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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

Victims' Observations in relation to the Confirmation of Charges Hearing

Source: Victims' Legal Representative

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

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I. INTRODUCTION

1. Two hundred and thirty-three victims were authorized to participate in the Confirmation of Charges Hearing and related proceedings in this case, pursuant to the Single Judge's Decision of 26 August 2011.¹ The undersigned Legal Representative was appointed in common to all participating victims by the Decision.²

2. The number of victim-participants has been reduced by two since the issuance of the Decision, as a consequence of the deaths of Victim a/8278/11 and Victim a/9316/11.³ Additionally, the Legal Representative has determined that the number of participating victims should be further reduced by two, insofar as three different intermediaries submitted application forms on behalf of the same victim to the Court's Victims Participation and Reparations Section ("VPRS"). The three applications were assigned different applicant numbers and processed as if for three different applicants, resulting in three pseudonyms being assigned to the same victim in the Decision. A review of the identification cards which accompanied applicant numbers a/9404/11, a/9275/11, and a/8275/11 confirm that they pertain to the same victim.

3. Excluding both deceased victims and two of the three pseudonyms which pertain to the same victim, 229 victims remain as participants in the proceedings.

II. PROCEDURAL POSTURE

¹ "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings," ICC-01/09-02/11-267, 26 August 2011 ("the Decision").

² See, paragraph (e), page 46 of the Decision.

³ Victim a/8278/11 died during the month of October 2011 due to ill health. The Legal Representative has determined that Victim a/9316/11 died due to ill health in mid-June 2011 before the appointment of the Legal Representative, but news of the victim's death has only now come to light. A notification will be filed with the Pre-Trial Chamber regarding both deceased victims as soon as official records of the deaths are available and/ or obtained by the Legal Representative.

4. On 31 March 2010, the Prosecutor was authorized by a Majority of the Chamber to open an investigation into the situation in the Republic of Kenya.⁴ Summonses to appear were issued to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali⁵ by the same Majority on 8 March 2011,⁶ with Judge Hans-Peter Kaul dissenting.⁷ The Suspects voluntarily appeared and the Initial Appearance was held on 8 April 2011.⁸

5. The Document Containing the Charges (“DCC”) was filed by the Prosecutor on 19 August 2011.⁹ An amended DCC was filed on 2 September 2011.¹⁰

6. The Decision specified that written submissions on specific issues of law and/or facts could be made by the Legal Representative, further to an application which demonstrates how the victims’ personal interests are affected by the issues at stake and if the Chamber deems it appropriate.¹¹

7. The Confirmation of Charges Hearing¹² was held between 21 September and 5 October 2011.¹³ At the close of the Hearing, the Chamber invited the victims to

⁴ “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, 31 March 2010; see *ibid.*, pages 84 – 163, for the *Dissenting Opinion of Judge Hans-Peter Kaul*.

⁵ Hereinafter “the Suspects.”

⁶ “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, 8 March 2011.

⁷ “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,’” ICC-01/09-02/11-3, 15 March 2011.

⁸ See, ICC-01/09-02/11-T-1-ENG ET WT 08-04-2011, 1/23 PV PT.

⁹ “Prosecution’s Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis

Chart of Evidence Included in the List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3),” ICC-01/09-02/11-257, 19 August 2011. See, also, Article 61(3)(a), Rome Statute of the International Criminal Court (“the Statute”).

¹⁰ “Prosecution’s Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), (4) and (5),” ICC-01/09-02/11-280, 2 September 2011. All references herein to the “DCC” are to the amended document.

¹¹ The Decision, para. 118. Relevant to the Chamber’s determination of the propriety of such submissions by the Legal Representative are factors such as, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects, and the principle of fairness and expeditiousness of the proceedings. *Ibid.*

¹² Hereinafter “the Hearing.”

submit written observations in relation to the Hearing.¹⁴ Having accepted that invitation with gratitude, the victims now bring forth their observations.

III. APPLICABLE LEGAL PRINCIPLES

A. Evidentiary Threshold at the Hearing

8. Article 61(7) of the Statute sets out the evidentiary threshold the Pre-Trial Chamber shall apply at this stage of the proceedings: i.e., “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”

9. Article 61(5) articulates much the same standard of proof regarding the Prosecutor’s obligation or burden of proof at the hearing: namely, to “support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.”

10. The various Chambers of the Court have consistently held that in order to satisfy the requisite evidentiary threshold, the Prosecutor “must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning his specific allegations.”¹⁵

11. Furthermore, the Pre-Trial Chamber stated in the *Abu Garda* case that “the purpose of the confirmation hearing is limited to committing to trial only those

¹³ See Annex A to “Decision on the Schedule for the Confirmation of Charges Hearing,” ICC-01/09-02/11-321, 13 September 2011. See, also, ICC-01/09-02/11-T-4-ENG ET WT 21-09-2011, 1/121 PV PT and ICC-01/09-02/11-T-15-CONF-ENG ET 05-10-2011, 1/90 SZ PT.

¹⁴ ICC-01/09-02/11-T-15-CONF-ENG ET 05-10-2011, 1/90 SZ PT, page 2, lines 4 – 7 and page 88, lines 14 – 17.

¹⁵ 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 (the “Katanga Decision”), para. 63; and Pre-Trial Chamber I, “Decision on the Confirmation of Charges” ICC-01/04-01/06-803-tEN (the “Lubanga Decision”), para. 37.

persons against whom sufficiently compelling charges beyond mere theory or suspicion have been brought. This mechanism is designed to protect the rights of the Defence against wrongful and unfounded charges. Accordingly at no point should the Pre-Trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction. Such a high standard is not compatible with the standard under article 61(7) of the Statute.”¹⁶

12. Furthermore, and pursuant to Article 61(5) of the Statute, the Prosecutor may rely on documentary and summary evidence at the Hearing and need not call the witnesses expected to testify at the trial.

13. Based on its determination of whether or not the evidentiary threshold at the Hearing has been satisfied, Article 61(7)(c)(ii) authorizes the Chamber to adjourn the hearing and request the Prosecutor to consider amending a charge, where the evidence submitted during the Hearing appears to establish a different crime within the jurisdiction of the Court.

B. Crimes against Humanity under the Rome Statute

14. The Suspects are charged with the crimes against humanity of murder under Article 7(1)(a), deportation or forcible transfer of population under Article 7(1)(d), rape and other forms of sexual violence under Article 7(1)(g), other inhuman acts under Article 7(1)(k), and persecution under Article 7(1)(h).

15. The Chapeau of Article 7 provides that:

¹⁶ Pre-Trial Chamber I, “Decision on the Confirmation of Charges,” ICC-02/05-02/09-243-Red, 8 February 2010, paras. 39-40.

For the purpose of this Statute, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack...

16. Article 7(2)(a) specifies that:

“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 an attack.

17. Concerning the contextual element of “organizational policy,” the Legal Representative incorporates by reference as if fully set out below herein, all observations and averments made in the submission filed by the victims on 14 October 2011.¹⁷

C. Destruction and Looting of Property as Underlying Acts of Persecution as a Crime against Humanity

18. Article 7(1)(h) of the Statute grants this Court jurisdiction over

“Persecution 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...”

19. Article 7(2)(g) elaborates on the meaning to be attributed to “Persecution” for the purposes of Article 7(1)(h) and states that:

“Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”

¹⁷ “Victims’ Consolidated Observations on the Kenyatta and Ali Submissions regarding Jurisdiction and/or Admissibility,” ICC-01/09-02/11-357, 14 October 2011.

20. Consequently, “severe deprivation of fundamental rights on discriminatory grounds” is at the core of the crime against humanity of persecution within the framework of the Statute.

21. It is established in the jurisprudence of the ICTY that for the required severity threshold to be met:

“[t]he acts underlying persecutions as a crime against humanity, whether considered in isolation or in conjunction with other acts, must be of equal gravity to the crimes listed in Article 5 of the [ICTY] Statute.”¹⁸

22. Indeed, different Chambers of the ICTY have concluded that acts of destruction¹⁹ and theft of personal property²⁰ may, under specific circumstances, amount to the underlying acts of persecution as a crime against humanity.

23. The *Kupreškić* Trial Chamber expressed the view that for acts of destruction and theft of property to rise to the level of persecutory acts they must have a “severe enough impact on the victims as to constitute crimes against humanity.”²¹ That Chamber concluded that the burning of someone’s car could amount to a crime against humanity if the car constitutes an indispensable or vital asset of the owner.²² The position taken in *Kupreškić* was subsequently endorsed by the ICTY Appeals Chamber in *Blaskić*.²³ Other Chambers in different cases have found destruction of private dwellings,²⁴ businesses,²⁵ and means of subsistence²⁶ to constitute the *actus*

¹⁸ *Prosecutor v. Kordić & Cerkez*, No. IT-65-14/2-A, Judgement, 17 December 2004, paras. 102, 671; *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgement, 29 July 2004, para. 160; *Prosecutor v. Krnojelac*, No. IT-97-25, Judgement, 17 September 2003, para. 221; *Prosecutor v. Simić*, No. IT-95-9-A, Judgement, 28 November 2006, para.177; *Prosecutor v. Brđanin*, No. IT-99-36-A, Judgement, 3 April 2007, para. 296.

¹⁹ *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgment, 29 July 2004, paras. 146, 149; *Prosecutor v. Gotovina, Cermak, Markac*, No. IT-06-90-T, Judgment, 15 April 2011, paras. 1825-1830; *Prosecutor v. Vujadin Popović, et al.*, No. IT-05-88-T, Judgment, 10 June 2010, para. 987.

²⁰ *Prosecutor v. Kordić & Cerkez*, No. IT-65-14/2-A, Judgment, 17 December 2004, paras. 109, 672-673.

²¹ *Prosecutor v. Kupreškić*, No. IT-95-16-T, Judgment, 14 January 2000, para. 631.

²² *Ibid.*

²³ *Prosecutor v. Blaškić*, No. IT-95-14-A, Judgement, 29 July 2004, para. 160, quoting with approval *Kupreškić*, Judgment, 14 January 2000, para. 631.

²⁴ *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment, 31 July 2003, para. 764 (“destruction, wilful damage and looting of residential... properties”); *Prosecutor v. Krstić*, No. IT-93-33-T, Judgment, 2 August 2001, para. 537 (“burning of homes... constitute[s] persecutory acts”); *Prosecutor v. Blaškić*, No. IT-95-14-T, Judgment, 3 March 2000, para. 227.

reus of persecution, particularly when the specific act in question was part of a larger pattern of plunder and property destruction.²⁷

24. Clearly, and as was maintained by the Trial Chamber in *Milutinović*, the assessment of the gravity of the act or omission for the purposes of determining whether it amounts to persecution, must be considered in context, looking at its cumulative effects and not at the act or omission in isolation.²⁸

25. Consideration of the illustrative decisional law above impels the reasonable conclusion that acts of destruction or theft of property can amount to the *actus reus* of persecution for the purposes of article 7(1)(h), as long as a severe impact on the victim's fundamental rights is established. The severity of the impact needs to be evaluated taking into account the nature of the property in combination with the specific circumstances of the victim, as well as the extent of the destruction.

D. Destruction and Looting of Property as the *Actus Reus* of the Crime against Humanity of Forcible Transfer

26. Article 7(1)(d) of the Statute attributes this Court jurisdiction over the crime of forcible transfer. Article 7(2)(d) specifies that:

“[...] forcible transfer of population” means 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.

27. In the Elements of the Crimes it is made clear that the term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that

²⁵ Ibid., *Stakić* (Trial Chamber Judgment), para. 764, (“destruction, wilful damage and looting of commercial... properties”); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 (*Blaškić* Trial Chamber Judgment), para. 227.

²⁶ Ibid., *Blaškić* Trial Chamber Judgment, para. 227.

²⁷ *Prosecutor v. Kordić*, No. IT-95-14/2-T, Judgement, 26 February 2001, para. 205.

²⁸ *Prosecutor v. Milutinović, et al.*, No. IT-05-87-T, Judgement, 26 February 2009, para 179.

caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.²⁹

28. It has been consistently held in the ICTY's jurisprudence that it is the absence of genuine choice that makes the displacement unlawful.³⁰

29. Destruction of homes and deprivation of one's means of subsistence constitute blatant examples of coercive measures one could resort to in order to successfully force people to flee the place they lawfully occupy. Attacks against personal property have been frequently treated as constituting, unless justified by military necessity, forcible transfer.³¹

IV. SUBMISSIONS: THE PERSONAL INTERESTS OF THE VICTIMS

A. The Class of Participating Victims

30. One hundred and thirty-six of the 229 participating victims were within the vicinity of Naivasha in the Rift Valley Province of Kenya when they were victimized. Those who were victimized within the vicinity of Nakuru (also in the Rift Valley Province) are ninety-three in number.

31. One hundred and thirty-four women and ninety-five men³² make up the victim participants at bar. Two hundred and thirteen of them are of the Luo ethnic group, fifteen are Luhya, and one is a Kalenjin.³³

²⁹ Elements of the Crimes, Article 7(1)(d), fn. 12.

³⁰ *Prosecutor v. Krnojelac*, No. IT- 97-25-A, Judgment, 17 September 2003, para. 229; *Prosecutor v. Stakić*, No. IT-97-24-A, Judgment, 22 March 2006, para. 279.

³¹ *Prosecutor v. Vujadin Popović, et al.*, No. IT-05-88-T, Judgment, 10 June 2010, para. 917; *Prosecutor v. Martić*, No. IT-95-11-T, Judgment, 12 June 2007, para. 296.

³² Compare the reference to "94 that are males" in the transcript of 21 September 2011. See ICC-01/09-02/11-T-4-ENG ET WT 21-09-2011, 1/121 PV PT, pages 59 – 60. A recount to confirm the gender distribution of the participating victims confirmed that there are 95 (and not 94) male victims before the Court.

³³ Pre-Trial Chamber, ICC-01/09-02/11-T-15-CONF-ENG ET, p. 22, lines 22-24.

B. “Personal Interests” of the Victims

32. The personal interests of victims are affected by the outcome of the pre-trial stage of a case, insofar as it is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the charged crimes.³⁴

33. The jurisprudence of the Court confirms that the victims’ right to justice falls within the ambit of “personal interests” within the meaning of Article 68(3) of the Statute and is to be defined, consistently with the jurisprudence of international and regional human rights courts, as the particular interest any victim of a crime has that the persons allegedly responsible for his or her suffering is brought to justice.³⁵ Criminal proceedings are, indeed, central to the satisfaction of the victims’ right to justice as it is through criminal proceedings that the truth is established and those identified as the perpetrators are punished. As the Single Judge stated in the *Katanga and Ngudjolo* case:

The issue of guilt or innocence of persons prosecuted before this Court is not only relevant, but also affects the very core interests of those granted the procedural status of victim in any case before the Court insofar as this issue is inherently linked to the satisfaction of their right to the truth. The victims’ central interest in the search for the truth can only be satisfied if (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue.³⁶

The interests of victims go beyond the determination of what happened and the identification of those responsible, and extend to securing a certain degree of punishment for those who are responsible for perpetrating the crimes for which they suffered harm. These interests - namely the identification, prosecution and punishment of those who have victimized them by preventing their impunity - are at the root of the well established right to justice for victims of serious violations of human rights, which international

³⁴ Pre-Trial Chamber 1 (Single Judge), “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case,” ICC-01/04-01/07-474, 13 May 2008, paras. 41 - 43.

³⁵ “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/1105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06-925, Separate Opinion of Judge Song.

³⁶ Pre-Trial Chamber 1 (Single Judge), “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case,” ICC-01/04-01/07-474, paras. 34-36.

human rights bodies have differentiated from the victims' right to reparations.³⁷

i. Confirmation of the Charges

34. It will be recalled that the Decision directed that the Legal Representative be provided with access to the "public" record of the case, including evidence that was filed publicly by the parties.³⁸ The Decision allowed for the possibility of access to the "confidential" record of the case (decisions, filings, and evidence), on a case-by-case basis, and either as authorized *proprio motu* by the Chamber, or upon the receipt of a specific and motivated request by the Legal Representative for such access.³⁹

35. A request by the Legal Representative for access to all confidential *inter partes* material was contested by the Prosecution and the three Suspects at bar.⁴⁰ The said request was denied by the Chamber on 14 September 2011,⁴¹ with one consequence being that the victims heard parts of the confidential record of the case for the first time in court during the Hearing.

36. On the basis of what evidence the victims heard at the hearing, coupled with disclosed evidence pursuant to Rule 121(2)(c)⁴² and the submissions made by the parties, the victims reiterate their view that the threshold standard of Article 61(7) has been met and the case should be committed to a trial.⁴³

37. The victims submit that "sufficient evidence to establish substantial grounds to believe" that the Suspects committed each of the charged crimes has been adduced and a trial is necessary to vindicate their right to justice and the truth.

³⁷ Ibid., paras. 38-39.

³⁸ Decision, paras. 107 – 111 and page 46, para. (h).

³⁹ Ibid., para. 109.

⁴⁰ See, "Request for Access to Confidential *Inter Partes* Material," ICC-01/09-02/11-310, 9 September 2011; "Prosecution's Response to the Victims' Legal Representative's Requests for Access to Confidential *Inter Partes* Material," ICC-01/09-02/11-322, 13 September 2011; "Defence Observations on Legal Representative's 'Request for Access to Confidential *Inter Partes* Material,'" ICC-01/09-02/11-323, 13 September 2011; "Defence Observations in Response to the 'Decision Requesting Observations (ICC-01/09-02/11-318),' " ICC-01/09-02/11-320, 13 September 2011; and "Corrigendum to 'Response to The Single Judge's *Decision Requesting Observations*,'" ICC-01/09-02/11-319-Corr, 13 September 2011.

⁴¹ "Decision on the Request for Access to Confidential *Inter Partes* Material," ICC-01/09-02/11-326, 14 September 2011.

⁴² See Rule 121(2)(c) of the Rules of Procedure and Evidence.

⁴³ See, ICC-01/09-02/11-T-15-CONF-ENG ET 05-10-2011 26/90 SZ PT, p. 26, lines 1 – 7 ; Article 61(7).

ii. Application to make Submissions of Fact and/ or Law regarding the Destruction and Looting of Property

38. It will be recalled that the Decision provided the Legal Representative with the possibility of applying to make written submissions on specific issues of law and/ or fact, if it could be demonstrated that the personal interests of the victims are affected by the issues at stake and the Chamber deems such submissions to be appropriate.⁴⁴

39. It is submitted that vindicating the victims' right to the truth and justice also implicates charges that accurately reflect the true nature and extent of the harm they suffered. In this regard, it is noteworthy that a significant number of victims from both Naivasha and Nakuru suffered loss of, or damage to, their property, as a consequence of the charged crimes. These "losses" took the form of theft, looting, burning, or other forms of destruction of property, both personalty and realty.⁴⁵ The Legal Representative submits that the personal interests of such victims are undoubtedly affected in matters relevant to those losses.

40. Bearing these observations in mind, and in conjunction with the Decision and the applicable legal principles in sections III(C) and III(D) above, the Legal Representative respectfully applies to make the following submissions of fact and/ or law in relation to the destruction and looting of property⁴⁶:

⁴⁴ The Decision, para. 118. Relevant to the Chamber's determination of the propriety of such submissions by the Legal Representative are factors such as, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects, and the principle of fairness and expeditiousness of the proceedings. *Ibid.*

⁴⁵ See, for example, the following applications: a/8280/11, a/8285/11, a/8447/11, a/8448/11, a/8454/11, a/8455/11, a/8457/11, a/8490/11, a/8505/11, a/8533/11, a/8535/11, a/8550/11, a/8617/11, a/8621/11, a/8669/11, a/8670/11, a/8671/11, a/8673/11, a/8674/11, a/8691/11, a/8692/11, a/8694/11, a/8791/11, a/8792/11, a/8794/11, a/8795/11, a/8796/11, a/8799/11, a/8800/11, a/9059/11, a/9060/11, a/9062/11, a/9066/11, a/9068/11, a/9071/11, a/9073/11, a/9074/11, a/9080/11, a/9081/11, a/9082/11, a/9083/11, a/9084/11, a/9085/11, a/9086/11, a/9087/11, a/9088/11, a/9089/11, a/9090/11, a/9097/11, a/9101/11, a/9106/11, a/9140/11, a/9141/11, a/9143/11, a/9145/11, a/9185/11, a/9186/11, a/9187/11, a/9189/11, a/9191/11, a/9192/11, a/9193/11, a/9194/11, a/9211/11, a/9213/11, a/9216/11, a/9219/11, a/9220/11, a/9222/11, a/9224/11, a/9248/11, a/9252/11, a/9253/11, a/9257/11, a/9258/11, a/9265/11, a/9266/11, a/9276/11, a/9283/11, a/9284/11, a/9286/11, a/9287/11, a/9288/11, a/9297/11, a/9299/11, a/9301/11, a/9342/11, a/9364/11, a/9370/11, a/9372/11, a/9388/11, a/9392/11, a/9393/11, a/9396/11, and a/9398/11.

⁴⁶ It is noteworthy that a similar request was made by the Legal Representative in the companion Kenyan case currently before this Pre-Trial Chamber. In granting the request in that case, the Single Judge authorized the inclusion of submissions on specific issues of law and/ or fact in the victims' final written submissions regarding the Confirmation of Charges Hearing. See, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "Decision on the 'Renewed Request by the Victims' Representative for Authorization by the Chamber to make Submissions on Specific Issues of Law and/ or Fact,'" ICC-01/09-01/11-338, 22 September 2011, para. 12. The victims at bar are of the view that such an approach is consonant with the spirit of judicial

**a. Amending the legal characterization of the facts so as to include
destruction and looting of property as underlying acts of
persecution as a crime against humanity**

41. The Prosecution's presentation at the Hearing and DCC indicate that between 24 and 28 January 2008, in Nakuru and in Naivasha, the Mungiki and pro-PNU youth implemented the common plan of the Suspects by subjecting perceived ODM supporters to systematic acts of violence including, *inter alia*, looting, burning and destruction of property.⁴⁷ The Prosecution stressed during the Hearing that the "offences" of destruction and looting of property "were not simply about mayhem[;] [t]hey were also about complete destruction."⁴⁸ The direct perpetrators relied on a variety of means of identification, such as lists, physical attributes, roadblocks and language in order to identify perceived ODM supporters.⁴⁹

42. In particular, during the attacks carried out in Naivasha on the 27 and 28 January 2008, the Mungiki in coordination with pro-PNU youth burnt, destroyed and/ or looted the property and businesses of perceived ODM supporters.⁵⁰ They also targeted and vandalized the houses of persons believed to be hosting ODM supporters.⁵¹ The attackers conducted door-to-door searches in a manner suggesting they had pre-identified targets.⁵²

43. In Kabati Estate, within Naivasha town, the Mungiki and pro-PNU youth targeted a house where a perceived ODM supporter was known to live; they set the

economy; they have, consequently, included both the request for authorization and the substance of the proposed submissions in the same pleading for consideration in the discretion of the Chamber.

⁴⁷ ICC-01/09-02/11-T-5-CONF-ENG ET 22-09-2011, 1/108 PV PT, p. 11, lines 1-9 and p. 102, lines 4-6; DCC, para. 68.

⁴⁸ ICC-01/09-02/11-T-5-CONF-ENG ET 22-09-2011, 1/108 PV PT, p. 103, lines 16-18.

⁴⁹ Ibid. See, also, DCC, para. 68 and; ICC-01/09-02/11-T-5-CONF-ENG ET 22-09-2011, 1/108 PV PT, p. 49, lines 21-24, p. 50, lines 5-16.

⁵⁰ Ibid. See, also, DCC, paras. 33 and 68; CIPEV Report, EVD-PT-OTP-00004; Photograph, EVD-PT-OTP-00142; KNCHR Report, EDV-PT-OTP-00001; Statement of Witness 0002, EVD-PT-OTP-00241, at 0209-0211; Witness Statement, EDV-PT-OTP-00578, at 0042; Witness Statement, EDV-PT-OTP-00600, at 0166; Witness Statement, EVD-PT-OTP-00341.

⁵¹ DCC, para. 68.

⁵² DCC, para. 67; ICC-01/09-02/11-T-5-CONF-ENG ET 22-09-2011, 1/108 PV PT, p. 100, lines 17-25, p. 101, lines 1-5; KNCHR Report, EDV-PT-OTP-00001.

house on fire and destroyed it, killing nineteen people (women and children), who had found refuge inside.⁵³ Additional evidence in relation to this incident was also disclosed by the Muthaura Defence team.⁵⁴ Furthermore, a Muthaura Defense witness testified about this incident during the Hearing, indicating that whilst he does not know who burnt the house, he suspected that they had to be Kikuyus, as Luos would not have burned their own houses.⁵⁵

44. The same witness testified about the looting of property in Naivasha during the attack of 27 January 2008. The witness specifically stated that he housed four Luos in his residence who were “internally-displaced persons” (“IDPs”) and that Luos lost property as a consequence of thefts, burnings, and lootings during the violence in Naivasha.⁵⁶

45. The attacks in Nakuru mirrored those in Naivasha town.⁵⁷ Mungiki and pro-PNU youth targeted perceived ODM supporters by torching homes and businesses, destroying and looting property.⁵⁸ For instance, the Prosecution referred to a particular incident that concerned a restaurant in Nakuru -- Club Lule's. The restaurant was owned by a Luo and was burnt down by Kikuyus.⁵⁹

46. The severe impact that these acts of looting, burning, and destruction of property have had on the victim-participants is still evidently present and palpably reflected in their daily lives. Their lives have been radically and dramatically changed, as a consequence of the attacks against their property. Many victims have been deprived of their homes and have been subsequently forced to live in tented camps for IDPs, or to move into the homes of relatives. Many have lost businesses that they owned before the violence erupted and with them, their means of

⁵³ DCC, paras. 33 and 70.

⁵⁴ EVD-PT-D12-00120; EVD-PT-D12-00122.

⁵⁵ Pre-Trial Chamber, ICC-01/09-02/11-T-CONF-ENG ET 26-09-2011, p. 105, lines 3-25 ; p. 106, lines 1-11.

⁵⁶ Pre-Trial Chamber, ICC-01/09-02/11-T-CONF-ENG ET 26-09-2011, p. 104, lines 15-25 and p. 105, lines 1-4.

⁵⁷ OHCHR, EDV-PT-OTP-00008, at 1066.

⁵⁸ Pre-Trial Chamber, ICC-01/09-02/11-T-5-CONF-ENG ET, p. 96, lines 23-25; p. 97, line 1.

⁵⁹ CIPEV Report, EDV-PT-OTP-00004; KNCHR Report, EVD-PT-OTP-00001.

subsistence and self-sufficiency. All cannot but be concerned about their daily survival.⁶⁰

47. The attacks against property suffered by the victims at bar has resulted in the destruction of their livelihood through the loss of indispensable and vital assets and, as such, has deprived them of fundamental human rights.⁶¹ Indeed, the Prosecution's presentation at the Hearing expressly acknowledged that looting and destruction of property were amongst those acts whose execution by the perpetrators severely deprived perceived ODM supporters of their fundamental rights, contrary to international law.⁶²

48. The fact that 213 of the 229 participating victims are Luos is *per se* sufficient to conclude that the perpetrators acted with a discriminatory intent, taking into account that Luos were perceived to be affiliated with the ODM political movement.⁶³ That conclusion is buttressed by evidence relied upon by the Prosecutor, both during the Hearing and in the DCC.⁶⁴ The evidence establishes that before carrying out the attacks, the direct perpetrators used different means in order to discern their pre-identified targets: door-to-door searches, lists, physical attributes, ID cards, roadblocks and language. The Prosecutor submitted at the Hearing that, in carrying out the acts of destruction and looting of property, the perpetrators who were "mobilized and directed by" the Suspects, targeted the victims by reason of their identity as a group and did it on political grounds, i.e., their support for a rival political party.⁶⁵

⁶⁰ Pre-Trial Chamber, ICC-01/09-02/11-T-4-ENG ET WT, p. 64, lines 10-19.

⁶¹ *Prosecutor v. Kupreškić*, No. IT-95-16-T, Judgment, 14 January 2000, para. 631.

⁶² ICC-01/09-02/11-T-6-ENG ET WT 23-09-2011, 1/81 PV PT, p. 4, lines 11-25.

⁶³ Pre-Trial Chamber, ICC-01/09-02/11-T-15-CONF-ENG ET, p. 22, lines 22-25 ; p. 23, line 1.

⁶⁴ "Amended Document Containing the Charges," ICC-01/09-02/11, paras. 67-68; Pre-Trial Chamber, ICC-01/09-02/11-T-6-CONF-ENG ET WT, p. 6, lines 5-9, p. 11, lines 14-19; Statement of Witness 001, EVD-PT-OTP-00326, at 1757; HRW Report, EVD-PT-OTP-00002, at 0293; Statement of Witness 0002, EVD-PT-OTP-00241, at 0203-0204; Int'l Crisis Group Report, EDV-PT-OTP-00009, at 1093; Statement of Witness 0004, EDV-PT-OTP-00248, at 0047; Witness Statement, EVD-PT-OTP-00002, at 0297.

⁶⁵ ICC-01/09-02/11-T-6-CONF-ENG ET WT, p. 12, lines 12-25.

49. A most appropriate conclusion to be drawn at this juncture is that there is sufficient evidence to establish substantial grounds to believe that acts of destruction, burning and looting of private property constituting the underlying acts of persecution as a crime against humanity were committed during the attacks in Naivasha and Nakuru.

b. Amending the legal characterization of the facts so as to include destruction and looting of property as part of the crime against humanity of forcible transfer

50. The Prosecution submitted that the Suspects' ultimate goal was to displace perceived ODM supporters, including members of the Luo, Luhya, and Kalenjin communities beyond the Rift Valley.⁶⁶ The forcible displacement of perceived ODM supporters (with the ultimate goal focused on displacing the Luos) was a specific goal of the Suspects and not merely a consequence of the attacks.⁶⁷ Accordingly, the attacks executed by the Mungiki and the pro-PNU youth in Naivasha and Nakuru were orchestrated so as to create a state of fear and coercion amongst the perceived ODM supporters who were left with no choice but to flee.⁶⁸

51. The Prosecution further submitted that its evidence establishes that the Suspects, together with local PNU politicians, the Mungiki, and PNU youths specifically targeted houses believed to be owned by Luos and other perceived ODM supporters, including the Kalenjins, with the ultimate goal of driving them out of Naivasha and Nakuru.⁶⁹ The perpetrators were said to have engaged the help of local

⁶⁶ ICC-01/09-02/11-T-5-CONF-ENG ET 22-09-2011, 1/108 PV PT, p. 72, lines 18-20, p. 75, lines 15-24; Statement of Witness 0002, EVD-PT-OTP-0023, at 0037 to 0038; Summary of Witness Statement, EVD-PT-OTP-00596.

⁶⁷ ICC-01/09-02/11-T-5-CONF-ENG ET 22-09-2011, 1/108 PV PT, p. 75, lines 15-24.

⁶⁸ ICC-01/09-02/11-T-5-CONF-ENG ET, p. 68, lines 17-20.

⁶⁹ Witness Statement, EDV-PT-OTP-00002, at 0297; EDV-PT-OPT-00607, at 0221.

Kikuyus, in order to identify their targets.⁷⁰ Reliance was had by the Prosecution on the statement of a witness who lived in Naivasha to support this conclusion.⁷¹

52. Looting and destruction of property were amongst those acts whose execution by the perpetrators severely deprived perceived ODM supporters of their fundamental rights, contrary to international law.⁷² Accordingly, and on the basis of the evidence now before the Chamber, there are substantial grounds to believe that the acts of destruction and looting of property carried out in Naivasha and Nakuru were utilized by the perpetrators as a means to commit forcible transfer of population. There are, consequently, specific and reasonable grounds to amend the legal characterization of the facts underpinning the crime of forcible transfer to include acts of destruction and looting of property.

V. CONCLUSION AND RELIEF REQUESTED

49. On the basis of the foregoing, the Legal Representative respectfully prays that the Chamber:

- i. find that the threshold standard of Article 61(7) has been satisfied in relation to the charged crimes;
- ii. entertain the victims' application to make written submissions on specific issues of law and/ or fact in relation to the destruction and looting of property; and
- iii. consider the submissions made above and exercise its authority under Article 61(7)(c)(ii) and request the Prosecutor to consider amending the legal characterization of the facts because the evidence submitted – disclosed evidence pursuant to Rule 121(2)(c), testimonial evidence and submissions – provides substantial grounds to believe that acts of destruction, looting, and/ or theft of property were committed as underlying acts of the crime against

⁷⁰ ICC-01/09-02/11-T-5-ENG ET, p. 78, lines 17-23 ; Witness Statement, EDV-PT-OTP-00002, at 0297.

⁷¹ EVD-PT-OTP-00600.

⁷² ICC-01/09-02/11-T-6-ENG ET WT 23-09-2011, 1/81 PV PT, p. 4, lines 11-25.

humanity of persecution and/ or as the *actus reus* of the crime against humanity of forcible transfer, in the context and within the meaning of Article 61(7)(c)(ii) of the Statute.⁷³

50. The requested relief above are not mutually-exclusive, firstly, in the sense that once the chapeau requirement of Article 61(7) has been met (i.e., “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”), the provisions of Article 61(7)(a) become operative and some or all of the charges are confirmed and the case is committed to a trial. Secondly, and unlike the situation where Article 61(7)(c) is invoked because a Chamber is unable to arrive at a determination regarding the chapeau requirement of Article 61(7),⁷⁴ the victims find no legal deficiency that precludes a determination regarding the chapeau requirement of Article 61(7) in relation to the charged crimes at bar.

51. Accordingly, the Chamber may confirm the existing charges and contemporaneously request the Prosecutor to consider amending the legal characterization of the facts as requested above, thereby triggering the provisions of Article 61(9), or adjourn the Hearing and request the Prosecutor to consider amending the charges pursuant to Article 61(7)(c)(ii).⁷⁵

Respectfully submitted,



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Victims' Legal Representative

⁷³ See, for example, “Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute,” ICC-01/05-01/08-388, 3 March 2009.

⁷⁴ Ibid., paras 17 – 20, and para 49.

⁷⁵ Ibid.

Dated this 28th day of October 2011

At Nairobi, Kenya.