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**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF**  
***THE PROSECUTOR v. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY***  
***AND JOSHUA ARAP SANG***

**Public Document**

**Observations of the Victims' Representative on the Defence challenges to  
jurisdiction**

**Source:** Victims' Representative

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

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Counsel for Henry Kiprono Kosgey  
George Odinga Oraro  
Counsel for Joshua Arap Sang  
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**Legal Representatives of the Victims**

Ms Sureta Chana

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented  
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**The Office of Public Counsel for  
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**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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## Introduction

1. The Single Judge's "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" of 5 August 2011 (the "5 August 2011 Decision")<sup>1</sup> appointed a common legal representative of all the victims admitted to participate by that decision (the "victims' representative").
2. Paragraph 101 of the 5 August 2011 Decision states that:
 

... the legal representative of the victims admitted to participate in the present proceedings may be authorised by the Chamber to make written submissions on specific issues of law and/or fact.
3. At the confirmation of charges hearing on 1 September 2011, the Pre-Trial Chamber ordered that the Prosecutor and the legal representative of the victims would be allowed to submit written observations on the applications by the Defence challenging the jurisdiction of the Court, by no later 17 than Friday, 17th of September, at 1600 hours.<sup>2</sup>
4. Pursuant to that order, the victims' representative files the present observations on:
  - a. the "Defence Challenge to Jurisdiction", filed on behalf of Mr. William Ruto and Mr. Joshua Sang on 30 August 2011 (the "Ruto and Sang Application");<sup>3</sup> and
  - b. the "Application on behalf of Mr. Henry Kiprono Kosgey pursuant to Article 19 of the Statute", filed by the Defence for Henry Kiprono Kosgey on 30 August 2011 (the "Kosgey Application").<sup>4</sup>
5. These challenges to jurisdiction affect the personal interests of the victims. As was submitted in the opening statement of the victims' representative at the

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<sup>1</sup> ICC-01/09-01/11-249 05-08-2011.

<sup>2</sup> Transcript, 1 September 2011, page 15, lines 7-17.

<sup>3</sup> ICC-01/09-01/11-305.

<sup>4</sup> ICC-01/09-01/11-306.

confirmation of charges hearing, the post-election violence of 2007-2008 was not the first time that Kenya had experienced election-related violence. The concern was expressed on behalf of the victims that such previous instances of election violence had gone unpunished, and that the authorities in Kenya had not displayed a serious resolve to punish those responsible for the violence in 2007-2008. It was stated on behalf of the victims that:

... Against this background, the exercise of jurisdiction by this international court is seen by the victims I represent as finally a basis for hoping that some measure of justice for the crimes visited upon them may realistically be achievable. Thus these proceedings directly affect the personal interests of those I represent, both at the very individual level and also at the family community level. It affects the future of their country and their succeeding generations who will live in it. This is a very serious matter.

The victims I represent are very mature. They understand that justice being done means a fair trial before an independent and impartial tribunal in accordance with the law. They all know the concept of a person is innocent until proven guilty. What is important to them, however, now, is that the criminal justice process has now engaged seriously, professionally and rigorously with what has occurred.<sup>5</sup>

6. The victims have also signalled their intention to seek reparations for the losses they have suffered as a result of the crimes.
7. The personal interests of the victims would therefore be directly affected if the Pre-Trial Chamber were to find (erroneously, in the submission of the victims' representative) that the Court lacks jurisdiction over the crimes charged.

### Legal framework

8. The Court's jurisdiction is established by its Statute.
9. The Court's subject-matter jurisdiction (jurisdiction *ratione materiae*) is dealt with primarily in Articles 5 to 8bis of the Statute, which set out the crimes within the jurisdiction of the Court.

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<sup>5</sup> Transcript, 1 September 2011, page 82, line 24, to page 83, line 12.

10. The Court's personal jurisdiction (jurisdiction *ratione personae*) and territorial jurisdiction (jurisdiction *ratione loci*) are dealt with primarily in Article 25(1) and Article 12 of the Statute.
11. Article 25(1) states that the Court has jurisdiction over "natural persons".
12. Article 12 indicates that the Court has jurisdiction over any natural person who is a national of a State which is a Party to the Statute in respect of a crime committed anywhere (whether or not on the territory of a State which is a Party), or over any natural person (whether or not a national of a State which is a Party) in respect of a crime committed on the territory of, or on an aircraft or vessel the State of registration of which is, a State which is a Party.
13. It is noted that the title to Article 12 is "Preconditions to the exercise of jurisdiction", suggesting that the provisions of Article 12 do not define the limits of the Court's personal and temporal *jurisdiction*, but simply impose limits on the circumstances in which the Court's jurisdiction will be *exercised*. However, this distinction is not material to the Defence challenges to jurisdiction, and is not further addressed in these observations.
14. The Court's temporal jurisdiction (jurisdiction *ratione temporis*) is dealt with primarily in Article 11.
15. Part 3 (Articles 22 to 33) of the Statute is entitled "General Principles of Criminal Law". Although (as noted above) Article 25(1) is a jurisdictional provision (defining the personal jurisdiction of the Court), the provisions of Part 3 generally do not deal with the jurisdiction of the Court. Rather, Part 3 contains provisions of *substantive law* that the Court is to apply in exercise of its jurisdiction. These provisions constitute the "general part" of the substantive criminal law applied by the Court.
16. Article 61(3)(a) of the Statute provides that prior to the confirmation of charges hearing, a person subject to an arrest warrant or summons to appear

before the Court shall be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial.

17. Article 19 of the Statute provides that a person for whom a warrant of arrest or a summons to appear has been issued may challenge the jurisdiction of the Court prior to or at the commencement of the trial, and that such challenge to jurisdiction may be brought before the Pre-Trial Chamber prior to the confirmation of the charges.

### **The circumstances of the present case**

18. The crimes with which the Suspects in this case have been charged are specified in the "Prosecution's Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3), (4) and (5)" of 15 August 2011,<sup>6</sup> specifically in Part VII of the "Document Containing the Charges" which is the Annex to that filing.<sup>7</sup>
19. All three Suspects now challenge the jurisdiction of the Court prior to the confirmation of any charges, in accordance with Article 19 of the Statute. As no charges have yet been confirmed, the challenge is necessarily a challenge to the jurisdiction of the Court over the charges as set out in the Charges Document.
20. Part VII of the Document Containing the Charges sets out the following charges:

#### **Count 1 (RUTO and KOSGEY)**

##### **Murder constituting a crime against humanity**

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

From on or about 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO and HENRY KIPRONO KOSGEY committed or contributed to the commission of crimes against humanity in the form of murder in locations including Turbo

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<sup>6</sup> ICC-01/09-01/11-261.

<sup>7</sup> ICC-01/09-01/11-261-AnxA. The charges were previously specified in the "Prosecution's Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3)" of 1 August 2011 and annex thereto (ICC-01/09-01/11-242 and ICC-01/09-01/11-242-AnxA).

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) of the Rome Statute.

#### **Count 2 (SANG)**

##### **Murder constituting a crime against humanity**

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

From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG, as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, 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)(d) of the Rome Statute.

#### **Count 3 (RUTO and KOSGEY)**

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

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

From on or about 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO and HENRY KIPRONO KOSGEY as co-perpetrators, 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) of the Rome Statute.

#### **Count 4 (SANG)**

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

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

From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, 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)(d) of the Rome Statute.

#### **Count 5 (RUTO AND KOSGEY)**

##### **Persecution as a crime against humanity**

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

From 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO, and HENRY KIPRONO KOSGEY as co-perpetrators, 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) of the Rome Statute.

### **Count 6 (SANG)**

#### **Persecution as a crime against humanity**

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

From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG, as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of persecution, when coperpetrators 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)(d) of the Rome Statute.

21. Typically, a challenge to the jurisdiction of the Court would contend that the qualification of the crimes charged are not of a kind within the subject-matter jurisdiction of the Court, or that place and time of the alleged crimes puts them outside the geographic or temporal jurisdiction of the Court, or that the Court lacks personal jurisdiction over the suspect or accused. However, in the present case, it is submitted that it is evident, and apparently not disputed by any of the three Suspects, that:

- a. each of the charges contained in the Document Containing the Charges is a charge of a crime within the *subject-matter jurisdiction* of the Court,



namely a crime specifically enumerated in Article 7(1)(a), (d) or (h) of the Statute;

- b. each of the Suspects is a natural person who is a national of Kenya, a State that is Party to the Statute, and each of the crimes charged is alleged to have been committed within the territory of Kenya, such that each of the charges is within the *personal jurisdiction* and *territorial jurisdiction* of the Court;
- c. each of the crimes charged is alleged to have been committed from on or about 30 December 2007 to the end of January 2008, which is after the Statute entered into force for Kenya (on 1 June 2005<sup>8</sup>), such that the crimes are within the *territorial jurisdiction* of the Court.

22. All of the counts charge the suspects with crimes against humanity. The requirements of crimes against humanity as set out in Article 7 of the Statute, including the requirement in Article 7(1) that the act be “part of a widespread or systematic attack”, and the requirement in Article 7(2)(a) that the attack be “pursuant to or in furtherance of a State or organizational policy to commit such attack” are not *jurisdictional* requirements. They are requirements of the *substantive law* that is applied by the Tribunal in exercise of its jurisdiction.

23. Counts 1, 3 and 5 of the charges allege that Mr Ruto and Mr Koskey are criminally responsible for the crimes charged in those counts under Article 25(3)(a) of the Statute. Article 25(3)(a) provides that a person is criminally responsible for a crime within the jurisdiction of the Court if that person “Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible”.

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<sup>8</sup> Kenya deposited its instrument of ratification to the Rome Statute on 15 March 2005 (<http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/Kenya.htm>; [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en)). Pursuant to Article 126(2) of the Statute, it entered into force for Kenya on the first day of the month after the 60th day following the deposit by Kenya of its instrument of ratification, that is, on 1 June 2005.

24. Counts 2, 4 and 6 of the charges allege that Mr Sang is criminally responsible for the crimes charged in those counts under Article 25(3)(d) of the Statute. Article 25(3)(d) provides that a person is criminally responsible for a crime within the jurisdiction of the Court if that person:

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime;

25. As observed in paragraph 15 above, Article 25(3) is not a jurisdictional provision. It is part of the substantive law to be applied by the Court in the exercise of its jurisdiction.

26. If the charges in this case are confirmed, the Court will be called upon to determine whether crimes were committed as charged (including whether crimes committed satisfied the substantive legal requirements referred to in paragraph 22 above). If the Court concludes that such crimes were committed, the Court will then be called upon to decide whether Mr Ruto and Mr Koskey did, within the meaning of Article 25(3)(a), "commit" the crimes charged in Counts 1, 3 and 5, and to determine whether Mr Sang did, within the meaning of Article 25(3)(d), "contribute to the commission or attempted commission of [the crimes charged in Counts 2, 4 and 6] by a group of persons acting with a common purpose". If the Court were to find that the answer to either of those questions is negative, the consequence would not be a finding by the Court that it lacks jurisdiction. Rather, the consequence would be a finding by the Court that the accused are not guilty. Questions of the interpretation and application of Article 7 and Article 25(3) are thus issues that are part of the *merits* of the present case. They are not issues of *jurisdiction*.

## The Ruto and Sang Application

27. The Ruto and Sang Application states in its opening paragraph that it challenges the jurisdiction of the Court on the basis that “the level of organization and structure in which the defendants allegedly orchestrated the crimes charged does not reach the requisite level to meet the threshold criteria of crimes against humanity punishable under Article 7 of the ICC Statute”.<sup>9</sup>
28. The Ruto and Sang Application advances two principal arguments in support of this contention.
29. The primary argument advanced in the Ruto and Sang Application is as follows. By virtue of Article 7(1) of the Statute, in order to be a crime against humanity, an act must have been “committed as part of a widespread or systematic attack directed against any civilian population”. Article 7(2)(a) of the Statute defines an “attack directed against any civilian population” as “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”. An “organisational policy”, according to the Ruto and Sang Application, must be a policy of an organisation that partakes of some characteristics of the State, as opposed for instance to mafia-type groups, mobs, groups of (armed) civilians or criminal gangs.<sup>10</sup>
30. The Ruto and Sang Application then further advances an alternative argument as follows. Irrespective of whether or not the concept of an “organisational policy” is confined to a policy of an organisation that partakes of some characteristics of the State, the facts on which the Prosecution relies do not amount to substantial grounds to believe that the defendants acted within an organization in the context of Article 7(2)(a) of the Statute. The Prosecution

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<sup>9</sup> Ruto and Sang Application, para 1.

<sup>10</sup> Effectively, paragraphs 2-61 of the Ruto and Sang Application.

relies a great deal on its theory of the existence of a “multi-faceted Network”, allegedly headed by Mr. Ruto, consisting of a political, military, media, tribal and financial branch, which were in 2007/2008, absorbed into a newly created Network which was purposefully and specifically developed by the defendants with a criminal purpose to commit violence against non-Kalenjins. There is insufficient evidence supporting the prosecution assertion that there was an organization, sufficient to meet the structural criteria necessary [under Article 7(2)(a)].<sup>11</sup>

31. The Ruto and Sang Application does not explain how either of these two arguments, even if they were hypothetically accepted, would deprive the Court of jurisdiction in these proceedings.

32. The final two paragraphs of the Ruto and Sang Application state:

... the Defence submits that the Prosecution has failed to produce sufficient evidence to establish all contextual elements of crimes against humanity under Article 7 of the ICC Statute. Notably, the Prosecution failed to establish on a ‘substantial grounds to believe’ standard, the existence of an ‘organizational policy’ behind the crimes charged. The Defence will produce further evidence in support of this submission in the course of the confirmation hearing.

... Accordingly, the Defence requests that the Pre-Trial Chamber declines to exercise jurisdiction in respect of the case against Mr. Ruto and Mr. Sang.<sup>12</sup>

33. The Ruto and Sang Application thereby appears to suggest that if, at the confirmation of charges hearing, the Pre-Trial Chamber were to find that the Prosecution has failed to produce sufficient evidence to establish all elements of the crimes charged (or at least, of all contextual elements of crimes against humanity), then the Pre-Trial Chamber should declare itself without jurisdiction.

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<sup>11</sup> Effectively, paragraphs 62-81 of the Ruto and Sang Application.

<sup>12</sup> Ruto and Sang Application, paras 82-83.

34. The victims' representative submits that this cannot be correct. Paragraphs 7 and 8 of Article 61 of the Statute provide:

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:
  - (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
  - (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
  - (c) Adjourn the hearing and request the Prosecutor to consider:
    - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
    - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.
8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

35. Thus, if the Pre-Trial Chamber were to conclude at this confirmation of charges state that the Prosecution has failed to produce sufficient evidence to establish all elements of the crimes charged, then the Pre-Trial Chamber would not declare itself *without jurisdiction*. Rather, the Pre-Trial Chamber would, *in the exercise of its jurisdiction*, either decline to confirm the charges in relation to which it has found the evidence insufficient in accordance with Article 61(7)(b), or adjourn the proceedings with an appropriate request to the Prosecutor in accordance with Article 61(7)(c).

36. In effect, the Ruto and Sang Application makes submissions in relation to the *merits* of the confirmation of charges hearings, while erroneously stating that these submissions are a challenge to *jurisdiction*.

37. It may be that the Ruto and Sang Application seeks to do this in order to generate a right of interlocutory appeal. The Statute provides for no

interlocutory appeal against a decision of the Pre-Trial Chamber under Article 61(7)(a) of the Statute to confirm charges. In contrast, Article 82(1)(a) of the Statute does provide for an interlocutory appeal against “A decision with respect to jurisdiction or admissibility”. However, in relation to matters where the Statute and Rules of Procedure and Evidence provide no right of interlocutory appeal, a party cannot artificially generate a right of interlocutory appeal merely by referring to the matter as a “challenge to jurisdiction”.

38. Paragraphs 62 to 81 of the Ruto and Sang Application, containing the “alternative argument” (see paragraph 28 above) are concerned directly with the evaluation of evidence in the case. Paragraph 64 submits “that there is insufficient evidence supporting the prosecution assertion that there was an organization, sufficient to meet the structural criteria necessary ...”. Paragraph 66 states that “Witnesses give varying accounts ...”. Paragraph 68 speaks of what “The evidence rather suggests”. Paragraph 69 concludes that “the evidence in support of this allegation is very thin even at the stage of confirmation”. Paragraph 70 contends that “the evidence of the Prosecution witnesses ... is insufficient to demonstrate an ‘organizational policy’”. Paragraph 73 argues that the Prosecution “has failed to produce any tangible evidence ...”. Paragraph 74 argues that “At best, the evidence demonstrates that ...” Paragraph 75 begins “The Prosecutor failed to demonstrate ...”. Paragraph 76 states that “there is insufficient evidence ...”. Paragraph 77 states that “The Prosecutor relies on evidence, whose reliability and credibility will be substantially disputed by the defence ...” Paragraph 80 begins with the words “...on the basis of the evidence presented by the Prosecution, it cannot be concluded that ...”. Paragraph 81 “requests the Pre-Trial Chamber requests the Pre-Trial Chamber to re-evaluate the evidence”.

39. It is thus submitted that the alternative argument presented in paragraphs 62 to 81 of the Ruto and Sang Application goes squarely and directly to the

merits of the confirmation of charges hearing. It is in no sense a challenge to jurisdiction.

40. As to the “primary argument” in the Ruto and Sang Application (see paragraph 27 above), this relates to a substantive point of law concerning the correct interpretation of Article 7(2)(a) of the Statute.
41. Article 7(2)(a) is one of the provisions of the Statute setting out the substantive law that is to be applied by the Court. In the exercise of its jurisdiction, the Court will be routinely called upon to determine questions of substantive law. In determining a point of substantive law, the Court is *exercising* its jurisdiction, rather than deciding whether or not it has jurisdiction.
42. The Ruto and Sang Application acknowledges that the particular point of law has in fact already previously been considered twice by the Pre-Trial Chamber, once in the context of the Situation in the Republic of Kenya,<sup>13</sup> and once in this particular case against these three suspects.<sup>14</sup> The Ruto and Sang Application goes on to note that on both occasions Judge Kaul gave a dissenting opinion, and argues that the view of Judge Kaul should be preferred over that of the majority.
43. The victims’ representative submits that this is a point of law that falls within the jurisdiction of the Court to decide. In the Investigation Decision, the Pre-

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<sup>13</sup> Ruto and Sang Application, paras 2-4, referring to ICC-01/09-19-Corr, Situation in 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” Pre-Trial Chamber II, 31 March 2010 (“Investigation Decision”), at especially para 90, where the Pre-Trial Chamber stated: “With regard to the term “organizational”, 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, 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” (footnotes omitted).

<sup>14</sup> Ruto and Sang Application, paras 2-4, referring to ICC-01/09-01/11, Prosecutor v Ruto, Kosgey and Sang, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, Pre-Trial Chamber II, 8 March 2011 (“Summons Decision”), at especially para 11: “[The Pre-Trial Chamber] finds no need to reiterate its finding and provide a further detailed assessment of the question of jurisdiction of the case arising from that situation at this stage”.

Trial Chamber did not treat this question as one that went to its jurisdiction. At paragraph 73 of the Investigation Decision, the Pre-Trial Chamber concluded that “Upon examination of the available information, ... the Chamber finds that the information available provides a reasonable basis to believe that crimes against humanity have been committed on Kenyan territory”. That was a conclusion on the *merits* of what the Pre-Trial Chamber had to decide at that stage of the proceedings, rather than a decision on the Court’s jurisdiction. At paragraph 76, the Pre-Trial Chamber indicated that this conclusion was based, *inter alia*, on its analysis of “... the contextual elements of crimes against humanity in section II.A.1.a [of the Investigation Decision]”. Paragraph 90 of the Investigation Decision (quoted in footnote 13 above), was one of the paragraphs of section II.A.1.a analysing the contextual elements of crimes against humanity. The Pre-Trial Chamber was considering an issue of substantive law in exercise of its jurisdiction, rather than deciding whether or not it had jurisdiction.

44. For these reasons, the victims’ representative submits that the Ruto and Sang Application, despite purporting to be a challenge to jurisdiction, is in fact *not* a challenge to jurisdiction. It is a submission which addresses the merits of issues in the confirmation of charges hearing. If the Pre-Trial Chamber does confirm the charges, the Defence can continue to address the merits at trial. In the event of an adverse judgement, the Defence can bring a post-judgment appeal against the Trial Chamber’s decision on issues of law or issues of fact under Article 81 of the Statute. However, the points taken in the Ruto and Sang Application should not be treated at this stage as if they were a challenge to jurisdiction.

45. As the points taken in the Ruto and Sang Application relate to the merits of this case, the victims’ representative does not address their substance in detail, this being a matter within the primary responsibility of the Prosecution and the Defence.



46. However, one point does arise that is of direct bearing on the interests of victims.
47. Paragraph 27 of the Ruto and Sang Application argues that "If the State is directly or indirectly implicated in committing the crimes, then there is good cause for intervention as it is unlikely that the same State will investigate and prosecute its own crimes in good faith". It adds at paragraph 32 that "This definition should not be extended to mafia-type groups, mobs, groups of (armed) civilians or criminal gangs because crimes committed by such groups should be dealt with by the State itself".
48. The apparent logic of the Defence argument is that if the State is not itself implicated in crimes, there is no reason why the State would not itself prosecute those crimes in good faith. Rather, it is where the State (or its Government) is implicated in crimes that the State cannot be relied upon to prosecute in good faith, so that it is necessary to rely on the international criminal justice system.
49. The victims' representative submits that this is a false logic, given that governments of States can change over time. Even where the State itself is involved in the commission of crimes, if there is a subsequent change of government in that State, the new regime may well have a good faith interest in prosecuting members of the former regime who were responsible.
50. Conversely, where crimes are committed, not by a State or its government, but by an opposition group aspiring to become the government of that State, the State may have no interest in prosecuting the crimes once that opposition group succeeds in becoming the government, or part of the government. The government of a State would have no interest in prosecuting its own members and supporters, particularly in respect of acts that were committed in order to contribute to bringing that government into power. That is a consideration of direct pertinence to the present case.

51. The interpretation apparently contended for by the Ruto and Sang Application would deprive the concept of crimes against humanity of much of its scope and effectiveness. It is submitted that the expression “a State or organizational policy” in Article 7(2)(a) of the Statute must at the very least extend to a political organisation which has the objective of becoming the government, or part of the government, especially where the acts in question were related to the furtherance of that objective.
52. Any other conclusion would lead to the irrational result that where there is a struggle between an incumbent government and a group struggling to overthrow and replace the government, crimes committed by agents of or supporting the government could be crimes against humanity, but crimes committed by the opposition group could not, even if the opposition group ultimately succeeded in becoming the government.
53. In the present case, the Document Containing the Charges alleges the following. At the time of the 2007 election in Kenya, the incumbent President was Mwai Kibaki of the Party of National Unity (“PNU”).<sup>15</sup> The Orange Democratic Movement (“ODM”) was the strongest opposition party to the PNU.<sup>16</sup> ODM’s presidential candidate in the election was Raila Odinga.<sup>17</sup>
54. From at least 2005, RUTO was “generally acknowledged to be one of the most important Kalenjin politician” and “the principal Kalenjin spokesman”,<sup>18</sup> and by December 2007, was one of the ODM’s most prominent leaders and was the Kalenjin representative in the ODM Pentagon (top party leadership).<sup>19</sup> Kosgey is a Kalenjin<sup>20</sup> and at the time of the 2007 elections was chairman of the ODM.<sup>21</sup> Sang is Kalenjin.<sup>22</sup> Sang was a broadcaster on the popular radio

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<sup>15</sup> Document Containing the Charges, para 9.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Document Containing the Charges, para 8.

<sup>19</sup> *Ibid.*, para 10.

<sup>20</sup> *Ibid.*, para 11.

<sup>21</sup> *Ibid.*, para 13.

<sup>22</sup> *Ibid.*, para 15.

station, Kass FM, and was a vocal supporter of Ruto and other ODM candidates.<sup>23</sup> It is alleged that from 2006 to January 2008, the three Suspects along with others had a plan “to punish and prevent the Kikuyu, Kamba and Kisii ethnic groups from benefiting from the anticipated electoral victory by inflicting fear and committing the crimes alleged”,<sup>24</sup> and that this included plans “to attack PNU supporters”.<sup>25</sup> It is alleged that on 30 December 2007, the Electoral Commission of Kenya (“ECK”) declared the incumbent, President Kibaki, as the winner of the presidential elections, and that the circumstances of President Kibaki’s victory were immediately contested by the ODM party members, including Ruto.<sup>26</sup> It is alleged that the intended targets of the plan were “members of the Kikuyu, Kamba and Kisii ethnic groups (“later referred to as “PNU supporters”) who were perceived to support other political forces, should these political forces win or rig the 2007 elections”.<sup>27</sup> It is alleged that following the announcement of the election results, the “Network” executed attacks against PNU supporters.<sup>28</sup> It is alleged that part of the organisational policy of the “Network” was to “gain power”.<sup>29</sup>

55. Although the Document Containing the Charges does not refer to the fact specifically, a consequence of the election violence was that a power-sharing deal was brokered under which the ODM did in fact gain a place in the government together with the PNU. Raila Odinga, who had been the ODM presidential candidate, became the Prime Minister, and other ODM members gained ministerial posts. Mr Ruto became Minister for Agriculture. One source, the Commonwealth Secretariat, describes this development as follows:

In 2007, when elections were due, the Orange Democratic Movement (ODM) led by Raila Odinga and Orange Democratic Movement-Kenya (ODM-K) led by Kalonzo Musyoka emerged as

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<sup>23</sup> *Ibid*, para 23.

<sup>24</sup> *Ibid*, para 24.

<sup>25</sup> *Ibid*, para 26.

<sup>26</sup> *Ibid*, para 27.

<sup>27</sup> *Ibid*, para 24.

<sup>28</sup> *Ibid*, especially paras 28, 31 and 32.

<sup>29</sup> *Ibid*, para 41.

the main opponents to Mwai Kibaki and his newly formed coalition, the Party of National Unity (PNU). The PNU included notably KANU which had earlier left the Orange team, FORD-Kenya, NARC-Kenya (an offshoot of NARC) and several smaller parties. Tensions were high in the pre-election period, with outbreaks of violence.

Following a relatively peaceful polling day on 27 December 2007, the Orange team decisively won the parliamentary elections; ODM took 99 seats and its partner NARC three. The ruling PNU took 43 seats and its coalition partners 35 seats. Of the remaining constituencies declared, ODM-K won in 16 and independents in 11. A re-run was ordered in the three undeclared constituencies.

Unofficial results of the presidential election indicated Raila Odinga led Kibaki by at least 200,000 votes and the absence of any official declaration provoked widespread unrest in the country. When in late January 2008 the Electoral Commission published results, Kibaki was ahead with 4,584,721 votes, then Odinga with 4,352,993 and Musyoka with 879,903. Commonwealth observers noted that the elections were 'the most competitive in the country's history' but raised doubts on the handling of the final stages of the presidential election, particularly the delay in announcing the results.

Protests about the presidential election results erupted and intensified in a period that became one of the most violent since independence and hundreds of people were killed. Some of the violence assumed an ethnic dimension with the Kikuyu perceived as pro-Kibaki and the Luo as Odinga supporters. The opposing leaders eventually agreed to work together in a power-sharing coalition government with Kibaki as president and Odinga as prime minister. The agreement was brokered by a group of eminent persons led by former UN Secretary-General Kofi Annan. In March 2008 the National Assembly enacted a law to formalise the deal. Odinga subsequently became prime minister in a grand coalition government.<sup>30</sup>

The agreement for a "power sharing coalition government" was contained in the Agreement on the Principles of Partnership of the Coalition Government" of 28 February 2008.<sup>31</sup> The preamble to that agreement stated that "Given the current situation, neither side can realistically govern the country without the

<sup>30</sup> <http://www.thecommonwealth.org/YearbookInternal/139182/politics/> (Annex A).

<sup>31</sup> <http://allafrica.com/download/resource/main/main/idatcs/00011474:0a475e18cc11ee0947cc4003c69de130.pdf> (Annex B).

other". This indicates that the practical effect of the post-election violence was to make the country ungovernable without the ODM being brought into the Government.

56. Thus, the political party supported by the alleged perpetrators of the crimes in this case is now part of the government of Kenya. The victims' representatives expressed the concern at the confirmation of charges hearing that the Government of Kenya has not shown interest in prosecuting the perpetrators of these crimes. The suggestion that the International Criminal Court cannot do so because of an insufficient "State" connection for purposes of Article 7(2)(a) of the Statute is, it is submitted, in circumstances such as these contrary to the purpose of international criminal law.
57. For the reasons given above, issues of the correct interpretation of Article 7 go to the merits of this case, and not to the Court's jurisdiction. Nevertheless, given that the Defence has signalled that there may be an issue in the case as to the extent to which the crimes charged had a "State" connection, it is submitted that it would be desirable for the Prosecution to clarify the extent to which the Prosecution alleges that there is a connection between the plan pursuant to which the alleged crimes were committed, and the aim of securing a place in Government for the ODM and/or certain of its members following the 2007 election. The victims' representative respectfully submits that the Pre-Trial Chamber might invite the Prosecution to give such clarification.
58. Finally, it is noted that the Ruto and Sang Application might be understood as suggesting that the Defence considers that the Prosecution has given insufficient particulars of its case. For instance, at paragraph 64, it states that "The Prosecution has, the Defence submits, failed to provide sufficient detail about the operation, purpose, structure and membership of "The Network". At paragraph 75, the Ruto and Sang Application states that: "Given the limited number of names mentioned in the evidence and the vague description of the functions and structure of 'The Network', there remain a

series of question marks as to what this organization was, who was part of it, how it operated, and when, why and by whom it was created”.<sup>32</sup>

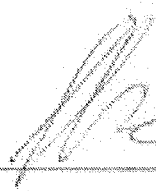
59. In this respect, it is submitted that if the Defence considers that it has been given insufficient notice of the particulars of the case against it, it can apply for appropriate remedies. For instance, if necessary, the Defence could file a motion seeking an order that the Prosecution provide it with further particulars. It is fully acknowledged that a Suspect or Accused is entitled to adequate notice of the Prosecution case. However, lack of adequate notice does not deprive the Court of *jurisdiction*. Rather, where adequate notice is not given, the Defence may ask the Court, within *the exercise of* its jurisdiction, to grant an appropriate remedy.

### **The Kosgey Application**

60. The Kosgey Application raises substantively similar arguments as those made in the Ruto and Sang application. The observations above apply equally in relation to the Kosgey application.

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<sup>32</sup> See also Ruto and Sang Application, para 69: “The DCC does not provide any details as to what coded words Mr. Sang actually used and what they allegedly indicated. .... Even these details are scanty”.

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Sureta Chana

Dated this 16<sup>th</sup> day of September 2011

At London, United Kingdom