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**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding Judge  
Judge Olga Herrera Carbuccion  
Judge Robert Fremr

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG**

**Public Redacted version of**

**‘Prosecution’s consolidated response to the “Corrigendum of Ruto Defence Request for Judgment of Acquittal” and “Sang Defence ‘No Case to Answer’ Motion”, filed on 20 November 2015 (ICC-01/09-01/11-2000-Conf)**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Mr Anton Steynberg

**Counsel for the Defence**

**For William Samoei Ruto:**

Mr Karim Khan  
Mr David Hooper  
Ms Shyamala Alagendra

**For Joshua Arap Sang:**

Mr Joseph Kipchumba Kigen-Katwa  
Ms Caroline Buisman

**Legal Representatives of the Victims**

Mr Wilfred Nderitu

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

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## INTRODUCTION

1. Both the Defence for Mr Ruto<sup>1</sup> and the Defence for Mr Sang<sup>2</sup> have filed motions requesting the Trial Chamber to find that there is ‘no case to answer’ (“NCTA”) and to dismiss the charges against both Accused and enter a judgment of acquittal.<sup>3</sup> The Prosecution submits that both Defence NCTA Motions fail to meet the applicable legal standard for a successful NCTA motion, as previously determined by the Chamber.<sup>4</sup> Accordingly, they should be dismissed.
2. The Prosecution has introduced sufficient evidence – for each element of each count, for at least one incident for each count, and for at least one of the applicable modes of liability for each count – on which, if accepted, a reasonable Trial Chamber could convict each of the Accused.
3. For the reasons set out below, the Defence have not demonstrated any circumstances warranting the Chamber’s assessment of the credibility, reliability or weight of the Prosecution’s evidence at this NCTA stage. These are rather matters best determined at the end of trial, when the Chamber considers the totality of the evidence. Consistent with its Decision No. 5, the Chamber should therefore take the Prosecution’s evidence at its highest, assume such evidence is entitled to credence, and deny the Defence NCTA Motions.

## PART I LEGAL ISSUES REGARDING THE NCTA

### A. The legal standard articulated by the Chamber

4. The Chamber has found that “the test to be applied for a ‘no case to answer’ determination is whether or not, on the basis of a *prima facie* assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber *could* convict the Accused. The emphasis is on the word ‘could’ and the exercise contemplated is

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<sup>1</sup> “Ruto Defence”.

<sup>2</sup> “Sang Defence”.

<sup>3</sup> ICC-01/09-01/11-1990-Conf (“Ruto NCTA Motion”) and ICC-01/09-01/11-1991-Conf (“Sang NCTA Motion”) respectively. Collectively: “Defence NCTA Motions”.

<sup>4</sup> ICC-01/09-01/11-1334 (“Decision No. 5”).

thus not one which assesses the evidence to the standard for conviction at the final stage of a trial.”<sup>5</sup>

5. The Chamber also indicated that the “determination of a ‘no case to answer’ motion does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of reliability or credibility. Such matters – which go to the strength of the evidence rather than its existence – are to be weighed in the final deliberations in light of the entirety of the evidence presented.”<sup>6</sup>
6. The Chamber agreed that the approach was “usefully formulated” in the *ad hoc* tribunal jurisprudence, “as a requirement, at this intermediary stage, to take the prosecution evidence ‘at its highest’ and ‘to assume that the prosecution’s evidence was entitled to credence unless incapable of belief’ on any reasonable view.”<sup>7</sup>
7. The Chamber further stated that “the appropriate analysis in the context of a ‘no case to answer’ motion would be for each count to be considered separately. That a count is alleged to include multiple incidents does not mean that each individual incident pleaded within the charges would be considered. Rather [...] it is more appropriate to consider whether or not there is evidence supporting any one of the incidents charged. The presence of such evidence on the record would defeat the ‘no case’ motion, provided there is also evidence which could support the alleged form of participation.”<sup>8</sup>
8. As regards the alleged form of participation for a particular count, the Chamber found “in the context of a ‘no case to answer’ determination, once it is established that there is evidence which could support any one pleaded mode

<sup>5</sup> Decision No. 5, para. 23; *see also*, ICC-01/09-01/11-1334-Anx (“Separate Further Opinion of Judge Eboue-Osuji”), paras. 2, 4, 107, 112 and 113.

<sup>6</sup> Decision No. 5, para. 24 (footnotes omitted).

<sup>7</sup> Decision No. 5, para. 24 (footnotes omitted).

<sup>8</sup> Decision No. 5, para. 27.

of liability, in respect of each count, that aspect of the required elements would be satisfied and there is no need to consider other modes of liability.”<sup>9</sup>

**B. The Chamber may refuse a ‘no case to answer’ motion on the basis of a legal re-characterisation of the facts**

9. Decision No. 5 also dealt with the possible legal re-characterisation of the facts set out in the Updated Document Containing the Charges (“UDCC”),<sup>10</sup> in particular, the form of participation. The Chamber ruled that it could “refuse to grant a ‘no case to answer’ motion on the basis that, although no evidence was presented which could support the legal characterisation of the facts as set out in the document containing the charges, it appears to the Chamber at the time of rendering its decision on the ‘no case to answer’ motion that the legal characterisation of the facts may be subject to change, in accordance with Regulation 55 of the Regulations.”<sup>11</sup>
10. The Prosecution notes that the Chamber has already given formal notice to Mr Ruto of the possible legal re-characterisation of facts to include participation under article 25(3)(b), (c), or (d).<sup>12</sup> In respect of Mr Sang, while the Chamber has not formally given him notice of any possible legal re-characterisation of facts, it has nevertheless advised him that “pursuant to paragraph 29 of ‘Decision No. 5 on the Conduct of Proceedings, Principles and Procedure on ‘No Case to Answer Motions’ (filing 1334), it may be prudent for the Sang Defence to anticipate any of the possible modes of liability in their litigation of the ‘no case to answer’ (see, ICC-01/09-01/11-T-26-Red-ENG, page 29, lines 4-17).”<sup>13</sup>
11. Accordingly, the Prosecution submits that the appropriate inquiry at the NCTA stage is whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber could find criminal responsibility: (i) under any of

<sup>9</sup> Decision No. 5, para. 28 (footnotes omitted).

<sup>10</sup> ICC-01/09-01/11-533-AnxA-Corr.

<sup>11</sup> Decision No. 5, para. 29.

<sup>12</sup> ICC-01/09-01/11-1122.

<sup>13</sup> Email from TrialChamberV-ACommunications to the parties and participants dated 16/10/2015 at 15:18. See also, Sang NCTA Motion, para. 9, which specifically notes this communication.

the modes of liability under articles 25(3)(a)-(d) for Mr Ruto; and (ii) under any of the modes of liability under articles 25(3)(b)-(d) in respect of Mr Sang.

**C. The Defence arguments do not meet the ‘no case to answer’ threshold**

12. In Decision No. 5, the Chamber explicitly emphasised that any NCTA motion “should not be pursued on a merely speculative basis or as a means of raising credibility challenges that are to be considered at the time of final deliberations.”<sup>14</sup> Despite this warning, and despite the Chamber’s clear articulation of the NCTA standard, the Defence arguments in the NCTA Motions essentially amount to a series of speculative arguments and credibility challenges, which – individually or cumulatively – fail to provide adequate grounds to dismiss any of the charges at this juncture.
13. The Chamber has indicated that the presence in the record of evidence supporting any one of the incidents charged in respect of each count would “defeat the ‘no case’ motion, provided there is also evidence which could support the alleged form of participation.”<sup>15</sup> Moreover, the “Chamber will not consider questions of reliability or credibility related to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber.”<sup>16</sup>
14. This is consistent with the approach taken in the *ad hoc* tribunals. There, as a general rule, the sufficiency of evidence is determined without examining its reliability and credibility, leaving those matters to the end of the trial.<sup>17</sup> Indeed, as the ICTY’s *Milošević* trial chamber articulated, “[w]here there is some evidence, but it is such that its strength or weakness depends on the view taken

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<sup>14</sup> Decision No. 5, para. 39.

<sup>15</sup> Decision No. 5, para. 27.

<sup>16</sup> Decision No. 5, para. 32.

<sup>17</sup> See e.g. *Prosecutor v. Rwamakuba*, ICTR-98-44C-R98bis, Decision on Defence Motion for Judgement of Acquittal, Rule 98bis of the Rules of Procedure and Evidence, 28 October 2005 (“*Rwamakuba* Rule 98bis Decision”), para. 7; *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on Tharcisse Muvunyi’s Motion for Judgement of Acquittal Pursuant to Rule 98bis, 13 October 2005 (“*Muvunyi* Rule 98bis Decision”), para. 36; *Prosecutor v. Mladić*, IT-09-92-AR73.4, Public Redacted Version of Decision on Defence Interlocutory Appeal From the Trial Chamber Rule 98bis Decision, 24 July 2014, para. 20 and *Prosecutor v. Kunarac, Kovač and Vuković*, Decision on Motion for Acquittal, 3 July 2000 (“*Kunarac et al.* Rule 98bis Decision”), para. 6.

of a witness's credibility and reliability and on one possible view of the facts a Trial Chamber could convict on it, the Motion will not be allowed."<sup>18</sup>

15. Therefore, as the Sang Defence acknowledges, "[t]o win a 'no case to answer' motion, it is not sufficient that the evidence is merely weak – there must be a lack of evidence on which a Chamber could convict. Thus, either there is an insufficient quantity of evidence, which is probative of one or more elements of the crime(s) charged, or the only evidence which has been presented is of such poor quality that no reasonable Chamber can convict on it because it is 'incapable of belief'".<sup>19</sup>
16. As regards the quantity of relevant evidence, Parts II to VI below clearly demonstrate that the Prosecution has led sufficient evidence for each count and for at least one mode of liability in respect thereof. As regards the quality of this evidence, Parts II to VI below clearly demonstrate that this is relevant and probative of the charges. As such the Chamber should take this Prosecution evidence "at its highest" and afford it credence on the basis that it cannot -- either individually, or as a whole -- be considered "incapable of belief".<sup>20</sup>
17. With regard to the general Defence arguments that any Prosecution evidence is uncorroborated,<sup>21</sup> hearsay<sup>22</sup> or contradictory,<sup>23</sup> the Prosecution notes at the outset the persuasive authority provided by the ICTR decision in *Bagosora et al*, in which the trial chamber stated, "[a]s it is well-established that a reasonable trier of fact may reach findings based on uncorroborated or hearsay evidence; that contradictory evidence may nevertheless be reliable, at least in part; and that circumstantial evidence may be sufficient to prove guilt beyond a

<sup>18</sup> *Prosecutor v. Slobadan Milošević*, IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004 ("Milošević Rule 98bis Decision"), para. 13(3).

<sup>19</sup> Sang NCTA Motion, para.18 (footnotes omitted).

<sup>20</sup> Decision No. 5, para. 24.

<sup>21</sup> See e.g. Ruto NCTA Motion, paras. 25 and 27 and Sang NCTA Motion, paras. 4 and 28.

<sup>22</sup> See e.g. Ruto NCTA Motion, paras. 25 and 201 and Sang NCTA Motion, paras. 28 and 99.

<sup>23</sup> See e.g. Ruto NCTA Motion, para. 4 and Sang NCTA Motion, para. 124.

reasonable doubt, there is no justification for discounting these types of evidence on a motion to acquit.”<sup>24</sup>

**1. Defence requests for the Chamber to make reliability and credibility assessments at the NCTA stage should be dismissed**

18. At this NCTA stage, the Chamber does not have all the evidence at its disposal to make the appropriate credibility and reliability assessments. As the Separate Further Opinion of Judge Eboe-Osuji noted, “counsel on either side are generally entitled to use to their own advantage any evidence called or tendered by the opposing side. In particular, any evidence tendered by the Defence may be used against them.”<sup>25</sup> Similarly, the ICTY’s *Kunarac* trial chamber explained, “[a] tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered.”<sup>26</sup> Consequently, and consistent with the stated approach of the Chamber<sup>27</sup> and the jurisprudence from the *ad hoc* tribunals, it is only in exceptional circumstances that matters of reliability or credibility arise at the NCTA stage.
19. Such exceptional circumstances arise only where the Prosecution’s case can be said to have ‘completely broken down’, or put another way, when “in what is likely to be a somewhat unusual case, the only relevant evidence when viewed as a whole is so incapable of belief that it could not properly support a conviction, even when taken at its highest for the Prosecution.”<sup>28</sup>
20. There are no exceptional circumstances in the present case that render the evidence “incapable of belief” such that reliability and credibility assessments

<sup>24</sup> Prosecutor v. *Bagosora et al*, Decision on Motion for Judgement of Acquittal, 2 February 2005 (“*Bagosora et al*. Rule 98bis Decision”), para. 10; *see also*, e.g. *Muvunyi* Rule 98bis Decision, para. 42 (finding that “contradictory evidence may nevertheless be reliable, at least in part, and thus, there is no justification for discounting these types of evidence on a motion to acquit.”).

<sup>25</sup> Separate Further Opinion of Judge Eboe-Osuji, para. 11.

<sup>26</sup> *Kunarac et al*. Decision on Motion for Acquittal, para. 4.

<sup>27</sup> Decision No. 5, paras. 24 and 32.

<sup>28</sup> *Prosecutor v. Strugar*, IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98bis, 21 June 2004, para. 18. *See also* *Prosecutor v. Nyiramasuhuko, Ntabaholi, Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje*, ICTR-98-42-T, Decision on Defence Motions for Acquittal Under Rule 98bis, para. 71.

are appropriate at this stage. Moreover, the Prosecution's case cannot, in any respect, be considered to have 'completely broken down'.<sup>29</sup> Therefore the Defence request for reliability and credibility assessments of the evidence can be rejected on this basis alone, without the need for further analysis. Nevertheless, the Prosecution will briefly address below a number of the Defence criticisms of the Prosecution evidence, which amount to little more than credibility challenges that fall short of establishing that such witnesses - individually or collectively - are incapable of belief. Brief consideration is also given in this section to the unsubstantiated and speculative assertion that the case has 'completely broken down'.

21. Before doing so, the Prosecution also notes the *Bagosora et al.* Rule 98bis Decision, in which it is stated that, "[t]he significance of the evidence should not be reviewed narrowly, and is entitled to any inferences or presumptions which a reasonable trier of fact could make."<sup>30</sup> In addition, the Prosecution notes the *Milošević* Rule 98bis Decision in which the chamber found that "[t]he determination whether there is evidence on which a tribunal could convict should be made on the basis of the evidence as a whole."<sup>31</sup> Similarly, the *Rwamakuba* trial chamber found that in applying the NCTA standard of review, "the Chamber must evaluate the Prosecution's evidence as a whole looking to the totality of the evidence."<sup>32</sup>

## **2. Issues of reliability in relation to the Rule 68 Statements have been adjudicated by the Chamber**

22. The Sang Defence argues that 'reliability' issues relating to the prior recorded testimony admitted under rule 68 ("Rule 68 Statements") render such statements "incapable of belief."<sup>33</sup> At the outset, the Prosecution notes that this

<sup>29</sup> As will be demonstrated below, there is adequate evidence on record to sustain all essential facts and circumstances alleged in the UDCC.

<sup>30</sup> *Bagosora et al.* Rule 98bis Decision, para. 10 (emphasis added).

<sup>31</sup> *Milošević* Rule 98bis Decision, para. 13(4).

<sup>32</sup> *Rwamakuba* Rule 98bis Decision, para. 8.

<sup>33</sup> Sang NCTA Motion, para. 29. *See also*, Ruto NCTA Motion, para. 223, which advances a similar argument.

issue has already been adjudicated by the Chamber, which found that the Rule 68 Statements not only have sufficient indicia of reliability,<sup>34</sup> but also have “*prima facie* probative value” that “outweighs any prejudicial effect caused to the Accused.”<sup>35</sup> It is a necessary corollary of this decision that the Rule 68 Statements are manifestly not “incapable of belief”. Therefore, consistent with the Decision No. 5, such issues of reliability simply do not arise at this NCTA stage.

23. The Defence arguments also do not explain how such evidence is rendered ‘incapable of belief’, but rather repeat earlier and ultimately unsuccessful submissions in the Defence challenge to the admission of the Rule 68 Statements.<sup>36</sup> Thus, these Defence submissions invite the Chamber to reconsider its Rule 68 Decision.<sup>37</sup> Whilst the Chamber has such discretion, the Defence have failed to establish the essential prerequisite, namely that this decision is “manifestly unsound and their consequences are manifestly unsatisfactory.”<sup>38</sup> Nor has the Defence established any “new facts or new arguments justifying reconsideration.”<sup>39</sup> Therefore, absent any decision of the Appeals Chamber in the pending appeal on the Rule 68 Decision that would require the Chamber to revisit this issue, the Chamber should not entertain these arguments.
24. However, notwithstanding the outcome of that appeal, as demonstrated in Parts II to VI, even without the Rule 68 Statements the Prosecution has led sufficient evidence, upon which, on the basis of a *prima facie* assessment, a reasonable Trial Chamber could convict the Accused on at least one of the

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<sup>34</sup> ICC-01/09-01/11-1938-Conf-Corr (“Rule 68 Decision”), paras. 67, 86, 117 and 145.

<sup>35</sup> Rule 68 Decision, para. 151.

<sup>36</sup> See e.g. ICC-01/09-01/11-1908-Conf-Corr, paras. 107-131, ICC-01/09-01/11-1911-Conf-Corr, paras. 39-40, 54-58 and 100-108.

<sup>37</sup> Rule 68 Decision.

<sup>38</sup> ICC-01/09-01/11-511, para. 6 (quoting ICC-01/04-01/06-2705, para. 18).

<sup>39</sup> See e.g. ICC-01/09-01/11-863, para. 11; *Prosecutor v. Goran Hadžić*, IT-04-75-T, Decision on Prosecution motion for reconsideration of decision on prosecution motion to substitute expert report of expert witness (Reynaud Theunens), 16 April 2013, para. 5; *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-AR73.16, Decision on *Jadranko Prlić’s* Interlocutory Appeal against the Decision on *Prlić* Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para 18.

relevant modes of liability.<sup>40</sup> As such the NCTA Motions would fail, irrespective of the outcome of that appeal.

**3. Issues of weight in relation to the Rule 68 Statements do not arise at this stage**

25. The Sang Defence have also requested that the Chamber determine the weight to be attributed to the Rule 68 Statements at this NCTA stage.<sup>41</sup> The Prosecution again notes that the Chamber has already decided in the Rule 68 Decision that it will determine the evidentiary weight of the Rule 68 Statements “once the entire case record is before it, for the purpose of the verdict in the case.”<sup>42</sup> Moreover, the Chamber was also clear in its Decision No. 5 that it would not, in principle, consider issues of reliability or credibility at the NCTA stage.<sup>43</sup> Again, these Defence arguments essentially amount to a request for the Chamber to reconsider its Rule 68 Decision, and for the reasons already discussed, these arguments should be rejected.
26. In respect of the Defence argument that the Rule 68 Statements should not be relied on unless corroborated,<sup>44</sup> the Prosecution notes the persuasive authority of the *Bagosora et al.* Rule 98bis Decision, discussed above, in which the trial chamber found “there is no justification for discounting [uncorroborated] evidence on a motion to acquit.”<sup>45</sup>
27. The Defence also urges the Chamber to give primacy to the *viva voce* testimony of the witnesses whose statements were admitted pursuant to rule 68.<sup>46</sup> However, such an exercise would necessarily require the Chamber to engage in a weighing of evidence exercise that it has clearly indicated it does not intend to undertake at this stage. The Prosecution further notes the jurisprudence from

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<sup>40</sup> In order to facilitate the Chamber’s analysis in the event that any of the Rule 68 Statements is/are excluded by the Appeals Chamber, the Prosecution has clearly labelled in the footnotes all references to Rule 68 evidence relied upon.

<sup>41</sup> Sang NCTA Motion, paras. 28-29.

<sup>42</sup> Rule 68 Decision, para. 151.

<sup>43</sup> Decision No. 5, para. 24.

<sup>44</sup> See e.g. Ruto NCTA Motion, para. 225 and Sang NCTA Motion, paras. 30-34.

<sup>45</sup> *Bagosora et al.* Rule 98bis Decision, para.10.

<sup>46</sup> See e.g. Ruto NCTA Motion, paras. 84, 86 and 97 and Sang NCTA Motion, paras. 30-34, 102 and 149.

the *ad hoc* tribunals on this issue, and in particular the *Blagojević and Jokić* Rule 98bis Decision, in which the trial chamber ruled it “will not evaluate the weight to be given to evidence, even when presented by a party as ‘suspect’, ‘contradictory’ or in any other way unreliable.”<sup>47</sup>

28. Furthermore, giving primacy to the *viva voce* testimony of the Rule 68 Witnesses would defeat the clear purpose of rule 68(2)(d), which is an explicit exception to the principle of orality<sup>48</sup> aimed at deterring witness interference and compensating for any evidence lost as a result thereof.<sup>49</sup> When the appropriate stage for making submissions on the credibility and reliability of evidence is reached, the Prosecution will argue that witness interference has been clearly established as the catalyst for the recantation of the compelled witnesses in this case.<sup>50</sup> Consequently, the Chamber should reject the witnesses’ *viva voce* recantations and accept the Rule 68 Statements, which are untainted by this improper interference. For present purposes, however, it suffices to submit that the circumstances surrounding the witnesses’ recantation of their prior statements are such that they cannot, at this NCTA stage, provide a sufficient basis to conclude that the Rule 68 Statements are incapable of belief.
29. For similar reasons, the Chamber should reject the Sang Defence argument that “where the contents of the [Rule 68] Statements have not been submitted and discussed in Court while the witness was on the stand under the oath, the Chamber should not consider them in its no case to answer analysis.”<sup>51</sup> The Defence provides no legal authority to support such a narrow interpretation of

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<sup>47</sup> *Blagojević and Jokić* Rule 98bis Decision, para. 15.

<sup>48</sup> “The testimony of a witness at trial shall be given in person, *except to the extent provided by the measures set forth in [...] the Rules of Procedure and Evidence*”, article 69(2) (emphasis added).

<sup>49</sup> Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, para. 34.

<sup>50</sup> On this issue of interference, the Prosecution notes the Rule 68 Decision, paras. 55, 79, 109 and 126.

<sup>51</sup> Sang NCTA Motion, para. 27.

the Chamber's Decision, other than relying on the dissenting view (on this issue) of Judge Eboe-Osuji.<sup>52</sup>

30. The Chamber made clear that it "shall consider as evidence only what has been 'submitted and discussed [...] at trial, and has been found to be admissible by the Chamber.'"<sup>53</sup> However, the entirety of the Rule 68 Statements were submitted by the Prosecution, discussed at length with the witnesses and in legal arguments and ultimately admitted by the majority of the Trial Chamber as proof of the truth of their contents -- without reservation, except that the admission is without prejudice to the ultimate weight to be ascribed thereto by the Chamber. Accordingly, the entirety of the Rule 68 Statements may be considered by the Chamber. To exclude any portion not specifically discussed during the *viva voce* testimony of a Rule 68 witness would undermine the purpose of rule 68(d), for the reasons discussed above. It should be noted that rule 68(d) also provides for the admission of prior recorded testimony in circumstances where the witness has failed to appear at all. Furthermore, the logical conclusion of this Sang Defence argument would be to render all evidence admitted by the Chamber, but not specifically discussed in court,<sup>54</sup> as inappropriate for consideration by the Chamber at the NCTA stage. This argument should be thus rejected.

**4. Any hearsay evidence in the Rule 68 Statements or *viva voce* testimony does not render the evidence incapable of belief**

31. The Ruto Defence asserts that the Prosecution's case is "built almost entirely on hearsay, whether it be in respect of the core testimony of the *viva voce* witnesses or the R68 evidence."<sup>55</sup> The Ruto Defence argues that consequently, the Chamber must "assess the credibility and reliability of the R68 evidence and the

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<sup>52</sup> Sang NCTA Motion, para. 27, which refers to the Partly Concurring Opinion of Judge Eboe-Osuji, ICC-01/09-01/11-1938-Conf-Anx-Corr, para. 48.

<sup>53</sup> Decision No. 5, para. 25.

<sup>54</sup> For instance, any evidence admitted pursuant to a 'Bar Table Motion'.

<sup>55</sup> Ruto NCTA Motion, para. 201.

hearsay evidence of the *viva voce* witnesses in determining whether there is a case for Mr. Ruto to answer.”<sup>56</sup>

32. At the outset, the Prosecution notes that for the most part, the Rule 68 Witnesses directly witnessed the events described in their Rule 68 Statements. Thus, their statements contain predominantly *direct evidence*, not hearsay. However, to the extent that the core testimony of the *viva voce* witnesses or the Rule 68 Statements contains any hearsay evidence, the Prosecution notes the *ad hoc* tribunal jurisprudence is instructive: the *Bagosora et al.* case decided that, at the NCTA stage, there is “no justification for discounting [hearsay] evidence on a motion to acquit.”<sup>57</sup> The *Milošević* trial chamber stated, “hearsay evidence, generally inadmissible in common law jurisdictions, is, pursuant to rule 89(C), admissible, the principal factor determining admissibility being the reliability of the evidence. Once admitted, it is for a Trial Chamber to determine the weight to be attached to hearsay evidence.”<sup>58</sup>
33. Similarly, hearsay evidence is admissible at the ICC pursuant to article 69(4) of the Rome Statute. Nevertheless, in the present case, the Chamber has been particularly attentive in this case to the propriety of admitting hearsay evidence.<sup>59</sup> Therefore, any such evidence in the record from the *viva voce* witnesses or in the Rule 68 Statements has already been subjected to judicial filter and admitted in accordance with the provisions of the Statute. As this Chamber has already ruled, the determination of what weight is attributable to the Rule 68 Statements is to be conducted at the end of the trial.<sup>60</sup>
34. On this basis, the Defence’s ‘hearsay’ argument<sup>61</sup> essentially amounts to an inappropriately belated admissibility challenge. Absent exceptional circumstances, such challenges must be raised at the time when the evidence

<sup>56</sup> Ruto NCTA Motion, para. 206.

<sup>57</sup> *Bagosora et al.* Rule 98bis Decision, para. 10.

<sup>58</sup> *Milošević* Rule 98bis Decision, para. 13(5).

<sup>59</sup> T-48, 75:14-18.

<sup>60</sup> Rule 68 Decision, para. 151.

<sup>61</sup> Ruto NCTA, paras. 201-202.

was submitted to the Chamber, pursuant to Rule 64(1). To the extent that such arguments were made unsuccessfully, the Defence is entitled to appeal at the appropriate time, or in appropriate circumstances, ask for reconsideration of any relevant admissibility decision. In the present circumstances however, at this NCTA stage, it is inappropriate to ask the Chamber to determine the weight to be attached to the admitted evidence, hearsay or otherwise. These Defence arguments should therefore be dismissed.

**5. Any hearsay evidence in the Rule 68 Statements or *viva voce* testimony does not render the Prosecution's case 'completely broken down'**

35. The Ruto Defence declares that the Prosecution's case has 'completely broken down' on the basis of what it refers to as "the collapse of the 'Confirmation Six' and subsequent reliance on hearsay evidence – both the core evidence of the *viva voce* witnesses and the R68 evidence."<sup>62</sup> However, no acceptable explanation is offered establishing how such factors, whether taken separately or together, amount to the Prosecution's case having 'completely broken down', or being incapable of belief on any reasonable view.
36. On the issue of "the collapse of the 'Confirmation Six'",<sup>63</sup> the fact that the evidence presented before this Chamber differs from that presented to the Pre-Trial Chamber during confirmation does not in any way indicate that the Prosecution's case has 'completely broken down'. To the contrary, in its Decision No. 5 the Chamber specifically acknowledged that "the nature and content of the evidence may change between the confirmation hearing and completion of the Prosecution's presentation of evidence at trial" and further noted that "the Prosecution need not introduce the same evidence at trial as it did for confirmation."<sup>64</sup> This is a fact that has been acknowledged by both the Ruto Defence<sup>65</sup> and the Sang Defence.<sup>66</sup> Furthermore, as regards the suggested

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<sup>62</sup> Ruto NCTA Motion, para. 211.

<sup>63</sup> Ruto NCTA Motion, para. 211.

<sup>64</sup> ICC-01/09-01/11-1334, para. 23.

<sup>65</sup> Ruto NCTA Motion, para. 211.

reliance on hearsay evidence, in addition to the above arguments on this issue, the Prosecution notes that the Ruto Defence itself acknowledges that there is no explicit bar on reliance upon hearsay evidence.<sup>67</sup>

37. Neither of these factors are therefore a basis for a Prosecution's case having 'completely broken down'. Nevertheless, the Ruto Defence argues that "the confluence of these factors, fairly and impartially considered" results in the conclusion that the case has 'completely broken down'.<sup>68</sup> The Defence raises insufficient arguments to demonstrate that such a threshold has been reached.
38. Jurisprudence from the *ad hoc* tribunals suggests that the situation in which a Prosecution case has 'completely broken down' can arise "either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case."<sup>69</sup> That the Prosecution's evidence has changed since confirmation, or relies in part on hearsay evidence, is not in any way sufficient to establish that "the Prosecution case can be said to have "completely broken down," in that no trier of fact could accept the evidence relied upon by the Prosecution to maintain its case on a particular issue."<sup>70</sup>
39. Moreover, the Defence completely ignores the fact that the change in the content of the Prosecution's evidence since the confirmation hearing is to a large part due to interference with Prosecution witnesses. In this regard, the Prosecution notes the Chamber's finding in its Rule 68 Decision, that "the element of systematicity of the interference of several witnesses in this case [...] gives rise to the impression of an attempt to methodically target witnesses of this case in order to hamper the proceedings."<sup>71</sup> In taking the evidence at its

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<sup>66</sup> Sang NCTA Motion, para. 129.

<sup>67</sup> Ruto NCTA Motion, para. 211.

<sup>68</sup> Ruto NCTA Motion, para. 211.

<sup>69</sup> *Rwamakuba* Rule 98bis Decision, para.7; *see also Prosecutor v. Kordić and Čerkez*, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, para. 28.

<sup>70</sup> *Blagojević and Jokić* Rule 98bis Decision, para. 15 (footnotes omitted).

<sup>71</sup> Rule 68 Decision, para. 60.

highest, and considering the totality of the Prosecution's evidence, such interference is clearly a relevant consideration for the Chamber at this NCTA stage. Rather than 'completely breaking down', the Prosecution's evidence has evolved to meet the NCTA standard, despite this interference. Consequently, and in light of the above arguments, this argument should be dismissed.

**6. The Chamber should reject Defence requests to deviate from the NCTA legal standard articulated in its Decision No. 5**

40. As discussed above, in its Decision No. 5 the Chamber has clearly articulated the NCTA legal standard, drawing on the jurisprudence of the *ad hoc* tribunals where necessary. Further guidance is provided in the Separate Further Opinion of Judge Eboe-Osuji.<sup>72</sup> Given the unequivocal nature of this guidance to the Parties, the Chamber should reject the various Defence arguments to depart from this standard. These amount to no more than a belated request for reconsideration, but fail to meet the necessary threshold.
41. The Ruto Defence argues that the Chamber is empowered, "given the extent of reliance on hearsay evidence, to intervene and determine whether it is fair, proper and in the interests of justice for such a case to continue."<sup>73</sup> It further asserts that "such a mandate falls within the 'general obligation' identified by the Chamber 'pursuant to Article 64(2) of the Statute, to ensure that the trial is fair and expeditious and conducted in a manner which respects the rights of the accused.'"<sup>74</sup> On this basis, the Ruto Defence argues that the present is an "exceptional type of case" where a Trial Chamber has a right to make a definitive judgement that guilt has not been established by the evidence, even accepting that a reasonable tribunal could convict on the evidence, if accepted.<sup>75</sup> The Sang Defence echoes this argument.<sup>76</sup> However, this argument is strained and does not bear scrutiny. The Prosecution notes that the Defence have not

<sup>72</sup> Separate Further Opinion of Judge Eboe-Osuji, inc. paras. 2, 4, 107 and 112.

<sup>73</sup> Ruto NCTA Motion, para. 213 (footnotes omitted).

<sup>74</sup> Ruto NCTA Motion, para. 213.

<sup>75</sup> Ruto NCTA Motion, paras. 215- 216.

<sup>76</sup> Sang NCTA Motion, para. 21.

shown any concrete circumstances, or credible fair trial concerns, that would require the Chamber to depart from its articulated NCTA standard.

42. Furthermore, such an approach completely ignores the Chamber's Decision No. 5, which delivered a reasoned opinion, clearly setting out the standard for review at the NCTA stage. The Chamber explicitly stated that "a distinction needs to be made between the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case."<sup>77</sup> As such, any attempt by the Defence to blur this distinction, or to apply an elevated standard of proof at this stage, should be dismissed.
43. In this regard the Prosecution briefly notes the Ruto Defence argument that "'sufficient evidence' at the 'no case to answer' stage must necessarily have a direct relationship to the standard of proof for conviction."<sup>78</sup> The Prosecution notes simply that the Chamber, in its Decision No. 5, clearly distinguished between the "beyond a reasonable doubt" test to be applied to the evidence at the end of the case, and the objective of the NCTA assessment, which "is to ascertain whether the Prosecution has lead sufficient evidence to necessitate a defence case".<sup>79</sup> Additionally, in his separate opinion, Judge Eboe-Osuji emphasised his agreement with the Chamber's finding in Decision No. 5 that "the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of the trial."<sup>80</sup> Once again, the Defence argument attempts to blur this distinction.
44. The Chamber should also reject the Ruto Defence argument that the "Chamber's competency to intervene at the close of the OTP case must take account of the nature of the evidence upon which the case is based."<sup>81</sup> If not, so the argument goes, the "application of the 'no case' standard at the ICC would

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<sup>77</sup> Decision No. 5, para. 23.

<sup>78</sup> Ruto NCTA Motion, para. 206.

<sup>79</sup> Decision No. 5, para. 23.

<sup>80</sup> Separate Further Opinion of Judge Eboe-Osuji, para. 10.

<sup>81</sup> Ruto NCTA Motion, para. 223.

occasion the absurd result of the Pre-Trial Chamber's filtering function at the lower confirmation stage of proceedings being applied with greater rigour and effect than the Trial Chamber's filtering function at the end of the OTP case."<sup>82</sup>

45. The Chamber has specifically ruled that the "lower evidentiary standard, limited evidentiary scope and distinct evidentiary rules applicable at the confirmation of charges stage do not preclude a subsequent consideration of the evidence actually presented at trial by the Prosecution."<sup>83</sup> Furthermore, the Chamber has been very clear that at this stage of proceedings it will take account of the nature of the evidence upon which the OTP's case is based, but take such evidence "at is highest" and "assume that the prosecution's evidence was entitled to credence unless incapable of belief."<sup>84</sup>
46. Far from being "absurd", the NCTA standard articulated by the Chamber is entirely consistent with the case law of the *ad hoc* tribunals, as the Chamber has acknowledged and as discussed above. It is also consistent with the important differences between the confirmation hearing and the NCTA inquiry. At the confirmation stage, the Pre-Trial Chamber is empowered to conduct a full assessment of the credibility and probative value of the totality of the evidence before it, as presented by all parties. This is a natural consequence of the fact that the article 61 decision is the *final* decision of the Pre-Trial Chamber, concluding the confirmation process. Thus, it is a fundamentally different enquiry, more comparable with the final verdict under article 74 (albeit at a lower threshold of proof) than a NCTA inquiry. Any attempt to compare an article 61 decision with a NCTA ruling is therefore meaningless.

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<sup>82</sup> Ruto NCTA Motion, para. 223. *See also* Sang NCTA Motion, para. 22, which makes a similar argument.

<sup>83</sup> ICC-01/09/11-1334, para. 14.

<sup>84</sup> ICC-01/09/11-1334, para. 24.

**7. The Chamber should reject the Defence arguments for it to consider individual incidents within a count**

47. The Prosecution notes that in Decision No. 5, the Chamber indicated that it was not required to consider “each individual incident pleaded within the charges”, and that it was “more appropriate to consider whether or not there is evidence supporting any one of the incidents charged.”<sup>85</sup> Such a charge-based, rather than incident-based, approach is consistent with the practice of the *ad hoc* tribunals, as recently affirmed in the *Hadžić* Rule 98bis Decision: the *Hadžić* trial chamber relied on the “settled practice within the ICTY trial chambers to entertain motions for judgement of acquittal in respect of entire counts and not individual charges within a count.”<sup>86</sup> Despite this, the Defence argue that individual allegations at this NCTA stage should be struck out by the Chamber.<sup>87</sup> In support of their argument the Ruto Defence reference the “older decisions of the ICTY”, as well a dissenting opinion from the *Šešelj* case.<sup>88</sup> Such an approach would amount to a departure from the standard set out by the Chamber, and the current jurisprudence in *ad hoc* tribunals. Consequently, it should be rejected.

**8. The Defence arguments in relation to deportation and forcible displacement are legally incorrect**

48. The Ruto Defence’s legal analysis on deportation and forcible transfer is incorrect, in particular its submission that the Prosecution has failed to prove “that Kikuyus or perceived PNU supporters who were attacked within the temporal and geographical scope of the charges were forcibly transferred *outside the Rift Valley*.”<sup>89</sup> The Prosecution does not allege in its UDCC that the victims were forcibly transferred ‘outside the Rift Valley’ and has not set out to

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<sup>85</sup> Decision No. 5, para. 27.

<sup>86</sup> *Prosecutor v. Hadžić*, IT-04-75, Oral Decision on Defence Motion for Acquittal Pursuant to Rule 98bis, 20 Feb 2014 (“*Hadžić* Rule 98bis Decision”), p. 3.

<sup>87</sup> Ruto NCTA Motion, paras. 139 and 141 and Sang NCTA Motion, para. 134.

<sup>88</sup> Ruto NCTA Motion, para. 141.

<sup>89</sup> Ruto NCTA Motion, para. 164 (emphasis added).

prove that this is so. This is because this is not an essential element of the charge.

49. Article 7(1)(d) prohibits “[d]eportation or forcible transfer of population”. Article 7(2)(d) clarifies that this means the “forced displacement of the persons concerned by expulsion or other coercive acts *from the area in which they are lawfully present*”.<sup>90</sup> In addressing article 7(1)(d) the Elements of Crimes further explains the requirement as follows: “The perpetrator deported or forcibly transferred [...] one or more persons to another State *or location*”.<sup>91</sup> While deportation requires proof that the victims were expelled from the relevant State,<sup>92</sup> there is no explicit geographical requirement for forcible transfer, other than that the victims were transferred or displaced “to another location” within the State.<sup>93</sup> Thus, the alleged requirement that the victims must be shown to have been transferred or displaced out of the Rift Valley is not a requirement in law.
50. In this case, the Pre-Trial Chamber confirmed the charge of deportation or forcible transfer notwithstanding the fact that it was clear on the evidence before it that most of the displaced persons were still within the Rift Valley area.<sup>94</sup> The only context in which the Pre-Trial Chamber considered it necessary to address the location to which the victims were ultimately relocated was in the context of the distinction between deportation (i.e. beyond State borders) or forcible transfer.<sup>95</sup> Similarly, in the *Kenyatta* case the same Pre-Trial Chamber confirmed the charge of deportation or forcible transfer where the evidence

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<sup>90</sup> Emphasis added.

<sup>91</sup> Emphasis added. In fn. 13, the Elements of Crimes explains that “deported or forcibly transferred” is interchangeable with “forcibly displaced”.

<sup>92</sup> *Milošević* Rule 98bis Decision, para. 68.

<sup>93</sup> *Milošević* Rule 98bis Decision, para. 69.

<sup>94</sup> ICC-01/09-01/11-373, para. 248-267 (“Ruto and Sang Confirmation Decision”).

<sup>95</sup> Ruto and Sang Confirmation Decision, para. 268. Ultimately the PTC found it unnecessary to decide this question for the purposes of confirmation.

established that the perpetrators “caused the attacked residents of Nakuru and Naivasha to leave their homes and seek shelter in IDP camps.”<sup>96</sup>

51. In its commentary on deportation and forcible transfer, the International Law Commission in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind stated that: “[w]hereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State.”<sup>97</sup> The Prosecution notes that this position has been adopted in the jurisprudence of the *ad hoc* tribunals. In *Krnojelac*,<sup>98</sup> the appeals chamber found that “[t]he prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of the territory entail the criminal responsibility of the perpetrator, *not the destination to which these inhabitants are sent.*”<sup>99</sup>

52. Therefore, to establish forcible transfer, it is sufficient for the Prosecution to establish that the victims were displaced from their homes and other places where they were lawfully present to locations anywhere within the State of Kenya, whether inside or outside of the Rift Valley. As discussed in Part II below, there is ample evidence led by the Prosecution on which the Chamber may conclude that persons were displaced from places where they were lawfully present to other locations, including police stations and IDP camps.

## 9. The Prosecution case does not exceed the facts and circumstances of the Updated Document Containing the Charges

53. The Prosecutor notes the arguments of the Sang Defence on the issue of exceeding the facts and circumstances alleged in the UDCC.<sup>100</sup> Insofar as these

<sup>96</sup> ICC-01/09-02/11-382-Conf, paras. 243-244.

<sup>97</sup> Commentary to the Code, Article 18, para. 13.

<sup>98</sup> *Prosecutor v Milorad Krnojelac*, IT-97-25-A, Judgement, 17 September 2003 (“*Krnojelac Appeals Chamber Judgement*”).

<sup>99</sup> *Krnojelac Appeals Chamber Judgement*, para. 218 (emphasis added).

<sup>100</sup> Sang NCTA Motion, paras. 35-43.

arguments relate to the Prosecution's request to give notice of possible legal re-characterisation of the facts under regulation 55(2)<sup>101</sup> this issue has been previously litigated before the Chamber and therefore the Prosecution relies on its prior written and oral submissions on this matter.<sup>102</sup>

54. However, the Sang Defence argument goes further. It asserts, in abstract, that certain evidence presented by the Prosecution cannot be taken into account, except for limited purposes, since it exceeds the facts and circumstances charged. The Sang Defence notes that "in determining the guilt or innocence of the accused, the Chamber can only rely on evidence which links the accused with the allegations that are set out in the Prosecutor's UDCC, and not with any other allegations."<sup>103</sup> However, they then proceed to extrapolate the argument that "[t]he Prosecution cannot rely on evidence relating to events outside the temporal and geographical scope of the charges to fill gaps in its case."<sup>104</sup>
55. This argument is fatally flawed, as it conflates two distinct concepts, namely, the issues of the *factual allegations* underpinning the charges and *evidence* led in support thereof. While the material facts and circumstances alleged in the UDCC may not be varied during the trial, nor exceeded by the Chamber in its decision under article 74, the same restriction does not apply to the evidence that may be led by the parties, or relied upon by the Chamber. The DCC need not describe all of the evidence that the Prosecution intends to lead. Rather, it is sufficient that the relevant evidence is properly disclosed and identified in the Prosecution's List of Evidence. Indeed, these are normally prerequisites for the admission of evidence. Thus, the Prosecution submits that the Chamber may freely assess all admitted evidence on the record in deciding whether or not the NCTA threshold has been met, provided it is not manifestly incapable of belief.

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<sup>101</sup> See e.g. Sang NCTA Motion, para. 35.

<sup>102</sup> ICC-01/09-01/11-1951 ("Prosecution Request for Sang Rule 55(2) Notice") and ICC-01/09-01/11-T-208-ENG.

<sup>103</sup> Sang NCTA Motion, para. 36.

<sup>104</sup> Sang NCTA Motion, para. 36. See also, Ruto NCTA Motion, para. 138, which makes a similar argument.

56. Furthermore, the Sang Defence argues that evidence relating to events outside the temporal and geographical scope of the charges “can only be relevant to demonstrate the context in which the crimes charged were committed, the existence of a Network, or that the accused had the requisite knowledge and intent.”<sup>105</sup> However, the authorities relied on do not support such a narrow compartmentalisation of the evidence. The ICC authorities quoted *permit* the Prosecution to mention “any event which occurred before or during the commission of the acts or omission with which the suspect is charged, especially if that would be helpful in better understanding the context in which the conduct charged occurred.”<sup>106</sup> However, they do not *limit* the Prosecution to this circumstance. The *Šešelj* case in fact provides authority for the fact that the Prosecution may also rely on evidence outside of the temporal or geographical scope of the charges for an additional purpose: namely to establish pattern evidence.<sup>107</sup> Although in that case it was used to prove the Accused’s participation in a joint criminal enterprise, it is submitted that there is no reason in law why such evidence may not also be used to support proof of the *actus reus*.<sup>108</sup>

57. In the instant case, it is also important to distinguish between the temporal and geographical limits of the commission of the crimes charged by the direct perpetrators, and the accessory contributions allegedly made by Mr Sang to the commission of those crimes. While the former are constrained by the temporal and geographical scope described in the charges,<sup>109</sup> the latter are not. The only qualification in the UDCC as regards Mr Sang’s contribution is that it was made either “prior to the attacks” or “during the attacks”.<sup>110</sup> Thus, any relevant

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<sup>105</sup> Sang NCTA Motion, para. 36. *See also*, Ruto NCTA Motion para. 138, fn. 416, which simply states that such evidence “may be relevant to prove the contextual elements of the crimes”.

<sup>106</sup> *See e.g. Lubanga*, ICC-01/04-01/06-803-tEN, para. 152.

<sup>107</sup> Otherwise called ‘similar fact’ evidence. *Prosecutor v. Šešelj*, Decision on Appeal against the Trial Chamber’s Oral Decision of 9 January 2008, 11 March 2008, paras. 19-22.

<sup>108</sup> *See e.g. Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-T, 18 May 2012, paras. 99-101.

<sup>109</sup> The Prosecution will demonstrate below at para 64 *et seq.* that there is sufficient evidence to establish the commission of crimes in respect of at least one incident alleged in the UDCC for each charge.

<sup>110</sup> UDCC, paras. 126 – 129.

evidence of conduct by Mr Sang prior to or during the attacks charged may be relied upon to establish that he in fact made a contribution to the crimes in any manner alleged in the UDCC. However, even subsequent conduct may be relied upon for the purposes of establishing *mens rea* or as pattern evidence.

58. Thus, the Prosecution submits that the argument that the evidence presented exceeds the facts and circumstances alleged in the UDCC is unpersuasive and should be rejected.
59. A related complaint of the Sang Defence is that the Prosecution is seeking to rely on new evidence that was not confirmed by the PTC.<sup>111</sup> As noted above, however, the Trial Chamber has already confirmed that “the Prosecution need not introduce the same evidence at trial as it did for confirmation.”<sup>112</sup> This position finds support in other jurisprudence of the Court, such as the *Kenyatta* case.<sup>113</sup> The Sang Defence complaint should therefore be rejected.

#### **10. Mr Sang’s utterances do not amount to protected speech**

60. The Sang Defence argue that “this Trial Chamber ought not to find that any alleged broadcasts or statements or political rhetoric made by Mr Sang of an anti-Kikuyu or anti-PNU nature are anything but protected opinions.”<sup>114</sup>
61. The Prosecution acknowledges that there is a general agreement in international law that offending, shocking, or disturbing speech is protected by the right to freedom of expression.<sup>115</sup> The right to freedom of speech, however, is not an absolute right. Such protection is not accorded to “all forms of expression which spread, incite, promote or justify hatred based on intolerance.”<sup>116</sup> The Prosecution notes that pursuant to article 21(3) of the Statute, the application and interpretation of the Court’s law must be consistent

<sup>111</sup> Sang NCTA Motion, paras. 22, 37-43.

<sup>112</sup> Decision No. 5, para. 14.

<sup>113</sup> ICC-01/09-02/11-728, para. 105.

<sup>114</sup> Sang NCTA Motion, para. 48.

<sup>115</sup> ECHR, *Jersild v Denmark*, Appl. no. 15890/89, Judgment, 23 September 1994, paras. 28-35; ECHR, *Handyside v the UK*, Appl. no. 5493/72, Judgment, 7 December 1976, para. 49.

<sup>116</sup> ECHR, *Erbakan v Turkey*, Appl. no. 59405/00, Judgment, 6 July 2006, para. 56; *see also* ECHR, *Seurot v France*, Appl. no. 57383/00, Admissibility Decision, 18 May 2004.

with internationally recognised human rights, and be without any adverse distinction founded on grounds such as political opinion, ethnic origin, or other status. On this basis this jurisprudence on international law provides guidance for the Chamber.

62. For the reasons set out in Part V below, Mr Sang's utterances amount to criminal conduct that does not fall within the parameters of protected speech, but rather constitute an abuse of the right to freedom of expression. Before and during 2007-2008 post-electoral violence, Mr Sang made these utterances with intent and knowledge that his words would lead to intolerance, discrimination and violence against perceived PNU supporters, in particular from Kikuyu, Kamba, and Kisii ethnic groups. Likewise, Kalenjin PNU supporters were also targeted.
63. Consequently, affording protected status to Mr Sang's hate speech would defeat the purpose of the Statute, namely punishing and preventing the most serious crimes of concern to the international community as a whole. Moreover, such a position is inconsistent with international law.

## **PART II EVIDENCE THAT CRIMES WERE COMMITTED**

64. In this section, the Prosecution will show that it has adduced sufficient evidence that, a reasonable court might conclude, establishes the required elements of the crimes of Murder, Deportation or Forcible Transfer and Persecution as Crimes Against Humanity as charged in the UDCC.
65. The Prosecution submits that there is also ample evidence to show that all the necessary contextual elements establishing the commission of crimes against humanity exist. However, since the Prosecution's evidence establishing the contextual elements largely overlaps with the evidence in this part and the parts

dealing with the criminal responsibility of Messrs Ruto and Sang, it will be more efficient to address the contextual elements later in this Response.<sup>117</sup>

66. As noted in Part I above, the Chamber has held that in deciding whether or not the evidence on record establishes the charges alleged in the UDCC, it is “appropriate to consider whether or not there is evidence supporting *any one* of the incidents charged (*emphasis added*).”<sup>118</sup>
67. The Prosecution has outlined above the reasons why the Ruto Defence’s request for reconsideration of this clear instruction should be rejected.<sup>119</sup> Accordingly, the Prosecution will proceed on the basis of the Chamber’s direction and will provide an analysis of evidence presented at trial with respect to *two* incidents per crime, on the understanding that the Chamber will make its finding on the basis of one incident per crime only.

**A. Count 1: Murder constituting a crime against humanity (article 7(1)(a))**

68. The required elements of the crime against humanity of murder are:
- i. The perpetrator killed one or more persons.
  - ii. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
  - iii. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>120</sup>

**1. Kiambaa Church, Greater Eldoret Area, Uasin Gishu District<sup>121</sup>**

69. As alleged in the UDCC, the evidence at trial establishes that the Kenya Assembly of God Church in Kiambaa (Kiambaa Church) was attacked and burned by armed Kalenjin warriors on 1 January 2008. The victims were the

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<sup>117</sup> See Part VI below.

<sup>118</sup> Decision No. 5, para. 27.

<sup>119</sup> See para. 47 above.

<sup>120</sup> For evidence supporting (ii) and (iii), see Parts IV, V and VI below.

<sup>121</sup> The Prosecution notes the Ruto Defence concedes that there is sufficient evidence to establish that Kalenjin youths attacked Kiambaa on 1 January 2008, killing Kikuyus, *see* Ruto NCTA Motion, para. 162.

most vulnerable of Kiambaa's Kikuyu community who were killed whilst taking refuge in the church. The Kalenjin warriors attacked Kiambaa village from different directions. The perpetrators poured fuel on the church and on mattresses that were used to block the doors. They then set fire to the church. The attackers deliberately trapped the victims in the church, burning many to death. Others were hacked to death by the Kalenjin youth outside the church as they tried to escape the inferno. Altogether, between 17 and 35 men, women, children, elderly, and disabled persons were killed.<sup>122</sup>

70. [REDACTED], Witnesses **P-0536** [REDACTED] saw armed Kalenjin attackers descend upon Kiambaa village from different directions. They had painted faces and were bearing machetes, axes, sticks and spears.<sup>123</sup> [REDACTED] many other Kikuyu inhabitants of Kiambaa village and surround took refuge inside the Kiambaa Church. As the Kalenjin youth approached the church, they burned houses in Kiambaa village<sup>124</sup> and then began to pelt the church with stones.<sup>125</sup> The church was then ignited by the Kalenjin attackers. **P-0536** recognised ODM candidate and local youth leader Steven Kikweti Shamalan,<sup>126</sup> whom she saw throw a jerry-can containing petrol on the roof of the church.<sup>127</sup> The Kalenjin youth then piled up mattresses against the sides of the church and lit them.<sup>128</sup> The attackers had also blocked the exits of the church with bicycles and mattresses, trapping the Kikuyu civilians inside and preventing their escape.<sup>129</sup> As a result, between 17 and 35 people were burned inside the church by the Kalenjin youth that day, including babies and children.<sup>130</sup> Specific

<sup>122</sup> UDCC, paras. 76, 77.

<sup>123</sup> **P-0536**, T-29, 37:17 and 38:13–40:2; [REDACTED].

<sup>124</sup> [REDACTED]; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420.

<sup>125</sup> [REDACTED]; **P-0536**, T-29, 40:22–23.

<sup>126</sup> **P-0536** refers to Steven Shamalan, whereas [REDACTED] an ODM candidate for the elections and as being a local leader. The Prosecution and Sang Defence agreed that this individual's first name is Steven. See **P-0536**, 41:23–42:4 [REDACTED].

<sup>127</sup> **P-0536**, T-29, 40:10–12, 41:23–42:14, 44:1–3 and 50:22–25.

<sup>128</sup> **P-0536**, T-29, 51:4–6; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0421.

<sup>129</sup> **P-0536**, T-29, 53:11– 54:4 and T-33, 51:11–20; EVD-T-OTP-00003/ [KEN-OTP-0033-0104](#), time stamp 07:18–07:50; [REDACTED].

<sup>130</sup> EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420 and 0423; EVD-T-OTP-00083/ [KEN-OTP-0006-1021](#) at 1026.

instances of deaths inside the church included [REDACTED],<sup>131</sup> [REDACTED],<sup>132</sup> [REDACTED]<sup>133</sup> and [REDACTED]'s wife and child.<sup>134</sup> **P-0536** said she saw at least eight burned bodies including women and children when she returned to what remained of the church<sup>135</sup> and more Kikuyu bodies were transported to the mortuary.<sup>136</sup> Injured victims of the Kiambaa attack were transported to the Moi Teaching and Referral Hospital, where records indicate 11 others died from their injuries at, or on the way to the Hospital.<sup>137</sup>

71. After **P-0536** managed to escape the burning church, she witnessed the Kalenjin attackers murder village Elder Baba Shalagu and rape and murder Margaret Wanjiro.<sup>138</sup> [REDACTED].<sup>139</sup> [REDACTED],<sup>140</sup> [REDACTED].<sup>141</sup> **P-0536** described the scene outside the Kiambaa Church as a “slaughter house” and saw at least another three dead bodies that had been hacked with machetes.<sup>142</sup>
72. Direct perpetrators of the attack on Kiambaa and the burning of the KAG church included Network member Steven Shamalan, Emmanuel Bor, Kimei Bor, Brown and Rono.<sup>143</sup> **P-0536** saw Shamalan,<sup>144</sup> Emmanuel Bor, Kimei Bor and Brown, all local Kalenjin known to her, participate in the attack.<sup>145</sup> [REDACTED].<sup>146</sup>
73. [REDACTED],<sup>147</sup> [REDACTED].<sup>148</sup> [REDACTED].<sup>149</sup> The meetings [REDACTED] were attended by up to 3000 Kalenjin youth<sup>150</sup> and significantly, youth leaders

<sup>131</sup> **P-0536**, T-29, 55:15-19, 56:11-57:1 and T-33, 55:12-16 and 57:5-7.

<sup>132</sup> [REDACTED].

<sup>133</sup> [REDACTED]. See also **P-0189**, T-49, 58:20-59:6.

<sup>134</sup> **P-0376**, T-51, 80:16-25.

<sup>135</sup> **P-0536**, T-33, 42:11-16 and T-33, 43:19-44:8. See also **P-0189**, T-49, 58:20-59:6.

<sup>136</sup> **P-0536**, T-33, 56:1-18; **P-0189**, T-49, 56:7-57:12.

<sup>137</sup> EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420; EVD-T-OTP-00060/ [KEN-OTP-0011-0640](#) at 0643.

<sup>138</sup> **P-0536**, T-29, 60:20-61:19 and T-33, 43:6-18; EVD-T-OTP-00002.

<sup>139</sup> [REDACTED].

<sup>140</sup> [REDACTED].

<sup>141</sup> [REDACTED].

<sup>142</sup> **P-0536**, T-33, 44:9-13 and 48:22-49:11.

<sup>143</sup> **P-0536**, T-34, 15:22-16:19.

<sup>144</sup> **P-0536**, T-29, 40:10-12, 41:23-42:14, 44:1-3 and 50:22-25, 25:3-7, 28:8-30:10. Note that Shamalan was also a Network member, see above paras. 150 and 266.

<sup>145</sup> **P-0536**, T-29, 59:12-60:12 and T-33, 21:13-22.

<sup>146</sup> [REDACTED].

<sup>147</sup> [REDACTED].

Brown, Shamalan [Chamalan], Emanuel and Kimei Bor were present<sup>151</sup> – perpetrators who subsequently took part in the attack on Kiambaa on 1 January.

## 2. Huruma, Greater Eldoret Area, Uasin Gishu District

74. The evidence supports the allegations in the UDCC that on or after 1 January 2008, Kalenjin youth attacked Huruma and its Kikuyu inhabitants, burning houses and killing up to 14.<sup>152</sup>
75. [REDACTED].<sup>153</sup> [REDACTED].<sup>154</sup> Despite the Ruto Defence's disputing the geographical composition of Huruma, its assertion that "the OTP's own evidence establishes that none of these locations are in Huruma"<sup>155</sup> is incorrect and misleading. Indeed, when the Defence put their theory regarding the geographical scope of Huruma locality to Prosecution witnesses, it was either refuted<sup>156</sup> or responses were inconclusive.<sup>157</sup> There is thus sufficient evidence upon which a reasonable Chamber may conclude that the relevant events took place within Huruma.
76. Before and on 1 and 2 January 2008, Kalenjin youth armed with *pangas*, *rungas*, bows and arrows attacked the Huruma locality and burned the houses of its Kikuyu residents.<sup>158</sup>
77. [REDACTED].<sup>159</sup> [REDACTED].<sup>160</sup> **P-0508** provided eyewitness evidence of a dead body at a roadblock between Huruma and [REDACTED] on 1 January. Although he was unsure of the ethnicity of the victim, the roadblock was

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<sup>148</sup> [REDACTED].

<sup>149</sup> [REDACTED].

<sup>150</sup> **P-0536**, T-34, 46:7-23.

<sup>151</sup> **P-0536**, T-34, 47:12-17, 58:11-25, 63:11-18 and T-39, 22:17-19, 23:16-18, 27:10-13.

<sup>153</sup> [REDACTED].

<sup>153</sup> [REDACTED].

<sup>154</sup> [REDACTED].

<sup>155</sup> Ruto NCTA Motion, para. 144.

<sup>156</sup> [REDACTED].

<sup>157</sup> [REDACTED].

<sup>158</sup> [REDACTED].

<sup>159</sup> [REDACTED].

<sup>160</sup> [REDACTED].

manned by armed Kalenjin warriors and the witness was convinced the same would happen to him if the Kalenjin found out he was Kikuyu.<sup>161</sup> [REDACTED].<sup>162</sup> Documentary evidence tendered at trial shows that up to 14 people were killed in Huruma during the violence perpetrated by Kalenjin attackers.<sup>163</sup>

78. The evidence elicited at trial provides an adequate foundation upon which a reasonable court may find that the crime of murder under article 7(1)(a) was committed in both Kiambaa and Huruma between 1 and 4 January 2008.

**B. Count 2: Forcible transfer constituting a crime against humanity (article 7(1)(d))**

79. The required elements of the crime against humanity of deportation or forcible transfer are:
- i. The perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
  - ii. Such person or persons were lawfully present in the area from which they were so deported or transferred.
  - iii. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
  - iv. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
  - v. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>164</sup>
80. As discussed above,<sup>165</sup> the Prosecution rejects the Defence assertion that the evidence must show that Kikuyus or perceived PNU supporters were forcibly

<sup>161</sup> P-0508, T-104, 68:9-19.

<sup>162</sup> [REDACTED].

<sup>163</sup> EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0423 and EVD-T-OTP-00083/ [KEN-OTP-0006-1021](#) at 1026.

<sup>164</sup> For evidence supporting (iii), (iv) and (v), see Parts IV, V and VI below.

<sup>165</sup> See paras. 48-52 above.

transferred outside the Rift Valley.<sup>166</sup> In addition, the elements of the crime of deportation or forcible transfer are silent as to how *long* the persons must be displaced –only requiring that they *are* forced out, which is the criminal act. [REDACTED].<sup>167</sup>

**1. Kiambaa, Greater Eldoret Area, Uasin Gishu District<sup>168</sup>**

81. The trial evidence supports the allegation that, between 1 and 4 January 2008, armed Kalenjin warriors attacked Kiambaa village and burned and looted houses. As a result, Kiambaa's residents fled their homes and many took refuge in the Kiambaa Church. Thereafter, the Kalenjin attackers set fire to the church. Many perished in the inferno or outside the church and those who managed to escape had no choice but to flee for their lives once more to police stations or IDP camps. Most of Kiambaa's Kikuyu residents were permanently displaced and never returned to live in Kiambaa.<sup>169</sup>

**(a) Expulsion or coercive acts**

82. The trial evidence establishes that on 1 January 2008, Kiambaa's residents fled their homes and took refuge in the KAG church for fear of being attacked by Kalenjin youth.<sup>170</sup> Up to 500 households were forced to leave their homes in Kiambaa village, filling the KAG church to capacity.<sup>171</sup> [REDACTED].<sup>172</sup> [REDACTED].<sup>173</sup> Witnesses were able to identify some of the Kalenjin attackers,<sup>174</sup> who were armed with *pangas*, *rungas*, bows, arrows and sticks. [REDACTED].<sup>175</sup> Many of Kiambaa's Kikuyu residents were killed.<sup>176</sup> [REDACTED].<sup>177</sup> [REDACTED].<sup>178</sup> [REDACTED].<sup>179</sup> [REDACTED].<sup>180</sup>

<sup>166</sup> Ruto NCTA Motion, para. 164.

<sup>167</sup> See Ruto NCTA Motion, para. 214.

<sup>168</sup> The Prosecution notes that the Ruto Defence accepts that many individuals were forced to flee their homes in Kiambaa, Ruto NCTA Motion, para. 185.

<sup>169</sup> UDCC, paras. 76-78.

<sup>170</sup> **P-0536**, T-29, 34:22–35:6; **P-0405**, T-122, 19:13–20:17; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420.

<sup>171</sup> **P-0536**, T-29, 35:12-22.

<sup>172</sup> [REDACTED].

<sup>173</sup> [REDACTED]; **P-0536**, T-29, 38:13–40:8; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420.

<sup>174</sup> See para. 72 above.

<sup>175</sup> [REDACTED]; **P-0536**, 39:3-40:23; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0421.

**(b) Deported or forcibly transferred to another location**

83. Kiambaa's Kikuyu residents were forced to flee their homes and Kiambaa village altogether after the vicious attack on the town and the church. According to expert evidence, up to 123 structures were burned in Kiambaa village,<sup>181</sup> including the church,<sup>182</sup> rendering most of Kiambaa uninhabitable. Over 80 Kikuyu were admitted to hospital due to injuries sustained during the attack.<sup>183</sup> Those that were able fled to police stations, churches, the Eldoret Showgrounds and other IDP camps, where conditions were tough.<sup>184</sup> [REDACTED].<sup>185</sup> P-0536 was forced to take refuge at the Eldoret Showgrounds where conditions were "difficult" due to exposure to the harsh elements and IDPs suffered due to lack of food and amenities.<sup>186</sup>

**(c) Those persons were lawfully present in the area**

84. In 2007 and during the PEV, Kiambaa was predominantly made up of Kikuyus.<sup>187</sup> Those who fled their homes were living in Kiambaa with their families and had been there for many years and, as Kenyan citizens, were lawful residents of the area.<sup>188</sup>

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<sup>176</sup> See above paras. 69-71 for evidence of murder in Kiambaa.

<sup>177</sup> [REDACTED].

<sup>178</sup> [REDACTED].

<sup>179</sup> [REDACTED]; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420.

<sup>180</sup> [REDACTED].

<sup>181</sup> P-0488, T-109, 71:11-72:14; see generally EVD-T-OTP-00050/ [KEN-OTP-0092-1380](#) and at 1384 indicating the number of structures destroyed by fire in Kiambaa.

<sup>182</sup> EVD-T-OTP-00003/ [KEN-OTP-0033-0104](#), timestamp 07:18-07:50.

<sup>183</sup> [REDACTED]; EVD-T-OTP-00060/ [KEN-OTP-0011-0640](#); EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420.

<sup>184</sup> P-0536, T-33, 42:17- 43:4, 54:1- 55:11 and T-41, 22:13-16; [REDACTED]; P-0376, T-51, 79:14- 80:4 and 80:16-25; [REDACTED]; EVD-T-OTP-00004/ [KEN-OTP-0080-0731](#), timestamp 21:30 - 24:55 (see P-0536, T-33, 58:13- 59:10); EVD-T-OTP-00005/ [KEN-OTP-0026-4599](#), timestamp 2:30 to 2:45 (see P-0536, T-33, 60:24-61:16); P-0423, T-68, 22:20-23:13.

<sup>185</sup> [REDACTED].

<sup>186</sup> P-0536, T-33, 42:17-43:4, 54:1-55:11 and 60:24-61:16 and EVD-T-OTP-00005/ [KEN-OTP-0026-4599](#), timestamp 02:30-02:45.

<sup>187</sup> P-0536 estimates that there were at least 500 Kikuyu households in Kiambaa (T-29, 41:18-20). See also P-0536, T-29, 23:3-5; [REDACTED]; P-0376, T-51, 95:13-22.

<sup>188</sup> [REDACTED].

## 2. Kapsabet Town, Nandi District

85. Trial evidence establishes that from 30 December 2007, after the announcement of the results of the presidential election, to 16 January 2008, perpetrators attacked, looted and burned businesses and properties believed to belong to PNU supporters in Kapsabet. They attempted to attack IDPs seeking refuge at a local police station. Other perpetrators blocked the roads to Kapsabet town. IDPs fled to Kapsabet town police station, which sheltered IDPs from Kapsabet town and surrounding areas.<sup>189</sup>

### *(a) Expulsion or coercive act*

86. After the announcement of the election results, Kalenjin youth started torching pre-selected Kikuyu houses in Kapsabet.<sup>190</sup> At trial, **P-0442** testified that on 1 January 2008, [REDACTED] flee, as their houses were going to be burnt down. As a result, **P-0442** left her home [REDACTED].<sup>191</sup> As **P-0442** was fleeing, she saw a group of about 10 armed Kalenjin youth known to her arrive carrying jerry-cans of petrol and hid in the bush.<sup>192</sup> From her hiding place, she could hear the youths discussing which houses they would torch, commencing with the house of a Kikuyu named [REDACTED]. She watched as they poured petrol on the ground floor while other youth went upstairs. Shortly thereafter, **P-0442** saw [REDACTED] house on fire. It was also pillaged.<sup>193</sup> **P-0442** saw the youth take out a piece of paper and read from it, [REDACTED].<sup>194</sup> [REDACTED].<sup>195</sup> Much of Kapsabet was destroyed – Kikuyu businesses and houses were broken into and looted and others burned down.<sup>196</sup> Armed Kalenjin youth set up roadblocks around Kapsabet in order to target those Kikuyu fleeing Kapsabet.<sup>197</sup>

<sup>189</sup> UDCC, paras. 81-82.

<sup>190</sup> **P-0442**, T-99, 12:3–13:5; EVD-T-OTP-00332/ [KEN-D10-0001-0250](#) at 0252-0254.

<sup>191</sup> [REDACTED].

<sup>192</sup> **P-0442**, T-99, 16:6-13 and 16:25–17:10.

<sup>193</sup> **P-0442**, T-99, 17:11–18:17 and 19:7-8.

<sup>194</sup> [REDACTED].

<sup>195</sup> [REDACTED].

<sup>196</sup> **P-0268**, T-61, 95:19–97:22.

<sup>197</sup> **P-0442**, T-99, 47:3–52:1.

**(b) Deported or forcibly transferred to another location**

87. Kapsabet's Kikuyu and Kisii residents had no choice but to flee their homes and their town.<sup>198</sup> Many took refuge at Kapsabet and Eldoret Police Stations, subsequently ending up at the Eldoret Showgrounds.<sup>199</sup> **P-0442** arrived at Kapsabet Police Station on 1 January, and over the next few days saw thousands of Kikuyu, Kisii and Kamba from all over Nandi take refuge there. Some Kikuyu were badly injured with machete or arrow wounds.<sup>200</sup> Many of Kapsabet's inhabitants were forced to take up residence at the IDP camp at the Eldoret Showgrounds,<sup>201</sup> [REDACTED].<sup>202</sup> [REDACTED].<sup>203</sup> The displaced victims of the attack on Kapsabet suffered at the Showgrounds, where conditions were dire.<sup>204</sup>

**(c) Those persons were lawfully present in the area**

88. In 2007, Kapsabet was made up of Kikuyu and Kalenjin inhabitants.<sup>205</sup> As Kenyan citizens, the Kikuyu living and working in Kapsabet were lawfully present before they were forced to leave by Kalenjin attackers during the PEV.<sup>206</sup>

89. The evidence elicited at trial thus provides an adequate foundation upon which a reasonable court may find that the crime of deportation or forcible transfer under article 7(1)(d) was committed in Kiambaa between 1 and 4 January 2008 and in Kapsabet between 30 December 2007 and 16 January 2008.

<sup>198</sup> **P-0268**, T-61, 73:6-14, 75:6-78:25; **P-0442**, T-99, 33:17-36:25, 39:9-42:21, 46:15-47:2, 52:11-25, 54:10-19 and 60:21-61:15.

<sup>199</sup> **P-0442**, T-99, 52:13-53:16 and 60:22-61:19; EVD-T-OTP-00078/ [KEN-OTP-0012-0478](#) at 0480.

<sup>200</sup> **P-0442**, T-99, 52:13-53:16.

<sup>201</sup> **P-0268**, T-62, 8:20-9:1.

<sup>202</sup> [REDACTED].

<sup>203</sup> [REDACTED].

<sup>204</sup> [REDACTED]; **P-0536**, T-33, 60:24-61:16 and EVD-T-OTP-00005/ [KEN-OTP-0026-4599](#), timestamp 02:30-02:45; [REDACTED]; **P-0376**, T-51, 79:14-80:4 and 80:16-25; EVD-T-OTP-00004/ [KEN-OTP-0080-0731](#), timestamp 21:30 - 24:55 (see **P-0536**, T-33, 58:13-59:10); EVD-T-OTP-00005/ [KEN-OTP-0026-4599](#), timestamp 2:30 to 2:45 (see **P-0536**, T-33, 60:24-61:16); **P-0423**, T-68, 22:20-23:13.

<sup>205</sup> **P-0442**, T-98, 40:22-41:4.

<sup>206</sup> [REDACTED].

### 3. Other locations of forcible transfer or deportation

90. The Prosecution's evidence elicited during the trial satisfies the elements required to prove displacement or forcible transfer in other incidents including, but not limited to Yamumbi, Huruma and Turbo. Yamumbi was attacked after the announcements of the election results and its Kikuyu inhabitants had no alternative but to flee.<sup>207</sup> Armed Kalenjin warriors burned and looted Kikuyu houses and businesses, completely destroying their village and injuring its inhabitants.<sup>208</sup> Many were displaced.<sup>209</sup> Also in the Greater Eldoret Area, Huruma was attacked by Kalenjin after the announcement of the election results and in the days that followed. [REDACTED].<sup>210</sup> The Kalenjin youth attacked Huruma's Kikuyu residents, injuring many, with the attack resulting in up to 14 deaths.<sup>211</sup> Huruma's Kikuyu residents had no option but to flee as a result of the attack.<sup>212</sup> Those that managed to get through roadblocks manned by Kalenjin youth<sup>213</sup> fled to the Divisional Police Headquarters, Eldoret Showgrounds and to IDP camps in Nakuru.<sup>214</sup> The Prosecution's evidence also shows that Kikuyu were deported or forcibly transferred from Turbo town on 31 December and the days that followed. [REDACTED]<sup>215</sup> [REDACTED].<sup>216</sup> As a result, many of Turbo's Kikuyu residents were displaced and were forced to become IDPs living in tents at the Turbo Police Station, Eldoret Police Station and other makeshift IDP camps.<sup>217</sup>

<sup>207</sup> **P-0508**, T-105, 10:12–24; **P-0423**, T-68, 22:8–23:13; **P-0405**, T-122, 34:19–36:20.

<sup>208</sup> **P-0423**, T-68, 20:22–21:10; [REDACTED]; **P-0189**, T-49, 22:9–19; EVD-T-OTP-00060/ [KEN-OTP-0011-0640](#) at 0643–0644.

<sup>209</sup> **P-0405**, T-122, 36:3–20 and 37:2–11; **P-0423**, T-68, 36:25–37:3 [REDACTED]; **P-0189**, T-49, 20:19–21:5 and 24:5–7.

<sup>210</sup> [REDACTED].

<sup>211</sup> [REDACTED]; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420; EVD-T-OTP-00060/ [KEN-OTP-0011-0640](#) at 0642–0643.

<sup>212</sup> **P-0487**, T-55, 21:4–13, 25:20–27:6; **P-0508**, T-104, 72:11–16.

<sup>213</sup> **P-0508**, T-104, 68:9–19; **P-0535**, T-71, 36:2–40:16.

<sup>214</sup> **P-0487**, T-55, 31:1–21; **P-0508**, T-105, 10:3–11:18; **P-0442**, T-99, 60:22–61:1.

<sup>215</sup> [REDACTED].

<sup>216</sup> [REDACTED].

<sup>217</sup> **P-0613**, T-119, 83:13–25 and 84:1–3; EVD-T-OTP-00107/ [KEN-OTP-0033-0009](#); **P-0469**, T-107, 42:14–16; [REDACTED].

### **C. Count 3: Persecution as a crime against humanity (article 7(1)(h))**

91. The required elements of the crime against humanity of persecution are:

- i. The perpetrator severely deprived, contrary to international law, one of more persons of fundamental rights.
- ii. 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.
- iii. 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.
- iv. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
- v. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- vi. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>218</sup>

92. The Prosecution's evidence shows that the Kikuyu population of the Rift Valley were largely affiliated with the PNU party,<sup>219</sup> and were widely perceived by the Kalenjin community to be PNU supporters. For this reason Kikuyu, [REDACTED],<sup>220</sup> were attacked by Kalenjin ODM-supporters.<sup>221</sup> Their aim was to oust the Kikuyu and other PNU supporters from the Rift Valley,<sup>222</sup> and did so

<sup>218</sup> For evidence supporting (iv), see paras. 68-90 above and for (v) and (vi), see Parts IV, V and VI below.

<sup>219</sup> **P-0604**, T-129, 44:5-9 and [REDACTED]; **P-0464**, T-89, 37:15-18; EVD-T-OTP-00044/ [KEN-OTP-0093-1308](#) at 1323 and 1329; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420.

<sup>220</sup> [REDACTED].

<sup>221</sup> [REDACTED]; **P-0487**, T-56, 8:2-9:6.

<sup>222</sup> **P-0464**, T-89, 44:7-10, 58:24-25; [REDACTED]; **P-0356**, T-77, 49:2-4; **P-0423**, T-67, 33:5-7.

by burning and looting houses, attacking them and killing them.<sup>223</sup> This desire to expel the Kikuyu from the Rift Valley must also be understood against the background of the longstanding friction over land ownership in the Rift Valley.<sup>224</sup>

# 1. Kiambaa, Greater Eldoret Area, Uasin Gishu District

## *i – iii. Discriminatory intent resulting in severe deprivation of fundamental rights*<sup>225</sup>

93. The trial evidence establishes that from 1 January 2008, Kiambaa's Kikuyu residents were targeted due to their perceived political affiliation with the PNU by way of murdering and forcibly displacing PNU supporters.<sup>226</sup> Perpetrators armed with traditional weapons attacked the Kiambaa area and blocked roads to prevent PNU supporters from escaping. A church in Kiambaa filled with sheltering PNU supporters was set alight by the attackers, killing up to 35 victims. Perceived PNU supporters who attempted to flee the fire were hacked to death.<sup>227</sup>

94. When armed Kalenjin youth attacked Kiambaa village – a village made up of predominantly Kikuyu inhabitants<sup>228</sup> – on 1 January 2008, their specific goal was to oust its residents, who were believed to support the PNU.<sup>229</sup> Direct perpetrators included known ODM Kalenjin affiliates like Steven Shalaman.<sup>230</sup> Kiambaa's Kikuyu residents were killed and forced to flee by their Kalenjin attackers.<sup>231</sup> [REDACTED].<sup>232</sup> Kalenjin youth set up roadblocks that targeted Kikuyus who were fleeing the attack on Kiambaa.<sup>233</sup> By killing and deporting or forcibly displacing Kiambaa's Kikuyu community, the Kalenjin attackers

<sup>223</sup> See paras. 68-78 (Murder) and 79-90 (Deportation/Forcible Transfer) above.

<sup>224</sup> **P-0464**, T-89, 27:25–29:8; EVD-T-OTP-00044/ [KEN-OTP-0093-1308](#) at 1309-1311, 1338; **P-0326**, T-43, 70:25–72:19; **P-0658**, T-163, 42:19-21; **P-0268**, T-60, 66:20–67:14 and 69:1-18; **P-0469**, T-106, 34:20–35:4.

<sup>225</sup> The Prosecution notes that the Ruto Defence agrees that the evidence adduced with regards to Kiambaa town indicates that the victims were mainly Kikuyu, perceived supporters of PNU.

<sup>226</sup> UDCC, para. 96.

<sup>227</sup> UDCC, p. 48.

<sup>228</sup> **P-0536**, T-29, 23:3-5; [REDACTED]; **P-0376**, T-51, 95:13-22.

<sup>229</sup> EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at -0420; [REDACTED].

<sup>230</sup> [REDACTED]; **P-0536**, T-29, 40:10-12, 41:23–42:14, 44:1-3 and 50:22-25.

<sup>231</sup> See paras. 68-71 (Murder) and 81-84 (Deportation/forcible transfer) above.

<sup>232</sup> [REDACTED].

<sup>233</sup> [REDACTED]; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0798.

severely deprived the victims of their fundamental rights, including the right to life, the right not to be subjected to cruel, inhuman or degrading treatment and the right to private property.<sup>234</sup>

## 2. Huruma, Greater Eldoret Area, Uasin Gishu District

### *i – iii. Discriminatory intent resulting in severe deprivation of fundamental rights*

95. On or after 1 January 2008, direct perpetrators attacked Huruma. They burned houses and attacked its Kikuyu inhabitants. Perpetrators burned houses and killed PNU supporters, causing residents to flee because of the attack. Roadblocks were erected and manned on all major roads, where persons perceived to be PNU supporters were targeted.<sup>235</sup>
96. Huruma was targeted by Kalenjin attackers after the announcement of the election results and on 1 and 2 January 2008. Huruma was a mixed community, but had a large Kikuyu population who were perceived as PNU supporters.<sup>236</sup> Its Kikuyu residents were attacked and ousted from their homes which were burned.<sup>237</sup> **P-0487** testified that Kalenjin houses were marked with “ODM” and “41” indicating that those properties were to be spared, and that only Kikuyu houses were to be burned.<sup>238</sup> [REDACTED] testified that 360 Kikuyu houses and one Kalenjin house were burned in Huruma locality during the PEV.<sup>239</sup> The Kalenjin youth attacked Huruma’s Kikuyu residents, injuring many, with the attack resulting in up to 14 deaths.<sup>240</sup> Huruma’s Kikuyu residents were forced to flee as a result of the attack.<sup>241</sup> Kalenjin youth set up roadblocks in and around Huruma, specifically targeting Kikuyus perceived to be PNU supporters who

<sup>234</sup> See articles 6(1), 7 and 8 of the International Covenant on Civil and Political Rights.

<sup>235</sup> UDCC, para. 73 and pp. 45, 47.

<sup>236</sup> **P-0487**, T-53, 86:1-3 [REDACTED] and T-54, 50:1-11; **P-0508**, T-104, 24:1-6 and 35:12-18; **P-0535**, T-70, 48:1-4, 49:20-25 and 51:5-6; [REDACTED].

<sup>237</sup> **P-0508**, T-104, 70:20-72:10 and T-105, 5:7-23 and 9:7-8; [REDACTED].

<sup>238</sup> **P-0487**, T-54, 96:16-97:25.

<sup>239</sup> [REDACTED].

<sup>240</sup> [REDACTED]; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420; EVD-T-OTP-00060/ [KEN-OTP-0011-0640](#) at 0642-0643.

<sup>241</sup> [REDACTED]; **P-0508**, T-104, 72:11-16.

were attempting to flee.<sup>242</sup> Those that managed to get through fled to the Divisional Police Headquarters, Eldoret Showgrounds and to IDP camps in Nakuru.<sup>243</sup> By killing and deporting or forcibly displacing Huruma's Kikuyu community, the Kalenjin attackers severely deprived the victims of their fundamental rights, including the right to life, the right not to be subjected to cruel, inhuman or degrading treatment and the right to private property.<sup>244</sup>

97. [REDACTED].<sup>245</sup> [REDACTED].<sup>246</sup>

98. The evidence elicited at trial thus provides an adequate foundation upon which a reasonable court may find that the crime of persecution under article 7(1)(h) was committed in both Kiambaa and Huruma between 1 – 4 January 2008.

### **PART III      LEGAL REQUIREMENTS OF ARTICLE 25(3)**

99. The Prosecution does not expect the Chamber to make any final determination of the legal elements for criminal responsibility under article 25(3). However, in order to demonstrate that the trial evidence satisfies the legal requirements for criminal liability, it is first necessary for the Prosecution to set out its understanding of those requirements.

#### **A. Legal requirements of article 25(3)(a)**

100. In its Decision confirming the charges in the present case, Pre-Trial Chamber II held that the objective and subjective elements of the mode of participation of indirect co-perpetration were as follows: (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner, which result in the fulfilment of the material elements of the crime; (iii) the suspect must have control over the organisation; (iv) the organisation must consist of an organised and hierarchical apparatus of power;

<sup>242</sup> **P-0508**, T-104, 68:2–69:11; **P-0535**, T-71, 36:2–40:16; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at -0429.

<sup>243</sup> **P-0487**, T-55, 31:1-21; **P-0508**, T-105, 10:3–11:18; **P-0442**, T-99, 60:22–61:1.

<sup>244</sup> See articles 6(1), 7 and 8 of the International Covenant on Civil and Political Rights.

<sup>245</sup> [REDACTED].

<sup>246</sup> [REDACTED].

(v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).<sup>247</sup>

101. The Prosecution makes the following observations on some of the legal requirements enunciated by the Pre-Trial Chamber.
102. In relation to the first objective element, the Appeals Chamber has held that an agreement or common plan between co-perpetrators may be express or implied, previously arranged, or materialise extemporaneously.<sup>248</sup> A common plan need not be specifically directed at the commission of a crime. It is sufficient that it involves a “critical element of criminality”, such that the Accused is aware that its implementation will result in the commission of a crime in the ordinary course of events.<sup>249</sup> Although the co-perpetrators must intend a particular offence, or range of offences (or be aware that they will occur in the ordinary course of events), they need not intend or know the specific instances in which those offences will be carried out.<sup>250</sup>
103. In relation to the second objective element, the Accused and their co-perpetrator(s) must each “[provide] an essential contribution to the *common plan* that resulted in the commission of the relevant crime[s]”.<sup>251</sup> This means that the contribution must be such that some or all of the crimes resulting from the implementation of the common plan “would not have been committed or

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<sup>247</sup> ICC-01/09-01/11-373, para. 292.

<sup>248</sup> ICC-01/04-01/06-3121-Red, para. 445.

<sup>249</sup> *Ibid.*, para. 446.

<sup>250</sup> See below para. 170. See also, ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Judgment, 3 April 2007, paras. 418; 420-425; SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, para. 76.

<sup>251</sup> ICC-01/04-01/06-2842, paras. 1006, 1018(ii) (emphasis added). See also ICC-01/04-01/06-3121, para. 469. At paras. 488 and 491, the Appeals Chamber refers to the “essential nature of his contribution to the common plan” and “Mr Lubanga’s [essential role] to the implementation of the common plan”. In addition, at paras. 455 and 499, the Appeals Chamber endorsed the findings and the approach of the Trial Chamber on this issue. See further, ICC-02/11-02/11-186, paras. 135-136.

would have been committed in a significantly different way”.<sup>252</sup> Co-perpetration “requires that the offence [is] the result of the combined and coordinated contributions of those involved”.<sup>253</sup> Consequently, “the prosecution does not need to demonstrate that the contribution of the accused, taken alone, caused the crime; rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan.”<sup>254</sup> The Appeals Chamber has endorsed this finding that an “agreement between [the] perpetrators, which [leads] to the commission of one or more crimes [...] ties the co-perpetrators together and [...] justifies the reciprocal imputation of their respective acts”.<sup>255</sup> The mutual attribution of the respective conduct of co-perpetrators who share a common plan means that an individual co-perpetrator who provides an essential contribution to the common plan resulting in certain crimes can be held responsible for other crime(s) to which he did not directly contribute, as long as these latter crimes were committed by his co-perpetrators in the implementation of the common plan.<sup>256</sup>

104. In relation to the third objective element listed by the Confirmation Decision in the present case, the Prosecution submits that to satisfy this element, it must prove that the Accused has the ability to cause the organisation to contribute to the crime. For example, in the *Katanga* Confirmation Decision, Pre-Trial Chamber I articulated this concept as requiring a showing that the Accused “mobilize[d] his authority and power within the organization to secure compliance with his orders”.<sup>257</sup> While compliance with orders<sup>258</sup> is one possible

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<sup>252</sup> ICC-02/11-01/11-656-Red, para. 230; ICC-02/11-02/11-186, para. 135. As to the assessment of the essential nature of a contribution, *see*, ICC-01/04-01/06-2842, paras. 1000-1001.

<sup>253</sup> ICC-01/04-01/06-2842, para. 994.

<sup>254</sup> *Ibid.*

<sup>255</sup> ICC-01/04-01/06-3121-Red, para. 445.

<sup>256</sup> ICC-01/04-01/06-2842, paras. 1000, 1004.

<sup>257</sup> ICC-01/04-01/07-717, paras. 511-514. The Prosecution notes that the *Katanga* Confirmation Decision uses the term “control over the organisation”. Since this element should not be confused with the separate requirement of the collective control over the crime by all co-perpetrators, the Prosecution focuses on the essence of this element, namely the Accused’s individual ability to use the organisation as a tool to contribute to the commission of the crime.

manner to establish this element, it is not the only one.<sup>259</sup> It may also be met, for example, by a showing that the Accused possessed a power of veto within the organisation, or that he had the capacity to hire, train, impose discipline and provide resources to the subordinates.<sup>260</sup> So for instance, while the Prosecution submits that its evidence demonstrates that Mr Ruto was the head of the Network, he would still be liable as indirect co-perpetrator even if he only had joint control of the Network together with other of its members.

105. As to the fourth and fifth objective elements listed by the Pre-Trial Chamber in the Confirmation Decision, the Prosecution must establish the existence of an organisation that is based on hierarchical relationships between superiors and subordinates.<sup>261</sup> This also requires proof that the implementation of the will of the co-perpetrators cannot be compromised by any particular subordinate's failure to comply because the individual subordinates within the organisation were fungible.<sup>262</sup> This can be established through attributes of the organisation, such as a large enough size to "provide a sufficient supply of subordinates" in order to replace anyone who refused to act,<sup>263</sup> or for instance through the existence of "intensive, strict, and violent training regimes".<sup>264</sup>
106. However, contrary to the findings of the Pre-Trial Chambers,<sup>265</sup> this element does not necessarily require the Prosecution to establish the subordinates' almost automatic compliance with "orders" of a superior. Compliance with an order may be sufficient to demonstrate that the organisation is composed of

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<sup>258</sup> ICC-01/04-01/07-717, paras. 497-498, 500-510, 514; ICC-01/05-01/08-14-tENG, para. 78; *see also* 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, Temis, 2005), page 240.

<sup>259</sup> *See* Thomas Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept', 9 *Journal of International Criminal Justice* 1, pages 95-101 (noting that under the theory as originally articulated, the touchstone is the "dominance" enjoyed by the perpetrator behind the perpetrator, not orders as such).

<sup>260</sup> ICC-01/04-01/07-717, para. 513. These examples are not exhaustive, neither are they indicative of the level of participation that is required to establish responsibility for indirect co-perpetration. They only serve the purpose of demonstrating that a person can move an organisation to contribute to a crime by ways other than ordering.

<sup>261</sup> ICC-01/04-01/07-717, paras. 511-514.

<sup>262</sup> ICC-01/04-01/07-717, paras. 516-517.

<sup>263</sup> ICC-01/04-01/07-717, para. 516.

<sup>264</sup> ICC-01/04-01/07-717, para. 518.

<sup>265</sup> ICC-01/04-01/07-717, paras. 515-516, 518; ICC-01/09-02/11-Red, para 297; ICC-01/09-01/11-373-Red, para 292.

fungible individuals, but it is not the only way to making that showing. Actions and attributes other than orders, such as those referred to in the previous paragraph, may also be capable of establishing this element.

107. For the subjective elements (under (vi)-(viii) above), the Prosecution submits that to establish intent, an Accused must mean to engage in the relevant conduct.<sup>266</sup> In relation to a consequence, he must either (a) mean to cause the consequence; or (b) be aware that it will occur in the ordinary course of events.<sup>267</sup> It is sufficient that each of the Accused was aware that the implementation of their common plan would, in the ordinary course of events, result in the commission of a crime or crimes within its scope.<sup>268</sup> They need not have been aware of the *specific* crimes that resulted from the implementation of their common plan. Instead, the Accused need only have been aware that the implementation of their common plan would, in the ordinary course of events, have resulted in the commission of the type of offences charged by one or more of the co-perpetrators who shared the common plan. In other words, in the context of co-perpetration, the “*consequence*” of which the person needs to be aware<sup>269</sup> is the *nature* of the crime(s) (e.g. murder, inhumane acts, *etc.*), not each specific instance in which those crimes will be committed or exactly by whom.<sup>270</sup>

108. To establish knowledge, an Accused must be aware (a) that the common plan or agreement involves an element of criminality;<sup>271</sup> (b) of the fundamental features of the organisation;<sup>272</sup> and (c) of the factual circumstances that enable him or

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<sup>266</sup> Article 30(2)(a).

<sup>267</sup> Article 30(2)(b). *See also*, ICC-01/09-01/11-373, para. 335; ICC-01/04-01/06-803, paras. 350-352.

<sup>268</sup> ICC-01/04-01/07-717, para. 533.

<sup>269</sup> According to article 30(2)(b).

<sup>270</sup> This view, albeit in the context of joint criminal enterprise, is supported by the jurisprudence of the Appeals Chamber of the ICTY. *See, e.g., Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, para.1491; *Prosecutor v. Kvočka et al*, IT-98-30/1-A, Judgement, para. 276.

<sup>271</sup> ICC-01/04-01/06-803, paras. 361-365.

<sup>272</sup> ICC-01/04-01/07-717, para. 534.

her, together with other co-perpetrators, to jointly exercise functional control over the crimes.<sup>273</sup>

109. Finally, as regards the *mens rea* requirements for the contextual elements of crimes against humanity, this is addressed separately under Part VI below.

## **B. Legal requirements of article 25(3)(b)**

110. There is consensus among the jurisprudence of this Court that the terms soliciting and inducing “both characterize the situation whereby the perpetrator is prompted by another to commit the offence” and that both conducts have the same legal requirements.<sup>274</sup> As commentators put it “there is no clear delimitation between soliciting and inducing” as “in substance, in both cases a person is caused to commit a crime”.<sup>275</sup> More importantly for present purposes, “[i]nducing is an umbrella-term which covers soliciting. Inducing is a broad enough term to cover any conduct which leads another person to commit a crime, including solicitation.”<sup>276</sup>

111. Commentators of the Rome Statute have described the act of soliciting as “*inter alia*, urging, advising, commanding or otherwise inciting another to commit a crime”,<sup>277</sup> and of inducing as “synonymous to incitement, encouragement and abetting”,<sup>278</sup> one which “entails the enticement or urging of another person to commit a crime”.<sup>279</sup>

112. It derives from the above-mentioned ICC jurisprudence that the legal elements of soliciting and inducing are as follows: (a) the person exerts influence over another person to either commit a crime which in fact occurs or is attempted or to perform an act or omission as a result of which a crime is carried out; (b) the

<sup>273</sup> ICC-01/04-01/06-803, paras. 366-367; ICC-01/04-01/07-717, para. 538.

<sup>274</sup> ICC-02/11-02/11-186, para. 159; ICC-01/05-01/13-749, para. 34.

<sup>275</sup> Kai Ambos, *Treatises on International Criminal Law*, Volume 1, Oxford, pp. 163-164.

<sup>276</sup> Bowman, K., “Article 25”, in *Commentary Rome Statute*, Case Matrix Network, available at: <http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/> [last accessed: 20/11/2015].

<sup>277</sup> Kai Ambos, *Treatises on International Criminal Law*, Volume 1, Oxford, pp. 163-164.

<sup>278</sup> William A. Schabas’ analysis of 25 (3) (b) and (c) in *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010), pp. 433-434.

<sup>279</sup> Kai Ambos, *Treatises on International Criminal Law*, Volume 1, Oxford, pp. 163-164.

inducement or solicitation has a direct effect on the commission or attempted commission of the crime; and (c) the person is at least aware that the crimes will be committed in the ordinary course of events as a consequence of the realisation of the act or omission.<sup>280</sup>

113. As such, the Prosecution submits that any conduct of any nature by the Accused can engage his criminal responsibility under the latter two provisions within article 25(3)(b) as long as, through such conduct, the Accused exerted an influence over another person to commit a crime (or to perform an act that resulted in a crime) and the crime occurred as a result.<sup>281</sup>
114. The Prosecution further submits that this position is consistent with the intent of the legislators. Had the drafters intended to limit the type of conduct underlying solicitation and inducement, they would have expressly done so. In fact, during the Diplomatic Conference in Rome proposals to define solicitation were tabled, but in the end it was resolved to include these specific modes of liability in the Statute without defining them in any way.<sup>282</sup>
115. Against this background, the Prosecution submits that an Accused can exert his influence over another to commit a crime through acts, omissions or various types of statements. Depending of the circumstances of the case these statements could consist of, *inter alia*, requests, counselling, encouragement, persuasion or incitement.
116. Turning to the requirement under (c) above, the Prosecution submits that for all three modes of influencing the commission of the crime under article 25(3)(b), it must be established that the culpable conduct of the Accused had a “direct” effect on the commission or attempted commission of the crime. However, the Rome Statute or the ICC jurisprudence does not qualify the degree or level of contribution required. In particular, it does not require for the act of

<sup>280</sup> ICC-01/04-02/06-309, para. 153; ICC-01/05-01/13-749, para. 34.

<sup>281</sup> Subject to the establishment of a sufficient causal link with the commission or attempted commission of the crime, as discussed below.

<sup>282</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals), G.A., 51st Sess., Supp. No. 22, UN Doc. A/51/22, 1996, p. 56.

inducement or solicitation under article 25(3)(b) to be a *conditio sine qua non* for the commission of the crime.

117. The Prosecution submits that all that needs be established is the existence of a link or nexus between the act and conduct of the Accused and the commission of a crime. Unless the conduct of an Accused is so trivial that no relation between that conduct and any of the elements of the crime can be established,<sup>283</sup> any contribution to the crime will be sufficient for criminal liability under article 25(3)(b).
118. As previously indicated, the Accused's contribution can be a positive act, an omission or a statement. With respect to statements in particular, the Prosecution submits that there is no need for them to be precise, direct or explicit to have the effect of persuading others to commit a crime and therefore engage the author's criminal liability under the Statute. This is contrary to the requirements for statements inciting the commission of genocide under article 25(3)(e).<sup>284</sup> All that is required in the context of solicitation or inducement under 25(3)(b), is that the statement be perceived by its audience as an encouragement to the commission of a crime and that the crime is ultimately committed or attempted. The Prosecution submits that article 25(3)(b) liability involves a less onerous standard than article 25(3)(e).<sup>285</sup> In fact, in order for a person be held accountable for incitement to commit genocide the Statute requires that he engage in a specific conduct -- that is a direct and public act of incitement, which may include statements. This is a consequence of the inchoate nature of that particular form of liability: the Accused may be found liable on the strength of his words alone, even if genocide does not eventually occur. The

<sup>283</sup> ICC-01/04-01/10-514 OA4 (Dissenting Opinion), para. 12.

<sup>284</sup> The Prosecution notes that in the *Nahimana* case, which concerned a charge of incitement to commit genocide, the ICTR Appeals Chamber considered that "there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion", *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 692.

<sup>285</sup> Article 25(3): "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (e) In respect of the crime of genocide, *directly* and *publicly* incites others to commit genocide" (emphasis added).

requirements of “direct” and “public” operate in this particular context as corrective factors, ensuring that only conduct that is *per se* dangerous enough leads to criminal responsibility.

119. However, the Statute does not require that a person engage in any specific type of conduct to be held accountable as a solicitor or inducer of a crime against humanity (or war crime). It only requires that the conduct be linked meaningfully to the crimes that are solicited or induced and that actually occur or are attempted.<sup>286</sup> In this context, the Prosecution submits, the Chamber is free to consider any conduct - as in actions, omissions and statement - of an Accused that is alleged to have solicited or induced the commission of the crime charged.
120. When the solicitor or inducer is alleged to have contributed to the crimes through statements, the triers of fact can be assisted in the determination of the criminal nature of such statements by looking at the circumstances external to and surrounding the statement itself and not limit themselves only to the words used. A contextual analysis of the statement may include situating the words and their utterance within the relevant linguistic, historical, cultural and economic framework and considering whether the author used words or indirect means of inciting the listeners in a way that will be understood by the listeners at that time and place. Such a holistic interpretation is critical to the determination of the statement’s “true message”, both from the perspective of the author and of his audience, and therefore of its effect on the commission of the crimes. In *Nahimana*, the ICTR Appeals Chamber held, in relation to direct and public incitement to commit genocide, that “[t]he principal consideration is thus the meaning of the words used in the specific context: it does not matter

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<sup>286</sup> The Prosecution further notes that during the Diplomatic Conference in Rome the drafters rejected the proposal that the incitement provision related to genocide [that it be direct and public] be extended to apply also to crimes against humanity, war crimes and aggression, see Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/Conf.183/2/Add.1, 1998, p. 59.

that the message may appear ambiguous to another audience in another context”.<sup>287</sup>

121. Finally, with respect to the *mens rea* requirement – letter (d) above - article 25(3)(b) does not prescribe any particular one. As such, the general provisions of article 30 apply. Accordingly, in order for solicitation or inducement liability to attach, the Prosecution must simply establish that the Accused intentionally engaged in the criminal conduct prescribed and either meant to cause the crime or was aware that the crime would be committed in the ordinary course of events.
122. However the Prosecution submits that, based on the plain wording of article 25(3)(b), it is not additionally required to establish that the Accused was aware that the crime would be committed in the ordinary course of events as the only consequence of the execution or implementation of the act of solicitation or inducement.<sup>288</sup> As such, it is sufficient for the Prosecution to establish that the suspect was aware that, due to the totality of the relevant facts and circumstances, which include but are not limited to his conduct, the crimes would be committed in the ordinary course of events.

### **C. Legal requirements of article 25(3)(c)**

123. The *actus reus* under article 25(3)(c) requires proof that a person “aids, abets or otherwise assists” in the commission or attempted commission of a crime, “including providing the means for its commission”. This broad formulation (any form of assistance) implies that the degree of assistance is not qualified. In particular, it is not necessary for the Prosecution to demonstrate that the assistance of the suspect was essential, substantial or significant,<sup>289</sup> as long as it is proven that the conduct of the suspect did in fact assist the direct

<sup>287</sup> *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 701.

<sup>288</sup> See above below paras. 135-139.

<sup>289</sup> At the ICTY, it is necessary to establish that the assistance is “substantial”: see e.g. *Prosecutor v. Šainovic et al.*, IT-05-87-A, Judgement, 23 January 2014, paras.1624, 1626, 1649, 1677.

perpetrator(s) in any way in the commission of the crime. Such assistance is not limited to *material* assistance, but includes *moral* assistance or support.<sup>290</sup>

124. As regards the *mens rea*, article 25(3)(c) provides that the suspect aids, abets or otherwise assists in the commission of the crime “for the purpose of facilitating the commission of such crime”. This, if interpreted in conjunction with Article 30, requires some form of intent in addition to knowledge.<sup>291</sup>
125. However, the Prosecution submits that the term “purpose” does not relate to the commission of the crime,<sup>292</sup> but to the suspect’s *act of facilitation*. In other words, the suspect need not intend the commission of the crime, but he must only intend or mean that his conduct facilitate the commission of the crime by others.<sup>293</sup> This interpretation is also consistent with article 30(2)(b).
126. There are good reasons why “purpose” cannot mean anything more than this. Any higher mental requirement for article 25(3)(c) would frustrate its object and purpose and status as an accessorial mode of liability. Requiring “purpose” to mean more than article 30(2) would, in particular:
  - a. impose a *mens rea* for aiding and abetting that is similar to, or even higher than, that required for a direct perpetrator under article 25(3)(a); and
  - b. effectively require proof of specific intent for each individual crime under the Statute, even if the definition of those crimes does not include any specific intent requirement.
127. These outcomes would be incongruous.

<sup>290</sup> ICTY, *Prosecutor v. Šainović et al*, IT-05-87-A, Judgement, 23 January 2014, paras.1626, 1649; ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgement, 10 December 1998, paras.233-235; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 484.

<sup>291</sup> ICC-01/04-01/10-465-Red, para. 274; ICC-01/04-02-12-4, (Concurring Opinion), para. 25.

<sup>292</sup> *Contra*, Eser in Cassese et al (eds.) *The Rome Statute of the International Criminal Court: a commentary* (Oxford:OUP, 2002), pp. 801, 901-902; Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge:CUP, 2007), p. 312; Ambos in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2 Ed. (München and Oxford:C.H. Beck and Hart, 2008) (“Triffterer”), p. 757; Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (Oxford:OUP, 2010), p. 435. *But see* Piragoff and Robinson in Triffterer, pp. 855-857.

<sup>293</sup> *See e.g.* USA, *Rosemond v. United States*, No.12–895, slip op, 572 U.S. \_\_\_\_ (2014), Justice Kagan for the Court, p.14; Canada, *R. v. Hibbert*, [1995] 2 S.C.R. 973, para.39; England and Wales, *DPP for Northern Ireland v. Lynch* [1975] AC 653, 678; England and Wales, *R. v. Bryce* [2004] 2 Cr. App. R. 35, 603; England and Wales, *National Coal Board v. Gamble* [1959] 1 QB 11, 23.

128. Consistent with article 30(3), the knowledge requirement for aiding and abetting requires proof that the suspect was aware that the crime will be committed in the ordinary course of events by the direct perpetrators. This includes knowledge of the intent of the direct perpetrators, but it does not require proof that the suspects shared that intent.<sup>294</sup>

**D. Legal requirements of article 25(3)(d)**

129. Individual criminal responsibility pursuant to article 25(3)(d) entails the following elements: (i) a crime within the jurisdiction of the Court was attempted or committed; (ii) a group of persons acting with a common purpose attempted to commit or committed this crime; (iii) the Accused contributed to the crime, in any way other than those set out in article 25(3)(a) to (c) of the Statute; (iv) the contribution was intentional; and (v) the contribution was made either with the aim of furthering the criminal activity or criminal purpose of the group, or in the knowledge of the intention of the group to commit the crime.<sup>295</sup>

**1. A crime within the jurisdiction of the Court was attempted or committed**

130. This element merely requires that any of the crimes under articles 6, 7 or 8 of the Rome Statute is carried out. It is not necessary that the material elements of the crime have been completed, as long as an attempt to commit a crime pursuant to article 25(3)(f) was made.

**2. A group of persons acting with a common purpose attempted to commit or committed this crime**

131. As found by Pre-Trial Chamber II, the “concept of ‘common plan’ is functionally identical to the statutory requirement of article 25(3)(d) [...] that there be a ‘group of persons acting with a common purpose’”. A common

<sup>294</sup> ICTY, *Prosecutor v. Blagojevic & Jokic*, IT-02-60-A, Judgement, 9 May 2007, para. 221; ICTY, *Prosecutor v. Simic*, IT-95-9-A, Judgement, 28 November 2006, para. 86. *Contra*, ICC-01/04-01/10-465-Red, para. 281.

<sup>295</sup> ICC-01/09-01/11-373, para. 351; ICC-01/09-01/11-1, para. 51; ICC-01/09-02/11-1, para. 47; ICC-01/04-01/10-465-Red, paras. 268-289; ICC-01/04-01/10-1-US, para. 39, re-classified as public pursuant to ICC-01/04-01/10-7.

purpose must include an element of criminality, but does not need to be specifically directed at the commission of a crime.”<sup>296</sup>

132. The common purpose does not need to be expressed explicitly, and its existence can be inferred from the concerted action of the group of persons.<sup>297</sup> It can also be inferred from the intention of the leader or the leaders of the group, provided they played a major role in that group, such as being significantly involved in creating the group, leading the group, or organising its criminal activities.<sup>298</sup> Moreover, the common purpose may materialise extemporaneously and does not need to have been previously arranged or formulated.<sup>299</sup>
133. Article 25(3)(d) applies irrespective of whether the Accused is a member of the group acting with a common purpose.<sup>300</sup> The legal requirement that the group of persons holding a common purpose *commit* or *attempt to commit* a crime does not entail that any given member directly perpetrate its material elements; nor, is the term “commit” used in the provision limited only to situations where a crime can be imputed to a member of the group under article 25(3)(a).<sup>301</sup> The term “commit” in this context must be interpreted broadly and in accordance with article 25(2), in the sense that it may entail other forms of liability under article 25. Accordingly, a suspect may be criminally responsible under article 25(3)(d) for contributing to a crime directly perpetrated by persons who do not share the common purpose. Criminal liability under article 25(3)(d) will attach as long as the crime forms part of the common purpose and can be imputed (pursuant to *any* mode of liability under article 25) to at least one other member

<sup>296</sup> ICC-01/04-01/10-465-Red, para. 271.

<sup>297</sup> ICC-01/04-01/10-465-Red, para. 271; see also *Prosecutor v. Duško Tadić* (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, para. 227.

<sup>298</sup> ICC-01/09-01/11-373, para. 352.

<sup>299</sup> *Prosecutor v. Duško Tadić* (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, para. 227.

<sup>300</sup> ICC-01/04-01/10-465-Red, para. 275.

<sup>301</sup> Respectively, *contra*, ICC-02/11-01/11-656-Anx, Dissenting Opinion of Judge Van den Wyngaert, paras. 8-9; and *contra*, ICC-01/04-01/07-3436, para.1628, *citing* ICC-01/04-01/10-465-Red, Dissenting Opinion of Judge Monageng, para. 55. The Prosecution notes that Judge Monageng’s Diss. Op. relies on ICTY jurisprudence which stands for the opposite proposition (*Prosecutor v. Brdanin*, Judgement, 3 April 2007, IT-99-36-A, paras. 410, 413, 430).

of the group acting in accordance with the common purpose in using such a direct perpetrator.

134. By analogy to the concept of joint criminal enterprise adopted by the UN *ad hoc* tribunals, the Prosecution submits that the group acting with common purpose need not be organised in a military, political or administrative structure.<sup>302</sup>

**3. The Accused contributed to the crime, in any way other than those set out in article 25(3)(a) to (c) of the Statute**

135. Article 25(3)(d) applies when the Accused contributes to the commission or attempted commission of the crime “in any other way” that is not encapsulated under articles 25(3)(a)-(c).<sup>303</sup> It entails the lowest objective threshold for participation according to article 25 [...]”.<sup>304</sup> Accordingly, *any contribution to the crime* is sufficient to satisfy this element.<sup>305</sup>

136. This means that article 25(3)(d) merely requires the existence of a link or *nexus* between the act and conduct of an Accused and the commission of a crime by a group of persons acting with common purpose. While it is necessary that the act and conduct of the Accused *contributes* to the commission of the crime, *any* such contribution will suffice. The relevant contribution may be linked to a material element of a crime (for instance by facilitating in any way the commission of the material elements of the crime),<sup>306</sup> but it may also be linked to any of the subjective elements of the crime (for instance, by encouraging troop morale of those who commit the material elements of the crime).<sup>307</sup> Moreover,

<sup>302</sup> *Prosecutor v. Duško Tadić* (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, para. 227.

<sup>303</sup> ICC-01/09-01/11-373, para. 354; ICC-01/04-01/10-465-Red, para.278. See also Kai Ambos, “Article 25”, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos, 1999), p.484, [21]; Albin Eser, “Individual Criminal Responsibility”, in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford, Oxford University Press, 2002), pp. 802-803.

<sup>304</sup> ICC-01/09-01/11-373, para. 354. See also Kai Ambos, “Article 25”, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos, 1999), p.484, [21]; Albin Eser, “Individual Criminal Responsibility”, in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford, Oxford University Press, 2002), pp. 802-803.

<sup>305</sup> ICC-01/09-01/11-373, para. 354. This is also corroborated by Judge Fernandez, the only judge from the Appeals Chamber who expressed herself on the merits of the matter (see ICC-01/04-01/10-514 OA4, Dissenting Opinion Judge Fernandez, paras. 8-15). See *a contrario*, ICC-01/04-01/10-465-Red, paras. 276-285, requiring the level of contribution under Article 25(3)(d) to be “significant”.

<sup>306</sup> ICC-01/09-01/11-373, Dissenting Opinion Judge Monageng, para. 101.

<sup>307</sup> ICC-01/09-01/11-373, paras. 330, 339; see also Dissenting Opinion Judge Monageng, paras. 82, 100.

the wording of article 25(3)(d) does not require that a contribution is provided directly to the physical perpetrators of a crime. It is sufficient that it is provided to “a group of persons acting with a common purpose”, and can therefore be provided to any member of the group, regardless of whether that member commits the material elements of the crime.<sup>308</sup>

137. Where the conduct of an Accused is so trivial that no relation between that conduct and any of the elements of the crime can be established, the contribution may be considered to be “neutral”,<sup>309</sup> which is insufficient for criminal liability under article 25(3)(d). In this sense any *real* contribution to the crime must be understood to be sufficiently “*significative ou importante*”.<sup>310</sup>
138. Any further qualification of the level of contribution under article 25(3)(d) is inconsistent with a grammatical interpretation of the provision, as well as its object and purpose as a residual mode of liability, which is to ensure that all contributions to the most serious crimes of international concern are punishable.<sup>311</sup>
139. The contribution can consist of an act or an omission, provided the Accused has a duty to act,<sup>312</sup> and does not need to be criminal *per se*.<sup>313</sup> Moreover, an Accused can be held liable for contributing to a crime after it has been committed, as long as this contribution had been agreed upon by the relevant group, including the Accused, prior to the perpetration of the crime.<sup>314</sup>

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<sup>308</sup> ICC-01/09-01/11-373, Dissenting Opinion Judge Monageng, para. 103; see also paras. 86, 78.

<sup>309</sup> ICC-01/04-01/10-514 OA4, Dissenting Opinion Judge Fernandez, para. 12.

<sup>310</sup> ICC-01/04-01/07-3319, para. 33.

<sup>311</sup> ICC-01/04-01/06-803-tEN, para.337; ICC-01/04-01/07-1497 OA8, para.79; ICC-01/04-01/06-2205 OA15 OA16, para. 77. As the Prosecution has argued previously, the drafting history of Article 25(3)(d) corroborates that “any” contribution suffices to give rise to criminal responsibility (see ICC-01/04-01/10-499-Corr OA 4, paras. 59-60).

<sup>312</sup> *Prosecutor v. Miroslav Kvočka et al.* (IT-98-30/1-A), Judgement, Appeals Chamber, 28 February 2005, para.187; for the requirement of a duty to act see *Prosecutor v. Naser Orić* (IT-03-68-T), Judgement, Trial Chamber II, 30 June 2006, footnote 741.

<sup>313</sup> *Krajišnik* Appeal Judgement, *above* note 165, paras. 218, 695.

<sup>314</sup> ICC-01/04-01/10-465-Red, para. 287.

#### 4. The contribution was intentional

140. Article 25(3)(d) provides that the Accused's "*contribution* shall be intentional".<sup>315</sup>

Hence, the definition of intent under article 30(2) applies only with respect to the Accused's conduct which constitutes such contribution, and not to the consequence.<sup>316</sup> Accordingly, the Prosecution must prove that the Accused meant to engage in the relevant conduct.<sup>317</sup>

141. Article 25(3)(d) includes additional subjective requirements that in part overlap with,<sup>318</sup> and in part deviate from<sup>319</sup> the normal intent in relation to the consequence as set out in article 30(2)(b). Article 30(1) clarifies that the provision only applies "unless otherwise provided", which is precisely the case in relation to article 25(3)(d) liability. Thus, the notion of intent in relation to a consequence enshrined in article 30(2)(b) is not applicable to establish the relevant *mens rea* under that mode of liability.<sup>320</sup>

#### 5. The contribution was made either with the aim of furthering the criminal activity or criminal purpose of the group

142. Under article 25(3)(d)(i), the Prosecution must establish that the Accused acted with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court.

### PART IV CRIMINAL LIABILITY OF MR RUTO

143. The Prosecution will detail below the different modes of liability under which Mr Ruto could be held criminally liable for the counts above. The evidence on the record, taken at its highest, supports criminal responsibility for Mr Ruto under article 25(3)(a), (b), (c) or (d). The Prosecution recalls that the Chamber

<sup>315</sup> Emphasis added.

<sup>316</sup> ICC-01/04-01/10-465-Red, para. 288.

<sup>317</sup> Article 30(2)(a).

<sup>318</sup> See Article 25(3)(d)(i) referring to the contribution being made "with the aim of furthering the criminal activity or criminal purpose of the group".

<sup>319</sup> See Article 25(3)(d)(ii) which requires only "knowledge of the intention of the group to commit the crime".

<sup>320</sup> ICC-01/04-01/10-465-Red, para. 288. See also Barbara Goy, *Individual Criminal Responsibility before the International Criminal Court – A Comparison with the Ad Hoc Tribunals*, International Criminal Law Review 12 (2012) 1-70, at 68; see also additional authorities quoted at footnote 483.

has ruled that it will reject a NCTA motion if the evidence on record establishes criminal reliability to the requisite threshold in respect of any one of these modes of liability.<sup>321</sup>

**A. Mr Ruto is criminally liable under article 25(3)(a)**

144. The Prosecution submits that there is ample evidence on record demonstrating that Mr Ruto is criminally liable under article 25(3)(a) of the Statute for the charges of murder, deportation or forcible transfer and persecution. The evidence establishes that (i) Mr Ruto, together with other key members of the Network, Mr Sang and others agreed to and had a common plan between themselves and others to evict members of the Kikuyu, Kisii, Kamba communities in particular, because they were perceived to be PNU supporters; (ii) Mr Ruto and other co-perpetrators carried out essential contributions in a coordinated manner, resulting in the crimes; (iii) Mr Ruto controlled the organisation (Network); (iv) the Network was an organised and hierarchical apparatus of power; (v) there was almost automatic compliance with Mr Ruto's instructions; (vi) Mr Ruto, Mr Sang and other co-perpetrators intended to attack particular parts of the civilian population, due to their perceived political affiliation; and (vii) Mr Ruto was aware of the factual circumstances enabling him to exercise joint control over the commission of crimes through other persons. The Prosecution submits that the evidence below also demonstrates the existence of an organisation pursuant to article 7(2) – the Network itself – and a policy to evict perceived PNU supporters which was encapsulated in the common plan.

*Summary of the Prosecution's evidence*

145. The Prosecution's evidence – establishing the existence of a Network and common plan – can be summarised as follows: (1) Mr Ruto was the recognised leader of the Kalenjin community prior to and during the PEV;<sup>322</sup> (2) Mr Ruto

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<sup>321</sup> Decision No. 5, paras. 27 and 28.

<sup>322</sup> See below paras. 253-255.

used this authority to hold general preparatory meetings at his house – with Network members and Kalenjin youth - to prepare the attacks in the charged incidents;<sup>323</sup> (3) [REDACTED];<sup>324</sup> (4) immediately after the presidential election results were announced, preparatory meetings were held by Network members to mobilise the Kalenjin youth and begin the attacks;<sup>325</sup> (5) the organised nature and similar pattern of the attacks on the locations charged demonstrate that they were pre-planned and orchestrated by the Network;<sup>326</sup> (6) Mr Ruto – represented by Network member and close confidant Farouk Kibet – distributed sums of money to those who had been involved in the PEV.<sup>327</sup>

146. The Prosecution will detail below its evidence regarding Mr Ruto’s criminal responsibility in accordance with the legal requirements and the relevant factual allegations alleged in the UDCC.

1. **Mr Ruto, other key members of the Network, Mr Sang and others agreed to a common plan between themselves and others to evict members of the Kikuyu, Kisii, Kamba communities in particular because they were perceived to be PNU supporters.**<sup>328</sup>

**(a) The evidence supports the existence of a Network and a common plan**

147. The Prosecution submits that the evidence on record is sufficient to establish the existence of an organisation, the “Network” – with Mr Ruto at its head and the Network members at its base – and an organisational policy, the “common plan”. The Network was constituted at the very latest by October 2007 and was comprised of tribal leaders, key youth leaders, ODM politicians, businessmen and a member of the media. The common plan pursued by members of the Network – and implemented through the Kalenjin youth during the PEV – was the targeting of the civilian population supporting, or perceived to be supporting, the PNU. In order to implement the common plan, Mr Ruto and

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<sup>323</sup> See below paras. 153-159.

<sup>324</sup> See below para. 167.

<sup>325</sup> See below paras. 168-172, 199-201.

<sup>326</sup> See below paras. 164-215.

<sup>327</sup> See below para. 216.

<sup>328</sup> UDCC, paras. 98- 101.

Network members held at least three important preparatory meetings prior to the PEV – one only a matter of days before the elections – where the expulsion of the Kikuyu from the Rift Valley was explicitly discussed and planned. In order to prepare the Kalenjin youth for the attacks and to ensure the achievement of the common plan, Network members trained Kalenjin youth prior to the PEV and obtained firearms for the impending “war”. Following the announcement of the election results Network members involved in these very meetings were subsequently implicated – at the ground level – in mobilising, coordinating and/or directing the Kalenjin youth in the relevant areas and in contributing in various ways to the successful achievement of the common plan. The results of the Kalenjin attacks – which left many Kikuyu, dead, injured, displaced or homeless – further confirmed the crux of the common plan.

***(b) Details of the common plan***

148. Despite the lack of direct evidence regarding certain specific details of the common plan discussed at preparatory meetings - for example maps identifying Kikuyu houses - there is a significant body of both direct and circumstantial evidence which adequately establishes the existence and content of the common plan. The nature and pattern of the Kalenjin attacks in the relevant areas – including the clear indicia of organisation and the direct involvement of Network members – constitutes a sufficient basis on which a reasonable Chamber could conclude that the material aspects of the common plan had been agreed upon prior to the PEV. In effect, the amount of preparation and coordination necessary for thousands of Kalenjin youth – some of whom were transported from distant regions and housed and fed in local compounds – to conduct surgical and organised attacks on specific Kikuyu houses in predominantly Kikuyu areas, negates the Defence’s claim that the attacks were the product of spontaneous action. To the contrary, it speaks of a premeditated and organised action on the part of a well-oiled machine: the

Network. Last, given Mr Ruto's position of leadership in the Kalenjin community and his authority over various persons implicated in the violence, it can be inferred that no concerted Kalenjin action/attack against the Kikuyu could have been taken without it having been approved or ordered by him.

(c) Members of the Network

149. The evidence demonstrates that the Network was essentially composed of a three-tiered hierarchy: Mr Ruto – the *Kirkawindet* or leader – sat at the top of the hierarchy and exercised *de facto* authority over the other Network members. Various political allies, prominent Kalenjin businessmen and tribal elders supported him.<sup>329</sup> The latter in turn had authority, by virtue of their position in the Kalenjin tribal hierarchy, over the various Kalenjin youth leaders who led attacks in various locations.<sup>330</sup> Below these three tiers of authority, the Kalenjin youth formed a fourth tier, subordinate to the Network members, and were thus used to implement the common plan on the ground.<sup>331</sup> As spokesman, leader and King of the Kalenjin community, Mr Ruto's orders had to be obeyed.<sup>332</sup>
150. According to the evidence on record, the main players of the Network involved in preparing and implementing the common plan were Jackson Kibor, Farouk Kibet, Christopher Kitino Kisorio, John K. Tanui, Mark Too, Isaac Maiyo, Isaac Maiyo†,<sup>333</sup> Samuel Ruto, Solomon Tirop, Lucas Sang, Fred Kapondi and Joshua Arap Sang. All of these were prominent Kalenjin individuals who held influential positions within the Kalenjin community and most were closely connected to Mr Ruto - even prior to the PEV. (1) Jackson Kibor – [REDACTED]<sup>334</sup> - had been campaigning for Mr Ruto since 2002.<sup>335</sup> Kibor was

<sup>329</sup> See below paras. 253-255.

<sup>330</sup> See below paras. 201, 415.

<sup>331</sup> See below paras. 164-215.

<sup>332</sup> P-0409, T-91, 50:21-22, 51:5-6. See also below paras. 253-255.

<sup>333</sup> N.B. Two members of the Network share this name- one deceased† and the other one still alive. They will therefore be distinguished in this manner.

<sup>334</sup> [REDACTED].

<sup>335</sup> P-0356, T-77, 65:14-15.

regarded as one of Mr Ruto's right hand men. (2) Farouk Kibet, [REDACTED],<sup>336</sup> [REDACTED].<sup>337</sup> [REDACTED].<sup>338</sup> (3) Solomon Tirop [REDACTED].<sup>339</sup> (4) Christopher Kisorio [REDACTED].<sup>340</sup> (5) Isaac Maiyo was the Community Development Fund ("CDF") chairman for Eldoret North – [REDACTED].<sup>341</sup> Maiyo was also the ODM coordinator for the 2007 elections. As such, he supervised the ODM nominations in the North Rift area.<sup>342</sup> (6) Mark Too was a wealthy Kalenjin farmer, who owned farms, livestock and lorries. He had once been an MP.<sup>343</sup> Evidence confirms that Mr Ruto and Too knew each other prior to the PEV, and that their relations were good in 2007.<sup>344</sup> (7) Samuel Ruto: was the ODM councillor-elect for Kimumu ward<sup>345</sup> and hence a political ally of Ruto. (8) Isaac Maiyo† was a wealthy Kalenjin man, living in a farm adjacent to Yamumbi locality,<sup>346</sup> (9) John K. Tanui, [REDACTED];<sup>347</sup> (10) Steven Chemalan,<sup>348</sup> was a youth leader <sup>349</sup>and ODM candidate in Kiambaa;<sup>350</sup> (11) Lucas Sang, [REDACTED]<sup>351</sup> [REDACTED]<sup>352</sup> [REDACTED];<sup>353</sup> (12) Fred Kapondi, an ODM MP from Mount Elgon and hence a political ally of Mr Ruto,<sup>354</sup> (13) Joshua Arap Sang, the leading Kalenjin journalist and host one of the most popular Kalenjin radio show in the Rift Valley in 2007 – the *Lene Emet* show. [REDACTED].<sup>355</sup>

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<sup>336</sup> [REDACTED].

<sup>337</sup> [REDACTED].

<sup>338</sup> [REDACTED].

<sup>339</sup> [REDACTED].

<sup>340</sup> [REDACTED].

<sup>341</sup> [REDACTED].

<sup>342</sup> [REDACTED].

<sup>343</sup> **P-0536**, T-34, 18:20-19:5.

<sup>344</sup> **P-0536**, T-34, 45:4.

<sup>345</sup> [REDACTED].

<sup>346</sup> **P-0423**, T-68, 6:14-22, 7:5-7.

<sup>347</sup> [REDACTED].

<sup>348</sup> Steven Shamalan is also referred to as Chemara or Steven Chemalan in the Prosecution's evidence. *See P-0536*, T-29, 41:23–42:4 and [REDACTED].

<sup>349</sup> **P-0536**, T-34, 58:15-58:22.

<sup>350</sup> [REDACTED].

<sup>351</sup> [REDACTED].

<sup>352</sup> [REDACTED].

<sup>353</sup> [REDACTED].

<sup>354</sup> [REDACTED].

<sup>355</sup> [REDACTED].

*(d) The time frame of the common plan*

151. As regards to the time frame for the adoption and implementation of an organisational policy<sup>356</sup> the evidence on record establishes that preparatory meetings adopting and implementing the organisational policy - or common plan - were held in [REDACTED] and not 30 December 2006 as initially alleged in the UDCC.<sup>357</sup> However, the reduced time frame does not detract from the fact that the Network concluded a common plan prior to the PEV and that this plan was subsequently implemented during the PEV.

*(e) Demonstration of the Network and common plan*

152. The existence of the Network and the common plan is demonstrated by (1) a series of general preparatory meetings held at [REDACTED]; (2) the training of the Kalenjin youth; (3) the obtaining of firearms for the purpose of the PEV; (4) the similar nature and patterns of the attacks in the charged incidents - including the clear indications of prior planning and the involvement of Network members with close ties to Mr Ruto; and (5) [REDACTED] on behalf of Mr Ruto. The submissions that follow will be subdivided according to these themes. In all, the evidence reveals that the attacks in the charged incidents were not the product of spontaneous actions, but rather the end result of a concerted, organised attack by thousands of Kalenjin youth directed and assisted by the Network.

*(i) General preparatory meetings*

153. Mr Ruto held three important general preparatory meetings [REDACTED], aimed at mobilising and coordinating the Network members and the Kalenjin youth, from different areas in the Rift Valley, and obtaining weapons for the latter to ensure a successful implementation of the common plan. It was planned that the attacks would be triggered if the Kikuyu stole the votes and won the elections.

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<sup>356</sup> UDCC, para. 38

<sup>357</sup> See below paras. 154-155.

[REDACTED]

154. [REDACTED]<sup>358</sup> [REDACTED]<sup>359</sup> [REDACTED].<sup>360</sup> [REDACTED].<sup>361</sup>  
 [REDACTED].<sup>362</sup> [REDACTED].<sup>363</sup> [REDACTED].<sup>364</sup> [REDACTED].<sup>365</sup>  
 [REDACTED].<sup>366</sup> [REDACTED].<sup>367</sup> [REDACTED].<sup>368</sup> [REDACTED].<sup>369</sup>  
 [REDACTED].<sup>370</sup> [REDACTED].<sup>371</sup> [REDACTED].<sup>372</sup> [REDACTED].<sup>373</sup>  
 [REDACTED]<sup>374</sup> [REDACTED].

155. [REDACTED].<sup>375</sup> [REDACTED]<sup>376</sup> [REDACTED].<sup>377</sup> [REDACTED].<sup>378</sup>

[REDACTED]

156. [REDACTED].<sup>379</sup> [REDACTED].<sup>380</sup> [REDACTED].<sup>381</sup> [REDACTED].<sup>382</sup>  
 [REDACTED].<sup>383</sup> [REDACTED].<sup>384</sup> [REDACTED].

157. [REDACTED].<sup>385</sup> [REDACTED]<sup>386</sup> [REDACTED].

[REDACTED]

158. [REDACTED].<sup>387</sup> [REDACTED].<sup>388</sup> [REDACTED].<sup>389</sup>

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<sup>358</sup> [REDACTED].

<sup>359</sup> [REDACTED].

<sup>360</sup> [REDACTED].

<sup>361</sup> [REDACTED].

<sup>362</sup> [REDACTED].

<sup>363</sup> [REDACTED].

<sup>364</sup> [REDACTED].

<sup>365</sup> [REDACTED].

<sup>366</sup> [REDACTED].

<sup>367</sup> [REDACTED].

<sup>368</sup> [REDACTED].

<sup>369</sup> [REDACTED].

<sup>370</sup> [REDACTED].

<sup>371</sup> [REDACTED].

<sup>372</sup> [REDACTED].

<sup>373</sup> [REDACTED].

<sup>374</sup> [REDACTED]

<sup>375</sup> See below paras. 197-211.

<sup>376</sup> [REDACTED].

<sup>377</sup> [REDACTED].

<sup>378</sup> See below paras. 197-211.

<sup>379</sup> [REDACTED].

<sup>380</sup> [REDACTED].

<sup>381</sup> [REDACTED].

<sup>382</sup> [REDACTED].

<sup>383</sup> [REDACTED].

<sup>384</sup> [REDACTED].

<sup>385</sup> See below paras. 197-211.

<sup>386</sup> See above para. 156.

<sup>387</sup> [REDACTED].

<sup>388</sup> [REDACTED].

<sup>389</sup> [REDACTED].

159. The Prosecution submits that a reasonable Chamber may conclude in the circumstances that [REDACTED] was acting as Mr Ruto's mouthpiece when he addressed the youth about attacking the Kikuyu. This can also be inferred from [REDACTED] Mr Ruto's house and that he (Mr Ruto) was the Kalenjin *spokesman* or leader. It can also be inferred from the totality of the Prosecution's evidence that Mr Ruto's meeting with other 'major officials' was for the purpose of preparing the attack [REDACTED].

*(ii) Training of Kalenjin youth prior to PEV*

160. The evidence, taken at its highest, establishes that prior to the PEV Network member [REDACTED] organised the training of Kalenjin youth from different areas, including Ziwa, and that Mr Ruto paid for the training of Kalenjin youth from Eldoret and neighbouring areas.

161. [REDACTED].<sup>390</sup> [REDACTED]<sup>391</sup> [REDACTED].<sup>392</sup> [REDACTED].

162. [REDACTED].<sup>393</sup> [REDACTED].<sup>394</sup> [REDACTED].<sup>395</sup> [REDACTED]<sup>396</sup> [REDACTED]<sup>397</sup>; [REDACTED];<sup>398</sup> [REDACTED].<sup>399</sup> [REDACTED].<sup>400</sup>

*(iii) [REDACTED]*

163. Members of the Network also obtained firearms in order to help the Kalenjin youth in accomplishing the common plan. [REDACTED]<sup>401</sup> – [REDACTED]<sup>402</sup> [REDACTED].<sup>403</sup> [REDACTED].<sup>404</sup>

*(iv) The similar pattern of the attacks*

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<sup>390</sup> [REDACTED].

<sup>391</sup> [REDACTED].

<sup>392</sup> [REDACTED].

<sup>393</sup> [REDACTED].

<sup>394</sup> [REDACTED].

<sup>395</sup> [REDACTED].

<sup>396</sup> [REDACTED].

<sup>397</sup> [REDACTED].

<sup>398</sup> [REDACTED].

<sup>399</sup> [REDACTED].

<sup>400</sup> [REDACTED].

<sup>401</sup> [REDACTED].

<sup>402</sup> [REDACTED].

<sup>403</sup> [REDACTED].

<sup>404</sup> [REDACTED].

164. Based on the similar pattern evident in the different Kalenjin attacks in the charged incidents, a reasonable Trial Chamber may conclude that the attacks were pre-planned and directed by the same source: the Network. Following the announcement of the election results, witnesses testify to a strikingly similar pattern of events: (1) Kalenjin attackers were launched into action – often after war cries were heard; (2) armed Kalenjin attackers – many transported from outside regions - attacked Kikuyu and destroyed their property in an organised and surgical manner; (3) road blocks were erected; and (4) Network members assisted/directed the Kalenjin attackers on the ground. A reasonable Chamber may conclude from the totality of the evidence summarised below that only the leader of the Kalenjin community - Mr Ruto – and his Network had the authority and the resources to swiftly mobilise thousands of Kalenjin youth from different areas and coordinate their attacks on the ground.

165. Although some of the events described below fall outside the temporal scope of the various incidents as alleged in the UDCC, this evidence nevertheless provides important pattern/similar fact evidence on which a Trial Chamber may rely as proof of the existence of the Network, the common plan and the link between the Network and the crimes committed in the relevant areas.

*Kalenjin attacks on the Greater Eldoret (area)*

166. In addition to the three general preparatory meetings above, the meeting [REDACTED] on 31 December provide important evidence of the Network's mobilisation of the Kalenjin youth to implement the common plan in the Greater Eldoret area. The evidence demonstrates that Network members Lucas Sang and Samuel Ruto - [REDACTED] - were themselves later implicated in the attack on Kimumu.<sup>405</sup>

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<sup>405</sup> [REDACTED].

[REDACTED]

167. [REDACTED]<sup>406</sup> [REDACTED].<sup>407</sup> [REDACTED]<sup>408</sup> [REDACTED].<sup>409</sup>  
 [REDACTED].<sup>410</sup> [REDACTED].<sup>411</sup> [REDACTED].<sup>412</sup> [REDACTED].<sup>413</sup>  
 [REDACTED].<sup>414</sup> [REDACTED]<sup>415</sup> [REDACTED].<sup>416</sup> [REDACTED].<sup>417</sup>  
 [REDACTED].<sup>418</sup>

*Events following the announcement of the election results on 30 December*

168. Following the announcement of the presidential election results, final preparatory meetings were held in different areas with the objective of implementing the common plan. In the greater Eldoret area, as in the other areas charged, the Kikuyu were attacked almost immediately after these meetings. On the strength of the evidence described below, a reasonable Trial Chamber may conclude that the [REDACTED], was instrumental in mobilising, coordinating and launching the Kalenjin attacks on the greater Eldoret area.<sup>419</sup>

[REDACTED]

169. [REDACTED].

170. [REDACTED]<sup>420</sup> [REDACTED]<sup>421</sup> [REDACTED].<sup>422</sup> [REDACTED].<sup>423</sup>  
 [REDACTED].<sup>424</sup> [REDACTED].<sup>425</sup> [REDACTED].<sup>426</sup> [REDACTED]<sup>427</sup>

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<sup>406</sup> [REDACTED].

<sup>407</sup> [REDACTED].

<sup>408</sup> [REDACTED].

<sup>409</sup> [REDACTED].

<sup>410</sup> [REDACTED].

<sup>411</sup> [REDACTED].

<sup>412</sup> [REDACTED].

<sup>413</sup> [REDACTED].

<sup>414</sup> [REDACTED].

<sup>415</sup> [REDACTED].

<sup>416</sup> [REDACTED].

<sup>417</sup> [REDACTED].

<sup>418</sup> [REDACTED].

<sup>419</sup> See below para. 169-196.

<sup>420</sup> [REDACTED].

<sup>421</sup> [REDACTED].

<sup>422</sup> [REDACTED].

<sup>423</sup> [REDACTED].

<sup>424</sup> [REDACTED].

<sup>425</sup> [REDACTED].

<sup>426</sup> [REDACTED].

<sup>427</sup> [REDACTED].

[REDACTED]".<sup>428</sup> [REDACTED],<sup>429</sup> [REDACTED],<sup>430</sup> [REDACTED].<sup>431</sup>  
[REDACTED].<sup>432</sup> [REDACTED].<sup>433</sup>

171. [REDACTED].<sup>434</sup> [REDACTED].<sup>435</sup> [REDACTED].<sup>436</sup> [REDACTED].<sup>437</sup>  
[REDACTED].<sup>438</sup> [REDACTED].<sup>439</sup> [REDACTED].

172. [REDACTED] on 4 January, he saw many armed youth gathered in the middle of the road. [REDACTED] told the youth that they were still waiting for orders "from the above" to know whether they would stop the roadblocks or not.<sup>440</sup> [REDACTED] understood this to be a reference to orders from the ODM party and Mr Ruto, who had been elected as Kalenjin spokesman.<sup>441</sup>

*Kimumu*

- *The Attack*

173. The attack on Kimumu by the Kalenjin youth on 31 December was conducted in an organised and surgical manner – with the help of Network members Jackson Kibor, Samuel Ruto and [REDACTED]. In line with the Network's common plan Kalenjin youth – many of which had been bussed into the area from Ziwa and other Kalenjin villages – attacked the Kikuyu and destroyed their property. The Prosecution submits that the attack was the direct result of the general preparatory meetings and more specifically those held by Network members in [REDACTED] and [REDACTED] in the days prior to the attack.

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<sup>428</sup> [REDACTED].

<sup>429</sup> [REDACTED].

<sup>430</sup> [REDACTED].

<sup>431</sup> [REDACTED].

<sup>432</sup> [REDACTED].

<sup>433</sup> [REDACTED].

<sup>434</sup> [REDACTED].

<sup>435</sup> [REDACTED].

<sup>436</sup> [REDACTED].

<sup>437</sup> [REDACTED].

<sup>438</sup> [REDACTED].

<sup>439</sup> [REDACTED].

<sup>440</sup> [REDACTED].

<sup>441</sup> [REDACTED].

- *War Cries*

174. [REDACTED],<sup>442</sup> [REDACTED].<sup>443</sup> [REDACTED].<sup>444</sup> [REDACTED],<sup>445</sup>  
[REDACTED].<sup>446</sup> [REDACTED]<sup>447</sup> [REDACTED].<sup>448</sup> [REDACTED].<sup>449</sup>  
[REDACTED],<sup>450</sup> [REDACTED].<sup>451</sup> [REDACTED]<sup>452</sup> [REDACTED].<sup>453</sup>

- *Transporting the Kalenjin youth to Eldoret*

175. [REDACTED]<sup>454</sup>, [REDACTED],<sup>455</sup> [REDACTED].<sup>456</sup> [REDACTED]<sup>457</sup>  
[REDACTED]<sup>458</sup> [REDACTED]<sup>459</sup> [REDACTED] <sup>460</sup>[REDACTED]  
<sup>461</sup>[REDACTED].<sup>462</sup> [REDACTED].<sup>463</sup> [REDACTED].<sup>464</sup> [REDACTED].<sup>465</sup>  
[REDACTED].<sup>466</sup>

- *Arrival of the Kalenjin youth*

176. **P-0469** testified that on 31 December she arrived at Joyland on Iten road (between Junction and Iten). At about 10-11am<sup>467</sup> she observed approximately 1000<sup>468</sup> armed people,<sup>469</sup> mostly Kalenjin,<sup>470</sup> coming from the Marura/Iten location. Meanwhile, she saw the Chief of Kimumu and Samuel<sup>471</sup> Ruto in a

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<sup>442</sup> [REDACTED].

<sup>443</sup> [REDACTED].

<sup>444</sup> [REDACTED].

<sup>445</sup> [REDACTED].

<sup>446</sup> [REDACTED].

<sup>447</sup> [REDACTED].

<sup>448</sup> [REDACTED].

<sup>449</sup> [REDACTED].

<sup>450</sup> [REDACTED].

<sup>451</sup> [REDACTED].

<sup>452</sup> [REDACTED].

<sup>453</sup> [REDACTED]

<sup>454</sup> [REDACTED].

<sup>455</sup> [REDACTED].

<sup>456</sup> [REDACTED].

<sup>457</sup> [REDACTED].

<sup>458</sup> [REDACTED].

<sup>459</sup> [REDACTED].

<sup>460</sup> [REDACTED].

<sup>461</sup> [REDACTED].

<sup>462</sup> [REDACTED].

<sup>463</sup> [REDACTED].

<sup>464</sup> [REDACTED].

<sup>465</sup> [REDACTED].

<sup>466</sup> [REDACTED].

<sup>467</sup> **P-0469**, T-107, 25:16-17.

<sup>468</sup> **P-0469**, T-107, 24:16-24.

<sup>469</sup> **P-0469**, T-107, 27:2-8.

<sup>470</sup> **P-0469**, T-107, 25:3-15.

<sup>471</sup> **P-0469**, T-106, 54:10-54:12.

pick-up (used for storing oil/water) driving back and forth from Junction to Iten Road for about an hour.<sup>472</sup> According to **P-0469** the Chief of Kimumu and Sami Ruto were waiting for the other groups from Betafarm and Ziwa to arrive so that they could “begin their work.”<sup>473</sup> **P-0469** then observed a group of many people arriving on foot from the direction of Ziwa.<sup>474</sup> When both groups met at Junction they started to burn all of the Kikuyu houses.

177. Also on 31 December, **P-0189** testified that she observed two lorries<sup>475</sup> on Iten highway carrying about two hundred armed Kalenjin youth<sup>476</sup> with white faces and hair.<sup>477</sup> The lorries were coming from the direction of Marura River on the Iten highway.<sup>478</sup> Armed Kalenjin youth then proceeded to attack the Kikuyu and their property in the Kimumu area.<sup>479</sup>

#### *Yamumbi*

178. The attack on Yamumbi also bears the signature of the Network: Following the war cries, armed Kalenjin youth arrived in the area by lorries and promptly attacked the Kikuyu and destroyed their property in an organised and surgical manner. Furthermore, Network member Isaac Maiyot assisted by housing the Kalenjin youth during the attack.

- *War cries*

179. [REDACTED]<sup>480</sup> [REDACTED],<sup>481</sup> [REDACTED].<sup>482</sup>

180. **P-0423** testified shortly after the election results had been announced, at approximately 8pm,<sup>483</sup> the Kalenjin youth started burning houses in his area.<sup>484</sup>

The Kalenjin youth had arrived on foot, after having been transported to the

<sup>472</sup> **P-0469**, T-107, 30:1-8, 30:24-31:8 and 32:20-23.

<sup>473</sup> **P-0469**, T-107, 32:14-19.

<sup>474</sup> **P-0469**, T-107, 32:24-33:3.

<sup>475</sup> **P-0189**, T-48, 80:5-8.

<sup>476</sup> **P-0189**, T-48, 80:22-81:1.

<sup>477</sup> **P-0189**, T-48, 81:9-17.

<sup>478</sup> **P-0189**, T-48, 82:15-21, 88:4-10. See also **P-0189**'s annotated map at EVD-T-OTP-00010/ [KEN-OTP-0076-0533](#).

<sup>479</sup> **P-0189**, T-46, 97:3-6.

<sup>480</sup> [REDACTED].

<sup>481</sup> [REDACTED].

<sup>482</sup> [REDACTED].

<sup>483</sup> **P-0423**, T-68, 13:8-9.

<sup>484</sup> **P-0423**, T-67, 79:24-80:17.

area by approximately ten lorries.<sup>485</sup> **P-0423** later learned from a friend that some of the lorries belonged to rich individuals such as Isaac Maiyo.<sup>486</sup> The armed Kalenjin youth<sup>487</sup> started shouting while moving towards **P-0423**'s area in order to gather other Kalenjins to assist them in their operation.<sup>488</sup> In the evening of the first day of the attack [30 December] the attackers burnt ten houses belonging to Kikuyu – including **P-0423**'s.<sup>489</sup> When the attack was launched **P-0423** was able to observe that stolen cows from Yamumbi were being taken to Isaac Maiyo's place by police officers.<sup>490</sup> On the morning of the following day [31 December], the Kalenjin youth came back to finish their work and burned down the houses one after another.<sup>491</sup> They split into several groups to attack the different villages.<sup>492</sup> In total about three hundred houses were burnt down<sup>493</sup> and a Kikuyu man was killed.<sup>494</sup>

181. [REDACTED],<sup>495</sup> [REDACTED].<sup>496</sup> [REDACTED].<sup>497</sup> [REDACTED] himself saw one of these lorries – similar to those for carrying fuel – parked in Isaac Maiyo's compound.<sup>498</sup> On that day at around 11:00,<sup>499</sup> [REDACTED] observe groups of 20 and 10<sup>500</sup> [armed Kalenjin youth],<sup>501</sup> who had smeared their faces "with white",<sup>502</sup> moving single file into Maiyo's compound.

182. **P-0423** confirms Isaac Maiyo's connection with Mr Ruto, the Network and its common plan. **P-0423** testified that Mr Maiyo had attended a secret, Nandi

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<sup>485</sup> **P-0423**, T-68, 3:17-4:7.

<sup>486</sup> **P-0423**, T-68, 4:14-17.

<sup>487</sup> **P-0423**, T-68, 13:1-7.

<sup>488</sup> **P-0423**, T-67, 83:3-23.

<sup>489</sup> **P-0423**, T-68, 13:20-14:12.

<sup>490</sup> **P-0423**, T-68, 6:10-14.

<sup>491</sup> **P-0423**, T-68, 14:15-20.

<sup>492</sup> **P-0423**, T-68, 14:23-15:1-5.

<sup>493</sup> **P-0423**, T-68, 15:8-10.

<sup>494</sup> **P-0423**, T-68, 16:9-23.

<sup>495</sup> [REDACTED].

<sup>496</sup> [REDACTED].

<sup>497</sup> [REDACTED].

<sup>498</sup> [REDACTED].

<sup>499</sup> [REDACTED].

<sup>500</sup> [REDACTED].

<sup>501</sup> [REDACTED].

<sup>502</sup> [REDACTED].

only<sup>503</sup> “large scale meeting” for Mr Ruto in Kapsaret forest,<sup>504</sup> during which it was stated that whether or not the ODM would win, the Kikuyu had to leave.<sup>505</sup> This meeting was also attended by Kibor and Mr Ruto himself.<sup>506</sup> Also, **P-0423** testified that at the “time of the events that unfolded” he heard that Mr Ruto had sent policemen to protect Mr Maiyo’s residence and farm.<sup>507</sup>

#### *Huruma*

183. The pattern of the attack on Huruma is identical to that of other attacks orchestrated by the Network: Following war cries, armed Kalenjin youth arrived from Ziwa and conducted an organised and surgical attack of the Kikuyu and destroyed their property. Network member John Tanui contributed by feeding and housing the Kalenjin youth during the attack.

- *Alarm cry/Nduru*

184. **P-0508** testified to hearing an alarm cry (*nduru*) on the evening of 30 December,<sup>508</sup> coming from [REDACTED].<sup>509</sup> Upon arriving there, **P-0508** and others witnessed that two Kikuyu houses were already burning. **P-0508** later learned that the alarm cry had been made by the daughter of a Kalenjin lady.<sup>510</sup>

- *Kibor’s lorries*

185. On 31 December early in the morning, **P-0487** observed two lorries – one white and another “creamish” – transporting each about 40-50 Kalenjin youth heading towards [REDACTED].<sup>511</sup> Later on he observed a group of Kalenjin positioning themselves in the upper area of the valley. The group signalled to other Kalenjin through cries and their number increased to approximately 300.<sup>512</sup> Thereafter, the armed Kalenjin youth attacked [REDACTED], causing **P-0487** to

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<sup>503</sup> **P-0423**, T-67, 63:25-64:3.

<sup>504</sup> **P-0423**, T-67, 59:18-24.

<sup>505</sup> **P-0423**, T-67, 64:4-8.

<sup>506</sup> **P-0423**, T-67, 59:18-24 and 62:10-15.

<sup>507</sup> **P-0423**, T-68, 7:17-25.

<sup>508</sup> **P-0508**, T-104, 34:5-7.

<sup>509</sup> **P-0508**, T-104, 36:17-18.

<sup>510</sup> **P-0503**, T-104, 39:11-25.

<sup>511</sup> **P-0487**, T-54, 63:19-65:22.

<sup>512</sup> **P-0487**, T-54, 69:11-20.

flee with others.<sup>513</sup> On the same day, **P-0487** saw lorries similar to those he had seen earlier that day dropping off Kalenjin youth.<sup>514</sup> Later on, **P-0487** “came to know” that the lorries belonged to Kibor.<sup>515</sup>

186. **P-0508** testified that on 31 December he observed three groups of youth/warriors positioned on [REDACTED]<sup>516</sup> - he was informed that the warriors had been transported to the location from Ziwa by lorries.<sup>517</sup> The three groups – composed of 50-100 youth<sup>518</sup> – attacked [REDACTED] in successive waves. One group would attack while the other two would remain on the hill - the groups never operated at the same time.<sup>519</sup> After a group has completed its mission – the burning of houses – it would retreat; this was also the case if a group was overpowered- then another group would be organised to go down.<sup>520</sup> The Kalenjin youth resumed the fight on 1 January 2008 in the morning- this is when P-0508 and others were overpowered and his house was burnt.<sup>521</sup> This is indicative of overall planning and coordination of the attack.
187. **P-0508** further testified that after the accomplishment of their missions the attackers would [REDACTED].<sup>522</sup> After the attacks, for every two days, the groups would go to [REDACTED]’s house, [REDACTED] and go back to their position.<sup>523</sup> [REDACTED] was an important Kalenjin leader in the area,<sup>524</sup> [REDACTED].<sup>525</sup>
188. On 1 January 2008, **P-0508** observed between 150 and 200 Kalenjin youth<sup>526</sup> gathered in a meeting being addressed by an elderly man<sup>527</sup> who was speaking

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<sup>513</sup> **P-0487**, T-54, 70:14-25.

<sup>514</sup> **P-0487**, T-54, 98:11-99:3.

<sup>515</sup> **P-0487**, T-54, 99:4-7.

<sup>516</sup> **P-0508**, T-104, 47:1-6.

<sup>517</sup> **P-0508**, T-105, 2:20-3:2.

<sup>518</sup> **P-0508**, T-104, 49:11-16.

<sup>519</sup> **P-0508**, T-104, 47:24-25 and 48:1-13.

<sup>520</sup> **P-0508**, T-104, 58:2-9.

<sup>521</sup> **P-0508**, T-104, 71:13-17.

<sup>522</sup> **P-0508**, T-104, 58:12-15 and 59:2-3.

<sup>523</sup> **P-0508**, T-104, 62:3-16.

<sup>524</sup> **P-0508**, T-104, 61:8-15.

<sup>525</sup> [REDACTED].

<sup>526</sup> **P-0508**, T-105, 4:15-17.

<sup>527</sup> **P-0508**, T-105, 4:19-20.

to them in Kalenjin.<sup>528</sup> **P-0508** testified that the youth and elders had been transported in two lorries that were parked nearby - one beige coloured and the other one white.<sup>529</sup>

*Kiambaa*

189. The evidence establishes that the Network – through the direct involvement of Mr Ruto and Kibor – orchestrated and directed the attack on Kiambaa with the help of local Network member Mark Too. Once again the organised pattern of the attack – including the significant number of armed Kalenjin youth involved - points to prior planning by the Network.

190. [REDACTED].<sup>530</sup> [REDACTED].<sup>531</sup> [REDACTED].<sup>532</sup> [REDACTED].<sup>533</sup>  
 [REDACTED].<sup>534</sup> [REDACTED].<sup>535</sup> [REDACTED].<sup>536</sup> [REDACTED].<sup>537</sup>  
 [REDACTED].<sup>538</sup> [REDACTED].<sup>539</sup> [REDACTED].<sup>540</sup> [REDACTED].<sup>541</sup>  
 [REDACTED].<sup>542</sup> [REDACTED].<sup>543</sup> [REDACTED].<sup>544</sup> [REDACTED].<sup>545</sup>  
 [REDACTED].<sup>546</sup> [REDACTED].<sup>547</sup> [REDACTED].<sup>548</sup> [REDACTED].<sup>549</sup>  
 [REDACTED].<sup>550</sup>

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<sup>528</sup> **P-0508**, T-105, 5:1-4.

<sup>529</sup> **P-0508**, T-105, 4:3-6. N.B.: This corresponds to the description of the lorries seen by **P-0487** above.

<sup>530</sup> [REDACTED].

<sup>531</sup> [REDACTED].

<sup>532</sup> [REDACTED].

<sup>533</sup> [REDACTED].

<sup>534</sup> [REDACTED].

<sup>535</sup> [REDACTED].

<sup>536</sup> [REDACTED].

<sup>537</sup> [REDACTED].

<sup>538</sup> [REDACTED].

<sup>539</sup> [REDACTED].

<sup>540</sup> [REDACTED].

<sup>541</sup> [REDACTED].

<sup>542</sup> [REDACTED].

<sup>543</sup> [REDACTED].

<sup>544</sup> [REDACTED].

<sup>545</sup> [REDACTED].

<sup>546</sup> [REDACTED].

<sup>547</sup> [REDACTED].

<sup>548</sup> [REDACTED].

<sup>549</sup> [REDACTED].

<sup>550</sup> See below para. 191.

- *The attack*<sup>551</sup>

191. **P-0536** testified that approximately 3000<sup>552</sup> armed<sup>553</sup> Kalenjin youth attacked Kiambaa (Church) on 1<sup>st</sup> January. They arrived from two directions,<sup>554</sup> some with their faces disguised with clay,<sup>555</sup> **P-0536** saw Chemalan,<sup>556</sup> Kimei Bor, Emmanuel Bor, and Brown among the attackers.<sup>557</sup>

192. [REDACTED].

*Langas*

193. The evidence points to the Network as being responsible for the attack on Langas. [REDACTED]<sup>558</sup> and second the evidence below demonstrates that the attacks were indeed organised, coordinated and directed by elders, following a very similar pattern and purpose as the other attacks in the greater Eldoret area.

194. Houses in Langas were burned by armed Kalenjin youth, starting on the night of 29 December. The Kikuyu victims were told by Kalenjin youth in Langas that “it was time to clear the *madoadoa*” and that they had no choice but to flee.<sup>559</sup> P-0376 testified that when he returned to Langas on 31 December, he discovered that “houses had been set ablaze [...] by our rivals”. He was referring to the Kalenjin youth, who he saw in Langas armed with bows and arrows.

- *Meeting on 4 January at Kipkaren Salient*

195. [REDACTED].<sup>560</sup> [REDACTED].<sup>561</sup> [REDACTED].<sup>562</sup> [REDACTED].<sup>563</sup>  
[REDACTED].<sup>564</sup> [REDACTED].<sup>565</sup> [REDACTED].<sup>566</sup> [REDACTED].<sup>567</sup>

<sup>551</sup> See above para. 69-73.

<sup>552</sup> **P-0536**, T-29, 38:22-24..

<sup>553</sup> **P-0536**, T-29, 39:3-4.

<sup>554</sup> **P-0536**, T-29, 38:18-21.

<sup>555</sup> **P-0536**, T-29, 39:11-13.

<sup>556</sup> **P-0536**, T-29, 42:1-14 and 44:1-3.

<sup>557</sup> **P-0536**, T-29, 59:12- 60:12.

<sup>558</sup> See above para. 154.

<sup>559</sup> **P-376**, T-51, para. 50:6-11.

<sup>560</sup> [REDACTED].

<sup>561</sup> [REDACTED].

<sup>562</sup> [REDACTED].

<sup>563</sup> [REDACTED].

<sup>564</sup> [REDACTED].

<sup>565</sup> [REDACTED].

<sup>566</sup> [REDACTED].

<sup>567</sup> [REDACTED].

[REDACTED].<sup>568</sup> A reasonable Trial Chamber may infer from this (i) that the attacks in Langas and Huruma were pre-planned and led by Kalenjin youth leaders, who in turn reported to tribal elders; and (ii) that the attacks on Langas and Huruma that commenced shortly after the elections continued up until at least 4 January 2008.

- *Roadblocks in the Greater Eldoret area*

196. The pattern of attack in the Greater Eldoret area also included the erection of roadblocks by Kalenjin youth on major arteries surrounding/near the targeted areas, in order to control access to and from the areas and identify perceived PNU supporters/Kikuyu. [REDACTED].<sup>569</sup> [REDACTED].<sup>570</sup> [REDACTED].<sup>571</sup>

- *Turbo*

197. The evidence demonstrates that the attack on Turbo was planned, organised and directed by Mr Ruto and members of the Network. [REDACTED]<sup>572</sup> [REDACTED].

- *War cries*

198. [REDACTED].

- *Meeting on 30 December at Besiebor Junction*

199. Immediately, after the election results were announced meetings were held by tribal leaders to mobilise and coordinate the youth into action. The evidence in this regard demonstrates that the attacks were organised and that Mr Ruto was communicating directly with the leaders on the ground – in this case Kisorio – to launch the attacks. [REDACTED].<sup>573</sup> [REDACTED].<sup>574</sup>

200. [REDACTED].<sup>575</sup> [REDACTED].<sup>576</sup> [REDACTED].<sup>577</sup>

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<sup>568</sup> [REDACTED].

<sup>569</sup> [REDACTED]; **P-0508**, T-104, 68:1-19; **P-0535**, T-71, 36:2–40:16. [REDACTED].

<sup>570</sup> [REDACTED].

<sup>571</sup> [REDACTED].

<sup>572</sup> [REDACTED].

<sup>573</sup> [REDACTED].

<sup>574</sup> [REDACTED].

<sup>575</sup> [REDACTED].

<sup>576</sup> [REDACTED].

<sup>577</sup> [REDACTED].

201. [REDACTED].<sup>578</sup> [REDACTED].<sup>579</sup> [REDACTED].<sup>580</sup> [REDACTED].<sup>581</sup>  
[REDACTED].

202. [REDACTED]<sup>582</sup> [REDACTED]<sup>583</sup> [REDACTED]<sup>584</sup> This evidence, taken at its highest, establishes that Mr Ruto was receiving reports on the progress of the attack on Turbo directly from someone actually participating in the violence, confirming the organisational policy and hierarchy of the Network.

- [REDACTED]

203. [REDACTED].<sup>585</sup> [REDACTED].<sup>586</sup> [REDACTED]<sup>587</sup> [REDACTED].<sup>588</sup>  
[REDACTED].<sup>589</sup> [REDACTED].<sup>590</sup> [REDACTED]<sup>591</sup> [REDACTED].<sup>592</sup>  
[REDACTED].<sup>593</sup>

204. **P-0613** testified that on the morning of 31 December 2007 she observed a group of Kalenjin youth enter Turbo, coming from Sugoi direction. In the afternoon at about 15:00 or 16:00 she saw another group of about 50-100 Kalenjin youth coming from Besiebor and going to Turbo.<sup>594</sup> **P-0613** states that she could tell that they were Kalenjin youth by their “special scream” – similar to the ones that are done when they are going for circumcision.<sup>595</sup> Turbo was attacked by the Kalenjin youth and Kikuyu houses were burnt and/or destroyed.<sup>596</sup>

- [REDACTED]

205. [REDACTED].

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<sup>578</sup> [REDACTED].

<sup>579</sup> [REDACTED].

<sup>580</sup> [REDACTED].

<sup>581</sup> [REDACTED].

<sup>582</sup> [REDACTED].

<sup>583</sup> [REDACTED].

<sup>584</sup> [REDACTED].

<sup>585</sup> [REDACTED].

<sup>586</sup> [REDACTED].

<sup>587</sup> [REDACTED].

<sup>588</sup> [REDACTED].

<sup>589</sup> [REDACTED].

<sup>590</sup> [REDACTED].

<sup>591</sup> [REDACTED].

<sup>592</sup> [REDACTED].

<sup>593</sup> [REDACTED].

<sup>594</sup> **P-0536**, T-118: 90:21.

<sup>595</sup> **P-0536**, T-118, 91:2-22.

<sup>596</sup> See above para. 90.

- *Nandi Tribunal*

206. The existences of a Nandi Tribunal, chaired by Network members, to punish Kalenjin PNU supporters also contributed to the implementation of the common plan by ensuring that all available Kalenjin men would fall in line with the Network and follow its instructions. [REDACTED].<sup>597</sup> [REDACTED].<sup>598</sup> [REDACTED].<sup>599</sup> [REDACTED].<sup>600</sup> [REDACTED].

207. [REDACTED].<sup>601</sup> [REDACTED].<sup>602</sup> [REDACTED].<sup>603</sup> [REDACTED].<sup>604</sup> [REDACTED].<sup>605</sup>

208. [REDACTED].<sup>606</sup>

- *Coordination of the Kalenjin youth by tribal leaders/elders*

209. [REDACTED].<sup>607</sup> [REDACTED].<sup>608</sup> [REDACTED].<sup>609</sup> [REDACTED].<sup>610</sup>

210. [REDACTED].<sup>611</sup>

- *Cooking for the Kalenjin youth*

211. Network members operated feeding and resupply stations at specific locations to feed the Kalenjin youth during the PEV in Turbo. This demonstrates the extent to which the Network organised the necessary logistics for the attacks. [REDACTED].<sup>612</sup>

*Kapsabet*

212. The organised pattern of the attack on Kapsabet by Kalenjin youth may also lead a reasonable Chamber to conclude that it was the work of the Network. Kalenjin youth who burned and pillaged Kikuyu belongings had information

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<sup>597</sup> [REDACTED].

<sup>598</sup> [REDACTED].

<sup>599</sup> [REDACTED].

<sup>600</sup> [REDACTED].

<sup>601</sup> [REDACTED].

<sup>602</sup> [REDACTED].

<sup>603</sup> [REDACTED].

<sup>604</sup> [REDACTED].

<sup>605</sup> [REDACTED].

<sup>606</sup> [REDACTED].

<sup>607</sup> [REDACTED].

<sup>608</sup> [REDACTED].

<sup>609</sup> [REDACTED].

<sup>610</sup> [REDACTED].

<sup>611</sup> [REDACTED].

<sup>612</sup> [REDACTED].

regarding the names of Kikuyu/Kisii civilians. Houses and businesses in the Business centre belonging to Kikuyu were also broken into. Further, Kalenjin-owned premises were marked to distinguish them from Kikuyu ones.

- *The Attack*

213. **P-0442** testified that on 1 January<sup>613</sup> a family member warned her that Kalenjin youth were gathering to attack [REDACTED],<sup>614</sup> situated three to four kilometres from [REDACTED].<sup>615</sup> As **P-0442** was hiding,<sup>616</sup> she saw approximately 10 youth arrive, most of whom were Kalenjin. One had a jerry-can of petrol, the others had arrows<sup>617</sup> and one had a piece of paper in his hand.<sup>618</sup> The youth with the paper read out the names of people of Kisii/Kikuyu ethnicity that were to be attacked.<sup>619</sup> **P-0442** witnessed the youth burning one house and pillaging another, both belonging to people on the list.<sup>620</sup>
214. **P-0268** testified that [REDACTED],<sup>621</sup> he observed that many of the Kikuyu buildings, business premises and residential houses in the business centre had been broken into.<sup>622</sup> Kalenjin premises were distinguished from Kikuyu ones with the inscription “*Kitwek*” – in dark oil paint or permanent marker.<sup>623</sup> In Kalenjin “*Kitwek*” means people who speak the same language.<sup>624</sup> **P-0268** heard this term for the first time while listening to Joshua Sang’s show *Lene Emet* show on KASS FM sometime before 2005.<sup>625</sup> [REDACTED].<sup>626</sup> The buildings bearing this inscription were intact.<sup>627</sup>

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<sup>613</sup> **P-0442**, T-99, 16:18.

<sup>614</sup> **P-0442**, T-99, 15:1-8.

<sup>615</sup> **P-0442**, T-98, 38:13-17.

<sup>616</sup> **P-0442**, T-99, 16:18-20.

<sup>617</sup> **P-0442**, T-99, 16:2-10 and 16:25.

<sup>618</sup> **P-0442**, T-99, 16:10-12.

<sup>619</sup> **P-0442**, T-99, 19:25 and 20:1-4.

<sup>620</sup> **P-0442**, T-99, 18:6-17 and 20:20-25.

<sup>621</sup> **P-0268**, T-61, 98:9-14.

<sup>622</sup> **P-0268**, T-61, 95:19-25 and 96:1-6.

<sup>623</sup> **P-0268**, T-61, 98:15-18.

<sup>624</sup> **P-0268**, T-61, 97:3-6.

<sup>625</sup> **P-0268**, T-61, 97:7-24.

<sup>626</sup> **P-0268**, T-62, 3:2-6.

<sup>627</sup> **P-0268**, T-61, 98:9-99:21

- *Roadblocks*

215. Roadblocks were also present in the Kapsabet area during the PEV. **P-0442** testified that while fleeing to the Police Station on 3 January, she encountered three roadblocks manned by armed Kalenjin youth.<sup>628</sup> **P-0268** also testified having encountered roadblocks on the road [REDACTED] in late January/early February. They were manned by Kalenjin youth, who were checking for Kikuyu<sup>629</sup> and asking for protection fees.

[REDACTED]

216. [REDACTED].<sup>630</sup> [REDACTED].<sup>631</sup> [REDACTED].<sup>632</sup> [REDACTED].<sup>633</sup>  
[REDACTED].<sup>634</sup>

## 2. **Mr Ruto and the other co-perpetrators carried out essential contributions in a coordinated manner which resulted in the crimes**<sup>635</sup>

217. The evidence on record establishes that Mr Ruto, in his capacity as top of the hierarchical structure of the Network, and other co-perpetrators provided essential contributions to the implementation of the Network's common plan.

218. The evidence demonstrates that based on his prominent role in the Network, Mr Ruto activated mechanisms leading to the almost automatic compliance with his orders;<sup>636</sup> (2) his role was central in organising, coordinating and planning the attack directed against a particular part of the civilian population, namely perceived PNU supporters;<sup>637</sup> he created the Network for which the purposes included evicting the PNU supporters;<sup>638</sup> he supervised the overall

<sup>628</sup> **P-0442**, T-99, 47:11-25, 48:2, 48:12-13, 49:20, 51:6-8 and 52:6-8.

<sup>629</sup> **P-0268**, T-61, 82:16-19, 86:15, 86:7-12 and 91:1-3.

<sup>630</sup> [REDACTED].

<sup>631</sup> [REDACTED].

<sup>632</sup> [REDACTED].

<sup>633</sup> [REDACTED].

<sup>634</sup> [REDACTED].

<sup>635</sup> UDCC, paras. 102-107.

<sup>636</sup> See below paras. 260-263.

<sup>637</sup> See above paras. 253-255, 154-159.

<sup>638</sup> See above paras. 154-159.

planning and was responsible for the implementation of the common plan to carry out crimes in the entire Rift Valley.<sup>639</sup>

219. The evidence also establishes that Mr Ruto and other key members of the Network, together with Mr Sang, carried out coordinated essential contributions including (1) attending preparatory meetings and events where the attacks were planned;<sup>640</sup> (2) contributing funds;<sup>641</sup> and (3) creating the organisation that would allow them to systematically construct roadblocks, distribute weaponry and attack multiple locations in a limited time frame.”<sup>642</sup>

**(a) Mr Ruto's contributions**

***(i) Mr Ruto contributed to the common plan by using his authority in the Rift Valley to mobilise supporters for the Network and to implement the common plan;***

- *Mr Ruto as the King/Spokesperson of the Kalenjin community*

220. The Prosecution submits that Mr Ruto leveraged his status of spokesperson and King of the Kalenjin community in order to mobilise supporters for the Network and to implement the common plan. In this regard the Prosecution incorporates by reference the evidence regarding (1) Mr Ruto's authority as leader of the Kalenjin community and (2) how he held the preparatory meetings at his house in Sugoi with other Network members and Kalenjin youth.<sup>643</sup>

***(ii) Using anti-PNU rhetoric at preparatory meetings and events to create an atmosphere of anti-PNU sentiment and fear among PNU supporters;***

221. Starting in 2005, Mr Ruto's speeches - at Political Rallies and meetings - were often laced with anti-PNU rhetoric which demeaned PNU supporters including the Kikuyu, and advocated their expulsion from the Rift Valley. These incendiary comments helped galvanize anti-PNU sentiment amongst the

<sup>639</sup> UDCC para. 103. See above para. 202.

<sup>640</sup> UDCC para. 104. See above paras. 154-159 for Mr. Ruto and above para. 158 for Mr Sang.

<sup>641</sup> See above below paras. 169-172, 210, 238.

<sup>642</sup> See above paras. 154-159.

<sup>643</sup> See above paras. 154-159.

Kalenjin community in the relevant areas and essentially prepared the ground for the attacks during the PEV.

- [REDACTED]

222. [REDACTED].<sup>644</sup> [REDACTED].<sup>645</sup> [REDACTED].<sup>646</sup> [REDACTED].<sup>647</sup>

223. [REDACTED].<sup>648</sup> [REDACTED].<sup>649</sup> [REDACTED].<sup>650</sup> [REDACTED].<sup>651</sup>

- [REDACTED]

224. [REDACTED].<sup>652</sup>

- *Political rally in Nandi Hills Stadium, October 2007*

225. At a political rally at Nandi Hills Stadium in October 2007 - attended by ODM MP's including Henry Kosgey and approximately 1000 mostly Kalenjin people – P-0658 heard Mr Ruto tell the crowd in Kalenjin that they did not want the “trees that were brought by the whites”, referring to the Kikuyu, Luo, Luhya and Kisii;<sup>653</sup> that they should not let the “grass penetrate into their house”;<sup>654</sup> and that when the day came they should do the work according to instructions.<sup>655</sup> Mr Ruto referred to the Kikuyu using the term “*madoadoa*” – meaning that he did not want people from two colours.<sup>656</sup> When Mr Ruto made this speech, people were cheering him.<sup>657</sup> Approximately two weeks later, Mr Ruto spoke at another political rally in Kapchorwa and repeated the same things while adding, “we are going to do the work together and in the same way”<sup>658</sup> and “do the job that has been asked of you.”<sup>659</sup>

- *Kaptabee Secondary School*

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<sup>644</sup> [REDACTED].

<sup>645</sup> [REDACTED].

<sup>646</sup> [REDACTED].

<sup>647</sup> [REDACTED].

<sup>648</sup> [REDACTED].

<sup>649</sup> [REDACTED].

<sup>650</sup> [REDACTED].

<sup>651</sup> [REDACTED].

<sup>652</sup> [REDACTED].

<sup>653</sup> P-0409, T-91, 57:14-57:18; 58:17-59:12; 65:22-66: 4 and 82:22-83:3.

<sup>654</sup> P-0409, T-92, 19:15-16.

<sup>655</sup> P-0409, T-92, 21:25-22:1, 24:24-25.

<sup>656</sup> P-0409, T-92, 25:13-25, 26:1-8.

<sup>657</sup> P-0658, T-92, 26:21-25, 27:1-2.

<sup>658</sup> P-0658, T-92, 57:16-19.

<sup>659</sup> P-0658, T-92, 58:12.

226. [REDACTED].<sup>660</sup> [REDACTED].<sup>661</sup>

- *Political rally at Kubjoi in November 2007*

227. **P-0128** participated in a political rally in Kobujoi<sup>662</sup> in November 2007.<sup>663</sup> The rally was attended by thousands of mainly Kalenjin people,<sup>664</sup> as well as Raila Odinga, Henry Kosgey and Mr Ruto.<sup>665</sup> Mr Ruto stated in Kalenjin that once the ODM would take power they would uproot the “tree stumps” and their land would be given back to their owners.<sup>666</sup> **P-0128** understood that the “tree stumps” referred to the Kikuyu and the Luhya<sup>667</sup> and that the term “owners” referred to the Kalenjin.<sup>668</sup>

- [REDACTED]

228. [REDACTED].<sup>669</sup> [REDACTED].<sup>670</sup> [REDACTED].<sup>671</sup>

- *Political rally in Kapsabet Stadium, 5 December 2007*

229. **P-0268** testified that he participated in an ODM rally<sup>672</sup> in Kapsabet Stadium on 5 December 2007.<sup>673</sup> The rally was attended by thousands of mostly Kalenjin ethnicity,<sup>674</sup> including dignitaries such as Mudavadi and Elijah Lagat.<sup>675</sup> The witness heard Mr Ruto chiding MOI for supporting Kibaki,<sup>676</sup> saying in Kalenjin that the Kikuyu were the enemies and that whoever supported Kibaki was a witch.<sup>677</sup> Mr Ruto also told the crowd that Kibaki had taken all the jobs in the civil service and reduced their people to being *boda-boda* operators.<sup>678</sup> This rally

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<sup>660</sup> [REDACTED].

<sup>661</sup> [REDACTED].

<sup>662</sup> **P-0128**, T-83, 7:5-10.

<sup>663</sup> **P-0128**, T-83, 8:1-3.

<sup>664</sup> **P-0128**, T-83, 16:20-17:5; T-85, 50:21-51:1.

<sup>665</sup> **P-0128**, T-83, 17:6-14.

<sup>666</sup> **P-0128**, T-83, 21:9-11. [REDACTED].

<sup>667</sup> **P-0128**, T-83, 22:13-23:3.

<sup>668</sup> **P-0128**, T-83, 23: 6-10.

<sup>669</sup> [REDACTED].

<sup>670</sup> [REDACTED].

<sup>671</sup> [REDACTED].

<sup>672</sup> **P-0268**, T-61, 27:4.

<sup>673</sup> **P-0268**, T-61, 28:24-25 and 29:1-11.

<sup>674</sup> **P-0268**, T-61, 29:20.

<sup>675</sup> **P-0268**, T-61, 32:3-32:19; 33: 25 and 34:1-2.

<sup>676</sup> **P-0268**, T-61, 34:12-17.

<sup>677</sup> **P-0268**, T-61, 34:12-17.

<sup>678</sup> **P-0268**, T-61, 41:13-14.

was aired live on KASS FM and many journalists from different media houses were present.<sup>679</sup>

- [REDACTED]

230. [REDACTED].<sup>680</sup> [REDACTED].<sup>681</sup>

- *Political rally in Eldoret 64 Stadium, 19/20 December 2007*

231. **P-0487** testified having attended an ODM Rally at the Eldoret 64 Stadium in December 2007, along with tens of thousands of other people, predominantly ODM supporters.<sup>682</sup> Members of the Pentagon were also present. Mr Ruto referred to the Kikuyu as “grabbers” and said that they would be put in a pick-up and taken back to Central.<sup>683</sup> In reaction to Mr Ruto’s speech people shouted “ODM, ODM” and “Kikuyu back to Central, Kikuyu should go back to Central.”<sup>684</sup> The media was present at the rally with cameras.<sup>685</sup>

- *Political rally in Meteitei, December 2007*

232. A few days before the elections, **P-0409** participated in a political rally at Meteitei,<sup>686</sup> attended by approximately 1000 people of mostly Kalenjin ethnicity<sup>687</sup> and including Henry Kosgey and Mr Ruto.<sup>688</sup> During the rally, Mr Ruto, who spoke last, told the crowd in Kalenjin to do the work that they had been ordered to do;<sup>689</sup> he spoke about the trees that had to be uprooted<sup>690</sup> and of the grass that they should not allow to creep into their houses.<sup>691</sup> During his speech, Mr Ruto also used the Kalenjin equivalent of *madoadoa* saying “we do not want two types of clothing.”<sup>692</sup>

- [REDACTED]

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<sup>679</sup> **P-0268**, T-61, 47:12-17.

<sup>680</sup> [REDACTED].

<sup>681</sup> [REDACTED].

<sup>682</sup> **P-0487**, T-53, 96:19-25, 101:6-7.

<sup>683</sup> **P-0487**, T-53, 102:10-17.

<sup>684</sup> **P-0487**, T-55, 109:2-8.

<sup>685</sup> **P-0487**, T-55, 99:7-12.

<sup>686</sup> **P-0409**, T-93, 8:3-11.

<sup>687</sup> **P-0409**, T-93, 9:10-22.

<sup>688</sup> **P-0409**, T-93, 8:14-23.

<sup>689</sup> **P-0409**, T-93, 18:21-19:1.

<sup>690</sup> **P-0409**, T-93, 21:22.

<sup>691</sup> **P-0409**, T-93, 20:22-25.

<sup>692</sup> **P-0409**, T-93, 26:6-27:11.

233. [REDACTED].<sup>693</sup> [REDACTED].<sup>694</sup> [REDACTED].<sup>695</sup>

*(iii) Providing direct perpetrators with weapons, food and other logistical necessities;*

234. There is ample evidence demonstrating that Mr Ruto - or other members of the Network acting on his behalf – provided the Kalenjin youth with the means to commit the attacks on the Kikuyu and satisfy the common plan.

- *Weapons*

235. [REDACTED].<sup>696</sup> [REDACTED].<sup>697</sup> [REDACTED].<sup>698</sup>

- *Food and fuel*

236. [REDACTED].<sup>699</sup> [REDACTED].<sup>700</sup>

- *Transportation*

237. [REDACTED].<sup>701</sup> Taking into consideration that Kibet was one of Mr Ruto's right hand men, representing Ruto in various matters, and that many youth were indeed transported to Eldoret and other areas during the PEV, it may be inferred that these sums of money were indeed ultimately provided by Mr Ruto. Through Kibor, Mr Ruto also provided transportation to Kalenjin youth traveling to the sites of the attacks such as the greater Eldoret area<sup>702</sup> and Huruma.<sup>703</sup>

- *Funding for training the youth*

238. [REDACTED].<sup>704</sup>

*(iv) Financing the Network*

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<sup>693</sup> [REDACTED].

<sup>694</sup> [REDACTED].

<sup>695</sup> [REDACTED].

<sup>696</sup> See above para. 163.

<sup>697</sup> See above para. 163.

<sup>698</sup> [REDACTED].

<sup>699</sup> [REDACTED].

<sup>700</sup> See above para. 190.

<sup>701</sup> [REDACTED].

<sup>702</sup> See above para. 175.

<sup>703</sup> See above para. 185.

<sup>704</sup> [REDACTED].

239. The evidence demonstrates that Mr Ruto was a major contributor of finances for the Network prior to and during the PEV. [REDACTED].<sup>705</sup> The Prosecution also incorporates by reference the evidence cited in paragraphs 169-172.

- (v) *Coordinating the implementation of the common plan via coordination of logistics (transportation/communication/perpetrators);*

240. The Prosecution incorporates by reference the evidence cited in paragraphs 169-172 and 202.

- (vi) *Providing instructions to subordinates and direct perpetrators on where to obtain instructions, how to communicate with one another, and how to execute the plan*

241. [REDACTED]<sup>706</sup> [REDACTED].

(b) *Role of Network members and Mr Sang as conduits for instructions*

242. [REDACTED].<sup>707</sup> [REDACTED].<sup>708</sup>

- *Funding*

243. [REDACTED].<sup>709</sup> [REDACTED].<sup>710</sup> [REDACTED].<sup>711</sup> [REDACTED]<sup>712</sup>  
[REDACTED].<sup>713</sup> [REDACTED].<sup>714</sup>

- *Transportation*

244. [REDACTED].<sup>715</sup> [REDACTED].<sup>716</sup>

- *Weapons*

245. [REDACTED].<sup>717</sup>

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<sup>705</sup> See above paras. 169-172, 210, 239.

<sup>706</sup> See above para. 154.

<sup>707</sup> [REDACTED].

<sup>708</sup> UDCC, para. 106. See above paras. 197-211.

<sup>709</sup> [REDACTED].

<sup>710</sup> [REDACTED].

<sup>711</sup> [REDACTED].

<sup>712</sup> [REDACTED].

<sup>713</sup> [REDACTED].

<sup>714</sup> [REDACTED].

<sup>715</sup> [REDACTED].

<sup>716</sup> P-0487, T-54, 99:4-7.

<sup>717</sup> See above para. 163.

- *Food*

246. [REDACTED].<sup>718</sup> [REDACTED].<sup>719</sup> [REDACTED].<sup>720</sup>

- *Identified PNU supporters as targets for the attack*

247. [REDACTED].<sup>721</sup> [REDACTED].<sup>722</sup> [REDACTED].<sup>723</sup> [REDACTED].<sup>724</sup>  
[REDACTED].<sup>725</sup> [REDACTED].

- *Organised transportation for perpetrators*

248. P[REDACTED].<sup>726</sup> [REDACTED].<sup>727</sup>

- *Ensured the provision of sufficient funds to execute the attacks*

249. The Prosecution incorporates by reference the evidence dealing with how Network members [REDACTED].<sup>728</sup>

- *Led perpetrators during attacks while maintaining contact with Mr Ruto to receive instructions and informing him of their progress*

250. [REDACTED].<sup>729</sup> [REDACTED].<sup>730</sup> [REDACTED].<sup>731</sup>

251. Along with other key figures in the Network and Joshua Sang, Mr Ruto also operated as a “hub” of the organisation by: (1) obtaining information from groups located in various locations in the Rift Valley;<sup>732</sup> (2) sharing plans and information from group to group regarding targeted locations;<sup>733</sup> (3) reporting on the progress of the overall plan;<sup>734</sup> and (4) financially supporting the attacks.<sup>735</sup>

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<sup>718</sup> See above para. 211.

<sup>719</sup> [REDACTED].

<sup>720</sup> [REDACTED].

<sup>721</sup> [REDACTED].

<sup>722</sup> [REDACTED].

<sup>723</sup> [REDACTED].

<sup>724</sup> [REDACTED].

<sup>725</sup> [REDACTED].

<sup>726</sup> [REDACTED].

<sup>727</sup> See above para. 175.

<sup>728</sup> See above paras. 169-172.

<sup>729</sup> See above para. 202.

<sup>730</sup> See above para. 250.

<sup>731</sup> [REDACTED].

<sup>732</sup> See above paras. 202, 250.

<sup>733</sup> See above paras. 202, 250.

<sup>734</sup> See above paras. 202, 250.

<sup>735</sup> See above paras. 169-172, 210.

### 3. Mr Ruto controlled the Organisation (Network)

252. The Prosecution submits that Mr Ruto had control over the Network and its supporters and that he exercised his control over the organisation and its supporters in a manner that assured his orders were carried out by almost automatic compliance.

*(a) Mr Ruto was crowned the Kalenjin leader, which gave him the authority to decide on matters affecting the Kalenjin community; Mr Ruto was the single most authoritative ODM figure in the Rift Valley;*

253. At the time of the PEV, Mr Ruto was a sitting MP for Eldoret North,<sup>736</sup> a member of the Pentagon<sup>737</sup> and most importantly the elected spokesperson or King of the Kalenjin community. All of these factors contributed to making Mr Ruto the uncontested *de facto* leader of the Kalenjin community in Kenya during the PEV. Mr Ruto enjoyed this status since 2006.<sup>738</sup> The evidence confirms that Mr Ruto was pronounced as the only spokesperson and King of the Kalenjin community<sup>739</sup> during a meeting held at the Eldoret Sports Club in June 2006<sup>740</sup> [REDACTED].<sup>741</sup> Many ODM and Kalenjin leaders were present during the ceremony – including retired Army John Sei,<sup>742</sup> retired Major General Augustin Cheruiyot and Kibor<sup>743</sup> along with thousands of other people.<sup>744</sup> [REDACTED]<sup>745</sup>

254. The title of *spokesperson* meant that Mr Ruto was the “final person” and that whatever Mr Ruto would say would be respected by the Kalenjin community.<sup>746</sup> As such, he would give orders and the Kalenjin ethnic group had to follow them.<sup>747</sup> [REDACTED].<sup>748</sup> This was echoed by Joshua Sang on KASS

<sup>736</sup> P-0658, T-119, 89:16-20.

<sup>737</sup> P-0326, T-44, 73:14-16.

<sup>738</sup> P-0405, T-121, 19:1-17; P0356, T-77, 66:5-8, 71:11-23 and 72:6.

<sup>739</sup> P-0356, T-77, 66:5-8.

<sup>740</sup> EVD-T-OTP-00066/ [KEN-OTP-0045-0021](#) and EVD-T-OTP-00065/ [KEN-OTP-0045-0020](#).

<sup>741</sup> [REDACTED].

<sup>742</sup> P-0356, T-77, 73:6-18.

<sup>743</sup> P-0356, T-77, 74:14-16 and 75:16-17.

<sup>744</sup> P-0356, T-77, 73:2-5.

<sup>745</sup> [REDACTED].

<sup>746</sup> P-0356, T-77, 34:1-6.

<sup>747</sup> P-0409, T-91, 50:9-51:6.

<sup>748</sup> [REDACTED].

FM during his *Lene Emet* show, who said that Mr Ruto was the only king and that whatever he said was the word of the community.<sup>749</sup> Any Kalenjin who held different views to Mr Ruto was held to be a traitor.<sup>750</sup>

255. Mr Ruto's effective authority over the Kalenjin community is further demonstrated by his *de facto* ability to issue orders to his subordinates, which were obeyed, and that his subordinates would seek or await his approval before acting. For instance: (1) [REDACTED];<sup>751</sup> [REDACTED];<sup>752</sup> [REDACTED];<sup>753</sup> [REDACTED];<sup>754</sup> (5) [REDACTED];<sup>755</sup> (6) [REDACTED];<sup>756</sup> (7) Mr Ruto was being briefed by Kalenjin youth leaders regarding the situation on the ground [REDACTED]<sup>757</sup> [REDACTED].<sup>758</sup>

**(b) Mr Ruto used the existing structures and roles in Kalenjin society to create a Network**

256. Existing structures in the Kalenjin society permitted Mr Ruto to create a Network where his orders would be passed on through the tribal leaders down to the Kalenjin youth.<sup>759</sup> Mr Ruto effectively leveraged his role as spokesperson and king of the Kalenjin community in order to implement the common plan. Mr Ruto's orders were final and could not be challenged.<sup>760</sup> In fact, the Kalenjin ethnic group had to follow his orders.<sup>761</sup> He also took advantage of the cultural position of the elders in traditional Kalenjin society and the culture of obedience with their orders.<sup>762</sup> The evidence demonstrates that Mr Ruto was not only directing the elders – who would then pass on his orders to the youth – but was also instructing the youth directly. The first case is best demonstrated through

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<sup>749</sup> P-0356, T-77, 34:7-12.

<sup>750</sup> [REDACTED].

<sup>751</sup> See above 154-159.

<sup>752</sup> See above 156-157.

<sup>753</sup> See above paras. 156-157

<sup>754</sup> See above paras. 167.

<sup>755</sup> See above para. 172.

<sup>756</sup> See above para. 200.

<sup>757</sup> See above para. 202.

<sup>758</sup> See above para. 250.

<sup>759</sup> See below para. 260.

<sup>760</sup> See above paras. 253-255.

<sup>761</sup> P-0409, T-91, 50:9-51:6.

<sup>762</sup> See above paras. 253-255.

the fact that [REDACTED].<sup>763</sup> [REDACTED]<sup>764</sup> [REDACTED].<sup>765</sup> [REDACTED]. In the second case, there is evidence that Mr Ruto also directed the Kalenjin youth directly on the ground.<sup>766</sup>

257. **P-0613** testified that the Kalenjin youth could not act without instructions from the elders and that the elders were supposed to “give direction as to what to do and what not to do”<sup>767</sup> The elders would basically tell them what to do.<sup>768</sup> This was clearly demonstrated by the evidence of tribal elders/leaders instructing the Kalenjin youth.<sup>769</sup> In fact the youth received instructions directly from the elders in the meetings held prior to the attacks<sup>770</sup> and during the attacks as well. [REDACTED].<sup>771</sup> [REDACTED].

**(c) Mr Ruto ensured that Network members and supporters understood and believed in the common plan**

258. Mr Ruto used the [REDACTED]<sup>772</sup> in order to ensure that the tribal elders and the Kalenjin youth of the different areas understood the basics of the common plan. As detailed above, Mr Ruto not only advocated for the expulsion of the Kikuyu but also denigrated them and catalogued the wrongs they had committed to justify this course of action.<sup>773</sup> Other meetings were held by local Network members at the ground level, immediately after the announcement of the election results, in order to further disseminate the common plan amongst the Kalenjin youth.<sup>774</sup>

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<sup>763</sup> [REDACTED].

<sup>764</sup> [REDACTED].

<sup>765</sup> [REDACTED].

<sup>766</sup> See above para. 202.

<sup>767</sup> **P-0613**, T-119, 64:5-7.

<sup>768</sup> **P-0613**, T-119, 64:5-7.

<sup>769</sup> See above paras. 154-159, 197-211, 202.

<sup>770</sup> See above paras. 154-159, 197-211, 202.

<sup>771</sup> [REDACTED].

<sup>772</sup> See above paras. 154-159.

<sup>773</sup> See above para. 154.

<sup>774</sup> See above paras. 167-172, 190, 195, 199-205, 209-211.

**(d) Mr Ruto together with other high ranking members of the Network financed the Network**

259. In this regard, the Prosecution incorporates by reference the above section addressing the issue of Mr Ruto's financing of the Network.<sup>775</sup> The evidence supporting this factual allegation is identical.

**(e) Mr Ruto exercised control through a payment and punishment mechanism**

260. Mr Ruto exercised his control over the organisation and its supporters in a manner that assured that his orders were carried out by almost automatic compliance by way of at least a two-fold strategy: (1) a payment mechanism; and (2) a punishment mechanism. These Network subordinates adopted the Network's organisational policy to punish and expel PNU supporters in their specific areas and executed attack as ordered by Mr Ruto.<sup>776</sup>

- *The payment mechanism*

261. The Prosecution incorporates by reference the evidence regarding the payment of sums of money by Mr Ruto to tribal leaders and Kalenjin youth attending [REDACTED].<sup>777</sup> The Prosecution submits that these sums further encouraged tribal leaders and especially the Kalenjin youth to continue attending meetings and to participate in the attacks. [REDACTED].<sup>778</sup> [REDACTED].<sup>779</sup> [REDACTED].<sup>780</sup> [REDACTED].

- *The punishment mechanism*

262. The evidence demonstrates that Mr Ruto, through the Network members, created a punishment mechanism which compelled people to participate in the meetings, attacks and deterred anyone from refusing to do so. Thus ensuring automatic compliance with his orders. [REDACTED].<sup>781</sup> [REDACTED].<sup>782</sup>

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<sup>775</sup> See above paras. 239.

<sup>776</sup> UDCC, para. 106.

<sup>777</sup> See above paras. 154-159.

<sup>778</sup> See above para. 216.

<sup>779</sup> See above paras. 190, 210.

<sup>780</sup> See above para. 190.

<sup>781</sup> [REDACTED].

<sup>782</sup> See above para. 174.

[REDACTED].<sup>783</sup> [REDACTED],<sup>784</sup> [REDACTED].<sup>785</sup> [REDACTED].<sup>786</sup>  
[REDACTED].<sup>787</sup>

#### 4. Existence of an organised and hierarchical apparatus of power

263. Mr Ruto and other key members of the Network created an *ad hoc* hierarchy through which the attacks were executed. Mr Ruto was at the top of the hierarchy, though a few other key members also played a predominant role. Mr Ruto's authority and control over the Network was recognised by Network subordinates, supporters and direct perpetrators.<sup>788</sup>

264. The *ad hoc* hierarchy through which the attacks were executed was both simple and effective. Mr Ruto, as the leader of the Kalenjin community, sat at the head of a four-tiered hierarchy, and below him stood the Network members, the youth leaders and finally the Kalenjin youth who were subordinate to all. During the PEV, Mr Ruto transmitted orders/instructions to the relevant tribal leaders and these would then instruct the Kalenjin youth – or the relevant youth leader. The efficiency of the Network – and its hierarchy – was facilitated through the communication between the different levels of the hierarchy. The success of the attacks by the Kalenjin youth speaks to the efficiency of the Network and its hierarchy.

##### (a) Mr Ruto was at the top of the hierarchy

265. As spokesperson and King of the Kalenjin community Mr Ruto sat at the top of the hierarchy. In this regard, the Prosecution incorporates by reference the evidence cited in paragraphs 253-255 above. He had effective control over the other Network members and, both through them and directly, the perpetrators of the attacks charged.

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<sup>783</sup> [REDACTED].

<sup>784</sup> [REDACTED].

<sup>785</sup> [REDACTED].

<sup>786</sup> [REDACTED].

<sup>787</sup> See above paras. 206-208.

<sup>788</sup> UDCC, para. 110.

**(b) Key Network members of the hierarchy**

266. Network members constituted the second-tier of the *ad hoc* hierarchy and as such reported to Mr Ruto.<sup>789</sup> They played a vital role in ensuring, through different means, the successful implementation of the common plan. The evidence demonstrates that (1) Jackson Kibor: [REDACTED];<sup>790</sup> [REDACTED];<sup>791</sup> [REDACTED] <sup>792</sup>[REDACTED] <sup>793</sup>(2) Farouk Kibet: [REDACTED];<sup>794</sup> [REDACTED];<sup>795</sup> relayed instructions from Mr Ruto to the Kalenjin youth on the ground in Turbo;<sup>796</sup> [REDACTED]; (3) Christopher Kisorio: [REDACTED];<sup>797</sup> [REDACTED] (4) Solomon Tirop: [REDACTED]; acted as youth leader in the attack on Turbo; and relayed orders from Mr Ruto to the Kalenjin youth; (5) Mark Too: [REDACTED];<sup>798</sup> and (6) Samuel Ruto: [REDACTED] was later on implicated in the attack on Kimumu;<sup>799</sup> (7) Lucas Sang: [REDACTED]; (8) Isaac Maiyo†: [REDACTED]; (9) John K. Tanui, [REDACTED] (10) Stephen Shamalan/Chemalan, [REDACTED] and played a leading role in the attack on Kiambaa; (11) Isaac Maiyo, [REDACTED]; (12) Fred Kapondi, [REDACTED];<sup>800</sup> (13) Joshua Sang, [REDACTED];<sup>801</sup> [REDACTED];<sup>802</sup> used his show Lene Emet to diffuse anti-PNU/Kikuyu rhetoric in the form of derogatory language and hate speech;<sup>803</sup> instructed the Kalenjin to go out and “demonstrate” following the

<sup>789</sup> See above paras. 154-159, 253-255.

<sup>790</sup> See above paras. 154-159.

<sup>791</sup> See above para. 172.

<sup>792</sup> See above paras. 169-172.

<sup>793</sup> See above para. 172.

<sup>794</sup> See above paras. 154-159.

<sup>795</sup> See above para. 161.

<sup>796</sup> **P-0613**, T-119, 51:10-52:19.

<sup>797</sup> [REDACTED]. See above paras. 154-159, 197-211, 200.

<sup>798</sup> For Tirop, see above paras. 154-159, 202, 197-211. For Mark Too, see above para. 190.

<sup>799</sup> **P-0469**, T-107, 30:4-8, 32:17-19 and 34:20-35:2.

<sup>800</sup> For Lucas Sang, See above paras. 167, 174; for Isaac Maiyo†, see above paras. 180-182; for John K. Tanui, see above paras. 187-188; For Steven Shamalan [Chemalan] see above paras. 73, 190; For Isaac Maiyo, see above paras. 169-172; For Fred Kapondi see above paras. 158-159.

<sup>801</sup> See above paras. 158-159.

<sup>802</sup> See above para. 170.

<sup>803</sup> See above below paras. 307-326.

election results;<sup>804</sup> coordinated the efforts on the ground through his reports on KASS FM.<sup>805</sup>

***(c) The Kalenjin youth***

267. The Kalenjin youth formed the bottom layer of the hierarchy, subordinate to the youth leaders and the members of the Network. The youth leaders acted as an intermediate level between the youth and the Network members.<sup>806</sup>

***(d) Communication between Mr Ruto, Key Network members and the Kalenjin youth***

268. The implementation of the common plan during the attack was greatly facilitated by the efficient communication between different levels of the hierarchy. This enabled the Network members to adjust their strategy depending on what the Kalenjin youth reported. [REDACTED].<sup>807</sup>

**5. There was an almost automatic compliance with Mr Ruto's instructions**

269. Mr Ruto and other key members of the Network ensured near compliance with their instructions by (1) indoctrinating Network members to accept and agree with the common plan by referring to PNU supporters in a derogatory manner; (2) training direct perpetrators; (3) creating localized coordination structures headed by local subordinates who ensured compliance in their respective areas; (4) paying subordinates and direct perpetrators; and (5) instilling in the subordinates and direct perpetrators fear of punishment if they did not participate.

***(a) Indoctrinating Network members to accept and agree with the common plan by referring to PNU supporters in a derogatory manner***

270. The Prosecution incorporates by reference the evidence it cited above dealing with the anti-PNU rhetoric voiced at the general preparatory meetings<sup>808</sup> and the

<sup>804</sup> See above below paras. 340-352.

<sup>805</sup> See above below paras. 353-359.

<sup>806</sup> See above paras. 167, 190-191, 195, 201-202, 209, 253-255.

<sup>807</sup> [REDACTED].

<sup>808</sup> See above paras. 154-159.

ODM political rallies and events.<sup>809</sup> The Kikuyu community was often referred to, in derogatory terms, as an undesirable element that had to be removed from the Rift Valley. Joshua Sang also contributed in indoctrinating the Network members by using his *Lene Emet* show, and its popularity amongst Kalenjin listeners, to demean people of Kikuyu ethnicity and advocate for their removal.<sup>810</sup>

**(b) Training direct perpetrators**

271. The Prosecution incorporates by reference the evidence cited in paragraphs 16-162 above dealing with the two trainings organised by the Network members for the Kalenjin youth in preparation for the attacks.

**(c) Creating localized coordination structures headed by local subordinates who ensured compliance in their respective areas**

272. The Prosecution incorporates by reference the evidence cited in the paragraphs 197-211 and 169-177 above regarding the attacks on Turbo and Kimumu which demonstrate how local subordinates mobilised the youth and directed the attacks on the ground in the incidents charged.

**(d) Paying subordinates and direct perpetrators**

273. The Prosecution incorporates by reference the evidence cited in paragraphs 190 and 216 above, which demonstrates that subordinates and direct perpetrators were paid for their “work”. [REDACTED].

**(e) Instilling in the subordinates and direct perpetrators fear of punishment if they did not participate**

274. The Prosecution incorporates by reference the evidence cited in paragraphs 206-208 and 262 above which addresses the issue of how Kalenjin youth were compelled – through fear of punishment - to participate in attacks and meetings.

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<sup>809</sup> See above paras. 221-233.

<sup>810</sup> See below paras. 307-326.

**6. Mr Ruto, other co-perpetrators and Mr Sang intended to attack particular parts of the civilian population due to their perceived political affiliation<sup>811</sup>**

275. In regards to Mr Ruto's awareness and knowledge: The Prosecution incorporates by reference the evidence it cited above regarding Mr Ruto's (1) inciting/hate speeches made during political rallies and events;<sup>812</sup> (2) statements made during the preparatory meetings;<sup>813</sup> (3) essential contributions to the common plan.<sup>814</sup>

**7. Mr Ruto was aware of the factual circumstances enabling him to exercise joint control over the commission of the crimes through other persons**

276. In regards to Mr Ruto's awareness: The Prosecution incorporates by reference the evidence it cited above regarding (1) Mr Ruto's authority,<sup>815</sup> and that of others, in the Network<sup>816</sup> and his leading role in the preparatory meetings;<sup>817</sup> (2) the common plan;<sup>818</sup> (3) the hierarchy of the Network;<sup>819</sup> (4) the organised and hierarchical apparatus of power and (5) the almost automatic compliance with Mr Ruto's instructions.

**8. *Mens Rea* under article 30**

277. A reasonable Chamber may infer from the evidence described above that (1) Mr Ruto intended to engage in the conduct that led to the offences charged being committed;<sup>820</sup> and (2) that he meant to cause the offences charged<sup>821</sup> or that he was aware that they would occur in the ordinary course of events.<sup>822</sup>

278. With respect to crimes against humanity, the Prosecution submits that Mr Ruto either knew that his conduct was part of or intended his conduct to be part of a

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<sup>811</sup> UDCC, paras. 115-119.

<sup>812</sup> See above paras. 221-233.

<sup>813</sup> See above paras. 154-159.

<sup>814</sup> See above paras. 220-241.

<sup>815</sup> See above paras. 253-255.

<sup>816</sup> See above paras. 154-159, 169-172, and 197-211.

<sup>817</sup> See above paras. 154-159.

<sup>818</sup> See above paras. 154-159.

<sup>819</sup> See above paras. 263-268.

<sup>820</sup> See above paras. 154-159, 220-241

<sup>821</sup> See above paras. 154-159, 220-241.

<sup>822</sup> See above paras. 154-159, 220-241.

widespread or systematic attack against a civilian population<sup>823</sup> and that the conduct was pursuant to or in furtherance of an organisational policy.<sup>824</sup>

**B. Mr Ruto is criminally liable under article 25(3)(b)**<sup>825</sup>

279. As regards article 25(3)(b), the evidence establishes that Mr Ruto, through the inciting speeches that he made at the general preparatory meetings<sup>826</sup> and the ODM political rallies and other events<sup>827</sup> “induced” the Kalenjin youth to commit the offences charged.

**1. Mr Ruto exerted influence over Kalenjin tribal leaders and youth to commit the crimes charged, which in fact occurred**

**(a) Mr Ruto’s inciting speeches induced the Kalenjin tribal leaders and youth to commit the attacks**

280. The evidence demonstrates that, as early as 2005, Mr Ruto expressed anti-PNU rhetoric in public meetings, public gatherings [REDACTED], mostly aimed specifically at the Kikuyu community.<sup>828</sup> The anti-PNU rhetoric often took the form of derogatory and inflammatory speeches demeaning the Kikuyu in a variety of ways, for example calling them thieves,<sup>829</sup> “grabbers”<sup>830</sup> and likening them to tree stumps<sup>831</sup> while advocating for their removal from the Rift Valley back to Othaya [Central province].<sup>832</sup> This had the effect of galvanizing anti-PNU sentiment amongst the Kalenjin community and basically induced or solicited the Kalenjin youth to commit the crimes charged during the PEV.

<sup>823</sup> Elements of Crimes, Articles 7(1)(a)(3); ICC-01/09-02/11-382-Red, para 417.

<sup>824</sup> There is no explicit reference to knowledge of the policy element. However, as the second paragraph of the Introduction to the Elements of Crimes under Article 7 indicates, it is not required that the perpetrator knew the precise details of the policy. This implies that some awareness of an underlying policy is required, even if it leaves considerable ambiguity as to the extent of that awareness: Robinson D., ‘The Elements of Crimes against Humanity’, (Transnational Publications, 2001) Lee et al. (ed.), in ICC: Elements of Crimes and Rules of Procedure and Evidence, page 73.

<sup>825</sup> In regards to the legal requirements for these MOL the Prosecution incorporates by reference the analysis provided in Part III.

<sup>826</sup> See above paras. 154-159.

<sup>827</sup> See above paras. 221-233.

<sup>828</sup> See above paras. 154-159 and 221-233.

<sup>829</sup> See above paras. 154

<sup>830</sup> See above para. 231.

<sup>831</sup> See above para. 227.

<sup>832</sup> See above para. 231.

**(b) Mr Ruto's words influenced the Kalenjin tribal leaders and youth**

281. Mr Ruto's inciting speeches influenced many Kalenjin people in the Rift Valley – but most importantly it galvanised the tribal leaders and the youth into action. It bears recalling that many Kalenjin tribal leaders and youth who were subsequently implicated in the attacks of the incidents charged attended the [REDACTED] during which anti-PNU and Kikuyu rhetoric was voiced by Mr Ruto himself. Mr Ruto's hate speech was widely diffused: thousands of Kalenjin people attended political rallies in large venues and listened to Mr Ruto express anti-PNU rhetoric in the form of derogatory and inciting language concerning the Kikuyu.<sup>833</sup> It is reasonable to infer that given Mr Ruto's position as leader of the Kalenjin community, word of what he had stated must have been shared with others not attending the rallies. Further, the media was also present at certain meetings thus further propagating Mr Ruto's inciting statements. As seen above, Mr Ruto made inciting statements to thousands of Kalenjin during a public rally in Kapsabet on 5 December, which was aired live by KASS FM.<sup>834</sup>

**(c) Mr Ruto made inciting speeches and derogatory comments regarding PNU supporters**

282. As of 2005 and leading up to the 2007 Kenyan elections, Mr Ruto used public and private meetings including ODM rallies to make inciting and derogatory anti-PNU speeches frequently targeting the Kikuyu.<sup>835</sup> In the relevant context, the content of the speeches could only be perceived as an encouragement/appeal for the Kalenjin tribal leaders and youth to commit a crime: in this case the eviction of Kikuyu from the Rift Valley and more. [REDACTED].<sup>836</sup> It bears recalling that barely a month later Kalenjin youth burnt most of the Kikuyu houses in Turbo and destroyed their property.<sup>837</sup> At a political rally in Meteitei, just days before the elections, Mr Ruto, speaking in

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<sup>833</sup> See above paras. 221-233.

<sup>834</sup> See above para. 229.

<sup>835</sup> See above paras. 221-233 regarding Mr Ruto's inciting speeches.

<sup>836</sup> See above para. 228.

<sup>837</sup> See above para. 90.

Kalenjin, told the crowd to do the work that they had been ordered to do.<sup>838</sup> He spoke about the trees that had to be uprooted<sup>839</sup> and of the grass that they should not allow to creep into their houses, which was understood to be an encouragement to uproot and expel the Kikuyu from the Rift Valley.<sup>840</sup> Last, just four days before the elections, Mr Ruto told a crowd at Eldoret Kipchoge Stadium that if the PNU stole the votes “they would see”. The Prosecution submits that a reasonable Trial Chamber may inferred that this was an incitement to punish the Kikuyu if the ODM lost the elections. During these speeches Mr Ruto often used derogatory language to describe the PNU supporters and the Kikuyu.<sup>841</sup>

(d) *The power of Mr Ruto’s inciting speeches was amplified*

283. The noxious compound effect of Mr Ruto’s inciting speeches on the Kalenjin community – and more specifically the tribal leaders and the youth - was amplified by three separate elements: (1) as the spokesperson and King of the Kalenjin community Mr Ruto’s words carried a lot of weight. Mr Ruto represented and spoke on behalf of the Kalenjin community and consequently it can be inferred that his views on the Kikuyu like his orders<sup>842</sup> had to be respected and followed; (2) the socio-historical context, namely the idea amongst the Kalenjin community that the Kikuyu had stolen Kalenjin land in the Rift Valley and that they occupied all the important positions in the government, gave Mr Ruto’s words an added layer of importance and urgency; and finally (3) Mr Kibaki’s victory in the presidential elections confirmed to the Kalenjin community what Mr Ruto (and Mr Sang) had been saying all along and justified the use of force to remedy what they had been persuaded was a great injustice.

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<sup>838</sup> See above para. 232.

<sup>839</sup> See above para. 232.

<sup>840</sup> See above para. 232.

<sup>841</sup> See above paras. 221-233.

<sup>842</sup> See above para. 253-255.

## 2. The inducement or solicitation had a direct effect on the commission or attempted commission of the crime

284. The Prosecution submits that the following seven indicia demonstrate that Mr Ruto's inciting speeches induced or solicited the Kalenjin youth to commit the offences charged, which did in fact occur:<sup>843</sup> (1) Mr Ruto, as the leader and King of the Kalenjin made the inciting speeches. Consequently his words carried significant weight in the Kalenjin community. It can be inferred that his views on the Kikuyu, like his orders,<sup>844</sup> had to be respected and followed by the Kalenjin community. (2) The audience, who listened to his speeches at meetings and political rallies, were predominantly Kalenjin.<sup>845</sup> This facilitated the dissemination of Mr Ruto's message throughout the Kalenjin community. (3) The Kalenjin tribal leaders and youth were an important audience of Mr Ruto's inciting speeches.<sup>846</sup> Some of these would later be implicated in the attacks during the incidents charged. (4) As described above, Mr Ruto's speeches not only demeaned the Kikuyu, but they were also (explicitly or implicitly) a call for violence by advocating the eviction of the Kikuyu from the Rift Valley.<sup>847</sup> (5) The inciting speeches touched upon sensitive, long-held grievances by the Kalenjin community against the Kikuyu, namely that the Kikuyu were living on stolen Kalenjin land in the Rift Valley and that they were occupying all the important positions in the government.<sup>848</sup> (6) Most of the inciting speeches were made in areas of the Rift Valley that would later on become the scene of attacks by the Kalenjin youth. (7) Most of the inciting speeches were made in the three months prior to the attacks. In fact, Mr Ruto made some of the most virulent speeches in the weeks before the start of the attacks.<sup>849</sup>

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<sup>843</sup> See Part II above.

<sup>844</sup> See above paras. 153-155.

<sup>845</sup> See above paras. 154-159 and 221-233.

<sup>846</sup> See above in regards to three general preparatory meetings, paras. 154-159. See also the implication of Kisorio and Tirop in the attack on Turbo above paras. 197-211.

<sup>847</sup> See above paras. 227 and 231.

<sup>848</sup> In regards to the Kikuyu occupying most of the Governmental jobs: **P-0464**, T-90, 41:7-14; [REDACTED]; **P-0268**, T-61, 41:3-14. In regards to the Kikuyu occupying stolen land: **P-0464**, T-89, 58:17-25; [REDACTED].

<sup>849</sup> See above paras. 221-233.

### 3. *Mens Rea*

285. The Prosecution submits that the evidence<sup>850</sup> demonstrates that Mr Ruto (1) intended engage in his conduct<sup>851</sup> and satisfies the *mens rea* for inducement or solicitation.<sup>852</sup>

#### C. Mr Ruto is criminally liable under article 25(3)(c)<sup>853</sup>

286. The evidence above taken at its highest also supports criminal responsibility for Mr Ruto under article 25(3)(c).

#### 1. **Mr Ruto is criminally liable for “abetting” in the commission of the offences charged**

287. The evidence supporting Mr Ruto’s criminal responsibility for inducing or soliciting the Kalenjin youth to commit the crimes charged under article 25(3)(b) also establishes his criminal responsibility for “abetting” under article 25(3)(c). In fact, as seen above, through his inciting/hate speeches Mr Ruto encouraged – and thus “abetted” the Kalenjin tribal leaders and youths in committing the offences charged.<sup>854</sup> The above analysis and evidence regarding the causation for “inducement” also applies to this form of criminal responsibility.

#### 2. *Mens Rea*

288. The Prosecution submits that the evidence<sup>855</sup> demonstrates that Mr Ruto intended to engage in his conduct and satisfies the *mens rea* for aiding and abetting.<sup>856</sup>

#### 3. **Mr Ruto is criminally responsible for “aiding” in the commission of the offences charged**

289. The evidence above regarding Mr Ruto’s “essential contributions” to the common plan also supports criminal liability for “aiding” the commission of the

<sup>850</sup> See above paras. 154-159 and 221-233.

<sup>851</sup> See above paras. 154-159 and 221-233.

<sup>852</sup> See above paras. 121-122, 154-159, 221-233.

<sup>853</sup> In regards to the legal requirements for these MOL the Prosecution incorporates by reference the analysis provided in Part III.

<sup>854</sup> See above para. 123.

<sup>855</sup> See above paras. 154-159 and 221-241.

<sup>856</sup> See above paras. 124-128, 154-159 and 221-241.

offences charged.<sup>857</sup> In regards to causation, the Prosecution submits that this is established by the evidence described above regarding Mr. Ruto's contributions to the implementation of the common plan by Kalenjin tribal leaders and youth, who later on participated in the attacks regarding the incidents concerned.<sup>858</sup>

#### 4. *Mens Rea*

290. The Prosecution submits that the evidence demonstrates that Mr Ruto intended to engage in his conduct and satisfies the *mens rea* for aiding and abetting.<sup>859</sup>

#### D. Mr Ruto is criminally liable under article 25(3)(d)<sup>860</sup>

291. The Prosecution submits that the evidence cited above as support for criminal liability under article 25(3)(b) and (c) also supports Mr Ruto's criminal liability under article 25(3)(d). The Prosecution submits that the requirement of contributing "in any other way" in article 25(3)(d) encompasses all of the evidence – which as demonstrated above – induced/aided or abetted in the commission of the crimes.<sup>861</sup> In regards to the causation, the Prosecution incorporates by reference the arguments it advanced above for "aiding" AND "abetting" under article 25(3)(c).

#### 4. *Mens Rea*

292. The Prosecution submits that the evidence<sup>862</sup> demonstrates that Mr Ruto (1) intended to engage in his conduct<sup>863</sup> and (2) satisfies the *mens rea* requirements under article 25(3)(d).<sup>864</sup>

*Concluding remarks*

<sup>857</sup> See above paras. 154-159 and 220-241.

<sup>858</sup> See above para. 154-159 and 197-211.

<sup>859</sup> See above paras. 124-128, 154-159 and 220-241.

<sup>860</sup> In regards to the legal requirements for these MOL the Prosecution incorporates by reference the analysis provided in Part III.

<sup>861</sup> See above paras. 154-159 and 221-241.

<sup>862</sup> See above paras. 154-159 and 221-241.

<sup>863</sup> See above paras. 154-159 and 221-241.

<sup>864</sup> See above paras. 140-141, 154-159 and 221-241.

293. The Prosecution accordingly submits that the evidence on record, taken at its highest, is sufficient to persuade a reasonable Trial Chamber that Mr Ruto is criminally liable for the offences charged under article 25(3)(a), (b), (c) or (d).

## **PART V CRIMINAL LIABILITY OF MR SANG**

294. In this section, the Prosecution will show that it has adduced sufficient evidence upon which a reasonable Chamber could conclude that the required elements of Mr Sang's criminal responsibility under article 25(3)(b), (c) or (d) of the Statute have been established.

### *Preliminary remarks concerning the nature of the evidence on record*

295. The Defence makes three general assertions in relation to Mr Sang's criminal responsibility: (i) that at the close of the Prosecution's case the Accused faces a "radically different factual case [...] as compared to the facts and circumstances contained in the Confirmation Decision";<sup>865</sup> (ii) that "the Prosecution's motives for not calling its Confirmation Witnesses" at trial is a factor that the Chamber should consider when evaluating the lack of credibility (to the point of incapable of belief) of the replacement witnesses who came to testify";<sup>866</sup> and that (iii) "the case against [Mr] Sang is dependent on a very small number of witnesses [...] who talk about disparate incidents [...] and do not corroborate each other".<sup>867</sup>

296. With respect to claim (i), the Prosecution refers to its previous submission in paragraphs 53-59.

297. As for claims (ii) and (iii), the Prosecution submits that they are all variations of the same theme pertaining to the issue of the applicable legal standard of a NCTA motion and the Prosecution therefore refers to Part I.C. above.

298. In the same section, the Sang Defence also requests the Chamber to strike out those factual allegations contained in the UDCC for which the Pre-Trial

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<sup>865</sup> Sang NCTA Motion, para. 129.

<sup>866</sup> Sang NCTA Motion, paras. 129-130.

<sup>867</sup> Sang NCTA Motion, para. 132.

Chamber did not provide support in the Confirmation Decision and “for which there is now no evidence on the record.”<sup>868</sup> The Prosecution submits that for the determination of the NCTA Motions, it is irrelevant whether the Pre-Trial Chamber provided support for certain specific factual allegations. As the Trial Chamber has already decided, the Pre-Trial Chamber's silence on relevant statements of facts made in the DCC does not mean that the Pre-Trial Chamber did not confirm those facts and their legal characterisation, unless it explicitly declined to do so.<sup>869</sup> What is relevant, at this intermediary stage, is whether for each factual allegation contained in the UDCC the Prosecution has adduced evidence that is entitled to credence and is not incapable of belief on any reasonable view.<sup>870</sup>

**A. Mr Sang is criminally liable under article 25(3)(d)**

**1. Contributing to the commission of a crime by a group of persons acting with a common purpose (article 25(3)(d)(i))**

299. The Prosecution submits that there is sufficient evidence upon which a reasonable Chamber could hold Mr Sang individually criminally responsible under the provision of article 25(3)(d) for murder, forcible transfer of population and persecution as crimes against humanity. The evidence on the record demonstrates that: Mr Sang is criminally responsible for crimes carried out by a group of persons acting with a common purpose; and Mr Sang intentionally contributed to the commission of the alleged crimes by the Network's direct perpetrators with the aim of furthering the criminal activity and criminal and discriminatory purpose of the group, led by Mr Ruto.<sup>871</sup>

300. The analysis of these legal elements is set out in Part III above. The Prosecution will now turn to examine the evidence on record which satisfies these elements.

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<sup>868</sup> Sang NCTA Motion, para. 134.

<sup>869</sup> ICC-01/09-01/11-522, para. 19.

<sup>870</sup> Decision No. 5, para. 24. See also *above*, paras. 35-39.

<sup>871</sup> UDCC para. 121.

## 2. Crimes within the jurisdiction of the Court were committed

301. The evidence demonstrating that article 7 crimes were committed is described in section II above, which is incorporated by reference.

## 3. A group of persons acting with a common purpose allegedly committed crimes within the jurisdiction of the Court

302. The Prosecution alleged in the UDCC that the crimes committed in the different locations charged were committed pursuant to a common plan established by Mr Ruto and others, as members of the group of persons belonging to the organisation, with the support of Mr Sang.<sup>872</sup>

303. The evidence in support of this allegation is set out in Part IV.A.1 above, which is incorporated by reference.

## 4. Mr Sang contributed to the crimes charged (in any way)<sup>873</sup>

304. The Prosecution recalls its submissions at paragraph 135-139 and submits that the evidence on record is sufficient to establish the existence of a link between Mr Sang's acts and conducts and the crimes committed by the Network. In the UDCC, that link was alleged to be established by the following facts:

305. [REDACTED].<sup>874</sup> [REDACTED].<sup>875</sup> By virtue of his position and notoriety, Mr Sang contributed to the commission of the crimes charged principally by placing his morning show, *Lene Emet*, at the disposal of the Network. In so doing, he provided material assistance to a group of persons acting with a common purpose who committed the crimes charged. In particular, during/through his *Lene Emet* show, Mr Sang: (i) broadcast propaganda against PNU supporters;<sup>876</sup> (ii) broadcast preparatory meetings and event locations of the organisation;<sup>877</sup> (iii) used his show to advertise the meetings of the

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<sup>872</sup> UDCC, para. 123.

<sup>873</sup> UDCC, paras. 125 – 129.

<sup>874</sup> [REDACTED].

<sup>875</sup> [REDACTED].

<sup>876</sup> UDCC, p. 41 and para. 126.

<sup>877</sup> UDCC, p. 41 and para. 126

organisation;<sup>878</sup> (iv) fanned the violence through the spread of hate messages explicitly revealing desire to expel the Kikuyu;<sup>879</sup> (v) broadcast false news regarding alleged murders of Kalenjin people in order to inflame the atmosphere in the days preceding the elections;<sup>880</sup> (vi) called on perpetrators to begin the attacks;<sup>881</sup> and (vii) broadcast instructions during the attacks through the use of coded language in order to direct the physical perpetrators to the areas designated as targets.<sup>882</sup>

306. The Prosecution submits that there is sufficient evidence on the record which, taken at its highest, established Mr Sang's contribution, as alleged.

**(a) *Broadcasting propaganda against PNU supporters***<sup>883</sup>

307. During the 2007 elections, PNU supporters in the Rift Valley were predominantly of Kikuyu ethnicity.<sup>884</sup> The latter had also predominantly supported the proposed constitutional amendments in the 2005 referendum.<sup>885</sup> As explained in more detail below, Mr Sang actively opposed such reform in 2005 and broadcast propaganda against its supporters. Through his show, he created an environment of fear among the Kalenjin, relying heavily on existing historical tensions among them and other communities of the Rift Valley, in particular the Kikuyu. Mr Sang exacerbated such tensions through the manipulation of recurring themes, such as the loss of sovereignty of the Kalenjin over their ancestral land and jobs, and the use of derogatory language against those perceived to be responsible of such situation. This evidence is relevant both to the determination of whether Mr Sang engaged in similar behaviour prior to the 2007 elections and to the assessment of his *mens rea*.

<sup>878</sup> UDCC, p. 41 and para. 127.

<sup>879</sup> UDCC, p. 41 and para. 127.

<sup>880</sup> UDCC, p. 41 and para. 127.

<sup>881</sup> UDCC, p. 41 and para. 128.

<sup>882</sup> UDCC, p. 42 and paras. 128-129.

<sup>883</sup> UDCC, p. 41 and para. 126.

<sup>884</sup> EVD-T-OTP-00044/ [KEN-OTP-0093-1308](#) at 1323, 1329; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0420; **P-0604**, T-129, 44:5-9; [REDACTED].

<sup>885</sup> [REDACTED]**P-0268**, T-60, 62:17-62:21, 74:3-74:18 ; **P-0442**, T-98, 50:19-51:16; [REDACTED]; **P-0487**, T-53, 89:8-90:25; [REDACTED].

308. Mr Sang employed the same rhetorical devices in 2007, in the context of the general elections. Through his *Lene Emet* program, he strongly advocated for the ODM party and leadership<sup>886</sup> fostering the idea that the Kalenjin community was at risk.<sup>887</sup> The Prosecution submits that, based on the evidence presented in the following paragraphs, it is reasonable to infer that Mr Sang promoted that idea so as to legitimise his vilification of the pro-PNU supporters as the enemy.
309. Mr Sang used his show to display [REDACTED],<sup>888</sup> in particular those of Kikuyu ethnicity, calling them interchangeably<sup>889</sup> [REDACTED],<sup>890</sup> thieves,<sup>891</sup> the enemy of the Kalenjin people.<sup>892</sup> [REDACTED].<sup>893</sup> The Prosecution submits that a reasonable Trial Chamber could conclude that, in the context, this was a veiled call for the expulsion of the Kikuyu from the Rift Valley, which was considered to be the ancestral home of the Kalenjin people.<sup>894</sup>
310. Mr Sang would accuse the Kikuyus of having grabbed the Kalenjin's "Canaan land,"<sup>895</sup> [REDACTED]<sup>896</sup> Similarly, Mr Sang would blame the Kikuyu for having taken all government positions and jobs.<sup>897</sup> [REDACTED].<sup>898</sup>
311. Mr Sang labelled any Kalenjin who did not subscribe to the ODM agenda as traitors<sup>899</sup> [REDACTED].<sup>900</sup>
312. In addition to broadcasting anti-PNU propaganda personally, Mr Sang frequently allowed callers into his show to express anti-Kikuyu rhetoric. Through the use of a dedicated line,<sup>901</sup> Mr Sang filtered his listeners' calls and

<sup>886</sup> [REDACTED]; **P-0268**, T-62, [REDACTED]; 49:17-18; 59:22-60:1; T-65, 85:19-21.

<sup>887</sup> [REDACTED]; **P-0356**, T-77, 47 :6-18; [REDACTED].

<sup>888</sup> [REDACTED].

<sup>889</sup> **P-0356**, T-77, 40:3-42:3; 41:5-13; 55:2-18; 64:3-15; [REDACTED].

<sup>890</sup> [REDACTED].

<sup>891</sup> **P-0356**, T-77, 45:4-13.

<sup>892</sup> [REDACTED]; **P-0442**, T-100, 8:14-9:3.

<sup>893</sup> [REDACTED].

<sup>894</sup> [REDACTED]; **P-0356**, T-77, 49:2-4; **P-0268**, T-62, 34:17-24; [REDACTED]; EVD-T-OTP-00044/ [KEN-OTP-0093-1308](#) at 1310.

<sup>895</sup> **P-0268**, T-62, 30:24-34:23; [REDACTED].

<sup>896</sup> [REDACTED].

<sup>897</sup> [REDACTED]; **P-0268**, T-62, 33:13-25, 34:17-35:8; [REDACTED].

<sup>898</sup> [REDACTED].

<sup>899</sup> [REDACTED]. *See also*, **P-0268**, T-62, 69: [REDACTED]; 70:11-14.

<sup>900</sup> [REDACTED].

<sup>901</sup> [REDACTED].

gave priority to those Kalenjin opinion leaders<sup>902</sup> [REDACTED].<sup>903</sup>  
[REDACTED].<sup>904</sup> [REDACTED].<sup>905</sup>

313. Mr Sang would also not allow PNU supporters to call or appear in his show to express their views, and when that occurred unexpectedly he would immediately change tone, cut them off, ridicule, openly attack or verbally insult them.<sup>906</sup> [REDACTED].<sup>907</sup> **P-0268** summarised in court that “generally, PNU supporters were not liked” and Mr Sang’s program “didn’t like other people from other parties”.<sup>908</sup>
314. In contrast, Mr Sang promoted the ODM as the only party for the Kalenjin people<sup>909</sup> who had to “stand firm to fight for themselves,”<sup>910</sup> [REDACTED]<sup>911</sup> [REDACTED]<sup>912</sup> [REDACTED].<sup>913</sup> [REDACTED].<sup>914</sup> [REDACTED]<sup>915</sup> [REDACTED].<sup>916</sup>
315. In his expert report, **P-0464**, stated that “[c]ontemporary Kalenjin ethnicity is also sustained by a particular type of interpretation of the current situation of the Kalenjins. They appear to see themselves as both persecuted by the de-Kalenjinisation of senior government and victims of historical injustices related to the fact that their land is sometimes occupied by families from other regions. This naturally creates a powerful anti-Kikuyu ideology which is consonant with

<sup>902</sup> [REDACTED]; **P-0268**, T-62, 46:23- 48:7. *See also*, [REDACTED].

<sup>903</sup> [REDACTED]. For allegations existing at the time of the 2007 elections that callers-in to Mr Sang’s show were pre-selected, see also [REDACTED].

<sup>904</sup> [REDACTED].

<sup>905</sup> [REDACTED].

<sup>906</sup> [REDACTED]; **P-0268**, T-62, 35:14-19; 40:21-42:16; [REDACTED]; **P-0356**, T-77, 35:19-24; 39:7-18; 40:3-42:3; 45:4-13; 54:21-55:20; [REDACTED].

<sup>907</sup> [REDACTED].

<sup>908</sup> **P-0268**, T-62, 69:1-70:4.

<sup>909</sup> **P-0268**, [REDACTED], T-62, 30 :11-15, 49:17- 18, [REDACTED]-70[REDACTED], 8-10; **P-0356**, T-77, 39:7-18, T-78, 22:16-17; [REDACTED]; **P-0604**, T-131, 84 :22-25.

<sup>910</sup> [REDACTED]; **P-0268**, T-62, 70:8-10.

<sup>911</sup> [REDACTED].

<sup>912</sup> **P-0356**, T-77, 34:8-12, 64 :3-15 ; T-78, 22:16-17, 84:19-20; **P-0268**, T-62, 59:22- 60:14; 69:8-10; [REDACTED].

<sup>913</sup> [REDACTED].

<sup>914</sup> [REDACTED]. *See also*, EVD-T-OTP-00044/ [KEN-OTP-0093-1308](#) at 1323.

<sup>915</sup> **P-0604**, T-131, 84:22-25.

<sup>916</sup> [REDACTED].

discourses of the other ODM leaders but which, according to some specialists, is of particular type as it legitimises the use of violence”.<sup>917</sup>

316. [REDACTED].<sup>918</sup> [REDACTED].<sup>919</sup> On one occasion, on 25 December 2007, Mr Sang requested a guest speaker on his show, ODM candidate Silas Tarus, to read out the registration numbers of two vehicles that were alleged to be transporting falsified ballot papers to Eldoret on behalf of the government. Mr Sang asked his listeners to watch out for those vehicles.<sup>920</sup>

317. [REDACTED].<sup>921</sup> [REDACTED].<sup>922</sup> [REDACTED].<sup>923</sup> [REDACTED].<sup>924</sup>  
[REDACTED].<sup>925</sup>

318. [REDACTED].<sup>926</sup>

319. All of the above demonstrates not only that Mr Sang made inciting statements in the run-up to the 2007 election, but also the powerful effect of such incitement on the Kalenjin population of the Rift Valley in general, and specifically Eldoret.

320. The Sang Defence claims that Mr Sang’s reporting of the fake ballots was done out of “a genuine concern” for the integrity of the election process and cannot be construed as a contribution to the commission of the crimes he is charged with.<sup>927</sup> They support their assertion by relying, *inter alia*, on the audio-recordings of Mr Sang’s evening program (*Kusgong*) arguing that Mr Sang was merely broadcasting “factual information” already exposed to the public and calling people to remain calm.

321. The Prosecution rejects this assertion and submits that for the purpose of Mr Sang’s criminal responsibility it is irrelevant whether the information was

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<sup>917</sup> EVD-T-OTP-00044/ [KEN-OTP-0093-1308](#) at 1326.

<sup>918</sup> [REDACTED].

<sup>919</sup> [REDACTED].

<sup>920</sup> **P-0604**, [REDACTED]; T-137, 19:12-21; EVD-T-D11-00049/ [KEN-D11-0014-0568](#) at 0648-0649.

<sup>921</sup> [REDACTED].

<sup>922</sup> [REDACTED].

<sup>923</sup> [REDACTED].

<sup>924</sup> [REDACTED].

<sup>925</sup> [REDACTED].

<sup>926</sup> [REDACTED].

<sup>927</sup> Sang NCTA Motion, para. 151.

already in the public domain and whether it was “factual” or speculative. What is relevant in this context is that a reasonable Trial Chamber could conclude that his broadcasting of that particular information at that particular point in time intentionally reinforced the notion among Mr Sang’s listeners that the elections would be rigged by the then PNU-led government. This in turn, contributed to escalate the climate of fear, suspicion and hatred against the PNU and its supporters among those who would later carry out the attacks pursuant to the Network’s plan.

322. Furthermore, Mr Sang’s announcement cannot be viewed in isolation, but should be scrutinised in light of the anti-PNU rhetoric that he had been espousing in the months prior to the elections. A reasonable Trial Chamber could conclude that Mr Sang must have been aware of the potentially incendiary effect that news of an alleged election impropriety on the part of the government could have on his audience at that moment in time, particularly in the context of the longstanding tensions between the Kikuyu and Kalenjin peoples in the Rift Valley and the history of electoral violence in the area. [REDACTED],<sup>928</sup> [REDACTED].<sup>929</sup> [REDACTED].<sup>930</sup> This in fact occurred -- with violent results -- as described above. Against this backdrop and in light of Mr Sang’s knowledge of his audience and its idiosyncrasies, the Prosecution submits that the value of any call for calm by Mr Sang is diluted to the point of becoming mere window-dressing. [REDACTED].<sup>931</sup>

323. Months of anti-PNU propaganda prior to the attacks, culminated in the day the electoral results were announced, on 30 December 2007. [REDACTED].<sup>932</sup> [REDACTED].<sup>933</sup> [REDACTED].<sup>934</sup>

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<sup>928</sup> [REDACTED].

<sup>929</sup> [REDACTED].

<sup>930</sup> [REDACTED].

<sup>931</sup> [REDACTED].

<sup>932</sup> [REDACTED]. *See also*, **P-0442**, T-98, 71:3-12.

<sup>933</sup> [REDACTED].

<sup>934</sup> [REDACTED].

324. Through the conduct described above, Mr Sang spread the Network's dogma and contributed to the creation of a toxic climate of distrust, animosity and hatred against the PNU and its supporters, in particular the Kikuyu. [REDACTED].<sup>935</sup> [REDACTED].<sup>936</sup>
325. Further proof of Mr Sang's contribution to the commission of the crimes through his active dissemination of anti-PNU rhetoric can be inferred from his subsequent conduct. As explained in more detail below, in or about the end of January 2007 and beginning of February 2008, Witness **P-0442**, [REDACTED], heard Mr Sang say on air that "the work had been done properly but it wasn't finished yet" as there were still "enemies" hiding in the bush who had not been yet uprooted.<sup>937</sup> To refer to these "enemies" Mr Sang used a derogatory term – *bunyt* - which the witness understood to mean the Kikuyu people.<sup>938</sup> The fact that Mr Sang was uttering these words shortly after the crimes charged had occurred provides corroboration for the evidence that that he was making similarly inflammatory statements in the period preceding and during the PEV, as indicated above. It is also highly relevant to the determination of his *mens rea*, since by that time he was fully aware of the violence that had erupted in the Rift Valley, including the charged locations, as discussed further below at paragraph 360 and following.
326. In sum, the Prosecution submits that a reasonable Trial Chamber may accept that Mr Sang used his knowledge of and influence over the Kalenjin community and his oratory skills to serve the criminal purposes of the Network. In so doing, through months of propagating anti-PNU and anti-Kikuyu propaganda, Mr Sang instilled or nurtured in his listeners sentiments of fear and hatred against the PNU supporters, which were later used by him and the Network to galvanise the support of direct perpetrators of the violence and facilitate their immediate mobilisation.

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<sup>935</sup> [REDACTED].

<sup>936</sup> [REDACTED].

<sup>937</sup> **P-0442**, T-100, 8:6-9:3.

<sup>938</sup> **P-0442**, T-100, 8:14-9:03, 10:5-17.

***(b) Broadcasting preparatory meetings and event locations of the organisation; and using his show to advertise the meetings of the organisation***<sup>939</sup>

327. As indicated above, during the 2007 electoral campaign period Mr Sang [REDACTED].<sup>940</sup> [REDACTED].<sup>941</sup> As detailed in paragraph 280-282 above, there is evidence on record which, if accepted, establishes that Mr Ruto used such rallies to espouse anti-PNU and anti-Kikuyu rhetoric.
328. Similarly and more importantly, after the PNU had been declared the winner of the election and the first sparks of violence had erupted<sup>942</sup>, [REDACTED].<sup>943</sup> [REDACTED].<sup>944</sup> [REDACTED] <sup>945</sup>[REDACTED]<sup>946</sup>
329. [REDACTED].<sup>947</sup> [REDACTED].<sup>948</sup> [REDACTED].<sup>949</sup> [REDACTED]<sup>950</sup> [REDACTED].<sup>951</sup> [REDACTED].<sup>952</sup> [REDACTED].<sup>953</sup> [REDACTED].<sup>954</sup>
330. [REDACTED].<sup>955</sup> [REDACTED].<sup>956</sup> [REDACTED].<sup>957</sup>
331. [REDACTED].<sup>958</sup> [REDACTED].<sup>959</sup>
332. [REDACTED]<sup>960</sup> [REDACTED].<sup>961</sup> [REDACTED].<sup>962</sup>
333. [REDACTED].<sup>963</sup> [REDACTED].<sup>964</sup>
334. [REDACTED].<sup>965</sup> [REDACTED].<sup>966</sup>

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<sup>939</sup> UDCC, p. 41 and para. 126.

<sup>940</sup> See above paras. 308, 314.

<sup>941</sup> [REDACTED].

<sup>942</sup> See above paras. 85-87.

<sup>943</sup> [REDACTED].

<sup>944</sup> [REDACTED].

<sup>945</sup> [REDACTED]

<sup>946</sup> See above paras. 150, 266 and 169-172.

<sup>947</sup> [REDACTED].

<sup>948</sup> [REDACTED].

<sup>949</sup> [REDACTED].

<sup>950</sup> [REDACTED].

<sup>951</sup> [REDACTED].

<sup>952</sup> [REDACTED].

<sup>953</sup> See above paras. 149-150.

<sup>954</sup> [REDACTED].

<sup>955</sup> [REDACTED].

<sup>956</sup> [REDACTED].

<sup>957</sup> [REDACTED].

<sup>958</sup> [REDACTED].

<sup>959</sup> [REDACTED].

<sup>960</sup> [REDACTED].

<sup>961</sup> [REDACTED].

<sup>962</sup> [REDACTED].

<sup>963</sup> [REDACTED].

<sup>964</sup> [REDACTED].

335. The Sang Defence claims that the Prosecution has failed to adduce evidence that the funds collected in [REDACTED].<sup>967</sup> However, the Prosecution submits that on the strength of the evidence [REDACTED],<sup>968</sup> a reasonable Chamber may infer that they were indeed used for this purpose. Similarly, in light of the suspicious timing of Mr Sang's announcement of [REDACTED]<sup>969</sup> a reasonable Trial Chamber may infer that he was fully aware of the purpose of the meeting. Finally, there is evidence of the fact that Kalenjin youth were in fact transported by lorries from Ziwa to Eldoret during the relevant period<sup>970</sup> and several witnesses have testified to seeing Kalenjin warriors arriving at the scene of the attacks in lorries.<sup>971</sup>
336. In support of their assertion, the Sang Defence refers to the ICTR jurisprudence in *Bikindi*. However, the Prosecution submits that such decision is distinguishable, both in fact and in law.
337. With respect to the law, the ICC statutory provisions, as interpreted by the jurisprudence of this Court, are the applicable provisions. As indicated above, article 25(3)(d) enables any contribution by the Accused (direct or indirect) to the crime charged to impute liability, as long as it is made with the necessary *mens rea* and there is a nexus between the Accused's actions and the commission of a crime by a group of persons acting with common purpose.
338. With respect to the facts, the Chamber in *Bikindi* refused to impute liability to the defendant because the Prosecution had not included as a factual allegation in its indictment that the money collected at the defendant's concerts was used to procure weapons and that the evidence adduced by the Prosecution was not credible. The Prosecution submits that the present case is different for at least two reasons. *First*, in its UDCC, the Prosecution had alleged that Mr Sang

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<sup>965</sup> [REDACTED].

<sup>966</sup> See above paras. 69-78, 81-82, 85-89, 93-98.

<sup>967</sup> Sang NCTA Motion, paras. [REDACTED].

<sup>968</sup> [REDACTED].

<sup>969</sup> [REDACTED].

<sup>970</sup> **P-0508**, T-105, 2:20-3:2; 6:25-7:12; **P-0469**, T-107, 32:17-19.

<sup>971</sup> **P-0189**, T-48, 80:3-25; **P-0487**, T-54, 98:12-25; [REDACTED].

contributed to the commission of the crime by, *inter alia*, using his show to advertise the meetings of the organisation and adduced evidence at trial to support that allegation, [REDACTED]. By advertising an event [REDACTED] and calling upon people to participate in it, Mr Sang helped to make possible attacks against the civilian population possible. As such, Mr Sang contributed to the commission of the crimes charged pursuant to article 25(3)(d). As stated above, the requisite *mens rea* may reasonably be inferred in the circumstances. *Second*, the evidence adduced by the Prosecution in support of this factual allegation is, at this intermediate stage, entitled to credence unless incapable of belief on any reasonable view. The Prosecution submits that this is not the case here and the evidence is sufficient to prove the factual allegation to the required standard.

*(c) Fanning the violence through the spread of hate messages explicitly revealing desire to expel the Kikuyu*<sup>972</sup>

339. As described above, during the 2007 electoral campaign, Mr Sang used derogatory language to refer to PNU supporters, in particular those of Kikuyu ethnicity. [REDACTED].<sup>973</sup>

*(d) Calling on perpetrators to begin the attacks*<sup>974</sup>

340. As described above, in the last period of the electoral campaign, Mr Sang started pressing the notion that the elections could be rigged by the government.<sup>975</sup> He did so also immediately after the voting had taken place and prior to the announcement of the results, broadcasting that there were signs that the votes had been stolen.<sup>976</sup> [REDACTED].<sup>977</sup> [REDACTED].<sup>978</sup>

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<sup>972</sup> UDCC, p. 41 and para. 127.

<sup>973</sup> See above paras. 309, 311, 325.

<sup>974</sup> UDCC, p. 41 and para. 128.

<sup>975</sup> See above paras. 316-318.

<sup>976</sup> P-0442, T-98, 70:1-13.

<sup>977</sup> [REDACTED].

<sup>978</sup> [REDACTED].

341. It was formally announced in the evening of 30 December 2007 that the PNU had won the presidential race.<sup>979</sup> [REDACTED],<sup>980</sup> [REDACTED].<sup>981</sup> [REDACTED].<sup>982</sup>
342. [REDACTED].<sup>983</sup>
343. The day after the announcement, on 31 December 2007, Witness **P-0442** heard Mr Sang on the radio calling for people to get out of their houses and “fight for their rights”, declaring that those who had stolen the vote should be “punished”<sup>984</sup> and praising the people for having done “a good job” in Kisumu and Kakamega.<sup>985</sup> Kisumu, situated in the Nyanza Province, where the majority of the victims of the violence were of Kikuyu ethnicity, had already been attacked.<sup>986</sup>
344. [REDACTED].<sup>987</sup> The Prosecution submits that this instance shows that Mr Sang was aware of his authority and influence over the Kalenjin youth so that he could direct their actions -- in this instance, who to let through at roadblocks.
345. [REDACTED]<sup>988</sup> [REDACTED].<sup>989</sup> [REDACTED].<sup>990</sup> [REDACTED].<sup>991</sup> [REDACTED].<sup>992</sup>
346. [REDACTED].<sup>993</sup>
347. Similarly, Witness **P-0442** stated that further to Mr Sang’s radio appeal, many Kalenjin youth assembled in Kapsabet town to protest against the stolen elections, accusing the Kikuyu of having rigged them.<sup>994</sup> Elijah Lagat,

<sup>979</sup> EVD-T-OTP-00329/ [KEN-OTP-0045-0209](#).

<sup>980</sup> [REDACTED].

<sup>981</sup> [REDACTED].

<sup>982</sup> [REDACTED].

<sup>983</sup> [REDACTED].

<sup>984</sup> **P-0442**, T-99, 3:11-24- 4:11.

<sup>985</sup> **P-0442**, T-99, 9:12-20.

<sup>986</sup> EVD-T-OTP-00329/ [KEN-OTP-0045-0209](#); **P-0405**, T-122, 60:6-16; EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0720-0721.

<sup>987</sup> [REDACTED].

<sup>988</sup> [REDACTED].

<sup>989</sup> [REDACTED].

<sup>990</sup> [REDACTED].

<sup>991</sup> [REDACTED].

<sup>992</sup> [REDACTED].

<sup>993</sup> [REDACTED].

<sup>994</sup> **P-0442**, T-99, 3:19-24- 4:13; 5:24-6:3.

[REDACTED],<sup>995</sup> was among them.<sup>996</sup> The witness further saw Kalenjin youth in Namgoi trading centre listening to the radio and saying that Mr Sang was not lying.<sup>997</sup>

348. With respect to the above, the Defence claims that Mr Sang could not have been heard on the radio after the announcement of the electoral results as a ban on all live-broadcasting had been imposed.<sup>998</sup> The Prosecution submits that there is no evidence on record showing that the “ban” was anything more than a mere government directive and that it in fact prevented media from broadcasting.<sup>999</sup> The then Permanent Secretary of the Ministry of information, Bitange Ndemo, testified before CIPEV that the directive was issued on 31 December 2007 and that it was resisted by the media outlets,<sup>1000</sup> as also confirmed by comments made at the time by the Media Council Chairman.<sup>1001</sup>
349. Moreover, as explained by the then government spokesperson: “[the ban] is a temporary measure[s] we hope to lift it within a day or two once the emotions get down. So it is not a ban on media or media freedom. It is just telling and it is actually meant to ... for vernacular radio stations especially not even television. Where people are calling in or people are inciting others to take up arms and burn houses of their neighbours. We are saying listen to the content first before you air it. And you can air it in 3 seconds later or 30 seconds later. It is not telling you that you can not (*sic*) broadcast or that you can not (*sic*) choose your content.”<sup>1002</sup>
350. In light of the above, the Prosecution submits that the “ban” merely required media houses to self-censor and that, despite this government directive and its threat of sanctions, Mr Sang and KASS FM were not physically hampered from

<sup>995</sup> [REDACTED]; **P-0268**, T-61, 29:23-30: 2; **P-0442**, T-98, 42:2-3. *See also* above para. 229.

<sup>996</sup> **P-0442**, T-99, 5:2-20, 6:17-21.

<sup>997</sup> **P-0442**, T-99, 7:12-15.

<sup>998</sup> Sang NCTA Motion, paras. 161, 188-203.

<sup>999</sup> EVD-T-OTP-00329/ [KEN-OTP-0045-0209](#) and EVD-T-00130/ [KEN-OTP-0010-0021](#).

<sup>1000</sup> EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0671.

<sup>1001</sup> EVD-T-D11-00038/ [KEN-OTP-0054-0119](#) at 0123.

<sup>1002</sup> EVD-T-D11-00038/ [KEN-OTP-0054-0119](#) at 0125. *See also* EVD-T-OTP-00329/ [KEN-OTP-0045-0209](#).

airing live programs. [REDACTED].<sup>1003</sup> There is evidence that at least one radio station defied the ban and continued to operate.<sup>1004</sup>

351. Furthermore, the “ban” seemed to cover only “inciting or alarming material”.<sup>1005</sup> [REDACTED].<sup>1006</sup> Significantly, the District Commissioner for Koibatek in the Central Rift Valley testified to CIPEV that prior and during the post-election violence he could monitor the broadcasting of vernacular radios, including KASS FM, as he did not speak Kalenjin.<sup>1007</sup> It is reasonable to infer, therefore, that the content of Mr Sang’s broadcasts could go undetected even under a government-controlled “ban” regime.

352. In summary, the existence of a media ban, the extent and observation of which has not yet been established by the Defence, does not provide sufficient basis to conclude that the evidence of the various Prosecution witnesses who testified to having heard Mr Sang on air over the relevant period is ‘manifestly incapable of belief’. [REDACTED].<sup>1008</sup> To the contrary, this is simply a piece of (possibly) contradictory evidence that the Chamber will take into account in its final assessment of the weight of the evidence. For present purposes, however, the evidence of the Prosecution witnesses is to be taken ‘at its highest’.

*(e) Broadcasting instructions during the attacks through the use of coded language in order to direct the physical perpetrators to the areas designated as targets*<sup>1009</sup>

353. [REDACTED].<sup>1010</sup> [REDACTED].<sup>1011</sup>

354. [REDACTED].<sup>1012</sup> [REDACTED].<sup>1013</sup>

355. [REDACTED].<sup>1014</sup> [REDACTED].<sup>1015</sup>

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<sup>1003</sup> [REDACTED].

<sup>1004</sup> EVD-T-D11-00051/ [KEN-D09-0022-0010](#).

<sup>1005</sup> EVD-T-OTP-00329/ [KEN-OTP-0045-0209](#).

<sup>1006</sup> [REDACTED].

<sup>1007</sup> EVD-T-OTP-00328/ [KEN-OTP-0001-0364](#) at 0674.

<sup>1008</sup> See above paras. 340-347.

<sup>1009</sup> UDCC, p. 42 and paras. 128-129.

<sup>1010</sup> [REDACTED].

<sup>1011</sup> [REDACTED].

<sup>1012</sup> [REDACTED].

<sup>1013</sup> [REDACTED].

356. [REDACTED].<sup>1016</sup>

357. [REDACTED].<sup>1017</sup>

358. Another witness, **P-0442**, testified that in early January 2008, after having been displaced from her village in Kapsabet and taking shelter at the Eldoret showground, she listened to KASS FM and Mr Sang's shows. The witness never heard Mr Sang calling to his listeners to stop using the violence and reconcile<sup>1018</sup> and, towards the end of January or beginning of February 2008, she heard Mr Sang say "that the work had been done properly but it wasn't finished yet", as there were still enemies hiding in the bush who had not been uprooted yet.<sup>1019</sup> Mr Sang used a derogatory term to refer to these "enemies" and, since "there were no secrets at that time", the witness understood Mr Sang was referring to the Kikuyu people.<sup>1020</sup>

359. Although there is no specific evidence on record that the Mr Sang's statement described above was broadcast using specific codes, the evidence establishes that [REDACTED].<sup>1021</sup> In any event, even if the use of coded language is not established, this is not fatal to the establishment of Mr Sang's contribution to the commission of the crimes by the common purpose group. It is relevant only to the *means* of his contribution, rather than the fact thereof.

**5. The contribution of Mr Sang was intentional; and it was made either with the aim of furthering the criminal activity or criminal purpose of the group**

360. The Prosecution submits that the evidence on record, taken at its highest, may persuade a reasonable Trial Chamber that Mr Sang acted intentionally and with the aim of furthering the criminal activity of the Network making him liable under article 25(3)(d). His intention to engage in the conduct and in so doing

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<sup>1014</sup> [REDACTED].

<sup>1015</sup> [REDACTED].

<sup>1016</sup> [REDACTED].

<sup>1017</sup> [REDACTED].

<sup>1018</sup> **P-0442**, T-100, 17:19-23.

<sup>1019</sup> **P-0442**, T-100, 8:6- 9:3.

<sup>1020</sup> **P-0442**, T-100, 8:14-16, 10:5-17.

<sup>1021</sup> [REDACTED].

further the Network's criminal activity, can be inferred from several facts such as his direct affiliation with the Network; his participation in at least one planning meeting where the plan of said Network was espoused; his sponsorship and promotion of Mr Ruto in the media; and his promotion of the Network's plan and meetings through his radio broadcasts. More specifically, Mr Sang's intention to contribute to the realisation of this plan can be summarised as follows:

361. *First*, through his daily broadcasts, Mr Sang was uniquely situated to reach out to the Kalenjin, and must have been aware of his influence over his listeners.<sup>1022</sup> This privileged position derived from Mr Sang's role and authority within the Kalenjin community, which he started establishing in 2005 at the time of the referendum to reform the Kenyan constitution -- a reform that, as indicated above, he and Mr Ruto both opposed.<sup>1023</sup>
362. [REDACTED].<sup>1024</sup> [REDACTED].<sup>1025</sup> [REDACTED].<sup>1026</sup> [REDACTED].<sup>1027</sup>  
[REDACTED].<sup>1028</sup>
363. [REDACTED].<sup>1029</sup>
364. [REDACTED].<sup>1030</sup> [REDACTED].<sup>1031</sup> [REDACTED].<sup>1032</sup>, [REDACTED].<sup>1033</sup>
365. [REDACTED].<sup>1034</sup>
366. [REDACTED].<sup>1035</sup> [REDACTED].<sup>1036</sup> [REDACTED].<sup>1037</sup>

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<sup>1022</sup> UDCC, para. 130.

<sup>1023</sup> [REDACTED]; **P-0442**, T-98, 46:12-20; 48:4-8.

<sup>1024</sup> [REDACTED].

<sup>1025</sup> [REDACTED].

<sup>1026</sup> [REDACTED]; **P-0356**, T-77, 55:2-18

<sup>1027</sup> [REDACTED].

<sup>1028</sup> [REDACTED]. *See also*, EVD-T-OTP-00044/ [KEN-OTP-0093-1308](#) at 1310.

<sup>1029</sup> [REDACTED].

<sup>1030</sup> [REDACTED].

<sup>1031</sup> [REDACTED].

<sup>1032</sup> [REDACTED].

<sup>1033</sup> [REDACTED].

<sup>1034</sup> [REDACTED].

<sup>1035</sup> [REDACTED].

<sup>1036</sup> [REDACTED].

<sup>1037</sup> [REDACTED].

367. [REDACTED].<sup>1038</sup> [REDACTED].<sup>1039</sup> [REDACTED].<sup>1040</sup> [REDACTED].<sup>1041</sup>

368. Mr Sang was aware that his utterances against the constitutional reform and its supporters were inappropriate and punishable. This is demonstrated by the evidence that [REDACTED].<sup>1042</sup>

369. [REDACTED].<sup>1043</sup> [REDACTED].<sup>1044</sup> [REDACTED].

370. Mr Sang further consolidated his authority among the Kalenjin community by forging a close relationship with and positioning himself close to Mr Ruto. As indicated above, during the referendum period and through his shows, Mr Sang actively promoted Mr Ruto as the ultimate leader of the Kalenjin people.<sup>1045</sup> [REDACTED].<sup>1046</sup> [REDACTED]<sup>1047</sup> [REDACTED].<sup>1048</sup>

371. [REDACTED]<sup>1049</sup> [REDACTED].<sup>1050</sup> [REDACTED].<sup>1051</sup> [REDACTED],<sup>1052</sup> [REDACTED].<sup>1053</sup> [REDACTED].<sup>1054</sup> [REDACTED].<sup>1055</sup>

372. The Prosecution submits that all the above establishes that Mr Sang acted intentionally -- that is, he meant to engage in the conducts described, and did so in view of furthering the Network's purpose. Mr Sang, who was aware of his influence and authority over the Kalenjin community, used it during his shows to incite the direct perpetrator of the violence against PNU supporters and advocate for their expulsion from the Rift Valley. As such, it can be reasonably

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<sup>1038</sup> [REDACTED].

<sup>1039</sup> [REDACTED].

<sup>1040</sup> [REDACTED].

<sup>1041</sup> [REDACTED].

<sup>1042</sup> [REDACTED]. *See also*, with respect to the nature of Mr Sang's broadcasts, [REDACTED].

<sup>1043</sup> [REDACTED].

<sup>1044</sup> [REDACTED].

<sup>1045</sup> See above para. 314. [REDACTED], [REDACTED]; **P-0356**, T-77, 34:3-6; 76:5-8; 80:2-17; T-78, 84 :19-20; [REDACTED].

<sup>1046</sup> [REDACTED].

<sup>1047</sup> [REDACTED].

<sup>1048</sup> [REDACTED]. *See also*, EVD-T-OTP-00044/ [KEN-OTP-0093-1308](#) at 1321, 1325.

<sup>1049</sup> [REDACTED].

<sup>1050</sup> [REDACTED].

<sup>1051</sup> [REDACTED].

<sup>1052</sup> [REDACTED].

<sup>1053</sup> [REDACTED].

<sup>1054</sup> [REDACTED].

<sup>1055</sup> [REDACTED].

inferred that, by using his unique position of broadcaster to the Kalenjin community, Mr Sang contributed to the crimes charged wilfully and with the intent to promote the common purpose of the group.

373. Furthermore, a reasonable Chamber may infer Mr Sang's intent to use his influence over the Kalenjin community to further the Network's plan from the evidence of his subsequent conduct.<sup>1056</sup> [REDACTED].<sup>1057</sup> [REDACTED].<sup>1058</sup> As such, this particular broadcast by Mr Sang in March 2008, after the crimes charged occurred, is evidence of a conduct from which the Chamber might infer that, at the relevant time, Mr Sang acted with the requisite intent.
374. *Second*, Mr Sang participated in at least one meeting, along with Mr Ruto, at which the expulsion of PNU supporters was advocated.<sup>1059</sup> [REDACTED].<sup>1060</sup> [REDACTED].<sup>1061</sup> [REDACTED].<sup>1062</sup> [REDACTED].<sup>1063</sup>
375. *Third*, Mr Sang's intent to contribute to the crimes charged is further demonstrated by the fact that, during the 2007 electoral campaign, he personally aired anti-PNU rhetoric, which instilled fear and hatred among the Kalenjin against PNU supporters whom he also said should be expelled.<sup>1064</sup> Paragraphs 308-322 are incorporated by reference.
376. *Fourth*, Mr Sang provided access to pre-screened callers<sup>1065</sup> and then aired derogatory and anti-PNU language.<sup>1066</sup> Paragraphs 312, 316-318 are incorporated by reference.
377. The Prosecution submits that the fact that Mr Sang provided preferential access and air-time to special callers into his show and that he allowed them to express

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<sup>1056</sup> The Sang Defence concede that evidence outside of the temporal scope of the charges can be relied upon, *inter alia*, to establish "that the accused had the requisite knowledge and intent". Sang NCTA Motion, para. 36.

<sup>1057</sup> [REDACTED].

<sup>1058</sup> EVD-T-OTP-00022/ [KEN-OTP-0102-0422](#) at 0425.

<sup>1059</sup> UDCC, para. 130.

<sup>1060</sup> [REDACTED].

<sup>1061</sup> [REDACTED].

<sup>1062</sup> [REDACTED].

<sup>1063</sup> [REDACTED]. *See also* above paras. 158-159.

<sup>1064</sup> UDCC, para. 130.

<sup>1065</sup> [REDACTED].

<sup>1066</sup> UDCC, para. 130.

anti-PNU rhetoric, is indicative of Mr Sang's intent to contribute to the crime and further the criminal purpose of the Network. By allowing these callers to participate repeatedly in his program, using derogatory language against PNU supporters and/or Kikuyu residing in the Rift Valley, Mr Sang reinforced the discourse that the latter were enemies of the Kalenjin and should be expelled if the ODM lost the elections. The Prosecution submits that this is evidence from which a reasonable Chamber could infer Mr Sang's *mens rea* with respect to the crimes charged.

378. *Fifth*, as regards Mr Sang's alleged use of coded language during his broadcasts, which was understood by listeners as instructions to attack specific targets,<sup>1067</sup> the Prosecution submits that although there is no specific evidence on record that Mr Sang's statements described above were broadcast using specific codes, [REDACTED].<sup>1068</sup> A reasonable Chamber may infer from this that Mr Sang Sang did not speak openly because he knew that what he was doing was illegal and could lead to the commission of crimes.

379. The Prosecution submits that in light of the evidence above-mentioned it is reasonable to infer that when, after months of anti-PNU rhetoric, Mr Sang [REDACTED], he did so with the intention to provoke their violent reaction against the PNU-supporters thereby further the common plan of the Network to expel them.

380. Paragraphs 351, 353-359 are incorporated by reference.

381. *Sixth*, after the attacks began, Mr Sang broadcast live calls from and provided instructions to the direct perpetrators.<sup>1069</sup> Paragraphs 353-359 are incorporated by reference.

382. The Prosecution submits that the evidence on record shows that, shortly after the announcement of the electoral results and the eruption of the violence in the

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<sup>1067</sup> UDCC, para. 130.

<sup>1068</sup> [REDACTED].

<sup>1069</sup> UDCC, para. 130.

locations charged, Mr Sang aired calls from individuals on the ground about the attacks, warned the physical perpetrators about the presence of law enforcement in certain locations and informed his listeners about a fund-raising event to further the on-going attacks. The Prosecution submits that from the evidence of this conduct, a reasonable Chamber could infer that Mr Sang acted intentionally to further the purpose of the Network, which was to expel the perceived PNU-supporters.

**B. Mr Sang is criminally liable under article 25(3)(b)**

383. The Prosecution submits that the evidence on record, taken at its highest, may persuade a reasonable Trial Chamber that all the necessary elements for liability under article 25(3)(b) have been established and that Mr Sang is criminally accountable for inducing or soliciting the commission of the crimes charged.

384. The Prosecution will now turn to the analysis of these legal elements, as set out in Part III above.

**1. The person exerts an influence over another person to either commit a crime which in fact occurs or is attempted or to perform an act or omission as a result of which a crime is carried out**

385. The Prosecution submits that through his conduct, which as described in the preceding sections included both positive acts and incitement statements, Mr Sang exerted an influence over the physical perpetrators of the crimes charged which prompted them to commit such crimes and to perform actions that resulted in the commission of such crimes. In so doing, Mr Sang solicited or induced the commission of the crimes charged and is therefore liable under article 25(3)(b).

386. Paragraphs 307-359 are incorporated by reference.

**(a) The acts of inducement or solicitation had a direct effect on the commission of the crime**

387. In light of the above, the Prosecution submits that Mr Sang's contribution to the commission of the crime as described in paragraphs 307-359 above is such as to

have had a direct effect over the commission of the crimes charged. In particular, by (i) broadcasting propaganda against PNU supporters;<sup>1070</sup> (ii) advertising the meetings of the organisation, such as the fund-raising event in Ziwa;<sup>1071</sup> (iii) spreading hate messages explicitly revealing a desire to expel the Kikuyu;<sup>1072</sup> (iv) calling on the perpetrators to begin the attacks;<sup>1073</sup> and (v) by broadcasting instructions during the attacks through the use of coded language in order to direct the physical perpetrators to the areas designated as targets,<sup>1074</sup> Mr Sang instigated the direct perpetrators to commit the crime charged and in so doing had a direct effect on the commission of such crimes.

**2. The suspect acted intentionally and is at least aware that the crime will be committed in the ordinary course of events**

388. The *mens rea* of Mr Sang for his responsibility under article 25(3)(b) can be inferred from the facts and circumstances referred to at paragraphs 360-382 above. Moreover, the Prosecution submits that given the deeply polarised atmosphere against the PNU and its supporters, Mr Sang could not ignore that calling his audience to demonstrate against the election results, as in fact he did, would lead to the commission of crimes in the ordinary course of events. Indeed, in light of his position in the community and of his cultural and political awareness, Mr Sang was conscious of the ethnic tensions existing at the time of the 2007 elections as well as of the previous episodes of ethnic violence in the region. Therefore, a reasonable Trial Chamber may conclude that he knew that there was a likelihood that, for instance, by announcing that the elections had been rigged by the PNU-led government and calling people to action, would ignite the proverbial powder keg and that crimes within the jurisdiction of the Court would be committed as a result.

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<sup>1070</sup> See above paras. 307-326.

<sup>1071</sup> See above paras. 327-338

<sup>1072</sup> See above para. 339.

<sup>1073</sup> See above paras. 340-352.

<sup>1074</sup> See above paras. 353-359.

389. For the foregoing, it is reasonable to infer that Mr Sang acted with the requisite *mens rea*.

**C. Mr Sang is criminally liable under article 25(3)(c)**

390. The Prosecution submits that the evidence on record, taken at its highest, may persuade a reasonable Trial Chamber that all the necessary elements for liability under article 25(3)(c) have been established and that Mr Sang is criminally accountable for aiding, abetting or otherwise assisting in the commission of the crimes charged.

391. The Prosecution will now turn to the analysis of these legal elements, as set out in Part III above.

**1. A person aided, abetted or otherwise assisted in the commission of a crime**

392. The Prosecution submits that, in the instant case, the evidence on record establishing inducement and/or solicitation under article 25(3)(b) also establish “abetting” – through encouragement<sup>1075</sup> – or “otherwise assisting in the commission of” the crimes charged under article 25(3)(c). As in the modes of liability under article 25(3)(b), Mr Sang’s conduct had a direct impact on shaping the determination of the direct perpetrators of the violence to commit the crimes. As such, the same facts and arguments are equally relevant for article 25(3)(c). They show how Mr Sang’s contribution provided assistance to the Network by placing his *Lene Emet* at the disposal of the organisation. Paragraphs 307-359 are incorporated by reference.

**2. The person acted for the purpose of facilitating the commission of the crime**

393. The *mens rea* of Mr Sang for his responsibility under article 25(3)(c) can also be inferred from the facts and circumstances referred to at paragraphs 360-382.

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<sup>1075</sup> See William A. Schabas’ analysis of 25 (3) (b) and (c) in *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010), pp. 433-434, wherein he states that the term “abetting” suggests “encouragement” or another “manifestation of moral suasion” and that the term “inducement” is synonymous to “incitement, encouragement and abetting”.

Concluding remarks

394. The Prosecution accordingly submits that the evidence on record, taken at its highest, is sufficient to persuade a reasonable Trial Chamber that Mr Sang is criminally liable under article 25(3)(d), as charged. However, should the Chamber conclude that any of the essential elements of liability under article 25(3)(d) is not sufficiently established, the Prosecution submits that the Chamber should nevertheless dismiss the NCTA motion, since the evidence nevertheless establishes Mr Sang's criminal responsibility under article 25(3)(b) and/or (c).

**PART VI CONTEXTUAL ELEMENTS OF CRIMES AGAINST HUMANITY**

395. Pursuant to article 7 of the Statute, a crime against humanity involves the commission of certain prohibited acts committed as part of a widespread or systematic attack directed against a civilian population, with the knowledge of the attack. Article 7(2)(a) defines the "attack" as a course of conduct involving the multiple commission of acts under article 7(1) against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack. For the most recent jurisprudence on the matter, the Prosecution refers to the *Gbagbo* Decision on confirmation of the charges (ICC-02/11-01/11-656, paras. 207-225).

396. The Defence NCTA Motions do not seriously challenge the fact that there were attacks and that the attacks were widespread or systematic, or that they were aimed at the civilian population. They do, however, specifically dispute that the Prosecution has established the existence of an organisation or organisational policy as required by article 7.<sup>1076</sup> Additionally, the Sang Defence disputes that the evidence establishes the existence of the *mens rea* requirement necessary under article 7.

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<sup>1076</sup> Ruto NCTA Motion, paras. 14-41.

**A. The existence of an organisation within the meaning of article 7(2)(a) of the Statute**

397. By majority, Pre-Trial Chamber II has held that non-State organisations can, for the purposes of article 7(2)(a) devise and carry out a policy to attack a civilian population.<sup>1077</sup> The following non-exhaustive list of elements may be considered to determine, on a case-by-case basis, whether a group qualifies as an organisation: (1) whether a group is under a responsible command, or has an established hierarchy; (2) whether the group possesses, in fact, the means to carry out a widespread and systematic attack against a civilian population; (3) whether the group exercises control over a part of the territory of a State; (4) whether the group has criminal activities against the civilian population as a primary purpose; (5) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (6) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria. These factors do not constitute a rigid legal definition and do not need to be exhaustively fulfilled.<sup>1078</sup>
398. The Prosecution notes that both the Ruto and Sang Defence challenge the correctness of the Majority's interpretation of the 'organisational policy' requirement and request the Chamber to apply the narrower test advocated in the dissenting decision of Judge Kaul. Additionally, the Ruto Defence submits that the Chamber should dismiss the charges for lack of jurisdiction *ratione materiae*.<sup>1079</sup> These arguments should be dismissed for at least four reasons: Firstly, as regards jurisdiction, rule 133 requires that challenges to jurisdiction must be made at the commencement of the trial, save with the leave of the Court, which the Ruto Defence has neither sought nor received; Secondly, the Appeals Chamber has already decided in the *Kenyatta* case<sup>1080</sup> that the fact that the Prosecution has alleged the commission of crimes against humanity is

<sup>1077</sup> ICC-01/09-01/11-373, para 184.

<sup>1078</sup> *Ibid*, para 185.

<sup>1079</sup> Ruto NCTA Motion, para. 11.

<sup>1080</sup> ICC-01/09-02/11-425.

sufficient to establish subject matter jurisdiction.<sup>1081</sup> Thus, the existence of an organisational policy is an issue which falls to be decided by the Chamber when reaching a determination on the merits -- at the end of the case. Thirdly, it is inappropriate to require the Chamber to make an interlocutory decision on an essential element of the charge at the NCTA stage. Not only would this lead to a piecemeal adjudication of the merits of the case, but it is inconsistent with the Chambers determination that at the NCTA stage the Prosecution's case must be taken "at its highest". Finally, the Chamber should be even more loath to be drawn into an interlocutory decision on this issue on the grounds that the decision of the majority has been consistently applied in subsequent decisions of the Court.<sup>1082</sup>

399. To satisfy the policy requirement of article 7(2)(a), the Prosecution must show that the attack was "planned, directed or organised" as opposed to "spontaneous or [consisting of] isolated acts". The policy need not be formalised or explicitly defined by the organisation and can be inferred from the manner in which the acts occur or from the occurrence of a series of events such as general historical circumstances and the overall political background against which the criminal acts are set, [...] and media propaganda.<sup>1083</sup>

400. The Prosecution submits that there is sufficient evidence on record at this stage that a reasonable Chamber may find establishes the existence of an organisation (hereinafter "Network"). As further demonstrated below, the evidence shows that Network was a well-coordinated and hierarchical organisation with ample

<sup>1081</sup> *Ibid*, para. 35: "As the Prosecutor has expressly alleged crimes against humanity, including the existence of an organisational policy, the Appeals Chamber finds that the Court has subject-matter jurisdiction over the crimes with which Mr Muthaura and Mr Kenyatta have been charged. Whether the Prosecutor can establish the existence of such a policy, in law and on the evidence, is a question to be determined *on the merits*."; (emphasis added).

<sup>1082</sup> "Chambers of the Court have consistently held that the policy may be linked to groups that govern a specific territory or to an organisation that has the capability to commit a widespread or systematic attack against the civilian population." *Prosecutor v Gbagbo*, ICC-02/11-01/11-656-Red (emphasis added). See also Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 396; Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", para. 81; Pre-Trial Chamber III, "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo", ICC-02/11-01/11-9-Red, para. 37.

<sup>1083</sup> ICC-01/09-19-Corr, paras. 84-86.

means at its disposal to carry out a widespread or systematic attack. The Network identified the criminal activities against PNU supporters as its primary purpose and articulated an intention to attack them.

401. The evidence, when viewed in aggregate, also demonstrates the improbability that the violence of the magnitude, geographical scope and duration as the attack on the charged locations could have been possible without pre-mediated and coordinated activities of the Network's members acting pursuant to or in furtherance of the Network's policy to punish and expel Kikuyus and other perceived PNU supporters out of the Rift Valley.
402. While the Prosecution acknowledges that some of the relevant factual allegations contained in the UDCC are no longer supported by the evidence, their absence is not fatal to the Prosecution's ability to prove the existence of the organisational policy.<sup>1084</sup> In this respect, the Prosecution submits that it is not required to provide direct evidence of the actual meetings where the Network was formed, its policy to attack PNU supporters adopted, and the crucial steps for the implementation of the policy taken. It is sufficient to show that a reasonable Chamber may conclude that the Network of perpetrators who committed the attack on PNU supporters satisfied the six-factor test above and that it was improbable that the criminal acts committed by them in the charged locations occurred randomly.

## **1. Structure of the Network**

403. The Prosecution has led sufficient evidence to demonstrate that the Network was a well-coordinated and hierarchical organisation with Mr Ruto at the top.<sup>1085</sup> It was based on existing tribal roles and structures of Kalenjin society. Mr Ruto was a crowned Kalenjin elder, the leader and spokesperson of the Kalenjin community.<sup>1086</sup> As the Kalenjin leader he could direct the Kalenjin

<sup>1084</sup> UDCC, para. 38, in relation to a series of preparatory meetings where modalities of the implementation of the Network's organisational policy were discussed.

<sup>1085</sup> See above paras. 253-255, 266.

<sup>1086</sup> [REDACTED]; P-0326, T-44, 17:18-25.

community in social, political and economic matters and anyone who would “cross” Mr Ruto’s way would be cursed “to dry up like a tree”.<sup>1087</sup> Whatever Mr Ruto said was followed by the Kalenjin.<sup>1088</sup> More specifically, the evidence also demonstrates that Mr Ruto was the controlling force in the Network and there was almost automatic compliance with his instructions.<sup>1089</sup>

404. Below Mr Ruto, the Network comprised of several prominent Kalenjin individuals, including Joshua Sang, Solomon Tirop, Jackson Kibor, Isaac Maiyo, Fred Kapondi, Christopher Kisorio, Farouk Kibet, Lucas Sang, Samuel Ruto and Mark Too among others.<sup>1090</sup> These Network members played different roles within the organisation but all pursued one common plan – to expel Kikuyus and other PNU supporters from the Rift Valley by whatever means necessary. They ensured that the Network had political leadership, a media platform, necessary financial and logistical resources as well as adequately trained manpower. As regards the hierarchy of the Network, the Prosecution incorporates by reference paragraphs 263-268 above.
405. Mr Ruto, aspiring and sitting ODM MP and councillors organised political rallies and events where they encouraged the attendees to attack PNU supporters by using inflammatory speech and evoking deep historical grievances, particularly regarding land ownership.<sup>1091</sup> They also participated in planning and financing the PEV attacks or otherwise participated in preparatory meetings and events before and during the attacks.<sup>1092</sup>
406. KASS FM actively promoted the ODM and Mr Ruto and served as a platform to spread anti-Kikuyu propaganda and thus galvanise the Kalenjin community to implement the policy to expel the targeted communities. Mr Sang in his role as

<sup>1087</sup> EVD-T-OTP-000066/ [KEN-OTP-0045-0021](#).

<sup>1088</sup> [REDACTED].

<sup>1089</sup> See above paras. 253-255.

<sup>1090</sup> See above paras. 266, 154-159, 167, 169-172, 174, 180-182, 187-188, 190 and 197-211.

<sup>1091</sup> See above paras. 221-233.

<sup>1092</sup> See above paras. 221-233 and 239.

a broadcaster on KASS FM furthered the Network's organisational policy prior to and during the attacks.<sup>1093</sup>

407. Several witnesses have testified how the Network capitalised on the important role and authority of elders in Kalenjin society to plan, coordinate and execute the attacks against Kikuyu and other perceived PNU supporters. [REDACTED].<sup>1094</sup> Elders participated in mobilisation of youth when the PEV started, sent attackers to invade the Kikuyu areas and conducted oathing ceremonies prior to and cleansing ceremonies after the attacks. They were instrumental in ensuring compliance of the direct perpetrators with the Network's policy. According to **P-0613**, Kalenjin youth could not make decisions without elders - elders were supposed to give directions as to what to do.<sup>1095</sup>

*(a) The role of the Kalenjin elders in the Network*

408. [REDACTED]. Village elders ensured that all Kalenjin men joined the attackers and that the youth did not stay home and were stationed either at the assembly point in Ziwa or on the roads manning roadblocks.<sup>1096</sup> [REDACTED].<sup>1097</sup>
409. [REDACTED].<sup>1098</sup> [REDACTED].<sup>1099</sup>
410. [REDACTED].<sup>1100</sup>

## **2. Means to carry out the attack**

411. The Prosecution has led sufficient evidence to demonstrate that the Network had extensive means at its disposal with which to carry out the attacks. It had thousands of Kalenjin youth available to attack the targeted locations, financial resources provided by politicians and businessmen, weapons, transportation

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<sup>1093</sup> See above paras. 304-359.

<sup>1094</sup> [REDACTED].

<sup>1095</sup> **P-0613**, T-119, 64:5-7.

<sup>1096</sup> **P-0356**, T-76, 51:5-6, 9-12 and T-77, 20:12-20; [REDACTED] and **P-0469**, T-107, 32:17-19.

<sup>1097</sup> [REDACTED].

<sup>1098</sup> [REDACTED].

<sup>1099</sup> [REDACTED].

<sup>1100</sup> [REDACTED].

and other logistical support to quickly mobilise the attack and sustain it for an extended period.

412. The Network had thousands of Kalenjin youth at its disposal for deployment in the attacks. The evidence establishes that some Network members with a military background were utilised as trainers of the youth and local leaders identified those youth who were to undergo training before the elections: [REDACTED].<sup>1101</sup> [REDACTED].<sup>1102</sup>
413. [REDACTED].<sup>1103</sup> [REDACTED].<sup>1104</sup> [REDACTED].<sup>1105</sup> [REDACTED].<sup>1106</sup> [REDACTED].<sup>1107</sup>
414. [REDACTED].<sup>1108</sup> [REDACTED].<sup>1109</sup> In Yamumbi, [REDACTED], arranged collection of stones to be used as weapons by the attackers.<sup>1110</sup>
415. Other Network members who were familiar with the geographic areas led the youth in the attacks as leaders of the attackers. Lucas Sang, [REDACTED],<sup>1111</sup> [REDACTED].<sup>1112</sup> Shamalan (Chemalan), a youth leader from Kiambaa, led attackers in the Kiambaa attack and carried a jerry-can which was used to set the Kiambaa Church on fire.<sup>1113</sup>
416. Members of the Network arranged for the attackers to be transported by lorries to various locations. They organised reinforcements, food provisions, and the supply of necessary materials such as fuel.<sup>1114</sup> During the violence local leaders and members of the Network, like Christopher Kisorio in Besiebor, were in charge of the feeding and resting points for the Kalenjin warriors in various

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<sup>1101</sup> [REDACTED].

<sup>1102</sup> [REDACTED].

<sup>1103</sup> [REDACTED].

<sup>1104</sup> [REDACTED].

<sup>1105</sup> [REDACTED].

<sup>1106</sup> [REDACTED].

<sup>1107</sup> [REDACTED].

<sup>1108</sup> See above paras. 169-170.

<sup>1109</sup> [REDACTED].

<sup>1110</sup> **P-0423**, T-67, 43:19-44:11.

<sup>1111</sup> [REDACTED].

<sup>1112</sup> [REDACTED].

<sup>1113</sup> **P-0536**, T-39, 12:8-25; T-29, 41:23-42:11, 50:14-50:25.

<sup>1114</sup> [REDACTED]; **P-0405**, T-121, 77:17- 77:22

compounds close to the targeted locations. The warriors would receive food, rest and launch their attacks from such points.<sup>1115</sup>

417. Furthermore, some of the Network's perpetrators were in charge of identifying houses that belonged to perceived PNU supporters to loot and destroy. For example, [REDACTED].<sup>1116</sup> Some of these houses were later burnt during the attack on Kimumu. [REDACTED].<sup>1117</sup> The group he was with proceeded to loot and destroy the identified houses.<sup>1118</sup>

418. The Network received financial support for the attacks from a variety of sources including Mr Ruto and other rich Kalenjin businessmen.<sup>1119</sup> In addition, [REDACTED] ensured that every Kalenjin family contributed 100 Ksh.<sup>1120</sup> These funds were used in a variety of ways to further the organisational policy of the Network. [REDACTED]<sup>1121</sup> [REDACTED].<sup>1122</sup> [REDACTED].<sup>1123</sup>

### **3. Criminal activities as a primary purpose and intention to attack**

419. The Prosecution has led sufficient evidence upon which a reasonable Chamber may conclude that the Network's primary purpose was to drive PNU supporters out of the Rift Valley by whatever means necessary. This is evident from consistent anti-Kikuyu rhetoric and the pledges to provide funds and source weapons for the specific purpose of evicting the Kikuyu Kamba and Kisii and other perceived PNU supporters.<sup>1124</sup>

420. The evidence also shows that the Network members first articulated, then implemented, the plan to target members of the civilian population perceived as PNU supporters. First, the Network held a series of planning meetings, public rallies and events where the plan was articulated, reaffirmed and

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<sup>1115</sup> [REDACTED]. See also above paras. 181, 190, 211 and 246.

<sup>1116</sup> [REDACTED].

<sup>1117</sup> [REDACTED].

<sup>1118</sup> [REDACTED].

<sup>1119</sup> See above paras. 169-172.

<sup>1120</sup> **P-0356**, T-77, 20:19-20:24.

<sup>1121</sup> [REDACTED].

<sup>1122</sup> [REDACTED].

<sup>1123</sup> [REDACTED].

<sup>1124</sup> See above paras. 221-233.

disseminated to the Network members through incitement and use of derogatory terms against PNU supporters.<sup>1125</sup> Second, the intention to attack the PNU supporters was implemented through direct participation of the Network's members in the planning and execution of the attacks against PNU supporters.<sup>1126</sup>

**B. Existence of a policy to commit the attack**

421. The evidence establishes that the attack on members of the civilian population in the charged locations followed a strikingly similar pattern inconsistent with spontaneous and isolated acts of violence. The attack was committed against the background of anti-PNU atmosphere fuelled by continuous and consistent incitement by pro-ODM Kalenjin politicians and media propaganda. These factors alone should satisfy the policy requirement of article 7(2). However, the Prosecution has led sufficient evidence to demonstrate that this similar pattern of the attack was the direct result of the planning, organisation, and implementation of the common plan by Mr Ruto and other Network members.<sup>1127</sup>

422. Some of the common elements of the attacks on each charged location were 1) the speed with which the Kalenjin youth were armed and mobilised in large numbers; 2) they were launched after signature Kalenjin war cries were heard; 3) a large number of the attackers were transported from outside regions; 4) Kikuyus and their property were identified and targeted; and 5) roadblocks were erected and manned by Kalenjin warriors. Below, the Prosecution will highlight few examples of evidence on the record demonstrating these elements of the similar pattern.

423. [REDACTED].<sup>1128</sup> They were coming from two directions -- Marura and Ziwa -- and some had been brought by lorries.<sup>1129</sup> Many of the youth had white faces

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<sup>1125</sup> See above paras. 221-233.

<sup>1126</sup> See above paras. 70, 154-157, and 221-233.

<sup>1127</sup> See above paras. 154-172.

<sup>1128</sup> [REDACTED].

and hair<sup>1130</sup> [REDACTED].<sup>1131</sup> The attacks were chiefly targeted against Kikuyu and their property.<sup>1132</sup> [REDACTED],<sup>1133</sup> [REDACTED].<sup>1134</sup>

424. According to the evidence, Kalenjin attackers in Huruma, some armed with bows and arrows, were organised and approached their targets in groups. Lorries were used to transport the attackers from other locations, such as Ziwa,<sup>1135</sup> and to pick them up after the attacks were finished. The attackers used war cries to communicate with each other<sup>1136</sup> and for reinforcement and getting other Kalenjin youth to join the attacks.<sup>1137</sup> The Kalenjin youth in [REDACTED] were divided into three groups<sup>1138</sup> The groups took turns to attack rather than all attacking simultaneously.<sup>1139</sup> Kalenjin youth implemented specific methods to identify their targets, such as putting a sign “ODM 41” The houses that did not bear the sign were burnt<sup>1140</sup> and those who failed to provide pre-identified codes were attacked.<sup>1141</sup>
425. [REDACTED].<sup>1142</sup> [REDACTED].<sup>1143</sup> [REDACTED].<sup>1144</sup> The Kalenjin attackers burned Kikuyu<sup>1145</sup> houses in the area for two days. On the first day of the attack the attackers burned 10 houses, including **P-0423’s** house,<sup>1146</sup> and on the second day of the attack they burned approximately 300 Kikuyu houses more.<sup>1147</sup> **P-0423** testified that the attackers were shouting in order to call other Kalenjin youth for help and to send a warning to the enemy, i.e. the Kikuyu.<sup>1148</sup>

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<sup>1129</sup> **P-0469**, T-107, 32:17-19, 33:17-18.

<sup>1130</sup> **P-0189**, T-48, 81:9-17.

<sup>1131</sup> [REDACTED].

<sup>1132</sup> **P-0189**, T-48, 100:1-102:18.

<sup>1133</sup> [REDACTED].

<sup>1134</sup> [REDACTED].

<sup>1135</sup> **P-0508**, T-105, 2:20-3:2; 6:25-7:12.

<sup>1136</sup> **P-0487**, T-54, 46:11-47:2.

<sup>1137</sup> **P-0487**, T-54, 66-8:67:8; 69:6-20; **P-0535**, T-70, 69:3-5 and 76:4-20.

<sup>1138</sup> **P-0508**, T-104, 49:13-16.

<sup>1139</sup> **P-0508**, T-104 47:6-48:13; 49:11-16; 56:8-24.

<sup>1140</sup> **P-0487**, T-54, 96:15-97:23.

<sup>1141</sup> **P-0487**, T-55 8:6-16; 10:1-18; 9:20-10.

<sup>1142</sup> [REDACTED].

<sup>1143</sup> [REDACTED].

<sup>1144</sup> [REDACTED].

<sup>1145</sup> **P-0405**, T-121, 62:15-22.

<sup>1146</sup> **P-0423**, T-67, 80:14-17.

<sup>1147</sup> **P-0423**, T-68, 15:6-16:6

<sup>1148</sup> **P-0423**, T-67, 83:3-23.

426. In Kiambaa, Yamumbi, Turbo, Kimumu and Huruma, Kalenjin attackers were housed in compounds that either belonged to, or were overseen by, members of the Network. These Network members instructed the warriors where and how to carry out the attacks and were also responsible for ensuring that all Kalenjin youth participated in the attacks and that food was available to sustain them.<sup>1149</sup>
427. The evidence shows that establishing roadblocks was part of the common plan in order to implement the organisational policy to evict the Kikuyu. The purpose of the roadblocks was to identify, evict<sup>1150</sup> and attack<sup>1151</sup> Kikuyu travellers. Some of those who were manning the roadblocks in and around Huruma were carrying *pangas*, *rungus* and stones.<sup>1152</sup> [REDACTED]<sup>1153</sup> [REDACTED].<sup>1154</sup> [REDACTED].<sup>1155</sup> Evidence indicates that roadblocks were established in and around Kimumu too. Witnesses testified about roadblocks in Rock Centre, Jerusalem, Cheptiret, and Rock II among other places. The youth who were manning the roadblocks were mostly Kalenjin armed with machetes, bows and arrows. Many of those who were manning the roadblocks were wearing torn clothes, with white chalked face and hair.<sup>1156</sup>
428. In sum, the Prosecution submits that it can be reasonably concluded from the evidence above that the attack on Kikuyu, Kisii and Kamba civilians and other perceived PNU supporters in Turbo town, Greater Eldoret Area, Kapsabet town and Nandi Hills town from 30 December 2007 until 16 January 2008 was the work of the Network acting pursuant to its organisational policy. This inference is further strengthened when the similar pattern of the attacks is considered in light of other evidence on the record demonstrating: 1) similar post-election

<sup>1149</sup> See above paras 178-182, 186-188, 190 and 199-211.

<sup>1150</sup> **P-0535** was told at the roadblock that Kikuyu has to leave the area and go to Othaya. T-71, 36:2-40:13.

<sup>1151</sup> **P-0508** saw a dead body next to the roadblock. T-104, 69:9-11.

<sup>1152</sup> **P-0508**, T-104, 68:10-19.

<sup>1153</sup> [REDACTED]; **P-0189**, T-49, 14:7-23 and 18:23.

<sup>1154</sup> [REDACTED]; **P-0189**, T-49, 14:7-23, T-49, 18:23.

<sup>1155</sup> [REDACTED].

<sup>1156</sup> **P-0189**, T-49, 18:23-19:08.

violence pitting Kalenjins against Kikuyus in the past,<sup>1157</sup> 2) historical Kalenjin land grievances toward Kikuyus,<sup>1158</sup> 3) consistent anti-Kikuyu messages articulated by Mr Ruto and other members of the Network in public meetings and events prior to the elections;<sup>1159</sup> 4) Mr Sang's continuous broadcasts on Kass FM of anti-PNU propaganda,<sup>1160</sup> 5) warnings that the elections would be rigged in favour of PNU,<sup>1161</sup> and 6) the threats and warnings given to Kikuyus about imminent attacks.<sup>1162</sup>

### C. Mens rea requirement for crimes against humanity

429. In its NCTA Motion, the Sang Defence claims that there is no evidence on record showing that Mr Sang had knowledge of the attack against the civilian population as per requirements of article 7 of the Statute and for that reason he cannot be held accountable for the crimes charged.<sup>1163</sup> The Ruto Defence does not expressly challenge this element, however what follows applies equally, *mutatis mutandis*, with respect to Mr Ruto's *mens rea*.

430. The Prosecution briefly recalls that the *chapeau* of article 7(1) of the Statute requires that crimes against humanity be committed in the knowledge of the Accused of the broader context in which his actions occurred. More particularly, it requires the Prosecution to establish that the Accused either knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population,<sup>1164</sup> and that his conduct was pursuant to or in furtherance of an organisational policy.<sup>1165</sup>

<sup>1157</sup> **P-0464**, T-89, 55:22-56:10, 74:22-75:23; [REDACTED]; **P-0405**, T-122, 39:21-40:1; **P-0508**, T-105, 22:25-23:14, **P-0423**, T-67, 35:4-36:6

<sup>1158</sup> See above paras. 310, 315 and 369.

<sup>1159</sup> See above paras. 221-233.

<sup>1160</sup> See above paras. 307-326.

<sup>1161</sup> See above paras. 167, 223, 233 and 316-317.

<sup>1162</sup> **P-0536**, T-29, 34: 9-34:11; **P-0613**, 35:24-36: 1; **P-0442**, T-99, 15: 3-15:11, **P-0535**, T-70, 63:14-64:7.

<sup>1163</sup> Sang NCTA Motion, paras. 119-122.

<sup>1164</sup> Elements of Crimes, Articles 7(1)(a)(3); ICC-01/09-02/11-382-Red, para. 417, and ICC-01/05-01/08-424, para. 88.

<sup>1165</sup> There is no explicit reference to knowledge of the policy element. However, as the second paragraph of the Introduction to the Elements of Crimes under Article 7 indicates, it is not required that the perpetrator knew the precise details of the policy. This implies that some awareness of an underlying policy is required, even if it leaves considerable ambiguity as to the extent of that awareness: Robinson D., 'The Elements of Crimes against Humanity', (Transnational Publications, 2001) Lee et al. (ed.), in ICC: Elements of Crimes and Rules of

‘Knowledge’, in the context of this provision, is to be interpreted as part of the general intent within the meaning of article 30.<sup>1166</sup> Thus, the Prosecution submits that there is no requirement that the Accused acted with special intent, or motive, or shared or approved the attack.<sup>1167</sup>

431. Moreover, paragraph 2 of the introduction of the Elements of Crimes for article 7 further clarifies that the Accused is not required to possess detailed knowledge of the plan or policy in furtherance of which the attack occurred. This element may be satisfied if the Accused intended to further such an attack.<sup>1168</sup> As always, existence of such knowledge or intent can be inferred from relevant facts and circumstances.<sup>1169</sup>
432. In light of the above and contrary to the Sang Defence’s assertion, the Prosecution submits that it has proven to the required standard of proof at this intermediate stage that Mr Sang (and indeed Mr Ruto) acted with ‘knowledge’ within the meaning of article 7.
433. Such knowledge can be inferred from the fact that Mr Sang was a member of the Network<sup>1170</sup> and as such, *inter alia*: (i) broadcast propaganda against PNU supporters,<sup>1171</sup> including hate messages explicitly revealing desire to expel the Kikuyu;<sup>1172</sup> (ii) participated in at least one preparatory meeting at Mr Ruto’s Sugoi house on 26 December 2007 where the Network’s plan was espoused;<sup>1173</sup>

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Procedure and Evidence, p. 73. Note that Canada and Germany suggested that specific knowledge of the underlying policy should not be required.

<sup>1166</sup> ICC-01/05-01/08-424, para. 87.

<sup>1167</sup> *Limaj*, IT-03-66-T, 30 November 2005, para 190; *Tadić*, IT-94-1-A, 15 July 1999, paras 270-272; *Kunarac*, IT-96-23/1-A, 12 June 2002 para 102-3; *Blaškić*, IT-95-14-A, 29 July 2004 para 124; *Kordić and Čerkez*, IT-95-14/2-A, 17 December 2004, para. 99 (need not share purpose or goals); *Krnojelac*, IT-97-25-A 17 September 2003, para. 102 (personal motives irrelevant); *Simić, Tadić and Zarić*: IT-95-9-T, 17 October 2003 para. 45 (“The accused need not “share the motive, intent, or purpose of those involved in the attack”); *Kupreškić*, IT-95-16-T, 14 January 2000 para 558 (personal motives irrelevant); *Fofana and Kondewa* (CDF case) SCSL-04-14-T, 2 August 2007 para 121 (not purpose, goals, motives); *Brima, Kamara and Kanu* (AFRC case) SCSL-2004-16-A 22 February 2008 para 221-2 (motives irrelevant). On attenuated knowledge in ICC law specifically see ICC Elements of Crimes, Article 7, Introduction, para 2; K. Ambos & S. Wirth, “The Current Law of Crimes Against Humanity”, 13 *Criminal Law Forum* (2002) at 39-41.

<sup>1168</sup> Elements of Crimes, Article 7 (Introduction), para. 2.

<sup>1169</sup> General introduction to the Elements of Crime, para. 3.

<sup>1170</sup> See above paras. 150 and 266.

<sup>1171</sup> See above paras. 307-326.

<sup>1172</sup> *Ibid.*

<sup>1173</sup> See above para. 374.

(iii) organised fundraising events that financed the attacks;<sup>1174</sup> and (iv) sought progress from perpetrators during the attack and broadcast instructions.<sup>1175</sup>

434. The Prosecution submits that these facts and circumstances demonstrate that Mr Sang's conduct was in line with the common plan of the Network – to expel the perceived PNU supporters from the Rift Valley –, a plan that was executed and led to the commission of the crimes charged.<sup>1176</sup> As such, the Prosecution submits that the evidence in support of such facts is sufficient basis from which a reasonable Chamber could infer that Mr Sang possessed the requisite knowledge within the meaning of article 7.

435. As regards Mr Ruto, the Prosecution submits that the evidence summarised in Part IV above amply demonstrates that Mr Ruto had the necessary *mens rea* in respect of the contextual elements of crimes against humanity.

## CONCLUSION

436. The Prosecution submits that the evidence presented, taken at its highest, is sufficient to satisfy a reasonable Trial Chamber that the Prosecution has proved all of the essential elements required to secure a conviction of both Accused. Accordingly, the Defence NCTA Motions should be dismissed.




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**Fatou Bensouda, Prosecutor**

Dated this 26<sup>th</sup> day of November 2015

At The Hague, the Netherlands

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<sup>1174</sup> See above paras. 328-334.

<sup>1175</sup> See above paras. 353-358.

<sup>1176</sup> See above Part III.