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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

Public Document

Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of 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

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Detention Section

Victims Participation and Reparations Section
Fiona McKay

Others

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PRE-TRIAL CHAMBER II (the "Chamber") of the International Criminal Court (the "Court"), to which the situation in the Republic of Kenya has been assigned,[1] issues the present decision pursuant to article 15(4) of the Rome Statute (the "Statute") on the "Request for authorisation of an investigation pursuant to Article 15" (the "Prosecutor's Request"), submitted by the Prosecutor on 26 November 2009.[2]

In order to decide on the Prosecutor's Request, the Chamber will set out the criteria for the Chamber's authorization of an investigation under article 15 of the Statute (part I). Subsequently, the Chamber will examine whether the requisite criteria have been met (part II). Finally, the Chamber will lay out the material, temporal and territorial scope of the authorized investigation (part III).

PROCEDURAL HISTORY

1. On 6 November 2009, the Presidency issued the "Decision assigning the situation in the Republic of Kenya to Pre-Trial Chamber II".[3]

2. On 26 November 2009, the Prosecutor filed the "Request for authorisation of an investigation pursuant to Article 15", together with 39 appended annexes, in which he requested the Chamber to "authorise the commencement of an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008".[4]

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[1] Presidency, ICC-01/09-1.
[2] ICC-01/09-3.
[3] Presidency, ICC-01/09-1.
[4] ICC-01/09-3 and its annexes.

3. On 10 December 2009, the Chamber issued the "Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute".[5]

4. On 21 December 2009, the Registry, through the Victims Participation and Reparations Section (the "VPRS"), filed the confidential and *ex parte* "Report Concerning Victims' Representations" with annexes, requesting an extension of time for the filing of victims' representations.[6]

5. On 23 December 2009, the Chamber issued the confidential and *ex parte* "Decision on Extension of Time Limit", granting the VPRS's request for extension of time and ordering the VPRS to file a report containing victims' representations at the latest on 15 March 2010.[7]

6. On 11 January 2010, Professors Max Hilaire and William A. Cohn (the "Applicants") submitted an application to appear as *amicus curiae* for the sake of filing observations on some issues related to the Prosecutor's Request "within 30 days or within such period" to be decided by the Chamber (the "*Amicus Curiae* Application").[8]

7. On 15 January 2010, the Prosecutor submitted a request for leave to respond to the *Amicus Curiae* Application (the "Prosecutor's Request for Leave to Respond").[9]

8. On 18 January 2010, the Prosecutor filed the confidential and *ex parte* "Prosecutor's Application for Access to any VPRS Filing and any Decision by this Chamber" (the "Prosecutor's Application"), requesting the Chamber (i) to grant the Prosecution access to the VPRS report, (ii) to order the VPRS to

[5] ICC-01/09-4.
[6] ICC-01/09-6-Conf-Exp and its annexes.
[7] ICC-01/09-7.
[8] ICC-01/09-8.
[9] ICC-01/09-9.

notify the Prosecutor of any subsequent filings and disallow *ex parte* Registry only filings, (iii) to allow the Prosecutor to present his position on the substance of VPRS submissions and (iv) to re-classify the existing VPRS filings as public, unless there is a basis for maintaining confidentiality.[10]

9. On 20 January 2010, a legal representative for one of the victims filed a response to the *Amicus Curiae* Application in which he requested the Chamber to reject it on several grounds (the "Legal Representative's Request").[11]

10. On 27 January 2010, the Applicants responded to the Legal Representative's Request[12] as well as to the Prosecutor's Request for Leave to Respond[13] (the "Applicants' Requests").

11. On 3 February 2010, the Chamber rejected the *Amicus Curiae* Application, the Prosecutor's Request for Leave to Respond, the Legal Representative's Request and the Applicants' Requests.[14]

12. On 18 February 2010, the Chamber rendered its "Decision Requesting Clarification and Additional Information".[15]

13. On 3 March 2010, the Prosecutor filed a response to the Decision Requesting clarification and additional information together with 5 appended annexes (the "Prosecutor's Response").[16]

14. On 15 March 2010, the VPRS submitted its "Report on Victims' Representations" together with 407 appended annexes, including the original

[10] ICC-01/09-10 and its annex.
[11] ICC-01/09-11.
[12] ICC-01/09-12.
[13] ICC-01/09-13.
[14] ICC-01/09-14.
[15] ICC-01/09-15.
[16] ICC-01/09-16 and its annexes.

victims' representations (the "victims' representations").[17] On 18 March, the VPRS filed the "Corrigendum to the Report on Victims' Representations" (the "Report on Victims' Representations").[18]

15. On 24 March 2010, the Chamber issued its "Decision on Re-classification and on the 'Prosecutor's Application for Access to any VPRS Filing and any Decision by this Chamber'".[19]

16. On 29 March 2010, the VPRS filed a public redacted version of its "Report Concerning Victims' Representations"[20] as well as of the "Corrigendum to the Report on Victims' Representations" and its annexes 1 and 5.[21]

I. THE CRITERIA FOR THE CHAMBER'S AUTHORIZATION OF AN INVESTIGATION UNDER ARTICLE 15 OF THE STATUTE

A. Article 15(3) and (4) and article 53(1) of the Statute – "Reasonable basis to proceed" standard

17. Article 15 of the Statute regulates the procedure for initiating an investigation upon the Prosecutor's own initiative, subject to authorization by the Chamber. At the outset, the Chamber wishes to highlight that it is well aware that this article is one of the most delicate provisions of the Statute. The current provision is the product of extensive debates and division of views throughout the drafting process and until the end of the Rome Conference. The main point of controversy was whether the Prosecutor should be

[17] ICC-01/09-17-Conf-Exp and its annexes.
[18] ICC-01/09-17-Conf-Exp-Corr and its annexes.
[19] ICC-01/09-18.
[20] ICC-01/09-6-Red and its annexes.
[21] ICC-01/09-17-Corr-Red and its annexes.

empowered to trigger the jurisdiction of the Court, of his own motion, in the absence of a referral from a State Party or the Security Council.[22]

18. Thus, it suffices to mention that, insofar as *proprio motu* investigations by the Prosecutor are concerned, both proponents and opponents of the idea feared the risk of politicizing the Court and thereby undermining its "credibility".[23] In particular, they feared that providing the Prosecutor with such "excessive powers" to trigger the jurisdiction of the Court might result in its abuse.[24] This concern prompted the drafters of the Statute to seek a balanced approach that rendered the *proprio motu* power of the Prosecutor to initiate an investigation acceptable to those who feared it.[25] The intended result was accomplished through the current text of article 15 of the Statute,

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[22] *Report of the Ad hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), paras 113-114; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc. A/51/22 (1996), paras 149-151; *E.g.*, In favour: UN Doc. A/CONF.183/C1/SR.9, paras 84–88 (Lesotho), 89 (Thailand), 89–91 (Jordan), 93–94 (Mexico), 95 (Costa Rica), 96–97 (Venezuela), 100 (Morocco), 101–102 (Czech Republic), 106–107 (Ireland), 108–110 (Romania), 116 (Australia), 120–122 (New Zealand), 124 (Belgium), 131–132 (Trinidad and Tobago), 134–135 (Netherlands), 136–137 (Norway); UN Doc. A/CONF.183/C1/SR.9, paras 1–2 (Italy), 3–4 (South Africa), 7–8 (Tanzania), 10 (Brazil), 11–12 (Denmark), 13–14 (Madagascar), 15–16 (Germany), 17–18 (Sweden), 19-20 (Slovenia), 21 (Canada), 22 (Chile), 23 (Bahrain), 24 (Andorra), 25–26 (Greece), 28 (Senegal), 31 (Azerbaijan), 32 (Republic of Korea), 33 (Switzerland), 34–35 (Togo), 36 (Sierra Leone), 41 (Portugal), 42 (Burkina Faso), 43 (Peru), 44 (Uruguay), 45 (Namibia), 46 (Poland). Opposed: UN Doc. A/CONF.183/SR.7, para. 88 (Nigeria); UN Doc. A/CONF.183/C1/SR.9, paras 82–83 (Iran), 92 (Kenya), 98 (Yemen), 99 (Iraq), 103 (Indonesia), 105 (India), 111–112 (Israel), 117 (Libya), 118 (Cuba), 119 (Egypt), 123 (Saudi Arabia), 125–130 (United States), 133 (Russian Federation); UN Doc. A/CONF.183/C1/SR.9, paras 6 (Nigeria), 9 (China), 29 (Tunisia), 30 (Algeria), 37 (Turkey), 38 (Japan), 39 (United Arab Emirates), 40 (Pakistan), 47 (Bangladesh).

[23] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc. A/51/22 (1996), para. 151; see also, C. Stahn, "Judicial Review of Prosecutorial Discretion: Five Years On", in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, (Leiden, Boston: Martinus Nijhoff Publishers, 2009), p. 265.

[24] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc. A/51/22 (1996), para. 151.

[25] The proposal submitted by Argentina and Germany to the Preparatory Committee in March 1998 introducing a layer of judicial control on the Prosecutor's discretion by way of seeking the Pre-Trial Chamber's authorisation prior to proceeding with an investigation, was the decisive factor for accepting the current text of article 15 of the Statute. See *Proposal Submitted by Argentina and Germany, article 46, Information Submitted to the Prosecutor*, UN Doc. A/AC.249/1998/WG.4/DP. 35 (1998).

which subjects the Prosecutor's conclusion that a reasonable basis to proceed *proprio motu* with an investigation exists to the review of the Pre-Trial Chamber at a very early stage of the proceedings, namely before the Prosecutor may start an investigation into a situation. In light of this background, the Chamber will examine the Prosecutor's Request taking into consideration the sensitive nature and specific purpose of this procedure.

19. In this context, the Chamber wishes to point out that since the Statute is a multilateral treaty, the interpretation of its provisions is governed by the customary rules of treaty interpretation[26] embodied in articles 31 and 32 of the Vienna Convention on the Law of Treaties.[27]

20. The Chamber notes that according to article 15(2) and (3) of the Statute, the Prosecutor, after having analyzed the seriousness of the information received from different sources, may conclude that there is "a reasonable basis to proceed with an investigation". In reaching this conclusion, rule 48 of the Rules of Procedure and Evidence (the "Rules") dictates that the Prosecutor "shall consider the factors set out in article 53, paragraph 1(a) to (c)". On the basis of a finding by the Prosecutor that there is "a reasonable basis to proceed with an investigation", the Prosecutor "shall submit" to the Chamber a request for authorization of the investigation. The Chamber, in turn, is mandated to review the conclusion of the Prosecutor by examining the available information, including his request, the supporting material as well

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[26] See, *e.g.*, International Court of Justice (ICJ), *The Dispute Regarding Navigational And Related Rights (Costa Rica* v. *Nicaragua)*, Judgment of 13 July 2009, para. 47; ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, ICJ Reports 1994, para. 41; ICJ, *Maritime Delimitation and Territorial Questions (Qatar* v. *Bahrain)*, Jurisdiction and Admissibility, Judgment of 15 February 1995, ICJ Reports 1995, para. 33.

[27] United Nations Treaty Series, volume 1155, p. 331; The Appeals Chamber supported this view in its Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, para. 33.

as the victims' representations (collectively, the "available information").[28] If, upon examination, the Chamber considers that the "reasonable basis to proceed" standard is met, it shall authorize the commencement of the investigation.

21. In this regard, the Chamber observes that the language used in both article 15(3) and (4) and in the *chapeau* of article 53(1) of the Statute is identical. The phrase "reasonable basis to proceed" in paragraph 3 regarding the Prosecutor's conclusion is reiterated in paragraph 4, which governs the Chamber's review of the Prosecutor's Request. Exactly the same language is also included in the opening clause of article 53(1) of the Statute. Thus, these provisions prescribe the same standard to be considered both by the Prosecutor and the Pre-Trial Chamber. In the Chamber's opinion, it would be illogical to dissociate articles 15(3) and 53(1) from article 15(4) of the Statute and to advance the view that the scope of the "reasonable basis to proceed" standard with respect to the Prosecutor is different than the one required for the Chamber's consideration, notwithstanding that the same language is used within the same or related articles and for the same purpose, *i.e.*, the opening of an investigation.

22. This conclusion finds support in the *travaux préparatoires* of the Statute. Had the drafters intended different standards, they could have used different wordings. The drafting history of articles 15 and 53 of the Statute reveals that the intention was to use exactly the same standard for these provisions. Draft articles 12 and 13, which mainly captured the language of current article 15(1) to (3) of the Statute, used the terms "sufficient basis to proceed" as well as "reasonable basis to proceed" respectively. Draft article 54(1), presently article 53(1) of the Statute, similarly referred to "reasonable basis". Further, draft

[28] For the purpose of the present decision, the available information also includes the Prosecutor's Response and the annexes attached thereto.

article 12 was followed by a *nota bene*, that "[t]he terms 'sufficient basis' used in this article (if retained) and 'reasonable basis' in article 54, paragraph 1, should be harmonized".[29] At the Rome Conference, the term "sufficient basis" was abandoned and replaced by "reasonable basis" in draft article 12.[30] The adopted formulation appeared in the final text of article 15 of the Statute. Thus, the fact that the drafters finally avoided using different language (such as "sufficient basis to proceed") and the current texts of articles 15(3) and (4) and 53(1) of the Statute instead use the same wording, "reasonable basis to proceed", confirm that this is one and the same standard.

23. The *travaux préparatoires* of the Statute further demonstrate the link that the drafters wanted to establish between articles 15 and 53 of the Statute. Indeed, the first proposals at the origin of the current article 15 of the Statute were originally placed in Part 5 (entitled "Investigation and Prosecution") of the draft Statute,[31] together with the article at the origin of the actual article 53 of the Statute, but were removed from Part 5 at a very late stage of the negotiations, namely just before the start of the Rome Conference,[32] in order to have all issues concerning the trigger mechanisms of the jurisdiction of the Court in one and the same part of the draft Statute. At the beginning of the Rome Conference, the drafters clearly showed that they wanted the future articles 15 and 53 of the Statute to be harmonized since article 53 was intended

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[29] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act*, articles 12, 13(1) and 54(1), UN Doc. A/Conf.183/2/Add.1 (1998), pp. 37, 75. The term 'sufficient basis' also appeared in a proposal tabled by Mexico with respect to draft article 12 *bis* and another one by the United States in relation to preliminary rulings regarding admissibility, draft article 16. Both proposals referred to 'sufficient basis' as being the standard used in draft article 12 (currently article 15 of the Statute). See UN Doc. A/CONF.183/C.1/L.14/REV.1; UN Doc. A/CONF.183/C.1/L.25 (1998).

[30] *Bureau : discussion paper regarding part 2 (Jurisdiction, Admissibility and Applicable Law)*, UN Doc. A/CONF.183/C.1/L.53 (1998), Option 1, article 12(3), (4); *ibid.*, UN Doc. A/CONF.183/C.1/L.59 (1998), Option 1, article 12(3), (4).

[31] *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, UN Doc. A/AC.249/1998/L.13 (1998), p. 86.

[32] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/2/Add.1 (1998), p. 37.

to be the general article for the "initiation of an investigation" containing the exhaustive criteria in relation to such an initiation, irrespective of the triggering mechanisms for the jurisdiction of the Court provided for in Part 2 of the Statute.[33] However, as the debates on Part 2 of the draft Statute ended very late during the Rome Conference, there was no time to reconcile the drafting of articles 15 and 53 of the Statute. Instead, rule 48 of the Rules[34] filled this lacuna by establishing a link between articles 15 and 53 of the Statute thereby unifying the applicable criteria for the initiation of an investigation.

24. Moreover, if the purpose of the article 15 procedure is to provide the Chamber with a supervisory role over the *proprio motu* initiative of the Prosecutor to proceed with an investigation, then it is not possible to fulfill this function, unless the Chamber applies the exact standard on the basis of which the Prosecutor arrived at his conclusion. This means that the Chamber must equally consider whether the requirements set out in article 53(1)(a) – (c) of the Statute are satisfied for the sake of meeting the "reasonable basis to proceed" test before deciding whether to authorize the Prosecutor to commence an investigation.[35] This is the only assessment which will allow the

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[33] On 18 June 1998, a working paper on article 54, which is the actual article 53 of the Statute, contained the following footnote: "This draft does not attempt to prejudge the resolution of the number of proposals to be considered by the Committee of the Whole regarding the starting point for the Prosecutor's investigative authority. These include, among others, referrals by States, referrals by the Security Council, and *proprio motu* authority subject to approval by the Pre-Trial Chamber. In the event the last proposal is among those accepted, the text might read "...shall initiate an investigation upon...or shall seek the approval of the Pre-Trial Chamber to initiate an investigation in a case under article 13, unless...". See UN Doc. A/CONF.183/C.1/WGPM/L.1 (1998).

[34] Other rules establish such a link, such as rules 47 and 104 in relation to the powers of the Prosecutor during the phase preceding the initiation of an investigation, and rule 105 in relation to the notification of a decision by the prosecutor not to initiate an investigation.

[35] As for the assessment of "interests of justice" under article 53(1)(c), the Chamber considers that its review is only triggered when the Prosecutor decides not to proceed on the basis of this clause. Indeed, unlike the assessment to be made in accordance with article 53(1)(a) and (b), the Prosecutor is not required to positively determine that an investigation is in the interests of justice and does not have to present reasons or supporting material in this respect. It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she must notify the Chamber of the reasons for such a decision not to

Chamber to properly determine whether the conclusion reached by the Prosecutor pursuant to articles 15(3) together with 53(1) of the Statute and rule 48 of the Rules is warranted.

25. Accordingly, the Chamber is of the view that an examination of the requirements which satisfy article 53(1)(a)-(c) of the Statute is necessary before engaging in a review of the available information.

1. Article 53(1)(a) – "Reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed"

26. The Chamber observes that the words "reasonable basis" referred to in article 15 and the *chapeau* of article 53(1) are also reiterated in article 53(1)(a) of the Statute. In this respect, the Chamber wishes to point out that the "reasonable basis to believe" test set out in article 53(1)(a) of the Statute is subsumed by the "reasonable basis to proceed" standard referred to in the opening clause of article 53(1) of the Statute, since the former is only one element of the latter. Thus, if upon review of the three elements embodied in article 53(1)(a)-(c) of the Statute and on the basis of the information provided, the Chamber reaches an affirmative finding as to their fulfillment, the "reasonable basis to proceed" standard will consequentially be met.

a) Reasonable basis to believe

27. As for the "reasonable basis to believe" test referred to in article 53(1)(a) of the Statute, the Chamber considers that this is the lowest evidentiary standard provided for in the Statute. This is logical given that the nature of this early stage of the proceedings is confined to a preliminary examination. Thus, the information available to the Prosecutor is neither expected to be "comprehensive" nor "conclusive", if compared to evidence

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proceed, therefore triggering the review power of the Chamber. See section I.A.3 below, para 63.

gathered during the investigation.[36] This conclusion also results from the fact that, at this early stage, the Prosecutor has limited powers, which cannot be compared to those provided in article 54 of the Statute at the investigative stage.

28. The Statute includes three higher evidentiary standards applicable in the course of the different stages of the proceedings. These standards are different in scope and purpose.[37] The first of the said evidentiary standards, found in article 58 of the Statute, governs the issuance of an arrest warrant during the pre-trial phase. According to this standard, the relevant Pre-Trial Chamber is required to be satisfied that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court". The next evidentiary standard, applicable at a later stage, concerns the confirmation of charges under article 61(7) of the Statute. Based on this standard, the respective Pre-Trial Chamber must determine whether the evidence available is "sufficient" to establish "substantial grounds to believe that the person committed each of the crimes charged". The highest evidentiary standard, envisaged by article 66(3) of the Statute, "beyond reasonable doubt", is required to prove the guilt of an accused at the trial stage.

29. Of the three outlined standards, the closest to the "reasonable basis to believe" found in article 53(1)(a) of the Statute is the one required for the

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[36] See also M. Bergsmo, J. Pejić, "Article 15", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. (Munich etc.: C.H.Beck etc., 2008), p. 1069.

[37] See, *e.g.*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-73, paras 30, 33; Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, paras 37-38; Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 63; Pre-Trial Chamber III, Disclosure Decision, ICC-02/05-01/08-55, paras 15 and 19; 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 27-28.

issuance of a warrant of arrest pursuant to article 58 of the Statute. Article 58 of the Statute uses almost the same wording, "reasonable grounds to believe", but this standard, as explained below, has a completely different object and purpose. It applies to the criminal responsibility of an individual, something which is not at stake for the authorization of an investigation. Since neither the Statute, the Rules, nor the Regulations of the Court define any of these standards, an independent analysis by the Chamber to define the "reasonable basis to believe" standard is warranted.

30. In the English language, "reasonable" means "fair and sensible",[38] or "within the limits of reason".[39]

31. Hitherto, the Court's case-law has equated the "reasonable grounds to believe standard" with the "reasonable suspicion" standard under article 5(1)(c) of the European Convention on Human Rights. The European Court of Human Rights (ECtHR) construed "reasonable suspicion", for the purpose of lawful arrest and detention, as "presuppos[ing] the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence".[40]

32. However, the definition provided by the ECtHR, endorsed by this Court, concerns the deprivation of an individual's liberty which is not the case with the "reasonable basis to believe" standard in article 53(1) of the Statute. The latter was not designed to determine whether a particular person was involved in the commission of a crime within the jurisdiction of the Court,

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[38] C. Soanes, A. Stevenson (eds.), Concise Oxford English Dictionary, 11th ed. (Oxford: OUP, 2004), p. 1198.

[39] Shorter Oxford English Dictionary on Historical Principles, 5th ed., (Oxford: OUP, 2002), volume 2, p. 2482.

[40] ECtHR, *Fox, Campbell, and Hartley* v. *The United Kingdom*, Application no. 12244/86; 12245/86; 12383/86, Judgment, 30 August 1990, para. 32; *K.-F.* v. *Germany*, Application no. 144/1996/765/962, Judgment, 27 November 1997, para. 57; *Labita* v. *Italy*, Application no. 26772/95, Judgment, 6 April 2000, para. 155; *Case of O'Hara* v. *The United Kingdom*, Application no. 37555/97, Judgment, 16 October 2001, para. 34.

which may justify his arrest. Instead, the "reasonable basis to believe" standard has a different object, a more limited scope and serves a different purpose, and as such, it must be understood within the context in which it operates. The standard should be construed and applied against the underlying purpose of the procedure in article 15(4) of the Statute, which is to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility.

33. In this regard, the Chamber recalls the Appeals Chamber's interpretation of the "reasonable grounds to believe" standard in the context of article 58 of the Statute. The Appeals Chamber stated that meeting this standard does not require that the conclusion reached on the facts be the only possible or reasonable one. Nor does it require that the Prosecutor disprove any other reasonable conclusions.[41] Rather, it is sufficient at this stage to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available.

34. Mindful of this interpretation and bearing in mind that the "reasonable basis" standard under article 15 of the Statute is even lower than that provided under article 58 of the Statute (the subject-matter of the said Appeals judgment), the Chamber considers that in the context of the present request, all the information provided by the Prosecutor certainly need not point towards only one conclusion.

35. Accordingly, in evaluating the available information provided by the Prosecutor, the Chamber must be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction

[41] Appeals Chamber, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010, para. 33.

of the Court "has been or is being committed". A finding on whether there is a sensible justification should be made bearing in mind the specific purpose underlying this procedure.

b) A crime within the jurisdiction of the Court

36. After defining the "reasonable basis to believe" standard, the Chamber must then consider whether the available information, when assessed against the backdrop of this standard, indicates that "a crime within the jurisdiction of the Court has been or is being committed". In this regard, the Chamber notes that the reference to "crime within the jurisdiction of the Court" may support an interpretation that the Chamber is only to consider the subject-matter jurisdiction referred to in article 5(1) of the Statute. Adopting such an interpretation, however, would amount to an absurd conclusion, because it excludes an examination of the other jurisdictional requirements, the existence or absence of which would directly impact on the Chamber's determination of whether to authorize the commencement of an investigation.

37. Thus, the Chamber considers that according to a contextual and teleological interpretation, the phrase "a crime within the jurisdiction of the Court" would mean that an examination of the necessary jurisdictional prerequisites under the Statute must be undertaken. This construction ensures that the Chamber is in a position to properly assess whether the Court is acting within the scope of its legal parameters before ruling on the Prosecutor's Request.

38. In its judgment of 14 December 2006, the Appeals Chamber stated that:

> [t]he notion of jurisdiction has four different facets: subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction - jurisdiction *ratione loci* - and lastly jurisdiction *ratione temporis*. These facets find expression in the Statute. The jurisdiction of the Court is laid down in the Statute: Article 5 specifies the subject-matter of the jurisdiction of the Court, namely the

> crimes over which the Court has jurisdiction, sequentially defined in articles 6, 7, and 8. Jurisdiction over persons is dealt with in articles 12 and 26, while territorial jurisdiction is specified by articles 12 and 13 (b), depending on the origin of the proceedings. Lastly, jurisdiction *ratione temporis* is defined by article 11[42]

39. Thus, the Chamber considers that for a crime to fall within the jurisdiction of the Court, it has to satisfy the following conditions: (i) it must fall within the category of crimes referred to in article 5 and defined in articles 6, 7, and 8 of the Statute[43] (jurisdiction *ratione materiae*); (ii) it must fulfill the temporal requirements specified under article 11 of the Statute (jurisdiction *ratione temporis*); and (iii) it must meet one of the two alternative requirements embodied in article 12 of the Statute (jurisdiction *ratione loci* or *ratione personae*).[44] The latter entails either that the crime occurs on the territory of a State Party to the Statute or a State which has lodged a declaration by virtue of article 12(3) of the Statute, or be committed by a national of any such State.

2. Article 53(1)(b) – "The case is or would be admissible under article 17"

40. The Chamber notes that the second requirement it must consider on the basis of the available information is whether "the case is or would be admissible under article 17". Such an examination must be distinguished from that of jurisdiction. The question of admissibility mainly concerns the scenarios or conditions on the basis of which the Court shall refrain from exercising its recognized jurisdiction over a given situation or case.

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[42] Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, paras 21- 22.

[43] Although the crime of aggression is referred to in article 5 of the Statute, and thus, it falls within the jurisdiction of the Court, the latter cannot exercise jurisdiction over it until a definition is adopted pursuant to articles 121 and 123 of the Statute defining the crime and outlining the conditions on the basis of which the Court shall exercise its competence with respect to this crime.

[44] Pre-Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, para. 36; Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, para. 12.

41. The Chamber observes that article 53(1)(b) of the Statute speaks of the admissibility of a "case" under article 17 of the Statute. The opening clause of article 17 of the Statute also states that the "Court shall determine that a case is inadmissible where [...]" certain conditions have been met. Thus, according to a textual interpretation, admissibility should be assessed against the backdrop of a "case". However, the Chamber wishes to underline that the Statute is drafted in a manner which tends to solve questions related to admissibility at different stages of the proceedings up until trial.[45] These stages begin with a "situation" and end with a concrete "case", where one or more suspects have been identified for the purpose of prosecution.[46]

42. The first occasion where an admissibility determination must be carried out emerges in response to a referral by either a State Party (articles 13(a) and 14(1) of the Statute) or the Security Council (article 13(b) of the Statute), or when the Prosecutor is acting *proprio motu* (article 15 of the Statute). In these instances, the Prosecutor must conduct an initial admissibility examination in the course of determining whether there is a "reasonable basis to proceed" for the sake of initiating an investigation (article 53(1)(b) of the Statute and rule 48 of the Rules).

43. Reaching a determination that there is a "reasonable basis to proceed" in relation to the admissibility requirement provided for in article 53(1)(b) of the Statute, when the Prosecutor is acting *proprio motu*, requires an *exceptional* review of his finding on admissibility at this *particular* stage by the relevant Pre-Trial Chamber as in the present case. With the additional exception of a possible separate review under article 53(3)(a) of the Statute, in case the Prosecutor decides not to proceed with an investigation, a review by the Pre-

[45] Statute, articles 53, 18, 19.

[46] Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, No.: ICC-01/04, 17/01/2006, (public redacted), ICC- 01/04-101-etEN-Corr., para. 65.

Trial Chamber of the Prosecutor's initial admissibility determination does not otherwise arise before the stage of article 18 of the Statute.

44. In any of these instances, the Prosecutor and the Pre-Trial Chamber operate within the parameters of an entire "situation", rather than in relation to a specific "case". This understanding finds support from a plain reading of articles 13(a) and (b), 14(1), 15(5) and (6), and 18(1) of the Statute. In relation to a specific case, the Court's jurisprudence has considered that a "case" falls within the ambit of the article 19 stage[47] and it starts after the issuance of an arrest warrant or a summons to appear pursuant to article 58 of the Statute.[48]

45. The Chamber is therefore of the opinion that article 53(1)(b) of the Statute must be construed in its context, and accordingly, an assessment of admissibility during the article 53(1) stage should in principle be related to a "situation" (admissibility of a situation). In this context, the Chamber notes that the use of the word "case" instead of "situation" in the text of article 53(1)(b) of the Statute could be explained as follows.

46. It is apparent from a review of the *travaux préparatoires* of the Statute that the formulation used in the opening clause of article 17 of the Statute that "the Court shall determine that a *case* is inadmissible [...]", was commonly used in all draft proposals tabled during the work of the Preparatory Committee and remained unchanged in the draft final act, which was submitted to the Rome Conference.[49] At the Rome Conference, there was a

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[47] Appeals Chamber, Judgment of the Prosecutor's Appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04-169, para. 52.

[48] See, *e.g.*, Statute, article 53(2); Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58 (7) of the Statute, ICC-02/05-01/07-1-Corr, para. 18.

[49] *Decisions Taken By the Preparatory Committee at its Session Held from 4 to 15 August 1997*, UN Doc. A/AC.249/1997/L.8/Rev. 1 (1997), article 35(2), p. 10; *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands*, UN Doc. A/AC.249/1998/L.13 (1998), article 11[35]1[2], p. 42; *Report of the Preparatory Committee on the Establishment of an*

prevailing trend inspired by the coordinator to avoid reopening the "substance" of the admissibility provisions, given the difficulty posed in reaching acceptable compromises at the Preparatory Committee.[50] Although a few delegations were not fully satisfied with the compromises achieved at the Preparatory Committee and requested renegotiating the admissibility provisions, none of these concerns was related to the formulation of the *chapeau* of article 17 of the Statute, which included the reference to a "case".[51] Therefore, the current formulation remained throughout the drafting process until it appeared in the current text of article 17 of the Statute. Consequently, had the relevant working group on article 53 changed their terminology from "case" to "situation", this would have required revisiting the text of article 17 which, as discussed above, was an unfavourable idea

47. However, the Chamber is more persuaded that the drafters advertently retained the terminology of a "case" in all relevant provisions addressing admissibility, including article 17 of the Statute, thereby leaving it for the Court to harmonize the meaning according to the different stages of the proceedings. This view is confirmed considering that the selected formulation referring to the word "case" was before the Preparatory Committee while the term "situation" for the purpose of triggering the jurisdiction of the Court, first proposed in 1996, was being discussed in parallel, and ultimately gained the support of a "large majority of States".[52] The term "situation" finally

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International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/Conf.183/2/Add.1 (1998), article 15(1), p. 48.

[50] J. T. Holmes, "The Principle of Complementarity", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues. Negotiations. Results*, (The Hague, Boston: Kluwer Law International, 1999), pp. 51-52; UN Doc. A/CONF.183/C.1/SR.30 (1998), para. 123.

[51] UN Doc. A/CONF.183/C.1/SR.30 (1998), para. 37 (Mexico); UN Doc. A/CONF.183/C.1/SR.35 (1998), paras 6, 35 (Egypt and Iraq); UN Doc. A/CONF.183/C.1/L.14/REV.1 (1998) (Mexico); UN Doc. A/CONF.183/C.1/L. 23 (1998) (Uruguay).

[52] See, on the debates concerning a referral of "situations" versus "cases", S. A. Fernández de Gurmendi, "The Role of the International Prosecutor", in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues Negotiations Results* (The Hague, Boston: Kluwer Law International, 1999), p. 180.

found its way into those provisions of the Statute as outlined in paragraph 44, and most importantly article 15(5) and (6) of the Statute. The reference to "situation" in these paragraphs when compared to the use of "case" in the last line of article 15(4) of the Statute demonstrates that the drafters made an express choice to retain "case" rather than "situation" for the purpose of admissibility determinations, depending on the stage of the proceedings.

48. Accordingly, the reference to a "case" in article 53(1)(b) of the Statute does not mean that the text is mistaken but rather that the Chamber is called upon to construe the term "case" in the context in which it is applied. The Chamber considers, therefore, that since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation.[53]

49. It is also the Chamber's opinion that the admissibility assessment, whether of actual or potential cases, cannot be conducted in the abstract. Rather, it must be carried out within the framework of certain parameters. In this respect, the Chamber fails to comprehend how the Prosecutor can determine whether a case "would be admissible", without *preliminarily* knowing the type of groups of persons or incidents (involving the commission of crimes falling within the jurisdiction of the Court), or both, likely to shape his future case(s).[54] In the absence of such information, a

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[53] See also, R. Rastan, "What is a 'Case' for the Purpose of the Rome Statute?", 19 *Criminal Law Forum* 435, 441-442 (2008).

[54] In the same vein see P. F. Seils, "Making Complementarity Work: Maximising the Limited Rule of the Prosecutor", in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice,* (Cambridge: CUP, forthcoming, 2010) ("The argument that the Prosecutor is not in a position to know the specific cases at the point of opening an investigation is not persuasive [...]. As to incidents and conduct, by the time the process of preliminary examination reaches its conclusion there should almost always be substantial clarity on the type of the alleged criminal conduct, the numbers of incidents and

comparison could never be made between what the Court intends to do with respect to investigations, and what domestic courts are actually doing or have done, thus making a finding of *inadmissibility* impossible.

50. Accordingly, admissibility at the situation phase should be assessed against certain criteria defining a "potential case" such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). The Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage, depending on the development of the investigation.

51. The Chamber emphasizes that defining the scope of potential case(s) at this stage may well serve an effective application of article 18 of the Statute, which is immediately applicable when a Pre-Trial Chamber authorizes the commencement of an investigation. This would generally enable States which "would normally exercise jurisdiction over the crimes" in question to receive useful information (subject to the limitation provided in article 18(1) of the Statute), as to the parameters of possible case(s) before the Court. In turn, this would facilitate a mutual understanding between the Court and the relevant

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victims of that conduct, and related matters concerning aggravation or impact. While it is always possible that the investigation will conclude that certain incidents identified during preliminary examination cannot be substantiated, this does not invalidate the identification of *potential cases* as such at this point: it merely demonstrates the provisional nature of the preliminary examination".

State(s) as to the scope of the complementarity assessment dictated by article 18(2)-(5) of the Statute.

52. Having said the above, the Chamber considers that, at this stage, the admissibility assessment requires an examination as to whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court's investigations. If the answer is in the negative, the "case would be admissible", provided that the gravity threshold is also met. In this regard, the Chamber wishes to remind that the admissibility test has two main limbs: (i) complementarity (article 17(1)(a)-(c) of the Statute); and (ii) gravity (article 17(1)(d) of the Statute).

53. With respect to complementarity, the Chamber underlines that the first step concerns the absence or existence of national proceedings. Article 17(1)(a) of the Statute makes clear that the Court "shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". In its judgment of 25 September 2009, the Appeals Chamber interpreted this provision as involving a twofold test:

> [I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a

> State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.[55]

54. Thus, in the present scenario, it is not necessary to proceed to the second step, which requires an examination of the remaining parts of the provision, since the available information indicates that there is a situation of inactivity with respect to the elements that are likely to shape the potential case(s), as elaborated below in section II.B.

55. As for the element of gravity, the Chamber notes that according to article 17(1) of the Statute, "[...] the Court shall determine that a case is inadmissible where: [...] (d) the case is not of sufficient gravity to justify further action by the Court."

56. In this context, the Chamber recalls that all crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases. In the *Lubanga* case, Pre-Trial Chamber I adopted a similar approach when it stated:

> [The] gravity threshold is in addition to the drafters' careful selection of crimes included in articles 6 to 8 of the Statute [...]. Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.[56]

57. Thus, conducting an admissibility assessment within the context of a situation under article 53(1)(b) of the Statute not only requires an examination regarding the existence or absence of national proceedings, but also one which involves gravity. Therefore, although a State with jurisdiction over a case may have remained entirely inactive with respect to domestic

[55] Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, para. 78.

[56] Pre-Trial Chamber I, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ICC-01/04-01/06-8-Corr, para. 41.

investigations, the Court should still determine the case as inadmissible if it "is not of sufficient gravity to justify further action [...]". Accordingly, the gravity assessment is a mandatory component for the determination of the question of admissibility.

58. In this respect, the Chamber considers that although an examination of the gravity threshold must be conducted, it is not feasible that at the stage of the preliminary examination it be done with regard to a concrete "case". Instead gravity should be examined against the backdrop of the likely set of cases or "potential case(s)" that would arise from investigating the situation.

59. The Chamber has defined the parameters of a potential case by way of reference to: (i) the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).

60. As for the first element, the Chamber considers that it involves a generic assessment of whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed. Such assessment should be general in nature and compatible with the pre-investigative stage into a situation.

61. As for the second element, the Chamber is of the view that this mainly concerns the gravity of the crimes committed within the incidents, which are likely to be the focus of an investigation. In this regard, there is interplay between the crimes and the context in which they were committed (the incidents). Thus, the gravity of the crimes will be assessed in the context of their *modus operandi*.

62. In making its assessment, the Chamber considers that gravity may be examined following a quantitative as well as a qualitative approach.[57] Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave.[58] When considering the gravity of the crime(s), several factors concerning sentencing as reflected in rule 145(1)(c) and (2)(b)(iv) of the Rules, could provide useful guidance in such an examination. These factors could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (*i.e.*, the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families. In this respect, the victims' representations will be of significant guidance for the Chamber's assessment.

3. Article 53(1)(c) – "Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice"

63. The final requirement that the Chamber is called upon to review under article 53(1)(c) of the Statute is whether "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". Unlike sub-paragraphs (a) and (b), which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect. Thus, the

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[57] Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-02/05-02/09-243-Red, para. 31.

[58] See, *e.g.*, W. A. Schabas, "Prosecutorial Discretion and Gravity", in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, (Leiden, Boston: Martinus Nijhoff Publishers, 2009), pp. 245-246.

Chamber considers that a review of this requirement is unwarranted in the present decision, taking into consideration that the Prosecutor has not determined that an investigation "would not serve the interests of justice", which would prevent him from proceeding with a request for authorization of an investigation.[59] Instead, such a review may take place in accordance with article 53(3)(b) of the Statute if the Prosecutor decided not to proceed with such a request on the basis of this sole factor. It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision,[60] thereby triggering the review power of the Chamber.

B. Article 15(4) – "The case appears to fall within the jurisdiction of the Court"

64. Lastly regarding the reference to "the case" in article 15(4) of the Statute, the Chamber is of the view that it raises the same problem as previously discussed with respect to article 53(1)(b) of the Statute. Therefore, this requirement shall be understood as relating to potential cases within the situation at stake. Having said that, the Chamber notes that it already reviews, in accordance with article 53(1)(a) of the Statute, if there is a reasonable basis to believe that a *crime* within the jurisdiction of the Court has been or is being committed.

65. Although a "case" has a different meaning than a "crime", since the former encompasses both crimes and one or several persons suspected to have committed those crimes in the course of specific incidents, the Chamber finds that its determination of jurisdiction concerning the crimes as required under article 53(1)(a) of the Statute already covers the analysis of jurisdiction

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[59] Prosecutor's Request, ICC-01/09-3, para. 61.

[60] See rule 105(5). The Chamber may, in accordance with regulation 48 of the Regulations, request the Prosecutor to present information in order to exercise its review power.

over any potential case pursuant to article 15(4) of the Statute. In the context of the present decision, an affirmative finding on the basis of jurisdiction *ratione loci* in relation to the crimes allegedly committed on the territory of the Republic of Kenya consequently precludes the need to consider jurisdiction *ratione personae*. However, if the territoriality requirement was not met, the Chamber would still be obliged under article 53(1)(a) of the Statute to examine personal jurisdiction, albeit limited only to whether the potential perpetrators are nationals of States Parties, in order to verify that it could open an investigation.

66. This analysis makes it evident that there is a degree of redundancy in article 15(4) of the Statute insofar as the first requirement necessitates assessment of a "reasonable basis to proceed" under article 53(1)(a) of the Statute, and the second requirement equally prescribes assessment of whether "the case appears to fall within the jurisdiction of the Court".

67. In order to explain such a redundancy, it is worth recalling that: (i) articles 15 and 53 of the Statute were dealt with by different working groups during the Rome Conference;[61] (ii) there was no time at the end of the Rome Conference to reconcile both texts and even these provisions were not finally considered by the drafting committee; and (iii) many fundamental questions[62] remained unresolved until the very end of the Rome Conference including, *inter alia*, article 15 of the Statute,[63] as well as essential questions relating to jurisdiction, such as the preconditions for the Court to exercise jurisdiction

[61] H. Friman, "Investigation and Prosecution", in R. S. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Ardsley: Transnational Publishers, 2001), p. 494.

[62] See *Bureau Proposal on Part 2, Jurisdiction, Admissibility and Applicable Law, 10 July 1998*, UN Doc. A/CONF.183/C.1/L.59 (1998). Although presented just one week before the end of the Rome Conference, this proposal still contains an impressive list of the different options which were still considered at that time.

[63] S. A. Fernández de Gurmendi, "The Role of the International Prosecutor", in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues Negotiations Results* (The Hague, Boston: Kluwer Law International, 1999), p. 187.

(alternative or cumulative option) and the need for the States Parties to accept the jurisdiction of the Court in relation to certain crimes.

68. It follows from the above analysis that the Chamber is satisfied that a review of article 53(1)(a)-(c) of the Statute is sufficient for the purpose of this procedure and there is no need to duplicate its assessment of jurisdiction under article 15(4) of the Statute.

69. Having laid out the applicable law, the Chamber will now determine, upon examination of the available information, whether the requisite criteria for authorization of an investigation have been met. Thus, the Chamber will examine whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed (section II.A) and whether the case is or would be admissible under article 17 of the Statute (section II.B).

II. WHETHER THE REQUISITE CRITERIA HAVE BEEN MET

A. Whether there is a reasonable basis to believe that crimes against humanity within the jurisdiction of the Court have been committed

70. In the Prosecutor's Request, it is alleged that there is a reasonable basis to believe that the crimes against humanity of murder, rape and other forms of sexual violence, deportation or forcible transfer of population and other inhumane acts were committed and that therefore the Court's material jurisdiction is established.[64] The Prosecutor further submits that these crimes fall under the temporal jurisdiction of the Court since they occurred after the entry into force of the Statute for the Republic of Kenya.[65] Finally, he contends

[64] Prosecutor's Request, ICC-01/09-3, paras 47 and 48.
[65] Prosecutor's Request, ICC-01/09-3, para. 49.

that, since the alleged crimes were committed on Kenyan territory, they fall within the Court's territorial jurisdiction.[66]

71. The Chamber recalls that, to fall under the jurisdiction of the Court, a crime must fulfill the jurisdictional parameters *ratione materiae, ratione temporis* and – in the alternative - *ratione personae* or *ratione loci*. In the following sections, the Chamber will address each of these requirements in turn.

1. Jurisdiction *ratione materiae*

72. The Prosecutor submits that there is a reasonable basis to believe that murder, rape and other forms of sexual violence, deportation and forcible transfer of population and other inhumane acts constituting crimes against humanity have been committed during the period referred to in the Prosecutor's Request.[67]

73. Upon examination of the available information, bearing in mind the nature of the present proceedings, the low threshold, as well as the object and purpose of this decision, the Chamber finds that the information available provides a reasonable basis to believe that crimes against humanity have been committed on Kenyan territory.

74. At the outset, the Chamber wishes to highlight that this finding is without prejudice to any further submission by the Prosecutor or finding by the Chamber to be made pursuant to a different threshold at a later stage of the proceedings in the context of the situation in Kenya.

75. The Chamber also underlines that in the development of the proceedings the Prosecutor is neither bound by his submissions with regard to the different acts constituting crimes against humanity, nor by the incidents and persons identified in the annexes appended to the Prosecutor's Response.

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[66] Prosecutor's Request, ICC-01/09-3, paras 47 and 50.
[67] Prosecutor's Request, ICC-01/09-3, para. 93.

Accordingly, upon investigation, the Prosecutor may take further procedural steps provided for in the Statute in respect of these or other acts constituting crimes against humanity, incidents or persons, subject to the parameters of the present authorization discussed in part III.

76. The Chamber bases its finding set out in paragraph 73 upon the considerations laid out in the following section. In particular, the Chamber will analyze the contextual elements of crimes against humanity in section II.A.1.a, while in section II.A.1.b it will turn to the submissions in the Prosecutor's Request with regard to the underlying conduct.

a) Contextual elements of crimes against humanity

(i) The law and its interpretation

77. Article 7(1) of the Statute describes the contextual elements of crimes against humanity as follows:

> [...] '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.

78. Article 7(2)(a) of the Statute further indicates that:

> '[a]ttack 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.

79. The Chamber observes that the following requirements can be distinguished: (i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack. In light of the nature of the current stage of the proceedings, bearing in mind that there is presently no suspect before the Court, the Chamber considers that the last requirement cannot be adequately

addressed at this stage, as knowledge is an aspect of the mental element under article 30(3) of the Statute. Therefore, the Chamber's analysis will be limited to the first four enumerated requirements.

(aa) An attack directed against any civilian population

80. The meaning of the term "attack", although not addressed in the Statute, is clarified by the Elements of Crimes, which state that, for the purposes of article 7(1) of the Statute, an attack is not restricted to a "military attack".[68] Instead, the term refers to "a campaign or operation carried out against the civilian population". As provided for in article 7(2)(a) of the Statute, an attack consists of a course of conduct involving the multiple commission of acts referred to in article 7(1).[69]

81. Moreover, the *chapeau* of article 7(1) of the Statute defines crimes against humanity as any of the acts specified therein, when committed as part of an attack "directed against any civilian population". The Chamber considers that the potential civilian victims of a crime under article 7 of the Statute are groups distinguished by nationality, ethnicity or other distinguishing features.[70] The Prosecutor will need to demonstrate, to the standard of proof applicable, that the attack was directed against the civilian population as a whole and not merely against randomly selected individuals.[71]

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[68] Elements of Crimes, Introduction to Article 7 of the Statute, para. 3.

[69] 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. 75.

[70] 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. 76; Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 399.

[71] 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.

82. The Chamber need not be satisfied that the entire civilian population of the geographical area in question was being targeted.[72] However, the civilian population must be the primary object of the attack in question and cannot merely be an incidental victim.[73] The term "civilian population" refers to persons who are civilians, as opposed to members of armed forces and other legitimate combatants.[74]

(bb) State or organizational policy

83. Further, article 7(2)(a) of the Statute imposes the additional requirement that the attack against any civilian population be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack".[75] The Elements of Crimes offer further clarification in paragraph 3, *in fine*, of the Introduction to Crimes against humanity, where it is stated that:

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77. See also ICTY, *Prosecutor* v. *Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, para. 627; ICTY, *Prosecutor* v. *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 90.

[72] 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. 76. See also ICTR, *Prosecutor* v. *Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001, para. 80; ICTR, *Prosecutor* v. *Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003, para. 330; ICTY, *Prosecutor* v. *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 90.

[73] 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. 77. See also ICTY, *Prosecutor* v. *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, paras 91-92; ICTY, *Prosecutor* v. *Stakić*, Case No. IT-97-24-T, Judgement 31 July 2003, para. 624; ICTY, *Prosecutor* v. *Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, para. 33.

[74] 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. 78. See also ICTY, *Prosecutor* v. *Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 425; Article 3 Common to the 1949 Geneva Conventions; Article 4 of the Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, United Nations Treaty Series, volume 75, p. 135; Articles 43 and 50 of Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, United Nations Treaty Series, volume 1125, p. 3.

[75] Statute, Article 7(2)(a).

> [i]t is understood that "policy to commit such an attack" requires that the State or organization actively promote or encourage such an attack against a civilian population;

and in footnote 6 of the same Introduction to Crimes against Humanity, where it is stated that:

> [a] policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

84. The Chamber notes that the Statute does not provide definitions of the terms "policy" or "State or organizational". However, both this Chamber and Pre-Trial Chamber I have addressed the policy requirement in previous decisions. In the case against Katanga and Ngudjolo Chui, Pre-Trial Chamber I found that this requirement:

> [...] ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion.[76]

85. In the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", this Chamber also addressed the issue, stating that:

> [t]he requirement of 'a State or organizational policy' implies that the attack follows a regular pattern. Such a policy may be made by groups of person who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised.

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[76] Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 396 (footnotes omitted).

> Indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.[77]

86. Regarding the meaning of the term "policy", the Chamber will apply, in accordance with article 21(2) of the Statute, the definitions given in the abovementioned precedents. The Chamber also takes note of the jurisprudence of the *ad hoc* tribunals, and the work of the International Law Commission (the "ILC").[78] While the Chamber is mindful of the jurisprudential evolution and the eventual abandonment of the policy requirement before the *ad hoc* tribunals,[79] it nevertheless deems it useful and thus appropriate to consider their definition of the concept in earlier cases.

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[77] Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 81 (footnotes omitted). See also ICTY, *Prosecutor* v. *Tadić*, Case No. IT-94-1-T, Judgement, 7 May 1997, para. 653; R. Dixon, C. K. Hall, "Article 7", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. (Munich etc.: C.H.Beck etc., 2008), p. 236.

[78] In particular, see Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission (the "ILC") in 1996, which reads: "[a] crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group [...]." In its Commentary of the Draft Code, the ILC indicated that this wording "intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization", which according to the ILC, would not constitute a crime against humanity. See Yearbook of the International Law Commission 1996, Volume 2, Part 2, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2) (1996), p. 47. It is worth noting, however, that the ICL Draft Code does not require that there must be a policy *per se*, but only that the crimes be instigated by the Government or organization. This approach is confirmed by an author, according to whom, "the policy element only requires that the acts of individuals alone, which are isolated, un-coordinated, and haphazard, be excluded." See R. Dixon, C. K. Hall, "Article 7", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., (Munich etc.: C.H.Beck etc., 2008), p. 236.

[79] In the earlier jurisprudence of these tribunals, the policy element was considered to be a constitutive element of crimes against humanity: See, *e.g.*, ICTY, *Prosecutor* v. *Tadić*, Case No. IT-94-1-T, Judgement, 7 May 1997, para. 653; ICTR, *Prosecutor* v. *Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 580; ICTR, *Prosecutor* v. *Rutaganda*, Judgement, 6 December 1999, para. 69; ICTR, *Prosecutor* v. *Musema*, Judgement, 27 January 2000, para. 204; ICTR, *Prosecutor* v. *Kayishema and Ruzindana*, Judgement, 21 May 1999, paras 123-125, 581. This requirement was abandoned by the Kunarac Appeal Judgement, which held that neither the attack nor the acts of the accused need to be supported by any form of "policy" or "plan": ICTY, *Prosecutor* v. *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12

87. In particular, the Chamber takes note of the judgment in the case against Tihomir Blaškić, in which the ICTY Trial Chamber held that the plan to commit an attack:

> [...] need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events, *inter alia*:
> - the general historical circumstances and the overall political background against which the criminal acts are set;
> - the establishment and implementation of autonomous political structures at any level of authority in a given territory;
> - the general content of a political programme, as it appears in the writings and speeches of its authors;
> - media propaganda;
> - the establishment and implementation of autonomous military structures;
> - the mobilisation of armed forces;
> - temporally and geographically repeated and co-ordinated military offensives;
> - links between the military hierarchy and the political structure and its political programme;
> - alterations to the "ethnic" composition of populations;
> - discriminatory measures, whether administrative or other (banking restrictions, laissez-passer,...);
> - the scale of the acts of violence perpetrated – in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites.[80]

88. The Chamber may refer to these factors, *inter alia*, when determining whether there was a policy to commit an attack against the Kenyan civilian population.

89. With regard to the definition of the terms "State or organizational", the Chamber firstly notes that while, in the present case, the term "State" is self-explanatory, it is worth mentioning that in the case of a State policy to commit an attack, this policy "does not necessarily need to have been conceived 'at the highest level of the State machinery.'"[81] Hence, a policy adopted by regional

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June 2002, para. 98. This conclusion was then endorsed *inter alia* in ICTY, *Prosecutor* v. *Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, para. 36, ICTY, *Prosecutor* v. *Naletilić and Martinović*, Case No. IT-98-34-T, Judgement, 31 March 2003, para. 234, ICTR, *Prosecutor* v. *Semanza* , Case No. ICTR-97-20-T, Judgement, 15 May 2003, para. 329.

[80] ICTY, *Prosecutor* v. *Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 204 (footnotes omitted).

[81] ICTY, *Prosecutor* v. *Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 205.

or even local organs of the State could satisfy the requirement of a State policy.

90. With regard to the term "organizational",[82] the Chamber notes that the Statute is unclear as to the criteria pursuant to which a group may qualify as "organization" for the purposes of article 7(2)(a) of the Statute. Whereas some have argued that only State-like organizations may qualify,[83] the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values:

> the associative element, and its inherently aggravating effect, could eventually be satisfied by 'purely' private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by 'territorial' entities or by private groups, given the latter's acquired capacity to infringe basic human values.[84]

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[82] The Arabic, French, Russian and Spanish versions refer to "عملا بسياسة دولة أو منظمة" (emphasis added), "la politique d'un État ou d'*une organisation*"(emphasis added), "политики государства *или организации*"(emphasis added), "la política de un Estado o de *una organización*"(emphasis added). The wording found in these language versions emphasizes that, in the absence of a State policy, the existence of an organization behind the policy is an essential component of the "organizational policy" requirement.

[83] See, *e.g.*, W. Schabas, *The Rome Statute of the International Criminal Court: A* Commentary (Oxford: OUP), p. 152; C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed. (The Hague: Kluwer Law International, 1999), pp. 244-245.

[84] See M. Di Filippo, "Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes", 19 *European Journal of International Law* 533, 567 (2008). See also D. Robinson, "Defining 'crimes against humanity' at the Rome Conference", 93 *American Journal of International Law* 43, 50 (1999); K Kittichaisaree, *International Criminal Law* (Oxford, OUP, 2001), p. 98; S. Ratner, *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy*, 3rd ed. (Oxford: OUP, 2009), p. 70; B. Conforti, *Diritto internazionale* (Naples: Editoriale scientifica, 2006), p. 191; P. Burns, "Aspect of Crimes Against Humanity and the International Criminal Court – A paper prepared for the Symposium on the International Criminal Court, February 3 – 4, 2007; Beijing, China" – online, at: http://www.icclr.law.ubc.ca/Site%20Map/ICC/AspectofCrimesAgainstHumanity.pdf (consulted on 1 March 2010).

91. The Chamber deems it useful to turn to the work of the ILC which determined in the Commentary to the Draft Code adopted during its 43rd session, that one shall not:

> confine possible perpetrators of the crimes to public officials or representatives alone. Admittedly, they would, in view of their official position, have far-reaching factual opportunity to commit the crimes covered by the draft article; yet the article does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code.[85]

92. The Chamber finds that had the drafters of the Statute intended to exclude non-State actors from the term "organization", they would not have included this term in article 7(2)(a) of the Statute. The Chamber thus determines that organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population.

93. In the view of the Chamber, the determination of whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. In making this determination, the Chamber may take into account a number of considerations, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy;[86] (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic

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[85] Yearbook of the International Law Commission 1991, Volume 2, Part 2, A/CN.4/SER.A/1991/Add.1 (Part 2) (1991), p. 103. See also ICTY, *Prosecutor* v. *Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 205, which states that: individuals "with *de facto* power or organized in criminal gangs" are just as capable as State leaders of implementing a large-scale policy of terror and committing mass acts of violence." See also R. Dixon, C. K. Hall, "Article 7" in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, 2nd ed. (Munich etc.: C.H.Beck etc., 2008), pp. 236-237.

[86] Cf. Article 1(1) of the Protocol II Additional to the Geneva Conventions of 12 August 1949, 8 June 1977.

attack against a civilian population;[87] (iii) whether the group exercises control over part of the territory of a State;[88] (iv) whether the group has criminal activities against the civilian population as a primary purpose;[89] (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population;[90] (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria. It is important to clarify that, while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.

(cc) Widespread or systematic nature of the attack

94. Under article 7(1) of the Statute, an act listed therein constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population. The Chamber considers that this contextual element applies disjunctively, such that the alleged acts must be *either* widespread *or* systematic to warrant classification as crimes against humanity.[91] The rationale behind this contextual element is to "exclude

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[87] See, *e.g.*, M. Di Filippo, "Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes", 19 *European Journal of International Law* 533, 567-568 (2008).

[88] See, *e.g.*, Article 1(1) of the Protocol II Additional to the Geneva Conventions of 12 August 1949, 8 June 1977; M. Di Filippo, "Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes", 19 *European Journal of International Law* 533, 566-567 (2008).

[89] See, *e.g.*, J. M. Smith, "An international hit job: Prosecuting organized crime acts as crimes against humanity", 97 *Georgetown Law Journal* 1111, 1133-1134 (2009); P. Burns, "Aspect of Crimes Against Humanity and the International Criminal Court – A paper prepared for the Symposium on the International Criminal Court, February 3 – 4, 2007; Beijing, China" – online, at: http://www.icclr.law.ubc.ca/Site%20Map/ICC/AspectofCrimesAgainstHumanity.pdf (consulted on 1 March 2010).

[90] See, *e.g.*, P. Burns, "Aspect of Crimes Against Humanity and the International Criminal Court – A paper prepared for the Symposium on the International Criminal Court, February 3 – 4, 2007; Beijing, China" – online, at: http://www.icclr.law.ubc.ca/Site%20Map/ICC/AspectofCrimesAgainstHumanity.pdf (consulted on 1 March 2010).

[91] This alternative is clear from the text of Article 7(1) of the Statute, which clearly states "widespread *or* systematic" (emphasis added). See also Pre-Trial Chamber I, Decision on the

isolated or random acts from the notion of crimes against humanity".[92] Importantly, only the attack, and not the alleged individual acts are required to be "widespread" or "systematic".[93]

95. Insofar as the "widespread" element is concerned, this has long been defined as encompassing "the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims".[94] As such, the element refers to both the large-scale nature of the attack and the number of resultant victims.[95] The assessment is neither exclusively quantitative nor geographical, but must

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confirmation of charges, ICC-01/04-01/07-717, para. 412; ICTY, *Prosecutor* v. *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 97.

[92] Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 33; Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, para. 62. See also ICTY, *Prosecutor* v. *Tadić*, Case No. IT-94-1-T, Judgement, 7 May 1997, para. 648; ICTR, *Prosecutor* v. *Rutaganda*, Case No. ICTR-96-3-T, Judgement, 6 December 1999, paras 67-69; ICTR, *Prosecutor* v. *Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, paras 122-123; R. Dixon, C. K. Hall, "Article 7" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, 2nd ed. (Munich etc.: C.H.Beck etc., 2008), p. 169.

[93] ICTY, *Prosecutor* v. *Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 94; ICTY, *Prosecutor* v. *Deronjić*, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 para. 109; ICTY, *Prosecutor* v. *Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, para. 101; ICTY, *Prosecutor* v. *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 96.

[94] Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 83; Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, paras 395. See also ICTR, *Prosecutor* v. *Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 580; *Prosecutor* v. *Musema*, Case No. ICTR-96-13-A, Appeal Judgement, 27 January 2000, para. 204.

[95] 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. 83; Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-01-Corr, para. 62. See also ICTY, *Prosecutor* v. *Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 94; ICTY, *Prosecutor* v. *Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004 , para. 101; ICTY, *Prosecutor* v. *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 94; R. Dixon, C. K. Hall, "Article 7, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, 2nd ed. (Munich etc.: C.H.Beck etc., 2008), p. 178.

be carried out on the basis of the individual facts. Accordingly, a widespread attack may be the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude".[96]

96. In contrast to the large-scale character of "widespread", the term "systematic" refers to the "organised nature of the acts of violence and the improbability of their random occurrence".[97] An attack's systematic nature can "often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis."[98] The Chamber notes that the "systematic" element has been defined by the ICTR as (i) being thoroughly organised, (ii) following a regular pattern, (iii) on the basis of a common policy, and (iv) involving substantial public or private resources,[99] whilst the ICTY has determined that the element requires (i) a political objective or plan, (ii) large-scale or continuous commission of crimes which are linked, (iii) use of significant public or private resources, and (iv) the implication of high-level political and/or military authorities.[100]

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[96] ICTY, *Prosecutor* v. *Blagojević and Jokić,* Case No. IT-02-60-T, Judgement, 17 January 2005, para. 545. See also Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 83, ICTY, *Prosecutor* v. *Blaškić,* Case No. IT-95-14-T, Judgement, 3 March 2000, para. 206; ICTY, *Prosecutor* v. *Kordić and Čerkez,* Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 94; ICTY, *Prosecutor* v. *Blaškić,* Case No. IT-95-14-A, Appeal Judgment, 29 July 2004 , para. 101; R. Dixon, C. K. Hall, "Article 7, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article,* 2nd ed. (Munich etc.: C.H.Beck etc., 2008), p. 178.

[97] Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 394; Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, para. 62. See also ICTY, *Prosecutor* v. *Tadić,* Case No. IT-94-1-T, Judgement, 7 May 1997, para. 648; ICTY, *Prosecutor* v. *Kordić and Čerkez,* Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 94; ICTY, *Prosecutor* v. *Blaškić,* Case No. IT-95-14-A, Appeal Judgment, 29 July 2004 , para. 101.

[98] Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 397. See also ICTY, *Prosecutor* v. *Kordić and Čerkez,* Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 94; *Prosecutor* v. *Blagojević and Jokić,* Case No. IT-02-60-T, Judgement, 17 January 2005, para. 545.

[99] ICTR, *Prosecutor* v. *Akayesu,* Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 580.

[100] ICTY, *Prosecutor* v. *Blaškić,* Case No. IT-95-14-T, Judgement, 3 March 2000, para. 203.

(dd) Nexus between the individual acts and the attack

97. As previously noted, the *chapeau* of article 7(1) of the Statute defines crimes against humanity as any of the acts specified therein insofar as they are committed "as part of a widespread or systematic attack directed against any civilian population".[101] Thus, the nexus between such acts and the attack against a civilian population is one of the requirements that must be satisfied in order for the commission of crimes against humanity to be established.[102]

98. In determining whether an act falling within the scope of article 7(1) of the Statute forms part of an attack, the Chamber must consider the nature, aims and consequences of such act.[103] Isolated acts which clearly differ, in their nature, aims and consequences, from other acts forming part of an attack, would fall outside the scope of article 7(1) of the Statute.[104]

99. In light of this review of the law, the Chamber will now turn to the examination of the available information.

(ii) Examination of the available information

(aa) An attack directed against any civilian population

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[101] Statute, Article 7(1). See also Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 84; Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 400.

[102] See Elements of Crimes, Article 7(1)(a)(2); 7(1)(d)(4); 7(1) (g)-1 (3); (2), 7 (1)(g)-6 (4); 7(1) (k)(4); 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. 85.

[103] 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. 86. See also ICTR, *Prosecutor* v. *Kalelijeli*, Case No. ICTR-98-44A-T, Judgement, 1 December 2003, para. 866; *Prosecutor* v. *Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003, para. 326.

[104] See ICTY, *Simić, Tadić and Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003, para. 41.

100. In the Prosecutor's Request, it is alleged that "the post-election violence of 2007-2008 occurred in the context of a widespread and systematic attack against the Kenyan civilian population".[105]

101. The Prosecutor further submits that "the post-election violence in Kenya comprised hundreds of incidents with varying degrees of organization."[106]

102. The Chamber considers that the available information indicates that murder, rape and other forms of sexual violence, forcible transfer of population and other inhumane acts, as further developed in section III.A.1.b of the present decision, occurred on Kenyan territory within the time frame covered by the Prosecutor's Request.

103. The Chamber further concurs with the Prosecutor's assertion that the violence comprised a significant number of incidents. While these incidents differed from one region to another, depending on the respective ethnical composition and other region-specific dynamics,[107] some of these incidents seem to relate to three general categories of attacks.

104. A first category would comprise the attacks initiated by groups associated with the Orange Democratic Movement (the "ODM") and directed against perceived Party of National Unity (the "PNU") supporters.[108]

105. The second category can be understood to involve retaliatory attacks conducted by members of the groups targeted by the initial attacks and

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[105] Prosecutor's Request, ICC-01/09-3, para. 77.
[106] Prosecutor's Response, ICC-01/09-16, para. 14.
[107] Office of the High Commissioner for Human Rights ("OHCHR"), "Report from the OHCHR Fact-finding Mission to Kenya, 6-28 February 2008", ICC-01/09-3-Anx7, p. 4.
[108] OHCHR Report, ICC-01/09-3-Anx7, pp. 4, 10 - 11.

directed against members of those groups deemed responsible for the initial violence.[109]

106. Concerning the third category, the supporting material points to a large number of violent acts committed by the police.[110] In this regard, it is reported that between June and October 2007, the police summarily executed at least five hundred suspected Mungiki members in a government campaign aimed at the suppression of the gang.[111] Moreover, hundreds of men were reportedly tortured and killed by the Government's security forces in an operation against the Sabaot Land Defence Force (the "SLDF") in 2008.[112] With regard to the period between 27 December 2007 and 28 February 2008, there are many references concerning allegations of excessive use of force,[113] partiality or collaboration with the attackers[114] and deliberate inaction by the police.[115]

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[109] Kenya National Commission on Human Rights, "On the Brink of the Precipice: a Human Rights Account of Kenya's Post-2007 Election Violence", 15 August 2008 (the "KNCHR Report"), ICC-01/09-3-Anx4, para. 529; OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya, 6-28 February 2008" (the "OHCHR Report"), ICC-01/09-3-Anx7, pp. 4, 11.

[110] Human Rights Watch "From Ballots to Bullets", March 2008, ICC-01/09-3-Anx3, pp. 28-38; OHCHR Report (the "HRW Report"), ICC-01/09-3-Anx7, p. 11; Report of the Special Rapporteur, ICC-01/09-3-Anx11, pp. 26-28. With regard to the 27 December 2007 - 29 February 2008 period, statistics indicate that around 37,5 % of the killings were caused by the police. In Nyanza, this figure allegedly amounts to 79,9 %: Report of the Special Rapporteur, ICC-01/09-3-Anx11, pp. 34, 36.

[111] HRW Report, ICC-01/09-3-Anx3, p. 48.

[112] Report of the Special Rapporteur, ICC-01/09-3-Anx11, pp. 26-28.

[113] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, paras 216-218 (includes claims of people being shot from behind), 275-278; Commission of Inquiry into Post-Election Violence, "Final Report", 16 October 2008 (the "CIPEV Report"), ICC-01/09-3-Anx5, p. 68; Western province: KNCHR Report, ICC-01/09-3-Anx4, paras 433, 436 (police reported to have shot persons not taking part in demonstrations). Nyanza: HRW Report, ICC-01/09-3-Anx3, pp. 31-33; KNCHR Report, ICC-01/09-3-Anx4, paras 401-403, 406-407; OHCHR Report, ICC-01/09-3-Anx7, p. 12. Nairobi: KNCHR Report, ICC-01/09-3-Anx4, paras 175-176. See also victim's representation r/0045/10, ICC-01/09-17-Conf-Exp-Anx55. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[114] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, paras 219, 221, 282, 344, 349, 350, 353; CIPEV Report, ICC-01/09-3-Anx5, pp. 68, 89. Nairobi: KNCHR Report, ICC-01/09-3-Anx4, paras 178-179. See also HRW Report, ICC-01/09-3-Anx3, pp. 63-65. See also victims'

107. The Prosecutor claims that "members of the organised groups associated with members or supporters of PNU and ODM deliberately targeted civilians who were perceived to be sympathetic to the rival group"[116] and that the acts of violence were "based on ethnicity and political affiliation."[117]

108. As stated above, in making its assessment whether the attacks were directed against a civilian population, the Chamber takes into account the information relevant to the status of the victims, their ethnic or political affiliation as well as the methods used during the attacks.

109. With regard to the status of the victims, the available information indicates that the civilian population was the primary target of the attacks. Indeed, with regard to the initial and retaliatory attacks, it is reported that the attackers targeted business premises and residential areas of various villages[118], burnt down entire houses,[119] as well as places where people sought

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representations r/0180/10, ICC-01/09-17-Conf-Exp-Anx190; r/0188/10, ICC-01/09-17-Conf-Exp-Anx194. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[115] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, paras 216, 219, 279-282, 345-346, 352-353; CIPEV Report, ICC-01/09-3-Anx5, p. 68. Western province: KNCHR Report, ICC-01/09-3-Anx4, para. 435. Nairobi: KNCHR Report, ICC-01/09-3-Anx4, para. 177; Nyanza: KNCHR Report, ICC-01/09-3-Anx4, paras 399-400.

[116] Prosecutor's Request, ICC-01/09-3, para. 83.

[117] Prosecutor's Request, ICC-01/09-3, para. 86.

[118] OHCHR Report, ICC-01/09-3-Anx7, p. 10. See also victims' representations r/0209/10, ICC-01/09-17-Conf-Exp-Anx214; r/00220/10, ICC-01/09-17-Conf-Exp-Anx224; r/00232/10, ICC-01/09-17-Conf-Exp-Anx236. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[119] *E.g.*, the burning of a house in Naivasha leading to the death of an entire family: HRW Report, ICC-01/09-3-Anx3, pp. 47, 51; KNCHR Report, ICC-01/09-3-Anx4, paras 83, 319; CIPEV Report, ICC-01/09-3-Anx5, pp. 130 – 131.

refuge.[120] Targets of police violence allegedly included "unarmed women, elderly persons, children and teachers."[121]

110. The supporting material further indicates that, depending on the respective location and the phase of the violence, the attacks were directed against members of specifically identified communities. These communities were targeted on behalf of their ethnicity which was, in turn, associated with the support of one of the two major political parties, PNU and ODM.[122]

111. Accordingly, during the initial phase of the violence, Rift Valley was the scene of attacks specifically targeting the non-Kalenjin community and in particular people of Kikuyu, Kisii and Luhya ethnicity, perceived as affiliated with the PNU.[123] In Western province, the violence mainly targeted members of the Kikuyu community[124] and with regard to Coast province, it is alleged that the Kikuyu and Meru communities were the main targets of the attacks.[125]

112. During the phase of retaliatory violence, the attacks were directed mainly against the non-Kikuyu communities, including in particular people of Kalenjin, Luo and Luhya ethnicity, perceived as affiliated with the ODM.[126]

113. Regarding the methods of attack, the supporting material shows that in some instances the attackers thoroughly identified the members of these

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[120] *E.g.*, the burning of the Assemblies of God Church: HRW Report, ICC-01/09-3-Anx3, p. 45; KNCHR Report, ICC-01/09-3-Anx4, paras 79, 237-244; CIPEV Report, ICC-01/09-3-Anx5, pp. 58-59; Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 59.

[121] Prosecutor's Response, ICC-01/09-16, para. 27.

[122] KNCHR Report, ICC-01/09-3-Anx4, paras 243, 325, 392, 393; CIPEV Report, ICC-01/09-3-Anx5, pp. 55, 58, 99.

[123] KNCHR Report, ICC-01/09-3-Anx4, paras 204, 235, 258; CIPEV Report, ICC-01/09-3-Anx5, p. 114; OHCHR Report, ICC-01/09-3-Anx7, p. 11; Center for Rights Education and Awareness, "Women paid the Price", 2008 (the "CREA Report"), ICC-01/09-3-Anx10, p. 25.

[124] KNCHR Report, ICC-01/09-3-Anx4, paras 424, 430, 431.

[125] KNCHR Report, ICC-01/09-3-Anx4, para. 481.

[126] In Langas Estate, in North Rift, there was an attack targeting Luos and Luhyas: KNCHR Report, ICC-01/09-3-Anx4, para. 269. In Naivasha, the attacks were directed mainly against the Luo community but Luhyas and Kalenjins were also targeted: CIPEV Report, ICC-01/09-3-Anx5, pp. 129, 131. Central province: KNCHR Report, ICC-01/09-3-Anx4, paras 490-491.

groups. With regard to Rift Valley, it is stated that the attackers took time to identify specific homes and premises for attack[127] and marked their own dwellings in order to show the raiders over which houses they had to carry out the attack.[128] As for Naivasha and Nairobi, the attackers reportedly conducted a door-to-door search in order to single out members of the Luo community and other non-Kikuyus.[129]

114. With regard to the violence emanating from the police, it is reported that the campaigns against the Kikuyu gangs targeted individuals suspected to be members of these gangs[130] while the violence related to the operation against the SLDF was directed against suspected SLDF members and residents of the Mt Elgon region.[131] Between 27 December 2007 and 28 February 2008, there were also instances where individual police officers targeted members of those ethnic communities perceived to be opposed to their own ethnic affiliation.[132]

(bb) State or organizational policy

115. In the Prosecutor's Request, it is alleged that although "the violence initially appeared to be spontaneous",[133] "[i]n many cases, the multiple crimes had been organized and planned."[134]

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[127] KNCHR Report, ICC-01/09-3-Anx4, para. 204.
[128] KNCHR Report, ICC-01/09-3-Anx4, para. 209; CIPEV Report, ICC-01/09-3-Anx5, p. 156.
[129] Naivasha: HRW Report, ICC-01/09-3-Anx3, p. 52; KNCHR Report, ICC-01/09-3-Anx4, para. 319; CIPEV Report, ICC-01/09-3-Anx5, p. 131. Nairobi: CIPEV Report, ICC-01/09-3-Anx5, p. 209. In Tigoni (Central province) and Naivasha, it was further reported that Kikuyus were paid for each Luo killed: UNFPA, UNICEF, UNIFEM, Christian Children's Fund, "A Rapid Assessment of Gender Based Violence During the Post-Election Violence in Kenya", January-February 2008 (the "UNICEF/UNFPA/UNIFEM/Christian Children's Fund Report"), ICC-01/09-3-Anx9, p. 42; KNCHR Report, ICC-01/09-3-Anx4, para. 317.
[130] HRW Report, ICC-01/09-3-Anx3, p. 48.
[131] Report of the Special Rapporteur, ICC-01/09-3-Anx11, pp. 3-4, 26-29.
[132] HRW Report, ICC-01/09-3-Anx3, pp. 63-65; KNCHR Report, ICC-01/09-3-Anx4, paras 179, 219-221, 349-350.
[133] Prosecutor's Request, ICC-01/09-3, para. 63.
[134] Prosecutor's Request, ICC-01/09-3, para. 57.

116. In the Prosecutor's Response, it is submitted that such crimes were organized, enticed and/or financed by "senior political and business leaders belonging to or associated with the ruling PNU party and the opposition ODM".[135] The Prosecutor further makes reference to "serious allegations that members of the police were responsible for hundreds of deaths caused through apparent excessive use of fire arms."[136] In this regard, he claims that the information available contains examples of "an unofficial 'shoot-to-kill' policy"[137] and he makes a link between the police violence and the "use by PNU leaders of government institutions to carry out the crimes".[138]

117. Upon examination of the available information, the Chamber observes that some of the violent events which occurred during the period under examination spontaneously arose after the announcement of the election results. Additionally, there were accounts of opportunistic crime which accompanied the general situation of lawlessness. However, the Chamber is of the view that the violence was not a mere accumulation of spontaneous or isolated acts. Rather, a number of the attacks were planned, directed or organized by various groups including local leaders, businessmen and politicians associated with the two leading political parties, as well as by members of the police force.

118. With regard to the initial attacks, the Chamber notes various accounts of meetings of local leaders, businessmen and politicians. Most of these meetings were convened in Rift Valley, with the alleged aims to discuss the

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[135] Prosecutor's Response, ICC-01/09-16, para. 16.
[136] Prosecutor's Response, ICC-01/09-16, para. 25.
[137] Prosecutor's Response, ICC-01/09-16, para. 27.
[138] Prosecutor's Response, ICC-01/09-16, para. 25.

eviction of the Kikuyu community, to coordinate violence and to organize funding.[139]

119. The supporting material includes additional accounts of meetings between businessmen or politicians and groups of young people. It is alleged that during these meetings, the youth were given instructions, supplied with weapons and distributed money.[140] Moreover, it is reported that training and oathing in camps or at private residences took place in preparation for the attacks.[141] In some instances, such meetings were directly followed by violent attacks against specific communities.[142]

120. The supporting material further indicates that prior to the elections, some politicians employed inflammatory rhetoric to articulate their aim to evict the Kikuyus.[143] Such statements were publicly disseminated through leaflets or the media.[144] In addition, there are references to warnings given to people in anticipation of the violence.[145]

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[139] A meeting was reportedly held at Chepkinoiyo near Sitoito after the 2007 nominations. At this meeting it was resolved that Kikuyus should be evicted so that they do not vote for the Kikuyu aspirant in Kuresoi: KNCHR Report, ICC-01/09-3-Anx4, para. 323. A meeting held at Assis Hotel in Eldoret on 1 December 2007 is reported to have discussed the eviction of the Kikuyus: KNCHR Report, ICC-01/09-3-Anx4, paras 259-260. Another meeting, which was held in Keringet on 22 December 2007, reportedly declared total war on the Kikuyu and the Kisii: KNCHR Report, ICC-01/09-3-Anx4, paras 324-330. See also HRW Report, ICC-01/09-3-Anx3, pp. 41-43; CIPEV Report, ICC-01/09-3-Anx5, pp. 80, 82, 104.

[140] KNCHR Report, ICC-01/09-3-Anx4, para. 207.

[141] KNCHR Report, ICC-01/09-3-Anx4, paras 205, 214, 325, 537; CIPEV Report, ICC-01/09-3-Anx5, pp. 83-84, 159.

[142] HRW Report, ICC-01/09-3-Anx3, pp. 44-45, 57; KNCHR Report, ICC-01/09-3-Anx4, para. 207.

[143] Rift Valley: HRW Report, ICC-01/09-3-Anx3, p. 40; KNCHR Report, ICC-01/09-3-Anx4, paras 189, 261-263, 332, 342, 356; CIPEV Report, ICC-01/09-3-Anx5, p. 147; OHCHR Report, ICC-01/09-3-Anx7, p. 10. Nyanza: KNCHR Report, ICC-01/09-3-Anx4, para. 376.

[144] HRW Report, ICC-01/09-3-Anx3, pp. 40-41; KNCHR Report, ICC-01/09-3-Anx4, paras 261, 271-272, 359; CIPEV Report, ICC-01/09-3-Anx5, p. 227; OSCAR Foundation Report, ICC-01/09-3-Anx12, p. 14.

[145] In most cases, these were given to members of the Kikuyu community by their Kalenjin friends, tenants, business partners, or relatives in inter-ethnic marriages: CIPEV Report, ICC-01/09-3-Anx5, pp. 78-79. In Kericho, Bureti and Londiani (South Rift), the attackers sent

121. The Chamber also considers that the organized nature of some of the attacks may further be inferred from the strategy and method employed in the attack.[146] In this regard, it is reported that the attacks were well coordinated and organized.[147] In some instances, attacks were carried out by large groups of raiders which arrived from different directions outside of the scene of the attack,[148] carried out simultaneous attacks[149] or fought in different shifts.[150] Some groups of attackers showed visible signs of internal cohesion consisting of some form of uniform or face painting.[151]

122. The supporting material also highlights phenomena such as the large supply of petrol and the use of sophisticated weaponry.[152] Such phenomena are consistent with allegations that businessmen or politicians financed the violence[153] or directly supplied vehicles, petrol or weapons which were to be used in the attacks.[154]

123. With regard to the entity behind the initial attacks, the supporting material contains references pointing to the involvement of Kalenjin leaders,

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signals before raiding certain people's homes by telephoning them and giving notices to those who were alleged to be supporting PNU and belonged to non-Kalenjin communities: KNCHR Report, ICC-01/09-3-Anx4, para. 213; CIPEV Report, ICC-01/09-3-Anx5, p. 159.

[146] CIPEV Report, ICC-01/09-3-Anx5, p. 80.

[147] For example, in Rift Valley, there were days for evicting the non-Kalenjin from the areas, others for burning the houses, and others for blocking the roads: KNCHR Report, ICC-01/09-3-Anx4, para. 204.

[148] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, para. 203, 205, 209, 211, 233, 305, 307, 331, 534; CIPEV Report, ICC-01/09-3-Anx5, pp. 80-81, 156. Nairobi: KNCHR Report, ICC-01/09-3-Anx4, para. 170. Western: KNCHR Report, ICC-01/09-3-Anx4, para. 445. See also HRW Report, ICC-01/09-3-Anx3, p. 44.

[149] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, para. 331.

[150] KNCHR Report, ICC-01/09-3-Anx4, para. 210 (South Rift).

[151] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, paras 205, 264, 331. Western: KNCHR Report, ICC-01/09-3-Anx4 paras 442, 445.

[152] KNCHR Report, ICC-01/09-3-Anx4, paras 208, 215, 264; CIPEV Report, ICC-01/09-3-Anx5, p. 85.

[153] Rift Valley: CIPEV Report, ICC-01/09-3-Anx5, pp. 82, 84, 212.

[154] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, para. 269; Nairobi: KNCHR Report, ICC-01/09-3-Anx4, para. 140.

businessmen and ODM politicians, including cabinet ministers.[155] Finally, several ODM politicians reportedly announced in public their determination to evict the Kikuyu community.[156]

124. Some of the retaliatory attacks showed similar features pointing to forms of organization and planning. In this regard, the Chamber notes a number of references to meetings organized by politicians, local businessmen and local leaders where attacks against communities associated with the ODM were reportedly discussed. Most of these meetings were held in Rift Valley,[157] others took place in Central province[158] and Nairobi.[159]

125. There are accounts of politicians employing hate speech against non-Kikuyu communities[160] as well as ethnic propaganda disseminated by religious leaders and local language media.[161] In addition, it is reported that

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[155] HRW Report, ICC-01/09-3-Anx3, pp. 41-43; KNCHR Report, ICC-01/09-3-Anx4, paras 207, 264, 323, 324, 342, 356; OHCHR Report, ICC-01/09-3-Anx7, p. 11.

[156] Rift Valley: HRW Report, ICC-01/09-3-Anx3, p. 40; KNCHR Report, ICC-01/09-3-Anx4, paras 189, 262-263, 332, 342; CIPEV Report, ICC-01/09-3-Anx5, p. 147; OHCHR Report, ICC-01/09-3-Anx7, p. 10. Nyanza: KNCHR Report, ICC-01/09-3-Anx4, para. 376; OSCAR Foundation Report, ICC-01/09-3-Anx12, p. 14.

[157] There are a number of references to two meetings which were held at a hotel in Naivasha on 23 and 26 January 2008. It is reported that during these meetings, which were attended by numerous youths and influential local people, the eviction of the Luos was planned. Youths were reportedly paid for participating in the attacks and a further and better payment was allegedly made for every Luo killed: HRW Report, ICC-01/09-3-Anx3, pp. 49-50; KNCHR Report, ICC-01/09-3-Anx4, paras 314, 317, 339, 341; CIPEV Report, ICC-01/09-3-Anx5, p. 135. Several other meetings were subsequently held at other places: HRW Report, ICC-01/09-3-Anx3, p. 58; KNCHR Report, ICC-01/09-3-Anx4, paras 316, 340.

[158] A group of businessmen allegedly met on 26 January 2008 at Kikuyu Country Club to fundraise for the eviction of non-Kikuyu residents: CIPEV Report, ICC-01/09-3-Anx5, p. 226.

[159] Two meetings were allegedly held in State House and Nairobi Safari Club in the run up of the election, reportedly with the involvement of senior members of the Government and other prominent Kikuyu personalities: CIPEV Report, ICC-01/09-3-Anx5, pp. 133-134. Later, meetings were reportedly held during the months of January, February and March 2008 at Kenyatta International Conference Centre, Landmark Hotel and the Marble Arch Hotel. While these meetings were ostensibly intended to discuss the plight of internally displaced persons, they allegedly took a sinister turn and organised retaliation, raised funds and sourced weapons: KNCHR Report, ICC-01/09-3-Anx4, paras 169, 509.

[160] KNCHR Report, ICC-01/09-3-Anx4, para. 356.

[161] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, para. 359. Central province: KNCHR Report, ICC-01/09-3-Anx4, paras 512-513.

prior to the violence, verbal warnings and leaflets were circulated among the non-Kikuyus.[162]

126. Attacks in Central Rift have been described as well organised and regimented[163] and it is reported that youths were paid for participating in the violence.[164] It is further alleged that PNU politicians financed the violence or supplied weapons, vehicles and petrol.[165] With regard to Central Rift and Nairobi, it is reported that many attackers were not residents of the areas where attacks took place.[166]

127. Groups associated with the planning of the retaliatory attacks included Kikuyu leaders, businessmen and PNU politicians who reportedly planned the attacks against perceived rival communities during their meetings.[167] Furthermore, with regard to the violence which occurred in Naivasha between 27 and 30 January 2008, the Waki Commission claimed it had evidence that "government and political leaders in Nairobi, including key office holders at the highest level of government may have directly participated in the preparation of the attacks."[168] Finally, the supporting material contains a number of contentions to the effect that, especially in Rift Valley and in the slums of Nairobi, Kikuyu leaders enlisted Kikuyu gangs,

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[162] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, paras 317, 338; Central province: HRW Report, ICC-01/09-3-Anx3, p.59; KNCHR Report, ICC-01/09-3-Anx4, paras 496-497.
[163] KNCHR Report, ICC-01/09-3-Anx4, para. 335.
[164] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, paras 335, 346.
[165] KNCHR Report, ICC-01/09-3-Anx4, paras 316, 338, 509.
[166] Central Rift: KNCHR Report, ICC-01/09-3-Anx4, para. 308. Nairobi: KNCHR Report, ICC-01/09-3-Anx4, para. 170.
[167] Rift Valley: HRW Report, ICC-01/09-3-Anx3 pp. 49-50; KNCHR Report, ICC-01/09-3-Anx4, paras 314, 316, 317, 339, 340, 341; CIPEV Report, ICC-01/09-3-Anx5, p. 133-135; OHCHR Report, ICC-01/09-3-Anx7, p. 11. Nairobi: KNCHR Report, ICC-01/09-3-Anx4, paras 169, 509.
[168] CIPEV Report, ICC-01/09-3-Anx5, p. 133.

and in particular the Mungiki gang, to unleash violence on perceived rival communities.[169]

128. With regard to the attacks emanating from the police, it is reported that the killings of the suspected Mungiki members occurred pursuant to a government campaign aimed at the suppression of this gang[170] while the killings of suspected SLDF members and Mt Elgon residents reportedly occurred in the context of a government joint military – police operation.[171]

(cc) Widespread nature of the attack

129. The Prosecutor claims that "the post-election violence were not isolated or random acts; they took place on a large scale and targeted a large number of civilian victims."[172]

130. The Chamber considers that the available information substantiates the Prosecutor's submission that a large number of civilians were victimized in the course of the attacks.

131. As for the period between 27 December 2007 and 28 February 2008, it is reported that 1,133 to 1,220 people were killed,[173] about 3,561 people injured[174] and up to approximately 350,000 persons displaced.[175] Furthermore, an

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[169] HRW Report, ICC-01/09-3-Anx3, pp. 47-49; CIPEV Report, ICC-01/09-3-Anx5, pp. 116, 134, 135, 359; KNCHR Report, ICC-01/09-3-Anx4, para. 554.
[170] HRW Report, ICC-01/09-3-Anx3, p. 48.
[171] Report of the Special Rapporteur, ICC-01/09-3-Anx11, pp. 3-4, 27.
[172] Prosecutor's Request, ICC-01/09-3, para. 81.
[173] The Waki Commission, which provides figures relating to the period between 27 December 2007 and 29 February 2008 and bases its findings on information received from hospitals in Western, Rift Valley, Nyanza, Nairobi and Coast provinces, reports 1,133 deaths: CIPEV Report, ICC-01/09-3-Anx5, p. 320. The KNCHR reports 1,162 deaths: KNCHR Report, ICC-01/09-3-Anx4, para. 5. OHCHR alleges that at least 1,220 persons were killed: OHCHR Report, ICC-01/09-3-Anx7, p. 12. In the same period of investigation, newspapers reported the killing of 1,414 people: KNCHR Report, ICC-01/09-3-Anx4, para. 546, footnote 537.
[174] CIPEV Report, ICC-01/09-3-Anx5, p. 346.
[175] According to the KNCHR and the Waki Commission, about 350,000 Kenyans were displaced: CIPEV Report, ICC-01/09-3-Anx5, p. 284; KNCHR Report, ICC-01/09-3-Anx4, para.

increased number of rapes and other forms of sexual violence reportedly occurred during this period.[176]

132. With regard to the initial attacks, it is reported that 268 Kikuyus and 57 Kisii were killed[177] and many more displaced[178] in the period between 27 December 2007 and 28 February 2008.

133. Concerning the retaliatory attacks, the supporting material indicates that 158 Kalenjins, 278 Luos and 163 Luhyas were killed,[179] and many more displaced[180] in the same period.

134. With regard to the violence emanating from the police, it is reported that in the period from June to October 2007, the police summarily executed at least five hundred suspected Mungiki members.[181] Throughout 2008, hundreds of people were reportedly killed in the context of a government campaign against the SLDF.[182] With regard to the time frame between 27 December 2007 and 28 February 2008, it is reported that 405 of the recorded deaths resulted from police shootings.[183] The percentage of persons who died

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2. The OHCHR reports the displacement of over 268,330 individuals: OHCHR Report, ICC-01/09-3-Anx7, pp. 9, 15. The ICG reports the displacement of more than 300,000 people: ICG Report, ICC-01/09-3-Anx6, pp. 4, 6.

176 CIPEV Report, ICC-01/09-3-Anx5, p. 249; CREA Report ICC-01/09-3-Anx10, p. 6; FIDA-K, "Submissions To The Commission Of Inquiry Into The Post Election Violence (the Waki Commission) By Fida-K On Sexual And Gender Based Violence" On Behalf Of The Inter Agency Gender Based Violence (Gbv) Sub-Cluster", 11 September 2008 (the "FIDA-K Report"), ICC-01/09-3-Anx8, p. 2.

177 CIPEV Report, ICC-01/09-3-Anx5, p. 356.

178 Rift Valley: HRW Report, ICC-01/09-3-Anx3, pp.43-44; KNCHR Report, ICC-01/09-3-Anx4, paras 200-201, 232, 246, 251, 253, 254, 306-307; CIPEV Report, ICC-01/09-3-Anx5, pp.112-113, 165; Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 60; Nyanza: KNCHR Report, ICC-01/09-3-Anx4, paras 392, 393, 394; CIPEV Report, ICC-01/09-3-Anx5, p. 199; Nairobi: KNCHR Report, ICC-01/09-3-Anx4, paras 146, 147, 152.

179 CIPEV Report, ICC-01/09-3-Anx5, p. 356.

180 Rift Valley: HRW Report, ICC-01/09-3-Anx3, p. 47; KNCHR Report, ICC-01/09-3-Anx4, para. 202. Central province: HRW Report, ICC-01/09-3-Anx3, p. 59.

181 HRW Report, ICC-01/09-3-Anx3, p. 48.

182 Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 28.

183 CIPEV Report, ICC-01/09-3-Anx5, p. 324.

as a result of gunshots, pointing to police violence, is particularly high with regard to Nyanza (107 out of 134 deaths) and Western province (74 out of 98 deaths).[184]

(dd) Nexus between the individual acts and the attack

135. The Chamber points out that the issue of whether an act was committed as part of a widespread or systematic attack needs to be analyzed on a case-by-case basis with regard to each particular act. At the current stage of the proceedings, the Chamber merely considers the situation as a whole without focusing beyond what is necessary for the purpose of the present decision on specific criminal acts. In this regard, the Chamber observes that the nature, aims and consequences of many of the individual acts recall either the characteristics of the initial attacks, the retaliatory attacks or the attacks emanating from the police.[185]

136. With regard to the initial attacks, the Chamber notes, for instance, that in different locations within the Rift Valley large groups of youth attacked Kikuyu and Kisii civilians and burnt down their houses with the alleged aim to expel the members of these groups. The consequence of such attacks was the massive displacement of members of the targeted groups from their place of residence.[186]

137. With regard to the retaliatory attacks, in many locations, the attacks were carried out by members of the Mungiki gang and groups of youths who attacked members of the Kalenjin and Luo community with machetes and other weapons and forcibly circumcised Luo men. At the various scenes of

[184] CIPEV Report, ICC-01/09-3-Anx5, pp. 328-329.
[185] For this purpose, the Chamber also notes the Prosecutor's Sample of relevant crimes, as linked to persons listed in Annex 2; ICC-01- 09-16-Conf-Exp-Anx1.
[186] HRW Report, ICC-01/09-3-Anx3; KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5; Report of the Special Rapporteur, ICC-01/09-3-Anx11.

such attacks, the consequence of the violence was the massive displacement of the targeted communities from the respective areas.[187]

138. In as far as the attacks emanating from the police are concerned, there are accounts of excessive use of force which left many people dead or injured.[188]

b) Underlying acts constituting crimes against humanity

139. In the Prosecutor's Request, it is alleged, *inter alia,* that the crimes against humanity of murder, rape and other forms of sexual violence, deportation or forcible transfer of population and other inhumane acts were committed in Kenya.[189]

140. The Chamber examines the Prosecutor's submissions in light of the nature of the current stage of the proceedings, bearing in mind that there is presently no suspect before the Chamber. Therefore, while it is impossible for the Chamber to assess the *mens rea* in relation to the specific crimes, the *actus reus* will be assessed in accordance with the general approach as explained above in part I.

(i) Murder constituting a crime against humanity under article 7(1)(a) of the Statute

141. The Chamber recalls that to establish that the crime of murder has been committed, it must be satisfied that a "perpetrator killed one or more persons".[190]

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[187] KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5; ICG Report, "Kenya in Crisis", ICC-01/09-3-Anx6.
[188] HRW Report, ICC-01/09-3-Anx3; KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5.
[189] Prosecutor's Request, ICC-01/09-3, para. 93.
[190] Elements of Crimes, Article 7(1)(a) (1) (footnote omitted).

142. The Prosecutor alleges that "the post-election violence resulted in a reported 1,133 deaths, [of which] [t]he majority [...] were reportedly due to injuries caused by arrows, machetes and traditional weapons used during attacks/raids on villages, followed by gun shots mainly attributed to the police forces (405 deaths), and burning of people alive".[191]

143. The Chamber finds that the Prosecutor's submission that murder occurred is substantiated by the available information.

144. It is indicated that in Rift Valley, between June and October 2007, the police executed at least five hundred suspected Mungiki members in a government campaign, aimed at the suppression of the Mungiki gang.[192]

145. The supporting material further shows that in the time period between 27 December 2007 and 28 February 2008, at least 1,133 deaths occurred on Kenyan territory[193] with 744 deaths occurred in Rift Valley.[194] For example, on 1 January 2008, 28 to 35 people were killed in an attack on the area surrounding the Assemblies of God Church in Kiambaa and the subsequent burning of the church.[195] Likewise, in Naivasha, on 27 January 2008, 40 people were killed by gangs of youths.[196] The Chamber further notes that 194 of the

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[191] Prosecutor's Request, ICC-01/09-3, para. 64.
[192] HRW Report, ICC-01/09-3-Anx3, p. 48.
[193] The Waki Commission, which bases its findings on information received from hospitals in Western, Rift Valley, Nyanza, Nairobi and Coast provinces, reports 1,133 instances of deaths for the period between 27 December 2007 and 29 February 2008 : CIPEV Report, ICC-01/09-3-Anx5, p. 320. According to the KNCHR, 1,162 deaths occurred within the same time period: KNCHR Report, ICC-01/09-3-Anx4, para. 5. OHCHR provides the number acknowledged by the government of Kenya according to which at least 1,220 persons were killed: OHCHR Report, ICC-01/09-3-Anx7, p. 12. In the same period of investigation, newspapers reported 1,414 persons killed: KNCHR Report, ICC-01/09-3-Anx4, para. 546, footnote 537.
[194] CIPEV Report, ICC-01/09-3-Anx5, p. 320.
[195] HRW Report, ICC-01/09-3-Anx3, p. 45; KNCHR Report, ICC-01/09-3-Anx4, paras 237-244; CIPEV Report, ICC-01/09-3-Anx5, p. 58; Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 59.
[196] The deaths include several Luo men who were allegedly forcefully circumcised and beheaded by Kikuyu gangs as well as 19 members of a Luo family who died in an arson

deaths which were recorded in the province were allegedly caused by gunshots.[197]

146. Within the same time frame, 98 people were reportedly killed in Western province with 74 people killed by gunshots.[198] It is reported that further killings occurred after February 2008 in the Mt Elgon region.[199]

147. In Nyanza, 134 deaths occurred in this time frame[200] while 79,9 percent of these deaths were allegedly caused by the police.[201]

148. In Nairobi province, 125 deaths occurred between 27 December 2007 and 28 February 2008.[202] It is further reported that in the night from 30 to 31 December 2007 alone, 38 Luos were forcibly circumcised and left bleeding to death.[203]

149. With regard to Central province, up to approximately 15 people were killed between 27 December 2007 and 28 February 2008.[204]

150. In Coast province, at least 27 deaths allegedly occurred between 27 December 2007 and 28 February 2008.[205]

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attack on their house: HRW Report, ICC-01/09-3-Anx3, pp. 47, 51; KNCHR Report, ICC-01/09-3-Anx4, paras 83, 319; CIPEV Report, ICC-01/09-3-Anx5, pp. 130-131.

[197] CIPEV Report, ICC-01/09-3-Anx5, pp. 328-329. In North Rift, in January 2008, 12 to 14 youths were shot dead by the police who tried to separate rival clans in Cherangany: KNCHR Report, ICC-01/09-3-Anx4, paras 255, 278. In Nandi, 9 youths were shot dead by the police: KNCHR Report, ICC-01/09-3-Anx4, para. 278.

[198] CIPEV Report, ICC-01/09-3-Anx5, p. 329.

[199] In 2008, hundreds of men were reportedly tortured and killed in the context of an operation by the Government's security forces. The number of persons killed or disappeared by the security forces is conservatively estimated at over 200: Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 28. 13 people were reportedly killed during the joint military-police operation *Okoa Maisha*: Report of the Special Rapporteur, ICC-01/09-3-Anx11, pp. 26-27.

[200] CIPEV Report, ICC-01/09-3-Anx5, p. 320.

[201] Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 34.

[202] CIPEV Report, ICC-01/09-3-Anx5, p. 320.

[203] ICG Report, ICC-01/09-3-Anx6, p. 14.

[204] The Waki Commission reports the death of five people: CIPEV Report, ICC-01/09-3-Anx5, p. 320. The KNCHR claims that approximately 15 people were killed: KNCHR Report, ICC-01/09-3-Anx4, para. 500.

(ii) Rape and other forms of sexual violence constituting a crime against humanity under article 7(1)(g) of the Statute

151. The Chamber recalls that to establish that the crime of rape has been committed, it must be satisfied that a "perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body".[206] In order to establish that the crime of sexual violence has been committed, it must be satisfied that a perpetrator "committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion [...]".[207]

152. The Prosecutor alleges that "numerous incidents of sexual violence including rape of men and women" took place.[208]

153. The Chamber observes that the available information substantiates the foregoing allegation.

154. According to the Kenya Police Crime Record, 876 cases of rape and 1984 cases of defilement were reported in Kenya throughout 2007.[209] In the period between 27 December 2007 and 29 February 2008, the Nairobi Women's Hospital's Gender Violence Recovery Centre treated 443 survivors of sexual and gender based violence, 80 percent of which were rape or

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[205] According to the Waki Commission, 27 deaths occurred in the province in this period: CIPEV Report, ICC-01/09-3-Anx5, p. 320. The police acknowledged that 25 deaths occurred on 30 December 2007 and the next three days in Mombasa alone, while the Provincial Director of Medical Services gave the figure of 32 people killed: CIPEV Report, ICC-01/09-3-Anx5, pp. 238, 239.

[206] Elements of Crimes, Article 7(1)(g)-1(1) (footnote omitted).

[207] Elements of Crimes, Article 7(1)(g)-6(1).

[208] Prosecutor's Request, ICC-01/09-3, para. 96.

[209] CREA Report, ICC-01/09-3-Anx10, p. 6.

defilement cases.[210] Between January and March 2008, the Nairobi Women's Hospital and partner hospitals received at least 900 cases of sexual violence.[211] A large number of rapes and other forms of sexual violence were reported in Rift Valley[212] and Nairobi[213] while the number of reported incidents in Western Province,[214] Nyanza,[215] Central province,[216] and Coast province[217] is lower. In relation to the specific element of force, the Chamber notes the high number of reported gang rapes,[218] including rapes by a group of over 20 men,[219] and the brutality, characterized in particular by the cutting of the victims[220] or the insertion of crude weapon and other objects in the victim's vagina.[221]

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[210] CREA Report, ICC-01/09-3-Anx10, p. 6.

[211] CIPEV Report, ICC-01/09-3-Anx5, p. 260; FIDA-K Report, ICC-01/09-3-Anx8, pp. 5-6.

[212] KNCHR Report, ICC-01/09-3-Anx4, paras 247, 623; CIPEV Report, ICC-01/09-3-Anx5, pp. 64, 73, 106-107, 119; FIDA-K Report, ICC-01/09-3-Anx8, pp. 5, 6; UNICEF/UNFPA/UNIFEM/ Christian Children's Fund Report, ICC-01/09-3-Anx9, pp. 18, 43, 44, 54, 55, 58, 59; CREA Report, ICC-01/09-3-Anx10, pp. 24, 29, 34, 40, 41; Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 58.

[213] KNCHR Report, ICC-01/09-3-Anx4, para. 156; CIPEV Report, ICC-01/09-3-Anx5, pp. 209-210, 274-275, 410; FIDA-K Report, ICC-01/09-3-Anx8, pp. 3, 4, 6; UNICEF/UNFPA/UNIFEM/ Christian Children's Fund Report, ICC-01/09-3-Anx9, pp. 18, 31, 32, 34, 35, 36, 38; CREA Report, ICC-01/09-3-Anx10, pp. 33, 41.

[214] Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 58.

[215] CIPEV Report, ICC-01/09-3-Anx5, pp. 410, 504; FIDA-K Report, ICC-01/09-3-Anx8, p. 5; CREA Report, ICC-01/09-3-Anx10, p. 41; Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 24.

[216] KNCHR Report, ICC-01/09-3-Anx4, para. 504; UNICEF/UNFPA/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, p. 42.

[217] UNICEF/UNFPA/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, pp. 18, 64.

[218] KNCHR Report, ICC-01/09-3-Anx4, paras 153, 156, 504; CIPEV Report, ICC-01/09-3-Anx5, pp. 73, 106-107, 209-201, 274-275, 410, 504; UNICEF/UNFPA/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, pp. 15, 32, 38, 42, 54, 58; FIDA-K Report, ICC-01/09-3-Anx8, pp. 3, 5, 6; CREA Report, ICC-01/09-3-Anx10, pp. 3, 24, 33, 34, 37, 41; Report of the Special Rapporteur, ICC-01/09-3-Anx11, pp. 28, 58.

[219] KNCHR Report, ICC-01/09-3-Anx4, para. 156.

[220] UNICEF/UNFPA/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, p. 58; CIPEV Report, ICC-01/09-3-Anx5, pp. 106-107, 274-275; CREA Report, ICC-01/09-3-Anx10, pp. 3, 24, 33, 34, 37, 41.

[221] CIPEV Report, ICC-01/09-3-Anx5, p. 360; FIDA-K Report, ICC-01/09-3-Anx8, p. 6.

155. While the supporting material corroborates that some of the rapes and sexual violence may be qualified as opportunistic acts facilitated by the general climate of civil unrest and lawlessness,[222] there are however instances of sexual violence encompassing an ethnic dimension and targeting specific ethnic groups.[223] Finally, it is alleged that many acts of rape and other forms of sexual violence were committed by police or security agents.[224]

(iii) Forcible transfer of population constituting a crime against humanity under article 7(1)(d) of the Statute

156. The Chamber recalls that to establish that the crime of deportation or forcible transfer of population has been committed, it must be satisfied that a "perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts".[225]

157. The Prosecutor alleges that approximately 350,000 persons were displaced as a consequence of post electoral violence within the boundaries of Kenya.[226] He further claims that organized groups associated with the PNU

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[222] CIPEV Report, ICC-01/09-3-Anx5, p. 264; OHCHR Report, ICC-01/09-3-Anx7, p. 14; FIDA-K Report, ICC-01/09-3-Anx8, p. 3; UNICEF/UNFPA/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, pp. 11, 15; CREA Report, ICC-01/09-3-Anx10, p. 32.

[223] CIPEV Report, ICC-01/09-3-Anx5, p. 264; KNCHR Report, ICC-01/09-3-Anx4, paras 153, 155, 157, 621; UNICEF/UNFPA/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, p. 11.

[224] FIDA-K Report, ICC-01/09-3-Anx8, pp. 3, 5; CREA Report, ICC-01/09-3-Anx10, p. 41; Report of the Special Rapporteur, ICC-01/09-3-Anx11, pp. 41, 58; CIPEV Report, ICC-01/09-3-Anx5, p. 410; UNICEF/UNFPA/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, p. 20. See also victims' representations r/0373/10, ICC-01/09-17-Conf-Exp-Anx374; r/0375/10, ICC-01/09-17-Conf-Exp-Anx376; r/0377/10, ICC-01/09-17-Conf-Exp-Anx378. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[225] Elements of Crimes, Article 7(1)(d)(1) (footnote omitted).

[226] Prosecutor's Request, ICC-01/09-3, para. 67.

and ODM forcibly transferred rival ethnic and/or political groups by mobilizing and directing targeted attacks.[227]

158. The Chamber is of the view that the Prosecutor's submission that civilians were forcibly displaced[228] is supported by the available information.

159. The supporting material suggests that up to approximately 350,000 individuals were forcibly displaced as a result of the post-election violence.[229] After 28 February 2008, it is reported that the total IDP population fell to 150,671 persons as of 21 April 2008 and 138,428 persons as of 13 May 2008.[230]

160. Regarding the communities most affected by the displacements, it is reported that in Rift Valley, in a first phase of violence, the majority of people displaced were of Kikuyu and Kisii ethnicity.[231] Many of the victims were forcibly displaced towards the Southern Rift Valley and Central province, which are traditional Kikuyu areas.[232] It is reported that in and from these places, members of the Kikuyu community organized retaliatory attacks which led to the displacement of Luhyas and Kipsigiis in Rift Valley[233] and the non-Kikuyus in Central province.[234]

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[227] Prosecutor's Request, ICC-01/09-3, para. 100.
[228] According to footnote 13 in the Elements of Crimes, "deported or forcibly transferred" is interchangeable with "forcibly displaced".
[229] KNCHR Report, ICC-01/09-3-Anx4, para. 2 (350,000 Kenyans displaced); CIPEV Report, ICC-01/09-3-Anx5, p. 284; ICG Report, ICC-01/09-3-Anx6, pp. 4, 6 (displacement of more than 300,000 people); OHCHR Report, ICC-01/09-3-Anx7, pp. 9, 15 (as of 27 February 2008, 268,330 individuals were displaced with a similar number of displaced living in host communities); CREA Report, ICC-01/09-3-Anx10, p. 3 (as of 6 January 2008, United Nations estimates put the increase in IDPs at over 250,000).
[230] CREA Report, ICC-01/09-3-Anx10, pp. 9, 11.
[231] HRW Report, ICC-01/09-3-Anx3, pp. 43-44; KNCHR Report, ICC-01/09-3-Anx4, paras 200-201, 232, 246, 251, 253, 254, 307; CIPEV Report, ICC-01/09-3-Anx5, pp. 112-113, 165; Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 60.
[232] HRW Report, ICC-01/09-3-Anx3, p. 47.
[233] HRW Report, ICC-01/09-3-Anx3, p. 47; KNCHR Report, ICC-01/09-3-Anx4, para. 202.
[234] HRW Report, ICC-01/09-3-Anx3, p. 59.

161. In Western province, the violence targeted not only Kikuyus but also Bukusus, some of whom fled to Uganda.[235] In Nyanza, in the first phase of evictions, Kikuyus, Meru and Kisii were targeted while the second phase of evictions was directed against the non-Luos, especially the Kamba and Kisii communities.[236] In Nairobi, the supporting material suggests that in most of the settlements, the evictions mainly targeted Kikuyus.[237]

162. The supporting material reveals further that the displacements did not take place on a voluntary basis, and were forced. People were displaced either as a result of violence or as a consequence of threats of violence.[238]

163. As set out in section II.A.1.a.i.bb of the present decision, warnings addressed at the targeted communities were allegedly disseminated through leaflets, eviction notices, radio programs or spread by word of mouth, causing many people to leave their homes.[239]

164. However, in most cases, IDPs were forcefully evicted through direct physical violence against them, the burning of their houses and the destruction of their property. Most IDPs left their homes in panic, under emergency conditions, often under direct attack from gangs of armed youth.[240] Sexual violence was another means to forcibly evict women and their families from particular communities.[241]

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[235] KNCHR Report, ICC-01/09-3-Anx4, para. 430.
[236] KNCHR Report, ICC-01/09-3-Anx4, paras 392-394; CIPEV Report, ICC-01/09-3-Anx5, p. 199.
[237] KNCHR Report, ICC-01/09-3-Anx4, paras 146-147, 152.
[238] CIPEV Report, ICC-01/09-3-Anx5, p. 363.
[239] HRW Report, ICC-01/09-3-Anx3, p. 59; KNCHR Report, ICC-01/09-3-Anx4, paras 213, 317, 338, 496-497; CIPEV Report, ICC-01/09-3-Anx5, p. 159. See also victim's representation r/0339/10, ICC-01/09-17-Conf-Exp-Anx340. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.
[240] CIPEV Report, ICC-01/09-3-Anx5, p. 287; OHCHR Report, ICC-01/09-3-Anx7, p. 10.
[241] CIPEV Report, ICC-01/09-3-Anx5, p. 264; UNICEF/UNFPA/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, p. 14.

165. Finally, the available information does not include any contentions to the effect that the targeted communities were not lawfully present in the area from which they were transferred or that such transfer could have been justified by grounds permitted under international law.[242]

(iv) Other inhumane acts causing serious injury constituting a crime against humanity under article 7(1)(k) of the Statute

166. The Chamber recalls that to establish that other inhumane acts have been committed, it must be satisfied that a "perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act".[243]

167. The Prosecutor alleges that other inhumane acts occurred, including "injuries inflicted by sharp objects or gun and arrow shots",[244] as well as "particularly brutal conduct such as traumatic circumcisions".[245]

168. The Chamber finds that the available information substantiates the Prosecutor's submission with regard to the occurrence of other inhumane acts.

169. The supporting material indicates that at least 3,561 persons suffered injuries as a result of the violence associated with the 2007 presidential elections.[246] The majority of these injuries were reported in Rift Valley (2193 incidents), followed by Nyanza (747 incidents), Nairobi (342 incidents), Western (146 incidents) and Coast (133 incidents).[247]

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[242] Article 7(2)(d) of the Statute.
[243] Elements of Crimes, Article 7(1)(k)(1).
[244] Prosecutor's Request, ICC-01/09-3, para. 70.
[245] Prosecutor's Request, ICC-01/09-3, para. 70.
[246] CIPEV Report, ICC-01/09-3-Anx5, p. 346.
[247] CIPEV Report, ICC-01/09-3-Anx5, p. 346.

170. On examination of the supporting material, the Chamber observes a number of recurrent forms of physical violence. First, there are numerous accounts of injuries caused through gunshots or beatings, allegedly inflicted by the police or other security agents.[248] The Chamber further notes various instances of cutting and hacking,[249] including amputations.[250] Finally, in Rift Valley, Central province and Nairobi, there are allegations of forced circumcision and genital amputation inflicted upon members of the Luo community.[251]

171. The nature of these conducts suggests that they caused great suffering or serious injury to body or to mental or physical health. For instance, forced circumcisions were allegedly carried out in a crude manner with objects such as broken glass,[252] and some gunshot victims incurred long-term disabilities including amputations, loss of hearing and sight and inability to eat solid food.[253]

2. Jurisdiction *ratione temporis*

172. The Chamber recalls that for a crime to fall within the jurisdiction of the Court it must occur within the period set out in article 11 of the Statute.

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[248] KNCHR Report, ICC-01/09-3-Anx4, paras 255, 282, 403, 437, 438; CIPEV Report, ICC-01/09-3-Anx5, pp. 168, 202, 203, 214-215; Report of the Special Rapporteur, ICC-01/09-3-Anx11, pp. 54, 57-59, 62.

[249] CIPEV Report, ICC-01/09-3-Anx5, p. 169; CREA Report, ICC-01/09-3-Anx10, p. 24.

[250] KNCHR Report, ICC-01/09-3-Anx4, p. 54; CIPEV Report, ICC-01/09-3-Anx5, p. 157.

[251] Rift Valley: HRW Report, ICC-01/09-3-Anx3, pp. 54-55; KNCHR Report, ICC-01/09-3-Anx4, para. 319; CIPEV Report, ICC-01/09-3-Anx5, pp. 114, 119, 131, 270 - 271. Central province: KNCHR Report, ICC-01/09-3-Anx4, paras 499 and 502; CIPEV Report, ICC-01/09-3-Anx5, p. 222; Nairobi: KNCHR Report, ICC-01/09-3-Anx4, para. 126-128.

[252] HRW Report, ICC-01/09-3-Anx3, pp. 54-55; KNCHR Report, ICC-01/09-3-Anx4, paras 126-128; CIPEV Report, ICC-01/09-3-Anx5, pp. 270-271.

[253] HRW Report, ICC-01/09-3-Anx3, pp. 33, 34; CIPEV Report, ICC-01/09-3-Anx5, p. 202. See also the victims' representations r/0045/10, ICC-01/09-17-Conf-Exp-Anx55; r/0062/10, ICC-01/09-17-Conf-Exp-Anx62; r/0056/10, ICC-01/09-17-Conf-Exp-Anx66; r/0182/10, ICC-01/09-17-Conf-Exp-Anx192. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

173. In this respect, the Prosecutor submits that, since the Republic of Kenya ratified the Rome Statute on 15 March 2005 and, pursuant to article 126(1), the Statute entered into force for that State on 1 June 2005, the crimes allegedly committed fall within the Court's temporal jurisdiction.[254]

174. The Chamber concurs with the Prosecutor that the crimes allegedly committed after 1 June 2005, as they appear from the available information, fall within the jurisdiction *ratione temporis* of the Court.

3. Jurisdiction *ratione loci*

175. The Chamber recalls that for a crime to fall within the jurisdiction of the Court for the purpose of article 53(1)(a) of the Statute, it must also meet at least one of the alternative conditions specified in article 12 of the Statute. The crime must either occur on the territory of a State Party to the Statute or a State which has lodged a declaration by virtue of article 12(3) of the Statute, or be committed by a national of any such State.

176. In this regard, the Prosecutor submits that the crimes, including those which took place within the context of the incidents identified by his office, were committed on Kenyan territory,[255] and that the main affected areas include (i) the slum districts of Nairobi; (ii) Rift Valley province, in particular the localities of Eldoret, Naivasha and Nakuru; (iii) Western and Nyanza provinces, and Kisumu and its surrounds in particular.[256]

177. The Chamber reviewed the information available before it, which indeed indicates that the main theatres of violence were Nairobi, Rift Valley,

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[254] Prosecutor's Request, ICC-01/09-3, para. 49.

[255] Prosecutor's Request, ICC-01/09-3, para. 50; Prosecutor's Response, Annex 1, ICC-01/09-16-Conf-Exp-Anx1, pp. 2-6 (the various incidents identified by the Prosecutor all occurred on Kenyan territory).

[256] Prosecutor's Request, ICC-01/09-3, para. 71.

Western and Nyanza provinces, as well as Coast.[257] In total, the violence affected approximately 136 constituencies in six of Kenya's eight provinces.[258] The supporting material otherwise makes countless references to crimes committed in different cities, districts and provinces throughout Kenya.[259]

178. Thus, on the basis of the available information examined, the Chamber concurs with the Prosecutor that the alleged crimes against humanity occurred on the territory of the Republic of Kenya, for which reason the Court's jurisdiction (*ratione loci*) under article 12(2)(a) of the Statute is satisfied.

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[257] See KNCHR Report, ICC-01/09-3-Anx4, pp. 13, 18 (para 4 Gross violations of human rights occurred in those different parts of the country, particularly in Western, Nyanza, Rift Valley, Nairobi and the Coast provinces), 25 (map of Kenya with marked theatres of violence); OHCHR Report, ICC-01/09-3-Anx7, pp. 9 (Rift Valley, Western, Nyanza, Nairobi, Central and to a lesser extent Coast province were particularly affected), 10 (Violence particularly engulfed the Molo, Trans-Nzoia, and Uasin Gishu districts of Rift Valley as well as Eldoret and Kericho towns and Burnt Forest).

[258] KNCHR Report, ICC-01/09-3-Anx4, pp. 13. See also CIPEV Report, ICC-01/09-3-Anx5, p. 8 ("The 2007-2008 post-election violence was also more widespread than in the past. It affected all but 2 provinces and was felt in both urban and rural parts of the country"); Report on Victims' Representations, ICC-01/09-17-Corr-Red, paras 32, 44.

[259] Map of Kenya, ICC-01/09-3-Anx1B; HRW Report ICC-01/09-3-Anx3, pp. 31 (massacre in Kisumu on the eastern edge of Lake Victoria), 36 (police shooting in Nairobi slums), 39 (violence starting in Eldoret and sweeping across the Rift Valley), 49 (revenge attacks in Naivasha), 53 (violence hits Nakuru); KNCHR Report, ICC-01/09-3-Anx4, pp. 44-136 (Chapter 4 discussing the main theatres of violence, namely Central, Coast, Nairobi, Central Rift, South Rift, North Rift, Nyanza, and Western), paras 189 ("The South Rift suffered serious violence particularly in Kericho town and its environs that include Kipkelion, Sotik and Barabu areas"), 228 (In North Rift, the most affected districts were Uasin Gishu and Trans Nzoia), 231 (Eldoret Town and nearby Burnt Forest were the main theatres of violence in North Rift), 295 ("a lot of violence that took place in the Central Rift included urban areas such as Nakuru and Naivasha as well as towns in Molo and Kuresoi"), 369 (In Nyanza province, "the worst hit areas [...] were Kisumu city, Migori and Homa Bay towns"); CIPEV Report, ICC-01/09-3-Anx5, pp. 49-246 (Chapters 3 and 4 discuss violence in Rift Valley, Western and Nyanza, Nairobi, Central and Coast provinces), 112 ("the December 2007 violence affected urban as well as rural areas of Nakuru district"); ICG Report, ICC-01/09-3-Anx6, p. 14 ("The violence in Kisumu and other towns of western Kenya started on 29 December [...]. The next day, [...] riots broke out across the country, mainly in Nairobi, Kisumu, Eldoret [...] and Mombasa").

179. Accordingly, since the requirement of jurisdiction *ratione loci* is fulfilled, the Chamber is under no obligation to examine jurisdiction *ratione personae* under article 12(2)(b) of the Statute.

180. Having determined that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed, the Chamber will now proceed to examine whether the case would be admissible under article 17 of the Statute.

B. Whether the case is or would be admissible under article 17 of the Statute

181. Upon examination of the available information, while bearing in mind the nature of the present proceedings as explained earlier in this decision, the Chamber concludes that the case would be admissible under article 17 of the Statute. The Chamber bases its conclusion on the following considerations.

182. The Chamber reiterates its finding that the admissibility assessment at this stage actually refers to the admissibility of one or more *potential* cases within the context of a "situation". The parameters of a potential case have been defined by the Chamber as comprising two main elements: (i) the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). Accordingly, the Chamber is required to review whether the information provided by the Prosecutor reveals that the Republic of Kenya or any third State is conducting or has conducted national proceedings in relation to these elements which are likely to constitute the Court's future case(s). If, upon review of the available information, the finding is in the

negative, then the case would be admissible, provided that the gravity threshold under article 17(1)(d) of the Statute is met.

183. With respect to the first part concerning the existence of national proceedings, the Prosecutor initially submitted that, despite early indications of a desire by the Kenyan authorities to establish a special tribunal charged with conducting national proceedings concerning the post-election violence, a bill establishing such a tribunal has not been approved by the Kenyan Parliament to date, such that at present there is no domestic prosecution for the alleged crimes against humanity, nor is there any prospect of such prosecution.[260] Instead, he acknowledged that there have been a limited number of proceedings for a range of lesser offences, *inter alia*, malicious damage, theft, house breaking, possession of an offensive weapon, and robbery with violence.[261] However, since there is a lack of pending national proceedings against "those bearing the greatest responsibility for the crimes against humanity allegedly committed", the Prosecutor submitted the possible case(s) to arise from his investigation into the situation "would be currently admissible".[262]

184. In its decision of 18 February 2010, the Chamber requested the Prosecutor to provide more recent information on domestic investigations with respect to the two main elements defining a potential case.[263] In response, the Prosecutor reiterated the findings outlined in his request for authorization referred to above[264] and submitted that there are no domestic proceedings either in the Republic of Kenya or in any third State with respect to the senior leaders related to or associated with the PNU and the ODM whose names are

[260] Prosecutor's Request, ICC-01/09-3, para. 53.
[261] Prosecutor's Request, ICC-01/09-3, para. 54
[262] Prosecutor's Request, ICC-01/09-3, para. 55.
[263] Pre-Trial Chamber II, Decision Requesting Clarification and Additional Information, ICC-01/09-15, p. 6.
[264] Prosecutor's Response, ICC-01/09-16, pp. 4-5, paras 35-36.

provided in an annex appended to his response.[265] Nor are there domestic proceedings in relation to "some of the most serious criminal incidents", which appear in another annex appended to his response.[266] Thus, in his opinion, there is a scenario of domestic inactivity regarding "the incidents and against the individuals that would likely form the focus of [...] [his] investigation [...]".[267]

185. In this regard, the Chamber's review of the available information does not contravene the Prosecutor's conclusion that there is a lack of national proceedings in the Republic of Kenya or in any third State with respect to the main elements which may shape the Court's potential case(s).[268] Yet, there are references to a number of domestic investigations and prosecutions concerning the post-election period, but only in relation to minor offences.[269] In particular, the February 2009 report submitted to the Kenyan Attorney General concerning cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi provinces reveals that national investigations and prosecutions were directed against persons that fall outside the category of those who bear the greatest responsibility[270] and are likely to be the focus of the Prosecutor's investigation as indicated in annex 2 appended to the Prosecutor's Response.[271] Moreover, attempts to establish a special tribunal to prosecute those who are responsible for the post-election violence were

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[265] Prosecutor's Response, ICC-01/09-16, p. 4, paras 33-34.
[266] Prosecutor's Response, ICC-01/09-16, para. 33.
[267] Prosecutor's Response, ICC-01/09-16, para. 34.
[268] State House, "Special tribunal to be set up", 17 December 2008, ICC-01/09-3-Anx25; State House, "Parliament rejects a local special tribunal", 12 February 2009, ICC-01/09-3-Anx26; The Standard Online, "MPs snub Imanyara Bill debate, yet again", ICC-01/09-3-Anx32; Daily Nation, "The joint victims and civil society communiqué to Kenyans, the Office of the Prosecutor of the International Criminal Court (ICC) and the international community", 5 November 2009, ICC-01/09-3-Anx33; Report on Victims' Representations, ICC-01/09-17-Corr-Red, para. 66 (victims observing that Kenyan authorities do not appear willing to investigate).
[269] Prosecutor's Response, ICC-01/09-16-Conf-Exp-Anx3
[270] Prosecutor's Response, ICC-01/09-16-Conf-Exp-Anx3.
[271] Prosecutor's Response, ICC-01/09-16-Conf-Exp-Anx2.

frustrated,[272] which serves as a further indication of inactivity on the part of the Kenyan authorities to address the potential responsibility of those who are likely to be the focus of the Court's investigation.

186. The Chamber otherwise notes that the available information shows some inadequacies or reluctance from the national authorities to generally address the election violence, which, in any event, is not worth further scrutiny for the Court's assessment of admissibility insofar as the Chamber has already determined that there is a lack of national investigations in relation to the main elements that may shape the Court's potential case(s).[273]

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[272] State House, "Special tribunal to be set up", 17 December 2008, ICC-01/09-3-Anx25; State House, "Parliament rejects a local special tribunal", 12 February 2009, ICC-01/09-3-Anx26; The Standard Online, "MPs snub Imanyara Bill debate, yet again", ICC-01/09-3-Anx32; Daily Nation, "The joint victims and civil society communiqué to Kenyans, the Office of the Prosecutor of the International Criminal Court (ICC) and the international community", 5 November 2009, ICC-01/09-3-Anx33; Report on Victims' Representations, ICC-01/09-17-Corr-Red, para. 67 (on the failure of the Kenyan government to establish a special tribunal for crimes arising from the post-election violence).

[273] KNCHR Report, ICC-01/09-3-Anx4, para. 180 ("A major frustration expressed by many victims was the inaction of the police following their recording statements and identifying their attackers"); CIPEV Report, ICC-01/09-3-Anx5, pp. 182 (Concerning the inquests into the deaths in Western province, "inquest files [...] have been opened, but no further steps taken to investigate the killings"), 244 (In Coast province, a witness submitted video footage of the looting of his shop and with the looters' faces to police. However, as at 1 September 2008 the police had taken no action against the perpetrators, despite being identifiable), 404 (With respect to casualties in the Coast, "inquest files were opened in respect of 5 deaths, as well as 20 others, but there is no apparent follow up action being taken in respect of those wounded by gunshots"), 405, 406 ("The Commission was particularly disappointed with the lack of investigative work by the police even when provided with strong evidence identifying offenders. Witnesses told the commission that, 'many complainants identified looters by name and address and gave definitive information to the police about the whereabouts of their property. In some cases the police told complainants they should be grateful that they are alive and forget what happened.'"), 406 (Waki Commission noted that "the quality of the investigative work as well as the quantity of it left much to be desired. The Commission heard on a number of occasions that no investigation would be undertaken unless there was a complaint." Even in cases of serious crimes, "little to no follow-up was evident. An examination of some inquest files revealed that at best a superficial investigative effort was undertaken"); Report of the Special Rapporteur, ICC-01/09-3-Anx11, pp. 18 ("Police investigations of murders are generally inadequate, due in large part to resource, training and capacity constraints", but "the problem is also one of will"); HRW Report, ICC-01/09-3-Anx3, pp. 24 (Concerning pre-election violence throughout 2007, "several politicians and local leaders were implicated in this violence, but no politician has yet been held accountable for

187. Thus, in the absence of national investigations in relation to: (i) the senior business and political leaders associated with the ODM and PNU, which are referred to in annex 2 of the Prosecutor's Response; and (ii) the crimes against humanity allegedly committed in the context of the most serious criminal incidents referred to in annex 1 of the Prosecutor's Response, the case would be admissible under article 17 of the Statute, subject to satisfaction of the gravity threshold under article 17(d) of the Statute.

188. As for the second part of the admissibility assessment, which relates to gravity under article 17(1)(d) of the Statute, the Chamber recalls its finding that such examination must be also conducted against the backdrop of a potential case within the context of a situation. This involves a generic examination of: (i) whether the persons or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed within the incidents, which are likely to be the object of an investigation. In relation to the latter, the Chamber stated earlier that it is guided by factors such as the scale, nature, manner of commission, impact of crimes committed on victims and the existence of aggravating circumstances (*i.e.*, qualitative dimension).

189. The Chamber observes that the Prosecutor's submissions on gravity concern the assessment of gravity of the entire situation rather than the

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their role in the violence [...] The report also details several cases where local leaders have been arrested and set free as a result of suspected political interference. Human rights activists [...] cited an example of one chief who had been arrested five times for his role in inciting and organizing violence but who had been released each time"), 60 (police arrested some masked (Kikuyu) men who subsequently threatened Luos who did not leave, but local MP convinced the police to release the arrested "for the sake of peace"); KNCHR Report, ICC-01/09-3-Anx4, para. 222 (Police are facing challenges, namely gathering evidence and finding willing witnesses, but also with politicians interfering with those who are arrested and demanding their release); Report on Victims' Representations, ICC-01/09-17 -Corr-Red, para. 66 (victims observing that Kenyan authorities do not appear willing to investigate).

gravity of one or more potential cases. However, the Chamber will first review the Prosecutor's general submission on gravity of the entire situation before undertaking its own assessment of the gravity of the potential cases subsequently provided in the Prosecutor's Response.

190. The Prosecutor contends that the scale of the post-election violence resulted in 1,133 to 1,220 murders, more than 900 acts of documented rapes and sexual violence, approximately 350,000 displaced persons, and 3,561 reported acts of serious injury, and affected six of the eight Kenyan provinces.[274]

191. Having reviewed the supporting material, the Chamber finds that the Prosecutor's submission concerning the scale of the post-election violence appears substantiated. This finding is justified on the basis of the alleged number of deaths,[275] documented rapes,[276] displaced persons,[277] and acts of injury,[278] as well as the geographical location of these crimes, which appears widespread.[279]

192. The Prosecutor also submits that the attacks were attended by a degree of brutality, insofar as perpetrators crudely cut off body parts, attacked civilians with a range of sharp objects, including machetes, poisonous arrows, and broken glass, and even burnt victims alive, terrorized communities by installing checkpoints where they would select their victims based on

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[274] Prosecutor's Request, ICC-01/09-3, para. 56.
[275] CIPEV Report, ICC-01/09-3-Anx5, pp. 317, 357 (1,133 murders); KNCHR Report, ICC-01/09-3-Anx4, p. 13 (Finding 5 reports 1,162 deaths); OHCHR Report, ICC-01/09-3-Anx.7, p. 12 (alleges a minimum of 1,220 deaths).
[276] CIPEV Report, ICC-01/09-3-Anx5, p. 260 (900 victims treated for sexual violence "was just the tip of the iceberg").
[277] CIPEV Report, ICC-01/09-3-Anx5, p. 363 (reports 350,000 displaced); KNCHR Report, ICC-01/09-3-Anx4, p. 13 (Finding 2 reports 350,000 displaced). *Cf.* OHCHR Report, ICC-01/09-3-Anx7, pp. 9, 15 (reports the displacement of 268,330 individuals); ICG Report, ICC-01/09-3-Anx6, pp. 4, 6 (reports the displacement of more than 300,000 people).
[278] CIPEV Report, ICC-01/09-3-Anx5, pp. 347, 358 (reporting 3,561 acts of injury).
[279] KNCHR Report, ICC-01/09-3-Anx4, p. 13 (Finding 1).

ethnicity, and hack them to death, commonly committed gang rape, genital mutilation and forced circumcision, and often forced family members to watch.[280]

193. The Chamber is of the view that the Prosecutor's submission concerning the element of brutality is pertinent to the means used to execute the violence. The supporting material corroborates the Prosecutor's contention insofar as it reveals many instances of cutting and hacking,[281] including amputations,[282] and reports of forced circumcision and genital amputation inflicted upon members of the Luo community.[283] The supporting material further indicates that rapes were often characterized by a degree of brutality, including high numbers of reported gang rapes,[284] including by a group of over 20 men,[285] and the cutting of the victims[286] or the insertion of crude weapon and other objects in the vagina.[287]

194. The Prosecutor also submitted that victims have suffered devastating impacts. Most notably, sexual violence victims suffered psychological trauma,

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[280] Prosecutor's Request, ICC-01/09-3, para. 58.

[281] KNCHR Report, ICC-01/09-3-Anx4, para. 319; CIPEV Report, ICC-01/09-3-Anx5, p. 131, 169, 274-275; CREA Report, ICC-01/09-3-Anx10, p. 24.

[282] KNCHR Report, ICC-01/09-3-Anx4, p. 54 (witness account: a woman's ear and a man's arm were cut off); CIPEV, Report, ICC-01/09-3-Anx5, p. 157 (both hands of a tea picker were reportedly amputated as a result of a violent attack by Kipsigii raiders).

[283] Rift Valley: KNCHR Report, ICC-01/09-3-Anx4, para. 319; CIPEV Report, ICC-01/09-3-Anx5, pp. 114, 119, 131. Central province: KNCHR Report, ICC-01/09-3-Anx4, paras 499, 502; CIPEV Report, ICC-01/09-3-Anx5, p. 222. Nairobi: KNCHR Report, ICC-01/09-3-Anx4, para. 128.

[284] KNCHR Report, ICC-01/09-3-Anx4, paras 153, 156, 504; CIPEV Report, ICC-01/09-3-Anx5, pp. 73, 106-107, 209-210, 274-275, 410, 504; FIDA-K Report, ICC-01/09-3-Anx8, pp. 3, 5, 6; UNFPA/UNICEF/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, pp. 15, 32, 38, 42, 54, 58; CREA Report, ICC-01/09-3-Anx10, pp. 24, 33, 34, 37, 41; Report of the Special Rapporteur, ICC-01/09-3-Anx11, p. 58.

[285] KNCHR Report, ICC-01/09-3-Anx4, para. 156.

[286] UNFPA/UNICEF/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, p. 58; CIPEV Report, ICC-01/09-3-Anx5, pp. 106-107, 274-275; CREA Report, ICC-01/09-3-Anx10, pp. 24, 34, 37, 41.

[287] CIPEV Report, ICC-01/09-3-Anx5, p. 360; FIDA-K Report, ICC-01/09-3-Anx8, p. 6.

social stigma, abandonment, and being infected with HIV/AIDS, while displaced people have lost their homes and existence.[288]

195. In this respect, the supporting material corroborates the Prosecutor's submission as far as it indicates that many rape victims contracted HIV/AIDS, were abandoned by their husbands or families due to the social stigma of rape. Some victims became pregnant as a result of the rape, and/or otherwise suffered inevitable psychological burdens of helplessness and isolation.[289] Many others also lost their property, homes, legal documents and possessions,[290] only to find themselves in *ad hoc* camps for IDPs, which scarcely provided better security against attacks,[291] considering the numerous

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[288] Prosecutor's Request, ICC-01/09-3, para. 59.

[289] CIPEV Report, ICC-01/09-3-Anx5, pp. 249, 256 ("over 75% of the individuals her group interviewed said they had been raped at home in front of their spouses and children causing a great deal of stress that resulted in their being abandoned by their husbands"), 257 ("Some contracted HIV/AIDS because they could not get to hospital in time to receive post-exposure prophylaxis (PEP) [...] which [...] prevents HIV infection if administered in time"), 257 ("others became pregnant because of the violations"), 273 ("A number of unintended consequences included infection with HIV/Aids, physical injury and psychological trauma"), 274 ("many victims of sexual violence were injured extensively [*i.e.* cutting] and suffered psychological trauma"), 275 (a little boy forced to watch his father being mutilated has gone mad and repeatedly says "dad they are chopping off your thing"), 276 (on rape victims being abandoned by husbands and other family members), 277 ("These same victims of gang rapes, mutilation, HIV/AIDs, abandonment, psychological trauma, homelessness, loss of property, and violence-induced poverty are in a state of utter misery, feeling isolated and lonely"), 362 ("Other than the extraordinary physical and psychological trauma stemming from being a victim of sexual violence, victims also suffered acute injuries, permanent disabilities, contracting incurable diseases like HIV/AIDS and hepatitis B, ostracism, abandonment [...], loss of abode and income, as well as extreme feelings of humiliation").

[290] CIPEV Report, ICC-01/09-3-Anx5, p. 258, 285 ("Most of the IDPs the Commissioners interacted with had no other home apart from the place they were evicted. Displacement meant not only the loss of a home but loss of friendships and other relationships, economic and personal, built over many years, dispersal of relatives, a loss of memories that constituted one's being. That most of the displacement was violent in nature aggravated the loss"); ICG Report, ICC-01/09-3-Anx6, p. 22.

[291] See CIPEV Report, ICC-01/09-3-Anx5, p. 288-293.

accounts of rapes and other forms of sexual violence as well as transactional sex and sexual exploitation which occurred in these camps.[292]

196. The Chamber observes that the victims' representations also corroborate the Prosecutor's submission concerning the individual impact of the violence on the victims.[293] Complaints of harm suffered concern the inability of victims' children to continue their education,[294] poor living conditions and health concerns in IDP camps,[295] psychological damage such as trauma, stress, and depression,[296] loss of income due to loss of jobs or an inability to re-establish their business,[297] the contraction of sexually

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[292] KNCHR Report, ICC-01/09-3-Anx4, paras 370, 424; CIPEV Report, ICC-01/09-3-Anx5, pp. 265, 272; OHCHR Report, ICC-01/09-3-Anx7, p. 15; UNFPA/UNICEF/UNIFEM/Christian Children's Fund Report, ICC-01/09-3-Anx9, pp. 4, 18, 19, 31, 44, 55.

[293] Report on Victims' Representations, ICC-01/09-17Corr-Red, para. 135.

[294] Victims' representations r/0007/10, ICC-01/09-17-Conf-Exp-Anx18; r/0019/10, ICC-01/09-17-Conf-Exp-Anx29; r/0021/10, ICC-01/09-17-Conf-Exp-Anx31; r/0045/10, ICC-01/09-17-Conf-Exp-Anx55; r/0051/10, ICC-01/09-17-Conf-Exp-Anx61; r/0061/10, ICC-01/09-17-Conf-Exp-Anx71; r/0119/10, ICC-01/09-17-Conf-Exp-Anx129; r/0148/10, ICC-01/09-17-Conf-Exp-Anx158; r/0166/10, ICC-01/09-17-Conf-Exp-Anx176; r/0174/10, ICC-01/09-17-Conf-Exp-Anx184; r/0176/10, ICC-01/09-17-Conf-Exp-Anx186; r/0207/10, ICC-01/09-17-Conf-Exp-Anx217; r/0232/10, ICC-01/09-17-Conf-Exp-Anx242; r/0379/10, ICC-01/09-17-Conf-Exp-Anx389. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[295] Victims' representations r/0003/10, ICC-01/09-17-Conf-Exp-Anx14; r/0213/10, ICC-01/09-17-Conf-Exp-Anx217; r/0215/10, ICC-01/09-17-Conf-Exp-Anx219. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[296] Victims' representations r/0007/10, ICC-01/09-17-Conf-Exp-Anx18; r/0017/10, ICC-01/09-17-Conf-Exp-Anx27; r/0018/10, ICC-01/09-17-Conf-Exp-Anx28; r/0019/10, ICC-01/09-17-Conf-Exp-Anx29: r/0020/10, ICC-01/09-17-Conf-Exp-Anx30; r/0021/10, ICC-01/09-17-Conf-Exp-Anx31; r/0047/10, ICC-01/09-17-Conf-Exp-Anx57; r/0051/10, ICC-01/09-17-Conf-Exp-Anx61; r/0122/10, ICC-01/09-17-Conf-Exp-Anx132; r/0155/10, ICC-01/09-17-Conf-Exp-Anx165; r/0166/10, ICC-01/09-17-Conf-Exp-Anx176; r/0191/10, ICC-01/09-17-Conf-Exp-Anx197; r/0193/10, ICC-01/09-17-Conf-Exp-Anx199; r/0238/10, ICC-01/09-17-Conf-Exp-Anx242; r/0372/10, ICC-01/09-17-Conf-Exp-Anx373; r/0374/10, ICC-01/09-17-Conf-Exp-Anx375; r/0380/10, ICC-01/09-17-Conf-Exp-Anx381. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[297] Victims' representations r/0013/10, ICC-01/09-17-Conf-Exp-Anx24; r/0019/10, ICC-01/09-17-Conf-Exp-Anx29; r/0047/10, ICC-01/09-17-Conf-Exp-Anx57; r/0366/10, ICC-01/09-17-Conf-Exp-Anx367; r/0372/10, ICC-01/09-17-Conf-Exp-Anx373; r/0373/10, ICC-01/09-17-Conf-Exp-Anx374. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

transmitted diseases after rape,[298] abandonment after rape,[299] and the separation of families.[300]

197. The Chamber will now turn to its assessment of the gravity related to the elements constituting a potential case.

198. With respect to the first element concerning the groups of persons likely to be the focus of the Prosecutor's future investigations, the supporting material refers to their high-ranking positions,[301] and their alleged role in the violence, namely inciting, planning, financing, colluding with criminal gangs, and otherwise contributing to the organization of the violence.[302] This renders the first constituent element of gravity satisfied.

199. In relation to the second element concerning the crimes allegedly committed within the incidents that are likely to be the object of the Prosecutor's investigations, the Chamber considers that some of the specific crimes committed in the context of the potential incidents suggested by the Prosecutor satisfy the element of scale. This is so having regard to the number of burned houses,[303] deaths,[304] and displaced people,[305] which resulted from

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[298] Victims' representations r/0003/10, ICC-01/09-17-Conf-Exp-Anx14; r/0047/10, ICC-01/09-17-Conf-Exp-Anx57; r/0369/10, ICC-01/09-17-Conf-Exp-Anx370; r/0376/10, ICC-01/09-17-Conf-Exp-Anx377. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[299] Victim's representation r/0003/10, ICC-01/09-17-Conf-Exp-Anx14. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[300] Victims' representations r/0375/10, ICC-01/09-17-Conf-Exp-Anx376; r/0380/10, ICC-01/09-17-Conf-Exp-Anx381; r/0388/10, ICC-01/09-17-Conf-Exp-Anx389. The Chamber, being aware of the confidential nature of this filing, does not consider its mention to be inconsistent with the confidential nature of the documents as such.

[301] Prosecutor's Response, Annex 2, ICC-01/09-16-Conf-Exp-Anx2, pp. 4-8. See generally also KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5.

[302] Prosecutor's Response, ICC-01/09-16, paras 15-20. See generally also KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5.

[303] See Prosecutor's Response, ICC-01/09-16-Conf-Exp-Anx1, pp. 3, 4. See generally also HRW Report, ICC-01/09-3-Anx3; KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5.

the violence. Some of the crimes which occurred in the context of the proposed incidents were also marked by elements of brutality, for example burning victims alive,[306] attacking places sheltering IDPs,[307] beheadings,[308] and using pangas and machetes to hack people to death.[309]

200. In light of the above, the Chamber considers that the second constituent element of gravity is also satisfied and accordingly the general gravity threshold under article 17(1)(d) of the Statute is met.

III. THE SCOPE OF THE AUTHORIZED INVESTIGATION

A. Temporal parameters

201. The Chamber observes that in the Prosecutor's Request the temporal scope of the investigation is not clearly defined.

202. In paragraph 93 of the Prosecutor's Request, he declares that there is a reasonable basis to believe that crimes against humanity have been committed "during the post-election period, including but not limited to the time period

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[304] See Prosecutor's Response, ICC-01/09-16-Conf-Exp-Anx1, pp. 2, 5, 6 (referring to estimated killings). See generally also HRW Report, ICC-01/09-3-Anx3; KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5; Report of the Special Rapporteur, ICC-01/09-3-Anx11.

[305] See Prosecutor's Response, ICC-01/09-16-Conf-Exp-Anx1, pp. 2, 4, 5 (referring to resultant mass displacement). See generally also KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5; UNICEF/UNFPA/UNIFEM/ Christian Children's Fund Report, ICC-01/09-3-Anx9; CREA Report ICC-01/09-3-Anx10.

[306] Prosecutor's Response, ICC-01/09-16-Conf-Exp-Anx1, pp. 2, 5. See generally also HRW Report, ICC-01/09-3-Anx3; KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5; FIDA-K Report, ICC-01/09-3-Anx8.

[307] Prosecutor's Response, ICC-01/09-16-Conf-Exp-Anx1, pp. 2, 4. See generally also HRW Report, ICC-01/09-3-Anx3; KNCHR Report, ICC-01/09-3-Anx4.

[308] See generally HRW Report, ICC-01/09-3-Anx3; KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5.

[309] See generally HRW Report, ICC-01/09-3-Anx3; KNCHR Report, ICC-01/09-3-Anx4; CIPEV Report, ICC-01/09-3-Anx5; OHCHR Report, ICC-01/09-3-Anx7.

between 27 December 2007 and 28 February 2008".[310] Later, in the relief, the Prosecutor requests the Chamber to authorize the commencement of an investigation into the situation "in the Republic of Kenya in relation to the post-election violence of 2007-2008".[311]

203. In the Chamber's opinion, the reference to the phrases "including but not limited to" and "in relation to the post election violence of 2007-2008", is too broad, and as such, it is the responsibility of the Chamber to define the temporal scope of the authorization for investigation with respect to the situation under consideration.

204. Upon review of the available information, it is apparent to the Chamber that certain areas of Kenya have repeatedly experienced violence prior to 2007 and even subsequent to 2008. These events led some victims to request that any possible investigation by the Court encompass a broader temporal scope, namely the time before 27 December 2007 and after 28 February 2008.[312]

205. The Chamber, accordingly, considers that the temporal scope of the investigation in Kenya cannot be limited to events which took place between December 2007 and February 2008, thus agreeing with the Prosecutor's assertion to the extent that the investigation should not be limited to this particular period.[313] Such a limitation would be inconsistent with: (i) the purpose behind investigating an entire situation as opposed to subjectively selected crimes and; (ii) the Prosecutor's duty to establish the truth by extending the investigation to cover all facts and evidence pursuant to article 54(1) of the Statute. Thus, it is logical to define the scope of the investigation

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[310] Prosecutor's Request, ICC-01/09-3, para. 93 (emphasis added).
[311] Prosecutor's Request, ICC-01/09-3, para. 114.
[312] Report on Victims' Representations, ICC-01/09-17-Corr-Red, paras 95-105.
[313] Prosecutor's Request, ICC-01/09-3, para. 93.

as to cover events prior to December 2007 in relation to crimes against humanity allegedly committed within the entire situation, some of which are referred to in the available information.

206. Since article 15(4) of the Statute subjects the Chamber's authorization of an investigation to an examination of the Prosecutor's Request and supporting material, it would be erroneous to leave open the temporal scope of the investigation to include events subsequent to the date of the Prosecutor's Request. Article 53(1)(a) of the Statute, by referring to "a crime [which] has been or is being committed", makes clear that the authorization to investigate may only cover those crimes that have occurred up until the time of the filing of the Prosecutor's Request.

207. Accordingly, the Chamber considers it appropriate to define the temporal scope of the authorized investigation of the events that took place as between 1 June 2005 (*i.e.*, the date of the Statute's entry into force for the Republic of Kenya) and 26 November 2009 (*i.e.*, the date of the filing of the Prosecutor's Request), since this was the last opportunity for the Prosecutor to assess the information available to him prior to its submission to the Chamber's examination.

B. Material parameters

208. As for the material parameters of the authorization with respect to the investigation in Kenya, the Chamber recalls that the purpose of the proceedings under article 15 of the Statute is to provide it with a supervisory role over the Prosecutor's *proprio motu* initiative to proceed with an investigation. The Chamber is of the view that, allowing the Prosecutor, by way of the present authorization, to investigate acts constituting crimes within the jurisdiction of the Court other than crimes against humanity (*i.e.*, the alleged crimes referred to in the Prosecutor's Request and in the

supporting material and, as such, the only material subject-matter of the present decision), would not be consistent with the specific purpose of the provision of article 15 of the Statute to subject the Prosecutor's *proprio motu* initiative to commence an investigation to the review of the Chamber. By the same token, to leave open the material scope of the authorization would deprive of its meaning the examination of the Prosecutor's Request and supporting material conducted by the Chamber for the purposes of its decision to authorize or not the commencement of an investigation initiated *proprio motu* by the Prosecutor.

209. For this reason, the Chamber is of the view that the authorization granted to the Prosecutor pursuant to article 15 of the Statute shall encompass the investigation into the situation in Kenya in relation to the alleged commission of crimes against humanity.

C. Territorial parameters

210. As established above for the purposes of the determination of whether the alleged crimes fall within the jurisdiction *ratione loci* of the Court (section II.A.3), the available information refers to crimes allegedly committed in different locations throughout Kenya.

211. The scope of the authorization of the commencement of an investigation is therefore limited to events which allegedly occurred on the territory of the Republic of Kenya.

FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY

authorizes the commencement of an investigation into the situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009.

Judge Hans-Peter Kaul appends a dissenting opinion.

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

Dated this Wednesday, 31 March 2010

At The Hague, the Netherlands

Judge Ekaterina Trendafilova
Presiding Judge

Judge Hans-Peter Kaul

Judge Cuno Tarfusser

DISSENTING OPINION OF JUDGE HANS-PETER KAUL

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I. Introduction and Main Conclusions

1. The majority concluded, upon examination of the Prosecutor's "Request for authorization of an investigation pursuant to Article 15" (the "Prosecutor's Request")[1] and the facts contained in the supporting material, including the victims' representations,[2] that there is a reasonable basis pursuant to article 15(4) of the Rome Statute (the "Statute") to proceed with an investigation of alleged crimes against humanity on the territory of the Republic of Kenya from 1 June 2005 until 26 November 2009.

2. I regret that I am unable to accept the decision of the majority and the analysis that underpins it.

3. Basing my analysis on the supporting material, including the victims' representations, I am of the considered view that Pre-Trial Chamber II (the "Chamber") should not authorize the commencement of the Prosecutor's *proprio motu* investigation in the situation of the Republic of Kenya.

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[1] ICC-01/09-3 with 39 annexes. The Prosecutor requested the Chamber on 26 November 2009 to authorize the commencement of an investigation into the situation in the Republic of Kenya. He purported that there is a reasonable basis to believe that crimes against humanity have occurred on the territory of the Republic of Kenya in relation to the 2007/2008 post-election violence. The Chamber requested further clarification and additional information on 18 February 2010, ICC-01/09-15. The Prosecutor responded on 3 March 2010, ICC-01/09-16 with 5 annexes. In his response, the Prosecutor clarified his legal submissions on (1) State or organizational policy under article 7(2)(a) of the Statute and (2) admissibility within the context of the situation in the Republic of Kenya. Essentially, no additional new information was provided which was not already contained in the supporting material submitted on 26 November 2009. The reference to the "Prosecutor's Request" embraces the Prosecutor's both submissions of 26 November 2009 and 3 March 2010.

[2] ICC-01/09-17-Corr-Red. 406 victims or groups of victims presented their representations on 15 March 2010 to the Chamber out of which 320 individual representations and 76 collective representations met the criteria of rule 85 of the Rules of Procedure and Evidence. 383 victims or groups of victims expressed the view that the ICC should authorize the investigation. Nine victims expressed the view that an investigation should not take place. Four did not express a view on this question.

4. In essence, the main reason for this position is the following: both, my interpretation of article 7(2)(a) of the Statute, which sets out the legal definition of "attack directed against any civilian population" as constitutive contextual element of crimes against humanity, and my examination of the Prosecutor's Request and supporting material, including the victims' representations, have led me to conclude that the acts which occurred on the territory of the Republic of Kenya do not qualify as crimes against humanity falling under the jurisdictional ambit of the Court. I have concluded in particular that there is no reasonable basis to believe that crimes, such as murder, rape and other serious crimes, were committed in an "attack against any civilian population" "pursuant to or in furtherance of a State or organizational policy to commit such attack", as required by article 7(2)(a) of the Statute.

5. This conclusion does not preclude or prejudice any other finding on individual criminal responsibility for crimes committed in the Republic of Kenya under customary law[3] or national laws of States having jurisdiction.

6. I wish to emphasize and stress in the clearest terms that my analysis, which is based on the supporting material submitted by the Prosecutor and the victims' representations, does not mean that crimes have not occurred during the period in question in the Republic of Kenya. I strongly and unequivocally condemn any of those acts that have been described so elaborately in the reports of non-governmental organizations and others. The question is not whether or not those

[3] Articles 10 and 22(3) of the Statute.

crimes have happened. The issue is whether the ICC is the right *forum* before which to investigate and prosecute those crimes.

7. I wish to thank all victims and victims' representatives in the Republic of Kenya who have come forward to provide Pre-Trial Chamber II with their representations, their testimony and their accounts of the events pertaining to what is often referred to as the post-election violence of 2007-2008. I was, as a human being, deeply moved by these accounts. My feelings and all my sympathy are with the victims and their families. Likewise, I have studied with anguish and deep sorrow in particular the reports of the Commission of Inquiry into Post-Election Violence ("CIPEV" or "Waki Commission") and the Kenyan National Commission of Human Rights ("KNCHR") who have investigated in the field over a prolonged period of time and gathered testimonies from victims, those who may have been involved in the violence and State authorities alike.[4]

8. As a Judge of the International Criminal Court (the "Court" or the "ICC"), I would like to ask all in the Republic of Kenya who yearn for justice and who support the intervention of the Court in this country for understanding the following: there 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.

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[4] KNCHR Report, ICC-01/09-3-Anx4, para. 15; CIPEV Report, ICC-01/09-3-Anx5, p. 16 *et seq.*

9. There is, in my view, a demarcation line between crimes against humanity pursuant to article 7 of the Statute, and crimes under national law. There is, for example, such a demarcation line between murder as a crime against humanity pursuant to article 7(1)(a) of the Statute and murder under the national law of the Republic of Kenya. It is my considered view that the existing demarcation line between those crimes must not be marginalized or downgraded, even in an incremental way. I also opine that the distinction between those crimes must not be blurred.

10. Furthermore, it is my considered view that this would not be in the interest of criminal justice in general and international criminal justice in particular. It is neither appropriate nor possible to examine and explain in this opinion all the potential negative implications and risks of a gradual downscaling of crimes against humanity towards serious ordinary crimes. As a Judge of the ICC, I feel, however, duty-bound to point at least to the following: such an approach might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute. It would broaden the scope of possible ICC intervention almost indefinitely. This might turn the ICC, which is fully dependent on State cooperation, in a hopelessly overstretched, inefficient international court, with related risks for its standing and credibility. Taken into consideration the limited financial and material means of the institution, it might be unable to tackle all the situations which could fall under its jurisdiction with the consequence that the selection of the situations under actual investigation might be quite arbitrary to the dismay of the numerous victims in the situations disregarded by the Court who would be deprived of any access to justice without any convincing justification.

11. Having said the above, I shall set out in the following my understanding of article 15 authorizations, my interpretation of article 7(2)(a) of the Statute and my analysis of the Prosecutor's Request and the supporting material, including, where appropriate, the victims' representations.

II. Authorization to Commence an Investigation *Proprio Motu*

12. Article 15 of the Statute, one of the most fervently negotiated provisions at the Rome conference and introduced at a late stage into the Statute,[5] encapsulates the very essence of the filtering function and pivotal role of a Pre-Trial Chamber in proceedings before the International Criminal Court.

13. For the purpose of preliminary examination under article 15(1) and (2) of the Statute, and before approaching the Pre-Trial Chamber, the Prosecutor must have properly and thoroughly analyzed the material received or gathered and must sequentially present his determinations in a conclusive manner as to whether there is a reasonable basis to proceed with an investigation. I take note of the Prosecutor's statement that the situation has been under preliminary examination since the violence erupted in the context of national elections held on 27 December 2007.[6] During almost two years of preliminary examination, the Prosecutor, instructed by rule 48 of the Rules of Procedure and Evidence (the "Rules"), considered all factors set out in article 53(1)(a) to (c) of the Statute

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[5] For an overview regarding the legislative history of article 15 of the Statute, see M. Bergsmo/ J. Pejić, Article 15, in: O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (2nd ed., C.H.Beck/Hart/Nomos, 2008), MN 1-6.

[6] ICC-01/09-3, para. 3.

before concluding that there is a reasonable basis to proceed with an investigation. The Chamber, thereafter, examines the Prosecutor's request and supporting material, including the victims' representations, pursuant to article 15(4) of the Statute.

14. I concur with the majority that all requirements set out in article 53(1)(a) to (c) of the Statute fall squarely under judicial scrutiny of the Pre-Trial Chamber. I also agree with the majority's finding that the threshold to be applied in article 15(4) of the Statute is quite low. While I thus far concur with the majority I wish, however, to emphasize that the low threshold of article 15(4) of the Statute still requires a full, genuine and substantive determination of the Chamber whether there exists a reasonable basis to believe that crimes falling under the jurisdiction of the Court have been committed.

15. The majority emphasized the unique character of article 15 and the difficult compromise it illustrates. It further remarked that "the standard should be construed and applied against the underlying purpose of the procedure in article 15(4) of the Statute, which is to prevent the Court from proceeding with unwarranted, frivolous or politically motivated investigations that could have a negative effect on its credibility."[7] Indeed, I believe that this conclusion embodies the underlying precept when examining a request under article 15 of the Statute which calls for a serious, thorough and well-considered approach based on the law. I wish to add that another underlying consideration is that the Pre-Trial Chamber ensures that the Court has jurisdiction throughout all stages of the proceedings. Admittedly, the standard against which the Prosecutor's request

[7] Majority Decision, para. 32.

under article 15 of the Statute is examined is quite low and shall not be raised *contra legem*. However, I caution against a somewhat generous or only summary evaluation whereby *any* information, of even fragmentary nature, may satisfy the standard just because the standard is low. Hence, the question is: how low is the standard in article 15 of the Statute?

16. National prosecutors are called upon to commence investigations if they become aware of *any* information that a crime may have occurred. Here as well, the standard is low. However, it seems to me that in the context of article 15 of the Statute, this principle is not entirely transferable. While the wording of article 53(1) of the Statute establishes that the Prosecutor "shall" initiate an investigation, he or she is obliged to do so only if his or her determinations in accordance with article 53(1)(a) to (c) of the Statute lead him or her to conclude that a reasonable basis to proceed exists. The differing nature of the mandate of the ICC Prosecutor and that of national prosecutors therefore warrants a more nuanced approach. The Prosecutor himself has highlighted this difference at earlier occasions, e.g. in his responses to communications concerning the situations in Venezuela and Iraq.[8]

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[8] The response of the Prosecutor to communications received concerning Venezuela is available at: http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf (last visited on 29 March 2010); the response of the Prosecutor to communications received concerning Iraq is available at: http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last visited on 27 March 2010). In both responses the Prosecutor explained: "Unlike a national prosecutor, who may initiate an investigation on the basis of very limited information, the Prosecutor of the International Criminal Court is governed by the relevant regime under the Rome Statute. Under this regime, my responsibility is to carry out a preliminary phase of gathering and analyzing information, after which I may seek to initiate an investigation only if the relevant criteria of the Statute are satisfied." See also M. Bergsmo/J. Pejić, Article 15, in: O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (2nd ed., C.H.Beck/Hart/Nomos, 2008), MN 7.

17. Bearing in mind the above, I believe that given the nature of article 15 of the Statute, the limited jurisdiction of the Court and its mandate that the most serious crimes of concern to the international community as a whole must not go unpunished, the judicial examination pursuant to article 15(4) of the Statute must reveal that the submitted information assessed in its entirety satisfies the standard. In addition, I am of the view that the standard must be applied in an equal and consistent manner to all requirements falling under article 15 of the Statute, in particular in relation to the *ratione materiae* jurisdiction of the Court.

18. As emphasized by the majority, the Chamber's review covers all jurisdictional parameters, including subject-matter (*ratione materiae*),[9] time (*ratione temporis*),[10] persons (*ratione personae*)[11] and location (*ratione loci*)[12], with the last two requirements being in the alternative. It is my opinion that in the present case, despite the low threshold, an examination of in particular all legal requirements of article 7 of the Statute, which establish the *ratione materiae* jurisdiction of the Court, including the contextual elements, is still required. It is most striking that in the Prosecutor's Request of 26 November 2009 the analysis of the contextual element of crimes against humanity, this crucial point of the entire request, was inadequately explored. I believe that the Prosecutor must

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[9] Article 5(1) of the Statute.

[10] Article 11 of the Statute. According to article 11(2) of the Statute, if the State, such as the Republic of Kenya, becomes a Party to the Statute after its entry (i.e. after 1 July 2002), the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for this State, subject to a declaration under article 12(3) of the Statute. In the present case, the Court may exercise jurisdiction over crimes at the earliest as of 1 June 2005.

[11] Article 12(2)(a) of the Statute. This requirement need not be present when a situation has been referred by the Security Council.

[12] Article 12(2)(b) of the Statute. This requirement need not be present when a situation has been referred by the Security Council.

demonstrate his determination under article 53(1)(a) of the Statute and substantiate it with adequate material leading the Chamber to conclude that an authorization of the commencement of an investigation is warranted. A somewhat selective or summary examination in the hope – as has been suggested by the Prosecutor[13] – that the investigation may bring about the missing pieces of his determination under article 53(1)(a) of the Statute is not enough. It is even more crucial to determine that there is a reasonable basis to believe that the contextual elements of crimes against humanity appear to be present as it is this decisive element which triggers the jurisdiction of the Court, elevates the acts concerned, which otherwise would fall exclusively under the responsibility of national jurisdictions, to international crimes and sets aside considerations of State sovereignty.

19. Any other approach would mean that the Pre-Trial Chamber would authorize the commencement of investigations by the Prosecutor without having ascertained at this early stage, albeit against a quite low threshold, that the jurisdiction of the Court is triggered. In other words, should the Court adopt a generous approach in the evaluation of the material submitted and authorize the commencement of investigations, the Court could operate without having properly assessed jurisdiction. Only at the stage of a request for a warrant of arrest or a summons to appear under article 58 of the Statute would the Pre-Trial Chamber for the first time make such a proper assessment. Admittedly, the Pre-Trial Chamber does not engage in such an examination upon referral of a

[13] See the Prosecutor's understanding reflected in footnote 13 and paragraph 30 of his response to the Chamber's decision requesting clarification and additional information dating 3 March 2010, ICC-01/09-16.

situation by a State Party[14] or the Security Council based on a resolution under chapter VII of the UN Charter[15]. But here lies the difference in triggering the jurisdiction of the Court under article 13(c) of the Statute and the deliberate choice of States to subject the *proprio motu* powers of the Prosecutor to judicial control. The decision whether or not the Prosecutor may commence an investigation rests ultimately with the Pre-Trial Chamber. Thus, the Pre-Trial Chamber's decision pursuant to article 15(4) of the Statute is not of a mere administrative or procedural nature[16] but requires a substantial and genuine examination by the judges of the Prosecutor's Request. Any other interpretation would turn the Pre-Trial Chamber into a mere rubber-stamping instance.

20. In the following I shall set out my understanding of the relevant law and my analysis of the Prosecutor's Request and supporting material.

III. The Law and its Interpretation

21. The competence of the International Criminal Court and hence that of Pre-Trial Chamber II is determined by the terms of the Statute. I do not dispute that the offences as alleged in the Prosecutor's Request satisfy the requirements of time and place imposed by articles 11 and 12(2)(b) of the Statute. My disagreement with the majority concerns the subject-matter jurisdiction of the Court. Therefore, I deem it convenient to set out my reading of article 7 of the Statute, more specifically its *chapeau* elements, including the constitutive contextual requirement provided for in article 7(2)(a) of the Statute. I will confine

[14] Article 13(a) of the Statute.
[15] Article 13(b) of the Statute.
[16] See the Prosecutor's understanding to this effect reflected in paragraph 110 of his request submitted on 26 November 2009, ICC-01/09-3.

my elaborations to only those issues which were essential to my analysis of the facts.

1. The Constitutive Contextual Requirement of Crimes Against Humanity Pursuant to Article 7(2)(a) of the Statute

22. Generally, crimes against humanity are acts which are committed in the course of an attack directed against any civilian population. To qualify as a crime against humanity, a nexus is required between the individual act of a perpetrator (specific crime) and the attack (contextual element).[17]

23. Article 7(1) of the Statute reads, in relevant part:

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

In the following subparagraphs (a) to (k) of article 7(1) of the Statute an exhaustive list of individual acts is set out which constitute crimes against humanity insofar as they are committed as part of an attack.

24. In general, an attack is a "campaign or operation carried out against the civilian population" and is not restricted to a military attack.[18] However, the Statute defines in article 7(2)(a) the components of the requirement "attack directed against any civilian population" further as meaning:

> "(...) 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[.]"

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[17] 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 84-86.
[18] 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. 75 and Elements of Crimes, Introduction to Article 7, point 3.

25. The wording of article 7(2)(a) of the Statute suggests that this attack may be understood as 'one' attack, conducted following 'one' State or organizational policy. However, I believe that such a construction of the terms of article 7(2)(a) of the Statute would prove too restricted. I believe that a scenario may be found to exist in which one or more attacks following each a policy may be identified on one and the same territory. It is obvious that those separate attacks must satisfy all criteria articulated in article 7 of the Statute. Another consideration would be to view several attacks as constituting 'one' attack. In this case, a link between the several attacks must be established which allows the conclusion that they formed one attack pursuant to or in furtherance of a policy.

26. Given the statutory definition of "attack" in article 7(2)(a) of the Statute, there is little doubt that the above mentioned contextual component pertaining to State or organizational policy forms *de lege lata* a constitutive contextual requirement of the concept of crimes against humanity as defined in the Statute. This necessity is further stressed by the introductory text element "[f]or the purpose *of this Statute*" in article 7(1) of the Statute (emphasis added). As I explained above, article 7(2)(a) of the Statute thus serves also as a jurisdiction-endowing provision elevating ordinary crimes to the level of international crimes.

27. The majority has demonstrated its understanding of article 7 of the Statute and of the constitutive contextual elements in particular. To this end, references were made to the jurisprudence of this Court and that of the ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY)[19] and the

[19] The accurate denomination of the tribunal is "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the

International Criminal Tribunal for Rwanda (ICTR)[20]. This offers me an opportunity to express my views on this matter in a more general manner.

2. The Issue of Jurisprudential References to Decisions of Other Courts

28. Jurisprudential references to the *ad hoc* tribunals and that of other hybrid tribunals, such as the Special Court for Sierra Leone ("SCSL"),[21] are, in my opinion, to be treated with utmost caution in the present case for various reasons.

29. Those tribunals and courts interpret and apply the law as set forth in their respective basic legal texts. The States Parties to the ICC have adopted a statute separate and different from those judicial institutions noted above. Article 21 of the Statute sets forth in a comprehensive manner the applicable law for this Court. This article contains a list of sources of law and establishes a hierarchy between them, manifesting the primacy of the Statute. Article 21 of the Statute does not provide that a further source of law is to be found in the decisions or

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Territory of the Former Yugoslavia since 1991", UN Doc. S/RES/808 (1993). The statute of the ICTY may be found in the Secretary-General's report to the Security Council presented on 3 May 1993, UN Doc. S/25704 (1993). Hereinafter, the Security Council approved and adopted the report of the Secretary-General in resolution 827 (1993). An updated version of the tribunal's statute may be found at http://www.icty.org/sections/LegalLibrary/StatuteoftheTribunal (last visited on 12 March 2010).

[20] The accurate denomination of the tribunal is "International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994", UN Doc. S/RES/955 (1994). The statute of the ICTR may be found in the annex to the abovementioned Security Council resolution.

[21] The Special Court for Sierra Leone was established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) dating 14 August 2000, see UN Doc S/RES/1315 (2000). The agreement between the UN and the Government of Sierra Leone was signed on 16 January 2002 to which the statute for the SCSL is annexed. The statute may be found at www.sc-sl.org (last visited 27 March 2010).

judgments of other courts and tribunals.[22] A provision, such as article 20(3) of the statute of the SCSL, is absent in the Court's Statute.[23] There exists no other rule in the Statute or the Court's Rules which confers upon a judicial decision of another court or tribunal the legally binding character of a precedent.[24] Decisions and judgments of other courts and tribunals neither create the law for the ICC nor is the ICC inferior to any other judicial institution. There is also no institutional link between Chambers of the ICC and that of other courts which may justify an approach to heed the jurisprudence of other judicial institutions.[25] Consequentially, decisions and judgments of other judicial institutions do not constitute a precedent for this Court or are in any other way binding on the ICC as such. Insofar as the Rome Statute already provides the applicable law, there is no room for the jurisprudence of other courts and tribunals.[26]

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[22] Article 21(2) of the Statute allows the Court to follow precedents established by this Court: "The Court *may* apply principles and rules of law as interpreted in its previous decisions" (emphasis added).

[23] Article 20(3) of the SCSL statute reads: "The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone."

[24] "A precedent is the making of law by a court in recognizing in applying new rules while administering justice." Thus, the precedent may "furnish the basis for determining later cases involving similar facts or issues"; in: Black's Law Dictionary, 7th ed., (B. Garner, ed.), West Group, St Paul, Minn., 1999, p. 1195.

[25] In contrast, the ICTY and the ICTR share the same Appeals Chamber which is composed of one and the same group of judges, see article 13(3) of the ICTR statute and article 12(2) of the ICTY statute.

[26] Article 21(1)(a) of the Statute obliges the Court to apply "[*i*]*n the first place*, this Statute, Elements of Crimes and its Rules of Procedure and Evidence" (emphasis added). This position has been repeatedly adopted in various cases before this Court, e.g. Pre-Trial Chamber II, "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", ICC-01/05-01/08-475, para. 42; Pre-Trial Chamber II, "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration and Motion for Clarification", ICC-02/04-01/05-60, para. 19; Trial Chamber I, "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial", ICC-01/04-01/06-1049, para. 44. Following the same logic and calling for a

30. However, the ICC does not exist in autistic isolation from developments in international criminal law. The jurisprudential legacy of such other tribunals and courts, which is not as such applicable law before the Court, may be referred to by chambers of this Court within the parameters of article 21 of the Statute. In my view, the Court may resort to the jurisprudence of other courts and tribunals in the process of identifying "principles and rules of international law", which may be *mirrored* in such decisions or judgments of other courts and tribunals.[27] It thus allows the Court to overcome possible shortcomings of the Court's primary legal texts and embeds the Statute in the broader normative environment of international criminal law. Yet again, I believe that such an approach does not release the Court from ascertaining for itself in a given instance whether e.g., the constitutive elements of custom, namely State practice and *opinio iuris sive necessitatis*, are met. The jurisprudence of the *ad hoc* tribunals, as critical and significant as it has been in the development of international criminal law, may serve as a source of inspiration but may be only of limited value for the ICC.

31. A cautious approach is even more warranted in the event that the basic texts of other courts and tribunals do not contain the same legal *requirements* in a provision as contained in the Court's Statute. In this respect, it is worth noting that the pertinent provisions in the statutes of e.g., the ICTY and the ICTR do not contain *expressis verbis* a legal requirement equivalent to that of article 7(2)(a) of

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cautious and well-considered approach in using jurisprudence of other courts and tribunals, see Pre-Trial Chamber I, "Decision on the Practices of Witness Familiarisation and Witness Proofing", ICC-01/04-01/06-679.

[27] Article 21(1)(b) of the Statute. The Statute makes clear that "principles and rules of international law" are a subsidiary source of law.

the Statute, namely the legal requirement of a "State or organizational policy".[28] Recent jurisprudence of these tribunals reveals that considerations of "policy" are not a legal requirement but may have evidential relevance for the presence of a "systematic" attack.[29]

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[28] The Statute of the ICTY provides in article 5: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (...)"; The Statute of the ICTR reads in article 3: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (...)".

[29] This short overview shall assist in understanding the jurisprudential legacy. ICTY, *Prosecutor v Tadić*, Case No. IT-94-1-T, "Opinion and Judgment", 7 May 1997, para. 653: "Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not." This position was overturned with the judgment of the Appeals Chamber in the case of the *Prosecutor v Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, "Judgement", 12 June 2002, para. 98: "Contrary to the Appellants' submissions, neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime." This has been recently confirmed as "settled jurisprudence" in ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-T, "Judgment", 12 June 2007, para. 49. The same jurisprudential development can be witnessed at the ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, "Judgment", 2 September 1998, para. 580: "The concept of systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy"; however, the ICTR in recent jurisprudence abandoned the existence of a policy or plan as a legal requirement, see ICTR, *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, "Judgment and Sentence", 1 December 2003, para. 872: "There has been some debate in the jurisprudence of this Tribunal about whether or not the term systematic necessarily contains a notion of a policy or plan. The Chamber finds that it does not, and adopts the same position as Trial Chamber III in *Semanza* where it endorsed the jurisprudence of the Appeals Chamber of the ICTY in *Kunarac*, that whilst "the existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread and systematic, [...] the existence of such a plan is not a separate legal element of the crime""; confirmed in ICTR,

32. I now turn to the Statute of the ICC which seems to follow another route by establishing that a "State or organizational policy" is a legal *requirement* radiating on the entire *chapeau* of article 7 of the Statute as it is linked with the element of "attack" and not the component "systematic". This fact compels me to conduct a careful analysis before drawing an analogy with or relying on the jurisprudence of other tribunals. Article 10 of the Statute reinforces the assumption that the drafters of the Statute may have deliberately deviated from customary rules as evinced in the jurisprudence of other courts and tribunals in providing that "[n]othing in this Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than in the Statute".[30]

3. Interpretation of Article 7(2)(a) of the Statute According to Article 31 of the Vienna Convention on the Law of Treaties

33. Coming back to the issue in question, article 7(2)(a) of the Statute provides a statutory definition for an element which is a component of the contextual constitutive elements of crimes against humanity. Including a definition in the Statute can have no other purpose than to pronounce a legal requirement against which the facts of a case must be assessed.[31]

Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, "Judgment and Sentence", 28 April 2005, para. 527: "The concept of a 'systematic' attack, within the meaning of Article 3 of the Statute, refers to a deliberate pattern of conduct but does not necessarily require the proof of a plan. The existence of a policy or plan may be evidentially relevant (...). However, the existence of such a policy or plan is not a distinct legal element of the crime." This legal interpretation has also been endorsed by the Appeals Chamber of the Special Court for Sierra Leone, see *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, "Judgment", 28 May 2008, para. 246.

[30] See also article 22(3) of the Statute.

[31] Therefore, this does not leave room for any other view that there is no policy requirement under the Rome Statute. Consequentially, more recent jurisprudence of the *ad hoc* tribunals that

34. Therefore, it is in my view appropriate to engage in interpreting article 7(2)(a) of the Statute and give content to the constitutive contextual element of "State or organizational policy" against which I have analyzed the facts contained in the supporting material to the Prosecutor's Request and the victims' representations. To this end, I apply the principles comprised in article 31 of the Vienna Convention on the Law of Treaties (the "VCLT")[32] which, enshrined in an applicable treaty within the meaning of article 21(1)(b) of the Statute,[33] are also declaratory of customary law.[34]

35. Article 31 of the VCLT provides, in relevant part:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty."

36. An "attack directed against any civilian population" *per definitionem legis* is a course of conduct involving the multiple commission of acts against such

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there is no policy requirement for crimes against humanity under customary law does not need to be discussed in the context of the Rome Statute.

[32] Vienna Convention on the Law of Treaties, adopted on 22 May 1969 by the United Nations Conference on the Law of Treaties, United Nations Treaty Series (UNTS), vol. 1155, p. 331.

[33] Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, para. 33.

[34] See also International Court of Justice, *LaGrand Case* (Germany/United States of America), Judgment of 27 June 2001, ICJ Reports (2001), p. 466, at p. 501, para. 99; *id.*, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar/Bahrain). Jurisdiction and Admissibility, Judgment of 15 February 1995, ICJ Reports (1995), p. 6, at p. 16, para. 33.

population "pursuant to or in furtherance of a State or organizational policy to commit such attack". The Statute suggests that the attack is not any attack that has been directed against any civilian population. Rather, it is qualified by the added features that it is "widespread" or "systematic" and that it was conducted "pursuant to or in furtherance of a State or organizational policy". As the latter qualification represents a point of disagreement with the majority's decision, I shall develop my understanding on this aspect of article 7 of the Statute only.

37. The Statute clarifies that, on the one hand, either a State may adopt such a policy or, on the other hand, that an "organizational policy" may be found to exist. I observe that the Statute does not provide any guidance regarding the notion "organizational policy". Based on the English text of the Statute one might arrive to the conclusion that in this case the policy need only be "organizational", seemingly referring to the nature of such policy as being (only) of an organized, planned or systematic manner, leaving aside the question of attribution to a specific authorship.[35] However, I note that the English text of the Statute is phrased more broadly than other authentic versions of the Statute, leaving some doubt as to its exact meaning. The original of the Statute in Arabic, Chinese,

[35] The Prosecutor's line of argumentation in his request for authorization of 26 November 2009 seemed to follow this interpretation or at least was in part ambiguous, see e.g., "organized aspect of the violence" (para. 63), "these attacks were organized by political and/or traditional leaders" (para. 68), "organized retaliatory violence" (para. 73), "persons in position of power appear to have been involved in the organization (...) of violence", (para. 75), "indications emerged illustrating the organized nature of some of the violence" (para. 84), "as indicia of organization" (para. 88), "indicators of organized attacks" (para. 89); further references of a rather ambiguous nature included the mention of "organized groups" throughout the Prosecutor's Request leaving room for interpretation whether the groups, purportedly associated with the main political parties, had organized themselves or whether they constituted an "organization" within the meaning of article 7(2)(a) of the Statute, see references in paras 74, 78, 80, 83, 85, 86 and 100.

English, French, Russian and Spanish are equally authentic.[36] A look at the French, Spanish and Arabic text reveals the following.[37]

38. The French text of the Statute reads "la politique d'un État ou d'une *organisation*" (emphasis added). The Spanish text of the Statute refers to an attack "de conformidad con la política de un Estado o de una *organización*" (emphasis added). The Arabic text equally asks for عملاً بسياسة دولة أو منظمة, an attack in application of a policy of a State or an organization. I conclude that while the English text would accept the meaning of a policy to be of a systematic nature but does not necessarily need to be authored by an entity like that of an "organization", the other authentic texts of the Statute clearly refer to the requirement that a policy be adopted by an 'organization'. In case where two or more versions possess equal authority and one appears to have a wider bearing than the other, I shall adopt the interpretation which offers the more limited interpretation and which accords with the intention of the drafters as enshrined in the other texts.[38] I therefore believe that the Statute has opted for the meaning whereby "organizational" shall be construed as meaning to pertain to an organization[39].

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[36] Article 128 of the Statute reads: "The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States." Article 33(3) of the VCLT provides: "The terms of the treaty are presumed to have the same meaning in each authentic text."

[37] The Russian version of the Statute reads in article 7(2)(a) of the Statute "политики государства *или организации*" (emphasis added) which points to the requirement of an 'organization'; equally, the Chinese version of article 7(2)(a) of the Statute reads '国家或组织(攻击平民人口)的政策' referring to the term 'organization'.

[38] See for this approach already taken by the Permanent Court of Justice (PCIJ), *Mavrommatis Palestine Concessions Case,* Judgment of 30 August 1924, PCIJ Reports, Series A (1926), No.2, at p. 19.

[39] Shorter Oxford English Dictionary, (5th ed., OUP, 2002), p. 2019.

39. The contextual interpretation of article 7(2)(a) of the Statute leads me to the same conclusion. The Elements of Crimes,[40] which constitute an agreement within the meaning of article 31(2)(a) VCLT, in point three of the Introduction, stipulate that the "'policy to commit such attack' requires that the State or *organization* actively promote or encourage such an attack against a civilian population" (emphasis added).

40. Having established that an 'organization' is an indispensable part and parcel of an "organizational policy" within the meaning of article 7(2)(a) of the Statute, I now conclude that three components require to be established for the purpose of that provision: (1) the existence of a State or an 'organization'; (2) a policy to commit such attack; and (3) a link between the multiple commission of acts referred to in article 7(1) of the Statute and the policy of such State or 'organization', as emphasized by the terms "pursuant to or in furtherance of". In other words, it must be ascertained by the Court that the criminal conduct under judicial examination is ultimately attributable to a State or an 'organization', which established or at least endorsed[41] a policy to commit such an attack.

41. I agree with the majority that the "policy", if not formally adopted, may be deduced from a variety of factors which, taken altogether, militate in favour of a policy, involving ways and means for the common purpose to attack a civilian population. It is the product of a State or 'organization', the intellectual authors,

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[40] Article 9 of the Statute provides that the Elements of Crimes "shall assist the Court in the interpretation and application of articles 6, 7, and 8".

[41] See footnote 6 of the Elements of Crimes reading: "A policy which has a civilian population as the object of the attack would be implemented by state or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action."

following to which the individual acts enlisted in article 7(1)(a) to (k) of the Statute are committed. However, caution is warranted in accepting criteria which have been identified in other cases before this Court and the *ad hoc* tribunals where the underlying facts of the cases were dissimilar to those in the present request *sub judice*.

42. But more important is the question: who are the authors of such a policy?

43. While the requirement of a "State" is self-explanatory, the question remains at which level a policy may be adopted in order to be attributable to a State. I agree with the majority that acts of the central government and of any other organ[42] at the regional or local level may be imputable to a State;[43] however, considerations of attribution do not answer the question of who can establish a State policy. In other words, while the acts of low-level State officials, such as governmental law enforcement agencies or members of the armed forces, are imputable to the State, it is not clear whether they are able to establish a policy of the State. The establishment of a policy within the meaning of article 7(2)(a) of the Statute

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[42] Instructive on the issue of attribution is the work of the International Law Commission on the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 9 August 2001 and adopted by the UN General Assembly in resolution A/RES/56/83 on 12 December 2001. Particular mention is to be made to article 4 of the draft articles on state responsibility which concerns the "conduct of organs of a State" and reflects customary law, see International Court of Justice (ICJ), *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports (1999), p. 62 at p. 87, para. 62. In this case, the ICJ was principally concerned with decisions of State courts but the same principle applies to legislative or executive acts, see an early ruling in e.g., PCIJ, *Certain German Interests in Polish Upper Silesia*, Judgement 25 May 1926, PCIJ Series A, No. 7, p. 19: "From the standpoint of International Law and of the Court which is its organ, municipal laws express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."

[43] I further wish to add that a differentiation must be made as to whether that state official acted in an official or private capacity.

implies, in my opinion, a policy-making at the high level.[44] Certainly, a policy may be established, for example, by the government or high-ranking military commanders. However, considering the specific circumstances of the case, a policy may also be adopted by an organ which, albeit at the regional level, such as the highest official or regional government in a province, has the means to establish a policy within its sphere of action.

44. Another question constitutes what is to be understood by the term 'organization'. The Statute lacks a definition. The majority conceives this term very broadly and does not restrict it to state-like actors.[45]

a) Ordinary Meaning

45. A legal dictionary offers the meaning of an 'organization' to be "a body of persons (such as a union or corporation)".[46] Clearly, the 'organization' is an entity different from a "State" if the legislator was to avoid redundancy. Thus, it is permissive to conclude that an 'organization' may be a private entity (a *non-state* actor) which is not an organ of a State or acting on behalf of a State. But how can this non-state 'organization' be further delineated? A look at previous rulings of this Court[47] reveals that jurisprudence of both Pre-Trial Chambers exists in which some findings addressing this aspect have been made, namely in the cases of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* and *The Prosecutor v. Jean-Pierre Bemba Gombo*.

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[44] In case the policy is not established at a high level, it must be at least endorsed at the high level. In this respect, I note the last sentence of footnote 6 of the Elements of Crimes which reads: "[t]he existence of such a policy cannot be inferred solely from the absence of *governmental* or organizational action" (emphasis added).

[45] Majority Decision, paras 90 and 92.

[46] Black's Law Dictionary, 7th ed., (B. Garner, ed.), West Group, St Paul, Minn., 1999, p. 1126.

[47] Article 21(2) of the Statute.

46. In the first case mentioned above, Pre-Trial Chamber I found that the attack:

> "(...) must also be conducted in furtherance of a common policy involving public of private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population."[48]

47. In the second case noted above, Pre-Trial Chamber II equally held that:

> "such a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population."[49]

48. But I read this jurisprudence against the backdrop that the Pre-Trial Chambers at that time assessed, to the standard of proof applicable, the acts of military-like organized armed groups in the context of an armed conflict not of an international character who over a prolonged period of time allegedly committed crimes according to a policy.[50]

49. The jurisprudence of other international and national tribunals, to the extent that it may be applied in accordance with article 21 of the Statute, offers only little guidance as the tribunals have not further clarified the constitutive characteristics and contours of non-state 'organizations', in case they alluded to this possibility.[51]

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[48] Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 396.
[49] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 81.
[50] At the time of this dissent, no judgments by the competent Trial Chambers have been rendered in the abovementioned cases.
[51] National proceedings, such as the *Menten, Barbie, Finta, Touvier, Papon* and *Eichmann* cases are only of limited value as they relate to involvement of the accused within the state apparatus of Nazi-Germany or the accused was working in the interests of the European Axis countries. *Pieter Menten* ([13 January 1981] 75 I.L.R. p. 331) was a Dutch national working in the service of the German staff of Dr. Eberhard Schöngarth, Befehlshaber der Sicherheitspolizei und des Sicherheitsdienstes; *Klaus Barbie* ([6 October 1983] J.C.P. II G, No. 20, p. 107; [26 January 1984]

50. A look at the academic literature, for reasons of completeness, reveals a more dissonant dialogue. One prominent academic argues that the wording "organizational policy" refers only to a policy of an organ of the State.[52] Other commentators have argued to interpret that notion quite broadly, *inter alia*, in light of the need to protect basic human values.[53] Others have advanced a more restricted reading of the term 'organization', linking it to state-like entities.[54]

J.C.P. II G, No. 20, p. 197; [20 December 1985] J.C.P. II G, No. 20, p. 655; [3 June 1988] J.C.P. II G, No. 21, p. 149) was head of the Gestapo in Lyon; *Imre Finta* (R. v. Finta, [1994] 1 S.C.R. 701) was captain in the Royal Hungarian Gendarmerie, a paramilitary police force under the direct command of the German SS; *Paul Touvier* ([27 November 1992] J.C.P. II G, No. 21, p. 977) was a member of the Milice in Lyon. Acting within the Vichy-regime, he was seen as collaborating with Nazi-Germany and furthering the plan of a state practicing a hegemonic political ideology. *Maurice Papon* ([23 January 1997] J.C.P. II G, No. 22, p. 812) was Secretary-General of the prefecture in the Département Gironde and seen as an official of the Vichy-regime. *Adolf Eichmann* ([12 December 1961] 36 I.L.R. p. 5) was an SS-Obersturmbannführer. Therefore, national courts were not confronted with the task to define in borderline cases the contours of the term 'organization'. On the international level, the tribunals have equally provided rather rudimentary holdings with regard to the exact nature of an 'organization'. The ICTY ruled on the possibility that crimes against humanity may be conducted by organizations distinct from a State, see ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, "Opinion and Judgment", 7 May 1997, para. 654, adding, however that "[i]n this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, *have de facto control over, or are able to move freely within, defined territory*" (emphasis added). This position was endorsed in the case of the *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, "Judgement". 3 March 2000, para. 205 ("with de facto power or organized in criminal gangs"), in which the Chamber, without further explanation, relied, *inter alia*, on the work of the International Law Commission, rulings in previous decisions of other ICTY trial chambers and the Rome Statute(!). The ICTR in the case of the *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 580: "There is no requirement that this policy must be adopted formally as the policy of a state." Without defining further the ambit of this statement; this ruling was affirmed in the case of the *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, "Judgement", 21 May 1999, para. 125: "Who or what must instigate the policy? Arguably, customary international law requires a showing that crimes against humanity are committed pursuant to an action or policy of a State. However, it is clear that the ICTR Statute does not demand the involvement of a State."

[52] Ch. Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, vol. 1 (Transnational Publishers, 2005), p. 152. However, I note that the same author seemed to accept a broader concept in his book *Crimes Against Humanity in International Criminal Law*, (Kluwer Law International, 1999), p. 275.

[53] G. Werle, *Principles of International Criminal Law*, (2nd ed., T.M.C. Asser, 2009), MN 814 *et seq*; B. Kuschnik, *Der Gesamttatbestand des Verbrechens gegen die Menschlichkeit*, (Duncker & Humblot,

51. I read the provision such that the juxtaposition of the notions "State" and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities. These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure,[55] including, as a minimum, some kind of policy level; (e) with the

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2009), p. 235 *et seq;* following the same line of thought, arguing for a "liberal interpretation" in the context of "core terrorism", M. Di Filippo, "Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", *EJIL* 19 (2008), p. 533, at p. 568. Without further elaboration, Ch. Hall, Article 7, in: O. Triffterer, Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article (2nd ed., C.H.Beck/Hart/Nomos, 2008), MN 92; seems to advocate for a broad interpretation, Y. Jurovics, *Réflexions sur la résponsabilité du crime contre l'humanité,* (L.G.D.J., 2002), p. 417.

[54] W. Schabas, *The Rome Statute of the International Criminal Court. A Commentary* (OUP, 2010), article 7, p. 152; *id.*, Crimes Against Humanity: The State Plan or Policy, in: Theory and Practice of International Law, Essays in Honour of M. Ch. Bassiouni (L.N. Sadat/M. P. Scharf, eds., Martinus Nijhoff, 2008), p. 347 at p. 359; K. Ambos, *Internationales Strafrecht* (C.H.Beck, 2006), p. 215; G. Acquaviva/F. Pocar, "Crimes against Humanity", in: Max Planck Encyclopedia of Public International Law (R. Wolfrum, ed., OUP, 2010), para. 1 (also available online under www.mpepil.com); C. Kress, Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts, 15 *Journal of Conflict & Security Law* (2010/2), forthcoming.

[55] Being an applicable treaty within the meaning of article 21(1)(b) of the Statute, reference may be made to the notion in article 1(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 ("Additional Protocol II"), UNTS, vol. 1125, p. 609. I also take note of the existing jurisprudence of the Court, to which I may resort pursuant to article 21(2) of the Statute, which seems to have established that "organized armed groups" within the meaning of article 1(1) of the Additional Protocol II acting during non-international armed conflict are qualified as 'organizations' in the context of crimes against humanity, see the *Prosecutor v. Jean-Pierre Bemba,* "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424; the *Prosecutor v. Joseph Kony,* "Warrant of Arrest for Joseph Kony Iussed on 8 July 2005 as Amended on 27 September

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.[56]

52. In contrast, I believe that non-state actors which do not reach the level described above are not able to carry out a policy of this nature, such as groups of organized crime, a mob, groups of (armed) civilians or criminal gangs. They would generally fall outside the scope of article 7(2)(a) of the Statute. To give a concrete example, violence-prone groups of persons formed on an *ad hoc* basis, randomly, spontaneously, for a passing occasion, with fluctuating membership and without a structure and level to set up a policy are not within the ambit of the Statute, even if they engage in numerous serious and organized crimes. Further elements are needed for a private entity to reach the level of an 'organization' within the meaning of article 7 of the Statute. For it is not the cruelty or mass victimization that turns a crime into a *delictum iuris gentium* but the constitutive contextual elements in which the act is embedded.

53. In this respect, the general argument that any kind of non-state actors may be qualified as an 'organization' within the meaning of article 7(2)(a) of the Statute

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2005", ICC-02/04-01/05-53; the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the confirmation of charges", ICC-01/04-01/07-717. Hence, even though an 'organization' may not show a military structure, it should nevertheless have a structure and capacity similar to that of an "organized armed group".

[56] In the existing jurisprudence of this Court, 'control over the territory' was rejected to be a requirement for the existence of an "organized armed group" in the context of an armed conflict not of an international character, see Pre-Trial Chamber I, Decision on the confirmation of charges, 01/04-01/06-803-tEN, para. 233 *et seq*; and 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. 236. I therefore opine that, given the similarity to 'organization' (see footnote *supra*), control over the territory is not needed. However, this element may serve as an additional *factor* to be considered.

on the grounds that it "has the capability to perform acts which infringe on basic human values"[57] 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.[58]

b) Contextual Interpretation

54. The qualitative requirement of "State or organizational policy" in article 7(2)(a) of the Statute distinguishes crimes against humanity from other common crimes which are to be prosecuted at the national level only. The preamble of the Statute, being part of the context to be considered,[59] accentuates the gravity of the crimes subject to the jurisdiction of the Court. The following paragraphs demonstrate the fundamental idea which permeates the entire Statute:

> "**Mindful** that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
> **Recognizing** that such grave crimes threaten the peace, security and well-being of the world,
> **Affirming** that the most serious crimes of concern to the international community as a whole must go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
> **Determined** to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole"[60]

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[57] Majority Decision, para. 90.
[58] See the fourth paragraph of the preamble of the Rome Statute.
[59] Article 31(2) of the VCLT.
[60] Paragraphs 2, 3, 4, and 5 of the preamble of the Rome Statute.

55. The Court is reminded to interpret the statutory provisions against those objectives. In other words, the Statute imposes that the requirements of article 7 of the Statute shall not be watered down, be it in an incremental or gradual manner. The preamble stipulates the objective and purpose of the Statute. It instructs the Court to avoid a "banalisation" or "trivialization" of the crimes contained in the Statute. Further, in light of article 22 of the Statute,[61] caution is warranted to broaden article 7(2)(a) of the Statute infinitely beyond its conceptual confines.

c) Object and Purpose

56. The restricted interpretation of this contextual requirement is also warranted by a teleological interpretation of article 7(2)(a) of the Statute, i.e., in light of its object and purpose. In this regard, it is imperative to enquire the content of the contextual element in article 7(2)(a) of the Statute in light of the fundamental rationale underlying crimes against humanity. It seems to me that this question surfaces strikingly at the present occasion. What is the object and purpose of crimes against humanity? What is in fact the underlying rationale or *raison d'être* of crimes against humanity? What makes it different from other common crimes which fall solely under the jurisdiction of States?

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[61] Article 22 of the Statute is contained in Part 3 of the Statute titled "General Principles of Criminal Law". Considering that this part of the Statute contains principles of a more general nature, not pertaining to the individual criminal responsibility of an individual (see articles 22(3) and 25(4) of the Statute), one may argue that article 22 of the Statute does not have as a sole purpose the protection of persons prosecuted before the Court. It has also the purpose of imposing a strict interpretation in the jurisdictional ambit of the Court. This is further evidenced in the Introduction of the Elements of Crimes which refers to strict interpretation in general. Point 1 of the Elements of Crimes reads: "Since article 7 pertains to international criminal law, its provisions, consistent with article 22, *must be strictly construed*, taking into account the crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world" (emphasis added).

57. It seems that until now this fundamental question has hardly been raised or discussed as such by this Court. The Prosecutor's Request and its implications make it, in my opinion, compelling to address in the present circumstances this question.

58. A plethora of academic writings explores this issue and proposes different explanations on which I shall not comment here.[62] Rather, I wish to lay down my understanding in the following:

59. In the 20th century, the international community has been challenged by the tragic phenomenon of mass crimes against civilian populations of unimaginable

[62] See for instance the position of E. Schwelb, "Crimes Against Humanity", British Yearbook of International Law 23 (1946), p. 178, at p. 195: "A crime against humanity is an offence against certain general principles of law which, in certain circumstances, become the concern of the international community, namely if it has repercussions reaching across international frontiers, or if it passes 'in magnitude or savagery any limits of what is tolerable by modern civilisations'."; Ch. Bassiouni, *Crimes against Humanity in International Criminal Law*, (Kluwer Law International, 1999), p. 252 *et seq.*: "Thus, crimes committed by virtue of 'state action or policy' alter the nature and character of such crimes, and that is the essential characteristic of 'crimes against humanity'"; Y. Jurovics, *Réflexions sue la spécificité du crime contre l'humanité*, (L.G.D.J., 2002), p. 283: "Dès que ce lien est établi, cette politique, élément fondamental dans l'identification du crime contre l'humanité, transforme ainsi chaque acte individual qui contribute à sa réalisation en crime contre l'humanité, meme si ce dernier compte peu de victims." ; M. Köhler, "Zum Begriff des Völkerstrafrechts", Annual Review of Law and Ethics, 11 (2003), p. 435 who, basing his considerations on Immanuel Kant, sees in the occurrence of crimes against humanity a 'negative constitutional decision' (negative Verfassungsentscheidung); Ernst-Joachim Lampe, "Verbrechen gegen die Menschlichkeit", in Festschrift für Günter Kohlmann zum 70. Geburtstag, (H.J. Hirsch/J. Wolter/U. Brauns, eds, Verlag Dr. O. Schmidt, 2003), p. 147, sees the rationale of crimes against humanity (1) in the protection of human rights of the individual because the person belongs to humanity and therefore possesses dignity and (2) the procedural guarantee of their protection against State arbitrariness beyond national boundaries; G. Manske, *Verbrechen gegen die Menschlichkeit als Verbrechen an der Menschheit*, (Duncker & Humblot, 2003), pp. 273-365, who argues that the occurrence of crimes against humanity calls into question the existence of the international *legal* order, of which the individual is part. In targeting a civilian, the perpetrator targets the entire group the victim civilian is representing. Targeting the entire group means to abrogate the rights of such group in its entirety which may transcend State boundaries.

magnitude and atrocity; in particular the systematic annihilation of Jews and other unforgettable acts of barbarism which, *inter alia,* triggered the establishment of the International Military Tribunal in Nuremberg and Tokyo in 1945/1946. As a consequence, the international community has recognized that mass crimes committed by sovereign States against the civilian population, sometimes the State's own subjects, according to a State plan or policy, involving large segments of the State apparatus, represent an intolerable threat against the peace, security and well-being of the world, indeed a threat for humanity and fundamental values of mankind. Such values were considered fundamental by the international community as evidenced in international instruments prior to the establishment of the Military Tribunals.[63]

60. Crimes of this nature and magnitude were made possible only by virtue of an existing State policy followed in a planned and concerted fashion by various segments of public power targeting parts of the civilian population who were deprived totally and radically of their basic fundamental rights. It was not (only) the fact that crimes had been committed on a large scale but the fact that they were committed in furtherance of a particular (in-humane) policy. Consequently, it was felt that the threat emanating from such State policy is so fundamentally

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[63] It has been argued that, although not expressly articulated as a penal norm, crimes against humanity were embedded in international law encapsulated in the term of 'humanity' as contained in various international instruments. The most prominent example was to be found in the mention of "*interests of humanity*" (para. 2) and the "principles of the law of nations, derived from the usages established among civilized peoples, from the *laws of humanity* and from the dictates of the public conscience" (para. 8) in the preamble of the Fourth Hague Convention Respecting the Laws and Customs of war on Land, 18 October 1907, and its Annex: Regulating the Laws and Customs of War on Land, Martens, NRG (3e série), vol. 3, p. 461. For further references and historic examples see E. Schwelb, "Crimes against humanity", 23 BYIL (1946), pp. 179-188; P. Currat, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale,* (Bruylant/L.G.D.J./Schulthess, 2006), p. 32 *et seq.*; B. Kuschnik, *Der Gesamttatbestand des Verbrechens gegen die Menschlichkeit,* (Duncker & Humblot, 2009), p. 34 *et seq.*

different in nature and scale that it concerned the entire international community. In other words, the presence of a policy element elevated those crimes to the international level. While not a legal requirement in the London Charter, subsequent steps in the development of international criminal law encapsulated this specific threat in the requirement of a policy element which creates the contextual circumstance under which crimes against humanity are promoted and committed.

61. In general and to emphasize and clarify further this decisive point: historic experience demonstrates that it is, exactly and above all, the phenomenon of a State adopting either formally or in practice a policy to attack a civilian population, which leads to this very grave, if not enormous risk and threat of mass crimes and mass victimization. The drafters of the London Conference were acutely aware that this grave risk and threat emanating from the criminal policy of Nazi Germany had indeed materialized in mass crimes and mass victimization of an unprecedented scale. They recognized in 1945 that the commission of crimes against civilian populations according to a State policy necessitated the adoption of crimes against humanity as a new category of crimes under international law. The intolerable risks and threats for humankind emanating from such State policy required international criminalization and international enforcement.

62. Since 1945, the experience of other mass crimes committed in various parts of the world has confirmed, time and again: each time when it is a State which adopts or practices a policy to attack a civilian population, quite regularly the same apocalyptic threat of mass crimes reappears or materializes. This was the case in particular with the Khmer Rouge "crimes against humanity" committed

in Cambodia, with the mass poisoning of Kurds in Halabja in 1988, with the Rwanda crisis in 1994 and other mass crimes such as the ones in former Yugoslavia in the 90ies of the last century.

63. Given these experiences, it continues to seem a logical application of a lesson learnt that the drafters of the Statute confirmed in 1998 in article 7(2)(a) of the Statute the requirement "pursuant to or in a furtherance of a State or organizational policy" as a decisive, characteristic and indispensable feature of crimes against humanity. It is thus a fundamental rationale of crimes against humanity as codified in article 7 of the Statute to protect the international community against the extremely grave threat emanating from such policies. If leaders of a State who normally have the duty to uphold the rule of law and to respect human rights engage in a policy of violent attacks against a civilian population, it is the community of States which must intervene and prevent, control and repress this threat to the peace, security and well- being of the world. This illustrates further the fundamental underlying rationale of crimes against humanity.

64. Consequently, when the concept of crimes against humanity was developed in 1945, the prosecution as common crimes at the national level was deemed inadequate. Indeed, it was feared that with the involvement of State and government resources in the commission of heinous offences of such nature, the crimes would go unpunished if left solely to national prosecutorial authorities. With the values of mankind being under attack by the specific threat, considerations of State sovereignty (*domaine réservé*) were deemed irrelevant in these particular instances.

65. Having said the above, I believe that the historic origins are decisive in understanding the specific nature and fundamental rationale of this category of international crime. It is this understanding which guides me to conclude that 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. One concludes that the ICC serves as a beacon of justice intervening in limited cases where the most serious crimes of concern to the international community *as a whole* have been committed.[64]

66. The Statute in relation to crimes against humanity embraces all these considerations and further accommodates new scenarios of threats which may equally shake the very foundations of the international community and deeply shock the conscience of humanity. Such policy may also be adopted and implemented by private entities. However, it follows from the above that the private entity must have the means and resources available to reach the gravity of systemic injustice in which parts of the civilian population find themselves. Would that be the case if, for example, the mafia was to commit crimes, be it on a large scale, warranting the international community to intervene? Thus, the teleological interpretation leads me to adopting a more restricted reading of the term 'organization' requiring that they be state-like.

67. Having established that the 'organization' must be state-like, one last question seems vital to be addressed: under what conditions can the policy be

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[64] See the wording of article 5(1), first sentence, of the Statute and paragraphs 4 and 9 of the preamble of the Statute. Article 1(1), first sentence, of the Statute refers to "the most serious crimes of international concern".

attributed to a private 'organization'? While the attribution of actions of state agents can be attributed *qua* their status vis-à-vis the State (agency relationship), this status is absent in case a private entity is to be considered under article 7(2)(a) of the Statute. The more one broadens the concept of non-state 'organizations', beyond the concept of state-like entities, the more challenges one encounters and would need to overcome with regard to the conditions of imputability.

68. As I have endeavoured to demonstrate above, certain criteria need to be satisfied to qualify a non-state actor as an 'organization' under the ambit of article 7(2)(a) of the Statute. This state-like 'organization' is the author of a policy "to commit such attack" against any civilian population which is implemented by its members using the means of the 'organization'. As in case of a State policy, it seems to me that the "organizational policy" must be established at the policy-making level of the 'organization'. In case the policy is not formal, it must be endorsed *qua* acquiescence or be condoned by the highest policy-level of the 'organization'. Suffice to mention here, that in the absence of a State structure, what constitutes the highest policy-level of a state-like 'organization' will have to be assessed on a case-by-case basis.

69. For the purposes of attribution, the acts of the members of the 'organization' must be linked to the 'organization'. Several factors may be indicative. A specific collectivity of persons with some kind of policy level and hierarchical structure, the capacity to impose the policy on its members and to sanction them, induces a particular relationship between the policy level of that 'organization' and its members. Generally, any of the acts of a member of that 'organization' will be ascribed to the 'organization'. Further, any such act of an individual that,

following such a policy, is condoned by the policy-making level of the 'organization' may be attributable. The attribution may also be ascertained in the event that members of the 'organization' use the means of the 'organization' to attack any civilian population.

70. Lastly, the attack followed pursuant to or in furtherance of a policy of a State or a private entity as outlined above must be "widespread" or "systematic". Both criteria relate to the attack which must have, as its basis, a policy to commit such attack. In case such a policy cannot be established, it is futile to examine the other two elements.

IV. Findings

71. The Prosecutor purports that information indicates that senior leaders of both parties, the Party of National Unity ("PNU") and the Orange Democratic Movement ("ODM"), implemented a policy with the involvement of a number of State officers and public and private institutions.[65] However, he also suggests that there is a reasonable basis to believe that the attacks were conducted "by members or organized groups associated with the main political parties, the PNU and the ODM". The Prosecutor highlighted that the pattern of behaviour demonstrated planning.[66] He also concluded from the fact that so many attacks were launched following a similar *modus operandi* within a short time-span "is indicative of an existence of a policy to use an organization to commit them".[67]

[65] ICC-01/09-16, p. 3.
[66] ICC-01/09-16, para. 20.
[67] ICC-01/09-16, para. 21.

Lastly, he provided a series of factors which were purportedly followed by political and business leaders implementing their criminal policy.[68]

72. Indeed, crimes, such as murder, rape, mutilations, looting, destruction of property, arson and eviction, seem to have occurred on the territory of the Republic of Kenya at least in the course of the events between 28/29 December 2007 and 28 February 2008, commonly referred to as the post-election violence. Numerous abhorrent, brutal and vile incidents have been described in the reports upon which the Prosecutor based his determinations. But the point is not whether or not those crimes took place. The question is, whether those events reach the level of crimes against humanity *as defined under the Statute* and are thus subject to the jurisdiction of this Court. After having meticulously analysed the information contained in the supporting material and the victims' representations, I conclude that this threshold is not met.

73. In the following I shall set forth my analysis of the events and lay down the mapping of events as they present themselves from the reports. The Prosecutor provided as supporting material of his request a selection of publicly available reports.[69] I set out my analysis region by region covering six from eight provinces[70] which have experienced "post-election violence" in 2007/2008.

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[68] ICC-01/09-16, para. 23. These factors include public incitement, warnings, planning meetings, financing, hiring gangs, transportation, road blocks, selective targeting and the radio broadcasts.
[69] Human Rights Watch, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government", March 2008 ("HRW Report"); International Crisis Group, "Kenya in Crisis", 21 February 2008 ("ICG Report"); United Nations Office of the High Commissioner on Human Rights, "Report from the OHCHR Fact-Finding Mission to Kenya 6-28 February 2008" ("OHCHR Report"); Federation of Women Lawyers (FIDA-K), "Submissions to The Commission into the Post Election Violence (Waki Commission) by FIDA-K on Sexual and Gender Based Violence" on behalf of the Inter agency Gender based Violence (GBV) Sub-Cluster", 11 September 2008 ("FIDA Report"); UNFPA, UNICEF, UNIFEM, Christian Children's Fund, "A Rapid Assessment of Gender Based Violence During the Post-Election Violence in Kenya", January-February 2008

1. Nairobi

74. The "post-election violence" initially started with "general sporadic violent acts" which were reported on 28 and 29 December 2007.[71] Subsequently, the violence occurred in three phases. A first wave of "methodical violence" broke out on 30 December 2007 in the slums of Nairobi, namely Kibera, Mathare, Dandora, Kariobangi and Kawangware[72] and lasted until New Year.[73] A second wave of violence erupted on 9 January 2008 while a third wave of violence took place upon the killing of Mugabe Were on 29 January 2008.[74]

75. The violence in Nairobi hit mainly the low-income neighbourhoods and slum areas. According to the KNCHR, these places are "balkanized along ethnic lines", with specific ethnic groups being pre-dominant in specific areas.[75] These areas are further characterized by the presence of various illegal organized gangs which pre-existed before the 2007 post-election violence, such as the Mungiki, Siafu, Bukhungu, Jeshi la Darjani, Taliban and Ghetto,[76] which are operating in

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("UNICEF *et al* Report"); Centre for Rights Education and Awareness, "Women paid the Price", 2008 ("CREA Report"); Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions", A/HRC/11/2/Add.6, "Mission to Kenya", 26 May 2009 ("Special Rapporteur Report"); Oscar Foundation Report, "Ethnicity and a failed democracy", February 2008 ("OSCAR Report"); OCHA, "Kenya Humanitarian Update" January 2008 ("OCHA Update").

[70] For the purposes of this analysis, Rift Valley Province has been subdivided into North Rift, Central Rift and South Rift Valley.

[71] KNCHR Report, ICC-01/09-3-Anx4, paras 119 and 120.

[72] KNCHR Report, ICC-01/09-3-Anx4, para. 121; CIPEV Report, ICC-01/09-3-Anx5, p. 208; ICG Report, ICC-01/09-3-Anx6, p. 14.

[73] KNCHR Report, ICC-01/09-3-Anx4, para. 133; CIPEV Report, ICC-01/09-3-Anx5, p. 208.

[74] CIPEV Report, ICC-01/09-3-Anx5, p. 208.

[75] KNCHR Report, ICC-01/09-3-Anx4, para. 114; CIPEV Report, ICC-01/09-3-Anx5, p. 210; OHCHR Report, ICC-01/09-3-Anx7, p. 4.

[76] KNCHR Report, ICC-01/09-3-Anx4, paras 123, 159 and 160; Special Rapporteur Report, ICC_01/09-3-Anx11, p. 10 ("In addition, criminal organizations exercise vicious control over significant geographical areas and infrastructure in slums in Nairobi and Central Province"); ICG Report, ICC-01/09-3-Anx6, p. 19.

order to fill the gap left by the absence of any effective State authority.[77] It is against this background, exacerbated by the miserable living conditions, that the Waki Commission claims that "crime and daily violence (...) has become something that ordinary citizens living here have had to live with."[78]

76. The violence was characterized by arson, destruction of property, forced evictions and displacement of people.[79] In particular, it is reported that between 28 December 2007 and 29 February 2008 125 people were killed.[80] There was also alleged widespread rape of members of various ethnic groups in the city's informal settlements and IDP[81] camps during the election violence.[82] Moreover, "[b]etween 27 December 2007 and 30 January 2008 the City Hospital and other medical centres treated many cases of injuries caused by the post-election violence",[83] including some cases of forced circumcision.[84] According to the FIDA, there seemed to have been people taking advantage of the insecurity to commit sexual violence.[85]

77. Information is available according to which the violence seemed to be planned, organized and coordinated.[86] It is alleged that local politicians, civic

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[77] KNCHR Report, ICC-01/09-3-Anx4, para. 161.
[78] CIPEV Report, ICC-01/09-3-Anx5, p. 205.
[79] KNCHR Report, ICC-01/09-3-Anx4, para. 145. It is reported that by 10 January 2008 there were about 75,000 internally displaced people in Nairobi.
[80] CIPEV Report, ICC-01/09-3-Anx5, pp. 320-321.
[81] Internally Displaced Persons.
[82] KNCHR Report, ICC-01/09-3-Anx 4, para. 153; FIDA Report, ICC-01/09-3-Anx8, p. 3; UNICEF *et ad*. Report, ICC-01/09-3-Anx9, pp. 30-38.
[83] KNCHR Report, ICC-01/09-3-Anx4, para. 125.
[84] UNICEF *et al* Report, ICC-01/09-3-Anx9, p. 23 ; OHCHR Report, ICC_01/09-3-Anx7, p. 15.
[85] FIDA Report, ICC-01/09-3-Anx-8, p 3; UNICEF *et al* Report, ICC-01/09-3-Anx9, pp. 3, 11 and 15 ; OHCHR Report, ICC_01/09-3-Anx7, p. 14.
[86] KNCHR Report, ICC-01/0-93-Anx4, paras 158, 170 and 173.

candidates or aspirants, councilors and business people financed the violence.[87] Several meetings were reportedly held during the months of January, February and March 2008 at Kenyatta International Conference Centre, Landmark Hotel and the Marble Arch Hotel – initially with the aim to discuss the issue of internally displaced persons, "but the meetings took a sinister turn and organized retaliation, raised funds and sourced weapons".[88]

78. The KNCHR states that the violence had a "decidedly ethnic dimension" inasmuch as the victims were those perceived to have voted against the wishes of the majority population in a particular settlement or area.[89] The Waki Commission adds that "rent disputes between mostly Kikuyu landlords and largely non-Kikuyu tenants are among the most serious underlying causes of ethnic conflicts in the poor neighbourhoods of Nairobi."[90] In this regard, both the KNCHR and the Waki Commission corroborate that in most of the settlements where the violence occurred, tenants took advantage of the post election chaos to evict landlords,[91] who in turn prompted a new round of violence when they enlisted gangs to reclaim their property.[92]

79. It is further reported that the violence was mostly spearheaded by illegal gangs. The KNCHR remarks that

> "[t]he levels of involvement of illegal gangs in the violence as well as the scale of mobilization suggests sophisticated levels of planning and organization of the

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[87] KNCHR Report, ICC-01/09-3-Anx4, paras 140, 158, 164 and 165.
[88] KNCHR Report, ICC-01/09-3-Anx4, para. 169.
[89] KNCHR Report, ICC-01/09-3-Anx4, paras 144 and 157.
[90] CIPEV Report, ICC-01/09-3-Anx5, p. 207.
[91] KNCHR Report, ICC-01/09-3-Anx4, paras 147, 150 and 152; CIPEV Report, ICC-01/09-3-Anx5, pp. 210-211.
[92] KNCHR Report, ICC-01/09-3-Anx4, para. 151; CIPEV Report, ICC-01/09-3-Anx5, p. 211.

> violence in Nairobi that evidently used the pre-existing infrastructure of violence which was easily recalled during the post-election violence."[93]

There are allegations to be found that politicians have used those gangs for political activities, including unleashing violence on their opponents.[94] The supporting material also contains references to violent fights between rival gangs.[95] Moreover, the supporting material points to the occurrence of opportunistic crime with "youth [taking] advantage of the situation to loot".[96]

80. The targeted groups were various, such as members of the Luo,[97] Nubians,[98] Kikuyus,[99] and Kamba[100] communities.

81. Concerning the role of the police, the Waki Commission highlights the presence of an "uneven and disjointed police action".[101] This statement is supported by numerous accounts revealing an inconsistent behaviour of the police. While it appears that, in some instances, the police used excessive force in attempts to contain the violence,[102] there are also references to wrongful inaction by the police[103] as well as contentions to the effect that the police force was

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[93] KNCHR Report, ICC-01/09-3-Anx4, para. 173.
[94] KNCHR Report, ICC-01/09-3-Anx4, para. 159 *et seq.*
[95] CIPEV Report, ICC-01/09-3-Anx5, p. 211.
[96] KNCHR Report, ICC-01/09-3-Anx4, para. 130.
[97] Forcible circumcision of male members of the Luo community was one particular form of violence allegedly conducted by members of the Mungiki gang, see KNCHR Report, ICC-01/09-3-Anx 4, paras 126, 128 129 and 167.
[98] KNCHR Report, ICC-01/09-3-Anx4, para. 134.
[99] KNCHR Report, ICC-01/09-3-Anx4, para. 140.
[100] KNCHR Report, ICC-01/09-3-Anx4, para. 155.
[101] CIPEV Report, ICC-01/09-3-Anx5, p. 214
[102] HRW Report, ICC-01/09-3-Anx3, p. 29, pp. 36-38; KNCHR Report, ICC-01/09-3-Anx4, para. 175. It is further reported that 25 out of the 125 deaths recorded between 27 December 2007 to 29 February 2008 occurred as a result of gun shot wounds: CIPEV Report, ICC-01/09-3-Anx5, pp. 328-329; OHCHR Report, ICC-01/09-3-Anx7, p. 12.
[103] KNCHR Report, ICC-01/09-3-Anx4, para. 177.

divided along ethnic lines[104] with police officers taking side with their ethnic communities.[105] Other references simply refer to the police being overwhelmed by the violence,[106] whereas in some instances police assistance was commended without which the situation would have become worse.[107]

82. Taking the above into consideration, I fail to see that an "attack directed against the civilian population" was committed "pursuant to or in furtherance of a State or organizational policy". I fail to see an 'organization' in Nairobi which satisfies the criteria I have set out in paragraph 51 above. Local politicians, civic candidates or aspirants, councilors and business people meeting and allegedly financing the violence do not form an 'organization' with a certain degree of hierarchical structure acting over a prolonged period of time. Meetings during the time concerned point to *ad hoc* preparations and planning of violent incidents during the period of post-election violence. Local politicians using criminal gangs for their own purposes is an indicator of a partnership of convenience for a passing occasion rather than an 'organization' established for a common purpose over a prolonged period of time. Further, opportunistic violence and acts of individuals to resolve rental issues equally does not allude to an 'organization' characterized by structure and membership.

83. Likewise, I fail to see a State policy according to which the civilian population was attacked. Information that some local politicians, civic candidates and aspirants were engaged in the organization of violent acts does not necessarily entail that a policy was established or at least endorsed at the high level of the

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[104] KNCHR Report, ICC-01/09-3-Anx4, para. 216.
[105] KNCHR Report, ICC-01/09-3-Anx4, para. 179; ICG Report, ICC-01/09-3-Anx6, p. 14.
[106] CIPEV Report, ICC-01/09-3-Anx5, p. 216
[107] KNCHR Report, ICC-01/09-3-Anx4, paras 177 and 181.

State. Equally, based on the multifaceted information regarding police behaviour I feel unable to deduce that overall the police was implementing a State policy to attack the civilian population.

2. North Rift Valley

84. The supporting material suggests that a first episode of violence erupted on the evening of 30 December 2007 with the main theatres of violence in Eldoret town and nearby Burnt Forest in Uasin Gishu district[108] as well as in Nandi North and Nandi South districts.[109]

85. The North Rift has a long record of election-related violence.[110] The supporting material contains allegations that the violence seemed to be organized and purposeful in parts of North Rift Valley.[111] This is inferred from the fact that the perpetrators came from afar.[112] The KNCHR further makes reference to meetings, including a meeting held at Assis Hotel in Eldoret on 1 December 2007. It is reported that during this meeting, which was attended by 15 representatives drawn from various parts of the region, the eviction of the Kikuyus was discussed.[113] It is further reported that political actors used

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[108] KNCHR Report, ICC-01/09-3-Anx4, para. 231; OHCHR Report, ICC-01/09-3-Anx7, p. 10.
[109] CIPEV Report, ICC-01/09-3-Anx5, p. 60.
[110] CIPEV Report, ICC-01/09-3-Anx5, p. 50. The Waki Commission noted that the North Rift has experienced violence already in the context of presidential and parliamentary elections of 1992 and 1997. In 2007, the main difference was that the violence was "more intense, more widespread, (...) urban as well as rural, lasted longer, and occurred after rather than before the elections." The ICG reports that violence in North Rift Valley is rooted in "deeply entrenched, long-festering anti-Kikuyu sentiment within certain segments of the (...) Kalenjin population.", ICG Report, ICC-01/09-3-Anx6, p. 16.
[111] KNCHR Report, ICC-01/09-3-Anx4, paras 257 and 258.
[112] KNCHR Report, ICC-01/09-3-Anx4, para. 233.
[113] KNCHR Report, ICC-01/09-3-Anx4, paras 259-261.

language showing that certain communities were not welcome in the region.[114] Moreover, it is stated that plans were made in the course of violence to acquire weaponry.[115]

86. On the other side, information is available that indicates that the initial violence was a spontaneous expression of discontent. Human Rights Watch adds that "tensions over land ownership and other issues have long been a source of mistrust and violence between the majority Kalenjin population around Eldoret and the area's Kikuyu minority."[116]

87. In Uasin Gishu, the violence was brought about by large marauding gangs of Kalenjin youths who blocked roads, burned vehicles and engaged in killing, rioting and looting.[117] It is reported that 272 persons died,[118] 52,611 houses were burnt and 21,749 people were displaced as a result of the violence between December 2007 and February 2008.[119] For example, on 30 December 2007, there was an attack on Kimuru village which neighbours Kiambaa. Residents sought refuge at the Kiambaa Kenya Assemblies of God Church, which was set on fire on 1 January 2008.[120] Up to approximately 35 people were burned in the church,

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[114] HRW Report, ICC-01/09-3-Anx3, p. 40; KNCHR Report, ICC-01/09-3-Anx4, paras 261, 262 (MP for Eldoret North incited his supporters against other communities) and 263; CIPEV Report, ICC-01/09-3-Anx5, p. 21.
[115] KNCHR Report, ICC-01/09-3-Anx4, para. 266.
[116] HRW Report, ICC-01/09-3-Anx3, p. 39.
[117] CIPEV Report, ICC-01/09-3-Anx5, p. 42.
[118] CIPEV Report, ICC-01/09-3-Anx5, p. 61.
[119] CIPEV Report, ICC-01/09-3-Anx5, p. 62.
[120] HRW Report, ICC-01/09-3-Anx3, p. 45; KNCHR Report, ICC-01/09-3-Anx4, paras 238 *et seq.*, CIPEV Report, ICC-01/09-3-Anx5, p. 59.

others were hacked to death.[121] Additionally, there are reported cases of rapes and other sexual violence.[122]

88. In Nandi North and Nandi South, the violence was largely directed against PNU supporters, government departments and houses.[123] In Langas Estate, a Kikuyu mob attacked Luos and Luhyas[124] and Luos were allegedly beheaded by the Kikuyus.[125]

89. Other areas witnessed a violent interplay of attacks and subsequent counterattacks. For example, in Matunda centre, in January 2008, 14 to 25 Kalenjin men were hacked to death by local residents in a failed attempt to raid businesses.[126] In other districts, such as Baringo, killings, rapes or serious injury were reportedly rare and isolated as residents were afforded a chance to flee.[127]

90. In Trans Nzoia, and in particular in the Mt Elgon region, the violence encompassed a further, distinct, dimension. Here, it appears that the "post-election violence" overlapped with the violence perpetrated by the Saboat Land Defence Force (the "SLDF") which was ongoing before and continued even after the "post-election violence" ended in other affected North Rift areas.[128] For example, in early March 2008, at Embakasi in Saboti, 13 people were killed by

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[121] HRW Report, ICC-01/09-3-Anx3, p. 45; KNCHR Report, ICC-01/09-3-Anx4, paras 237-244; CIPEV Report, ICC-01/09-3-Anx5, p. 58; Special Rapporteur Report, ICC-01/09-3-Anx11, p. 59.
[122] UNICEF *et al* Report, ICC-01/09-3-Anx9, pp. 54-55 and 57-59.
[123] CIPEV Report, ICC-01/09-3-Anx5, p. 60.
[124] KNCHR Report, ICC-01/09-3-Anx4, para. 269.
[125] HRW Report, ICC-01/09-3-Anx3, pp. 46-47.
[126] CIPEV Report, ICC-01/09-3-Anx5, p. 57.
[127] KNCHR Report, ICC-01/09-3-Anx4, para. 251.
[128] KNCHR Report, ICC-01/09-3-Anx4, paras 48, and 247-249 ; CIPEV Report, ICC-01/09-3-Anx5, pp. 64-65; OHCHR Report, ICC-01/09-3-Anx7, p. 8. See also the Special Rapporteur Report on events in the Mt Elgon region, ICC-01/09-3-Anx11, pp. 24 *et seq.*

suspected SLDF members.[129] The atrocities committed by the SLDF have prompted a military operation that has restored relative peace in the area[130] but which, in turn, involved a large number of killings.[131]

91. The targeted groups were various, such as members of the Kalenjin, Luo and Kikuyu communities.[132]

92. The police in the North Rift was reported to be inactive[133], overwhelmed or the target of attacks.[134] There are also allegations of excessive use of force[135] as well as contentions to the effect that the police was ethnically divided[136] and purportedly colluded with the attackers.[137] Other accounts reveal that the police prevented gangs from attacking in several cases.[138]

93. Taking the above into consideration, I fail to see that an "attack directed against the civilian population" was committed "pursuant to or in furtherance of a State or organizational policy". I fail to see an 'organization' in North Rift

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[129] KNCHR Report, ICC-01/09-3-Anx4, para. 249.
[130] KNCHR Report, ICC-01/09-3-Anx4, para. 250.
[131] In 2008, hundreds of men were reportedly tortured and killed in the context of an operation by the Government's security forces. The number of persons killed or disappeared by the security forces is conservatively estimated at over 200: Special Rapporteur Report, ICC-01/09-3-Anx11, p. 28. 13 people were reportedly killed during the joint military-police operation *Okoa Maisha*: Special Rapporteur Report, ICC-01/09-3-Anx11, pp. 26-27.
[132] KNCHR Report, ICC-01/09-3-Anx4, paras 231, 234, 236 and 246.
[133] KNCHR Report, ICC-01/09-3-Anx4, para. 279; CIPEV Report, ICC-01/09-3-Anx5, p. 68.
[134] KNCHR Report, ICC-01/09-3-Anx4, paras 273, 274, 275, 276, 277, 280 and 282; CIPEV Report, ICC-01/09-3-Anx5, pp. 66-67.
[135] CIPEV Report, ICC-01/09-3-Anx5, pp. 67-68. For example, 12 youths were shot by the police who tried to separate two rival communities in Cherangany in January 2008, further youths were killed by GSU during a raid in Kapcherop area targeting Kisii people: KNCHR Report, ICC-01/09-3-Anx4, para. 255.
[136] CIPEV Report, ICC-01/09-3-Anx5, p. 89.
[137] KNCHR Report, ICC-01/09-3-Anx4, para. 282; CIPEV Report, ICC-01/09-3-Anx5, pp. 68-69.
[138] HRW Report, ICC-01/09-3-Anx3, p. 64 (in Eldoret).

Valley which satisfies the criteria I have set out in paragraph 51 above. Persons from various parts of the region meeting in a hotel in Eldoret seems to indicate that people gathered *ad hoc* and spontaneously for this passing occasion. The violence in the province appears to have been triggered by spontaneous gatherings of marauding youth gangs, supporting the assumption that there was no 'organization' with a certain degree of hierarchical structure acting over a prolonged period of time. *Ad hoc* forming of groups to retaliate also does not point towards an 'organization' established for a common purpose over a prolonged period of time characterized by structure and membership. Information that politicians used derogatory language expressing that certain communities were not welcome in the region does not lead me to conclude that an organizational policy existed or that those actions may be attributed to an 'organization'. Rather, the information available points towards actions committed by private individuals trying to gather some support at the local level.

94. Likewise, I fail to see a State policy according to which the civilian population was attacked.[139] The military operation in Mt Elgon region, according to the information available, seems to have been launched in the context of combating the SLDF. While I take cognizance of the information provided by the Special Rapporteur Philip Alston, I fail to see that the operation amounted to an attack directed against the civilian population associated with the SLDF. Furthermore, local politicians using derogatory language to instigate evictions of members of specific communities equally does not suggest a State policy adopted or endorsed at a high level. Likewise, based on the multifaceted information

[139] The ICG assesses "while (...) there was a certain amount of anti-Kikuyu incitement by local elders, the suggestion [that] there was a systematic, well-orchestrated campaign to purge the region of Kikuyus needs to be treated cautiously.", ICG Report, ICC-01/09-3-Anx6, p. 16.

regarding police behaviour, I feel unable to deduce that overall the police was implementing a State policy to attack the civilian population.

3. Central Rift Valley

95. The clashes in this region broke out in different towns at different moments. According to the KNCHR, the violence in the worst hit area of Kuresoi began rising in November 2007 and reached its peak on 30 December 2007.[140] In Nakuru town, tensions gradually started rising from 28 December 2007 until chaos erupted in town on 30 December 2007.[141] In Narok the violence erupted on 30 December 2007[142]. The Waki Commission conveys a somewhat different picture, stating that clashes broke out as early as May 2007 and rose to the peak on 30 December 2007.[143] Between 22 November and 4 December 2007, ethnic hostilities reached its fever pitch. The Commission further specifies that in Nakuru town, the first wave of violence broke out on 30 December 2007 while the second wave erupted on 24 January 2008.[144] In Narok district, the violence allegedly commenced on 3 January 2008[145] while in Naivasha, violence only broke out on 27 January 2008.[146] The violence subsided in the region in March 2008.[147]

96. This region reportedly has a long history of ethnic clashes[148], dating back to the constitutional referendum of November 2005[149] and the elections of 1992.[150]

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[140] KNCHR Report, ICC-01/09-3-Anx4, para. 306.
[141] KNCHR Report, ICC-01/09-3-Anx4, paras 312 *et seq*.
[142] KNCHR Report, ICC-01/09-3-Anx4, para. 321.
[143] CIPEV Report, ICC-01/09-3-Anx5, p. 95.
[144] CIPEV Report, ICC-01/09-3-Anx5, p. 111.
[145] CIPEV Report, ICC-01/09-3-Anx5, p. 141
[146] KNCHR Report, ICC-01/09-3-Anx4, para. 319.
[147] KNCHR Report, ICC-01/09-3-Anx4, para. 307.
[148] KNCHR Report, ICC-01/09-3-Anx4, paras 286 *et seq* ; CIPEV Report, ICC-01/09-3-Anx5, p. 109 (Nakuru).
[149] CIPEV Report, ICC-01/09-3-Anx5, p. 95 (Molo district).

The KNCHR reports that the violence in the region can be sub-classified in the following categories: the first category comprised spontaneous uprisings of mobs protesting against the delay of the announcement of the presidential election results;[151] the second pertains to ODM supporters (mainly Kalenjin and Massai) attacking PNU supporters (Kikuyu and Kisii) which resulted in counter-attacks organized by PNU supporters; the third category concerns violence which was organized to revenge PNU allied supporters.[152]

97. The supporting material provides information of allegations that the violence in Central Rift was of an organized nature.[153] In this regard, the Waki Commission claims having received "credible evidence to the effect that the violence in Naivasha between the 27th and the 30th January 2008 was pre-planned and executed by Mungiki members who received support of Naivasha political and business leaders."[154] It is further alleged that attackers were brought from

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[150] HRW Report, ICC-01/09-3-Anx3, p. 57 (Molo district); CIPEV Report, ICC-01/09-3-Anx5, p. 140 (Narok district).

[151] KNCHR Report, ICC-01/09-3-Anx4, para. 343.

[152] KNCHR Report, ICC-01/09-3-Anx4, para. 302. The example of Nakuru town exemplifies that the violence may have taken a different turn: the Waki Commission specifies that the first wave of violence was "largely triggered by spontaneous, election related incidents", whereas the second wave of violence "took a more planned and systematic nature, pitting well organized ethnic based criminal gangs against each other." In various estates, Kikuyu militias forcefully circumcised and beheaded Luo men which prompted retaliatory attacks by the Kalenjin community, CIPEV Report, ICC-01/09-3-Anx5, p. 114.

[153] KNCHR Report, ICC-01/09-3-Anx4, paras 317 *et seq*, 322 *et seq.*, 337 *et seq.*, 355 (several meetings in hotels and residences were reported to have provided a platform for planning the violence and instigating the communities. Members of parliament of Kuresoi or aspirants to the Kuresoi seat had attended those meetings. Businessmen of the region provided their residence as a gathering for the meetings and money, weapons, vehicles, petrol and other resources to facilitate the violence. It has also been alleged that the politicians gave instructions on how to execute the attacks. Local leaders of the region allegedly hosted the perpetrators. Other notable persons, such as teachers and civil servants, allegedly coordinated the transport of perpetrators.); HRW Report, ICC-01/09-3-Anx3, p. 9.

[154] CIPEV Report, ICC-01/09-3-Anx5, p. 133 *et seq* ;

outside this area to buttress the local organized groups/militias.[155] Politicians and wealthy businessmen are believed to have provided vehicles. Those vehicles were allegedly fueled by funds provided by leaders and businesspersons and through fundraising.[156] In Nakuru town, politicians have been reported to meet[157] with Mungiki or to support them.[158] Local politicians and businessmen are further believed to have raised funds to revenge attacks against the Luo, Luhya and Kalenjin communities[159] and it is reported that youths were paid for the attacks against the Luo community.[160] Kalenjin were equally organized to fight back the Mungiki gangs.[161]

98. However, the KNCHR also reports that some leaders of the region appealed for calm.[162] For instance, brief skirmishes between Maasai and Kikuyu fizzled out after elders from the two communities struck a peace deal.[163]

99. Information available further suggests that the violence in this region must be assessed in context with other parts of the country. It is particularly evidenced by the arrival of non-Kalenjin communities from the North Rift to this region which caused a significant backlash against Luo and Kalenjin communities.[164] For example, in Naivasha, the violence allegedly broke out "as a result of the growing bitterness caused by the massive influx of IDPs from other districts of

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[155] KNCHR Report, ICC-01/09-3-Anx4, paras 305 and 308.
[156] KNCHR Report, ICC-01/09-3-Anx4, para. 305.
[157] HRW Report, ICC-01/09-3-Anx3, p. 53.
[158] KNCHR Report, ICC-01/09-3-Anx4, para. 311.
[159] KNCHR Report, ICC-01/09-3-Anx4, para. 314.
[160] HRW Report, ICC-01/09-3-Anx3, pp. 50 and 52.
[161] KNCHR Report, ICC-01/09-3-Anx4, para. 336 ; HRW Report, ICC-01/09-3-Anx3, pp. 55-56.
[162] KNCHR Report, ICC-01/09-3-Anx4, para. 356.
[163] KNCHR Report, ICC-01/09-3-Anx4, paras 301 and 321 ; See also ICG Report, ICC-01/09-3-Anx6, p. 16.
[164] KNCHR Report, ICC-01/09-3-Anx4, para. 300; CIPEV Report, ICC-01/09-3-Anx5, p. 111.

the North Rift Province."[165] Against this background, it is reported that Kikuyu gangs killed forty people in one day including nineteen members of one Luo family who died in an arson attack on their house.[166]

100. The targeted groups were various, such as members of the Kikuyu, Luo, Luhya, Maasai and Kalenjin communities.[167]

101. It is alleged that the police was overwhelmed, lacked the resources to effectively respond to the violence or connived with the gangs, participated in looting or was callous to the events.[168] In Nakuru town, for example, the police arrived to separate arriving parties and created a buffer zone but was seen to be overwhelmed by the sheer numbers of the gangs so that the army was called to assist.[169] On the other hand, there are allegations of partisanship[170] and police complicity in the violence.[171] Moreover, with regard to Naivasha, the Waki Commission points to "breaks in the chain of command and parallel ethnic command structures within the police".[172]

102. Taking the above into consideration, I fail to see that an "attack directed against the civilian population" was committed "pursuant to or in furtherance of a State or organizational policy". I fail to see an 'organization' in Central Rift

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[165] CIPEV Report, ICC-01/09-3-Anx5, p. 128. See also OHCHR Report, ICC-01/09-3-Anx7, p. 11.
[166] CIPEV Report, ICC-01/09-3-Anx5, pp. 130-131; See also HRW Report, ICC-01/09-3-Anx3, pp. 47 and 50-51.
[167] KNCHR Report, ICC-01/09-3-Anx4, paras 313, 314 and 321, 335, 336 and 342.
[168] HRW Report, ICC-01/09-3-Anx3, p. 56 (Nakuru); KNCHR Report, ICC-01/09-3-Anx4, paras 344 *et seq*; CIPEV Report, ICC-01/09-3-Anx5, p. 101 (Molo district), p. 121 (Nakuru), p. 136 (Naivasha); KNCHR Report, ICC-01/09-3-Anx4, para. 320 (Naivasha).
[169] KNCHR Report, ICC-01/09-3-Anx4, paras 313 and 315.
[170] CIPEV Report, ICC-01/09-3-Anx5, p. 108 (Koibatek district)
[171] CIPEV Report, ICC-01/09-3-Anx5, p. 101
[172] CIPEV Report, ICC-01/09-3-Anx5, pp. 136-138.

Valley which satisfies the criteria I have set out in paragraph 51 above. The nature of the violence as described in paragraph 96 above is exemplifying the absence of an 'organization' and is pointing rather to the occurrence of spontaneous, *ad hoc* events for a passing occasion. This becomes even more apparent in the event that violence is triggered by arriving IDPs in the region. Local politicians using criminal gangs for their own purposes is an indicator of a partnership of convenience for a passing occasion rather than an 'organization' established for a common purpose over a prolonged period of time. In addition, it appears that serious efforts were undertaken to calm the situation. This factor reinforces the impression that actions taken are those of certain individuals trying to take advantage from a period of unrest rather than actions pursuant to or in furtherance of an organizational policy.

103. Likewise, I fail to see a State policy according to which the civilian population was attacked. Based on the multifaceted information regarding police behaviour I feel unable to deduce that overall the police was implementing a State policy to attack the civilian population.

4. South Rift Valley

104. The violence seems to have erupted on different days in different districts of the region. In Transmara[173] and in Sotik district[174] the skirmishes began on 28 December 2007, in Kipkelion[175] and Chebilat[176] the violence began on 30 December 2007, and in Kericho district the violence erupted following the announcement of the presidential election results, and thereafter again on 31

[173] KNCHR Report, ICC-01/09-3-Anx4, para. 191.
[174] CIPEV Report, ICC-01/09-3-Anx5, p. 154.
[175] KNCHR Report, ICC-01/09-3-Anx4, para. 194.
[176] KNCHR Report, ICC-01/09-3-Anx4, para. 197.

January 2008.[177] The International Crisis Group states that the violence "took a less organized, more opportunistic turn later in January, resulting from the total collapse of state authority in the area."[178]

105. The supporting material suggests that the violence took various forms, depending on location and time. In Sotik district, the violence started with marauding youth barricading roads, lighting bonfires and attacking non-Kalenjin communities, but it subsequently moved to the border area between Borabu and Sotik, involving fights between Kipsigis and Kisii communities.[179] In Kericho, large crowds of people armed with improvised weapons invaded Kericho town and looted businesses whereas, later, the violence moved away into the tea estates and the rural areas[180] with attackers arriving from other areas.[181] In Kipkelion, the violence involved widespread arson on homes of persons not considered to be indigenous to the area.[182]

106. It is purported that the violence was organized and coordinated as the perpetrators were armed, came in large numbers from different directions targeting specific communities,[183] were fighting in shifts, each group having its role and area to attack. It is contended that training and oathing took place in camps or farms of senior leaders.[184] Members of parliament, councilors, parliamentary and civic aspirants allegedly used derogatory speeches or were

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[177] KNCHR Report, ICC-01/09-3-Anx4, para. 196.
[178] ICG Report, ICC-01/09-3-Anx6, p. 15.
[179] CIPEV Report, ICC-01/09-3-Anx5, p. 154.
[180] CIPEV Report, ICC-01/09-3-Anx5, p. 155.
[181] CIPEV Report, ICC-01/09-3-Anx5, p. 156.
[182] CIPEV Report, ICC-01/09-3-Anx5, p. 158.
[183] KNCHR Report, ICC-01/09-3-Anx4, paras 203, 204, 206, 209 and 213.
[184] KNCHR Report, ICC-01/09-3-Anx4, para. 214.

otherwise involved in the violence.[185] It is purported that local politicians and business people financed the violence;[186] former and retired security officers and leaders from the region are accused of having trained the youths.[187] The local communities also provided support by providing food, transport and out of pocket allowances.[188] Further indicators that the violence in the region was planned include warnings given to victims by perpetrators of the violence, the scale and extent of the violence as well as the widespread availability of petrol.[189]

107. However, these allegations contrast with information that leading ODM members participated in peace meetings[190] and that the local administration established peace committees.[191]

108. As for the underlying causes of the violence, the Waki Commission was informed that the violence at the Borabu/Sotik border was in part the result of territorial disputes between the Kipsigis and the Kisiis[192] which predate the post-election period.[193] Rivalry between these communities, which from time to time broke into war, has further been described as constituting an ancient phenomenon.[194]

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[185] KNCHR Report, ICC-01/09-3-Anx4, para. 189, 207 (MP for Ainamoi used derogatory language; MP for Bureti stated that investors in Kericho should be either Kalenjin or Indians and allegedly distributed money; another MP instructed youth to block the road; a pastor and a mayor allegedly were part of the inciters; two other MPs in Sotik reportedly had a meeting with 500 to 700 youths at Sotik Tea Estate during which they said they would "fight the government".).
[186] KNCHR Report, ICC-01/09-3-Anx4, para. 212.
[187] KNCHR Report, ICC-01/09-3-Anx4, para. 205.
[188] KNCHR Report, ICC-01/09-3-Anx4, paras 212 and 215.
[189] CIPEV Report, ICC-01/09-3-Anx5, pp. 170-171.
[190] CIPEV Report, ICC-01/09-3-Anx5, p. 155 (Sotik).
[191] CIPEV Report, ICC-01/09-3-Anx5, p. 161 (Kipkelion).
[192] CIPEV Report, ICC-01/09-3-Anx5, p. 151.
[193] CIPEV Report, ICC-01/09-3-Anx5, p. 152.
[194] CIPEV Report, ICC-01/09-3-Anx5, pp. 152-153.

109. Furthermore, it is suggested that the violence in this region was largely influenced by "spill-over effect[s]" from neighbouring districts.[195] Two types of IDPs were identified in the region: the outgoing IDPs belonging mainly to the Kikuyu and Kisii communities while the incoming IDPs were Kipsigis.[196] The KNCHR contends that in almost all the districts in the region chiefs were targeted because they were perceived as PNU supporters and were forced to offer food or money.[197]

110. The targeted groups were various, such as members of the Maasai, Kalenjin, Kipsigis (a Kalenjin subgroup), Kisii and Kikuyu communities.[198]

111. The information available reveals that the police were "overstretched" and lacked the necessary resources to operate effectively,[199] failed to rescue people under attack,[200] used excessive force[201], was biased[202] or participated in the violence or took advantage of the situation for their personal benefit[203]. Other groups commended the police without which the situation would have become worse.[204]

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[195] CIPEV Report, ICC-01/09-3-Anx5, p. 150.
[196] KNCHR Report, ICC-01/09-3-Anx4, paras 201–202.
[197] KNCHR Report, ICC-01/09-3-Anx4, para. 204.
[198] KNCHR Report, ICC-01/09-3-Anx4, paras 194, 197, 201 and 202.
[199] KNCHR Report, ICC-01/09-3-Anx4, para. 222; CIPEV Report, ICC-01/09-3-Anx5, p. 163 (Kipkelion).
[200] CIPEV Report, ICC-01/09-3-Anx5, p. 162.
[201] CIPEV Report, ICC-01/09-3-Anx5, pp. 161-162 (Kericho town), pp. 166-169.
[202] CIPEV Report, ICC-01/09-3-Anx5, p. 164.
[203] KNCHR Report, ICC-01/09-3-Anx4, para. 220.
[204] KNCHR Report, ICC-01/09-3-Anx4, para. 222.

112. Taking the above into consideration, I fail to see that an "attack directed against the civilian population" was committed "pursuant to or in furtherance of a State or organizational policy". I fail to see an 'organization' in South Rift Valley which satisfies the criteria I have set out in paragraph 51 above. Local politicians, civic aspirants and councilors being involved in the violence one way or the other do not constitute an 'organization' with a certain degree of hierarchical structure acting over a prolonged period of time. The strategic alliance of some people seems to be opportunistic and spontaneous. I also take note that other politicians were involved in peace meetings. Meetings held during the period of "post-election violence" point to *ad hoc* preparations and planning of violent incidents.

113. Likewise, I fail to see a State policy according to which the civilian population was attacked. The information that some local politicians and civic aspirants were engaged in the organization of violent acts does not necessarily entail that a policy was established or at least endorsed at the high level of the State. Information is available whereby the provincial authorities and politicians were undertaking serious efforts to calm the situation. Based on the multifaceted information regarding police behaviour I feel unable to deduce that overall the police was implementing a State policy to attack the civilian population.

5. Nyanza Province

114. Even though instances of violence were reported in Nyanza before the 27 December 2007 elections, the region was affected by three main phases of violence starting on 29 December 2007.[205] The first phase was characterized by

[205] KNCHR Report, ICC-01/09-3-Anx4, para. 369; CIPEV Report, ICC-01/09-3-Anx5, p. 189.

discontent with the delay of the announcement of the election results and the subsequent outcome of the elections, leading to demonstrations, riots and mob violence.[206] According to the KNCHR, this phase took place between 29 December 2007 and 10 January 2008,[207] while the Waki Commission identifies the first phase to have lasted from 29 December 2007 to 31 December 2007.[208] The second phase was reported to be reactionary to excessive use of force by the police and also in response to calls for mass action by the ODM leadership.[209] While the KNCHR confines this phase to 15-17 January 2008,[210] the Waki Commission draws a slightly different picture, indicating that the second phase of violence started at the beginning of January 2008 and went on until mid-January 2008.[211] The third wave of violence was triggered by the massive influx of IDPs from areas including Naivasha and Central Rift as well as by the deaths of two ODM MPs towards the end of January 2008.[212] In other parts of the region, the violence seemed to have ended only when the National Accord was signed in late February 2008.[213]

115. Generally, the violence was characterized by widespread looting and destruction of property. Some of these actions deliberately targeted individuals perceived to belong to members of "foreign communities",[214] while others seem to have been perpetrated by gangs of youths taking advantage of the lawlessness

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[206] KNCHR Report, ICC-01/09-3-Anx4, para. 373; CIPEV Report, ICC-01/09-3-Anx5, p. 189.
[207] KNCHR Report, ICC-01/09-3-Anx4, paras 372 and 375.
[208] CIPEV Report, ICC-01/09-3-Anx5, p. 189.
[209] CIPEV Report, ICC-01/09-3-Anx5, p. 189; HRW Report, ICC-01/09-3-Anx3, p. 30.
[210]KNCHR Report, ICC-01/09-3-Anx4, paras 372, 401 *et seq*
[211] CIPEV Report, ICC-01/09-3-Anx5, p. 189.
[212] KNCHR Report, ICC-01/09-3-Anx4, para. 374; CIPEV Report, ICC-01/09-3-Anx5, pp. 189 and 195; UNICEF *et al.* Report, ICC-01/09-3-Anx9, p. 41.
[213] CIPEV Report, ICC-01/09-3-Anx5, p. 196.
[214] KNCHR Report, ICC-01/09-3-Anx4, paras 380 *et seq*; CIPEV Report, ICC-01/09-3-Anx5, pp. 192 and 202.

of the situation.[215] The Waki Commission reports that "as a result of the violence, many idle youth resorted to criminal activities and at one point in time, the rioters and hooligans overwhelmed the security officers".[216] In some areas, predominantly in Migori and Rongo towns and Kisumu city, individuals of non-Luo origin were targeted for eviction in two phases.[217] There are also reports of sexual and gender-based violence as well as human trafficking of IDPs.[218] According to the Nyanza Provincial Commissioner, by 11 February 2008, 102 people were reported dead, 685 people injured, while 40,000 non-Luos had fled the province.[219]

116. According to the KNCHR the evictions as well as the looting and destruction of property between 29 December 2007 and 10 January 2008 seemed to not have been the result of a high level of planning or organization and were largely caused by pre-election incitement, coupled with the delay of the election results and subsequently the discontent with the outcome of the election.[220] It is reported, however, that the attacks against "foreign communities" which subsequently took place were well planned and coordinated and that the group of youths mostly responsible for destruction of property and for eviction of individuals appeared to have followed some organized form of leadership.[221]

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[215] CIPEV Report, ICC-01/09-3-Anx5, p. 202.
[216] CIPEV Report, ICC-01/09-3-Anx5, p. 190.
[217] KNCHR Report, ICC-01/09-3-Anx4, paras 392-393.
[218] KNCHR Report, ICC-01/09-3-Anx4, paras 370 and 371 ; FIDA Report, ICC-01/09-3-Anx8, p. 5.
[219] CIPEV Report, ICC-01/09-3-Anx5, p. 199.
[220] KNCHR Report, ICC-01/09-3-Anx4, paras 409 and 412; CIPEV Report, ICC-01/09-3-Anx5 p. 188.
[221] KNCHR Report, ICC-01/09-3-Anx4, paras 410 and 411. The Waki Commission provides a summary of the events in Kisumu city which exemplifies the actions of youth: "The next day, on December 30th, the violence erupted again in the entire city of Kisumu. More than 4,000 people converged at Kondele market as early as 8.00 a.m. demanding the immediate release of national presidential results while disturbances also erupted in other parts of the town with riotous mobs

Some of the attacks were supposedly led by local businessmen and -women as well as by other local individuals of influence, who seemed to rely on local groups of youths who were able to recognize members of "foreign communities".[222] The attacks against the Kisii allegedly stopped when ODM leader Raila Odinga requested the Luo community to cease attacking the Kisii.[223] It is also reported that Ecumenical prayer meeting was held in Kisumu stadium where religious and political leaders appealed for peace.[224]

117. The targeted groups were mainly those perceived as "foreign", meaning of non-Luo origin, and included members of the Kikuyu, Meru, Kamba, Kisii and Asian communities.[225] There were also reports of attacks against persons of Kalenjin or Luo communities for retaliatory purposes or as part of a "class struggle".[226]

118. The reaction of the police forces to the violence is characterized by both inaction and excessive use of force.[227] The police generally seemed not to have been prepared for dealing with the magnitude of violence that occurred.[228] Particularly during the first phase of violence, the police has been said to have

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vandalizing and looting from shops perceived to belong to people who were 'non-indigenous'. (...) The rioters were initially dispersed but they regrouped and violently stormed into the centre of the city where they engaged in vandalism and looting of property.", ICC-01/09-3-Anx5, p. 191.

[222] KNCHR Report, ICC-01/09-3-Anx4, paras 410 and 411.

[223] KNCHR Report, ICC-01/09-3-Anx4, paras 393 and 396.

[224] CIPEV Report, ICC-01/09-3-Anx5, p. 195.

[225] KNCHR Report, ICC-01/09-3-Anx4, paras 380, 393 and 393 ; CIPEV Report, ICC-01/09-3-Anx5, p. 192.

[226] KNCHR Report, ICC-01/09-3-Anx4, paras 378 and 380.

[227] KNCHR Report, ICC-01/09-3-Anx4, para. 398 ; ICG Report, ICC-01/09-3-Anx6, p. 14; OHCHR Report, ICC-01/09-3-Anx7, p. 12.

[228] CIPEV Report, ICC-01/09-3-Anx5, pp. 193, 195 and 200.

stood by while crime was committed.[229] This was the case in the looting and subsequent destruction of Ukwala Supermarket in which allegedly some seven people died. Other interviewees reported that the police encouraged the looting and engaged in looting and destructing the building itself.[230] With regard to the second and third phases of violence, the reports point to excessive use of force by the police, who fired live bullets into crowds, injuring and killing protesters, as well as killing people in their homes and in some instances shooting at fleeing persons.[231] The supporting material also suggests that in Kisumu the police opened fire without warning as a tactic in order to push the crowd out of the towns and into the slums, an action which resulted in the killing of about 10 people on 29 December 2008.[232] Statistics from the Provincial General Hospital in Kisumu quoted by the KNCHR indicate that between 29 December and 8 January 2008, approximately 52 people had died as a result of being shot by security agents. Human Rights Watch quotes a medical superintendent from the same hospital who states that between 28 December 2007 and 11 January 2008, between 44 people died from gunshot wounds.[233] The same report claims that of 14 January 2008, the hospital had treated 59 inpatients and 138 outpatients with gun shot wounds.[234] According to the Waki Commission, the majority of deaths in Nyanza are attributable to the police;[235] a Medical Officer of Health told the Commission that 90% of the deaths in New Nyanza General Hospital stemmed

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[229] KNCHR Report, ICC-01/09-3-Anx4, para. 399.
[230] KNCHR Report, ICC-01/09-3-Anx4, para. 385; CIPEV Report, ICC-01/09-3-Anx5, p. 204.
[231] KNCHR Report, ICC-01/09-3-Anx4, paras 401 *et seq* ; CIPEV Report, ICC-01/09-3-Anx5, p. 202 *et seq* ; HRW Report, ICC-01/09-3-Anx3, p. 29.
[232] HRW Report, ICC-01/09-3-Anx3, pp. 31 *et seq*.
[233] HRW Report, ICC-01/09-3-Anx3, pp. 34 *et seq*.
[234] HRW Report, ICC-01/09-3-Anx3, p. 35.
[235] CIPEV Report, ICC-01/09-3-Anx5 p. 186.

from gun shots.[236] The police itself acknowledged that those shot were likely shot by police officers.[237]

119. Taking the above into consideration, I fail to see that an "attack directed against the civilian population" was committed "pursuant to or in furtherance of a State or organizational policy". I fail to see an 'organization' in Nyanza Province which satisfies the criteria I have set out in paragraph 51 above. Local individuals of influence and local businesspersons being involved do not form an 'organization' with a certain degree of hierarchical structure acting over a prolonged period of time. The violence seems to have been spontaneous, opportunistic and retaliatory in the course of the events. The strategic alliance of a certain number of people points to be opportunistic and spontaneous. I also take note that politicians and religious leaders appealed for peace.

120. Likewise, I fail to see a State policy according to which the civilian population was attacked. The information that some local politicians and businessmen and -women were engaged in the organization of violent acts does not necessarily entail that a policy was established or at least endorsed at the high level of the State. Information is available whereby politicians and religious leaders were undertaking serious efforts to calm the situation. By the same token, based on the multifaceted information regarding police behaviour, I feel unable to deduce that overall the police was implementing a State policy to attack the civilian population.

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[236] CIPEV Report, ICC-01/09-3-Anx5, p. 199.
[237] HRW Report, ICC-01/09-3-Anx3, p. 35; OHCHR Report, ICC-01/09-3-Anx7, p. 12.

6. Western Province

121. The reports indicate that the violence started well before the elections, as early as 18 December 2007.[238] The violence started in Mumias district on 27 December 2007[239] and in Budalangi, Busia district on 29 December 2007[240]. In Nambale, Busia district, the Waki Commission found the first instances of violence to have taken place on 27 December 2007[241], while according to the KNCHR the first instances of violence only occurred on 30 December 2007.[242] According to the Provincial Commissioner, the violence in Western province reached its climax and its end on 31 December 2007.[243]

122. The violence in Western province consisted mainly of acts of burning, looting and vandalizing property owned by members of the Kikuyu community.[244] Additionally, there were many cases of displacement and eviction of perceived PNU supporters, primarily individuals of Kikuyu origin but also of Kisii.[245] Western province reported a total of 293 deaths according to the KNCHR.[246] The Waki Commission counted 98 deaths of which 74 died of gunshots, indicating that they were killed by the police.[247] An estimated 55,862 people were displaced in the province.[248]

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[238] KNCHR Report, ICC-01/09-3-Anx4, para. 425; CIPEV Report, ICC-01/09-3-Anx5, p. 176.
[239] KNCHR Report, ICC-01/09-3-Anx4, para. 426; CIPEV Report, ICC-01/09-3-Anx5, p. 177.
[240] KNCHR Report, ICC-01/09-3-Anx4, para. 429; CIPEV Report, ICC-01/09-3-Anx5, p. 177.
[241] CIPEV Report, ICC-01/09-3-Anx5, p. 178.
[242] KNCHR Report, ICC-01/09-3-Anx4, para. 430.
[243] CIPEV Report, ICC-01/09-3-Anx5, p.179.
[244] KNCHR Report, ICC-01/09-3-Anx4, para. 424; CIPEV Report, ICC-01/09-3-Anx5, pp. 176 *et seq.*
[245] KNCHR Report, ICC-01/09-3-Anx4, para. 424.
[246] KNCHR Report, ICC-01/09-3-Anx4, para 433.
[247] CIPEV Report, ICC-01/09-3-Anx5, p. 182.
[248] CIPEV Report, ICC-01/09-3-Anx5, p. 180.

123. Overall, the violence in Western province seems to have taken place spontaneously and not in an organized manner.[249] There are accounts of opportunistic attacks by youths taking advantage of the lawless situation.[250] Some interviewees report to have seen ring-leaders holding lists[251], which was seen as some form of planning or organization. However, no clear details emerged in this regard and the Waki Commission takes the view that the violence in Western province was a "direct result of disaffection with the final tally of the Presidential election campaign".[252] This seems, however, not to be true for the violence in Lugari district, where the supporting material suggests that the attackers came from a different district and attacked in a prepared and coordinated manner.[253]

124. The persons targeted in the civilian violence were mostly of Kikuyu or Kisii origin,[254] while the groups most affected by police violence were Luo and Tesos.[255]

125. Generally, Western province has experienced incidents of tribal clashes, particularly in 1992 and 1997,[256] fueled, *inter alia*, by the Sabaot communities' discontent with the allocation of land, which gave rise to the creation of the SLDF.[257] In March 2008, Western province was the scene of a joint military-police

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[249] KNCHR Report, ICC-01/09-3-Anx4, para. 441; CIPEV Report, ICC-01/09-3-Anx5, pp. 183 *et seq.*
[250] CIPEV Report, ICC-01/09-3-Anx5, p. 179.
[251] KNCHR Report, ICC-01/09-3-Anx4, para. 442.
[252] CIPEV Report, ICC-01/09-3-Anx5, p. 160.
[253] KNCHR Report, ICC-01/09-3-Anx4, paras 428, 444 *et seq*; CIPEV Report, ICC-01/09-3-Anx5, p. 184.
[254] KNCHR Report, ICC-01/09-3-Anx4, para. 424.
[255] KNCHR Report, ICC-01/09-3-Anx4, para. 430.
[256] ICG Report, ICC-01/09-3-Anx6, p. 8; CIPEV Report, ICC-01/09-3-Anx5, p. 174.
[257] CIPEV Report, ICC-01/09-3-Anx5, p. 174 *et seq*; Special Rapporteur Report, ICC-01/09-3-Anx11, p. 23 ; ICG Report, ICC-01/09-3-Anx6, pp. 15 and 17.

operation against the SLDF in the Mt. Elgon district, in which allegedly over 200 people were killed by security forces or disappeared and many were tortured.[258] However, the violence associated with the SLDF militia dates back at least to 2006 and the Waki Commission stated that it was unable to establish any link to the post-election violence of 2007/2008.[259]

126. The picture portrayed of police behaviour in Western province is a very contradictory one. On the one hand, the supporting material suggests that the police took measures to protect people and tried to restore law and order.[260] On the other hand, individual police officers were accused of commanding raiding groups of youths or refusing to respond to pleas of help.[261] Generally, it was held that the police was understaffed and overwhelmed[262] and responded to demonstrations and lootings using excessive force and in some cases targeted uninvolved civilians.[263] The supporting material also points to cases in which the police stood by and did not help to protect people's property[264].

127. Taking the above into consideration, I fail to see that an "attack directed against the civilian population" was committed "pursuant to or in furtherance of a State or organizational policy". I fail to see an 'organization' in Western Province which satisfies the criteria I have set out in paragraph 51 above. Opportunistic and spontaneous violence throughout the province by definition

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[258] Special Rapporteur Report, ICC-01/09-3-Anx11, p. 28.
[259] CIPEV Report, ICC-01/09-3-Anx5, p. 174; See also the Special Rapporteur Report on events in the Mt Elgon region, ICC-01/09-3-Anx11, pp. 24 *et seq.*
[260] KNCHR Report, ICC-01/09-3-Anx4, para. 434.
[261] KNCHR Report, ICC-01/09-3-Anx4, paras 435, 438 and 439.
[262] CIPEV Report, ICC-01/09-3-Anx5, pp. 179 and 183.
[263] KNCHR Report, ICC-01/09-3-Anx4, paras. 433, 436, 437 and 438; CIPEV Report, ICC-01/09-3-Anx5, p. 181; ICG Report, ICC-01/09-3-Anx6, p. 15.
[264] CIPEV Report, ICC-01/09-3-Anx5, p. 179.

cannot be committed pursuant to an organizational policy. I lack further information to conclude that an 'organization' established a policy to attack the civilian population.

128. Likewise, I fail to see a State policy according to which the civilian population was attacked. I lack information according to which a policy was adopted at the high level. The joint military-police operation in Mt Elgon region, according to the information available, seems to have been taken in the context of combating the SLDF. While I take cognizance of the information provided by the Special Rapporteur Philip Alston, I fail to see, that the operation amounted to an attack directed against the civilian population associated with the movement SLDF. By the same token, based on the multifaceted and contradictory information regarding police behaviour, I feel unable to deduce that overall the police was implementing a State policy to attack the civilian population.

7. Coast Province

129. While it was reported that tension was felt and youths gathered chanting slogans in the region already on 28 and 29 December 2007,[265] the chaos in some parts of the region[266] began immediately after the announcement of the election results in the afternoon of 30 December 2007.[267] In mid January 2008 the violence was apparently under control.[268] In Mombasa, the situation was calm again by 25 January 2008.[269]

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[265] CIPEV Report, ICC-01/09-3-Anx5, pp. 235-236.
[266] The Waki Commission reports that some coastal areas, such as Malindi District and Lamu District, did not experience any level of violence, CIPEV Report, ICC-01/09-3-Anx5, p. 241.
[267] KNCHR Report, ICC-01/09-3-Anx4, para. 456; CIPEV Report, ICC-01/09-3-Anx5, p. 236.
[268] CIPEV Report, ICC-01/09-3-Anx5, p. 241.
[269] CIPEV Report, ICC-01/09-3-Anx5, p. 242.

130. The Coast region has a long record of election-related violence.[270] The region is characterized by land disputes and issues pertaining to distribution of resources, poverty and unemployment.[271] Political contests usually mobilize around such grievances.[272] The Coast region is inhabited by a diverse array of communities, such as members of the Mijikenda communities, Swahili speaking communities, people of Arab descent, and other smaller ethnic communities commonly referred to as the residents from the upcountry.[273]

131. The KNCHR summarized the events in that region in the following terms:

> "The reaction to the presidential results were characterized by demonstrations and barricading of the roads; looting, property destruction and arson; killings; forceful displacement and evictions targeting specific communities and generally unrest amongst the youth who also took advantage of the situation to settle scores. The pattern of violence was similar across the two Coast, however, what differed was the magnitude of the violence."[274]

132. Information seems to suggest that youth perpetrators dominated the violence by blockading the roads, stoning cars, lighting tyres and looting[275]. Officials of the provincial administration interviewed by KNCHR assessed that the violence was not targeted against at any specific community. As residents

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[270] KNCHR Report, ICC-01/0-93-Anx4, para. 450 *et seq.*

[271] CIPEV Report, ICC-01/09-3-Anx5, pp. 232-233: The Commission highlighted that "the issue of land at the Coast has specially been problematic". A witness to the Commission explained that "there was a potential violence much higher than any other part of the country because of the underlying issues of poverty, their political feeling of being excluded and a lot of unemployment. All these going by the history of the Coast... we felt the issues here, the threats were higher than other parts of the country."); see also KNCHR Report, ICC-01/09-3-Anx4, para. 530 ("In the Coast province, we were told that the election was simply an occasion to express the real grievances of the Miji Kenda which include deprivation, inequitable distribution and lack of access to resources").

[272] KNCHR Report, ICC-01/09-3-Anx4, para. 452.

[273] KNCHR Report, ICC-01/09-3-Anx4, para. 448.

[274] KNCHR Report, ICC-01/09-3-Anx4, para. 457.

[275] KNCHR Report, ICC-01/09-3-Anx4, paras 458, 460-463 and 479; CIPEV Report, ICC-01/09-3-Anx5, pp. 236, 239 and 241.

lived in mixed neighbourhoods, the destruction of property was considered random.[276] Information is available following to which IDPs from different, even warring communities, sought refuge in police stations and a church.[277] The Coast Provincial Hospital received 70 people with gun shot wounds and burns especially between 31 December 2007 and 3 January 2008.[278] One much reported incident concerned the killing of 11 persons by a "murderous mob".[279] The Provincial Director of Medical Services gave to the Waki Commission a figure of 32 people having been killed.[280] It is also reported that killings occurred during demonstrations by youth.[281] According to the Nairobi Hospital, 18 women had been subjected to sexual violence in the Coast province.[282]

133. It was alleged that an MP in that region was hosting youths in his home but he denied any involvement. He maintained that he took proactive measures to prevent the violence. He also suggested that part of the violence was brought to the region from community members from outside the region.[283] Other accounts reveal that local politicians were supposedly involved in paying the youth to destroy property.[284]

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[276] KNCHR Report, ICC-01/09-3-Anx4, para. 466.
[277] KNCHR Report, ICC-01/09-3-Anx4, paras 470 *et seq.*
[278] KNCHR Report, ICC-01/09-3-Anx4, para. 475.
[279] KNCHR Report, ICC-01/09-3-Anx4, para. 474.
[280] CIPEV Report, ICC-01/09-3-Anx5, p. 238. Police records indicated a total of 26 deaths, KNCHR Report, ICC-01/09-3-Anx4, para. 476.
[281] CIPEV Report, ICC-01/09-3-Anx5, p. 242.
[282] KNCHR Report, ICC-01/09-3-Anx4, para. 477 ; however, 18 out of 51 women interviewed by the Kenya YMCA reported physical and/or sexual attacks, UNICEF *et al* Report, ICC-01/09-3-Anx9, pp. 63-64.
[283] KNCHR Report, ICC-01/09-3-Anx4, para. 459.
[284] KNCHR Report, ICC-01/09-3-Anx4, para. 468 ; CIPEV Report, ICC-01/09-3-Anx5, p. 237.

134. While it is suggested by some that the violence in the Coast region was planned,[285] other KNCHR interviewees alleged that there was no planning element[286] but a mere reaction to the polling results[287]. Other sources from the government and officials from the Council of Imams reported that the violence was not organized but spontaneous.[288] KNCHR interviewees reported that the violence in the region did not spiral out of control as there were peace initiatives by elders, church leaders and the Council of Imams.[289] According to the Council of Imams, the violence was mainly triggered by anger and frustration over the announcement of election results.[290] The Waki Commission reports that the flight of the Kikuyu and Meru communities gave "an opportunity to criminals to engage in an orgy of looting and destruction."[291]

135. The targeted groups were various, such as members of the Luo, Luhya, Kikuyu, Meru, Gema and Kamba communities.[292] Non-governmental organizations report that Kikuyu and Meru communities were the main targets of violence in all parts of the region.[293]

136. The police reacted to demonstrations by firing tear gas to disperse demonstrators and shooting in the air.[294] It is alleged that the police was

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[285] See also CIPEV Report, ICC-01/09-3-Anx5, p. 238.
[286] See also CIPEV Report, ICC-01/09-3-Anx5, p. 238: "People simply captured the moment and decided there and then what to do with absolutely no prior arrangements."
[287] CIPEV Report, ICC-01/09-3-Anx5, p. 239.
[288] KNCHR Report, ICC-01/09-3-Anx4, para. 482.
[289] CIPEV Report, ICC-01/09-3-Anx5, p. 242; KNCHR Report, ICC-01/09-3-Anx4, para. 478.
[290] KNCHR Report, ICC-01/09-3-Anx4, para. 478.
[291] CIPEV Report, ICC-01/09-3-Anx5, p. 240.
[292] KCHR Report, ICC-01/09-3-Anx4, paras 459, 464, 466, 469, 470 and 471; CIPEV Report, ICC-01/09-3-Anx5, pp. 239 and 240-241.
[293] KNCHR Report, ICC-01/09-3-Anx4, para. 481.
[294] CIPEV Report, ICC-01/09-3-Anx5, p. 242.

overwhelmed by the skirmishes and that they focused on protection of life rather than property by an alleged policy 'to loot but not to kill or beat people'.[295] Reports suggest that police may have used excessive force.[296] A degree of inefficiency and dysfunction within the police and an alleged indifference of the police were also alleged.[297]

137. Taking the above into consideration, I fail to see that an "attack directed against the civilian population" was committed "pursuant to or in furtherance of a State or organizational policy". I fail to see an 'organization' in the Coast Province which satisfies the criteria I have set out in paragraph 51 above. Information that some local politicians funding youth to destroy property does not suggest the existence of an 'organization' with a certain degree of hierarchical structure acting over a prolonged period of time. Several accounts are to be found according to which the violence was spontaneous and opportunistic. I also take note that serious peace initiatives by elders, the Council of Imams and church leaders were undertaken. Hence, I fail to see that the violence was committed pursuant to or in furtherance of an organizational policy.

138. Likewise, I fail to see a State policy according to which the civilian population was attacked. Information that some local politicians were engaged in the organization of violent acts does not necessarily entail that a policy was established or at least endorsed at the high level of the State. Based on the multifaceted information regarding police behaviour, I feel unable to deduce that

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[295] KNCHR Report, ICC-01/09-3-Anx4, paras 458, 462, 483 ; CIPEV Report, ICC-01/09-3-Anx5, pp. 244 and 246.
[296] KNCHR Report, ICC-01/09-3-Anx4, para. 485; CIPEV Report, ICC-01/09-3-Anx5, p. 238.
[297] CIPEV Report, ICC-01/09-3-Anx5, p. 244.

overall the police was implementing a State policy to attack the civilian population.

8. Central Province

139. The Central Province was characterized by relative calm during the election campaign, the voting and counting period.[298] Tensions started to rise one month after the announcement of the presidential election results as members of the Kikuyu community started to be attacked in the Rift Valley. The burning of the Eldoret church on 1 January 2008 heightened tensions amongst the ethnicities in the region.[299] Limuru, Thika and Kikuyu areas were the most affected areas in the region.[300] The violence appears to have lasted until end of February 2008.[301]

140. The information available suggests that the violence was mainly caused by the influx of displaced Kikuyu communities in other regions of the country.[302] This fact triggered demonstrations against the government perceived to have failed to protect members of the Kikuyu community in other violence torn areas of the country.[303] At the same time, threats were uttered and preparation was undertaken to evict non-Kikuyu people from the region.[304] Further, rumors and harrowing stories of incoming Kikuyu infuriated local residents who allegedly

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[298] There were only sporadic incidents of violence reported during the period leading to the elections. See KNCHR Report, ICC-01/09-3-Anx4, para. 488; CIPEV Report, ICC-01/09-3-Anx5, pp. 218-219.
[299] KNCHR Report, ICC-01/09-3-Anx4, para. 490.
[300] KNCHR Report, ICC-01/09-3-Anx4, para. 499.
[301] CIPEV Report, ICC-01/09-3-Anx5, p. 224.
[302] KNCHR Report, ICC-01/09-3-Anx4, para. 491; CIPEV Report, ICC-01/09-3-Anx5, p. 219. The Waki Commission reports that the number of IDPs ejected from Rift Valley and Nyanza Provinces was recorded at 18,406 on 31 January 2008, CIPEV Report, ICC-01/09-3-Anx5, p. 224; OHCHR Report, ICC-01/09-3-Anx7, p. 11.
[303] KNCHR Report, ICC-01/09-3-Anx4, paras 491 and 495.
[304] KNCHR Report, ICC-01/09-3-Anx4, paras 496, 497, 505, 507 and 509; CIPEV Report, ICC-01/09-3-Anx5, p. 220, pp. 228-229.

started meting out retaliation on members of other communities in the region.[305] Lastly, unemployed youth apparently took advantage of the unrest and engaged in theft and other unlawful practices.[306] By 31 January 2007, non-Kikuyu people had moved to police stations, the largest gathering at Kiambaa Division hosting a total of 8,000 IDPs.[307] It is estimated that 15 people were killed in the province on account of post-election violence.[308] There are reports of forced circumcisions and one rape but it is alleged that generally there were few cases of sexual violence in Central Province.[309]

141. It is alleged that politicians allegedly raised funds and organized gangs to perpetuate the post-election violence. It is purported that meetings were held in Nairobi at hotels to discuss the plight of IDPs and to raise funds and organize retaliatory violence.[310] Others allege that politicians and religious leaders[311] have incited the violence. Yet other information indicates that Kikuyu leaders from Rift Valley, Central and Nairobi provinces, newly elected MPs, politicians and local administration officials purportedly made public statements calling for an end to the violence on their people or otherwise intervened to quell the

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[305] KNCHR Report, ICC-01/09-3-Anx4, paras 493 and 508 ; CIPEV Report, ICC-01/09-3-Anx5, p. 219.

[306] KNCHR Report, ICC-01/09-3-Anx4, para. 494.

[307] KNCHR Report, ICC-01/09-3-Anx4, paras 496 and 497 ("over 7,000 IDP camped at the police station in Tigoni"); CIPEV Report, ICC-01/09-3-Anx5, p. 219. The information also reveals that the absence of major IDP camps in the Kikuyu township and other areas of the province is due to the fact that many incoming IDPs were hosted by private families throughout the province absorbing them into society, KNCHR Report, ICC-01/09-3-Anx4, para. 492; CIPEV Report, ICC-01/09-3-Anx5, p. 223.

[308] KNCHR Report, ICC-01/09-3-Anx4, para. 500.

[309] KNCHR Report, ICC-01/09-3-Anx4, paras 502 and 504; CIPEV Report, ICC-01/09-3-Anx5, p. 222; UNICEF *et al* Report, ICC-01/09-3-Anx9, p. 23.

[310] KNCHR Report, ICC-01/09-3-Anx4, para. 509.

[311] CIPEV Report, ICC-01/09-3-Anx5, p. 229.

violence.[312] As the government did not respond, some members of the Kikuyu communities started to mobilize against killings and destruction of property which ultimately triggered the violence in the Central region.[313] The involvement of businessmen is unclear albeit it is alleged that they may have been involved in fundraising and provision of weapons.[314] The Waki Commission further reports that:

> "there were instances when youths within Central province took advantage of the unrest to engage in unlawful activities. There were instances when non-Kikuyu employees working in various companies were targeted for attacks and eviction so as to create employment opportunities for themselves in those companies". [315]

142. Non-Kikuyu IDPs alleged that members of the Mungiki gang had played a role in their eviction, while many Kikuyu residents of Central Province and the Provincial Administration downplayed Mungiki's role. It has been suggested that individuals masqueraded as Mungiki to frighten non-Kikuyu communities into leaving.[316] The Waki Commission remarks with regard to the "resurgence" of Mungiki:

> "many of the acts of violence perpetrated by this militia outfit at the time may be explained as retributive violence that was specifically targeted at members of ethnic communities perceived to be supportive of the ODM Party, and against whom accusations had been made for targeting members of the Kikuyu community in other parts of the country."[317]

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[312] KNCHR Report, ICC-01/09-3-Anx4, para. 490; CIPEV Report, ICC-01/09-3-Anx5, p. 220 (reporting that the blockade of the Nairobi-Nakuru highway by rioting mobs was dissolved after the intervention of a Limuru District Officer), p. 222.

[313] KNCHR Report, ICC-01/09-3-Anx4, para. 490.

[314] KNCHR Report, ICC-01/09-3-Anx4, para. 511; CIPEV Report, ICC-01/0-93-Anx5, p. 226. The Waki Commission also refers to allegations that in a company hate mail was circulated by unknown persons calling upon the Kalenjin to rise against Kikuyu people, CIPEV Report, ICC-01/09-3-Anx5, p. 227.

[315] CIPEV Report, ICC-01/09-3-Anx5, p. 224.

[316] KNCHR Report, ICC-01/09-3-Anx4, para. 514.

[317] CIPEV Report, ICC-01/09-3-Anx5, pp. 227-228.

143. The Waki Commission further found:

> "The re-emergence of Mungiki and associated criminal gangs followed the killings and evictions Kikuyus in ODM party strongholds in western Kenya. The turbulence, in our view, provided a perfect opportunity for these proscribed militia to reinvent and package themselves as instruments for the advancement of political and ethnically motivated violence."[318]

144. The targeted groups were various, such as members of the Luo, Luhya, Kalenjin, Turkana and to a lesser degree Kisii communities.[319] There were also allegations of intra-ethnic violence where Kikuyu men have been attacked by gangs for 'failing' to 'defend' their own community from 'aggressors'.[320]

145. The police was seen as ill-prepared to satisfactorily handle the influx of IDPs.[321] It responded to distress calls from residents and swiftly contained groups of youth.[322] It has been suggested that at one point the police was overwhelmed when larger groups started attacking.[323] Information suggests that police provided 24h surveillance to IDPs in various police camps to ensure IDP security.[324] Province and District officials were organizing and addressing peace meetings together with government officers and members of parliament.[325] In total, it is said that 37 peace and reconciliation meetings were held across the province which may have pacified the situation.[326] The police also helped to coordinate humanitarian responses.[327]

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[318] CIPEV Report, ICC-01/09-3-Anx5, p. 230.
[319] KNCHR Report, ICC-01/09-3-Anx4, para. 505; CIPEV Report, ICC-01/09-3-Anx5, p. 221.
[320] CIPEV Report, ICC-01/09-3-Anx5, p. 228.
[321] CIPEV Report, ICC-01/09-3-Anx5, p. 225.
[322] KNCHR Report, ICC-01/09-3-Anx4, para. 516.
[323] KNCHR Report, ICC-01/09-3-Anx4, para. 517.
[324] KNCHR Report, ICC-01/09-3-Anx4, para. 518.
[325] KNCHR Report, ICC-01/09-3-Anx4, para. 519; CIPEV Report, ICC-01/09-3-Anx5, p. 225.
[326] CIPEV Report, ICC-01/09-3-Anx5, p. 225.
[327] KNCHR Report, ICC-01/09-3-Anx4, para. 519.

146. Taking the above into consideration, I fail to see that an "attack directed against the civilian population" was committed "pursuant to or in furtherance of a State or organizational policy". I fail to see an 'organization' in the Central Province which satisfies the criteria I have set out in paragraph 51 above. The nature of revenge violence in response to stories of incoming IDPs and counterattacks of particular communities does not allow me to conclude that an 'organization' existed with a certain degree of hierarchical structure acting over a prolonged period of time. Information that politicians and religious leaders inciting the violence during the time concerned points to *ad hoc* preparations and planning of violent incidents during the period of "post-election violence". Local politicians using criminal gangs for their own purposes is an indicator of a partnership of convenience for a passing occasion rather than an 'organization' established for a common purpose over a prolonged period of time. Moreover, I take note of the numerous efforts of leaders and politicians to quell the disturbances.

147. Likewise, I fail to see a State policy according to which the civilian population was attacked. Information that some local politicians were engaged in the organization of violent acts does not necessarily entail that a policy was established or at least endorsed at the high level of the State. Based on the multifaceted information regarding police behaviour I feel unable to deduce that overall the police was implementing a State policy to attack the civilian population. I particularly take note of the assistance which the police it provided to vulnerable communities.

V. General Conclusions

148. On a general note, I observe that the information available does not lead to the conclusion of 'one' "attack" during the time frame under examination but a series of numerous incidents, as suggested by the Prosecutor. Numerous violent acts were launched at different times by different groups and against different groups throughout the country. The violence was *at the occasion* of the as rigged perceived presidential elections in December 2007. The reasons for the violence appear to go beyond allegations of manipulated elections. Information in the supporting material and the victims' representations suggests that the cause of the violence may be found in long-lasting and unresolved issues, such as land distribution,[328] poverty,[329] unemployment,[330] rental issues,[331] inter-ethnic tensions,[332] xenophobia,[333] disenfranchisement,[334] perceived discrimination,[335] desire for ethnically homogenous neighbourhoods,[336] organized crime,[337] retaliation[338] and anger over the support of the opposing political party[339]. The origin of such issues may sometimes date back to colonial times. Albeit the motives of the perpetrators are not decisive and may vary, it nevertheless sheds light on the question of the existence of a possible policy.

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[328] KNCHR Report, ICC-01/09-3-Anx4, para. 193; CIPEV Report, ICC-01/09-3-Anx5, p. 35; HRW Report, ICC-01/09-3-Anx3, p. 16; OHCHR Report, ICC-01/09-3-Anx7, pp. 4, 7 and 16.
[329] OHCHR Report, ICC-01/09-3-Anx7, p. 17; CREA Report ICC-01/09-3-Anx10, p. 3.
[330] KNCHR Report, ICC-01/09-3-Anx4, para. 545.
[331] KNCHR Report, ICC-01/09-3-Anx4, paras 149 and 553. In Nairobi tenants, those affiliated with the ODM, allegedly felt that their landlords, who were mostly PNU supporters, were overcharging them on their rent. Thus, rental disputes apparently became a flashpoint for the evictions.
[332] KNCHR Report, ICC-01/09-3-Anx4, para. 191; ICG Report, ICC-01/09-3-Anx6, p. 20.
[333] KNCHR Report, ICC-01/09-3-Anx4, paras 382 *et seq*.
[334] OHCHR Report, ICC-01/09-3-Anx7, p. 17; CREA Report ICC-01/09-3-Anx10, p. 3.
[335] OHCHR Report, ICC-01/09-3-Anx7, p. 16.
[336] KNCHR Report, ICC-01/09-3-Anx4, para. 553.
[337] KNCHR Report, ICC-01/09-3-Anx4, para. 554; CIPEV Report, ICC-01/09-3-Anx5, p. 35; Special Rapporteur Report, ICC-01/09-3-Anx11, p. 9.
[338] KNCHR Report, ICC-01/09-3-Anx4, para. 529.
[339] KNCHR Report, ICC-01/09-3-Anx4, para. 129.

149. The supporting material suggests that some groups seemed to be organized and prepared to engage in violent acts before the results of the presidential elections were announced. The announcement of the election results appeared to be a welcome opportunity for those groups to commence violent skirmishes.[340] Some other groups were formed *ad hoc* in response to the violence which erupted.[341] Others seemed to follow their own agenda taking advantage of the situation to achieve their own goals.[342] Amidst those groups, individuals seem to have taken advantage of the chaotic situation and have committed crimes seemingly feeling protected from a shield of immunity.[343] Experience with previous cycles of violence and pre-existing infrastructure of violence was easily mobilized.

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[340] CIPEV Report, ICC-01/09-3-Anx5, p. 239; KNCHR Report, ICC-01/09-3-Anx4, para. 530 ("In the Coast province, we were told that the election was simply an occasion to express the real grievances of the Miji Kenda which include deprivation, inequitable distribution and lack of access to resources").

[341] These are just a few of the many examples which are to be found in the reports: KNCHR Report, ICC-01/09-3-Anx4, paras 151 and 168. Landlords were forcibly evicted from their houses in Nairobi. This situation precipitated another round of violence as the owners hired gangs to rehire their property. At another occasion KNCHR remarks that "once the initial violence broke out and information spread that particular ethnic groups were being targeted in certain areas, people mobilized their tribesmen for retaliation or defence.", ICC-01/09-3-Anx4, para. 171. At yet another occasion the KNCHR reports that "in response [to attacks on Kisii members by Kipsigis], the Kisii community mobilized youths to defend themselves led by local councilors", ICC-01/09-3-Anx4, para. 197; see also the example of the Chinkoro vigilante group which "organized itself in response to the post-election violence", KNCHR Report, ICC-01/09-3-Anx4, para. 378.

[342] KNCHR Report, ICC-01/09-3-Anx4, para. 482; CIPEV Report, ICC-01/09-3-Anx5, p.214 ("Most of those who perpetrated the violence were gangs who took advantage of the situation."); CIPEV Report, ICC-01/09-3-Anx5, p. 221 (referring to "rowdy youths"), p. 222 (referring to "surging youth").

[343] CIPEV Report, ICC-01/09-3-Anx5, p. 240; FIDA Report, ICC-01/09-3-Anx8, p. 3 ("(...) there appears to have been a lot more cases of individuals taking advantage of the general insecurity to perpetrate acts of sexual violence, the perpetrators sometimes being in groups of people from diverse ethnic origins."); OHCHR reports: "Information gathered during interviews conducted with victims of rape and sexual violence suggests that by and large, most of the reported cases of rape seem to have been 'opportunistic', perpetrated in the urban setting by groups of youth taking advantage of the chaotic and violent situation.", ICC-01/09-3-Anx7, p. 14.

150. While I accept that some of the violence appears to have been organized and planned in advance, I fail to see the existence of an 'organization' behind the violent acts which may have established a policy to attack the civilian population within the meaning of article 7(2)(a) of the Statute. I find indications in the supporting material that some *local* leaders, some *local* businessmen, some *local* politicians, some religious leaders, some journalists at local vernacular radio stations, some chiefs of communities and some civic and parliamentary aspirants were involved in the preparation of the violence. But I do not see an 'organization' meeting the prerequisites of structure, membership, duration and means to attack the civilian population. To the contrary, the overall assessment of the information in the supporting material, including the victims' representations leads me to conclude that several centres of violence in several provinces existed which each do not rise to the level of crimes against humanity.

151. In the event that those centres of violence was to be considered as 'one' attack, the unifying element would be the policy implemented by an 'organization' at the national level. As I don't have information available indicating that such policy was adopted at the national level,[344] I fail to see how those crimes and centres of violence could be assessed in light of article 7(1) of the Statute.

152. A different aspect involves the conduct of law enforcement agencies and the military. The reactions of the police during the "post-election violence" range from being mere passive observers, assisting civilians, being overwhelmed with

[344] HRW Report, ICC-01/09-3-Anx3, p.43; KNCHR Report, ICC-01/09-3-Anx4, paras 393 and 396.

the situation to actively engaging in the violence.[345] In many areas of Kenya, the police had to be assisted by the military to re-gain control. Another distinct aspect of police involvement concerns its participation in addressing organized crime and combating movements which do not necessarily relate to the events surrounding the "post-election violence". In sum, I have not found any information in the supporting material, including the victims' representations, suggesting that a State policy existed pursuant to which the civilian population was attacked.

153. In total, the overall picture is characterized by chaos, anarchy, a collapse of State authority in most parts of the country and almost total failure of law enforcement agencies.

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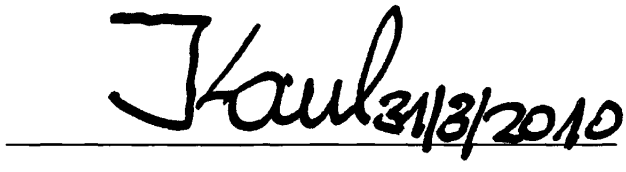
[345] The Waki Commission summarized: "The Commission found that there was a heavy-handed Police response whereby large numbers of citizens were shot – 405 fatally – by Police in Kisumu, Kakgema, Trans Nzoia, Uasin Gishu, Kericho, Nakuru, Nairobi and other places. Among the victims were some who were ostensibly going about their lawful business when they were hit by bullets and many more whose wounds confirmed that they had been shot from behind. (...) The Commission found that Police used a variety of tactical options during the [post-election violence]. Tactical options included but were not limited to the use of tear gas, the use of blank ammunition, the use of rubber bullets and finally the use of live ammunition. On many occasions police shot live ammunition into the air in an attempt to disperse protectors and thereby protect life and property. In other cases, police officers shot directly into the groups of protesters and crowds of people thought to be involved in looting or property destruction and scores were seriously injured or killed as a result. In the vast majority of cases, the force used by police occurred during lawful enforcement duties to protect life and property.", ICC-01/09-3-Anx5, pp. 429-430; OHCHR Report, ICC-01/09-3-Anx7, pp. 5, 11-12; HRW Report, ICC-01/09-3-Anx3, pp. 9, 28 *et seq*, 63 *et seq*.

In light of all of the above, I feel unable to authorize the commencement of an investigation in the situation in the Republic of Kenya.

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



Hans-Peter Kaul

Judge

Dated this Wednesday, 31 March 2010

At The Hague, The Netherlands