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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

**Decision on the Prosecutor's Application for Summons to Appear for William
Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang**

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

The Office of the Prosecutor
 Luis Moreno-Ocampo, Prosecutor
 Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

Other

REGISTRY

Registrar & Deputy Registrar
 Silvana Arbia, Registrar
 Didier Preira, Deputy-Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision on the “Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang” (the “Application”).¹

1. On 31 March 2010, the Chamber issued its decision, in which it granted, by majority, the Prosecutor’s request to commence an investigation in the situation in the Republic of Kenya for crimes against humanity to the extent specified in the operative part of the said decision (the “31 March 2010 Decision”).²
2. On 15 December 2010, the Prosecutor submitted the Application requesting the Chamber to:
 - 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.³
3. The Prosecutor also requested that the Chamber issue the summonses to appear for the three persons subject to a number of conditions outlined in paragraph 219 of the Application.⁴
4. On 16 February 2011, the Chamber requested the Prosecutor to submit all witnesses’ statements which he relies on for the purposes of his Application under

¹ ICC-01/09-30-Conf-Exp and its Annexes.

² Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr, 31 March 2010.

³ Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-30-Conf-Exp, 15 December 2010, p. 79 [hereinafter Prosecutor’s Application].

⁴ Prosecutor’s Application, para. 219.

article 58 of the Rome Statute (the “Statute”), no later than 23 February 2011 (the “16 February 2011 Decision”).⁵

5. On 23 February 2011, the Chamber received the witnesses’ statements as requested in its 16 February 2011 Decision.⁶

6. For the sake of ruling on the Prosecutor’s Application, the Chamber shall examine in a chronological order the following elements: (i) jurisdiction and admissibility; (ii) whether there are reasonable grounds to believe that one or more crimes outlined in the Prosecutor’s Application has been committed; (iii) whether there are reasonable grounds to believe that William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (“Ruto”, “Kosgey” and “Sang” respectively) are criminally responsible for the crimes presented in the Prosecutor’s Application; and (iv) whether the requirements to issue summonses to appear for Ruto, Kosgey and Sang have been met.

I. Jurisdiction and admissibility

7. Article 19(1) of the Statute provides that: “The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17”.

8. The Chamber considers that, regardless of the mandatory language of article 19(1) of the Statute, which requires an examination of whether the Court has the competence to adjudicate the case under consideration, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential feature in the exercise by any judicial body of its

⁵ Pre-Trial Chamber II, “Decision Requesting the Prosecutor to Submit the Statements of the Witnesses on which he Relies for the Purposes of his Applications under Article 58 of the Rome Statute”, ICC-01/09-45-Conf-Exp.

⁶ ICC-01/09-48-Conf-Exp and its Annexes.

functions and is derived from the well-recognised principle of *la compétence de la compétence*.⁷

9. The phrase “satisfy itself that it has jurisdiction” also entails that the Court must ‘attain the degree of certainty’ that the jurisdictional parameters set out in the Statute have been satisfied.⁸ Thus, the Chamber’s determination as to whether it has jurisdiction over the case against Ruto, Kosgey and Sang is a prerequisite for examining the Prosecutor’s Application and in turn, the issuance or not of summonses to appear against those persons pursuant to article 58 of the Statute.

10. In its 31 March 2010 Decision, the Chamber examined the different facets of jurisdiction in terms of place (*ratione loci*, i.e. in the Republic of Kenya), time (*ratione temporis*, i.e. crimes allegedly committed after 1 June 2005), and subject-matter (*ratione materiae*, i.e. crimes against humanity). It also defined the scope of the Prosecutor’s investigation with respect to the situation under consideration, in view of the above-mentioned three jurisdictional prerequisites, namely the territorial, temporal and material parameters of the situation. It found that all the requirements were met, which led it to authorise the Prosecutor to commence an investigation into the situation in the Republic of Kenya in relation to “crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009”.⁹

11. In the context of the present decision, the Chamber has reviewed the Application and the supporting materials and is of the view that, since the Prosecutor has adhered to the Court’s territorial, temporal and material parameters defining the situation as confirmed in its 31 March 2010 Decision, it 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. In light of the foregoing, the

⁷ Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-424, para. 23.

⁸ Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-424, para. 24.

⁹ Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr, p. 83.

Chamber finds that it has jurisdiction to adjudicate the case which is the subject of the Prosecutor's Application.

12. Regarding admissibility, the second sentence of article 19(1) of the Statute dictates that an admissibility determination of the case is only discretionary at this stage of the proceedings, in particular when triggered by the *proprio motu* powers of the Chamber. Accordingly, the Chamber shall not examine the admissibility of the case at this phase of proceedings.

II. Whether there are reasonable grounds to believe that one or more of the crimes presented in the Prosecutor's Application have been committed

13. In his Application, the Prosecutor alleged that crimes against humanity have been committed in different locations in the Republic of Kenya as follows:

Count 1
Murder constituting a crime against humanity
 (Article 7(1)(a) and Article 25(3)(a) or (d) of the 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 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 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 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.

14. The Prosecutor submitted that the crimes referred to under Counts 1 to 4 were committed by large and organized gangs of Kalenjin youth against members of the civilian population, as part of a widespread and systematic attack. In the view of the Prosecutor, this attack was committed on the basis of the population's political affiliation to the Party of National Unity (PNU)¹⁰ and pursuant to an organizational policy.¹¹

15. The Chamber recalls its legal analysis and findings on the law (as opposed to the facts) concerning the contextual elements of the crimes against humanity as conducted in its previous decisions, including the 31 March 2010 Decision, and sees no reason to either reiterate or depart from them.¹²

¹⁰ Prosecutor's Application, para. 3, 23.

¹¹ Prosecutor's Application, para. 130.

¹² Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 77-99; See also

16. On the basis of the Application, the information and the summary of evidence presented (collectively, the "material"), the Chamber finds that there are reasonable grounds to believe that, immediately after the announcement of the results of the presidential election and specifically from 30 December 2007 until the end of January 2008, an attack was carried out in locations including Turbo town, the greater Eldoret area (encompassing Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town, in the Uasin Gishu and Nandi Districts, Republic of Kenya.¹³

17. The Chamber further finds that there are reasonable grounds to believe that the attack targeted the civilian population namely, the Kikuyu, Kamba and Kisii ethnic groups, which were perceived as PNU supporters. There also reasonable grounds to believe that the attack against the civilian population was widespread, as evidenced by the number of victims subjected to the attack and those who have been displaced or have taken refuge as a result of such attack, the different locations targeted, as well as the amount of burning and destruction of properties.¹⁴

18. In particular, there are reasonable grounds to believe that the violence in the Uasin Gishu District (encompassing Turbo town and the Eldoret area) resulted in burning and destruction of 1475 houses, death of approximately 230, 505 injured persons and the displacement of 7800 persons.¹⁵ In the Nandi District (encompassing Kapsabet town and Nandi Hills town), the attack ended in the death of 7 persons and the injury of more than 500.¹⁶ A number of houses and business premises were also looted and burned.¹⁷ The perpetrators left three people dead on 8 January 2008

Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, 15 June 2009, paras 73-88.

¹³ Prosecutor's Application, Annex 8, pp. 54, 60, 347-348, 357-358; Annex 9, pp. 73-76 Annex 19, pp. 554-557, 571-572, 584-585, 589, 628-629, 749-750, 938, 939-940.

¹⁴ Prosecutor's Application, Annex 5, pp. 41-42; Annex 8, pp. 48-49, 60; Annex 9, pp. 75, 137-138; Annex 12, p. 2; Annex 13, p. 2; Annex 19, pp. 584-585, 616-617, 619, 749-750.

¹⁵ Prosecutor's Application, Annex 8, p. 60; Annex 12, p. 2; Annex 13, p. 2.

¹⁶ Prosecutor's Application, Annex 12, p. 2; Annex 13, p. 2.

¹⁷ Prosecutor's Application, Annex 5, pp. 41-42; Annex 9, pp. 137-138; Annex 19, pp. 584-585, 616-617, 619.

in Kapsabet town and killed others in the vicinity of the roadblocks erected about 2 kilometers from Kapsabet town.¹⁸ About 32,000 persons were forced to seek refuge at Nandi Hills police station and in the surrounding areas.¹⁹

19. Moreover, there are reasonable grounds to believe that the attack was also systematic as the perpetrators employed similar means and methods to attack the different locations, namely that they: (i) approached the targets simultaneously, in large numbers, and from different directions;²⁰ (ii) erected roadblocks around such locations;²¹ (iii) had previously identified which properties belonged to PNU supporters, in readiness for their attack;²² and (iv) used petrol and other inflammable material to systematically burn down the properties belonging to PNU supporters.²³

20. The Chamber is also satisfied that there are reasonable grounds to believe that the attack against the civilian population was committed pursuant to an organizational policy.²⁴

21. According to the Prosecutor, there was a plan to punish PNU supporters in the event that the 2007 presidential elections were rigged.²⁵ The plan aimed at expelling them from the Rift Valley, with the ultimate goal of creating a uniform Orange Democratic Movement (ODM) voting block.²⁶

22. In order to implement the plan agreed upon, the Prosecutor submitted that Ruto, Kosgey and Sang established a network of perpetrators belonging to the Kalenjin community. This network was comprised of eminent ODM political representatives,

¹⁸ Prosecutor's Application, Annex 9, p. 75; Annex 19, pp. 749-50.

¹⁹ Prosecutor's Application, Annex 9, p. 75.

²⁰ Prosecutor's Application, Annex 19, pp. 346, 584, 1395.

²¹ Prosecutor's Application, Annex 9, p. 80; Annex 10, p. 2; Annex 19, pp. 749-750, 1561-1562.

²² Prosecutor's Application, Annex 19, pp. 316, 326, 400, 503, 604, 1106, 1114.

²³ Prosecutor's Application, Annex 19, pp. 432, 519.

²⁴ Prosecutor's Application, Annex 5, pp. 41-42; Annex 8, pp. 78-89; Annex 9, pp. 77, 137-38; 184-186; Annex 19, pp. 310-311, 314, 316, 319, 320, 326, 390-391, 400, 415, 419, 423, 425, 432, 445, 448, 450, 452, 461, 478-479, 493-494, 503, 530-531, 589, 598, 604, 890, 938, 1106, 1113-1114, 1193, 1704.

²⁵ Prosecutor's Application, paras 1, 3, 18.

²⁶ Prosecutor's Application, para. 18.

representatives of the media, former members of the Kenyan police and the army, Kalenjin elders as well as local leaders.²⁷

23. The Chamber is of the view that there are reasonable grounds to believe that the network had the capability to perform acts which infringe on basic human values.²⁸ According to the material presented by the Prosecutor, there are reasonable grounds to believe that the network was under responsible command and had an established hierarchy, with Ruto as leader,²⁹ Kosgey as deputy leader and treasurer³⁰ and Sang as responsible for communicative purposes.³¹ The material presented establishes reasonable grounds to believe that the hierarchical structure of the network comprised of three commanders and four divisional commanders, who were responsible for operations on the field.³² Subordinate to the commanders, were other individuals who were tasked with more specific functions, such as the identification of targets and storage of weapons.³³

24. There are also reasonable grounds to believe that the network possessed the means to carry out a widespread or systematic attack against the civilian population, as its members had access to and utilised a considerable amount of capital, guns, crude weapons and manpower.³⁴ The material presented also provides reasonable grounds to believe that the network identified the criminal activities against the

²⁷ Prosecutor's Application, para. 19.

²⁸ Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 90.

²⁹ Prosecutor's Application, Annex 19, pp. 42-43, 323, 353, 390, 424-425, 445, 461, 493-494, 603, 955, 1825, 1943.

³⁰ Prosecutor's Application, Annex 19, pp. 421-422, 424-425, 493-494, 516-517, 874, 1106, 1314-1315, 1500-1501, 1508, 1544, 1654.

³¹ Prosecutor's Application, Annex 19, pp. 393, 792-793, 1269-1270, 1456, 1493-1496, 1548-1552, 1570, 1748-1749.

³² Prosecutor's Application, Annex 19, pp. 493-494, 1106.

³³ Prosecutor's Application, Annex 19, pp. 604, 909, 923-924, 1106, 1114.

³⁴ Prosecutor's Application, Annex 19, pp. 428, 448-449, 461, 530-531, 873-874, 1120-1121, 1125, 1140-1141, 1186-1187, 1590-1591.

civilian population as its primary purpose,³⁵ and that it articulated an intention to attack the civilian population.³⁶

25. In light of the foregoing, the Chamber considers that the network qualifies as an "organization" within the meaning of article 7(2)(a) of the Statute.

26. With regard to the policy element, the Chamber considers that there are reasonable grounds to believe that the organization promoted a policy aimed at targeting members of the civilian population supporting the PNU, in order to punish them and evict them from the Rift Valley, with the ultimate goal of gaining power and creating a uniform ODM voting block.³⁷

27. More specifically, there are reasonable grounds to believe that between late December 2006 and the days immediately before the 2007 presidential elections, a series of preparatory meetings were held to discuss and arrange the modalities of the implementation of the said policy.³⁸

28. The Chamber finds that there are reasonable grounds to believe that, over the course of these meetings, several issues which were crucial for the implementation of the policy were dealt with, including: (i) the appointment of commanders and divisional commanders responsible for operations on the field;³⁹ (ii) the production of maps marking out areas most densely inhabited by communities perceived to be or actually siding with the PNU;⁴⁰ (iii) the purchase of weapons and their storage before the attack;⁴¹ (iv) the transportation of the perpetrators to and from the targeted locations;⁴² (v) the establishment of a rewarding mechanism to motivate the

³⁵ Prosecutor's Application, Annex 19, pp. 310, 314, 316, 319, 320, 352, 391, 425, 450, 452, 461-463, 506-508, 580, 918.

³⁶ Prosecutor's Application, Annex 19, pp. 390-391, 407, 432, 562, 597.

³⁷ Prosecutor's Application, Annex 5, pp. 41-42; Annex 8, pp. 78-89; Annex 9, p. 77, 137; 184-186; Annex 19, pp. 310-311, 314, 316, 319, 320, 326, 390-391, 400, 415, 419, 423, 425, 432, 445, 448, 450, 452, 461, 478-479, 493-494, 503, 530-531, 589, 598, 604, 890, 938, 1106, 1113-1114, 1193, 1704.

³⁸ Prosecutor's Application, Annex 11, p. 2.

³⁹ Prosecutor's Application, Annex 19, pp. 314, 493-494, 1438-1440.

⁴⁰ Prosecutor's Application, Annex 19, pp. 316, 598.

⁴¹ Prosecutor's Application, Annex 19, pp. 428, 530-531, 1004-1005.

⁴² Prosecutor's Application, Annex 19, p. 320.

perpetrators to kill the highest possible number of persons belonging to the target communities as well as to destroy their properties.⁴³

29. In view of the above, the Chamber finds that the contextual elements for crimes against humanity alleged in the Prosecutor's Application have been satisfied.

30. Turning to the alleged underlying acts constituting crimes against humanity, the Chamber is satisfied, on the basis of the facts presented in the material, that there are reasonable grounds to believe that murder as a crime against humanity was committed, as part of the attack against the civilian 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, from 30 December 2007 to the end of January 2008 (Count 1).⁴⁴ In particular, according to the material presented, the physical perpetrators identified people belonging to enemy communities by checking their identification documents or asking for their names, killing them immediately by way of shooting with weapons or with arrows.⁴⁵

31. On the basis of the factual examination entertained in paragraph 18 above, the Chamber further finds that there are reasonable grounds to believe that forcible transfer of population, as a crime against humanity, was committed as part of the attack against the civilian 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, from 30 December 2007 to the end of January 2008 (Count 2).⁴⁶ More specifically, between 30 December 2007 and 1 January 2008, large gangs of perpetrators associated with the network strategically converged upon Turbo Town, the greater Eldoret area, Kapsabet town and Nandi Hills town, and started burning down

⁴³ Prosecutor's Application, Annex 19, pp. 445, 461-463.

⁴⁴ Prosecutor's Application, Annex 5, pp. 45-46; Annex 8, pp. 58-59; Annex 9, pp. 73-75; Annex 19, pp. 344, 515, 584, 589, 610-611, 627-629, 646-647, 664-689, 749-750, 939-940, 1220.

⁴⁵ Prosecutor's Application, Annex 5, p. 45; Annex 19, p. 343-344, 749-750.

⁴⁶ Prosecutor's Application, Annex 5, p. 43; Annex 8, pp. 60-61, 112, 129; Annex 9, pp. 71, 75, 106; Annex 19, pp. 554-555, 560-561, 571-572, 655, 699-700, 740-741, 754.

properties.⁴⁷ These houses and business premises were burned as they were owned and/or occupied by members of particular communities, namely Kikuyu, Kamba and Kisii.⁴⁸ The destruction of property was the primary tactic used by the network's perpetrators to forcibly remove PNU supporters from the targeted areas.⁴⁹

32. In respect of the Prosecutor's allegations regarding the crimes against humanity of persecution, the Chamber considers that the material presented establishes reasonable grounds to believe that the acts of murder and forcible transfer of population, referred to earlier, were committed primarily on political grounds by reason of the identity of the victims as perceived PNU supporters. Therefore, the Chamber finds that there are reasonable grounds to believe that persecution as a crime against humanity, was committed in connection with and through acts of murder and forcible transfer, as part of the attack against the civilian 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 from 30 December 2007 until the end of January 2008 (Count 4).⁵⁰

33. Finally, in relation to the Prosecutor's allegations of acts constituting torture as a crime against humanity (Count 3), the Chamber considers that the material presented is not sufficient to establish reasonable grounds to believe that acts of torture as a crime against humanity were committed in the relevant locations and at the relevant time referred to in the Prosecutor's Application. This is without prejudice to the possibility that the Prosecutor presents new evidence in the future substantiating this alleged crime.

⁴⁷ Prosecutor's Application, Annex 5, pp. 41-42; Annex 19, pp. 584-585, 616-617, 783-785, 1590.

⁴⁸ Prosecutor's Application, Annex 5, pp. 41-42; Annex 19, pp. 415, 584-585, 616-617, 783-785.

⁴⁹ Prosecutor's Application, Annex 5, pp. 41-42; Annex 9, pp. 137-138; Annex 19, pp. 584-585, 616-617, 619.

⁵⁰ Prosecutor's Application, Annex 5, pp. 42, 45-46; Annex 9, pp. 75-76, 138; Annex 19, pp. 316, 400-401, 415, 419, 432, 461, 488, 497, 503, 509, 519, 562, 570-571, 580, 604, 1106, 1113-1114.

III. Whether there are reasonable grounds to believe that William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang are criminally responsible for the crimes presented in the Prosecutor's Application

34. In view of the conclusions reached in section II above, the Chamber's assessment with regard to the attribution of criminal responsibility for Ruto, Kosgey and Sang shall be confined to those crimes in respect of which the Chamber has found reasonable grounds to believe that they were committed namely, the crimes set out in Counts 1, 2 and 4 of the Prosecutor's Application.

35. In his Application, the Prosecutor inconsistently presented different modes of liability. In paragraphs 26 and 27 of the Application, the Prosecutor submitted that 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 crimes against humanity referred to in Counts 1 to 4 of the Application, and 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". In presenting his counts, the Prosecutor described the alleged responsibility of the three persons only "as co-perpetrators, or in the alternative" as falling under article 25(3)(d) of the Statute. Later, under the section on modes of liability, the Prosecutor alleged that the three persons' criminal responsibility fits as "indirect co-perpetrators, or in the alternative, as co-perpetrators" or as common purpose liability under article 25(3)(d) of the Statute.

36. Although the Prosecutor may generally charge in the alternative, he should be consistent throughout his Application about the actual mode(s) of liability that he intends to present to the Chamber. Moreover, the possibility for the Prosecutor to charge in the alternative does not necessarily mean that the Chamber has to respond in the same manner. In particular, the Chamber is not persuaded that it is best practice to make simultaneous findings on modes of liability presented in the alternative. A person cannot be deemed concurrently as a principal and an accessory to the same crime. Thus, it is the Chamber's view that an initial decision has to be made on the basis of the material provided, as to whether there are reasonable

grounds to believe that Ruto, Kosgey and Sang bear criminal responsibility for the crimes against humanity that occurred in the specific locations in the Republic of Kenya, as discussed in section II above, either as co-perpetrators, indirect co-perpetrators, or any other form of liability presented or that the Chamber finds appropriate.

37. On the basis of the material presented, the Chamber finds reasonable grounds to believe that Ruto and Kosgey are criminally responsible for the crimes against humanity of: murder (article 7(1)(a)); forcible transfer of population (article 7(1)(d)) and persecution (article 7(1)(h)) as indirect-co perpetrators pursuant to article 25(3)(a) of the Statute. The Chamber, however, does not find reasonable grounds to believe that Sang is criminally responsible as a principal, *i.e.*, an indirect co-perpetrator with Ruto and Kosgey for the crimes against humanity referred to above.

38. Since the Chamber is satisfied, on the basis of the available material, that indirect co-perpetration is the appropriate mode of liability for Ruto and Kosgey, there is no reason to examine their role in light of the alternative mode of liability embodied in article 25(3)(d) of the Statute. As to Sang, the Chamber is satisfied that the material presented, reveals that there are reasonable grounds to believe that his role is best characterised under article 25(3)(d) of the Statute.

39. The Chamber recalls its finding in the confirmation of charges decision concerning the *Prosecutor v. Jean-Pierre Bemba*, in which it acknowledged that the concept of co-perpetration (joint commission), whether direct or indirect, embodied in article 25(3)(a) of the Statute and reflected in the words “[committing] jointly with another or through another person” must go together with the notion of “control over the crime”.⁵¹

40. The Chamber also recalls that the mode of liability of indirect co-perpetration consists of the following elements: (i) the suspect must be part of a common plan or

⁵¹ Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-424, paras 346-347.

an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime; (iii) the suspect must have control over the organisation; (iv) the organisation must consist of an organised and hierachal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).⁵²

41. The Chamber finds that there are reasonable grounds to believe that from 30 December 2006 to the end of December 2007, Ruto, Kosgey and Sang, held a series of meetings in which they agreed on a common plan to punish PNU supporters and evict them from the Rift Valley, with the ultimate goal of gaining power and to create a uniform ODM voting block.⁵³

42. The Chamber is satisfied that there are reasonable grounds to believe that Ruto – in his capacity as the most representative Kalenjin leader and head of the organization established – together with Kosgey – who was the deputy of Ruto and the Chairman of ODM as well as MP for Tinderet constituency – provided essential contributions to the implementation of the common plan by way of organising and coordinating the commission of widespread and systematic attacks that meet the threshold of crimes against humanity as discussed in section II above, in the absence of which the plan would have been frustrated. More specifically, the material

⁵² Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, paras. 350-351; Pre-Trial Chamber I "Decision on the confirmation of charges" against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, paras. 500-514, 527-539; Pre-Trial Chamber I, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-3, paras 209-213.

⁵³ Prosecutor's Application, Annex 11, p. 2; Annex 19, pp. 222, 314, 316, 320, 404-405, 427-428, 444-446, 461-463, 491-495, 515-517, 529-531, 598, 1004-1010, 1703-1704.

presented establishes reasonable grounds to believe that Ruto: (i) overall planned and was responsible for the implementation of the common plan in the entire Rift Valley;⁵⁴ (ii) created a network of perpetrators to support the implementation of the common plan;⁵⁵ (iii) directly negotiated or supervised the purchase of guns and crude weapons;⁵⁶ (iv) gave instructions to the perpetrators as to who they had to kill and displace and whose property they had to destroy;⁵⁷ (v) established a rewarding mechanism with fixed amounts of money to be paid to the perpetrators upon successful murder of PNU supporters or destruction of their properties.⁵⁸

43. With regard to Kosgey, the evidence indicates that there are reasonable grounds to believe that he: (i) promoted, together with Ruto, the creation of the network of perpetrators;⁵⁹ (ii) actively organized the modalities of the implementation of the common plan, in his capacity as deputy of Ruto;⁶⁰ and that (iii) he was responsible for the implementation of the common plan in the Nandi District.⁶¹ Moreover, there are reasonable grounds to believe that Kosgey was in charge of managing the financial resources of the organization for the purpose of implementing the common plan.⁶²

44. However, the Chamber is not satisfied that there are reasonable grounds to believe that Sang's involvement in two of the preparatory meetings throughout the period 30 December 2006 until end of December 2007, as well as his role as a broadcaster for Kass FM radio station, constituted essential contributions, to the extent that he had the power to frustrate the commission of the crimes, by not fulfilling his task. Accordingly, the Chamber finds that there are not reasonable

⁵⁴ Prosecutor's Application, Annex 19, pp. 424-425.

⁵⁵ Prosecutor's Application, Annex 19, pp. 314, 419, 444-446, 493-494.

⁵⁶ Prosecutor's Application, Annex 19, pp. 25, 530-531, 1004-1005.

⁵⁷ Prosecutor's Application, Annex 19, pp. 562, 1520-1521, 1525-1526, 1825, 1943.

⁵⁸ Prosecutor's Application, Annex 19, pp. 445, 461-463.

⁵⁹ Prosecutor's Application, Annex 19, pp. 424, 1544.

⁶⁰ Prosecutor's Application, Annex 19, pp. 404-406, 424, 427-428, 515-517, 1079-1080, 1105-1106, 1500-1501, 1507, 1544.

⁶¹ Prosecutor's Application, Annex 19, pp. 425.

⁶² Prosecutor's Application, Annex 19, pp. 874, 1507, 1654.

grounds to believe that Sang is a principal perpetrator to the crimes within the meaning of article 25(3)(a) of the Statute.

45. Nevertheless, the Chamber reiterates that there are reasonable grounds to believe that there existed an organization which reflected a hierarchical structure, headed and controlled by Ruto and Kosgey by virtue of the different prominent roles they played within that organization.⁶³ In addition, there are reasonable grounds to believe that, due to their positions and powers within the organization, Ruto and Kosgey were able to secure the execution of the crimes agreed upon by almost automatic compliance of the physical perpetrators with the orders given by the leaders.⁶⁴

46. According to the material available, the Chamber finds reasonable grounds to believe that Ruto and Kosgey satisfy the subjective elements of the crimes and that they were aware of the widespread and systematic nature of the attacks committed against the civilian population, in the context of which the crimes were perpetrated.⁶⁵ The evidence indicates that there are reasonable grounds to believe that Ruto, during the preparatory meetings and in the implementation phase of the plan, gave instructions to the perpetrators – either orally or via phone messages – to carry on acts of murders, displacement and destruction of property against PNU supporters.⁶⁶

47. As for Kosgey, there are also reasonable grounds to believe that he actively participated in a number of preparatory meetings where the details of the plan were disclosed, including the amount of weapons and funds at disposal of the organization and the identification of the areas most densely inhabited by PNU supporters.⁶⁷

⁶³ Prosecutor's Application, Annex 19, pp. 16, 20, 26, 322-323, 353, 419, 424-425, 445, 461, 493-494, 580, 603, 874, 909, 923-24, 954-955, 1106, 1112-1114, 1307-1309, 1313-1316, 1322, 1409, 1508-1509, 1544.

⁶⁴ Prosecutor's Application, Annex 19, pp. 381-382, 424-425, 461, 580, 581, 583, 587, 874, 1140-1141, 1186-1187, 1544, 1624-25, 1627-30, 1630-31, 1635-36, 1638-39, 1643-45.

⁶⁵ Prosecutor's Application, Annex 19, pp. 310, 314, 316, 319-320, 404-407, 421-422, 461-463, 503, 515-516, 562, 1079-1080, 1507, 1511, 1520-1521, 1525, 1590-1591, 1825, 1861, 1880-1881, 1943.

⁶⁶ Prosecutor's Application, Annex 19, pp. 1520-1521, 1525, 1825, 1943.

⁶⁷ Prosecutor's Application, Annex 19, pp. 404-407, 421-422, 427-428, 516-517, 1079-80.

48. The Chamber further finds that there are reasonable grounds to believe that Ruto and Kosgey, by virtue of their positions within the organization and the powers they exercised over its members and its resources, were aware and accepted that implementing the common plan, which they agreed upon, would have resulted in the fulfilment of the material elements of the crimes against humanity referred to in section II above.⁶⁸ Moreover, there are reasonable grounds to believe that Ruto and Kosgey were vested with such a power and exercised such functions within the organization so as to put them in position of exercising joint control over the commission of these crimes and to make them aware of the circumstances enabling them to jointly exercise such control.⁶⁹

49. For the foregoing reasons, the Chamber finds that there are reasonable grounds to believe that Ruto and Kosgey are criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute for the crimes against humanity examined in section II of the present decision.

50. The Chamber recalls its earlier finding, in paragraph 37 of the present decision, that based on the material submitted by the Prosecutor, there are not reasonable grounds to believe that Sang could be held responsible as indirect co-perpetrator under article 25(3)(a) of the Statute. In anticipation, the Prosecutor requested, in the alternative, that Sang be considered as having contributed to a crime committed by a group of persons within the meaning of article 25(3)(d) of the Statute. Thus, the Chamber shall examine whether there are reasonable grounds to believe that Sang is criminally responsible under article 25(3)(d) of the Statute for the crimes against humanity committed and referred to in section II of this decision.

51. According to article 25(3)(d) of the Statute, there are specific requirements that must be met in order to trigger the responsibility of Sang under this mode of

⁶⁸ Prosecutor's Application, Annex 19, pp. 310-311, 314, 316, 318-323, 404-407, 421-422, 427-428, 443-452, 461, 462-464, 515-517, 1079-1080, 1500-1503, 1507-1509, 1511, 1525, 1590-1591, 1654, 1861, 1880-1881, 1943.

⁶⁹ Prosecutor's Application, Annex 19, pp. 323, 424-426, 445, 455-461, 844, 874-875, 955, 1079-1080, 1500-1501, 1507-1508, 1543-1544, 1654, 1880-1881.

liability. Thus, the Chamber must ascertain in view of the required evidentiary threshold that: (i) a crime within the jurisdiction of the Court is attempted or committed; (ii) a group of persons acting with a common purpose attempted to commit or committed this crime; (iii) the individual contributed to the crime, in any way other than those set out in article 25(3)(a) to (c) of the Statute (objective elements); (iv) the said contribution is intentional; and (v) has been made either (a) with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime (subjective elements).⁷⁰

52. The Chamber recalls its findings in section II that there are reasonable grounds to believe that crimes within the jurisdiction of the Court were committed. The Chamber has also found in paragraph 41 of the present decision that there are reasonable grounds to believe that these crimes have been committed, pursuant to a common plan, by a group of persons acting in a concerted manner.

53. The Chamber is of the view that there are reasonable grounds to believe that Sang intentionally contributed to the commission of the crimes and his contribution was made, by at least, knowing of the intention of Ruto and Kosgey to commit the crimes against humanity discussed earlier. This conclusion may be deduced from the fact that he participated in the meetings of 30 December 2006 and 2 November 2007, during which the different aspects of planning to attack the Kikuyus were developed.⁷¹ Moreover, the material presented provides reasonable grounds to believe that Sang, by virtue of his influence in his capacity as a Kass FM radio broadcaster contributed in: (i) placing Kass FM at the disposal of the organization;⁷² (ii) advertising the organization's meetings;⁷³ (iii) fanning violence through spreading hate messages and explicitly revealing a desire to expel the Kikuyus;⁷⁴ and

⁷⁰ Pre-Trial Chamber I, "Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana", ICC-01/04-01/10, para. 39.

⁷¹ Prosecutor's Application, Annex 19, pp. 9-10, 222.

⁷² Prosecutor's Application, Annex 19, pp. 1002-1003, 1144.

⁷³ Prosecutor's Application, Annex 19, pp. 87-92, 1140, 1470-1471.

⁷⁴ Prosecutor's Application, Annex 19, pp. 393, 799-800.

(iv) broadcasting false news regarding alleged murder(s) of Kalenjin people in order to inflame the atmosphere.⁷⁵ Accordingly, the Chamber finds reasonable grounds to believe that Sang is criminally responsible under article 25(3)(d) of the Statute for the crimes against humanity committed as discussed in section II above.

IV. Whether the requirements to issue summons to appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang have been met

54. The Chamber notes that according to article 58(7) of the Statute, summonses to appear for Ruto, Kosgey and Sang shall be issued, if it is satisfied that there are reasonable grounds to believe that these persons have committed the crimes alleged in the Prosecutor's Application and that summonses are sufficient to ensure their appearance before the Court.

55. The Chamber has already determined that there are reasonable grounds to believe that criminal responsibility under article 25(3)(a) and (d) of the Statute can be attributed to the persons named in the Prosecutor's Application for the occurrence of the crimes against humanity discussed in section II above. Yet, for summonses to be issued, article 58(7) still requires the Chamber to be satisfied that such an option is sufficient to ensure the persons' appearance before the Court.

56. Based on the information submitted in the Prosecutor's Application, the Chamber is satisfied that the issuance of summonses to appear for Ruto, Kosgey and Sang is sufficient to ensure their appearance before the Court. The Chamber concurs with the Prosecutor that, at this stage, there is no indication that Ruto, Kosgey and Sang, are either perceived as flight risks or likely to evade personal service of the summonses or refrain from cooperating if summoned to appear.⁷⁶ This is without prejudice to the Chamber's competence to revisit its finding either *proprio motu* or in response to a request submitted by the Prosecutor. Should Ruto, Kosgey and Sang fail to appear on the date specified in the summonses or to comply with the conditions imposed in the operative part of this decision, the Chamber reserves the

⁷⁵ Prosecutor's Application, Annex 19, pp. 1493-1496.

⁷⁶ Prosecutor's Application, paras 218, 222.

right to replace the summonses to appear with warrants of arrest under article 58 of the Statute and rule 119(4) of the Rules of Procedure and Evidence (the "Rules").

V. Conclusion

57. In view of the foregoing, the Chamber is satisfied that there are reasonable grounds to believe that, from 30 December 2007 until end of January 2008, Ruto and Kosgey are criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute, and that Sang is criminally responsible as having contributed to crimes committed by a group of persons within the meaning of article 25(3)(d) of the Statute, 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, for the following acts constituting crimes against humanity:

- (i) murder within the meaning of article 7(1)(a) of the Statute (Count 1);
- (ii) forcible transfer of population within the meaning of article 7(1)(d) of the Statute (Count 2);
- (iii) persecution within the meaning of article 7(1)(h) of the Statute (Count 4).

59. The Chamber therefore decides to issue summonses to appear, pursuant to article 58(7) of the Statute, for the three persons, being satisfied that this measure is sufficient to ensure their appearance before the Court.

FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY

SUMMONS

William Samoei Ruto, born on 21 December 1966 in Kamagut village, Kenya, currently a suspended Minister of Higher Education, Science and technology of the Republic of Kenya;

Henry Kiprono Kosgey, born on 14 July 1947 Nandi district, Kenya, currently Minister of Industrialization of the Republic of Kenya and the Chairman of the ODM; and

Joshua Arap Sang, born in Kitale, Trans-Nzoia District, Kenya, currently the head of operations at Kass FM in Nairobi, the Republic of Kenya;

to APPEAR before the Court on **Thursday, 7 April 2011 at 9.30 hours** for the purposes of the hearing to be held pursuant to article 60 of the Statute and rule 121(1) of the Rules;

ORDERS

William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, without prejudice to further decisions of the Chamber in this respect:

- (i) 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 for which William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang have been summoned;
- (ii) 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;
- (iii) to refrain from committing crime(s) set forth in the Statute; and
- (iv) to attend all required hearings at the International Criminal Court.

ORDERS

the Registrar to serve the present summonses on William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, as required by article 58(7) of the Statute and in accordance with regulation 31(3)(b) of the Regulations of the Court.

ORDERS

the Registrar, in accordance with regulation 110 of the Regulations of the Court, to make, where necessary, a request for cooperation to the Republic of Kenya in conformity with articles 93 (1) (d) and 99 (1) of the Statute.

Judge Hans-Peter Kaul shall issue a dissenting opinion in due course.

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



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul
Judge

Judge Cuno Tarfusser
Judge

Dated this Tuesday, 8 March 2011
At The Hague, The Netherlands