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PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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Prosecution's Response to Decision Requesting Clarification and Additional Information

Source: Office of the Prosecutor

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to:

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Other

I. Introduction

In response to the Decision of Pre-Trial Chamber II ('PTC II' or 'the Chamber') of 18 February 2010, the Prosecution hereby provides the requested clarification and additional information with respect to: (1) the "State and/or organizational policy" to commit attacks against the civilian population under article 7(2)(a); and (2) admissibility within the context of the situation in the Republic of Kenya.¹

The Prosecution clarifies that senior political and business leaders associated with the main political parties, the PNU which was in the government at the time of the violence and the ODM which was the main opposition party at the time,² organized, enticed and/or financed attacks against the civilian population on account of their perceived ethnic and/or political affiliation pursuant to or on furtherance of a State and/or organizational policy.

The available information indicates such senior leaders from both parties were guided by political objectives to retain or gain power. They utilized their personal, government, business and tribal networks to commit the crimes. They implemented the policy with the involvement of a number of State officers and public and private institutions, such as members of the parliament, senior government officers, the police force and youth gangs.

Different reports, including those by the Kenya National Commission on Human Rights (KNCHR) and the Commission of Enquiry into Post Election Violence (CIPEV) – also known as the "Waki Commission" – indicate that in a structured and well planned and organized manner, political leaders particularly from the PNU and the ODM, allegedly recruited gangs of youths and transported them to strategic points to unleash terror, and to kill, rape and destroy property belonging to communities aligned to the rival party.³ Additionally, the reports emphasize that the senior political leaders were providing instructions to the police officers to deliberately use excessive force; and at the same time they were colluding with criminal gangs. It appears that individuals associated with the ruling PNU may have used the means and apparatus of the Kenya Police Service to commit crimes.

¹ ICC-01/09-15, Decision Requesting Clarification and Additional Information, 18 February, para. 11.

² ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010 *inter alia*, paras. 56 – 81.

³ ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 346-348; ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 3, at paras. 4-8.

In support of the clarifications and additional information provided below, the Prosecution has attached two confidential, *ex-parte*, annexes. Annex 1 is a list of the most serious criminal incidents that appear to have resulted from a State and/or organisational policy within the meaning of article 7(2)(a), as linked to the persons listed in Annex 2.

Annex 2 is a preliminary list of 20 political and business leaders belonging to or associated with the PNU and the ODM who appear, at this stage and according to the information available, to bear the greatest responsibility for the most serious crimes, with an indication of their specific role.

Should the Chamber authorize an investigation, the Prosecution will collect additional information and evidence in an impartial and independent manner in order to verify the allegations against the persons mentioned in Annex 2 and identify those who should be prosecuted.

The Prosecution notes that the post-election violence in Kenya comprised hundreds of incidents with varying degrees of organization. The inflammatory statements and hate speech disseminated via radio broadcasts, e-mails and text messages before the elections suggests that a number of incidents occurred in furtherance of strategies to incite violence.⁴ Therefore, even those acts of violence that appeared to be spontaneous or opportunistic, as observed by CIPEV and KNCHR, should be properly investigated to analyze their relation with the inflammatory hate speech and public incitement that triggered much of the violence that followed the elections.

A precise determination of the extent and nature of the links between the individuals allegedly involved and the public and private organizations utilized to allegedly commit the crimes will be made during the course of an independent investigation by the Prosecutor, if authorized.

In relation to the issue of admissibility, the information available to the Prosecution as of the date of its 'Request for authorisation of an investigation pursuant to article 15' ('the Application'), including the information submitted to the Prosecution by the Kenyan authorities, indicates that no investigations or prosecutions were then initiated by the Kenyan authorities in respect of any incidents and against any individual identified in the annexes. This observation remains valid as of the date of this Response. The limited number of proceedings

⁴ ICC-01/09-15, Decision Requesting Clarification and Additional Information, 18 February, para. 89.

conducted to date in Kenya concern only minor offences, as officially and publicly recognized by Kenyan authorities.⁵ The Prosecution also notes that to date, the Kenyan Parliament has not set up the Special Tribunal intended to prosecute those responsible for the post-election violence.⁶ This was also noted by former UN Secretary General Kofi Annan.⁷ On 5 of November 2009, the Prosecutor informed President Mwai Kibaki and Prime Minister Raila Odinga that he would request authorization to open an investigation and the two leaders committed to cooperate with the ICC.⁸

Should the Chamber authorize an investigation, the Prosecution will continually assess the existence of national proceedings.

The Prosecution submits that its Application and supporting material, together with the clarifications and additional information provided herein, satisfy the regulatory framework for the authorisation of an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007–2008. The Prosecution requests an expedited decision from the Chamber given that the crimes were committed two years ago and judicial proceedings have not been initiated. Subsequent to the commission of the crimes, rumours have circulated as to the identity of the alleged perpetrators. Both victims and the persons identified as potential suspects need clarity on the process ahead.

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 PTC II.

⁵ ICC-01/09-15, Decision Requesting Clarification and Additional Information, 18 February, para. 54.

⁶ ICC-01/09-15, Decision Requesting Clarification and Additional Information, 18 February, para 17.

⁷ *Remarks by Kofi Annan on Conclusion of the Visit to Kenya, 2-8 December 2009*

<http://kofiannanfoundation.org/newsroom/press/2009/12/remarks-he-kofi-annan-conclusion-visit-to-kenya-au-panel-eminant-african>.

⁸ ICC-01/09-15, Decision Requesting Clarification and Additional Information, 18 February,, para. 21.

3. On 26 November 2009, the Prosecutor filed its Application. The Application contained thirty nine annexes. It requested the Chamber to ‘authorise the commencement of an investigation into the situation in the Republic of Kenya in relation to the post-election violence 2007-2008.’⁹
4. On 10 December 2009, the Chamber issued an ‘Order to the Victims Participation and Reparations Section (‘VPRS’) Concerning Victims’ Representations pursuant to article 15(3) of the Statute’ directing that the VPRS present a report to the Chamber by 21 December 2009.¹⁰
5. On 18 January 2009, having not then received a report of submission by the VPRS, nor a decision from the Chamber on this issue, the Prosecution filed an Application for Access to any VPRS filing and any decision by the PTC II.¹¹
6. On 18 February 2010, the Chamber issued a ‘Decision Requesting Clarification and Additional Information’. It requested the Prosecutor to provide the Chamber, no later than 3 March 2010, with additional information and clarification with respect to (1) the State and/or organizational policy under article 7(2)(a) and (2) admissibility within the context of the situation in the Republic of Kenya.¹²

III. Request for Confidentiality

7. The Prosecution files this Response and annex 4 and 5 as public. The Prosecution files annexes 1, 2 and 3 of this Response confidential, *ex parte*, Prosecution only, as they reference information on persons who appear to bear the greatest responsibility as well as information on the most serious incidents according to the information contained in the twelve reports provided in support of its Application. Publicly disclosing such information may prejudice independent investigation of the situation by the Prosecution and it may also endanger the safety of potential witnesses, victims and other persons.

⁹ ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010 and its annexes.

¹⁰ ICC-01/09-4, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, 10 December 2009.

¹¹ ICC-01/09-10-Conf-Exp, Prosecution's Application for Access to any VPRS Filing and any Decision by this Chamber, 18 January 2010.

¹² ICC-01/09-15, Decision Requesting Clarification and Additional Information, 18 February 2010, para. 11.

IV. Clarification and Additional Information

8. The clarifications and additional information requested by the Chamber are provided below. The Prosecution emphasizes that its submissions are based on the information that is available from a preliminary examination of the situation and aim at meeting the standard established by art 15, 4 that there is a “reasonable basis” to proceed with an investigation. Because the Prosecution has not yet collected evidence, the information provided is without prejudice to any finding that may result from the Prosecution’s independent investigation into the situation or its case selection strategy.

9. In this Response, the Prosecution has relied primarily on material that has been previously provided to the Chamber in support of its Application, which in its view supports the required finding of a reasonable basis to proceed with an investigation. Nonetheless, in order to provide additional clarity and information pursuant to the Chamber’s request, the Office provides the appendices 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, Coast and Nairobi Provinces* dated February 2009. According to this material, none of the persons who appear to bear the greatest responsibility, as indicated in Annex 2 feature therein or currently are the subject of proceedings related to the crimes committed during post-election violence.

V (i). The State and/or organizational policy under article 7(2)(a)

10. In its Application the Prosecution stated that the information available 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.¹³

11. In its Decision, the Chamber took note of different events, inter alia, meeting of local leaders, businessmen, and politicians, and police involvement in the commission of certain acts. The Chamber requested “additional information and more clarity on the linkage between, on the one hand, such events, the persons involved, the acts of violence allegedly

¹³ ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010, para. 77. The Prosecution has maintained the designation ‘State and/or organizational policy’ at this stage since the nature of the policy attributable to persons belonging to or associated with the PNU, the ODM and the police with be identified during the course of an investigation.

committed in the various regions of the Republic of Kenya during different periods of time and, on the other hand, a policy of a State or one or more organizations”.¹⁴

12. The entity that implements the policy does not need to be a State. Non-state actors or private individuals who exercise de facto power can constitute the entity behind the policy¹⁵ and instigate an attack against civilian population.¹⁶ Any group of people can be categorized as an organization if it has at its disposal, in material and personnel, the potential to commit a widespread or systematic attack on a civilian population.¹⁷ The following are relevant indicators to determine the existence of an organization:

- Existence of pre-determined objectives, whether formally or informally adopted by the members of the organization.
- Existence of a common identity, whether political, ethnic, religious, etc.
- Activities carried out by the group, including meetings, financial transfers, fund raising, logistical arrangements, etc.
- Public discourse, including communications, writings, broadcast, etc.
- Ability to pursue their objectives through certain agreed methods and active involvement such as directing or instigating the crime.
- Sufficient resources (material and personnel) to pursue their objectives

All these elements have been identified in the analysis of the Kenya situation.

13. In paragraphs 74 to 75 of its Application, the Prosecutor identified the groups allegedly involved in the crimes including political leaders particularly from PNU and ODM and

¹⁴ ICC-01/09-15, Decision Requesting Clarification and Additional Information, 18 February 2010, para. 13.

¹⁵ 1991 ILC Draft Code, p. 266, cited in Dixon R., in Triffterer, pp. 236-237 [92], footnotes 382-383. This provision in the article reflects the contemporary position that individuals not linked to a state or its authorities can commit crimes under international law. See 1996 ILC Draft Code, 94; *Tadic TJ*, para. 654 (“the law in relation to crimes against humanity has developed to take into account forces which, although no those of the legitimate government, have de facto control over, or are able to move freely within, defined territory”[...]. See also Elements of Crimes, Article 7, Introduction, paragraph 3, footnote 6; Robinson D., *Defining ‘Crimes against Humanity’ at the Rome Conference*, 93 AM. Journal IN’L L., p. 50; Hwang P., *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 Fordham Int’L L.J. (1998), p. 504; Robinson D., in Lee et al. (ed.), *The Elements of Crimes against Humanity*, in “ICC: Elements of Crimes and Rules of Procedure and Evidence”, p. 64.

¹⁶ Robinson D., and Von Hebel H., in Lee R.S. (ed.), “Crimes within the Jurisdiction of the Court” in *The International Criminal Court The Making of the Rome Statute*, p. 97.

¹⁷ Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 396; Prosecutor v Jean-Pierre Bemba Gomba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gomba, ICC-01/05-01/08-424, 15 June 2009, para. 81; Werle G., in “Part Four: Crimes against Humanity” in *Principles of International Criminal Law (TMC, Asser Press, The Hague 2005)*, p. 228..

security services. In paragraphs 83 to 92 of its Application, the Prosecutor provided relevant information on the issue of State and/or organizational policy including the systematic nature of the attacks, the deliberate and selective targeting of civilians, the methods, networks and the means of involvement as well as the indicia of the organization of the attacks identified according to the different supporting materials.

14. As the Prosecution has previously noted, the post-election violence in Kenya comprised hundreds of incidents with varying degrees of organization. As CIPEV and KNCHR observed, not every act of violence occurring during the post-election violence necessarily appear to result from a State or organizational policy. However, the inflammatory statements and hate speech disseminated via radio broadcasts, e-mails and text messages before the elections suggests that incidents occurred in furtherance of strategies to incite violence.¹⁸ Therefore it is a need to conduct a proper investigation.
15. In addition to the clarifications and additional information provided herein, the Prosecution has attached two confidential, *ex-parte*, annexes. Annex 1 presents a list of the most serious criminal incidents that appear to have resulted from a State and/or organisational policy within the meaning of article 7(2)(a), as linked to the persons listed in Annex 2. Annex 2 presents a preliminary list of 20 political and business leaders belonging to or associated with the PNU and the ODM who appear, at this stage and according to the information available, to bear the greatest responsibility for the most serious crimes, with an indication of their specific alleged role. As set out in the Office's Prosecutorial Strategy, the category of persons bearing the greatest responsibility includes those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes.¹⁹
16. The Prosecution's Application and the supporting materials provide a reasonable basis to believe that the widespread and systematic attacks directed against the civilian population, involving a course of conduct comprised of multiple commission of acts referred to in article 7(1) against specific segments of the civilian population, were conducted, *inter alia*, by members of organised groups associated with the main political parties, the PNU and the

¹⁸ ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010, para. 89.

¹⁹ OTP-ICC - *Prosecutorial Strategy 2009-2012*, 1 February 2010, para. 19, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>

ODM.²⁰ Persons in positions of power, including senior political and business leaders belonging to or associated with the PNU and the ODM listed in Annex 2, appear to have been directly involved in the organization, enticement and/or financing of such attacks, which were directed against selected segments of the Kenyan civilian population on the basis, *inter alia*, of their perceived ethnic and/or political affiliation. As such, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of an investigation, the Prosecution clarifies that the State and/or organizational policy pursuant to or in furtherance of which the attacks were allegedly committed appears to relate primarily to the policy of senior political and business leaders belonging to or associated with the ruling PNU party and the opposition ODM.²¹

17. In regard to the linkage requested by the Chamber in paragraph 13 of its Decision, both the KNCHR and the CIPEV indicate that political leaders on all sides, particularly from the PNU and the ODM, allegedly recruited gangs of youths and transported them to strategic points to unleash terror, and to kill and destroy property belonging to communities aligned to the rival party.²² Entire communities were stigmatized and deliberately targeted on the basis of their perceived ethnic and/or political affiliation. Typically, perpetrators attacked, killed and displaced members of communities that were the minority in that area.²³
18. As referred to in the Prosecution's Application, the implementation of the State and/or organizational policy of the senior political and business leaders belonging to or associated with the PNU and the ODM appears to have been channelled through community structures at the local level. Local leaders and ODM mobilizers arranged frequent meetings to organize, direct and facilitate the violence. Local leaders and elders including church and government officials called on ordinary citizens to target acts of violence against civilians belonging to perceived rival communities based on ethnicity and political affiliation. Politicians stoked ethnic tensions to mobilize political support among their ethnic group.²⁴

²¹ ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 346-348.

²² ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 3, at paras. 4-8; ICC-01/09-3-Anx 5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 346-348.

²³ ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010, para. 57.

²⁴ ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010, paras. 83 and 85-86.

19. Members of regional political and business establishments appear to have funded the transport of youths involved in the attacks or counter-attacks and paid them.²⁵ The acts committed resulted in killings of civilians, acts of rape and other forms of sexual violence, internal displacement, and acts causing serious injury, affecting hundreds of thousands.²⁶
20. The policy to commit attacks against the civilian population appears to have been defined by senior political and business leaders through the course, *inter alia*, of several meetings and was implemented following a consistent set of methods in different incidents and regions, thus demonstrating planning.
21. As highlighted by the KNCHR, there was a pattern of behaviour throughout most theatres of violence in the Rift Valley, Nyanza, Western, Coast and Central regions: the attacks and counter-attacks were carried out with military discipline; in the Rift Valley attackers participated in oathing ceremonies and wore a semblance of uniform; both attacking Kalenjin forces and counter-attacking Kikuyu forces were transported into areas of operation in vehicles; roads were barricaded for the intended purpose of identifying, killing or injuring travellers from non-local communities. That so many attacks were launched following a similar modus operandi in wide-afar areas across Kenya and within a short time-span of two months is indicative of an existence of a policy to use an organization to commit them.²⁷
22. Crimes followed a consistent pattern as described below :
- a. After the announcement of the controversial results of the elections the ODM leaders set in motion two parallel tracks of protest. Whereas the party officially called for peaceful mass demonstrations, some influential party leaders, particularly in the Rift Valley province, launched violent attacks against civilians perceived as supporters of the PNU. The attacks against civilians were conceived and utilized by certain political and business leaders associated to the ODM as a

²⁵ ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010, paras. 91-92.

²⁶ ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010, para. 56.

²⁷ ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 3, at paras. 1-7.

form of protest against the suspected electoral fraud and a means to claim their share of power.²⁸

- b. The mass protests by the opposition led some of PNU political leaders to respond with the use of excessive police force against demonstrators and with the instigation of mob violence against civilians perceived to be affiliated to the ODM. Such use of violence against the civilian population, particularly in the opposition strongholds of the Nyanza and Rift Valley provinces, was instrumental for the PNU leaders to keep their hold on power.²⁹
- c. Some opposition leaders and followers decided to give vent to their anger by attacking civilians who were perceived to have voted for the PNU. The attacks served the purpose of punishing government supporters and weakening their political allegiance.³⁰
- d. After the first wave of attacks, certain leaders of the victimized communities formed a policy to launch revenge attacks against members of rival communities. This appears to have been the rationale behind the violent attacks by Mungiki and other Kikuyu youth mobs against Luo and Kalenjin civilians in Nakuru and Naivasha.³¹
- e. The expulsion of civilians of the opposing communities was clearly defined as an objective and incited by political leaders in a series of public rallies during and after the electoral campaign. Political leaders aimed at establishing constituencies with “loyal” population as the basis for their political ambitions.³²

²⁸ ICC-01/09-3-Anx6, [Annex 6 to Request for authorisation of an investigation pursuant to Article 15](#), p. 13; ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), p. 37.

²⁹ See, for example, ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 91-92.

³⁰ ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 71, at para. 262-263; and p. 82, at para. 302.

³¹ ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), p. 43; p. 45; pp. 49-50; ICC-01/09-3-Anx6, [Annex 6 to Request for authorisation of an investigation pursuant to Article 15](#), p. 14.; ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 3, at para. 5; ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 121-124.

³² ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 69, at para. 254.

23. The following appear to be the main methods by political and business leaders to implement their criminal policy:

- a. Public incitement – In a series of instances during and after the electoral campaign political leaders incited in public rallies violence against the “enemy” communities, including by referring to them as undesirable “spots” that needed to be “removed”, hence instigating their mass expulsion. The instances of public incitement correspond to the areas where large-scale attacks were subsequently carried out involving thousands of raiders. The motivation of the attackers was based on promises of benefits (jobs, housing, land) made to them by the same leaders that later incited the violence. This type of incitement is most often reported for the ODM leaders in the Rift Valley.³³
- b. Warnings – Warning were issued against members of certain tribes with anonymous leaflets and other means of communication to the effect that they should go away or face violence. Such warnings indicate a degree of planning, resources and discriminatory intent.³⁴
- c. Planning meetings – Clandestine meetings to organize the violence have been reported for both sides mainly in December 2007 and January 2008 in Nairobi and in the Rift Valley province. Reportedly these meetings were called by senior political and business leaders and the participants included leading members of the parties, businessmen, local activists and retired police and military officers. The agenda of the meetings included issues of financing, logistics and arms, with a clear purpose to conduct criminal attacks against civilians.³⁵ Meetings of this kind have been consistently reported by witnesses that had first-hand knowledge and both the CIPEV and the KNCHR assessed as credible and reliable.

³³ ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 23-24, at paras. 40-42; p. 52, at para. 189; p. 58, at para. 207; p. 134, at para. 531.

³⁴ ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 66-67; ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 70-71, at para. 261; p. 87, at para. 317; p. 91, at para. 338; p. 133, at para. 528; ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), p. 55 and p. 40

³⁵ ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 70, at para. 259; p. 87, at para. 318; pp. 91-92, at para. 338; p. 209, at Nos. 105-107; pp. 212-213, at No. 120; p. 225, at No. 165; p. 227, at No. 172.

- d. Financing – Many of the political leaders from both sides that incited the attack are also rich businessmen or land owners and contributed financially to the attacks from their own resources. The planning meetings served also as fund raising events for the attacks, during the course of which agreement was also reached on the amounts of money to be paid to the youth mobs and other hired gangs. Financial contributions were used to purchase fuel for the arson operations, to buy weapons and to arrange transportations.³⁶
- e. Hiring gangs – Political and business leaders hired organized crime gangs with a notorious record of violence to carry out the attacks. This method was reportedly characteristic of the acts carried out, *inter alia*, by the Mungiki gang, who were allegedly hired by Kikuyu political and business leaders from Nairobi and the Rift Valley province.³⁷
- f. Transportation – The use of trucks to ferry large groups of attackers has been reported in several incidents, particularly in the Rift Valley province.³⁸
- g. Road blocks – Youth mobs from both sides established road blocks to screen civilians and attack them if they were found to belong in the “enemy” tribe, for example in Eldoret and Naivasha.³⁹
- h. Selective targeting – In addition to the screening in road blocks, the attacks selectively targeted civilians on the basis of their perceived tribal identity by means of door-to-door identification and specifically directing the violence against

³⁶ ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 70, at para. 259; p. 87, at para. 318; pp. 91-92, at para. 338. ; pp. 201-202, at No. 78; p. 213, at No. 120; p. 227, at No. 172

³⁷ ICC-01/09-3-Anx6, [Annex 6 to Request for authorisation of an investigation pursuant to Article 15](#), p. 14; ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 43 and 45; ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 85, at para. 311; p. 87, at para. 317; p. 129, at para. 510; p. 225, at No. 165; p. 228, at No. 176; p. 231, at Nos. 183-184; p. 232, at No. 185

³⁸ ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 91, at para. 333; p. 222, at No. 154; ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), p. 46; ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), p. 45; p. 70.

³⁹ ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), p. 42; p. 68; p. 119; ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 64; p. 65; ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), p. 28.

areas and houses inhabited by the “enemy” tribe. The forcible circumcision of Luo men is an example of such selective targeting.⁴⁰

- i. Media – In some cases local radio stations broadcast derogatory messages and instructions to coordinate the attacks. Radio Kass FM in Eldoret is the station that has been most prominently reported to this effect.⁴¹

24. The abovementioned attacks appear to have been executed by youth mobs in the framework of a State and/or organisational policy attributable to political and business leaders associated with the PNU and the ODM.

25. In addition, in relation to the alleged use by PNU leaders of government institutions to carry out the crimes, there are serious allegations that members of the police were responsible for hundreds of deaths caused through apparent excessive use of fire arms. The provinces where allegations against the police were most persistent were the Rift Valley province, the Nyanza province and some suburbs of Nairobi, which were all strongholds of the ODM opposition. Members of the police were allegedly responsible for a large share of the deaths resulting from the violence that followed the 2007 elections. Of over 1100 people killed, it is reported that some 405 resulted from police shootings.⁴²

26. Three branches of the Kenya Police Service have been the subject of allegations. These branches are the regular Kenyan Police, the General Service Unit (GSU), a specialist unit trained in riot control, and the Administrative Police who are in charge of protecting the administration and provide support to regular Police.⁴³ All regional activities of these three branches fall within the control of the Provincial Police Office who is advised by the Provincial Security Committees and is chaired by the District Commissioner and Provincial Commissioner.⁴⁴

⁴⁰ ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 91, at para. 335; p. 128, at para. 502; p. 140, at para. 554; p. 146, at para. 583; ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), p. 107; p. 119; p. 197, p. 251 and p. 258.

⁴¹ ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 62, at paras. 224-225; p. 74, at paras. 271-272; p. 140, at para. 556; p. 195, at No. 52; ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), p. 36 ; ICC-01/09-3-Anx6, [Annex 6 to Request for authorisation of an investigation pursuant to Article 15](#), p. 13; ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), p. 67; p. 69; p. 295; pp. 298-302.

⁴² ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), p. 311.

⁴³ ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), p. 24.

⁴⁴ ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), p. 24.

27. The information available also provides examples of instances in which police units approved the use of live bullets to counter riots as well as the existence of an unofficial ‘shoot-to-kill’ policy.⁴⁵ It also appears that in many instances the victims of police shootings were attempting to escape violence and did not pose a mortal threat to the police.⁴⁶ The information points to unarmed women, elderly persons, children and teachers as having been subjected to beatings, torture and killings.⁴⁷
28. In other instances the police appear to either have failed to intervene or have directly participated in violent acts including looting, arson, rapes, beatings and derision.⁴⁸ The information also appears to show that in several instances the police responded inconsistently to violent groups depending on the affiliation of the victimised population or by taking sides with the attacking mobs. In the crime scenes surrounding Nairobi, such as Kisumu, police were frequently quick to use excessive force to quell Kalenjins and Luos. However, when facing Kikuyu mobs engaged in killing and burning in Naivasha and Nakuru, the police reportedly generally refrained from reacting. In other parts of the country such as Eldoret and Molo, witnesses have alleged that the police was primarily siding with the Kalenjin mobs.⁴⁹
29. The police have also been criticised for allegedly failing to investigate crimes. According to Philip Alston, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, there has been a chronic omission on the part of the police service to properly investigate these allegations.⁵⁰
30. While it seems that members of the police force committed a number of crimes against civilians during the post-election violence, including killings, rape and torture, the information available and the existence of a policy within the meaning of article 7(2)(a) requires further corroboration through additional information and evidence during the course of an investigation.

⁴⁵ ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 105, at para. 405; ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), p. 25.

⁴⁶ ICC-01/09-3-Anx4, [Annex 4 to Request for authorisation of an investigation pursuant to Article 15](#), p. 61, at para. 217.

⁴⁷ ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 59-60.

⁴⁸ ICC-01/09-3-Anx5, [Annex 5 to Request for authorisation of an investigation pursuant to Article 15](#), pp. 50-51.

⁴⁹ ICC-01/09-3-Anx3, [Annex 3 to Request for authorisation of an investigation pursuant to Article 15](#), p. 25.

⁵⁰ ICC-01/09-3-Anx11, [Annex 11 to Request for authorisation of an investigation pursuant to Article 15](#), p. 26, at para. 71.

V (ii). Admissibility within the context of the situation in the Republic of Kenya

31. In its Decision the Chamber requested more recent information on; (1) the incidents that are likely to be the target of an investigation; (2) the groups of persons involved that are likely to be the target of an investigation for the purpose of identifying the potential cases under consideration; and (3) domestic investigations, if any, with respect to those potential cases as constituted by the previous two elements. The Chamber referenced its request on Regulation 29(2)(c) of the Regulations of the Court as well as Regulations 33 and 34 of the OTP Regulations.⁵¹
32. The Prosecution submits that the clarifications and additional information provided herein together with its previous submission, satisfy the requirement of Regulation 49 of the Regulations of the Court to indicate “[t]he persons involved, if identified, or a description of the persons or groups of persons involved”. As referred to in paragraph 15 above, Annex 2 presents a preliminary list of mainly senior political and business leaders belonging to or associated with the PNU and the ODM who appear, at this stage and according to the information available, to bear the greatest responsibility for the most serious crimes, with an indication of their specific alleged role.
33. Accordingly, the Prosecution has examined whether there are any relevant national proceedings, in Kenya or in third States, against persons who appear, at this stage and according to the information available, to bear the greatest responsibility for the most serious crimes. In response to the Chamber’s request, the Prosecution confirms that there currently are no national proceedings in relation to: (i) the senior political and business leaders belonging to or associated with the PNU and the ODM listed in Annex 2 and (ii) the list of the some of most serious criminal incidents that appear to have resulted from a State and/or organisational policy within the meaning of article 7(2)(a), as linked to the persons listed in Annex 2.
34. As such, the information available to the Prosecution, including the information submitted to the Prosecution by the Kenyan authorities on national proceedings, shows that, as of the

⁵¹ ICC-01/09-15, [Decision Requesting Clarification and Additional Information](#), 18 February 2010, para. 14. The Prosecution notes that OTP Regulations 33 and 34 apply after an investigation has been opened. Regulation 33 refers to the analysis of information collected during preliminary examination stage *as well as* additional necessary information and evidence collected during investigations. The reference to the factors set out in article 53(1)(a)-(c) at the stage of selecting potential cases during the investigation, moreover, is made on a *mutatis mutandis* basis. The identification of a case-hypothesis, as set out in OTP Regulation 34, similarly, can only occur on the basis of “the information and evidence collected” – i.e. during the course of an investigation.

date of its Application, no investigations or prosecutions were being initiated in Kenya or any third State in respect of the incidents and against the individuals that would likely form the focus of an investigation by the Prosecution. None of the individuals cited in Annex 2 appears in 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, Coast and Nairobi Provinces dated February 2009 and transmitted to the Office of the Prosecutor on 13 July 2009. The Prosecution confirms that the information available does not indicate the existence of any national proceedings that would alter its assessment since the filing of the Application. In the case of Eldoret politician Jackson Kibor, the State has withdrawn all incitement charges.

35. As indicated in paragraph 54 of the Application, the information available to the Prosecutor only shows that a limited number of proceedings have been initiated in Kenya in relation to minor offences committed during the post-election violence.
36. The Prosecution also notes that the Kenyan Parliament has not established a Special Tribunal to prosecute those responsible for the post-election violence. On 2 February 2010, Prime Minister Raila Odinga confirmed that the Government has not been able to set up such a tribunal. He reiterated, nonetheless, that the Kenyan Government is ready to provide full cooperation to the ICC, including in the execution of arrest warrants.⁵²
37. Should the Chamber authorize an investigation, the Prosecutor will continue to assess the existence of national proceedings for the duration of the investigation.

⁵²ANNEX 4: The Standard, Raila on ICC, 02 February 2010
(<http://www.standardmedia.co.ke/InsidePage.php?id=2000002269&catid=532&a=1>)

Relief Requested

The Prosecution respectfully requests the Pre-Trial Chamber enter an expeditious determination on Prosecutor's Application to authorise an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008.



Luis Moreno-Ocampo, Prosecutor

Dated this 3rd day of March 2010
At The Hague, The Netherlands