermore, a non-ICC witness, whose statement has been placed before the Chamber in the form of a summary, indicated that "the violence [in Nakuru] started after the election on 25 January 2008",[179] and that it was "planned and committed by persons from outside of the area".[180] The same person explained that "most of the people killed during the violence were [of] Luo and Luhya ethnic origin".[181] Another non-ICC witness referred to Mungiki presence in Nakuru during the fighting.[182]

121. The National Security Intelligence Service (the "NSIS") Situation Report for 28 January 2008 reported "allegations that armed Mungiki sect members wearing AP Police uniforms have been moving from house to house in Nakuru posing as Police Officers in search of members of certain communities whom they then attack/kill".[183]

122. Further corroboration is provided in the Commission of Inquiry into Post-Election Violence Final Report (the "CIPEV Report"), which refers to a "second wave of violence" in Nakuru which "started on 24 January 2008 and took a more planned and systematic nature",[184] and also states that the Mungiki were involved in the fighting.[185] The Kenya National Commission on Human Rights Final Report (the "KNCHR Report") equally reports Mungiki involvement in a wave of violence which erupted on 25 January 2008.[186] Further, the Chamber notes that the Human Rights Watch report entitled "Ballots to Bullets" (the "HRW Report") refers to "co-ordinated attacks of January 24-26" in Nakuru, and attributes these attacks to the Mungiki.[187]

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[177] Statement of Witness OTP-12, KEN-OTP-0060-0405, at 0407.
[178] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0041, 0043-0044. Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1312; KEN-OTP-0052-1469, at 1481.
[179] KEN-OTP-0053-0040, at 0040.
[180] KEN-OTP-0053-0040, at 0040.
[181] KEN-OTP-0053-0040, at 0040.
[182] KEN-OTP-0053-0158, at 0158.
[183] KEN-OTP-0002-0015, at 0043.
[184] KEN-OTP-0001-0364, at 0473.
[185] KEN-OTP-0001-0364, at 0476.
[186] KEN-OTP-0001-0002, at 0093.
[187] KEN-OTP-0001-0248, at 0299-0300.

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Corroboration is also provided by the United Nations Office of the High Commissioner for Human Rights report entitled "Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008" (the "OHCHR Report")[188] and the International Crisis Group report entitled "Kenya in Crisis" (the "ICG Report").[189]

123. In light of the above, the Chamber is satisfied that the evidence demonstrates to the required threshold that the attack in or around Nakuru was carried out by Mungiki members. In this respect, the Chamber notes that the Amended DCC contains numerous references to "pro-PNU youth", in the context of the mobilization, recruitment and payment of participants in the attack.[190] However, upon review of the submissions and the evidence, and as explained in greater detail below,[191] the Chamber considers that the mobilized and newly recruited members formed an integral part of the Mungiki organization at the time and in the context of the events under consideration in the present case. For this reason, the Chamber does not find any distinction necessary and finds it appropriate to refer to the organization perpetrating the attack simply as the Mungiki. The Chamber clarifies that this conclusion also applies with respect to the events in or around Naivasha for which the same references to the involvement of "pro-PNU youth" in the attack are contained in the Amended DCC.[192]

124. The Chamber observes that, during the confirmation of charges hearing, the Defence of Mr. Muthaura contested the attribution of the violence in Nakuru to the Mungiki as well as the planned nature of the attack.[193] To support its challenge, the Defence of Mr. Muthaura cited the statements of witnesses Wilson Wanyanga (D12-38), [redacted] (D12-9) and Edward Mutahi (D12-23). However, the Chamber is not persuaded by the evidence put forward by the Defence for the reasons set out in the following paragraphs.

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[188] KEN-OTP-0001-1057, at 1066.
[189] KEN-OTP-0001-1076, at 1089.
[190] See *e.g.* Amended DCC, para. 52.
[191] See below paras 164-167.
[192] Amended DCC, para. 52.
[193] ICC-01/09-02/11-T-7-ENG, p. 85, line 13, to p. 87, line 19.

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125. The Chamber notes that Wilson Wanyanga (D12-38), who was the District Commissioner for Nakuru District at the relevant time,[194] states the attack by "pro-ODM youths of mixed ethnicity" on PNU supporters in Githima was the trigger of the "general violence" that took place on 25 January 2008.[195] According to the witness, "[a]fter the news of the attack on Githima spread, there was a spontaneous reaction from the Kikuyus. [...] This was not an organised group. [...] Some were armed with sticks and stones and couldn't possibly have managed to organize any attack."[196] The witness also states that, from what he saw and observed, the Mungiki did not participate in the violence.[197]

126. The Chamber considers that the events described by Wilson Wanyanga (D12-38) do not appear to be events directly relevant to the case. Indeed, the witness refers to spontaneous groups of Kikuyu, some armed with sticks and stones. However, the evidence available to the Chamber reveals that a number of Luo, Luhya and Kalenjin fatalities were caused by gunshots,[198] and that a large number of Luo, Luhya and Kalenjin residents in Nakuru were displaced as a result of the attack.[199] The absence of any explanation of these facts, or even of a reference thereto, in the witness' statement brings into question the witness' recollection of the events in Nakuru.

127. The Defence of Mr. Muthaura further relies on the statement of [redacted] (D12-9), a Kikuyu resident of Nakuru, who asserts:

> The Kikuyus and Kisii who were involved in the fighting were civilians who were living in Nakuru and in Kaptembwa and Githima Estates. From what I know, there was no one that was brought from the outside to fight for the Kikuyus. I was defending my people. I was throwing stones.[200]

128. The Chamber is of the view that the statement provided by this witness, whether related or not to the events under consideration, does not in itself negate

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[194] Statement of Wilson Wanyanga (D12-38), KEN-D12-0001-0386, at 0388.
[195] Statement of Wilson Wanyanga (D12-38), KEN-D12-0001-0386, at 0393, 0395.
[196] Statement of Wilson Wanyanga (D12-38), KEN-D12-0001-0386, at 0395.
[197] Statement of Wilson Wanyanga (D12-38), KEN-D12-0001-0386, at 0396.
[198] KEN-OTP-0041-0679, at 0681-0690.
[199] See below paras 245-248.
[200] Statement of [redacted] (D12-9), KEN-D12-0002-0009, at 0012.

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either the participation of Mungiki in the attack or the planned nature of such attack, since the witness only asserts that, as far as he knew, none of the attackers were ferried to Nakuru from elsewhere. In any case, the Chamber considers that the absence of this fact has no bearing on the conclusion with respect to the attribution of the attack in Nakuru to the Mungiki, or with respect to the planned nature of the attack.

129. Finally, the Chamber turns to the statement of Edward Mutahi (D12-23), who visited Nakuru on 24 and 25 January 2008 in his capacity as Permanent Secretary in the Ministry of Education, Science and Technology.[201] He states:

> On our way back from the last school we came out of a corner turned right to go up to the main road that comes from Nyahururu to Nakuru about two kilometers from Nakuru town center as we approached the main road we saw a crowd of people. Some were yelling others were simply walking but from what I observed some were carrying crude weapons. As we tried to go up the road an old man stopped us and said don't go that route. I asked him why this was the case and he said that these people were very angry. He said that they were Kikuyu's going to revenge for the people who had been killed.[202]

130. In the view of the Chamber, the statement of Edward Mutahi (D12-23) is equally irrelevant to the question of the attribution of the attack in Nakuru to the Mungiki and to the planned nature of the violence therein. In fact, even if the "angry" group of Kikuyu, armed with crude weapons and seeking revenge, were indeed among the perpetrators of the attack at issue in the present case, this would not indicate, as argued by the Defence of Mr. Muthaura, that all the violence in Nakuru was spontaneous or that none of it was carried out by the Mungiki.

131. In addition, at the confirmation of charges hearing, the Defence of Mr. Muthaura relied on the list of deaths reported to CIPEV to argue that the Prosecutor's allegations are contradicted by the fact that the majority of those killed

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[201] Statement of Edward Mutahi (D12-23), KEN-D12-0002-0081, at 0089.
[202] Statement of Edward Mutahi (D12-23), KEN-D12-0002-0081, at 0090.

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in Nakuru were Kikuyu, and thus that the violence in Nakuru could not be attributed to the Mungiki and that it had not been planned.[203]

132. The Chamber considers that the Defence of Mr. Muthaura improperly draws conclusions from the item of evidence in question. Indeed, not all violent events in Nakuru in the post-election period are related to the charges in the present case, and by extension of this fact, not all deaths recorded in the list are relevant. The fact that the majority of those killed during the post-election violence, or even on or around 24 January 2008, were Kikuyu has no bearing on the determination of the issue as to whether a Mungiki attack took place. For the purposes of the present case, it is significant that: (i) 43 Luo, Luhya and Kalenjin victims are recorded between 24 and 27 January, and a peak in recorded killings of these ethnic groups is discernible exactly during the time when the Mungiki attack is alleged to have taken place; (ii) sharp object injuries and gunshot wounds are the two most frequent causes of death listed for Luo, Luhya and Kalenjin victims in the relevant time period; and (iii) all gunshot deaths in the relevant time period were of Luo, Luhya and Kalenjin victims.[204]

b) Naivasha – 27 - 28 January 2008

133. Turning to the events in Naivasha, the Chamber finds that the Mungiki attacked perceived ODM supporters in or around Naivasha on the morning of 27 January 2008, and that the attack lasted until 28 January 2008.

134. The Chamber notes in particular the evidence provided by Witness OTP-2, who directly observed the events as they unfolded on the ground. The witness testifies that the violence started on the morning of 27 January 2008,[205] when groups of young men armed with *pangas* (machetes) went around town in search of

[203] ICC-01/09-02/11-T-7-ENG, p. 83, lines 7-14.
[204] KEN-OTP-0041-0679, at 0681-0690.
[205] Statement of Witness OTP-2, KEN-OTP-0042-0003, at 0010-0012.

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members of the Luo, Luhya and Kalenjin communities.[206] The witness additionally states that the attackers were led to their victims' homes by local guides, where they looted the dwellings and burned the property of the residents.[207] Outside of the town centre, houses belonging to members of the Luo and Kalenjin communities were burnt down and residents were maimed or killed.[208] Likewise, according to Witness OTP-2, the attackers stopped people in the streets, identified their ethnicity, killed perceived ODM supporters on the spot,[209] and forcibly circumcised Luo men.[210] The witness states that thousands of Naivasha's residents ran away from their homes and sought refuge at the town's police station and in the grounds of the nearby prison.[211]

135. The account of Witness OTP-2 finds corroboration in other witness statements relied upon by the Prosecutor. Witnesses OTP-4, OTP-11 and OTP-12, all (former) members of the Mungiki, confirm that a Mungiki attack took place in Naivasha.[212] Additionally, Witness OTP-10, another former Mungiki member, states that he was brought to Naivasha from Nairobi to participate in the attack.[213]

136. The Chamber also notes the CIPEV Report, wherein it was found that "the attacks on members of the Luo, Kalenjin and Luhya communities started on 27 January 2008 and were executed in an orderly and well planned manner by a coordinated group".[214] Furthermore, the KNCHR Report[215], the HRW Report[216] and the OHCHR Report[217] all corroborate these same facts.

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[206] Statement of Witness OTP-2, KEN-OTP-0042-0030, at 0036-0037. See also a photograph provided by the witness, KEN-OTP-0027-0020, at 0025.
[207] Statement of Witness OTP-2, KEN-OTP-0042-0167, at 0203-0204; see also KEN-OTP-0042-0044, at 0058, 0060.
[208] Statement of Witness OTP-2, KEN-OTP-0042-0044, at 0077; KEN-OTP-0042-0228, at 0256.
[209] Statement of Witness OTP-2, KEN-OTP-0042-0078, at 0099.
[210] Statement of Witness OTP-2, KEN-OTP-0042-0078, at 0084.
[211] Statement of Witness OTP-2, KEN-OTP-0042-0044, at 0047, 0066, 0071.
[212] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0050. Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1312, KEN-OTP-0052-1469, at 1481. Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0377, 0379-0380.
[213] Summary of statement of Witness OTP-10, KEN-OTP-0060-0550, at 0552.
[214] KEN-OTP-0001-0364, at 0491.
[215] KEN-OTP-0001-0002, at 0094-0095.
[216] KEN-OTP-0001-0248, at 0295-0296.
[217] KEN-OTP-0001-1057, at 1066.

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137. The Prosecutor also relies upon the summaries of testimonies of five non-ICC witnesses, which contain corroborating information.[218] Corroboration is also found in the summary of an investigative report on gender-based violence during the post-election violence.[219]

138. The Chamber observes that the Defence of Mr. Muthaura seeks to challenge the Prosecutor's allegations through the testimony of Lucas Katee Mwanza (D12-25), who was District Commissioner for Naivasha District at the relevant time. This witness denied having any knowledge of a Mungiki presence in Naivasha during the violence,[220] and described the events as a demonstration of locals which erupted into violence.[221]

139. In the assessment of the Chamber, however, the events that the witness described are not the same events as the Mungiki attack in Naivasha. In fact, the Mungiki attack took place primarily in the residential estates inhabited by members of the Luo, Luhya and Kalenjin communities, and not in the centre of Naivasha town or at road junctions outside the residential areas, where the witness was engaged with the demonstrators on 27 January 2008. Significantly, according to the witness' own testimony, on that day he visited several sites in Naivasha where people were demonstrating,[222] but does not mention visiting the residential estate where, according to his own testimony, the worst incident of violence occurred.[223] In fact, the Chamber notes that the evidence contains several independent and consistent references to the fact that the demonstrations by locals were exploited by the

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[218] KEN-OTP-0053-0042, at 0042; KEN-OTP-0053-0152, at 0152; KEN-OTP-0053-0154, at 0154; KEN-OTP-0053-0166, at 0166; KEN-OTP-0053-0174, at 0174; KEN-OTP-0053-0231, at 0231.
[219] KEN-OTP-0052-2176, at 2176-2179.
[220] ICC-01/09-02/11-T-8-Red-ENG, p. 56, lines 5-7, lines 20-23.
[221] ICC-01/09-02/11-T-8-Red-ENG, p. 36, lines 6-9; p. 38, lines 23-25; p. 39, lines 2-9; p. 40, line 25 to p. 45, line 7; p. 56, lines 9-17.
[222] ICC-01/09-02/11-T-8-Red-ENG, p. 39 lines 2-12; p. 40, line 25 to p. 44, line 1.
[223] ICC-01/09-02/11-T-8-Red-ENG, p.44, lines 2-6.

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Mungiki attackers to divert the attention of the authorities away from the attack in residential areas.[224]

140. Second, the Chamber considers that Lucas Katee Mwanza's (D12-25) interpretation of the events in Naivasha is contradicted by: (i) his own admission during his testimony that he received indications that the violence was organized by certain individuals, including [redacted];[225] and (ii) the fact that the Naivasha District Security and Intelligence Committee, under the chairmanship of the witness, recommended on 31 January 2008 the arrest of [redacted] and certain other individuals, including [redacted], who are alleged by the witnesses relied upon by the Prosecutor to have been involved in the organization of the Mungiki attack in Naivasha.[226]

141. Finally, at the confirmation of charges hearing, the Defence of Mr. Muthaura brought to the attention of the Chamber an alleged inconsistency within the evidence presented by the Prosecutor. The Defence stated that, while *pangas* were allegedly purchased for the attack, no evidence indicates the use of new *pangas* during the attack, and more specifically, that Witness OTP-2 did not see any new *pangas*.[227] The Chamber however notes that, contrary to the Defence assertion, Witness OTP-2, who has seen attackers use *pangas*, does not say that no new *pangas* were used, but rather that from the distance from which the witness observed the events unfold, the condition of the *pangas* could not be seen.[228] There are several other items of evidence which refer explicitly to the use of *pangas* by the attackers,[229] and the Chamber does not consider it decisive whether the *pangas* used are described in the evidence as new.

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[224] Statement of Witness OTP-2, KEN-OTP-0042-0167, at 0181. Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1312. KEN-OTP-0001-0364, at 0492.
[225] ICC-01/09-02/11-T-8-Conf-ENG, p. 71, lines 18-24.
[226] KEN-OTP-0012-0196, at 0197.
[227] ICC-01/09-02/11-T-7-ENG, p. 62, line 21 to p. 63, line 6.
[228] Statement of Witness OTP-2, KEN-OTP-0042-0167, at 0196.
[229] Summary of statement of Witness OTP-10, KEN-OTP-0060-0550, at 0552. Statement of Witness OTP-12, KEN-OTP-0060-0511, at 0519. KEN-OTP-0001-0364, at 0493, 0498.

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(ii) The targeted population

142. Upon review of the evidence, the Chamber considers that the Prosecutor's description of the targeted civilian population as "perceived ODM supporters" appropriately captures the nature of the Mungiki attack in Nakuru and Naivasha.

143. First, there is evidence to support the conclusion that the attack in Nakuru and Naivasha was politically motivated and directed against the opponents of the PNU Coalition. Witness OTP-2 avers that the violence in Naivasha was politically motivated.[230] Witness OTP-11 similarly states that "what [was] being planned [were] retaliatory attacks [...] to fight any other person who [was] not supporting Kikuyus".[231] Furthermore, Witness OTP-12 explains:

> [The attack occurred] because the members of the Kikuyu wanted to retain the seat, the presidential seat. [...] [B]ecause it was announced that Kibaki had won the elections. Now, the people who were against the Kikuyus winning started complaining that it was not fair, and these people were the Kalenjins and the Luos. Now, the Kikuyus now had to retaliate and they were prepared to fight back because they also claimed that they had won the elections, so it was as a result of the outcome of the presidential announcement, of the results.[232]

144. Second, in the view of the Chamber the evidence equally indicates that the attackers chose their individual targets based upon the assumed political allegiance of particular ethnic groups. As laid out in the preceding section, the evidence establishes that the perceived ODM supporters consisted predominantly of Luo, Luhya and Kalenjin residents of Nakuru and Naivasha. However, the Chamber considers that this does not diminish the fact that the identification of the targeted population was essentially on political grounds.

145. Finally, the Chamber finds substantial grounds to believe that the attack in or around Nakuru and Naivasha resulted in a large number of killings, displacement of thousands of people, rape, severe physical injuries, mental suffering and destruction

[230] Statement of Witness OTP-2, KEN-OTP-0042-0405, at 0451-0452.
[231] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1303.
[232] Statement of Witness OTP-12, KEN-OTP-0060-0405, at 0407.

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of property. The Chamber refers to its analysis of the evidence and its findings below in sections relating to the individual crimes charged.[233]

(iii) Planned and coordinated nature of the attack in or around Nakuru and Naivasha

146. The Chamber considers that there are substantial grounds to believe that the attack in or around Nakuru and Naivasha was planned and coordinated, as shown by the evidence analyzed below.

147. The Chamber first turns to the evidence revealing specific planning activities prior to the attack. In this regard, Witness OTP-12 states that [redacted] and [redacted] were responsible for co-ordination of the attack in Nakuru, together with a number of other named Mungiki co-ordinators.[234] He refers to a planning meeting "in a certain hotel".[235] He explains that arrangements were made so that weapons and uniforms would be provided from Nakuru State House, and concurrently details how the acquisition of weapons from Olmoran was planned.[236] Additionally, this witness states that the persons in charge of the local planning arranged for the administration of Mungiki oath to new members "in the forest of Menengar Crater", for the specific purpose of increasing the fighting capacity on the ground.[237] According to Witness OTP-12, [redacted] and [redacted] were associates of Mr. Kenyatta and followed his directions.[238] Finally, Witness OTP-12 states in relation to the planning in Nakuru that Uhuru Kenyatta advised [redacted] on "how to get money" for the purpose of organization of the attack on the ground.[239]

148. Similarly, in relation to the planning of the attack in Naivasha, Witness OTP-12 states that for this particular attack the Mungiki were mobilized from Thika and

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[233] See below section VI.
[234] Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0126-0128.
[235] Statement of Witness OTP-12, KEN-OTP-0060-0385, at 0389; see also KEN-OTP-0060-0093, at 0096.
[236] Statement of Witness OTP-12, KEN-OTP-0060-0385, at 0389-0390.
[237] Statement of Witness OTP-12, KEN-OTP-0060-0385, at 0390.
[238] Statement of Witness OTP-12, KEN-OTP-0060-0385, at 0389-0390.
[239] Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0126.

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Limuru in Central Province, using the money that was brought for this purpose by [redacted] from Mr. Kenyatta.[240] The witness explains that men were "hired to go and kill Luos in Naivasha" and were placed under the command of [redacted].[241] According to the witness, shortly before the attack, the attackers gathered in Naivasha and there was a meeting at a local hotel,[242] during which the attendees were told by [redacted] "to attack the Luos who are against our Government".[243] The witness also states that [redacted] specifically mentioned that "there's a village where [...] Luos live there and they supported Raila"[244] and that "we have to get rid of them".[245]

149. In addition, Witness OTP-11 also states that the attack was planned. With respect to Nakuru, this witness specifically mentions [redacted] as the principle coordinator on the ground, with links to Mr. Kenyatta.[246] Further, the witness mentions by name several other coordinators of the Mungiki in Nakuru, who participated in the planning of the attack.[247]

150. With respect to Naivasha, Witness OTP-11 also states that the Mungiki attackers coming from Thika and Limuru met in Naivasha with people who had been recruited locally and they attacked together.[248] The witness also reports that preparatory meetings were held in Naivasha under the leadership of [redacted],[249] who had received money from Mr. Kenyatta to co-ordinate the attack in Naivasha.[250]

151. Witness OTP-4, whose statement primarily relates to the planning of the attack by Mr. Muthaura, Mr. Kenyatta and others in Nairobi, corroborates the

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[240] Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0118; KEN-OTP-0060-0365, at 0371, 0378.
[241] Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0373.
[242] Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0376-0377.
[243] Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0377.
[244] Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0376.
[245] Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0378.
[246] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1314; KEN-OTP-0052-1469, at 1482; KEN-OTP-0052-1487, at 1488-1489.
[247] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1481-1482.
[248] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1312.
[249] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1481, 1483.
[250] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1485; KEN-OTP-0052-1487, at 1494.

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evidence given by Witnesses OTP-12 and OTP-11.[251] In particular, Witness OTP-4 states that Mr. Kenyatta, during a meeting with Mungiki members, referred to [redacted] as their "contact person in Nakuru", who was "organizing his own people there".[252]

152. Another witness, Witness OTP-9, who is also a former Mungiki member, states that, at rallies in Central Province, young men who "wanted to go" to, *inter alia*, Nakuru and Naivasha could register for this purpose in Kenya African National Union-owned offices.[253] Furthermore, the witness explicitly confirms that people were paid and deployed to Naivasha.[254]

153. Witness OTP-2 provides independent corroboration of the evidence relating to the planning of the violence in Naivasha. The witness was informed on 26 January 2008 that a meeting was being held at La Belle Inn where an attack was being planned,[255] and specifically mentions [redacted] as attending this meeting, along with several other named individuals.[256]

154. A number of NSIS Situation Reports constitute additional corroborating evidence relating to the planning of the attack. On 9 January 2008, the NSIS reported "speculations that Mungiki members would attack" the Kalenjin, Luhya and Luo communities residing in Nakuru.[257] The same report mentions SMS messages warning members of the communities of an impending attack by "Mungiki adherents dressed in Police gear".[258] On 10 January 2008, the NSIS reported:

> Mungiki elements are reportedly meeting/assembling at Stem Hotel, Nakuru with a view to attacking ODM supporters/strongholds in Eldoret, Kisumu,

[251] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0039-0041.
[252] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0041.
[253] Statement of Witness OTP-9, KEN-OTP-0059-0177, at 0188-0189.
[254] Statement of Witness OTP-9, KEN-OTP-0059-0265, at 0285.
[255] Statement of Witness OTP-2, KEN-OTP-0042-0167, at 0169.
[256] Statement of Witness OTP-2, KEN-OTP-0042-0078, at 0107-0109.
[257] KEN-OTP-0002-0015, at 0065.
[258] KEN-OTP-0002-0015, at 0065.

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Kakamega, Kericho and Nakuru, effective from 10.01.08. They will impersonate policemen as they unleash violence on the victims.[259]

155. On 14 January 2008 the NSIS again recorded Mungiki plans to attack in Nakuru.[260] Finally, the NSIS Situation Report for 23 January 2008 explicitly mentions "[redacted] [as] allegedly organizing Mungiki members to attack non-Kikuyu residing within Nakuru Town."[261]

156. Similarly, on 21 January 2008 the NSIS reported that "Kikuyu youth in Naivasha are also planning to revenge violence meted to their kinsmen in Narok Town by attacking the Maasai, the Luhya and the Luo in Naivasha".[262] Although it refers to "Kikuyu youth" and not explicitly to the Mungiki, the Chamber considers this report to be corroborative of the other evidence establishing the planned nature of the attack in Naivasha.

157. Finally, the above evidence in relation to planning activities ahead of the attack in Nakuru and Naivasha is corroborated by the KNCHR Report and the HRW Report.[263]

158. In addition, the Chamber is of the view that several other subsidiary facts alleged by the Prosecutor also support the conclusion that the Mungiki attack in or around Nakuru and Naivasha was not a spontaneous occurrence of violence, but was organized and systematic. In particular, the Chamber finds that the following facts are of relevance to this conclusion: (i) the ferrying of attackers from other locations specifically for the purpose of the attack;[264] (ii) the recruitment of new members into the Mungiki organization specifically for the purpose of participating in the attack;[265]

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[259] KEN-OTP-0002-0015, at 0064.
[260] KEN-OTP-0002-0015, at 0059.
[261] KEN-OTP-0002-0015, at 0048-0049.
[262] KEN-OTP-0002-0015, at 0052.
[263] KEN-OTP-0001-0248, at 0295; KEN-OTP-0001-0002, at 0094, 0099, 0227.
[264] See below paras 160-161.
[265] See below paras 164-167.

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(iii) the provision of uniforms and weapons to the attackers;[266] and (iv) the precise identification of the targets of the attack.[267]

159. The Chamber wishes to clarify that, while these subsidiary facts are indicative, they are not indispensable for the Chamber's overall conclusion on the planned and coordinated nature of the attack, in particular in light of the evidence of the planning activities discussed above. Accordingly, the Chamber does not consider it decisive that some of the findings below relate only to either the events in Nakuru or the events in Naivasha.

160. First, the Chamber turns to the allegation that the attackers were ferried from elsewhere. In this respect, Witness OTP-2 states that "people from other areas" and not only locals were involved in the attack in Naivasha.[268] According to this witness, especially in Kabati estate the attackers were not known to their victims.[269] In addition, the HRW Report quotes a victim who reported seeing three trucks with armed men arriving in Naivaisha "on the night of Saturday, January 26".[270]

161. This constitutes, in the view of the Chamber, sufficient corroboration of the evidence discussed above in relation to the planning in Central Province and the subsequent organization and transport of Mungiki members to Naivasha for the purpose of the attack.[271] The Chamber is therefore satisfied that the attackers in Naivasha included non-residents who were transported to Naivasha with the specific purpose to attack.

162. Turning to Nakuru, the Chamber notes that the Prosecutor asserts that the attackers were brought from other locations.[272] At the confirmation hearing, the Defence of Mr. Muthaura challenged this particular point.[273]

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[266] See below paras 168-175.
[267] See below paras 176-179.
[268] Statement of Witness OTP-2, KEN-OTP-0042-0167, at 0201.
[269] Statement of Witness OTP-2, KEN-OTP-0042-0167, at 0202.
[270] KEN-OTP-0001-0248, at 0296.
[271] See above paras 148, 150.
[272] Amended DCC, para. 59.

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163. Although there are certain references in the evidence to the fact that some attackers arrived from elsewhere,[274] the Chamber considers that, viewed as whole, the evidence establishes that the majority of the attackers in Nakuru were local Mungiki.[275] However, the Chamber recalls its above consideration to the effect that this fact is not in itself required for the overall determination of the organized and systematic nature of the attack.[276]

164. The Chamber also considers relevant the evidence indicating that prior to the attack, recruitment activities, in particular the oathing of new Mungiki members, were undertaken by the Mungiki in Nakuru and Naivasha. The significance of oathing as a tool to secure obedience within the Mungiki hierarchy is explained elsewhere in this decision.[277]

165. Witness OTP-12 states that in preparation for the attack in Nakuru, oaths were administered to new members of the Mungiki.[278]

166. Witness OTP-11 explains the recruitment activities in Naivasha in considerable detail. He states that [redacted], a Mungiki leader, was given money for this purpose and a "go-ahead" by Mr. Kenyatta.[279] According to Witness OTP-11, men in military uniforms were searching for young men and administering oaths to them "in a bush".[280] The witness explicitly states that these new members joined those coming from Thika and Limuru, and participated in the attack in Naivasha.[281] Witness OTP-12 provides similar information, stating that [redacted]

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[273] ICC-01/09-02/11-T-7-ENG, p. 80, line 21 to p. 81, line 11.
[274] KEN-OTP-0053-0040, at 0040.
[275] Statement of Witness OTP-12, KEN-OTP-0060-0385, at 0397. See also KEN-OTP-0001-0248, at 0299-0300.
[276] See above para. 159.
[277] See below paras 208-209.
[278] Statement of Witness OTP-12, KEN-OTP-0060-0385, at 0390, 0392.
[279] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1303-1304.
[280] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1306; KEN-OTP-0052-1451, at 1460; KEN-OTP-0052-1487, at 1492.
[281] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1312.

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[redacted] contacted a *mzebu* (Mungiki oath administrator) in Naivasha "so they could recruit another Kikuyu people to behave as Mungiki".[282]

167. In addition to these witness statements, the Chamber also has before it as corroborating evidence the NSIS Situation Report for 7 January 2008, stating that "Mungiki sect leader John Maina Njenga has directed sect coordinators to carryout recruitment and oathing ceremonies in preparation to joining the current skirmishes in some parts of the country".[283] Additionally, the NSIS reported on 21 January 2008 that the Mungiki were planning to embark on an oathing campaign under supervision of [redacted] in order to revive their activities in the Rift Valley.[284] [redacted]'s involvement in the organization and preparation of the attack in Naivasha is further corroborated by the minutes of the meeting of the Naivasha District Security and Intelligence Committee of 31 January 2008, in which his name is to be found among those considered responsible for the crimes committed in Naivasha.[285]

168. The evidence before the Chamber also establishes to the requisite threshold that the attackers in Nakuru utilized police uniforms and guns distributed for this purpose from Nakuru State House. Witness OTP-12 explains that Mungiki members were "called to go to State House" where "they got uniforms and guns" and that the following day they were ready to "counter the move", meaning to attack in Nakuru.[286]

169. This statement is corroborated by Witness OTP-11, who states that military uniforms and rifles were distributed from Nakuru State House.[287] Witness OTP-11

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[282] Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0376; KEN-OTP-0060-0405, at 0422.
[283] KEN-OTP-0002-0015, at 0069-0070
[284] KEN-OTP-0002-0015, at 0053.
[285] KEN-OTP-0012-0196, at 0197.
[286] Statement of Witness OTP-12, KEN-OTP-0060-0093, at 0096; KEN-OTP-0060-0385, at 0392-0393.
[287] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1481.

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explains that the Mungiki were given uniforms at the initiative of the "Government", to conceal the identity of the attackers and to confuse the police.[288]

170. In addition, the NSIS Situation Report for 28 January 2008 explicitly mentions the use of Administrative Police uniforms by the attackers in Nakuru.[289] Additionally, the use of guns by the attackers is supported by the significant number of gunshot deaths among the Luo, Luhya and Kalenjin casualties in Nakuru between 24 and 27 January 2008.[290]

171. At the confirmation of charges hearing, the Defence presented evidence to challenge the Prosecutor's allegations that weapons and uniforms were distributed from Nakuru State House.[291] This argument is reiterated in the final written observations of the Defence of Mr. Muthaura.[292]

172. The Defence relies on the statement of Kinuthia Mbugua (D12-17), the Administration Police Commandant, who states that "[i]t would be unimaginable in the context of the [Administration Police] procedures and practices that any firearms could be issued to criminal gangs" and that "in the [Administration Police], issuance of firearms is very highly managed".[293] The Chamber observes, however, that it is not alleged that weapons were provided to the Mungiki attackers following the official procedures and practices established for this purpose within the Administration Police. Accordingly, the Chamber does not consider the generic statement provided by the witness to be capable of negating the specific evidence presented by the Prosecutor on the matter at issue.

173. Another witness relied upon by the Defence, [redacted] (D12-48), a member of the Mungiki at the relevant time, states that "[i]t is not true that Mungiki were given administration police uniforms and guns to go and attack

[288] Statement of Witness OTP-11, KEN-OTP-0052-1451, at 1468.
[289] KEN-OTP-0002-0015, at 0043.
[290] KEN-OTP-0041-0679, at 0681-0690.
[291] ICC-0109-02/11-T-7-ENG, p. 60, line 25 to p. 62, line 20.
[292] ICC-01/09-02/11-374-Red, paras 80-83.
[293] Statement of Kinuthia Mbugua (D12-17), KEN-D12-0002-0164, at 0171.

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Nakuru and Naivasha. This suggestion is totally wrong. This is madness."[294] The Chamber notes, nonetheless, that this individual is alleged by the core witnesses relied upon by the Prosecutor to be involved in the commission of the crimes subject of the present case and that, therefore, he must be deemed to have an interest in denying this allegation.[295] To the contrary, the Chamber sees no personal interest on the part of the witnesses alleging that uniforms and guns were distributed from Nakuru State House that would cast doubt on the reliability of their evidence. Therefore the Chamber does not find this statement of [redacted] (D12-48) of such value that it would exclude substantial grounds to believe in relation to the particular fact under consideration.

174. Finally, the Chamber clarifies that the use of weapons and uniforms is established by the evidence only in relation to the events in Nakuru. Conversely, the Chamber does not at this stage of the proceedings find sufficient evidence to substantiate the Prosecutor's allegation that weapons and uniforms were used in Naivasha. Witness OTP-12 states clearly that weapons were not used,[296] and Lucas Katee Mwanza (D12-25) testified that the gunshot deaths in Naivasha were attributable to the police.[297] As for the uniforms, while Witness OTP-11 states that they were distributed to the attackers in Thika under the directions of Mr. Muthaura,[298] there is no evidence that uniforms were in fact used during the attack in Naivasha. However, the Chamber reiterates that it does not consider its determination with respect to this fact to be of such significance as to undermine the

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[294] Statement of [redacted] (D12-48), KEN-D12-0010-0072, at 0077.

[295] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0030-0031, 0039; Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1307; Statement of Witness OTP-12, KEN-OTP-0060-0093, at 0103. The Chamber notes certain discrepancies with respect to the name of this individual, as referred to in the various items of evidence. However, because the nickname [redacted] is consistently used by the witnesses, and confirmed by the individual himself, the Chamber is satisfied that the references relate to one and the same person.

[296] Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0379.

[297] ICC-01/09-02/11-T-8-ENG, p. 81, lines 11-12.

[298] Statement of Witness OTP-11, KEN-OTP-0052-1317, at 1327-1328; KEN-OTP-0052-1451, at 1468; KEN-OTP-0052-1469, at 1470.

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overall conclusion with regard to the organized nature of the attack in Nakuru and Naivasha.[299]

175. A further fact which the Chamber considers as informative with respect to its conclusion regarding the planning of the violence in Nakuru is that activities for the purchasing of weapons were initiated in advance of the attack by the leading local organizers. In this respect, the Chamber notes that according to Witness OTP-11, two channels were used to get guns for the attack in Nakuru, the first one being the provision of funds to local MPs – conducted by Mr. Kenyatta – and the second the distribution of guns from Nakuru State House – secured by the intervention of Mr. Muthaura.[300] Witness OTP-12 confirms this account and specifies that guns were purchased in Olmoran and that [redacted] then distributed these weapons, and those received from State House, to the Mungiki immediately before the attack in Nakuru.[301]

176. Further, the Chamber considers that the precise identification of targets by the attackers is indicative of the planned and systematic nature of the violence.

177. Witness OTP-2 states that at Kabati estate in Naivasha, local water vendors guided the attackers.[302] The witness also states, having visited the attacked locations, that the attackers "knew all the houses to attack [...], so they were not just getting into any plot."[303] Witness OTP-10 similarly states that in Naivasha, the attackers used local Kikuyu to identify targets.[304] Witness OTP-11 confirms that locals were used to identify individual targets in Naivasha.[305] The same information is provided in the summary of an investigative report on gender based violence during the post-election violence.[306] Further, a non-ICC witness stated that the attackers "mov[ed]

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[299] See above para. 159.
[300] Statement of Witness OTP-11, KEN-OTP-0052-1451, at 1462-1464.
[301] Statement of Witness OTP-12, KEN-OTP-0060-0385, at 0390-0400.
[302] Statement of Witness OTP-2, KEN-OTP-0042-0167, at 0203.
[303] Statement of Witness OTP-2, KEN-OTP-0042-0044, at 0058, see also 0060.
[304] Summary of statement Witness OTP-10, KEN-OTP-0060-0550, at 0552.
[305] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1312; KEN-OTP-0052-1574, at 1577.
[306] KEN-OTP-0052-2176, at 2179.

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from house to house looking for Luos".[307] Another non-ICC witness stated that the attackers "had a list of the door numbers of plots where Luos lived".[308]

178. The Chamber additionally notes the KNCHR Report which found that in Naivasha, the attackers "conducted a door-to-door search of the Luo community in a manner suggesting they knew where they lived."[309] Similarly, the HRW Report recorded a witness in Naivasha reporting that "a Kikuyu mob, led by one well-dressed man ... came to her building with a list of three Luo names. They wanted to know which apartments belonged to the Luos".[310]

179. The ICG Report equally states that "[i]n Naivasha and Nakuru, Mungiki members were guided by local youths, who identified houses of non-Kikuyu, especially those of Luo and Kalenjin".[311]

180. At the confirmation of charges hearing, the Defence of Mr. Muthaura contested the planned nature of the attack in Nakuru, relying on the statements provided by a number of witnesses.[312] In particular, the Defence cited for this purpose the statements of witnesses Wilson Wanyanga (D12-38), [redacted] (D12-9) and Edward Mutahi (D12-23) as well as the list of deaths in Nakuru reported to CIPEV. The Chamber notes that, according to the Defence of Mr. Muthaura, these items of evidence demonstrate both that the attack in Nakuru was not carried out by Mungiki members and that such attack was not planned but spontaneous. The Chamber recalls that it has already analyzed the relevance of these pieces of evidence with respect to the attribution of the attack in Nakuru to the Mungiki.[313] The same conclusion applies here, and accordingly the Chamber does not find it necessary to reiterate its prior analysis.

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[307] KEN-OTP-0053-0152, at 0152.
[308] KEN-OTP-0053-0166, at 0166.
[309] KEN-OTP-0001-0002, at 0095.
[310] KEN-OTP-0001-0248, at 0298.
[311] KEN-OTP-0001-1076, at 1093.
[312] ICC-01/09-02/11-T-7-ENG, p. 85, line 13, to p. 87, line 19.
[313] See above paras 124-132.

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181. The Chamber further notes that the Defence of Mr. Muthaura argues that the attack in Nakuru was spontaneous by also relying on the statements of [redacted] (D12-29), a priest in Nakuru. In relation to the violence under consideration, the witness states that he "never believed" that there were any deliberate arrangements from Nairobi or elsewhere to organize the Kikuyu community for the attacks.[314] The Chamber is of the view that the witness' statement is, in this particular respect, a mere expression of an opinion and is not based on his observance of the events under consideration. As such, it cannot be relevant for the conclusions of the Chamber on this particular point.

182. The Chamber finally notes that in its final written observations, the Defence of Mr. Muthaura alleges that, contrary to the Prosecutor's assertion: (i) the Mungiki had no national leader through whom its activities as a group were coordinated;[315] (ii) members of the Mungiki participated in the attack in their individual capacities and not as part of the Mungiki organization;[316] and (iii) the Mungiki had no national forum for the planning of the attack.[317] To support such contention, the Defence of Mr. Muthaura relies on the testimony of Witness OTP-11, submitting that the witness states: (i) that since Maina Njenga was in prison "it was hard for [the Mungiki] to get a 'green light' from their leaders";[318] (ii) that "only a small group of Mungiki – 17 or 20 – moved from one location to another to help others";[319] and (iii) that "there was no national forum where the Mungiki leadership sat down and planned the attacks; instead, small groups of Mungiki would plan these retaliatory attacks in their own way".[320]

183. The Chamber notes that the excerpts from the statement of Witness OTP-11 relied upon by the Defence are part of one and the same answer given by the witness

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[314] Statement of [redacted] (D12-29), KEN-D12-0001-0350, at 0353.
[315] ICC-01/09-02/11-374-Red, para. 106.
[316] ICC-01/09-02/11-374-Red, para. 107.
[317] ICC-01/09-02/11-374-Red, para. 108.
[318] ICC-01/09-02/11-374-Red, para. 106.
[319] ICC-01/09-02/11-374-Red, para. 107.
[320] ICC-01/09-02/11-374-Red, para. 108.

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and as such, need to be put in their context as opposed to be read in isolation. First, it is clear that the witness is explaining how the persons acting on behalf of Mr. Muthaura and Mr. Kenyatta tried at the beginning to get the support of the Mungiki. The witness asserts that they thought that it would be difficult to get a clear answer as to their request for the Mungiki support with Maina Njenga in prison. [321] The witness explains that, as a result of this, they "resolved to get individuals from Mungiki whom they thought [to be] better placed to help them" and indicates in particular the names of 17 Mungiki national leaders (including Charles Ndungu Wagacha, [redacted] and [redacted]), who were contacted in order to get the support of the Mungiki, and of local Mungiki leaders, who were directed to mobilize, in their respective areas, members of the organization for the perpetration of the attack.[322] Moreover, reading these expressions in their context, it is clear that in mentioning the lack of a "national platform" or the fact that the Mungiki "were divided" Witness OTP-11 refers to the execution of the attack on the ground, which was delegated to local Mungiki leaders.

184. The reading of the excerpts advanced by the Defence of Mr. Muthaura not only does not find support either in the clear wording used by the witness or in their immediate context, but is also contradicted by other information provided by the same witness in other parts of his statement. For example, in another passage, the witness states that when Maina Njenga was in prison "the Government was trying to understand: if Maina is not there who can be the leaders of Mungiki? Who can be able to control the Mungiki? This because PNU wanted Mungiki to support them".[323] The witness further refers in detail to the activation by the persons acting on behalf of Mr. Muthaura and Mr. Kenyatta of several channels to establish contacts with the Mungiki organization, which eventually permitted them to reach Maina Njenga in order to get his agreement as to the use of Mungiki members in the attack in the Rift

[321] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1307.
[322] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1307-1308.
[323] Statement of Witness OTP-11, KEN-OTP-0052-1262, at 1270.

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Valley.[324] In another passage, the witness again mentions that "the Mungiki as a group did not sit down and planned these retaliatory attacks", but clarifies that instead "these attacks were perfectly planned by PNU and by Uhuru Kenyatta and his colonies".[325]

185. On the basis of the foregoing considerations, the Chamber concludes that the statement of Witness OTP-11, when read in its entirety, does not support the argument of the Defence of Mr. Muthaura. Instead it points to the overall conclusion of the Chamber, based on all the evidence discussed above, that the Mungiki attack in Nakuru and Naivasha was planned and organized.

(iv) The Mungiki organization

186. The Chamber shall analyze in this section the evidence with respect to a series of facts that support its conclusion that the Mungiki qualified as an organization within the meaning of article 7(2)(a) of the Statute at the time of the events under consideration. In particular, the Chamber finds that the following facts are of relevance to its conclusion: (i) the Mungiki was a hierarchically structured organization under the control of Maina Njenga;[326] (ii) there existed an effective system of ensuring compliance by the members with the rules and orders imposed by higher levels of command;[327] (iii) the Mungiki was a large organization and included a trained quasi-military wing;[328] and (iv) it controlled and provided, in certain parts of Kenya, essential social services, including security.[329]

187. The Chamber's findings rest primarily on the evidence provided by witnesses who are former members of the Mungiki. Therefore, the Chamber considers it appropriate to address as a preliminary point an issue raised by the Defence of Mr. Muthaura in respect of one such insider witness, Witness OTP-4. The Defence stated

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[324] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1278-1289.
[325] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1314.
[326] See below paras 191-206.
[327] See below paras 208-213.
[328] See below paras 204-215.
[329] See below paras 217-219.

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at the confirmation of charges hearing that Witness OTP-4 was not a member of the Mungiki and "just fabricated the evidence for his own personal ends".[330]

188. The Defence cited in support of this argument the statements of witnesses [redacted] (D12-37) and [redacted] (D12-48). [redacted] (D12-37) states that Witness OTP-4 "was never a Mungiki member".[331] [redacted] (D12-48), another member of the Mungiki,[332] in turn states that he does not even know Witness OTP-4.[333] The Chamber observes, however, that both [redacted] (D12-37)[334] and [redacted] (D12-48)[335] are described by the core witnesses relied upon by the Prosecutor as having had significant roles in the organization of the violence in Nakuru and Naivasha. While these witnesses are naturally motivated to deny the allegations against them, no personal interest in implicating them can be discerned on the part of Witness OTP-4. Therefore, the Chamber, also taking into account that the detailed evidence regarding the nature of the Mungiki provided by Witness OTP-4 is corroborated by several other independent sources, does not find the challenge of the Defence of Mr. Muthaura persuasive; rather it considers that Witness OTP-4 was at the relevant time a member of the Mungiki, and that his evidence must be duly considered.

189. Having addressed this preliminary matter, the Chamber now turns to the analysis of the evidence relevant to demonstrating that at the relevant time the Mungiki qualified as an organization within the meaning of article 7(2)(a) of the Statute.

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330 ICC-01/09-02/11-T-7-ENG, p. 53, lines 4-7.
331 Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0416.
332 Statement of [redacted] (D12-48), KEN-D12-0010-0072, at 0074.
333 Statement of [redacted] (D12-48), KEN-D12-0010-0072, at 0075.
334 Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0030, para. 144; at 0031, para. 149; at 0033, paras 157-159; at 0034, para. 163; at 0038, para. 190. Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1307. Statement of Witness OTP-12, KEN-OTP-0060-0299, at 0307; KEN-OTP-0060-0426, at 0451.
335 See above para. 173.

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190. First, the Chamber notes that several independent sources in the evidence before it show that the Mungiki operated at the relevant time as a hierarchical organization with defined roles for members at different levels. The evidence also indicates that Maina Njenga possessed exclusive control over the Mungiki organization.

191. Witness OTP-4 explains that "[t]he Mungiki hierarchy works around one main centre of power – Maina Njenga".[336] The same witness clarifies that although "Ndungu" was the Chairman of the organization, he was under Maina Njenga and could not take important decisions on his own.[337] In his second statement to the Prosecutor, Witness OTP-4 confirms that "[i]t is Maina Njenga who has all the real power. The other leaders can have different titles, but all the decisions and powers come from Maina Njenga".[338]

192. Witness OTP-9 provides a corroborating account of the structure of the Mungiki, referring to Maina Njenga as on "the top"[339] and a hierarchical command structure below him.[340] He confirms that during the post-election violence, although he was in prison, Maina Njenga was still making decisions on behalf of the Mungiki.[341]

193. Witness OTP-11 states that "Maina Njenga is the Head of the Mungiki, the top boss of everything," explaining also that when he went to prison, Maina Njenga delegated the chairmanship to Charles Ndungu Wagacha.[342]

194. Witness OTP-12 refers to Maina Njenga as "the most powerful man in the movement".[343] According to the witness, when Maina Njenga was in prison, Charles

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[336] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0012.
[337] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0013.
[338] Statement of Witness OTP-4, KEN-OTP-0051-1045, at 1051.
[339] Statement of Witness OTP-9, KEN-OTP-0059-0097, at 0123.
[340] Statement of Witness OTP-9, KEN-OTP-0059-0200, at 0203.
[341] Statement of Witness OTP-9, KEN-OTP-0059-0200, at 0209.
[342] Statement of Witness OTP-11, KEN-OTP-0052-1433, at 1444.
[343] Statement of Witness OTP-12, KEN-OTP-0060-0074, at 0088.

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Ndungu Wagacha was representing him, receiving his orders by going to prison to visit Maina Njenga or through the telephone.[344] Witness OTP-12 continues:

> Only Maina can issue orders. The big orders, like those pertaining to national issues are given by Maina. No one else can do that. Small things can be done at the local level, but not the things that pertain to national issues. These are only for one man. If you are outside the movement and there is something that you want the Mungiki to do, you first approach the local Mungiki leaders. If the local leaders agree, they will take you to the next level. Eventually you can reach Maina Njenga.[345]

195. Both Witnesses OTP-4 and OTP-12 state that after Maina Njenga and the Chairman, there was a national-level organ within the Mungiki, reporting to Maina Njenga.[346]

196. Turning more specifically to individual Mungiki leaders that, as clarified below,[347] are alleged to have played key roles in the commission of the crimes with which the Suspects are charged in the present case, the Chamber first notes that according to Witness OTP-4, Maina Diambo, [redacted] and [redacted] were members of the "Higher Office" – the highest group in the Mungiki ranking after Maina Njenga and Charles Ndungu Wagacha – and, as such, were "very close to Maina Njenga,"[348] and "in charge of sending information from Maina Njenga to the local branches of the Mungiki".[349]

197. Witness OTP-11 confirms that Maina Kangethe Diambo was one of the trustees of Maina Njenga.[350] Witness OTP-12 states more specifically, that Maina Kangethe, nicknamed "Diambo", was the former bodyguard of Maina Njenga.[351]

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[344] Statement of Witness OTP-12, KEN-OTP-0060-0226, at 0242-0244.
[345] Statement of Witness OTP-12, KEN-OTP-0060-0250, at 0260-0262.
[346] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0013; Statement of Witness OTP-12, KEN-OTP-0060-0226, at 0237. In this regard, the Chamber notes the discrepancy in the English name of such organ as indicated by the two witnesses in their respective statements, but does not consider this difference to be decisive given that the Mungiki is an organization not based on written rules and working primarily in the Kikuyu language.
[347] See below paras 301-374.
[348] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0013.
[349] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0013.
[350] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1295.
[351] Statement of Witness OTP-12, KEN-OTP-0060-0299, at 0307.

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198. Witness OTP-12 explains that [redacted], commonly known as [redacted], was the Nairobi coordinator of the Mungiki.[352] Witness OTP-11 similarly states that [redacted] was one of the top leaders of the Mungiki.[353] In addition, the NSIS Situation Report for 21 January 2008 refers to him as "Acting National Coordinator" in the context of information on the planning of retaliatory attacks by the Mungiki.[354] Importantly, the Chamber notes that the individual himself, interviewed by the Defence of Mr. Muthaura, confirms his identity as the "Mungiki Coordinator for Nairobi".[355]

199. Moreover, according to Witness OTP-11, [redacted] was the treasurer of the organization and a confidant of Maina Njenga.[356] Witness OTP-12 refers to [redacted] as the "Executive Officer" and the link to [redacted], the lawyer representing the interests of the Mungiki.[357] This individual, who states his name as [redacted], is also Witness D12-37. He states that he was a Mungiki member between 1999 and 2006,[358] but denies involvement in the planning of violence in Naivasha and Nakuru.[359] The Chamber, however, reiterates that, due to the level of involvement of this individual as shown by the evidence, it does not find the denial of [redacted] about any association with the Mungiki at the time of the alleged crimes decisive for the findings of the Chamber on the point at issue.[360]

200. Finally, the evidence before the Chamber demonstrates that, although not formally holding any leadership position within the Mungiki anymore, [redacted],[361] was *de facto* an important Mungiki leader at

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[352] Statement of Witness OTP-12, KEN-OTP-0060-0093, at 0103.
[353] Statement of Witness OTP-11, KEN-OTP-0052-1331, at 1342.
[354] KEN-OTP-0002-0015, at 0053.
[355] Statement of [redacted] (D12-48), KEN-D12-0010-0072, at 0074.
[356] Statement of Witness OTP-11, KEN-OTP-0052-1557, at 1562.
[357] Statement of Witness OTP-12, KEN-OTP-0060-0299, at 0307.
[358] Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0415.
[359] Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0420.
[360] See above para. 188.
[361] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0012.

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the relevant time, working under the direction of Maina Njenga. This is discernible from the statements of Witnesses OTP-4[362] and OTP-11.[363]

201. Furthermore, the evidence indicates that the Mungiki is territorially organized. Witness OTP-4 states:

> The Mungiki is organized into local and regional branches. In every local area, there is a local Chairman who has his own office and his own people. There is a Chairman for every region. The Chairmen of the different regions are equals in the hierarchy. They are the next level after the Higher Office. The Chairmen would get orders from the Higher Office which got its orders from Maina Njenga. The Chairmen could independently take some decisions at the local level as they were seen as the "eyes" of Maina Njenga on the ground at that level. However, the Chairmen were bound by general or common rules for the organization which I do not think are written. Nevertheless, the Chairmen must follow instructions given by [Maina Njenga].[364]

202. Witness OTP-4 also states that "[i]nformation flowed well in the organization [...]; [t]he communication and orders were given through mobile phones".[365] Witness OTP-11 confirms this particular point, stating that "[i]t is through phones and the message can reach in the grass roots within a period of 15 minutes".[366]

203. Witness OTP-11 also confirms that the Mungiki were, at the relevant time, territorially organized in regions with their own coordinators.[367] Witness OTP-12 provides a similar account, explaining that the Mungiki were organized in territorially defined units, at village, location and division level.[368]

204. The Chamber considers that although the witnesses give diverging estimates of the size of the Mungiki membership,[369] the evidence in total nevertheless supports the conclusion that the Mungiki was at the time of events under consideration a large

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[362] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0012-0013; 0014.
[363] Statement of Witness OTP-11, KEN-OTP-0052-1433, at 1444-1449.
[364] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0015.
[365] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0016.
[366] Statement of Witness OTP-11, KEN-OTP-0052-1451, at 1456.
[367] Statement of Witness OTP-11, KEN-OTP-0052-1451, at 1453.
[368] Statement of Witness OTP-12, KEN-OTP-0060-0226, at 0235-0236.
[369] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0015. Statement of Witness OTP-11, KEN-OTP-0052-1433, at 1440. Statement of Witness OTP-12, KEN-OTP-0060-0093, at 0095. KEN-OTP-0033-0297, at 0303-0304.

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organization, capable of carrying out complex operations without depending on the will of the individual members.

205. The Chamber notes the argument of the Defence of Mr. Kenyatta that the Mungiki is "far from being under responsible command with an established hierarchy", because it is "no more than an amorphous group with disparate aims, shifting politically, as its changing aspirations dictate".[370] In its final written observations, the Defence of Mr. Kenyatta reiterates its argument that the Mungiki lack a coherent ideology, as evidenced by the transient support for different religious movements of members of the Mungiki.[371] The Defence highlights that the political alliances of Mungiki members have changed over time, which shows their lack of ability to act in a uniform manner with a coherent purpose, subject to an established hierarchy.[372]

206. Upon examination of the Defence argument, the Chamber does not consider that the evidence of the changing political alliances of the Mungiki – a fact on which the Prosecutor appears to agree[373] – stands in contradiction with its nature as a hierarchical organization and the fact that it was, at the relevant time, under the control of a single leader, Maina Njenga. For this reason, the Chamber does not find the Defence challenge conclusive.

207. In the view of the Chamber, the evidence further demonstrates the existence, at the relevant time, of an effective system of ensuring compliance by the members of the Mungiki with the rules of the organization.

208. One such mechanism was the Mungiki oath, which is described in detail by those witnesses who are (former) Mungiki members. In this respect, Witness OTP-4 states, referring to his own experience of being forcefully recruited into the Mungiki, that the content of the oath was to "abide by the rules of the Kikuyu organization",

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[370] ICC-01/09-02/11-339, para. 66.
[371] ICC-01/09-02/11-372, para. 46.
[372] ICC-01/09-02/11-372, para. 46.
[373] Amended DCC para. 87.

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and never to "betray the Kikuyu community".[374] The witness states that he was told that he would be killed if he did not respect the oath.[375]

209. Witness OTP-9, who voluntarily took the Mungiki oath, refers to it as a promise of secrecy.[376] Witness OTP-10 also confirms having taken the Mungiki oath.[377] Witness OTP-11 describes the Mungiki oath as "degrading" and its purpose as being to "instill fear" in the new members,[378] further confirming that a pledge of secrecy forms part of this oath.[379] Witness OTP-12 also confirms that oathing rituals were used by the Mungiki.[380] Further corroboration is provided by Mungiki members interviewed by the Defence teams. [redacted] (D12-37) states that he underwent a "cleansing process" in order to become a member of the Mungiki.[381] [redacted] (D12-48) in turn refers to being "baptized" to join the Mungiki.[382]

210. More generally on the matter of discipline within the Mungiki, Witness OTP-4 states:

> The Mungiki do not tolerate dissidence. People who disobeyed the Mungiki and the Chairman would disappear. [...] It is even worse for members. If a member disobeys, they would cut that member's head off and put the head in public view at the place where they had a problem with that member.[383]

211. Similarly, Witness OTP-12 states that not to follow orders was "a crime in the movement".[384]

212. The Chamber is also informed by the evidence of Witnesses OTP-9 and OTP-10, who provide independent testimony about their own hesitation to leave the

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[374] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0009.
[375] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0009.
[376] Statement of Witness OTP-9, KEN-OTP-0059-0032, at 0049.
[377] Summary of statement of Witness OTP-10, KEN-OTP-0060-0550, at 0550.
[378] Statement of Witness OTP-11, KEN-OTP-0052-1228, at 1230.
[379] Statement of Witness OTP-11, KEN-OTP-0052-1228, at 1230.
[380] Statement of Witness OTP-12, KEN-OTP-0060-0026, at 0032-0045.
[381] Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0415.
[382] Statement of [redacted] (D12-48), KEN-D12-0010-0072, at 0074.
[383] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0018.
[384] Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0368.

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Mungiki, for fear of punishment by death.[385] Witnesses OTP-11 and OTP-12 confirm that in the Mungiki defectors were killed.[386]

213. In addition, the witnesses relied upon by the Prosecutor provide extensive evidence describing a quasi-judicial system of enforcement of Mungiki rules. Witness OTP-4 explains that "before a person is killed, he is taken before the Mungiki judicial system, where the Chairman is the judge."[387] Witness OTP-11 provides similar testimony in relation to Mungiki courts, stating that the judges in these courts (also referred to as *mzebu/wazebu*) had their "own policemen who can come and arrest you" and even "their own cells where you will be put".[388] Finally, Witness OTP-12 also refers to what he calls "kangaroo courts" operated by the Mungiki,[389] while also describing the sanctions applied, including the death penalty.[390]

214. Furthermore, the Chamber finds relevant the evidence which establishes that the Mungiki organization possessed, at the relevant time, quasi-military capabilities.

215. Witness OTP-4 refers to the existence of "radical members", or "militants", who were "the ones that kill" and "the ones who control people in the slums."[391] They were at the centre of Mungiki operations and carried out the violence and killings.[392] According to the witness, Maina Diambo had control over the militants.[393] Witness OTP-9 corroborates the existence of a special class of Mungiki members, who were used for killings and received training in martial arts, self-defence and shooting.[394] Witness OTP-11 explains that within the Mungiki, there was a "military

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[385] Statement of Witness OTP-9, KEN-OTP-0059-0017, at 0026; Summary of statement of Witness OTP-10, KEN-OTP-0060-0550, at 0553.
[386] Statement of Witness OTP-11, KEN-OTP-0052-1433, at 1449; KEN-OTP-0052-1557, at 1567. Statement of Witness OTP-12, KEN-OTP-0060-0250, at 0254-0255.
[387] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0018.
[388] Statement of Witness OTP-11, KEN-OTP-0052-1244, at 1249; KEN-OTP-0052-1419, at 1427.
[389] Statement of Witness OTP-12, KEN-OTP-0060-0210, at 0217.
[390] Statement of Witness OTP-12, KEN-OTP-0060-0210, at 0220.
[391] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0017.
[392] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0017.
[393] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0039.
[394] Statement of Witness OTP-9, KEN-OTP-0059-0017, at 0024; KEN-OTP-0059-0097, at 0100, 0108.

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group".[395] Furthermore, the witness states that there was a weapons management system and certain members were given training in the use of these weapons.[396] Additionally, Witness OTP-12 refers to the existence of a military wing within the Mungiki.[397] According to the witness, its members received special training in military skills, marching, martial arts and the handling of guns.[398]

216. Moreover, the Chamber is cognizant of the evidence of Mungiki activities as approximating those of a public authority in certain slums in Nairobi as well as in Central Province.

217. In this respect, the Chamber refers first to the above discussion of the evidence in relation to a system of courts operated by the Mungiki[399] and notes that the evidence establishes that this system was applied not only to members of the organization but to the general population of slum areas where the Mungiki was present.[400]

218. Furthermore, Witness OTP-4 explains that the Mungiki provided basic services in the slums, such as security, electricity, water and public toilets.[401] Witness OTP-11 independently provides identical information to the effect that the Mungiki provided security, water and electricity in certain slum areas.[402] Witness OTP-12 similarly states that in the slums, the Mungiki kept security in exchange for small payments, agreed with or imposed on the local population.[403]

219. The evidence also shows that the Mungiki granted protection from competing cartels to *matatu* (minibus) drivers, and imposed fees in exchange. This is confirmed

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[395] Statement of Witness OTP-11, KEN-OTP-0052-1433, at 1440.
[396] Statement of Witness OTP-11, KEN-OTP-0052-1451, at 1461-1462.
[397] Statement of Witness OTP-12, KEN-OTP-0060-0210, at 0221-0222.
[398] Statement of Witness OTP-12, KEN-OTP-0060-0226, at 0228-0233.
[399] See above para. 213.
[400] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0018; Statement of Witness OTP-12, KEN-OTP-0060-0210, at 0217, 0220.
[401] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0019.
[402] Statement of Witness OTP-11, KEN-OTP-0052-1433, at 1438.
[403] Statement of Witness OTP-12, KEN-OTP-0060-0210, at 0217.

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explicitly by Witnesses OTP-4,[404] OTP-11[405] and OTP-12[406] as well as by George Thuo (D12-34)[407] and also by documentary evidence.[408] Witness OTP-10 stated more generally that in Nairobi, the Mungiki generated income from taxation of local businesses.[409]

220. The Defence of Mr. Kenyatta maintains that the Mungiki have sought to alleviate crime in Nairobi slums and invested in social programmes and campaigned against "drunkness, rent hikes, drug use, prostitution".[410] On this basis, the Defence argues that the Mungiki do not have criminal activities against the civilian population as a primary purpose, and that, therefore, they do not qualify as an organization under article 7(2)(a) of the Statute.[411] The Chamber does not accept this argument. First, it is predicated on an improper interpretation of the Chamber's previous articulation of the considerations which may guide the determination of whether a given organization meets the requirements of article 7(2)(a) of the Statute.[412] The Chamber has emphasized that "while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled".[413] Second, the evidence indicates clearly that Mungiki activities must generally be seen as criminal, because they involve acts of violence and extortion of the population in areas of Mungiki activity.[414] In fact, such is also the submission of the Defence of Mr. Kenyatta.[415]

221. A similar conclusion must be reached with respect to the Defence argument that the Mungiki does not exercise control over part of the territory of a State. The

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[404] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0019.
[405] Statement of Witness OTP-11, KEN-OTP-0052-1262, at 1271.
[406] Statement of Witness OTP-12, KEN-OTP-0060-0210, at 0217-0218.
[407] Statement of George Thuo (D12-34), KEN-D12-0001-0365, at 0367; KEN-D13-0005-0859, at 0867.
[408] KEN-OTP-0046-0128, at 0144.
[409] Summary of statement of Witness OTP-10, KEN-OTP-0060-0550, at 0550.
[410] ICC-01/09-02/11-372, para. 50.
[411] ICC-01/09-02/11-372, para. 50.
[412] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 93.
[413] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 93.
[414] See above paras 212-213, 215, 217-219.
[415] ICC-01/09-02/11-372, para. 49.

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Defence of Mr. Kenyatta argues that Mungiki activities "remain limited in nature and are territorially restricted, in particular to the slums of Nairobi".[416] More specifically, the Defence of Mr. Kenyatta asserts that such activities are to be qualified as "criminal extortion and cannot be considered evidence of the entity having *de facto* control over the territory so as to be endowed with a capability to provide an organizational policy".[417] The same argument is also advanced by the Defence of Mr. Ali.[418] The Chamber observes that it is nowhere alleged by the Prosecutor that the Mungiki exercise control over part of the Kenyan territory. Indeed, in the 31 March 2010 Decision, the Chamber clarified that, whilst territorial control is among the various factors that may guide its determination as to the existence of "organization", it is not a rigid legal criterion.[419] For this reason, the Chamber is not persuaded by the argument of the Defence teams of Mr. Kenyatta and Mr. Ali.

222. Further, the Chamber notes the Defence of Mr. Kenyatta's assertion that "the Mungiki did not have the means at its disposal to commit a large-scale attack directed against the civilian population" as demonstrated by the Prosecutor's allegation that the group relied on external funds and logistics.[420] In this respect, the Defence of Mr. Kenyatta, in its final written observations, refers to the live testimony of Lewis Nguyai (D13-26), who stated that he had been regularly asked for small amounts of money by two Mungiki members.[421] However, in view of the above analysis of the evidence and the determination that the Mungiki is a large, hierarchically structured organization with a trained military wing, and with access to regular income,[422] the Chamber does not consider the issues of whether the Mungiki relied on external funding in the commission of the particular crimes alleged in this case, or whether two members of the Mungiki individually requested

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[416] ICC-01/09-02/11-372, para. 49.
[417] ICC-01/09-02/11-339, para. 70; ICC-01/09-02/11-372, para. 49.
[418] ICC-01/09-02/11-338, paras 33-34.
[419] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 93.
[420] ICC-01/09-02/11-339, para. 68
[421] ICC-01/09-02/11-372, para. 48.
[422] See above paras 191-204, 215.

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financial assistance of Lewis Nguyai, to be relevant to the determination of whether the Mungiki qualifies as an organization under article 7(2)(a) of the Statute.

223. Finally, the Chamber recalls that the Defence of Mr. Kenyatta seeks to challenge the qualification of the Mungiki as an organization under article 7(2)(a) of the Statute by asserting that no link exists between Mr. Kenyatta and the Mungiki.[423] The Chamber however recalls that, for the purposes of the determination of contextual elements of crimes against humanity, the attack within the meaning of article 7(2)(a) of the Statute need not, as a matter of law, be attributed to the person charged, neither does the person charged need to be the leader, or even a member, of the organization within the meaning of the same provision.[424] This follows from the language of article 7(1) of the Statute, which refers to "knowledge of the attack" as a legal requirement of crimes against humanity, thereby making clear that examination of any tighter link between the person charged and the organization bearing the policy to commit a widespread or systematic attack is unnecessary. Therefore, the Chamber shall not further address this particular aspect of the Defence objections to the charges.

(v) <u>The allegation of police involvement in the attack</u>

224. With respect to the Prosecutor's allegation of police participation in the attack by way of a deliberate failure to act or a creation of a "free zone",[425] the Chamber concludes that the evidence placed before it does not allow for this allegation to be upheld.

225. The evidence presented by the Prosecutor in support of his allegation includes individual accounts of police officers denying assistance to victims of the Mungiki attack[426] and references to subsequent police failure to properly investigate the crimes

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[423] ICC-01/09-02/11-372, paras 42-43.
[424] See also Pre-Trial Chamber II, "Decision on the 'Prosecution's Application for Leave to Appeal the Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-27, para. 18.
[425] Amended DCC, para. 31; ICC-01/09-02/11-T-5-Red-ENG, p. 11, lines 10 to 13.
[426] KEN-OTP-0053-0040, at 0040; KEN-OTP-0053-0054, at 0054; KEN-OTP-0053-0221, at 0221.

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committed during the attack and to prosecute those responsible for the attacks.[427] Moreover, the Prosecutor relies on subsequent reports and findings by the CIPEV and the KNCHR that the police response to the violence was inadequate.[428]

226. The Chamber finds this evidence reliable and of relevance to the Prosecutor's allegation. However, the evidence reveals that such failure mainly occurred as a result of ethnic bias on the part of individual police officers[429] as well as of ineptitude and failure of senior police officers to sufficiently appreciate the violence in Nakuru and Naivasha, leaving the police officers on the ground often overwhelmed and outnumbered by the attackers.[430] In fact, the Chamber is of the view that the evidence presented in this regard does not allow for the conclusion that there existed an identifiable course of conduct within any of the police agencies active in Nakuru and Naivasha at the relevant time, amounting to participation, by way of inaction, in the attack carried out by the Mungiki.

(vi) Conclusions of the Chamber

227. The above analysis of the evidence provides substantial grounds to believe that the Mungiki carried out a planned and coordinated attack against perceived ODM supporters in or around Nakuru and Naivasha between 24 and 28 January 2008,[431] which involved the commission of a number of crimes perpetrated on a large scale.[432]

228. The Chamber further finds that there are substantial grounds to believe that the Mungiki qualified at the relevant time as an "organization" within the meaning of article 7(2)(a) of the Statute. This is established by sufficient evidence supporting that: (i) the Mungiki was a hierarchically structured organization;[433] (ii) there existed an effective system of ensuring compliance by the members with the rules and orders

[427] KEN-OTP-0053-0038, at 0038; KEN-OTP-0053-0040, at 0040; KEN-OTP-0053-0166, at 0166.
[428] KEN-OTP-0001-0364, at 0494; KEN-OTP-0001-0002, at 0100-0102.
[429] Statement of Witness OTP-2, KEN-OTP-0042-0078, at 0097; KEN-OTP-0001-0002, at 0101.
[430] KEN-OTP-0001-0248, at 0299; KEN-OTP-0001-0002, at 0095.
[431] See above paras 117-185.
[432] See above para. 145 and below section VI.
[433] See above paras 191-206.

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imposed by higher levels of command;[434] (iii) the Mungiki was a large organization and included a trained quasi-military wing;[435] and (iv) it controlled and provided, in certain parts of Kenya, essential social services, including security.[436]

229. In light of the above the Chamber is therefore satisfied that there are substantial grounds to believe that the events in or around Nakuru and Naivasha between 24 and 28 January 2008 constitute an attack within the meaning of article 7(2)(a) of the Statute, since they qualify as a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute against a civilian population, pursuant to an organizational policy to commit such attack. Furthermore, the Chamber finds that there are substantial grounds to believe that this attack was widespread and systematic.

VI. ACTS CONSTITUTING CRIMES AGAINST HUMANITY

230. In this section of the present decision, the Chamber shall lay out its determination with regard to the objective elements of the specific acts constituting crimes against humanity as charged. The analysis in this part is limited to the conduct of the direct perpetrators. The attribution of this conduct to the Suspects and the subjective elements of the crimes are examined further below.[437]

A. Murder

231. In Counts 1 and 2 of the Amended DCC, the Prosecutor charges murder constituting a crime against humanity under article 7(1)(a) of the Statute, namely the murder of civilian supporters of the ODM in or around Nakuru and Naivasha. More specifically, the Prosecutor alleges, in relation to the events in Nakuru:

> Throughout the PEV, between 161 and 213 people were killed in Nakuru, including 48 people killed during the night of 26 January alone. [...] The majority of killings and injuries were caused by sharp objects or instruments. Based on a list of reported deaths compiled by the CIPEV, at least 90 perceived ODM

[434] See above paras 208-213.
[435] See above paras 204-215.
[436] See above paras 217-219.
[437] See below section VI.

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> supporters out of approximately 112 people were killed in Nakuru town between 24 and 27 January.[438]

232. As concerns Naivasha, the Prosecutor avers:

> As of 31 January 2008, at least 50 people had been killed during the PEV in Naivasha. Among them, the majority were ODM supporters. Twenty-three victims, including 13 children were burnt to death. Six were killed by gunshot and 16 by crude weapons, mostly machetes, but also local clubs called *rungus*, pieces of metal and spiked clubs.[439]

233. The Chamber finds that the evidence establishes substantial grounds to believe that the Mungiki attackers killed civilians as part of the attack on the perceived ODM supporters between 24 and 27 January 2008 in or around Nakuru and on 27 and 28 January 2008 in or around Naivasha.

234. Witness OTP-2 provides detailed evidence in relation to the killings in Naivasha, including photographs.[440] The witness [redacted] and states that 45 bodies were brought there as a result of the violence.[441] The witness explains that 23 people died as a result of burns, including 19 who were killed in a single incident of arson in Kabati estate.[442] As for the rest of the deaths, the witness states that they occurred as a result of machete wounds.[443] The Chamber considers, taking into account the totality of the evidence in relation to the events in Naivasha, that the deaths which occurred as a result of burns and machete wounds are attributable to the Mungiki attackers.

235. Witness OTP-12 likewise states that killings occurred as part of the attack.[444] The witness confirms this fact explicitly with respect to both Nakuru[445] and

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[438] Amended DCC, para. 62.
[439] Amended DCC, para. 74.
[440] KEN-OTP-0027-0020, at 0022, 0023, 0037, 0038, 0040, 0041, 0042.
[441] Statement of Witness OTP-2, KEN-OTP-0042-0044, at 0074.
[442] Statement of Witness OTP-2, KEN-OTP-0042-0078, at 0082.
[443] Statement of Witness OTP-2, KEN-OTP-0042-0078, at 0083.
[444] Statement of Witness OTP-12, KEN-OTP-0060-0453, at 0455-0456.
[445] Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0127.

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Naivasha,[446] and mentions in particular the incident in Naivasha where a petrol bomb was thrown inside a house, and some people were burnt inside.[447]

236. The Chamber observes that elsewhere in his testimony, as noted also by the Defence of Mr. Muthaura at the confirmation hearing,[448] Witness OTP-12 contradicts his statement and denies that killings by the Mungiki took place.[449] However, upon the analysis of the entirety of the witness' statement, the Chamber considers that the inconsistency and the reluctance to admit, upon direct prompting by the OTP investigator, that particular crimes were committed, which stands out manifestly against the rest of the witness' testimony, appears to be a result of the witness' association with the Mungiki and his involvement in the events in question. Therefore, the Chamber considers it appropriate not to base its findings on these denials but instead on the witness' specific statements referred to in the preceding paragraph. The Chamber clarifies that the same conclusion applies to similar categorical denials by Witness OTP-12 in relation to other crimes.[450]

237. The Chamber also notes that one of the witnesses relied upon by the Defence of Mr. Muthaura, Lucas Katee Mwanza (D12-25), testified before the Chamber that between 42 and 50 people were killed in Naivasha on or shortly after 27 January 2008,[451] including 19 people who died in the arson attack in Kabati estate.[452]

238. Additionally, the Prosecutor relies on the list of reported death cases during the post-election violence.[453] For Nakuru District, 43 people of Luo, Luhya and Kalenjin origin are listed to have been killed between 24 and 27 January 2008, as a result of sharp object injuries, blunt object injuries, burns and gunshots.[454] For

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[446] Statement of Witness OTP-12, KEN-OTP-0060-0074, at 0089; KEN-OTP-0060-0365, at 0373, 0380; KEN-OTP-0060-0405, at 0422.
[447] Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0119; see also KEN-OTP-0060-0365, at 0379.
[448] ICC-01/09-02/11-T-15-ENG, p. 48, lines 11-13.
[449] Statement of Witness OTP-12, KEN-OTP-0060-0385, at 0395.
[450] Statement of Witness OTP-12, KEN-OTP-0060-0385, at 0398-0399.
[451] ICC-01/09-02/11-T-8-Red-ENG, p. 81, lines 3-5.
[452] ICC-01/09-02/11-T-8-Red-ENG, p. 81, lines 7-10.
[453] KEN-OTP-0041-0679.
[454] KEN-OTP-0041-0679, at 0681-0690.

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Naivasha District, 39 deaths of members of Luo, Luhya and Kalenjin communities are listed.[455]

239. Further corroboration is found in the summary of the statement of a non-ICC witness, who referred to the killings of members of the Luo and Luhya communities during the attack in Nakuru.[456] Likewise, two summaries of statements of non-ICC witnesses support the conclusion that people were killed as part of the Mungiki attack in Naivasha.[457]

240. Killings in Nakuru and Naivasha with nexus to the Mungiki attack are also corroborated by the CIPEV Report,[458] the KNCHR Report,[459] the HRW Report[460] and the ICG Report.[461]

B. Deportation or forcible transfer of population

241. In Counts 3 and 4 of the Amended DCC, the Prosecutor charges deportation or forcible transfer of population constituting a crime against humanity under article 7(1)(d) of the Statute, namely the deportation or forcible transfer of the civilian population supporting the ODM in or around Nakuru and Naivasha. He alleges that in Nakuru, the attacking Mungiki "forcibly displaced thousands [of ODM supporters] from their homes into IDP camps". Concerning Naivasha, the Prosecutor asserts that "about 9,000 perceived ODM supporters were forced to seek refuge in the Naivasha Police Station".[462]

242. Pursuant to article 7(2)(d) of the Statute, deportation or forcible transfer means the "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law".

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[455] KEN-OTP-0041-0679, at 0679-0681.
[456] KEN-OTP-0053-0040, at 0040.
[457] KEN-OTP-0053-0154, at 0154; KEN-OTP-0053-0166, at 0166.
[458] KEN-OTP-0001-0364, at 0476, 0480-0481, 0494.
[459] KEN-OTP-0001-0002, at 0093, 0094-0095.
[460] KEN-OTP-0001-0248, at 0296, 0298, 0300-0301.
[461] KEN-OTP-0001-1076, at 1092.
[462] Amended DCC, para. 75.

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243. The Chamber finds that there are substantial grounds to believe that the Mungiki attackers displaced civilians as part of the attack on the perceived ODM supporters between 24 and 27 January 2008 in or around Nakuru and on 27 and 28 January 2008 in or around Naivasha. Further, the Chamber is satisfied that the civilians had been lawfully present in that area and that they were transferred without grounds permitted under international law.

244. In the view of the Chamber, the evidence establishes that the destruction of homes in residential areas,[463] the brutality of the killings and injuries,[464] the rape of perceived ODM supporters,[465] and the public announcements to the effect that "all Luos must leave",[466] amounted to coercion, which caused the attacked residents of Nakuru and Naivasha to leave their homes and seek shelter in IDP camps.

245. The evidence establishes that residents of Nakuru belonging to ethnic groups perceived as supporting the ODM were displaced to the Afraha Stadium as a result of the Mungiki attack. The evidence includes summaries of statements of two non-ICC witnesses who reported having been displaced from their homes by the attackers,[467] and the KNCHR report states specifically that "[t]he Luo community camped at the Afraha Stadium in Nakuru".[468]

246. Mohamed Amin, testifying before the Chamber, confirmed the displacement of "Luos particularly" in Nakuru.[469] Another witness, [redacted], who was a police officer in Nakuru at the relevant time, confirms that Luo residents of Nakuru

[463] Statement of Witness OTP-2, KEN-OTP-0042-0167, at 0190, 0203. Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0379. KEN-OTP-0053-0042, at 0042. KEN-OTP-0053-0152, at 0152
[464] Statement of Witness OTP-2, KEN-OTP-0042-0030, at 0034; KEN-OTP-0042-0167, at 0194. KEN-OTP-0052-2176, at 2177-2178. KEN-OTP-0053-0154, at 0154. KEN-OTP-0001-0002, at 0094. KEN-OTP-0001-0331, at 0345. KEN-OTP-0001-0364, at 0494-0495
[465] See below paras 258-259.
[466] Statement of Witness OTP-2, KEN-OTP-0042-0030, at 0034, 0035, 0037. KEN-OTP-0001-0248, at 0301.
[467] KEN-OTP-0053-0158, at 0158; KEN-OTP-0053-0168, at 0168.
[468] KEN-OTP-0001-0002, at 0092.
[469] ICC-01/09-02/11-T-14-Red-ENG, p. 17, lines 1-2.

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were fleeing to Afraha Stadium as a result of the violence,[470] and states that the police escorted at least 100 people per day to reach the Stadium.[471]

247. Further corroborating evidence includes a summary of statement of a non-ICC witness who stated that a large number of people fled from their homes as a result of the violence and sought refuge at the Afraha Stadium and Show Ground.[472] In addition, the CIPEV Report states:

> Between the 25th, 26th and 27th of January, the Law Society Rift Valley Chapter rescued approximately 300 to 400 people from Ponda Mali, Kaptembwa, Githima and Mwariki areas who were taken to Afraha Stadium and to the Nakuru ASK Show Ground.[473]

248. Also, the HRW report states that in Nakuru, "thousands of houses belonging to people on all sides were burned and thousands of people were displaced."[474]

249. In respect of Naivasha, Witness OTP-2 states that 9,000 people found refuge at the Naivasha Police Station,[475] while people also fled to and gathered at the nearby prison grounds.[476] The witness, who visited the police station at the time,[477] explains that the persons displaced were of Luo, Luhya and Kalenjin ethnic origin.[478] They were "insisting that they wanted to go to their rural homes" in Nyanza Province,[479] as they "felt that they couldn't stay [in Naivasha], they felt that ... it was not safe for them to live in Naivasha again".[480] Witness OTP-2 explains that over the course of the three weeks following the attack, many people were ferried to Nyanza province from

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[470] Statement of [redacted], KEN-D14-0004-0043, at 0044.
[471] Statement of [redacted], KEN-D14-0004-0043, at 0044.
[472] KEN-OTP-0053-0040, at 0040.
[473] KEN-OTP-0001-0364, at 0484.
[474] KEN-OTP-0001-0248, at 0302.
[475] Statement of Witness OTP-2, KEN-OTP-0042-0044, at 0047, 0066. See also a photograph provided by the witness, KEN-OTP-0027-0020, at 0045.
[476] Statement of Witness OTP-2, KEN-OTP-0042-0044, at 0071; KEN-OTP-0042-0115, at 0117, 0151.
[477] Statement of Witness OTP-2, KEN-OTP-0042-0030, at 0039.
[478] Statement of Witness OTP-2, KEN-OTP-0042-0044, at 0058.
[479] Statement of Witness OTP-2, KEN-OTP-0042-0044, at 0069-0070.
[480] Statement of Witness OTP-2, KEN-OTP-0042-0044, at 0070.

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the police station and the prison grounds, while the remaining were finally resettled to "Kedong ranch at the flower farms".[481]

250. In addition to the testimony of this witness, the evidence before the Chamber includes the summary of a statement of a non-ICC witness, who stated that, during the attack that started on 27 January 2008, he was forced to leave his home and went to the Naivasha Police Station.[482]

251. Lucas Katee Mwanza (D12-25) confirmed, before the Chamber, that on 27 January 2008, people "started running away from their rented houses to the police station [and] into the prison grounds".[483] He stated that there were about 8,000 displaced persons at the police station and a further 10,000-12,000 at the prison grounds.[484] According to this witness, the displaced in these camps were mostly of Luo and Kalenjin, and to some extent also of Kisii and Luhya ethnicity.[485] Mohamed Amin testified similarly before the Chamber.[486]

252. [redacted], who was at the relevant time a police officer in Naivasha, confirms that at the end of January, and as a result of an attack on their homes, members of the Luo, Kalenjin, Luhya communities, and to some extent Kisii residents of Naivasha sought refuge at the police station and at the prison grounds.[487]

253. Finally, the Chamber notes that the lawful presence of the persons displaced as a result of the Mungiki attack in Nakuru and Naivasha is not a matter of dispute between the parties and considers that it is not brought into question by any item of evidence available to the Chamber. Likewise, the Chamber finds that the established facts do not reveal any grounds permitting the displacement under international law.

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[481] Statement of Witness OTP-2, KEN-OTP-0042-0044, at 0071.
[482] KEN-OTP-0053-0174, at 0174.
[483] ICC-01/09-02/11-T-8-Red-ENG, p. 47, lines 5-8.
[484] ICC-01/09-02/11-T-8-Red-ENG, p. 53, lines 20-22.
[485] ICC-01/09-02/11-T-8-Red-ENG, p. 80, lines 1-3.
[486] ICC-01/09-02/11-T-14-Red-ENG, p. 16, line 24 to p. 17, line 1.
[487] Statement of [redacted], KEN-D14-0003-0010, at 0011.

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C. *Rape and other forms of sexual violence*

254. In Counts 5 and 6 of the Amended DCC, the Prosecutor charges rape and other forms of sexual violence constituting a crime against humanity under article 7(1)(g) of the Statute, committed against civilian supporters of the ODM in Nakuru and Naivasha. With respect to the events in Nakuru, the Prosecutor alleges:

> Forty-five cases of sexual violence were reported during [the relevant] period, including forced male circumcision and rapes. Six people were treated at the Provincial general Hospital of Nakuru for traumatic circumcision and penile amputation; 29 rape cases were also treated at the same hospital. In Nakuru, a number of women were gang raped - often in the presence of their husbands - maimed and killed.[488]

255. With respect to Naivasha, the Prosecutor avers:

> Four cases of forcible circumcision were reported. It is suggested that many other cases of rape and other forms of sexual violence went unreported due to the trauma caused by such crimes and societal stigma.[489]

256. Considering that they depend on examination of distinct facts, the Chamber shall examine first the allegation of rape and thereafter the allegation of other forms of sexual violence.

(i) Rape

257. The Chamber finds that there are substantial grounds to believe that the Mungiki attackers raped civilians as part of the attack on the perceived ODM supporters between 24 and 27 January 2008 in or around Nakuru and on 27 and 28 January 2008 in or around Naivasha.

258. The Chamber has before it the summaries of statements of two non-ICC witnesses who reported having been raped in Nakuru in circumstances which in the view of the Chamber demonstrate a nexus to the Mungiki attack.[490] In addition, the Chamber takes into consideration the summary of the statement of Witness OTP-7,

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[488] Amended DCC, para. 63.
[489] Amended DCC, para. 74.
[490] KEN-OTP-0053-0158, at 0158; KEN-OTP-0053-0168, at 0168.

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who reported "about a Luo victim from Nakuru who was gang raped in January 2008. Her assailants repeated the PNU slogan [...]. They were of Kikuyu ethnicity."[491]

259. As for Naivasha, the Chamber notes a video recording on the post-election violence, produced by a Kenyan NGO, in which a woman relays her story of having been raped in Naivasha by five men who spoke Kikuyu.[492] Corroboration is provided by a video report stemming from another NGO, which reported on the occurrence of gang rape during the Mungiki attack in Naivasha.[493] Finally, the Chamber notes a written report by yet another NGO which also refers to rape in Naivasha during the relevant time period.[494] The Chamber is of the view that in their totality, the aforementioned items of evidence reach the threshold required at this stage of the proceedings.

(ii) Other forms of sexual violence

260. The Chamber finds, on the facts, that there are substantial grounds to believe that the Mungiki attackers carried out acts of forcible circumcision and penile amputation against Luo men as part of the attack on the perceived ODM supporters between 24 and 27 January 2008 in or around Nakuru and on 27 and 28 January 2008 in or around Naivasha.

261. Witness OTP-2 reports having met two men at the local hospital who had been forcibly circumcised at the Kayole estate in Naivasha during the attack.[495] A doctor in a hospital in Naivasha also reported receiving cases of forcible circumcision.[496] Similarly, Witness OTP-7 was told that in Naivasha men were forced to remove their underwear to confirm their ethnicity and forcibly circumcised if they were identified as Luo.[497] The KNCHR Report corroborates this fact.[498]

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[491] KEN-OTP-0054-0036, at 0037.
[492] KEN-OTP-0049-0052, at 20.35.
[493] KEN-OTP-0038-0864, at 5.10.
[494] KEN-OTP-0001-1516, at 1519-1520.
[495] Statement of Witness OTP-2, KEN-OTP-0042-0078, at 0084.
[496] KEN-OTP-0052-2176, at 2177.
[497] KEN-OTP-0054-0036, at 0037.

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262. In relation to Nakuru, the KNCHR Report states that, during the attack, Luo men were "rounded up and forcefully circumcised using pangas and broken bottles".[499] Likewise, the CIPEV Report states, referring to medical records, that "7 persons were admitted at the Provincial General Hospital, Nakuru, where they were treated for traumatic circumcision and penile amputation. 5 out of the 7 traumatic circumcisions occurred on 25 January 2008".[500] Also, the Report quotes the Medical Officer of Health for Nakuru, who confirmed that 6 cases of forcible circumcision were received.[501] In one case, a 22-year-old man's penis was entirely cut off.[502] The CIPEV Report also mentions four cases of forcible circumcision visited upon Luo men in Naivasha.[503]

263. The HRW Report also states that in Nakuru the attackers were forcibly circumcising Luo men and quotes a Luhya witness who was forced to accompany a group of 50 people who forcibly circumcised two Luo men.[504] As for Naivasha, the HRW Report states that 4 victims of forced male circumcision were treated at the hospital.[505]

264. Turning to the legal characterization of these acts, the Chamber recalls that it is essential for qualification of a certain act as other forms of sexual violence pursuant to article 7(1)(g) of the Statute that the act in question be of a sexual nature.[506] The Chamber notes that at the confirmation of charges hearing, the Prosecutor submitted "that these weren't just attacks on men's sexual organs as such but were intended as attacks on men's identities as men within their society and were designed to destroy their masculinity".[507]

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[498] KEN-OTP-0001-0002, at 0095.
[499] KEN-OTP-0001-0002, at 0093.
[500] KEN-OTP-0001-0364, at 0481, see also at 0476.
[501] KEN-OTP-0001-0364, at 0632.
[502] KEN-OTP-0001-0364, at 0632.
[503] KEN-OTP-0001-0364, at 0493.
[504] KEN-OTP-0001-0248, at 0300-0301.
[505] KEN-OTP-0001-0248, at 0298.
[506] Elements of Crimes, Article (7) (1) (g)-6, para. 1.
[507] ICC-01/09-02/11-T-5-Red-ENG, p. 88, lines 9-15.

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265. The Chamber is of the view that not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence. In this respect, the Chamber considers that the determination of whether an act is of a sexual nature is inherently a question of fact.

266. The Chamber finds that the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other.[508] Therefore, the Chamber concludes that the acts under consideration do not qualify as other forms of sexual violence within the meaning of article 7(1)(g) of the Statute. However, as explained in the following section, the Chamber considers them as part of the Prosecutor's allegation of acts causing severe physical injuries and will address them accordingly.

D. Other inhumane acts

267. In Counts 7 and 8 of the Amended DCC, the Prosecutor charges other inhumane acts constituting a crime against humanity under article 7(1)(k) of the Statute, namely the inflicting of great suffering and serious injury to body or to mental or physical health by means of inhumane acts upon civilian supporters of the ODM in or around Nakuru and Naivasha. In the Amended DCC, the Prosecutor refers more specifically to causing physical injury,[509] individuals being made to watch as the attackers kill their husbands and children,[510] and destruction or vandalizing of property and businesses.[511]

268. At the confirmation of charges hearing, the Prosecutor argued:

> [T]he perpetrators inflicted great suffering, serious injury to body, mental and physical health by severely beating, hacking, amputating the limbs of perceived ODM supporters. The Prosecution also submits that the perpetrators inflicted

[508] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0024; Statement of Witness OTP-11, KEN-OTP-0052-1574, at 1579.
[509] Amended DCC, paras 62, 74.
[510] Amended DCC, para. 63.
[511] Amended DCC, para. 68.

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> great suffering, serious injury to mental and physical health by mutilating the bodies of individuals in front of their family members, destroying homes and businesses through acts of arson and looting personal properties. These acts were a serious violation of international human rights law and a serious attack on human dignity with implications for the victims' physical and mental health.[512]

269. Article 7(1)(k) of the Statute refers to "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The Chamber understands that other inhumane acts is a residual category within the system of article 7(1) of the Statute. Therefore, if a conduct could be charged as another specific crime under this provision, its charging as other inhumane acts is impermissible. Secondly, the Chamber opines that the language of the relevant statutory provision and the Elements of Crimes, as well as the fundamental principles of criminal law, make it plain that this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.

270. The Chamber turns first to the alleged acts causing severe physical injuries. At this point, the Chamber recalls its previous finding that the evidence establishes substantial grounds to believe that acts of forcible circumcision and penile amputation were carried out by the Mungiki as part of the attack in Nakuru and Naivasha. As stated in the preceding section, the Chamber is of the view that the evidence presented does not demonstrate that such acts were of a sexual nature. However, the Chamber understands that these acts also form part of the factual category of serious physical injuries, which, according to the Prosecutor, in turn constitutes other inhumane acts under article 7(1)(k) of the Statute.

271. In addition to the acts of forcible circumcision and penile amputation, the Chamber also considers that there is sufficient evidence to demonstrate that, as part of the attack, many surviving victims endured mutilations and other severe injuries to their bodies.

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[512] ICC-01/09-02/11-T-5-Red-ENG, p. 94, line 18 to p. 95, line 2.

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272. Witness OTP-2 provides evidence of such injuries, in particular of sharp-object injuries to the head.[513] Witness OTP-10 reports having observed unarmed Luo men being chased and struck with machetes, crying and begging for their lives.[514] The evidence also includes a reference to a doctor in Naivasha reporting that at the relevant time, cases of trauma, including cuts, gun-shot wounds and blunt force trauma, were treated at the hospital.[515]

273. The Chamber opines that these acts of serious physical injury inflicted great suffering on the victims, of a character similar to the other acts referred to in article 7(1) of the Statute.

274. Secondly, the Chamber turns to the Prosecutor's allegations of mental suffering on the part of the victims whose family members were killed in front of their eyes.

275. Witness OTP-2 reports having met and spoken to a boy at the Naivasha police station who was "not active", "wouldn't even laugh, he was just very, very rigid".[516] The witness reports that when spoken to, the boy bluntly replied: "The... the Kikuyus killed my father, they h... cut my father's head".[517]

276. Further, the Chamber notes the evidence relayed in the CIPEV Report, concerning a witness who testified before the CIPEV that, in Naivasha on 28 January 2008, her brother had been killed and mutilated in front of his 5-year-old son. According to the witness, the victim's son has since "gone mad".[518]

277. The Chamber considers that these acts of brutal killings and mutilations in front of the eyes of the victims' family members caused serious mental suffering, and are comparable in their nature and gravity to other acts constituting crimes against humanity.

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[513] KEN-OTP-0027-0020, at 0028, 0030, 0032.
[514] Summary of statement of Witness OTP-10, KEN-OTP-0060-0550, at 0553.
[515] KEN-OTP-0052-2176, at 2177.
[516] Statement of Witness OTP-2, KEN-OTP-0042-0078, at 0101.
[517] Statement of Witness OTP-2, KEN-OTP-0042-0078, at 0101.
[518] KEN-OTP-0001-0364, at 0494-0495.

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278. Finally, the Chamber turns to the Prosecutor's allegation that destruction of property occurred as part of the events underlying the charges, and that it may qualify as other inhumane acts constituting crimes against humanity.

279. Whilst satisfied to the required threshold that the acts of destruction of property were indeed carried out as alleged by the Prosecutor, the Chamber is however of the view that the evidence presented fails to establish that such conduct caused "serious injury to mental health" within the definition of other inhumane acts pursuant to article 7(1)(k) of the Statute. The evidence presented in fact (only) reveals that homes and businesses belonging to perceived ODM supporters were destroyed by the Mungiki as part of the attack,[519] as well as that such destruction of property was used, amongst other coercive acts, as a means to ensure forcible transfer or deportation[520]. Conversely, no evidence has been presented to the effect of establishing the occurrence, the type and the intensity of the alleged mental suffering caused, in itself, by the loss of property. Accordingly, the Chamber finds that the requisite elements of other inhumane acts as a crime against humanity in the form of destruction of property have not been established.

280. On the basis of the foregoing analysis, the Chamber concludes that there are substantial grounds to believe that the objective elements of other inhumane acts constituting a crime against humanity under article 7(1)(k) of the Statute are met, in respect of severe physical injury of perceived ODM supporters and infliction of serious mental suffering to perceived ODM supporters by way of subjecting them to witnessing the killings and the mutilations of their close relatives, in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008.

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[519] Statement of Witness OTP-2, KEN-OTP-0042-0167, at 0190, 0203; Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0379; KEN-OTP-0053-0042, at 0042; KEN-OTP-0053-0152, at 0152

[520] See above para. 244.

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E. Persecution

281. In Counts 9 and 10 of the Amended DCC, the Prosecutor charges persecution constituting a crime against humanity under article 7(1)(h) of the Statute, namely the intentional and discriminatory targeting of civilians based on their political affiliation, committing murder, rape and other forms of sexual violence, other inhumane acts and deportation or forcible transfer, in or around Nakuru and Naivasha.[521]

282. The crime against humanity of persecution is defined by article 7(2)(g) of the Statute as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". According to article 7(1)(h) of the Statute, persecution must be committed "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any acts referred to in this paragraph or any crime within the jurisdiction of the Court".

283. The Chamber reiterates at this point its above findings in relation to killings,[522] displacement,[523] rape,[524] serious physical injuries,[525] and acts causing serious mental suffering,[526] and considers that they constitute severe deprivations of fundamental rights. Moreover, the Chamber refers to its analysis and conclusions at paragraphs 142 to 144 and 177 to 179 of the present decision, and considers on this basis that the victims were targeted by reason of their identity as perceived ODM supporters, representing a distinction on political grounds within the meaning of article 7(1)(h) of the Statute. Accordingly, the Chamber is satisfied that the objective elements of persecution constituting a crime against humanity charged under counts 9 and 10 are sufficiently established.

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[521] Amended DCC, pp. 42-43.
[522] See above para. 233.
[523] See above para. 243.
[524] See above para. 257.
[525] See above paras 270-271.
[526] See above paras 275-277.

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284. In this context, the Chamber notes that the Legal Representative of Victims requests the Chamber to exercise its authority under article 61(7)(c)(ii) of the Statute to adjourn the hearing and request the Prosecutor to "consider amending the legal characterization of the facts because the evidence submitted [...] provides substantial grounds to believe that acts of destruction, looting, and/or theft of property were committed as underlying acts of the crimes against humanity of persecution".[527]

285. Article 61(7)(c)(ii) of the Statute allows the Chamber to request the Prosecutor, on the basis of the hearing, to consider amending a charge *i.e.* to modify the legal characterization of facts underpinning the charges. Conversely, consistent with the principle of prosecutorial discretion, the Chamber is not vested with the authority to request the Prosecutor to consider adding a new charge, *i.e.* to expand the factual ambit of the charges as originally presented.

286. As discussed above, in the present case the Prosecutor decided to charge as persecution only the alleged destruction of property causing mental suffering of a degree which would qualify it as other inhumane acts within the meaning of article 7(1)(k) of the Statute, but not destruction of property and looting as such. In the view of the Chamber, in doing so, the Prosecutor exercised his discretion to proffer charges, since he could have chosen otherwise, and could have included destruction of property *per se*, as well as looting, in the charge of persecution. In these circumstances, the Chamber considers that to adjourn the hearing as requested by the Legal Representative of Victims would mean to go beyond the factual ambit of the charges in the present case, and would therefore be tantamount to requesting the Prosecutor to consider adding a new charge. For this reason, the Chamber does not consider it appropriate, in the present circumstances, to adjourn the hearing under article 61(7)(c) of the Statute.

[527] ICC-01/09-02/11-360, para. 49.

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VII. INDIVIDUAL CRIMINAL RESPONSIBILITY

A. Mr. Muthaura and Mr. Kenyatta

(i) Allegations of the Prosecutor

287. Mr. Muthaura and Mr. Kenyatta are charged with the commission of the crimes in or around Nakuru and Naivasha as indirect co-perpetrators under article 25(3)(a) of the Statute.

288. The Prosecutor alleges that Mr. Muthaura and Mr. Kenyatta, together with others, "agreed to pursue an organizational policy to keep the PNU in power through every means necessary, including orchestrating a police failure to prevent the commission of crimes".[528] According to the Prosecutor, "[t]o implement the policy, [Mr. Muthaura and Mr. Kenyatta] devised a common plan to commit widespread and systematic attacks against perceived ODM supporters by: (i) penalizing them through retaliatory attacks; and (ii) deliberately failing to take action to prevent or stop the retaliatory attacks".[529]

289. In particular, the Prosecutor alleges that, prior to the election, Mr. Kenyatta, "taking the role of mediator between the PNU and the Mungiki criminal organization, facilitated a series of meetings from November 2007 involving Muthaura, other senior PNU government officials, politicians, businessmen and Mungiki leaders. Initially the meetings were to solicit the assistance of the Mungiki in supporting the government in the December 2007 elections".[530]

290. Furthermore, according to the Prosecutor, "[a]fter the election, Kenyatta, in conjunction with Muthaura, facilitated the meetings with the Mungiki with a view to organizing retaliatory attacks against perceived ODM supporters in the Rift Valley.

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[528] Amended DCC, para. 18.
[529] Amended DCC, para. 19.
[530] Amended DCC, para. 20.

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The primary purpose of the attacks was to strengthen the PNU's hold on power after the swearing in of the President".[531]

291. The Prosecutor further alleges that Mr. Kenyatta and Mr. Muthaura mobilized the Mungiki and the pro-PNU youth to attack perceived ODM supporters in or around Nakuru and Naivasha.[532]

292. In the Amended DCC it is also alleged that Mr. Muthaura and Mr. Kenyatta "provided funding, transportation, accommodation, uniforms, weapons and logistical support to the Mungiki and pro-PNU youth to carry out coordinated attacks in specific locations".[533]

293. Furthermore, according to the Prosecutor, Mr. Muthaura, "in his capacity as Chairman of the National Security Committee, with the support of Ali, who as Commissioner of Police was a member of the Committee, provided safe passage for the attacks to be carried out" and "ensured that the Kenya Police did not intervene before, during or after the attacks, despite having prior knowledge of the attacks".[534]

294. Moreover, the Prosecutor alleges that the contributions of Mr. Muthaura and Mr. Kenyatta to the implementation of the common plan included: (i) adopting the common plan; (ii) soliciting the support and contribution of local politicians and businessmen; (iii) mobilizing and authorizing the Mungiki and pro-PNU youth to implement the common plan; and (iv) providing the Mungiki and pro-PNU youth with logistical and other support.[535]

295. Finally, the Prosecutor alleges that Mr. Muthaura additionally contributed to the implementation of the common plan, by securing the non-intervention of the Kenya Police and by failing to punish the main perpetrators of the attacks.[536]

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[531] Amended DCC, para. 21.
[532] Amended DCC, para. 22.
[533] Amended DCC, para. 23.
[534] Amended DCC, para. 25.
[535] Amended DCC, para. 26.
[536] Amended DCC, para. 26.

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(ii) The applicable law

296. The Chamber recalls its finding in the confirmation of charges decision in the case of *The Prosecutor v. Jean-Pierre Bemba*, where it acknowledged that the concept of co-perpetration (joint commission), whether direct or indirect, embodied in article 25(3)(a) of the Statute and reflected in the words "[committing] jointly with another or through another person", must go together with the notion of "control over the crime".[537]

297. The Chamber also recalls that the mode of liability of indirect co-perpetration consists of the following elements: (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime; (iii) the suspect must have control over the organization; (iv) the organization must consist of an organized and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).[538]

(iii) Findings of the Chamber

298. In light of the evidence placed before it, the Chamber finds that there are substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta are criminally

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[537] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, paras 346-347.
[538] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, paras 350-351; Pre-Trial Chamber I "Decision on the confirmation of charges" against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, paras 500-514, 527-539; Pre-Trial Chamber I, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-3, paras 209-213.

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responsible as indirect co-perpetrators pursuant to article 25(3)(a) of the Statute for the crimes against humanity of murder (under article 7(1)(a) of the Statute), deportation or forcible transfer of population (under article 7(1)(d) of the Statute), rape (under article 7(1)(g) of the Statute) other inhumane acts (under article 7(1)(k) of the Statute), and persecution (under article 7(1)(h) of the Statute), as specified above.[539]

299. Hereinafter, the Chamber will set out its analysis of the evidence which it considers to be indicative of a number of facts relevant to establishing the individual criminal responsibility of Mr. Muthaura and Mr. Kenyatta. In light of the specificities of the present case and given the relevance of these facts to a number of different elements of the mode of liability under which Mr. Muthaura and Mr. Kenyatta are charged, the Chamber does not find it useful to conduct its analysis in accordance with the Prosecutor's characterization of these facts as proving one or the other of the requirements of the mode of liability under consideration; rather, the Chamber will set out, in chronological (and logical) order, the relevant facts, which, based on a comprehensive analysis of the evidence available, it deems to be satisfactorily established. In conducting this assessment, the Chamber will consider the evidence presented by the parties and the challenges to the Prosecutor's allegations advanced by the Defence teams.

300. After such analysis, the Chamber will provide its conclusions with respect to the different facts which underlie the objective and subjective requirements of indirect co-perpetration as recalled above.

a) Preliminary contacts between Mr. Muthaura and Mr. Kenyatta's intermediaries and the Mungiki

301. As explained below, the Chamber finds that the evidence placed before it provides substantial grounds to believe that, at least as of November 2007, a series of contacts took place between Mungiki representatives and individuals acting on

[539] See above section VI.

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behalf of Mr. Muthaura and Mr. Kenyatta. According to the evidence, the purpose of such contacts was to secure the support of the Mungiki for the upcoming presidential elections following a period of an intense government crackdown on the organization, which had commenced at least as of 2006.[540]

302. The evidence provided by Witnesses OTP-11 and OTP-12 shows that Mr. Muthaura and Mr. Kenyatta entrusted [redacted] with the responsibility of contacting Mungiki leaders and coordinating Mungiki support for the campaign of the PNU Coalition.[541] According to these witnesses, Mr. Muthaura and Mr. Kenyatta used [redacted] as the link with the Mungiki throughout the period leading to the commission of the crimes in or around Nakuru and Naivasha.[542]

303. In particular, the witnesses state that [redacted] – together with a number of other individuals, including a person referred to as [redacted], allegedly representing "State House"[543] – reassured Mungiki members that, in exchange for their support to the PNU Coalition, the extrajudicial killings would stop and the Mungiki would be allowed to conduct their rituals openly and without interference of the police.[544]

304. In fact, in November 2007, as confirmed by Witnesses OTP-4, OTP-11 and OTP-12, the extrajudicial killings stopped because of the agreement between the

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[540] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0024-0028. Statement of Witness OTP-9, KEN-OTP-0059-0265, at 0276. Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1298; KEN-OTP-0052-1469, at 1477. Statement of Witness OTP-12, KEN-OTP-0060-0047, at 0060; KEN-OTP-0060-0078, at 0102.

[541] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1288; KEN-OTP-0052-1292, at 1298; KEN-OTP-0052-1451, at 1464-1465; KEN-OTP-0052-1506, at 1520. Statement of Witness OTP-12, KEN-OTP-0060-0272, at 0297 and KEN-OTP-0060-0299, at 0304.

[542] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1288; KEN-OTP-0052-1451, at 1464-1465; KEN-OTP-0052-1506, at 1520; Statement of Witness OTP-12, KEN-OTP-0060-0272, at 0297 and KEN-OTP-0060-0299, at 0304.

[543] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1278 and 1284; KEN-OTP-0052-1292, at 1298. Statement of Witness OTP-12, KEN-OTP-0060-0047, at 0060; KEN-OTP-0060-0093, at 0102-0104.

[544] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1278-1284; KEN-OTP-0052-1292, at 1294 and 1298; Statement of Witness OTP-12, KEN-OTP-0060-0047, at 0060; KEN-OTP-0060-0093, at 0103.

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Mungiki and the Government[545] and the Mungiki were allowed to openly conduct their rituals with the participation of a large number of Mungiki members in public places and without any interference of the police.[546]

305. Witnesses OTP-11 and OTP-12 further refer to an occasion where the Mungiki convened a meeting in Murang'a in November 2007.[547] According to the witnesses, two named Mungiki members were arrested by the police during the meeting and Mr. Muthaura intervened to secure their release,[548] after being informed by [redacted] of the incident itself and, significantly, that the Mungiki "complained [...] [because] they were not supposed to be arrested [since] they [were] working with the Government and they had a leeway to hold such meetings".[549]

306. [redacted] (D12-47) confirms that on 10 November 2007, on the second day of a road show organized in support of the PNU Coalition, two of the organizers of the event were arrested in Murang'a for allegedly being part of the Mungiki and released immediately thereafter.[550] However, he denies that the meeting was a Mungiki meeting and that Mr. Muthaura intervened to secure the release of the arrested individuals.[551] Because [redacted] is alleged to have acted as a crucial intermediary between Mr. Muthaura and Mr. Kenyatta on the one side and the Mungiki on the other side,[552] he is naturally motivated to deny his involvement. As a result, the Chamber considers that his statement cannot be accorded such probative

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[545] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1298; Statement of Witness OTP-12, KEN-OTP-0060-0453, at 0465; Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0028, paras 130-131. See also KEN-OTP-0001-1076, at 1093, KEN-OTP-0033-0297, at 0310.

[546] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1279-1286; KEN-OTP-0052-1523, at 1526. Statement of Witness OTP-12, KEN-OTP-0060-0093, at 0103.

[547] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1476; KEN-OTP-0052-1523, at 1524-1525. Statement of Witness OTP-12, KEN-OTP-0060-0272, at 0294; KEN-OTP-0060-0299, at 0304-0310.

[548] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1476; KEN-OTP-0052-1523, at 1525. Statement of Witness OTP-12, KEN-OTP-0060-0272, at 0294; KEN-OTP-0060-0299, at 0304-0310.

[549] Statement of Witness OTP-11, KEN-OTP-0052-1523, at 1525.

[550] Statement of [redacted] (D12-47), KEN-D12-0013-0013, at 0018-0019.

[551] Statement of [redacted] (D12-47), KEN-D12-0013-0013, at 0018-0019.

[552] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1288; KEN-OTP-0052-1292, at 1294, 1298; KEN-OTP-0052-1451, at 1464-1465; KEN-OTP-0052-1469, at 1475-1476; KEN-OTP-0052-1506, at 1520; KEN-OTP-0052-1523, at 1525. Statement of Witness OTP-12, KEN-OTP-0060-0272, at 0294, 0297; KEN-OTP-0060-0299, at 0304-0310.

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value that it would exclude the existence of substantial grounds to believe the facts established by the consistent statements of both Witnesses OTP-11 and OTP-12, in relation to whom there is no indication of any personal interest which would cast doubt on their evidence with respect to the fact under consideration.

307. The Chamber also notes as a relevant fact that the two Mungiki leaders who were, according to Witnesses OTP-11 and OTP-12, the main contacts of [redacted] and [redacted] during this initial stage of negotiations (respectively, [redacted] and [redacted]) were, as asserted by Witness OTP-4[553] and as elaborated below,[554] among those individuals who later met, on behalf of Maina Njenga, with Mr. Muthaura and Mr. Kenyatta in preparation of the crimes in Nakuru and Naivasha.

308. The Chamber is of the view that through these preliminary contacts, Mr. Muthaura and Mr. Kenyatta redefined the PNU Coalition's relationship with the Mungiki, which eventually led to the Mungiki support in the 2007 election campaign and finally to the use of the Mungiki for the attack in or around Nakuru and Naivasha.

b) Mr. Muthaura and Mr. Kenyatta's participation in meetings with Mungiki members

309. As elaborated below, the evidence placed before the Chamber provides substantial grounds to believe that, following these preliminary contacts, Mr. Muthaura and Mr. Kenyatta directly participated in a number of meetings with Mungiki leaders.

(1) Nairobi State House – 26 November 2007

310. In particular, the Chamber is satisfied that there are substantial grounds to believe that on 26 November 2007 a meeting was held at Nairobi State House

[553] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0030-0041.
[554] See below paras 310-359.

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between Mr. Muthaura, Mr. Kenyatta, Mungiki representatives, President Mwai Kibaki, and others.

311. The occurrence, purpose and subject of this meeting are established, to the requisite threshold and in considerable detail, by the statement of Witness OTP-4, who was present at this meeting as a Mungiki representative. The witness states that, among others,[555] a number of named individuals, both on the side of the Mungiki (Maina Diambo, [redacted] and [redacted]) and on the side of the PNU Coalition (Mr. Muthaura, Mr. Kenyatta, Mwai Kibaki, [redacted], Hyslop Ipu, Isaiya Kabira and Stanley Murage) were in attendance.[556] The witness states that during this meeting, which was held in a tent at State House, Mr. Muthaura introduced the Mungiki members to the President – referring to them, throughout the entire meeting, as "the youth" – and encouraged them to inform the President of their demands in exchange for their support for his electoral campaign.[557] One of the Mungiki representatives ([redacted]) then presented on behalf of Maina Njenga a number of demands to the PNU Coalition.[558] Such demands included: (i) the cessation of extrajudicial killings of Mungiki members; (ii) the release from prison of Maina Njenga; and (iii) the recruitment of Kikuyu youths into the security and armed forces.[559] Witness OTP-4 states that, after hearing the Mungiki demands, the President addressed Mr. Muthaura telling him "something to the effect of: 'You have heard what the youth want, so now it is upon you'".[560] During this meeting, Mr. Kenyatta spoke as well, and told the Mungiki to fully support "the President", invoking their allegiance to the same community.[561] Witness OTP-4 further states that Mr. Kenyatta told the Mungiki representatives that he would contact [redacted]

[555] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0035.
[556] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0032.
[557] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0032.
[558] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0033.
[559] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0033.
[560] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0034.
[561] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0034.

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and that they would organize more meetings.[562] Witness OTP-4 finally states that, at the end of the meeting, Mr. Muthaura gave money to the Mungiki representatives.[563]

312. The statement of Witness OTP-4 is independently corroborated by the statement of Witness OTP-11, who refers to a meeting held in State House on 26 November 2007, where [redacted], Maina Kangethe Diambo, [redacted] and other named Mungiki members met with the President and agreed to support the PNU Coalition for the upcoming elections.[564] Witness OTP-11 further clarifies that the meeting was also convened in order to reassure the Mungiki that the individuals with whom they had been in contact that far, in particular [redacted], were indeed acting on behalf of the PNU Coalition.[565] Corroboration of these accounts is also provided by Witness OTP-12, who states that, as part of "Operation Kibaki Again", a group led by [redacted], a number of named Mungiki members, including [redacted], went to State House.[566] Furthermore, Witness OTP-11 states that "Operation Kibaki Again" was a lobby group created by the Mungiki to allow campaigning while concealing their identity as Mungiki.[567]

313. The decision that the Mungiki organization would support the PNU Coalition in exchange for several concessions as well as the nature of the "Operation Kibaki Again" as a cover group for the Mungiki operations is further reflected in the NSIS Situation Report for 28 November 2007, which states:

> Some Mungiki national officials [...] have resolved to campaign for the president through a lobby group called "Operation Kibaki Again" (OKA) but on conditions that its members would be recruited into the Military/Police, restitution of the group's vehicles impounded by police and being allowed to re-open their offices/operation bases.[568]

314. Further corroboration of the evidence concerning the meeting at State House on 26 November 2007 is provided by the summary of the statement of Witness OTP-

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[562] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0034.
[563] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0034.
[564] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1283; KEN-OTP-0052-1506, at 1513, 1519.
[565] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1283; KEN-OTP-0052-1506, at 1513, 1519.
[566] Statement of Witness OTP-12, KEN-OTP-0060-0426, at 0449.
[567] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1294.
[568] KEN-OTP-0002-0015, at 0088.

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6, which refers to a meeting between members of the Mungiki and the "Government" held at State House prior to the elections, in which President Kibaki, in exchange for Mungiki support, promised cash rewards as well as employment within the armed forces.[569] Finally, the Chamber notes the summary of the statement provided by Witness OTP-1 who alleges that a meeting took place between the Mungiki and Government representatives "whereby prior to the elections the Mungiki were recruited to support the PNU" and that both Mr. Kenyatta and Mr. Muthaura were involved in this meeting.[570]

315. Both the Defence of Mr. Muthaura and the Defence of Mr. Kenyatta contest that a meeting with Mungiki members took place at State House on 26 November 2007, with their clients in attendance.

316. First, both Defence teams draw the Chamber's attention to a number of inconsistencies between the account provided by Witness OTP-4 in his statement to the Prosecutor and the account given by the same witness to the CIPEV. According to the Defence, the main inconsistencies relate to the witness not mentioning to the CIPEV the presence of Mr. Kenyatta at the meeting as well as the difference as to the time the meeting allegedly took place.[571] Furthermore, the Defence of Mr. Muthaura asserts that the witness provides inconsistent evidence as to the amount of money he allegedly received at the end of the meeting at State House and as to his own role in the preparation of the document containing the demands of the Mungiki in order to give their support to the PNU Coalition.[572]

317. The Chamber notes that the asserted inconsistency in relation to Mr. Kenyatta's involvement in the meeting is to be more appropriately qualified as an omission, since the witness did not state to the CIPEV that Mr. Kenyatta was not present at the meeting at State House on 26 November 2007. As regards the

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[569] Summary of statement of Witness OTP-6, KEN-OTP-0053-0015, at 0019.
[570] Summary of statement of Witness OTP-1, KEN-OTP-0053-0026, at 0026.
[571] ICC-01/09-02/11-T-10-ENG, p. 23, lines 2-6; ICC- 01/09-02/11-372, para. 31; ICC-01/09-02/11-374-Red, para. 25.
[572] ICC-01/09-02/11-374-Red, para. 25.

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difference in the time of the alleged commencement of the meeting (11.00 a.m. *versus* 11.45 a.m.), the Chamber considers this difference as minimal and as such immaterial. Similarly, the Chamber considers as immaterial the alleged inconsistencies in relation to the amount of money received by the witness, and in relation to the witness' role in the preparation of the statement containing the Mungiki's demands for the meeting. For these reasons, and given that Witness OTP-4's statement finds external corroboration in relation to the meeting of 26 November 2007, the Chamber considers that the alleged inconsistencies do not impair the reliability of the witness' account.

318. The Defence of Mr. Muthaura also asserts that the account given by Witness OTP-11 cannot corroborate that of Witness OTP-4, since the former "when providing a hearsay account of an alleged Statehouse meeting does not mention [the latter] nor that a meeting took place in a tent with Mungiki in Statehouse".[573] The Chamber observes that Witness OTP-11, who does not assert his presence at the meeting at State House, does not provide an exhaustive list of participants; rather, he mentions as attendees of the meeting, among others, [redacted][574] – who in fact confirms his presence at State House that day[575] – as well as a number of Mungiki members,[576] including those mentioned by Witness OTP-4[577] and whose presence is also registered in the list of participants provided by the Defence of Mr. Muthaura[578] and confirmed by two witnesses relied upon by the Defence.[579] With respect to the witness' omission to mention that the meeting at State House took place in a tent, the Chamber finds it of no relevance to challenge the corroborative nature of the account provided by Witness OTP-11 with respect to the facts at issue. The Chamber takes this view given that, as already clarified, the witness does not assert that his presence

[573] ICC-01/09-02/11-374-Red, para. 53.
[574] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1283.
[575] Statement of [redacted] (D12-47), KEN-D12-0013-0013, at 0016-0017.
[576] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1283.
[577] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0032.
[578] KEN-D12-0010-0069, at 0069-0070.
[579] Statement of [redacted] (D12-47), KEN-D12-0013-0013, at 0016-0017; Statement [redacted] (D12-37), KEN-D12-0001-0412, at 0417.

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at the meeting and, therefore, he could be legitimately unaware of its details. This does not however negate that the statement of Witness OTP-11 corroborates the evidence provided by Witness OTP-4.

319. The Defence of Mr. Muthaura further provides a number of witness statements in order to demonstrate that the meeting with the President held at State House in the morning of 26 November 2007 was a meeting with youth leaders who were supporting President Kibaki's campaign.[580] The Chamber notes that several Defence witnesses confirm Mr. Muthaura's attendance at this meeting.[581] However, a number of Defence witnesses, who were allegedly present, state that none of the youth attending the meeting was there to represent the Mungiki.[582]

320. The Chamber observes that some Defence witnesses refer to a meeting with the President which took place on the morning of 26 November 2007, but apparently earlier than the time referred to by Witness OTP-4, *i.e.* 11.45 a.m. Yvonne Khamati (D12-11) states that she attended a meeting with the President in the Boardroom of State House on that day and that this meeting started at around 9.45/10.00 a.m. and lasted for about one hour.[583] In the same vein, [redacted] (D13-23) testifies that the meeting he attended with the President and, among others, Mr. Muthaura started at around 10.30 a.m. and lasted for about 1 hour and 20 minutes.[584] Regardless of the apparent inconsistency between the accounts of the two witnesses as to the starting

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[580] Statement of Mwai Kibaki (D12-13), KEN-D12-0001-0444, at 0448; Statement of Yvonne Khamati (D12-11), KEN-D12-0001-0276, at 0282-0287; Statement of Cyrus Gituai (D12-5), KEN-D12-0002-0001, at 0006; Statement of Hyslop Ipu (D12-46), KEN-D12-0010-0001, at 0012-0013; Statement of Benson Githinji (D12-43), KEN-D12-0011-0015, at 0020-0021.

[581] Statement of Mwai Kibaki (D12-13), KEN-D12-0001-0444, at 0448; Statement of Yvonne Khamati (D12-11), KEN-D12-0001-0276, at 0282; Statement of Cyrus Gituai (D12-5), KEN-D12-0002-0001, at 0006; Statement of Hyslop Ipu (D12-46), KEN-D12-0010-0001, at 0012-0013; Statement of Benson Githinji (D12-43), KEN-D12-0011-0015, at 0020-0021 paras 24, 31; Statement of [redacted] (D13-23), KEN-D13-0005-0779, at 0802; Statement of [redacted] (D13-08), KEN-D13-0005-0524, at 0539.

[582] Statement of Mwai Kibaki (D12-13), KEN-D12-0001-0444, at 0450; Statement of Yvonne Khamati (D12-11), KEN-D12-0001-0276, at 0285; Statement of [redacted] (D12-47), KEN-D12-0013-0013, at 0017; Statement of Hyslop Ipu (D12-46), KEN-D12-0010-0001, at 0014; Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0418; Statement of [redacted] (D13-23), KEN-D13-0005-0779, at 0807; Statement of [redacted] (D13-08), KEN-D13-0005-0524, at 0540.

[583] Statement of Yvonne Khamati (D12-11), KEN-D12-0001-0276, at 0282, 0285.

[584] Statement of [redacted] (D13-23), KEN-D13-0005-0779, at 0802.

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time of the meeting(s) with the President, the Chamber is of the view that no conclusion could be drawn from these witnesses' statements as to the unreliability of the evidence provided by Witness OTP-4, since they seem to refer to a meeting other than that with the Mungiki mentioned by Witness OTP-4.

321. With respect to the individuals named by Witness OTP-4 as present at the meeting on behalf of the PNU Coalition, the Chamber notes that two of them, Mwai Kibaki (D12-13) and Hyslop Ipu (D12-46), confirmed their participation on that day in the meeting with the representatives of the youth, but denied the presence of the Mungiki therein.[585] Nevertheless, since these persons are directly mentioned by Witness OTP-4 as having participated in the meeting with Mungiki representatives, the Chamber approaches their statements with reservation and considers that the witnesses' denial cannot be regarded as decisive in the determination of this fact, in particular given the external corroboration in relation to this meeting.

322. [redacted] (D12-47) – who, according to both Witnesses OTP-11 and OTP-12, was the co-ordinator of "Operation Kibaki Again" and brought the Mungiki members to State House on 26 November 2007 – confirms that, together with him, a number of people attended the meeting with the President and Mr. Muthaura at State House on 26 November 2007.[586] In particular, [redacted] (D12-47) mentions the presence of [redacted], [redacted] and Maina Kangethe Diambo as representatives of "Operation Kibaki Again" at the meeting.[587] However, [redacted] denies that Mungiki issues were discussed during the meeting.[588]

323. Initially, the Chamber notes that the individuals mentioned by [redacted] (D12-47) as members of "Operation Kibaki Again" – which, as indicated by the different sources referred to above,[589] appears to have operated as a cover group for Mungiki activities during the election campaign – are the same individuals who

[585] Statement of Mwai Kibaki (D12-13), KEN-D12-0001-0444, at 0450; Statement of Hyslop Ipu (D12-46), KEN-D12-0010-0001, at 0014.
[586] Statement of [redacted] (D12-47), KEN-D12-0013-0013, at 0016-0017.
[587] Statement of [redacted] (D12-47), KEN-D12-0013-0013, at 0016-0017.
[588] Statement of [redacted] (D12-47), KEN-D12-0013-0013, at 0017.
[589] See above paras 312-313.

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Witness OTP-4 and Witness OTP-11 place in attendance of the meeting at State House as representatives of the Mungiki. [redacted] (D12-47) also declares that Mungiki issues were not discussed at the said meeting,[590] and, more generally, that there was "no other meeting of youth" and no tents pitched outside at the State House gardens.[591] However, the Chamber accords low probative value to these particular statements, mindful of the consistent evidence which contradicts them as well as of a number of sources indicating that [redacted] played a significant role in the meeting and, more generally, in the events leading to the commission of the crimes in or around Nakuru and Naivasha.[592]

324. Another Defence witness, [redacted] (D12-37), confirms his participation in the meeting at State House as a representative, together with Maina Diambo and [redacted], of "Operation Kibaki Again".[593] This witness also confirms that the same people mentioned by Witness OTP-4 attended the meeting at State House as well as the fact that Maina Kangethe Diambo was a member of the Mungiki at the relevant time,[594] as referred to by Witnesses OTP-4, OTP-11 and OTP-12.[595] Furthermore, the witness states that at the end of the meeting they received an envelope containing money.[596] However, the witness asserts that: (i) he was only a member of the Mungiki up until 2006, thus, at the time when he attended the meeting at State House on 26 November 2007, he had already quit the Mungiki organization;[597] (ii) Witness OTP-4 was not present at the said meeting;[598] and (iii)

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590 Statement of [redacted] (D12-47), KEN-D12-0013-0013, at 0017.
591 Statement of [redacted] (D12-47), KEN-D12-0013-0013, at 0017.
592 Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1283, 1288; KEN-OTP-0052-1292, at 1295, 1298; KEN-OTP-0052-1451, at 1464-1465; KEN-OTP-0052-1469, at 1475-1476; KEN-OTP-0052-1506, at 1512, 1520; KEN-OTP-0052-1523, at 1525. Statement of Witness OTP-12, KEN-OTP-0060-0093, at 0105-0106; KEN-OTP-0060-0272, at 0294, 0297; KEN-OTP-0060-0299, at 0304-0310; KEN-OTP-0060-0325, at 0333-0334; KEN-OTP-0060-0426, at 0449-0451. KEN-OTP-0002-0015, at 0088.
593 Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0417-0419.
594 Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0417-0418.
595 Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0013; Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1295; Statement of Witness OTP-12, KEN-OTP-0060-0299, at 0307.
596 Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0418.
597 Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0416.
598 Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0418.

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nothing about the Mungiki was discussed during the meeting.[599] The Chamber, however, does not consider these denials as decisive in the determination of the relevant fact, and refers to its previous analysis on the probative value to be attached to the statement of [redacted] (D12-37) regarding specific issues of Mungiki involvement in the commission of the crimes in or around Nakuru and Naivasha.[600]

325. The Chamber points out that with respect to the individuals who participated in the meeting at State House the Defence evidence corroborates the evidence provided by Witness OTP-4. In fact, as noted above, a number of attendees mentioned by Witness OTP-4 are witnesses relied upon by the Defence teams and directly confirm their attendance at a meeting at State House on 26 November 2007.[601] Further, the Chamber notes that the attendance of Stanley Murage – who is not a witness relied upon by any of the Defence teams – is confirmed by three Defence witnesses.[602]

326. The Defence of Mr. Muthaura presented to the Chamber the list of visitors to State House on 26 November 2007 as provided by Hyslop Ipu (D12-46), State House Comptroller.[603] The Defence submits that this list contradicts the account provided by Witness OTP-4.[604] However, the Chamber notes that Hyslop Ipu (D12-46) admits that the list is not complete and that some names of the youth leaders who attended the meeting are omitted.[605] This is also confirmed by two witnesses of the Defence of Mr. Kenyatta, [redacted] (D13-08) and [redacted] (D13-23), who state that they attended the meeting at State House and who clarify, when the list provided by

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[599] Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0418.
[600] See above para. 188.
[601] Statement of Mwai Kibaki (D12-13), KEN-D12-0001-0444, at 0448; Statement of Hyslop Ipu (D12-46), KEN-D12-0010-0001, at 0012; Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0417; Statement of Isaiya Kabira (D12-53), KEN-D12-0016-0001, at 0004-0005.
[602] Statement of Benson Githinji (D12-43), KEN-D12-0011-0015, at 0020; Statement of [redacted] (D13-23) KEN-D13-0005-0779, at 0802; Statement of [redacted] (D13-08) KEN-D13-0005-0524, at 0539.
[603] KEN-D12-0010-0069.
[604] ICC-01/09-02/11-374-Red, para. 54.
[605] Statement of Hyslop Ipu (D12-46), KEN-D12-0010-0001, at 0012.

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Hyslop Ipu (D12-46) is shown to them, that a number of individuals who went to the meeting at State House on that day do not appear on this list.[606] Therefore, since the list of visitors as presented does not exclude the presence of individuals not mentioned therein, it is of no assistance to the Chamber in the determination of the matter.

327. The Defence of Mr. Muthaura also provides a video and a press article about the meeting,[607] containing a photograph of the attendees of the meeting held at State House in the morning of 26 November 2007, purporting to demonstrate that Witness OTP-4 was not present at State House on 26 November 2007.[608] The Chamber, however, notes, as correctly pointed out by the Prosecutor,[609] that a video and a photograph cannot constitute a complete record of the proceedings at State House on that day. These pieces of evidence relied upon by the Defence of Mr. Muthaura are therefore inconclusive and do not exclude that a meeting with Mungiki members took place as alleged by Witness OTP-4.

328. The Defence of Mr. Muthaura also relies on the statement of Michael Kagika (D12-8), who was Administrative Officer at State House during the relevant period, and was "in charge of events management and hospitality".[610] He states that there was no meeting and no tents were pitched up in the State House garden on 26 November 2007.[611] However the Chamber observes that the witness only arrived at State House in the afternoon of that day, and otherwise provides no explanation as to his asserted knowledge on the matter at issue.[612] Considering this and also the fact that the witness was not a high-ranking officer, and thus it cannot be assumed to have been privy to everything which occurred at State House, especially in his

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[606] Statement of [redacted] (D13-08) KEN-D13-0005-0524, at 0539; Statement of [redacted] (D13-23), KEN-D13-0005-0779, at 0800-0801.
[607] KEN-D12-0009-0003, KEN-D12-0016-0007.
[608] ICC-01/09-02/11-374-Red, para. 26.
[609] ICC-01/09-02/11-361, para. 49.
[610] Statement of Michael Kagika (D12-8), KEN-D12-0002-0202, at 0203.
[611] Statement of Michael Kagika (D12-8), KEN-D12-0002-0202, at 0207.
[612] Statement of Michael Kagika (D12-8), KEN-D12-0002-0202, at 0207.

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absence, the Chamber considers that the statement of Michael Kagika (D12-8) cannot have decisive force in the determination of the matter at issue.

329. Finally, in order to challenge the occurrence of a meeting with Mungiki leaders at State House on 26 November 2007, the Defence of Mr. Muthaura further relies on the statement of Michael Gichangi (D12-4), the Director General of the NSIS.[613] The witness avers that if Mr. Muthaura had attended a meeting at State House with Mungiki members the NSIS would have known about it.[614] The Chamber, however, finds the testimony in question unsubstantiated and speculative, and thus lacking the ability to cast doubt on the account of the meeting as provided by the specific evidence analyzed above. In fact, as pointed out by the Prosecutor in his final observations,[615] although Lewis Nguyai (D13-26) admitted to having links with Mungiki leaders during the post-election violence,[616] this information does not appear anywhere in the NSIS reports.

330. The Defence of Mr. Kenyatta alleges that on the morning on 26 November 2007 Mr. Kenyatta was present, with the PNU parliamentary candidates, at the Kenyatta International Conference Centre ("KICC") and that therefore he could not have attended the meeting at State House at the same time.[617] During the confirmation hearing, Mr. Kenyatta stated that he arrived at the KICC at about 9.00 a.m. and left at around 12.00 - 12.30 p.m. when he went to the Intercontinental Hotel for a luncheon with the President.[618] In order to support this allegation, the Defence of Mr. Kenyatta relies on: (i) a video clip showing Mr. Kenyatta entering the KICC on 26 November 2007;[619] (ii) a picture of politicians walking from the KICC to the Intercontinental Hotel;[620] and (iii) a newspaper article about the meeting held at the

[613] ICC-01/09-02/11-T-7-ENG, p. 12, line 17 to p. 15, line 2.
[614] Statement of Michael Gichangi (D12-4), KEN-D12-0001-0401, at 0409.
[615] ICC-01/09-02/11-361, para. 51.
[616] ICC-02/09-02/11-T-12-Red-ENG, p. 56, lines 7-16.
[617] ICC-01/09-02/11- T-10-ENG, p. 75, line 24, to p. 77, line 25.
[618] ICC-01/09-02/11- T-11-Red-ENG, p. 25 lines 7-18.
[619] KEN-D13-0001-0358.
[620] KEN-D13-0001-0357.

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KICC reporting that the President did not attend it.[621] The Chamber does not find conclusive any of these pieces of evidence in order to exclude Mr. Kenyatta's attendance at the meeting with Mungiki members at State House. Regardless of the fact that Mr. Kenyatta is missing from the presented photos of the event, the Chamber believes that the evidence presented would not show more than the fact that Mr. Kenyatta went to the KICC at and for an unknown time. This does not therefore have the capacity to deny the allegations, since it does not place Mr. Kenyatta physically away from the meeting with Mungiki members at State House. In fact the Defence evidence leaves the possibility of Mr. Kenyatta attending the meeting at State House after leaving the KICC building and attending the luncheon with the President thereafter.

331. The Defence also relies on the statement of [redacted] (D13-6) who states that Mr. Kenyatta attended the PNU affiliates' meeting at the KICC in the morning and thereafter the luncheon at the Intercontinental Hotel.[622] The Chamber notes that the witness does not give clear indication of the source of his knowledge nor does he clarify whether he was with Mr. Kenyatta on the morning on 26 November 2007. Having analyzed the witness statement, it appears to the Chamber that he relied on the same media materials which, as indicated above, the Chamber does not find conclusive.

332. Finally, the Chamber notes that during the confirmation hearing the Defence teams of Mr. Muthaura and Mr. Kenyatta argued that the idea of Mungiki members entering State House is "inconceivable".[623] The Defence teams rely on a number of witness statements containing declarations of this nature.[624] The Chamber is not persuaded by any such argument. First, the witnesses' opinions are not based on anything more than mere speculation, as opposed to a recollection of events, and

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[621] KEN-D13-0001-0356.

[622] Statement of [redacted] (D13-6), KEN-D13-0005-0408, at 0430-0431.

[623] ICC-01/09-02/11-T-4-ENG, p. 75, lines 3-7; ICC-01/09-02/11-T-10-ENG, p. 96, lines 7-11.

[624] Statement of Mwai Kibaki (D12-13), KEN-D12-0001-0444, at 0447, 0450; Statement of Yvonne Khamati (D12-11) KEN-D12-0001-0276, at 0284; Statement of Hyslop Ipu (D12-46), KEN-D12-0010-0001, at 0014-0015; Statement of Benson Githinji (D12-43), KEN-D12-0011-0015, at 0021-0022.

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therefore do not in themselves have any probative value. Second, the Chamber notes that at least one individual, Maina Kangethe Diambo, whose membership of the Mungiki is confirmed even by witnesses relied upon by the Defence,[625] was indeed present at the meeting at State House on 26 November 2007, as demonstrated by the list of visitors[626] and asserted by a number of witnesses relied upon by both the Prosecutor and the Defence.[627] Third, the Chamber notes that a great number of witnesses relied upon by the parties consistently state that it would be impossible to identify a Mungiki member by sight alone, since Mungiki do not have any distinguishing feature that would permit any such identification.[628] Finally, it is to be noted that, according to the testimony of Witness OTP-4, the Mungiki members attending the meeting at State House were presented as a group of Kikuyu youth, guests of Mr. Kenyatta, supporting the campaign of President Kibaki and not referred to by the name "Mungiki".[629]

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333. The evidence placed before the Chamber also provides substantial grounds to believe that, on 30 December 2007, there was a second meeting at State House with Mungiki members and a number of MPs, where Mr. Kenyatta was also present. This is established to the requisite threshold by the testimony provided by Witness OTP-11, corroborated by Witness OTP-12 and Witness OTP-6.

334. Witness OTP-11 refers to the occasion as an "urgent" meeting in which Mr. Kenyatta said that he had the capability of organizing his people and mobilizing

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[625] Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0417; Statement of [redacted] (D12-48), KEN-D12-0010-0072, at 0075.

[626] KEN-D12-0010-0069, at 0070.

[627] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0031. Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1283; KEN-OTP-0052-1506, at 1513. Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0417.

[628] Statement of [redacted], KEN-D14-0003-0010, at 0012; Statement of [redacted], KEN-D14-0003-0013, at 0014; Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0414; Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0013; Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1312; Statement of Witness OTP-9, KEN-OTP-0059-0200, at 0206-0207; Statement of Witness OTP-12, KEN-OTP-0060-0486, at 0495; ICC-01/09-02/11-T-8-Red-ENG, p. 56, lines 5-7.

[629] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0031.

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them for any eventuality.[630] According to the witness, during this meeting, Mr. Kenyatta also gave some MPs and Mungiki coordinators 3.3 million KSh each.[631] In particular, the witness states that [redacted] was among the recipients of money to coordinate the Mungiki attack in Naivasha,[632] as well as that the money distributed at this meeting was later spent in part to buy the guns that were used in the attack in Nakuru.[633]

335. Witness OTP-12 corroborates the account provided by OTP-11, stating that there was a meeting at State House, where the logistics of the attack in Naivasha were planned.[634] The witness further indicates that the provision of 3.3 million KSh by Mr. Kenyatta to local politicians to mobilize the people from the ground occurred during the meeting at State House.[635]

336. Finally, the occurrence and the purpose of the meeting as well as Mr. Kenyatta's presence therein are corroborated by Witness OTP-6 who states that a second meeting with Mungiki members occurred at State House during the post-election violence in which logistics of the retaliatory attacks and financing of the Mungiki's activities for such purpose were discussed.[636] The witness also alleges that a source close to the Mungiki informed him that Mr. Kenyatta was in attendance of this meeting.[637]

337. The Chamber observes that it is not alleged that Mr. Muthaura was present at this meeting at State House and, therefore, does not find it necessary to address the evidence presented by his Defence allegedly demonstrating that he could not have attended the meeting.

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[630] Statement of Witness OTP-11, KEN-OTP-0052-1506, at 1514.
[631] Statement of Witness OTP-11, KEN-OTP-0052-1451, at 1463; KEN-OTP-0052-1469, at 1485; KEN-OTP-0052-1506, at 1514.
[632] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1485.
[633] Statement of Witness OTP-11, KEN-OTP-0052-1451, at 1463.
[634] Statement of Witness OTP-12, KEN-OTP-0060-0405, at 0408.
[635] Statement of Witness OTP-12, KEN-OTP-0060-0405, at 0419.
[636] Summary of statement of Witness OTP-6, KEN-OTP-0053-0015, at 0019.
[637] Summary of statement of Witness OTP-6, KEN-OTP-0053-0015, at 0019.

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338. The Chamber notes that one of the witnesses relied upon by the Defence of Mr. Muthaura, Godhard Kamau (D12-52), states that Mungiki members were not present at State House on 30 December 2007.[638] The witness asserts that he was not at Nairobi State House in the period from 29 December to 31 December 2007 and, therefore, that the only source of his account is the list of visitors to State House,[639] attached to his statement.[640] The Chamber recalls however that it has established, with respect to another date, that a list of visitors does not constitute the complete recording of people present at State House.[641] Thus, the Chamber considers that this, taken together with the fact that the statement of Godhard Kamau (D12-52) is not based on his personal observation, precludes any decisive relevance being attached to this witness's statement with respect to the issue under consideration.

339. During the confirmation hearing, Mr. Kenyatta asserted that on 30 December 2007 he was at the KICC until the election results were announced and that, at around 5 p.m., he went to State House for the swearing-in ceremony of the President, which lasted around one hour and after which he went home to sleep.[642] To support Mr. Kenyatta's assertions, his Defence relies on two videos[643] and on the statement of [redacted] (D13-20).[644] The first of the videos shows the swearing-in ceremony of the cabinet which actually occurred on 17 April 2008, and is therefore not relevant.[645] With respect to the second video showing Mr. Kenyatta at the KICC[646] the Chamber notes that, notwithstanding the apparent inconsistency between the time appearing on the video and Mr. Kenyatta's own assertions during the hearing, the video does not in any way exclude that Mr. Kenyatta met with Mungiki members at State House on 30 December 2007, since it only shows that Mr. Kenyatta was also at the KICC on that day.

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[638] Statement of Godhard Kamau (D12-52), KEN-D12-0012-0019, at 0022.
[639] Statement of Godhard Kamau (D12-52), KEN-D12-0012-0019, at 0022.
[640] KEN-D12-0012-0014, at 0015-0017.
[641] See above para. 326.
[642] ICC-01/09-02/22- T-11-Red-ENG, p. 28, line 8, to p. 30, line 8.
[643] KEN-D13-0001-0151, KEN-D13-0001-0348.
[644] Statement of [redacted] (D13-20), KEN-D13-0005-0755.
[645] KEN-D13-0001-0348.
[646] KEN-D13-0001-0151.

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340. Turning to the assertions of [redacted] (D13-20), the Chamber notes the ambiguousness with respect to dates in his written statement. In fact, taking the statement on its face, what emerges is that: (i) the witness does not state that he was with Mr. Kenyatta on 30 December when the electoral results were announced; and (ii) on 31 December, the witness and Mr. Kenyatta went to State House for the swearing-in ceremony of Kibaki and after that they went to Mr. Kenyatta's house.[647] The Chamber is however of the view that dating the swearing-in ceremony of the President as at 31 December 2007, instead of 30 December 2007, could be a typographical error and that the witness, in his account, could be referring to one and the same date, *i.e.* 30 December 2007. In any event, the Chamber notes that the witness is extremely vague on the timing of Mr. Kenyatta's movements and that his assertions do not exclude Mr. Kenyatta meeting some Mungiki members at State House on 30 December 2007.

(3) *Nairobi Club – 3 January 2008*

341. The Chamber is further satisfied that there are substantial grounds to believe that on 3 January 2008 at the Nairobi Club, Mr. Muthaura and Mr. Kenyatta met with Mungiki members and directed them to commit the crimes charged.

342. The occurrence of this meeting is established, to the requisite threshold, by the testimony of Witness OTP-4, who was present therein as a Mungiki representative and who provides a detailed account thereof. In particular, Witness OTP-4 states that the meeting commenced at around 9 a.m. with about 12 people present.[648] The witness specifically mentions the presence of Mr. Muthaura, Mr. Kenyatta and George Saitoti on the side of the PNU Coalition and [redacted], Maina Diambo and [redacted] on the side of the Mungiki.[649] According to the witness, at the beginning of the meeting, Mr. Muthaura told the Mungiki, addressing them in Kikuyu, that since "our community" was being targeted in the Rift Valley, they needed to

[647] Statement of [redacted] (D13-20), KEN-D13-0005-0755, at 0758-0759.
[648] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0039.
[649] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0038-0039.

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"revenge or retaliate".[650] Thereafter, Mr. Kenyatta took the floor and asked Maina Diambo whether the Mungiki "had plans".[651] Maina Diambo replied confirming that "the 'youth' were ready" and that everything depended on the side of the "government officials"[652] and asked whether the Police would interfere with the Mungiki operation in the Rift Valley.[653] At this point, according to the witness, Mr. Muthaura called Mr. Ali, telling him in Kiswahili, and sounding like he was giving him instructions, "Our youth will be going to the Rift Valley and we don't want them to be disturbed".[654] The witness further reports that Mr. Kenyatta told the Mungiki representatives that plans were being prepared and that there would be another meeting at the Blue Springs Hotel later that day to discuss the logistics of the Mungiki attacks in the Rift Valley and to bring money to be allocated to the Mungiki for this purpose.[655] Moreover, according to the witness, Mr. Kenyatta told the Mungiki that [redacted], would be the contact person for the Mungiki in charge of organizing the attacks in Nakuru.[656]

343. The Chamber observes that on 7 January 2008, a few days after the meeting at the Nairobi Club, the NSIS registered particular movements of the Mungiki. The NSIS Situation Report in fact reads as follows:

> Mungiki sect leader John Maina Njenga has directed sect coordinators to carry out recruitment and oathing ceremonies in preparation to joining the current skirmishes in some parts of the country. Separately, sect members have intensified the acquisition of weapons with which they plan to execute the machination. Mungiki members have been employed in [...] Nakuru [...] for revenge missions. [...] The sect appears to have been revitalized for revenge missions hence the importance of sustained crackdown.[657]

344. Finally, the Chamber notes the summary of the statement provided by Witness OTP-1 who alleges that, after the breakout of violence, a meeting took place between the Mungiki and Government representatives to recruit the Mungiki "to

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[650] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0039.
[651] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0039.
[652] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0039.
[653] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0040.
[654] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0040.
[655] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0040-0041.
[656] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0041.
[657] KEN-OTP-0002-0015, at 0069-0070.

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retaliate against perceived ODM supporters in the Rift Valley" and that both Mr. Kenyatta and Mr. Muthaura were involved in this meeting.[658]

345. The Defence teams of both Mr. Muthaura and Mr. Kenyatta assert that no meeting with Mungiki members took place at the Nairobi Club on 3 January 2008.

346. First, both Defence teams challenge the credibility of Witness OTP-4 by mentioning a number of inconsistencies between the information provided to the Prosecutor and that previously given to CIPEV. In particular, as highlighted by the Defence of Mr. Muthaura[659] and of Mr. Kenyatta[660], the Chamber notes that, whilst in his statement to CIPEV the witness asserted that the meeting with Mungiki members on 3 January 2008 took place at the "Nairobi Safari Club" at around 11 a.m., in his statement to the Prosecutor he states that the meeting was held at the "Nairobi Members' Club" at breakfast time and commenced around 9 a.m. The Chamber notes that with respect to the name of the location of the meeting, the witness explains the inconsistency and confirms that the meeting took place at "Nairobi Members' Club", also describing its precise location in Nairobi[661] as well as its interiors.[662] Furthermore, the Chamber observes the number of details on the timing of the meeting given by Witness OTP-4 in the statement provided to the Prosecutor, *e.g.* precise information on what the witness did before arriving at the meeting and the fact that the witness had "breakfast" in the meeting room immediately before the meeting commenced.[663] Conversely, the only reference to the time of the meeting in the witness' statement to CIPEV is the planned time of the commencement of the meeting that the witness was given the day before. In light of the above, the Chamber does not find that there exists an inconsistency which would cast doubt on the witness' statement with respect to the meeting under consideration.

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[658] Summary of statement of Witness OTP-1, KEN-OTP-0053-0026, at 0026.
[659] ICC-01/09-02/11-374-Red, p. 14, para. 25.
[660] ICC-01/09-02/11-372, p. 15, para. 30.
[661] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0038. The Chamber shall refer to the venue as "Nairobi Club", as this is its proper name as established at the hearing.
[662] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0039.
[663] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0038-0039.

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347. The Chamber further notes, as exposed at the hearing by the Defence of Mr. Ali, that Witness OTP-4 stated to the CIPEV that "the president's PA" placed a call to Mr. Ali during the meeting on 3 January 2008,[664] whilst to the Prosecutor he asserts that the phone call to Mr. Ali was made by Mr. Muthaura.[665] The Chamber observes however that the statement to the CIPEV contains merely a short reference to the phone call, while to the Prosecutor the witness provides a detailed description of how the call took place, what was discussed, and what happened before and after the call. The Chamber thus concludes that no inconsistency exists which would render the statement of Witness OTP-4 unusable for the Chamber in the determination of this particular fact.

348. In order to challenge the occurrence of the meeting with Mungiki members at the Nairobi Club, the Defence of Mr. Muthaura further relies on: (i) a number of statements provided by staff members of the Club denying that a meeting took place at the Club on the morning of 3 January 2008; and (ii) evidence allegedly placing Mr. Muthaura away from the Nairobi Club at the time of the meeting.

349. With respect to the staff members of the Nairobi Club, the Chamber notes that the Defence of Mr. Muthaura provides the statements of David Waters (D12-39), [redacted] (D12-41) and [redacted] (D12-51). David Waters (D12-39), former Chairman of Nairobi Club and current Club Secretary, states that he consulted the available records of that day, which show that 11 people spent the night of 2 January 2008 at the Club.[666] The Chamber believes that the said testimony does not negate the account provided by Witness OTP-4 since David Waters (D12-39) admits that he was not at the Club on that day and bases his declaration upon: (i) the record of people that stayed at the Club overnight – as opposed to those who had breakfast there and for which it seems that such a list does not exist; and (ii) on the fact that none of his staff "recalls the presence of a group of about 16 people, with

[664] KEN-OTP-0005-0484, at 0494.
[665] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0040.
[666] Statement of David Waters (D12-39), KEN-D12-0003-0111, at 0112.

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Kenyatta, Muthaura and Saitoti having breakfast with and addressing a group of youth at the restaurant on the 3rd of January".[667]

350. [redacted] (D12-41), who was a waiter at that time, and [redacted] (D12-51), [redacted], are both current staff members of the Nairobi Club who state that they were present at the Club on the morning of 3 January 2008.[668] Both of them recall that that morning breakfast was served only to a group of 10 or 11 people and that neither Mr. Muthaura nor Mr. Kenyatta was part of this group.[669] The Chamber notes that the witnesses do not provide the names of the people who they recall having had breakfast that morning "because of the club policy",[670] which, according to David Waters (D12-39), "does not permit disclosure of any information relating to members activities to third parties".[671] This is confirmed by the letter of appointment of [redacted] (D12-41), which includes, as a contractual clause, the non-disclosure of any confidential matter to anyone not authorized to receive them.[672] In light of the above, the Chamber is of the view that the statements of these witnesses do not have a decisive impact on the determination of the facts in question.

351. The Defence of Mr. Muthaura also purports to demonstrate that on the morning of 3 January 2008, Mr. Muthaura was at Harambee House for a meeting of the National Security Advisory Committee ("NSAC"). For this purpose, the Defence relies on the minutes of this meeting.[673] The Chamber observes that, contrary to the assertion of the Defence, the minutes provided show that the NSAC meeting was scheduled to start at 9.15 a.m., but was only called to order at 9.50 a.m.,[674] thus making it possible for Mr. Muthaura to have attended the previous meeting with the

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[667] Statement of David Waters (D12-39), KEN-D12-0003-0111, at 0112.
[668] Statement of [redacted] (D12-41), KEN-D12-0008-0039, at 0041; Statement of [redacted] (D12-51), KEN-D12-0012-0001, at 0003.
[669] Statement of [redacted] (D12-41), KEN-D12-0008-0039, at 0041; Statement of [redacted] (D12-51), KEN-D12-0012-0001, at 0003.
[670] Statement of [redacted] (D12-51), KEN-D12-0012-0001, at 0003.
[671] Statement of David Waters (D12-39), KEN-D12-0003-0111, at 0113.
[672] Statement of [redacted] (D12-41), KEN-D12-0008-0043, at 0044.
[673] KEN-D12-0001-0055.
[674] KEN-D12-0001-0055, at 0056.

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Mungiki at the Nairobi Club that, according to Witness OTP-4, commenced around 9 a.m. and only lasted for the duration of the breakfast.

352. The Defence of Mr. Muthaura also relies on the statement of Alfred Mutua (D12-2) to the effect that Mr. Muthaura could not have attended the meeting at the Nairobi Club on the morning of 3 January 2008. The Chamber notes that Alfred Mutua states that, on that day, he saw Mr. Muthaura at around 8.30 a.m. and that he remembers Mr. Muthaura entering the NSAC meeting at about 9 a.m.[675] Considering that the witness explains that he remembers these particular circumstances "because [he] saw [Mr. Muthaura] almost every day"[676] and that, despite clearly stating having seen Mr. Muthaura enter the NSAC meeting at 9.00 a.m., the witness does not recall whether he himself attended the said meeting,[677] the Chamber is of the view that the declaration of Alfred Mutua as to his recollection of the events of the morning of 3 January 2008 is selective and speculative and therefore does not cast doubt on the account provided by Witness OTP-4 on the meeting held at the Nairobi Club, as corroborated by other independent sources.

353. The Defence of Mr. Muthaura further relies on the statements of Hyslop Ipu (D12-46), Isaiya Kabira (D12-53) and Alfred Mutua (D12-2), who state that on 3 January 2008 they were with Mr. Muthaura preparing a speech for the President.[678] However, the Chamber notes that, as specifically clarified by two of the witnesses – Hyslop Ipu (D12-46) and Alfred Mutua (D12-2) – the drafting of the speech took place in the afternoon after 1 p.m.[679] The Chamber notes that the third witness, Isaiya Kabira (D12-53), despite not providing the time, confirms that, when he was preparing the speech for the President with Mr. Muthaura, Hyslop Ipu (D12-46) was present as well, thus indicating that such activity was conducted in the afternoon of 3

[675] Statement of Alfred Mutua (D12-2), KEN-D12-0001-0330, at 0331.
[676] Statement of Alfred Mutua (D12-2), KEN-D12-0001-0330, at 0331.
[677] Statement of Alfred Mutua (D12-2), KEN-D12-0001-0330, at 0331.
[678] Statement of Hyslop Ipu (D12-46), KEN-D12-0010-0001, at 0017; Statement of Isaiya Kabira (D12-53), KEN-D12-0016-0001, at 0005; Statement of Alfred Mutua (D12-2), KEN-D12-0001-0330, at 0331-0332.
[679] Statement of Hyslop Ipu (D12-46), KEN-D12-0010-0001, at 0017; Statement of Alfred Mutua (D12-2), KEN-D12-0001-0330, at 0331.

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January 2008.[680] Therefore, the testimonies of none of these witnesses refer to the morning, when the meeting at Nairobi Club took place according to Witness OTP-4, and therefore do not exclude Mr. Muthaura's attendance at the meeting.

354. The Defence of Mr. Muthaura also places before the Chamber the statements provided by Frederick Mbogoh (D12-16), the Security Advisor/Driver of Mr. Muthaura, and of Daniel Mumira (D12-22), the Chief of Security for Mr. Muthaura. Both witnesses state that they did not hear from any of Mr. Muthaura's security officers or drivers that Mr. Muthaura went to the Nairobi Club.[681] Regardless of the fact that Daniel Mumira (D12-22) is clearly referring to the Nairobi Safari Club, as opposed to the Nairobi Club,[682] the Chamber finds the testimony provided by these two witnesses as speculative in nature, as opposed to being based upon their specific recollection of the facts at issue. Indeed, the Chamber cannot accept the proposition that the two of them would always know Mr. Muthaura's movements and activities.

355. Additionally, the Chamber notes that during the confirmation of charges hearing the Defence of Mr. Muthaura contested the account of Witness OTP-4 by asserting that no phone call took place between Mr. Muthaura and Mr. Ali.[683] In support, the Defence relies on phone records and information obtained from witnesses [redacted] (D12-40) and Beatrice Muriithi (D12-42). The Chamber has not identified any circumstance casting doubt upon the authenticity of the phone records provided. Nevertheless, the Chamber notes that the evidence relied upon by the Prosecutor does not contain a specific reference to the phone number that Mr. Muthaura is alleged to have used to place the call, and that therefore it is of limited relevance to establish that no calls to Mr. Ali are found in the phone records concerning a single phone number allegedly used by Mr. Muthaura. In fact, it is in the view of the Chamber possible that Mr. Muthaura would use other phone numbers, as indicated by the fact that the phone number for which the

[680] Statement of Isaiya Kabira (D12-53), KEN-D12-0016-0001, at 0005.
[681] Statement of Frederick Mbogoh (D12-16) KEN-D12-0002-0026, at 0027; Statement of Daniel Mumira (D12-22) KEN-D12-0001-0324, at 0326.
[682] Statement of Daniel Mumira (D12-22), KEN-D12-0001-0324, at 0326.
[683] ICC-01/09-02/11-T-7, p. 30, line 16 to p. 31, line 9.

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Defence of Mr. Muthaura provides records is not registered in the name of Mr. Muthaura,[684] and by the relatively low number of calls listed in the phone records. In its determination of this fact, the Chamber does not find persuasive the statement of Beatrice Muriithi (D12-42) that "Mr. Muthaura has only one mobile telephone",[685] since it does not exclude the possibility of Mr. Muthaura using another phone number without the witness being aware of this and given the powerful position of Mr. Muthaura *vis-à-vis* the witness.

356. Finally, the Defence of Mr. Muthaura challenges the account provided by Witness OTP-4 stating that Mr. Muthaura is Meru and therefore: (i) he doesn't speak Kikuyu;[686] and (ii) he could not have been referring to the Kikuyu as "our community".[687] With a view to supporting its first argument, the Defence relies on the statement of Beatrice Muriithi (D12-42). However, the Chamber notes that the witness clarifies that she never *heard* Mr. Muthaura speaking Kikuyu and does not at all suggest that he is not able to speak Kikuyu.[688] Furthermore the Chamber observes that, according to the evidence, Kikuyu and Meru are mutually intelligible.[689]

357. As concerns the second argument proposed by the Defence of Mr. Muthaura, the Chamber considers that the specific evidence concerning Mr. Muthaura's involvement in the 3 January 2008 meeting at Nairobi Club, and his commission of crimes charged in general, must be given precedence over the generic argument that Mr. Muthaura's ethnicity does not correspond to the ethnic animosity allegedly underlying the post-election violence and the case at issue.

358. During the confirmation hearing, Mr. Kenyatta stated that he did not attend any meeting with Mungiki members at the Nairobi Club on 3 January 2008 and that

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[684] Statement of [redacted] (D12-40), KEN-D12-0008-0031, at 0032.
[685] Statement of Beatrice Muriithi (D12-42), KEN-D12-0011-0001, at 0002.
[686] ICC-01/09-02/11-T-7, p. 48, lines 10-12.
[687] ICC-01/09-02/11-T-7, p. 48, lines 8-11.
[688] Statement of Beatrice Muriithi (D12-42), KEN-D12-0011-0001, at 0002.
[689] Statement of Witness OTP-11, KEN-OTP-0052-1387, at 1388-1389; Statement of Witness OTP-12, KEN-OTP-0060-0426, at 0433.

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on that day he was "basically" and "largely" at home for security reasons.[690] To support this assertion, the Defence of Mr. Kenyatta relies on the statements provided by two witnesses. [redacted] (D13-20) states that on the morning of 3 January he was with Mr. Kenyatta "around" Mr. Kenyatta's house "waiting to see what would materialize with the [announced ODM] rally" and that mid-morning they were joined by three other people.[691] However, the Chamber notes that the statement of [redacted] (D13-20) is very general in nature and does not exclude in itself the possibility that Mr. Kenyatta left the house briefly to attend the meeting at the Nairobi Club early in the morning. The second witness, [redacted] (D13-6) states that he went to Mr. Kenyatta's house at lunchtime,[692] thus not at the time where the meeting with the Mungiki at the Nairobi Club allegedly took place. Therefore, in the view of the Chamber, the evidence relied upon by Mr. Kenyatta does not exclude his attendance at the meeting at the Nairobi Club referred to by Witness OTP-4.

359. Finally, the Chamber notes that both the Defence of Mr. Kenyatta and the Defence of Mr. Ali state that the Nairobi Club is an exclusive place only for members.[693] The Chamber however notes that, as indicated by the witnesses relied upon by the Defence of Mr. Muthaura, members can sign in visitors.[694] Furthermore, it is of significance that Witness OTP-4 does not assert that they were introduced as Mungiki members.

c) Maina Njenga's agreement with Mr. Muthaura and Mr. Kenyatta

360. The Chamber observes that the evidence shows that in the meetings referred to above – whether with either of Mr. Muthaura and Mr. Kenyatta or with individuals acting as their intermediaries – Mungiki members were present on behalf of the top leader of the Mungiki, Maina Njenga. In particular, Witnesses OTP-4, OTP-

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[690] ICC-01/09-02/11-T-11-Red-ENG, p. 34, lines 14-21.
[691] Statement of [redacted] (D13-20), KEN-D13-0005-0755, at 0760.
[692] Statement of [redacted] (D13-6), KEN-D13-0005-0408, at 0412.
[693] ICC-01/09-02/11-T-10-ENG, p. 82, lines 9-23; ICC-01/09-02/11-T-13-ENG, p. 19, lines 10-17.
[694] Statement of [redacted] (D12-41), KEN-D12-0008-0039, at 0040; Statement of [redacted] (D12-51), KEN-D12-0012-0001, at 0002. The Chamber notes that at the hearing, Mr. Kenyatta stated that he was a member of Nairobi Club, see ICC-01/09-02/11-T-11-Red-ENG, p. 34, line 8.

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11 and OTP-12 mention several individuals who were involved in the preparatory activities leading to the common plan to commit the crimes in Nakuru and Naivasha, stating consistently that those individuals acted as trustees of Maina Njenga and were in constant contact with him to receive instructions.[695]

361. The Chamber refers at this point to its previous conclusion that, at the relevant time, Maina Njenga possessed exclusive control over the Mungiki organization.[696]

362. As mentioned above, the Chamber notes that the evidence demonstrates that Maina Njenga was approached with, and eventually agreed to the common plan with Mr. Muthaura and Mr. Kenyatta in exchange for, a number of concessions that the PNU Coalition made – or promised to make – to him.

363. In particular, the evidence placed before the Chamber shows that Maina Njenga received a significant amount of money on at least two occasions in order for him to agree to the common plan and make available the services of the Mungiki to the PNU Coalition for the commission of the crimes. In this respect, Witness OTP-11 states that, around mid-December 2007, Maina Njenga was given 8 million KSh from "State House", *i.e.*, according to the witness, from Mr. Kenyatta.[697] The witness further clarifies that, out of this money, 2 million KSh was supposed to be shared by the Mungiki leaders who were directly in contact with the PNU Coalition (*i.e.* "Mungiki leaders who knew what was happening that day because Kenyatta was not just alone there").[698] The same account is given by Witness OTP-12 who confirms both that 8 million KSh was brought to Maina Njenga in prison and that the person who gave this money to Maina Njenga was sent by Mr. Kenyatta.[699]

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[695] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0013. Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1278-1279; KEN-OTP-0052-1292, at 1295-1296; KEN-OTP-0052-1557, at 1562-1563; Statement of Witness OTP-12, KEN-OTP-0060-0272, at 0294; KEN-OTP-0060-0299, at 0304-0310; KEN-OTP-0060-0325, at 0333-0334.

[696] See above paras 191-194.

[697] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1296; KEN-OTP-0052-1523, at 1528.

[698] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1296; KEN-OTP-0052-1523, at 1528.

[699] Statement of Witness OTP-12, KEN-OTP-0060-0272, at 0297.

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364. According to Witness OTP-12, in late January 2008, before the commission of the crimes in Naivasha, Maina Njenga was given another 20 million KSh, which was brought to him in prison again by Maina Diambo and [redacted], together with [redacted] who was sent by Mr. Kenyatta for that purpose.[700] The witness further states that it was after receiving this money that the Mungiki attacked "the Luos" in Naivasha.[701] Witness OTP-11 also confirms that 20 million KSh were indeed given to Maina Njenga.[702]

365. The evidence placed before the Chamber further shows that, together with financial concessions, Maina Njenga also agreed to the common plan in exchange for the promise of cessation of extrajudicial killings of Mungiki members as well as the promise of his own release from prison.

366. As for the cessation of extrajudicial killings of Mungiki members, the Chamber recalls that, according to the testimony of Witness OTP-4, this was one of the requests that, on 26 November 2007, the Mungiki representatives made to support the campaign of the PNU Coalition.[703] The same witness further states that extrajudicial killings indeed stopped in November 2007 after the meeting at State House and started again around February 2008.[704] The promise to stop extrajudicial killings in order to get the support of the Mungiki as well as the fact that the cessation of such practice indeed occurred between November 2007 and February 2008 is confirmed by the statements provided by Witnesses OTP-11 and OTP-12.[705]

367. Moreover, the release of Maina Njenga from prison was, according to Witness OTP-4, among the demands made by the Mungiki representatives at the meeting at

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[700] Statement of Witness OTP-12, KEN-OTP-0060-0074, at 0089; KEN-OTP-0060-0272, at 0297; KEN-OTP-0060-0325, at 0333-0334.
[701] Statement of Witness OTP-12, KEN-OTP-0060-0074, at 0089; KEN-OTP-0060-0272, at 0297; KEN-OTP-0060-0325, at 0333-0334.
[702] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1295; KEN-OTP-0052-1523, at 1527.
[703] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0033.
[704] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0028; KEN-OTP-0051-1045, at 1055.
[705] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1284; KEN-OTP-0052-1292, at 1298. Statement of Witness OTP-12, KEN-OTP-0060-0453, at 0465.

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State House on 26 November 2007.[706] Both Witnesses OTP-11 and OTP-12 confirm that the PNU Coalition, through [redacted], promised the Mungiki leaders that Maina Njenga would be released from prison if he agreed to what was being demanded of the Mungiki.[707] In fact, according to Witness OTP-11, a significant amount of money was then given to Maina Njenga upon his complaint that the PNU Coalition had not fulfilled the agreement reached with respect to his release from prison.[708]

368. The evidence shows that, in exchange for these concessions, Maina Njenga agreed to the common plan and placed the Mungiki at the disposal of Mr. Muthaura and Mr. Kenyatta.[709] In this respect, the Chamber recalls that, as noted above, the Mungiki are hierarchically organized and Maina Njenga is the absolute leader of the organization.[710] The evidence provided by Witnesses OTP-4, OTP-9, OTP-11 and OTP-12 further shows that Maina Njenga continued to act as the Mungiki top leader while in detention[711] and that Mungiki members were directed by him to co-operate with Mr. Muthaura and Mr. Kenyatta,[712] who, in turn, gained control of the Mungiki for the time and for the purpose of the commission of the crimes in Nakuru and Naivasha. As noted above, such control was eventually exercised when Mr. Muthaura and Mr. Kenyatta activated the Mungiki and instructed them to commit the crimes in Nakuru and Naivasha.[713]

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[706] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0033.
[707] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1287; Statement of Witness OTP-12, KEN-OTP-0060-0453, at 0467.
[708] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1295-1296.
[709] Statement of Witness OTP-11, KEN-OTP-0052-1276, at 1287; KEN-OTP-0052-1331, at 1333; KEN-OTP-0052-1469, at 1480, KEN-OTP-0052-1523, at 1526. Statement of Witness OTP-12, KEN-OTP-0060-0074, at 0089; KEN-OTP-0060-0365, at 0368; KEN-OTP-0060-0426, at 0437.
[710] See above paras 190-204.
[711] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0012; Statement of Witness OTP-9, KEN-OTP-0059-0200, at 0209; Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1295; KEN-OTP-0052-1523, at 1526. Statement of Witness OTP-12, KEN-OTP-0060-0226, at 0242-0244; KEN-OTP-0060-0250, at 0252; KEN-OTP-0060-0426, at 0436-0437.
[712] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1295; KEN-OTP-0052-1433, at 1449, KEN-OTP-0052-1469, at 1480. Statement of Witness OTP-12, KEN-OTP-0060-0074, at 0089, KEN-OTP-0060-0325, at 0334; KEN-OTP-0060-0365, at 0368, KEN-OTP-0060-0426, at 0437.
[713] See above paras 333-359.

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369. The Chamber observes that both the Defence teams of Mr. Muthaura and Mr. Kenyatta assert that, contrary to the evidence presented by the Prosecutor, the Mungiki actually supported the ODM party during the general election of 2007.[714] In support of this statement, the Defence of Mr. Muthaura relies on: (i) a video interview of Maina Njenga;[715] (ii) the NSIS report dated 14 January 2008;[716] (iii) the statement of Witness OTP-12;[717] and (iv) the statement of [redacted] (D12-37).[718]

370. First, the Chamber notes that the video of the interview in which Maina Njenga stated that he personally supported Raila Odinga to become president in 2007 is dated 29 October 2009, almost two years after the material time. Therefore no conclusion can be drawn from this video with respect to the matter at issue.[719]

371. As regards the statement of Witness OTP-12, the Chamber notes that the Defence relies on a number of sentences wherein the witness states that in general members of the Mungiki, including the witness himself, voted for Raila Odinga during the elections of 2007.[720] However, whilst making these statements, the witness himself clarifies that those Mungiki members who were on the side of the PNU were those who were "paid and hired".[721] Furthermore, Witness OTP-11 states that Mungiki members, despite being divided as to the actual voting, in any case wanted to show support to PNU.[722] In the same vein, Witnesses OTP-11 and OTP-12 consistently refer to at least one occasion in November 2007 when more than 10,000 Mungiki campaigned for a PNU Coalition politician, in spite of general animosity between the Mungiki and the particular individual, only because they had received

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[714] ICC-01/09-02/11-T-6-ENG, p. 67, lines 20-25; ICC-01/09-02/11-T-10-ENG, p. 50, lines 10-15.
[715] KEN-D12-0009-0005.
[716] KEN-OTP-0002-0015, at 0058.
[717] Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0115; KEN-OTP-0060-0171, at 0191, KEN-OTP-0060-0453, at 0458.
[718] Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0420.
[719] KEN-D12-0009-0005.
[720] Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0115; KEN-OTP-0060-0171, at 0191, KEN-OTP-0060-0453, at 0458.
[721] Statement of Witness OTP-12, KEN-OTP-0060-0453, at 0458.
[722] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1480.

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an order to this effect from Maina Njenga, who was in turn given 3 million KSh by the politician.[723]

372. According to the Chamber, the political views of the individual members of the Mungiki are not of relevance. What needs to be established is exclusively whether Mr. Muthaura and Mr. Kenyatta used the Mungiki for the purposes of the commission of the crimes. In fact, in order to attribute the crimes committed by the Mungiki to Mr. Muthaura and Mr. Kenyatta, it is not necessary that Mungiki members share the purpose or the motive of the suspects; quite the opposite, within the scheme of indirect co-perpetration, the individuals through which the crimes are committed are mere tools in the hands of the principal perpetrators. Therefore, the fact that some Mungiki members committed the crimes against perceived ODM supporters, yet allegedly voted for ODM and not for PNU, only confirms that the retaliatory attacks were not a "Mungiki fight" but that Mungiki members were mobilized through money and because an order to that effect was given by their leader Maina Njenga.

373. The same consideration applies with respect to the NSIS report, relied upon by the Defence of Mr. Muthaura, stating that some Mungiki members "are said to be in support of ODM's call for mass action".[724]

374. Likewise, the Chamber does not find relevant for the determination of the matter at stake that [redacted] (D12-37) asserts that "during the 2007-2008 election period, the Mungiki was totally on the side of the ODM".[725] Furthermore, the Chamber has already expressed its consideration to the effect that a lower probative value shall be accorded to the evidence provided by such witness with respect to Mungiki participation in the post-election violence[726] and, at this juncture, notes that the witness purports to know the political views of Mungiki members, despite denying being in the organization at that time.

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[723] Statement of Witness OTP-12, KEN-OTP-0060-0272, at 0294; KEN-OTP-0060-0299, at 0304-0310.
[724] KEN-OTP-0002-0015, at 0058.
[725] Statement of [redacted] (D12-37), KEN-D12-0001-0412, at 0420.
[726] See above paras 190-204.

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d) The role of Mr. Muthaura and Mr. Kenyatta in the events leading to the commission of the crimes in or around Nakuru and Naivasha

375. As noted above, according to the evidence, at the meeting held in Nairobi Club on 3 January 2008, Mr. Muthaura and Mr. Kenyatta directed the Mungiki to commit the crimes in Nakuru and Naivasha.[727] The commission of the crimes was thus triggered by a precise instruction given by Mr. Muthaura and Mr. Kenyatta, pursuant to the authority gained as a result of the agreement with Maina Njenga. As stated in this respect by Witness OTP-4, the Mungiki were in fact ready to act and were only waiting for an order to that effect to be given – as eventually occurred – by Mr. Muthaura and Mr. Kenyatta.[728]

376. Nevertheless, while the Chamber is of the view that the activation of the mechanism that led to the physical commission of the crimes is the most important contribution of both Mr. Muthaura and Mr. Kenyatta to the crimes, it is equally satisfied that the evidence placed before it shows additional forms of contribution.

377. In particular, with respect to the role of Mr. Muthaura in the commission of the crimes, the Chamber, as elaborated above, considers that his contribution primarily lies in securing the support of the Mungiki and directing the latter to commit the crimes in Nakuru and Naivasha. The Chamber is mindful, however, of the evidence which establishes to the requisite threshold that Mr. Muthaura also provided institutional support for the execution of the crimes on behalf of the PNU Coalition, using the tools available to him by virtue of his *de facto* authority.

378. In particular, the Chamber recalls the evidence indicating that in November 2007, Mr. Muthaura intervened to secure the release of Mungiki members who were arrested during a rally in Murang'a.[729] During the build-up of a relationship between the Mungiki and the PNU Coalition, he received the demands on behalf of the

[727] See above paras 341-359.
[728] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0039.
[729] See above paras 305-306.

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Mungiki and was tasked with follow-up.[730] Additionally, there is evidence that he was ultimately in control of ensuring that weapons and uniforms would be provided to the attackers in Nakuru from Nakuru State House.[731] In this respect, the Chamber recalls its previous finding that during the attack in Nakuru the Mungiki used Administration Police uniforms and guns distributed for this purpose from Nakuru State House.[732]

379. Furthermore, although the Chamber has not found that the Kenya Police participated in the Mungiki attack in or around Nakuru and Naivasha, it considers the statement of Witness OTP-4, according to which during the 3 January 2008 meeting Mr. Muthaura called Mr. Ali and instructed him to ensure that the police would not interfere with the attackers,[733] to be indicative of the overall role assumed by Mr. Muthaura in the commission of the crimes.

380. The Defence of Mr. Muthaura challenged comprehensively the allegations that Mr. Muthaura possessed any authority over any branch of the Kenyan government, submitting that he was simply not in position to perform the actions attributed to him by the Prosecutor.[734]

381. The Defence relies first on a series of witness statements wherein it is asserted that the NSAC is an advisory and not a decision-making body.[735] It argues on this basis that Mr. Muthaura could not have committed crimes as the Chairman of the NSAC.[736] The Chamber accepts this evidence as credible but considers that, since the Prosecutor does not aver that Mr. Muthaura committed the crimes alleged through an exercise of his official position as Chairman of the NSAC, it is not determinative.

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[730] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0033-0034.
[731] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1470
[732] See above paras 168-173.
[733] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0040.
[734] ICC-01/09-02/11-T-7, p. 63, line 7, to p. 71, line 5. ICC-01/09-02/11-374-Red, paras 86-98.
[735] Statement of Mwai Kibaki (D12-13), KEN-D12-0001-0444, at 0446; Statement of Amos Wako (D12-35), KEN-D12-0003-0093, at 0096-0097; Statement of Michael Gichangi (D12-4), KEN-D12-0001-0401, at 0405-0406; Statement of Jeremiah Kianga (D12-12), KEN-D12-0001-0291, at 0293; Statement of Cyrus Gituai (D12-5), KEN-D12-0002-0001, at 0003; Statement of Titus Gateere (D12-3), KEN-D12-0002-0210, at 0212-0213; ICC-01/09-02/11-T-9-Red, p. 29, line 20, to p. 31, line 5.
[736] ICC-01/09-02/11-T-7, p. 63, line 7, to p. 71, line 5. ICC-01/09-02/11-374-Red, paras 86, 95-96, 98.

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382. Further, the Defence also relies on witnesses who provide more general information on the alleged absence of authority of Mr. Muthaura in the Kenyan government.[737] However, considering the nature of the present case, in particular the alleged implication of the PNU Coalition, the Chamber does not consider these witness statements to be decisive as to the issue, given that they are provided by persons currently or previously affiliated with the Kenyan Government, with a natural interest in the outcome of the present case.

383. Instead, the Chamber is of the view that the evidence establishes, to the requisite threshold, the conclusion that Mr. Muthaura possessed sufficient *de facto* authority that enabled him to secure the institutional support for the commission of the crimes, referred to above. This conclusion is supported by the statement of Witnesses OTP-4 and OTP-11.[738]

384. Turning now more specifically to the role of Mr. Kenyatta at the execution stage of the common plan, the evidence placed before the Chamber shows that he was in charge of the provision of financial and logistical support to the direct perpetrators of the crimes, as elaborated below.

385. In particular, with respect to the attack in Nakuru, Witness OTP-11 asserts that Mr. Kenyatta gave 3.3 million KSh to [redacted] and that part of this money was eventually used to buy guns for the attack in Nakuru.[739] The witness further states that [redacted] coordinated the Mungiki in Nakuru under the direction of Mr. Kenyatta.[740] This is confirmed by the statement of Witness OTP-12, who asserts that [redacted] was given the mandate, by Mr. Kenyatta, to coordinate the

[737] Statement of Amos Wako (D12-35), KEN-D12-0003-0093, at 0098-0099; Statement of Mwai Kibaki (D12-13), KEN-D12-0001-0444, at 0446; Statement of Michael Gichangi (D12-4), KEN-D12-0001-0401, at 0405; Statement of Jeremiah Kianga (D12-12), KEN-D12-0001-0291, at 0294; Statement of Titus Gateere (D12-3), KEN-D12-0002-0210, at 0212; Statement of Daniel Arap Moi (D12-18), KEN-D12-0002-0195, at 0199; Statement of Francis Kimemia (D12-14), KEN-D12-0001-0301, at 0302-0303.
[738] Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0034, 0040. Statement of Witness OTP-11, KEN-OTP-0052-1451, at 1466; KEN-OTP-0052-1451-1469, at 1470.
[739] Statement of Witness OTP-11, KEN-OTP-0052-1451, at 1463.
[740] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1482.

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Mungiki for the purposes of the attack in Nakuru[741] and was also advised by Mr. Kenyatta on how to get the necessary funds for the purchasing of the weapons to be used by the attackers in Nakuru.[742] Furthermore, as stated above, according to Witness OTP-4, the Mungiki representatives at the meeting held at Nairobi Club on 3 January 2008 were specifically told by Mr. Kenyatta that the coordinator of the attack in Nakuru would be [redacted].[743] In this respect, the Chamber recalls its previous finding that the Mungiki attack in Nakuru was in fact coordinated by [redacted], who, in preparation of the attack, purchased weapons to be distributed to the Mungiki together with the weapons received from Nakuru State House.[744]

386. Concerning Naivasha, Witness OTP-11 states that Mr. Kenyatta gave [redacted] 3.3 million KSh in order for her to coordinate the commission of the crimes therein.[745] Such provision of funds is also corroborated by the statement of Witness OTP-12.[746] The evidence shows that [redacted] was given the logistical command of the Mungiki for the purposes of the commission of the crimes in Naivasha.[747]

387. The evidence also shows that another mid-level perpetrator, [redacted], was in charge of the coordination of the Mungiki preparatory activities in Naivasha pursuant to Mr. Kenyatta's instructions and was directly answerable to Mr. Kenyatta, as shown below.

388. First, the Chamber recalls that, according to Witness OTP-4, [redacted] was in attendance at the meeting of 26 November 2007 at Nairobi State House between Mr. Muthaura, Mr. Kenyatta and Mungiki leaders.[748]

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741 Statement of Witness OTP-12, KEN-OTP-0060-0385, at 0389-0390.
742 Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0126
743 Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0041.
744 See above paras 147, 149, 155, 175.
745 Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1485; KEN-OTP-0052-1487, at 1494.
746 Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0118.
747 Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1483-1485; KEN-OTP-0052-1487, at 1494. Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0373, 0375-0378; KEN-OTP-0060-0426, at 0448.
748 Statement of Witness OTP-4, KEN-OTP-0043-0002, at 0032.

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389. Further, both Witnesses OTP-11 and OTP-12 consistently state that the money that [redacted] used for the operations in preparation of the attack in Naivasha was provided to him by Mr. Kenyatta.[749]

390. The Chamber recalls its previous finding that the Mungiki who perpetrated the crimes in Naivasha were transported from elsewhere, *i.e.* from Thika and Limuru.[750] The evidence shows that [redacted] was the individual entrusted with the responsibility of mobilizing Mungiki members from Thika as well as of coordinating their transportation to Naivasha.

391. In this respect, Witnesses OTP-11 and OTP-12 state that a group of 30 Mungiki members from Thika town were mobilized by [redacted] and that, immediately before the attack in Naivasha, a meeting between [redacted] and these Mungiki members was held at the Blue Post Hotel in Thika, which belongs to Mr. Kenyatta.[751] According to these witnesses the purpose of this meeting was to discuss the logistics and financing of the attack in Naivasha.[752]

392. Witnesses OTP-11 and OTP-12 further affirm that during this meeting a number of Mungiki members refused to follow the instructions of [redacted].[753] According to Witness OTP-11, it was only after receiving confirmation that [redacted] was acting pursuant to instructions from Mr. Kenyatta that the Mungiki finally resolved to follow his orders.[754]

393. Furthermore, according to Witnesses OTP-11 and OTP-12, [redacted], with the money received from Mr. Kenyatta, hired a lorry by which the Mungiki from Thika were transported to Limuru – where they were joined, at Manga Corner, by

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[749] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1309; KEN-OTP-0052-1487, at 1494. Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0371, 0378.
[750] See above paras 148, 150, 161.
[751] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1308-1309. Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0118-0119; KEN-OTP-0060-0365, at 0371-0375.
[752] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1308-1310; Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0118; KEN-OTP-0060-0365, at 0371-0372, 0374, 0376.
[753] Statement of Witness OTP-11, KEN-OTP-0052-1487, at 1490. Statement of Witness OTP-12, KEN-OTP-0060-0405, at 0408-0409.
[754] Statement of Witness OTP-11, KEN-OTP-0052-1487, at 1490.

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another group of 30 Mungiki – and eventually to Naivasha.[755] According to the witnesses, once in Naivasha, Mungiki members were brought to the La Belle Inn Hotel where they were joined with locally mobilized Mungiki members, addressed by [redacted] and given specific instructions for the attack.[756] The witnesses further specify that this third group of Mungiki was mobilized by [redacted], who was given for this purpose part of the money that [redacted] received from Mr. Kenyatta, together with the 3.3 million KSh that she had previously obtained directly from Mr. Kenyatta.[757]

394. The Chamber observes that [redacted], who is a witness in the case, denies the allegations against him, stating that: (i) he "was never given large sums of money by Uhuru Kenyatta during the violence to fund Mungiki fighters";[758] (ii) he "never hired trucks or lorries to take Mungiki to commit violence in Naivasha, or from Thika or Limuru";[759] and (iii) "it is absolute nonsense to suggest that [he] would be an intermediary between the Mungiki, Uhuru Kenyatta or government, given [his] opposition to them".[760] The Chamber however does not accord to these reactionary denials of [redacted] a higher probative value than to the detailed allegations made by Witnesses OTP-11 and OTP-12, in light of the natural interest of [redacted] to deny his implication in the crimes.

395. Witnesses OTP-11 and OTP-12 further state that some Mungiki members from Thika and Limuru left the group before arriving in Naivasha and needed to be replaced.[761] The witnesses explain that, for this purpose, Mr. Kenyatta directly contacted a person referred to as [redacted], who was a Mungiki coordinator in

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[755] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1308-1312; KEN-OTP-0052-1487, at 1490. Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0371-0373.

[756] Statement of Witness OTP-12, KEN-OTP-0060-0112, at 0118-0119; KEN-OTP-0060-0371, at 0376-0378. Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1483. See also Statement of Witness OTP-2, KEN-OTP-0042-0167, at 0173.

[757] Statement of Witness OTP-11, KEN-OTP-0052-1469, at 1485; KEN-OTP-0052-1487, at 1494. Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0370, 0375.

[758] Statement of [redacted] (D13-25), KEN-D13-0005-0859, at 0867.

[759] Statement of [redacted] (D13-25), KEN-D13-0005-0859, at 0867.

[760] Statement of [redacted] (D13-25), KEN-D13-0005-0859, at 0868.

[761] Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0375; Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1312.

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Central Province.[762] Witness OTP-12 states that Mr. Kenyatta gave 6 million KSh to [redacted] in order to gather another group of Mungiki from Thika to participate in the attack in Naivasha.[763] This account is corroborated by the statement of Witness OTP-11.[764]

396. The Chamber recalls its previous finding that, together with Mungiki members mobilized from Thika, Limuru and Naivasha, local Kikuyu youth were recruited into the Mungiki for the specific purpose of participation in the commission of the crimes in Naivasha.[765] The evidence demonstrates that the person in charge of conducting the administration of oath was [redacted], a Mungiki leader who had been in contact since November 2007 with the PNU Coalition[766] and who had been requested, at least as of January 2008, to conduct the recruitment of Mungiki members for the attacks.[767] In this respect, Witness OTP-11 states that in these operations [redacted] was directly answerable to Mr. Kenyatta, who had specifically entrusted him with the task of recruiting "as many people as possible for the retaliatory attacks".[768] Witness OTP-12 further specifies that the process of administration of oath intensified after a number of Mungiki members from Thika and Limuru left the group before arriving in Naivasha.[769] This account is also confirmed by Witness OTP-11.[770]

397. Finally, the Chamber notes that the Defence of Mr. Kenyatta challenges the Prosecutor's allegation that Mr. Kenyatta financed the commission of crimes in Nakuru and Naivasha, and states that in fact, Mr. Kenyatta attended a number of

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[762] Statement of Witness OTP-12, KEN-OTP-0060-0405, at 0408-0412; Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1308.
[763] Statement of Witness OTP-12, KEN-OTP-0060-0405, at 0408-0412.
[764] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1308.
[765] See above paras 165-167.
[766] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1299; KEN-OTP-0052-1433, at 1444-1449.
[767] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1304; Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0376.
[768] Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1304.
[769] Statement of Witness OTP-12, KEN-OTP-0060-0365, at 0376; KEN-OTP-0060-0405, at 0422.
[770] Statement of Witness OTP-11, KEN-OTP-0052-1305, at 1312.

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fundraising meetings to assist the victims of the post-election violence.[771] The Chamber does not find it necessary to entertain in detail the occurrence and purpose of the various fundraising meetings that Mr. Kenyatta attended, as this fact, even if accepted, has no significant bearing on the determination of the case. In fact, in the view of the Chamber, such activity on the part of Mr. Kenyatta is compatible with the allegations of the Prosecutor.

e) Conclusions of the Chamber

398. In light of the analysis of the evidence conducted above, the Chamber is of the view that there are substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta are criminally responsible under article 25(3)(a) of the Statute as indirect co-perpetrators for the crimes committed in or around Nakuru and Naivasha.

(1) Objective elements

(a) The common plan between Mr. Muthaura, Mr. Kenyatta and others to commit the crimes in Nakuru and Naivasha

399. As stated above, the first requirement of indirect co-perpetration is the existence of a common plan to commit the crimes charged. The Chamber recalls that, according to the jurisprudence of the Court, the common plan must encompass an element of criminality, meaning that it must involve the commission of a crime with which the suspect is charged.[772] Furthermore, the agreement does not need to be explicit and its existence can be inferred from the subsequent concerted actions of the co-perpetrators.[773]

400. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that a common plan to commit the crimes in Nakuru and Naivasha was agreed between Mr. Muthaura, Mr. Kenyatta and Maina Njenga. As shown above, this conclusion is established to the requisite threshold by the evidence

[771] ICC-01/09-02/11-T-10-ENG, p. 86, line 11, to p. 94, line 25.
[772] Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 523; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/06-803-tEN, para. 344.
[773] Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 523; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/06-803-tEN, para. 345.

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demonstrating: (i) the contacts between Mr. Muthaura, Mr. Kenyatta and Maina Njenga through their respective intermediaries for the purposes of securing the services of the Mungiki for the PNU Coalition;[774] (ii) the agreement reached between Mr. Muthaura, Mr. Kenyatta and Maina Njenga to the effect that Mungiki members would be used for the attack in Nakuru and Naivasha;[775] (iii) the order given by Mr. Muthaura and Mr. Kenyatta to Mungiki leaders to commit the crimes in Nakuru and Naivasha;[776] and (iv) the activities performed by Mr. Muthaura and Mr. Kenyatta at the execution stage of the plan to commit such crimes.[777]

(b) Mr. Muthaura and Mr. Kenyatta's essential contribution to the commission of the crimes in or around Nakuru and Naivasha

401. As specified above, the second requirement of indirect co-perpetration is that Mr. Muthaura and Mr. Kenyatta carried out coordinated essential contribution that resulted in the fulfillment of the material elements of the crimes charged.

402. The Chamber recalls that, according to the jurisprudence of the Court, where the persons commit the crimes through others, their essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes.[778] Moreover, the Statute does not require that the essential character of a task be linked to its performance at the execution stage.[779] In this regard, the Chamber recalls the following holding of Pre-Trial Chamber I in the case of *The Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui*:

> Designing the attack, supplying weapons and ammunitions, coordinating and moving the activities of the direct perpetrators may constitute contributions that must be considered essential regardless of when they are exercised (before or during the execution stage of the crime).[780]

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[774] See above paras 301-359.
[775] See above paras 341-374.
[776] See above paras 333-359.
[777] See above paras 375-397.
[778] Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 525.
[779] Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 526.
[780] Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 526.

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403. The Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta provided essential contributions to the implementation of the common plan to commit the crimes in Nakuru and Naivasha.

404. In particular, the Chamber is of the view that there are substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta, exercising the authority over the Mungiki obtained by virtue of their agreement with Maina Njenga,[781] specifically directed the Mungiki to commit the crimes in Nakuru and Naivasha, thus activating the mechanisms leading to the commission of the crimes.[782] The Chamber considers that, in the absence of this action, the common plan to commit the crimes would have been frustrated and, in this sense, Mr. Muthaura and Mr. Kenyatta's contribution is to be understood as "essential" within the meaning of the relevant element of indirect co-perpetration.

405. As discussed above, the Chamber is further satisfied that there are substantial grounds to believe that Mr. Muthaura's contribution also consisted of providing institutional support, on behalf of the PNU Coalition, to secure: (i) the agreement with Maina Njenga by virtue of which Mr. Muthaura and Mr. Kenyatta gained control over the Mungiki for the purpose of the commission of the crimes;[783] and (ii) the execution on the ground of the common plan by the Mungiki in Nakuru and Naivasha.[784]

406. Furthermore, as found above, the Chamber is also satisfied that there are substantial grounds to believe that Mr. Kenyatta's contribution also consisted of: (i) establishing links, through intermediaries, between the PNU Coalition and the Mungiki for the purposes of the commission of the crimes;[785] (ii) contributing funds to local politicians and Mungiki leaders towards the organization of the crimes on

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[781] See above paras 310-374.
[782] See above paras 333-359.
[783] See above paras 305-306, 310-332, 341-359.
[784] See above paras 377-383.
[785] See above paras 301-308, 310-332.

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the ground;[786] (iii) mobilizing, through mid-level perpetrators, Mungiki members to carry out the attack in Nakuru and Naivasha;[787] and (iv) placing the Mungiki members under the operational command of local politicians for the time and for the purposes of the commission of the crimes.[788]

(c) Mr. Muthaura and Mr. Kenyatta's control over the Mungiki for the purposes of the commission of the crimes in or around Nakuru and Naivasha – The Mungiki as a hierarchical and organized apparatus of power – Execution of the crimes ensured by automatic compliance with the orders

407. The last three objective elements of indirect co-perpetration are that: (i) the suspect must have control over the organization; (ii) the organization must consist of an organized and hierarchal apparatus of power; and (iii) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect. With respect to these elements, the Chamber shall address them collectively given the nature of the facts of this case and the interrelation between these elements.

408. As demonstrated by the evidence assessed above, the Chamber finds substantial grounds to believe that, by virtue of the agreement with Maina Njenga, Mr. Muthaura and Mr. Kenyatta gained control over the Mungiki organization for the time and for the purposes of the commission of the crimes in or around Nakuru and Naivasha.[789] In fact, the evidence establishes, to the requisite threshold, that Mr. Muthaura and Mr. Kenyatta relied on the pre-existing structure of the Mungiki organization in order to secure the commission of the crimes charged.[790] In this respect, the Chamber also refers to its previous findings on the hierarchical structure of the Mungiki organization[791] as well on the mechanisms used within the organization to ensure that its members comply with the orders issued by their leaders.[792] It is also significant, as a further indication that Mr. Muthaura and Mr.

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[786] See above paras 333-340, 385-386, 389, 393-395.
[787] See above paras 333-359, 385, 387-396.
[788] See above paras 342, 385-386.
[789] See above paras 301-374.
[790] See above paras 333-359.
[791] See above paras 191-206.
[792] See above paras 208-213.

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Kenyatta had the necessary control over the Mungiki, that the crimes in or around Nakuru and Naivasha were in fact committed pursuant to orders given by them.

409. The Chamber further considers it of particular relevance to its present finding that the evidence demonstrates that when a number of Mungiki members who were mobilized in Thika left the group before arriving in Naivasha, the execution of the common plan was not frustrated as they were promptly replaced.[793] In this respect, the Chamber disagrees with the Defence of Mr. Muthaura which asserts that the said fact demonstrates that Mr. Muthaura "could not be in control of this amorphous group whose, identity, composition and departure to and arrival in Naivasha is in serious doubt".[794] As explained above, the evidence indicates that Mr. Muthaura and Mr. Kenyatta relied for the commission of the crimes at issue upon the Mungiki as an organization, rather than upon its individual members.[795] Therefore, contrary to the assertion of the Defence of Mr. Muthaura, this fact shows that the direct perpetrators were entirely replaceable and, as such, that the commission of the crimes was not dependent upon their will but was secured by the utilization of a pre-existing hierarchical and organized structure by Mr. Muthaura and Mr. Kenyatta. This is in line with the underlying rationale of the model of indirect co-perpetration, according to which the suspect must have "control over the crime committed", in the sense that he controls or masterminds its commission because he decides whether and how the offence will be committed by direct perpetrators who are merely anonymous and interchangeable figures.[796]

(2) Subjective elements

410. As recalled above, together with elements of an objective nature, the mode of liability of indirect co-perpetration requires the following subjective elements: (i) the suspects must satisfy the subjective elements of the crimes; (ii) the suspects must be

[793] See above paras 395-396.
[794] ICC-01/09-02/11-374-Red, para. 105.
[795] See above paras 333-359.
[796] See Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, paras 485, 515, 516.

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mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (iii) the suspects must be aware of the factual circumstances enabling them to exercise joint control over the commission of the crime through another person(s).

411. The Chamber notes the provision of article 30 of the Statute, which establishes the requisite *mens rea* in order for a person to be held criminally responsible for a crime within the jurisdiction of the Court. In particular, article 30 of the Statute requires that the material elements of the crimes be committed with intent and knowledge. The provision specifies that intent within the meaning of this article requires that the suspect means to engage in the conduct. Two alternatives are instead provided in relation to the consequences of the conduct, *i.e.* that: (i) the person means to cause such consequences (*dolus directus* in the first degree); or (ii) the person is aware that the consequence will occur "in the ordinary course of events" (*dolus directus* in the second degree). Therefore, whilst in the first alternative the suspect intends to bring about the material elements of the crime, in the second alternative it is sufficient that he or she is aware that the material elements of the crimes will be the almost inevitable outcome of his or her acts or omissions.[797] With respect to the required "knowledge", article 30 of the Statute specifies that this requires the "awareness that a circumstance exists or a consequence will occur in the ordinary course of events".

412. According to the evidence presented as assessed above, the Chamber finds that there are substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta fulfill the subjective elements of the crimes charged under Counts 1, 3, 5, 7 and 9 of the Amended DCC.

413. The Chamber reaches this conclusion on the basis of the evidence that sufficiently demonstrates that Mr. Muthaura and Mr. Kenyatta: (i) entered into an agreement with Maina Njenga for the specific purpose to use the Mungiki

[797] See Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, paras 358-359.

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organization for the attack in Nakuru and in Naivasha;[798] (ii) expressly directed the Mungiki to commit the crimes;[799] and (iii) issued instructions to a series of mid-level perpetrators in order to secure the perpetration of the crimes as planned.[800] Additionally, the evidence provides substantial grounds to believe that Mr. Muthaura provided institutional support for the commission of the crimes in or around Nakuru and Naivasha[801] and that Mr. Kenyatta contributed funds for the same purpose.[802]

414. Accordingly, the Chamber is of the view that there are substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta intended that the Mungiki, in coordinated groups and using crude weapons and guns, carried out the attack upon unarmed civilian residents in or around Nakuru and Naivasha. Therefore the Chamber concludes that there are substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta intended the killings, displacement and the severe physical and mental injuries which took place in or around Nakuru and Naivasha, *i.e.* that they intended both to engage in the conduct and to cause the consequences (*dolus directus* in the first degree).

415. Turning now to the charge of rape, the Chamber reiterates that the evidence shows that Mr. Muthaura and Mr. Kenyatta directed a group of armed Mungiki members to revenge against civilian residents of Nakuru and Naivasha, in the knowledge of and exploiting the ethnic hatred of the attackers towards their victims.[803] In these circumstances, the Chamber considers that Mr. Muthaura and Mr. Kenyatta knew that rape was a virtually certain consequence of the implementation of the common plan. Therefore, the Chamber finds that there are substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta possessed the requisite intent for

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[798] See above paras 301-374.
[799] See above paras 341-359.
[800] See above paras 341-359, 385-396.
[801] See above paras 305-306, 310-332, 341-359, 377-383.
[802] See above paras 384-386, 389, 393-395.
[803] Statement of Witness OTP-9, KEN-OTP-0059-0222, at 0229, line 270 to 0230, line 274; Statement of Witness OTP-11, KEN-OTP-0052-1292, at 1303; Statement of Witness OTP-12, KEN-OTP-0060-0325, at 0328.

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rape, *i.e.* they intended to engage in the conduct and were aware that the consequence would occur in the ordinary course of events, as the almost inevitable outcome of their conduct, within the meaning of article 30(2)(b) of the Statute (*dolus directus* in the second degree).

416. Furthermore, the evidence sufficiently establishes substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta defined the targeted population of the attack on political grounds, *i.e.* by reason of their perceived political affiliation to the ODM.[804] Accordingly, the Chamber is further satisfied that Mr. Muthaura and Mr. Kenyatta intended to commit the crime of persecution.

417. On the basis of the above, the Chamber also finds that there are substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta knew that the crimes were committed as part of a widespread and systematic against a civilian population, within the meaning of article 7(1) of the Statute.

418. The Chamber considers that the above finding that Mr. Muthaura and Mr. Kenyatta were part of the common plan to commit the crimes charged and satisfy the subjective elements of the crimes makes it unnecessary to address in further detail the requirement that the suspect be aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes.

419. Further, on the basis of the above analysis of the evidence, the Chamber finds substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta were aware that their respective roles were essential to the implementation of the common plan, and that due to the essential nature of their tasks, they could have frustrated its implementation by refusing to activate the mechanisms that led to the commission of the crimes.

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[804] See above paras 341-359.

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B. Mr. Ali

420. The Prosecutor charges Mr. Ali with the commission of the crimes in or around Nakuru and Naivasha under article 25(3)(d)(i) of the Statute.

421. This mode of liability has the following specific requirements: (i) a crime within the jurisdiction of the Court was attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with the common purpose; (iii) the individual contributed to the crime in any way other than those set out in article 25(3)(a) to (c) of the Statute; (iv) the contribution was intentional; and (v) the contribution was made with the aim of furthering the criminal activity or criminal purpose of the group.[805]

422. The Prosecutor alleges that Mr. Ali contributed to the commission of the crimes in or around Nakuru and Naivasha by way of: (i) "instruct[ing] the Kenya Police and other security forces that were under his effective control not to obstruct the movement of the Mungiki and pro-PNU youth into the Rift Valley in preparation for the attack against perceived ODM supporters"; (ii) "ensur[ing] that the police response to the attacks in Naivasha and Nakuru were inadequate"; and (iii) "fail[ing] to arrest or initiate the prosecution of any of the main perpetrators of the attacks in Nakuru and Naivasha".[806]

423. Therefore, the allegations of the Prosecutor are that Mr. Ali is criminally responsible for the inaction of the Kenya Police that, in turn, made possible and strengthened the Mungiki attack in or around Nakuru and Naivasha.

424. Accordingly, in order to hold Mr. Ali criminally responsible under the Statute for crimes allegedly committed *through* the Kenya Police, it is essential that it first be determined that the Kenya Police indeed carried out the objective elements of the crimes charged, whether by a positive conduct or by way of inaction. This is rooted

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[805] Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01, para. 47.
[806] Amended DCC, para. 99.

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in fundamental principles of criminal law, according to which it is necessary to determine at first the occurrence of the alleged historical event(s) and, if sufficiently established, the existence of a link between such events and the suspect. Only if and when there is a positive determination of *imputatio facti* to a suspect, is it possible to proceed to the assessment as to whether the link between the historical event(s) and the suspect grounds his or her criminal responsibility (*imputatio iuris*).

425. The Chamber recalls its previous finding to the effect that the evidence placed before it does not provide substantial grounds to believe that the Kenya Police participated in the attack in or around Nakuru and Naivasha, *i.e.* that there existed an identifiable course of conduct of the Kenya Police amounting to a participation, by way of inaction, in the attack perpetrated by the Mungiki in or around Nakuru and Naivasha.[807]

426. Since the Chamber is not satisfied that the historical events alleged by the Prosecutor took place, it is not possible to entertain further the attribution of any conduct of the Kenya Police to Mr. Ali, and, *a fortiori*, his individual criminal responsibility.

427. Accordingly, the Chamber is of the view that there is not sufficient evidence to establish substantial grounds to believe that Mr. Ali committed the crimes charged.

VIII. OVERALL CONCLUSIONS OF THE CHAMBER

428. In sum, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta are individually criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute for:

a. murder constituting a crime against humanity within the meaning of article 7(1)(a) of the Statute, *i.e.* the killing of perceived ODM supporters in or

[807] See above paras 224-226.

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around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008 (Count 1);

b. deportation or forcible transfer of population constituting a crime against humanity within the meaning of article 7(1)(d) of the Statute, *i.e.* the displacement of perceived ODM supporters in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008 (Count 3);

c. rape constituting a crime against humanity within the meaning of article 7(1)(g) of the Statute, *i.e.* the rape of perceived ODM supporters in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008 (Count 5);

d. other inhumane acts constituting a crime against humanity within the meaning of article 7(1)(k) of the Statute, *i.e.*: (i) severe physical injury of perceived ODM supporters; and (ii) infliction of serious mental suffering to perceived ODM supporters by way of subjecting them to witnessing the killings and the mutilations of their close relatives, in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008 (Count 7);

e. persecution constituting a crime against humanity within the meaning of article 7(1)(h) of the Statute, *i.e.* the following acts committed against perceived ODM supporters by reason of their perceived political affiliation: (i) killing; (ii) displacement; (iii) rape; (iv) severe physical injury; and (v) infliction of serious mental suffering by way of subjecting them to witnessing the killing and the mutilation of their close relatives, in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008 (Count 9).

429. Accordingly, pursuant to article 61(7)(a) of the Statute, the Chamber concludes that the charges against Mr. Muthaura and Mr. Kenyatta must be confirmed to the

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extent specified in the preceding paragraph and that Mr. Muthaura and Mr. Kenyatta must be committed to a Trial Chamber for trial on the charges as confirmed.

430. Conversely, the Chamber determines that there is not sufficient evidence to establish substantial grounds to believe that Mr. Ali committed any of the crimes charged. Therefore, the Chamber must decline to confirm the charges against Mr. Ali pursuant to article 61(7)(b) of the Statute.

FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY

a) **DECIDES** that the case falls within the jurisdiction of the Court;

b) **CONFIRMS** the charges presented under Counts 1, 3, 7, 9 and the charge of rape presented under Count 5 of the Amended Document Containing the Charges against Mr. Muthaura and Mr. Kenyatta;

c) **DECLINES** to confirm the charge of other forms of sexual violence presented under Count 5 of the Amended Document Containing the Charges against Mr. Muthaura and Mr. Kenyatta;

d) **DECLINES** to confirm the charges presented under Counts 2, 4, 6, 8 and 10 of the Amended Document Containing the Charges against Mr. Ali;

e) **DECIDES** to commit Mr. Muthaura and Mr. Kenyatta to a Trial Chamber for trial on the charges as confirmed;

f) **DECIDES** that the conditions imposed on Mr. Muthaura and Mr. Kenyatta in the Decision on Summonses to Appear remain in effect;

g) **DECIDES** that the conditions imposed on Mr. Ali in the Decision on Summonses to Appear cease to have effect.

Judge Hans-Peter Kaul appends a dissenting opinion.

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Done in both English and French, the English version being authoritative.

Judge Ekaterina Trendafilova
Presiding Judge

Judge Hans-Peter Kaul
Judge

Judge Cuno Tarfusser
Judge

Dated this Monday, 23 January 2012

At The Hague, The Netherlands

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Dissenting Opinion by Judge Hans-Peter Kaul

I. Introduction

1. Today, on the basis of the hearing held from 21 September to 5 October 2011 and the disclosed evidence, the Majority of Pre-Trial Chamber II (the "Chamber") affirmed the Court's jurisdiction in the case of the *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* confirmed the charges against Francis Kirimi Muthaura ("Mr Muthaura") and Uhuru Muigai Kenyatta ("Mr Kenyatta") and committed them for trial. The Chamber declined to confirm the charges against Mohammed Hussein Ali ("Mr Ali").

2. I am unable to accept this decision of the Majority and the analysis that underpins it. I continue to believe – and after having heard the arguments of all parties and participants at the hearing I am even more firmly convinced – that the International Criminal Court (the "ICC" or the "Court") lacks jurisdiction *ratione materiae* in the situation in the Republic of Kenya, including in the present case. Contrary to the Majority's findings, I am not satisfied that the crimes allegedly committed by Mr Muthaura and Mr Kenyatta occurred pursuant to or in furtherance of a policy of an *organization* within the meaning of article 7(2)(a) of the Rome Statute (the "Statute"). Thus, I am not satisfied that the crimes charged constitute crimes against humanity as set out in article 7 of the Statute.

3. Accordingly, having regard to article 19(1), first sentence, of the Statute, I shall first set out my own conclusion on jurisdiction *ratione materiae,* focusing on the notion of 'organization' which is the subject of my difference of opinion with the

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Majority (see sections II.1-II.3 below). I shall thereafter address the challenge to jurisdiction lodged by Mr Kenyatta (see section II.4 below).[1]

4. Having sat in the confirmation of charges hearing (the "Hearing") notwithstanding my principled position on the lack of jurisdiction *ratione materiae* in the situation in the Republic of Kenya, including the present case, I wish to make further observations (see section III below) on certain issues which arose during the Hearing, namely the impact of the Prosecutor's respect for article 54(1)(a) of the Statute during his investigation on the proceedings conducted by the chambers of this Court, and the rights of the Defence during the Hearing pursuant to article 61(6) of the Statute.

II. The Issue of Jurisdiction *Ratione Materiae*

1. The Charges Presented by the Prosecutor

5. I note that the Prosecutor presented essentially[2] the same case hypothesis and line of argument both in the amended document containing the charges[3] and at the Hearing as he did when requesting the Chamber to summon Mr Muthaura, Mr Kenyatta and Mr Ali in this case: he maintains his contention that crimes against humanity were committed from on or about 30 December 2007 through 31 January 2008[4] in Nakuru and Naivasha, Rift Valley Province, pursuant to or in furtherance of an organizational policy pursued by Mr Muthaura and Mr Kenyatta as Principal Perpetrators, together with Mr Ali, Mungiki leaders and

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[1] ICC-01/09-02/11-339. Since the Majority declined to confirm all charges against Mr Ali, I do not deem it necessary to entertain Mr Ali's submission in that regard (ICC-01/09-02/11-338).

[2] I note the adjustments to the Prosecutor's presentation of the case as a result of the 8 March 2011 Majority's decision, *inter alia* in relation to locations, time, conduct of the Kenyan Police and the responsibility of Mr Ali.

[3] ICC-01/09-02/11-280-AnxA.

[4] ICC-01/09-02/11-280-AnxA, para. 29.

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other prominent supporters of the Party of National Unity (the "PNU"), to maintain the PNU in power at all costs.[5] To implement this policy, the Principal Perpetrators purportedly devised the common plan to commit a widespread and systematic attack against civilians perceived to support the Orange Democratic Movement (the "ODM")[6] "by (1) penalizing them through retaliatory attacks and (2) deliberately failing to take action to prevent or stop the retaliatory attacks".[7] To achieve this goal, the Principal Perpetrators allegedly utilised (i) the Mungiki to perpetrate the widespread and systematic attacks[8] and (ii) the Kenyan Police to ensure that the Mungiki operations were not disrupted.[9] The Mungiki were allegedly sent to the Rift Valley to commit the crimes,[10] whilst the Kenyan Police provided protection in the form of a "free zone" by not interfering[11]. Together they allegedly constituted "a single ad hoc organization".[12]

6. As regards the specificities of the organisation and the involvement of the Principal Perpetrators, the Prosecutor maintains that Mr Kenyatta exercised control over the Mungiki,[13] a criminal organisation[14] structured into local and regional branches[15] with a political and military wing[16] which purportedly

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[5] ICC-01/09-02/11-280-AnxA, para. 35; ICC-01/09-02/11-T-5-RED-ENG CT, p. 12, lines 1-5 ; p. 16, lines 16-17 ; p. 37, lines 20-21.
[6] ICC-01/09-02/11-T-5-RED-ENG CT, p. 49, lines 10-14 ; p. 50, lines 9-16.
[7] ICC-01/09-02/11-280-AnxA, para. 35; ICC-01/09-02/11-T-4-ENG ET, p. 53, lines 22-25; p. 58, lines 3-14 ; ICC-01/09-02/11-T-5-RED-ENG CT, p. 22, lines 7-9; p. 37, lines 1-5.
[8] ICC-01/09-02/11-T-4-ENG ET, p. 52, lines 9-12.
[9] ICC-01/09-02/11-T-5-RED-ENG ET, p. 17, lines 18-24.
[10] ICC-01/09-02/11-T-4-ENG ET, p. 54, lines 21-23; p. 57, lines 10-11; ICC-01/09-02/11-T-5-RED-ENG CT, p. 45, lines 2 to p. 46, line 1; p. 53, lines 15-16; p. 54, line 3.
[11] ICC-01/09-02/11-T-4-ENG ET, p. 53, lines 8-18; p. 54, lines 12-15; ICC-01/09-02/11-T-5-RED-ENG CT, p. 11, lines 12-13.
[12] ICC-01/09-02/11-T-5-RED-ENG CT, p. 10, line 2; p. 22, lines 3-5; p. 35, line 19.
[13] ICC-01/09-02/11-280-AnxA, para. 37.
[14] ICC-01/09-02/11-T-5-RED-ENG CT, p. 10, lines 3-5.
[15] ICC-01/09-02/11-280-AnxA, para. 39; ICC-01/09-02/11-T-5-RED-ENG CT, p. 19, lines 7-11.
[16] ICC-01/09-02/11-280-AnxA, para. 40; ICC-01/09-02/11-T-5-RED-ENG CT, p. 15, lines 17-18.

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controls the public transport system in addition to providing illegal electricity connections, public toilets, water and protection in the poorest parts of Central Province and Nairobi.[17] The Prosecutor contends that Mr Kenyatta mobilised the Mungiki[18] and, together with Mr Muthaura, "provided funding,[19] transportation, accommodation, uniforms, weapons[20] and logistical support";[21] the Mungiki in turn mobilised additional local pro-PNU youths for the purposes of the attacks.[22] Prior to the events relevant to this case, the Mungiki allegedly demanded an end to extra-judicial killings of Mungiki members by government forces. Government forces temporarily acceded to this demand.[23] As Chairman of the National Security Committee and Secretary to the Cabinet Security Committee,[24] Mr Muthaura allegedly exercised *de jure* and *de facto* authority over the various Kenyan security agencies, including the Kenyan Police and therefore over Mr Ali,[25] who in turn putatively had *de jure* and *de facto* control over the Kenyan Police[26]. Mr Muthaura is alleged to have ordered Mr Ali not to interfere with the Mungiki activities,[27] which order Mr Ali purportedly implemented.[28] Together,

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[17] ICC-01/09-02/11-280-AnxA, para. 41; ICC-01/09-02/11-T-5-RED-ENG CT, p. 19, line 25 to p. 20, line 4.
[18] ICC-01/09-02/11-280-AnxA, para. 37; ICC-01/09-02/11-T-4-ENG ET, p. 52, lines 7-15; ICC-01/09-02/11-T-5-RED-ENG CT, p. 18, lines 1-2; ICC-01/09-02/11-361, para. 59.
[19] ICC-01/09-02/11-T-4-ENG ET, p. 52, lines 9-15; p. 54, lines 21-23; ICC-01/09-02/11-T-5-RED-ENG CT, p. 14, lines 6-10; p. 37, line 8; p. 42, lines 1-5; p. 53, lines 21-24; ICC-01/09-02/11-361, para. 59.
[20] ICC-01/09-02/11-T-5-RED-ENG CT p. 44, lines 9-25; p. 54, lines 3-4.
[21] ICC-01/09-2/11-280-AnxA, para. 23.
[22] ICC-01/09-02/11-280-AnxA, para. 42; ICC-01/09-02/11-T-5-RED-ENG CT, p. 43, lines 16-22; p. 44, lines 4-7.
[23] ICC-01/09-02/11-T-5-RED-ENG CT, p. 22, lines 22-25.
[24] ICC-01/09-02/11-280-AnxA, para. 38.
[25] ICC-01/09-02/11-280-AnxA, para. 38; ICC-01/09-02/11-T-4-ENG ET, p. 56, lines 14-15; ICC-01/09-02/11-T-5-RED-ENG CT, p. 20, lines 10-18.
[26] ICC-01/09-02/11-280-AnxA, para. 43; ICC-01/09-02/11-T-5-RED-ENG CT, p. 32, lines 24-25.
[27] ICC-01/09-02/11-T-4-ENG ET, p. 56, line 18 to p. P. 57, line 6; ICC-01/09-02/11-T-5-RED-ENG CT, p. 16, lines 5-13; p. 20, line 10; p. 21, lines 6-8; p. 40, lines 19-20; ICC-01/09-02/11-361, paras 79 and 87.
[28] ICC-01/09-02/11-T-5-RED-ENG CT p. 11, lines 10-13; p. 33, lines 16-19; p. 46, lines 16-20; p. 47, lines 8-14; ICC-01/09-02/11-361, paras 79 and 87.

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Mr Kenyatta and Mr Muthaura allegedly exercised control over the ad hoc organization.[29]

2. The Applicable Law

7. My fundamental disagreement with the Majority stems from the differing interpretation of the notion of 'organization' within the meaning of article 7(2)(a) of the Statute. It is worth recalling that under the Statute crimes alleged to be part of an attack against any civilian population must be committed pursuant to the policy of a State or 'organization'. In my 31 March 2010 dissenting opinion on the Majority's "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" (the "31 March 2010 Dissenting Opinion") I set out in appropriate detail my understanding of the applicable law governing this constitutive contextual requirement.[30] Lacking any definition in the Statute,[31] I was duty-bound to give meaning and clarity to the indeterminate legal term "organizational policy" through *lege artis* interpretation in conformity with article 31 of the Vienna Convention on the Law of Treaties.[32] The relevant parts of my interpretation of this specific statutory legal requirement are briefly rehearsed below:

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[29] ICC-01/09-02/11-T-5-RED-ENG CT, p. 18, lines 2-4; p. 35, lines 18-23.

[30] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, pp. 84 *et seq.*

[31] See para. 114 of the Majority decision ("It suffices to recall that nowhere in article 7(2)(a) of the Statute is it mentioned that the organization should be State-like. Any other intention of the drafters would have found its expression in the text of the article").

[32] Vienna Convention on the Law of Treaties, adopted on 22 May 1969 by the United Nations Conference on the Law of Treaties, United Nations Treaty Series (UNTS), vol. 1155, p. 331. See the analysis undertaken in Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, pp. 101-120.

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51. I read the provision such that the juxtaposition of the notions 'State' and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities. These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy 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.

52. In contrast, I believe that non-state actors which do not reach the level described above are not able to carry out a policy of this nature, such as groups of organized crime, a mob, groups of (armed) civilians or criminal gangs. They would generally fall outside the scope of article 7(2)(a) of the Statute. To give a concrete example, 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.

53. In this respect, the general argument that any kind of non-state actors may be qualified as an 'organization' within the meaning of article 7(2)(a) of the Statute on the grounds that it "has the capability to perform acts which infringe on basic human values" without any further specification seems unconvincing to me. In fact this approach may expand the concept of crimes against humanity to any infringement of human rights. I am convinced that a distinction must be upheld between human rights violations on the one side and international crimes on the other side, the latter forming the nucleus of the most heinous violations of human rights representing the most serious crimes of concern to the international community as a whole.[33]

8. In the 15 March 2011 "Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed

[33] The footnotes in this excerpt are omitted.

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Hussein Ali'" (the 15 March 2011 Dissenting Opinion")[34] I also rehearsed this interpretation of the law, against which I assessed the facts of the case.

9. Hereinafter I shall assess the Prosecutor's presentation of the facts in light of my interpretation of article 7(2)(a) of the Statute as set out above. In so doing, I am guided by the standard established by this Chamber when "satisfy[ing] itself that it has jurisdiction in any case brought before it" pursuant to article 19(1) of the Statute. I recall the Chamber's interpretation of this provision to posit "that the Court must 'attain the degree of certainty' that the jurisdictional parameters set out in the Statute have been met".[35] I will develop that standard further when considering the Defence challenge to jurisdiction.[36]

3. Findings

10. As summarised above at paragraphs 5 and 6, the Prosecutor's presentation of the case in the amended document containing the charges is premised on the assumption that the 'organization' in question basically rests upon two pillars: the Mungiki (which also includes other individuals) and the Kenyan Police. Both stakeholders allegedly played different roles in the tragic events that occurred in the towns of Naivasha and Nakuru. While the Mungiki, together with pro-PNU youths, were allegedly committing the crimes, the Kenyan Police is believed to have deliberately abstained from intervening, thereby providing a "free zone" for the Mungiki to conduct their operations. In the amended document

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[34] Pre-Trial Chamber II, ICC-01/09-02/11-3.

[35] See para. 23 of the Majority decision. See also Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 24; Pre-Trial Chamber II, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-1, para. 9.

[36] See para. 33 below.

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containing the charges and throughout the Hearing, the Prosecutor contended that the widespread and systematic attack was made possible by this "alliance" of both stakeholders, forming *one* 'organization'.

11. Mindful of the Prosecutor's allegations and arguments, and having heard the Defence arguments and presentation of evidence at the Hearing, I remain unconvinced by the Prosecutor's portrayal of the Mungiki *and* the Kenyan Police as *one* 'organization' with a pre-defined allocation of roles, apparently unified in the goal of attacking civilians perceived as supporting the ODM (see sub-section (a) below). I also continue to believe that neither can the role of the Kenyan Police be reduced to the behaviour described by the Prosecutor (see sub-section (b) below) nor do the Mungiki alone qualify as an 'organization' within the meaning of article 7(2)(a) of the Statute (see sub-section (c) below).

a) The Kenyan Police and the Mungiki as *one* organisation

12. Consistent with my 15 March 2011 Dissenting Opinion, I remain unpersuaded that the Kenyan Police and the Mungiki together possess the characteristics of *one* State-like 'organization' in terms of membership, duration, the capacity to impose a policy on its members, and the capacity and means to attack any civilian population:

> 31. On the basis of the Prosecutor's presentation of the case and the evidence submitted, I fail to see how an 'organisation' could have existed in which the primary actors were the Mungiki gang and the Kenyan Police Forces. I am satisfied by the evidence provided that Uhuru Kenyatta was the principal contact between the Mungiki gang and the Principal Perpetrators. However, a series of meetings with facilitators and the Principal Perpetrators does not transform a limited partnership of convenience into an 'organisation' within the meaning of article 7(2)(a) of the Statute. Forging an opportunistic partnership of convenience for a specific purpose, namely the upcoming 2007 presidential elections, tends to demonstrate that the coalition between the Mungiki and the Kenyan Police Forces was created *ad hoc* in nature. The fact that the 'cooperation' between the Mungiki gang and the Kenyan Police Forces was established shortly before the

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> 2007 presidential elections tends to demonstrate the temporary character of this partnership of convenience. This is further confirmed by the fact that a series of police operations were directed against the Mungiki gang before and after the 2007/2008 violence. Additionally, the evidence leads me to conclude that the Mungiki gang and the Kenyan Police Forces do not share a common hierarchy but rather maintain separate structures. I therefore conclude that the 'organisation' as presented by the Prosecutor, consisting mainly of the Mungiki gang and the Kenyan Police Forces, did not exist.[37]

b) The role of the Kenyan Police

13. Furthermore, having heard the arguments of the parties during the Hearing, I take the view that the role of the Kenyan Police (and that of other Kenyan security agencies) during the 2007/2008 post-election violence cannot be reduced to the behaviour simplistically described by the Prosecutor in the amended document containing the charges. In this respect, I fully concur with the Majority's finding.[38] As I have held previously, based on the evidence presented as a whole, I accept that at times Kenyan Police officers may have used excessive force or wrongfully abstained from taking action.[39] However, other Kenyan police officers also diligently performed their duty,[40] assisted victims of violence[41]

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[37] Pre-Trial Chamber II, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber's ' Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', ICC-01/09-02/11-3, para. 31 (footnotes omitted); see also ICC-01/09-02/11-T-7-ENG ET, p. 14, lines 10-13; p. 26, lines 7-12.

[38] See paras 224 to 226 of the Majority decision.

[39] ICC-01/09-02/11-T-8-RED-ENG WT, p. 44, lines 7-8; p. 49, lines 15-18; p. 81, lines 11-14; p. 112, lines 14-25; ICC-01/09-02/11-T-14-RED-ENG CT, p. 74, lines 21-23.

[40] ICC-01/09-02/11-T-8-RED-ENG WT, p. 28, lines 6-10; p. 37, lines 14-20; p. 43, lines 17-18, 24; p. 44, lines 6-10; p. 45, lines 12-14; p. 106, line 13; ICC-01/09-02/11-T-13-ENG ET, p. 32, lines 11-20; p. 37, lines 23-24; p. 65, lines 15-17 and 19-25; ICC-01/09-02/11-T-14-RED-ENG CT, p. 26, line 17 to p. 27, line 9.

[41] ICC-01/09-02/11-T-7-ENG ET, p. 89, lines 18-22; ICC-01/09-02/11-T-8-RED-ENG WT, p. 47, lines 3-13; p. 53, lines 20-25 to p. 54, line 1; p. 80, lines 1-3; p. 104, lines 15-16; p. 115, lines 13-15; ICC-01/09-02/11-T-12-RED-ENG WT, p. 17, lines 21-24; ICC-01/09-02/11-T-13-ENG ET, p. 133, lines 23-25; p. 134, lines 1-6; p. 139, lines 21-23; p. 142, lines 2-4.

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or were simply overwhelmed[42] prompting, on occasion, the intervention of the Kenyan Army[43]. When considered as a whole, the performance of the Kenyan Police during the 2007/2008 events reveals a far more complex picture. As far back as in 31 March 2010, when I issued my first Dissenting Opinion, I held that

> 152. (...) [t]he reactions of the police during the "post-election violence" range from being mere passive observers, assisting civilians, being overwhelmed with the situation to actively engaging in the violence. In many areas of Kenya, the police had to be assisted by the military to re-gain control. Another distinct aspect of police involvement concerns its participation in addressing organized crime and combating movements which do not necessarily relate to the events surrounding the "post-election violence". (...)
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> 153. In total, the overall picture is characterized by chaos, anarchy, a collapse of State authority in most parts of the country and almost total failure of law enforcement agencies.[44]

c) The Mungiki

14. Whilst the Majority rightly excludes the Kenyan Police from being an integral part of the 'organization', it fundamentally changes and redefines the Prosecutor's presentation of the facts by arguing that during the relevant time period, the Mungiki alone represented the 'organization'. The Majority argues that the Mungiki fulfill all the requirements of an 'organization' on the grounds that (1) they are a hierarchically structured organisation under the exclusive control of Maina Njenga with defined roles for members at different levels;[45] (2) there exists an effective system of ensuring compliance by the members of the Mungiki with the rules of the organisation, such as taking an oath and

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[42] ICC-01/09-02/11-T-8-RED-ENG WT, p. 46, lines 8-11; p. 50, lines 15-16; ICC-01/09-02/11-T-13-ENG ET, p. 34, lines 8-9 and 14-21; p. 36, lines 4-7, 14 and 17; p. 147, lines 5-10; ICC-01/09-02/11-T-14-RED-ENG CT, p. 16, lines 1-3.

[43] ICC-01/09-02/11-T-7-ENG ET, p. 87, lines 11-12; ICC-01/09-02/11-T-8-RED-ENG WT, p. 53, lines 7-11; p. 54, lines 10-14 ; ICC-01/09-02/11-T-14-RED-ENG CT, p. 29, lines 21-22.

[44] Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, pp. 161-162 (footnotes omitted).

[45] Paras 190-206 of the Majority decision.

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sanctions;[46] (3) the organisation has "quasi-military capabilities";[47] and (4) "Mungiki activities [approximate] those of a public authority in certain slums of Nairobi as well as in Central Province"[48].

15. I must differ. I am still unable to see, how the Mungiki can qualify overall as an 'organization' within the meaning of article 7(2)(a) of the Statute. As I previously held in my 15 March 2011 Dissenting Opinion:

> 32. Even if, for the sake of argument, and taking into consideration the Majority's finding to that effect, the Mungiki gang alone were to be considered as the entity which had established a policy of attacking the civilian population, I hold that the Mungiki gang *as such* does not qualify as an 'organisation' within the meaning of article 7(2)(a) of the Statute. Admittedly, the Mungiki gang appears to control core community activities and to provide services, such as electricity, water and sanitation, and transport. However, the activities of the Mungiki gang remain limited in nature and are territorially restricted, in particular, to the slums of Nairobi. Moreover, as noted above, the evidence reveals that a series of police operations were directed against the Mungiki gang before and after the 2007/2008 violence and that it could only have committed the crimes alleged with the support of certain individuals within the Kenyan political elite and the police apparatus. That said, I doubt whether the Mungiki gang had the capacity and the means at its disposal to attack any civilian population on a large scale. In light of the foregoing, I therefore do not find that the Mungiki gang, a criminal organisation, could have qualified as a 'organisation' within the meaning of article 7(2)(a) of the Statute.[49]

16. At the Hearing, no sufficiently compelling new argument, fact or piece of evidence was presented for me to reconsider my previous assessment of the facts in this case. Even had I followed the Majority's factual findings on the Mungiki (see paragraph 14 above), I simply cannot conclude that the Mungiki reach the

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[46] Paras 207-213 of the Majority decision.
[47] Paras 214-215 of the Majority decision.
[48] Paras 216-219 of the Majority decision.
[49] Pre-Trial Chamber II, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber's ' Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', ICC-01/09-02/11-3, para. 32 (footnotes omitted).

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level of a State-like 'organization' within the meaning of article 7(2)(a) of the Statute. I remain convinced that the Mungiki, a violent and organised criminal gang[50] operating mainly in the slums of Nairobi,[51] primarily engage in illegal economic activities and organised crime[52] just like any other well-known criminal organisation in other countries. The provision of illegal electricity connections, sanitation and protection in certain slums, however, does not place them on a par with a State which provides a broad range of services to its population. Furthermore, so-called "Mungiki courts" cannot be equated in any way with a State's judicial apparatus, which covers all aspects of litigation for the entire population. Moreover, the Mungiki are normally subjected to severe crackdowns by the Kenyan Police. Regardless of questions as to their legality, these are police operations as conducted against any criminal gang. In this context, the Mungiki arguably required the extra-judicial killings and arrests to cease in order to be able to operate outside their very limited sphere of influence (mainly the slums of Nairobi). This is a further clear indication that their capacity to act is far more limited than that of a State. Consequently, all of the above considerations militate against the assumption that the Mungiki are a State-like 'organization'.

17. During the Hearing, I noted another aspect of the Prosecutor's presentation of the facts. According to the Prosecutor, the Mungiki apparently required substantial assistance from others in order to commit the crimes in Naivasha and Nakuru town[53]: they purportedly received funding, uniforms and weapons, and had to be transported to different parts of the country. According to the

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[50] ICC-01/09-02/11-T-12-RED-ENG WT, p. 37, lines 18-20.
[51] ICC-01/09-02/11-T-13-ENG ET, p. 46, lines 24-25.
[52] ICC-01/09-02/11-T-13-ENG ET, p. 45, lines 9-18.
[53] "Mr Muthaura and Mr Kenyatta provided to the ad hoc organisation access to substantial state and private resources and *therefore the means to be able* to carry out the attacks on the civilian population" (emphasis added), ICC-01/09-02/11-T-5-RED-ENG CT, p. 10, lines 12-15.

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Prosecutor, the Mungiki benefited from a "free zone", allegedly facilitated by the Kenyan Police, for the purposes of the attack, which was vital – almost a *conditio sine qua non* – for the success of their operations. In this connection, it is noteworthy that the Mungiki apparently successfully negotiated a temporary end to extra-judicial killings of Mungiki members by Government forces in order to perform their activities unhindered.

18. The foregoing leads me to conclude that had the Kenyan Police allegedly not abstained, had the Mungiki not received money, uniforms and weapons, and had they not been transported to different parts of the country, they would not have been able to launch the alleged large-scale attack against Kenyan civilians over a large geographical area. Even if, *arguendo*, the Mungiki "relied on external funding" in the "commission of particular crimes",[54] their need for financial support, regardless of its extent, shows that they do not have sufficient means to commit crimes on a large scale. Therefore, I am at pains to understand how this 'organization', heavily dependent on outside logistical support, could satisfy the criteria I set out in my 31 March 2010 Dissenting Opinion[55] to the extent of qualifying as a State-like 'organization' or any other 'organization' *with the capability, including the means*, to target the civilian population on a large scale. More importantly, in light of the Majority's finding excluding the Kenyan Police from the 'organization', I have serious doubts whether, having been deprived of the second pillar in the 'organization' structure, the Mungiki could have launched on their own a widespread or systematic attack against civilians, as the Prosecutor maintains. If this indispensable and quintessential element of the

[54] See para. 222 of the Majority decision.
[55] See para. 7 above.

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'organization' structure is excluded, I remain doubtful whether this case, thus amputated, can be argued and sustained at all.

19. I therefore reaffirm my previous finding that the Mungiki, like many other criminal gangs in Kenya or elsewhere, remain a somewhat structured, outlawed, violent criminal gang engaged in organised crime and deriving revenues from the illegal provision of certain community services to the local population, mainly in the slums of Nairobi. In light of the foregoing, I take the view that the Mungiki cannot qualify as an 'organization' within the meaning of article 7(2)(a) of the Statute. Accordingly, they fall outside the scope of the Statute.

20. In conclusion, I am not satisfied to the 'degree of certainty' that the crimes were committed pursuant to the policy of a State-like 'organisation', which is an indispensable constitutive contextual element and inherent characteristic of crimes against humanity under article 7 of the Statute. Without the crimes alleged having been embedded in an "organizational policy", I maintain that the Court has no jurisdiction *ratione materiae* over the situation in the Republic of Kenya, including in the present case.

21. Finally, apart from my disagreement on fundamental issues of law, I wish to add some more thoughts to the Majority's finding in relation to the Mungiki gang. I underline my deep concern with regard to the fact that the Majority has set an unfortunate precedent in accepting, with far-reaching consequences, the activities of a mafia-like criminal gang to fall under the ambit of article 7(2)(a) of the Statute. Since criminal gangs, with the capability to perform acts which infringe on basic human values, operate not only in the Republic of Kenya but in most parts of the world, all their activities would, according to the Majority, fall

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under the Court's jurisdiction *ratione materiae*. Is this what the drafters of the Rome Statute intended? And what may be the consequences of this unfortunate precedent, if maintained, for the future work of the International Criminal Court? As I have explained my carefully considered approach as far back as on 31 March 2010:

> (...) It is neither appropriate nor possible to examine and explain in this opinion all the potential negative implications and risks of a gradual downscaling of crimes against humanity towards serious ordinary crimes. As a Judge of the ICC, I feel, however, duty-bound to point at least to the following: such an approach might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute. It would broaden the scope of possible ICC intervention almost indefinitely. This might turn the ICC, which is fully dependent on State cooperation, in a hopelessly overstretched, inefficient international court, with related risks for its standing and credibility. Taken into consideration the limited financial and material means of the institution, it might be unable to tackle all the situations which could fall under its jurisdiction with the consequence that the selection of the situations under actual investigation might be quite arbitrary to the dismay of the numerous victims in the situations disregarded by the Court who would be deprived of any access to justice without any convincing justification.[56]

4. The Challenge to Jurisdiction of the Court by the Defence

22. I note that on 19 September 2011, the Defence for Mr Kenyatta brought a challenge to jurisdiction of the Court in this case under article 19(2)(a) of the Statute.[57] On the first day of the Hearing, the Chamber rendered an oral decision on the conduct of proceedings pursuant to rule 58(2) of the Rules of Procedure and Evidence and ordered the parties and victims to provide their written submissions within the prescribed time-limit.[58]

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[56] Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Application of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, p. 88, para. 10.
[57] ICC-01/09-02/11-339; Mr Ali, against whom the Majority ultimately declined to confirm all charges, equally lodged a challenge to the jurisdiction of the Court, see ICC-01/09-02/11-338.
[58] ICC-01/09-02/11-T-4-ENG ET, p. 16, lines 4-20.

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23. The Defence for Mr Kenyatta requests the Chamber

> 73. (...) to (i) adopt the definition of organizational policy as set out by [the 15 March 2011 Dissent], (ii) assess the entirety of the evidence at the conclusion of the confirmation hearing; and (iii) in due course, decline to exercise jurisdiction in respect of the case against [Mr] Kenyatta.
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> 74. In the alternative, even if the [Chamber] decides not to adopt the definition of organizational policy as set out by [the 15 March 2011 Dissent], the Defence requests that the [Chamber] (i) assess the entirety of the evidence at the conclusion of the confirmation hearing; and (iii) in due course, decline to exercise jurisdiction in respect of the case against [Mr] Kenyatta.[59]

24. The Defence for Mr Kenyatta moves the Chamber to decline to exercise jurisdiction over the case, essentially advancing two issues: (i) a reconsideration of the Majority definition of "organizational policy" ("the Basic Human Value Test") which the Defence considers to be incorrect. In so doing, the Defence advocates to adopt the definition set out in the 15 March 2011 Dissenting Opinion (issue of law);[60] and (ii) an assessment of the evidence as the Defence maintains that the Prosecutor's evidence fails to establish the existence of an 'organization' under either interpretation as provided by the Majority and the dissenting Judge (issue of fact).[61]

25. The Prosecutor seeks the summary dismissal of the Defence jurisdictional challenge on the grounds that it is not a proper legal challenge.[62] He explains that "jurisdiction is a threshold matter to be resolved by courts before proceeding to consider the merits of the case",[63] whereas, in his opinion, the Defence is in fact already arguing the merits of the case in its challenge.[64] The Prosecutor further

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[59] ICC-01/09-02/11-339.
[60] ICC-01/09-02/11-339, paras 15-58.
[61] ICC-01/09-02/11-339, paras 59-71.
[62] ICC-01/09-02/11-356.
[63] ICC-01/09-02/11-356, para. 3.
[64] ICC-01/09-02/11-356, para. 3.

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maintains that the Court has jurisdiction over this case since Mr Kenyatta has been charged with crimes against humanity.[65] Whether or not article 7 of the Statute applies, the Prosecutor contends, is a matter of statutory construction or sufficiency, and not jurisdiction.[66] The Prosecutor buttresses his submission by reference to a decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (the "ICTY").[67] In response to the two arguments raised by the Defence for Mr Kenyatta, the Prosecutor asserts that the Majority's interpretation of the notion of 'organization' is correct.[68] As regards the second limb of the Defence challenge, namely the purported insufficiency of the evidence, the Prosecutor alleges that this matter "has no place in a jurisdictional challenge" but must be deferred to the decision pursuant to article 61(7) of the Statute.[69]

26. The victims participating in this case request that the challenge to jurisdiction of the case be denied.[70] The victims essentially argue that the Basic Human Value Test adopted by the Majority is correct. They take the view that "[t]he existence of an "organizational policy is an inherent aspect of collective targeting, but that such a policy need not be adopted by any particular type of organization".[71] The victims maintain that there is "an abundance of evidence" that large numbers of civilians were targeted.[72]

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[65] ICC-01/09-02/11-356, para. 13-14.
[66] ICC-01/09-02/11-356, paras 14 and 16.
[67] ICC-01/09-02/11-356, para. 15. The full name of the tribunal is "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991", UN Doc. S/RES/827 (1993).
[68] ICC-01/09-02/11-356, paras 17-34.
[69] ICC-01/09-02/11-356, paras 35-37.
[70] ICC-01/09-02/11-357.
[71] ICC-01/09-02/11-357, para. 40.
[72] ICC-01/09-02/11-357, para. 34.

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27. The Majority decision in the present case, concurs with the Prosecutor's submissions, dismissing *in limine* the jurisdictional challenge brought by Mr Kenyatta and arguing that it is "not jurisdictional in nature but, instead, [a challenge] on the merits of the Prosecutor's case on the facts".[73] With regard to the two issues raised by the Defence for Mr Kenyatta, namely the definition of 'organization' and the insufficiency of the evidence, the Majority determines that, based on the formulation chosen by the Defence, they are not "independent arguments" but so inextricably intertwined as to require concurrent adjudication.[74] The Majority explains that "only after conducting both steps (...) the Chamber should decline to exercise jurisdiction over the present case".[75] The Majority therefore does not consider the definition of the term 'organization' to be a separate issue raised by the Defence. The Majority nevertheless underscores that even were it to uphold the issue regarding the definition of 'organization', it would still need to consider the second limb of the challenge, namely the insufficiency of evidence. As the "challenge cannot be answered without an assessment of the facts of the case", the Majority concludes that these questions should be addressed in the part of the decision pursuant to article 61(7) of the Statute concerning the contextual elements of crimes against humanity.[76] The Majority holds that the same conclusion must be reached *a fortiori* with respect to the alternative request put forth by the Defence.[77]

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[73] See para. 30 of the Majority decision.
[74] See para. 33 of the Majority decision.
[75] *Ibid.*
[76] See paras 33-34 of the Majority decision. The challenge to jurisdiction presented by Mr Ali is dismissed *in limine* by the Majority on similar grounds, see paras 31-32 of the Majority decision.
[77] See para. 34 of the Majority decision.

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28. I disagree with this interpretation of the Defence challenge. I am unable to share the view that the issues are formulated in such a way as to bar adjudication by the Chamber of the Defence jurisdictional challenge. Unlike the Majority, I consider the two issues raised by the Defence to be sufficiently independent. The Defence, in my opinion, has not made the assessment of facts a precondition to the interpretation of the notion "organizational policy". Rather, it asks that a proper interpretation be adopted in relation to which the facts are appraised, with a view to decline jurisdiction. At all events, any assessment of facts logically implies that the Court interpret the law first. In this respect, I observe that the Majority decision addresses the Defence arguments in the context of the applicable law relating to the notion of an 'organization' without addressing the issue of insufficiency of evidence, thus disentangling the Defence arguments.[78] The same independent treatment of issues advanced by the Defence is evidenced in today's Majority decision on the confirmation of charges in the case of the *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*. In that decision, faced with Defence challenges on grounds identical to those pressed by Mr Kenyatta, the Majority appears to acknowledge by implication as a matter of law that a challenge may raise the issue of a correct interpretation of a contextual element, such as the notion of 'organization', since it rejected this part of the challenge on the merits.[79] At the same time, it dismissed *in limine* the issue pertaining to insufficiency of evidence.[80] I therefore opine that at least the same disjunctive approach could have been adopted in the present case.

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[78] See paras 112-114 of the Majority decision.

[79] See para. 34 of the Majority decision on the confirmation of charges in the case of the *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.*

[80] See the paras 35-36 of the Majority decision on the confirmation of charges in the case of the *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.*

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29. With regard to the substance of the challenge, I fundamentally disagree with the position taken by the Majority in the present case for the reasons set out below. From the outset, I must make it clear that I do not wish to embark anew upon a discussion of the correct interpretation of the notion of 'organization'. I have set out my understanding of the law in sufficient detail in both dissenting opinions in which I analysed the facts as presented by the Prosecutor. I shall therefore only respond to new arguments advanced in relation to the following two preliminary questions:

(a) Whether the interpretation of the contextual element of "organizational policy" as a matter of law is part of a jurisdictional challenge; and

(b) Whether and to what extent an assessment of facts, and by extension of evidence, can be part of a jurisdictional challenge.

a) Issue of law: the correct interpretation of "organizational policy" is part of the jurisdictional challenge

30. As I have observed above, in its decision on the confirmation of charges in the case of the *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* the Majority appears to acknowledge as a matter of law that this issue may qualify as a jurisdictional challenge (see paragraph 28 above). While I agree with this principled approach followed by the Majority, I shall set out my own reasons in more detail below.

31. The established jurisprudence of this Court, including that of this Chamber, clearly shows that jurisdiction is composed of four requirements, namely subject-matter (*ratione materiae)*, temporal (*ratione temporis*), personal (*ratione personae*) and territorial (*ratione loci*), with the last two requirements being in the

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alternative.[81] Jurisdiction *ratione materiae* refers to the crimes which fall within the jurisdiction of the Court – as enumerated in articles 6, 7 and 8 and article 8*bis* of the Statute, which has yet to enter into force – and encompasses the constitutive contextual elements in which the specific crimes are embedded. Thus, the contextual legal requirement of an 'organization' within the meaning of article 7(2)(a) of the Statute falls entirely within the 'jurisdiction test'. Obviously, this includes any issue of interpretation which may affect the applicability of the contextual elements.

32. The argument that the contextual elements, such as that of 'organization' under article 7(2)(a) of the Statute, do not in any way fall within the ambit of the 'jurisdiction test' but concern matters of substance relating to the merits of the case is as astonishing as it is misconceived. It disregards the inseparable, twofold nature of contextual elements which are both elements of the crimes as stated in the Elements of Crimes[82] relating to the merits *and* jurisdictional in nature insofar as the Court cannot exercise jurisdiction over the underlying acts in the absence of such contextual elements. The presence of contextual elements differentiates

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[81] Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, paras 21 and 22; Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, paras 38 and 39; Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, para. 12; Pre-Trial Chamber III, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, ICC-02/11-01/11-9-Red, para. 9; Pre-Trial Chamber I, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC-01/04-01/07-4, para. 11; Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, para. 36.

[82] In this respect it is noteworthy to recall the second introductory paragraph to crimes against humanity in the Elements of Crimes which confirms that "[t]he last two elements for each crime against humanity describe the context in which the conduct must take place".

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the crimes within the jurisdiction of the Court from ordinary crimes. As I explained in the 31 March 2010 Dissenting Opinion:

> It is even more crucial to determine that (...) the contextual elements of crimes against humanity appear to be present as it is this decisive element which triggers the jurisdiction of the Court, elevates the acts concerned, which otherwise would fall exclusively under the responsibility of national jurisdictions, to international crimes and sets aside considerations of State sovereignty.[83]

33. Article 19(1), first sentence, of the Statute instructs the Judges of this Court in unequivocal terms to determine their competence to adjudicate a case: "The Court *shall* satisfy itself that it *has* jurisdiction in any case before it" (emphasis added). As explained above, this Chamber has interpreted this provision to imply "that the Court must 'attain the degree of certainty' that the jurisdictional parameters set out in the Statute have been met".[84] I draw two conclusions therefrom. Firstly, the answer to the question of whether the Court has such jurisdiction is, in principle, not subject to the progressively higher evidentiary thresholds which apply at the different stages of the proceedings. Secondly, an affirmative answer to that question is a pre-condition to the Court's consideration of the merits.[85] Consequently, the question cannot be deferred to the merits but must be ruled upon definitively *ab initio*. In other words, the Court does not have limited jurisdiction when issuing a warrant of arrest or summons to appear; slightly more jurisdiction at the confirmation of charges stage; and

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[83] Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, p. 93, para. 18.
[84] Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 24: Pre-Trial Chamber II, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-1, para. 9; Pre-Trial Chamber II, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-1, para. 9; see also para. 23 of the Majority decision.
[85] See also para. 23 of the Majority decision.

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jurisdiction "beyond reasonable doubt" at trial, after the merits have been fully adjudged. The Court either has jurisdiction or does not.

34. That being said, I am fully aware that issues of jurisdiction may be intimately bound up with the merits of the case. To avoid unnecessarily prolonging the proceedings on jurisdiction, I take the view that a careful assessment of the contextual elements – which are decisive in triggering the Court's intervention – should or must only be carried out where it appears that the 'degree of certainty' may not be attained. Such situations warrant an immediate resolution without delving into and prejudging the merits of the case and can only be assessed on a case-by-case basis. In the circumstances of the present case, I deemed it both appropriate and necessary for the contextual elements of crimes against humanity, which form part of jurisdiction *ratione materiae*, to be entertained in greater detail when examining jurisdiction and at the early stage of the initiation of the investigation into the situation in the Republic of Kenya. I took that view because the degree of certainty appeared not to have been attained. At the same time, I found it necessary to save the Court from entertaining further time-consuming and expensive proceedings without jurisdiction.

35. In support of his claim that the issues raised by the Defence are not proper challenges to jurisdiction, the Prosecutor refers to a recent ICTY Appeals Chamber decision,[86] arguing that the ICTY, when "faced with an almost identical defence argument in a case before it, refused to consider the claim as one addressing jurisdiction".[87] A careful review of the Appeals Chamber decision

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[86] ICTY, *Prosecutor v Ante Gotovina et al.*, Case No. IT-06-90-AR72.1, "Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction", 6 June 2007.
[87] ICC-01/09-02/11-356, para. 15.

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

36. The necessity for a correct determination on jurisdiction finds support in the jurisprudence of the Court which has frequently affirmed its jurisdiction after satisfying itself that the jurisdictional parameters, including the contextual elements of the alleged crimes, had been met.[88] Admittedly, no chamber has yet embarked upon an in-depth analysis of facts in the context of determining jurisdiction *ratione materiae*. However, this may be explained by the fact that no

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[88] See for example: Pre-Trial Chamber I, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-8-Corr, para. 25, considering the contextual elements of war crimes; Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, para. 39, in which explicit reference is made to the contextual elements of crimes against humanity; Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, para. 13, in which explicit reference is made to the contextual elements of crimes against humanity and war crimes; Pre-Trial Chamber III, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, ICC-02/11-01/11-9-Red, para. 11, in which explicit reference is made to the contextual elements of crimes against humanity.

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chamber until the present day was faced with a similar clear necessity to determine whether or not the Court has jurisdiction *ratione materiae*.

37. The Prosecutor himself follows the very same approach. He clearly assesses jurisdiction *ratione materiae*, including the contextual elements of the crimes allegedly committed, when determining whether there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed" pursuant to article 53(1)(a) of the Statute. Most remarkably, the Prosecutor declined to initiate an investigation into the situation in Venezuela on the grounds that crimes against humanity did not appear to have taken place. He explained:

> (...) In order to constitute a crime against humanity, Article 7(1) of the Rome Statute provides that particular acts must have been committed as part of a widespread or systematic attack directed against any civilian population. This test creates a stringent threshold. Even on a generous evaluation of the information provided, the available information did not provide a reasonable basis to believe that the requirement of a *widespread or systematic attack against any civilian population* had been satisfied (emphasis added).[89]

38. I find no logical or legal reason why the Prosecutor may decline to initiate investigations based on an alleged lack of jurisdiction *ratione materiae* due to the absence of the required contextual elements of crimes against humanity, whereas the Chamber should be barred from entertaining this issue or reviewing the Prosecutor's preliminary assessment on jurisdiction altogether. Rather, it is my

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[89] See pages 3-4 of the Prosecutor's response to the communications received concerning the situation in Venezuela, available at: http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf (last visited on 10 January 2012). I also note that in this response the Prosecutor appears to have gone even so far as to examine, based on the communications received, the specific elements of the crime of persecution pursuant to article 7(1)(h) of the Statute, concluding that "[m]any of the allegations of persecution did not appear to satisfy the elements for the crime of persecution", see p. 3.

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view that the Chamber has full competence to consider issues of jurisdiction in order to discharge fully the duty cast on it by article 19(1) of the Statute.

39. The Prosecutor's further argument that the Court *has* jurisdiction because the suspect is *charged* with crimes against humanity under article 7 of the Statute is legally and procedurally untenable. The charges, which imply jurisdiction, are merely *presented* by the Prosecutor. Again, it is ultimately for the Judges of this Court to decide on jurisdiction, not the Prosecutor. Were it otherwise, the Prosecutor could label any crime as a crime within the jurisdiction of the Court thus removing the subject-matter jurisdiction (*ratione materiae*) from the scope of article 19(1), first sentence, of the Statute and limiting any challenges or questions raised respectively under articles 19(2) and 19(3) of the Statute to jurisdiction *ratione temporis* and *ratione loci/ratione personae*. In my opinion, such an interpretation would render articles 19(1), 19(2) and 19(3) of the Statute largely ineffective.

40. In this respect, I am mindful of the interpretation of article 19 of the Statute of Pre-Trial Chamber I in the *Mbarushimana* case. Pre-Trial Chamber I clearly underlined the importance of the remedy provided to a suspect by that provision:

> The Chamber observes that a suspect's right to challenge the jurisdiction of the Court is a special remedy enshrined in article 19 of the Statute, as such autonomous and independent from any other remedy which the suspect might have by virtue of other statutory provisions.[90]

The above finding highlights the general importance of the jurisdictional challenges under article 19 of the Statute which should not be diminished.

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[90] Pre-Trial Chamber I, Decision on the 'Defence Challenge to the Jurisdiction of the Court', ICC-01/04-01/10-451, para. 11.

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Hence, the function of article 19 of the Statute must not be significantly reduced by excluding matters of jurisdiction *ratione materiae*.

b) Issue of fact: an assessment of facts, and by extension evidence, is part of the jurisdictional challenge

41. Another related preliminary question to the Defence challenge is the issue whether and to what extent facts, and by extension evidence, may be assessed with regard to jurisdiction *ratione materiae*, which, as demonstrated above, is part and parcel of the 'jurisdiction test'. The Majority declines to undertake such a discussion on evidentiary matters as it entails an assessment of the facts which can only take place at the stage of the merits. I disagree with this position taken for the following two reasons.

42. First, I observe in general that a court of law does not address legal questions, including that of jurisdiction, for the sake of having a legal discussion but interprets the law with a view to appraise the facts *sub judice* in light thereof. As the establishment of the facts *sub judice* may prove to be controversial, evidentiary issues may arise at any stage of the proceedings. [91]

43. Secondly, I note the Chamber's duty to pronounce itself on jurisdiction by having attained the 'degree of certainty' which it can only logically satisfy by

[91] See also Appeals Chamber, Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II, ICC-02/04-01/05-371, para. 36: "The Appeals Chamber observes that it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law."

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assessing facts presented by the Prosecutor. As the 'jurisdiction test' consists of four requirements (see paragraph 31 above), an assessment of facts must necessarily extend to all those four requirements, including jurisdiction *ratione materiae*.

44. In light of the foregoing, I find it difficult to accept that an assessment of the facts, and by extension evidence, cannot take place for the purposes of determining jurisdiction *ratione materiae* but must be deferred to the stage of the merits. In my opinion, the issue of fact raised by the Defence falls, in principle, under the ambit of this challenge.

45. In conclusion, I am of the firm view that the Defence challenge must be fully entertained. Against the backdrop of my previous findings with regard to jurisdiction, I hold that the Defence challenge should be granted and jurisdiction over this case be denied. I further opine that the issues raised by the Defence are appealable under article 82(1)(a) of the Statute and, therefore, leave to appeal pursuant to article 82(1)(d) of the Statute need not be sought.

III. Further Observations

46. Notwithstanding my view on the lack of jurisdiction *ratione materiae* in the situation in the Republic of Kenya, and therefore in the present case, I have followed attentively the entirety of these confirmation of charges proceedings. In this part of the dissent, I wish to provide some more thoughts on two issues which merit particular attention. First, I shall set forth my thoughts on the impact of the Prosecutor's respect for article 54(1)(a) of the Statute during his investigation on the proceedings conducted by the chambers of this Court.

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Secondly, I will set out my views as to the rights of the Defence during the Hearing pursuant to article 61(6) of the Statute.

1. Prosecutor's Respect for Article 54(1)(a) of the Statute

47. At the Hearing, the Prosecutor is called upon, in conformity with article 61(5) of the Statute, to support each charge with "sufficient evidence" as gathered during the investigation.

48. On the basis of my observations and experiences at the Court until the present day, I use this opportunity to clarify and summarise my views and expectations with regard to any investigation undertaken by the Office of the Prosecutor on behalf of the Court. I do so as a Judge who is fully aware of the serious responsibility to take such a far-reaching decision as to confirm or to decline to confirm the charges on which the Prosecutor intends to seek trial for the person(s) charged. I note that such an important decision and the entire process leading to it will have in any given situation, including the present case, far-reaching consequences not only for the person(s) concerned but also for the Court itself, and the fulfillment of its mandate to promote lasting respect for and the enforcement of international justice.

49. Having said that, it is in my view an absolute, indispensable necessity that any such investigation must be as comprehensive, professional, expeditious and thereby as effective as possible. With regard to this necessity, I recall, firstly, article 54(1)(a) of the Statute, which reads:

> **Article 54**
> ***Duties* and powers of the Prosecutor with respect to investigations**
> 1. The Prosecutor shall

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(a) In order *to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment* of whether there is *criminal responsibility* under this Statute, and, in doing so, *investigate incriminating and exonerating circumstances equally*; (emphasis added)

50. It is my understanding that this crucial provision demonstrates in particular the following for any proceedings before this Court:

(1) Already the investigation undertaken from its initiation into the situation until the confirmation of the charges has the decisive purpose to establish the truth and to provide a solid basis for a future judicial assessment whether there is indeed individual criminal responsibility which will require, pursuant to article 66(3) of the Statute, that the Judges "must be convinced of the guilt of the accused beyond reasonable doubt";

(2) The scope of the investigation must be *extended* to cover *all* facts and evidence to make possible such a judicial assessment as referred above under (1);

(3) The investigation undertaken shall cover incriminating and exonerating circumstances equally as the Prosecutor is conceived in the Statute as an objective truth seeker and not as a partisan lawyer.

51. These are, in my view, fundamental requirements which set out clear, if not high standards for proper investigations carried out by the Prosecutor on behalf of the Court and with regard to which he or she shall take, pursuant to article 54(1)(b) of the Statute, appropriate measures to ensure their effectiveness while fully respecting the rights of persons concerned, as required by article 54(1)(c) of the Statute.

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52. I do not find it difficult to conclude that any investigation which does not meet these standards is not in conformity with the letter and spirit of article 54(1) of the Statute. Likewise, I do not find it difficult to assume that any investigation meeting these standards only partially and unsatisfactorily will probably lead to problems and difficulties not only for an effective and successful prosecution but also for the work of the Chamber concerned and for the Court in general. This may be the case, for example, if the investigation in a concrete case *de facto* does not cover all facts and evidence of that case, or if not all possible measures are taken to make the investigation effective; then the consequence may be that there will be only a limited amount of evidence or – *in extremis* – scarcity of evidence. Another example of such unsatisfactory investigation would be an approach which *de facto* is aiming, in a first phase, (only) at gathering enough evidence to reach the "sufficiency standard" within the meaning of article 61(7) of the Statute, maybe in the expectation or hope that in a further phase after the confirmation proceedings, additional and more convincing evidence may be assembled to attain the 'beyond reasonable doubt' threshold, as required by article 66(3) of the Statute. I believe that such an approach, as tempting as it might be for the Prosecutor, would be risky, if not irresponsible: if after the confirmation of the charges it turns out as impossible to gather further evidence to attain the decisive threshold of 'beyond reasonable doubt', the case in question may become very difficult or may eventually collapse at trial, then with many serious consequences, including for the entire Court and the victims who have placed great hopes in this institution.

53. I submit that it is therefore the duty of the Prosecutor to conduct any investigation *ab initio* as effectively as possible with the unequivocal aim to assemble as expeditiously as possible relevant and convincing evidence which

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will enable ultimately the Trial Chamber to consider whether criminal responsibility is proven 'beyond reasonable doubt'. Such determined Prosecution action without delay is also necessary because of the well-known experience that the chances of investigations to be effective and successful are gradually diminishing and fading away the more time is passing since the commission of the crime(s) in question. Furthermore, having regard to article 21(3) of the Statute which imposes on the Court to interpret and apply the Statute, among others, consistent with "internationally recognized human rights", I note the jurisprudence of the European Court of Human Rights which clearly establishes a requirement of "promptness and reasonable expedition" in the conduct of a criminal investigation as a *conditio sine qua non* of its effectiveness.[92]

54. In this context, I hold that my view as summarised above is, generally consistent with the Appeals Chamber judgment of 13 October 2006[93]. I note that this decision was concerned with the specific question whether and to what extent post-confirmation investigations are permitted under the Statute; it was not concerned with the general and different question of the duties of the Prosecutor, pursuant to article 54(1) of the Statute, to ensure that the investigations undertaken are as proper, expeditious and effective as possible.

55. I am aware that the Appeals Chamber permitted (only) "in certain circumstances" further investigations after confirmation, in particular "in

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[92] European Court of Human Rights, *Bazorkina v. Russia*, Judgment of 27 July 2006, Application n°69481/01, para. 119; *Tanrikulu v. Turkey*, Judgment of 8 July 1999, Application n°23763/94, para. 109.

[93] Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence', ICC-01/04-01/06-568.

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situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing [...]".[94] With regard to this case I note that there is, according to the information available, currently no ongoing conflict in the Republic of Kenya.

56. While I have nothing to say with regard to the above reasoning of the Appeals Chamber, I see the possibility, if not the risk, that this limited permission of post-confirmation investigations in practice might be too broadly interpreted by the Prosecutor, possibly as some kind of license to investigate whenever, even after confirmation, thus enabling the Prosecutor also to follow a phased approach for the gathering of evidence as exemplified above. This would in my view amount to a serious misinterpretation of the Appeals Chamber judgment of 13 October 2006.

57. Given this situation, I underline once again the absolute necessity for the Prosecutor to exhaust all ways and means to make the investigation *ab initio* as comprehensive, expeditious and thus as effective as possible, as required by article 54(1) of the Statute. I hold that it is not only desirable, but necessary that the investigation is complete, if at all possible, at the time of the Hearing, unless the Prosecutor justifies further investigations after confirmation with compelling reasons, such as those mentioned above in paragraph 55. In case a Pre-Trial Chamber is not convinced that the investigation is complete, it may use its powers under articles 61(7)(c) and 69(3) of the Statute in order to compel the Prosecutor to complete his investigation before considering committing any

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[94] *Ibid.*, para. 54.

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suspect to trial. I consider this issue to be of utmost importance for the success of this Court.

2. Rights of the Defence

58. I will, at first, deal with the Prosecutor's persistent demand that the Pre-Trial Chamber should not embark on an in-depth examination of the evidence, in particular the reliability and credibility of the Prosecutor's evidence. Rather, the Chamber "should accept as dispositive the [Prosecutor's] evidence, so long as it is relevant", leaving any analysis of the evidence to the Trial Chamber.[95]

59. While I concur with the Majority's view that this argument is not acceptable in light of the fundamental authority of the Chamber to freely assess all evidence available,[96] I find it necessary to provide some clarifying observations on the rights of the Defence with respect to the confirmation of charges procedure. I am firmly convinced that a proper understanding of these rights, especially in light of the purpose of pre-trial proceedings, is of fundamental importance not only in the present case but also in future pre-trial proceedings. Such a proper understanding is, in my view, indispensable for sound and fair decisions on the confirmation of charges pursuant to article 61 of the Statute.

60. I hold that article 61(6) of the Statute is the decisive provision to delineate the rights of the Defence at the confirmation of charges stage. I note in particular the quite clear wording of article 61(6)(b) and (c), namely that the person may *"(b) Challenge the evidence presented by the Prosecutor; and (c) Present evidence."* Consequently, I have no doubt that according to this provision, the Defence may not only

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[95] ICC-01/09-01/11-345, para. 5; ICC-01/09-02/11-361, para. 5.
[96] See para. 60 of the Majority decision.

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provide rebuttal evidence but may also challenge and contest the relevance, reliability and credibility of all evidence presented by the Prosecutor.[97] Otherwise, the rights as set out in article 61(6) of the Statute would be deprived of any real meaning.

61. I submit further that these rights of the Defence and the related necessity of a proper assessment of all evidence presented are in full conformity with the purpose of the confirmation proceedings. It is undisputed that one of the main purposes of the confirmation phase is to filter the cases that should go to trial from those which should not. Bearing in mind the enormous consequences of a trial for the person charged, this filtering function not only ensures fairness but also avoids, when the "sufficiency standard" cannot be met, unnecessary public stigmatisation and other negative consequences for the person over the foreseeable long time span of a trial. In such a case, unwarranted lengthy proceedings would also lead to huge expenses and amount to a violation of the necessity to ensure, as much as possible, judicial economy in the interest of justice. Needless to say, it remains the responsibility of the Chamber to ensure that the nature and purpose of the confirmation are not overstretched or distorted in particular through possible Defence attempts to turn the confirmation in a "trial before the trial".

62. In sum, the Chamber cannot satisfy itself solely with the evidence, which the Prosecutor claims to be relevant and reliable, in order to effectively and

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[97] This thought was also expressed by Judge Georghios M. Pikis in his Separate Opinion, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', ICC-01/04-01/06-1486, pp. 56-57 at para. 43.

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genuinely exercise its filtering function. Such a general approach would have, in my view, the untenable consequence that Prosecution evidence would be considered as credible almost by default through the formal act of its presentation. Likewise, it would have the equally untenable consequence that the role and rights of the Defence would be dramatically and unfairly curtailed.

IV. Concluding Remarks

63. As I continue to be of the considered view, more so than ever, that the Court lacks jurisdiction *rationae materiae* in the present case, I feel barred, at least in principle, from pronouncing a view on the merits of the case, more specifically on whether or not there are substantial grounds to believe that Mr Muthaura and Mr Kenyatta committed the crimes charged, as required by article 61(7) of the Statute. Consequently, and secondly, I also feel barred from examining whether or not the Prosecutor presented "sufficient evidence" within the meaning of that provision. Likewise, I feel barred from determining whether or not the numerous Defence challenges to the Prosecutor's evidence pursuant to article 61(6)(b) of the Statute are well-founded and relevant.

64. My dissent to the Majority's decision must not be misconstrued as any determination on my part as to the commission of crimes in the Republic of Kenya during the 2007/2008 post-election violence. In fact, the Defence arguments and evidence presented during the Hearing have not upset my views previously made in the 15 March 2011 Dissenting Opinion. To all Kenyan citizens who have been following those proceedings to the present day, I wish to emphasise anew that:

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> [t]here are, in law and in the existing systems of criminal justice in this world, essentially two different categories of crimes which are crucial in the present case. There are, on the one side, international crimes of concern to the international community as a whole, in particular genocide, crimes against humanity, and war crimes pursuant to articles 6, 7 and 8 of the Statute. There are, on the other side, common crimes, albeit of a serious nature, prosecuted by national criminal justice systems, such as that of the Republic of Kenya.
>
> (...)
>
> [A] demarcation line must be drawn between international crimes and human rights infractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation.[98]

65. That said, and while I do not question that abhorrent crimes, as described in the amended document containing the charges, have been committed, my doubts pertain to their correct qualification. Consequently, my principled disagreement with the Majority centres on the question of whether the ICC is the right *forum* before which to investigate and prosecute those crimes.

66. I remain convinced and reiterate that the crimes and atrocities described by the Prosecutor in the amended document containing the charges concerning Mr Muthaura and Mr Kenyatta fall within the competence of the Kenyan criminal justice authorities as a matter to be investigated and prosecuted under Kenyan criminal law forthwith. I join the victims participating in this case in their desire to see justice delivered.[99]

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[98] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, p. 87, para. 8; p. 118, para. 65.
[99] ICC-01/09-02/11-T-4-ENG ET, p. 63, lines 3-7.

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Done in both English and French, the English version being authoritative.

Judge Hans-Peter Kaul

Dated this Monday, 23 January 2012

The Hague, the Netherlands