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PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

PUBLIC
With Public Annex A and Confidential Annex B

William Samoei Ruto Defence Brief following the Confirmation of the Charges Hearing

Source: **Defence for Mr. William Samoei Ruto**

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

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I. INTRODUCTION

1. On 1 January 2008, just a day after the post election violence commenced, William Ruto appeared on Kenyan National Television and stated:

> "We have said very clearly and loudly that we want a peaceful nation; we are asking Kenyans wherever they are across the country that we want to protest against what happened to us in this country but we want to do it peacefully. We abhor any acts of violence, any acts of looting, any acts of destruction of property which is unnecessary. We are telling our people across the country that burning property, destroying life, engaging in acts of violence...is actually against the democracy we are fighting for. We want every Kenyan to be heard, to participate in...freedom of association and freedom of expression, but within limits of peace."[1]

2. The disputed election results announced on 30 December 2007 precipitated violence across six of Kenya's eight provinces.[2] The violence commenced shortly after the swearing in of President Kibaki. It was of a scale and intensity never before witnessed in the Republic of Kenya.
3. The Office of the Prosecutor (OTP) sought and obtained authorisation to investigate the Situation in the Republic of Kenya. Upon the OTP's application the Pre-Trial Chamber (PTC) issued summons against, amongst others, Mr. William Samoei Ruto (Ruto). The charges for which the OTP are seeking confirmation are crimes against humanity. These are specifically, murder, forceful transfer or deportation, and persecution.
4. The Prosecution's case relies principally on four anonymous witnesses. There is no independent evidence to verify the accuracy and truthfulness of their accounts of preparatory meetings or inciting statements, nor their integrity.
5. The prosecution is expected to present its core and best evidence at the confirmation hearing. No prudent and reasonable prosecutor can withhold his best evidence and risk non-confirmation. Accordingly, what is presently before the PTC can reasonably be seen as the best evidence the prosecutor can bring. He cannot claim to have better, undisclosed evidence reserved for the trial.
6. The Defence submits that the OTP failed to carry out professional, impartial and open-minded investigations to establish the truth. Instead the OTP simply became a conduit to convey to the PTC materials that had been assembled by Human Rights bodies and or organizations without exercising sufficient caution as to the veracity of the accounts proffered. It is the defence case that these accounts are authored by witnesses whose predominant goals are to take advantage of the situation for their own benefit. The

[1] EVD-PT-OTP-00378 at 0225.
[2] EVD-PT-OTP-00004 at 0370.

Chamber should be very alert to the advantages of being a witness, particularly in the present context, such as endeavouring to get relocation to western countries or countries with equivalent income levels, provision of accommodation, education or other services.

7. The OTP, in disregard of its duty to investigate exculpatory and incriminating circumstances equally, did not present to the PTC exculpatory evidence which was in the public domain and readily available, such as evidence of the whereabouts of Mr. Ruto during the dates the Prosecution witnesses allege he attended "preparatory meetings" to organise a common criminal plan. Had the OTP performed its duties in a reasonable and professional manner it would have been apparent to them that they were being misled by their own witnesses.
8. The poor evidence presented by the OTP to the PTC cannot be said to reach the legal threshold of "substantial grounds to believe" that Ruto committed any of the alleged crimes. The Defence invites the PTC not to confirm the charges against Ruto.
9. As at the confirmation hearing, the defence for William Ruto adopts all those relevant submissions of law and fact made on behalf of Josuhua Sang, and vice versa, without having to repeat them here at length and burden the Chamber with repetitive submissions.
10. The Defence attaches at Confidential Annex A a schedule of sources of evidence in respect of specific facts in the Document Containing the Charges and List of Evidence. The Annex demonstrates the weakness of the foundations upon which the Prosecution has tried to erect its case. The evidence is limited to those very few witnesses. The Annex also demonstrates the lack of corroborating, independent evidence produced in support of their principal allegations.
11. The Defence will demonstrate through an in-depth analysis of the Prosecution's case presented at the confirmation hearing that the case is not fit to proceed further. The Defence submit that the Chamber's duty is to prevent such a case progressing further.

II. STANDARD OF PROOF

12. The Prosecution in order to meet its evidentiary burden at the confirmation stage must present concrete and tangible evidence demonstrating a clear line of reasoning underpinning its specific allegations. This is settled jurisprudence in this court.[3] The Prosecution has not met this standard.

[3] Sang Confirmation Brief para 5

13. The intention of filtering cases that are fit to go to trial through the confirmation hearing is designed to protect the rights of a suspect against wrongful and wholly baseless charges.[4] This calls for the PTC to examine and review all the evidentiary materials presented before it carefully.
14. For reasons set out in paragraphs 5 to 16 in Sang's written submissions, and which the Defence respectfully invites the PTC to consider as part of this brief without burdening the Chamber with repeated and identical argument, the prosecution did not present evidence to meet the established legal standard.
15. The Defence acknowledges that it is the duty of the court to evaluate the evidence. It is respectfully submitted that the judges of this court, after carefully weighing and evaluating the evidence presented both by the Prosecution and the Defence, can only reach the one inevitable conclusion that this case is not fit for confirmation.

III. FLAWED INVESTIGATIONS

Failure to Investigate Potential Bias of its Witnesses

16. The Prosecution relies largely on Witness 4 to support several propositions with respect to the planning and execution of the alleged common plan involving Ruto and Sang. For instance, the Prosecution references Witness 4 alone to prove that "each attack involved the distribution of money and weapons",[5] that Network-related "businesses provided funding, food and livestock to the perpetrators"[6], and that reinforcements for the attack on Langas should be brought in from the Nandi District,[7] that people escaping from the attack on Huruma were shot by arrows, and that after the attacks, perpetrators "returned to their meeting points, reporting that the attacks were successful".[8]
17. Despite relying extensively on allegations from Witness 4 to support its case, the Prosecution failed to investigate any potential bias of Witness 4. Ruto informed the Prosecution of Witness 4's long-standing vendetta against him.[9] When he spoke to the Prosecution in November 2010,[10] he produced several newspaper articles written by Witness 4, dating back more than a decade, which malign Ruto.[11] Witness 4 claims that he has never personally met Ruto but told the Prosecution, "I know that he knows about

[4] Sang Confirmation Brief paras 14
[5] EVD-PT-OTP-00239; See para 70 of the DCC and Prosecution List of Evidence, p. 116.
[6] EVD-PT-OTP-00239; See para 72 of the DCC and Prosecution List of Evidence, p. 120.
[7] EVD-PT-OTP-00239 at 0100; See para 79 of the DCC and Prosecution List of Evidence, p. 128.
[8] EVD-PT-OTP-00239 at 0101; See para 79 of the DCC and Prosecution List of Evidence, p. 130-1.
[9] EVD-PT-OTP-00412 at 0102-4.
[10] EVD-PT-OTP-00420.
[11] EVD-PT-OTP-00422; -00423; -00424; -00425; -00426; -00427; -00428; -00429; -00430; -00431; and -00432.

me".[12] Then some of his statement is redacted. Despite having been put on clear notice regarding this bias, the Prosecution never went back to Witness 4 to ask him about this bias and whether or not it affected the truthfulness of his statements against Ruto or whether it provided him any incentive to lie.

18. The Prosecution should have investigated and disclosed any potential bias on the part of someone they intended to use as an anonymous witness against Ruto.[13] The identity of Witness 4 was mistakenly disclosed and is known to the Defence;[14] the Prosecution's intent was to use him as an anonymous witness, and so he technically remains. The issue of bias should have been thoroughly explored, especially after the prosecution was put on notice. The Defence invites the Chamber to view the entirety of the evidence given by Witness 4 with great caution with respect to allegations against either Ruto or Sang.

Failure to Investigate Clearly Exculpatory Information

19. The Prosecutor has a statutory duty to investigate exculpatory matters. Contrary to prosecution claims at para 72 of its Brief, the Defence submits that the disclosure of potentially exculpatory material without further, reasonable investigation of the same is not sufficient to fulfil this duty. For instance, though the Prosecution disclosed a handful of newspaper articles and video clips of statements from Rono and Wekesa, two CIPEV and KNCHR witnesses, who say they were coached and induced to implicate Ruto and recruited others to do the same,[15] the Prosecution did not investigate the serious allegations of impropriety committed by these two and the KNCHR commissioner, Omar Hassan Omar. This is especially troubling since the Prosecution is relying on the CIPEV and KNCHR report and may be relying on witnesses such as Witness 4 and others who appear to be among those recruited by Rono and Wekesa.[16] These individuals were allegedly asked to co-operate and change their statements, so they could be systematic and consistent, in exchange for upkeep, paid apartments, and relocation outside of Africa.[17] Of course, relying on testimony from witnesses who have been promised relocation or

[12] EVD-PT-OTP-00239 at 0106.
[13] At the ICTY, the Trial Chamber held in the *Tadic* case with respect to the use of anonymous witnesses that "…the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy. To this end the Prosecutor must have examined the background of the witness as carefully as the situation in the [country] and the protection sought permit. There should be no grounds for supposing that the witness is not impartial or has an axe to grind."). Prosecutor v. Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 64.
[14] EVD-PT-OTP-00239 at 0092. See also, ICC-01/09-01/11-T-10-CONF-ENG, 6 Sept 2011, p. 38 to 41.
[15] EVD-PT-OTP-00464; -00433; -00434; -00463; -00464.
[16] EVD-PT-D09-00048.
[17] EVD-PT-D09-00048.

other benefits in exchange for providing information raises a host of other concerns regarding their credibility and reliability.[18]

20. Despite having this exculpatory information the Prosecution did not interview Witness 4 or any other witness, about these inducements or the recanting statements. When Witness 8 raises with his Prosecution investigators the issue of "coaching witnesses, being paid 60,000 and being … rented mansions", Witness 8 is told that for now, all the Prosecution is interested in is the facts, and that they would have to come back to this issue.[19] The Prosecution investigators never returned to this exculpatory issue with Witness 8; or, if they did, such material was not disclosed to the Defence.
21. The Defence submits that the above failures in the investigation, taken cumulatively, demonstrate that the evidence put forth by the Prosecution is insufficient for the case to be confirmed because the material adduced before the Chamber is insufficiently comprehensive to establish an objective truth, as required by the Statute. A deeply flawed and unbalanced approach to the investigation can have no other result but to produce a biased and inadequate basis for the confirmation of the charges.
22. Furthermore, the Chamber will recall Defence submissions to the effect that the Prosecution did not pursue evidentiary leads provided to them by their own witnesses. For instance, Witness 8 stated that on 6 December 2007 he was at an ODM rally in Kipkaren where Ruto addressed the crowd and told the youths to prepare to barricade roads, destroy property and kill the Kikuyus. Witness 8 indicated to the Prosecution that Citizen TV had been present at the rally and had recorded it, or that the Prosecution should check the archives of the Standard and the Nation newspapers in order to substantiate his account.[20] There is no material to suggest that the Prosecution did seek to corroborate Witness 8's account and no such compelling material to support that account.
23. A further example is from the testimony of Witness 6. He claims that he read a story about grenades being found at Cherambos' house in the Standard and the Nation newspapers.[21] Witness 6 has no personal knowledge of grenades at Cherambos' (and this

[18] *Prosecutor v. Taylor*, SCSL-03-01-T-1048, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 23 September 2010, para. 21, citing *Prosecutor v. Karemera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005, para. 7 (acknowledging that information within the Prosecution's knowledge concerning benefits paid to or promises made to witnesses beyond that which is reasonably required may affect the credibility of witnesses and must be disclosed); *Prosecutor v. Martic*, IT-IT-95-11, Trial Judgment, 12 June 2007, para. 38 (the Trial Chamber expressed "significant doubt as to the credibility of both witnesses [who had sought and received assistance from the Prosecution]" and only gave weight to the parts of their evidence which were corroborated).
[19] EVD-PT-OTP-00562 at 1139-40.
[20] EVD-PT-OTP-00551 at 0832-3.
[21] EVD-PT-OTP-00486 at 0284-5.

is an allegation Cherambos himself denied[22]), and the Prosecution investigations did not produce any evidence from the Nation or the Standard in order to substantiate Witness 6's account. Yet the Prosecution continues to show that Ruto and Kosgey, together with Sang and others met in preparatory meetings where grenades were supplied.

Inadequate Investigations

24. The Prosecution's investigators failed to do elementary investigative work. A prudent investigator would have been interested in establishing independently where a suspect (Ruto) was on the dates the prosecution witnesses allege that he attended preparatory meetings. This was not done by the OTP.
25. Ruto is a well-known public figure whose movements are recorded and documented by the electronic and print media. His movements and activities are openly known and are of public and media interest. Contemporaneous records exist of his whereabouts and activities for the period in question and those records are easily accessible. It is shocking that the OTP did not carry out a basic investigative exercise and more particularly secure those records.
26. The Defence at the confirmation hearing presented video recordings showing Ruto's whereabouts and activities sourced from the said public records.[23] In the material presented to court by the Defence to show Ruto's whereabouts it is manifestly clear that he was hundreds of kilometres away from the venues the Prosecution witnesses allege he (Ruto) was to foster criminal objectives.
27. The Prosecution in their closing submissions argued that it was possible for Ruto to be in distant places in a short time by use of helicopters. No evidence was adduced by the Prosecution in support of that theory nor is it supported by their witnesses. None of the witnesses state that Ruto arrived or left in a helicopter for any of the alleged preparatory meetings. The only mention by the Prosecution's witnesses of use of the helicopters is in attending public rallies and meetings.[24] The PTC should decline the invitation by the Prosecution to speculate on the use of the helicopters in attending the alleged preparatory meetings.

[22] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-7, 3 Sept 2011, p. 48.
[23] Alleged 2 November 2007 meeting – Ruto in Kapkatet (EVD-PT-D09-00054 at 0020); Alleged 14 December 2007 meeting – Ruto in Amagoro (EVD-PT-D09-00054 at 0013); Alleged 22 December 2007 meeting – Ruto in Kisumu (EVD-PT-D09-00054).
[24] EVD-PT-OTP-00160 at 1281 to 1282 (Political meeting in Kapsabet on 5 December 2007); EVD-PT-OTP-00161 at 1304 (Kapsabet political meeting); EVD-PT-OTP-00222 at 0152 (Witness saw Ruto heading to a rally by helicopter; date is redacted); EVD-PT-OTP-00488 at 0366 to 0367 (Political meeting in Kaptumo in December 2007; date is redacted).

28. The Prosecutor was under a statutory duty to carry out its own independent investigations under Article 54. Instead, he presented a case to the PTC based on reports from human rights bodies, contaminated by acknowledged false testimonies, including CIPEV/ Waki, HRW and KNCHR. The Prosecutor's case is deficient due to the failure to investigate the credibility questions of his own witnesses and to pursue investigative leads.
29. For reasons set out in paragraphs 22 to 38 in Sang's written submissions, and which we respectfully invite the PTC to consider as part of this brief, the Prosecutor should be found to have wholly failed in his statutory duty to investigate this case and these charges should not be confirmed.

IV. DEFICIENCIES IN THE DOCUMENT CONTAINING THE CHARGES

30. In the course of the confirmation hearing the defence for Mr Ruto made a number of submissions relating to what it maintained were significant deficiencies in the Prosecution's case and the Document Containing the Charges ("DCC").[25] The Defence herein presents a more detailed analysis of those submissions.

Flaws in Description of Counts

31. Ruto is charged as a co-perpetrator under Article 25(3)(a) with murder, deportation or forcible transfer, and persecution under counts 1, 3, and 5.
32. The descriptions of these counts contain flaws similar to those contained in the counts against Sang and are almost identical save for the form of liability. However, whilst Ruto is charged as a co-perpetrator, the descriptions of the charges against him refer to his committing or contributing to the commission of the crimes charged. If the Pre-Trial Chamber confirms the charges the Defence submits that the words 'or contributed to' should be removed.
33. The description of the counts includes the vague phrase 'including' and the characterization of the crime as either 'deportation or forcible transfer'. The Defence for Ruto adopts the arguments of the Defence for Sang in this respect.[26]

Dolus Eventualis

[25] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-6, 2 Sept 2011, p. 119-124; ICC-01/09-01/11-T-10, 6 Sept 2011, p. 21-22
[26] Sang Closing Brief paras 145

34. In respect to individual responsibility the contents title '(vi)' states:

> 'Ruto and Kosgey were mutually aware and mutually accepted that implementing their common plan might result in the realization of the crimes charged' (emphasis added). It is submitted that the use of the word 'might' in this context is an error, particularly when read together with paragraph 117 which states that "… their actions would cause the crimes to occur as they did" (emphasis added).

35. Similarly, the DCC at paragraph 99 states that Ruto and Kosgey "… were aware and accepted the risk involved in implementing their common plan" (emphasis added).

36. These references to 'might' and 'accepted the risk' could suggest that the allegations against Ruto and Kosgey encompass the concept of *dolus eventualis* which requires merely that the realisation of the crimes were foreseeable even if not intended. However, as orally submitted and reiterated elsewhere,[27] the ICC Statute requires a higher standard of intent. The Prosecution must demonstrate 'substantial grounds' to believe that the suspects intended the crimes to be committed or accepted that, in the ordinary course of events, they would be committed.

Members of the Network

37. At the confirmation hearing, the Defence emphasised that the DCC does not mention any name other than the names of the three suspects.[28] From the DCC, it is unclear who are Ruto's alleged co-perpetrators other than Kosgey; who are the Network members other than Ruto and Kosgey; who are Ruto's and, or Kosgey's alleged subordinates; who are the subordinates of Ruto's and Kosgey's alleged subordinates; who are the coordinators and who are the alleged direct perpetrators.

38. The suspect is entitled to know the factual allegations against him in sufficient detail. The non-inclusion in the DCC of the names or identifying features of any of the Network-members, 'other' co-perpetrators, the suspect's subordinates or the actual perpetrators, renders it impossible for the suspect to defend himself adequately.

39. The Defence submits that the relevant information should be contained in the DCC, rather than in the list of evidence, the In-depth Analysis Charts ("IDAC") or the evidence itself, as the Prosecution can bring new evidence in the event of a trial. Thus, the evidence is fluid whereas the DCC is not.

40. In other international tribunals, a failure to plead the prosecution case with sufficient clarity and precision in the charging document may result in the document being

[27] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-6, 2 Sept 2011, p. 150; also paras 34-36 of this Brief.
[28] *Ibid*, p. 122-128.

materially defective. Such material defects cannot generally be remedied by reference to supporting evidence.[29] If the charging document is not adjusted in a timely manner, the material defects may affect the charging document to such an extent that it cannot be cured in any way other than dismissal of the affected components in the charging document.

41. This PTC has also affirmed that the DCC forms the basis of the confirmation hearing and that it can only refer to the disclosed evidence in order to interpret properly the DCC.[30] Thus, the DCC itself must have all relevant information described in an unambiguous, precise manner.

42. Even when considering the list of evidence, the IDAC or the evidence itself, the suspect is not greatly assisted. The witnesses mention the names of a number of participants attending meetings, where a common plan to commit murder, persecution and forcible transfer of PNU supporters was allegedly discussed, but fail to indicate what position they had with Ruto in the hierarchy– i.e. whether they were co-perpetrators, direct or indirect subordinates, coordinators, or had some other relationship with Ruto, with each other, or with 'the Network'.

43. This lack of precision is problematic because Ruto is charged under a common plan liability mode. His alleged involvement is with and through others. In such a situation, it is essential to know who these others were and how these others relate to the suspect. Being unaware of who, and how many people were part of the common plan, and who were the people used to implement the plan, the Defence is not placed in a position to determine whether Ruto's alleged contribution was essential - in the sense that he could have frustrated the realisation of the alleged common plan by not performing his task.[31]

44. Further, co-perpetration is dependent on the Prosecution demonstrating that each member of the common plan was mutually aware of, and accepted, the risk that implementing the

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[29] *Prosecutor v. Krnojelac*, Decision On The Defence Preliminary Motion On The Form Of The Indictment, 24 February 1999 para 15; See also *Prosecutor v. Ntagerura et al*, No. ICTR-99-46-T, Trial Judgment, 25 February 2004, para. 29: "Although Article 20(4)(a) of the Statute does not require that the nature and the cause of the charge be communicated to the accused in any particular format, it is clear from the Statute and the Rules that this information should be included in the indictment, which is the only accusatory instrument provided for therein." See also *Prosecutor v. Brdjanin and Talic*, Decision on Motion to Dismiss Indictment, 5 October 1999, para. 13: The Chamber held that for the purpose of determining whether a *prima facie* cases existed in relation to the confirmation of the indictment, "the supporting material may not be used to fill in any gaps which may exist in the material facts so pleaded when determining whether a *prima facie* case exists in accordance with Article 19.1 of the Statute.

[30] *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Bemba Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 ("Bemba Confirmation Decision"), paras. 207, 311.

[31] *Prosecutor v. Lubanga*, ICC-01/04-01/06-803, Decision on the Confirmation of Charges, 29 January 2007 ("Lubanga Confirmation Decision"), para. 367.

common plan would result in the realisation of the elements of the crime; and reconciled with or consented to it. It is because of their awareness and acceptance that each co-perpetrator may be held criminally responsible for acts not committed by them personally, or for the crime as a whole, even when they carried out only part of the crime.[32] It is unreasonable to expect the Defence to assess and present an adequate defence against the elements of mutual awareness and acceptance if it is unaware of the identities and number of the co-perpetrators.

45. In an analogous situation at the ICTR, (*Karemera*), it was held that the Defence must be informed with whom the defendant is alleged to have participated in a Joint Criminal Enterprise.[33] Likewise, Ruto has the right to be informed with whom else, other than Kosgey, he is alleged to have participated in the common plan.
46. In addition, only if the identities of the suspect's direct subordinates and their subordinates are known is it possible to evaluate whether there is a hierarchical structure between him and his subordinates, which is one of the elements of the mode of liability under which Ruto is charged.
47. Ruto can only be found guilty of the crimes charged if it can be established that he had control over the crimes through control over the organization. In order to demonstrate Ruto's control over the crimes committed it is necessary to establish the existence of an organisational and hierarchical apparatus of power and that there was near automatic compliance with Ruto's orders.[34] These elements can only be established if the identities of the subordinates are known, otherwise it is impossible to establish that Ruto had hierarchical command over them and that his orders were almost automatically complied with.
48. The organisation which Ruto, Kosgey and 'other' co-perpetrators are said to have controlled has been branded by the Prosecution as the "Network". This "Network" has barely been defined. The "Network" is invisible without a name or an identity. Nor are there identifying features such as a flag, uniform or identifiable clothing, membership

[32] Lubanga Confirmation Decision, para. 362.
[33] *Prosecutor v. Karemera et al*, ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 19; *Prosecutor v. Ntagerura et al*, ICTR-99-46-T, Judgment, 25 February 2004, para. 34. See also *Prosecutor v. Gatete*, No. ICTR-00-61-I, Decision on Defence Preliminary Motion, 29 March 2004, paras. 12-13, where it was held that the Defence must be informed of the identities of at least those perpetrators the Prosecution is aware of. See also the ICTY cases of *Prosecutor v. Pavkovic et al*, IT-03-70-PT, Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment, 8 July 2005, para. 25; *Prosecutor v. Prlic et al*, IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment, 22 July 2005, para. 11.
[34] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, ("Katanga Confirmation Decision"), paras 515-518.

criteria, stamp, codes or any other sign to recognise the organisation and its members. The DCC does not mention any of the members of this Network nor how many members it had. The non-inclusion of the names of any of the Network members is particularly troublesome in light of the fact that they are not identifiable in any other way. Even their ethnicity is not known with certainty.

49. In the course of the confirmation hearing, the Prosecution produced a confidential chart listing the names of a number of members of the Network in hierarchical order.[35] The chart places Ruto at the head of the Network, followed by Kosgey. The chart then lists three names in the political branch of the network, one name (Sang) in the media branch, two names in the financial branch, two names in the tribal elderly branch and two names in the military branch.[36] Under these names come the mid-level coordinators of which eight names are listed in the chart, followed by the direct perpetrators none of whom is mentioned by name.
50. The information is too little, too late. Too late, because its disclosure at confirmation has deprived the Defence of a reasonable opportunity to react or prepare for the purpose of the confirmation hearing.[37] Too little, because the number of names given is wholly insufficient unless the Network has no, or few, other members than those identified.
51. For instance, the DCC makes numerous references to Ruto, Kosgey and 'other' co-perpetrators.[38] Yet, the charge gives no indication who these 'other' co-perpetrators are. Hierarchically, it appears from the chart that everyone is subordinate to Ruto, including Kosgey although he remains at the head of the suggested organisation together with Ruto. All others identified in the chart seem to be their subordinates rather than co-perpetrators. The Defence submits that no co-perpetrators other than Kosgey, no direct subordinates other than those mentioned under the various branches, and no additional coordinators to those in the chart can be added by the Pre-Trial Chamber even if the testimony of witnesses refers to other names. The PTC cannot remedy deficits in the DCC.[39]

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[35] ICC-01/09-01/11-321-AnxA-Conf; *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-6, 2 Sept 2011, p. 80-82.
[36] The Defence notes with surprise that the military branch lists 2 names only, while the Prosecution's Article 58 Application named 3 commanders (ICC-01/09-01/11-224-Conf-AnxA, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 15 December 2010 (made available to the Defence on 26 July 2011) at para. 80). The Defence assumes that it is the position of the Prosecution that the third commander is no longer assumed to be part of the Network.
[37] Bemba Confirmation Decision, para. 208 ("a DCC must state the material facts underpinning the charges and […] the material facts underpinning the charges shall be specific enough to clearly inform the suspect of the charges against him or her, so that he or she is in a position to prepare properly his or her defence.").
[38] *Prosecutor v. Ruto et al*, Document Containing Charges, ICC-01/09-01/11-261-AnxA, 15 August 2011 ("DCC"), for instance, paras 24, 25, 26, 44.
[39] Bemba Confirmation Decision, para. 208.

52. This PTC has firmly stated in *Bemba* that "[t]he duty to present evidence in relation to each legal requirement of the crime cannot be compensated by the Chamber."[40] Thus, the PTC can fill in the gaps in the DCC only to the extent that the information can be found clearly in the evidence presented before it. It is not for the PTC to guess who the Prosecution alleges are Ruto's co-perpetrators and subordinates. Even if someone is said to have been present at one of the meetings where the common plan was allegedly discussed, that itself does not give the person in question a particular function or position vis-à-vis Ruto.
53. Most of the vague references in the DCC cannot be clarified. This is particularly apparent in respect of the direct perpetrators of whom the Prosecution has failed to provide even the most basic information, such as their names, identities, other identifying features (such as the unit or group they belonged to), their ethnicity or their relationship to Ruto, Kosgey or any of their identified subordinates. It is impermissible for the PTC to fill in these gaps.
54. For the Prosecution to establish that Ruto had control over the crimes it must establish a chain of command that extends all the way to the perpetrators. It is submitted that the relationship between Ruto and the persons who carried out the crimes must be one of effective control.[41] It is impossible to establish the nature of the relationship, if any, if none of the perpetrators is identified. The Defence acknowledges that in cases of mass crimes it may be impractical and thus unnecessary for the Prosecutor to demonstrate, for each individual killing, the identity of the direct perpetrator.[42] However, the PTC must be able to verify whether any of the actual perpetrators acted on the suspect's instructions. If none or too few of the actual perpetrators can be identified as having done so, an acquittal must necessarily follow at the end of the day.[43] Thus, if the Prosecution is unable to provide the names of any of the actual perpetrators, then at least it should provide information as to the unit or group to which they belonged.[44] The Prosecution has given no such information.
55. The only relationship between Ruto and the actual perpetrators pleaded in the DCC is one of ethnicity and of political affinity. At paragraph 109 of the DCC, the Prosecution alleges, *inter alia*, that Ruto's position as a 'crowned Kalenjin leader' and as 'the single

[40] Bemba Confirmation Decision, para. 300.
[41] For the definition of the liability mode, see section on Indirect Co-Petetration paras 78-110
[42] Bemba Confirmation Decision, para. 134.
[43] *Prosecutor v. Oric*, Appeal Judgment, 3 July 2008, paras. 35 & 48.
[44] This is in line with subordinate/superior relationship in ICTY: *Prosecutor v Oric*, Trial Judgement, 30 June 2006, para. 311; *Prosecutor v Hadzihasanovic & Kubura*, Trial Judgement, 15 March 2006, para. 90; *Prosecutor v. Blagojevic & Jokic*, Appeal Judgement, 9 May 2007, para. 287; *Prosecutor v. Brima et al*, SCSL-04-16-T, Trial Judgment, 20 June 2007, para. 790.

most authoritative ODM figure in the Rift Valley' gave him a position of authority in the Kalenjin community allowing him to control the Network. It is, however, not at all clear how many of the actual perpetrators belonged to the Kalenjin ethnic group and supported the ODM.

56. Accordingly, the Defence submits that the allegations in the DCC are too vague to be confirmed.

Essential Contribution to Common Plan

57. A number of paragraphs in the DCC describe Ruto's role in the planning and organising attacks on PNU supporters. Ruto's essential contributions are alleged to have included:

> "(1) using his authority as a top Kalenjin leader and MP in the Rift Valley to mobilize supporters for the Network and to implement the common plan;
> (2) using anti-PNU rhetoric at preparatory meetings and events to create an atmosphere of anti-PNU rhetoric and sentiment and fear among PNU supporters;
> (3) providing direct perpetrators with weapons and other logistical necessities;
> (4) financing the Network;
> (5) coordinating the implementation of the common plan via coordination of logistics (transportation/communication/ perpetrators); and
> (6) providing instructions to subordinates and direct perpetrators on where to obtain instructions (e.g. SANG/Kass FM), how to communicate to each other, and how to execute the plan."[45]

58. Network subordinates, serving as conduits between Ruto, Kosgey and the perpetrators, were allegedly assigned similar essential tasks to further the common plan.[46] Along with these Network subordinates, Ruto and Kosgey are said to have coordinated their essential contributions in the following way: "(1) attending preparatory meetings and events where the attacks were planned; (2) contributing funds; (3) creating the organization where they could systematically construct roadblocks, distribute weaponry and attack multiple locations in a limited time frame."[47]

59. Similar tasks have been described in other paragraphs of the DCC,[48] but no further details have been provided, neither in the DCC, nor in the list of evidence, the IDAC or the evidence itself.

60. The Defence submits that this description does not sufficiently inform the suspect of the essential contributions he allegedly made to the common plan - a common plan to commit

[45] DCC, at para. 105.
[46] DCC, at para. 107.
[47] DCC, at para. 108.
[48] See particularly paras. 26, 47, 62, 65, 68, 77, 78, 92, 94, 102, 103, 104, 106.

murder, persecution and forcible transfer of PNU supporters. Nor does it sufficiently inform him of how he and Kosgey, along with Network subordinates, co-ordinated their actions in implementing the common plan such that it can be said that each contribution was the *sine qua non* (or essential contribution) towards realising the common plan.[49]

61. This PTC has previously held that the Prosecution should where possible "identify the method of commission of the crime or the manner in which it was committed."[50] It is submitted that, contrary to the Prosecution assertion,[51] this method includes the method used to plan and organise the crimes. This follows from the fact that the suspect is alleged not to have participated personally in the commission of crimes but to have planned and organised them. In such a situation, the "method of commission of the crime" equals the method used to plan and organise the crime because that constitutes the criminal conduct for which the suspect is blamed.
62. Given that Ruto is charged with acts which are physically perpetrated by other persons the Prosecutor is expected to specify his link to the crime with sufficient precision.[52] It is submitted that there is even a heightened obligation on the Prosecution to plead, with greater detail, the acts and conduct of the defendant to demonstrate that he possessed the intent that these acts be committed.[53]
63. Similarly, the *ad hoc* international tribunals have determined that the defendant must be informed of the nature of his own participation in the enterprise,[54] as well as that of his alleged co-perpetrators, subordinates or accomplices.[55]

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[49] See also jurisprudence at other international tribunals relevant to these points. For instance, see *Prosecutor v. Krajisnik*, Judgement, 27 September 2006, para. 884, where the Trial Chamber held (citing *Stakic* Appeals Chamber Judgement, para. 69): "It is evident, however, that a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives. Rather, it is the interaction or cooperation among persons – their joint action – in addition to their common objective that makes those persons a group. The persons in a criminal enterprise must be shown to act together or in concert with each other in the implementation of the common objective if they are to share responsibility for the crimes committed through the joint criminal enterprise."

[50] See Bemba Confirmation Decision, para. 208.

[51] At para. 80 of their brief, the Prosecution states that "[t]he material elements do not extend to or include the existence of the method used to plan the crimes." See ICC-01/09-01/11-345, Prosecution's Written Submissions Following the Hearing on the Confirmation of Charges, 30 September 2011 ("Prosecution Confirmation Brief").

[52] See Bemba Confirmation Decision, para. 133.

[53] See, for instance, *Prosecutor v. Kvocak et al*, Appeals Chamber Judgement, 28 Feb 2005, para 65, citing *Prosecutor v. Galic*, IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2001, para. 15.

[54] *Prosecutor v. Karemera et al*, ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 19; *Prosecutor v. Ntagerura et al*, ICTR-99-46-T, Judgment, 25 February 2004, para. 34; *Prosecutor v. Boskoski & Tarculovski*, IT-04-82-PT, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment, 1 November 2005, para. 30.

[55] *Prosecutor v. Karemera et al*, ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 19; *Prosecutor v. Prlic et al*, IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment, 22 July 2005, para. 27.

64. Details are particularly lacking in respect of Ruto's logistical assistance. As for the alleged provision of weapons and ammunition. Only if such details are known is it possible to determine whether Ruto's contribution was essential.

65. In addition, the Defence submits that the Prosecution must specify how many preparatory meetings were held and on which dates. The DCC refers to six preparatory meetings of which four dates are given.[56] The transcripts of witness testimony refer to ten meetings of which six are provided with an exact date. At the confirmation hearing, the Prosecution referred to eight meetings but provided three exact dates only. The Defence notes with surprise that the alleged meeting at Ruto's house on 22 December 2007,[57] where the alleged weapons delivery took place, for which the Defence has provided clear evidence of being in Kisumu, does not feature on the chart. The Defence assumes that the Prosecution no longer relies on this meeting but wonders when and where the weapons delivery would then have taken place. It is thus confusing to the Defence how many meetings were allegedly held and upon which dates.

66. The Defence submits that the dates of these meetings are of crucial importance to the Defence because it is at these meetings that Mr Ruto's alleged criminal conduct occurred, i.e. where he allegedly made his essential contributions to the realisation of the common plan. In other words, both the *actus reus* and *mens rea* of the crimes charged were fulfilled at these meetings. As such, the Prosecution has an obligation to provide the dates of the meetings pursuant to regulation 52(b), requiring the DCC to include "a statement of facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court".

67. In line with the jurisprudence of the *ad hoc* international tribunals, which has to grapple with similar fair trial issues, the location, dates and attendees of meetings constitute material facts which must be specified in the indictment with sufficient precision.[58] In terms of what constitutes sufficient precision, the ICTR Appeals Chamber found that a reference to weapons being distributed in April 2004, without any specification as to the date of the location of the alleged distribution, was impermissibly vague because the

[56] See DCC, para. 65; Annex B, p. 108.
[57] Witness 4: EVD-PT-OTP-00239 at 0091-3.
[58] *Prosecutor v. Ntawukulilyayo*, Decision On Defence Preliminary Motion Alleging Defects In The Indictment, 28 April 2009, paras 19-22; *Prosecutor v. Kvocka et al*. Appeal Judgement, 28 February 2005, para. 31.

distribution of weapons was a criminal act which the defendant was alleged to have committed personally.[59]

68. The non-disclosure of the dates of half of the meetings severely limits the Defence's ability to present an alibi defence in respect of the undated meetings.[60]

69. The importance of pleading the dates of key meetings as material facts is further underscored by the *Abu Garda* case where the PTC declined to find that the defendant was an indirect perpetrator as the Prosecution had failed to establish that Abu Garda had attended meetings during which plans to attack were discussed.[61] In reaching the finding that Abu Garda was not individually responsible the Chamber took into consideration statements tendered by the Defence supporting the position that the defendant was not present as part of the delegation which had participated in various meetings.[62]

70. The fact that some of the dates are redacted due to protective measures is irrelevant to the question as to whether the Prosecution has pleaded the material facts with sufficient detail to enable the Chamber to confirm the charges. Although Article 68(1) permits the Chamber to adopt appropriate measures for the protection of witnesses, such measures "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". For this reason, the jurisprudence of the ICTR recognises that witness protection cannot be relied upon by the Prosecutor as a valid reason for not including the material facts in the indictment.[63]

71. In light of the above deficits, which have been insufficiently remedied by the evidence admitted for the purpose of the confirmation hearing, the Defence submits that the allegations pleaded against Ruto are sufficiently vague such that the PTC should not confirm any charge based upon them. The Defence emphasises the importance for the PTC to confirm only clear and precise charges, given that a confirmation decision is a precise and guiding instrument for any trial. Indeed, the various Trial Chambers and the

[59] *Prosecutor v. Kamuhanda*, Appeals Judgement, 19 September 2005, para. 19.
[60] See *Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 40: "[t]he absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance". See further Sang Defence Brief, paras 51-57 and para 77.
[61] *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Public Redacted Version - Decision on the Confirmation of Charges, 8 February 2010 ("Abu Garda Confirmation Decision"), paras 168-179.
[62] *Ibid*, paras 213 and 214.
[63] *Prosecutor v. Ntagerura*, Trial Judgement, 25 February 2004, FN 41: "Of course, witness protection cannot be used as a pre-text to frustrate the proper preparation of a defence.", citing *Prosecutor v. Gacumbitsi*, ICTR-2001-64-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003, para. 11 ("The protection of witnesses should not . . . serve to frustrate or hinder an effective defence.").

Appeals Chamber have uniformly confirmed that the Trial Chamber cannot exceed the facts and circumstances set out in the Decision on the Confirmation of Charges.[64]

72. Trial Chamber II put it in the following terms:

> "[I]t should be recalled that the filing of the Confirmation Decision represents not the starting point of the preliminary proceedings but in fact their termination. In the Chamber's view, the decision on the confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed. This is one of the fundamental reasons for the existence of the Pre-Trial Chamber, the purpose of which is to enable the trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain, and accessible to the accused. If the Prosecutor were to be entitled to present at the confirmation hearing a mere sample of the facts with which he intends to charge the accused, and to reserve the right subsequently to add new facts at the trial, this requirement of certainty could not be satisfied."[65]

73. For this reason, Trial Chamber II found that "strict compliance with the provisions of articles 64(2) and 67(1)(a) of the Statute requires that the decision should set out, with a maximum of precision, the facts and circumstances in terms of times and locations and also, as far as possible, the precise numbers and identities of the victims and the means employed to commit the crimes. This is information which the accused is entitled to know if he is to be in a position effectively to prepare his defence. To that same end, he is also entitled to expect of the Pre-Trial Chamber that, in the context of a particular charge, it will specify not only the facts and circumstances on which it expressly relies but also those which it considers should be dismissed from the scope of the prosecution".[66]
74. Thus, confirming defective charges would be inconsistent with the purpose of the confirmation hearing as the Pre-Trial Chamber would be committing for trial a case that would inevitably be dismissed by the Trial Chamber due to these flaws.
75. Accordingly, the Defence requests the Pre-Trial Chamber not to confirm the charges on the basis that the identities of Ruto's co-perpetrators, subordinates, and the actual perpetrators, their relationship with Ruto and the contributions they and Ruto himself

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[64] See *Prosecutor v. Katanga and Ngudjolo*, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG at para 16; *Prosecutor v. Bemba*, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, ICC-01/05-01/08-836 at para 35; *Prosecutor v. Lubanga*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205, at paras 90-91.

[65] *Prosecutor v. Katanga and Ngudjolo*, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG at para 22.

[66] *Ibid*, para 31. See further: *Prosecutor v. Banda and Jerbo*, Decision on the Joint Submission regarding the contested issues and the agreed facts, ICC-02/05-03/09-227, 28 September 2011, at para. 33.

made towards implementing the common plan, as well as all other issues raised at confirmation, have been pleaded imprecisely and insufficiently.

Lack of Consent from Witnesses who provided Non-ICC Statements Requires Exclusion

76. The Prosecution is relying on summaries of statements made by several, anonymous, non ICC witnesses in order to support the allegations against the suspects.[67] The Single Judge has previously observed that the "summaries do neither contain the identity of the witnesses nor the names of the organizations which took the statements or their agents. […]The Prosecutor clarifies that he has not contacted those witnesses yet and that they are, thus, not yet ICC prosecution witnesses".[68] It is thus clear that the persons who initially provided the statements have not given their consent for their statement/summary to be used in ICC proceedings. Yet under the Rome Statute, no one can be compelled to give evidence. They must consent to appearing as a witness or to having their statement used as evidence. For this reason, in *Lubanga*, the PTC excluded witness statements due to the fact that the Prosecution had failed to obtain the witnesses' consent to use their statement at the confirmation hearing:

> "In the view of the Chamber, the first and foremost measure required under article 68(1) of the Statute and rule 86 of the Rules is to inform each prospective witness of the fact that a party intends to rely on his or her statement, or the report or transcript of his or her interview for the purpose of the confirmation hearing in a specific case. Hence, as is the case before the Chamber with respect to witnesses […] the information was not provided to the said witnesses. In order to protect them appropriately, the Chamber considers that their statement, transcript or reports of their interview must be ruled inadmissible for the purposes of the confirmation hearing".[69]

77. Likewise, the Defence submits that all Non-ICC Statement Summaries must be excluded from evidence at this stage. Such evidence, without the consent of the individuals who gave the evidence initially, should not be used in the confirmation of charges decision to corroborate any other Prosecution allegations.[70]

V. INDIRECT CO-PERPETRATION UNDER 25(3)(a)

[67] These are EVD-PT-OTP-00495 to 00526, and EVD-PT-OTP-00760 to 00762.
[68] *Prosecutor v. Ruto et al,* ICC-01/09-01/11-145-Conf-Red, First Decision on Redactions, paras. 77-78.
[69] Lubanga Confirmation Decision, para. 59. As is clear from paragraph 43 of this same decision, the Single Judge had authorized the OTP not to disclose the identities of these witnesses to the Defence.
[70] Note that the instances where the Non-ICC Statement Summaries are impermissibly used to corroborate other evidence is noted in the attached annex.

78. Ruto is charged together with Kosgey as an indirect co-perpetrator under article 25(3)(a) of the ICC Statute.[71] In the Decision on the Prosecution's Application for the Summons, the Pre-Trial Chamber delineated the elements of indirect co-perpetration.[72] The Defence submits that, to do justice to these requirements set out by the PTC, the elements of this liability mode must be strictly construed, and the control element must be particularly emphasized. Otherwise, this mode would be inconsistent with the ordinary meaning, object and purpose of the Statute, as well as customary international law.
79. In order to be held criminally liable for any crime in any jurisdiction, the *actus reus* and *mens rea* must be firmly established. The mode of indirect co-perpetration, effectively merging indirect and co-perpetration into a new mode of joint control over the crime, potentially has a wide scope. Co-perpetration requires a horizontal structure of responsibility, whereas indirect perpetration requires a vertical structure of responsibility. The combination of those two modes of liability is far-reaching because it creates liability not only for crimes committed by persons under the control of the defendant but potentially also for crimes committed by persons under the control of his co-perpetrators.
80. In addition, given the manner in which the mode of liability is currently phrased it may not even be necessary to demonstrate that the actual perpetrators are among the subordinates of one of the co-perpetrators. They can be the subordinates of the subordinates of the subordinates of a co-perpetrator, or persons outside the chain of command of any of the co-perpetrators, provided these persons belong to a pool of people who would readily replace anyone withdrawing from the execution of the plan to ensure automatic compliance of the joint orders of the co-perpetrators. In such situations, the element of control is so far remote that it can hardly be argued that the suspect either had control or the will that the crimes be committed as they did.
81. The present case illustrates the profound difficulties this mode of liability presents. The Prosecution seeks to hold Ruto responsible for crimes committed by an unknown number of perpetrators, whose identities are unknown, on the assumption that Ruto controlled a nameless organisation whose members are largely unidentified. It is submitted that, in a case as the present one, the actions of the suspect are too remote from the actual commission of the crimes charged to impute criminal liability as an indirect co-perpetrator.

[71] DCC, particularly paras. 98, 99, which describe Mr. Ruto's alleged criminal liability under article 25(3)(a).
[72] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-01, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, para 40.

82. The Defence submits that the Prosecution cannot circumvent its obligation to establish the elements of *actus reus* and *mens reus* under article 25(3)(a) by relying on the theory that the defendant controlled an organisation through which the actual crimes were committed. Whether directly, through or with another, or through an organisation, the defendant must have control over the execution of the crimes and intent that they be committed. Otherwise, the defendant would not be in a position to "decide whether and how the offence will be committed",[73] as is required for liability to hold persons who did not physically carry out the actual objective elements of the crimes charged, criminally liable under article 25(3)(a).
83. Imputing liability to a defendant under article 25(3)(a) where the actual crimes are committed by persons not under the command or control of the defendant but rather of his alleged co-perpetrators, or nobody, would undermine the defendant's ability to control the crime and, thus stretch the criminal liability of a principal perpetrator too far.
84. To expand criminal liability under article 25(3)(a) beyond its ordinary meaning and watering down the defendant's control and thus the *actus reus* and *mens rea* elements would be inconsistent with the view of the drafting committee that "specificity of the essential elements of the principle of criminal responsibility was important; it serves as a foundation for many of the other subsequent principles".[74] Article 22(2) reflects this view: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'
85. Werle expressed a similar view, holding that "[c]ommission warrants the highest degree of individual criminal responsibility. Therefore, it must be strictly construed. This holds true particularly for joint commission."[75]
86. To avoid an excessive use of this mode of liability it is necessary to define clear boundaries and in particular stringent conditions as to the hierarchical relation that needs to be established between the principal perpetrator under article 25(3)(a) and the perpetrator(s) who directly committed the crimes charged. The Defence submits that the requisite level of intent for this mode of liability is one of *dolus directus* only, in line with Article 30 of the Statute.

[73] Confirmation Decision, par 485; citing Lubanga Confirmation Decision, para. 330.
[74] See Preparatory Committee on the Establishment of an International Criminal Court, Informal Group on General Principles of Criminal Law, Proposal of 26 August 1996 (A/AC.249/CRP.13), found at Prep Comm. 1996, Vol II, page 101.
[75] G. Werle, Individual Criminal Responsibility in Article 25 ICC Statute, Journal of International Criminal Justice, 5 (2007), 953-975, p. 974.

Requirement of Control

87. Article 25(3)(a) of the Rome Statute provides for three forms of commission: (1) as an individual; (2) jointly with another; or (3) through another person.

88. Of particular controversy is the definition given to "commission through another person", also referred to as indirect perpetration. This form of commission does not only cover situations where the person carrying out the crime is not criminally liable but also where such a person bears full criminal liability as a direct perpetrator. This already extends the notion of indirect perpetration, as it is known, mainly in common law countries, where liability as an indirect perpetrator only covers the first type of situation.[76] This has been discussed at length in the course of the ICC drafting process; eventually leading to an explicit recognition that indirect perpetration covers persons who committed the crimes charged through a criminally liable person.[77] Such an indirect perpetrator is referred to as 'the perpetrator behind the perpetrator' who can be held liable because he controls the will of the perpetrator.[78]

89. Pre-Trial Chamber I has gone further by determining that indirect perpetration also includes perpetration through another by means of "control over an organisation" (Organisationsherrschaft), thereby predominantly relying on the arguments of Claus

[76] Indeed, a study conducted by the Max Planck Institute indicates that some six countries have adopted constructions involving an offender operating behind a fully responsible offender, but that such constructions were rejected by another six countries. See, Max Plank study: *Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion*, Commissioned by the United Nations – International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor- Project Coordination: Prof. Dr. Ulrich Sieber., Priv. Doz. Dr. Hans-Georg Koch, Jan Michael Simon, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, Germany. See Part I p 18-19.

[77]. This did not go without criticism. See Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 499, footnote 660, where the Pre-Trial Chamber held: "Essentially, the possibility that a person may so control the will of another such that he can be said to perpetrate a crime through that other, seems incompatible with a meaningful notion of that other as a fully responsible actor. ROXIN, C. responded to these criticisms in "Organistionsherrschaft und Tatentschlossenheit", 7 Zeitschrift für Internationale Strafrechtsdogmatik (2006), p. 296. See also AMBOS, K., La parte general del derecho penal internacional, Montevideo, Temis, 2005, p. 220.

[78] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 496-498; reliance on: ROXIN, C., "Straftaten im Rahmen organisatorischer Machtapparate", Goltdammer's Archiv für Strafrecht (1963), pages 193-207; AMBOS, K., La parte general del derecho penal internacional, Montevideo, Ternis, 2005, p. 240; Ambos, Kai. 'Article 25' In Otto Triffterer (ed) 1999. *Commentary on the Rome Statute of the International Criminal Court.* Baden-Baden: Nomos Verlagsgesellschaft, p. 479 ; Cassese, Antonio, Paola Gaeta and John R.W.D. Jones (eds). 2002. *The Rome Statute of the International Criminal Court: A Commentary, Vol. I.* Oxford University Press, pages 794 – 795 ; *Olásolo, H./Perez Cepeda, A.*, The Notion of Control of the Crime in the Jurisprudence of the ICTY: The Stakic´ Case, 4 International Criminal Law Review 474 (2004), p. 485, p. 488–489.

Roxin, a German criminal law theorist.[79] Through control of the organisation or apparatus, the indirect perpetrator has available a nearly unlimited number of potential willing executors.[80] Roxin's concept of control over the crime is highly controversial, and has been explicitly rejected by a number of domestic and international jurisdictions. It is submitted that it can be applied only if liability is limited to the actions of persons strictly under the principal perpetrator's control. This view has academic support. Ambos writes that indirect perpetration is inconsistent with customary international law "if the indirect perpetrator cannot dominate the direct perpetrator sufficiently so as to justify attributing to him the latter's conduct as though it were his own."[81]

90. In the Argentine Junta trial an appeal chamber confirmed convictions on a mode of liability influenced by Roxin's theory of control of the act through an "organized apparatus of power".[82] However, their Supreme Court rejected this mode of liability, emphasising that it did not even exist in the country of origin of Roxin's legal theory, Germany. The Supreme Court found the concept of a perpetrator behind the perpetrator too controversial for it to be applied in Argentinean courts.[83]

91. Germany does not apply a notion of joint control over the crime in the sense that the indirect perpetrator can be held liable for perpetrators under the control of a co-perpetrator rather than his own. According to Judge Hamdorf, a "person will only be liable as a principal if he can be regarded as a direct perpetrator, a co-perpetrator or an indirect perpetrator, each of the three modes of liability having their own prerequisites. … In all other cases, the participant could only be regarded as an aider or instigator".[84] Even Claus Roxin does not suggest that different modes can be combined. His approach is that

[79] Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 496-498; reliance on: ROXIN, C., "Straftaten im Rahmen organisatorischer Machtapparate", Goltdammer's Archiv für Strafrecht (1963), pages 193-207.

[80] Ambos 2007, 182 ; C. Roxin, Taterschaft und Tatherrschaft, Berlin (2000), pp. 242-252, 653-654 and G.P. Fletcher (1978), pp. 655-656, quoted in van Sliedregt, E. 2003. *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law.* The Hague, T.M.C. ASSER Press, p. 70.

[81] K. Ambos, Triffterer, Commentary on the Rome Statute of the ICC (1999), pp.479-80.

[82] See *Videla Judgment*, National Appeals Court (Criminal Division) for the Federal District of Buenos Aires (Camara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal) Buenos Aires, December 9, 1985. See H. Olasolo and A P Cepeda, The Notion of Control of the Crime and its Application by the ICTY in the Stakic Case, Int Crim Law Review 4: 475-526, 2004, p.511, footnote 118.

[83] See Corte Suprema de Justicia de la Nación, *Resolución*, *Causa 13/84*. December 30, 1986, in particular paras. 20, 22 and 23. See further: Christiane Wilke: Dissertation: A Belated Vindication of Rights: Criminal Trials for Massive Human Rights Violations, Chapter 5 – The Spider's Head: The 1985 Trial of the Juntas, September 2005, sections IV and V.

[84] K. Hamdorf, The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime, Journal of Int. Crim. Justice 5 (2007), 208-226, at p.224-5. Article 25 of the German Criminal Code (Strafgesetzbuch, StGB) (as promulgated 13 November 1998 Federal Law Gazette I, p.945, p.3322) provides:
(1) Whoever commits the crime himself or through another shall be punished as a perpetrator.
(2) If more than one person commit the crime jointly, each shall be punished as a perpetrator (co-perpetrator).

perpetration "develops in three different ways: (i) in the direct or immediate perpetration as 'control over the action'; (ii) in the indirect perpetration as 'control of the will'; and (iii) in co-perpetration as 'functional control'."[85]

92. Nor do the *ad hoc* international criminal tribunals apply a liability mode of joint control over the crime similar to indirect co-perpetration. The Trial Chamber in the ICTY case of *Stakic* sought to introduce a form of joint control over the crime,[86] but the Appeals Chamber rejected it on the ground that it "does not have support in customary international law or in the settled jurisprudence of this Tribunal".[87]
93. There have been two dissenting opinions from one ICTY/ICTR appeal judge expressing a preference for liability on the basis of control over the crime rather than liability for participation in a joint criminal enterprise. However, he does not suggest merging co-perpetration and indirect perpetration because that would lead to liability even where the perpetrator has no effective control over the perpetrator and no ability to frustrate the commission of crimes.[88]
94. Recently, the Appeals Chamber of the Special Tribunal for Lebanon confirmed that notions such as perpetration by means, indirect co-perpetration and joint commission through another person have not yet attained customary international law status and refused to apply it as a mode of liability in that tribunal.[89]
95. Accordingly, the Defence submits that, in order to do justice to the rationale behind adopting the notion of indirect co-perpetration or joint control over the crime, the control aspect must be fully complied with. If not, it does not find any support in customary international law (for which extensive and uniform state practice is an essential requirement),[90] any general principle of international law, or law derived from national laws of legal systems of the world under articles 21(1)(b) and (c) of the Rome Statute.
96. For the indirect co-perpetrator to have sufficient control over the commission of the crimes to impute criminal liability to him for these crimes, it is necessary that he be like a

[85] H. Olasolo and A P Cepeda, The Notion of Control of the Crime and its Application by the ICTY in the Stakic Case, Int Crim Law Review 4: 475-526, 2004, p. 488, referring to *Roxin*, Taterschaft und Tatherrschaft, 7th ed, 2000, pp.122 et seq.
[86] *Prosecutor v. Stakic*, IT-92-24-T, Trial Judgment, 31 July 2003, paras. 438-442, 741-742, 774, 818, 822 and 826. See also *ibid*, p. 479, 513-516.
[87] *Prosecutor v. Stakic*, IT-92-24-A, Appeals Chamber Judgment, 22 March 2006, para. 62; also see paras 439-441. See also *Prosecutor v Milutinovic*, Trial Chamber, Decision On Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 May 2006, para 38 (a notion of indirect co-perpetration was similarly rejected).
[88] *Prosecutor v. Gacumbitsi Appeals Judgement*, 7 July 2006, Schomburg dissenting opinion, paras 17, 18 and 26; also see *Prosecutor v. Martic*, Appeals Judgement, 8 October 2008, Schomburg dissenting opinion, para. 7.
[89] STL-11-0111, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide,, Perpetration, Cummulative Charging, 16 January 2011, paras 253-256.
[90] ICJ, Case of North Sea Continental Shelf, pp. 74.

master-mind.[91] This requires more than inducing or soliciting a person to commit a crime, and involves any means of causing another person to commit a crime, be it the use of force, or the exploitation of an error, or any other handicap on the tool's side, provided that it is the exertion of some controlling predominance on the indirect perpetrator's side.[92]

97. Thus, the indirect co-perpetrator can be held criminally liable only if he dominates the will of the direct perpetrators.[93] If the indirect co-perpetrator is found to control the will of the direct perpetrators, and thus the execution of his plan by way of his control over the organisation, crimes committed by the direct perpetrators can then be attributed to him as though they were his own.[94] However, many well-respected scholars have held that this can only be the case if there is a sufficiently tight control by the indirect over the direct perpetrator, similar to the relationship between superior and subordinate in the case of command responsibility (Article 28).[95] This is the case where the indirect co-perpetrator is able to exercise effective control over the direct perpetrators by means of the organizational apparatus created and dominated by him.[96]

98. In *Abu Garda*, the Pre-Trial Chamber indicated that the Prosecution must establish that the crimes charged were committed by the physical perpetrators under the defendant's control.[97]

99. Anything falling short of such a relationship of effective control between each of the co-perpetrators and their subordinates would undermine the indirect co-perpetrators' control over, and their ability to frustrate, the execution of the common plan. The relation between the indirect and direct perpetrator does not need to be an official, long-established or

[91] Ambos, Kai. 'Article 25' In Otto Triffterer (ed) 1999. *Commentary on the Rome Statute of the International Criminal Court.* Baden-Baden: Nomos Verlagsgesellschaft, p. 479.
[92] Cassese, Antonio, Paola Gaeta and John R.W.D. Jones (eds). 2002. *The Rome Statute of the International Criminal Court: A Commentary, Vol. I.* Oxford University Press, p.794.
[93] *Olásolo, H./Perez Cepeda, A.*, The Notion of Control of the Crime in the Jurisprudence of the ICTY: The Stakic´ Case, 4 International Criminal Law Review 474 (2004), p. 485, p. 488–489.
[94] *Ibid*.
[95] Albin Eser: Individual Criminal Responsibility, in: Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds): The Rome Statute of the International Criminal Court: A Commentary, Vol. I, Oxford University Press 2002, page 795. The key issue is whether the mastermind or *Hintermann* is able to exercise effective control over the direct perpetrators by means of the organizational apparatus created and dominated by him. The indirect perpetrator must thus be able to sufficiently dominate the direct perpetrator. See further: Kai Ambos: Joint Criminal Enterprise and Command Responsibility, 5 Journal of International Criminal Justice, March 2007, 159 at page 180. See also : K. Ambos, Triffterer, Commentary on the Rome Statute of the International Criminal Court, (1999), p. 479-80.
[96] Ambos, Kai. 2007. Joint Criminal Enterprise and Command Responsibility, *5 Journal of International Criminal Justice*, March, 2007, 159 at 180.
[97] Abu Garda Confirmation Decision, para. 191.

direct one.[98] However, substantial influence or persuasive ability as a form of control is insufficient.[99] In order to have effective control, the indirect perpetrator must have the material ability to prevent the crimes or punish the perpetrators subsequently, even if not in a strictly legal or formal capacity.[100]

100. The Defence requests the PTC to apply strictly and explicitly the control requirement. This is in line with its own criteria set out for indirect co-perpetration.

Requisite Intent

101. The Defence further requests the PTC to confirm, as done in Bemba,[101] that the requisite intent is *dolus directus* and does not extend to *dolus eventualis*.
102. As with any person charged, the Prosecution must demonstrate substantial grounds to believe that Ruto, through and with others, committed the crimes charged with intent and knowledge pursuant to article 30 of the ICC Statute.
103. Article 30 of the Statute sets out the mens rea required for imputing criminal liability on a person for the commission of any of the crimes under the jurisdiction of the ICC.
104. In accordance with the express language of this provision 'unless otherwise provided', it must be established that the material elements of the crime were committed with intent and knowledge, as further defined in Article 30(2) and (3). This also follows from paragraph 2 of the General Introduction of the Elements of the Crimes, which states that, "[w]here no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element (...) intent, knowledge or both, set out in Article 30, applies".
105. The Defence submits that Article 30(2) and (3) incorporate two types of intent:[102]

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[98] See in this regard the jurisprudence of the other international courts and tribunals on effective control. For instance, see *Prosecutor v. Delalic et al*., Appeal Judgment, 20 February 2001, paras 254-255, *Prosecutor v. Kordic and Cerkez*, Appeal Judgment, 17 December 2004, para. 828; *Prosecutor v Strugar*, Trial Judgement, 31 January, 2005, para. 363; *Prosecutor v Halilovic*, Trial Judgement, 16 November, 2005, para. 63; *Prosecutor v Oric*, Trial Judgement 30 June 2006, para. 311.

[99] See, for instance: *Prosecutor v. Delalic et al*., Appeal Judgment, 20 February 2001, paras 258-266; also see, *Prosecutor v. Kordic*, Trial Judgment, 26 February, 2001, para. 415; *Prosecutor v. Brima et al*, Trial Judgment, 20 June, 2007, para. 784; *Prosecutor v. Fofana & Kondewa*, SCSL-04-14-T, Trial Judgment, 2 August 2007, para. 238; *Prosecutor v. Brima et al*, Appeal Judgment, 22 February, 2008, para. 289; *Prosecutor v Ntagerura et al*, Trial Judgement, 25 February, 2004, para. 628; *Prosecutor v. Nahimana et al*, Appeal Judgment, November 28, 2007, para. 882; *Prosecutor v Karera*, Judgement and Sentence, 7 December, 2007, paras. 564, 567-568; *Prosecutor v Oric*, Trial Judgement, 30 June, 2006, para. 311; *Prosecutor v Hadzihasanovic & Kubura*, Trial Judgement, 15 March, 2006, para. 80.

[100] *Prosecutor v. Brima et al*, Appeal Judgement, 22 February 2008, para. 257; also see *Prosecutor v. Semanza*, Trial Judgement, 15 May 2003, para. 402; *Prosecutor v. Kajelijeli*, Judgment and Sentence, 1 December 2003, para. 774.

[101] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08 123/186 15 June 2009.

(1) Direct intent, or *dolus directus* in the first degree, requiring knowledge of the suspect that his or her acts or omissions will bring about the material elements of the crime and that he or she carries out these acts or omissions with the purposeful will or desire to bring about these material elements.

(2) Oblique intent or *dolus directus* in the second degree requiring awareness of the suspect that his or her acts or omissions will result in the bringing about of the material elements of the crime even if not directly intended.

106. The doctrine of joint criminal enterprise as applied at the *ad hoc* international tribunals includes a third type of intent, known as *dolus eventualis*, commonly referred to as advertent recklessness.[103] *Dolus eventualis* requires merely that the consequences were foreseeable. It is submitted that this third variant of intent is clearly excluded from article 30 of the ICC Statute. In this regard, the Defence fully agrees with PTC II's conclusion in *Bemba* that "the express language of the phrase "will occur in the ordinary course of events" […] does not accommodate a lower standard than the one required by *dolus directus* in the second degree (oblique intention)".[104] Rather, "virtual certainty" or "practical certainty" that the consequences will follow, "barring an unforeseen or unexpected intervention that prevent its occurrence" is the requisite standard.[105]

107. The PTC's view in *Bemba* that Article 30 does not encompass *dolus eventualis* is in accordance with article 22(2) of the Statute pursuant to which the provisions in the Statute must be strictly construed.[106] This view also finds support in the *travaux préparatoires* in respect of article 30 of the Statute. Whilst notions such as recklessness and *dolus eventualis* have been discussed and considered, they were omitted in the final Rome Statute.[107] Given that their inclusion has been explicitly considered, this omission was

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[102] *Ibid*, paras 357-359.

[103] *Ibid*, para 357. See also ICTY jurisprudence: *Prosecutor v Stakic*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, para. 587; *Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeal Judgment, 22 March 2006, para. 101; *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 265 n. 702; *Prosecutor v Vidoje Blagojevic et al*, Case No. IT-02-60-T, Judgment on Motions for Acquittal Pursuant to Rule 98bis, 5 April 2004, para. 50; *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgment, 15 July 1999, para. 220.

[104] See Bemba Decision on Charges, para. 360 (footnotes omitted).

[105] *Ibid*, para. 362 (footnotes omitted). See also para. 363, where PTC II states, "had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words "may occur" or "might occur in the ordinary course of events" to convey mere eventuality or possibility, rather than near inevitability or virtual certainty" (footnotes omitted).

[106] This interpretation of article 30 also ensures that the Chamber "is not substituting the concept of *de lege lata* with the concept of *de lege ferenda* only for the sake of widening the scope of Article 30 of the Statute and capturing a broader range of perpetrators" (*ibid*, para. 369).

[107] For an in-depth discussion on these concepts and their differences, see, for instance: Ambos, General Principles of Criminal Law in the Rome Statute, at 21-22; John D. Van der Vyver, The International Criminal Court and the Concept of Mens Rea in International Criminal Law, 12 U. Miami Int"l & Comp. L. Rev. 57, 63-64 (2004); Antonio Cassese, The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise, 5 J. Int"l Crim. Just. 109, 111 (March 2007).

clearly deliberate indicating that article 30 was not intended to capture *dolus eventualis* or recklessness.[108]

108. This also reflects the general view of academics and commentators including those who have participated in the drafting of Article 30 of the Statute.[109]

109. Article 30 cannot be circumvented by applying a broad notion of indirect perpetration which waters down the *mens rea* element. Only if it can be established that the defendant intended the crimes to be committed can he found liable under article 25(3)(a). Given the remoteness of an indirect co-perpetrator to the execution of his common plan, both geographically and hierarchically, it is a real possibility that crimes will be committed outside the scope of the plan he had agreed with his co-perpetrators. Even if foreseeable, the indirect co-perpetrator cannot be held liable for such crimes.

110. No charge under any notion of indirect co-perpetration which does not strictly apply the requirements of control and intent should be confirmed.

VI. FAILURE TO ESTABLISH ELEMENTS OF 25(3)(a) MODE OF LIABILITY

111. The Defence submits that the Prosecution failed to prove, on the 'substantial' test, the requisite elements set out by the PTC to impute liability to Ruto under article 25(3)(a). In particular, the Prosecution failed to establish that (a) there was a common plan to commit crimes under the ICC Statute; (b) Ruto made an essential contribution to the realisation of the common plan; and (c) Ruto had control over the crimes charged or the actual perpetrators; (d) Ruto had the intent to participate in a common plan to commit the crimes charged.

(a) Prosecution failed to establish common plan

112. There are no substantial grounds to believe Ruto and Kosgey agreed to commit murder, persecution and forcible transfer of PNU supporters.

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[108] See Bemba Decision on Charges, para. 366.

[109] Cassese, The Statute of the International Criminal Court: Some Preliminary Reflections, at 154; Van der Vyver, The International Criminal Court and the Concept of Mens Rea in International Criminal Law, 64-65; Piragoff & Robinson, at 850; Werle & Jessberger, supra n. 3, at 41; Kai Ambos, General Principles of Criminal Law in the Rome Statute, 10 Crim. L. Forum 1, 21-22 (1999); Eser, at 915. Two scholars are, however, of the view that article 30 encompasses *dolus eventualis* although neither of them provides any explanation for that interpretation which is unsupported by the drafting history or the express language of article 30. See Ferrando Mantovani, The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer, 1 J. Int"l Crim. Just. 26, 32 (April 2003); Hans-Heinrich Jescheck, The General Principles of International Criminal Law Set Out in Nuremberg, As Mirrored in the ICC Statute, 2 J. Int"l Crim. Just. 38, 45 (March 2004).

113. It is submitted that, in order to find Ruto liable for the crimes charged under Article 25(3)(a), the plan or agreement must involve the commission of the three crimes charged. This follows from the requisite intent under article 30, as set out above.

114. Thus, Ruto and Kosgey must have agreed and wanted to have PNU supporters in the Rift Valley murdered, persecuted and forcibly transferred on a large scale. It is not sufficient that these were the foreseeable consequences of a different agreement, for instance, to create a uniform ODM voting block in the region. The crimes must have been specifically intended, or must have been the inevitable consequences of the common plan.

115. The common plan was allegedly formulated at several preparatory meetings.[110] The occurrence of these meetings is critical to the Prosecution's case: if the meetings did not take place at all, or as alleged, it is not possible for the Prosecution to provide substantial grounds to believe that Ruto had an agreement with Kosgey and/or other unnamed members of the Network to commit the crimes alleged. The Prosecution case is that Ruto planned and coordinated the attacks on perceived PNU-supporters / Kikuyus / Kisiis / Kambas at these meetings.[111] Apart from the evidence describing these meetings being inconsistent, contradictory and unreliable such meetings did not in fact take place.[112]

116. Some of the alleged meetings are said to have taken place more than a year before the actual crimes were committed, starting on 30 December 2006 and continuing in September 2007, 2 November 2007, 6 December 2007 and 14 December 2007.[113] On the face of it, it seems wholly unlikely that Ruto would be planning violence for a year later, and only in the event that the elections were rigged, a very unknown factor so long in advance. In addition, as Ruto himself pointed out in his address to the Chamber,[114] at that time some of the later-PNU supporters, including Uhuru Kenyatta, were actually part of the ODM. It is entirely illogical that Ruto would be planning violence against them at a time they were cooperating in the same political party.

117. In respect of some of the alleged meetings, the three suspects alleged to having been present, have convincingly shown to the Court that they were elsewhere on those days.[115]

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[110] DCC, para. 102.
[111] DCC, para. 65.
[112] Ruto has shown that he was elsewhere during several of the alleged meetings, as discussed at the Confirmation of Charges hearing on 5 and 6 September 2011.
[113] DCC, para. 65.
[114] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-5-ENG 1 September 2011, p. 98.
[115] See Defence submissions at confirmation: *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-9, 5 September 2011, and ICC-01/09-01/11-T-10-ENG, 6 September 2011, p. 2-10.

The Defence has also demonstrated that other alleged active participants at those meetings could not possibly have been present.[116]

118. In addition, the witnesses speaking of those meetings contradict each other on significant issues relating to who was present, what was said and done by whom, and who was in charge.[117] They are all anonymous and none of them testified under oath in front of the judges who thus were not in a position to assess their demeanour and credibility. A number of the meetings are discussed by non-corroborated witnesses only.[118] No other evidence was presented to demonstrate that the meetings took place and in the manner suggested.

119. On the other hand, the judges were given an opportunity to assess the demeanour of Cherambos, a retired police officer who allegedly represented the military branch of the 'Network'. Cherambos stated under oath in front of the judges that no meeting was ever held at his house; and that he never came to Ruto's house.[119] Cherambos attended only one rally in Aldai Constituency where Ruto was campaigning; the rally was of an innocent nature and there was no suggestion that any common plan to murder, forcibly transfer and persecute PNU supporters/Kikuyus/Kisiis/Kambas in the Rift Valley was ever discussed.[120]

120. In assessing the credibility of Cherambos compared to the accounts of anonymous prosecution witnesses, the Defence requests that the Pre-Trial Chamber consider the legal principles discussed at confirmation, as well as in the Sang Confirmation Brief.[121]

121. Thus, the Defence submits that the Prosecution failed to demonstrate with sufficiently reliable evidence even at the stage of confirmation that Ruto and Kosgey agreed to have PNU supporters killed, persecuted and forcibly transferred on a large scale.

122. However, even if the evidence is taken at its highest, as the Prosecution erroneously argues it should be taken,[122] it does not demonstrate on a 'substantial grounds to believe' standard that Ruto and Kosgey agreed to the alleged common plan.

123. In order to establish that there was such an agreement between Ruto and Kosgey, the Prosecution must establish that it was discussed at meetings they were both attending and

[116] Take for example, Fred Kapondi who according to Witness 8 attended meetings on 2 Nov 2007 (EVD-PT-OTP-00285) and 14 Dec 2007 (EVD-PT-OTP-00379). However a letter from the Kenyan Commissioner of Prisons shows that Kapondi was in jail from 17 April to 14 December 2007 (EVD-PT-D09-00043).
[117] See Sang Confirmation Brief, para. 43.
[118] ICC-01/09-01/11-261-AnxB-Conf, LOE, p. 108 (only Witness 6 is relied upon for the four Nandi meetings).
[119] *Prosecutor v. Ruto et al,* ICC-01/09-01/11-T-7, 3 September 2011, p. 16.
[120] *Prosecutor v. Ruto et al,* ICC-01/09-01/11-T-7, 3 September 2011, p. 35-37.
[121] See Sang Confirmation Brief, para. 47-50
[122] Prosecution's Written Submissions, para. 4. See also Sang's paras 7-8

they both accepted it. Mere presence at meetings, which for avoidance of doubt the defence contend never took place, where the agreement was discussed is insufficient to demonstrate that the suspects accepted it. The evidence must show a more precise role of each of them at these meetings.[123]

124. The evidence of any such agreement made between Ruto and Kosgey is non-existent. There is no evidence of the actual plan being explicitly discussed between the two suspects. The evidence that Kosgey was even present at any of the meetings where the alleged common plan was discussed is insufficient to infer that the two indirect co-perpetrators had a common plan together. Only witness 6 places Kosgey at a few of the meetings in December 2007, long after the plan was allegedly created. The discussions that were held at those December or any of the other alleged meetings are described in a vague manner, so much so that it has not been demonstrated that Ruto and Kosgey were even aware that a common plan to commit murder, forcible transfer and persecution on massive scale was discussed in their presence; let alone that they agreed to it.
125. If the Prosecution fails to prove that Kosgey was part of the alleged common plan, then Ruto cannot have been part of it either, given that the alleged common plan amounts to no more than a joint agreement between the two of them. It has previously been noted that the DCC does not name any other persons who were allegedly part of the common plan as co-perpetrators, albeit it refers to 'other co-perpetrators'.[124] However, the Prosecution no longer alleges that there were any co-perpetrators other than Ruto and Kosgey, as was made clear through the confidential chart they relied on at confirmation. Anyone else who attended the meeting was a subordinate rather than a co-perpetrator. Accordingly, if one of the two indirect co-perpetrators falls away, the common plan simultaneously falls apart.
126. The existence and Ruto's approval of a common plan to commit murder, forcible transfer and persecution on a large scale cannot be inferred from his alleged conduct. The evidence refers to Ruto's alleged derogatory remarks vis-à-vis the PNU supporters or Kikuyus at meetings and rallies. However the said allegations fall short of establishing the existence of a common plan to murder, persecute or forcibly transfer them on large scale.
127. In any event political speech and propaganda cannot be equated with intent to commit crimes. In this connection, the UN Human Rights Committee has held that "the value placed by the Covenant on uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political

[123] Abu Garda Confirmation Decision, paras. 163, 171, 173-174, 176, 177, and 179.
[124] See section on "Members of the Network".

domain".[125] Accordingly, Ruto's alleged political speeches cannot be relied on to demonstrate the existence, and his approval of a common plan to murder, forcibly transfer and persecute his opponents.

(b) Prosecution failed to establish that Ruto made an essential contribution

128. The meeting said to have taken place on 22nd December 2007 has been removed by the Prosecution's from the list of his alleged participatory meetings. This is because the Defence was able to show whereabouts of Mr. Ruto on the said date.[126]

129. An "essential contribution" has been defined as essential tasks that are the *sine qua non* for the commission of the crime such that the commission of the crime would be frustrated if the defendant decided not to perform them.[127] Further, the essential contribution must "result in the fulfilment of the material elements of the crime". Thus, the defendant's essential contribution must be directed not just to the common plan itself, but also to the material elements of the alleged crime. In the present case, the essential contribution must have been directed to the realisation of the material elements of three crimes: murder, forcible transfer and persecution.

130. It is noteworthy that the crime of persecution must be targeted against an identifiable group.[128] Thus, the essential contribution to persecution must be directed to the targeting of a specific identified group. The DCC alleges that the PNU supporters / Kikuyus / Kisii / Kambas constituted the targeted group. However, from the 230 alleged deaths, only 47 have been specified. As for the remainder, no evidence has been produced that they were of a certain ethnicity or political party. It is even very unclear how the Prosecution got to the number of 230 killings. The Prosecution could easily have obtained the death certificates of the alleged victims, or records from mortuaries but chose not to. Thus, it has

[125] General Comment no. 34, 21 July 2011. CCPR/C/GC/34 at para 34. The Committee further elaborated that "all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism from political opposition […] State parties should not prohibit criticism of institutions, such as the army or the administration. The penalisation of a media outlet or journalists solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression" (at paras. 38 and 39).

[126] DCC, paras. 107-108.

[127] Lubanga Confirmation Decision, para 347.

[128] See article 7(1)(h): "Persecution against any identifiable group, or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined I paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". See also provision 7(1)(h) (2) and (3) of the Elements of the Crime: (2) The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
(3) Such targeting was based on political, racial, national, ethnic, cultural religious, gender (as defined in article 7, paragraph 3 of the Statute, or other grounds that are universally recognised as impermissible under international law.

not been established that the PNU supporters/Kikuyus/Kisii/Kambas were targeted, or most importantly that Ruto was aware that the PNU supporters were targeted. On this basis alone, it will be difficult for the PTC to find that there are substantial grounds to believe that essential contributions were made towards the realisation of the crime of persecution.

131. Ruto's essential contributions have been alleged to be: provision of funds, transport, petrol, telephones, guns, ammunition and grenades, as well as instructions to the perpetrators. Ruto is also said to have appointed three commanders to oversee the attacks. In addition, Ruto allegedly spoke publicly about PNU supporters/Kikuyus/Kisii/Kambas in derogatory terms, thereby indoctrinating the actual perpetrators, or promised rewards to the actual perpetrators.[129]

132. The Prosecution must demonstrate the truthfulness of these allegations. In this regard, the Prosecution relies on the redacted transcripts of the same unreliable witnesses' testimony as for the meetings. Many of the allegations are uncorroborated and stem from one unreliable and anonymous witness only.[130] The Defence therefore relies on its arguments above, at the confirmation, and those set out in Annex B.

133. Even if the Prosecution had been able to show that Ruto made the contributions, the Prosecutor must further demonstrate that these contributions were essential for the commission of the crimes charged. The Prosecution must therefore show that Ruto could have frustrated the execution of the common plan to commit murder, forcible transfer and persecution by failing to make these contributions.

134. The Defence submits that the Prosecution failed to establish substantial grounds to believe that Ruto did as alleged and, even if he did, his actions have either not been directed to the

[129] DCC, para 102.

[130] Witness 6 only, DCC, Annex B, page 151,"At these preparatory meetings and events, RUTO, KOSGEY and others planned logistics regarding weapons (materials/storage for traditional weapons)"; DCC, Annex B, page 153,"At these preparatory meetings and events, RUTO, KOSGEY and others informed perpetrators of the plans to attack other areas and their progress."
Witness 8 only, DCC, Annex B, page 155, "Subordinates to RUTO and KOSGEY were Network perpetrators (Network subordinates) who were also part of the common plan. They included financial contributors including businessmen."
Witness 1 only, DCC, Annex B, page 162, "RUTO used anti-PNU rhetoric at preparatory meetings and events to create an atmosphere of anti- PNU sentiment and fear among PNU supporters."
Witness 1 only, DCC, Annex B, page 169, "Serving as conduits between RUTO, KOSGEY and the direct perpetrators, Network Subordinates ensured the provision of sufficient funds to execute the attacks."
Witness 1 only, DCC, Annex B, page 169, "Serving as conduits between RUTO, KOSGEY and the direct perpetrators, Network Subordinates ensured continuous support of the direct perpetrators of the common plan."
Witness 6 only, DCC, Annex B, page 181, "RUTO and KOSGEY reported on the progress of the overall plan"
Witness 6 only, DCC, Annex B, page 222, "subordinates and direct perpetrators were fully integrated into the Network"

commission of the crimes at all, or they were not essential for the commission of the crimes.

Funds and Logistics

135. The Defence notes the Prosecution's failure to produce any tangible evidence to support the allegations from the prosecution witnesses. Notably, it failed to produce any transaction receipts, bank statements or other concrete evidence demonstrating that the purchases of logistical items occurred. Such evidence is readily available in a well-functioning State such as Kenya, if it exists. Thus, the Prosecution should not circumvent its obligation to produce the best evidence to the Court by relying on anonymous witnesses whose reliability and credibility is clearly questionable.

Guns, grenades and ammunition

136. The Prosecution has alleged in the DCC that Ruto provided guns, grenades and ammunition to the direct perpetrators.[131] However, nowhere in the DCC does it say that anyone died from gunshot wounds. On the contrary, the DCC speaks about perpetrators armed with traditional weapons, machetes (pangas) and bows and arrows.[132]
137. Evidence from prosecution witnesses also contradicts the assumption that guns and grenades were used for the commission of the crimes charged. Instead, the evidence refers to people being chopped to death[133], throats slit[134], use of machetes[135], people hacked to death[136], shot by bows and arrows[137] and others burned to death.[138]
138. The CIPEV Report provides an analysis of cause of death per district and clearly shows that the highest number of gunshot wounds were in Western Kenya, particularly Kisumu and not the Rift Valley.[139] The Commission concludes that "since no evidence to the contrary was ever shown, police were responsible for all cases of shooting."[140]
139. This evidence clearly undermines the evidence that Ruto delivered guns, ammunition and grenades. It is highly unlikely that the perpetrators would not have used those fire

[131] ICC-01/09-01/11-261-AnxB, DCC, p. 69.
[132] ICC-01/09-01/11-261-AnxB, DCC, p. 126.
[133] ICC-01/09-01/11-261-AnxB, DCC, p. 128.
[134] ICC-01/09-01/11-261-AnxB, DCC, p. 129.
[135] ICC-01/09-01/11-261-AnxB, DCC, p. 129.
[136] ICC-01/09-01/11-261-AnxB, DCC, p. 130, 136.
[137] ICC-01/09-01/11-261-AnxB, DCC, p. 130-131, 144.
[138] ICC-01/09-01/11-261-AnxB, DCC, p. 135, 146.
[139] EVD-PT-OTP-00004 at 0687.
[140] EVD-PT-OTP-00004 at 0716.

weapons if they had them rather than their traditional weapons in attacking the PNU supporters/Kikuyus/Kissis/Kambas.

140. In addition, Witnesses 1, 2, 6 and 8 allege that Kapondi supplied the weapons.[141] However, as demonstrated at the confirmation hearing and shown in Defence exhibits, Kapondi was in prison from 17 April 2007 until 14 December 2007 and could not supply the weapons as alleged.[142] It is significant that the only source of the weapons according to all the Prosecutor's witnesses was solely the said Kapondi.

141. Accordingly, the Prosecution clearly failed to demonstrate that Ruto provided any guns, ammunition and grenades to the direct perpetrators. This is particularly so because the Prosecution failed to produce any receipts or other tangible evidence of weapons purchases.[143]

Election of commanders

142. In its Summons Application, the Prosecution named three commanders who were elected by Ruto to oversee the attacks.[144] However, at the confirmation hearing, the Prosecution produced a chart listing two commanders only (Cheruiyot and Cherambos). The Defence is taken by surprise by the sudden omission of the third commander notwithstanding that all the witnesses refer to three commanders (Cheruiyot, Cherambos and Koech).[145]

143. The Prosecutor disbelieves all its witnesses in respect of the existence of three commanders. It is strange for the same Prosecutor to expect the judges to believe the account he has himself disbelieved.

144. The various witness accounts on the election of the commanders who were allegedly tasked to oversee the attacks are inconsistent. Witness 1 states that the commanders were elected on 2 November 2007.[146] By contrast, witness 2 states that the commanders were elected on 14 December 2007.[147] Witness 8 provides yet another date for this election, namely 30 December 2006.[148] Cherambos, one of the alleged commanders, the only one

[141] Witness 1: EVD-PT-OTP-00149 at 0589; EVD-PT-OTP-00157 at 1101; Witness 2: EVD-PT-OTP-00800 at 0209; Witness 6: EVD-PT-OTP-00382 at 0015-0016; EVD-PT-OTP-00483 at 0195; Witness 8: EVD-PT-OTP-00544 at 0588; EVD-PT-OTP-00547 at 0715; and EVD-PT-OTP-00551 at 0526.
[142] See EVD-PT-D09-00043.
[143] ICC-01/09-01/11-T-5, 1 Sept 2011, p. 45 (noting that the sum of 1.2 billion allegedly available for the purpose of perpetrating violence has not been proven); ICC-01/09-01/11-T-11, 7 Sept 2011 (testimony from Rev Kosgei that Kass FM is not a member of EMO foundation and that the foundation has not raised such money).
[144] ICC-01/09-01/11-224-Conf-AnxA, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 15 December 2010, para. 80.
[145] See for example, EVD-PT-OTP-00273, EVD-PT-OTP-00280, EVD-PT-OTP-00285.
[146] EVD-PT-OTP-00152 at 0718, EVD-PT-OTP-00153 at 0793-0801.
[147] EVD-PT-OTP-00222 at 0140.
[148] EVD-PT-OTP-00543 at 0555.

of them who testified under oath in front of the judges, testified that he did not attend any of the alleged meetings and therefore could not have been present for any election.[149] Given these inconsistencies in the various accounts, the Defence requests the Pre-Trial Chamber to accept Cherambos's evidence which was not contradicted by the Prosecution.

Anti-PNU/Kikuyu/Kisii/Kamba rhetoric

145. The Prosecution alleges in the DCC that Ruto's agreement with the common plan and contribution to its realisation can be deduced from anti-PNU/Kikuyu/Kisii/Kamba rhetoric at political meetings in the run up to the election. In alleging this, the Prosecution relies on witnesses 2 and 8.[150]
146. In order to establish that Ruto made an essential contribution to the crimes alleged by giving anti-PNU/Kikuyu/Kisii/Kamba public speeches, it must be established that such speeches were indeed given. In this regard, the Defence reiterates that the reliability and credibility of Witnesses 2 and 8 are in dispute.
147. The Defence also notes that the Prosecution produced no broadcasts, tapes, recordings, newspaper or other contemporaneous reports which corroborate the witnesses' allegations that Ruto made inciting anti-PNU/Kikuyu/Kisii/Kamba public speeches. This is rather surprising, given that Ruto is a public figure whose movements are constantly followed by the Kenyan media. If Ruto made any inflammatory speeches, they would surely have been reported somewhere at the time. The fact that the Prosecution produced no such contemporaneous report, but instead chose to rely on unreliable, anonymous witnesses only, should cause the PTC to find that the Prosecution failed to establish substantial grounds to believe that Ruto made any of the alleged speeches. This submission is supported by the recent dismissal by the Chamber in the ICTR case of *Bizimungu et al* of an allegation of incitement over the radio, which was alleged by one witness without corroboration of the actual transcripts of the broadcast.[151]

[149] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-7-ENG, 3 September 2011, p. 16, 30-34.
[150] EVD-PT-OTP-00222 at 0137; EVD-PT-OTP-00539 at 0366; EVD-PT-OTP-00544 at 0588; EVD-PT-OTP-00545 at 0649; EVD-PT-OTP-00548 at 0752; EVD-PT-OTP-00551 at 0840; EVD-PT-OTP-00551 at 0846; EVD-PT-OTP-00552 at 0855. It is noteworthy that the DCC says that Ruto OR Kosgey (not specific) participated in meetings where they said they have to get rid of the weeds. (Annex B page 143). However, this is based solely on the summary of an anonymous, non-ICC witness statement, alleging that "Politicians including William RUTO, Sally KOSGEI, Henry KOSGEY and Raila ODINGA referred to the need to get rid of the Kikuyu from their area. Henry KOSGEY would incite in Kalenjin saying that people had to get rid of the "weeds" (Kikuyus); he used inflammatory rhetoric in every meeting" (KEN-OTP-0051-0724).
[151] *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Summary of Judgment of 30 September 2011, para. 55.

148. The Defence further reiterates the above observation that politicians have a great leeway to make inflammatory speeches, which should not be equated with incitement to commit murder, forcible transfer and persecution.[152]

149. Assuming that Ruto made anti-PNU/Kikuyu/Kisii/Kamba statements, the Prosecution must then still establish that these statements amounted to essential contributions to the execution of the alleged common plan. For this, the Prosecution must demonstrate that there was a causal nexus between the statements and the crimes charged. Such a nexus can only be established where the Prosecution identifies the perpetrator who heard the statement and provides evidence that he committed the crimes charged as a direct result of hearing the statement.[153] In order for the Prosecution to do so, there cannot be too long a time lapse between the inciting statements and the commission of the crimes.[154] The ICTR Appeals Chamber held that statements which contributed to the 'general climate of violence in a country' were insufficient to prove that there would have been a link between the publication and the commission of a specific crime.[155]

150. In the instant case, the Prosecution produced no evidence of such a nexus between Ruto's alleged inciting statements and the crimes committed. This is particularly so given that the dates on which he allegedly made these statements are mostly unspecific, and most of the perpetrators have not been identified. Thus, it is impossible to establish whether they even heard Ruto speak and that they committed the crimes as a direct result of that.

151. In addition, most of the victims have not been identified and their ethnicity or political party has not been established. The Prosecution failed to show that the perpetrators targeted PNU supporters/Kikuyu/Kisii/Kamba as a result of Ruto's speeches allegedly inciting violence against PNU supporters/Kikuyu/Kisii/Kamba. If such speeches were even given, and if Ruto intended them to result in murder, forcible transfer and persecution of PNU supporters /Kikuyu/Kisii/Kamba, then at best he failed in his attempt given that none of the victims can be identified as PNU supporters.

152. In conclusion, the Prosecution failed to establish substantial grounds to believe that Ruto made any essential contribution towards the realisation of any of the crimes charged.

(c) Prosecution failed to establish Ruto's control

[152] *Prosecutor v. Bikindi*, ICTR-01-72-T, Judgement, 2 December 2008.
[153] *Prosecutor v. Nahimana*, ICTR-99-52-A, Judgement and Sentence, 28 November 2007, para. 505.
[154] Nahimana Appeal Judgement, para. 513.
[155] Katanga Confirmation Decision, para. 519.

There are no substantial grounds to believe that the organisation consisted of an organised and hierarchical apparatus of power

153. In order to show that the organisation consists of an organised and hierarchical apparatus of power, it must be demonstrated that the organisation has a defined leadership structure, and a culture of compliance/obedience such that if one person fails to implement an order, that person will be automatically replaced by another who will.[156] There must also be a method of ensuring compliance through the structures of the organization i.e. through disciplinary measures, installing compliance through military training/indoctrination, providing significant financial incentives or disincentives.[157]

154. Although this notion has been applied to political structures, they were political structures which included a repressive military/security component, and which acted in a dictatorial rather than a democratic manner, i.e. the Junta in Argentina in the Videla case.[158]

155. Nothing of this kind has been demonstrated in the present case. The 'Network' has no official status or an official existence. It consists of a handful individuals including Ruto who are tied together mainly by their political affiliation or their ethnicity and on the basis of their alleged intention to expel and punish PNU supporters / Kikuyu / Kisii / Kamba by murdering, forcibly transferring and persecuting them. The Prosecution failed to produce any evidence showing that the 'Network' had any ability to punish its subordinates or to take any disciplinary measures against them. It is entirely unclear from the evidence by what means the 'Network' managed to secure automatic compliance with its orders and what power it had to force a large number of people to participate in the commission of crimes against PNU supporters / Kikuyu / Kisii / Kamba.

156. It has previously been noted that none of the actual perpetrators have been identified. The suggestion is that they are ODM affiliates or members of the Kalenjin ethnic tribe. However, even this has not been established. It is a real mystery how many potential perpetrators were ready to take over from any subordinate who would refuse to follow the orders of the 'Network'. Thus, the Prosecution failed to establish substantial grounds to believe that the 'Network' consisted of an organised and hierarchical apparatus of power. Rather, it appears to be an informal, unofficial structure of a group of private individuals

[156] Katanga Confirmation Decision, paras 511-514.
[157] Katanga Confirmation Decision, para. 519.
[158] *Videla Judgment*, National Appeals Court (Criminal Division) for the Federal District of Buenos Aires (Camara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal) Buenos Aires, 9 December 1985.

who have no apparent power over any other individuals. No relationship between the different hierarchical levels of the 'Network' or the several branches has been established,

157. It is particularly striking that the political leader of the ODM, Raila Odinga, is said to have played no part in the 'Network'.

158. A number of the Prosecutor's witnesses were categorical that Raila Odinga was at the head of the Network's hierarchy and additionally funded the criminal activities of the Network.[159] The Prosecutor disbelieves this account of his witnesses. It is perplexing that he expects the judges to believe on the "substantial grounds standard" that which he himself does not believe.

There are no substantial grounds to believe that Ruto had control over the organisation

159. In order to demonstrate that Ruto had control over the alleged Network, the Prosecution must produce evidence showing that he was the 'mastermind' of the criminal plan.[160]

160. The Prosecutor's evidence failed to show the relationship between Ruto and the direct perpetrators. The only suggested commonality between them is their ethnicity. However, as the ethnicity of the perpetrators is not pleaded in the DCC, this cannot be the ground on which to establish Mr. Ruto's control over the perpetrators.

161. In any event, at best, it has been shown that Ruto was influential in the Kalenjin community, which is insufficient to demonstrate that he had control over them or any organisation that focused on Kalenjin interests.[161] The Kalenjin tribe is not a homogenous, hierarchically organised entity, which is capable of being subject to the effective control of one individual.[162]

162. The Prosecution and its witnesses have insisted that Ruto held such a high position in the Kalenjin society that if he asked for the violence to stop, it would have stopped. Yet, there is evidence that he did repeatedly call for peace in very strong and clear terms, starting on 1 January 2008.[163] No one, however, took heed and the violence continued. This negates the prosecution's theory that Ruto was the 'mastermind' of the criminal plan or that he exercised effective control over the perpetrators.

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[159] See chart drawn by Witness 6: EVD-PT-OTP-00399.
[160] K. Ambos 'Article 25 Individual Criminal Responsibility', in Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court – Observer's Notes Article by Article (Hart Publishers, Oxford 2008 at p. 750.
[161] DCC, paras 115-6.
[162] EVD-PT-D09-00051at 0008 (elevations of Kalenjin politicians are only symbolic gestures of appreciation).
[163] See below, paras 169.

168. Ruto's alleged intent to commit murder, persecution and forcible transfer on large scale wholly contradicts Ruto's conduct before and after the violence had taken off. Some days before, Ruto is held to have made several attempts to calm down the situation.[165]

169. Once the violence had started, Ruto regularly called for peace. On 1 January 2008, ODM leaders led by Ruto appealed to Kenyans to remain calm and observe peace saying, "We have said very clearly and loudly that we want a peaceful nation; we are asking Kenyans wherever they are across the country that we want to protest against what happened to us in this country but we want to do it peacefully. We abhor any acts of violence, any acts of looting, any acts of destruction of property which is unnecessary. We are telling our people across the country that burning property, destroying life, engaging in acts of violence...is actually against the democracy we are fighting for. We want every Kenyan to be heard, to participate in...freedom of association and freedom of expression, but within limits of peace."[166] On 1 January, 2008, it was never in the mind of Ruto that there will be ICC proceedings. This is contemporaneous speech given by Ruto asking for calm.

170. The ODM as a whole led by Raila Odinga and William Ruto also repeatedly called for calm during the violence. In one press conference held on 2 January 2008, Raila calls for mass action with Ruto interjecting that it will be peaceful mass action.[167] In the same peace conference, Raila asks Kenyans to desist from acts of hooliganism and thuggery.[168] In another similar press conference on 16 January 2008, ODM called the protests [they were initiating] passive, non-violent resistance to seek redress over the election results.[169] On 13 January 2008, Ruto and other members of ODM attended a church service where they again appealed for calm.[170] Also, Sang regularly called for peace through Kass FM during the violence.[171]

Ruto was unaware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person

171. The suspect must be aware of the role of the physical perpetrator in implementing the common plan, the means by which the compliance of the physical perpetrator is obtained,

[165] EVD-PT-OTP-00306 at 0047-8.
[166] EVD-PT-OTP-00378 at 0225.
[167] EVD-PT-D09-00053 at 0006.
[168] EVD-PT-D09-00053 at 0006.
[169] EVD-PT-D09-00053 at 0005.
[170] EVD-PT-D09-00054 at 0014
[171] EVD-PT-D11-00011 at 0014; EVD-PT-D11-00010 at 0005; EVD-PT-D11-00018 at 0010, EVD-PT-D11-00019 at 0021, EVD-PT-D11-00023 at 0046, EVD-PT-D11-00025 at 0061, EVD-PT-D11-00026 at 0072, EVD-PT-D11-00028 at 0081, EVD-PT-D11-00032 at 0109; EVD-PT-D11-00017 at 0007.

and the fact that the physical perpetrators were going to commit the crimes of forcible transfer, murder and persecution in the localities in question.[172]

172. The suspect must also be aware of the essential nature of his contribution to these crimes, and that he possesses the power to frustrate the implementation of the crimes, should he choose to do so.[173] The Prosecution failed to produce any evidence in relation to these issues.

VII. DEFENCE EVIDENCE

173. The Defence presented to the PTC two live witnesses, Mr. Cherambos and Mr. Murei. Additionally, video recordings of the whereabouts of Mr. Ruto at the material time were presented.[174] Contemporaneous newspaper recordings and a letter from the Commissioner of the Kenya Prison Service showing Mr. Kapondi's release from prison were presented.[175] The cumulative effect of this evidence is to demolish the fundamental features of the Prosecution's case. Consequently, we invite the Chamber to make a finding that the Prosecution has not established substantial grounds to believe that Ruto committed the crimes charged in view of the defence evidence.
174. Apart from the evidence referred to in the preceding paragraph, the Defence presented written statements and sworn affidavits from many witnesses drawn from different ethnic communities, social standing, political persuasion and religions.[176] The evidence of these witnesses is, in a nutshell, that the post election violence was spontaneous, that the suspects bear no responsibility for the violence, that the weapons used were crude weapons and there were no guns, grenades nor gas cylinders in the hands of civilians. The only use of guns was by the uniformed police personnel.
175. All the statements and affidavits were made voluntarily by the witnesses based on their personal knowledge and recollection of the events.
176. The Prosecution during its closing submissions and at paras 28 and 29 of its Brief,[177] criticizes the affidavits submitted as evidence by the Defence on the basis that they are brief and contain formulistic and unnatural language. The Prosecution suggests that this

[172] ICC-01/09-01/11-01, Summons Decision, 8 March 2011, para. 40.
[173] ICC-01/09-01/11-01, Summons Decision, 8 March 2011, para. 40.
[174] Alleged 2 November 2007 meeting – Ruto in Kapkatet (EVD-PT-D09-00054 at 0020); Alleged 14 December 2007 meeting – Ruto in Amagoro (EVD-PT-D09-00054 at 0013); Alleged 22 December 2007 meeting – Ruto elsehwere (EVD-PT-D09-00054).
[175] EVD-PT-D09-00043.
[176] See ICC-01/09-01/11-268-AnxA, List of Mr. Ruto's Evidence and *Viva Voce* Witnesses, 17 August 2011.
[177] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-12-ENG, 8 September 2011, p 5-6.

weakens the probative value of the statements presented on behalf of Ruto. The Defence rejects the notion that the similarity in language detracts from the genuineness or reliability of the information stated therein. Rather, this is a result of how the statements were taken, as customarily done in Kenya and other countries where counsel drafts formal court documents such as affidavits. The witnesses were asked relevant questions by counsel and responded accordingly. The affidavits were drawn by an independent advocate, in standard language. Thereafter the affidavits were commissioned by a third advocate, at which time the witnesses were asked to confirm that the affidavit captures the essence of his testimony.

177. In such a scenario, it is not possible to claim, as the Prosecution does, that because the statements were drafted in part by others, that they are not the witnesses' recollections of their own personal experiences and knowledge. This argument is fully supported by the ICC jurisprudence on victim applications which regularly show striking similarities.

178. For instance, the Chamber in *Lubanga* held that the "similarities between the applications are unsurprising and do not in any way undermine their credibility".[178] The Single Judge of this PTC has made a similar observation in respect of allegedly similar, and sometimes even identical language used in the victims applications:[179]

> In this respect, the Single Judge considers that this factor does not ground per se the rejection of the concerned applications. Indeed, as already clarified, the assessment as to the credibility of the applicants shall be conducted in light of the specific circumstances of each application. In particular, the Single Judge is of the view that applications using a similar description of facts could still reflect the applicants' own accounts of the events, when, inter alia, the applicants were assisted in filling in the form by the same person or they refer to the very same specific events.

179. The Defence invites the Chamber to disregard the Prosecution's suggestion that the language and style used in formal documents such as affidavits weaken their probative value. The court should consider the essential content, thrust and substance of the affidavits and statements.

VIII. DEFENCE'S OBJECTION TO THE VICTIMS' APPLICATION TO ADD CHARGES

[178] *Prosecutor v. Lubanga*, Redacted Version of the Decision on the Applications by 7 victims to participate in the proceedings, ICC-01/04-01/06-2764-RED, 25 July 2011, para. 25.
[179] *Prosecutor v. Ruto et al*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-01/11-249, para. 34.

180. The Defence submits that the PTC should reject the Victims' Legal Representative's request to add charges on the following grounds: (i) Article 67(7)(c)(ii) does not give jurisdiction to amend charges based on a new set of facts as the Victims Legal Representative has sought; (ii) An amendment in the style and extent proposed by the Victims Legal Representative amounts to interfering with the Prosecutor's statutory mandate to determine what charges to present to court. Ruto relies on the elaborate submissions fully set out in paragraphs 153 to 177 in Sang's Confirmation Brief on this issue which we request the Chamber to consider.

IX. JURISDICTION

181. In response to the *Corrigendum to "Prosecution's Response to the Defence Challenges to Jurisdiction" filed 16 September 2011,*[180] and the *Observations of the Victims' Representative on the Defence challenges to jurisdiction,*[181] the Defence submits a number of observations. The defence refers to the arguments set out in its *Defence Challenge to Jurisdiction.*[182]

182. In a recent decision concerning an article 15 Application (*Cote d'Ivoire*) PTC III, while not taking an explicit position in respect of the criteria for an organisation for the purposes of article 7(2)(a),[183] touched on the subject. The Chamber adopted the definition of an organised armed group as a party to a non-international armed conflict, as defined in article 1(1) of the Second Additional Protocol to the Geneva Conventions. This definition mirrors the definition proposed by the dissenting judge save that it is even narrower as it requires the armed group to have territorial control.[184]

183. The majority and dissenting views represent two different schools of thought and each receives some academic support. The main distinction appears to be that the majority approach is focused on victimhood rather than the manner in which the alleged

[180] ICC-01/09-01/11-334-Corr, filed on 20 September 2011.
[181] ICC-01/09-01/11-332, filed on 16 September 2011.
[182] ICC-01/09-01/11-305, filed on 30 August 2011.
[183] Pre-Trial Chamber III stated: "The Chamber notes that there is disagreement within the jurisprudence of the Court on the criteria required for a group to constitute an organisation for purposes of Article 7 of the Statute. In the present case, the FRCI fulfils the criteria for an organised armed group as a party to a non-international armed conflict, and so inevitably it qualifies as an organisation within the context of Article 7 of the Statute. Therefore, it is unnecessary to consider this issue further". See Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, 03-10-2011 ("Côte d'Ivoire Decision"), para. 99.
[184] Côte d'Ivoire Decision, para. 119; C. Kress, 'On the Outer Limits of Crimes against Humanity: the Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision', Leiden Journal of International Law, 23 (2010) 855, at page, p. 862.

perpetrators are organised. The majority criterion seeks to avoid adopting a rigid definition of 'organisation' preferring to leave the question to be determined on a case-to-case basis. Attractive as the majority view may sound, it is also dangerously loose and contrary to the wishes of many of the ICC member States as well as potential member States.

184. The alternative and more favoured view, academically, is more protective of State sovereignty and narrower in terms of the criteria to qualify under article 7(2)(a). The broader approach is more attractive to those scholars who envisage an ICC with greater power to exercise jurisdiction. Such scholars may be reluctant to place restraints on the ICC, particularly where the State itself is perceived as unable or unwilling to prosecute perpetrators of mass atrocity. This view seems to have motivated Darryl Robinson, one of the drafters of article 7 of the ICC Statute, to express his preference for the majority approach in a recent website forum.[185] Robinson also recognises that the more stringent approach advanced by the dissenting judge "has attracted support in thoughtful and well-reasoned recent scholarship", and refers to this approach as "internally coherent, reconcilable with limited doctrinal authorities and consistent with a sound theory of crimes against humanity".[186] He merely suggests that the majority approach also lends itself to support and that both the majority and the dissent provide compelling arguments.

185. The next issue raised is the question whether the issue is even a jurisdictional question. The Defence submits that it is. Pre-Trial Chamber II in the Kenya cases, and Pre-Trial Chamber III in the Situation in Cote d'Ivoire, have treated this question as being directly relevant to the assessment of whether the allegations fall within the jurisdiction *ratione materiae* of the Court.[187] Crimes against humanity, by definition, are an intrusion into state sovereignty and this motivated a cautious approach to ensure that the crimes

[185] Darryl Robinson blog on Ejil Talk re your jurisdictional challenges - Essence of Crimes against Humanity Raised by Challenges at ICC. EJIL Analysis 27 Sept, 2011 at: http://www.ejiltalk.org/category/ejil-analysis/
[186] *Ibid*.
[187] In the table of contents in the Kenya Investigation Decision (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr), the element of 'organisational policy' along with the other elements of Article 7 is listed under 'A. Whether there is a reasonable basis to believe that crimes against humanity within the jurisdiction of the Court have been committed', and under the further sub-title 'Jurisdiction *ratione materiae*'. In the Côte d'Ivoire Decision, Pre-Trial Chamber III indicated that it would "first examine whether i) there is a reasonable basis to believe that the alleged crimes committed in Côte d'Ivoire fall within one or more categories of crimes referred to in Article 5 of the Statute (jurisdiction ratione materiae)…" (para. 22). The Chamber, then in a section entitled 'B. Juridiction Ratione Materiae', sub-titled '1. Crimes Against Humanity', set out the contextual elements of crimes against humanity (including, naturally, the requirement of "organisational policy") (para. 29) and proceeded to analyse the alleged acts, "both with regard to contextual elements and underlying acts" in order to reach a determination of whether the acts fell within the jurisdiction ratione materiae of the Court.

committed required international intervention.[188] Accordingly, as was pointed out by Bassiouni, the 'policy' requirement is jurisdictional in that it "transforms crimes that would be national crimes into international ones".[189]

186. The Prosecution and Victims' Representative further maintains that the complaints regarding the lack of specificity and evidence do not form part of a jurisdiction challenge. The Defence respectfully disagrees. There must necessarily be an evidentiary test when considering whether the policy requirement has been complied with, which can only be tested if the factual circumstances are considered. To do this adequately, it is important to have sufficient specificity in the DCC.

187. When the Pre-Trial Chamber first considered the issue of jurisdiction, it first set out the legal definition of 'organisational policy' and then assessed the facts to consider whether they matched that definition.[190] It looked at similar issues as did the Defence in its *Challenge to Jurisdiction*, namely the extent to which the crimes were organised and funded. It made its assessment on a "reasonable grounds to believe" standard and found, "bearing in mind the nature of the present proceedings, the low threshold, as well as the object and purpose of this decision",[191] that crimes against humanity had been committed on Kenyan territory. It made this finding "without prejudice to any further submission by the Prosecutor or finding by the Chamber to be made pursuant to a different threshold at a later stage of the proceedings in the context of the situation in Kenya."[192]

188. Two conclusions can be drawn from this reasoning: first, that evidentiary submissions, as part of a jurisdiction challenge, are not only allowed but also necessary to demonstrate that the policy requirement has not been met; and second, that it is still open to the Chamber to reach a different conclusion at this stage given the higher standard of proof which it has to apply to the issues raised before it.

189. At present, the Pre-Trial Chamber must determine whether the case before it should proceed to trial. Part of that assessment is the challenge to jurisdiction which the Pre-Trial Chamber has included in the confirmation proceedings. This being the case, the Defence submits that the higher standard of "substantial grounds to believe" should be applied to the evidentiary assessment necessary to determine whether the crimes charged were committed pursuant to an organisational policy and thus qualify as crimes under the

[188] See also: Defence Challenge to Jurisdiction, paras. 23, 27, 38.
[189] M. Cherif Bassiouni, Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text, 2nd Ed., p. 150-151.
[190] Kenya Investigation Decision, paras. 115-128.
[191] *Ibid*, para. 73.
[192] *Ibid*, para. 74.

jurisdiction of the Court. This makes sense, as the evidentiary assessment does not go to the guilt of the suspects charged with crimes against humanity; but to whether crimes against humanity were committed.

190. Were the Pre-Trial Chamber to apply the "reasonable grounds to believe" standard, as it did in its initial assessment of this jurisdictional matter, an over-formalistic and artificial situation would be created. Indeed, this would mean that the Pre-Trial Chamber would have to approach the evidence in two ways: (1) on a pre-confirmation lower standard of "reasonable grounds to believe" to assess whether it has jurisdiction; (2) on a "substantial grounds to believe" standard to determine whether the threshold criteria of crimes against humanity have been established. Given that the matter is being considered at the same time as the confirmation hearing, the Pre-Trial Chamber should consider the entirety of the evidence to the "substantial grounds to believe" standard, rather than a two step standard. Accordingly, if the Chamber finds that there are no substantial grounds to believe that crimes against humanity have been committed, it should decline jurisdiction in respect of the crimes charged.

191. In the event that the Pre-Trial Chamber agrees with the Prosecution and Victims' Representative that such a determination does not amount to a challenge to jurisdiction but a determination on the merits, the Defence requests the Pre-Trial Chamber to find that there are no substantial grounds to believe that the suspects committed crimes against humanity.

192. The Defence has already argued that the crimes were not committed pursuant to any organisational policy, a view amply confirmed at the confirmation hearing. It is still wholly unclear what the "Network" is. Details of its members have not been provided because they are unknown to the Prosecution. Thus, the prosecution case is entirely based on speculation. A network that cannot be defined can hardly be said to be organised and structured.

193. Rather than pursuant to an organisational policy, the alleged crimes were committed as a result of spontaneous anger caused by what was perceived as an unfair election result. Prosecution Witness 3, for example, states that the violence appeared disorganized, spontaneous and that he could not see any leadership.[193] With regards to actual attacks, the same witness says that he heard shots and that his impression was that the police were the ones shooting and the "Kalenjin did not have the guns to shoot back."[194]

[193] EVD-PT-OTP-00220 at 0106.
[194] EVD-PT-OTP-00220 at 0109.

194. Defence witnesses also testified that the violence could not have been planned. Professor Chepkwony was asked by the Presiding Judge why he thought the violence was spontaneous. He responded that 52% of the population in Rift Valley voted for ODM while 48% did not; therefore it would have been impossible for the 52% to plan without the knowledge of the 48%.[195] Bishop Kosgey also described the violence as spontaneous. He testified that once the results were known, spontaneous violence took place in Nairobi and then Kisumu.[196]

195. In the CIPEV Report (Waki Commission Report), a report heavily relied on by the Prosecution, a number of government officials testifying to the Commission described the violence as spontaneous.[197] Similarly, the Rapporteur's Report, compiled by Human Rights Watch, International Crisis Group and the Office of the High Commissioner for Human Rights also described the election violence in Eldoret as a spontaneous reaction to the presidential results.[198] Also according to the Kenya National Commission for Human Rights report, one characteristic of the violence was its apparent spontaneity.[199] It also reports that other interviewees reported no element of planning saying that the violence was merely a reaction to the poll results.[200] The report also describes the violence as spontaneous in many other places including Nakuru[201], Busia, Mumias and Bungoma[202] Six out of the eight provinces experienced violence and the Rift Valley was not hit the hardest. The violence in other provinces has been described as spontaneous and Rift Valley is no exception. Finally, the Chairman of the North Rift Branch of the Law Society of Kenya wrote a statement noting that, "the violence that erupted was spontaneous and so abrupt that it caught most people, including the state security agencies, unawares."[203] He gives four reasons why the violence was spontaneous including the fact that if any planning took place it would not have escaped the attention of the Kenyan Security Agencies.[204]

196. Should the Chamber come to the conclusion that the post-election violence was not spontaneous but planned, the Prosecution has nevertheless, failed to demonstrate, to the required legal standard, a causal link between the violence and Ruto.

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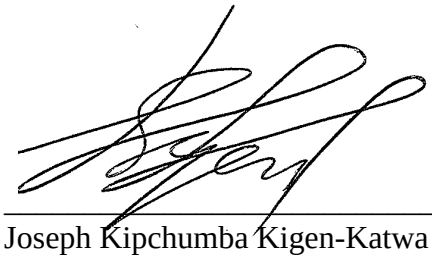
[195] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-10-ENG, 6 September 2011, p. 84.
[196] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-11-ENG, 7 September 2011, p. 15.
[197] EVD-PT-OTP-00004 at 0447, see also EVD-PT-OTP-00033 at 3854 and EVD-PT-OTP-00034 at 4293.
[198] EVD-PT-OTP-00041 at 8983.
[199] EVD-PT-OTP-00001 at 0137 para 522.
[200] EVD-PT-OTP-00001 at 0129 para 482, see also EVD-PT-OTP-00250 at 0130.
[201] EVD-PT-OTP-00001 at 0098 para 334.
[202] EVD-PT-OTP-00001 at 0120 para 441.
[203] EVD-PT-OTP-00119 at 0177.
[204] EVD-PT-OTP-00119 at 0178.

197. The Defence requests the Pre-Trial Chamber to treat the Defence submissions on the policy requirement under article 7(2)(a) as part of a jurisdiction challenge. In the alternative, the Defence requests the Pre-Trial Chamber to find that there are no substantial grounds to believe that crimes against humanity were committed as the alleged crimes were not committed pursuant to an organisational policy.

X. CONCLUSION

198. The Defence requests the Chamber to decline to confirm the charges against Ruto because the Prosecution has failed to establish substantial grounds to believe that he committed any of the crimes charged.
199. It is the Defence's submission that an exhaustive review, evaluation and assessment of the prosecution evidence can only lead to the conclusion that the Prosecutor's case theory lacks a clear line of reasoning and logic to underpin the specific allegations against Ruto.
200. The Chamber may come to the conclusion that the post election violence in Kenya was not spontaneous but planned. However, whichever view one takes, whether the Post Election Violence was spontaneous or planned, the Prosecution has failed to demonstrate, to the required legal standard, a causal link between the violence and Ruto.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. William Samoei Ruto

Dated this 24th day of October 2011
In Nairobi, Kenya