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PRE-TRIAL CHAMBER II

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

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

Public Document

**Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision
on the Prosecutor's Application for Summonses to Appear for Francis Kirimi
Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali"**

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

Defence

Francis Kirimi Muthaura
Uhuru Muigai Kenyatta
Mohammed Hussein Ali

Legal Representatives of the Victims

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

I. Introduction and Main Conclusions

1. The Majority of Pre-Trial Chamber II (the "Chamber"), having examined the "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" (the "Application")¹ and the evidence and other information submitted, issued on 8 March 2011 three summonses for Francis Kirimi Muthaura ("Francis Muthaura"), Uhuru Muigai Kenyatta ("Uhuru Kenyatta") and Mohammed Hussein Ali ("Mohammed Ali") to appear before the Court pursuant to article 58(7) of the Rome Statute (the "Statute").² The Majority is satisfied that there are reasonable grounds to believe that, from on or about 24 January 2008 until 31 January 2008, those three suspects are criminally responsible for crimes against humanity in the form of murder, forcible transfer of population, rape, persecution, and other inhumane acts pursuant to an organizational policy in 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), 7(1)(d), 7(1)(g), 7(1)(h) and 7(1)(k) of the Statute.

2. I am unable to accept the decision of the Majority and the analysis that underpins it. I continue to believe 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. I am not satisfied that there are reasonable grounds to believe that the crimes alleged, which occurred during the violence that took place from on or about 24 January 2008 until 31 January 2008 in Nakuru and Naivasha towns, were committed pursuant to the policy of an *organisation* within the meaning of article 7(2)(a) of the Statute. Thus, I am not satisfied that the crimes alleged constitute crimes against humanity pursuant to article 7 of the Statute.

3. I wish to confess that I have taken this position with a heavy heart. I am profoundly aware of the crimes and atrocities described in the Application for

¹ ICC-01/09-31-Red; ICC-01/09-31-Conf-Exp and annexes.

² 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.

summonses to appear for the three suspects Francis Muthaura, Uhuru Kenyatta and Mohammed Ali pursuant to article 58(7) of the Statute. I understand and sympathise with the hopes and expectations of the victims of the crimes committed in different locations, including Kisumu town (Kisumu District, Nyanza Province), Kibera (Kibera Division, Nairobi Province), Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province). I am aware of the victims' expectation that those responsible for these crimes should be brought to justice. I am also painfully aware that there are currently many citizens in the Republic of Kenya who hope for and support the intervention of the Court in this country because they do not have confidence in their criminal justice system.

4. In these circumstances, I would like to reiterate my request to all those in the Republic of Kenya who yearn for justice and support the intervention of the ICC with regard to the crimes alleged in this Application to understand and accept the following:

[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.³

5. Consequently, I have no doubt that the crimes alleged in the Application concerning Francis Muthaura, Uhuru Kenyatta and Mohammed Ali fall within the competence of the criminal justice authorities of the Republic of Kenya as a matter to be investigated and prosecuted under Kenyan criminal law.

³ Dissenting Opinion of Judge Hans-Peter Kaul to the "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 8 and 65.

6. It is essentially on this point alone that I must separate myself from the Majority of the Chamber. As I am of the considered view that the Court lacks jurisdiction *ratione materiae* in the present case because the crimes alleged do not amount to crimes against humanity pursuant to article 7 of the Statute, I also feel barred, at least in principle, from pronouncing a view on whether there are reasonable grounds to believe, as required by article 58(7) of the Statute, that (1) the three suspects are criminally responsible for crimes against humanity in the form of murder, forcible transfer of population, rape, persecution, and other inhumane acts; and (2) that summonses are sufficient to ensure the suspects' appearance.

7. I wish, however, to clarify and draw the attention of all concerned in the Republic of Kenya to the following: I do not question in this dissenting opinion that abhorrent crimes, as described in the Application, have been committed. Rather, my dissent concerns the fundamental issue whether the crimes alleged in the present case constitute crimes against humanity within the meaning of *article 7 of the Statute*. I reiterate that these offences are serious common crimes to be investigated and prosecuted by the competent authorities of the Republic of Kenya under Kenyan criminal law. Thus, it is the responsibility of the Republic of Kenya to initiate, without delay, genuine criminal proceedings to bring the main culprits, masterminds and perpetrators of the crimes committed during the 2007/2008 violence to justice.

8. In the following, I shall set out my understanding of the law and my analysis of the evidence as to the existence of the constitutive contextual requirement of "organizational policy" pursuant to article 7(2)(a) of the Statute.

II. The Law and its Interpretation

9. The chapeau of article 7(1) of the Statute reads:

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

10. Article 7(2)(a) of the Statute stipulates:

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

11. In my dissenting opinion to the Majority's decision of 31 March 2010 authorizing the commencement of the Prosecutor's *proprio motu* investigation into the situation in the Republic of Kenya,⁴ I set out in appropriate detail my understanding of the law governing in particular the constitutive contextual requirement of crimes against humanity in accordance with article 7(2)(a) of the Statute.

12. For the purposes of the present dissenting opinion, I briefly recall that crimes alleged as part of an attack against any civilian population must be carried out pursuant to a policy of an 'organization' in accordance with article 7(2)(a) of the Statute. In my previous dissenting opinion, I set out my understanding of this statutory requirement as follows:

51. I read [article 7(2)(a) of the Statute] 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

⁴ 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.

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.⁵

13. It is against this standard that I have carried out a full, genuine and substantive analysis of the Prosecutor's Application and evidence submitted. In doing so, I was instructed by article 58(7) in conjunction with article 21(3) of the Statute to assess the facts provided in the Prosecutor's Application and the evidence and other material against the rather low threshold of "reasonable grounds to believe".

14. The Prosecutor supported his Application, to a large extent, with the same public reports of non-governmental organizations and commissions that he already submitted on 26 November 2009 when seeking the Chamber's authorization for the commencement of the investigation into the situation in the Republic of Kenya pursuant to article 15 of the Statute.⁶ Additionally, he submitted a table, following

⁵ Dissenting Opinion of Judge Hans-Peter Kaul to the "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 (footnotes omitted).

⁶ ICC-01/09-3 and annexes. The material submitted in the present case includes the reports of the Commission of Inquiry into Post Election Violence, "Final Report" ("CIPEV Report"), 16 October 2008, ICC-01/09-30-Conf-Exp-Anx3; Kenya National Commission on Human Rights, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence. Final Report" ("KNCHR Report"), 15 August 2008, ICC-01/0-9-30-Conf-Exp-Anx5; Human Rights Watch, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Governance" ("HRW Report"), March 2008, ICC-

the structure and language of the Application, which contained only excerpts or a series of sentences, selected by the Prosecutor, from witness statements, reports, press articles and other material. Pursuant to a decision of the Chamber,⁷ on 23 February 2011 the Prosecutor provided the Chamber with audio-recorded or written statements of those witnesses on whose statements he relies in the present Application. He also submitted additional related material.⁸

15. The Prosecutor's Application has been submitted in confidential *ex parte* and public redacted forms; in the latter form, the Prosecutor has redacted all submissions under Part C "Standard of Proof" and Part G "Summary of the Evidence and Other Information Establishing Reasonable Grounds to Believe that Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali Committed Crimes Within the Jurisdiction of the Court Pursuant to Article 58(2)(D) of the Rome Statute". Mindful of the need for proper reasoning and the principle of publicity of proceedings, I make reference to those parts. However, special care has been taken not to disclose any information identifying witnesses or any other person who might be put at risk on account of the activities of the Court.

III. Findings

The Prosecutor's Application

16. The Prosecutor contends that there are reasonable grounds to believe that crimes against humanity were committed in Kisumu town (Kisumu District, Nyanza Province), Kibera (Kibera Division, Nairobi Province), Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province) from 27 December 2007 or thereabouts to 29 February 2008 pursuant to or

01/09-30-Conf-Exp-Anx7; and International Crisis Group, "Kenya in Crisis" ("ICG Report"), February 2008, ICC-01/09-30-Conf-Exp-Anx8.

⁷ Pre-Trial Chamber II, "Decision Requesting the Prosecutor to Submit the Statements of the Witnesses on which he Relies for the Purposes of his Applications under Article 58 of the Rome Statute", ICC-01/09-45-Conf-Exp. The information revealed from the confidential *ex parte* decision of the Chamber does not affect its level of classification as "confidential".

⁸ ICC-01/09-48-Conf-Exp. The information revealed from the confidential *ex parte* filing of the Prosecutor does not affect its level of classification as "confidential".

in furtherance of an “organizational policy”. In his Application the Prosecutor alleges that Francis Muthaura, Uhuru Kenyatta and Mohammed Ali, the “Principal Perpetrators”, agreed to pursue an organisational policy to attack civilians perceived to support the Orange Democratic Movement (“ODM”) in order to maintain the Party of National Unity (“PNU”) in power.⁹

17. With reference to the entity capable of carrying out the attack against the civilian population, the Prosecutor contends that the three Principal Perpetrators activated and utilised “pre-existing structures to perpetrate the widespread and systematic attacks”.¹⁰ The entity which purportedly implemented the policy consisted of the Principal Perpetrators, members of the Mungiki (a criminal organisation) and pro-PNU youth, members of the Kenyan Police Forces, PNU politicians, and wealthy PNU supporters.¹¹

18. With regard to the position and role of the Principal Perpetrators, the Prosecutor maintains that at the time relevant to the Application, Francis Muthaura was chairman of the National Security Advisory Committee and “exercised both *de jure* and *de facto* authority over the various Kenyan security agencies, including the Kenya Police, Administration Police and the National Security and Intelligence Service”.¹² At the time relevant to the Application, Mohammed Ali was purportedly a member of the National Security Advisory Committee¹³ and the Police Commissioner exercising “*de jure* and *de facto* control over the Kenya Police”.¹⁴ He was under the direct authority of Francis Muthaura and routinely reported to him.¹⁵ The Prosecutor also submits that at the time relevant to the Application, Uhuru Kenyatta was a member of parliament for Gatundu South Constituency in Thika District in Central

⁹ ICC-01/09-31-Conf-Exp, paras 5, 16 and 57.

¹⁰ ICC-01/09-31-Conf-Exp, para. 59.

¹¹ ICC-01/09-31-Conf-Exp, para. 57.

¹² ICC-01/09-31-Conf-Exp, paras 60 and 61.

¹³ ICC-01/09-31-Conf-Exp, para. 75.

¹⁴ ICC-01/09-31-Conf-Exp, paras 47, 66, 75 and 76.

¹⁵ ICC-01/09-31-Conf-Exp, paras 61 and 75.

Province¹⁶ and joined the PNU in September 2007¹⁷. The Prosecutor further contends that the Mungiki have constituted an important component of Uhuru Kenyatta's political support base since 2002.¹⁸ By virtue of his close ties¹⁹ with and support²⁰ for the Mungiki, he purportedly had the capacity to mobilize the Mungiki to support the PNU.²¹

19. The Prosecutor submits that the Mungiki is a "complex, multi-faceted, heterogeneous and decentralized" criminal organisation,²² which is organized into local and regional branches.²³ Local leaders are purportedly bound by general rules and instructions issued by the organization's patron.²⁴ The Prosecutor contends that the Mungiki operates in an organised and coordinated manner,²⁵ and engages in illegal activities, which have turned the Mungiki into a financially healthy organization²⁶. Moreover, the Prosecutor avers that during the violence, "the Mungiki mobilized additional human resources among jobless pro-PNU youth and through aggressive recruitment".²⁷

20. Finally, the Prosecutor maintains that local politicians and business people "organized meetings for the purpose of raising money"²⁸ or provided "hundreds of pangas" which were distributed to pro-PNU youth²⁹. The Prosecutor also contends that Uhuru Kenyatta organized meetings "for the planning of the logistics for the

¹⁶ ICC-01/09-31-Conf-Exp, para. 62.

¹⁷ ICC-01/09-31-Conf-Exp, para. 64.

¹⁸ ICC-01/09-31-Conf-Exp, para. 62.

¹⁹ It has been alleged that Uhuru Kenyatta was himself a Mungiki member, ICC-01/09-31-Conf-Exp, para. 62.

²⁰ The Prosecutor contends that Uhuru Kenyatta facilitated the political agreement with the senior officials of the Government of Kenya to end the crackdown against Mungiki members and provided funding for their operations, ICC-01/09-31-Conf-Exp, paras 64 and 65.

²¹ ICC-01/09-31-Conf-Exp, paras 25, 63 and 65.

²² ICC-01/09-31-Conf-Exp, para. 68.

²³ ICC-01/09-31-Conf-Exp, para. 70.

²⁴ ICC-01/09-31-Conf-Exp, para. 70.

²⁵ ICC-01/09-31-Conf-Exp, para. 72.

²⁶ ICC-01/09-31-Conf-Exp, para. 73.

²⁷ ICC-01/09-31-Conf-Exp, para. 74.

²⁸ ICC-01/09-31-Conf-Exp, para. 84

²⁹ ICC-01/09-31-Conf-Exp, para. 85

Mungiki and pro-PNU youth operations (...) and the contribution of money to support the operations”.³⁰

21. With regard to the nature of the attacks, the Prosecutor submits that the attacks were launched (1) “in response” to the “planned attacks” orchestrated by William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang against supporters of the PNU; and (2) to “[suppress] and [crush] any protests by ODM supporters and [penalize] ODM’s supportive communities”.³¹

22. Francis Muthaura and Mohammed Ali purportedly utilized the Kenyan Police Force to perpetrate attacks by (1) directing the Kenyan Police Forces to target perceived ODM supporters in attacks in Kisumu and Kibera; and (2) directing them not to intervene in attacks by the Mungiki and pro-PNU youth against perceived ODM supporters in Nakuru and Naivasha.³²

23. The Prosecutor further maintains that, with the support of Mohammed Ali, Francis Muthaura and Uhuru Kenyatta used the Mungiki and pro-PNU youth to perpetrate attacks against ODM supporters in Nakuru and Naivasha during late January 2008.³³ Francis Muthaura allegedly organised a meeting, together with Uhuru Kenyatta, “to plan the retaliatory attacks against ODM supporters using Mungiki members and other mobilized pro-PNU youth”.³⁴ It is alleged that the Mungiki had previously negotiated an end to the police crackdown against their members in exchange for providing political support to the PNU.³⁵ The Prosecutor submits that the cooperation between the Kenyan Police Forces and the Mungiki and

³⁰ ICC-01/09-31-Conf-Exp, para. 83.

³¹ ICC-01/09-31-Conf-Exp, paras 5, 16 and 57.

³² ICC-01/09-31-Conf-Exp, para. 24.

³³ ICC-01/09-31-Conf-Exp, para. 17.

³⁴ ICC-01/09-31-Conf-Exp, para. 67.

³⁵ ICC-01/09-31-Conf-Exp, para. 26.

the pro-PNU youth is confirmed by the lack of police intervention before, during and after the attacks.³⁶

Analysis of the Prosecutor's Application and the Evidence

24. I recognize that there is evidence which tends to show that crimes were committed by the Mungiki gang together with pro-PNU youth in Nakuru³⁷ and Naivasha³⁸. I am satisfied that the Kenyan Police Forces in Kisumu³⁹ and Kibera⁴⁰ committed crimes by using excessive force. At the same time, I am instructed by law to assess these facts against the statutory legal requirement of article 7(2)(a) of the Statute establishing that those crimes occurred pursuant to the policy of a State or an 'organisation'. Taking into consideration the Prosecutor's Application, I shall analyse hereunder whether the entity as presented by the Prosecutor can be qualified as an 'organisation' within the meaning of article 7(2)(a) of the Statute.

25. The Majority has found that "the attack was carried out pursuant to an organizational policy of the Mungiki".⁴¹ It has characterised the Mungiki as an 'organisation' within the meaning and for the purpose of article 7(2)(a) of the

³⁶ ICC-01/09-31-Conf-Exp, para. 27.

³⁷ KNCHR Report, ICC-01/09-31-Conf-Exp-Anx5, paras 315 and 335 (KEN-OTP-0001-0002 at 0093 and 0098); KNCHR Report, ICC-01/09-31-Conf-Exp-Anx5, p. 94 (KEN-OTP-0001-0002 at 0094); CIPEV Report, ICC-01/09-31-Conf-Exp-Anx3, pp.103-104 (KEN-OTP-0001-0364 at 0477-0478); "NSIS Situation Report" submitted to the CIPEV, ICC-01/09-31-Conf-Exp-Anx23, pp. 568-569; UNOHCHR, Fact-Finding Mission Report, ICC-01/09-31-Conf-Exp-Anx23, p. 545; ICG Report, ICC-01/09-31-Conf-Exp-Anx8, p. 14 (KEN-OTP-0001-1076 at 1093).

³⁸ KNCHR Report, ICC-01/09-31-Conf-Exp-An5, para. 317 (KEN-OTP-0001-0002 at 0094); CIPEV Report, ICC-01/09-31-Conf-Exp-Anx3, pp. 123-124, KEN-OTP-0001-0364 at 0497-0498); UNOHCHR, Fact-Finding Mission Report, ICC-01/09-Conf-Exp-Anx23, p. 545; ICG Report, ICC-01/09-31-Conf-Exp-Anx8, p. 14 (KEN-OTP-0001-1076 at 1093); Statement of Witness 11, ICC-01/09-48-Conf-Exp-Anx217, pp. 7-8 (KEN-OTP-0042-0044 at 0051-0052); Statement of Witness 11, ICC-01/09-48-Conf-Exp-Anx218, pp. 27-28 (KEN-OTP-0042-0078 at 0105-0106).

³⁹ UNOCHR, Fact-Finding Mission Report, ICC-01/09-31-Conf-Exp-Anx23, pp. 256-257; HRW Report, ICC-01/09-31-Conf-Exp-Anx7 pp. 25 and 27-31 (KEN-OTP-001-0248 at 0275 and 0277-0281); KNCHR Report, ICC-01/09-Conf-Exp-Anx5, para. 402 (KEN-OTP-0001-0002 at 0111).

⁴⁰ UNOCHR Fact-Finding Mission Report, ICC-01/09-31-Conf-Exp-Anx23, pp. 256-257; HRW Report, ICC-01/09-31-Conf-Exp-Anx7, pp. 32-33 (KEN-OTP-001-0248 at 0282-0283); Statement of [REDACTED] to the CIPEV, ICC-01/09-31-Con-Exp-Anx23, p. 511.

⁴¹ 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. 20.

Statute,⁴² on the ground that “the group has the capability to perform acts which infringe on basic human values”.⁴³ The Majority, therefore, did not regard any of the other actors mentioned in the Prosecutor’s Application, such as the Kenyan Police Forces, to be part of the ‘organisation’.

26. I disagree with this interpretation of the Prosecutor’s Application. Throughout the Application, the Prosecutor submits that the Principal Perpetrators used a variety of actors, most prominently the Mungiki and the Kenyan Police Forces, to attack civilians perceived as ODM supporters. Under the heading “Existence of an entity capable of carrying out a widespread or systematic attack against a civilian population”, the Prosecutor cites, besides the Principal Perpetrators themselves, the Mungiki and pro-PNU youth, the Kenyan Police Forces and other PNU politicians and wealthy PNU supporters. The attacks themselves were purportedly carried out by the Mungiki in Nakuru and Naivasha, and by the Kenyan Police Forces in Kisumu and Kibera. The Prosecutor maintains that both attacks were committed pursuant to the policy of *one* ‘organisation’. Hence, the activities of the two stakeholder groups, which allegedly committed the crimes in Nakuru/Naivasha and Kisumu/Kibera, are presented as being attributable to *one* ‘organisation’. I shall therefore interpret the notion of ‘organisation’ as encompassing, in principle, all stakeholders the Prosecutor has mentioned in the Application.

27. In my previous dissenting opinion to the Majority’s decision of 31 March 2010, I have set out my understanding of the essential characteristics of an ‘organisation’ in terms of membership, duration, structure, the capacity to impose the policy on its members and the capacity and means to attack any civilian population. Mindful of these characteristics, I fail to see an ‘organisation’, as portrayed by the Prosecutor, in the present case. My reading of the evidence submitted by the Prosecutor leads me to draw another conclusion, which I shall set out below.

⁴² *Ibid.*, para. 22.

⁴³ *Ibid.*, para. 21.

28. The Prosecutor presents different stakeholders purportedly as forming a homogeneous entity under the authority of the three Principal Perpetrators, unified in their goal of attacking civilians perceived as supporting the ODM. I note, however, that the pro-PNU youth is portrayed as cooperating closely with the Mungiki. Thus, they appear not to represent an independent component within the alleged 'organisation'. Equally, the PNU politicians and wealthy PNU supporters are presented in the Application as financiers and resource providers to the Mungiki and pro-PNU youth. Neither, therefore, do they appear to represent an independent component within the proposed 'organisation'. In light of the foregoing, I will focus my assessment of the evidence on the two leading stakeholders, the Mungiki and the Kenyan Police Forces, which together, according to the Prosecutor, form an 'organisation' within the meaning of article 7(2)(a) of the Statute.

29. It appears from the evidence that the Mungiki, an illegal gang of organized crime, has established parallel structures in the poorer parts of the country, notably the slums of Nairobi,⁴⁴ where there is no effective State authority, and engages in criminal activities.⁴⁵ The evidence further suggests that the Mungiki gang has in the past shown a certain degree of flexibility in supporting various political parties as a means to advance its own interests.⁴⁶ Prior to the attacks mentioned in the Prosecutor's Application, the Mungiki was actually subject to a police crackdown

⁴⁴ KNCHR Report, ICC-01/09-31-Conf-Exp-Anx5, paras 159 *et seq.* (KEN-OTP-0001-0002 at 0052-0053); CIPEV Report, ICC-01/09-31-Anx3, p. 194 (KEN-OTP-0001-0364 at 0568).

⁴⁵ Statement of Witness 2, ICC-01/09-48-Conf-Exp-Anx213, para. 41 (KEN-OTP-0033-0079 at 0087-0088); article by PeaceNet Kenya dated July 2009, ICC-01/09-31-Conf-Exp-Anx23, p. 129; report by LandInfo dated 29 January 2010, ICC-01/09-31-Conf-Exp-Anx23, pp. 123-124.

⁴⁶ Article in the "African Affairs", ICC-01/09-31-Conf-Exp-Anx23, p. 127, which states that in 2003 the Mungiki supported the Kenyan African National Union, and thus opposed the ruling National Rainbow Coalition of President Kibaki; Statement of Witness 14, ICC-01/09-48-Conf-Exp-Anx257, para. 137 (KEN-OTP-0043-0002 at 0029); Statement of Witness 14, ICC-01/09-48-Conf-Exp-Anx257, para. 130 (KEN-OTP-0043-0002 at 0028), that before the 2007 elections, he had been told that the Mungiki leadership had met with Raila Odinga and agreed that they would support the latter at the upcoming presidential election.

operation.⁴⁷ Cooperation within the 'organisation', as depicted by the Prosecutor, appears to have commenced following a meeting between leading PNU politicians and Mungiki members during which the PNU politicians solicited support in the upcoming elections in exchange for meeting specific demands made by the Mungiki.⁴⁸ Thereafter, the Mungiki gang appears to have benefited from financial and other support from PNU politicians.⁴⁹ I am also satisfied that at times the police did not intervene to stop crimes committed by Mungiki members in certain localities.⁵⁰ Overall, the evidence provided by the Prosecutor thus tends to show that the Mungiki, as a criminal gang, actually has an antagonistic relationship with the Kenyan Police Force⁵¹ but appeared to have benefited from certain *ad hoc* arrangements during the relevant period, despite a long record of violent clashes with the Kenyan police.

30. For their part, the Kenyan Police Forces are an integral part of the State apparatus with a hierarchy and a chain of command. The evidence tends to show that Francis Muthaura⁵² and Mohammed Ali⁵³ are *de jure* and *de facto* responsible for the policies, operations and actions of the Kenyan Police.

⁴⁷ Statement of Witness 14, ICC-01/09-48-Conf-Exp-Anx257 paras 112 and 130 (KEN-OTP-0043-0002 at 0024 and 0028); "NSIS Situation Report" dated 29 June 2007 submitted to the CIPEV, ICC-01/09-31-Conf-Exp-Anx23, p. 142-143.

⁴⁸ Statement of Witness 14, ICC-01/09-48-Conf-Exp-Anx257 paras 149-163 (KEN-OTP-0043-0002 at 0031-0034).

⁴⁹ Statement of Witness 14, ICC-01/09-48-Conf-Exp-Anx257, paras 201 and 202 (KEN-OTP-0043-0002 at 0040-0041); CIPEV Report, ICC-01/09-31-Conf-Exp-Anx3, p. 123 (KEN-OPT-0001-0364 at 0497); "NSIS Situation Report" from January 2008 submitted to the CIPEV, ICC-01/09-31-Conf-Exp-Anx23, pp. 93-94; KNCHR Report, ICC-01/09-31-Conf-Exp-Anx5, paras 317-318 (KEN-OTP-0001-0002 at 0094).

⁵⁰ Statement of Witness 14, ICC-01/09-48-Conf-Exp-Anx257, paras 198-200 and 280 (KEN-OTP-0043-0002, at 0040 and 0055).

⁵¹ "NSIS Situation Reports" dated 18 December 2007 submitted to the CIPEV, ICC-01/09-31-Conf-Exp-Anx23, pp. 551-553, which states that while one part of the Mungiki planned to disrupt voting in polling stations perceived to be Raila Odinga's strongholds, another part planned to cause violence immediately after the election to show their displeasure with the crackdown by the police/police-security forces/ministry of interior); "NSIS Situation Report" from January 2008 submitted to the CIPEV, ICC-01/09-31-Conf-Exp-Anx23, pp. 181-182, stating that the Mungiki collects protection money to finance their attacks: the report suggests a sustained crackdown); Statement of Witness 14, ICC-01/09-48-Conf-Exp-Anx257, para. 40 (KEN-OTP-0043-0002 at 0010), who alleges that four senior Mungiki leaders were killed extra-judicially by the police in March/April 2008.

⁵² Statement of Witness 27, ICC-01/09-48-Conf-Exp-Anx322, para. 97 (KEN-OTP-0040-0055 at 0077).

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.⁵⁴ 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 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.⁵⁵ 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.

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

⁵³ CIPEV, "Kenya Police", ICC-01/09-31-Conf-Exp-Anx23, pp. 183-185; Statement of Witness 67, ICC-01/09-48-Conf-Exp-Anx381, paras. 63-65 (KEN-OTP-0041-0209 at 0220).

⁵⁴ Statement of Witness 14, ICC-01/09-48-Conf-Exp-Anx257, paras 142 and 205 (KEN-OTP-0043-0002 at 0030 and 0041); KNCHR Report, ICC-01/09/31-Conf-Exp-Anx5, p. 187 (KEN-OTP-0001-0002 at 0187).

⁵⁵ Statement of Witness 14, ICC-01/09-48-Conf-Exp-Anx257, paras 112 and 130 (KEN-OTP-0043-0002 at 0024 and 0028); "NSIS Situation Report" dated 29 June 2007 submitted to the CIPEV, ICC-01/09-31-Conf-Exp-Anx23, pp. 142-143; Statement of Witness 14, ICC-01/09-48-Conf-Exp-Anx257, para. 40 (KEN-OTP-0043-0002 at 0010), who alleges that four senior Mungiki leaders were killed extrajudicially by the police in March/April 2008.

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.⁵⁶ 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.

33. With the evidence at hand, it is also striking that the Prosecutor has chosen in his Application to advance the argument of crimes against humanity pursuant to an “organizational policy” whilst neglecting the role and function of the State. I note the Prosecutor’s allegation that Francis Muthaura and Mohammed Ali (1) directed the Kenyan police to *attack* ODM supporters in Kisumu and Kibera and (2) directed the Kenyan police *not to intervene* in attacks⁵⁷ by the Mungiki gang against ODM supporters in Nakuru and Naivasha. Throughout his Application, the Prosecutor argues that Francis Muthaura and Mohammed Ali occupied high-level positions within the police and security apparatus of the State. By virtue of these positions they appear to have exercised authority over the Kenyan Police Forces, which is characterised by a vertical structure and obedience to orders of superiors. Furthermore, the Prosecutor presents the conduct of Francis Muthaura and Mohammed Ali as having occurred within the context of their respective official

⁵⁶ See also Dissenting Opinion of Judge Hans-Peter Kaul to the “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. 28, footnote 56.

⁵⁷ See footnote 6 of the Elements of Crimes, article 7.

roles as Chairman of the National Security Advisory Committee and the Commissioner of the Kenyan Police. In conclusion, any assessment of criminal conduct by the Kenyan Police Forces should have taken into consideration the official positions of the two Principal Perpetrators and, as the case may be, the responsibility of others with respect to the Kenyan Police Forces.

34. I therefore concur, in principle, with the Majority's finding that the Prosecutor "failed to provide an accurate factual and legal submission"⁵⁸ for acts of violence committed by the Kenyan Police Forces in Kisumu town and Kibera, which would have allowed me to assess whether the acts were committed pursuant to a State policy. By the same token, I concur with the Majority's finding that the Prosecutor did not allege the existence of a State policy by abstention with respect to the events in Nakuru and Naivasha towns.⁵⁹ I will therefore not entertain this issue.

35. In sum, whilst I am satisfied that crimes were committed in Nakuru, Naivasha, Kisumu and Kibera, and that certain organisational measures were taken to this end, I fail to see that these crimes were embedded in an "organizational policy". Hence, I consider that the Prosecutor has failed to prove that the crimes were committed pursuant to a policy of a state-like 'organisation' which is an indispensable element and inherent characteristic of crimes against humanity under article 7 of the Statute. I therefore continue to hold that the Court has no jurisdiction *ratione materiae* in the situation in the Republic of Kenya, including in the present case.

36. Accordingly, I decline to issue summonses to appear for Francis Muthaura, Uhuru Kenyatta and Mohammed Ali pursuant to article 58(7) of the Statute. Proceedings in this case shall not unfold before this Court.

⁵⁸ 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. 31.

⁵⁹ *Ibid.*, para. 24.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Kaul', with a horizontal line drawn underneath it.

Judge Hans-Peter Kaul
Judge

Dated this Tuesday, 15 March 2011

At The Hague, The Netherlands