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PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

Public Document

Request for authorisation of an investigation pursuant to Article 15

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

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Unrepresented Victims

**Unrepresented Applicants
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Victims**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

The Prosecutor hereby requests authorization from the Pre-Trial Chamber to proceed with an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008, pursuant to Article 15(3) of the Rome Statute.

For the purpose of this application, the Prosecutor has relied on a selected number of reliable and publicly available reports on alleged crimes committed during the post-election violence in Kenya, in particular the reports published by: the Commission of Inquiry into Post-Election Violence; the Kenyan National Commission on Human Rights (KNCHR); the Office of the High Commissioner for Human Rights; UNICEF, UNFPA, UNIFEM and Christian Children's Fund; the UN Special Rapporteur on extrajudicial, summary or arbitrary executions; the Oscar Foundation; the Federation of Women Lawyers (FIDA-K); Centre for Rights Education and Awareness (CREAW), Human Rights Watch; and the International Crisis Group. To date, the Prosecutor has received 30 communications from individuals, groups and others regarding information on crimes within the jurisdiction of the Court in relation to the situation in the Republic of Kenya pursuant to Article 15(2) of the Statute.

The Prosecutor submits that there is a reasonable basis to believe that crimes against humanity within the jurisdiction of the Court were committed in the context of the post-election violence of 2007-2008, in particular crimes of murder, rape and other forms of sexual violence, deportation or forcible transfer of population and other inhumane acts. Due to the absence of national proceedings relating to those bearing the greatest responsibility for these crimes, and in the light of the gravity of the acts committed, the Prosecutor submits that the cases that would arise from its investigation of the situation would be admissible. Furthermore, based on the available information, the Prosecutor has no reason to

believe that the opening of an investigation into the situation would not be in the interests of justice.

Pursuant to Regulation 49 of the Regulations of Court, the Application includes 1) a statement of facts indicating the location of the crimes, time period, and to the extent possible, the persons involved, 2) the Declaration of the Prosecutor (Annex 1E), 3) a chronology of relevant events (Annex 1C), 4) a map that illustrates the relevant locations (Annex 1B), 5) an explanatory glossary of relevant names of persons, locations and institutions (Annex 1D) and 6) pursuant to Rule 50, public notice to the victims dated 23 November 2009 (Annex 1F).

II. Procedural History

1. By letter of 5 November 2009, the Prosecutor notified the President of the Court, in accordance with Regulation 45 of the Regulations of the Court of his intention to submit a request for the authorisation of an investigation into the situation pursuant to Article 15 (3) of the Rome Statute.
2. On 6 November 2009, the Presidency of the Court assigned the situation in the Republic of Kenya to Pre-Trial Chamber II.

III. Background

3. The situation in the Republic of Kenya has been under preliminary examination since the violence erupted in the context of national elections held on 27 December 2007.
4. On 30 December 2007, the closely contested presidential elections in Kenya resulted in a declaration by the Electoral Commission of Kenya that incumbent President Mwai Kibaki of the Party of National Unity (PNU) was re-elected over

the main opposition candidate Raila Odinga of the Orange Democratic Movement (ODM). This triggered a series of violent demonstrations, and targeted attacks in several locations within Kenya.¹

5. On 5 February 2008, the Prosecutor issued a public statement recalling that Kenya is a State Party to the Rome Statute, and that the Office will carefully consider all information relating to alleged crimes within its jurisdiction committed on the territory of States Parties or by nationals of States Parties, regardless of the individuals or group alleged to have committed the crime.²

6. On 28 February 2008, international mediation efforts led by Kofi Annan, Chair of the African Union Panel of Eminent African Personalities, resulted in the signing of a power-sharing agreement between Mwai Kibaki as President and Raila Odinga as Prime-Minister. The agreement, also established three commissions: (1) the Commission of Inquiry on Post-Election Violence; (2) the Truth, Justice and Reconciliation Commission; and (3) the Independent Review Commission on the General Elections held in Kenya on 27 December 2007.³

7. By letters dated 6 March 2008, acting pursuant to Article 15(2), the Prosecutor requested additional information from selected sources for the purpose of analysing the seriousness of the information received, namely: the Government of Kenya, the Kenya Human Rights Commission, the Kenya National Commission on Human Rights (KNCHR), and the opposition party, the Orange Democratic Movement (ODM).

¹ Human Rights Watch (HRW), "From Ballots to Bullets", March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, p. 4 (Annex 3); International Crisis Group (ICG), "Kenya in Crisis", 21 February 2008, KEN-OTP-0001-1076 to KEN-OTP-0001-1114, p. 1 (Annex 6).

² OTP Statement in relation to events in Kenya, 05 February 2008 (Annex 13)

³ "Agreement on the Principles of Partnership of the Coalition Government" (Annex 21), and "The National Accord and Reconciliation Act 2008", (Annex 22).

8. On 26 August 2008, in response to its request, the Prosecution received a copy of the report from the KNCHR entitled, *“On the Brink of the Precipice: a Human Rights Account of Kenya’s Post-2007 Election Violence.”*⁴

9. On 15 October 2008 the Commission of Inquiry into the Post-Election Violence (CIPEV) - also known as the Waki Commission, named after its chair Justice Philip Waki of Kenya’s Court of Appeal - published its Final Report.⁵ The Report recommended the setting up of a special tribunal to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya. Short of the establishment of such a Special Tribunal, the Waki commission recommended forwarding to the Prosecutor of the ICC the list, placed under the custody of the Panel of Eminent African Personalities, containing names of those suspected to bear the greatest responsibility for these crimes and to request the Prosecutor to analyze the seriousness of this information with a view to proceeding with an investigation and possible prosecution.⁶

10. On 16 December 2008, President Kibaki and Prime Minister Odinga agreed to implement the recommendations of the Waki Commission and specifically to prepare and submit a Bill to the National Assembly to establish the Special Tribunal to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya.⁷

⁴ Kenyan National Commission on Human Rights (KNCHR), *“On the brink of the precipice: a Human Rights account of Kenya’s post-2007 election violence”*, 15 Aug 08, KEN-OTP-0001-0002to KEN-OTP-0001-0245 (Annex 4).

⁵ Commission of Inquiry into Post-Election Violence (CIPEV), *“Final Report”*, 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892 (Annex 5)

⁶ CIPEV, *“Final Report”*, 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, pp. 472-473 (Annex 5)

⁷ Kenya State House Statement, Special Tribunal to be set up, 17 December 2008, (Annex 25).

11. On 11 February 2009, the Prosecutor publicly reaffirmed that the situation in Kenya was being monitored by his Office.⁸
12. On 12 February 2009, the Kenyan Parliament did not adopt the “Constitution of Kenya (Amendment) Bill 2009” which was necessary to ensure that the Special Tribunal would be in accordance with the Constitution.⁹ Since the Constitutional Amendment Bill was not adopted, the Bill establishing the Special Tribunal was not discussed further.¹⁰
13. On 30-31 March 2009, the Office of the Prosecutor attended a meeting convened in Geneva by the Kofi Annan Foundation on the *Kenya National Dialogue and Reconciliation* and held consultations with various officials and civil society representatives from Kenya about the possibility of creating the tribunal referred to by the Waki Commission.
14. On 3 July 2009, at the seat of the Court, the Prosecutor met with a delegation from the Government of Kenya composed of Hon. Mutula Kilonzo, Minister of Justice and Constitutional Affairs, Hon. James Orengo, Minister of Lands; Hon. Amos Wako; Hon. William Cheptumo, Assistant Minister of Justice; Amb. Amina Mohamed, Permanent Secretary in the Ministry of Justice and Constitutional Affairs; Mr. Miguna Miguna, Prime Minister’s adviser on Coalition Affairs; and H.E. Ruthie Rono, the Kenyan Ambassador to the Netherlands. The Prosecutor reiterated that his Office was conducting a preliminary examination of the situation in Kenya and that crimes allegedly committed after the 2007 elections may fall within the jurisdiction of the ICC. The Prosecutor and the representatives of the Kenyan authorities agreed that impunity was not an option. The meeting resulted in *Agreed Minutes* stating

⁸ OTP Kenya Factsheet, “ICC Prosecutor reaffirms that the situation in Kenya is monitored by his office”, 11 February 2009 (Annex 14).

⁹ The Constitution of Kenya (Amendment) Bill 2009, 28 January 2009. State House, “Parliament rejects a local Special Tribunal”, 12 February 2009 (Annex 26).

¹⁰ Special Tribunal for Kenya Bill, 2009, 28 January 2009 (Annex 24).

that the Kenyan delegation agreed to provide the Prosecutor, by the end of September 2009, with a report on the current status of investigations and prosecutions arising out of post-election violence; information on measures put in place to ensure the safety of victims and witnesses; information on modalities for conducting national investigations and prosecutions of those responsible for the 2007 violence through a special tribunal or other judicial mechanism adopted by the Kenyan Parliament. In the alternative, the Government of Kenya was to refer the situation to the Prosecutor in accordance with Article 14 of the Rome Statute.¹¹

15. On 9 July 2009, the African Union Panel of Eminent African Personalities, chaired by Kofi Annan, announced its submission to the Prosecutor of a sealed envelope containing a list of persons allegedly implicated and supporting materials previously entrusted to Mr. Annan by the Waki Commission on the post-election violence.¹² On 16 July 2009, Prosecutor received the sealed envelope and six boxes containing documents and supporting material compiled by the Commission. The Prosecutor opened the sealed envelope, examined its content and resealed it.¹³

16. On 14 July 2009, the Prosecution received from the Kenyan Government copies of the following two reports: (i) *Report to the Hon. Attorney General by the Team on the Review of Post Election Violence related in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces, February 2009*; and (ii) *Status Report on the Operationalization of the Witness Protection Programme*.¹⁴

17. On 26 August 2009, the Constitution of Kenya (Amendment) (No. 3) Bill 2009 aiming at the establishment of a special tribunal was gazetted, enabling the bill to

¹¹ Agreed Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and the Delegation of the Kenyan Government (Annex 15).

¹² OTP Press Release, "ICC Prosecutor receives Sealed Envelope from Kofi Annan on Post-Election Violence in Kenya", 9 July 2009 (Annex 16). OTP Press Release, "Waki Commission list of names in the hands of ICC Prosecutor", 16 July 2009 (Annex 17).

¹³ OTP Press Release, "Waki Commission list of names in the hands of ICC Prosecutor", 16 July 2009 (Annex 17). OTP Press Release, "ICC Prosecutor receives material on Post-Election Violence in Kenya", 16 July 2009 (Annex 18).

¹⁴ OTP Press Release, "ICC Prosecutor receives material on Post-Election Violence in Kenya", 16 July 2009 (Annex 18).

be formally debated in Parliament.¹⁵ It was initiated by Gitobu Imanyara, Member of Parliament, and is based on the premise that those bearing the greatest responsibility for crimes committed during the post-election violence will be prosecuted by the ICC and the lower level perpetrators will be prosecuted at the Special Tribunal for Kenya.¹⁶

18. On 18 September 2009, the Prosecutor held a roundtable discussion at the seat of the Court with representatives from Kenyan civil society.¹⁷

19. On 9 October 2009, in accordance with the July reunion, the Prosecutor requested a meeting with the Kenyan authorities to inform them about the next steps that he was going to take.

20. On 27 October 2009, the Prosecutor sent a letter to Kenyan authorities explaining that the preliminary examination of the crimes committed in the context of post election violence in Kenya has revealed that acts constituting crimes against humanity might have been committed, that there are no relevant national judicial enquiries and the gravity threshold established by the Statute is reached. The letter explained that there were two options for initiating an investigation, namely a referral from the Kenyan Government or an independent decision of the Prosecutor to request authorization from the Pre-Trial Chamber to start an investigation.¹⁸

21. On 5 November 2009, the Prosecutor met with President Mwai Kibaki and Prime Minister Raila Odinga in Nairobi. The Prosecutor informed them that since all the statutory criteria are fulfilled it was his duty to open an investigation and requested the cooperation of the Kenya national authorities with the Court. The Prosecutor recalled the complementary roles of the ICC and the national

¹⁵ Constitution of Kenya (Amendment) (No. 3) Bill 2009, 24 August 2009 (Annex 27).

¹⁶ Constitution of Kenya (Amendment) (No. 3) Bill 2009, 24 August 2009, pp.1-2 (Annex 27)

¹⁷ OTP Press Release, "ICC Prosecutor: Kenya Can Be an Example to the World", 18 September 2009 (Annex 19).

¹⁸ The Office of the Prosecutor can provide a copy of this letter to the Chamber.

authorities in combating impunity. In a joint press conference the same day, the Prosecutor announced his intention to request authorization to proceed with an investigation into the situation of the Republic of Kenya.¹⁹ The President and Prime Minister issued a joint statement by which they recalled their constructive meeting with the Prosecutor. The Government noted that it remains fully committed to discharge its responsibility in accordance with the Rome Statute to establish a local judicial mechanism to deal with the perpetrators of the post-election violence, and that it remains committed to cooperate with the ICC within the framework of the Rome Statute and the Kenyan International Crimes Act.²⁰

22. On two successive occasions in November 2009, the bill drafted by Gitobu Imanyara could not be debated in the Kenyan Parliament due to the lack of a quorum.²¹

IV. Evaluation of Information

23. The Prosecution has evaluated the information available, has determined that the information received is reliable, and has concluded that it indicates that serious crimes were committed. This Application identifies the information, cites its sources and attaches as annexes the pertinent documents.
24. For the purpose of this Application the Prosecution provides the following summary of the main findings of these reports.

Commission of Inquiry into Post-Election Violence (CIPEV)

25. The Commission of Enquiry into Post Election Violence (CIPEV) - also known as the "Waki Commission" after the name of its Chair, Judge Philip Waki, judge of Kenya's Court of Appeal - was set up in accordance with the Kenya National

¹⁹ Kenyan authorities committed to cooperate as ICC Prosecutor informs them that in December he will request ICC Judges to open an investigation into post-election violence (06 Nov 09) (Annex 20).

²⁰ Statement by HE the President and the Right Honorable Prime Minister, 5 November 2009 (Annex 28).

²¹ The Standard, "MPs snub Imanyara Bill debate, yet again", 19 Nov 09 (Annex 32)

Dialogue and Reconciliation Accord of February 28, 2008, negotiated by Kofi Annan and the Panel of Eminent African Personalities.

26. The Commission was composed of two international members and one Kenyan citizen, selected by the Panel of Eminent African Personalities in consultation with PNU and ODM and appointed by the President. The CIPEV was a non-judicial body mandated to (i) investigate the facts and circumstances surrounding the violence between 28 December 2007 and 28 February 2008, (ii) investigate the conduct of State security agencies in their handling of it and (iii) to recommend measures with regard to bringing to justice those persons responsible for criminal acts. The Commission was set up on 23 May 2007 and took an oath of office on 3 June 2008. The Commission had an initial mandate of three months which was extended for an additional one month and finally an additional two weeks to draft the report. Because of the limited extension granted, the Commission lacked the time to examine all the areas where allegations of crime emerged.
27. The CIPEV interviewed government officials, representatives of the main political parties, security agents, NGOs, representatives of religious and faith based organisations, regional political actors and ordinary citizens in public and closed hearings. The Final report of the CIPEV was published on 15 October 2008.
28. The Report comprises 5 Parts. Part I of the Report is an introduction which discusses the historical context of the violence. Part II is a narration of the violence province by province. Part III deals with four cross cutting issues: sexual violence, internally displaced persons, the media and the nature and impact of the violence. Part IV deals with acts and omissions of state security agencies and impunity. Part V contains recommendations made with a view to the prevention of future reoccurrence of large scale violence; the investigation of alleged perpetrators; and how to tackle the culture of impunity.

Kenyan National Commission on Human Rights (KNCHR), "On the brink of the precipice: a Human Rights account of Kenya's post-2007 election violence"(15 August 2008)

29. The Kenya National Commission on Human Rights (KNCHR) is an independent national human rights institution established by the government of Kenya through an Act of Parliament in 2002. The mandate of the KNCHR is to enhance the promotion and protection of human rights in Kenya. KNCHR was accredited by the International Coordinating Committee of National Human Rights Institutions, which is based in Geneva at the Office of the High Commissioner for Human Rights, as a Category 'A' institution.
30. Between February and June 2008, KNCHR teams comprising commissioners and staff undertook over 36 missions to more than 136 constituencies across the country, selected in order to ensure a representative geographic spread across those areas of the country that were affected by the post-election violence. During this period, 1,102 statements from Kenyans of all ethnicities were gathered, including farmers, IDPs, public officials, security personnel, religious and political leaders, elders, etc. The second phase of the work of the commission consisted in the analysis of the information gathered.
31. The report of the KNCHR on the investigation of the post-election violence was released on the 15th of August 2008. The report comprises eight chapters devoted respectively to : the methodology used during the investigation; background information about the post-election violence; how violence occurred in the main theatres of conflict, namely the Central, Coast, Nairobi, Central Rift, South Rift, North Rift, Nyanza, and Western regions; an analysis of the national trends and patterns of post-election violence; the responsibility of those who planned, organised, financed and executed the violence under domestic and international law; the applicable human rights standards and their implications for the violence; conclusions and recommendations.

Office of the High Commissioner for Human Rights (OHCHR), "Report from OHCHR Fact-finding Mission to Kenya" (6-28 February 2008)

32. Between 6 and 28 February 2008, the UN Office of the High Commissioner for Human Rights (OHCHR) dispatched a fact-finding commission that investigated allegations of human rights violations. The ensuing "Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008" provides an analysis on the context, the patterns as well as a list of human rights violations. The OHCHR Mission conducted on-site visits to the affected areas and met with a wide range of actors in the Government, among the opposition, and met with victims, human rights defenders as well as the diplomatic community. The OHCHR Mission also analysed underlying civil, political, economic, social and cultural rights issues and formulated recommendations on possible accountability mechanisms.

Office for the Coordination of Humanitarian Affairs (OCHA) Humanitarian report updates

33. In response to the post-electoral violence in Kenya, the UN Office for the Coordination of Humanitarian Affairs (OCHA) has expanded the staff in their Kenya offices and has produced a series of publicly available humanitarian updates entitled "Humanitarian Report updates for Kenya".

34. The Prosecution's application refers to 4 different Humanitarian Update volumes covering the periods between 21 and 28 January 2008; 11 and 15 February 2008; 23 and 27 February 2008 and 8 to 30 October 2009.

UNICEF, UNFPA, UNIFEM and Christian Children's Fund, "A Rapid Assessment of Gender-Based Violence (GBV) during the post-election violence in Kenya" (Jan-Feb 08)

35. The report consists in an inter-agency gender based violence assessment carried out in January and February 2008 in selected sites in the North Rift Valley, South Rift Valley, the Coastal Region, Nairobi and Central Province. The assessment

examined the nature and scope of sexual violence occurring during flight, as well as within the internally displaced persons (IDP) camps and alternative settlements.

Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions "Mission to Kenya" (26 May 09)

36. Philip Alston, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions visited the Kenyan provinces of Nairobi, Rift Valley Province (Nakuru, Eldoret and Kiambaa), Western Province Bungoma and Kapsokwony), Nyanza Province (Kisumu), and Central Province (Nyeri) from 16 to 25 February 2009 in order to: ascertain the types and causes of extra-judicial killings; investigate whether those responsible for such killings are held to account; and propose constructive measures to reduce the incidence of killings and impunity. The main focus was on extra-judicial killings by the police, violence in the Mt Elgon District, and killings in the post-election period. The Special Rapporteur concluded those responsible for the post-election violence, including those police responsible for extrajudicial executions, and officials who organized or instigated violence, remain immune from prosecution.

Oscar Foundation (Oscar), "Ethnicity and a Failed Democracy" (February 2008)

37. Oscar is an NGO registered in Kenya. Most of their sources are from judicial organs. The report entitled "Ethnicity and a Failed Democracy" was published in February 2008 and focuses on the lead up to the eruption of post-election violence and the crimes committed in that context. The report was drafted by a team of paralegals who collected the information from six Provinces in Kenya and worked in collaboration with the staff at the Oscar Foundation Free Legal Aid Clinic Kenya (OFFLACK).

Federation of Women Lawyers (FIDA-K), "Submission to the CIPEV on behalf of the Inter Agency Gender Based Violence (GBV)" (11 September 2008)

38. The Federation of Women Lawyers is a non-governmental organization of women lawyers and law students which focuses on discrimination against women. It runs aid clinics and community action groups. Fida-K presented a submission to The Commission of Inquiry on behalf of the Inter Agency Gender Based Violence (GBV) Sub-Cluster, which coordinates gender based violence prevention and response following the post election violence. It is chaired by United Nations Population Fund (UNFPA) and co/chaired by the national Commission on Gender and Development.
39. The submission, which has been made public by the Sub-Cluster, addressed sexual violence in general, including conduct that may be deemed opportunistic and domestic violence. It not only addresses sexual violence against women but also refers to sexual violence against men. It addresses general patterns of violence, highlighting a few specific accounts from victims. The report also addresses the consequences of sexual violence, the issues of domestic and international law raised, and draws recommendations.

Centre for Rights Education and Awareness (CREAW), "Women Paid the Price" (2008)

40. The Centre for Rights Education and Awareness (CREAW) is a Kenyan NGO working on women's rights, including raising awareness against sexual and gender-based violence.
41. CREAW conducted a study between the last week of January 2008 and 25 April 2008 in five areas with IDP camps (Nairobi, Naivasha, Nakuru, Burnt Fores and Eldoret) and produced a document entitled "Women Paid the Price". Amongst its objectives, the study sought to understand the main causes and consequences of sexual and gender-based violence during the post election violence, through a combined methodology: a survey, case studies, in-depths interviews and focus group discussions with IDPs from different ethnic groups. The investigation also

gathered information from the Nairobi Women's Hospital (NWH), refugee camps in Nairobi and other sources. It addresses sexual violence committed during post-election violence, but also sexual violence in IDP camps.

Human Rights Watch, "From Ballots to Bullets" (March 2008)

42. Human Rights Watch produced five reports / press briefs relating to the post-election violence, principal among which is the report entitled "Ballots to Bullets – Organized Political Violence and Kenya's Crisis of Governance," dated March 2008. This report is based on two research missions to Kenya during January and February 2008. Researchers conducted over 200 interviews with a wide variety of actors, including victims, witnesses, perpetrators, police, magistrates, diplomats, Kenyan and international NGO staff, journalists, lawyers, businessmen, local councillors, and members of parliament across the country, from all major ethnic groups, by phone and in person. Interviews were conducted in English and Swahili without translators. Human Rights Watch also examined court records in Naivasha. Researchers visited the following areas: Nairobi, Kisumu, Kitale, Eldoret, Naivasha, Nakuru, and Molo.

International Crisis Group (ICG), "Kenya in Crisis," (21 Feb 08)

43. The International Crisis Group is an institute that carries out analysis and provides advice on the prevention and resolution of deadly conflict to governments and intergovernmental bodies such as the United Nations, the European Union and the World Bank.
44. ICG has produced one report on post-election violence in Kenya, entitled "Kenya in Crisis" dated 21 February 2008. This report provides contextual analysis of the violence relaying the tensions that exist between different communities and the surrounding complexities which have laid the basis for the inter-ethnic violence to erupt. "Kenya in Crisis" is based on interviews with a wide range of sources, including eyewitnesses, and members of the Electoral Commission of Kenya

(ECK), the Kenyan Red Cross and the Kenyan police, and includes information concerning the indoctrination and violent rhetoric that preceded the eruption of violence.

V. Jurisdiction

45. Article 15 of the Rome Statute provides that the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. Pursuant to paragraph 3 of Article 15, if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Rule 48 of the Rules of Procedure and Evidence provides that in determining whether there is a reasonable basis to proceed with an investigation under Article 15(3), the Prosecutor shall consider the factors set out in Article 53, paragraph 1 (a) to (c).

46. Article 53(1)(a) provides that the Prosecutor shall consider whether the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.

47. For a crime to fall within the Court's jurisdiction: (i) the crime must be one of the crimes set out in Article 5 of the Statute (jurisdiction *ratione materiae*); (ii) the crime must have been committed within the timeframe specified in Article 11 of the Statute (jurisdiction *ratione temporis*); and (iii) the crime must satisfy one of the two criteria laid down in Article 12 of the Statute.²²

48. With regard to the first condition, as demonstrated in detailed in Section VIII, the information obtained by the Prosecutor provides a reasonable basis to believe that at a minimum the following conduct has been committed as part of a widespread

²² [ICC-01/05-01/08-14-tENG](#), para. 12.

or systematic attack directed against the civilian population in Kenya: murder constituting a crime against humanity under Article 7(1)(a) of the Statute; rape and other forms of sexual violence constituting a crime against humanity under Article 7(1)(g) of the Statute; deportation or forcible transfer of population constituting a crime against humanity under Article 7(1)(d) of the Statute; and other inhumane acts constituting a crime against humanity under Article 7(1)(k) of the Statute. This is without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of investigations.

49. The alleged crimes committed at the end of 2007 and early 2008 are under jurisdiction *ratione temporis*, the Republic of Kenya deposited its instrument of accession to the Statute on 15 March 2005 and the Statute entered into force for Kenya on 1 June 2005, in accordance with Article 126(1).

50. The crimes are alleged to have been committed on Kenyan territory.

VI. Admissibility

51. Article 53(1)(b) provides that in determining whether there is a reasonable basis to proceed, the Prosecutor shall consider whether “the case is or would be admissible under Article 17”. The Prosecutor has considered admissibility at this stage taking into account the potential cases that would likely arise from an investigation into the situation.

52. With respect to the assessment of complementarity and *ne bis in idem* under Article 17(1)(a)-(c), the Appeals Chamber has confirmed that the first question is whether there are or have been any relevant national investigations or prosecutions. Where there are or have been no national proceedings, i.e. there is domestic inactivity, the question of unwillingness or inability does not arise.

Instead, there will be a presumption of admissibility in relation to Article 53(1)(b), subject to Article 17(1)(d).²³

53. The Agreement signed by the President and Prime Minister on 16 December 2008 demonstrates that Kenya's highest authorities consider necessary the establishment of a special tribunal in order to conduct national proceedings on the post election violence. The Kenyan Parliament did not approve the Bill presented in February 2009; there was no quorum to discuss the draft in November 2009. Therefore, according to the Kenyan authorities, there are no domestic prosecution for the crimes against humanity allegedly committed in Kenya, nor is there any prospect that there will be.

54. The information available to the Prosecutor confirms that there have been a limited number of proceedings for less serious offences in connection to the crimes allegedly committed during the post-election violence. According to the Report to the Hon. Attorney General by the Team on the Review of Post Election Violence-Related Cases in Western, Nyanza, Central, Rift Valley, Eastern East and Nairobi Provinces, the 156 cases were opened in relation to minor offences such as "malicious damage", "theft", "house breaking", "bond to keep peace", "publishing false rumor", and other criminal offences, such as "possession of offensive weapon", "robbery with violence" or "assaulting police officer".²⁴ Among the most prominent cases, the four accused of the so-called KIAMBAA case, charged for arsoning the Kiambaa Church in which 17 to 35 persons were burnt alive on 01 January 2008 in Eldoret, were acquitted for lack of evidence as a result of 'shoddy police investigations'.²⁵

²³ ICC-01/04-01/07-1497, para 78.

²⁴ Report to the Hon. Attorney General by the Team on the Review of Post-Election Violence Related Cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast, Coast and Nairobi Provinces, February 09, pp. 30-33 and 35-37 (Annex 29).

²⁵ *Republic v. Stephen Kiprotich Leting & 3 others* (2009) eKLR, Criminal Case 34 of 2008, Judgement, High Court of Kenya at Nakuru, 30 April 2009 (Annex 30).

55. Because no national investigations or proceedings are pending against those bearing the greatest responsibility for the crimes against humanity allegedly committed, the Prosecutor submits that the cases that would arise from its investigation of the situation would be currently admissible. Moreover, the available information does not indicate the existence of national proceedings in relation to the post-election violence in other States with jurisdiction.²⁶ The Prosecutor will continue to assess the existence of national proceedings for as long as the situation remains under investigation, should the Chamber authorise the investigation.²⁷

56. In terms of the gravity of the crimes under Article 17(1) (d), as set out more fully in section VIII, the scale of the post-election violence resulted in a reported 1,133 to 1,220 killings of civilians, more than nine hundred documented acts of rape and other forms of sexual violence, with many more unreported, the internal displacement of 350,000 persons, and 3,561 reported acts causing serious injury.²⁸ In addition, the social and economic structures of the local communities were largely affected by the widespread looting and wanton destruction of residential and commercial areas. Crimes have been committed in six out of eight Kenyan regions, and particularly in the country's most populated areas, including the capital city of Nairobi, the Rift Valley, and the Nyanza and Western provinces.

57. In many cases, the multiple crimes had been organized and planned within the context of a widespread and systematic attack against selected segments of the Kenyan civilian population. Groups, and persons belonging to these groups, have been stigmatized and deliberately targeted on the basis of distinctive ethnic feature and/or presumed political affiliations. Typically, the perpetrators attacked, killed and displaced members of other ethnicities that were the minority in the areas.

²⁶ See Section X below, in relation to the process envisaged under Article 18.

²⁷ Regulation 29(4), Regulations of the Office of the Prosecutor.

²⁸ Figures drawn from CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, pp. 345-351 (Annex 5).

58. Perpetrators often crudely cut off body parts, attacked civilians with any possible sharp pointed objects – machetes, poisonous arrows, broken glass, etc. - and terrorised the whole communities by installing check points where the perpetrators “selected” the victims based on their ethnicity, and hacked them to death. There were incidents of burning of people alive. In addition, occurrence of gang rape and genital mutilation, forced circumcision and penile amputation was reported during the period. There are also reports of family members witnessing their mothers, fathers, sisters, brothers, and little children being raped, killed, and maimed.

59. The crimes committed had a devastating impact first and foremost on the victims. Victims of sexual violence, who often suffered grave physical injury, suffer from enormous psychological trauma, may have been infected with HIV/AIDS and/or other types of sexually transmissible diseases, are often abandoned by their husbands and/or families and suffer from social stigma. Women and children who lost family members and property, and who had been chased away from their homes are a highly vulnerable population in need of special attention. The displaced persons, who have been forcibly evicted, have lost not only their home but much of their very existence. The crimes further had an impact on the local communities in terms of security, social structure, economy and persistence of impunity in the country. The economic activities were affected by the forced displacement, widespread looting and burning of houses and business premises. The Kenyan Gross Domestic Product growth rate fell from 7% in 2007 to 1.7% in 2008.²⁹

²⁹ CIA World Fact Book, Kenya, 11 November 2009 (Annex 34).

VII. Interests of Justice

60. Under Article 53(1), while the jurisdiction and admissibility are positive requirements that must be satisfied, the interests of justice is a potential countervailing consideration that may produce a reason not to proceed. As such, the Prosecutor is not required to establish that an investigation is in the interests of justice, but rather, whether there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time.

61. Based on the available information, the Prosecutor has no reason to believe that the opening of an investigation into the situation would not be in the interests of justice.

VIII. Crimes within the jurisdiction of the Court

62. Pursuant to Regulation 49 of the Regulations of the Court, the Prosecution provides the following information setting out: (i) a reference to the crimes believed to have been committed and a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been committed; and (ii) a declaration with reasons that the listed crimes fall within the jurisdiction of the Court.

(i) Alleged crimes and statement of facts

63. While the violence initially appeared to be spontaneous, triggered by the perceived rigging of the elections, the organised aspect of the violence became apparent as it emerged that political leaders, businessmen and others had enlisted criminal elements and ordinary people to carry out attacks against specifically targeted groups.

Murders

64. According to the Waki Report, the post-election violence resulted in a reported 1,133 deaths.³⁰ The majority of killings were reportedly due to injuries caused by arrows, machetes and traditional weapons used during attacks/raids on villages, followed by gun shots mainly attributed to the police forces (405 deaths), and burning of people alive.³¹ The Kenyan Government officially acknowledged a total of 1,220 people killed, including 123 by the police.³²
65. The highest number of deaths occurred in the Rift Valley, described by the Waki Commission Report as the epicentre of post-election violence (744),³³ followed by the Nyanza province (134), Nairobi (125), the Western Province (98), Coast (27) and the Central Province (5).³⁴ The information evaluated indicates that the most violent attacks registered within the Rift Valley province took place in the districts of Uasin Gishu where 230 persons were killed, Nakuru with 213 persons and Trans Nzoia with 104 persons.³⁵

Rape and other forms of sexual violence

66. Sexual violence in its multitude of forms was reported all over Kenya during the post-election violence³⁶ and may be considered as having been widespread where such post-election violence occurred,³⁷ and also where victims sought refuge.³⁸

³⁰ This finding of the CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. 305 (Annex 5), is based on information provided by hospitals in five provinces, namely Western, Rift Valley, Nyanza, Nairobi and Coast. Other sources have come to similar estimates: more than 1,200 according to United Nations Office of the High Commissioner on Human Rights (OHCHR), "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p.8 (Annex 7); at least 1,162 persons were killed. According to KNCHR, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post- 2007 Election Violence, Final Report", 15 August 2008, KEN-OTP-0001-0002 to KEN-OTP-0001-0245, p.3, para. 5 (Annex 4).

³¹ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p.311 (Annex 5).

³² OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", p. 11 (Annex 7).

³³ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p.341 (Annex 5).

³⁴ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p.306 (Annex 5).

³⁵ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p.345-346 (Annex 5)

³⁶ Federation of Women Lawyers (FIDA-K), "Submissions to The Commission of Inquiry into the Post Election Violence (the Waki Commission) by FIDA- K on Sexual and Gender Based Violence" on behalf of the Inter Agency Gender Based Violence (GBV) Sub-Cluster, 11 September 2008, KEN-OTP-0001-1516, page 3 (Annex 8).

³⁷ FIDA-K, "Submissions to The Commission of Inquiry into the Post Election Violence (the Waki Commission) by FIDA- K on Sexual and Gender Based Violence" on behalf of the Inter Agency Gender Based Violence (GBV) Sub-Cluster, 11 September 2008, KEN-OTP-0001-1516, page 1 (Annex 8). KNCHR, "On the Brink of the Precipice: A Human Rights Account of Kenya's

The Chief Executive Officer of Nairobi Women's Hospital, which provides free services to female and male victims of sexual violence, informed the Waki Commission that his hospital was 'inundated with patients during the post election period'³⁹. The Hospital received 524 cases of rape between 27 December 2007 and 31 March 2008. During that same period, partner hospitals of the Nairobi Women's Hospital received 286 cases of sexual violence, and the Kenyatta National Hospital responded to another 184 cases.⁴⁰ These figures are indicative of the increase in sexual assaults during the post-election violence. It should be noted that there appears to have been a significant underreporting in the occurrence of sexual violence.⁴¹ For example, a study among victims of sexual violence during the Post-Election period revealed that 82% of the women interviewed did not report the incidents.⁴²

Deportation or forcible transfer of population

67. The information evaluated indicates that approximately 350,000 persons were displaced as a consequence of post electoral violence within the boundaries of Kenya.⁴³ Although violent evictions have accompanied previous electoral processes, the internal displacement after the announcement of the 2007 elections results was unprecedented in the number of victims and the widespread nature.⁴⁴

Post- 2007 Election Violence, Final Report", 15 August 2008, KEN-OTP-0001-0002to KEN-OTP-0001-0245, pp.3-4, para. 8 (Annex 4).

³⁸ FIDA-K, "Submissions to The Commission of Inquiry into the Post Election Violence (the Waki Commission) by FIDA- K on Sexual and Gender Based Violence" on behalf of the Inter Agency Gender Based Violence (GBV) Sub-Cluster, 11 September 2008, KEN-OTP-0001-1516, page 3 (Annex 8); UNFPA, UNICEF, UNIFEM, Christian Children's Fund, "A Rapid Assessment of Gender Based Violence During the Post-Election Violence in Kenya", January – February 2008, KEN-OTP-0001-0973 to KEN-OTP-0001-1056, pp. 7-8 (Annex 9) and Center for Rights Education and Awareness (CREA), *Women paid the Price*, 2008, KEN-OTP-0001-1527, pp.2-4 (Annex 10).

³⁹ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. 247 (Annex 5).

⁴⁰ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. 248 (Annex 5).

⁴¹ CREA, "Women paid the Price", 2008, KEN-OTP-0001-1527, pp.34-35 (Annex 10).

⁴² CREA, "Women paid the Price", 2008, KEN-OTP-0001-1527 p.33 (Annex 10). UNFPA, UNICEF, UNIFEM, Christian Children's Fund, "A Rapid Assessment of Gender Based Violence during the Post-Election Violence in Kenya", January – February 2008, KEN-OTP-0001-0973 to KEN-OTP-0001-1056 p.33 (Annex 9).

⁴³ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. 272 (Annex 5). The Kenyan Red Cross recorded 268,330 IDPs in various camps as of 27 February 2008: OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p.14 (Annex 7). 12, 000 refugees also fled to Uganda: OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p.14 (Annex 7).

⁴⁴ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, pp. 271-273 (Annex 5).

Widespread looting and wanton destruction formed part of the coercive element of such displacement.⁴⁵

68. The information evaluated based on statements of victims provides a reasonable basis to believe that the displacements were coercive. Threats, lootings and burning of houses, killings and sexual violence were all used to displace members of specific ethnic groups. The Fact-Finding Mission of the OHCHR, which occurred between 6 - 28 February 2008, identified a wave of displacements in the wake of the post-election violence as a result of the attacks on private homes and businesses.⁴⁶ The mission established that a vast majority of these people left in panic, taking very little with them, and were reluctant to return to their homes.⁴⁷ The mission also suggested that many of these attacks were organized by political and/or traditional leaders eager to settle historic disputes over land title and other long-held grievances, with the aim of permanently displacing the targeted communities.⁴⁸

69. Displacements were not isolated events, but occurred on a widespread scale.⁴⁹ As of 27 February 2008, the Kenyan Red Cross estimated that there were 268,330 persons in IDP camps. They were displaced from six of Kenya's eight provinces, while a similar number of displaced persons were living in host communities.⁵⁰ Most of the displaced were reportedly living in some 200 IDP camps in the Rift

⁴⁵ The fact-finding mission of the United Nations Office of the High Commissioner for Human Rights reported 42,000 houses and many businesses were destroyed and/or looted. OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p.12 (Annex 7). The CIPEV report concluded that 117,216 houses, businesses, vehicles and farm produce were destroyed. CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892 (Annex 5).

⁴⁶ OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p. 14 (Annex 7).

⁴⁷ OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p. 14 (Annex 7).

⁴⁸ OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p.10 (Annex 7).

⁴⁹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/11/2/Add. "Mission to Kenya", 26 May 2009, KEN-OTP-0001-0910 to KEN-OTP-0001-0972, p. 59 (Annex 11). HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government", March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, pp.43-53 (Annex 3).

⁵⁰ OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p. 14 (Annex 7).

Valley, Nyanza, Western, Coastal and Central provinces.⁵¹ The OHCHR's findings also indicated that some 12,000 Kenyans were reported to have sought refuge across the border, in Uganda.⁵² OCHA's humanitarian update covering the last week of January 2008, estimated that approximately 290,000 IDPs were registered in camps (based on information from Kenyan Red Cross).⁵³

Other inhumane acts

70. The findings of the Waki Commission indicate that a total of at least 3,561 persons suffered injuries as a result of the post-election violence. Of those injured, the majority suffered from injuries inflicted by sharp objects or gun and arrow shots,⁵⁴ while others included particularly brutal conduct such as traumatic circumcisions.⁵⁵

(a) Places of alleged commission of the crimes

71. As an illustration of the geographic extent of the crimes, the main affected areas of the post-election violence included: (i) the slum districts of Nairobi, in particular the localities of Kibera, Mathare, Korogocho, Huruna, Kariobangi and Dandora; (ii) Rift Valley province, in particular the localities of Eldoret and its surroundings, Naivasha and Nakuru; and (iii) Western and Nyanza provinces, with a particular focus on the locality of Kisumu and the surrounding areas. Annex 1B shows a map giving a general overview of the distribution of violence across the regions.

(b) Time period of the alleged commission of the crimes

⁵¹OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p. 14 (Annex 7).

⁵² OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p. 14 (Annex 7).

⁵³ OCHA, "Kenya Humanitarian Update", volume 2, 21-28 January 08 (Annex 31).

⁵⁴ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. 334 (Annex 5).

⁵⁵ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. 336 (Annex 5).

72. A first wave of violence (29 December 2007 – 18 January 2008) concentrated on the districts of Molo, Trans-Nzoia, and Uasin Gishu in the North Rift.⁵⁶ Further south, Kedowa and other trading outposts near the town of Kericho were affected.⁵⁷ Within the space of a week dozens of communities in the Rift region, including Eldoret town, were driven away.⁵⁸
73. Organized retaliatory violence during a second wave of violence (24-28 January 2008) hit predominantly the towns of Molo, Nakuru and Naivasha causing further deaths although on a lower scale than during the first wave of violence.⁵⁹

(c) Persons or groups involved

74. The available information related to the main alleged perpetrators indicates that most offences were committed by gangs of young men armed with traditional weapons. Organized groups established roadblocks/check points; carried out simultaneous raids and attacks on multiple neighbourhoods and towns; and attacked and killing people from other tribes perceived as political opponents, allegedly with the involvement of politicians and business leaders.
75. Both the KNCHR and the Waki Commission indicate that persons in position of power appear to have been involved in the organization, enticement and/or financing of violence targeting specific groups⁶⁰. Political leaders of all sides, particularly from PNU and ODM, allegedly recruited gangs of youths and

⁵⁶ OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p.8 (Annex 7). ICG, "Kenya in Crisis", 21 February 2008, KEN-OTP-0001-1076 to KEN-OTP-0001-1114 p. 10 (Annex 6); HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government", March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, p. 37 (Annex 3).

⁵⁷ OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p. 8 (Annex 7); ICG, "Kenya in Crisis", 21 February 2008, KEN-OTP-0001-1076 to KEN-OTP-0001-1114 p. 10 (Annex 6).

⁵⁸ HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government", March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, p.39 (Annex 3).

⁵⁹ HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government", March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, p.43 (Annex 3).

⁶⁰ The KNCHR list of alleged perpetrators is annexed to their final report : KNCHR, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post- 2007 Election Violence, Final Report", 15 August 2008, KEN-OTP-0001-0002to KEN-OTP-0001-0245, pp.177-238 (Annex 4); the Waki list has not been published but handed over to the ICC Prosecutor on 9 July 2009.

transported them to strategic points to unleash terror, killing and destroying property belonging to communities aligned to the rival party. There are also reported allegations concerning the security services and their response to the violence.⁶¹

(ii) Legal characterisation and reasons that the listed crimes fall within the jurisdiction of the Court

76. For the reasons set out in this application, the information collected by the Office of the Prosecutor provides a reasonable basis to believe that crimes against humanity within the jurisdiction of the Court were committed in the context of the post-election violence of 2007-2008.

(a) Contextual elements of crimes against humanity

77. The available information provides a reasonable basis to believe that multiple crimes committed during the post-election violence of 2007-2008 occurred in the context of a widespread and systematic attack against the Kenyan civilian population pursuant to or in furtherance of a State or organizational policy to commit such acts on Kenyan territory, within the meaning of Article 7(1) of the Statute.

78. Pursuant to the Prosecutor's prosecutorial policy, the focus of the Prosecutions investigative activities will be directed at the persons bearing the greatest responsibility for the most serious crimes.⁶² The available information indicates that persons who incited and instigated the violence as well as those who mobilised and directed the activities of the different organized groups, with the knowledge that the behaviour of the members of the groups with which they

⁶¹ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, pp.417-418 (Annex 5); Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/11/2/Add.6, "Mission to Kenya", 26 May 2009, KEN-OTP-0001-0910 to KEN-OTP-0001-0972, pp.34-36 (Annex 11).

⁶² Regulation 34, Regulations of the Office of the Prosecutor.

were associated during the course of the post-election violence was part a widespread or systematic attack directed against the civilian population in Kenya.

79. As previously held by Pre-Trial Chamber III, the reference to a widespread or systematic attack has been interpreted as excluding isolated or random acts from the concept of crimes against humanity. In this regard, the adjective “widespread” refers to “the large-scale nature of the attack and the number of targeted persons”, while the adjective “systematic” refers to the “organised nature of the acts of violence and the improbability of their random occurrence”. The Chamber, moreover, opined that the existence of a State or organisational policy is an element from which the systematic nature of an attack may be inferred.⁶³

80. Based on the available information, there is a reasonable basis to believe that the attacks directed against the civilian population in the Kenya were both widespread and systematic. These attacks are allegedly to have been conducted primarily by members of organised groups associated with the main political parties (PNU and ODM).

81. According to findings of the Waki Commission and KNCHR and other sources, the post-election violence were not isolated or random acts; they took place on a large scale and targeted a large number of civilian victims. As mentioned, within two months, the post-election violence resulted in about 1,133 deaths, 3,561 persons suffered injuries that may constitute other inhumane acts causing serious injury, hundreds of rapes, and the internal displacement of approximately 350,000 persons.

⁶³ [ICC-01/05-01/08-14-tENG](#), para. 33.

82. The violence impacted on up to 136 constituencies in six of Kenya's eight provinces, and was felt both in urban and rural areas.⁶⁴ As the Waki Commission reports, "It was by far the most deadly and most destructive violence ever experienced in Kenya".⁶⁵ The main theatres of violence were Nairobi, the Rift Valley province (including the regions of South, Central and North Rift), as well as the Nyanza and Western provinces.⁶⁶

83. The available information further indicates that the attack against the civilian population was of a systematic nature. In particular, there is a reasonable basis to believe that members of the organised groups associated with members or supporters of PNU and ODM deliberately targeted civilians who were perceived to be sympathetic to the rival group. Human Rights Watch, for example, gathered information indicating that local leaders and ODM mobilizers arranged frequent meetings following the election to organize, direct and facilitate the violence.⁶⁷

84. Initially, the violence appeared to be spontaneous outbursts of chaos generated by angry demonstrators clashing with heavy-handed law-enforcement agents. As time elapsed and the violence intensified, however, indications emerged illustrating the organised nature of some of the violence, leading many observers to conclude that attacks were largely planned and premeditated or "evolved into well organized and coordinated attacks".⁶⁸

⁶⁴ KNCHR, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post- 2007 Election Violence, Final Report", 15 August 2008, KEN-OTP-0001-0002to KEN-OTP-0001-0245, p.3, para. 1 (Annex 4); CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. vii (Annex 5).

⁶⁵ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. vii (Annex 5).

⁶⁶ KNCHR, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post- 2007 Election Violence, Final Report", 15 August 2008, KEN-OTP-0001-0002to KEN-OTP-0001-0245, p.15 (Annex 4); See Map: Post-election violence hot-spots – Kenya, Depha, January 2008 (Annex 1B).

⁶⁷ HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government", March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, pp.37-38 (Annex 3).

⁶⁸ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. viii (Annex 5). These patterns were also mentioned by the OHCHR report of the fact-finding mission and corroborated by media reports, as well as the ICG and HRW reports on the crisis. See OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, pp. 8-10 (Annex 7); ICG, "Kenya in Crisis", 21 February 2008, KEN-OTP-0001-1076 to KEN-OTP-0001-1114 pp.35-36 (Annex 6); HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government", March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330 p.4 (Annex 3).

85. Examining the pattern of violence which erupted immediately following the communication of the electoral results, this appears to have acted as a signal for organized groups to launch their attacks.⁶⁹ Ordinary citizens allied to certain communities were reportedly called on by local leaders and elders including church and government officials to kill their neighbours.⁷⁰ For example, around Eldoret many politicians stoked ethnic tensions to mobilize political support among their ethnic group.⁷¹
86. Civilians were mobilised into organised groups which targeted acts of violence in a widespread and systematic manner against the civilian population based on ethnicity and political affiliation. In particular, bonfires were lit at roadblocks, as gangs of youths stopped all passers by, demanding their identification documents allegedly to know their ethnicity, and in some cases hacking to death all those people perceived to be political/tribal opponents.⁷²
87. In the Rift Valley, from the outset, violence showed a clear pattern of attacks intentionally targeting perceived PNU supporters, rather than against individually identified persons or in a random manner. The attacks appear to have been orchestrated, with a plan to forcibly displace the targeted communities from their lands.⁷³
88. As indicia of organization, the Waki Commission notes that warnings were sometimes issued to the civilian population prior the attacks; large number of attackers were mobilized, often coming from outside the targeted area; the

⁶⁹ This is also confirmed by HRW report which alleges that local elders and ODM organizers in many communities around Eldoret called meetings where they declared that electoral victory for Kibaki would be the signal for “war” against local Kikuyu. See HRW, “Ballots to Bullets. Organized Political Violence and Kenya’s Crisis of Government”, March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, p.37 (Annex 3).

⁷⁰ Oscar Foundation Report, “Ethnicity and a failed democracy”, February 2008, KEN-OTP-0001-0331 to KEN-OTP-0001-0363 (Annex 12).

⁷¹ HRW, “Ballots to Bullets. Organized Political Violence and Kenya’s Crisis of Government”, March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330 p.36 (Annex 3).

⁷² CIPEV, “Final Report”, 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p.42 and p.55 (Annex 5) ; ICG, “Kenya in Crisis”, 21 February 2008, KEN-OTP-0001-1076 to KEN-OTP-0001-1114, p.13 (Annex 6).

⁷³ CIPEV, “Final Report”, 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, pp.43 – 45 (Annex 5).

conduct of the attacks required logistical pre-arrangements; and many of the attacks were targeted only against members of specific groups to the exclusion of others.⁷⁴

89. Inflammatory radio broadcasts as well as alleged hate speech in the Rift Valley province already during the electoral campaign are further possible indicators of organised attacks.⁷⁵ Emails and text messages were also reportedly used to disseminate hate messages against particular candidates and other communities before the elections.⁷⁶ Ethnically motivated hate speech, inflammatory rhetoric and incitement by members of the leading political parties, particularly at the local level, were reportedly a recurring feature of the pre-election campaign.⁷⁷ In particular, reports indicate that political and spiritual leaders in the Rift Valley engaged in a process of indoctrination before the elections. The information suggests that these activities were part of a strategy to incite subsequent violence.

90. Such inflammatory statements continued after the elections, as leaflets quickly appeared telling members of opposing communities to leave parts of Rift Valley, Coast and Nyanza.⁷⁸

91. Information on the systematic nature of the attacks include the reportedly violence in the Burnt Forest settlement south of Eldoret town, where militia simultaneously attacked and burned 1320 houses in which 5,000 persons lived.⁷⁹ ICG reports that youths involved in the attacks in Eldoret (Rift Valley province)

⁷⁴ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p.347 (Annex 5).

⁷⁵ See for example Eldoret's popular Kalenjin-language radio KASS FM, see: HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government", March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, p. 36 (Annex 3); ICG, "Kenya in Crisis", 21 February 2008, KEN-OTP-0001-1076 to KEN-OTP-0001-1114, p. 12 (Annex 6). See also KNCHR, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post- 2007 Election Violence", Final Report, 15 August 2008, KEN-OTP-0001-0002 to KEN-OTP-0001-0245 p.4, para. 16 (Annex 4).

⁷⁶ OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p. 7 (Annex 7).

⁷⁷ ICG, "Kenya in Crisis", 21 February 2008, KEN-OTP-0001-1076 to KEN-OTP-0001-1114, p.13 (Annex 6).

⁷⁸ Oscar Foundation Report, "Ethnicity and a failed democracy", February 2008, KEN-OTP-0001-0331 to KEN-OTP-0001-0363 (Annex 12).

⁷⁹ OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya 6-28 February 2008", KEN-OTP-0001-1057 to KEN-OTP-0001-1075, p. 9 (Annex 7).

were transported to the locations of attacks by lorries and were allegedly paid to carry out the raids; funds were allegedly provided by members of the political and business establishment of the North Rift.⁸⁰

92. Counter-attacks were undertaken by other parties' supporters mainly in Nakuru and Naivasha and parts of western Rift Valley province. In the town of Naivasha, members of militia were reportedly paid by local businessmen to attack civilians, being promised money for each kill.⁸¹ The attacks also led to deaths and destruction of property.

(b) Acts constituting crimes against humanity committed in the context of a widespread or systematic attack

93. On the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of an investigation, the Prosecutor declares that there is a reasonable basis to believe that during the post-election period, including but not limited to the time period between 27 December 2007 to 28 February 2008, at a minimum the following conduct has been committed:

- a. murder constituting a crime against humanity under Article 7(1)(a) of the Statute;
- b. rape and other forms of sexual violence constituting a crime against humanity under Article 7(1)(g) of the Statute;
- c. forcible transfer of population constituting a crime against humanity under Article 7(1)(d) of the Statute; and
- d. other inhumane acts causing serious injury constituting a crime against humanity under Article 7(1)(k) of the Statute.

⁸⁰ ICG, "Kenya in Crisis", 21 February 2008, KEN-OTP-0001-1076 to KEN-OTP-0001-1114 p. 11 (Annex 6).

⁸¹ HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government". March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, pp. 46 – 48 (Annex 3).

Murder

94. The available information indicates that murders followed the same pattern of the attacks as the rest of the post-election violence, not only in terms of the manner in which they were committed, but also in terms of the victims, focussed mainly on members of the targeted ethnic/politically affiliated populations. The diverse causes of deaths included, according to the Waki Commission, death by burns, arrow shots, blunt object, severe wounds, sharp pointed object, assault, drowning, suffocation injury, stoning, shock, and hanging. This shows not only the variety but also the brutality of means resorted to by the assailants (28.2% of deaths were caused by sharp pointed objects, 7.5% by burns).⁸²

Rape and other forms of sexual violence

95. Sexual violence was used as part of the widespread and systematic attack against the civilian population. In general, sexual violence followed ethnic and/or political lines. Victims were often told by their aggressors that they were being victimised as a punishment for their ethnicity or political affiliations. In some cases, the perpetrators proceeded to rape victims even when they claimed to be HIV-positive.⁸³

96. The Prosecution has information of numerous incidents of sexual violence including rape of men and women, sexual mutilation and other forms of sexual violence. Medical services, and victim accounts, show that gang rapes by groups of men were prevalent.⁸⁴

97. Instances of rapes and other acts of sexual violence were committed with or accompanied by physical brutality.⁸⁵ Women and children's labia and vaginas

⁸² CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p.311 (Annex 5).

⁸³ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. 349 (Annex 5).

⁸⁴ FIDA-K, "Submissions to The Commission of Inquiry into the Post Election Violence (the Waki Commission) by FIDA- K on Sexual and Gender Based Violence" on behalf of the Inter Agency Gender Based Violence (GBV) Sub-Cluster", 11 September 2008, KEN-OTP-0001-1516 page 3 (Annex 8) ; CREA, "Women paid the Price", 2008, KEN-OTP-0001-1527 p. 251 (Annex 8).

⁸⁵ UNFPA, UNICEF, UNIFEM, Christian Children's Fund, "A Rapid Assessment of Gender Based Violence During the Post-Election Violence in Kenya", January – February 2008, KEN-OTP-0001-0973 to KEN-OTP-0001-1056, p. 4 (Annex 9).

were cut using sharp objects and bottles were stuffed into them. Attackers amputated the penises of men and boys, or subjected them to circumcision, in some cases using cut glass.⁸⁶ Furthermore, children and spouses often were forced to witness their partners, parents, brothers and sisters being sexually violated.⁸⁷

98. Sexual violence committed during the post-election violence was used to grab land. According to UNIFEM, “[Sexual violence was] being used as a tool to terrorize individuals and families and precipitate their expulsion from the communities in which they live. [S]exual violence [was] being used as a fear-instilling tactic, in so far as women were told they and their children would be raped if they did not vacate their property within a designated timeframe. Women were further threatened in the temporary shelters to which many fled; those who initially sought refuge in houses in Timboroa, in the North Rift Valley, for example, were told “if you don’t move, we are going to rape the women.”⁸⁸

99. As concluded by the Waki Commission Report “[i]n some areas, sexual violence was a means used to pressure people to leave their homes, to retaliate against them for having voted for the wrong candidate, tribe or party and in tandem with that to dominate, humiliate and degrade them and their communities into a pit of powerlessness.”⁸⁹

Deportation or forcible transfer of population

100. Acts of deportation or forcible transfer of population were part of attacks against members of rival ethnic and/or political groups, and followed the same patterns as other instances of post-election violence. Reports indicate that organised groups associated with the main political parties (PNU and ODM)

⁸⁶ CIPEV, “Final Report”, 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. 348 (Annex 5).

⁸⁷ CIPEV, “Final Report”, 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, pp. 348 and 244 (Annex 5).

⁸⁸ UNFPA, UNICEF, UNIFEM, Christian Children’s Fund, “A Rapid Assessment of Gender Based Violence During the Post-Election Violence in Kenya”, January – February 2008, KEN-OTP-0001-0973 to KEN-OTP-0001-1056, p. 4. and pp.31-32 (Annex 9).

⁸⁹ CIPEV, “Final Report”, 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, p. 252 (Annex 5).

were mobilised, directed, and in some instances paid, ⁹⁰ to attack targeted members of rival ethnic and/or political groups.⁹¹

Other inhumane acts

101. 3,561 people reportedly suffered injuries inflicted by or resulting from sharp pointed objects, blunt objects, soft tissue injury, gunshots, arrow shorts, burns, and other assaults. Although these injuries did not result in fatalities, as the Waki Commission indicated, a number were very serious and life-changing.⁹² Depending on the circumstances, injuries resulting from targeted attacks may constitute attempted murder or rape or other forms of sexual violence, persecution, or other inhuman acts of a similar character intentionally causing serious injury to body or to mental or physical health.

IX. Authorisation to proceed

102. The Prosecutor submits that the Court should proceed to authorise the investigation so long as it is satisfied that the Prosecutor's Application and supporting material reveal the existence of facts or information warranting investigation. The standard at this stage of the proceedings relates to the investigation of crimes of relevance to the situation as a whole and the existence of relevant information that provides a foundation to the request. It is not the opportunity to proceed with the identification of individual criminal liability.

103. The expression "reasonable basis" in Article 15 indicates that a decision to authorize the commencement of an investigation shall be made pursuant to a lower standard than the one required for the issuance of a warrant of arrest or

⁹⁰ HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government", March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, p.45-46 (Annex 3).

⁹¹ HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government", March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, pp.35-53 (Annex 3).

⁹² CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, pp.334-336 (Annex 5).

summons to appear.⁹³ The test of reasonable basis is the lowest found in the Rome Statute, which applies four escalating tests for the progressive phases of the proceedings.⁹⁴

104. Chambers of the Court have observed that the interpretation and application of the expression “reasonable grounds to believe” may be guided by the “reasonable suspicion” standard articulated in Article 51(1)(c) of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* on the right to liberty from illegal arrest or detention, which, as interpreted by the European Court of Human Rights (“ECHR”), “requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence”. Similarly, Chambers have been guided by the jurisprudence of the Inter-American Court of Human Rights (“IACHR”) on the fundamental right to liberty, as enshrined in Article 7 of the American Convention on Human Rights.⁹⁵ At a minimum, therefore, the “reasonable basis” standard should be considered as below that of “reasonable grounds to believe”. This would require the existence of some facts or information which would satisfy an objective observer that crimes with the jurisdiction of the Court appear to have been committed, but without identification of the persons who may have committed such offences.

⁹³ M. Bergsmo and J. Pejic, “Article 15 Prosecutor”, in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, (Second Edition 2008), p.589. See also, H. Olásolo, “*The Triggering Procedure of the International Criminal Court*”, Martinus Nijhoff Publishers, 2005, p. 61; M.W. El Zeidy, “Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court”, *Leiden Journal of International Law*, 19 (2006), p. 746; G. Turone, “Powers and Duties of the Prosecutor”, in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (2002), pp. 1152 and 1161; H. Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in H. Fischer et al. (eds.), *International and National Prosecution of Crimes Under International Law*, BWV/Berliner Wissenschafts-Verlag (2004), p. 193 – 194. (Annex 1A).

⁹⁴ Compare Articles 15 and 53(1) “reasonable basis”; Article 58(1) “reasonable grounds”; Article 61(7) refers “substantial grounds”; and Article 66(3) “beyond reasonable doubt”.

⁹⁵ [ICC-01/05-01/08-14-ENG](#), para. 24; [ICC-01/04-01/06-8-US-Corr](#), para. 12; [ICC-02/05-01/09-3](#), para. 32; ICC-01/04-02/06-20-Conf-Exp, para. 12; [ICC-02/05-01/07-1-Corr](#), para. 28. See ECtHR, *Case of O’Hara v. The United Kingdom*, Application no. 37555/97, “Judgment”, 16 October 2001, para. 34. See also, ECtHR, *Fox, Campbell, and Hartley v. The United Kingdom*, Application no. 12244/86; 12245/86; 12383/86, “Judgment”, 30 August 1990, para. 32; ECtHR, *K.-F. v. Germany*, Application no. 144/1996/765/962, “Judgment”, 27 November 1997, para. 57; ECtHR, *Labita v. Italy*, Application no. 26772/95, “Judgment”, 6 April 2000, para. 155; ECtHR, *Berktaş v. Turkey*, Requête n° 22493/93, “Arrêt”, 1er Mars 2000 (judgment only available in French), para. 199; ECtHR, *Erdagöz v. Turkey*, Application No. 127/1996/945/746, “Judgment”, 22 October 1997, para. 51; ECtHR, *Murray v. United Kingdom*, Application no. 14310/88, “Judgment”, 28 October 1994, para. 51. on the distinction between the applicability of different thresholds of proof depending on the stage in the proceedings see ECtHR, *K.-F. v. Germany*, Application No. 144/1996/765/962, Judgment, 27 November 1997, para. 57. (Annex 1A).

105. The text of Article 15 is based closely on a proposal submitted by Argentina and Germany during the March-April 1998 Preparatory Committee session.⁹⁶ The discussion focussed on which was the appropriate expression⁹⁷ and on an evaluation of whether the information obtained was “sufficient [and] verifiable”⁹⁸ or “clearly unfounded or not serious.”⁹⁹ The Prosecution is not required, at this stage, to present evidentiary material collected by others, such as testimonies of victims and witnesses.

106. The Prosecutor respectfully submits that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court, and therefore requests the Chamber to authorise the investigation. To this end, the procedure should be expeditious and summary in nature, without prejudice to subsequent determinations on questions of fact and law.¹⁰⁰

107. In particular, the Prosecutor notes that Article 15(4) of the Statute provides “[i]f the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case *appears* to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to

⁹⁶ Proposal submitted by Argentina and Germany for Article 46, Information submitted to the Prosecutor, U.N. Doc. [A/AC.249/1998/WG.4/DP.35](#), 25 March 1998. (Annex 1A).

⁹⁷ Delegations discussed about whether to use the expression “reasonable basis” rather than “sufficient basis” in the Statute. Eventually, it was agreed to incorporate the wording “reasonable basis” in the final version of Article 15. See *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, Preparatory Committee on the Establishment of an International Criminal Court, [UN Doc. A/AC.249/1998/L.13](#), 04 February 1998, p. 86; Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, [UN Doc. A/CONF.183/2/ADD.1](#), 14 April 1998, p. 37; Preparatory Committee on the Establishment of an International Criminal Court 16 March-3 April 1998, [A/AC.249/1998/CRP.11](#) 1 April 1998 p. 1. (Annex 1A).

⁹⁸ Draft Report of the Preparatory Committee, Preparatory Committee on the Establishment of an International Criminal Court, [A/AC.249/L.15](#), 23 August 1996, pp. 4-5. See also Report of the Preparatory Committee on the Establishment of an International Criminal Court Volume I (Proceedings of the Preparatory Committee during March-April and August 1996) General Assembly Official Records, Fifty-first Session Supplement No.22 ([A/51/22](#)), p. 49-50. (Annex 1A).

⁹⁹ Preparatory Committee on the Establishment of an International Criminal Court 4-15 August 1997 Working Group on Complementarity and Trigger Mechanism Rolling Text For Articles 21, 22, 23, 24 and 25, [A/AC.249/1997/WG.3/CRP.1](#), 13 August 1997, p. 7. (Annex 1A).

¹⁰⁰ See J. Holmes, “Complementarity: National Courts versus the ICC”, in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (2002), p. 680. (Annex 1A)

subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case” (emphasis added).¹⁰¹

108. In its “Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii)”, Pre-Trial Chamber III interpreted the word “appears” within the context of the confirmation of charges stage of the proceedings and noted: “[T]he notion of appearance is used in various provisions of the Statute, but lacks any statutory definition. In the English language, the word ‘appear’ means to “give a specified impression”¹⁰². Thus, this meaning should be borne in mind when the Chamber is called upon to decide on the nature and scope of determination required and the manner in which to approach the evidence under Article 61(7)(c)(ii) of the Statute. Given the nature of the present stage of the proceedings, the Chamber is of the opinion that the threshold required for a determination under sub-paragraph (c)(ii) must inevitably be lower than the “substantial grounds to believe” set out in the chapeau of Article 61(7) of the Statute.”¹⁰³

109. Pre-Trial Chamber III concluded that “[a]pplying the “appearance standard set out in Article 61(7)(c)(ii) of the Statute, the Chamber deems it unnecessary to engage in an in-depth analysis of the evidence in its possession for the purpose of this procedural decision. To this end, the Chamber considers that reference to specific evidence or arguments of the parties or participants is sufficient. This ensures that the Chamber is not engaged in a process of predetermination or prejudgment on the issues at stake, which in any event would be ruled upon in its decision on the merits.”¹⁰⁴

110. Because Article 15(4) does not require certainty, but simply that the case “appears to fall” within the jurisdiction of the Court, the Pre-Trial Chamber need

¹⁰¹ The Prosecution observes that at the stage of preliminary examination prior to the initiation of an investigation there is not yet a “case” strictly speaking, but only potential cases that may arise from an investigation into the situation as a whole.

¹⁰² [ICC-01/05-01/08-388](#), 04 March 2009, para. 25

¹⁰³ *Ibid.*, para. 25.

¹⁰⁴ *Ibid.*, para. 40.

not engage in an in-depth analysis of the information presented for the purpose of this procedural decision. This ensures, moreover, that the Chamber will not conclusively predetermine or prejudge questions of jurisdiction that may arise at a later stage in the proceedings. Accordingly, Article 15(4) requires the Pre-Trial Chamber to conduct “an examination of the request and the supporting material”. Absent anything to suggest the contrary, the Chamber should conclude that “the case appears to fall within the jurisdiction of the Court”.¹⁰⁵

111. The Prosecutor recalls that the object and purpose of Article 15 within the context of the Statute, as evidenced from the drafting history and a plain reading of the terms of the provision within their context, indicates that it serves primarily as a filtering mechanism to distinguish those situations that should form the subject of investigation from those that should not.¹⁰⁶

¹⁰⁵ M. Bergsmo and J. Pekic, “Article 15 Prosecutor”, in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, Second Edition, C.H. Beck, Hart and Nomos, 2008, pp. 590 - 591. (Annex 1A)

¹⁰⁶ The “filtering function” of the Pre-Trial Chamber has been previously recognized by Chambers of the Court with respect, *inter alia*, to the confirmation of charges; [ICC-01/05-01/08-388](#), para. 9. Similarly, commentators have observed that the Pre-Trial Chamber’s application of the reasonable basis standard “should primarily be steered by the underlying purpose of paragraph 4, that of providing a judicial filter which will protect the Court from the damaging effects of frivolous or politically motivated charges.” M. Bergsmo and J. Pekic, “Article 15 Prosecutor”, in O. Triffterer (ed.), *Commentary of the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, Second Edition, C.H. Beck, Hart and Nomos, 2008, p. 591. See also, S. Fernández de Gurmendi, “The Role of the Prosecutor”, in Lee (ed.), *The International Criminal Court The Making of the Rome Statute Issues, Negotiations, and Results*, Kluwer Law International, 1999, p.187; M. Arsanjani, “Reflections on the Jurisdiction and Trigger mechanism of the International Criminal Court”, in H.A.M. von Hebel et al. (eds.), *Reflections on the International Criminal Court*, T.M.C. Asser Press, 1999, p. 65. (Annex 1A). While recognizing the different standards used in other bodies functioning with different goals and procedures, the Chamber may wish to have resort the manner in which such a filtering function is applied by the European Commission of Human Rights, the European Court of Human Rights (Article 35(3) ECHR) and the Inter-American Court of Human Rights (Article 34 IACHR) when considering whether a particular communication or petition is ill-founded, frivolous or otherwise represents an abuse of the right of application. The European Commission of Human Rights has declared “an application inadmissible as being manifestly ill-founded only when an examination of the file does not disclose a *prima facie* violation”; *De Becker v. Belgium*, Application No. 214/56, “Judgement”, 9 June 1958; ECmmHR, *X v. The Federal Republic of Germany*, Application No. 3110/67, 19 July 1968. See also ECmmHR, *X v. The Federal Republic of Germany*, Application No. 2699/65, 1 April 1968; ECtHR, *Martynets v. Russia*, Application no. 29612/09, “First section decision as to the admissibility”, 5 November 2009, Part B; ECtHR, *Šefčíková v. Slovakia*, Application no. 6284/02, “Judgment”, 3 November 2009, paras. 91-92; ECtHR, *Petroff v. Finland*, Application no. 31021/06, “Judgment”, 3 November 2009, paras. 27-28. (Annex 1A) The Inter-American Commission of Human Rights has held that it must “make a *prima facie* evaluation to examine whether the complaint states facts indicative of an apparent or potential violation of a right guaranteed by the Convention, and not to establish the existence of a violation. This examination is a summary analysis that does not imply a pre-judging or preliminary opinion on the merits.”; IACommHR, *Simone André Diniz v. Brazil*, Report N° 37/02, “Petition 12.001, Admissibility”, 9 October 2002, para. 31. See also IACommHR, *Ruben Luis Godoy v. Argentina*, Report N° 4/04, “Petition 12.324, Admissibility”, 24 February 2004, para. 43 ; IACommHR, *Euclides Rafael Moreno Morean v. Venezuela*, Report No. 48/05, “Petition 12.194, Admissibility”, 12 October 2005, para. 24; IACommHR, *Robert Karel Hewitt v. Suriname*, Report No. 53/08, “Petition 498-04, Admissibility”, 24 July 2008, para. 38. The admissibility stage is “only a summary analysis, which neither prejudices the merits nor foreshadows any opinion on them is called for”; IACommHR, *Union of Ministry of Education Workers (atramec) v. El Salvador*, Report No. 23/06, “Petition 71-03, Admissibility”, 2 March 2006, para. 29. See also IACommHR, *José Luis Tapia González et al. v. Chile*, Report No. 21/04, “Petition 12.190, Admissibility”, February 24, 2004, para. 33; IACommHR, *Mercedes Eladia Farelo v. Argentina*, Report no. 10/09, “Petition 4071-02, Admissibility”, 19 March 2009, para. 42; IACommHR, *Igmar Alexander Landaeta Mejías and others v. Venezuela*, Report no. 22/09, “Petition 908-04, Admissibility”, 20 March 2009, para. 57; IACommHR, *Josenildo João de Freitas Jr. et al. v. Brazil*, Report No. 61/09, “Petition 373-03, Admissibility”, 22 July 2009, para. 36; IACommHR, *Florentino Rojas v. Argentina*, Report no. 64/09, “Petition 12.182, Admissibility”, 4 August 2009, para. 33; IACommHR, *Marcos Gilberto Chaves y Sandra Beatriz*

X. Procedural Issues

112. The Prosecutor informs the Chamber that, in compliance with Rule 50, on 23 November 2009, the Prosecutor provided notice to victims or their legal representatives of his intention to request authorization. Pursuant to Rule 50(1), this was done by general means through a widely publicized notification after the Prosecutor determined that to contact victims directly would pose a danger to the integrity of a future investigation or to the life or well-being of victims and witnesses. The Rule, moreover, provides that the Prosecutor may also give notice by general means in order to reach groups of victims if he determines in the particular circumstances of the case that such notice could not pose a danger to the integrity and effective conduct of the investigation or to the security and well-being of victims and witnesses. The Prosecution has consulted with the Registry on this notification.

113. The Prosecution also informs the Chamber that it will provide the notice foreseen in Article 18(1) of the Statute upon a decision of the Chamber to authorise an investigation into the situation in the Republic of Kenya. As provided for in Article 18(1), such notification can only occur after an affirmative determination of the Chamber on the Prosecutor's Application.

XI. Relief Requested

114. For the reasons set out above and on the basis of the information presented and the supporting material, the Prosecutor respectfully requests the Pre-Trial Chamber to authorise the commencement of an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008.

Chaves v. Argentina, Report no. 66/09, "Petition 920-03, Admissibility", 4 August 2009, para. 25; IACommHR, *Angel Pedro Falanga v. Argentina*, Report no. 87/09, "Petition 204-01, Admissibility", 7 August, 2009, para. 26. (Annex 1A)



Luis Moreno-Ocampo, Prosecutor

Dated this 26 November 2009

At The Hague, The Netherlands