

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 8 March 2011

PRE-TRIAL CHAMBER II

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

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

Public Document

**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

Counsel for the Defence

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

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision on the “Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “Application”).¹

1. On 31 March 2010, the Chamber issued its decision in which it granted, by majority, the Prosecutor’s request to commence an investigation in the situation in the Republic of Kenya for crimes against humanity to the extent specified in the operative part of the said decision (the “31 March 2010 Decision”).²

2. On 15 December 2010, the Prosecutor submitted the Application requesting the Chamber to:

- a) Find that there are reasonable grounds to believe that FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI committed crimes within the jurisdiction of the International Criminal Court and find that the issuance of summonses to appear is appropriate;
- b) Issue summonses to appear for FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI; and
- c) Direct the Registry, in consultation and coordination with the Prosecution, to prepare and transmit a request for summonses to appear for FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI.³

3. The Prosecutor also requested that the Chamber issues the summonses to appear for the three persons subject to a number of conditions outlined in paragraph 208 of the Application.⁴

4. On 16 February 2011, the Chamber requested the Prosecutor to submit all witnesses’ statements which he relies on for the purposes of his Application under

¹ ICC-01/09-31-Conf-Exp and its 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 Prosecutor’s Application, pp. 79-80.

⁴ Prosecutor’s Application, para. 208.

article 58 of the Statute, no later than 23 February 2011 (the “16 February 2011 Decision”).⁵

5. On 23 February 2011, the Chamber received the witnesses’ statements as requested in the 16 February 2011 Decision.⁶

6. For the sake of ruling on the Prosecutor’s Application, the Chamber shall examine in a chronological order the following elements: (i) jurisdiction and admissibility; (ii) whether there are reasonable grounds to believe that one or more crimes outlined in the Prosecutor’s Application have been committed; (iii) whether there are reasonable grounds to believe that Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (respectively, Muthaura, Kenyatta and Ali) are criminally responsible for the crimes presented in the Prosecutor’s Application; and (iv) whether the requirements to issue summons to appear for Muthaura, Kenyatta and Ali have been met.

I. Jurisdiction and admissibility

7. Article 19(1) of the Statute provides that: “The 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”.

8. The Chamber considers that, regardless of the mandatory language of article 19(1) of the Statute, which requires an examination of whether the Court has the competence to adjudicate the case under consideration, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential feature in the exercise by any judicial body of its

⁵ 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.

⁶ ICC-01/09-48-Conf-Exp and its Annexes.

functions and is derived from the well-recognised principle of *la compétence de la compétence*.⁷

9. The phrase “satisfy itself that it has jurisdiction” also entails that the Court must ‘attain the degree of certainty’ that the jurisdictional parameters set out in the Statute have been satisfied.⁸ Thus, the Chamber's determination as to whether it has jurisdiction over the case against Muthaura, Kenyatta and Ali is a prerequisite for examining the Prosecutor's Application and in turn, the issuance or not of summonses to appear against those persons pursuant to article 58 of the Statute.

10. In its 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”.⁹

11. In the context of the present decision, the Chamber has reviewed the Application and the supporting material and 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 the 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. In light of the foregoing the

⁷ 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. 23.

⁸ 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.

⁹ 31 March 2011 Decision, p. 83.

Chamber finds that it has jurisdiction to adjudicate the case which is the subject of the Prosecutor's Application.

12. Regarding admissibility, the second sentence of article 19(1) of the Statute dictates that an admissibility determination of the case is only discretionary at this stage of the proceedings, in particular when triggered by the *proprio motu* powers of the Chamber. Accordingly, the Chamber shall not examine the admissibility of the case at this phase of the proceedings.

II. Whether there are reasonable grounds to believe that one or more of the crimes presented in the Prosecutor's Application have been committed

13. In his Application, the Prosecutor alleged that crimes against humanity have been committed in different locations in the Republic of Kenya as follows:

Count 1

**Murder constituting a crime against humanity
(Articles 7(1)(a) and 25(3)(a) or (d) of the Statute)**

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALL, as co-perpetrators, or in the alternative, as part of a group of persons acting with a common purpose, 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 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), Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(a) or (d) of the Rome Statute.

Count 2

**Deportation or forcible transfer of population constituting a crime against
humanity
(Articles 7(1)(d) and 25(3)(a) or (d) of the Statute)**

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALL, as co-perpetrators, or in the alternative, as part of a group of persons 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)(a) or (d) of the Rome Statute.

Count 3
Rape and other forms of sexual violence constituting a crime against humanity
(Articles 7(1)(g) and 25(3)(a) or (d) of the Statute)

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALLI, as co-perpetrators, or in the alternative, as part of a group of persons 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 Kibera (Kibera Division, Nairobi Province), 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)(a) or (d) of the Rome Statute.

Count 4
Other inhumane acts constituting a crime against humanity
(Articles 7(1)(k) and 25(3)(a) or (d) of the Statute)

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALLI, as co-perpetrators, or in the alternative, as part of a group of persons 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 political party in or around 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), Republic of Kenya, in violation of Articles 7(1)(k) and 25(3)(a) or (d) of the Rome Statute.

Count 5
Persecution as a crime against humanity
(Articles 7(1)(h) and 25(3)(a) or (d) of the Statute)

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALLI, as co-perpetrators, or in the alternative, as part of a group of persons 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 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), Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(a) or (d) of the Rome Statute.

14. The Chamber notes that the Prosecutor's allegations relate to events that occurred at different times in different regions of the Republic of Kenya. The material presented at this stage does not indicate a sufficient link between the events in Nakuru and Naivasha, on the one hand, and those in Kisumu and Kibera, on the other hand, as to enable the Chamber to assess them in the course of one and the

same analysis. Accordingly, the Chamber will at first proceed to the question whether there are reasonable grounds to believe that the alleged crimes against humanity within the jurisdiction of the Court have been committed in Nakuru and Naivasha. The events that allegedly took place in Kisumu and Kibera will be examined thereafter.

15. The Prosecutor submitted that the crimes allegedly committed in Nakuru and Naivasha occurred in the context of a widespread and systematic attack against the civilian population carried out by the Mungiki and pro-Party of National Unity (PNU) youth against perceived Orange Democratic Movement (ODM) supporters, pursuant to an organizational policy.¹⁰

16. The Chamber recalls its legal analysis and findings on the law (as opposed to the facts) concerning the contextual elements of the crimes against humanity as conducted in its previous decisions, including the 31 March 2010 Decision, and sees no reason either to reiterate or to depart from them.¹¹

17. On the basis of the Application, the information and the evidence presented (collectively, the “material”), the Chamber finds that there are reasonable grounds to believe that from on or about 24 January 2008 until 31 January 2008, the Mungiki criminal organization carried out an attack against the non-Kikuyu population perceived as supporting the ODM (mostly belonging to Luo, Luhya and Kalenjin ethnic groups) in Nakuru and Naivasha.¹² According to the material presented, the events in Nakuru resulted in at least 112 deaths,¹³ 39 reported cases of rape,¹⁴ at least five cases of forcible circumcision¹⁵ and the displacement of thousands of people.¹⁶

¹⁰ Prosecutor’s Application, paras 57, 146, 152.

¹¹ 31 March 2010 Decision, paras 77-99. 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, paras 73-88.

¹² Prosecutor’s Application, Annex 3, pp. 114, 128-130; Annex 5, pp. 95, 98; Annex 7, pp. 49-52, 54-55; Annex 8, p. 15; Annex 23, pp. 244, 373, 377-379, 557-558, 664.

¹³ Prosecutor’s Application, Annex 3, p. 119. See also Annex 7, p. 56, reporting 161 deaths.

¹⁴ Prosecutor’s Application, Annex 23, p. 560.

¹⁵ Prosecutor’s Application, Annex 3, pp. 114, 119; Annex 7, p. 55; Annex 23, p. 560.

¹⁶ Prosecutor’s Application, Annex 7, p. 56.

With respect to the events taking place in Naivasha, the material made available to the Chamber indicates that at least 40 deaths occurred as a result of the Mungiki attack,¹⁷ along with at least four cases of forcible circumcision of Luo men¹⁸ and the displacement of up to 10,000 residents.¹⁹

18. Thus, the Chamber is satisfied, to the requisite threshold, that the events described in the preceding paragraph constitute an “attack” within the meaning of article 7(1) of the Statute. The Chamber concurs with the Prosecutor in that the targeted population was civilian, distinguished by virtue of its perceived political affiliation with the ODM.²⁰ It is also sufficiently sustained by the material presented that such perception of political affiliation was largely rooted in ethnic divisions.²¹

19. With respect to the statutory requirement that an attack against a civilian population be widespread or systematic, the material presented first reveals the large-scale nature of the attack as well as a high number of resultant victims.²² The Chamber thus finds that there are reasonable grounds to believe that the attack in Nakuru and Naivasha was widespread. Moreover, the material submitted shows that the attack by the Mungiki in Nakuru and Naivasha was organized²³ and followed a consistent pattern, which is demonstrated by the fact that the attackers utilized means to distinguish potential targets, such as employing local guides or identifying residents by their native language.²⁴ The Chamber thus finds that there are also reasonable grounds to believe that the attack in Nakuru and Naivasha was systematic.

¹⁷ Prosecutor’s Application, Annex 3, pp. 130-131; Annex 5, p. 95; Annex 7, p. 52; Annex 23, pp. 619-622.

¹⁸ Prosecutor’s Application, Annex 3, p. 131; Annex 5, p. 95; Annex 7, p. 52; Annex 23, pp. 622-623.

¹⁹ Prosecutor’s Application, Annex 3, p. 288; Annex 5, p. 95; Annex 23, pp. 597-599.

²⁰ Prosecutor’s Application, Annex 3, pp. 114, 131; Annex 5, p. 95; Annex 7, pp. 49, 54; Anx 8, p. 15; Anx 23, pp. 244, 377-379.

²¹ Prosecutor’s Application, Annex 5, pp. 28, 49, Annex 7, p. 21; Annex 8, pp. 6, 8.

²² See *supra* para. 17.

²³ Prosecutor’s Application, Annex 5, pp. 94, 98-99; Annex 23, pp. 38-46, 75-84, 159-160, 177-178, 246-251, 260, 296-299, 327-331, 568-569, 616-617, 645-646.

²⁴ Prosecutor’s Application, Annex 3, p. 131; Annex 7, pp. 51-52; Annex 8, p. 18; Annex 23, pp. 244, 351, 382, 387-388, 684-685.

20. The Chamber is also satisfied that there are reasonable grounds to believe that the attack was carried out pursuant to an organizational policy of the Mungiki. Due to the particulars of the events at hand, the Chamber will first give reasons as to why it considers the Mungiki to qualify as an “organization” under article 7(2)(a) of the Statute, before proceeding to the evaluation as to the existence of a policy.

21. As previously clarified by the Chamber, the distinction between “organizations” under article 7(2)(a) of the Statute and other groups that do not amount to such qualification should be drawn on whether the group has the capability to perform acts which infringe on basic human values.²⁵ In this respect, the Chamber, in its 31 March 2010 Decision, listed a series of factors that may be taken into account with a view to conducting such determination. Among those factors, *inter alia*, the following are included: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group has criminal activities against the civilian population as a primary purpose; and (iv) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population.²⁶

22. In this regard, the Chamber finds that there are reasonable grounds to believe that the Mungiki operate as a large and complex hierarchical structure featuring various levels of command and a clear division of duties in the command structure.²⁷ Furthermore, the material presented illustrates that obedience to the internal rules of the Mungiki is achieved by way of strict disciplinary measures.²⁸ The material also shows the existence of a trained militant wing of the Mungiki, which is employed to carry out violent operations, including executions.²⁹ The extent of the power of the Mungiki is sustained by the available material which demonstrates the Mungiki’s control over core societal activities in many of the poor residential areas, particularly

²⁵ 31 March 2010 Decision, para. 90.

²⁶ 31 March 2010 Decision, para. 93.

²⁷ Prosecutor’s Application, Annex 23, pp. 104-107, 115, 135-136.

²⁸ Prosecutor’s Application, Annex 23, pp. 124, 137-138, 141-142.

²⁹ Prosecutor’s Application, Annex 23, pp. 110-112, 115.

in Nairobi. In this regard, according to the material presented, the Mungiki, *inter alia*: (i) control and provide social services such as electricity, water and sanitation;³⁰ (ii) administer criminal justice through local chairmen who act as judges in their communities;³¹ and (iii) control the transport sector and other business activities, where they provide informal employment for members.³² The material shows that to support such activities, the Mungiki collect informal taxes in the areas under their control.³³ In light of the foregoing, the Chamber is of the opinion that the material submitted provides reasonable grounds to believe that the Mungiki qualify as an organization within the meaning and for the purposes of article 7(2)(a) of the Statute.

23. Turning now to the policy requirement, the Chamber is guided in its conclusion by the material relating to the occurrence, prior to the attack, of planning meetings, locally in Nakuru and Naivasha as well as in Nairobi.³⁴ The material also provides reasonable grounds to believe that: (i) the majority of the attackers had been ferried from elsewhere prior to the attack;³⁵ (ii) in the period immediately preceding the events, large quantities of crude weapons were bought and distributed to attackers;³⁶ and (iii) leaflets announcing the attack were circulated among the targeted population.³⁷ There are thus reasonable grounds to believe that the attack in Nakuru and Naivasha was carried out pursuant to a policy established to that effect by the Mungiki organization.

24. The Chamber further notes the Prosecutor's mentioning of the inactivity of the Kenyan Police Forces during the attack in Nakuru and Naivasha³⁸ and the references

³⁰ Prosecutor's Application, Annex 23, pp. 123-124, 129.

³¹ Prosecutor's Application, Annex 23, pp. 108, 129, 138-139.

³² Prosecutor's Application, Annex 23, pp. 122, 123, 129.

³³ Prosecutor's Application, Annex 5, p. 54; Annex 23, pp. 118, 121, 122, 129.

³⁴ Prosecutor's Application, Annex 5, pp. 94, 98-99; Annex 23, pp. 38-46, 75-84, 159-160, 177-178, 246-251, 260, 296-299, 327-331, 568-569, 616-617, 645-646.

³⁵ Prosecutor's Application, Annex 3, p. 135; Annex 5, pp. 94, 98; Annex 23, pp. 243-244, 544-545, 706-710.

³⁶ Prosecutor's Application, Annex 5, pp. 94, 98.

³⁷ Prosecutor's Application, Annex 5, p. 98; Annex 23, pp. 372, 570.

³⁸ Prosecutor's Application, para. 149, 157.

to this effect in the material presented.³⁹ However, the Prosecutor explicitly submitted that the attack occurred pursuant to an “organizational” policy,⁴⁰ without alleging the existence of a State policy by abstention.⁴¹ Accordingly, the Chamber will not entertain this issue. This is without prejudice to further submissions in this regard to be considered by the Chamber in the future.

25. With respect to the alleged underlying acts constituting crimes against humanity, the Chamber is satisfied, on the basis of the examination of the facts referred to in paragraph 17 above, that there are reasonable grounds to believe that murder and forcible transfer of population as acts constituting crimes against humanity were committed as part of the attack against the civilian population in Nakuru and Naivasha (Counts 1 and 2).

26. The Chamber also finds reasonable grounds to believe that rape as an act constituting a crime against humanity was committed as part of the attack in Nakuru (Count 3). Conversely, the Chamber notes that the Prosecutor failed to provide evidence substantiating his allegation that rape was committed as part of the attack in Naivasha. Consequently, and without prejudice to new evidence being submitted at a later stage of the proceedings, the Chamber finds that there are no reasonable grounds to believe that rape as an act constituting crimes against humanity was committed in Naivasha.

27. The Chamber notes that the Prosecutor alleged that, in addition to rape, other forms of sexual violence were committed during the attack.⁴² In this regard, it appears from his Application that, in the Prosecutor’s view, the acts of forcible circumcision of Luo men constitute such “other forms of sexual violence” within the meaning of article 7(1)(g) of the Statute.⁴³ In the Chamber’s view, however, the acts of forcible circumcision cannot be considered acts of a “sexual nature” as required by

³⁹ Prosecutor’s Application, Annex 3, p. 122; Annex 8, p. 19; Annex 23, pp. 241, 243-244, 657-658.

⁴⁰ Prosecutor’s Application, para. 57.

⁴¹ Elements of Crimes, footnote 6 to article 7.

⁴² Prosecutor’s Application, pp. 17-18 (Count 3).

⁴³ Prosecutor’s Application, para. 151.

the Elements of Crimes⁴⁴ but are to be more properly qualified as “other inhumane acts” within the meaning of article 7(1)(k) of the Statute. The Chamber reaches this conclusion in light of the serious injury to body that the forcible circumcision causes and in view of its character, similar to other underlying acts constituting crimes against humanity.⁴⁵ For this reason, and on the basis of the determination of facts above in paragraph 17, the Chamber concludes that there are reasonable grounds to believe that other inhumane acts as an act constituting a crime against humanity were committed as part of the attack against the civilian population in Nakuru and Naivasha (Count 4).

28. Finally, with respect to the Prosecutor’s allegation that persecution as an act constituting a crime against humanity was also committed during the attack described above, the Chamber considers that the available material provides reasonable grounds to believe that the acts of murder, forcible transfer of population, rape and other inhumane acts were committed against a collectivity identified on political grounds by reason of its perceived affiliation with the ODM.⁴⁶ Therefore, the Chamber finds that there are reasonable grounds to believe that persecution as an act constituting a crime against humanity was committed as part of the attack against the civilian population in Nakuru and Naivasha (Count 5).

29. Having analyzed the Prosecutor’s allegations and the material presented in relation to the events in Nakuru and Naivasha, the Chamber now turns to the events in Kisumu and Kibera that the Prosecutor likewise alleged to constitute crimes against humanity.

30. The Chamber finds that the material presented by the Prosecutor provides reasonable grounds to believe that in late December 2007 and in January 2008, Kenyan police used excessive force, in particular live ammunition, against the

⁴⁴ Elements of Crimes, Article 7(1)(g)-6.

⁴⁵ Elements of Crimes, Article 7(1)(k).

⁴⁶ Prosecutor’s Application, Annex 7, pp. 50-52; Annex 8, p. 18; Annex 23, pp. 244, 351, 372, 378, 382, 387-388, 570, 662, 684-685. See also Annex 5, pp. 28, 49, Annex 7, p. 21; Annex 8, pp. 6, 8.

civilian residents of Kisumu, which resulted in over 60 deaths.⁴⁷ In addition, there are reasonable grounds to believe that from late December 2007 until early January 2008 and again in mid-January 2008, Kenyan police raided the slums of Kibera⁴⁸ and that this resulted in deaths,⁴⁹ injuries⁵⁰ and rapes.⁵¹ The material also provides reasonable grounds to believe that, during that period, the Mungiki perpetrated acts of violence against the civilian population of Kibera.⁵²

31. With respect to these events in Kisumu and Kibera, the Chamber notes that the Prosecutor, although mentioning in his Application that the violence was executed by the Kenyan Police Forces, failed to provide an accurate factual and legal submission which would require the Chamber to examine whether the acts of violence were part of an attack pursuant to or in furtherance of a State policy.

32. Apart from the foregoing, it is even more compelling that the material presented by the Prosecutor does not provide reasonable grounds to believe that the events which took place in Kisumu and/or in Kibera can be attributed to Muthaura, Kenyatta and/or Ali under any mode of liability embodied in article 25(3) of the Statute.

33. For these reasons, the Chamber deems it unnecessary to proceed with any further analysis and legal qualification of the events which occurred in Kisumu and Kibera. This is without prejudice to further submissions in this regard to be considered by the Chamber in the future.

⁴⁷ Prosecutor's Application, Annex 3, pp. 194-195, 199; Annex 7, p. 31; Annex 19.

⁴⁸ Prosecutor's Application, Annex 3, p. 214-215; Annex 20; Annex 23, pp. 368, 494, 511-512, 518-530, 532-533, 534-535.

⁴⁹ Prosecutor's Application, Annex 7, pp. 36-37; Annex 20; Annex 23, pp. 525-527.

⁵⁰ Prosecutor's Application, Annex 3, p. 215; Annex 23, p. 494.

⁵¹ Prosecutor's Application, Annex 3, pp. 265-267; Annex 23, pp. 494, 507, 519.

⁵² Prosecutor's Application, Annex 23, pp. 499, 511-512.

III. Whether there are reasonable grounds to believe that Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali are criminally responsible for the crimes alleged in the Prosecutor's Application

34. The Prosecutor alleged that Muthaura, Kenyatta and Ali are criminally responsible for the crimes against humanity alleged under the different counts presented to the Chamber either as indirect co-perpetrators pursuant to article 25(3)(a) of the Statute or, in the alternative, as having contributed to a crime committed by a group of persons under article 25(3)(d) of the Statute.⁵³

35. The Chamber recalls its finding in the confirmation of charges decision concerning 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".⁵⁴

36. 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 fulfilment of the material elements of the crime; (iii) the suspect must have control over the organisation; (iv) the organisation must consist of an organised 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-perpetrator(s) must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and

⁵³ Prosecutor's Application, para. 163.

⁵⁴ 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.

(vii) 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).⁵⁵

37. On the basis of the material provided by the Prosecutor, the Chamber finds that there are reasonable grounds to believe that a series of meetings were held between, at least, mid-November 2007 and January 2008 between, *inter alia*, Muthaura, Kenyatta and members of the Mungiki, wherein the retaliatory attack in the Rift Valley was planned.⁵⁶ According to the material presented, it was envisaged at the meetings that the Mungiki would carry out the attack with the purpose of keeping the PNU in power, in exchange for an end to government repression and protection of the Mungiki's interests.⁵⁷ The Chamber is therefore of the view that there are reasonable grounds to believe that a common plan of committing the alleged crimes was agreed upon among Muthaura, Kenyatta, Mungiki representatives and others.

38. Conversely, the Chamber does not find at this stage that the material presented by the Prosecutor provide reasonable grounds to believe that Ali participated in the common plan, *i.e.* that he agreed with the other members of the plan, sharing the same intent, to commit the crimes against humanity referred to in the previous section. For this reason, the Chamber will not examine the remaining elements of indirect co-perpetration with respect to Ali's alleged individual criminal responsibility, but will proceed in this section only with regard to Kenyatta and Muthaura. Thereafter, the Chamber will examine whether there are reasonable grounds to believe that Ali in any other way contributed to the commission of the crimes by a group of persons acting with a common purpose, as alternatively alleged by the Prosecutor under article 25(3)(d) of the Statute.

⁵⁵ 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.

⁵⁶ Prosecutor's Application, Annex 5, pp. 134, 187; Annex 23: pp. 11, 34-36, 38-46, 75-84, 91, 159-160.

⁵⁷ Prosecutor's Application, Annex 23: pp. 43, 75-82.

39. In his Application, the Prosecutor alleged that both Kenyatta and Muthaura performed essential tasks in the implementation of the common plan.⁵⁸ The Chamber finds that there are reasonable grounds to believe that Kenyatta and Muthaura, as part of the common plan, had agreed to fulfill the material elements of the alleged crimes by using their authority respectively over the Mungiki and over the Kenyan Police Forces.⁵⁹

40. Regarding Kenyatta's role in the implementation of the common plan, the Prosecutor alleged that his tasks mainly consisted in securing the cooperation of the Mungiki criminal organization for the perpetration of the crimes agreed as part of the common plan.⁶⁰ The Chamber is of the view that there are reasonable grounds to believe that indeed Kenyatta: (i) organized and facilitated, on several occasions, meetings between powerful pro-PNU figures and representatives of the Mungiki, thus making possible the very conception of the common plan referred to above;⁶¹ (ii) supervised the preparation and coordination of the Mungiki in advance of the attack;⁶² (iii) contributed money towards the retaliatory attack perpetrated by the Mungiki in the Rift Valley.⁶³ The Chamber is thus of the view that there are reasonable grounds to believe that the contribution given by Kenyatta to the implementation of the common plan was essential.

41. In this regard, the Chamber recalls its previous findings as to the organized and hierarchical structure of the Mungiki.⁶⁴ There are also reasonable grounds to believe that Kenyatta had control over the Mungiki organization and that the commission of the crimes was secured by its members' almost automatic compliance with Kenyatta's orders. This emerges, to the requisite threshold, from the material submitted by the Prosecutor that indicate Kenyatta's powerful position within the

⁵⁸ Prosecutor's Application, para. 168.

⁵⁹ Prosecutor's Application, Annex 23: pp. 11, 75-82, 91.

⁶⁰ Prosecutor's Application, para. 170.

⁶¹ Prosecutor's Application, Annex 23, pp. 10-11, 34-36, 159-160.

⁶² Prosecutor's Application, Annex 23, pp. 83-84.

⁶³ Prosecutor's Application, Annex 5, pp. 134, 187; Annex 23: pp. 11, 287.

⁶⁴ *Supra*, para. 22.

Mungiki organization that have received from him protection and patronage on several occasions.⁶⁵ For instance, the material available shows that in exchange of this protection and patronage, Kenyatta's candidacy for the Office of President in the 2002 general election was publicly endorsed by the Mungiki.⁶⁶ There are thus reasonable grounds to believe that Kenyatta exercised over the Mungiki a control that amounted to the "control over the organization" as required for the purposes of establishing individual criminal liability under article 25(3)(a) of the Statute.

42. With respect to Muthaura, the material presented indicates that he personally led, therefore exercising a coordinating role within the organization, a number of meetings between prominent PNU members and Mungiki members wherein the common plan and its implementation were agreed upon.⁶⁷ The material submitted also shows that Muthaura, in at least one occasion, directly paid a significant sum of money to Mungiki representatives at the conclusion of one of the planning meetings held in November 2007.⁶⁸ Furthermore, the Chamber recalls that, at the relevant time, Muthaura held the position of Head of the Public Service and Secretary to the Cabinet, as well as of Chairman of the National Security and Advisory Committee. There are reasonable grounds to believe that Muthaura, by virtue of his position, exercised direct authority over the Kenyan Police Forces,⁶⁹ which secured automatic compliance with his orders. Thus the Chamber finds reasonable grounds to believe that Muthaura used his authority to ensure that the Kenyan Police Forces did not interfere with the commission of the crimes directly perpetrated by the Mungiki.⁷⁰

43. In light of the foregoing, the Chamber is satisfied that there are reasonable grounds to believe that Muthaura had the power to frustrate the commission of the crimes in the way they were committed by not performing his tasks and that his contribution was thus essential.

⁶⁵ Prosecutor's Application, Annex 23: pp. 91, 94, 106.

⁶⁶ Prosecutor's Application, Annex 23: pp. 27, 91, 130.

⁶⁷ Prosecutor's Application, Annex 23, pp. 38-46, 75-82.

⁶⁸ Prosecutor's Application, Annex 23, p. 45.

⁶⁹ Prosecutor's Application, Annex 23: pp. 192-193.

⁷⁰ Prosecutor's Application, Annex 3, p. 122; Annex 8, p. 19; Annex 23, pp. 81-82, 241, 243-244, 657-658.

44. In view of the above, the Chamber finds that the submitted material provides reasonable grounds to believe that: (i) a common plan that included the commission of the alleged crimes had been agreed among Kenyatta, Muthaura and others; (ii) Kenyatta and Muthaura, as part of the implementation of such common plan, performed coordinated essential tasks, respectively through the Mungiki and the Kenyan Police Forces; (iii) Kenyatta and Muthaura exercised joint control over the commission of these crimes and were aware of the circumstances enabling them to jointly exercise such control; (iv) Kenyatta and Muthaura were mutually aware and accepted that the implementation of the common plan, by way of performing their coordinated essential tasks, would have resulted in the fulfillment of the material elements of the alleged crimes; and (v) Kenyatta and Muthaura intended the crimes to be committed and were aware of the widespread and systematic nature of the attack committed against the civilian population, in the context of which the crimes were perpetrated.⁷¹

45. For the foregoing reasons, the Chamber finds that there are reasonable grounds to believe that Kenyatta and Muthaura are criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute for the crimes alleged by the Prosecutor in his Application under article 58 of the Statute.

46. As found above, the Chamber is of the view that the material submitted by the Prosecutor is not sufficient to establish reasonable grounds to believe that Ali can be held responsible as indirect co-perpetrator under article 25(3)(a) of the Statute. The Prosecutor alleged, in the alternative, that Ali is criminally responsible as having contributed to a crime committed by a group of persons within the meaning of article 25(3)(d) of the Statute.

47. This mode of liability has the following specific requirements: (i) a crime within the jurisdiction of the Court is attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting

⁷¹ Prosecutor's Application, Annex 23, pp. 75-84.

with a 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 (objective elements); (iv) the contribution is intentional; and (v) the contribution has been made either (a) with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime (subjective elements).⁷²

48. The Chamber recalls its findings in the preceding sections that there are reasonable grounds to believe that crimes within the jurisdiction of the Court were committed.⁷³ The Chamber has also found that there are reasonable grounds to believe that the said crimes have been committed, pursuant to a common plan, by a group of persons acting in a concerted manner.⁷⁴

49. The Chamber is of the view that there are reasonable grounds to believe that Ali, before the commission of the crimes, was contacted by Muthaura who informed him in advance of the intention of the members of the common plan to commit the alleged crimes and instructed him to order the Kenyan Police Forces not to interfere with the perpetration of the crimes by the Mungiki.⁷⁵ As demonstrated by the failure of the police to respond to the crimes being committed,⁷⁶ there are reasonable grounds to believe that Ali, exercising his authority as the Commissioner of the Kenyan Police Forces, directed the Police not to obstruct the Mungiki from committing the crimes. There are thus reasonable grounds to believe that the contribution made by Ali to the commission of the alleged crimes was intentional and relevant enough so as to amount to a contribution "in any other way" within the meaning of article 25(3)(d) of the Statute.

50. Likewise, there are reasonable grounds to believe that Ali's contribution to the commission of the crimes was made with the awareness of the intention of the group

⁷² Pre-Trial Chamber I, "Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana", ICC-01/04-01/10, para. 39.

⁷³ See *supra* paras 13 to 28.

⁷⁴ See *supra* paras 34 to 44.

⁷⁵ Prosecutor's Application, Annex 23, pp. 81-82.

⁷⁶ Prosecutor's Application, Annex 3, p. 122; Annex 8, p. 19; Annex 23, pp. 241, 243-244, 657-658.

to commit the said crimes.⁷⁷ Therefore, the Chamber does not find necessary at this stage to assess whether the other form of subjective element set out in the alternative in sub-paragraph (i) of article 25(3)(d) of the Statute emerges, to the requisite threshold, from the material presented.

51. In view of the foregoing, the Chamber is satisfied that there are reasonable grounds to believe that Ali is criminally responsible under article 25(3)(d) of the Statute for having contributed to the commission of the crimes against humanity as alleged by the Prosecutor under the different counts presented to the Chamber.

52. The Chamber wishes to clarify that all the findings in the present section are without prejudice to further evidence at a later stage of the proceedings which would establish individual criminal responsibility for the crimes under a different mode of liability.

IV. Whether the requirements for the issuance of summons to appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali have been met

53. The Chamber notes that according to article 58(7) of the Statute, summonses to appear for Muthaura, Kenyatta and Ali shall be issued, if it is satisfied that there are reasonable grounds to believe that these persons have committed the crimes alleged in the Prosecutor's Application and that summonses are sufficient to ensure their appearance before the Court.

54. The Chamber has already determined that there are reasonable grounds to believe that criminal responsibility under article 25(3)(a) and (d) of the Statute can be attributed to the persons named in the Prosecutor's Application for the occurrence of the crimes against humanity discussed in section II above. Yet, for summonses to be issued, article 58(7) of the Statute still requires the Chamber to be satisfied that such an option is sufficient to ensure the persons' appearance before the Court.

⁷⁷ Prosecutor's Application, Annex 23, pp. 81-82.

55. The Chamber concurs with the Prosecutor that the issuance of a warrant of arrest is not necessary as neither Muthaura nor Kenyatta nor Ali are perceived to be a flight risk and that nothing currently indicates that they would evade personal service of the summons or refrain from cooperating if summoned to appear.⁷⁸ Accordingly, the Chamber is satisfied that the issuance of summonses to appear for Muthaura, Kenyatta and Ali is sufficient to ensure their appearance before the Court. This is without prejudice to the Chamber's competence to revisit its finding either *proprio motu* or in response to a request submitted by the Prosecutor. Should Muthaura, Kenyatta and Ali fail to appear on the date specified in the summonses or to comply with the conditions to be imposed, the Chamber reserves the right to replace the summonses to appear with warrants of arrest under article 58 of the Statute and rule 119(4) of the Rules of Procedure and Evidence.

V. Conclusion

56. In view of the foregoing, the Chamber is satisfied that there are reasonable grounds to believe that Muthaura and Kenyatta are criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute and that Ali is criminally responsible as having contributed to crimes committed by a group of persons within the meaning of article 25(3)(d) of the Statute for the following acts constituting crimes against humanity committed from on or about 24 January 2008 until 31 January 2008:

- (i) murder within the meaning of article 7(1)(a) of the Statute (Count 1, only with respect to the murders committed in Nakuru and Naivasha);
- (ii) forcible transfer of population within the meaning of article 7(1)(d) of the Statute (Count 2, with respect to the forcible transfer committed in Nakuru and Naivasha);
- (iii) rape within the meaning of article 7(1)(g) of the Statute (Count 3, only with respect to the rapes committed in Nakuru);

⁷⁸ Prosecutor's Application, paras 207, 210, 211.

- (iv) other inhumane acts within the meaning of article 7(1)(k) of the Statute (Count 4, only with respect to the acts committed in Nakuru and Naivasha);
- (v) persecution within the meaning of article 7(1)(h) of the Statute (Count 5, only with respect to the acts committed in Nakuru and Naivasha).

57. The Chamber therefore decides to issue summonses to appear, pursuant to article 58(7) of the Statute, for the three persons, being satisfied that this measure is sufficient to ensure their appearance before the Court.

FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY

SUMMONS

FRANCIS KIRIMI MUTHAURA, born on 20 October 1946 in Mariene, Kenya, currently holding the positions of Head of the Public Service and Secretary to the Cabinet of the Republic of Kenya;

UHURU MUIGAI KENYATTA, born on 26 October 1961 in Nairobi, Kenya, currently holding the positions of Deputy Prime Minister and Minister for Finance of the Republic of Kenya; and

MOHAMMED HUSSEIN ALI, born in 1956 in Eldoret, Kenya, currently holding the position of Chief Executive of the Postal Corporation of Kenya;

to **APPEAR** before the Court on **Thursday, 7 April 2011 at 14.30 hours** for the purposes of the hearing to be held pursuant to article 60 of the Statute and rule 121(1) of the Rules;

ORDERS

Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, without prejudice to further decisions of the Chamber in this respect:

- (i) to have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali have been summoned;
- (ii) to refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence;
- (iii) to refrain from committing crime(s) set forth in the Statute;
- (iv) to attend all required hearings at the International Criminal Court;

ORDERS

the Registrar to serve the present summonses on Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, as required by article 58(7) of the Statute and in accordance with regulation 31(3)(b) of the Regulations of the Court;

ORDERS

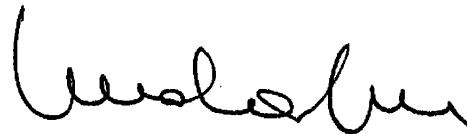
the Registrar, in accordance with regulation 110 of the Regulations of the Court, to make, where necessary, a request for cooperation to the Republic of Kenya in conformity with articles 93(1)(d) and 99(1) of the Statute.

Judge Hans-Peter Kaul shall issue a dissenting opinion in due course.

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 Tuesday, 8 March 2011

At The Hague, The Netherlands