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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

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**Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto,
Henry Kiprono Kosgey and Joshua Arap Sang**

Source: Office of the Prosecutor

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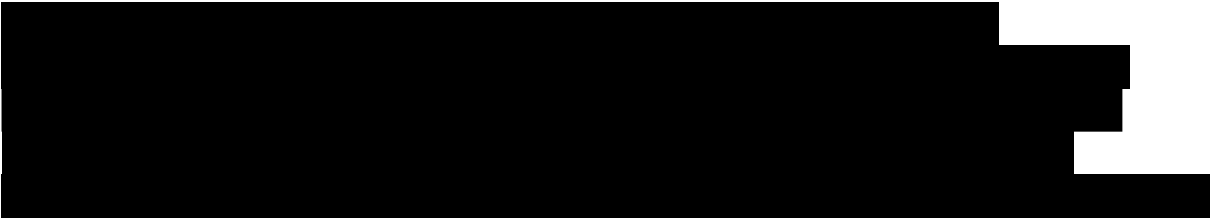
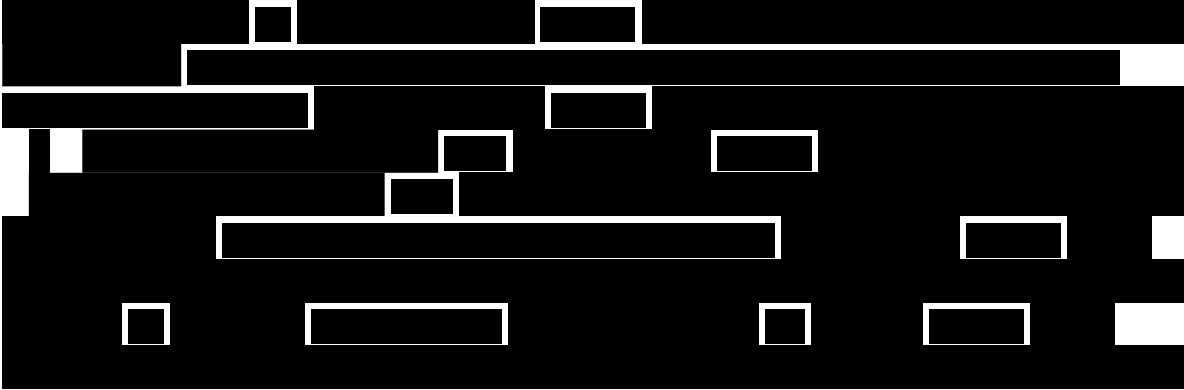
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A. SUMMARY OF THE CASE

1. As early as December 2006, WILLIAM SAMOEI RUTO (“RUTO”) and HENRY KIPRONO KOSGEY (“KOSGEY”), prominent leaders of the Orange Democratic Movement (“ODM”) political party, began preparing a criminal plan to attack those identified as supporters of the Party of National Unity (“PNU”).¹ JOSHUA ARAP SANG (“SANG”), a prominent ODM supporter, was a crucial part of the plan, using his radio program to collect supporters and provide signals to members of the plan on when and where to attack. To reach their goal, RUTO, KOSGEY and SANG coordinated a series of actors and institutions to establish a network, using it to implement an organizational policy to commit crimes. Their two goals were: (1) to gain power in the Rift Valley Province, Kenya (“Rift Valley”), and ultimately in the Republic of Kenya, and (2) to punish and expel from the Rift Valley those perceived to support the PNU (collectively referred to as “PNU supporters”).

2. Kenyans voted in the presidential election on 27 December 2007. On 30 December 2007, the Electoral Commission of Kenya declared that Mwai Kibaki, presidential candidate for the PNU, had won the election. The announcement triggered one of the most violent periods in Kenya’s history. The Prosecution will present some of the incidents, identifying those who are most responsible.

3. Thousands of members of the network (“perpetrators”) cultivated by RUTO, KOSGEY and SANG began to execute their plan by attacking PNU supporters immediately after the announcement of the presidential election results on 30 December 2007. On 30-31 December 2007, they began attacks in target locations including Turbo town, the greater Eldoret area (Huruma, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town. They approached each location from all directions, burning down PNU supporters’ homes and businesses, killing civilians, and systematically driving them from their homes. On 1 January 2008, the church located on the Kiambaa farm cooperative was attacked and burned with more

¹ This is a coalition of parties including the Kenya African National Union (“KANU”), Ford-Kenya, Ford-People, Democratic Party and the National Alliance Party of Kenya.

than one hundred people inside. At least 17 people died. The brunt of the attacks continued into the first week of January 2008.

4. All identified attacks occurred in a uniform fashion. Perpetrators gathered at designated meeting points outside of locations selected for attack. There, they met coordinators, who organized the perpetrators into groups with assigned tasks. Perpetrators then attacked target locations. Some perpetrators approached on foot, while others were driven in trucks, as had been previously arranged. SANG helped coordinate the attacks using coded language disseminated through radio broadcasts.

5. In response to RUTO, KOSGEY and SANG's planned attacks on PNU supporters, as well as to deal with protests organized by the ODM, prominent PNU members and/or Government of Kenya officials FRANCIS KIRIMI MUTHAURA ("MUTHAURA"), UHURU MUIGAI KENYATTA ("KENYATTA"), and MOHAMMED HUSSEIN ALI ("ALI") developed and executed a plan to attack perceived ODM supporters in order to keep the PNU in power.

6. First, under the authority of the National Security Advisory Committee, of which MUTHAURA and ALI were Chairman and a member, respectively, the Kenya Police, in joint operations with the Administration Police ("Kenyan Police Forces"), were deployed into ODM strongholds where they used excessive force against civilian protesters in Kisumu (Kisumu District, Nyanza Province) and in Kibera (Kibera Division, Nairobi Province). As a consequence, between the end of December 2007 and the middle of January 2008, the Kenyan Police Forces indiscriminately shot at and killed more than a hundred ODM supporters in Kisumu and Kibera.

7. Second, MUTHAURA, KENYATTA and ALI also developed a different tactic to retaliate against the attacks on PNU supporters. On or about 3 January 2008, KENYATTA, as the focal point between the PNU and the Mungiki criminal organization, facilitated a meeting with MUTHAURA, a senior Government of Kenya official, and Mungiki leaders to organize retaliatory attacks against civilian supporters of the ODM. Thereafter, MUTHAURA, in his capacity as Chairman of the National Security Advisory Committee, telephoned ALI, his subordinate as head of the Kenya Police, and instructed ALI not to interfere with the movement of pro-PNU

youth, including the Mungiki. KENYATTA additionally instructed the Mungiki leaders to attend a second meeting on the same day to finalize logistical and financial arrangements for the retaliatory attacks.

8. As a consequence, the Mungiki and pro-PNU youth attacked ODM civilian supporters in Nakuru (Nakuru District, Rift Valley Province) and Naivasha (Naivasha District, Rift Valley Province) during the last week of January 2008. During these attacks, the attackers identified ODM supporters by going from door to door and by setting up road blocks for intercepting vehicles, killing over 150 ODM supporters.

9. The violence resulted in more than 1,100 people dead, 3,500 injured, approximately 600,000 victims of forcible displacement, at least hundreds of victims of rape and sexual violence and more than 100,000 properties destroyed in six out of eight of Kenya's provinces. Many women and girls perceived as supporting the ODM were raped.

B. RELIEF SOUGHT

10. Pursuant to Article 58(1) of the Rome Statute, the Prosecution hereby applies to Pre-Trial Chamber II for the issuance of summonses to appear against RUTO, KOSGEY and SANG. Upon investigation of the crimes committed in the territory of the Republic of Kenya from 30 December 2007 through January 2008, the Prosecution has concluded that there are reasonable grounds to believe that RUTO, KOSGEY and SANG bear criminal responsibility under Article 25 of the Rome Statute for murder, torture, deportation or forcible transfer, and persecution based on political affiliation as crimes against humanity.

11. The Prosecution files this Application together with an Application for summonses to appear for MUTHAURA, KENYATTA and ALI, arising out of its investigation into the Situation in the Republic of Kenya. The two applications concern crimes that are interlinked, allegedly committed to prevent government actions or to retaliate against members of the opposition.

12. If the summonses are issued, the Prosecution considers that it will be necessary that the Chamber take into consideration the circumstances of both cases in its ruling and to decide on both cases at the same time. In the event that the Applications are granted and the charges are confirmed in both cases, the Prosecution will request that the cases be joined and decided by the same Trial Chamber.

C. STANDARD OF PROOF

13. Article 58(7) of the Rome Statute states that “the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons [...]. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged [...].”

14. Applying the same standard, the Appeals Chamber in *Prosecutor v. Omar Hassan Ahmad Al Bashir* ruled that the standard of “reasonable grounds to believe” under Article 58(1) is met where one of the reasonable conclusions available on materials provided by the Prosecution substantiates allegations concerning the responsibility of a person for a crime charged.² Hence, where the Prosecution relies on proof by inference, it is sufficient to show that one of the reasonable inferences to be drawn from the evidence submitted is that a person has committed a crime within the jurisdiction of the Court.

15. The Prosecution relies on proof by inference to minimize the risk to victims and witnesses at this stage of the proceedings. The individuals identified as most responsible, in particular MUTHAURA, occupy positions of authority within the Government of Kenya, and thus have the ability to interfere with individuals possessing information relevant to the post-election violence (“PEV”). In addition, because most victims of the crimes remain in Kenya, they remain vulnerable to threats, bribes, intimidation and/or retaliatory attacks.

² *Prosecutor v. Omar Hassan Ahmad Al Bashir*, 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”, 30 February 2010, ICC-02/05-01/09-73, paras. 1, 30. The standard of “reasonable grounds to believe” is also applicable to an application for a summons to appear under Article 58(7).

D. CONCISE STATEMENT OF THE FACTS PURSUANT TO ARTICLE 58(2)(c) OF THE ROME STATUTE

16. The Rift Valley, one of eight provinces in Kenya, was the epicentre of violence that followed the 2007 general election. It suffered the greatest number of victims, including over 700 deaths, the largest share of the injuries, and approximately 600,000 forcibly displaced persons. The violence that erupted in the Rift Valley was not spontaneous; rather, it was the product of planning and coordination led by RUTO, together with KOSGEY and SANG.

17. RUTO and KOSGEY were both senior ODM politicians. RUTO was a member of the five-person ODM leadership structure called the Pentagon. KOSGEY was the Chairman of ODM. RUTO and KOSGEY were running for re-election for the position of Member of Parliament ("MP") in their respective constituencies. SANG, while not a politician, was a prominent member of the community, due to his position as a broadcaster on the most popular vernacular radio station, Kass FM. SANG was a vocal supporter of ODM and its candidates.

18. In anticipation of the 2007 presidential election, RUTO, KOSGEY and SANG created a plan to expel PNU supporters from the Rift Valley in the event that the election were rigged. This plan would have the twofold effect of punishing PNU supporters and removing PNU supporters from the Rift Valley to gain power by creating a future pro-ODM voting block.

19. To execute this plan, RUTO, with KOSGEY and SANG, created a Network of perpetrators from existing structures in the Rift Valley ("the Network"). The Network consisted of: pro-ODM political figures; media representatives, particularly SANG in his role as a prominent host on Kass FM; financiers; regional tribal Elders; and former members and leaders of Kenyan police and military sectors.

20. In the year before the 2007 election, RUTO, KOSGEY and SANG organized the Network to plan, coordinate and later execute attacks on perceived PNU supporters in the Rift Valley. At a series of meetings, rallies and other events, they planned and incited attacks, and distributed resources to subordinate members of the Network who would physically execute the attacks.

21. At these meetings, RUTO, with KOSGEY and SANG, coordinated the Network by: (1) selecting Commanders to oversee specific areas in the Rift Valley, (2) creating a hierarchy below each Commander, (3) coordinating transportation and logistics, (4) coordinating the dissemination of meeting locations, (5) fundraising, (6) distributing RUTO's money and promising rewards for every PNU supporter killed or property destroyed, (7) paying direct perpetrators, (8) identifying target areas, and (9) providing guns, grenades and ammunition to the perpetrators to ensure that they had the necessary resources to succeed. Members of the Network were indoctrinated to believe that Kibaki's administration planned to rig the presidential election, and to attack groups perceived to support the PNU if the elections were rigged.

22. Kenyans voted in the presidential election on 27 December 2007. At 5:30 p.m. on 30 December 2007, the Electoral Commission of Kenya ("ECK") declared that Kibaki had won the election. The circumstances of his victory were hotly contested by ODM.

23. Immediately following the announcement of the presidential election results, the Network began to execute attacks against PNU supporters in various locations in Uasin Gishu and Nandi Districts, including Turbo town, the greater Eldoret area (Kiambaa, Yamumbi, Haruma, Kimumu and Langas), Kapsabet town, and Nandi Hills town, with the intent to expel them from the Rift Valley. The brunt of the attacks occurred from 30 December 2007 through the first week of January 2008. The crimes that are the subject of this Application occurred predominantly within a 25 kilometre radius of a house that RUTO owns in Sugoi (Uasin Gishu District), where he held meetings to plan the attacks.

24. The Network's attacks that are the subject of this Application occurred in a uniform fashion. Perpetrators gathered at designated meeting points outside of locations selected for attack, where they met their Coordinators. After the Coordinators organized the perpetrators into groups with assigned tasks, the attacks were executed. While some perpetrators approached on foot, trucks, previously arranged, often drove them to designated points of attack. SANG used coded language disseminated through radio broadcasts to help coordinate the attacks.

25. After establishing roadblocks at all major roads around towns, including Kapsabet town, Eldoret, Turbo town, and Nandi Hills town, perpetrators attacked and burned properties previously identified as belonging to perceived PNU supporters. They also killed some perceived PNU supporters. The attacks sent hundreds to thousands of PNU supporters fleeing to nearby police stations and churches for refuge. Perpetrators at roadblocks and those executing attacks demanded identification exposing victims' membership in ethnic groups believed to support PNU. Those from the groups perceived to support PNU were attacked and in some instances killed on the spot.

26. The Prosecution submits that on the basis of available evidence, and without prejudice to other possible crimes within the jurisdiction of the Court, there are reasonable grounds to believe that during the PEV, including but not limited to the time period between 27 December 2007 and the end of January 2008, RUTO, KOSGEY and SANG, committed the following crimes against humanity: murder under Article 7(1)(a) of the Statute; deportation or forcible transfer of population under Article 7(1)(d) of the Statute; torture under Article 7(1)(f) of the Statute; and persecution based on political affiliation under Article 7(1)(h) of the Statute.

27. The Prosecution further submits that there are reasonable grounds to believe that the requirements of direct/indirect co-perpetration or of common purpose criminal liability pursuant to Article 25(3)(a) or (d) have been met.

28. The Prosecution incorporates by reference Sections G.2, G.3, and G.4, below, into the Concise Statement of Facts. These sections provide a more detailed explanation of the Network, the planning meetings, rallies and other events, the attacks, and the roles of RUTO, KOSGEY and SANG.

E. PERSONS REQUESTED TO APPEAR (ARTICLE 58(2)(A))

29. The Prosecution applies to Pre-Trial Chamber II for the issuance of summonses to appear for three persons: William Samoei RUTO, Henry Kiprono KOSGEY, and Joshua Arap SANG.³

1. William Samoei RUTO

30. William Samoei RUTO was born 21 December 1966 in Kamagut village, Uasin Gishu District, Rift Valley Province, the Republic of Kenya. He is Kalenjin. He is married with several children,⁴ and owns at least one home in Sugoi, located in the Eldoret North constituency.⁵

31. RUTO attended primary school in Kamagut, and secondary schools in Wareng (Uasin Gishu District) and Kapsabet (Nandi District).⁶ Thereafter, he attended the University of Nairobi.⁷ RUTO is fluent in English, Swahili and Kalenjin.⁸

32. RUTO's political career began in 1992, while he attended the University of Nairobi. At that time, he became a leading member of Youth for KANU '92, a group formed to support former Kenyan President Daniel Arap MOI in the 1992 elections. His political career continued when he was elected MP for the Eldoret North

³ See Annex 2, Photographs of Suspects.

⁴ Website www.williamruto.com, page "About William Ruto", as of 23 November 2007, retrieved through Internet Archive, KEN-OTP-0046-0010 at 0011; Lynch, G., "Courting the Kalenjin: The failure of dynasticism and the strength of the ODM wave in Kenya's Rift Valley Province", *African Affairs*, 107/429 (2008), 541-568, KEN-OTP-0046-0014 at 0020 p. 553.

⁵ ICC statement of W-0026, KEN-OTP-0045-0094 at 0104 paras. 26-27. For maps of Kenya Provinces, Rift Valley Districts, and Uasin Gishu Constituencies & Main Towns, see Annex 3. For a detailed Map of Uasin Gishu and Nandi Districts, see Annex 4. *Note*: W-0026 is William Samoei RUTO. The Prosecution interviewed RUTO in The Hague from 4-6 November 2010. During this interview, RUTO denied any involvement in the 2007 post-election violence, indicating that witnesses against him were biased or of "questionable integrity and standing", and that he had previously been denied an opportunity to be heard by commissions investigating the violence. His statement has not been attached as an annex, but has been cited herein where relevant.

⁶ Website www.williamruto.com, page "About William Ruto", as of 23 November 2007, retrieved through Internet Archive, KEN-OTP-0046-0010 at 0011.

⁷ Website www.williamruto.com, page "About William Ruto", as of 23 November 2007, retrieved through Internet Archive, KEN-OTP-0046-0010 at 0011.

⁸ As shown in multiple public media records.

constituency in 1997, and again in 2002 (with the Kenya African National Union, or “KANU”) and in 2007 (with the ODM).⁹

33. In addition to his position as an MP, RUTO was appointed an Assistant Minister of State in the Office of the President in 1999, and Minister of Home Affairs in 2002.¹⁰

34. Following his opposition to the constitutional referendum in 2005, RUTO and others established the ODM in the run-up to the 2007 election. RUTO was one of its most prominent leaders.¹¹ Also in 2006, RUTO publicly declared his ambition to become the President of the Republic of Kenya in the 2007 election. The ODM instead nominated Raila Odinga as their presidential candidate, while RUTO remained a member of the five-person ODM Pentagon (top party leadership).¹²

35. On 3 June 2006, RUTO was crowned a Kalenjin Elder, giving him a leading role in the Kalenjin community.¹³ In 2007 RUTO referred to his “installation as a Kalenjin Leader” to promote his campaign for President of the Republic of Kenya.¹⁴ By 2007, RUTO was “generally acknowledged to be the most important Kalenjin politician” and “the principal Kalenjin spokesman”.¹⁵

⁹ ICC statement of W-0026, KEN-OTP-0045-0094 at 0101 para. 4; Website www.williamruto.com, page “About William Ruto”, as of 23 November 2007, retrieved through Internet Archive, KEN-OTP-0046-0010.

¹⁰ ICC statement of W-0026, KEN-OTP-0045-0094 at 0101, para. 7; Website www.williamruto.com, page “About William Ruto”, as of 23 November 2007, retrieved through Internet Archive, KEN-OTP-0046-0010.

¹¹ ICC statement of W-0026, KEN-OTP-0045-0094 at 0101-0102, para. 7; Lynch, G., “Courting the Kalenjin: The failure of dynasticism and the strength of the ODM wave in Kenya’s Rift Valley Province”, *African Affairs*, 107/429 (2008), 541-568, KEN-OTP-0046-0014 at 0020 p. 553.

¹² ICC statement of W-0026, KEN-OTP-0045-0094 at 0102, para. 8; Human Rights Watch, “Ballots to Bullets, Organized Political Violence and Kenya’s Crisis of Governance”, March 2008 (attached hereto as Annex 5), KEN-OTP-0001-0248 at 0289; International Crisis Group, “Kenya in Crisis”, Africa Report N° 137 - 21 February 2008 (attached hereto as Annex 6), KEN-OTP-0001-1076 at 1082.

¹³ “Pomp, Colour As Ruto Is Installed As Kalenjin Elder”, *The Standard*, 4 June 2006, KEN-OTP-0045-0020 at 0020; Barasa, L. and Ng’etich, P., “Ruto Made Elder Amid Calls to Kick Out Uhuru”, *Daily Nation*, 4 June 2006, KEN-OTP-0045-0021 at 0021; Audio recording of ICC interview with witness W-0015, KEN-OTP-0035-0020, timestamp 41:30-45:10.

¹⁴ Website www.williamruto.com, page “About William Ruto”, as of 23 November 2007, retrieved through Internet Archive, KEN-OTP-0046-0010 at 0010.

¹⁵ Lynch, G., “Courting the Kalenjin: The failure of dynasticism and the strength of the ODM wave in Kenya’s Rift Valley Province”, *African Affairs*, 107/429 (2008), 541-568, KEN-OTP-0046-0014 at 0020 p. 553; ICC statement of W-0024, KEN-OTP-0044-0003 at 0020 para. 119.

36. During the 2007 election, RUTO again ran for MP from Eldoret North constituency, and won his seat.¹⁶

37. In April 2008, RUTO was appointed Minister of Agriculture in the Grand Coalition Government. In April 2010 he was transferred to become Minister of Higher Education, Science and Technology, until October 2010 when he was suspended from this position.¹⁷

2. Henry Kiprono KOSGEY

38. Henry Kiprono KOSGEY was born in 1947.¹⁸ He is Kalenjin.¹⁹ He holds a Bachelor's Degree in Science (B.Sc. Hon.) from the University of Nairobi.²⁰ At the time of the PEV, KOSGEY owned a house in Nandi Hills, within Tinderet Constituency.²¹

39. KOSGEY was first elected to serve as the MP from Tinderet Constituency in Nandi District, Rift Valley Province in 1979. He was re-elected in 1983, and, after losing the 1987 election, he was repeatedly re-elected from 1992-2007.²² Like RUTO, in 2007 KOSGEY was also up for re-election, winning his seat.²³

¹⁶ ICC statement of W-0026, KEN-OTP-0045-0094 at 0101.

¹⁷ "Organization of the Government of the Republic of Kenya", Presidential Circulate No.1/2008, Office of the President (Naibori), May 2008, KEN-OTP-0033-0357 at 0358, 0369; "Speech by H.E. President Mwai Kibaki, During the Announcement of the Grand Coalition Government", 13 April 2008, KEN-OTP-0033-0396 at 0400; Kariuki, A., "Ruto moved in Kenya Cabinet Shuffle", Daily Nation, 22 April 2010, KEN-OTP-0033-0404 at 0404; "Acting Minister", Ministry for Higher Education, Science & Technology, KEN-OTP-0033-0406 at 0406; ICC statement of W-0026, KEN-OTP-0045-0094, at 0102 para. 11.

¹⁸ "Kenya – Henry Kosgey – Minister of Education", official biography posted on the UNESCO website, KEN-OTP-0045-0194.

¹⁹ International Crisis Group, "Kenya in Crisis", Africa Report N° 137 - 21 February 2008, KEN-OTP-0001-1076 at 1082; ICC statement of W-0019, KEN-OTP-0031-0085 at 0108 para. 167.

²⁰ "Kenya – Henry Kosgey – Minister of Education", official biography posted on the UNESCO website, KEN-OTP-0045-0194.

²¹ ICC statement of W-0024, KEN-OTP-0044-0003 at 0013 paras. 80-81; Exhibit 7 associated with the ICC statement of W-0024, KEN-OTP-0044-0041 at 0041.

²² "Kenya – Henry Kosgey – Minister of Education", official biography posted on the UNESCO website, KEN-OTP-0045-0194 at 0194; Kihoro, W., "Politics and Parliamentarians in Kenya 1944-2007", Center for Multiparty Democracy: Nairobi, 2007, KEN-OTP-0033-0138 at 0141; "Henry Kiprono Kosgey", KEN-OTP-0045-0195 at 0195.

²³ ICC statement of W-0024, KEN-OTP-0044-0003 at 0015 para. 95; Party of National Unity, "Descending into the Abyss of Genocide: A PNU account of the Kenya's post-2007 election violence", 09 September 2008, KEN-OTP-0016-0299 at 0417; International Crisis Group, "Kenya in Crisis", Africa Report N° 137 - 21 February 2008, KEN-OTP-0001-1076 at 1082.

40. Also like RUTO, through the 2002 election, KOSGEY was a candidate of KANU. In 2005, KOSGEY also opposed the new constitution, and in 2006, along with RUTO, he joined the leadership of ODM.²⁴ KOSGEY is currently the Chairman of the ODM.²⁵

41. The ministerial positions KOSGEY has held include: Minister for Transport and Communications (1980-1985); Minister for Cooperative Development (1985-1986); Minister for Culture and Social Services (1987-1988); Minister for Environment and Natural Resources (1996-1997); Minister for Tourism (1998-1999); Minister for Science and Technology (1999-2001); Minister for Education (2001-2006); and, since the establishment of the Grand Coalition Government in 2008, Minister of Industrialization.²⁶

3. Joshua Arap SANG

42. Joshua Arap SANG²⁷ is from Kitale, Trans-Nzoia District, Rift Valley Province.²⁸ He is Kalenjin.²⁹ He attended Kitale Academy Secondary School, from which he graduated in 1993, and Kenya Institute of Mass Communication, from which he graduated in 2006.³⁰

43. From 2005 through the present, SANG has been a radio broadcaster on Kass FM.³¹ Before to joining Kass FM in 2005, SANG worked at Sayare radio station, and

²⁴ International Crisis Group, "Kenya in Crisis", Africa Report N° 137 - 21 February 2008, KEN-OTP-0001-1076 at 1082; ICC statement of W-0019, KEN-OTP-0031-0085 at 0088 para. 17; Kihoro, W., "Politics and Parliamentarians in Kenya 1944-2007", Center for Multiparty Democracy: Nairobi, 2007, KEN-OTP-0033-0138 at 0141.

²⁵ E.g. Ndegwa, A., "Squaring it out", The Standard, 23 February 2010, KEN-OTP-0046-0004 at 0004.

²⁶ "Kenya – Henry Kosgey – Minister of Education", official biography posted on the UNESCO website, KEN-OTP-0045-0194 at 0194; "Organization of the Government of the Republic of Kenya", Presidential Circulate No.1/2008, Office of the President (Naibori), May 2008, KEN-OTP-0033-0357 at 0358, 0384-0385; "Speech by H.E. President Mwai Kibaki, During the Announcement of the Grand Coalition Government", 13 April 2008, KEN-OTP-0033-0396 at 0401.

²⁷ Also known as "Joshua SANG". See video, "Kass FM, Joshua Arap SANG", KEN-OTP-0045-0039 (attached hereto as Annex 7) (SANG gives his name and explains about his work with Kass FM, including his role as host of "Lene Emet").

²⁸ Facebook Profile for "Joshua Sang", 18 August 2010, KEN-OTP-0045-0201 at 0201.

²⁹ ICC statement of W-0016, KEN-OTP-0029-0131 at 0146 para. 101.

³⁰ "joshua kirwa sang (arap sang)", Graduates.com, 25 October 2010, KEN-OTP-0045-0199.

³¹ PNU, "Descending into the Abyss of Genocide: A PNU Account of the Kenya's Post-2007 Election Violence", August-September 2008, KEN-OTP-0016-0299 at 0323; Audio recording of ICC interview

then Biblia Husema Broadcasting until 2005,³² when he joined Kass FM. He is now reportedly the head of operations at Kass FM in Nairobi³³ and resides there.

44. Since the 2005 constitutional referendum campaign period,³⁴ SANG has hosted a call-in program on Kass FM called “Lene Emet”³⁵ (“*How is the country?*” or “*This is what the world says*” or “*what is the opinion of the country?*”).³⁶ SANG airs the views of callers on various topics.³⁷ To date, SANG continues to host “Lene Emet”.³⁸

45. SANG is connected with other Kalenjin organizations and the Kalenjin diaspora. He attended major events in 2007 and 2008 hosted by the Emo Foundation,³⁹ a Kalenjin organization, where he was called “the famous Kass FM presenter”.⁴⁰

with witness W-0015, KEN-OTP-0035-0020, timestamp 12:00-21:08; ICC statement of W-0016, KEN-OTP-0029-0131 at 0146 para. 101; ICC statement of W-0019, KEN-OTP-0031-0085 at 0089 para. 28.

³² “joshua kirwa sang (arap sang)”, Graduates.com, 25 October 2010, KEN-OTP-0045-0199 at 0199; Audio recording of ICC interview with witness W-0028, KEN-OTP-0036-0025, timestamp 14:41-15:25 (spelled “Sayari”).

³³ “Kass FM, Joshua Arap SANG”, KEN-OTP-0045-0039; “joshua kirwa sang (arap sang)”, Graduates.com, 25 October 2010, KEN-OTP-0045-0199 at 0199; Facebook Profile for “Joshua Sang”, 18 August 2010, KEN-OTP-0045-0201 at 0201.

³⁴ ICC statement of W-0019, KEN-OTP-0031-0085 at 0089 para. 28.

³⁵ Witnesses have also spelled the show *Le Nee Emet*, *Lee Ne Emet*, *Leneemet* or *Lee Nee Emet*. The spelling used in this report is that used on the Kass FM website’s “Programme Lineup”, KEN-OTP-0046-0002, available online at <http://www.kassfm.co.ke/kassfm/programme-line-up> (last accessed 18 November 2010).

³⁶ Audio recording of ICC interview with witness W-0015, KEN-OTP-0035-0020, timestamp 12:00-21:08; ICC statement of W-0016, KEN-OTP-0029-0131 at 0146 para. 101; ICC statement of W-0024, KEN-OTP-0044-0003 at 0012 para. 79 (describing “Lene Emet” but not discussing Joshua SANG; indicating that “Lene Emet” means “what is the opinion of the country?”); Audio recording of ICC interview with witness W-0028, KEN-OTP-0036-0024, timestamp 23:00-24:05.

³⁷ Audio recording of ICC interview with witness W-0015, KEN-OTP-0035-0020, timestamp 12:00-21:08; ICC statement of W-0016, KEN-OTP-0029-0131 at 0146 paras. 101, 106; Audio recording of ICC interview with witness W-0024, KEN-OTP-0044-0124, Track 1, timestamp 52:21-55:12; Audio recording of ICC interview with witness W-0024, KEN-OTP-0044-0125, Track 1, timestamp 39:50-41:03.

³⁸ “Programme Lineup”, Kass FM, KEN-OTP-0046-0002 at 0002, available online at <http://www.kassfm.co.ke/kassfm/programme-line-up> (last accessed 18 November 2010); Audio recording of ICC interview with witness W-0028, KEN-OTP-0036-0025, timestamp 33:38-35:28.

³⁹ Also called the “Emo Society” or “Emo”.

⁴⁰ Misoy, K., “EMO pledge to complete Leseru AIC church”, Emo Media, 27/10/2008, KEN-OTP-0027-0235 at 0236; Misoy, K., “Tumdo Rite of Passage”, Emo Media, 21/12/2008, KEN-OTP-0027-0223 at 0223-0224; Misoy, K., “Sparkle of Renaissance for Community”, Emo Media, 01/01/2009, KEN-OTP-0027-0225 at 0225. For more about the Emo Foundation, see paragraphs 73, 91, 92, 95, 97 and 116, below.

F. CRIMES WITHIN THE JURISDICTION OF THE COURT WHICH WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG HAVE COMMITTED PURSUANT TO ARTICLE 58(2) OF THE ROME STATUTE

Count 1

Murder constituting a crime against humanity

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

From 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY, and JOSHUA ARAP SANG, as co-perpetrators, or in the alternative, as part of a group of persons acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of murder in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(a) or (d) of the Rome Statute.

Count 2

**Deportation or forcible transfer of population
constituting a crime against humanity**

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

From 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY and JOSHUA ARAP SANG as co-perpetrators, or in the alternative, as part of a group of persons acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of deportation or forcible transfer of population in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya in violation of Articles 7(1)(d) and 25(3)(a) or (d) of the Rome Statute.

Count 3**Torture constituting a crime against humanity**

(Article 7(1)(f) and Article 25(3)(a) or (d) of the Rome Statute)

From 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY and JOSHUA ARAP SANG, as co-perpetrators, or in the alternative as part of a group of persons acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of torture by inflicting severe physical or mental pain or suffering upon civilians, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, and Langas), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(f) and 25(3)(a) or (d) of the Rome Statute.

Count 4**Persecution as a crime against humanity**

(Article 7(1)(h) and Article 25(3)(a) or (d) of the Rome Statute)

From 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY and JOSHUA ARAP SANG as co-perpetrators, or in the alternative as part of a group of persons acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, torture, and deportation or forcible transfer of population, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(a) or (d) of the Rome Statute.

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H. BACKGROUND TO INVESTIGATION/ LEGAL FRAMEWORK

1. Procedural History

204. By letter dated 5 November 2009, the Prosecutor notified the President of the Court, in accordance with Regulation 45 of the Regulations of Court, of his intent to submit a request for the authorisation of an investigation pursuant to Article 15(3) of the Rome Statute.

205. On 6 November 2009, the Presidency of the Court assigned the situation in the Republic of Kenya to Pre-Trial Chamber II.²⁸⁰

206. On 26 November 2009, the Prosecutor filed the Request for authorization to proceed with an investigation (“Request”) into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008.²⁸¹

207. On 31 March 2010, Pre-Trial Chamber II granted the Prosecution’s Request, and an investigation was initiated immediately thereafter.²⁸²

2. Issues of Victim and Witness Protection

208. Security issues regarding victims and witnesses are addressed in Annex 18.

3. Admissibility

209. The case against RUTO, KOSGEY and SANG is admissible. The information reviewed by the Prosecution indicates that there are no ongoing investigations or prosecutions by any State in relation to the conduct that forms the subject of the Prosecution’s Application against RUTO, KOSGEY and SANG.²⁸³ Moreover, on the basis of the evidence relied on in this Application, the case is of sufficient gravity to

²⁸⁰ *Situation in the Republic of Kenya*, Decision Assigning the Situation in the Republic of Kenya to Pre-trial Chamber II, 6 November 2009, ICC-01/09-1.

²⁸¹ *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010, ICC-01/09-3.

²⁸² *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19.

²⁸³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, 25 September 2009, ICC-01/04-01/07-1497 OA 8, para. 78.

justify further action by the Court, as shown by the description of the planning and the crimes in Sections G.2 and G.3.

I. The case has not been and is not being investigated or prosecuted by a State which has jurisdiction over it, in accordance with Article 17(1) (a) and (b) of the Rome Statute

210. In *Lubanga*, Pre-Trial Chamber I held that “it is a condition *sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.”²⁸⁴ As reflected below, no investigation or prosecution has been undertaken in any State in relation to the conduct which forms the subject of this Application. While there has been domestic activity in relation to other individuals and their responsibility for acts that occurred in the PEV, those situations are irrelevant to this case.

211. The crimes identified in this Application were committed on the territory of the Republic of Kenya. According to the information reviewed by the Prosecution, no investigations or prosecutions have been or are being undertaken against RUTO, KOSGEY or SANG for the incidents described herein.

II. The case has not been tried before any national or international jurisdiction for conduct which is the subject of the Prosecution’s Application, in accordance with Articles 17 (1)(c) and 20 (3) of the Rome Statute.

212. According to information reviewed by the Prosecution, there has been no trial held before any competent national jurisdiction for the conduct that is the subject of this Application.

4. Request for Confidentiality

213. Pursuant to Rule 23*bis*, the Prosecution requests that Sections C, G and H and Annexes 1-11 and 15-19 be received by the Pre-Trial Chamber confidential *ex parte*

²⁸⁴ *Prosecutor v. Lubanga*, Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/06-8-Corr, 24 February 2006, paras. 30-40.

and remain confidential ex parte for two reasons: (1) to protect ongoing investigations and (2) to protect victims and witnesses.

214. The Prosecution will simultaneously file a public redacted version revealing Sections A,B, D-F, I and J, as well as Annexes 12, 13, and 14, only.

I. REQUEST FOR SUMMONSES TO APPEAR FOR WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG PURSUANT TO ARTICLE 58(7) OF THE ROME STATUTE

215. Pursuant to Article 58 of the Rome Statute, if the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that a person has committed crimes within the jurisdiction of the Court, the Pre-Trial Chamber may issue, upon the Application of the Prosecution, either a warrant of arrest or a summons to appear.

216. To decide on the merits of these two options, the Prosecution is obligated to assess all of the information gathered during the investigation. In addition, its assessment and request involve an element of predicting the likelihood of future events. All of the information in this Application may bear upon the evaluation of these factors.

217. Regarding the location of RUTO, KOSGEY and SANG, the Prosecution has information indicating that RUTO, KOSGEY and SANG reside on the territory of the Republic of Kenya.

218. If the Chamber grants the Prosecution's Application, the Prosecution, at this time, believes that summonses to appear are sufficient to ensure the appearance of RUTO, KOSGEY and SANG. None of the three suspects are perceived to be a flight risk. All three suspects have prominent leadership status in Kenyan society. At the present time, there is no indication that they would evade personal service of the summonses.

219. Pursuant to Article 58(7) and Rule 119, the following conditions are requested for the three suspects summoned to appear:

- To provide the Chamber with all residential addresses and telephone numbers. The suspects shall verify the accuracy of this information (to the Registry) on a bi-monthly basis. Any change in the information provided shall be immediately reported to the Registry;
- To have no contact with the other suspects personally, by telephone (including, but not limited to, Skype or sms), in writing or through intermediaries, except through counsel for lawful purposes;
- To have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes in the Rift Valley;
- To refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence;
- To refrain from committing crime(s) set forth in Kenyan law or the Rome Statute;
- To timely respond to any request by the Chamber;
- To attend all required hearings at the International Criminal Court; and
- To post a bond or provide real or personal security or surety, as the Chamber deems fit.

220. In the event that current information indicating that bribes, intimidation and threats have occurred is confirmed, the Prosecution reserves the right to recommend the issuance of warrants of arrest.

221. Since April 2010 to date, RUTO has been in contact with the Prosecution, voicing his willingness to cooperate with the investigation. Further, in November 2010, RUTO voluntarily came to The Hague, the Netherlands to meet with the Prosecution. Upon his return to Kenya, RUTO confirmed that his contact with the Prosecution was positive, and that he had the opportunity to provide his version of the facts.²⁸⁵

²⁸⁵ "Ruto returns, but no word from Ocampo", Daily Nation, 8 November 2010, KEN-OTP-0046-0032.

222. The Prosecution does not possess similar information as to KOSGEY or SANG. Neither has made public announcements on this matter. However, there is no indication that they would not cooperate if summoned to appear.

223. Thus, at this stage, the Prosecution considers the issuance of summonses to appear sufficient to ensure the appearance of the three identified suspects.

J. CONCLUSION

224. For the reasons stated above, the Prosecution respectfully requests that Pre-Trial Chamber II:

- a. Find that there are reasonable grounds to believe that WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY and JOSHUA ARAP SANG committed crimes within the jurisdiction of the International Criminal Court and find that the issuance of summonses to appear is appropriate;
- b. Issue summonses to appear for WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY and JOSHUA ARAP SANG; and
- c. Direct the Registry, in consultation and coordination with the Prosecution, to prepare and transmit a request for summonses to appear for WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY and JOSHUA ARAP SANG.



Luis Moreno-Ocampo, Prosecutor

Dated this 15 December 2010

At The Hague, the Netherlands