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No.: **ICC-01/09-01/11**
Date: **6 November 2015**

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

Public Redacted Version of Sang Defence 'No Case to Answer' Motion, filed on 23 October 2015

Source: **Defence for Joshua arap Sang**

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

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I. INTRODUCTION

1. The charges against Joshua arap Sang in this five-year-old trial ring hollow as at the close of the Prosecution's case. He stands charged with crimes against humanity (murder, forcible transfer/deportation and persecution), alleged to have been committed during the Post Election Violence ("PEV") from 30 December 2007 until 16 January 2008 in several places in Uasin Gishu and Nandi Districts in Rift Valley, Kenya – Turbo town, Greater Eldoret Area (Huruma, Kimumu, Langas, Yamumbi, Kiambaa Church), Kapsabet Town, and Nandi Hills Town. The violence broke out after the results of the Presidential elections were announced on 30 December 2007. Whilst many people in Kenya, including those in the Rift Valley, supported Raila Odinga and believed he would win, it was the sitting President Mwai Kibaki who was announced the winner.[1] There was an immediate outburst of anger among supporters of Raila Odinga's party the Orange Democratic Movement ("ODM") throughout Kenya who believed President Kibaki had won unfairly by rigging the votes.[2] This anger led to various attacks on perceived supporters of the President's political party, the Party of National Unity ("PNU").[3]

2. Violence broke out everywhere in Kenya, not only in the Rift Valley, and was employed by all ethnic groups, not only the Kalenjin community living in Rift Valley. Kenya was not unfamiliar with such post election violence, which equally broke out in 1992 and 1997.[4] Yet, unlike these earlier occasions, the Prosecution alleges that the 2007-2008 PEV was not spontaneous, but was planned even before the elections by a Network consisting of Kalenjin supporters of the ODM, allegedly spearheaded by William Ruto and including Joshua Sang. The evidence of planning is however sparse. Even on the Prosecution evidence, the conclusion can be drawn that the violence was a spontaneous reaction to the election results. Indeed, there is insufficient evidence to conclude that the alleged perpetrators were well-funded and well-prepared.

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[1] T-54, 32-33; T-90, 52-54; T-120, 18-21; T-71, 73-74; EVD-T-OTP-00328 at 0434-0435, 0550, 0595.
[2] T-49, 79-80; T-54, 32-33; T-63, T-71, 73-74; 86-87; T-90, 52-54; T-120, 18-21.
[3] T-90, 58.
[4] P-0464, T-88, p 14:22 –16:2.

3. Mr Sang is alleged to have contributed to crimes against humanity that were committed by this Network. They were alleged to have been directed towards perceived supporters of the PNU, mostly those belonging to the Kikuyu ethnic group. Mr Sang's alleged contribution consisted of anti-Kikuyu and anti-PNU propaganda broadcasted on his daily radio program 'Lene Emet' on vernacular radio station Kass FM. At Confirmation, the Pre-Trial Chamber found that Mr Sang participated in several planning meetings and fundraising events. At some of these meetings, Mr Sang was the alleged master of ceremonies. However, the evidence led at trial no longer supports these allegations. Only witness [REDACTED].[5] This meeting was not addressed at all by the Prosecution during [REDACTED] examination-in-chief, which suggests that the Prosecutor did not attach any importance to it.

4. Accordingly, the main question is whether the evidence demonstrates that Mr Sang, by himself or through his callers, broadcasted messages which incited people to commit violence. The Defence submits that evidence is clearly lacking to demonstrate any criminal conduct on the part of Mr Sang. The case hinges on a very limited number of uncorroborated allegations contained in written statements signed by blatantly unreliable witnesses who recanted these allegations under oath. Most importantly, none of the allegations brought by recanting or non recanting witnesses against Mr Sang reveal criminal conduct. It concerns comments made by Mr Sang or callers on his radio program about PNU supporters and/or the Kikuyu population. At worst, these comments, of which no broadcast has been produced and which Mr Sang denies in any event, are a poor choice of words. While they might be considered derogatory, they certainly not criminal in the sense of being inciting. They were not meant to be inciting, nor did they incite anyone to commit violence against the Kikuyu population during the post election violence. Most of these comments were alleged to be made way before the violence broke out. Evidence of a nexus to any of the crimes committed by others is completely lacking.

[5] [redacted]

5. The evidence must further demonstrate that Mr Sang's conduct was a deliberate contribution to Mr Ruto's alleged network, which had the criminal intent "to punish and expel from the Rift valley those perceived to support PNU, namely, Kikuyu, Kamba and Kisii civilians".[6] In law, Mr Sang must be shown to at least have had knowledge that his contribution would go towards achieving this objective. Evidence of such knowledge is absent.

6. Mr Sang should in the circumstances be acquitted considering that the Prosecution has failed to show that there was any Network and/or that he was affiliated with any of the alleged Network members. There is no evidence of Mr Sang's participation in any Network meetings and/or fundraisings. Further, the Prosecution has failed to adduce any evidence of criminal utterances by Mr Sang, much less those that led to the commission of crimes.

7. If Mr Sang were to be put on his defence, which we submit he should not be, Mr Sang requests to be put on notice as to which mode(s) of liability he is being charged under (Article 25(b), (c) or (d)) and on what counts (murder, forcible eviction/transfer and persecution).

II. RECHARACTERISATION AS A PRELIMINARY MATTER

8. Recently, the Prosecution requested the Chamber to give notice to the parties and participants pursuant to regulation 55(2) of the Regulations of the Court of the possibility that the legal characterisation of Mr Sang's individual criminal responsibility for all counts in the Updated Document Containing the Charges ("UDCC") may be subject to change, to include liability under articles 25(3)(b) or (c) of the Statute.[7] The Prosecution requests that such notice be given prior to the filing of any 'no case to answer' submissions so that it will provide the Defence with adequate notice and opportunity to address all relevant modes of liability that may be established by the evidence.[8] The Defence has objected on

[6] ICC-01/09-01/11-373, para. 365.
[7] ICC-01/09-01/11-1951.
[8] Ibid, para. 26.

the ground that this submission has come too late as it has been submitted on the eve of the deadline to submit a 'no case to answer' application.[9]

9. On 16 October 2015, one week prior to the due date of the 'no case to answer' application, an oral hearing was held during which the parties were given the opportunity to expand upon their written submissions before the Chamber. At the end of the day, the Defence received the following note from the Chamber:[10]

> The Chamber hereby informs the Sang defence that it will not decide now on the Prosecution's Request pursuant to Regulation 55(2) of the Regulations of the Court (filing 1951). However, pending that decision, and 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).

10. In paragraph 29 of the Conduct of Proceedings Decision, the Chamber recalls that:

> [P]ursuant to Regulation 55 of the Regulations a Chamber may change the legal characterisation of facts to accord with the crimes or forms of participation specified in the Statute, provided such re-characterisation does not exceed the facts and circumstances described in the charges. The Trial Chamber could therefore 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.

11. The Chamber then proceeds to recall that, on 12 December 2013, notice under Regulation 55(2) was given of the possibility of recharacterisation of Mr Ruto's alleged individual criminal responsibility to additionally accord with liability under Article 25(b), (c) or (d) of the Statute. The Chamber noted that, "in the

[9] ICC-01/09-01/11-1976-Conf, para. 3 and 27.
[10] E-mail from Trial Chamber V-A Communications to counsel on 16 October 2015 at 3:17 p.m.

context of considering a 'no case to answer' motion it would be sufficient, in respect of Mr Ruto, for it to be established that there is sufficient evidence of facts which could support a conviction under the mode of liability as pleaded in the UDCC, or any one of the modes as specified in the Regulation 55 Notice".[11]

12. Accordingly, the Conduct of Proceedings Decision ontext, and not at all to Mr Sang. Therefore, this Decision clearly does not put Mr Sang on any notice of a potential recharacterisation. For now, there is only a Prosecutor's request to issue such a warning but not an actual warning, as the Prosecutor has also acknowledged.[12] There is further a warning from the Chamber that the Defence should anticipate that, the Chamber may, at the time of rendering its decision on the 'no case to answer' application, deem it necessary to put the Defence on notice under Regulation 55 that Mr Sang's individual criminal liability may be subject to recharacterisation. If the Chamber decides, at a later stage, to issue such a warning, the Defence should then be given an opportunity to make oral and/or written submissions, in accordance with Regulation 55(2).

13. In light of this, the Defence considers it is not on notice of any possible recharacterisation and will therefore focus its 'no case to answer' analysis on an assessment of whether the evidence presented could support a conviction under the Article 25(3)(d) mode of liability as pleaded in the UDCC.[13] However, in light of the Chamber's notice of a potential future Regulation 55(2) notice, the Defence will also address any other potential mode of liability, but only to the extent permitted by the time and page limit. In any event, the Defence submits that the Prosecution has failed to present a case for which Mr Sang could be convicted – whether as an inducer, solicitor, aider and abettor or a contributor.

[11] Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions) ICC-01/09-01/11-1334, para. 30.
[12] ICC-01/09-01/11-1951, para. 26.
[13] Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions) ICC-01/09-01/11-1334, paras. 30, 32 (03-06-2014).

III. LEGAL PRINCIPLES

A. Evidentiary Standard

14. The Defence submits that the Prosecution failed to prove its case against Mr Sang by any standard of proof. The evidence, if believed, does not demonstrate that Mr Sang, or anyone for whose conduct Mr Sang can be held liable on the basis of any of the modes of liability recognised in the Rome Statute, committed crimes against humanity. The evidence, if believed, does not even show that Mr Sang engaged in any type of criminal activity. In addition, much of the evidence is of a particularly poor quality, so much so that it cannot be relied upon, even at this stage. The case has been "so deficient in the evidence as to make it virtually vexatious, inappropriate, inefficient and/or pointless to prolong proceedings into the case for the Defence".[14] Accordingly, the case against Mr Sang should be dismissed because the Prosecution case "has not raised any serious question of guilt that the Defence should be put to the trouble of answering".[15]

15. This is the first time at the ICC that a 'no case to answer' motion is assessed. The ICC Statute and Rules do not explicitly provide for such a mechanism. Rather, the Chamber held that, pursuant to articles 64(2), 64(3)(a) and 64(6)(f), and Rule 134, it may exercise its discretion to determine whether the Defence has a case to answer.[16] In reaching this conclusion, the Chamber also took into account the rights of the accused, including "the fundamental rights to a presumption of innocence and to a fair and speedy trial, which are reflected in Articles 66(1) and 67(1) of the Statute".[17] This, combined with the onus of proving the guilt of the accused being on the Prosecution leads to the conclusion that the accused should be acquitted in cases where the Prosecution has failed to "lead sufficient evidence to necessitate a defence case".[18]

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[14] ICC-01/09-01/11-1334-Anx-Corr, Separate Further Opinion of Judge Eboe-Osuji, para. 6.
[15] Ibid, para. 6.
[16] ICC-01/09-01/11-1334, paras. 15-16.
[17] ICC-01/09-01/11-1334, para. 12.
[18] ICC-01/09-01/11-1334, para. 13.

16. Unlike at the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR"), the ICC Prosecutor can only bring a case where it has passed the "substantial grounds to believe" standard applied at the confirmation hearing. The Chamber held that, notwithstanding this filtering mechanism prior to trial, there is still room for a 'no case to answer' procedure at the end of the Prosecution's case because:[19]

> 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 in light of the requirements for conviction of an accused. Furthermore, the nature and content of the evidence may change between the confirmation hearing and completion of the Prosecution's presentation of evidence at trial. In addition, the Prosecution need not introduce the same evidence at trial as it did for confirmation.

17. The Chamber has indicated that it will apply the standard as that applied at *ad hoc* tribunals and in common law jurisdictions. That is: a 'no case to answer' submission should succeed where the Prosecutor has failed to present sufficient evidence upon which any reasonable Chamber could convict.[20] In other words, "if the evidence is not capable of satisfying the reasonable doubt standard", it cannot sustain a conviction and the case should be dismissed in whole or in part.[21] In that way, the 'no case to answer' procedure "has the potential to contribute to a shorter and more focused trial, thereby providing a means to achieve greater judicial economy and efficiency in a manner which promotes the proper administration of justice and the rights of an accused."[22]

18. To 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

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[19] Ibid, para. 14.
[20] ICC-01/09-01/11-1334, paras. 22-23.
[21] ICC-01/09-01/11-1334-Anx-Corr, para. 6. See also the Special Court for Sierra Leone ("SCSL") case of Charles Taylor, where the question was defined as "whether there is evidence, if accepted, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question" (SCSL-03-01-T, p 24195, lines 8-11).
[22] ICC-01/09-01/11-1334-Anx-Corr, para. 16.

convict.[23] Thus, either there is an insufficient quantity of evidence, which is probative of one or more of the 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'.[24] It will be so qualified only if it is "obviously incredible or unreliable".[25]

19. Evidence is taken at its highest and will be presumed credible. This is similar to the evidential standard, as is applied in common law jurisdictions, from which the 'no case to answer' procedure has been borrowed. The Chamber intends to apply a similar standard, and holds that evidence will not easily be considered as 'incapable of belief', and the judges will not assess its credibility or reliability too thoroughly. Issues of reliability and credibility come into play only where the Prosecution's case has "completely broken down".[26]

20. There are, however, a number of significant distinctions between the procedure before the Court and before common law domestic jurisdictions, warranting a different approach. Before the Court, the 'no case to answer' motion is being assessed by the same judges who will make the ultimate decision on the guilt of the accused at the end of the trial. In common law jurisdictions, the ultimate finders of fact tend to be lay jurors who are under no obligation to provide a reasoned written decision. The 'no case to answer' procedure protects an accused from a wrongful conviction if, in the mind of the judge, there is insufficient evidence that could sustain a conviction. The judge then enters an acquittal without allowing the jury to render the decision of fact. This is an extreme measure, to be applied in extreme cases only. Matters of credibility are mostly left to the jury.

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[23] *Prosecutor v. Taylor*, SCSL-03-01-T, p 24196, lines 22-26.
[24] ICC-01/09-01/11-1334, para. 24; SCSL-03-01-T, p 24195, lines 18-21.
[25] *Ibid*, line 23.
[26] ICC-01/09-01/11-1334, para. 20; *ibid*, lines 11-12. See also: "the object of the enquiry is not to make determinations of fact having weighed the credibility and reliability of the evidence, rather it is simply to determine whether the evidence, assuming that it is true, could not possibly sustain a finding of guilt beyond reasonable doubt" (lines 13-17).

21. Here, the same judges determine the 'no case to answer' motion and the facts at the end of the case. Therefore, the Defence submits that, in the event that the judges are already in a position to determine that they will not convict the accused on the basis of the Prosecution's evidence, even if they could hypothetically convict them, they should grant the 'no case to answer' Motion. If not, valuable Court time is wasted to reach the same conclusion many years later, after completing two defence cases, which they could have reached today. This would also be unfair on the accused whose trial should not drag on, if at the end of the day, they will be acquitted in any event.

22. Moreover, the standard applied at this stage should not be lower than that applied at Confirmation. Indeed, if on the basis of the evidence, no substantial grounds exist to believe that Mr Sang is guilty of the charges, then the case should not have been brought at all, let alone proceed to a defence case. It is not a question of re-assessing whether the Pre-Trial Chamber ("PTC") rightly confirmed the charges against Mr Sang, it is a question of assessing whether the evidence, having been presented before the Chamber and subjected to the test of cross-examination, passes the "substantial grounds to believe" test now. In this regard it is noteworthy that almost the entire Prosecution's case is new and has therefore not been reviewed by the PTC. The Chamber should keep this in mind in evaluating the Prosecution's case.

B. <u>Incapable of Belief</u>

23. In general, great faith is placed on the oath. Sworn testimony, particularly when tested in cross-examination, is usually given considerably more weight than an unsworn written statement.[27] In particular where the oral testimony departs significantly from the initial written statement, judges would be reluctant to rely on the latter, rather than on the former, or either.

24. There is only one precedent in the *ad hoc* tribunals where prior inconsistent statements of recanting witnesses were admitted for the truth of their contents.

[27] *Akayesu* Trial Judgment, para 137; *Musema* Trial Judgment, para 86; *Naletilic* Trial Judgement, para. 12.

These witnesses were, however, barely relied upon in the final judgment because their credibility was too questionable. The Chamber considered "the oral evidence of some of these witnesses was deliberately contrived to render it much less favourable to the Prosecution than the prior statement".[28] It also drew the conclusion that "overriding loyalties had a bearing upon the willingness of some witnesses to speak the truth in court about some issues".[29] On some occasions, the Chamber could not tell where the truth lay in the witnesses' inconsistent accounts and, thus, set the evidence aside.[30]

25. This Chamber appears to have a similar view on why witnesses altered their *viva voce* accounts. However, even if true that witnesses changed their testimony to make it less favourable to the Prosecution due to "overriding loyalties" to the accused, this does not suggest these witnesses told the truth in their initial accounts. Recantations make their testimony less reliable overall, as it is difficult, if not impossible, to determine where the truth lies.

26. In any event, the Defence recalls that in its *No Case to Answer Directions*, the Chamber stated as follows with regard to the scope of the evidence to be considered for purposes of the Chamber's assessment of this Motion:

> "Based on a combined reading of Articles 69(4) and 74(2) of the Statute and Rule 64(3) of the Rules, the Chamber shall consider as evidence only what has been 'submitted and **discussed** [...] at trial', and has been found to be admissible by the Chamber, whether originally submitted by the parties or ordered for production by the Chamber pursuant to Article 64(6)(d) of the Statute."[31] (emphasis added)

27. The Defence submits that this direction means that even though the Rule 68 Statements have been admitted at trial (and irrespective of what happens on appeal), where the contents of the Statements have not been submitted and discussed in Court while the witness was on the stand under oath, the Chamber should not consider them in its no case to answer analysis. This reading also

[28] *Limaj* Judgment, para. 13.
[29] Ibid.
[30] Ibid, para. 14.
[31] No Case to Answer Directions, ICC-01/09-01/11-1334, para. 25.

corresponds to the understanding of Judge Eboe-Osuji in his Separate Opinion[32] (albeit his focus was on admissibility of portions of statements not canvassed with the witness, and not whether they could be considered at this stage).

28. To the extent the Rule 68 Statements are assessed at all, the Defence concedes that each recanting witness must be considered on his or her own merits, with due consideration for individual explanations for the recantations and any means to test the reliability of the initial accounts. Indeed, just as with any other evidence, their reliability depends on the "circumstances under which the evidence arose, the content of the evidence, whether and how the evidence is corroborated, as well as the truthfulness, voluntariness and trustworthiness of the evidence."[33] The context, character, internal consistency, and level of contemporaneousness and hearsay ("first-hand" or further removed) of the evidence are relevant factors to determine its weight, as well as the neutrality and impartiality of the circumstances in which, and the person by whom the initial accounts were taken.[34] However, in general, recanting witnesses should be treated with caution, and can be relied upon only if corroborated.[35]

29. In this case, the initial accounts have been shown to be unreliable and should therefore be rejected as 'incapable of belief'. Their reliability is significantly undermined by the following factors: (i) they were taken by a party with a vested interest in the proceedings rather than a neutral officer; (ii) they were not taken under oath; (iii) the makers of the statements were not warned that the providing of false information could lead to perjury proceedings; and (iv) they are not video-recorded. The initial statements of [REDACTED], [REDACTED] and [REDACTED] are particularly unreliable, given that the same intermediaries

[32] ICC-01/09-01/11-1938-Red-Anx, para. 48.
[33] *Prosecutor v. Dusko Tadić*, IT-94-1-T, Decision on Defence motion on hearsay, 5 August 1996, paras.15-19.
[34] ICC-01/04-01/06-1399, Decision on the admissibility of four documents, 13 June 2008, paras.28, 38 and 40; ICC-01/04-01/07-2635, Decision on the Prosecutor's bar table motions, 17 December 2010, para.27.
[35] See, for instance, *Prosecutor v. Bizimungu Casimir et al*, Case No. ICTR-99-50-T, Judgement and Sentence, September 2011, paras. 757-764; ICC-01/05-01/08-1028, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 23 November 2010, para.11; ICC-01/05- 01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011.

connected them all to the Court, [REDACTED], had a motive to make up false allegations.[36] Witness [REDACTED]has not been subjected to any cross-examination so reliance on his statement would be particularly troublesome. The initial account of [REDACTED] is unreliable as it alleges that Sang was on air broadcasting inciting messages and directions for perpetrators, during the PEV immediately following the election results, whilst a ban on live broadcasts was in place from 30th December 2007. In addition, this type of evidence is contradicted by recorded peace messages which the Defence introduced during the Prosecution case, [REDACTED].[37]

30. Most allegations against Mr Sang contained in these witness statements are uncorroborated and untested. A principle has been formulated over the years that untested evidence directly implicating the accused must be corroborated.[38] As was held by the ICTY Appeals Chamber, "evidence which has not been cross-examined and goes to the acts and conduct of the accused or is pivotal to the Prosecution's case will require corroboration if used to establish a conviction."[39] Many of the allegations against Mr Sang have not been put to the test of cross-examination because the Prosecutor did not seek to rely on these allegations. In his separate opinion, the Presiding Judge expresses the view (which is shared by the Defence) that "considerations of efficiency and fairness to both the witnesses and the Defence, require that only the evidence of these witnesses to the extent of those questions and answers (including questions and answers connected to documentary and other materials put to the witness while on the stand) may be

[36] For further details, see ICC-01/09-01/11-1911-Conf, paras. 105-108.
[37] EVD-T-D11-00065 (audio) and EVD-T-D11-00066 (translation).
[38] *Martic* Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babic, para 53; reliance on *AM v Italy*, App No 37019/97, para 25; *Saïdi v France* (1994) 17 EHRR 251, paras 43-44; *Unterpertinger v Austria*, paras 31-33; *Lucà v Italy* (2001) 36 EHRR 807, paras 39-45. See also *Prosecutor v Haraqija & Morina* Appeals Chamber Judgment (23 July 2009), para 61.
[39] *Martic* Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babic, para 20; *Martic* Trial Judgment, para 27; *Haraqija & Morina* Judgement on Allegations of Contempt (17 Dec 2008), para 23; *Milutinovic* Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quater (16 Feb 2007), para 13; *Haradinaj* Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 quarter and 13th Motion for Trial-Related Protective Measures (7 Sep 2007), para 12; *Prlic* Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 quarter of the Rules (Hasan Rizvic), paras 22-23; *Prlic* Appeals Decision on Transcripts of Jadranko Prlic, para 53; *Blagojevic* Trial Judgement, para 26; *Halilovic* Trial Judgement, para 19.

considered for the truth of their content".[40] At the very least, such untested evidence should be corroborated.

31. The need for corroboration is further supported by ICTY jurisprudence, which has determined that statements admitted under Rule 92*quater* or Rule 92*quinquies* of the ICTY Rules, which are similar to amended Rule 68 of the ICC Rules, can only be relied upon if sufficiently corroborated. In the case of *Haraqija and Morina* the ICTY Chamber held that "[i]n order for a piece of evidence to be able to corroborate untested evidence, it must not only induce a strong belief of truthfulness of the latter, i.e. enhance its probative value, but must also be obtained in an independent manner".[41]

32. The Appeals Chamber affirmed that a conviction cannot rest decisively on untested evidence. It found that "[w]hether untested evidence is sufficiently corroborated is necessarily a fact specific inquiry and varies from case to case".[42] In this particular case, the Appeals Chamber was not satisfied that the untested evidence from the co-accused was sufficiently corroborated, given that all other available evidence was also untested, consisting of double or triple hearsay. The Appeals Chamber, therefore, overturned the conviction of one of the accused.[43]

33. Another category of evidence that is usually expected to be corroborated is evidence given by a co-perpetrator or others with a motive to incriminate the accused.[44] Co-perpetrators are frequently considered to be of diminished credibility, given that their answers are not trustworthy because they may seek to put the blame on the accused to avoid self-incrimination. Their evidence should, therefore, be treated with caution even where the co-perpetrator came to testify as a *viva voce* witness in the case and, as such, was subjected to the test of cross-examination. In most cases, although not a strict requirement, such

[40] ICC-01/09-01/11-1938-Conf-Anx, Partly Concurring Opinion of Judge Eboe-Osuji, para. 48.
[41] *Haraqija* Contempt Judgment, para 41.
[42] *Haraqija & Morina* Appeals Judgment (23 July 2009), para 62.
[43] *Ibid*, paras 64-69.
[44] Muvunyi Appeal Judgement, paras. 130-131.

evidence is only relied upon if corroborated.[45] Also, although not an absolute requirement, Chambers rarely rely on hearsay evidence without corroborative evidence.[46]

34. The Defence is cognisant of the fact that the proceedings have not yet reached a conclusion and that the Chamber does not yet need to review the evidence on the 'beyond reasonable doubt' standard. Due consideration should nonetheless be given to the principle which has evolved from the jurisprudence that corroboration is required in support of recanted allegations, particularly where they are untested or made by witnesses with a motive to falsely incriminate the accused. Without such corroboration, no reasonable Chamber can convict Mr Sang, which is a determination the Chamber can already make at this stage. Indeed, it is too late for the Prosecutor to search for corroborative material, and it would be improbable for any defence to introduce such material during a defence case. Accordingly, the Chamber can avoid wasting valuable court time by reaching the only conclusion a reasonable Chamber could reach – that is, that the Prosecutor has failed to bring a case against Mr Sang which is deserving of a defence response. The Chamber can safely reach that conclusion now.

C. Exceeding the Facts and Circumstances of the UDCC

35. Most of the evidence presented by the Prosecution relates to events that occurred outside the temporal and/or geographical scope of the charges. The Defence is only concerned with the case pleaded by the Prosecution in its UDCC, as confirmed by the Pre-Trial Chamber in its decision confirming the charges. Whilst Regulation 55 grants the Chamber discretion to recharacterise the

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[45] See *Cyangugu* Trial Judgement (25 Feb 2004), paras 92, 95, 108, 113, 118, 131, 135, 141, 174, 176, 216, 321, 403, 438, 484, 540, 587, where the Trial Chamber required corroboration of such testimony. In *Limaj* Trial Judgement, para 29, the Trial Chamber was extremely cautious of witnesses who were motivated by avoiding self-incrimination and considered one witness, who was clearly motivated as such, to be of diminished credibility. See also *Halilovic* Trial Judgement, para 17; *Martic* Trial Judgement, para 25.

[46] *Limaj* Oral Ruling of 18 November 2004, at 447–49; *Limaj* Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence (25 April 2005), para 27; *Prlic* Appeals Judgment, para 51; also *Aleksovski* Decision on Prosecutor's Appeal on Admissibility of Evidence (16 Feb 1999), para 25; *Popović* Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning (14 Dec 2007), para 50; *Prosecutor v. Bizimungu Casimir et al*, Case No. ICTR-99-50-T, Judgement and Sentence, September 2011, 712.

charges, provided such does not infringe the fair trial principles, it does not grant the Chamber the discretion to alter the factual allegations. Regulation 55(1) states explicitly that the Chamber may only recharacterise the charges if the facts and circumstances as described in the charges are not exceeded by doing so. If the Chamber had the power to find the case against an accused proven on the basis of different facts than those charged, the right of the accused under Article 67(1)(a) "[t]o be informed promptly and in detail of the nature, cause and content of the charge" would lose its meaning and effectiveness and become "theoretical and illusory" rather than "practical and effective".[47]

36. Accordingly, 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.[48] The Prosecution cannot rely on evidence relating to events outside the temporal and geographical scope of the charges to fill gaps in its case. Such evidence 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.[49] But in no way can allegations not charged replace the allegations charged even where such allegations may still make up the same charge. This is evident from Article 74(2) of the Rome Statute pursuant to which the final determination of the guilt (or not) of the accused "shall not exceed the facts and circumstances described in the charges and any amendments to the charges".

[47] *Airey v. Ireland*, Judgement of 9 October 1979, 32 ECrtHR (Ser. A), para. 24; *Artico v. Italy*, Judgement of 13 May 1980, 37 ECrtHR (Ser. A), para. 33.
[48] *Prosecutor v Bizimungu et al.,* Case No ICTR-99-50-AR73.2, Decision on Prosecution's Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004 (*Bizimungu* Appeals Chamber decision) paras. 18, 19.
[49] *Lubanga* Trial Judgement, 14 March 2012, pp. 442 et seq; *Prosecutor v. Katanga and Ngudjolo*, Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, ICC-01/04-01/07-648, para. 21; also see *Prosecutor v. Lubanga*, Decision on the confirmation of charges, January 29, 2007, ICC-01/04-01/06-803-tEN,paras 152-153. *See also* the ICTY case: *Prosecutor v. Seselj*, Decision on Appeal against the Trial Chamber's Oral Decision of 9 January 2008, 11 March 2008, at para. 24; *Prosecutor v. Strugar*, Decision on the Defence objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence, 22 January 2004, p. 3.

37. The Appeals Chamber of the *ad hoc* tribunals similarly noted that the accused "must be found guilty [or not guilty] on the basis of evidence of the crimes charged."[50] In the ICTR case of Muvunyi, the Appeals Chamber emphasized:[51]

> The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused. The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds. Defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected; this calls for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment of proceedings, or the exclusion of evidence outside the scope of the indictment. In reaching its judgement, **a Trial Chamber can only convict the accused of crimes that are charged in the indictment**. (emphasis added)

38. Accordingly, a conviction cannot be based on a different event from the one specifically alleged in the indictment. In *Muvunyi*, a re-trial was ordered where the accused was convicted on the evidence presented, which differed from the facts charged in the indictment in terms of dates, the nature of the attack and the accused's alleged role therein.[52] Also in subsequent cases, it has been held that an accused should not be convicted where the evidence radically transforms the allegations charged, in which case the Chamber should simply find that the charges in the indictments have not been proved.[53]

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[50] Bizimungu Appeals Chamber decision, para. 28.
[51] *Prosecutor v. Muvunyi*, Appeal judgment, August 29, 2008, para. 18 (emphasis added); also see: *Prosecutor v. Kupreskic et al*, Appeal judgment, October 23, 2001, para. 92, *Prosecutor v. Kvo~ka et al.,* Appeals Chamber Judgement, February 28, 2005, paras. 30-31, 33; *Prosecutor v. Seromba*, Appeals Chamber Judgement, March 12, 2008, paras. 27, 100; *Prosecutor v. Simba,* Appeals Chamber Judgement, November 27, 2007, para. 63; *Prosecutor v. Muhimana,* Appeals Chamber Judgement, May 21, 2007, paras. 76, 167, 195; *Prosecutor v. Gacumbitsi,* Appeals Chamber Judgement, July 7, 2006, para. 49; *Prosecutor v. Ndindabahizi,* Appeals Chamber Judgement, January 16, 2007, para. 16, *Prosecutor v. Ntagerura et al.*, Appeals Chamber Judgement, July 7, 2006, paras. 27-28; *Prosecutor v. Niyitegeka*, Appeal judgment, July 9, 2004, para. 194; *Prosecutor v. Nahimana et al.*, Appeals Chamber Judgement, November 28, 2007, para. 326.
[52] *Muvunyi* Appeals Chamber, para. 26.
[53] *Prosecutor v. Bagosora et al*, Decision on Kabiligi Request for Particulars of the Amended Indictment, September 27, 2005, para. 6; *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ (TC), November 18, 2003, para. 24.

39. In the hearing of 16 October 2015, when the Prosecution's request for the Chamber to issue a warning under Regulation 55(2) to Mr Sang that his individual criminal liability may be subject to recharacterisation, the differences between the *ad hoc* tribunals and the ICC in terms of their charging mechanism were discussed. The Presiding Judge highlighted the fact that defective indictments in the *ad hoc* tribunals can in principle and within the bounds of fairness be amended at any stage of the proceedings. This is indeed confirmed by the Appeals Chamber (see above). However, Chambers are less inclined to authorize amendments to the indictment when the proceedings are in a far advanced stage, as the later in the proceedings the amendment is sought, the more likely the accused will suffer prejudice if the amendment were to be allowed.[54] For instance, in *Muvunyi*, the Prosecutor sought to amend the indictment on the eve of trial, which the Chamber rejected on the ground that it would cause substantial prejudice to the accused and his right to prepare a defence.[55]

40. Defects in indictments in cases brought before the *ad hoc* tribunals can also be cured by a Pre-Trial Brief or other supporting documents, which may expand the factual allegations up to an extent, provided the accused has had adequate notice. However, this power is not unlimited. The Appeals Chamber observed:[56]

> [T]he "new material facts" should not lead to a "radical transformation" of the Prosecution's case against the accused. The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.

[54] *Prosecutor v. Musema*, Appeals Judgment, November, 16 2001, para. 343.
[55] *Prosecutor v. Muvunyi*, Decision on the Prosecutor's Motion for Leave to Amend the Indictment, February 24, 2005, para. 48. See also the ICTR case of *Bagosora et al*, where the Chamber rejected, as prejudicial to the accused, the Prosecutor's request to amend the indictment mid-trial to add material facts in order to make evidence admissible (*Prosecutor v Bagosora et al*, Decision on Ntabakuze Motion for Exclusion of Evidence, June 29, 2006, para. 63).
[56] *Prosecutor v. Bagosora et al.,* Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, September 18, 2006, para. 30; restated in *Prosecutor v. Muvunyi*, Appeal judgment, August 29, 2008, para. 20.

41. In the ICC, the Prosecutor cannot seek amendment of the document containing the charges once the trial has begun. Whilst, prior to the confirmation hearing, the Prosecutor may amend or withdraw any charges, provided the suspect is given reasonable notice thereof, after the charges are confirmed, the Prosecutor's power to amend the charges is much more constrained. Pursuant to Article 61(9), the Prosecutor may, before the trial has begun and with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. After the trial has begun, the Prosecutor may only withdraw, not amend the charges, and only after seeking the permission of the Trial Chamber. Accordingly, once the trial has begun, it is the Chamber's prerogative to invoke Regulation 55 where deemed necessary. As aforementioned, Regulation 55 only allows amendments to the legal characterization of facts, not the facts themselves.

42. Accordingly, the facts as alleged in the UDCC can no longer be amended or exceeded. The Pre-Trial Brief relies on the same factual allegations as those described in the UDCC. The case Mr Sang is facing consists of these factual allegations and no other. If these factual allegations cannot be proven, Mr Sang should be acquitted. And if these factual allegations are not, at this stage, supported by sufficient evidence so as to warrant a defence case, Mr Sang should be acquitted now, and not after a (possibly lengthy) defence case.

43. The Defence submits that the evidence relates to incidents and events not alleged in the UDCC or the Pre-Trial Brief, whilst many of the allegations in the UDCC are not supported by any evidence. In the circumstances, the request for notice of recharacterisation is unsupportable.

D. Protected Speech

44. The Defence submits that Mr Sang's role, if any, is limited to what he is alleged to have said the radio. In order to be criminally liable under Article 25(3)(d), Mr Sang must have made a significant contribution to the Network through his radio

program. For this, the Prosecutor must demonstrate that Mr Sang used his radio program to pursue the criminal aims of a Network (if any) by inciting or soliciting listeners to support the Network and participate in its criminal activity.

45. Mr Sang's conduct must have substantially contributed to the crimes charged. Therefore, there must be a direct nexus between his broadcasts and the crimes which occurred. Incitement as a contribution to a group with a common purpose is not a choate offence and is therefore punishable only if the incitement resulted in the commission of crimes. If not, such conduct at most amounts to an attempt.

46. Whether broadcasts can be qualified as inciting depends on their language and intent.[57] Jurisprudence has established the importance of the broadcaster's intent – e.g. the purpose of the communication (whether it is the dissemination of news versus the falsification of information or the promotion of criminal activity) – is crucial in determining whether communication can be branded as inciting.[58] The actual language used is critical to determine whether the purpose of the communication is the promotion of violence or rather it was to disseminate news: "Was the language intended to inflame or incite to violence?"[59] Or was it merely politically persuasive? Therefore, the messages must be more than mere vague or indirect suggestions, but clearly have the potential to incite people to use violence.[60] At the ICTR, it has further been established that the listeners must have understood the purpose of the communication.[61]

47. A distinction must be made between a discussion of ethnic consciousness and the promotion of ethnic hatred. Whilst the former falls squarely within the

[57] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*., Case (No. ICTR-99-52-A), Appeal Judgement, 28 November 2007, para. 677.
[58] *Ibid*, paras 1001-1002.
[59] *Ibid*, para. 1002; See also *Surek and Ozdimir v. Turkey* Case (application nos. 23927/94 and 24277/94) Judgement, 8 July 1999, Partly dissenting opinion of Judge Palm.
[60] *Ibid*,, para. 692.
[61] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*., Case (No. ICTR-99-52-T) Trial Judgement, 3 December 2003, paras 1014-1015.

protected freedom of speech, the latter does not.[62] The line between what is allowed and what is not can be thin. Ethnic hatred may result from the stereotyping of ethnicity combined with its denigration.[63] But given the timing and the context of the statements, espousing hatred is insufficient to show that crimes were intended or that they were linked to what was said.

48. The European Court of Human Rights has recognized that political debate is prone to personal invective and strong, exaggerated and polemical language, even provocation. However, the ECHR also recognizes that such language is nonetheless protected as a guarantee of a democratic society.[64] The ECHR has, for instance, held that the following type of expressions, which are much stronger than anything Mr Sang was alleged to have said, should not have been restricted: "If they want us to leave our territory, they must know that we will never agree to it"; or "The war will go on until there is only one single individual left on our side"; or "The Turkish State wants to oust us from our territory. It is driving people out of their villages"; or "They want to annihilate us".[65] Likewise, this Trial Chamber ought not to find that any alleged broadcasts or statements or political rhetoric made by Sang of an anti-Kikuyu or anti-PNU nature are anything but protected opinions.

49. Often speech may be undesirable but it does not always result in criminal culpability. Admittedly, Kenyan vernacular media is quite vibrant and at times inappropriately denigrates people of other ethnicities; but the vernacular media as a whole is not what is on trial here. In any event, even the international media is full of unfortunate statements made by high profile individuals against certain ethnic populations, and while the comments may be reprehensible, no criminal action would be taken against their makers even if the groups targeted by their comments were attacked in some manner. Recent xenophobic and racist

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[62] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze.*, Case (No. ICTR-99-52-T) Trial Judgement, 3 December 2003, para. 1020.
[63] *Ibid*, para. 1021.
[64] *Surek and Ozdimir v. Turkey* Case (application nos. 23927/94 and 24277/94) Judgement, 8 July 1999, para. 34 (also paras. 57-60); see also *Prager and Oberschlick v. Austria*, Judgment, 26 April 1995, Series A no. 313, p. 19; *Lopes Gomes da Silva v. Portugal*, No. 37698/97, Judgment, 28 September 2000, Reports 2000-X.
[65] *Ibid,* at pp 30-31, also paras 57-60.

comments made by American Presidential Candidate Donald Trump against Mexicans and Latinos come to mind. In addition to terming Latinos criminals, drug dealers, and rapists, who should be deported from the USA, he referred to his followers as "passionate" after hearing that two brothers attacked a 58 year old Hispanic homeless man, breaking his nose and urinating on him. They had told the police that "Donald Trump was right, all these illegals need to be deported".[66] Despite this rather clear nexus between the crime and Mr Trump's anti-Latino words, no one has suggested that Mr Trump could be criminally culpable for the attack. Mr Trump has also vitriolicly stated that he will send Syrian refugees home if he is elected, for fear that they could be ISIS members.[67] There has been no call for his prosecution, and he continues his campaign unabated.

50. Another example of hate speech which should be condemned, but which has not been condemned by law, are anti-Muslim and anti-immigrant statements made routinely by the Dutch politician Geert Wilders. Comments made by Wilders were extensively cited in the treatise written by Norwegian mass-murderer Anders Behring Breivik as having been inspirational to him.[68] Despite this, no one has suggested that Wilders could bear legal responsibility for the attack by Breivik.

51. In law, another distinction must be made between broadcasts that intend to inflame ethnic hatred and those that are informational in nature, but which might have an ethnic bent. If such information were not true, "the inaccuracy of the statement might then be an indicator that the intent of the statement was not to convey information but rather to promote unfounded resentment and inflame ethnic tensions".[69] However, conversely, if a statement is true, there is no crime in passing along information to listeners. For instance, the Defence recalls

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[66] http://www.huffingtonpost.com/entry/9-outrageous-things-donald-trump-has-said-about-latinos_55e483a1e4b0c818f618904b; http://edition.cnn.com/2015/07/07/politics/trump-immigration-rapists-mexicans-clinton/.
[67] http://www.bbc.com/news/world-us-canada-34397272.
[68] https://electronicintifada.net/blogs/ali-abunimah/norway-suspect-laid-out-detailed-plans-violence-against-traitors-muslims.
[69] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze.*, Case (No. ICTR-99-52-T) Trial Judgement, 3 December 2003, para.1021.

allegations (dealt with in more detail below) allegedly broadcast by Mr Sang on air, to the effect that the Kikuyus were given the majority of the jobs in Government or that Administration Police officers had been seen carrying false ballot boxes. If these events were factually true, then they were legitimate stories to be broadcast.

52. Even if any news broadcast by Mr Sang turned out to be false, and could potentially result in ethnic tensions, then it still has to be shown that Mr Sang knew it to be false but broadcast it anyway. For instance, the reading out of number plates of cars allegedly containing fake ballot papers, which was first done by Mr Sang's colleague a Mr Silas Tarus, and was merely repeated by Mr Sang, must be proven not only to be false information but also that Mr Sang was aware of its falsity. If not, the message cannot be considered as inciting.[70]

53. The background music of radio broadcasts is also important to determine whether they were meant to incite the listeners or not.[71] In this regard, it is noteworthy that Mr Sang's radio program *Lene Emet* has cheerful and calm music in the background. An example constitutes kimi bek kwenet, which was said to be inciting, but is in fact a religious song about hope for those suffering.[72] Also, the tone of his voice remains calm, if animated, throughout the program.

54. Inflammatory speeches, even if intended to mobilise anger against an ethnic group does not necessarily amount to a call to commit violence.[73] Additionally, a warning against a threat or a plan on the part of the enemy is not tantamount to a call to commit violence.[74]

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[70] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze.*, Case (No. ICTR-99-52-T) Trial Judgement, 3 December 2003, para. 982.
[71] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze.*, Case (No. ICTR-99-52-T) Trial Judgement, 3 December 2003, para. 1031.
[72] T-169, p 9, lines 3-25, pp 10-17, p 18, lines 1-2 (EVD-T-D11-00048 (KEN-D11-0013-0028)).
[73] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze.*, Case (No. ICTR-99-52-A), Appeal Judgement, 28 November 2007, para.742.
[74] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze.*, Case (No. ICTR-99-52-A), Appeal Judgement, 28 November 2007, para.741 and 747.

55. Neither intent nor nexus can be derived from the fact that crimes were committed, because their commission may have been the result of other factors.[75] Calling individuals by name as being part of the 'enemy' group does not necessarily have the intention to incite people to act against such individuals.[76] In no instance has the Prosecution proven that listeners heard Mr Sang say something on air and that they acted in a criminal manner because of what Mr Sang said. The one example that the Prosecution may have relied upon to show the impact of what Mr Sang said on air is the story of [REDACTED]. No such police record, however, exists and he continued to listen to Kass FM. Whatever the reliability of this piece of information, the alleged incident took place in [REDACTED], which is far outside the scope of the charges.[77]

IV. FACTUAL INSUFFICIENCIES: MR SANG HAS NO CASE TO ANSWER

56. In this submission, the Defence will demonstrate that the Prosecution's case brought against Mr Sang cannot reasonably support a conviction. Taken at its highest, the evidence does not show that Mr Sang committed any crime, or contributed to the commission of any crime. The evidence is simply not there to show criminal conduct.

57. If the Chamber is of the view that there is some Prosecution evidence which suggests that Mr Sang was engaged in criminal conduct, then this is undermined by the defence evidence to such an extent that no reasonable Chamber can convict Mr Sang on the totality of the evidence presented thus far. Therefore, any such Prosecution evidence is incapable of belief.

58. In particular, the Defence challenges the following elements:

A. the existence of a Network as the organization with a policy to orchestrate the commission of crimes against PNU supporters

[75] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze.*, Case (No. ICTR-99-52-A), Appeal Judgement, 28 November 2007, para.709.
[76] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze.*, Case (No. ICTR-99-52-A), Appeal Judgement, 28 November 2007, para.744.
[77] T-168, 68-71.

(part of 'organizational policy' – a necessary chapeau element of crimes against humanity);

B. that Mr Sang had knowledge of any widespread or systematic attack against a civilian population;

C. that Mr Sang made a significant or substantial contribution (element of article 25(3)(d) mode of liability);

D. that such a contribution was intentional (element of article 25(3)(d) mode of liability);

E. that such a contribution was made with the aim of furthering the criminal activity or criminal purpose of the group, or with the knowledge of this aim (element of article 25(3)(d) mode of liability);

F. that Mr Sang committed crimes against humanity in any other way – be it as an instigator, solicitor or aider and abettor.

59. In addition, the Defence submits that the Prosecutor's case as presented before the Chamber radically transforms the allegations as set out in the UDCC and/or the Prosecutor's Pre-Trial Brief. The case is entirely new based upon entirely new evidence, thereby exceeding the facts and circumstances as established by the PTC in its Confirmation decision. On this basis alone, the Defence submits that the case should be dismissed.

60. In addition, the Defence submits that the Prosecutor's evidence is in the main uncorroborated and is so lacking in reliability and credibility that it is incapable of belief. This is also a ground for dismissal of the case.

A. <u>There was No Organisational Policy – there was no "Network"</u>

61. In order to prove that crimes against humanity have been committed, the Prosecution must prove, amongst others, that there was an attack directed against a civilian population. Article 7(2)(a) defines this terms as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or

organizational policy to commit such attack." Accordingly, the Prosecutor must prove the existence of an organizational policy,[78] which must necessarily be comprised of both (1) an organization and (2) a policy.

(1) *Definition of and facts pertaining to an 'Organization'*

(i) Definition of 'Organization'

62. By majority (Judge Kaul dissenting), the PTC held that "a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values".[79] It also held that "organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population".[80]

63. According to the Majority of the PTC, whether a group qualifies as an organization under the Statute must be made on a case-by-case basis, taking into account non-exhaustive, flexible factors, such as whether the group: [81]

(i) is under a responsible command, or has an established hierarchy;
(ii) possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;
(iii) exercises control over part of the territory of a State;
(iv) has criminal activities against the civilian population as a primary purpose;
(v) articulates, explicitly or implicitly, an intention to attack a civilian population; or
(vi) is part of a larger group, which fulfils some or all of the abovementioned criteria.

64. These factors, whilst comprehensive and relevant to any determination of whether an organization capable of committing a widespread or systematic attack against a civilian population, "do not constitute a rigid legal definition, and

[78] Art 7(1) Introduction (3) of Elements of Crime
[79] ICC-01/09-01/11-373, para. 184; ICC-01/09-19-Corr, para. 90.
[80] ICC-01/09-01/11-373, para. 184; ICC-01/09-19-Corr, para. 90.
[81] ICC-01/09-01/11-373, para. 185; ICC-01/09-19-Corr, para. 93.

do not need to be exhaustively fulfilled".[82] The definition adopted by the Majority has been criticised precisely because of this lack of rigidity.[83]

65. The Defence submits that this definition must pass the test of Article 22(2), pursuant to which the definition of a crime "shall be strictly construed and shall not be extended by analogy". This requirement is emphasised in the Elements of Crime in respect of Article 7, "taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world".

66. To meet this requirement, the determination of whether a group of people qualifies as an organization under Article 7(2)(a) cannot simply be a case-to-case assessment. The definition cannot be open-ended. At least a number of the above factors should be established. The Defence submits that an 'organization' under Article 7(2)(a) should, "as a minimum, exercise a level of *de facto* control over territory or have clear structure with a formal hierarchy and the ability to punish, as well as sufficient means to organize crimes against a civilian population on a wide scale. Nor should the duration of the existence of the organization be overlooked."[84]

67. Otherwise, gangsters, motorcycle gangs, drug cartels, or even serial killers could be acting pursuant to an organizational policy, something the drafters wished to avoid. Indeed, unlike in the Statutes of the *ad hoc* tribunals, the drafters of the Rome Statute included the explicit requirement that the crimes under Article 7 be committed pursuant to a State or organizational policy. With this inclusion, the drafters intended to "ensure the scope of the application of crimes against humanity remains confined to extremely grave threats to basic human values,

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[82] Ibid.
[83] See, amongst others, Kress, 'Concept of Organisation within Policy Requirement', page 857-858. See also Jalloh: 'contextual elements of crimes against humanity', page 545.
[84] ICC-01/09-01/11-305, para. 60.

and … to describe a situation where there is a reason to doubt that a judicial response at the national level will follow".[85]

68. Judge Kaul, dissenting Judge in the PTC, took a different approach from the Majority and held that an 'organization' under Article 7(2)(a) should have some State or quasi-State abilities, and should not include mafia-type groups, mobs, groups of (armed) civilians or criminal gangs. He put it as follows:[86]

> [V]iolence-prone groups of persons formed on an ad hoc basis, randomly, spontaneously, for a passing occasion, with fluctuating membership and without a structure and level to set up a policy are not within the ambit of the Statute, even if they engage in numerous serious and organized crimes. Further elements are needed for a private entity to reach the level of an 'organization' within the meaning of article 7 of the Statute. For it is not the cruelty or mass victimization that turns a crime into a *delictum iuris gentium* but the constitutive contextual elements in which the act is embedded.

69. His view finds support in scholarly opinion. For instance, Schabas holds the view that the term 'organizational' should not be read "as a general invitation to include any form of organized criminal activity" but refers to organizations which are "either part of the state or 'state-like', in the sense of association with an entity that behaves like a state, that controls territory, etc".[87] May similarly noted that "[t]he actions of States, or State-like actors, have given the international community its clearest rationale for entry into what would otherwise be a domestic legal matter".[88] According to Bassiouni, the term 'organizational policy' only encompasses non-State actors which have "the characteristics of state actors in that they exercise some dominion or control

[85] Kress, 'Concept of Organisation within Policy Requirement', page 866. See also: Darryl Robinson, 'Defining "Crimes Against Humanity" pages 47-48.
[86] *Situation in Republic of Kenya*, Pre-Trial Chamber II, Public Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul Investigation Decision, ICC-01/09-19-Corr, para. 52.
[87] William A. Schabas: London Riots: Were they Crimes Against Humanity? At: http://humanrightsdoctorate.blogspot.com/2011/08/london-riots-were-they-crimes-against.html
[88] L. May, 'Crimes against Humanity: A Normative Account', (Cambridge: Cambridge University Press, 2005), page 88.

over territory and people, and carry out a "policy" which has similar characteristics as those of "state action or policy".[89]

70. Prior to the confirmation hearing, the Defence challenged the Court's jurisdiction in which it contested the definition adopted by the Majority, and supported the definition adopted by Judge Kaul.[90] The jurisdiction challenge was rejected – the majority did not see a persuasive reason to revisit the definition it had adopted in an earlier decision, given that it remained "in favour of providing an effective interpretation to article 7(2)(a) of the Statute".[91] The factual challenge of the existence of a Network was not considered as part of the jurisdictional challenge, but rather as part of the merits of the confirmation case.[92] Therefore, by majority, the PTC confirmed its definition in the *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*.[93]

71. The Defence still maintains its position and adopts all arguments set out in its Defence Challenge to Jurisdiction.[94] The law on the correct definition of "organizational policy" is not settled yet. For now, the only Chamber which specifically dealt with this issue was the PTC in the two Kenyan cases. In other cases, the definition of "organizational policy" has either not been addressed at all, or not challenged by any of the parties or participants. Accordingly, the Chamber is free to adjust the definition at this stage of the proceedings if it deems it necessary. The Defence requests it to do so and adopt a set of minimum requirements for a group to qualify as an 'organization' under Article 7(2)(a).

72. In this specific situation, whether the Majority or Minority definition of 'organization, or a definition in-between, is adopted will make little difference to the outcome of the query. There is clearly a lack of evidence of the existence of any type of organization, irrespective of the definition adopted.

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[89] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, ed. Kluwer Law International (The Hague/London/Boston, 1999 2nd ed), page 245.
[90] ICC-01/09-01/11-305.
[91] ICC-01/09-01/11-373, para. 34.
[92] ICC-01/09-01/11-373, para. 35.
[93] ICC-01/09-01/11-373, paras. 23-38.
[94] ICC-01/09-01/11-305.

(ii) Factual Deficiency: No Components of the Network

73. Per the Prosecution, the 'organization' constitutes a Network, allegedly operational from late December 2006 until January 2008, which consists of eminent ODM political representatives, media representatives, former members of the Kenyan police forces, Kalenjin elders and local leaders, and other subordinates and perpetrators of Kalenjin ethnicity. The Network was allegedly established by Mr Ruto (as the head) and Mr Sang, with the aim to implement the agreed-upon policy to (i) punish and expel from the Rift Valley perceived PNU supporters; and (ii) gain power and create a uniform ODM voting block.[95]

74. At Confirmation, the Prosecution relied on Confirmation Witness ("CW") 1 [REDACTED], CW2 [REDACTED], CW4 [REDACTED], CW5 [REDACTED], CW6 [REDACTED] and CW8 [REDACTED] to prove the existence of a Network and Mr Sang's involvement therein. Of these six, only [REDACTED] and [REDACTED] testified at trial, and neither one of them expressly or impliedly said nor suggested the existence of a Network. Despite this, the Prosecution did not seek to declare Witness [REDACTED] nor [REDACTED] hostile, for purposes of eliciting facts in relation to the alleged Network, nor did it seek to introduce their previous statements. Furthermore, none of the witnesses solicited by the Prosecution to replace the evidence of the Confirmation Witnesses testified about the existence of a Network at all, much less one that fit within the facts and circumstances of the Network as adduced at Confirmation. Accordingly, the theory of a Network can no longer be established on the basis of the evidence.

75. Already at Confirmation, the evidence of such a Network was thin, but at this stage there is barely any evidence left. The Network is no more than a name given by the Prosecution to an ill-defined, amorphous group consisting of a handful of private individuals. The Prosecution has failed to provide sufficient detail about the operation, purpose, structure and membership of the Network.

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[95] ICC-01/09-01/11-373, paras. 181-182.

Even the time span of alleged criminal activity of the Network was of a fleeting and very brief duration.

76. Additionally, the Prosecution has failed to show that the Network had any of the components which the Majority of the PTC had listed as requirements to demonstrate the existence of an organization:

- No responsible command,
- No hierarchy,
- No resources or means to carry out widespread or systematic attacks against the civilian population,
- No territory or control over the same,
- No articulation of an intention to attack the civilian population, and
- No specific criminal activities which were the Network's primary purpose for targeting the civilian population.

77. On the one hand, the Prosecution says ODM structures were used to create the Network, and on the other hand, the Prosecution says Kalenjin structures were used. This lack of clarity and the Prosecution's complete inability to identify what comprises the bedrock membership of the Network is in itself indicative of the fact that there has never been any Network. It is recalled that the Prosecution's position according to the UDCC, was that the Network "capitalized on existing entities in the Kalenjin community"[96] and "was based on existing structures and roles in Kalenjin society and included political, media, financial, tribal and military components".[97] It is common ground that violence visited the whole country, yet the Prosecution's alleged existence of a Network does not rationalize or explain the relationship between the Network and the violence in the Rift Valley as opposed to the other 8 provinces. Broadcasts were made from Nairobi and were transmitted nationwide – only a small percentage of the Kalenjin population is in Eldoret. So why the Prosecution's focus there?

[96] UDCC, para. 21.
[97] UDCC, para. 40.

78. The Prosecution has failed to provide sufficient evidence in relation to its allegation that the Network used the ODM party's structure to plan and organize the attacks on civilians, mainly because Mr Ruto was an authoritative ODM figure, that Network meetings were held within the ODM context, and that ODM Members of Parliament gave financial support to the Network. There is no evidence that the ODM political structure had any direct involvement in any Network or any of the alleged crimes. Many of the alleged Network meetings, in relation to which the Prosecution produced no evidence, took place before the ODM was even created in late 2007.[98] This factual impossibility is notable in contrast to the Prosecution's statement in the UDCC at paragraph 21 that "By December 2006, the Network consisted of pro-ODM political figures, media representatives, financiers, tribal elders, local leaders, and former members of the Kenyan police and army", who were in a Network supported by Mr Sang as a broadcaster on Kass FM.

79. **Military:** The military branch of the Network was allegedly comprised of former police and military officers giving military-strategic advice to Mr Ruto, and mobilizing Kalenjin to participate in fighting, offering them training and weapons. At Confirmation, the Prosecution relied essentially on the involvement of three retired military officers: Cheramboss, Koech and Cheruiyot. However, in the course of trial, little evidence has been produced which suggests these three, or any other military officers were involved in any Network. The evidence does not show any level of coordination of violence. There is no evidence to suggest that the actual perpetrators of crimes committed in the course of the PEV were coordinated in any way. Rather, it seems they converged spontaneously and needed little encouragement or assistance to participate in the violence. At most, there was an *ad hoc* anarchy countrywide, in the aftermath of the announcement of the election results, as a reaction to the widespread belief that elections had been rigged.

80. **Tribal Elders:** There is no evidence of any tribal elders being involved in a Network engaged in planning and orchestrating violence, or in organizing

[98] UDCC, para. 9.

traditional ceremonies for the alleged perpetrators before commencing the battle. The only time tribal elders have been mentioned is in relation to the ceremony honoring Kalenjin legend Koitalel Samoei; however, this ceremony was in 2006 and the guest of honor was President Kibaki himself, a Kikuyu.[99] Therefore, during that collection of Kalenjin elders, certainly no one could have spoken about developing a plan for the expulsion of the Kikuyus when the leader of the Kikuyu Government was present.

81. **Financiers:** There is no evidence of a financial branch of the Network. At Confirmation, the Prosecution relied on the involvement of the Emo Foundation and a handful of businessmen including Mr Ruto in supporting financially Kalenjin interests. The Prosecution produced no evidence of EMO at all and no credible evidence of any other organization or individual who financed the Network as criminal organization.

82. What is remaining of the Network theory is two individuals: Mr Ruto and Mr Sang. Through his radio program on Kass FM, Mr Sang allegedly supported the ODM party and politicians during the 2007 presidential election campaign. Mr Sang is alleged to have supported Mr Ruto as the Kalenjin leader. In purportedly promoting the ODM and Mr Ruto, Mr Sang, or Kass FM listeners calling into his program, allegedly spread anti-PNU and anti-Kikuyu propaganda. Even assuming this was true, which is denied, supporting one political party over another does not amount to a crime, nor does it demonstrate that there was an agreement between Mr Ruto and Mr Sang to use Mr Sang's radio program to promote the interests of the Network and to mobilize the youth to use violence. At best, if the evidence demonstrates that Mr Sang had a preference for the ODM and Mr Ruto (who was not even a Presidential candidate in 2007) over other parties and candidates, then this simply demonstrates that Mr Sang supported ODM and Mr Ruto.

83. However, even this suggestion, which does not show any sign of criminal activity, does not find support in the evidence. The broadcasts played by the Defence

[99] T-169, 91-94.

suggest that Mr Sang did not express a preference for one party over another, or for one candidate over another. Mr Sang gave significant airtime to PNU supporters, including Mr Matarit, who was opposed to Mr Ruto and ODM,[100] and even to Uhuru Kenyatta.[101] In any event, the practice at Kass FM, like at any other commercial radio station, was to indiscriminately sell airtime to generate revenue,[102] and so the choice of what was aired was not determined at the discretion of Mr Sang.

84. Similarly, spreading anti-PNU propaganda is not a crime, unless such propaganda amounts to incitement and can be linked to criminal conduct of the listeners, as a result of their listening to the message(s). Such evidence is clearly lacking as is further discussed below. In the circumstances, the significant contribution as contemplated by Article 25(3)(d), which was to be made by Mr Sang in his capacity as the "Media" component of the Network, has not been demonstrated in the Prosecution evidence; even in the event of recharacterization, this failure means that the threshold anticipated by Article 25(b) or (c) cannot be achieved.

85. In sum, there is no evidence of any Network. The PTC found that there were substantial grounds to believe that the Network had a responsible command and an established hierarchy, with Mr Ruto as the designated leader, in charge of securing the establishment and efficient functioning of the Network as well as the pursuit of its criminal purposes.[103] The hierarchical structure of the Network was found to have been comprised of three commanders and four divisional commanders responsible for the execution of the attack in the field, each of whom reported to Mr Ruto.[104] Subordinate to the divisional commanders, other network members acted as coordinators tasked with more specific functions, such as organizing the material perpetrators on the ground, identifying the targets during the attack.

[100] T-168, 60-61.
[101] EVD-T-D11-00034 (audio) and EVD-T-D11-00088 (translation).
[102] [REDACTED].
[103] CW1 and CW6.
[104] CW2, CW4, and CW6.

86. The Prosecution did not produce any evidence on this hierarchical structure or the involvement of the three commanders and four divisional commanders. None of the evidence the PTC relied on in making this finding has been produced at trial.[105] The Prosecution also failed to produce evidence of any other hierarchical structure of a Network. In the in-court testimony of 29 witnesses, no one has mentioned the existence of such commanders.

(iii) Factual Deficiency: No Meetings of Network Members

87. None of the alleged Network meetings or activities find support in the evidence. The PTC, in finding substantial grounds to believe that an organization within Article 7(2)(a) existed, had found there were at least twelve Network meetings.[106] None of these have established at trial, and there is no credible or corroborated evidence of any new Network meetings or interactions between alleged Network members sufficient to show the existence of the Network.

88. Indeed, the Prosecution produced no evidence in relation to the following meetings relied upon to confirm the charges, or any meetings at all:

i. **30 December 2006** – meeting to plan for war at Mr Ruto's house in Sugoi attended by Mr Cheramboss and Reverend Kosgei, as well as Members of Parliament, youth representatives, Kalenjin elders, farmers and business men;[107]

ii. **15 April 2007** - A secret oath ceremony using the blood of dogs, took place in a milk plant in Molo – attended by Mr Ruto, Mr Sang, Mr Cheramboss, Reverend Kosgei and others;[108]

iii. **2 September 2007** – preparatory meeting at Sirikwa Hotel in Eldoret, organised by Mr Ruto and attended by Mr Sang, Reverend Kosgei, the

[105] ICC-01/09-01/11-373, para. 197.
[106] ICC-01/09-01/11-373, paras. 187-196. See also UDCC, para. 59.
[107] ICC-01/09-01/11-373, para. 187. Reference to CW8
[108] ICC-01/09-01/11-373, para. 188. Reference to CW8

three commanders and several other Network members – to discuss transport, weapons and division of regions under the command of three commanders;[109]

iv. **2 November 2007** – preparatory meeting at Mr Ruto's house in Sugoi, attended by Mr Ruto, Mr Sang, several Members of Parliament, the three commanders, Kalenjin elders, traditional elders and a number of coordinators;[110]

v. **6 December 2007** – preparatory meeting or rally at the Kipkarren Salient Trading Center – where Mr Sang was allegedly the Master of Ceremony;[111]

vi. **14 December 2007** – preparatory meeting at Mr Ruto's home in Sugoi, attended by Mr Sang, the three commanders and several other network members. Mr Sang introduced attendees via microphone, presenting their names and their assigned duties in the Network. Preparation of attack against the enemy community in the event that Kibaki would win the elections – with the aim to evict these communities, including Kikuyu, from the Rift Valley;[112]

vii. **Between 14 and 22 December 2007** – intensification of meetings. At least three gatherings took place (one of which was held in Kabongwa at the residence of a network member where weapons would be stocked during the attack) to make final arrangements for the execution of the attack – attended by Mr Ruto, at least one of the three commanders, four divisional commanders, politicians and former soldiers;[113]

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[109] ICC-01/09-01/11-373, para. 189. Reference to CW1 and CW8.
[110] ICC-01/09-01/11-373, para. 190. Reference to CW1 and CW8.
[111] ICC-01/09-01/11-373, para. 191. Reference to CW8.
[112] ICC-01/09-01/11-373, para. 193. Reference to CW2 and CW8. While CW8 did not testify, [REDACTED] recanted that portion of his evidence, testifying that he did not attend this meeting and that it was a false allegation which he had been told by CW8 (who was working with [REDACTED]) to include in his statement. T-181, 22:15 – 23:1; 25:12 – 26:7 and 18-21, 38:12-16 and 22-24, 39:2-4 and 39:19-40:4.
[113] ICC-01/09-01/11-373, para. 194. Reference to CW6.

viii. **16 December 2007** – preparatory meeting at Mr Cheramboss' house – where participants discussed the use of Kass FM to mobilize and coordinate the attackers, explaining that proverbs and code words understood only by Kalenjins would be used to inform Kalenjin-speaking listeners where to go and who to attack and that pre-approved callers would spread propaganda;[114]

ix. **Subsequent meeting (before 22 December 2007)** – hosted by Mr Cheramboss attended by Mr Ruto and several other members - to reiterate the intention to attack the PNU supporters and to give final instructions as to the means to execute the attack. Also, physical perpetrators were chosen to contact Kass FM by phone in order to incite violence in the days immediately preceding the execution of the attack;[115] and

x. **22 December 2007** – final preparatory network meeting at Mr Ruto's Sugoi home – attended by at least two of the three commanders and other high ranking Network members. People from different regions were organised in separate tents.[116]

89. The fact that no witness testified to any of these meetings demonstrates that there is a real and inescapable gap in the Prosecution's case, in particular because it did not produce sufficient evidence about any 'replacement' meetings or events which could convince a reasonable Chamber that there was an organization involved in planning violence. The Prosecution mostly produced evidence about political rallies with no bearing on the question of whether a "Network" existed.

90. Indeed, it is even difficult to find instances from the evidence of events when Mr Sang was in proximity to other alleged Network members. While these few instances may exist if one stretches his imagination sufficiently, the accounts do

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[114] ICC-01/09-01/11-373, para. 192. Reference to CW6; ICC-01/09-01/11-625-AnxD-Conf, para. 79.
[115] ICC-01/09-01/11-373, para. 195. Reference to CW6.
[116] ICC-01/09-01/11-373, para. 196. Reference to CW4.

not plausibly detail any criminal purpose and are completely uncorroborated, either by another witness or independent contemporaneous evidence and thus are incapable of belief. The instances may include: the alleged interaction between Mr Sang and Hon Ruto and Hon Kosgey at Orange House in December 2007,[117] the alleged attendance of Mr Sang at a meeting at Mr Ruto's house in Sugoi on 23 December 2007 to finalize the plan to evict the Kikuyu if the PNU won the election,[118] and/or the alleged attendance of Mr Sang at the funeral for Lucas Sang on 10 January 2008 where he was to give remarks on behalf of Mr Ruto.[119]

91. [REDACTED] P-0326, testified somewhat incoherently about three occasions when he saw Mr Ruto, Mr Kosgey and/or and Mr Sang at Orange House at the same time. On one occasion, P-0326 says that after a press briefing at Orange House, Mr Sang went to meet with the Chairman of the ODM, Mr Henry Kosgey. That evening, Kosgey was supposed to have a talk on KASS FM to "reach the people". One of P-326's [REDACTED] told him that Mr Sang was a presenter on KASS.[120] P-0326 has no idea whether Mr Kosgey appeared on air and if he did, he has no idea as to the content of his discussion. This "meeting" of two alleged Network members is therefore clearly not useful to the Prosecution case.

92. On the second occasion, P-0326 testified that there was another press conference at Orange House during which Mr Sang spoke to Mr Ruto and Mr Kosgey about what Mr Ruto would go to the station and say.[121] P-0326 says that his [REDACTED] later said that Mr Ruto was on Kass to request that the Kalenjin people vote for ODM; he urged the Rift Valley to vote for ODM as a whole because ODM was the party which has got good views, good values, good leadership for the people".[122] This is hardly a sinister or inappropriate message and does not advance the theory of a Network.

[117] Allegation made [REDACTED]
[118] Allegation made [REDACTED], but recanted under oath. This alleged meeting is dealt with elsewhere.
[119] Allegation made [REDACTED]
[120] P-0326, T-44, 36:22 – 37:4.
[121] P-0326, T-44, 37:12 – 39:1.
[122] P-0326, T-44, 40:24 – 41:4.

93. P-0326 testified that on the third occasion, 25 December 2007, Christmas day, and two days before the election, he saw several ODM Pentagon members at Orange House for another press conference. P-0326 said that several media houses were present – both radio and television stations.[123] P-0326 was asked if any presenters of Kass FM were there and he says he believes Kass had a representative; however he paused 15 seconds before saying he could not remember the name of the person who was representing Kass FM.[124] He emphasized that there were quite a number of media houses which came to have information, so he forgot who represented KASS.[125] P-0326 had his memory refreshed and counsel read from his statement, after which he "remembered" that Sang was present on behalf of Kass FM on the 25th of December.[126] He then claims he again heard Mr Sang talking to Mr Ruto, asking him to come for a presentation at the station, and that later he heard Mr Ruto's voice on the radio and [REDACTED] that Mr Ruto asked people to vote for ODM.[127] P-0326 then 'remembered' that [REDACTED] the ODM Pentagon member had urged the Kalenjin that this is their best chance and that was the time they were going to have a good leadership and let the whole community vote for ODM, and whoever is not understanding what ODM means is just like an outcast – he's just like a weed within a good crop.[128] However, even the witness agreed that there was nothing wrong or objectionable with what Mr Ruto was said to have spoken; it was only campaign talk.[129]

94. Despite the innocent nature of the alleged encounter, Mr Sang still denies being at Orange House on the 25th; he was in the Kass FM station broadcasting Christmas carols and greetings.[130]

95. The only other time when there is alleged to have been a connection between Mr Sang and Mr Ruto, is from the testimony of P-0658, where he stated that on 10

[123] P-0326, T-44, 66:12-17.
[124] P-0326, T-44, 66:23 – 67;6
[125] P-0326, T-44, 67:9-13.
[126] P-0326, T-44, 75:10-15.
[127] P-0326, T-44, 77:8-23.
[128] P-0326, T-44, 84:4-9.
[129] P-0326, T-47, 15:18-24.
[130] EVD-T-D11-00001 (audio) and EVD-T-D11-00002 (translation); P-0326, T-47, 83:20-25.

January 2008, Mr Joshua Sang attended the funeral of the athlete Lucas Sang in Kuinet and conveyed greetings to the crowd on behalf of Mr Ruto. P-0658 claims that the funeral had been announced on Kass FM and that Mr Sang was in attendance and his condolences and praised Lucas Sang because he died fighting for the community.[131] This is untrue. During cross-examination, the Defence played a Kass FM audio during which P-0658 agreed that he heard Mr Sang broadcasting from the studio in Nairobi, stating the date as 10 January.[132] In fact, the witness was shown a video clip of the funeral where Mr Katwa Kigen delivered the message from Mr Ruto.[133] In any event, there is no dispute that the funeral took place on the 10th of January; the charges regarding the crime base for the Greater Eldoret area are limited to 1-4 January, and so there is no possibility that anything that transpired at the funeral between alleged Network members could have contributed to the violence.

(iv) Factual Deficiency: No Network Capacity to Carry-out a Widespread or Systematic Attack (ie, no funding, transport, training or weapons)

96. As to the next aspect of the existence of an organization,[134] the PTC found that there were substantial grounds to believe that, by December 2007, the Network possessed the means to carry out a widespread or systematic attack against the civilian population, as its members had access to and utilised a considerable amount of capital, guns, crude weapons and manpower.[135]

97. The PTC drew this conclusion on the basis of the finding that Network members, including Mr Ruto, gave regular assurances that money was available to cover the expenses needed to carry out the attack including buying weapons and providing the youth without military experience with operational training and transportation to and from the target locations.[136] According to the Confirmation

[131] P-0658, T-166, 20:16-21:25
[132] EVD-T-D11-00079 (audio) and EVD-T-D11-00080 (translation).
[133] P-0658, T-173, 62:9-67:4
[134] ICC-01/09-01/11-373, para. 200.
[135] CW2 and CW4.
[136] ICC-01/09-01/11-373, para. 201. Reference to CW1, CW6, and CW8.

Decision, the main funding came from private contributions by businessmen and Members of Parliament, including Mr Ruto,[137] and was used, amongst others, to pay network members according to their rank to motivate the perpetrators.[138]

98. None of these allegations can be sustained. There is no evidence of Mr Ruto or other members of the alleged Network actually contributing to the transportation, training or other logistics, be it for Kalenjin or ODM youth. P-0536 testified that [REDACTED].[139] However, the allegations made by P-0536 were completely dismantled by the Ruto Defence during cross-examination; given the totality of the Defence evidence, [REDACTED] claims are certainly incapable of belief.

99. There is some hearsay evidence that Mr Kibor's lorries were used to transport youth during the PEV.[140] However, there is no evidence which links Mr Kibor to a Network, or that he acted on Network instructions. There is no other evidence about transportation, which would suggest that a Network was behind its funding or organisation.

100. There are some vague references based on hearsay to Kalenjin youth assembling in Kapseret forest,[141] but there is no nexus to a Network or any of the alleged Network members. P-0800 gave a double-hearsay account, which he had heard from [REDACTED], that the [REDACTED].[142] Aside from the incredulous nature of the details of the training, it is notable that [REDACTED] himself recanted a similar allegation during his testimony.[143]

101. In regard to financing, there is some allegation by P-0326 that on 3 January 2008, Mr Ruto asked [REDACTED] to "send to the people who were being attacked" in the area.[144] P-0326 said that assistance was needed to help people being

[137] ICC-01/09-01/11-373, para. 202. Reference to CW1, CW2, CW4, and CW6.
[138] ICC-01/09-01/11-373, para. 202. Reference to CW4 and CW8.
[139] P-0536, T-34, 59:5-9, 17-22.
[140] P-0487, T-54, 64-65, 98-100; T-164, 73-76.
[141] P-0423, T-67, 39-42.
[142] P-0800, T-155, 17:7-18:7 and 21-23.
[143] P-0495, T-138, 70 et seq.
[144] P-0326, T-45, 27:6-15, 28:6-10.

attacked in Thika (which is near Nairobi). P-0326 also testified that he heard [REDACTED] say that he did not have that amount of money in cash but that it could be sent via Western Union to Jackson Kibor to help the youth in the Rift Valley who needed transport to move from the most affected areas.[145] Clearly, even assuming this account is accurate, it is not evidence of a well-financed Network, which as late as 3rd January and well into the violence was struggling to find the rough equivalent of [REDACTED]. Most importantly, P-0326 testified that the purpose of the cash was to move affected youths, not to equip them for violence.

102. The evidence relating to funding and logistics is not concrete at all and does not address who was in charge of providing funds and guns, and if they were in fact provided. The evidence does not link any of the alleged Network members to the purchase of weapons. There are some vague references to Kalenjins obtaining guns and traditional weapons during the PEV, but they are not brought in connection with either accused or the Network. In the Rule 68 Statements of [REDACTED][146] and [REDACTED],[147] there is a reference to meetings where Mr Ruto allegedly expressed an *intent* to procure weapons but there is no evidence of him ever carrying out that intent. In any event, under oath P-0604 denied ever attending a meeting at Mr Ruto's home and was not aware whether such a meeting actually occurred.[148]

103. Only one witness [REDACTED].[149] [REDACTED][150] [REDACTED].[151]

104. Moreover, the evidence suggests that the alleged Kalenjin perpetrators mainly used weapons (arrows for instance) other than firearms. The recorded PEV casualties in the region charged include only one Kikuyu whose injuries were caused by gunshot, but this injury was inflicted on him on a date outside the

[145] P-0326, T-45, 28:17-25, 29:1-7.
[146] EVD-T-OTP-00132, para. 64.
[147] EVD-T-OTP-00334, paras. 43-46, 63-68..
[148] P-0604, T-131, 32:1-10.
[149] [REDACTED]
[150] These contradictions were discussed at length by counsel for Mr Ruto during cross-examination. See [REDACTED]
[151] [REDACTED]

temporal scope of the charges.[152] One more individual sustained gunshot injuries in Yamumbi on 1 January 2008, but both his ethnicity and the ethnicity of the perpetrator is unknown.[153] Accordingly, taking the evidence at its highest, there is a clear lack of evidence to suggest that the Network was involved in purchasing weapons and distributing them to the alleged perpetrators.

105. In addition, the PTC refers to Mr Kapondi's position and influence in the Mount Elgon area, where weapons coming from neighbouring countries were allegedly introduced into the Kenyan territory, was one of the main channels to obtain weapons. In addition, Mr Ruto is alleged to have worked closely with at least 6 other people to obtain weapons.[154]

106. The PTC also found that there was a close connection between the Network, Mr. Kapondi, and Sabaot Land Defence Forces (SLDF), whose leader was allegedly present at the 14 December 2007 meeting at Mr Ruto's Sugoi house. The PTC held therefore that, even if Mr Kapondi was in prison on 14 December, as the Defence established at the Confirmation hearing,[155] having access to satellite phones, he was in a position to arrange the purchase and supply of weapons to the network.[156]

107. At trial, there is no longer any evidence at all about Mr Kapondi's collaboration with Mr Ruto or the alleged network, or his alleged role in purchasing weapons. In fact, very few of the witnesses the Prosecution currently relies on have even mentioned Mr Kapondi. There is similarly no mentioning of the SLDF or its leader. And nobody testified to the 14 December meeting at Mr Ruto's house.

[152] See for instance EVD-T-D09-00064; EVD-T-OTP-00016. The injury list (EVD-T-OTP-00060, @0640, entry 52, lists only one injured Kikuyu in Kimumu on 31 December 2007, an incident which is not charged.
[153] EVD-T-OTP-00060, at 0644, entry 323.
[154] ICC-01/09-01/11-373, paras. 203-205. Reference to CW6, CW8, and NSIS Situation Report, KEN-OTP-0002-0015 (EVD-T-OTP-00093) @0063.
[155] ICC-01/09-01/11-T-12-ENG, p. 39.
[156] ICC-01/09-01/11-373, paras. 205-206.

(v) Factual Deficiency: No Criminal Purpose for the Network

108. As another aspect of the existence of an organization, the PTC found that the Network identified the criminal activities against the civilian population as its primary purpose, and it articulated an intention to attack the civilian population.[157] More specifically, the PTC found, on the basis of the evidence presented at Confirmation, that Mr. Ruto and others established the Network for the sole purpose of committing criminal activities, namely to plan the attack against PNU supporters in connection with the 2007 presidential elections.[158]

109. There is no evidence of any planning of the violence, nor that a network was set up with the sole purpose of planning an attack against PNU supporters in connection with the 2007 presidential elections. According to the factual findings in the decision confirming the charges, the Network was established prior to the existence of the PNU party, which was announced on 16 September 2007.[159] Technically, it is therefore impossible that the Network could have been set up to attack supporters of a political party which was not yet in existence.

110. Accordingly, the Defence submits that no reasonable Chamber can find the existence of a Network on the basis of the evidence adduced by the Prosecution. Even the Prosecution itself has some doubt that the evidence suffices to find that a Network (whether relying upon Kalenjin structures or ODM structures) as described in the UDCC existed. At a Status Conference on 16 October 2015, the Prosecution indicated it still believes there is sufficient evidence to find that there was a Network to which Mr Sang made a contribution. The Prosecution found it nonetheless necessary to request the Chamber to issue a Regulation 55(2) warning to Mr Sang and add additional modes of liability because it "cannot rule out the possibility that the Chamber might come to a different conclusion".[160] What the Prosecution seems to forget is that, even for another mode of liability, it must establish that such a Network existed, given the chapeau

[157] ICC-01/09-01/11-373, para. 207. Reference to CW1, CW2, CW6.
[158] ICC-01/09-01/11-373, para. 207. Reference to CW1.
[159] https://en.wikipedia.org/wiki/Party_of_National_Unity_(Kenya).
[160] ICC-01/09-01/11-T-208, pg 11 lines 12-13.

elements of crimes against humanity. Failing that, as is the case here, it cannot establish, even at half time, that the crimes charged were crimes against humanity.

(2) Definition of and Facts Pertaining to a 'Policy'

(i) Definition of a Policy

111. The PTC held that the requirement of a policy is distinct from that of a plan, but that in the circumstances of the present case they overlap.[161] According to the Elements of Crimes, the policy element requires "that the State or organization actively promote or encourage such an attack against a civilian population".[162]

112. An attack which is "planned, directed or organised", as opposed to "spontaneous or [consisting of] isolated acts", satisfies the policy requirement.[163] The implementation of a policy can consist of a deliberate failure to take action, which is consciously aimed at encouraging such attack.[164]

113. The PTC emphasised that, according to Article 7(2)(a) of the Statute, the organizational policy must be directed to commit "such attack". "In the present circumstances, the Chamber must be satisfied that the Network, which has been found to be responsible for the attack in Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills town from 30 December 2007 to 16 January 2008, had acted pursuant to a policy to commit that attack."[165] The Defence takes no issue with this definition.

114. Initially, the Prosecution alleged that the policy pursued by the Network was two-fold.[166] It defined the first limb of this policy as: "to punish and expel from the Rift Valley those perceived to support PNU, namely, Kikuyu, Kamba and Kisii

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[161] ICC-01/09-01/11-373, para. 209.
[162] Elements of Crimes, Introduction (3) of Definition Article 7 (Crimes Against Humanity).
[163] ICC-01/09-01/11-373, paras 210, 363.
[164] ICC-01/09-01/11-373, para. 210, fn 364.
[165] ICC-01/09-01/11-373, para. 211.
[166] ICC-01/09-01/11-373, para. 212.

civilians".[167] The second limb of the policy was defined as: "to gain power and create a uniform ODM voting block".[168]

115. The PTC correctly found that the second limb of the alleged policy "is merely political in nature and may not aim at committing an attack against the civilian population, as required under the Statute. Rather, gaining power and creating a uniform ODM voting block can be considered to be the motive or the purpose of a potential policy to commit the attack. However, the Statute does not envisage any requirement of motive or purpose to prove that a policy to commit an attack against the civilian population exists. Thus, the second limb of the policy as presented by the Prosecutor falls outside the legal framework of crimes against humanity and is therefore not to be considered by the Chamber."[169]

116. Accordingly, the Chamber here must assess whether there is sufficient evidence for a reasonable Chamber to be able to find that the alleged Network acted pursuant to its alleged policy "to punish and expel from the Rift valley those perceived to support PNU, namely, Kikuyu, Kamba and Kisii civilians",[170] or any other policy. It is to be noted that the Prosecution have not supplied any other purpose for the policy other than to create a uniform ODM voting block, which is inherently illogical, given that if this were one's goal, it would want to achieve it before the elections and not through violence perpetrated after the elections.

(ii) Factual Deficiency: No Formulation of a Policy to Expel

117. The PTC found that several issues dealt with at the planning meetings were crucial to the implementation of the policy,[171] including (i) the appointment of commanders and divisional commanders responsible for the operations on the field;[172] (ii) the production of maps marking out the areas most densely

[167] ICC-01/09-01/11-373, para. 365.
[168] ICC-01/09-01/11-373, para. 366.
[169] ICC-01/09-01/11-373, para. 213.
[170] ICC-01/09-01/11-373, para. 365.
[171] ICC-01/09-01/11-373, para. 219.
[172] CW1, CW2, CW6, CW8.

inhabited by communities perceived to be or actually siding with the PNU;[173] (iii) the identification of houses and business premises owned by PNU supporters with a view to target them;[174] (iv) the purchase of weapons as well as of material to produce crude weapons and their storage before the attack;[175] (v) the transportation of the perpetrators to and from the target locations;[176] and (vi) the establishment of a stipendiary scheme and a rewarding mechanism to motivate the perpetrators to kill and displace the largest number of persons belonging to the target communities as well as to destroy their properties.[177]

118. As discussed above, there is no evidence of any of these factors. Most importantly, the Prosecution failed to produce any evidence in relation to the planning meetings. Without established meetings of members of the Network, it is difficult to see when or how a policy shared by those members could have been developed. Accordingly, even at half time, the Prosecution has failed to establish that there was a Network (whether Kalenjin or ODM) acting on a policy "to punish and expel from the Rift valley those perceived to support PNU, namely, Kikuyu, Kamba and Kisii civilians", for the purpose of creating an ODM voting block or otherwise.[178]

B. Mr Sang had No Knowledge of the Attack

119. The Elements of Crimes define the requirement of 'with knowledge of the attack' as follows:

> The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy

[173] CW8.
[174] CW1, CW2, CW4, CW5, CW6.
[175] CW1, CW2, CW6, CW8.
[176] CW1, CW8.
[177] CW1, CW2, CW4, CW6, CW8.
[178] ICC-01/09-01/11-373, para. 365.

> of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

120. The Defence submits that, even in the event the Chamber finds that there is sufficient evidence to establish a Network at this stage of the proceedings, Mr Sang can still not be found guilty for his alleged involvement in having the crimes committed. No reasonable Chamber could find that Mr Sang acted with knowledge of the attack. Accordingly, Mr Sang should be found to have no case to answer.

121. There is no evidence which links Mr Sang to the alleged Network. He has not been placed at any meeting or rally, nor is there any evidence that he and Mr Ruto ever discussed a plan to attack PNU supporters. Only one witness [REDACTED] referred to a meeting at Mr Ruto's Sugoi house on 23 December 2007, which Mr Sang allegedly attended. However, he only referred to this meeting in his initial statement and recanted this part of his initial account while under oath. The Prosecution did not ask him specifically whether he still stood by this part of his initial account, thereby depriving the Defence of an opportunity to test the evidence. This account is uncorroborated and untested, and thus incapable of belief. It can therefore not be relied on, even at half time.

122. Outside of meetings, there is no other evidence which suggests that Mr Sang was aware of the alleged preparations of the attack on PNU supporters on a large scale, nor that he intended to further such an attack. Accordingly, the charges against Mr Sang should be dropped because the Prosecution case "has not raised any serious question of guilt that the Defence should be put to the trouble of answering".[179]

C. Mr Sang did Not Contribute to the Commission of Crimes (per Article 25(3)(d))

[179] Ibid, para. 6.

123. Under any of the three possible modes of liability, Article 25(3) (b), (c) or (d), and whether or not the Rule 68 Statements remain in evidence, the Prosecution cannot sustain a case against Mr Sang. The facts adduced during trial, even taken at their highest, are simply not sufficient to reasonably support a conviction.[180] In its totality, it cannot prove that Sang has aided or abetted, solicited, instigated, or contributed to the crimes against humanity of murder, forcible displacement, or persecution.

124. In many instances, the Prosecution has failed to fulfil its burden of presenting evidence required. Either that, or the Prosecution has failed to adduce evidence within the scope of what was presented in the UDCC. On other occasions, the evidence presented by its witnesses is contradictory, has been recanted, or is "incapable of belief on any reasonable view".[181] The Defence will proceed to address the elements of the modes of liability which may be in play, and will evaluate what evidence could plausibly fall into those categories, with an eye toward believability, considering the witnesses' credibility and the totality of the evidence on record to this point.

125. To impute criminal liability upon Mr Sang pursuant to article 25(3)(d), the PTC held it must find (on the basis of the applicable evidentiary standard) that:

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. Mr. Sang contributed to the crime, in any way other than those set out in article 25(3)(a) to (c) of the Statute (objective elements);
iv. the said contribution was intentional; and
v. was made either (a) with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime (subjective elements).[182]

126. The Pre-Trial Chamber held that Article 25(3)(d), starting with the phrase "[i]n any other way contributes to the commission or attempted commission of the crime", must be understood "as a residual mode of accessorial liability, which is

[180] No Case to Answer Directions, ICC-01/09-01/11-1334, para. 22.
[181] No Case to Answer Directions, ICC-01/09-01/11-1334, para. 24.
[182] ICC-01/09-01/11-373, para. 351.

triggered only when subparagraphs (a)-(c) are not satisfied".[183] It thus establishes "the lowest objective threshold for participation according to Article 25 since it criminalizes 'any other way' that contributes to a crime".[184] Accordingly, "the contribution under subparagraph (d) is satisfied by a less than "substantial" contribution, as far as such contribution results in the commission of the crimes charged".[185]

127. However, the Defence submits that the Pre-Trial Chamber erred in finding that any contribution which results in the commission of the crimes charged qualifies as contribution under Article 25(3)(d). The Katanga Judgment says that a contribution must at least be significant to meet the requirements of this mode of liability.[186] This is also the position taken by the Pre-Trial Chamber in *Mbarushimana*.[187]

128. The Pre-Trial Chamber found there was sufficient evidence to establish substantial grounds to believe Mr Sang intentionally contributed to the commission of the crimes and that his contribution was made with the aim of furthering the criminal activity and criminal purpose of the group led by Mr Ruto.[188]

129. The Defence has already noted that only two of the six Confirmation Witnesses testified at trial. This partially accounts for the radically different factual case which Mr Sang faces at the close of the Prosecution's case, as compared to the facts and circumstances contained in the Confirmation Decision. The Defence acknowledges that the Prosecution is not obligated to call the same witnesses at Confirmation and at trial. However, the Defence submits that in the circumstances of this case, the Prosecution's motives for not calling its Confirmation Witnesses must be taken into account when evaluating the lack of

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[183] ICC-01/09-01/11-373, para. 354.
[184] ICC-01/09-01/11-373, para. 354. Reference to Ambos, Triffterer, 2nd ed., p. 758.
[185] ICC-01/09-01/11-373, para. 354.
[186] ICC-01/04-01/07-3436, paras 1632-1635.
[187] *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, para. 292.
[188] ICC-01/09-01/11-373, para. 352.

credibility (to the point of being incapable of belief) of the replacement witnesses who came to testify.

130. Of the replacement witnesses that the Prosecution located and brought on board after Confirmation, only the following mentioned Mr Sang in their statements to the Prosecution and actually said something that resembled those statements when testifying at trial: P-0326, P-0268, P-0356, P-0442 and P-0800.

131. Other replacement witnesses gave statements to the Prosecution which were later substantially recanted, especially in relation to whether Sang was on air following the announcement of the election results: P-0604, P-0495, P-0516, P-0637, and [REDACTED]. Additionally, the Majority of the Trial Chamber has admitted the statements of [REDACTED] into evidence (collectively "the Rule 68 Statements")[189]; the propriety of their admission is currently before the Appeals Chamber.

132. From the start, then, the Defence notes that the case against Mr Sang is dependent on a very small number of witnesses who, even taking their evidence at the highest, talk about disparate incidents (many of which relate to the 2005 Constitutional referendum or events in 2006 which fall outside the temporal jurisdiction) and do not corroborate each other. Keeping that context in mind, the Defence moves on to lay out the particular elements which were confirmed by the Pre-Trial Chamber and which make up the charges against Mr Sang, as compared to the evidence adduced at trial.

133. In its decision confirming the charges, the Pre-Trial Chamber held: "[B]y virtue of his position within Kass FM as a key broadcaster, Sang intentionally contributed to the commission of the crimes" charged.[190] Mr Sang's intentional contribution is said to consist of:

i. placing his show Lee Nee Emet at the disposal of the organization;

[189] The Defence reiterates the requirement of Article 74(2) that all evidence relied upon should have been submitted and discussed at trial.
[190] ICC-01/09-01/11-373, para 355; ICC-01/09-01/11-533, para. 127.

ii. advertising the meetings of the organization;

iii. fanning the violence through the spread of hate messages explicitly revealing desire to expel the Kikuyu;

iv. broadcasting false news regarding alleged murders of Kalenjin people in order to inflame the atmosphere in the days preceding the elections;[191] and

v. broadcasting instructions during the attacks in order to direct the physical perpetrators to the areas designated as targets. [192]

134. The Prosecution took some liberty in how it detailed Mr Sang's 'contributions' in the Updated Document Containing the Charges; in this process, the Trial Chamber determined that anything not expressly disallowed by the PTC in the Confirmation Decision was permissible.[193] Therefore, when framing the UDCC, the Prosecution split the alleged contributions of Mr Sang into three stages: prior to the attacks, after the election results were announced, and during the attacks. The evidence led at trial with respect of each of these stages is insufficient to sustain the charges. Specifically, the Sang Defence submits that where the Pre-Trial Chamber did not provide support in the Confirmation Decision for one of the Prosecution's propositions,[194] and where there is now no evidence on the record following the conclusion of the Prosecution's case, the Chamber should strike out that allegation so it is clear that the Defence would not have to address it in a defence case, should there be one.

Prior to the Attacks

135. The Prosecution argued (UDCC, para 126) that prior to the attacks, KASS FM:

(1) broadcast propaganda against PNU supporters,[195]
(2) broadcast preparatory meetings and event locations,[196] and

[191] ICC-01/09-01/11-373, para. 356 (this allegation was based on the statement of CW 8 – he did not testify at trial and there was no replacement evidence led).
[192] ICC-01/09-01/11-373, paras. 195, 355, 357; ICC-01/09-01/11-533, para. 127.
[193] ICC-01/09-01/11-522, Decision on the content of the updated document containing the charges, 28 December 2012, para. 19.
[194] Ie, where the Prosecution acknowledged in the UDCC that an allegation was not ruled upon by the PTC.
[195] ICC-01/09-01/11-373, paras. 355, 357 and 359.

(3) organized fundraising events that financed the attacks.[197]

At the preparatory meetings, the Network, in agreement with Sang, designated specific persons to call into SANG's program and spread the Network's views.[198]

136. To start, the Defence notes that the Prosecution has errantly framed these allegations in terms of KASS FM being the operative organization, rather than Joshua Sang as an individual. Of course, these are different entities, and only Sang is on trial. Mr Sang was but one of several employees of KASS FM; he was not the head of the organization nor can he be liable for all actions taken by other employees of the Station. But assuming for a moment that KASS FM and Joshua Sang are functionally equivalent and interchangeable, the Defence has the following observations.

Broadcast Propaganda against PNU Supporters

137. With regard to the allegation that KASS or Sang broadcast propaganda against PNU supporters, the Defence recalls that KASS FM was a station that finances itself through paid advertisements and a fixed schedule of what will be advertised when.[199] Therefore, contrary to the imaginations of the witnesses, Mr Sang as an employee was not at liberty to unilaterally broadcast propaganda against PNU supporters or to do the converse, to broadcast propaganda in favor of ODM supporters. Additionally, *Lene Emet* and *Kuskong*, the two programs presented by Sang in the lead up to the 2007 election, hosted politicians from all parties (details below).

138. That aside, the Prosecution has led only vague evidence of what may be considered as propaganda against PNU supporters; no witness was able to provide a concrete date of a broadcast or to demonstrate its content by producing an audio recording of anti-PNU supporter sentiments. The Defence

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[196] ICC-01/09-01/11-373, para. 355.
[197] Not ruled upon by the PTC.
[198] ICC-01/09-01/11-373, paras. 195, 355 and 357.
[199] T-175, p 44, lines 10-22; p T-176, p 3, line 25 – p 4, line 5.

also notes that broadcasting propaganda against a PNU *supporter* means that the target was an individual, not the PNU party or ideology as a whole. Therefore evidence which was led showing that Mr Sang had a preference for the ODM party or against the PNU party does not assist the Prosecution. The Defence also stresses that PNU political supporters were a different entity than ethnic Kikuyus, although there was a degree of overlap in the relevant period, and so anti-Kikuyu sentiments are not necessarily equivalent to propaganda against PNU supporters.

139. For this component, the Prosecution may try to rely on the testimony of P-0356,[200] P-0268[201], P-0658 and P-0604 to demonstrate that when on air at KASS FM, Mr Sang essentially expressed a preference for the ODM party, stated that Kikuyus were responsible for taking jobs or land [from the Kalenjin], and referred to Kikuyu as "chemulbi" meaning "weeds"[202] or "Kamurulda" [*sic*] / "kimurgelda" meaning "tinted teeth". Many of these derogatory comments, which Mr Sang denies making, are taken out of context or attributed an unfair meaning.

140. Firstly, it is not a crime to support a particular political party and to express that opinion on air. Even if Mr Sang were proven to have been an ODM supporter or to have favored that party, Mr Sang was entitled to express that opinion, even if it means explaining why the PNU is a less favorable choice. For instance, in his [REDACTED], P-0604 said that he heard people ([REDACTED] PNU supporters) saying that Sang was telling people to vote unanimously for Raila Odinga and ODM so that if ODM won, the Kalenjin community will be part of the government.[203] He explained that this implicated Mr Sang because it showed that he, as a radio presenter, could use that opportunity to show the Kalenjin community that the Kikuyu community was "evil-ish"; he had said that Mr Sang

[200] P-0356, T-77, 40:3-20.
[201] P-0268, T-62, 29-30 (when asked what Sang was broadcasting, he said that Kass FM had an agenda, they will lean on one side and take a position); T-62, 49:12-18 (that Sang used his show to rally people behind ODM candidates).
[202] P-0356, T-77, p.5 4-55.
[203] P-0604, T-131, 84:19-25.

brought a list of Kikuyu ministers in the government to show that they are not fair in distributing power.[204]

141. P-0604 further explained that he believed Sang gave this example to show that if the ODM did not form the next government, then those Kikuyu people would do the same, and this would make Kalenjins vote against the PNU.[205] Though P-0604 later testified that these allegations were false and that he never listened to KASS FM,[206] the Prosecutor acknowledged that even if true, this does not implicate Mr Sang in any crime.[207] Additionally, it was an established fact that the Kikuyus had taken the most prominent government jobs during the Kibaki administration;[208] it is not a crime to state facts.

142. P-0268 testified that Mr Sang talked about land issues during his program, and that he urged Kalenjins to protect their lands and not to sell it to other communities.[209] P-0268 recalled that Mr Sang said the land should not be sold because "God has given us a wonderful land. It's like Canaan".[210] Such discourse is not anti-PNU or anti-ODM, but it is an observation that the land is valuable and should be appreciated, not sold.

143. Yet even these witnesses accepted that their allegations were not unequivocal. For instance, contrary to P-0268's earlier statement that anyone who called during Mr Sang's show and expressed opinions which differed from Mr Sang's opinion were either cut off or there would be consequences,[211] P-0268 testified that once in a while Mr Sang hosted people who were opposed to the ODM campaign.[212] In addition, he confirmed that parties including the PNU were given a chance to explain themselves.[213] Indeed, the Defence has exhibited the

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[204] P-0604, T-131, 85:4-11; [REDACTED], EVD-T-OTP-00132, para. 182.
[205] P-0604, T-131, 85:12-24.
[206] P-0604, T-131, 84:2-9.
[207] P-0604, T-131, 84:22–85:4.
[208] P-0604 agreed that discussions about tribalism in the Kibaki government were a common thing. T-136, 65:19 – 68:20.
[209] P-0268, T-62, 31:20-32:1.
[210] P-0268, T-62, 30:24-31:6.
[211] P-0268, T-62, 36:14-19.
[212] P-0268, T-65, 86:6-11.
[213] P-0268, T-65, 86:12-15.

following Kass FM audios of Mr Sang's program featuring PNU or non-ODM politicians:

- 13 August 2007[214] – Kipruto Kirwa
- 14 September 2007[215] – Jackson Kibor, Musa Kosgei and Sammy Seronei
- 21 September 2007[216] – Joe Magut and Mutai Ngunyi
- 26 October 2007[217] – Uhuru Kenyatta, Murungaru, and Kaguthi
- 8 November 2007[218] – Peter Chemaswet and Jeremiah Ng'etich
- 28 November 2007[219] – William Kirwa

The audios and translations speak for themselves as to how the programs were conducted, how individuals were questioned and given a chance to speak and what the reaction from the callers was like. Although it was a politically contentious period, Mr Sang did not only present a one-sided, pro-ODM line up on the radio.

Broadcast Meeting Events and Locations

144. The Prosecution alleges that, prior to the attacks, Mr Sang broadcast preparatory meetings and event locations. There is no audio recording of such a broadcast, nor does any witness corroborate another with respect to any particular announcement. The plain need for "best" evidence, being transcripts or recordings rather than hearsay, is particularly apposite to allegations concerning broadcasts.

145. Indeed, not one witness testified about a preparatory meeting in which violence was planned, so there could have been no announcement of the same. Rather, to try to sustain this allegation, the Prosecution has to rely on the recanted statements of [REDACTED] and [REDACTED], in hopes of twisting the

[214] EVD-T-D11-00097 (audio) and EVD-T-D11-00098 (translation).
[215] EVD-T-D11-00101 (audio) and EVD-T-D11-00102 (translation).
[216] EVD-T-D11-00010 (audio) and EVD-T-D11-00011 (translation).
[217] EVD-T-D11-00034 (audio) and EVD-T-D11-00088 (translation); [REDACTED].
[218] EVD-T-D11-00022 (audio) and EVD-T-D11-00023 (translation).
[219] EVD-T-D11-00020 (audio) and EVD-T-D11-00021 (translation).

announcement of ordinary and lawful political rallies and gatherings into an evil affair.

146. For instance, [REDACTED] had said that Sang advertised almost all ODM rallies (in 2007) where Ruto was in attendance. He said that Sang would tell the listeners that the King of the Kalenjin was going to be present so they should all go in large numbers. [REDACTED] claimed that [REDACTED] Mr Sang to cover live-broadcasts of some rallies, such as those in Nandi Hills and Eldoret.[220] Irrespective of the factual truth of the statement, the announcements are perfectly harmless and there is no indication that they were outside the scope of Mr Sang's ordinary role at the Station to make announcements (which may have been paid for by a political party) or that Sang had any criminal intent in making the announcements. The Defence submits that it is absurd and stretches the imagination to suggest that all of the ODM rallies advertised on air were actually "preparatory meetings" ostensibly attended by Network members to plan violence against the PNU/Kikuyus.

147. With respect to the Rule 68 Statement of [REDACTED],[221] the witness had stated that Mr Sang and Mr Ruto had a political relationship and that Mr Ruto went often on KASS FM, where he emphasized that the Kalenjin community should be united under the ODM and KASS FM and that if there was any message to pass it should be passed through KASS FM. On the face of this allegation, there is nothing to suggest that Mr Ruto was talking about a political message, and not some coded secretive message as the Prosecution infers. Furthermore, the evidence does not point to any particular meeting or event location for which Mr Sang was to pass the message, so the Prosecution cannot rely on this allegation to prove that the meeting or event was for criminal purposes or had any criminal consequences. Nor has the Prosecution shown that "messages" referred to anything but legitimate political statements and sentiments during a tense election season. The Chamber should not sanction this creative interpretation of evidence, which the Prosecution suggests supports criminal charges.

[220] [REDACTED], EVD-T-OTP-00263, para. 135.
[221] EVD-T-OTP-00132, para. 183.

148. Several witnesses spoke about two incidents which were somewhat intertwined on 25 and 26 December 2007 – allegations of Administration Police officers (working on behalf of the Kibaki Government) transporting fake ballot papers from Nairobi to Brookside Dairy using Mololine buses. This was a hot news topic of the time. While on air at Kass FM, Mr Sang announced that there were reports of certain Mololine buses ferrying fake ballot papers and AP officers to polling stations; someone suggested the fake ballots were being stored at Brookside Dairy. For instance, in testimony P-0800 claims he was listening to the radio and heard people call into the station, that the buses had transported the ballot boxes to Brookside.[222] He says this announcement was made on Kass FM during *Lene Emet*, Joshua Sang's show.[223] After he heard the announcement on Mr Sang's show, he went to Brookside on his own at around 10am – many people were gathered there when he arrived, chanting that they wanted to burn down Brookside because they believed ballot papers were being hidden inside.[224]

149. Similarly in his Rule 68 Statement, [REDACTED] had said that on 25 December 2007, he had heard rumors of ballot boxes being transported by Mololine buses and 2 NK from Nairobi to Eldoret with cast votes inside, and so he went to Brookside.[225] During testimony, however, he said that he had not been at Brookside Dairy on 26 December 2007 and instead had been at home.[226]

150. P-0658 also explained that there had been a rumour that ballot papers for rigging the election were being transported from Nairobi to other areas. The rumour was spread by the public and political leaders and also by radio; specifically the vernacular stations, Chamgei and Kass FM. The witness listened "especially to Kass FM" and heard announcements by Sang that people should block the roads because vehicles (Mololine shuttles (rumoured to be owned by Kikuyus) and City Hoppers (also believed to be owned by Kikuyus)) might be carrying "wrong ballot papers to the areas". Mr Sang announced on his show

[222] P-0800, T-155, 40:15-23.
[223] P-0800, T-155, 41:2-9.
[224] P-0800, T-155, 41:23 – 42:2 and 10-12; p 42:15-21.
[225] EVD-T-OTP-00149, paras. 150-153.
[226] ICC-01/09-01/11-T-138-CONF, 17 Sept 2014, p 62, ln 17-23.

Lene Emet that there were vehicles carrying fake ballot papers so people had to be on alert. The witness heard the announcements around 8 am. The witness explains that Mr Sang was speaking to the Kalenjin community and by telling them to be alert the witness understood this to mean they should be ready to go to the road to stop the vehicles transporting the fake ballot papers.[227]

151. One might be tempted to suggest that Mr Sang used this incident to whip up emotions against the Kikuyu or PNU supporters. However, Mr Sang's only interest was to report the news of the day and to alert people if there were voting irregularities and to try and determine what was in fact happening. As stated earlier, reporting factual information (or information believed to be factual) is not improper. At the time, the general understanding was that this was a genuine concern.

152. Indeed, a news report from The Standard, dated 24 December 2007 and titled "State denies rigging claims"[228] was put to P-0658. The witness accepts that rigging claims were being made by ODM and reported in national newspapers before such allegations were made on Kass FM.[229] Additionally, Defence counsel for Sang played a Kass FM audio[230] in which Mr Sang stated to his listeners that they "have to talk about the rigging of the elections". Mr Sang then introduced Raila Odinga who stated, *inter alia*, "We are reliably informed that AP officers have been hired by PNU for the purpose of trying to steal votes. Those officers left Embakasi ..." yesterday "... night travelling in City Hopper and Kenya Bus Service buses. They have been transported to Rift Valley, Western and Nyanza provinces. Their job is to be Kibaki's agents. They will report tomorrow then they will take part in the elections on 27th."

153. Another section of the same audio was played and P-0658 agreed that it was a Mr Silas Tarus (not Joshua Sang himself) who read out number plates of vehicles

[227] T-162, 51:1-55:15.
[228] EVD-T-D09-00263.
[229] T-168, 35:2-36:16
[230] EVD-T-D11-00048 (audio) and EVD-T-D11-00049 (transcript).

suspected to have been carrying the ballot papers.[231] From the same audio, P-0658 also confirmed that Mr Sang was emphasising that people remain peaceful and was questioning whether the allegations about the vehicles are true or not.[232]

154. In relation to the same incident, P-0604 was referred to a newspaper article called "Calm Restored in Nyanza", from the Standard dated 27 December 2007.[233] After being read this article, P-604 agreed that the story he told the investigators that Sang alerted people and read the number plates was an issue that was very much in the public domain, and that the issue had been going on since 22 December 2007.[234]

155. The Defence played audio EVD-T-D11-00046 and P-0604 recognized the voices of Raila Odinga and Joshua Sang. P-0604 heard Raila saying that there were plans to rig the general elections using AP (administration police) officers.[235] P-0604 heard Raila specifically accuse Kinuthia Mbugua (the AP commandant in the APTC) and Mr Gitwai (permanent secretary in the office of the President).[236] In the audio, Mr Sang is interviewing Raila on air and Raila explains that "there is a deal to rig, because these guys [the PNU] are worried that they will not win unless they rig. That is why we have seen administration police being used this time".[237] In the audio, Raila goes on to explain in detail how the AP officers are expected to rig the election.[238]

156. The Defence played audio KEN-D11-0014-0568 (translation KEN-D11-0014-0569), and P-0604 again recognizes Raila's voice as Raila was saying that he heard the AP had been deployed to constituencies and were using City Hopper buses, in order to assist in rigging the elections.[239] P-0604 confirmed that what

[231] T-168, 9:16-10:20
[232] T-168, 10:21-15:5
[233] P-604, T-136, 15 Sept 2014, 79:17 et seq; EVD-T-D11-00045.
[234] P-604, T-136, 15 Sept 2014, 83:16-23.
[235] P-604, T-136, 15 Sept 2014, 84:14-25.
[236] P-604, T-136, 15 Sept 2014, 85:12-24.
[237] P-604, T-136, 87:5-9.
[238] P-604, T-136, 87-88.
[239] P-604, T-136, 15 Sept 2014, 91:16 – 93:2.

Raila was saying was not allegations of propaganda, but confirmed reports.[240] In the audio, Mr Sang then discussed Raila's accusations and asked Tarus to read the number plates of the vehicles being used so that "people can tell us if they have seen any of them, or if what we are hearing is propaganda".[241] Tarus reiterated what Raila had just said in a press conference about AP officers being transported from Nairobi (Embakasi) to the stations where they had been assigned; the understanding was that they were actually PNU agents.[242]

157. Therefore, given that this was a genuine news item at the time, nothing in relation to this incident can be said to have been propaganda against the PNU that should be held against Mr Sang.

158. Fatally, the Prosecution does not proffer any examples in support of the last critical sentence of paragraph 126 of the UDCC: "At the preparatory meetings, the Network, in agreement with SANG, designated specific persons to call into SANG's program and spread the Network's views". Here the evidence at trial is strikingly different from that adduced at Confirmation, where CW 6 ([REDACTED]) had stated that during a preparatory meeting held in December 2007 at Mr Cheramboss' house, a high-ranking member of the organization invited people to call Sang during his morning program on Kass FM in order to spread inciting messages, or where CW 8 ([REDACTED]) corroborated that the same person had been instructed to call Mr Sang at Kass FM. The Prosecution did not call these two witnesses to testify, and the evidence it led in replacement is insufficient to sustain this allegation. It is thus difficult to see how the announcement of rallies or harambees or the passing of messages could be said to be soliciting or inducing or aiding or abetting a crime where there is no record of the intention of the accused person to connect those actions to a criminal purpose.

[240] P-604, T-136, 15 Sept 2014, 93:7-10.
[241] P-604, T-136, 15 Sept 2014, 94:1-7.
[242] P-604, T-136, 15 Sept 2014, 95:21- 96:16.

Organized Fundraising Events that Financed the Attacks

159. In the Confirmation Decision, Sang was said to have participated in a meeting on 2 September 2007 at Sirikwa Hotel in Eldoret, during which, *inter alia,* money and fundraising were discussed.[243] This allegation was dependent on the testimony of CW 1 ([REDACTED]) and CW 8 ([REDACTED]). While the Prosecution did not call [REDACTED] to testify at trial, [REDACTED] said that though he remembers telling the Prosecution in April 2010 that he attended such a meeting where planning for violence was discussed, he does not recall that he had said the meeting was announced on Kass FM or that he paid 300 ksh to enter the meeting.[244] [REDACTED] testified that this is a story he no longer wants to stand by.[245] The witness states he did not lie to the Prosecution but got the story from a source. It is to be noted that this witness was not declared hostile and his statement did not form part of the Rule 68 Application; [REDACTED].[246]

160. Again, at Confirmation, the Prosecution led evidence from CW 6 ([REDACTED]) that Network meetings were held well in advance of the election, which were attended by William Ruto and Henry Kosgey, and in which other politicians actively participated in planning and financially supporting the attacks.[247] The Prosecution did not call this witness to testify and no such meetings (ones advertised by KASS FM or otherwise) are on the trial record. The closest the Prosecution evidence comes is the vague allegation by [REDACTED].

161. P-0658 states that on the morning of 31 December 2007, Sang announced the election results. Notably, even this allegation of completely innocent activity is contrary to independent evidence regarding the ban on live broadcasts, which the Government had directed in the evening of 30 December 2007.[248] However, [REDACTED]. To consider this evidence of "organizing fundraising events to finance the attacks" is a misrepresentation of the totality of [REDACTED]

[243] ICC-01/09-01/11-373, para. 130.
[244] [REDACTED].
[245][REDACTED]
[246] [REDACTED].
[247] ICC-01/09-01/11-373, paras. 6, citing (ICC-01/09-01/11-261-AnxA, paras 50-53; T-6-RED, 12: 19-23).
[248] EVD-T-OTP-00130.

evidence on this topic and attempts to fill the gaps in the evidence with a sinister purpose.

162. During testimony, [REDACTED].[249] [REDACTED].[250] [REDACTED].[251]

163. Furthermore, P-0658 said that he attended the Ziwa harambee and that it lasted merely 20 minutes. He claims that Isaac Maiyo, Jackson Kibor, and Fred Kapondi were present and that Kibor gave 200,000 ksh, allegedly from Ruto.[252] However, this story is incapable of belief given that the alleged site of the harambee was very close to the District Commissioner's office, and was within throwing distance of the Administration Police base,[253] and it would not have been possible to collect money for purposes of violence in that vicinity. Additionally, there is no evidence to show that the money was actually spent on items for fighting, that Sang was aware that it might have been spent on tools for violence; and also there is no link to any crimes committed as a result of [REDACTED].

164. In any event, this evidence, even if credible, is still convoluted uncorroborated hearsay evidence and does not support the contention that Sang had the intention to solicit or induce or aid and abet or otherwise contribute to fundraising events to finance the attacks [REDACTED]. The Defence's position is supported by jurisprudence from the ICTR, in the case of *Bikindi*, where the Chamber refused to impute liability to the defendant because the Prosecution failed to prove that the money collected at the defendant's concerts were used to purchase weapons,[254] the Defence requests the Pre-Trial Chamber not to impute any liability on Sang for his alleged participation in fund raising events, especially in the absence of any evidence showing that money allegedly raised at this event was used to commit crimes of murder, forcible displacement or persecution.

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[249] [REDACTED]
[250] [REDACTED]
[251] [REDACTED]
[252] [REDACTED]
[253] [REDACTED]
[254] *Bikindi* Trial Judgement, para. 376.

After the Election Results were Announced

165. The Prosecution then alleges (UDCC, para 128) that after the presidential election results were announced, SANG:

(1) called on perpetrators to begin the attacks,[255] and

(2) broadcast instructions during the attacks through the use of coded language in order to direct the physical perpetrators to the areas designated as PNU targets.[256]

The Prosecution continues by alleging that perpetrators who attended the meetings or events listened to the broadcasts, understood the coded language and proceeded to the previously identified locations to execute their plans for attack.[257] Given that there has been no evidence of meetings, there is no way Mr Sang and other meeting attendees could have developed a code of any sort to use on air; nor could they have pre-identified locations for attack. Of course, the Kalenjin language in and of itself is not a code and it was understood even by several Kikuyus and people of other ethnicities living in the Eldoret area. So if the Prosecution's theory is that by speaking in Kalenjin to a primarily Kalenjin audience, Mr Sang was successfully speaking in a coded language to perpetuate and disguise criminal activity, then that theory must fail, as it is both illogical and unsupported by the evidence.

166. The Prosecution will likely suggest that the evidence of P-0800, P-0268, P-0658 and P-0442 plus the recanted Rule 68 Statement of [REDACTED] establishes that "after the election results were announced, Sang called on perpetrators to begin the attacks". However, this would errantly conflate the notion of encouraging people to participate in lawful civic demonstration or protests, with that of criminal activity. These examples refer to people 'demonstrating' against 'stolen votes' or 'demanding' or 'fighting for their rights'. Any "instruction" given by Sang in these circumstances was obviously a plea of a protest nature and not a solicitation or inducement or aiding or abetting of criminal conduct. In truth, no

[255] ICC-01/09-01/11-373, paras. 355, 359-360.
[256] ICC-01/09-01/11-373, paras. 355, 360 (CW 2). Only ruled upon in part by PTC.
[257] Not ruled upon by the PTC.

witness actually alleges that Sang called on perpetrators to begin *attacks*, only that they stand up for themselves in the face of evidence that votes had been stolen. Indeed, P-0268 testified that Mr Sang searched people saying "What are you are still doing? We must show resentment. We must go out, demonstrate against stolen vote ... Let no man remain at home. Let women prepare food for those who are going to those meetings."[258] P-0268 testified that Mr Sang said this immediately after the results were announced;[259] that Mr Sang was announcing to people that they should go to demonstrate, to show their anger.[260]

167. While P-0268 may have interpreted Mr Sang's announcement to mean that people should go and join violent demonstrations, that intention is not evident from the words he stated that Mr Sang used. Indeed, even [REDACTED].[261] Surely there is no criminal purpose to be derived from encouraging people to stay well-nourished during a time of intense civil action.

168. Additionally, during cross-examination, P-0268 was referred to an excerpt from a Kass FM broadcast on 18 January 2008, as was captured in a BBC monitoring report,[262] where Mr Sang relayed the request of the police spokesperson: 'Such incidents leave me at a loss for words. I implore you, Kalenjin people, to pray. If you're going to work or to the farm or going about your usual duties, you may go. However, if you do not need to be anywhere, please stay at home. Although in the past since you voted you have been told to come out, today I implore you to stay and take time to pray and surrender to God. Pray according to prompting of your heart."[263] This is evidence that when it was necessary to demonstrate, people went out and when it was no longer necessary, Mr Sang through a caller asked people to stay at home.

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[258] ICC-01/09-01/11-T-62-CONF-ENG, 30 October 2013, p 49, line 22 –p 50, line 8; p 71, lines 3-5.
[259] ICC-01/09-01/11-T-62-CONF-ENG, 30 October 2013, p 49, p 71, lines 6-8.
[260] ICC-01/09-01/11-T-62-CONF-ENG, 30 October 2013, p 49, p 71, lines 9-15.
[261] ICC-01/09-01/11-T-62-CONF-ENG, 30 October 2013, p 74, lines 3-13.
[262] EVD-T-D11-00009.
[263] T-66, 75:10-19.

169. Likewise, P-0442 stated that after the announcement of the votes, Mr Sang continued saying that the votes had been stolen.[264] She says that on the 31st, Sang told people to "come out of their houses and to fight for their rights"; that "people should not be stopped from demanding that their rights be upheld. On that very day he called on people to ensure that their votes were not stolen."[265] P-0442 herself joined the crowd demonstrating at Kapsabet, but she did not describe seeing any violence.[266] Once P-0442 was home, she switched on the radio and the television.[267] She listened to the radio and Mr Sang was saying that people from Kisumu were calling for their rights and were authorized to do so; he spoke about Kisumu, Kakamega and other places.[268] Mr Sang said that in Kisumu and Kakamega they did good work … he didn't see why people should stay in their own homes when people were trampling upon their rights.[269] Again, this clarion call to action is not indicative of a criminal purpose.

170. For the reasons stated, Mr Sang's contribution or intention to contribute to the attacks cannot be ascertained through this alleged conduct.

<u>During the Attacks</u>

171. The Prosecution continued by alleging (UDCC, para. 129) that during the attacks, Mr Sang sought updates on the perpetrators' progress and broadcasted live from perpetrators as attacks were committed.[270] The Prosecution states that Mr Sang's broadcasts encouraged Network perpetrators to continue their participation and was one method of coordinating the redeployment of resources.[271] Notably, the Pre-Trial Chamber could not make any conclusive finding about this and no evidence of this nature has been led at trial.

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[264] P-0442, T-99, 3:1-10.
[265] P-0442, T-99, 3:11-18.
[266] P-0442, T-99, 4:1-11.
[267] T-99, 8:20-23.
[268] P-442, T-99, 8:22 – 9:2.
[269] P-442, T-99, 9:12–20.
[270] Not ruled upon by the PTC.
[271] Not ruled upon by the PTC.

172. The Prosecution may have hoped to rely on testimony from CW2 ([REDACTED]) in this regard. In his prior statements, [REDACTED].[272] [REDACTED].[273] [REDACTED].[274] [REDACTED].[275]

173. The closest the Prosecution came to eliciting such evidence was through P-0442 who testified that while she was at Eldoret Showground, from 3 January 2008, she had access to radio and that she used to listen to Citizen, Kass FM and Inooro.[276] She confirmed that she listened to some of Mr Sang's programs on Kass FM.[277] P-0442 said that she heard Mr Sang say that "the work had been done properly, but it wasn't finished yet. In Kericho, Nyagacho, Molo, Kwoke people were in the bush".[278] P-442 interpreted this to mean Kikuyus were in the bush. She claims Mr Sang said "they had not cleaned up all the kwekwe, the enemies". P-0442 described kwekwe as "that means the grass that grows in a field and the roots go down into the soil and when someone is cultivating his field he has to pull out that particular grass".[279] P-0442 says that when he talked about the enemies, Sang used the Kalenjin word "bunyot".[280] P-0442 says that she heard Mr Sang saying these things in late January or early February 2008; violence was only ongoing in other regions then.[281] Therefore, by the witness's own admission, the statements which she alleges Mr Sang to have said happened well after the period of violence for which he is charged (Eldoret area being limited to 1-4 January 2008 and Kapsabet being the latest until 16 January 2008).

174. The only other alternative that the Prosecution could try to rely upon is testimony from witness P-0658, who says he listened to Kass FM during the first few days of January 2008. He said that information was given about the violence and what was going on in different places. According to the witness, Mr Sang told

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[272] [REDACTED]
[273] [REDACTED]
[274] [REDACTED]
[275] [REDACTED]
[276] P-0442, T-100, 7:4-21.
[277] P-0442, T-100, 7:22-23.
[278] P-0442, T-100, 8:4-9.
[279] P-0442, T-100, 8:10-20.
[280] P-0442, T-100, 8:21 – 9:3.
[281] P-0442, T-100, 9:19 – 10:1.

people in Kalenjin not to go to or to retreat from particular areas because he had learned from an inside source that the police would use live bullets at those places and so they might be killed.[282] Obviously, even if this information were true, this is not a call for people to commit murder or to displace people or to persecute them; it is a call for people to remain safe and protected and not to go to areas which are prone to danger.

175. On the basis of the above facts, the Prosecution has failed to demonstrate that during the attacks, Mr Sang broadcast any information which directed perpetrators or assisted in redeploying resources.

Mr Sang did not Intentionally Contribute to the Crimes

176. According to the Prosecution, Mr Sang's contribution was allegedly made "with the aim of furthering the criminal activity and purpose of the group established by Mr. Ruto" to commit the crimes charged. The Pre-Trial Chamber found that Sang participated in five preparatory meetings between 15 April 2007 and 14 December 2007 at which "the different facets of the plan to attack the PNU supporters in Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills town were developed".[283] Yet at trial, there is absolutely no evidence of any planning meeting through which Mr Sang could be said to have developed or been aware of an intention to commit the crimes for which he is charged.

177. Mr Sang's intent cannot be inferred simply from the fact that post-election violence occurred,[284] but rather must be explicit from his own conduct. The Defence submits that his mere alleged attendance at meetings is insufficient to establish intent that the crimes charged be committed. His mere alleged association with members of the "Network", if at all, does not demonstrate that he collaborated with them for the specific purpose of committing or contributing to crimes against humanity.[285] As was similarly held by an ICTR Chamber,[286] the

[282] P-0658, T-165, 13:2-18:15 ; T-167, 35:11-23.
[283] ICC-01/09-01/11-373, para. 364.
[284] Nahimana Appeal Judgement, para. 709.
[285] Bikindi Trial Judgment, para. *72*. See also paras 374-377.

defendant's presence at a meeting with leading political figures is inconclusive as to a possible collaboration with them to commit the crimes charged.

178. Specifically, the Prosecution alleges that Mr Sang's intention for crimes against humanity to be committed can be derived from the following facts (UDCC, para 130):

> (1) as a **leading Kalenjin broadcaster**, SANG was uniquely situated to broadcast to the Kalenjin community;
>
> (2) **SANG along with RUTO led meetings advocating for the expulsion of PNU supporters**;
>
> (3) SANG personally aired anti-PNU rhetoric through Kass FM, which incited fear and hatred against PNU supporters, and specifically referred to the need to attack them;
>
> (4) SANG **provided access to pre-screened Network callers** and then aired **derogatory and anti-PNU language**;
>
> (5) **SANG used coded language during his broadcasts** which was understood by listeners as instructions to attack specific targets; and
>
> (6) **SANG broadcast live calls** from direct perpetrators during the commissions of attacks.

179. As for the first prong, the Defence does not dispute that Mr Sang was a popular broadcaster in the Kalenjin language. However, the Defence does not concede that that position of influence was used to leverage criminal activity.

180. As for the second prong, the Defence has repeatedly indicated that there was no evidence of Network meetings at all, let alone meetings where Mr Sang and Mr Ruto in tandem called for the expulsion of PNU supporters.

181. As for the third prong, the Defence acknowledges that some witnesses have testified that Mr Sang aired anti-PNU rhetoric, but there is no direct evidence that he ever stated that they should be attacked. Only P-0268 testified that according to what he heard, one day a caller said something contrary to what Mr

[286] Bikindi Trial Judgment, para. 374.

Sang wanted and Mr Sang said over the radio, "Look for that person and punish him for contributing to the radio what is not liked."[287] Yet this is uncorroborated hearsay which has not been independently verified, and it is unclear whether any action was ever taken.

182. As for the fourth prong, the Defence notes that a few witnesses testified that it seemed like certain frequent callers were known by name by Mr Sang without them first introducing themselves,[288] and were given preference on air. However, even if this were the case, this does not amount to giving access to secret pre-screened callers for the purpose of allowing them to air anti-PNU and derogatory language. For instance, several witnesses testified that one Kiptindinyo was a frequent caller to Kass FM and that his name was understood to refer to a rapist or a bad person.[289] However, the nickname Kiptindinyo, while being a rather unsavoury epithet, was not used to hide the identity of the caller. To the contrary, Kiptindinyo was a known personality; P-0658 testified that his real name was Julius Ruto[290] and in fact, the Defence exhibited a Facebook page with a picture of "Hon Kiptindinyo Ruttoh".[291]

183. In any event, no one has testified as to how Mr Sang could have given preference to pre-screened callers from where he sat in the studio. In fact, the Defence submits that due to limitations of the equipment in the studio, it was impossible for a presenter such as Mr Sang to know in advance who was calling. [REDACTED][292] [REDACTED]

[REDACTED][293]

[REDACTED]

[REDACTED].[294]

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[287] P-0268, T-62, 39:3-7.
[288] P-0743, T-180, 27:6-17.
[289] P-0800, T-161, 113:1-6; P-0743, T-180, 29:12-17; P-0658, T-166, 46:3-50:10.
[290] P-0658, T-166, 46:3-50:10.
[291] EVD-T-D11-00019.
[292] [REDACTED]
[293] [REDACTED]

[REDACTED].[295]

184. In light of the absence of meetings during which Mr Sang could have pre-selected callers and given the impossibility of the presenter being able to know who was calling into the studio due to the limitations of the equipment, the Prosecution's theory regarding frequent callers must fail.

185. As for the content of the frequent callers' alleged broadcasts, even if the Chamber finds that Mr Sang or his callers made anti-PNU remarks, this in and of itself does not demonstrate an intent on his part to contribute to the murder, forcible transfer and persecution of PNU supporters. Broadcasting anti-PNU propaganda, particularly in a pre-election period, falls squarely within protected political speech and is therefore wholly legitimate.[296]

186. Freedom of speech, including political discourse, is regarded as one of the fundamental cornerstones of a democratic society and is protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR)[297] and Article 9(2) of the African Charter on Human and Peoples' Rights[298]. Indeed, the UN Human Rights Committee has affirmed that this provision encompasses political discourse and commentary on public affairs, and that, subject to paragraph 3 and Article 20, it also protects expression "that may be regarded as deeply offensive".[299] As Judge Meron has stated, "to criminalise unsavory speech

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[294] [REDACTED]
[295] [REDACTED]
[296] Bikindi Trial Judgment, para. 171.
[297] Article 19: 1. Everyone shall have the right to hold opinions without interference; 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice; 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.
[298] Article 9(2): Every individual shall have the right to express and disseminate his opinions within the law.
[299] General Comment No. 34, 21 July 2011, ICCPR/C/GC/34, at para 11. See also General Comment No. 25: the right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12 July 1996, CCPR/C/21/Rev. 1/Add. 7, paras 12 and 25-6 (the Human Rights Committee held that "[f]reedom of expression and association are essential conditions for the effective exercise of the right to vote and must be fully protected".

that does not constitute actual imminent incitement might have grave and unforeseen consequences".[300]

187. As for the fifth and sixth prongs, that Mr Sang used coded language to direct the attackers or that Mr Sang broadcast live updates from the attackers, there is absolutely no evidence on the record. Nor is there evidence which could possibly be construed to that end.

188. In addition to the Prosecution's lack of actionable evidence in relation to the six prongs required to demonstrate that Mr Sang intended the commission of crimes, there is ample evidence on record to the contrary. The evidence of those who suggest that Mr Sang was on air conducting live broadcasts from the 31st of December through the first week of January 2008, while there was a Government ban on all live media broadcasts, is incapable of belief. Indeed, contrary to this hearsay testimony which is uncorroborated by any audio broadcasts, the evidence on record shows actually that during this period, Mr Sang, through Kass FM, was appealing for peace and airing pre-recorded messages from well-known Kalenjin personalities asking the community to shun violence and unify the country. These peace messages, which have been authenticated by Prosecution witnesses under oath, also demonstrate very clearly that Mr Sang did not intend for violence to be committed, or for anyone to be murdered, displaced or persecuted, despite the stolen election. The peace messages therefore effectively counter any allegation that Mr Sang was inciting violence during the period of the charges.

189. From 29 December 2007, prior to the official announcement of the presidential election results, Mr Sang was heard on Kass FM asking the Kalenjin people to maintain peace as they awaited the election results.[301] On 30 December 2007, immediately after the announcement of the election results, the Government of Kenya, through a letter from the Minister of State for Provincial Administration and Internal Security, Honorable John Michuki to Dr Bitange Ndemo, Permanent

[300] Nahimana Appeals Judgment, Dissenting Opinion, para. 12.
[301] EVD-T-D11-00016 (audio) and EVD-T-D11-00017 (translation).

Secretary for the Ministry of Information and Communication, directing him to invoke the powers under section 88 of the Kenya Communications Act 1988, "in the interest of public safety and tranquility".[302] The Communications Act of 1998, Section 88(1)(a) states that this power includes taking temporary possession of any radio communication station or apparatus within Kenya, and that radio communication shall not be emitted from any such radio communication station.[303]

190. The Government's ban on live broadcasts and its implementation was widely criticized by media houses who considered it to be a gagging order on freedom of speech and specifically by the Media Council Chairman who said the directive was inappropriate during a period of emerging difference over the just concluded election; he said the action was being "construed as an attempt to black out the voice of the opposition".[304] Alfred Mutua, the Government Spokesperson, said that the ban was especially meant for vernacular radio stations, such that they would listen to the content first before airing it until emotions got down.[305] A newspaper article by *Reporters sans Frontières* titled "Kenya: Government Imposes 'Dangerous and Counter-Productive' News Blackout, dated 31 December 2007, confirmed that stations had suspended their news programs and that local broadcast journalists were afraid that the police would raid their stations and order them to close.[306]

191. The media houses had a well-founded fear of being closed down or sanctioned given the Kenyan Government's raid on the *Standard* (newspaper) and KTN (TV) a few years earlier.[307] [REDACTED] agreed that there was a ban on live media

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[302] EVD-T-OTP-00130 (the letter was copied to Eng. John Waweru, Director General of Communication Commission of Kenya and Maj Gen Hussein Ali, Commissioner of Police); P-0189 recalled that immediately after the swearing in [of Kibaki], Michuki imposed a ban on live broadcasts (T-49, 85:2-6); P-0637 explained that he thought the purpose of the ban was to prevent violence which was underway (T-150, 59:19-60:1).
[303] http://www.researchictafrica.net/countries/kenya/The_Kenya_Communications_Act_1998.pdf
[304] EVD-T-D11-00037 (video) and KEN-T-D11-00038 @0123 (transcript).
[305] *Ibid,* @0125.
[306] EVD-T-D11-00051; P-0637, T-150, 57:8-24.
[307] P-0637 confirmed that previously KTN had been closed by Government after it raided the station (T-150, 59:9-18); [REDACTED] recalled the raid on the Standard and KTN organized by John Michuki (T-179, 66:13-25).

broadcasts which had been declared by Hon Michuki,[308] the same Minister (a Kikuyu in Kibaki's government) who had ordered the raid on the Standard in 2006.[309] [REDACTED] recalled that after the raid Hon Michuki had said "if you rattle a snake [the government], be prepared to be bitten by it".[310] P-0800 also listened to a Kass FM audio recording of 6 March 2006[311] and recognized Mr Sang's voice talking about the raid on the Standard and KTN.[312] It is therefore an established fact that media outlets in Kenya at the time of the Government's ban, Kass FM included, were well aware that if they did not comply, the Government would not hesitate to take action against them.

192. Notably, the article listed only one radio station, Kiss FM (not Kass FM) as continuing to broadcast a phone-in program, but that the program's host Caroline Mutoko was asking listeners not to cite Kiss FM as the source of reports so as to not get in trouble.[313]

193. Several of the Prosecution's witnesses were aware of the ban and stated that they did not listen to Kass FM in the days immediately following the announcement of the presidential election results. For instance, P-0637 acknowledged that during the period between 31 December 2007 and 7 January 2008, the Government had introduced a ban on live media broadcast.[314]

194. P-0268 stated "for awhile immediately after results were announced, I didn't listen to Kass Fm. I heard somebody say that Kass FM is no longer therefore a while".[315] P-0604 said that during the period of the violence, he was not listening to Kass FM (he was listening to Citizen).[316] [REDACTED] in his Rule 68 Statement said that when the violence started, he switched off Kass FM.[317] In [REDACTED] Rule 68 Statement he said that when areas were burning in Nairobi, "on Kass FM

[308] [REDACTED]
[309] [REDACTED]
[310] [REDACTED]
[311] EVD-T-D11-00059 (audio) and EVD-T-D11-00060 (translation).
[312] P-0800, T-161, 68:1 – 69:9.
[313] EVD-T-D11-00051.
[314] P-0637, T-150, 45:15-20.
[315] P-0268, T-62, 50:3-5.
[316] P-0604, T-131, 81:18-20, 83:7-14.
[317] [REDACTED]

it was only music"[318] and that he did not listen to the radio after the election and he does not know what Sang was saying then.[319] When asked during testimony if he heard anything on Kass FM other than music, P-0495 said he rarely had access to a radio at that time because he had no batteries.[320] P-0442 claims that she was aware of a ban on live broadcasts, but that Sang continued to broadcast throughout the period of December 2007 and January 2008.[321] However, it is clear that some witnesses, like P-0442 and P-0658[322] were unable to differentiate between hearing Mr Sang talking live on the radio and hearing Mr Sang's voice on a pre-recorded audio which was played on air.

195. Significantly, [REDACTED] testified in detail as to what transpired at the radio station in the days immediately following the announcement of election results. [REDACTED] testified that the ban on live media applied to all media houses, ie it was not directed at Kass FM.[323] [REDACTED] stated that only KBC was allowed to declare the election results.[324] [REDACTED] stated that at Kass FM, the ban lasted at least eight days,[325] during which time [REDACTED] was playing music and peace messages because no one could come to the studio and Kass could not continue its normal programming.[326] [REDACTED][327]

196. In his various accounts, [REDACTED] has been consistent about the peace messages that were broadcast at Kass FM during the violence. In his original statement to the Prosecution in November 2012, he stated that as a consequence of the violence, "General Sumbeiwa [sic] and Isaiah Kiplagat appeared in the studio to preach peace and calm. Isaiah Kiplagat is a neutral figure within the Kalenjin community. I believe they were invited by Kass FM management to spread peace".[328] The Prosecution do not appear to have asked any follow up

318 [REDACTED]
319 [REDACTED]
320 P-0495, T-141, 25:13 – 26:12.
321 P-0442, T-102, 30:16 – 31:3.
322 P-0658, T-167, 69:1-71:19.
323 [REDACTED]
324 EVD-T-D11-00084, lines 186-208.
325 EVD-T-D11-00084, line 222.
326 EVD-T-D11-00084, lines 186-188, 213-231.
327 [REDACTED]
328 [REDACTED]

questions about these peace messages,[329] nor did the Prosecution make an attempt to interview the individuals named by their witness as having been involved in their recording.

197. [REDACTED] elaborated on the messages and [REDACTED]. He explained that after the results had been declared, there were reports of violence and so different Kass presenters recorded messages appealing for peace. The messages were recorded by staff representing the different Kalenjin communities, such as Marakwet, Nandi, Kipsigis, and Tugen so that the presenters could appeal to the specific communities in their own dialects.[330] [REDACTED] recalled that [REDACTED] recorded a message, along with Mr Sang, Winnie, Carol Chesang, Geoffrey Lelmet, and others. [REDACTED].[331]

198. [REDACTED] said that in the days that followed, "eminent persons" or "important people" from the community also came to the studio to record messages of peace, including Sumbeiywo and Ambassador Kiplagat, some pastors, and others.[332] [REDACTED].[333] [REDACTED].[334]

199. [REDACTED] the Defence played several audio recordings for [REDACTED] and he confirmed that [REDACTED] had played them repeatedly on air in the period immediately after the results were announced. These same recordings had previously been played for P-0658 during his testimony before the Chamber, and he also testified to having heard them played on Kass FM at the material time.

200. The peace message recordings and transcripts and translations which are in evidence are as follows:

[329] [REDACTED]
[330] EVD-T-D11-00084, lines 42-50.
[331] EVD-T-D11-00084, lines 145-159
[332] EVD-T-D11-00084, lines 66-75.
[333] EVD-T-D11-00084, lines 177-185.
[334] [REDACTED]

- **1 January 2008**[335] **– Kass FM Staff**, including:

  - **Joshua arap Sang:** "Greetings, listeners of Kalenjin wherever you are listening to Kass FM. This is Joshua arap Sang, telling you we are fine, and to implore that we keep peace everywhere-peace in Kenya. May peace be promoted today and forever. Let us keep on maintaining peace".

  - **Mark Sirma:** "I am Mark Sirma. I am saying let peace reign in Kenya."

  - **Winnie Ruto:** "This is I, Winnie Ruto. We appeal for peace, countrymen. We appeal for peace in our country."

  - **Moses Rono:** "My name is Moses Rono in Kass FM News. We beseech that peace prevails in Kenya now and always."

  - **Gilbert Lang'at**: "My name is Gilbert Arap Lang'at. It is my appeal that we keep the peace. May the Lord's peace be sufficient for us."

  - **Geoffrey Lelmet**: "My name is Geoffrey Lelmet. I appeal to all people of Kenya to keep the peace and to mind our nation which we have built for many years."

  - **Edwin Kwamba**: "By name, I am Kiplagat, son of Kwambai. We are fine in Nairobi, all is well. Ee…. We appeal to all our Kalenjin listeners wherever you are; do not ruin the peace wherever you are; instead let us maintain peace which we have built over many years, so that our country may develop. We are well".

- **1 January 2008**[336] **– Ambassador Bethwel Kiplagat, Bishop Silas Yego, General Lazarus Sumbeiywo**

[335] EVD-T-D11-00065 (audio) and EVD-T-D11-00066 (translation).
[336] EVD-T-D11-00071 (audio) and EVD-T-D11-00072 (translation) ; [REDACTED]

- **1 January 2008**[337] **– Reverend Jackson Kosgei**

- **3 January 2008**[338] **– ADC MD William Kirwa**

- **3 January 2008**[339] **– Honorable William Samoei Ruto** ('stop the killings' news): "ODM believes that the loss of life, the destruction of property that is going on in our country is unnecessary, unwarranted and should stop immediately. Urgent steps should be taken. We are prepared as the ODM to make urgent steps towards resolving this issue. We just hope the other side realizes the urgency with which the situation in our country needs to be dealt with".

- **3 January 2008**[340] **– Honorable William Samoei Ruto** (peace message): "[…] is William Arap Ruto of Eldoret North. I would like to take this opportunity to wish the Kalenjin listeners and the people of the nation of Kenya a blessed New Year and every success in the New Year that has God's blessings. I would like to tell our Kalenjin listeners that there is serious insecurity in the country. There are issues surrounding the elections that have been very complicated. As ODM people, we are trying to talk so that we can solve those issues in a peaceful manner. We continue to talk with the people in the nation of Kenya and those from other countries. Gordon Brown, the Prime Minister of Britain, talked with Honourable Raila. Also, Hon. Raila talked with many people from different countries. We are trying to find a just solution to the issues that transpired in the elections. I would like to appeal to the Kalenjin people wherever they are, and the people of Kenya to persevere and renounce violence. Let us desist from any action that may ruin peace in our country Kenya, so that we may find a peaceful solution to these issues and that every voter in the just concluded elections may find justice. We are trying to find a peaceful solution on behalf of the people, and all of us

[337] EVD-T-D11-00069 (audio) and EVD-T-D11-00070 (translation).
[338] EVD-T-D11-00067 (audio) and EVD-T-D11-00068 (translation).
[339] EVD-T-D11-00026 (audio) and EVD-T-D11-00073 (transcription).
[340] EVD-T-D11-00024 (audio) and EVD-T-D11-00025 (translation).

who voted; so we would like to appeal to all people. I have heard that there is much violence and insecurity in many areas in Kenya (eeh)-in Eldoret, in Kericho, in Sotik, in Kisumu, Busia, Mombasa, Nairobi and many other places. We appeal that, please, let us exercise restraint: let there be peace in this land. We do not want to use unlawful methods. We want to use peaceful means, until we find justice. So I would like to appeal to the Kalenjin people wherever they are, and all the people of Kenya that we refrain from violence and pursue peace so that our country may prosper. So…. we would like to appeal for patience and beseech the Kalenjin people and all the people of Kenya to live in peace and wait as we seek a solution to the political problems of our country in a peaceful manner."

- **4 January 2008[341] – Bishop Kogo**

201. These messages, repeatedly played on air by the radio station at which Mr Sang was Head of Operations and at his bidding, invariably call on the Kalenjin community to exercise restraint, to remain calm and to pursue a peaceful solution to the election debacle. These messages are completely contrary to a demonstrable intention on the part of Mr Sang to solicit, induce, aid and abet or contribute to crimes against humanity against the Kikuyu or PNU supporters.

202. Most significantly, Mr Sang himself was heard on air during this period, preaching peace, and asking for the roads to be opened.

- **1 January 2008[342] – Joshua arap Sang** (peace message): "[…] Elections are past. We should keep the peace. To all people, or anyone in Kenya who may be engaged in wrongdoing and is not keeping peace, or is breaching the peace, we would like to pray for peace; that please, all of us, let us keep peace as Kenyan people. Let us keep peace wherever we are. Peace is what we need. All people whom we have heard about - including others that we heard that people have burnt a church with people inside. Oh, Kalenjin people, if it is the

[341] EVD-T-D11-00074 (audio) and EVD-T-D11-00075 (translation).
[342] EVD-T-D11-00061 (audio) and EVD-T-D11-00062 (translation).

Kalenjin people who have done such acts, such an act should never be committed by a human being. No child should be burnt; no woman should be burnt; and no adult should be burnt. No one who has sought refuge in God's house - where the Lord is glorified - should be burnt. When a person has reached there, he has gone to seek the Lord to cover him. It is wrong, and it is not befitting for any human being to engage in such an act. So we are pleading for peace, peace, peace. Please, please, at Kass FM we are appealing for peace. […]Wherever you are, burning, destruction and killings should not be meted out on any person created by God; to destroy and cut short the life of a person created by God. Desist from any act that may destroy the peace. Refrain from any act that may incite to do evil. That is the message from Kass - that please, please, please, let us keep the peace. Let us refrain from destruction; let us refrain from any killings that criminal or other person may execute. Let us keep the peace, now and always. Peace, peace, our people".

- **4 January 2008**[343] – **Joshua arap Sang** ('open roads'): "Greetings Kalenjin people wherever you are tuned in to Kass FM. This is Joshua Arap Sang, saying we are well here in Nairobi. What I would like to appeal to our Kalenjin people is the matter that God's servants already requested; along with political leaders – led by William Ruto – that all Kalenjin people, wherever you are, please open the roads. Open the roads so that food may reach those in need of it. Open the roads so that people who have experienced various problems may reach the hospitals: there are expectant mothers who need to deliver, but this is difficult for them to reach the hospital. Further, open the roads so that a traveller may go his way. Open the roads so that the Red Cross workers may reach people who are in need of humanitarian assistance, such as food or taking such people to hospital. Also, food is a basic need for everyone, but now it cannot reach the market. We appeal that you open roads so that those foods may reach the market; that people may gain access to food. There are so many people who cannot now reach their places of work. Their one major concern is that they may lose their jobs for failure to arrive in time. Therefore, we would like to appeal in

[343] EVD-T-D11-00063 (audio) and EVD-T-D11-00064 (translation).

all humility to everyone everywhere to open every road that is closed, and to allow those people with assistance to reach those in need. Further, religious and political leaders have appealed that we refrain from any form of violence, because we see that destruction has pervaded many areas, worse still, people have turned one to another. Roads are closed, and people are forced to pay so that a vehicle that could be of help to people may pass. So life has become extremely difficult in many areas. That is why we are saying let us open the roads wherever you are. And also people should move away from the roads because so much is going on now; so much power has arrived, and it may affect people in a big way that tomorrow may bring much sorrow in terms of lives lost. Therefore open the roads and keep the peace in Kenya. Thank you very much. Let's do so. I am Joshua Araap Sang".

203. These are the genuine, heartfelt, and imploring words of Mr Sang, calling for peace to prevail. Mr Sang did not use his voice as a weapon, to provoke and coordinate violence, as the Prosecution argued at Confirmation.[344] The irrefutable audios of the pre-recorded peace messages that have been put on record during the Prosecution's case destroy the Prosecution's theory of the charges. The messages negate the nefarious allegations made (and largely recanted) by its witnesses. The record reflects that after the election results were announced and the violence started, Mr Sang used his position at the radio station to encourage the Kalenjin community to stop the violence and let peace prevail. On this basis alone, the charges that Mr Sang committed crimes against humanity must fail.

D. Mr Sang is Not Alternatively Liable under Article 25(3)(b) or (c)

204. For liability to attach to Mr Sang under Article 25(3)(b) for ordering, soliciting or inducing the commission of a crime which occurs or is attempted, or under Article 25(3)(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission, the Prosecution has to rely on

[344] T-6, 64:17-20.

the same set of flawed evidence which has been analysed and shown to be deficient above. Even if Mr Sang is removed from the Network, and even if the Prosecution could somehow show the existence of an organizational policy outside the Network, the evidence pertaining to broadcasts made by Mr Sang on Kass FM is so weak that it could not sustain a conviction.

205. Article 30 of the Rome Statute states that, "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." Here, the Prosecution has not demonstrated that Mr Sang intended and had knowledge of the attacks. Simply calling on people to demand their rights in the face of a flawed election is not sufficient to prove that Mr Sang intended and knew that violence would be committed against the PNU/Kikuyu along the way.

206. With regard to Article 25(3)(b), the Defence notes that incitement is not a crime in and of itself; it is most akin to inducement or solicitation as mode of liability. Unlike the Genocide Convention and the ICTR and the ICTY, the Rome Statute treats incitement as a mode of participation, not a separate crime.[345] The underlying crime must therefore be proven in order to charge a person with incitement under the Rome Statute.[346] Even if the Chamber is minded to take this approach toward remarks allegedly made by Mr Sang on the radio, the Prosecution's case would still fail because of the temporal disconnect between comments made on air in the months preceding the election and the action of people in various locations throughout the Rift Valley in the days after the election.

[345] *See* Thomas E. Davies, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide*, 22 HARV. HUM. RTS. J. 245, 245 (2009) ("[T]he Rome Statute of the International Criminal Court . . . reduces the status of incitement from a crime in its own right to a mode of criminal participation in genocide. Unlike the Rome Statute, the Genocide Convention and the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia all treat incitement as a separate crime.").
[346] *See id.* at 261 ("Just as it would be impossible for the ICC to convict someone of aiding and abetting genocide without the prosecutor showing that an act of genocide had in fact taken place and the defendant had aided and abetted it, the same is true of incitement.").

207. At the ICTR, the *Akayesu* Trial Chamber required "proof of a possible causal link between the statement made by the Accused during the said meeting and the beginning of the killings."[347] Similarly, the *Gacumbisti* Trial Chamber, in finding the accused guilty of incitement, stated in explaining the definition of instigating that those who committed the crimes had actually listened to the speech by the accused.[348] The ICTY has repeatedly held that "the *nexus* between instigation and perpetration requires proof."[349] Here, the Prosecution has not led any evidence, within the time period of the charges, to the effect that a direct perpetrator heard a broadcast by Mr Sang, and then, because of that broadcast, went and murdered or displaced or persecuted a Kikuyu or a PNU supporter. That nexus between Mr Sang's speech and the perpetrator's actions is completely lacking.

208. Accordingly, Mr Sang cannot be found liable on this set of facts pursuant to Article 25(3)(b) or (c).

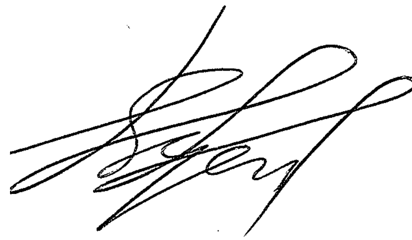
V. CONCLUSION

209. There have been clear shortcomings in the investigations conducted by the Prosecution in order to establish the truth. The Prosecution failed to extend the investigation to cover all facts and evidence relevant to the assessment of the individual criminal liability of the accused, as it is required to do under Article 54(1)(a) of the Rome Statute. From the outset, as Judge Kaul already noted in his dissent to the decision confirming the charges, the Prosecution failed to investigate incriminating and exonerating circumstances equally and thoroughly. As a result, its case as was presented at the confirmation hearing, has fully collapsed. It sought to replace this case by another, very weak and unconvincing case. This alone is sufficient grounds to throw the case out at this point.

210. Indeed, based on the above analysis, it is clear that the evidence the Prosecution relies on at trial "is not capable of satisfying the reasonable doubt standard", whether now or after a defence case. No reasonable Chamber can sustain a

[347] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, para. 349 (2 Sept. 1998).
[348] *Prosecutor v. Gacumbitsi,* ICTR-2001-64-T, Judgment, para. 11 (17 Jun. 2004).
[349] *Prosecutor v. Brđanin,* IT-99-36-T, Judgement, para. 269 (1 Sept. 2004).

conviction on the basis of the evidence. More specifically, evidence is lacking in respect of an organizational policy pursued by a "Network" or any other organization. Evidence is also lacking in respect of Mr Sang's own conduct, be it as a contributor, solicitor, inducer or aider and abettor. Taking the evidence at its highest, it does not establish criminal conduct, nor a nexus to criminal conduct, or Mr. Sang's intent to carry out criminal activities. Accordingly, no reasonable Chamber could convict Mr Sang on the basis of the Prosecution's evidence and the case should, therefore, be dismissed at this stage.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr Joshua arap Sang
Dated this 6th day of November 2015
In Nairobi, Kenya