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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 Francis Kirimi Muthaura,
Uhuru Muigai Kenyatta and Mohammed Hussein Ali**

Source: Office of the Prosecutor

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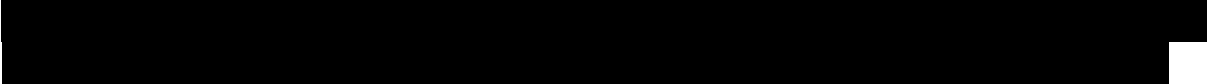
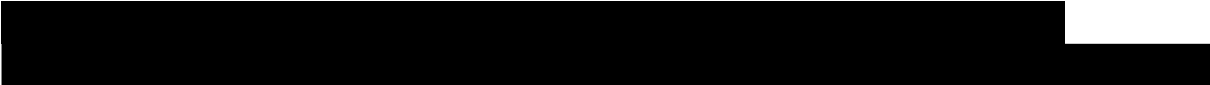



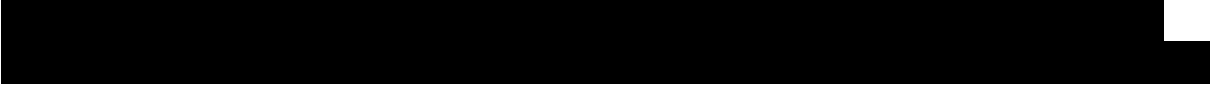
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A. SUMMARY OF THE CASE

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 Prosecutor hereby applies to Pre-Trial Chamber II for the issuance of summonses to appear against MUTHAURA, KENYATTA and ALI. Upon investigation of the crimes committed in the territory of Kenya from 27 December 2007 through 29 February 2008, the Prosecutor has concluded that there are reasonable grounds to believe that MUTHAURA, KENYATTA and ALI bear criminal responsibility under Article 25 of the Rome Statute for multiple crimes against humanity.

11. The Prosecution files this Application together with an Application for summonses to appear for RUTO, KOSGEY and SANG, 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,

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).

because most victims of the crimes remain in Kenya, they remain vulnerable to threats, bribes, intimidation and/or retaliatory attacks.

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

16. In response to attacks directed against PNU supporters in the Rift Valley, and in order to deal with protests organized by the ODM, prominent PNU members and/or Government of Kenya officials, MUTHAURA, KENYATTA and ALI (“Principal Perpetrators”), adopted and implemented a common plan to attack civilians perceived to support the ODM. The attacks were designed to consolidate the PNU’s hold on power by suppressing and crushing any protests by ODM supporters and penalizing ODM’s supportive communities.

17. MUTHAURA and ALI utilized the Kenyan Police Forces to perpetrate attacks against ODM supporters in Kisumu and Kibera between the end of December 2007 and middle of January 2008 in order to suppress any protests by them. With the support of ALI, MUTHAURA and KENYATTA also used the Mungiki, a criminal organization, and pro-PNU youth to perpetrate the attacks against ODM supporters in Nakuru and Naivasha during late January 2008.

18. The contributions of MUTHAURA, KENYATTA and/or ALI to the implementation of the common plan includes: (1) adopting the plan; (2) procuring the services of the Mungiki and pro-PNU youth; (3) providing the Mungiki and pro-PNU youth with logistical and other support; (4) authorizing the Kenyan Police Forces to participate in some attacks and not to intervene in other attacks; and (5) authorizing the Kenyan Police Forces and the Mungiki and pro-PNU youth to implement the common plan.

19. The activation, mobilization and coordination of the Kenyan Police Forces and the Mungiki and pro-PNU youth by the Principal Perpetrators was essential to the commission of the widespread and systematic attacks against perceived ODM supporters. The Principal Perpetrators had the capability to commit the widespread

and systematic attacks against perceived ODM supporters. Of the eight provinces in Kenya, three provinces were particularly affected by the attacks orchestrated by the Principal Perpetrators: Rift Valley, Nairobi and Nyanza Provinces.

20. As the Head of the Public Service and Secretary to the Cabinet, MUTHAURA is at the top of the administrative hierarchy and all public servants and senior State House officials, including ALI as head of the Kenya Police, reported to him.

21. At all times relevant to the Application, MUTHAURA and ALI were members of the National Security Advisory Committee (“national security committee”) which was chaired by MUTHAURA. The national security committee is a central intelligence sharing, security advisory and coordinating body within the Kenyan government. Its composition is mirrored in the Provincial Security and Intelligence Committee (“provincial security committee”) and District Security and Intelligence Committee (“district security committee”). As Chairman and a member of the national security committee respectively, MUTHAURA and ALI were responsible for ensuring the implementation of decisions of the committee and directing the provincial and district security committees on strategic and operational matters. By virtue of his position in the security committee, MUTHAURA exercised additional authority over ALI and the Kenyan Police Forces.

22. During the PEV, MUTHAURA convened weekly or bi-weekly national security committee meetings depending on the gravity of the security situation. General strategic and operational orders from the national security committee were transmitted to the provincial security committees which were responsible for reviewing, directing and coordinating security measures at the provincial level, and these orders were then passed on to the district security committees for action at the district level.

23. In their positions as Chairman and a member of the national security committee, MUTHAURA and ALI had formal access to intelligence gathered through a vertical structure organized from the ground level (district and provincial levels) all the way up to the central level. The presence of representatives from

government administration, police and intelligence entities involved in maintaining security in the security committees at central, provincial and district levels ensured an effective intelligence and information sharing system. ALI also received daily intelligence reports prepared by the National Security and Intelligence Service.

24. Despite possessing intelligence indicating that violence would occur in specific locations across the country, MUTHAURA and ALI nevertheless utilized the Kenyan Police Forces to implement the common plan in two ways. First, they directed them to target perceived ODM supporters in attacks in Kisumu and Kibera. Second, in Nakuru and Naivasha, they directed the Kenyan Police Forces not to intervene in attacks by the Mungiki and pro-PNU youth against perceived ODM supporters.

25. KENYATTA was the focal point between the Mungiki and MUTHAURA in the implementation of the common plan. He used his connections with different Mungiki leaders to mobilize members of the organization and other pro-PNU youth to launch retaliatory attacks against civilian supporters of the ODM. KENYATTA had a long and close association with the Mungiki from as early as March 2002 when the Mungiki officially endorsed him as their legitimate presidential candidate.

26. Through KENYATTA, Mungiki leaders entered into a political agreement with senior Government of Kenya officials in November 2007. They negotiated an end to the police crackdown against members of the organization along with a list of other demands in exchange for providing political support to the PNU. MUTHAURA was charged with meeting these demands and he collaborated with KENYATTA in dealing with the Mungiki. After the elections, MUTHAURA and KENYATTA took the association with the Mungiki to a criminal level by directing its leaders to attack perceived ODM supporters in retaliation for the killing of the Kikuyu in the Rift Valley.

27. The cooperation between the Kenyan Police Forces and the Mungiki and the pro-PNU youth is confirmed by the lack of police intervention before, during and after the attacks. Despite knowing the identity and location of Mungiki perpetrators, the Kenyan Police Forces did not prevent the attacks or punish its instigators. The

few mid-level perpetrators who were arrested were rapidly released, without any charges, after the intervention of local civil or political authorities.

28. In each of the identified areas, the excessive use of armed force, killings, rapes, forced circumcision, systematic and coordinated attacks on houses and properties identified as belonging to perceived ODM supporters, destruction of such properties, beatings and mutilations were some of the methods used by both the Kenyan Police Forces and Mungiki and pro-PNU youth in executing the plan of the Principal Perpetrators.

29. MUTHAURA, KENYATTA and ALI collectively contributed to the commission of the crimes described in this Application by recruiting, funding, arming and/or granting impunity to the Mungiki and pro-PNU youth. MUTHAURA and ALI also supervised the cooperation of the Kenyan Police Forces throughout the course of the commission of the crimes. By using the Kenyan Police Forces and Mungiki and pro-PNU youth, they shared and sought to further the common plan of carrying out widespread and systematic attacks against a civilian population to crush any protests by ODM supporters and severely penalize ODM supporters.

30. 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 29 February 2008, MUTHAURA, KENYATTA and ALI, committed the following crimes against humanity: murder under Article 7(1)(a) of the Statute; rape and other forms of sexual violence under Article 7(1)(g) of the Statute; deportation or forcible transfer of population under Article 7(1)(d) of the Statute; other inhumane acts causing serious injury under Article 7(1)(k) of the Statute; and persecution based on political affiliation under Article 7(1)(h) of the Statute.

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

32. To avoid duplication, 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 Mungiki and pro-PNU youth, the Kenyan Police Forces, the planning meetings, the attacks, and the contributions of MUTHAURA, KENYATTA and ALI.

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

33. The Prosecution applies to the Pre-Trial Chamber II for the issuance of summonses to appear for three persons: MUTHAURA, KENYATTA and ALI.³

1. Francis Kirimi MUTHAURA

34. MUTHAURA was born on 20 October 1946 in Mariene, Meru, Central District, Eastern Province in the Republic of Kenya. He is of Meru ethnicity and married with three children.⁴

35. MUTHAURA had his secondary education at Nkubu Secondary School, Nkubu in Eastern Province and Nyeri High School in Nyeri, Central Province before proceeding to the University of Nairobi where he obtained a Bachelor of Arts in Economics and Political Science in 1972. He later obtained a Diploma in International Relations in 1975 from the same University.

36. MUTHAURA began his career in the civil service under President Moi's regime and was subsequently promoted to various high profile diplomatic positions. In 1987, MUTHAURA took on the job of counsellor to the High Commission in London before being promoted to the position of Kenyan Ambassador to Belgium, Luxembourg and the European Community. He held this post until 1993, when he

³ See Annex 2, Photographs of Suspects.

⁴ "Government and Ministries: MUTHAURA Francis, Head of the Civil Service and Secretary to the Cabinet", *Indigo Publications*, 15 July 2003, KEN-OTP-0033-0660 at 0660.

was moved to New York to work as Kenya's ambassador to the Permanent Mission to the United Nations.⁵

37. In 2003, MUTHAURA was appointed as the head of the Public Service and Secretary to the Cabinet.⁶ In his position as head of the Public Service, all public servants report to him.⁷ MUTHAURA has a critical role in the coordination of intelligence and security activities as Chairman of the National Security and Advisory Committee.⁸

2. Uhuru Muigai KENYATTA

38. KENYATTA was born on 26 October 1961 in Nairobi, Kenya to the first Kenyan President Jomo Kenyatta and his fourth wife as the second of four children. He is married with 3 children.⁹

39. He attended St. Mary's High School in Nairobi and Amherst College in Amherst, Massachusetts, U.S.A. where he obtained his Bachelors in Economics and Political Science in 1985.¹⁰

40. He began his political career in 1992 when he joined the Kenya African National Union ("KANU")¹¹ and was elected KANU National Vice Chairman in March 2001.¹² In October 2001, he was nominated as a Member of Parliament ("MP") by President Moi.¹³ At the same time, he was nominated as the Minister for Local

⁵ "Government and Ministries: MUTHAURA Francis, Head of the Civil Service and Secretary to the Cabinet", *Indigo Publications*, 15 July 2003, KEN-OTP-0033-0660 at 0660.

⁶ Muthiga, M., Makali, D., "Kenya: Storm Over Muthaura's PM Powers", *The Standard*, 22 August 2004, KEN-OTP-0033-0668.

⁷ "Intrigues Behind Murage's exit from State House", *The Standard*, 27 January 2008, KEN-OTP-0033-0182 at 0183.

⁸ Commission of Inquiry into Post Election Violence, "NSIS Presentation to the Commission of Inquiry into Post-Election Violence", KEN-OTP-0002-0172 at 0178.

⁹ "Will the real Uhuru Kenyatta please stand up!", *The East African Standard*, 23 September 2002, KEN-OTP-0033-0467 at 0468.

¹⁰ "Will the real Uhuru Kenyatta please stand up!", *The East African Standard*, 23 September 2002, KEN-OTP-0033-0467 at 0467.

¹¹ This is one of the parties in the PNU coalition of parties.

¹² "Profile: Uhuru KENYATTA", *BBC News*, 14 October 2002, KEN-OTP-0033-0274 at 0275.

¹³ "Will the real Uhuru Kenyatta please stand up!", *The East African Standard*, 23 September 2002, KEN-OTP-0033-0467 at 0468; "Profile: Uhuru KENYATTA", *BBC News*, 14 October 2002, KEN-OTP-0033-

Administration in charge of the formulation and implementation of policies for local authorities.¹⁴

41. In 2002, he was sponsored by President Moi as the KANU candidate for the Presidential elections, but lost the elections to Mwai Kibaki.¹⁵ In January 2005, he was elected KANU National Chairman.¹⁶

42. In 2005, KENYATTA campaigned against the Constitutional Referendum presented by President Kibaki.¹⁷ The “No” vote he campaigned for won the referendum but KENYATTA lost the KANU Chairmanship in November 2006. In December 2006 and June 2007, respectively following his court challenge he was reinstated as the party’s leader and Chairman by two Kenya High Court decisions.¹⁸

43. In September 2007, KENYATTA withdrew from the Presidential elections of that year and announced his support for the PNU and the re-election bid of President Kibaki.¹⁹ From January to April 2008, before the grand coalition political agreement between the PNU and ODM, KENYATTA served as the Minister for Local Government.²⁰ Between April 2008 and January 2009, he held the positions of Deputy Prime Minister and Minister for Trade as a PNU representative in the grand coalition

0274 at 0275; Njoka, M., “Uhuru’s journey to the Centre of Politics”, *The Standard*, 20 October 2002, KEN-OTP-0046-0070 at 0070.

¹⁴ “Will the real Uhuru Kenyatta please stand up!”, *The East African Standard*, 23 September 2002, KEN-OTP-0033-0467 at 0468; ; “Kenya: Profiles of Leading Presidential Candidates”, *AllAfrica*, 27 December 2002, KEN-OTP-0033-0289 at 0289; “Vision and Mission”, *Office of the Deputy Prime Minister and Ministry of local Government, Republic of Kenya*, 2010, KEN-OTP-0033-0288 at 0288.

¹⁵ “Republic of Kenya: General Election of 27 December 2002”, *Institute for Education in Democracy*, 27 December 2002, KEN-OTP-0033-0292 at 0292; “Uhuru Kenyatta concedes defeat in Presidential Poll”, Kenya National African Union, 29 December 2002, KEN-OTP-0046-0268 at 0268.

¹⁶ “Kenyatta wins Moi party election”, *BBC News*, 1 February 2005, KEN-OTP-0033-0295 at 0295; “Odinga and the Oranges”, *Africa Confidential*, Volume 48, Number 4, 16 February 2007, KEN-OTP-0046-0079 at 0082-0083.

¹⁷ “Who is Who – Uhuru Muigai Kenyatta”, *Africa Confidential*, KEN-OTP-0046-0103 at 0104; “Odinga and the Oranges”, *Africa Confidential*, Volume 48, Number 4, 16 February 2007, KEN-OTP-0046-0079 at 0082-0083.

¹⁸ “Kenyan opposition leader’s position upheld”, *Independent Online*, 28 June 2007, KEN-OTP-0033-0483 at 0483; “Kenyatta Returns as Kanu Leader”, *BBC News*, 28 June 2007, KEN-OTP-0033-0484 at 0484.

¹⁹ “Ex-rival backs Kibaki re-election”, *BBC News*, 14 September 2007, KEN-OTP-0033-0481 at 0481.

²⁰ “Kibaki Names Part of Cabinet”, *The Nation* (on Pan African Newswire), 08 January 2008, KEN-OTP-0033-0475 at 0475.

Cabinet.²¹ From January 2009 till this date, he has been the Deputy Prime Minister and Minister for Finance.²²

44. Apart from his political appointments, KENYATTA has also served in the following capacities: as a Council member of the Jomo Kenyatta University of Agriculture and Technology (from 1998 to 2003);²³ Chairman of the Kenya Tourist Board;²⁴ Chairman of the Disaster Emergency Response Committee (2000 to 2001); and Member of the National Economic and Social Council (since 2008).²⁵

3. Major General Mohammed Hussein ALI

45. ALI was born in 1956 in Eldoret, Rift Valley Province in the Republic of Kenya.²⁶ He is an ethnic Somali²⁷ and married with children.

46. He attended Uasin Gishu School and then Kolanya Boys High School in Busia District. He joined the Kenyan Army in 1977 and trained in India, the United States and Egypt. During his military career he served as a military attaché in Zimbabwe and Uganda, and was the Commanding Officer of the Western Brigade of the Kenya Army Paratrooper Battalion and the Air Cavalry Regiment in Embakasi. He was eventually promoted to Brigadier in 2003 and Major General in 2005.²⁸

47. In 2004, he was appointed to the position of Commissioner of the Kenya Police whilst he was a Brigadier in the Kenya Air Force.²⁹ By virtue of this

²¹ "Kenya unveils coalition Cabinet", *BBC News*, 13 April 2008, KEN-OTP-0033-0473 at 0473.

²² "Kibaki recalls tainted minister", *Independent Online*, 23 January 2009, KEN-OTP-0033-0472 at 0472; "Kenya's new finance minister Uhuru Kenyatta", *Reuters*, 23 January 2009, KEN-OTP-0033-0471 at 0471.

²³ "Uhuru Kenyatta", *CreateYourLeader*, 28 January 2010, KEN-OTP-0033-0469 at 0470.

²⁴ "Will the real Uhuru Kenyatta please stand up!", *The East African Standard*, 23 September 2002, KEN-OTP-0033-0467 at 0468; "About Uhuru", *Uhuru Kenyatta Website*, KEN-OTP-0033-0466.

²⁵ "National Economic and Social Council of Kenya - The Council Members", *Office of the President, Government of Kenya*, KEN-OTP-0033-0462 at 0462.

²⁶ Mathenge, O., "Ali's surprise landing at post office", *Daily Nation*, 8 September 2009, KEN-OTP-0033-0352 at 0352.

²⁷ ICC statement of W-0027, KEN-OTP-0040-0055 at 0078-0079.

²⁸ Mathenge, O., "Ali's surprise landing at post office", *Daily Nation*, 8 September 2009, KEN-OTP-0033-0352 at 0352.

²⁹ Commonwealth Human Rights Initiative & Kenya Human Rights Commission: "The Police, The People, The Politics: Police Accountability in Kenya", 2006, KEN-OTP-0028-0170 at 0184.

appointment, ALI became the first person from outside the Kenyan Police Forces to occupy the position.³⁰ He held the position of Commissioner of Police throughout the period of the post election violence.

48. In January 2007, as part of efforts to improve the security situation in the country, the Kenya Police under ALI's leadership began cracking down on the Mungiki. The crackdown was severely criticized by human rights organizations.³¹

49. During his tenure as Commissioner of Police, ALI, among other things, instituted a rigid and centralized reporting structure for the Kenya Police.³² This structure was criticized in 2009 in a report by the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston. The report recommended that ALI was a stumbling block to police reform and called for his resignation.³³

50. On 8 September 2009, ALI was transferred to the position of the Chief Executive of the Postal Corporation of Kenya.³⁴

F. CRIMES WITHIN THE JURISDICTION OF THE COURT WHICH MUTHAURA, KENYATTA AND ALI HAVE COMMITTED PURSUANT TO ARTICLE 58(2) OF THE ROME STATUTE

Count 1

Murder constituting a crime against humanity

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

³⁰ Mathenge, O., "Ali's surprise landing at post office", *Daily Nation*, 8 September 2009, KEN-OTP-0033-0352 at 0352.

³¹ Alston, P., "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Kenya", 26 May 2009, KEN-OTP-0001-0910 at 0919-0920 and 0925, paras. 10 and 19-21.

³² Alston, P., "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Kenya", 26 May 2009, KEN-OTP-0001-0910 at 0925, para. 19.

³³ Alston, P., "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Kenya", 26 May 2009, KEN-OTP-0001-0910 at 0925 paras. 19 and 21.

³⁴ Mukinda, F., Wabala, D., "Change of Guard in Kenya's Police Force", *The Somaliland Times*, 12 September 2009, KEN-OTP-0033-0178 at 0178-0179; Kariuki, A., "Kibaki moves Ali, names new Kenyan Police boss", *Daily Nation*, 8 September 2009, KEN-OTP-0030-0002 at 0002.

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALI, as co-perpetrators, or in the alternative, as part of a group of persons acting with a common purpose, committed or contributed to the commission of crimes against humanity, namely the murder of civilian supporters of the Orange Democratic Movement political party in or around locations including Kisumu town (Kisumu District, Nyanza Province), Kibera (Kibera Division, Nairobi Province), Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(a) or (d) of the Rome Statute.

Count 2

Deportation or forcible transfer of population constituting a crime against humanity

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

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALI, as co-perpetrators, or in the alternative, as part of a group of persons acting with a common purpose, committed or contributed to the commission of crimes against humanity, namely the deportation or forcible transfer of civilian population supporting the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(d) and 25(3)(a) or (d) of the Rome Statute.

Count 3

Rape and other forms of sexual violence constituting a crime against humanity

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

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALI, as co-perpetrators, or in the alternative, as part of a group of persons acting

with a common purpose, committed or contributed to the commission of crimes against humanity, namely rape and other forms of sexual violence against civilian supporters of the Orange Democratic Movement political party in or around locations including Kibera (Kibera Division, Nairobi Province), Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(g) and 25(3)(a) or (d) of the Rome Statute.

Count 4

Other inhumane acts constituting a crime against humanity

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

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALI, as co-perpetrators, or in the alternative, as part of a group of persons acting with a common purpose, committed or contributed to the commission of crimes against humanity, namely the inflicting of great suffering and serious injury to body or to mental or physical health by means of inhumane acts upon civilian supporters of the Orange Democratic Movement political party in or around locations including Kisumu town (Kisumu District, Nyanza Province), Kibera (Kibera Division, Nairobi Province), Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(k) and 25(3)(a) or (d) of the Rome Statute.

Count 5

Persecution as a crime against humanity

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

From on or about 27 December 2007 to 29 February 2008, MUTHAURA, KENYATTA and ALI, as co-perpetrators, or in the alternative, as part of a group of persons acting with a common purpose, committed or contributed to the commission of crimes

against humanity, namely persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, rape and other forms of sexual violence, other inhumane acts and deportation or forcible transfer, in or around locations including Kisumu town (Kisumu District, Nyanza Province), Kibera (Kibera Division, Nairobi Province), Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(a) or (d) of the Rome Statute.

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H. BACKGROUND TO INVESTIGATION / LEGAL FRAMEWORK

1. Procedural history

193. 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.

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

195. 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.

196. On 30 March 2010, Pre-Trial Chamber II granted the Prosecution’s Request and the Prosecutor initiated an investigation immediately thereafter.

2. Issues of victim and witness protection

197. Security issues regarding victims and witnesses are addressed in Annex 22.

3. Admissibility

198. The case against MUTHAURA, KENYATTA and ALI 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 MUTHAURA, KENYATTA and

ALI.²⁸⁷ Moreover, on the basis of the evidence relied on in this Application, the Prosecution submits that the case is of sufficient gravity to justify further action by the Court.

(a) 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

199. 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.”²⁸⁸ 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 some domestic activity in relation to other individuals and their responsibility for acts that occurred during the post-election violence, those situations are irrelevant to this case.

200. The crimes that form the basis of 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 for the crimes allegedly committed by MUTHAURA, KENYATTA and ALI for the incidents described herein.

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

²⁸⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, 25 September 2009, No. ICC-01/04-01/07 OA 8, para. 78.

²⁸⁸ *Prosecutor v. Lubanga*, Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/06-8-Corr, 24 February 2006, para. 31.

201. According to information reviewed by the Prosecution, there has not been any trial before any competent national jurisdiction for the conduct that is the subject of this Application.

4. Request for confidentiality

202. Pursuant to Rule 23*bis*, the Prosecution requests that Sections C, G and H and Annexes 1-10, 14 and 16-23 be received by the Pre-Trial Chamber confidential ex parte and remain confidential ex parte for two reasons: (1) to protect ongoing investigations; and (2) to protect victims and witnesses.

203. The Prosecution will simultaneously file a public redacted version revealing sections A, B, D-F, I and J as well as Annexes 11-13 and 15 only.

I. REQUEST FOR ISSUANCE OF SUMMONSES TO APPEAR FOR MUTHAURA, KENYATTA AND ALI PURSUANT TO ARTICLE 58(7) OF THE ROME STATUTE

204. 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.

205. 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.

206. Regarding the location of MUTHAURA, KENYATTA and ALI, the Prosecution has information indicating that MUTHAURA, KENYATTA and ALI reside on the territory of the Republic of Kenya.

207. If the Chamber grants this Application, the Prosecution, at this time, believes that summonses to appear are sufficient to ensure the appearance of MUTHAURA, KENYATTA and ALI. None of the three suspects are perceived to be a flight risk. All three suspects hold prominent positions within the Kenyan government. At the present time, there is no indication that they would evade personal service of the summonses.

208. 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 Nyanza Province, Nairobi and 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.

209. 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.

210. Since the opening of investigations, the Government of Kenya has consistently indicated its commitment and willingness to cooperate with the OTP and with the ICC. This commitment to cooperation has included a commitment to hand over any suspects who may be the subject of an arrest warrant application by the ICC. KENYATTA has consistently indicated in numerous public statements that he is willing to cooperate with the OTP and with the ICC.²⁸⁹ ALI's representative has made similar suggestions.

211. The Prosecution does not possess similar information as to MUTHAURA. He has not made a public announcement on this matter. However, there is no indication that he would not cooperate if summoned to appear.

212. 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

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

- a. Find that there are reasonable grounds to believe that FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI committed crimes within the jurisdiction of the International Criminal Court and find that the issuance of summonses to appear is appropriate;
- b. Issue summonses to appear for FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI; and

²⁸⁹ Jillo, R., "Uhuru says he has nothing to fear over poll chaos", *Capital News*, 10 October 2010, KEN-OTP-0033-0269 at 0269.

- c. Direct the Registry, in consultation and coordination with the Prosecution, to prepare and transmit a request for summonses to appear for FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI.



Luis Moreno-Ocampo, Prosecutor

Dated this 15 December 2010

At The Hague, the Netherlands