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No.: **ICC-01/09-01/11**
Date: **26 October 2015**

TRIAL CHAMBER V(A)

Before: **Judge Chile Eboe-Osuji, Presiding**
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
With Public Annexes A and B

Public redacted version of "Corrigendum of Ruto Defence Request for Judgment of Acquittal", ICC-01/09-01/11-1990-Conf-Corr, 26 October 2015

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

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

The Office of the Prosecutor
Ms. Fatou Bensouda
Mr. James Stewart
Mr. Anton Steynberg

Counsel for William Samoei Ruto
Mr. Karim A. A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Dato' Shyamala Alagendra
Ms. Leigh Lawrie

Counsel for Joshua Arap Sang
Mr. Joseph Kipchumba Kigen-Katwa
Ms. Caroline Buisman

Legal Representatives of the Victims
Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms. Paolina Massida

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

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INTRODUCTION[1]

"And we are saying as the youth, speaking from Eldoret, this place is Kenya. There is no Kenyan who is not represented in Eldoret […] And we are saying, from Eldoret, that we want our Kenya for all Kenyans. We do not want tribalism." ~ **William Ruto, 23 November 2007**[2]

"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…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…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." ~ **William Ruto on Kass FM before 5 January 2008**[3]

"Q. And what [some PNU officials and some government officials] wanted [...] was to say William Ruto was responsible for that post-election violence in North Rift Valley even though he had nothing to do with it. I'm right, aren't I?
A. Yes." ~ **Testimony of P-0189**[4]

1. William Ruto's conduct before, during and after the 2007/2008 post-election violence in Kenya is beyond reproach. He campaigned on a platform of peace and equality in 2007, he called for peace when violence broke out after the elections and he was an architect of the Serena peace process which led, *inter alia,* to the formation of the CIPEV.[5] He has respected the rule of law and the authority of this court. This filing by the defence for Mr. Ruto ("Defence") will demonstrate that "[t]he underlying foundations of this case [were] rotten"[6] from the outset and William Ruto has no case to answer.

2. The case confirmed for trial - built primarily on the evidence of six witnesses (the "Confirmation Six") - bears little resemblance to the case which has emerged during the course of trial. There is no evidence upon which a reasonable Trial

[1] *See* Annex A for a list of abbreviations/definitions used in this request.
[2] EVD-T-D09-00247-track 3; EVD-T-D09-00250, lines 50-54.
[3] EVD-T-D11-00024; EVD-T-D11-00025
[4] T-50, 43:24-44:9.
[5] T-125, 39:4-40:14, 43:7-20; T-166, 61:12-23, EVD-T-D09-00219 to 00222.
[6] T-27, 64:3.

Chamber could find that Mr. Ruto "create[d] a community-backed organization – the Network – to attack multiple locations, in order to expel the targeted communities from the Rift Valley"[7] because of their perceived political affiliation.[8] Simply put, without the Network there is no case and the charges must be dismissed.

3. This case was confirmed based upon the statements of the "Confirmation Six".[9] Only three of these confirmation witnesses appeared before this Chamber, namely: (i) P-0658, who failed to testify in line with his original statement, stating, in respect of one meeting relied upon at confirmation,[10] that "it [was] not a story that [he]…want[ed] to stand by";[11] (ii) P-0743, who was declared "a thoroughly unreliable and incredible witness" by the OTP while on the stand;[12] and (iii) [REDACTED].[13] The fourth witness, P-0025, was withdrawn by the OTP as "not reliable".[14] The fifth witness, P-0015, whose [REDACTED][15] was the subject of the summons decision but the OTP decided not to call him.[16] Finally, P-0024, who [REDACTED], withdrew cooperation from the OTP for reasons unknown but was not made the subject of a summons request.[17] The evidence relied upon by the PTC to confirm this case has, on any analysis, evaporated.

4. The evidence obtained since confirmation is equally unreliable. [REDACTED] of the "linkage" witnesses identified by the OTP to be "necessary to prove its case"

[7] UPTB, para. 107.
[8] *E.g.*, UPTB, para. 97.
[9] The Confirmation Six are: P-0658 (CW 1); P-0743 (CW 2); [REDACTED] (CW 4); P-0025 (CW 5); P-0024 (CW 6); P-0015 (CW 8).
[10] *E.g.* Confirmation Decision, para. 189.
[11] ICC-01/09-01/11-T-173-CONF-ENG, 17:20-21. Hereinafter, transcripts will be referred to as (*e.g.*) T-173, etc.
[12] T-182, 8:1-2.
[13] [REDACTED].
[14] T-114, 50:2-5.
[15] ICC-01/09-01/11-474-Conf-Red, para. 14.
[16] ICC-01/09-01/11-1274-Corr2; T-189, 106:1-2.
[17] T-112, 3:19-4:5.

recanted under oath from their prior statements.[18] A sixth, [REDACTED], did not testify at all. The statements of [REDACTED] of these witnesses are now before the Chamber to be assessed for the truth of their contents. However, an analysis of this disavowed or untested evidence shows that it is mutually inconsistent, uncorroborated in its material incriminatory aspects and contradicted by other trial evidence including independent, objective evidence.[19] Further, as detailed below, the most striking feature of the remainder of the OTP's trial evidence, even when not adduced from recanting or absent witnesses, is that it is almost entirely hearsay or speculation. On this basis alone, judicial intervention is warranted and the case should be dismissed.[20]

5. The disintegration of the OTP's case cannot be blamed on extraneous factors, but derives directly from the serious deficiencies in the OTP's investigations from the outset, including the flawed decision to rely on witnesses sourced by the Waki Commission and the subsequent failure to properly investigate these witnesses' original accounts.[21] Had the OTP discharged its "legal and ethical obligation to make all reasonable efforts to ensure that the evidence it present[ed] [was] reliable and, to the extent possible, complete", the Defence submits that the OTP would "never have brought the charges in this case to begin with."[22]

6. In this request, a distinction is drawn between "Trial Evidence", defined as all evidence in the trial record save that admitted pursuant to decision ICC-01/09-01/11-1938-Conf-Corr, and "R68 evidence", defined as the body of evidence admitted pursuant to said decision. The Defence also proceeds on the basis that

[18] ICC-01/09-01/11-1866-Conf, paras. 52, 131, 147, 165, 179, 200. In fact, [REDACTED] recanted but P-0743 was not included in ICC-01/09-01/11-1866-Conf.
[19] *See* the Defence's arguments set out in ICC-01/09-01/11-1908-Conf-Corr.
[20] *See* Section V below.
[21] [REDACTED].
[22] ICC-01/04-01/07-3436-AnxI, para. 141.

the OTP will not rely on the evidence of: (i) [REDACTED];[23] (ii) P-0516 where the source of the witness' evidence is [REDACTED];[24] and (iii) P-0128 in relation to the alleged killing of the Kikuyu OCS in Nandi Hills, evidence shown by basic defence investigations to be demonstrably false.[25] Finally, unless otherwise stated, no challenge is made to the proper interpretation of the elements of the crimes or modes of liability at this stage of proceedings.

SUBMISSIONS

I. NO EVIDENCE OF A 'NETWORK'

A. The importance of the 'Network' to the OTP's case

7. The organisation, dubbed the 'Network' by the OTP,[26] is the keystone of the case.

8. According to the OTP, "[b]y 2007, RUTO was the head of a multi-faceted Network…based on…political, media, financial, tribal and military components."[27] Mr. Ruto and others allegedly established the Network for the sole purpose of implementing an organisational policy (or 'common plan') directed at: (i) punishing and expelling from the Rift Valley those perceived to support the PNU; and (ii) gaining power and creating a uniform ODM voting bloc.[28] The attacks were to take place "in the event of a PNU victory".[29] The existence of the common plan is, therefore, inextricably linked to the existence of the Network.[30] Ultimately, the OTP asserts that the three counts of crimes against humanity were committed through the Network.

[23] T-185, 43:6-9.
[24] T-141, 40:23-41:11.
[25] T-84, 3:10-14; T-85, 25:20-27-17.
[26] T-27, 26:19-20.
[27] UDCC, para. 40.
[28] UDCC, paras. 36, 40. The second limb "falls outside the legal framework of crimes against humanity" (Confirmation Decision, para. 213).
[29] UPTB, para. 72. *See also* paras. 27, 85, 126.
[30] UPTB, para. 108.

9. The existence of the Network is fundamental to the satisfaction of the legal building blocks of the OTP's case. Without it, the case must fail. Mr. Ruto is charged with three counts of crimes against humanity. Article 7(2)(a) of the Rome Statute ("Statute") requires that such crimes must have been committed "pursuant to or in furtherance of a State or organisational policy". The OTP's case is premised on the assertions that the Network qualifies as an 'organisation' and the common plan as the 'policy'.

B. Article 7(2), 'organisational policy'

10. The Statute does not define the terms 'organisational' or 'policy'. In this case, a Majority of the PTC held that the determination of whether a group qualifies as an organisation under the Statute must be made on a case-by-case basis.[31] In making this determination, the Majority found that a Chamber may take into account the following non-exhaustive considerations:

> *(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the above mentioned criteria.*[32]

11. The Defence submits that the Majority erred in adopting a new and overly broad definition of 'organisational policy'.[33] The Defence adopts its previous arguments on this matter.[34] Specifically, the Defence submits that Judge Kaul's interpretation of 'organisational policy' and conclusion that this Court has no jurisdiction *ratione materiae* over the present case because the crimes committed during the PEV were not committed pursuant to the policy of a State-like

[31] ICC-01/09-19-Corr, para. 93. *See also* Confirmation Decision, para. 185.
[32] ICC-01/09-19-Corr, para. 93 (footnotes omitted).
[33] Confirmation Decision, para. 33 endorsing the approach taken in ICC-01/09-19-Corr.
[34] ICC-01/09-01/11-305.

'organisation' is correct and means the Chamber should dismiss the charges for lack of jurisdiction.[35]

12. If, *arguendo*, the Chamber rejects Judge Kaul's approach or finds that it is not appropriate to raise such a challenge at this stage of proceedings, the Defence submits that there is no evidence on which a reasonable Trial Chamber could find the 'organisational policy' element of Article 7(2) satisfied.

13. As discussed more fully below, in determining that the Network qualifies as an Article 7(2) 'organisation', reliance was placed by the Majority on criteria (i), (ii), (iv) and (v) (see paragraph 10 above). More specifically, the Network was found to have responsible command, an established hierarchy and the necessary purpose, intent and capability to commit a widespread or systematic attack against the civilian population. While the Majority of the PTC was satisfied that the 'substantial grounds to believe' standard was met at confirmation, regarding the existence of an 'organisational policy', the OTP has failed to adduce sufficient evidence at trial to satisfy this indispensable contextual element of Article 7 to the requisite 'half-time' standard.

C. Failure to prove the existence of an Article 7(2) 'organisation'

14. Despite the UDCC's description of a hierarchically structured Network comprising five components and the OTP's opening claims that it would lead evidence of "a criminal organisation in the style of a mafia group or a triad organisation",[36] no evidence has emerged during trial to prove the creation, existence and operation of any such organisation. The OTP's failure to adduce sufficient evidence to fulfil Article 7(2) is fatal to its case.

[35] ICC-01/09-19-Corr, pp. 84 *et seq*; Confirmation Decision, pp. 140 *et seq*.
[36] T-27, 26:24; UDCC, paras. 40, 52-55.

15. At confirmation, the Network was found to qualify as an organisation within the meaning of Article 7(2) because it satisfied four of the Majority's non-exhaustive factors, namely: (i) it was under responsible command and had an established hierarchy; (ii) by December 2007, it possessed the means to carry out a widespread or systematic attack against the civilian population; (iii) it identified the criminal activities against the civilian population as its primary purpose; and (iv) it articulated an intention to attack the civilian population.[37] As pleaded in the UDCC, the Network qualifies as an organisation, not only because it allegedly had the means to carry out a widespread or systematic attack against a civilian population, but because it was a structured group under responsible command comprising political, media, financial, tribal and military components.

16. These factors qualifying the Network as an organisation were established at confirmation by reference to a series of "preparatory meetings…held by RUTO, and other members of the Network at various levels, to discuss, organise, and arrange the modalities of the implementation"[38] of the common plan.[39] The importance of these meetings *vis-à-vis* the Network is that steps were allegedly taken at them to establish the group's structure, including its command and hierarchy, and several issues, crucial for ensuring that the group had the means to implement the common plan, were dealt with including:

> *(1) selecting Commanders to oversee attacks in specific areas of the Rift Valley; (2) creating a hierarchy below each Commander; (3) coordinating transportation and logistics to and from the targeted locations; (4) announcing preparatory meeting and event locations; (5) fundraising to purchase weapons; (6) paying perpetrators and promising rewards for every PNU supporter killed or whose property was destroyed; (7) identifying target areas; (8) identifying callers to broadcast the Network's message on SANG's show on Kass FM; and (9) providing crude weapons, guns and ammunition to the direct perpetrators.*[40]

[37] Confirmation Decision, paras. 186, 197, 200, 207.
[38] UDCC, para. 38.
[39] Confirmation Decision, paras. 187-196.
[40] UDCC, para. 22. *See also* paras. 39, 97, 101 and PTB, para. 104.

17. However, none of the preparatory meetings relied on at confirmation[41] or in the UDCC[42] are in evidence. Given their fundamental importance to the OTP's case, their absence demonstrates a critical evidential gap that is fatal to the OTP's case. As shown below, this gap has not been filled by any other evidence.

18. The only Trial Evidence of purported "preparatory meetings"[43] comes from P-0536, P-0423 and P-0800. The evidence of these witnesses is not sufficient to establish the existence of an Article 7(2) 'organisation'.

19. In relation to P-0536, there is no reasonable basis upon which to conclude that this witness' evidence of [REDACTED] meetings at [REDACTED] compound were meetings to plan violence.[44] None of the steps set out in paragraph 16 above were taken and any link to the PEV is based purely on speculation. [REDACTED].[45] [REDACTED][46] However, the subject discussed at the meetings is unclear with the only identifiable topics being [REDACTED].[47] There is no reasonable basis on which to conclude that [REDACTED] were linked to the PEV. Further, there is nothing in the threats which the witness allegedly received from Kalenjin youth, including some [REDACTED], in situations unconnected to the meetings, that could reasonably be construed as linking the meetings to the PEV.[48] Therefore, P-0536's conclusion that the meetings indicated that there was some unspecified "problem" is without basis. P-0536's concession that [REDACTED] did not hear anything about violence at the meetings alone should mean that [REDACTED] evidence is disregarded.

[41] Confirmation Decision, paras. 187-196.
[42] UDCC, para. 59.
[43] *E.g.*, UDCC, Section V.A; UPTB, paras. 104, 108, 191.
[44] T-34, 44:23-65:19; T-39, 9:5-14:6.
[45] T-39, 36:9-12.
[46] T-39, 36:13-15.
[47] T-34, 59:6-22, 65:11-13.
[48] T-29, 34:1-17 (Kalenjin youth who P-0536 [REDACTED] said that if the Kikuyus did not vote for ODM they would face the consequences); T-41, 33:1-6 (after Kibaki was declared President, "young people" said the Kikuyu should go to "Oziah").

20. That said, while the Defence denies these meetings occurred, even taking the evidence at its highest, it is clearly insufficient to support the existence of the Network. P-0536 testified that Mr. Ruto attended only the [REDACTED] meeting. His connection to the [REDACTED] is based solely on the witness' speculation [REDACTED].[49] Therefore, all that is on the record is evidence of [REDACTED] gatherings on uncertain dates[50] at which discussions were allegedly had with Mr. Ruto in person [REDACTED].

21. In addition to being insufficient, the evidence is also incapable of belief in material respects. First, the improbable nature of P-0536's evidence is supported by the fact that the evidence about the first set of meeting dates conflicts with objective evidence that shows that Mr. Ruto was in Nairobi on [REDACTED] 2007,[51] and [REDACTED] and at two rallies on [REDACTED] 2007.[52] Second, it is highly improbable that [REDACTED] would ask [REDACTED], who understands Kalenjin,[53] [REDACTED] held by Kalenjins to plan attacks against Kikuyus, particularly when [REDACTED].[54] Third, P-0536's evidence that [REDACTED] Kikuyus is patently incredible.[55] Fourth, the evidence of youths having their toe nails painted by elderly men and the witness' speculation as to its significance is incapable of belief.[56] No other witness testified about youths wearing nail polish and P-0536's evidence is contradicted by other OTP evidence that bodies were not separated by ethnicity at the mortuary.[57]

[49] T-39, 11:4-12:2.
[50] In **re-examination**, P-0536 changed the date of the [REDACTED] meeting from [REDACTED] (T-42, 109-2:11). The date of the [REDACTED] meeting is unclear. The witness is shown [REDACTED] statement in re-examination but states [REDACTED] has nothing more to add (T-42, 109:23-110:11).
[51] MFI-T-D09-00001; EVD-T-D09-00002.
[52] [REDACTED].
[53] T-29, 23:8-10.
[54] T-42, 18:4-17.
[55] T-113, 20:2-19, 22:19-23:4; T-42, 40:6-41:2.
[56] T-39, 12:8-25.
[57] T-50, 66:23-67:8; T-104, 55:20-56:7.

22. The evidence of P-0423 and P-0800 regarding meetings can be swiftly dealt with. P-0423's evidence of two meetings allegedly held in Kapseret Forest[58] is entirely hearsay, lacks detail[59] and is based to a large extent on the witness' speculation [REDACTED].[60] Other than Mr. Ruto's alleged presence at these meetings, no incriminatory act is ascribed to him. Similarly, P-0800's evidence of meetings held in the [REDACTED] area prior to the PEV is hearsay, fails to show the operation of an organisation with any form of structure, let alone one with five components, or with the means to carry out a widespread or systematic attack against the civilian population and, speculation aside, makes no credible and reliable link to Mr. Ruto.[61] Thus, the evidence of both witnesses is insufficient to prove the existence of the Network.

23. The R68 evidence of [REDACTED], [REDACTED] and [REDACTED] that meetings were held at Sugoi on 20 October,[62] [REDACTED][63] and [REDACTED] 2007,[64] also fails to provide any basis on which a reasonable Trial Chamber could find that an 'organisation' for the purposes of Article 7(2) existed. The Defence denies that these meetings took place and, for the reasons set out more fully in Section V below, submits that this unsworn, hearsay evidence disavowed by [REDACTED] and [REDACTED] and untested in respect of [REDACTED] should not be relied on. In addition, an analysis of each witness' statement reveals that, even if it is found that the meetings involved an element of planning (which is denied), the evidence is insufficient because it fails to satisfy the Majority's non-exhaustive criteria for determining whether a given group qualifies as an 'organisation'.

[58] T-67, 58:19-79:13.
[59] *E.g.* no date is provided for the first meeting and the date of the second was "just prior to the elections" (T-67, 66:7).
[60] T-67, 64:10-14, 78:6-13.
[61] T-155, 30:11-39:20.
[62] EVD-T-OTP-00334, paras. 19-55.
[63] EVD-T-OTP-00132, paras. 64-91; EVD-T-OTP-00133, para. 26.
[64] EVD-T-OTP-00149, paras. 44-49.

24. Nothing in [REDACTED] untested, unsworn, uncorroborated, hearsay evidence about an alleged gathering at Mr. Ruto's home in Sugoi on 20 October 2007, attended by 600 people including alleged Network members Kisorio, Tilawen and "Farouk", establishes the existence of an Article 7(2) 'organisation'.[65] [REDACTED] evidence does not show the operation of an organisation "under responsible command" and "with an established hierarchy"[66] nor of any other organisation no matter how loosely defined or structured. Contrary to the OTP's case that the common plan was "to implement the attacks in the event of a PNU victory in the elections",[67] [REDACTED] alleges that Mr. Ruto said the Kikuyu were to go home "whether we win or not".[68] Finally, the statements allegedly made by Mr. Ruto that "we have rich people who are able to finance us in every way" and "Kalenjins based in places like Uganda…will even send guns and these can be distributed to the youth"[69] are denied and, in any event, do not establish that the so-called 'Network' had the means necessary to carry out crimes against humanity.[70] No evidence is provided about the identities of the persons who would provide the funds and guns or, more importantly, if they were actually provided. This untested, hearsay evidence about guns cannot be isolated from the fact that there is no reliable evidence that any Kikuyu or PNU supporter was shot dead in the Rift Valley during the PEV.

25. [REDACTED] R68 evidence, taken at its highest, concerns an alleged meeting at Mr. Ruto's Sugoi home on [REDACTED] 2007 attended by, *inter alia*, alleged Network members Kisorio, Tirop and Kibet, the primary purpose of which appears to have been the sourcing of [REDACTED].[71] [REDACTED].

[65] EVD-T-OTP-00334, paras. 19-55.
[66] *Contra* Confirmation Decision, para. 197.
[67] UPTB, para. 72.
[68] EVD-T-OTP-00334, para. 31.
[69] EVD-T-OTP-00334, para. 33.
[70] *Contra* Confirmation Decision, para. 200.
[71] EVD-T-OTP-00132, paras. 64-91.

[REDACTED] speculates that this word was used to refer to guns.[72] At this meeting, Mr. Ruto allegedly tasked Kibet and Tirop [REDACTED] and said that those gathered would be informed through unspecified means if there were [REDACTED]. [73] If, *arguendo*, the Chamber relies on this evidence notwithstanding that it is uncorroborated, disavowed, hearsay, it does not establish the existence and operation of an Article 7(2) 'organisation'. [REDACTED] does not provide evidence which supports the OTP's theory of a structured Network comprising five components. The alleged delegation of a task to Kibet and Tirop is isolated and patently inadequate to constitute evidence of an organisation under responsible command and with an established hierarchy capable of committing crimes on a widespread or systematic basis. Nor does [REDACTED] evidence show that the group gathered on [REDACTED] possessed the means to carry out an attack against the civilian population because there is no evidence that Kibet or Tirop acquired [REDACTED]. For example, if [REDACTED] R68 evidence is to be relied on, this witness clearly stated that the Kalenjin warriors at [REDACTED] who were allegedly under the command of Tirop did not have any guns.[74] Again, the Defence underlines that the evidence on the record about deaths from gunshot belies the allegations that guns were used by Kalenjin perpetrators against PNU supporters.

26. [REDACTED] hearsay evidence regarding a meeting at Mr. Ruto's Sugoi house on [REDACTED] 2007 attended, *inter alia*, by alleged Network members such as Kapondi, Seii, Kibet, Kibor and Joshua Sang is subject to the same criticisms as set out above in respect of the R68 evidence provided by [REDACTED] and [REDACTED].[75] Taking the evidence at its highest, effectively all [REDACTED] evidence supports is the making of anti-Kikuyu rhetoric by Kibet when Ruto is

[72] EVD-T-OTP-00132, paras. 76, 80.
[73] EVD-T-OTP-00132, paras. 87-88.
[74] EVD-T-OTP-00174, para. 94.
[75] EVD-T-OTP-00149, paras. 44-49.

not present and an assertion by Kibet that Ruto and other businessmen would give funds [REDACTED]. As explained below, there is no evidence before this Chamber that such funds [REDACTED] were provided by Mr. Ruto.

27. [REDACTED] uncorroborated evidence is also incapable of belief. The evidence before the Chamber strongly indicates that the witness is inherently unreliable and the material elements of [REDACTED] original account untrue. [REDACTED] evidence of the [REDACTED] is inseparable from [REDACTED] account of having attended a rally at [REDACTED] earlier that day.[76] However, independent media evidence establishes that the ODM elite, with Mr. Ruto, campaigned some distance away in Western Province on [REDACTED].[77] Further, [REDACTED], the [REDACTED] other witness who originally claimed to have gone to this non-existent rally, when confronted with his prior statement, said it was wrong and that there was no rally on [REDACTED].[78]

28. The OTP's failure to adduce evidence of so-called "preparatory meetings" or meetings at which the steps crucial to the implementation of the common plan were taken means it has failed to prove "the core of the case"[79] and, more specifically, the existence of an Article 7(2) 'organisation'. This failure is not remedied by other non-meeting-based evidence.

29. The existence of an 'organisation' cannot reasonably be founded on the Trial Evidence of P-0613 and the R68 evidence of [REDACTED] and [REDACTED]. A fair evaluation of this evidence does not establish a sufficient basis upon which a reasonable Trial Chamber could find the existence of the so-called Network so as to satisfy Article 7(2) of the Statute.

[76] EVD-T-OTP-00149, paras. 37-43.
[77] [REDACTED].
[78] T-160, 6:18-7:2.
[79] At confirmation, it was identified that "the core of the case *sub judice* is meeting-based" (Confirmation Decision, para. 110).

30. P-0613 testified that [REDACTED] told her that he was reporting to [REDACTED] during the attack on Turbo, that [REDACTED] was reporting to Mr. Ruto [80] and that Kisorio, Tirop and Kibet received "directions from Honourable Ruto".[81] According to [REDACTED] statement, which the witness disavowed under oath and testified was made up at the instigation of [REDACTED],[82] on [REDACTED] 2007 at around 7.30 pm at [REDACTED], [REDACTED] heard Kisorio recount to a group of 200 Kalenjin youth the details of a telephone call he had had with Mr. Ruto in which Ruto allegedly asked [REDACTED].[83] Ruto allegedly [REDACTED].[84] Thereafter, Kisorio allegedly issued certain instructions about the attack on [REDACTED] and [REDACTED].[85] [REDACTED].[86]

31. In [REDACTED] original statement, which [REDACTED] also disavowed under oath and testified was made up at the instigation of [REDACTED],[87] [REDACTED] identified Christopher Kitino as the leader of a group of elders based in [REDACTED] in [REDACTED] alongside about 1,000 Kalenjin warriors.[88] [REDACTED] also identified Tirop as being "in charge of the youth".[89] According to [REDACTED], the elders were communicating with places such as [REDACTED] and [REDACTED] where meetings similar to the one at [REDACTED] were taking place.[90]

32. The evidence of P-0613, [REDACTED] and [REDACTED] is insufficient for the following reasons. First, it is all hearsay. Indeed, [REDACTED] evidence is double hearsay. The repeated identification of evidence as hearsay throughout

[80] T-119, 53:9-54:12.
[81] T-119, 50:24-52:19.
[82] [REDACTED].
[83] EVD-T-OTP-00132, para. 106.
[84] EVD-T-OTP-00132, para. 106.
[85] EVD-T-OTP-00132, para. 108. *Also* paras. 106-107.
[86] EVD-T-OTP-00132, paras. 109-111.
[87] [REDACTED].
[88] EVD-T-OTP-00174, para. 65.
[89] EVD-T-OTP-00174, para. 67.
[90] EVD-T-OTP-00174, para. 70.

this motion is significant. As the Presiding Judge cautioned, hearsay evidence should not "saturate the record" or artificially bolster evidence.[91] The Defence submits that no reasonable Trial Chamber could find that an Article 7(2) 'organisation' is established solely, or even in large part, on the basis of hearsay.[92]

33. Second, P-0613's hearsay evidence does not establish a reporting structure because no evidence was elicited by the OTP regarding the basis of [REDACTED] knowledge regarding [REDACTED] purported reporting to Ruto and, critically, the witness failed to give examples of "directions". Even taking P-0613's evidence at its highest, it is plain that questions such as "Where are they?" and "How far have you gone?" cannot be construed in any way as "directions".[93]

34. Third, the terms of Mr. Ruto's alleged call to Kisorio are equivocal. No orders, directions, coordination or organisation are provided during the call. Further, the phrase in [REDACTED] Rule 68 statement [REDACTED] made in reference to Mr. Ruto's request for [REDACTED] is clearly the product of the witness' speculation.

35. Fourth, a *prima facie* assessment of the three witnesses' evidence shows that it concerns [REDACTED] and does not extend to all charged locations. A group comprising Mr. Ruto, Kisorio, Tirop, other local elders and Kalenjin youth which planned and perpetrated attacks on [REDACTED] clearly falls far short of the Network presented in the UDCC, comprising five components which allegedly launched coordinated attacks on several locations in Uasin Gishu and Nandi Districts. Properly considered, the evidence indicating the existence of any [REDACTED]-based group (which is denied) simply points to an isolated situation and not one which can be linked to all the charged crimes. Further, it is

[91] T-62, 39:25-40:11.
[92] *See also* Section V on the hearsay nature of the case.
[93] T-119, 51:23-52:8.

clear there was no over-arching organisation under which this isolated group was acting. [REDACTED] evidence that the elders at [REDACTED] were in touch with other elders in other locations is of no assistance to the OTP because, at its highest, it simply shows a flow of information including about the arrival of Mungiki rather than revealing any coordination or organised links between the different groups. Any narrowly focused [REDACTED]-based group cannot reasonably be considered an 'organisation' for the purposes of Article 7(2) whose criminal activities warrant international intervention.

36. Finally, evidence of a "mafia group" with Ruto at its apex cannot reasonably be found in speculation. P-0356's evidence that [REDACTED] told youths on 4 January 2008 that he was "still waiting for orders from above whether they will stop the roadblocks…or not"[94] and P-0356's understanding that "above" meant Mr. Ruto is plainly speculation. As is P-0658's evidence that the references to the "leader" (*kirwakindet*) made at the [REDACTED] 2007 meeting in [REDACTED] meant Mr. Ruto.[95]

37. In so far as an organisation within the meaning of Article 7(2) must have sufficient means to carry out a widespread or systematic attack against the civilian population, Section III below demonstrates that the OTP has failed to adduce sufficient evidence that the necessary resources were available.

38. In conclusion, nothing in the Trial and/or R68 evidence considered above provides sufficient evidence of the existence of a highly organised, "co-ordinated" group "under single leadership" with "an established structure", including "political, media, financial, tribal and military components" each of which "was entrusted with detailed tasks in planning, preparing, and

[94] T-76, 90:1-12.
[95] T-163, 96:1-108:22.

implementing the common plan",[96] and with the "necessary means" to commit the crimes charged.[97] This is what the OTP stated it would prove. It has failed.

D. Failure to prove the existence of an Article 7(2) 'policy'

39. The OTP's failure to adduce sufficient evidence to establish the existence of an 'organisation' for the purposes of Article 7(2) is fatal to the OTP's ability to prove the existence of an 'organisational policy' (or 'common plan').[98] Both are inextricably linked in this case because the plan's objective was allegedly "articulated", "reaffirmed" and steps taken to implement it in the same meetings which created and solidified the operation of the Network.[99] These steps, stated to have been "crucial for the implementation of the policy",[100] included:

> *(i) the appointment of commanders and divisional commanders responsible for the operations on the field; (ii) the production of maps marking out the areas most densely inhabited by communities perceived to be or actually siding with the PNU; (iii) the identification of houses and business premises owned by PNU supporters with a view to target them; (iv) the purchase of weapons as well as of material to produce crude weapons and their storage before the attack; (v) the transportation of the perpetrators to and from target locations; and (iv) 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.*[101]

40. In the present case, these steps were intended to serve a dual purpose, namely to prove the existence of a policy and to provide the necessary link between the policy and the attack.[102]

41. At confirmation, the Majority noted that, for the Article 7(2) policy requirement to be satisfied, the attack carried out must have been "'planned, directed or

[96] UPTB, para. 118.
[97] UPTB, para. 28.
[98] The "common plan" overlaps with the requirement of a policy in this case (Confirmation Decision, para. 209).
[99] UPTB, paras. 108, 118.
[100] Confirmation Decision, para. 219.
[101] Confirmation Decision, para. 219.
[102] The attack must have been "pursuant to or in furtherance" of the organisational policy *per* Article 7(2). *See also* ICC-01/04-01/07-3436-tENG, para. 1114.

organised', as opposed to 'spontaneous or [consisting of] isolated acts'".[103] According to the OTP, in this case, the pre-established design for the attacks carried out at the charged locations manifested in the course of the "preparatory meetings". Thus, the OTP's case theory is that the existence of the organisational policy was clear from the outset through the "existence of preparations or collective mobilisation orchestrated and coordinated by"[104] the Network.

42. As outlined in Section III.B below, the Defence denies that Mr. Ruto made any inciting speeches. However, if these arguments are rejected, in the absence of the "preparatory meetings" and any cogent evidence of a Network, all that can be discerned from the disputed evidence on the record is hollow anti-PNU and alleged anti-Kikuyu rhetoric made at rallies and public meetings to amorphous crowds rather than an organisational policy linked to the crimes committed at the charged locations. This is underlined by the fact that there is no evidence that any of the "crucial" implementing steps were taken.

43. For all these reasons, the Defence submits that the OTP has failed to adduce sufficient evidence on which a reasonable Trial Chamber could find that there existed an 'organisation' and/or a 'policy' to commit the attacks against the PNU supporters within the meaning of Article 7(2).

E. The PEV was a spontaneous, nationwide reaction to "rigged" elections

44. Contrary to the OTP's theory, the PEV was not committed pursuant to or in furtherance of an 'organisational policy'. Instead, the evidence led at trial supports the conclusion that the PEV was a spontaneous, nationwide reaction to the perception that the elections were rigged, rather than being "attributable to one and the same group of Kalenjin perpetrators…following a unified, concerted

[103] Confirmation Decision, para. 210 citing to ICC-01/04-01/07-717, para. 396. *See also* ICC-01/09-02/11-382-Red, para. 111; ICC-01/04-02/06-36-Red, para. 24; ICC-02/11-01/11-656-Red, paras. 213-216; ICC-02/11-01/11-9-Red, para. 37 citing ICC-02/11-14-Corr, paras. 42-46.
[104] ICC-01/04-01/07-3436-tENG, para. 1109.

and pre-determined strategy" at the charged locations in the Uasin Gishu and Nandi Districts.[105]

45. As P-0268 acknowledged, "by 2007 there was a perception that [Kenya had] an over-powerful presidency and a regime that had a criminal element".[106] Many Kenyans did not trust the government.[107] There were concerns that Kibaki and the so-called "Mount Kenya Mafia" were not willing to share power and that, by 2007, Kibaki was not going to give up power willingly.[108] These concerns were exacerbated by Kibaki's appointment of 19 out of the 22 ECK commissioners[109] and the perception that the elections would be rigged.[110]

46. Nevertheless, there was considerable expectation throughout Kenya that ODM would win the 2007 elections.[111] In the days immediately following the election, Odinga was winning by a considerable margin.[112] But the delay in announcing the results caused tensions to rise due to fears about rigging.[113] The delay prompted the ECK Chairman to ask "What kind of cooking is going on?".[114] International election observers also expressed concern about widespread irregularities.[115] As conceded by P-0464, "[t]here was a massive degree of frustration on the part of a lot of people. And the explosions of violence…which would immediately start after the results, that's based…on the fact that there was a massive feeling of injustice in a lot of areas in Kenya".[116] Even before the results were announced, violence flared between Kikuyus and Luos in Langas.[117]

[105] Confirmation Decision, para. 168.
[106] T-63, 85:14-16. *See also* T-89, 44:20-45:15; T-90, 37:13-38:7, 39:15-42:2, 46:20-47:20.
[107] T-63, 85:17-19.
[108] T-63, 80:8-81:12. *See also* T-49, 76:18-24; T-90, 45:22-46:19; T-120, 18:18-21.
[109] T-63, 85:25-86:9; T-90, 59:4-13.
[110] T-49, 76:18-24; T-51, 32:5-12, 35:17-36:1; T-120, 14:6-15:12; EVD-T-D09-00049; EVD-T-D09-00295; EVD-T-D11-00045.
[111] T-54, 32:15-33:2; T-90, 52:22-54:2; T-120, 18:18-21; EVD-T-OTP-00328 at 0550, 0595.
[112] T-71, 73:14-74:1.
[113] T-49, 79:11-80:19; T-63, 86:16-87:16; T-120, 18:22-20:15; MFI-T-D09-00051 at 00:48.
[114] T-49, 79:17-21; T-120, 19:8-17.
[115] T-49, 90:4-7; T-71, 77:23-78:3; T-63, 87:22-88:4.
[116] T-90, 58:16-20.
[117] T-49, 58:11-19, 94:9-96:11; T-122, 61:8-62:11; T-171, 92:1-94:9.

When Kibaki was finally announced as the winner, the result was that a spontaneous wave of violence erupted all over Kenya, not just in the Uasin Gishu and Nandi Districts, but starting in Nairobi and extending to Nyanza, Coast and Western Provinces.[118] The situation was inflamed by, *inter alia*, the broadcasting ban, the rushed presidential swearing in ceremony and rumours that Odinga and Ruto had been arrested and that the Mungiki were going to attack non-Kikuyus.[119]

47. There is no evidence before the Chamber to support the OTP's contention that the PEV in the North Rift was undertaken pursuant to a highly organised and well-coordinated plan with the direct perpetrators attacking locations identified beforehand on maps or seeking to obtain weapons from pre-arranged storage places.[120] Nor is there any evidence that these perpetrators were well-funded or logistically prepared.[121] Instead, P-0658,[122] [REDACTED],[123] [REDACTED][124] and [REDACTED][125] all speak about *ad hoc* preparations being undertaken in the midst of the violence, including by purported Network members, desperately trying to raise funds for weapons and transport or to source guns.

48. Finally, several witnesses testified that, in various locations subject to the charges, attacks were allegedly committed by people from several ethnic groups, including Luos and Luhyas and not only Kalenjins.[126] The Defence submits that this is fatal to the OTP's case, as reflected in the Confirmation Decision, that the crimes "were attributable to one and the same group of Kalenjin

[118] T-49, 82:18-84:11; T-65, 69:1-70:4; T-89, 72:19-73:3; T-120, 20:20-21:23; EVD-T-D11-00050; EVD-T-OTP-00149, para. 89; ICC-01/09-01/11-451-AnxA, agreed fact 99.
[119] T-49, 81:23-82:17, 84:16-86:16, 96:16-19; T-71, 74:10-77:22, 78:25-79:21, 110:24-111:1.
[120] *Contra* UDCC, paras. 22, 39, 97, 101.
[121] *Contra* UDCC, paras. 22, 39, 97, 101.
[122] Fundraising at Ziwa on 31 December 2007 and at Lucas Sang's funeral in January 2008 (T-164, 28:10-16, 76:21-25; T-173, 44:25-45:11).
[123] [REDACTED].
[124] [REDACTED].
[125] [REDACTED].
[126] *E.g.*, P-0189, T-48, 74:21-75:2; T-0487, T-55, 8:17-21; T-0442, T-99, 16:21-17:17, 55:25-56:3; P-0508, T-104, 64:17-68:21; T-0469, T-107, 24:16-35:2; P-0405, T-122, 9:11-10:17; P-0637, T-147, 27:17-29:2.

perpetrators…following a unified, concerted and pre-determined strategy"[127] at the charged locations in Uasin Gishu and Nandi Districts.[128]

II. FAILURE TO PROVE THE REQUISITE CAUSAL NEXUS

49. If, *arguendo*, the Chamber finds that there is sufficient evidence on which it could reasonably find that the PEV was committed pursuant to or in furtherance of an 'organisational policy', then the OTP has failed to lead sufficient evidence to establish Mr. Ruto's individual criminal responsibility for the crimes charged, to the standard applicable in determining 'no case to answer' motions.

50. To found Mr. Ruto's responsibility for the crimes charged, the OTP relies on the same acts and contributions for all modes of liability charged in the UDCC or notified in the Regulation 55 Notice, *i.e.* liability under Article 25(3)(a), (3)(b), (3)(c) and/or (3)(d).[129] All four modes require the OTP to prove a particularised causal nexus between Mr. Ruto's alleged personal acts and conduct and the crimes. As detailed in this motion, the OTP has failed to adduce sufficient evidence to satisfy the 'no case to answer' standard that Mr. Ruto's alleged personal acts or omissions amounted to an 'essential contribution' to (Article 25(3)(a)), had a 'direct' (Article 25(3)(b)) or 'substantial' (Article 25(3)(c)) effect on, or constituted a 'significant contribution' to the commission of the crimes alleged.

51. In order to prove an accused's criminal responsibility as an in-direct co-perpetrator (Article 25(3)(a)), Chambers of the Court (unanimously or by Majority) have consistently affirmed it must be shown that an accused acting

[127] Confirmation Decision, para. 168.
[128] *See also* the OTP's assertion that the Network was created using "existing structures and roles in Kalenjin society" (UDCC, para. 108).
[129] ICC-01/09-01/11-433, paras. 24-35; UPTB, paras. 135-138.

within the framework of a common plan provided an 'essential' contribution[130] such that by not performing such task(s) he or she "would have the power to frustrate the commission of the crime"[131] or the "way it was committed".[132] The OTP's wrongly founded proposition,[133] that a 'substantial' contribution is sufficient to incur liability under Article 25(3)(a),[134] should be rejected. The OTP has failed to adduce sufficient evidence to prove – and indeed does not submit that – Mr. Ruto was assigned 'essential' tasks within the framework of the alleged common plan such that his non-performance of such tasks "would have the power to frustrate the commission of the crime" or the "way it was committed". Mr. Ruto accordingly has no case to answer with respect to his alleged liability under Article 25(3)(a). Even under the OTP's incorrect lower standard of 'substantial' contribution, the OTP has failed to adduce sufficient evidence that Mr. Ruto's alleged acts or omissions within the framework of the alleged common plan and Network substantially contributed to the formation or operation of the alleged Network or otherwise to the commission of the crimes alleged.

52. With respect to the alternative modes of liability of ordering, soliciting or inducing (Article 25(3)(b)),[135] aiding, abetting or otherwise assisting (Article 25(3)(c),[136] and in any other way contributing (Article 25(3)(d)),[137] these modes

[130] *E.g.*, ICC-01/04-01/06-803-tEN ("Lubanga Confirmation"), para. 347; ICC-01/04-01/07-717, para. 525; ICC-02/05-03/09-121-Corr-Red ("Banda Confirmation"), para. 136; Confirmation Decision, para. 306; ICC-01/04-02/06-309, para. 108.
[131] Lubanga Confirmation, para. 347.
[132] Banda Confirmation, para. 136.
[133] The OTP, while conceding that Trial Chamber I in its Judgment in the *Lubanga* case confirmed the 'essential' contribution requirement, infers that in actuality the Chamber requires only a 'substantial' contribution "given [the finding] that the accused alone need not exercise control over the crime" (ICC-01/09-01/11-433, para. 11, citing to ICC-01/04-01/06-2842 ("Lubanga Judgment"), paras. 1006, 1018(ii)). The OTP ignores the Chamber's full finding, that the "the control over the crime falls in the hands of a collective" under Article 25(3)(a) (Lubanga Judgment, para. 994), which is consistent with the 'joint control' theory applied by the other Chambers of the Court (*see*, *e.g.*, Lubanga Confirmation, para. 347).
[134] UPTB, para. 94.
[135] Addendum, paras. 2-7.
[136] Addendum, paras. 8-12.
[137] Addendum, paras. 13-29.

require proof (not mere inference or assumption), as the OTP accepts,[138] of a sufficient causal effect between Mr. Ruto's alleged acts and conduct and the commission of the crimes. With regard to ordering, the Defence agrees with the OTP that "proof of a superior-subordinate relationship" is required,[139] which, as set out in this motion, the OTP have demonstrably failed to establish between Mr. Ruto on the one hand, and the alleged Network members and/or the direct perpetrators of the alleged crimes on the other.

53. Further, the OTP has patently failed to adduce sufficient evidence to demonstrate that Mr. Ruto's alleged orders/instructions, or alleged acts of solicitation and/or inducement[140] had a "direct effect"[141] on the commission of any crime alleged. For example, with respect to Mr. Ruto's alleged statements at public rallies,[142] the OTP has adduced no evidence that the direct perpetrators of the crimes attended such rallies, otherwise heard the alleged statements, and even if they had heard such statements, that the statements were "a factor substantially contributing to [their] conduct".[143] In regard to assessing the existence of 'direct effect', Chambers have found such causal nexus to exist when the instructions, solicitation or inducement were provided directly by an accused to the direct perpetrators or an individual in a position of high authority, the communications were of a specific nature, and such acts were very quickly followed by the crime alleged.[144] Accordingly, where such temporal,

[138] Addendum, paras. 3, 9, 19-22.
[139] Addendum, para. 4.
[140] Addendum, paras. 5-6.
[141] Addendum, paras. 3-4. ICC Chambers affirm the 'direct effect' causal nexus: ICC-02/11-02/11-186, para. 161; ICC-01/05-01/13-749, para. 34; ICC-02/11-01/11-656-Red, para. 244; ICC-01/04-02/06-309, para. 153.
[142] Addendum, para. 6.
[143] *Prosecutor v. Kordic et al.*, IT-95-14/2-A, Appeals Judgment, 13 December 2004, para. 27 (emphasis added). *See also Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Appeals Judgment, 7 July 2006, paras. 137-138 (sustaining Trial Chamber finding of a lack of a causal nexus between the instigating statement and charged rapes and affirming that the Prosecution's submissions were "speculative").
[144] *See* ICC-02/11-01/11-656-Red (finding substantial grounds to believe that the accused's orders or instigation had a direct effect on an attack perpetrated by a *de facto* militia due to the accused having instructed the leader of the militia to participate in repressive actions, which actions then commenced on the same day); ICC-02/05-01/07-1, paras. 90-91 (finding reasonable grounds that the suspect "personally incited Militia/Janjaweed" based on the alleged attack having occurred immediately following the suspect's speech, which described the target

communicative and/or accused-perpetrator nexuses are attenuated, the greater the burden on the OTP to adduce specific evidence of the alleged direct and substantial effect of the accused's actions on the commission of the crimes pursuant to Article 25(3)(b).

54. The OTP has equally failed to adduce sufficient evidence demonstrating that Mr. Ruto's alleged acts of aiding, abetting and/or otherwise assisting,[145] whether taken individually or collectively, had a "substantial effect"[146] on, or, *per* the lower, incorrect standard proposed by the OTP, "did in fact facilitate" in a non-neutral fashion,[147] the commission of the crimes. For example, the OTP has adduced no evidence that the guns Mr. Ruto allegedly purchased[148] were actually used by direct perpetrators in the crimes alleged; no effect on the crimes, let alone a substantial one, is demonstrated.

55. Additionally, with respect to Article 25(3)(c) liability, the OTP does not even attempt to prove the requisite *mens rea* - that Mr. Ruto acted with the purpose of facilitating the commission of the crime[149] - instead submitting that proof that the

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population as "rebels" and "booty" for the "Mujahidin" and "promis[ing] a large amount of money to the Militia/Janjaweed and the continuous support of the government").

[145] Addendum, para. 11.

[146] PTC I, in *Mbarushimana*, noted that "the application of analogous modes of liability [to Articles 25(3)(b) and (c)] at the *ad hoc* tribunals suggests that a substantial contribution to the crime may be contemplated" (ICC-01/04-01/10-465-Red, para. 279). In *Blé Goudé*, PTC I did not address as a matter of law the level of contribution required for culpability under Article 25(3)(c) (ICC-02/11-02/11-186, para. 167). PTC II, in *Bemba et al.*, held that Article 25(3)(c) culpability requires that the "contribution has an effect" on the commission of the crime, but did not specifically address the level of contribution required (ICC-01/05-01/13-749, para. 34). The SCSL Appeals Chamber, after an exhaustive review of the relevant jurisprudence of the *ad hoc* Tribunals and the SCSL, held that that the 'substantial effect' requirement arises as a matter of customary international law with respect to criminal liability for aiding or abetting (SCSL-03-01-A, *Taylor*, Judgment, para. 371).

[147] Addendum, para. 9.

[148] Addendum, para. 11(i).

[149] As specifically set out in Article 25(3)(c) and affirmed by PTC I (ICC-01/04-01/10-465-Red, para. 281; ICC-01/04-01/10-465-Red, para. 167) and PTC II (ICC-01/05-01/13-749, para. 35). *See also* K. Ambos, "Article 25", in O. Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court (2008), p. 757 (internal citations omitted). The Defence submits that Professor Ambos is, however, incorrect in then concluding that the "word 'facilitating' [in the context of *mens rea*] confirms that a direct and substantial assistance is not necessary" for purposes of Article 25(3)(c) (*id.*). Ambos corrects this error in reasoning in his oral submissions before PTC I in *Mbarushimana* (ICC-01/04-01/10-T-8-Red2-ENG, p. 10, line 4 to p. 11, line 2).

accused was aware that the crime will occur in the ordinary course of events, is sufficient.[150]

56. Finally, with respect to Article 25(3)(d), the OTP submits that this mode of liability "merely requires the existence of a link or nexus between the act and conduct of an accused and the commission of a crime by a group acting with common purpose [the members of the alleged common plan according to the OTP[151]]",[152] which may be satisfied by any conduct so long as it is not *de minimis*.[153] The OTP primarily relies on, in support of its 'mere existence' standard of contribution, the Confirmation Decision, and a separate opinion of Judge Fernandez from an Appeals Chamber judgment. First, the paragraph of the Confirmation Decision relied on by the OTP[154] does not support its 'mere existence' standard. Rather, the Pre-Trial Chamber commented that "the contribution under subparagraph (d) is satisfied by a less than 'substantial' contribution".[155] Second, Judge Fernandez's separate opinion on this point[156] is contrary to the holdings of Pre-Trial Chamber I in *Mbarushimana* (the subject of Judge Fernandez's separate opinion)[157] and Trial Chamber II in *Katanga*[158] that, at the very least, a 'significant' contribution is required for an accused to incur liability under Article 25(3)(d).

57. While the Defence does not concede that a 'significant' rather than 'substantial' contribution is the minimum level of contribution necessary to incur liability under Article 25(3)(d), the OTP has failed, as set out in this motion, to adduce

[150] Addendum, para. 10.
[151] Addendum, para. 27.
[152] Addendum, para. 20 (emphasis added).
[153] Addendum, para. 21.
[154] Addendum, para. 19, fn. 51, citing to Confirmation Decision, para. 354.
[155] Confirmation Decision, para. 354.
[156] ICC-01/04-01/10-514 OA4, Separate Opinion of Judge Silvia Fernandez de Gurmendi. The Majority of the Appeals Chamber did not consider this issue on the merits.
[157] ICC-01/04-01/10-465-Red, para. 283 ("[T]he Chamber finds that the contribution to the commission of a crime under article 25(3)(d) of the Statute cannot be just any contribution and that there is a threshold of significance below which responsibility under this provision does not arise.")
[158] ICC-01/04-01/07-3436-tENG, para. 1632.

sufficient evidence to meet even the significant contribution standard.[159] In this respect, Trial Chamber II provides pertinent general guidance regarding the type of contribution that may qualify as 'significant' for the purposes of Article 25(3)(d):

> *[T]he accused's contribution [must] be connected to the commission of the crime and not solely to the activities of the group in a general sense. […] By significant contribution, the Chamber wishes to lay stress on a contribution which may influence the commission of the crime. […] The contribution will be considered significant where it had a bearing on the occurrence of the crime and/or the manner of its commission.*[160]

III. MR. RUTO DID NOT CONTRIBUTE TO THE CRIMES CHARGED

58. As is evident in the following paragraphs, a review of the evidence concerning Mr. Ruto's alleged contributions (which falls far short of that pleaded in the UDCC and the UPTB) demonstrates that it is insufficient, incapable of belief and/or fails to establish the requisite nexus. Therefore, regardless of the way in which Mr. Ruto's alleged contributions are legally characterised, *i.e.* under Article 25(3)(a), (3)(b), 3(c) and/or 3(d), Mr. Ruto has no case to answer.

A. Mr. Ruto's Authority, Orders, Instructions

59. The OTP has failed to adduce sufficient evidence to support its assertions that Mr. Ruto is liable for the crimes charged by virtue of his position and the contributions this position permitted him to make.[161]

60. The OTP's evidence regarding the positions occupied by Mr. Ruto is confused[162] with the only coherent information capable of belief being provided *via* the expert, P-0464, and independent media and video evidence. It is accepted that in

[159] Addendum, paras. 27-28.
[160] ICC-01/04-01/07-3436-tENG, paras. 1632-1633.
[161] *E.g.*, UDCC, p. 40, i and paras. 93, 102, 103, 105, 112; Addendum, paras. 5-7, 27-28.
[162] *E.g.*, P-0356's differing testimony on the significance of the event shown in EVD-T-OTP-00037 at T-78, 6:7-19, T-78, 96:19-98:3 and T-82, 78:10-79:5; P-0326's evidence that Mr. Ruto was "king" of all the ethnic groups in the Rift Valley, T-44, 17:21-18:1; and the varying dates regarding Mr. Ruto's appointment to the various alleged positions.

2007 Mr. Ruto was the incumbent MP for Eldoret North, was contesting this parliamentary seat as an ODM candidate and was a member of the ODM Pentagon. However, in addition to these uncontroversial positions, Mr. Ruto is variously described in evidence as the "king" of the Kalenjins[163] (or, *per* P-0326, all ethnic groups in the Rift Valley),[164] the Kalenjin spokesman[165] and a Kalenjin elder.[166] Crucially, there is no evidence to support the OTP's allegations that Mr. Ruto occupied the position at the top of the Network, acted as its "hub" or was the head of its supposed military component.[167]

61. The correct position, as confirmed by P-0464, is that the Kalenjin identity is a relatively recent development and that notions of "Kalenjin kingship" based on associations with Koitalel Samoei are erroneous.[168] Instead, shortly after Mr. Ruto announced his intention to vie for the presidency in the "Eldama Ravine Declaration", he was installed as a Kalenjin elder in a ceremony at Eldoret Sports Club on 3 June 2006.[169] The contemporaneous newspaper reports on the installation and the video evidence establish that it was both a cultural and political event with high profile people from all over Kenya attending to show their support for Mr. Ruto and his presidential bid.[170] The video of the event shows that the theme espoused by all speakers was not ethnic division but unity. Specifically, Mr. Ruto talked about eradicating poverty and about everyone working together to benefit all Kenyans.[171]

62. Neither Mr. Ruto's political position, nor his position as a Kalenjin elder, imbued him with any authority to speak for the Kalenjin community as a whole, let

[163] T-77, 66:4-8; EVD-T-OTP-00334, para. 47.
[164] T-44, 17:21-18:1.
[165] T-91, 50:15; T-76, 90:3-12; T-88, 43:17-18; T-154, 26:18-19; EVD-T-OTP-00174, para. 27.
[166] T-90, 51:5-9; T-121, 19:1-3.
[167] *E.g.*, UDCC, paras. 54, 93, 102-103, 107, 112. For the absence of evidence, see Section I above.
[168] T-89, 11:5-22; T-90, 26:3-31:20.
[169] EVD-T-OTP-00044 at 1321; T-90, 50:21-51:9; EVD-T-OTP-00065 to 00067.
[170] EVD-T-OTP-00037 to 00039; EVD-T-OTP-00065 to 00067.
[171] EVD-T-OTP-00037 at 01:31:57-01:36:45; EVD-T-OTP-00038, lines 1382-1418; EVD-T-OTP-00039, lines 1419-1455.

alone direct or order anyone to commit criminal acts. As detailed below, testimony such as: (i) Mr. Ruto was "the only speaker and the king of Kalenjin community";[172] (ii) "whatever William Ruto is going to say, it's as if the Kalenjin community has said";[173] (iii) "[t]he spokesman of the Kalenjin is the person who gives orders, and those orders were to be obeyed";[174] and (iv) "[a]nyone who was contrary to Mr. Ruto was perceived to be a traitor",[175] is without proper evidential basis.

63. Rather than unifying the Kalenjin community under the "only" Kalenjin spokesman, the evidence shows that Mr. Ruto's appointment as an elder exacerbated existing divisions within the community.[176] Further, Kalenjins did not join and/or vote for Mr. Ruto's party, ODM, as a unified block. Kalenjins not only voted for other political parties including the PNU, as evidenced by most of the OTP's witnesses, but held official positions in the PNU.[177]

64. As was also crystalized in the cross-examination of P-0604, many of the political candidates supported or endorsed by Mr. Ruto in Uasin Gishu District lost their elections to a rival candidate.[178] This further demonstrates that Mr. Ruto did not have the power or authority to dictate the political choices of people in Uasin Gishu District, let alone in the Rift Valley.

65. More specifically, in relation to the crimes charged, there is no evidence on which a reasonable Trial Chamber could find that Mr. Ruto issued any instructions or orders or provided any co-ordination in respect of the PEV. On

[172] P-0356, T-77, 71:16.
[173] P-0356, T-77, 76:7-8.
[174] P-0409, T-91, 50:21-22.
[175] P-0800, T-155, 11:4.
[176] T-89, 3:15-4:20; EVD-T-OTP-00066 ("William Ruto yesterday moved further in antagonising his mentor, retired President Moi, when he was installed as a Kalenjin elder"); EVD-T-OTP-00067 ("the leaflets said the community's future was doomed if Ruto was made an elder").
[177] T-50, 13:2-14:2; T-71, 70:1-71:6; T-171, 90:8-19; T-179, 42:21-43:6.
[178] T-136, 12:2-17:1.

the contrary, the only evidence of instruction is his repeated calls for peace.[179] As explained above, the Trial Evidence of P-0613 that Kisorio, Tirop and Kibet received "directions from Honourable Ruto" is on proper scrutiny insufficient.[180]

66. Even if the Chamber does find *prima facie* evidence of the issuance of orders by Mr. Ruto, including at political rallies or meetings (see below), there is no evidence on the record that "RUTO…assured that his orders were carried out by almost automatic compliance by way of at least a two-fold strategy: (1) a payment mechanism; and (2) a punishment mechanism."[181]

67. No evidence in support of "payment mechanisms" was produced at trial.[182] Similarly, there is no evidence on the record which supports the OTP's other allegations that subordinates or direct perpetrators were paid in connection with acts directly linked to the PEV.[183]

68. The OTP also did not produce any evidence at trial to demonstrate that "punishment mechanisms", as envisaged in the UDCC and the Confirmation Decision,[184] existed for those who did not join and participate in the violence.

69. [REDACTED] R68 evidence about beatings on 31 December 2007, at the meeting place [REDACTED] on the orders of [REDACTED], does not provide sufficient evidence of a "punishment mechanism" to enforce Mr. Ruto's orders.[185] [REDACTED] states [REDACTED] was beaten for arriving late at the meeting and because [REDACTED] was suspected of "conspiring with the PNU".[186] A man named [REDACTED] and his wife were also beaten for failing to attend a

[179] *See* Annex B.
[180] *Supra*, paras. 32-35.
[181] UDCC, paras. 109, 114. *Also* UPTB, paras. 115, 121.
[182] UPTB, para. 47.
[183] UDCC, para. 114.
[184] UDCC, paras. 109, 114; Confirmation Decision, para. 324-327.
[185] EVD-T-OTP-00149, paras. 71, 75-76.
[186] EVD-T-OTP-00149, para. 76.

meeting [REDACTED] respectively.[187] Clearly, none of these reasons relate to a failure to comply with an order issued by Ruto to join the violence against the PNU. Also, other than the witness' assertion that certain members of the group were campaigners for Ruto,[188] there is no reasonable evidential basis on which to conclude that the group in [REDACTED] allegedly operating under [REDACTED] was also operating under Mr. Ruto. The Defence also observes that this group does not appear to have been linked to any highly organised and well-funded organisation since it started training its youth on 30 December 2007, and the same day was "look[ing] for ways to get funds."[189]

70. Equally insufficient is the evidence that Mr. Ruto organised and coordinated the attacks on the locations charged.[190] No reasonable Trial Chamber could consider the disavowed and double hearsay evidence provided by [REDACTED] in respect of the above discussed phone call on [REDACTED], during which Mr. Ruto allegedly questioned Kisorio [REDACTED] and said he hoped for [REDACTED], as sufficient to constitute coordination or organising of attacks.[191] Patently, no organisation or coordination is revealed during the call. Further, as previously noted, the phrase [REDACTED] is the product of the witness' speculation.

71. The only other evidence on which the OTP could rely to establish coordination is provided in [REDACTED] disavowed R68 evidence. According to [REDACTED] unsworn, uncorroborated statement, at the [REDACTED] meeting held on 31 December 2007, an individual called [REDACTED], allegedly related to Ruto [REDACTED], said "he was co-ordinating with RUTO".[192] He also said

[187] EVD-T-OTP-00149, para. 75.
[188] EVD-T-OTP-00149, para. 69.
[189] EVD-T-OTP-00149, para. 68.
[190] UDCC, p. 41, v and vi (relating to Mr. Ruto); UDCC, paras. 103, 105.
[191] EVD-T-OTP-00132, para. 106.
[192] EVD-T-OTP-00149, para. 84.

[REDACTED].[193] This evidence is patently insufficient. It is double hearsay and lacks detail. It also fails to establish the necessary nexus between this alleged "co-ordination" and the crimes charged. [REDACTED] disavowed, double hearsay evidence that the "youth from [REDACTED] had gone to Eldoret" is too general, failing to specify a charged location, and does not establish that the youth were acting pursuant to any coordination provided by Mr. Ruto.[194]

72. Apart from the foregoing, the only other evidence which ostensibly relates to the assertion that Mr. Ruto's high political office enabled him to command, authorise, urge, incite, request or advise Network members and direct perpetrators to attack PNU supporters in order to expel them from the Rift Valley arises in the context of political rallies and meetings and is addressed in the following sub-section.[195]

B. Public ODM Campaign Rallies

73. According to the OTP, during the 2007 election campaign, Mr. Ruto "stoked the flames of anti-Kikuyu sentiment"[196] and, at no fewer than ten public rallies, he and "other Network members...laid the groundwork for their plan to evict the PNU supporters from the Rift Valley...through the use of derogatory language in reference to PNU supporters, the further inciting of hatred against them through the evocation of land grievances, and by warnings that without their vigilance the upcoming election would be rigged against the Kalenjin people".[197] These allegations are denied. They are based entirely on uncorroborated testimony and R68 evidence, much of which emanates from witnesses incapable of belief. As a result, this evidence fails to satisfy the requisite 'half-time' standard.

[193] EVD-T-OTP-00149, para. 84.
[194] EVD-T-OTP-00149, para. 87. *Also* para. 97.
[195] Addendum, para. 6.
[196] T-27, 16:12-13.
[197] UPTB, para. 54. *Also* paras. 58, 59.

(1) The 2007 Campaign Period

74. At no time, including during the 2007 election campaign, did Mr. Ruto incite or induce the commission of crimes through his public utterances at rallies. The record is replete with public utterances of Mr. Ruto at rallies and in the media: (i) throughout the campaign, speaking against tribalism and, calling for unity among Kenyans and peaceful elections; (ii) in the immediate aftermath of the announcement of the presidential elections, supporting "peaceful" demonstrations against an internationally condemned presidential election;[198] and (iii) during the PEV, pleading with Kenyans to stop the violence and calling for peace.[199]

75. Independent evidence adduced at trial captures the general tenor of Mr. Ruto's public utterances before, during and after the period covered by the charges. Rather than advocating for violence against particular tribes and political opponents, as alleged, Mr. Ruto repeatedly spoke against any form of violence.[200] For example, at a rally in Eldoret Town on 23 November 2007, Mr. Ruto said:

> *We have said that we do not want violence. The leaders of PNU, the ministers and the assistant ministers, they are the ones leading criminals in Kenya. Mr Nyachae has a group of youth called Chingororo who wield machetes, axes and arrows. Like yesterday, the Assistant Minister called Wanjala was found carrying weapons in a GK vehicle. He was carrying machetes, axes, arrows – these government people have a plot to bring conflict in Kenya because they have seen that their days are over. Our weapon is the vote and they will see come the 27th.*[201]

76. Indeed, the 2007 elections and the PEV were extensively reported by the Kenyan media, and closely monitored by international and local organizations.[202] One of the most striking features of this prosecution is the OTP's failure to adduce any independent media or public source evidence to support its case that Mr. Ruto

[198] T-27, 79:7–80:25.
[199] Annex B; EVD-T-D09-00035; EVD-T-D09-00296.
[200] Annex B. *See also* EVD-T-D09-00209, lines 28-30; EVD-T-D09-00208; EVD-T-D09-00035; EVD-T-D09-00296.
[201] EVD-T-D09-00247; EVD-T-D09-00252, lines 90-94.
[202] T-159, 63:9-18.

incited violence against Kikuyus or PNU supporters at public rallies. Indeed, as discussed at paragraph 106 below, the independent evidence the OTP possessed contradicted its case, and was shied away from.

77. The evidence also establishes that Mr. Ruto was a member of a multi-ethnic, all-inclusive party. According to the evidence, ODM campaigns were directed at garnering the votes of all Kenyans from all tribes, including from the Kikuyu community.[203] P-0409 testified that he joined the ODM because he was attracted by its policies which promised a government for all Kenyans irrespective of tribe.[204]

78. OTP witnesses testified that during the 2007 elections, including in Mr. Ruto's constituency, Kikuyus not only supported the ODM and occupied official positions within it, but also campaigned for Mr. Ruto.[205] Further, before, during and after the 2007 elections, Mr. Ruto campaigned for and supported Kikuyu candidates for political positions in his own constituency.[206] At the national level, Mr. Ruto actively campaigned for the election of a Kikuyu President, H.E. Uhuru Kenyatta, in 2002,[207] and again in 2013.

79. As discussed, the record shows that in 2007, it was widely perceived that the presidential elections would be rigged in favour of Mr. Kibaki.[208] Contrary to the OTP's case, the evidence demonstrates that the rigging fears were not created by Mr. Ruto's public speeches.[209] Nor were they created by empty ODM rhetoric. Rather, it was the combination of several factors unconnected to Mr. Ruto which raised tensions about rigging and contributed to the outbreak of violence.[210]

[203] T-50, 15:11-16:11; T-94, 66:13-70:6, 75:10-18.
[204] T-94, 66:13-20.
[205] T-46, 76:10-77:1; T-50, 15:11-13, 29:2-9; T-91, 49:12-16; T-119, 90:13-91:9.
[206] T-50, 22:8-19.
[207] T-89, 20:4-12; T-136, 12:18-20.
[208] *Supra*, paras. 44-48.
[209] T-27, 29:25-30:1.
[210] *Supra*, paras. 44-48.

80. The OTP's position that "Mr. Ruto's ultimate goal was to seize political power for himself and his party through violent means…in the event that he could not do so through the ballot box"[211] cannot withstand scrutiny when cast against evidence on the record that Mr. Ruto, being the "obvious choice" and "the favourite of the people",[212] was expected to win his parliamentary seat and Raila Odinga was expected to take the presidency.[213] Indeed, OTP witnesses testified that Mr. Ruto enjoyed widespread support, had never lost an election since he first stood for his constituency in 1997, and secured the highest number of votes in the country in the 2007 parliamentary elections.[214] OTP witnesses testified that it came as a surprise that Mr. Kibaki was announced the winner[215] and to the ordinary Kenyan, sitting at home watching television, it was obvious that the elections had been rigged.[216] Foreign envoys, international election observers and civil society dismissed the 2007 presidential election results as irregular.[217] The outrage of what was perceived to be a "stolen election" was felt throughout the country, not just in Uasin Gishu. Indeed, apart from the fighting between Kikuyus and Luos in Langas, immediately after the announcement of the Presidential election results, violence erupted first in Nairobi, Kisumu and Mombasa - before the North Rift.[218]

81. Nothing in the way in which ODM rallies were organised indicates that they were held for anything other than ordinary political purposes. They were held in public with no restriction on attendees,[219] widely advertised[220] and attended by

[211] T-27, 15:21-23.
[212] T-119, 89:13-90:6.
[213] EVD-T-OTP-00328 at 0550, 0595.
[214] T-119, 89:16-90:6.
[215] T-71, 74:2-9; T-120, 18:11-21.
[216] T-63, 86:15-22.
[217] T-49, 90:4-7, MFI-T-D09-00055.
[218] T-49, 83:20-84:12.
[219] T-94, 31:13-16.
[220] T-83, 8:4-22; T-53, 97:22-25.

all Kenyan communities.[221] The personal address system used during Mr. Ruto's public rallies and events was supplied and managed by a Kikuyu.[222] Indeed, most of the witnesses who claimed to have attended ODM rallies, with the exception of [REDACTED][223] and P-0409[224], were in the PNU[225] or in the ODM-K.[226]

82. Witnesses confirm that there was a significant media[227] as well as police[228] presence at ODM rallies. However, not a single witness claims to have reported to the authorities, including to the Kikuyu OCPD in Eldoret,[229] that Mr. Ruto was inciting violence against the PNU or the Kikuyu. Nor have any contemporaneous reports made during the campaign period supporting the OTP's case been produced.

83. The evidence on the key rallies and public events presented by the OTP at trial is evaluated below. Nothing in this evidence establishes that Mr. Ruto has a case to answer.

(a) ODM Rallies/Public Events in Eldoret

ODM Rally, Kipchoge Keino Stadium, 23 December 2007

84. No reliance can be placed on [REDACTED] evidence about the rally [REDACTED] attended on 23 December 2007 at the Kipchoge Keino Stadium.[230] [REDACTED] testimony that [REDACTED] never attended such a rally[231] is supported by independent media evidence which establishes that the ODM elite,

[221] T-91, 58:17-25; T-83 17:1-5; T-55, 79:11-80:14; EVD-T-OTP-00334, para. 81.
[222] T-169, 90:16-91:3; T-171, 53:20-54:5.
[223] [REDACTED].
[224] T-94,71:23-24.
[225] [REDACTED]; P-0516, T-141, 60:5-12; P-0604, T-129, 43:1-12; [REDACTED]; P-0637, T-146, 29:19-30:1; P-0613, T-118, 87:9-11; P-0743, T-183, 61:4-8; P-0658, T-163, 55:16-19; P-0376, T-50, 90:23-25; P-0128, T-84, 26:19-25; 27:14-24.
[226] P-0800, T-159, 70:3-6; T-160, 42:16-19.
[227] T-55, 99:7-15; T-122, 51:19-22.
[228] T-56, 15:6-9; T-162, 88:13-21.
[229] T-162, 84:12-85:6.
[230] [REDACTED].
[231] [REDACTED].

with Mr. Ruto, campaigned [REDACTED] in [REDACTED] that day.[232] Also, [REDACTED], [REDACTED] who claimed to have attended this rally,[233] repudiated his previous account and testified under oath that the one rally he attended was at 64 Stadium (not Kipchoge Keino Stadium) on a different date.[234] In any event, there is nothing inciting in the alleged speech. In [REDACTED] evidence, [REDACTED] describes the words used by Mr. Ruto as terms commonly used during campaigns.[235]

The "last" ODM Rally, 64 Stadium, Eldoret

85. The OTP and the Defence agree that two ODM rallies took place at 64 Stadium in Eldoret on 19 August and 10 November 2007.[236] There is no independent evidence that supports the allegation that a third was held in December.

86. P-0800 testified that he attended the "last"[237] ODM rally in Eldoret which took place at 64 Stadium on either 19 or 20 December. His testimony is in stark contrast to what he told the OTP during his various interviews that the one ODM rally he attended was at Kipchoge Keino Stadium in Eldoret.[238] P-0487 also commenced his testimony asserting that he attended the "last"[239] ODM rally at 64 Stadium but concluded it by testifying that he was unable to decide whether the rally he attended was at Huruma Grounds or 64 Stadium.[240] However, from the detailed description of the venue he provided, it is clear that he intended to speak about 64 Stadium.[241]

[232] [REDACTED].
[233] T-160, 6:18-7:2.
[234] T-155, 26:21-27:4; T-160, 5:15.
[235] [REDACTED].
[236] T-160, 5:6-15.
[237] T-160, 5:18-20, 6:13-16.
[238] T-160, 3:7-22.
[239] T-53, 95:25-96:10.
[240] T-59, 5:6-6:4.
[241] T-55, 89:7-93:6.

87. The account of both witnesses as to what Mr. Ruto is alleged to have said at this "last" rally is different. P-0800 initially testified that Mr. Ruto stated that, if the Kikuyu did not vote in-line with the Kalenjin, they would be "sent away" or "fought" by the Kalenjin.[242] During cross-examination, however, he conceded that he could not remember what Mr. Ruto said at this rally.[243]

88. P-0487's testimony about the "last" ODM rally is incapable of belief. He testified that Mr. Ruto said, in Swahili, that "grabbers" would be put in a pick-up and sent back to Central. He also testified that Mr. Ruto did not use the word "Kikuyu" but, instead, used his cap to communicate secret messages to his Kalenjin supporters to evict Kikuyus.[244] The absurdity of the testimony cannot be ignored and certainly cannot form the basis of a finding that there is *prima facie* evidence that Mr. Ruto was propagating the forceful removal of Kikuyus through his cap. Tellingly, the witness, a Kikuyu, testified that he viewed Mr. Ruto's words as "a joke. I was not serious about it".[245]

89. The correct position, as reflected in the independent media evidence, is that the last ODM rally was held at Huruma Grounds on 20 December 2007.[246] If, indeed, Mr. Ruto called for members of the Kikuyu community to be evicted, this would have certainly been reported in the same media evidence. It was not.

90. A proper review of the witness evidence presented above demonstrates that it does not provide a sufficient basis on which the Chamber could find that an ODM rally was held at 64 Stadium on 20 December.

[242] T-155, 29:9-18.
[243] T-160, 8:22-24.
[244] T-55, 102:19-103:23.
[245] T-55, 110:3-14.
[246] T-53, 100:23-25; T-56, 56:21-59:25; EVD-T-D09-00062; EVD-T-D09-00063; EVD-T-D09-00080.

Eldoret Police Station and Brookside Dairy, 26 December 2007

91. The details provided at trial about an incident at Eldoret Police Station and Brookside Dairy on 26 December 2007 are consistent with the evidence detailed above regarding the rumours in Kenya that the presidential elections would be rigged and that pre-marked ballot papers would be used for this purpose. The rumours circulating were that Administration Police ("AP") were transporting these marked papers.[247] Witnesses confirm that on that day protests erupted in various parts of the country and AP officers were killed and several people injured.[248] The same rumours made their way to Eldoret. Here, it was alleged that *Mololine* and *Citihoppa* buses were ferrying marked ballot papers. As in other parts of the country, residents protested at the Eldoret police station and at Brookside Dairy, suspecting that marked ballot papers were being stored there. However, unlike in other areas, nobody was killed in Eldoret[249] and there is no evidence that anybody was injured.

92. The OTP's "incriminatory" evidence concerning what took place on 26 December 2007 is so inconsistent that it cannot be relied on to establish a *prima facie* case of inciting violence against Kikuyus. The Defence acknowledges that Mr. Ruto was at the Eldoret Police Station on that day. However, the OTP evidence shows that he was calming the crowds who were angered by the rumours. Whilst P-0800 testified that Mr. Ruto made an inciting speech at the Eldoret Police station referring to Kikuyus as "witches", implying they would be burnt,[250] [REDACTED][251] and P-0658's testimony[252] is that they were present and heard Mr. Ruto's speech calling for calm. This aspect of [REDACTED] and P-

[247] T-159, 72:17-20; EVD-T-D09-00263; EVD-T-D11-00044.
[248] *E.g.*, 2 AP officers were killed and several people injured in Nyanza Province, 2 AP officers were killed in Homa Bay and 2 AP Officers killed in Oyugis (T-169, 53:22-54:22; T-159, 72:23-73:17). AP officers were also attacked in Kisii and vehicles stoned in Mombasa (EVD-T-D09-00295).
[249] T-159, 73:18-20.
[250] T-155, 48:16-19, 52:15-22.
[251] [REDACTED].
[252] T-162, 88:9-16; T-169, 69:19-70:9.

0685's evidence is corroborated by P-0189,[253] independent media evidence[254] and a monitoring report by KHRC.[255] In these circumstances, the evidence of P-0800 cannot be accepted by any reasonable Trial Chamber. In this regard, the significant and pervasive credibility concerns surrounding this witness as revealed by cross-examination must be considered.

93. P-0658's testimony is that from Brookside Dairy, Mr. Ruto proceeded to Kapsabet Road, near Sosiani River in the centre of Eldoret Town, where he made a speech in Swahili to the effect that "we shall" put all the Kikuyu "in one pick-up and send them to Othaya".[256] P-0658's testimony is uncorroborated and is not supported by other evidence. P-0800 testified that he did not see Mr. Ruto at Brookside.[257] Further, neither P-0405 nor [REDACTED], who both claim to have been in Eldoret town for the rest of the day, mentioned that Mr. Ruto was there. There is also no reference in the media or monitoring reports that Mr. Ruto made such a speech.[258] Importantly, P-0658 testified that: (i) the OCPD was present at the Sosiani Bridge when Mr. Ruto allegedly spoke;[259] (ii) there were Kikuyus in the crowd;[260] and (iii) the media was present.[261] It would be incredulous to suggest that such a speech could be made in the presence of the most senior police officer in the area, especially one who was from the Kikuyu community, without Mr. Ruto being arrested or the event reported. In the circumstances, P-0658's account does not withstand scrutiny.

94. It is not credible that Mr. Ruto ever suggested in public rallies that Kikuyus should be sent to Central Province. The only context in which Mr. Ruto spoke about anyone "going home" during the 2007 campaign was in reference to the

[253] T-48, 61:24-63:1.
[254] EVD-T-D09-00295 at 0115; EVD-T-D11-00045.
[255] EVD-T-D09-00296.
[256] T-163, 27:3-37:9.
[257] T-159, 74:4-8.
[258] T-169, 71:8-13.
[259] T-162, 88:13-21; T-169, 71:8-13.
[260] T-163, 18:4-16; T-163, 41:11-18; T-169, 71:4-18.
[261] T-169, 79:21-25.

then President, Mwai Kibaki, being voted out as President and having to "leave State House" and "go back home" to his rural home in his Othaya constituency.[262] Mr. Ruto made a similar statement that "Kibaki will go back home because he's been defeated. OK?" at the ODM rally in Huruma Grounds on 20 December 2007.[263] This was harmless and humorous political campaigning. There are examples of former President Moi and other politicians being told the same thing by other politicians during other political campaigns.[264]

95. The Defence submits that the incriminatory testimony of P-0658 must be received with great caution. He is a self-confessed fabricator and, [REDACTED],[265] has demonstrated a calculated willingness and ability to give very detailed lies[266] in this case, to the extent of drawing the layout of Mr. Ruto's home to convince the OTP that he attended planning meetings there, although he accepted in cross-examination that he has never set foot in Mr. Ruto's home.[267]

(b) ODM Rallies/Public events in and around Turbo

St. Columban's Primary School, 15 December 2007

96. According to [REDACTED], on 15 December 2007, Mr. Ruto attended the St. Columban's Primary School and made a public speech stating "this year, kimurgelda will know us, who does Turbo belong to? These people they don't vote for us at any time, they don't vote for us, they don't know us but this time they will know us, they will have to go to their home because in their home, there are no Kalenjin".[268] However, [REDACTED] is that [REDACTED] attended

[262] T-163, 40:13-18; EVD-T-D09-00157 at minutes 1:10-1:25 (translation of this video is at MF1-T-D09-00158 lines 25-28). *See also* EVD-T-D09-00247, Track 4; EVD-T-D09-00252, lines 110-119.
[263] EVD-T-D09-00062; EVD-T-D09-00063, p. 4.
[264] T-120, 9:21-12:7; EVD-T-D09-00199; EVD-T-D09-00200; EVD-T-D09-00201; EVD-T-D09-00202; EVD-T-D09-00203; EVD-T-D09-00204.
[265] [REDACTED].
[266] T-173, 14:1-23:18.
[267] T:173, 22:15-23:18; EVD-T-D09-00324.
[268] EVD-T-OTP-00334, paras. 77, 84.

a PNU rally at the same venue, on the same day.[269] As the OTP concedes, "it's unlikely Mr. Ruto would be speaking at a PNU rally".[270] [REDACTED] also claims that P-0516 was at the event.[271] However, P-0516 makes no mention of this [REDACTED]. No reasonable Trial Chamber could, in the circumstances, accept the uncorroborated, [REDACTED] hearsay evidence of [REDACTED], contradicted by the [REDACTED] evidence of [REDACTED] and P-0516.

Rally, St. Columban's Primary School, "market day", December 2007

97. In [REDACTED] evidence, [REDACTED] states that [REDACTED] attended an ODM Rally at St. Columban's Primary School on "market day…which means it was either a Tuesday or a Saturday."[272] According to [REDACTED], this meeting took place on 21 December 2007.[273] However, 21 December 2007 was a Friday. This indicates that the Chamber should view the rest of [REDACTED] evidence about the event with circumspection. There is no other evidence to corroborate the occurrence of this event and [REDACTED].[274] In any event, during questioning, OTP counsel conceded that [REDACTED] evidence does not show that Mr. Ruto used any anti-Kikuyu words or any words about evicting Kikuyus.[275]

Public meeting, Besiebor Primary School, 20 November 2007

98. In relation to this alleged meeting, the OTP relies solely on the [REDACTED] evidence of [REDACTED]. However, the content of the speech attributed to Mr. Ruto by both witnesses is completely different and cannot be reconciled. In the first place, [REDACTED] double hearsay evidence is that Mr. Ruto was in Besiebor at 11 am, whereas [REDACTED] states that Mr. Ruto arrived at 5 pm.[276]

[269] EVD-T-OTP-00133, para. 27; T-131, 20:21-23.
[270] T-131, 25:8.
[271] [REDACTED].
[272] [REDACTED].
[273] [REDACTED].
[274] [REDACTED].
[275] [REDACTED].
[276] [REDACTED].

99. Further, [REDACTED] evidence is that, at the event, Mr. Ruto held a toy hammer and said that they needed to walk with a hammer and a matchbox so they could demolish the houses of the Kikuyu and then set them alight.[277] [REDACTED] states that Mr. Ruto said the toy hammer was a sign that "we don't like PNU".[278] The independent video evidence shows that the ODM, including Mr. Ruto, used the hammer to symbolize change and that it was a common feature at ODM rallies.[279] Video evidence also depicts Mr. Ruto telling a youth rally at his home on 23 November 2007 that "this hammer, we will use it to crash tribalism, poverty, crime, mercenaries, Mungiki, and all those we will crash them".[280] The hammer was described by ODM politicians as being the "the hammer of change...if it is held by Ruto or Mudavadi, it's the hammer of change".[281] P-0487 testified that the hammer symbol was a play on words deriving from Mr. Odinga's *Hummer* vehicle.[282] There is no other evidence that Mr. Ruto ever used the hammer as a symbol of violence and [REDACTED] uncorroborated, hearsay evidence is incapable of belief.

100. The OTP relies on [REDACTED] hearsay evidence to support its allegations that, at a meeting in Besiebor, Mr. Ruto instructed the crowd that he did not want any "stains" ("*madoadoa*").[283] [REDACTED].[284]

101. P-0376 testified that a few months before the elections, Mr. Ruto addressed a crowd at the Trans-National Bank of Kenya.[285] P-0376 claimed that he heard Mr. Ruto tell the crowd in Swahili to do all that was necessary to ensure that the *"madoadoa"*, meaning the Kikuyus, were removed because of their political

[277] [REDACTED].
[278] [REDACTED].
[279] T-56, 34:11-16; EVD-T-D09-00073; EVD-T-D09-00078.
[280] EVD-T-D09-00247-track 3; EVD-T-D09-00250.
[281] EVD-T-D09-00088.
[282] T-56, 34:11-23; 51:13-52:19.
[283] UPTB, para. 67.
[284] [REDACTED].
[285] T-51, 25:1-26:1, 29:15-30:1.

affiliation. P-0376 asserted that Mr. Ruto spoke in Swahili so that even the Kikuyus who were present could understand him.[286] The testimony is uncorroborated and contradicts his previous statements to the OTP that the rally he attended was actually at a different location, namely 64 Stadium.[287] When asked by the Presiding Judge, the witness testified that he had no recollection of ever having attended a rally at 64 Stadium.[288] In addition, the circumstances in which he claims to have heard Mr. Ruto speak are such that it casts substantial doubt as to the veracity of his account.[289] The testimony of this witness cannot be accepted by any reasonable Trial Chamber.

102. That "*madoadoa*" is not a derogatory term used by Mr. Ruto to refer to Kikuyus, as alleged,[290] is established by independent media evidence and the testimony of several OTP witnesses. The Defence also observes that it is not a term coined by either Mr. Ruto or the ODM during the 2007 elections.[291] The evidence demonstrates that, in the context of election campaigns, "*madoadoa*" simply meant a pattern whereby people voted for the same party, such as ODM, for all three tiers of governance, *i.e.* local, parliamentary and presidential. The meaning was similar to when ODM politicians told their supporters to follow the "three piece suit" voting style.[292] P-0516 testified that "*madoadoa*" did not mean that PNU supporters were stains or unwanted.[293] P-0376 also conceded that, in the context of the elections, ODM politicians encouraged people not to vote "*madoadoa*" which referred to voting for the ODM in the presidential, parliamentary and civic sections.[294] The meaning of the phrase by the ODM in

[286] T-51, 26:23-28:7.
[287] T-53, 21:22-26:10.
[288] T-53, 21:17-23:4, 26:4-12.
[289] T-53, 16:25-19:9.
[290] T-27, 30:4-6.
[291] T-52, 19:4-22.
[292] EVD-T-D09-00062; EVD-T-D09-00063; EVD-T-D09-00080; T-96, 24:3-28:13; EVD-T-D09-00255; T-147, 6:19-8:5; T-52:19:4-20:25.
[293] T-143, 50:9-51:24.
[294] T-52, 20:4-21:3.

the context of the 2007 elections is clear and does not support an interpretation that it is inciting or discriminatory in the least.

Public Meeting, Kaptabee Secondary School

103. P-0743's testimony about a meeting on 15 October 2007 at Kaptabee Secondary School must be disregarded.[295] Mr. Ruto "exhorted that the Kikuyu were the enemies of all the communities in Kenya…and the only thing to do was to kill them and evict them from the Rift Valley." P-0743's testimony about this meeting is inconsistent and uncorroborated. In his various statements to the OTP, P-0743 gave five different accounts of what Mr. Ruto said at this meeting. Of significance, [REDACTED].[296] The public meeting at Kaptabee Secondary School is not reported in the press or media, although the witness claims both international and local press and NSIS were present during the event.[297] [REDACTED], none of "this witness's evidence should be accepted [REDACTED].[298] The OTP has not presented any other acceptable evidence about the occurrence of this meeting.

104. The only other evidence about Mr. Ruto being at Kaptabee Secondary School in 2007 is [REDACTED].[299] Other evidence in the record demonstrates that Mr. Ruto was not at the Kaptabee Secondary School on 19 November 2007 and the details provided by [REDACTED] about this meeting were false.[300] The Defence submits that the details of the meetings P-0743 and [REDACTED] claim to have attended are so different that they could only be describing different events. For example: (i) the event [REDACTED] claims to have attended was on 19 November 2007, more than a month after the event P-0743 claims to have attended; (ii) although both witnesses describe the event as being a fundraiser –

[295] T-180, 53:7-68:25; T-181, 5:3-21; T-189, 53:20-66:20.
[296] T-189, 53:20-68:12, 79:23-80:4.
[297] T-189, 53:2-10.
[298] T-188, 91:13-15.
[299] T-131, 10:5-9, 12:12-15:23.
[300] T-133, 60:11-67:19, 85:7-86:9; T-135, 37:24-39:12.

both ascribe a different purpose for which the money was being raised;[301] and (iii) at the event [REDACTED] claims to have attended, the other speakers were [REDACTED], whereas P-0743 testified that the speakers were Chief Lagat and Christopher Kisorio.[302]

105. The testimony of both witnesses is incapable of belief because it is contradicted by other evidence which demonstrates that on 15 October 2007[303] and 19 November 2007[304] Mr. Ruto was in Nairobi, and not at Kaptabee Secondary School.

(c) ODM Rally, Kapsabet

106. [REDACTED], the OTP relies upon the evidence of P-0268 and P-0658 regarding the ODM Rally in Kapsabet on 5 December 2007.[305] This is the only 2007 ODM rally for which the OTP has a video-recording. Despite relying on this video to support its allegations [REDACTED] that "Ruto himself incited violence at a rally preceding the PEV",[306] it is significant to note that the OTP chose not to tender it at trial. In fact, the manner in which OTP dealt with this video and related transcript is telling. It demonstrates a resolve to sidestep independent and credible evidence that Mr. Ruto did not incite or induce the commission of crimes. For example:

(i) during its opening statement, the OTP turned the sound off when showing the video of Mr. Ruto's speech at the rally;[307]

(ii) during the testimony of P-0268, OTP Counsel chose to tender a summary[308] of Mr. Ruto's speech prepared by the witness in

[301] T-189, 58:20-59:10; [REDACTED.
[302] T-180, 53:7-56:9, [REDACTED].
[303] T-189, 79:4-22.
[304] EVD-T-D09-00240.
[305] [REDACTED].
[306] [REDACTED].
[307] T-27, 29:8-12.

preference to the video and transcript that was in the OTP's possession.[309] This witness's testimony is contradicted, in material respects, by what is shown in the video. The video and transcript were eventually exhibited by the Defence;[310] and

(iii) during the testimony of [REDACTED], OTP Counsel stated "I'm not going to ask you about the content of what's being said, but simply just the image".[311]

107. Mr. Ruto's message, and that of other ODM politicians throughout the campaign period, is reflected by the speeches made at this rally. The speech is important because the video and transcript form a complete record of all that was said by Mr. Ruto and the other campaigners on that day. Given the place and date, it provides an important indication of the subjects addressed and the language employed by Mr. Ruto in the course of the campaign. ODM politicians[312] and Mr. Ruto[313] called for Kenyans to unite irrespective of ethnicity, and spoke against the eviction of anyone from the Rift Valley. This critical and revealing video evidence directly controverts the OTP's core case that Mr. Ruto was involved in planning or inciting the deportation or forcible transfer and persecution of perceived PNU supporters. No reasonable Trial Chamber could convict Mr. Ruto of any of the charges alleged against him on the basis of this evidence.

(d) ODM Rallies in and around Nandi Hills

108. P-0409's evidence that Mr. Ruto made inciting speeches at rallies in Nandi Hills and Metetei in 2007 is incapable of belief.[314] The witness alleges that he attended

[308] EVD-T-OTP-00023.
[309] T-62, 99:19-100:20; EVD-T-OTP-00023.
[310] T-61, 34:12-17; T-64, 45:11-46:2, 85:7-87:6; T-65, 26:15-27:21; EVD-T-D09-00086; EVD-T-D09-00087; EVD-T-D09-00088.
[311] [REDACTED].
[312] EVD-T-D09-00088, lines 682-884, 696-700, 1837-1864.
[313] EVD-T-D09-00088, lines 1308-1337.
[314] UPTB, para. 58.

ODM rallies at: (i) Nandi Hills Stadium in October 2007;[315] (ii) Kapchorwa football field a few weeks later;[316] (iii) Maraba a month before the elections;[317] (iv) Labuiywo in December;[318] and (v) Meteitei a few days before the elections in December.[319] He testified that Mr. Ruto attended three of these events, *i.e.* the rallies at Nandi Hills, Kapchorwa School and Meteitei. At the outset, it is noteworthy that, in his previous statements, he did not mention Mr. Ruto being at any of these rallies. The first time he mentioned Mr. Ruto was when the case against Mr. Kosgey was not confirmed.[320]

109. According to P-0409, Mr. Kosgey repeated exactly the same words at all five rallies. At the three rallies Mr. Ruto is alleged to have attended, P-0409 testified that Mr. Ruto spoke after Mr. Kosgey and parroted Mr. Kosgey's words exactly.[321] The irrational nature of this evidence renders it incapable of belief. This is compounded by this witness' evidence that, despite having heard Mr. Kosgey and Mr. Ruto calling for "tree stumps to be uprooted" in the first rally, he continued to attend four more rallies unperturbed, and even voted for Henry Kosgey.[322] The falsity of his account was further exposed by his testimony that, in the 2007 elections, despite such speeches, every time Mr. Kosgey organized a rally he would attend because he was "pleased" with him.[323] No reasonable Trial Chamber could accept the evidence of this witness to make a finding that Mr. Ruto either was present at any of these rallies in and around Nandi Hills or that he incited violence as described by this witness.

[315] T-91, 52:10-12; 55:3-9.
[316] T-94, 78:18-23; T-92, 33:20-34:18.
[317] T-92, 59:2-10.
[318] T-92, 68:4-70:10.
[319] T-93, 8:3-13.
[320] T-96, 39:5-46:15.
[321] T-94, 32:1-41:17; T-91, 68:9-71:1, 78:1-11; T-92, 20:15-21:23, 43:7-48:25, 50:7-53:4, 63:9-66:15; T-93, 4:3-7:25, 13:14-17:14, 20:22-25:7.
[322] T-94, 71:23-24.
[323] T-92, 62:5-15.

110. P-0409 testified that there was only one ODM rally at Nandi Hills Stadium in 2007.[324] Independent media evidence establishes that this rally was on 16 December 2007 and was attended by Odinga and Kosgey. The evidence also establishes that on 16 December, Mr. Ruto was campaigning in Rarieda and Ugenya with Mudavadi before joining Odinga and Kosgey for a major rally in Kisumu.[325]

111. P-0128's testimony that Mr. Ruto addressed a rally in Kubojoi in November 2007 saying in Kalenjin "once the ODM took power, they were going to uproot the tree stumps and their lands would be given back to their owners" is hearsay. According to P-0128, by "tree stumps", Mr. Ruto was referring to Luhyas as well.[326] [REDACTED].[327] P-0128 [REDACTED] and does not speak Kalenjin. His evidence of what Mr. Ruto said at the rally is allegedly from an interpretation provided by [REDACTED].[328] There is no independent evidence that [REDACTED] speaks Kalenjin. Other OTP evidence, a security report, demonstrates that Mr. Ruto was at a rally in the area, in Kaptumo and did not say anything untoward during his speech.[329]

112. The Defence submits that the OTP has failed to prove that Mr. Ruto induced, solicited or in any other way incurred liability for the commission of the crimes charged through his speeches at public events. Indeed, in the paragraphs above, the Defence has demonstrated that the OTP has failed to adduce sufficient evidence or evidence capable of belief on which a reasonable Trial Chamber could find that Mr. Ruto made any statements or communicated in any other manner that could credibly incur liability under the Statute under any mode of liability charged or notified. However, assuming *arguendo*, this Chamber finds

[324] T-94, 77:22-78:17; T-95, 44:22-45:14.
[325] EVD-T-D09-00157; MFI-T-D09-00158, T-95, 61:3-63:5; MFI-T-D09-00171; MFI-T-D09-00172.
[326] T-83, 22:17-23:3.
[327] [REDACTED].
[328] T-83, 17:19-25.
[329] EVD-T-OTP-00071, at 1941.

that Mr. Ruto was present at all the events alleged and made the speeches as alleged by OTP witnesses, the OTP has failed to establish that there is any, let alone a sufficient, causal relationship between these speeches and the perpetration of the crimes alleged in the UDCC.

113. The submissions in Section II above are incorporated herein by reference. The requirement to prove a substantial contribution is strictly applied and a causal link between the alleged utterances and the crimes committed cannot be assumed but must be demonstrated by credible and reliable evidence.[330] Following the SCSL Appeals Chamber in the *CDF* Case, *mens rea* cannot be established by acts or words that are ambiguous and can be reasonably interpreted in more than one way.[331] The OTP's case that Mr. Ruto's speeches were inciting against Kikuyus, is based on the interpretation that its witnesses ascribe to the words used by Mr. Ruto[332] which, given their literal meaning, were nothing more than normal political electioneering.

114. All alleged rallies took place prior to the PEV and it is not alleged that Mr. Ruto made any inciting utterances during the PEV itself. The lapse of time between the rallies and the PEV and the facts described in the paragraphs above demonstrate "the possibility that other events might be the real cause"[333] of the crimes charged and Mr. Ruto's public speeches at campaign rallies might not have substantially contributed to them. This possibility is rendered even starker when set against Mr. Ruto's repeated statements against violence during the campaign period in 2007[334] and called for the violence to stop during the PEV.[335]

[330] Archbold International Criminal Courts, Sweet and Maxwell, 4th Ed., para. 10-20.
[331] *Prosecutor v. Fofana*, SCSL-04-14-A, Appeals Judgment, 28 May 2008 ("*Fofana*"), para. 56.
[332] T-131, 27: 5-30:4; T-118, 79:5-9; T-169, 76:7-79:13; T-64, 37:4-38:5, 46:3-20, 96:20-97:9, 101:13-103:4
[333] *Prosecuor v. Nahimana et al*, Appeals Judgement, 28 November 2007, para. 513.
[334] EVD-T-D09-00247; EVD-T-D09-0252, lines 68-94; EVD-T-D09-00209, lines 28-30; EVD-T-D09-00208.
[335] Annex B.

115. Notably, the OTP did not lead any evidence to show that the direct perpetrators who committed the crimes charged, were either present at the rallies[336] or at the very least heard about the alleged speeches, let alone that it had a substantial effect on them during the commission of crimes. For all these reasons, the Defence submits that the OTP has failed to establish even to the 'no case to answer' standard that Mr. Ruto induced, solicited or in any other way incurred liability for the commission of the crimes charged by his public utterances.

(2) 2005 Referendum

116. Contrary to the OTP's position that, during the 2005 Constitutional referendum in Kenya, Kikuyu, and Kalenjin took opposing sides,[337] the evidence establishes that many Kikuyus not only supported the "No" campaign but also headed the Orange team, like President Uhuru Kenyatta.[338]

117. The evidence of P-0800 and P-0658, that Mr. Ruto was inflaming violence against the Kikuyus during the 2005 referendum,[339] is contradicted by other objective evidence on the record.[340] For instance, P-0658's testimony that at the centenary memorial celebrations of the Nandi hero, Koitalel Samoei, on 19 October 2005, Mr. Ruto meticulously addressed each Kalenjin sub-tribe using "very inciting language for each specific community" inciting them to evict the Luhyas and Kikuyus,[341] is not only uncorroborated but is contradicted in its entirety by independent video-evidence of the actual event.[342]

118. The trial record demonstrates that, at "No" rallies during the 2005 referendum, Mr. Ruto called for Kenyans to unite and spoke out against discrimination and tribalism. For instance, at a "No" rally in 2005 at 64 Stadium, Mr. Ruto and Mr.

[336] *Fofana*, para. 85.
[337] T-27, 25:11-13.
[338] T-46, 75:9-20; T-158, 87: 6-8; T-171, 51:15-52:12.
[339] T-154, 19:8-25:4; T-169, 93:2-100:3.
[340] T-171, 21:16-27:25.
[341] T-169, 93:2-100:3.
[342] T-171, 21:16-27:25; EVD-T-D09-00301; EVD-T-D09-00302.

Kenyatta shared the same "No" campaign stage and spoke out against tribalism. During that rally, rather than Mr. Ruto "incit[ing] the people against Kikuyu",[343] Mr. Ruto said that we want "to live together as brothers and sisters without discriminating whether you are tall, what your age is, what your tribe is or what your religion is. As Uasin Gishu people we would like to live harmoniously as brothers and sisters from Kenya, and we do not want laws that will come to divide us so that we go to the courts to accuse each other."[344] Additionally, at the "No" Rally in Kisumu, Mr. Ruto said that "We as the nation of Kenya want to work together, are we together? And all of us as Kenyans we do not want tribalism."[345]

C. Financing of the 'Network'

119. There is no evidence - Trial and/or R68 - on which a reasonable Trial Chamber could find that Mr. Ruto "finance[ed] the Network".[346] The only Trial Evidence on which the OTP could seek to rely comes from three sources, P-0800, P-0658 and P-0326, but the evidence of all three is insufficient.

120. Scrutiny of P-0800's evidence demonstrates that there is no evidence that Mr. Ruto contributed to the training of Kalenjin youths. P-0800 testified that he heard from [REDACTED], who had been informed by an unnamed third person, about youths being trained a month before the elections in [REDACTED] by retired army officers "in preparation of the war which [would] take place after [the] elections".[347] P-0800 alleges that he was informed that those who attended the training were given money from Ruto.[348] However, [REDACTED] testified that [REDACTED] had not heard about any training at [REDACTED] before the PEV

[343] P-658, T-171, 53:2-11; T-149, 62:11-64:10; T-180, 59:12-16.
[344] T-171, 54:9-58:6.
[345] EVD-T-D09-00273; EVD-T-D09-00274.
[346] UDCC, p. 41.
[347] T-155, 17:11-18:3, 22:3-14, 23:21-24:1; T-160, 38:16-24. Note that in relation to this evidence, no reliance can be placed on EVD-T-OTP-00174, paras. 44-45 *per* T-141, 41:8-9.
[348] T-155, 26:14-20.

and made no mention of it in [REDACTED] original statement.[349] As detailed in paragraph 69 above, no reasonable evidential link is made between the group operating in [REDACTED] and Mr. Ruto.[350]

121. P-0800's evidence that Farouk Kibet "had been sent [to a cleansing ceremony attended by 3,000 in Nabkoi Forest in May 2008] with a little cash [from Mr. Ruto] to pay as a sign of thanks to the community"[351] is irrelevant. Even if such a contribution had been made, which is denied, it was made *ex post facto* and, thus, has no link to the commission of the crimes charged.

122. P-0658's evidence that Kibor handed over an envelope allegedly containing money from Mr. Ruto at a *harambee* to raise money to buy "things" in Ziwa on 31 December 2007 attended by Isaac Maiyo and Fred Kapondi is insufficient and/or incapable of belief on a number of bases.[352] First, it is hearsay. Second, it is speculation. Even if it is accepted that Kibor and Kapondi talked about getting "things", which is denied, it is submitted that there was no basis for P-0658 to conclude that "things" meant weapons. Additionally, as P-0658 conceded, he had no direct knowledge of whether the envelope was from Ruto or contained money - "[i]f it was a lie, then I cannot confirm."[353] Third, there is no link between the donation and the contribution (if any) it made to the crimes charged. Fourth, the evidence of a fundraiser being held the day after the announcement of the presidential results runs counter to the OTP's theory of a Network dating from late 2006 and manifesting a "high level of organisation"[354] and pre-planning. Fifth, P-0658's attendance at the *harambee* is tied to an announcement allegedly made on Kass FM on 31 December 2007.[355] The OTP's

[349] T-141, 8:8-16. *See also*, *e.g.*, [REDACTED].
[350] EVD-T-OTP-00149, paras. 65-67.
[351] T-156, 22:18-19. *Also* T-156, 16:10-23:25.
[352] T-164, 91:15-93:4.
[353] T-172, 109:10-110:17.
[354] PTB, para. 118.
[355] T-164, 58:19-62:9.

own evidence establishes that a broadcasting ban was imposed from 30 December and still in effect on 31 December 2007.[356] Sixth, P-0658 testified that he attended the aftermath of the killing of [REDACTED] on 30 December 2007.[357] The evidence establishes that [REDACTED] died on 31 December 2007.[358] P-0658 could not have been in two places at once. Seventh, [REDACTED] also gives hearsay evidence about a meeting in Ziwa on 31 December 2007 but, other than in respect of the presence of Kibor and Kapondi, [REDACTED] account differs significantly and in material respects from P-0658's account.[359] Finally, [REDACTED] evidence conflicts with the evidence of both [REDACTED] and P-0658 because [REDACTED] places [REDACTED] on [REDACTED].[360] All these contradictions are significant and cannot be ignored. Taking the OTP case at its highest does not mean "picking out the plums and leaving the duff behind."[361]

123. On any view, P-0326's hearsay evidence of money being given to Mr. Ruto on 3 January 2008 for onward transmission to Jackson Kibor via [REDACTED] is irrelevant because it is not incriminatory.[362] Even if it is accepted that the payment was made, which it is not, P-0326 testified that the intention was "to help the people" because the "youth who were…in the Rift Valley were…suffering".[363] He agreed that the money was sent to help the youths who were in areas under attack to move to places of safety.[364] Additionally, it is self-evident that the alleged 3 January 2008 payment cannot be linked to the donation allegedly given through Kibor in Ziwa on 31 December 2007. Accordingly, no reliance can be placed on P-0326's evidence to support the charges.

[356] EVD-T-OTP-00130; EVD-T-OTP-00329.
[357] T-164, 17:20-18:5.
[358] EVD-T-D09-00318 to EVD-T-D09-00320.
[359] [REDACTED].
[360] [REDACTED].
[361] *R v. Shippey* [1998] Crim LR 767.
[362] T-45, 27:6-29:7, 37:7-41:8.
[363] T-45, 28:14-16.
[364] T-47, 57:2-58:7.

124. A review of the R68 evidence also reveals that there is no evidence of Mr. Ruto contributing financially to the Network. The three fragments of evidence on this topic in [REDACTED] statement can all be rejected. First, in respect of the meeting held at [REDACTED][365] on [REDACTED], there is no evidence that [REDACTED] asked Mr. Ruto for funds or that Mr. Ruto provided them.[366] Second, the statement that [REDACTED] thought "RUTO was in charge" based on "the money provided and the co-ordinator's words" is vague and speculative and as a result evidentially worthless.[367] Third, the allegation that [REDACTED], the nominated councillor from [REDACTED], offered money from Mr. Ruto at a meeting at [REDACTED] is hearsay plus, even accepting such offer was made (which it is not), there is no evidence showing how this money contributed to or had any effect on the crimes charged.[368]

125. [REDACTED] hearsay evidence is similarly insufficient. The witness' bald statement that "RUTO was the one providing everything needed, mostly money, for the meetings at [REDACTED] place",[369] on analysis boils down to bare speculation. While [REDACTED] states that [REDACTED] heard [REDACTED] told to take the budget "to the Honourable RUTO and bring the money", [REDACTED] concedes [REDACTED] "never saw any money brought in" and [REDACTED] conclusion that the money was provided is based simply on the fact that "[f]ood was always available".[370] Even linking [REDACTED] R68 evidence to that of [REDACTED] regarding the alleged phone call between Kisorio and Mr. Ruto does not assist the OTP's case because the provision of funds was not discussed or agreed. In conclusion, no reasonable Trial Chamber could convict an accused on such derisory evidence.

[365] *E.g.*, EVD-T-OTP-00149, paras. 61, 63.
[366] EVD-T-OTP-00149, paras. 68-69.
[367] EVD-T-OTP-00149, para. 69.
[368] EVD-T-OTP-00149, para. 70.
[369] EVD-T-OTP-00174, para. 123.
[370] EVD-T-OTP-00174, para. 123.

D. Logistics for the 'Network'

(1) Transport

126. The OTP have failed to produce any evidence on which a reasonable Trial Chamber could find that Mr. Ruto contributed in any way to the transport of logistics including perpetrators involved in the crimes charged.[371] In the absence of any evidence linking Mr. Ruto to Jackson Kibor because of their involvement in a Network or common plan, the Trial Evidence of P-0487 and P-0658 alleging that lorries belonging to Kibor were transporting Kalenjin youth is irrelevant.[372] Further, P-0487's evidence that the lorries belonged to Kibor is hearsay and any link between the youth transported and the crimes committed is of little or no relevance because [REDACTED] is outside the geographic scope of the charges and P-0487 testified about crimes occurring prior to 1 January 2008, which is outside the temporal scope of the charges.[373] As regards P-0658's evidence, no necessary nexus between the youth transported and the crimes charged is provided.

(2) Weapons

127. Any evidence led by the OTP at trial alleging Mr. Ruto's involvement in weapons procurement and distribution (as opposed to "fundraising to purchase weapons"[374] (see above)) is insufficient and/or incapable of belief.[375] Indeed, the incoherence of the OTP's theory regarding the procurement of guns and Mr. Ruto's responsibility for the crimes charged is underscored by: (i) the fact that neither the UDCC[376] nor the UPTB contain any allegation of death by gunshot; and (ii) there is insufficient evidence on the record of the deaths of PNU supporters/Kikuyus by gunshot to establish any nexus between gun

[371] *E.g.*, UDCC, paras. 22(3), 25, 56(3), 64.
[372] P-0487, T-54, 64:1-65:22, 98:4-99:6, 100:16-22; P-0658, T-164, 73:13-76:15.
[373] *See infra*, paras. 144-146.
[374] UDCC, para. 22(5).
[375] *Contra*, *e.g.*, UDCC, para. 22; UPTB, paras. 47, 48, 60, 66, 76, 79.
[376] Reference is only made to youths armed with guns in Turbo (at pp. 42, 48).

procurement on the part of Mr. Ruto and the use of guns by Kalenjin youths during the PEV.

128. [REDACTED] to testify about [REDACTED] testified that on [REDACTED], together with [REDACTED] procured [REDACTED] and [REDACTED] from [REDACTED] and [REDACTED] from [REDACTED] (the [REDACTED]).[377] He also testified that before [REDACTED], Mr. Ruto called [REDACTED].[378] According to [REDACTED] passed the phone to [REDACTED] telling Mr. Ruto to speak to his [REDACTED].[379] [REDACTED] claimed that Mr. Ruto asked [REDACTED] to cooperate with [REDACTED].[380] [REDACTED] assumed that Mr. Ruto was talking about the [REDACTED].[381]

129. [REDACTED] uncorroborated account does not provide sufficient evidence upon which a reasonable Trial Chamber could convict. [REDACTED] provides no evidence that [REDACTED] discussed a [REDACTED] with Mr. Ruto [REDACTED].[382] Instead, [REDACTED] evidence is that [REDACTED] and Mr. Ruto discussed the vote counting.[383] Additionally, [REDACTED] account of [REDACTED] own conversation with Mr. Ruto does not provide any reasonable evidential basis on which to conclude that any reference was made to [REDACTED].[384]

130. In addition to being insufficient, [REDACTED] account is riddled with inaccuracies and contradictions that cannot be ignored and render it incapable of belief. First, it is an agreed fact that Kibaki was announced the winner of the presidential elections and sworn in on 30 December 2007.[385] [REDACTED]

[377] [REDACTED].
[378] [REDACTED].
[379] [REDACTED].
[380] [REDACTED].
[381] [REDACTED].
[382] [REDACTED].
[383] [REDACTED].
[384] [REDACTED].
[385] ICC-01/09-01/11-451-AnxA, agreed facts 35, 36.

maintained that the [REDACTED] and that, soon after the phone call with Mr. Ruto, [REDACTED] heard the swearing in ceremony of President Kibaki on the radio.[386] Second, the witness could not give a consistent account of the events surrounding [REDACTED]. [REDACTED] story about [REDACTED], [387] [REDACTED], [388] [REDACTED] [389] and [REDACTED] [390] repeatedly changed. Third, the record shows that [REDACTED] has provided [REDACTED] [391] [REDACTED].[392] Fourth, the only factor linking Mr. Ruto to the [REDACTED] is the alleged cryptic phone conversation. However, in [REDACTED] previous statements to [REDACTED], [REDACTED] attributed the call to another individual and not Mr. Ruto.[393] The witness' explanation that [REDACTED] did not tell the truth to [REDACTED] because [REDACTED] was afraid of [REDACTED][394] [REDACTED] does not withstand proper scrutiny. Many of the details [REDACTED] "changes" [395] do not alter the [REDACTED] nature of [REDACTED] original account to [REDACTED] in any way. [396] Further, [REDACTED] was unable to give a logical explanation for "lying" the first time [REDACTED] spoke to the OTP.[397]

131. There is also conflicting evidence regarding [REDACTED] location on [REDACTED]. [REDACTED] and [REDACTED] state that on this date between 2/3 pm[398] and 5 pm,[399] at the exact time that [REDACTED] was allegedly meeting [REDACTED] in [REDACTED],[400] [REDACTED] was at a [REDACTED]. The

[386] [REDACTED].
[387] [REDACTED].
[388] [REDACTED].
[389] [REDACTED].
[390] [REDACTED].
[391] [REDACTED].
[392] [REDACTED].
[393] [REDACTED].
[394] [REDACTED].
[395] [REDACTED].
[396] [REDACTED].
[397] [REDACTED].
[398] EVD-T-OTP-00149, para 80; T-164, 76:16-24.
[399] EVD-T-OTP-00149, para 83; T-164, 93:10-24.
[400] [REDACTED].

Defence submits that such glaring contradictions cannot be ignored even at 'half-time'.

132. In addition to being insufficient, [REDACTED] account is riddled with inaccuracies and contradictions that cannot be ignored and render it incapable of belief. However, even if the Chamber credits [REDACTED] evidence at this stage of proceedings, the OTP has failed to establish any nexus between Mr. Ruto's alleged phone call to [REDACTED], the alleged [REDACTED] and the crimes charged.

133. In the absence of any link to Mr. Ruto or the crimes charged, P-0423's evidence that Kalenjins were: (i) assembling bows and arrows at Kapseret forest;[401] and (ii) gathering big rocks at [REDACTED] house and breaking them into small pieces,[402] is of no significance and should not be considered.

134. [REDACTED] evidence records that one of the youth leaders who went to Huruma reported that "some of the other groups had guns…there was a fire-fight between the Kalenjin youth and some Kikuyu in Huruma. They were able to shoot a Kikuyu".[403] The Defence submits that not only did [REDACTED],[404] it is double hearsay, fails to link the gun used to Mr. Ruto and, thus, is insufficient.[405] It is also not corroborated by any other evidence that Kalenjins shot any Kikuyu in Huruma.

135. Whilst the evidence shows that Kalenjins are traditionally trained in the use of bows and arrows[406] and that during the PEV such weapons were carried and

[401] T-67, 39:19-42:15. This evidence is also hearsay.
[402] T-67, 43:21-48:10.
[403] [REDACTED].
[404] [REDACTED].
[405] *See also infra*, para. 148.
[406] EVD-T-OTP-00149, para. 66.

used by Kalenjijn youth,[407] there is no evidence linking Mr. Ruto to the provision of those weapons.

E. Other "contributions" to the 'Network'

136. For completeness, and taking the evidence of each witness at its highest, the Defence observes that there is nothing in the Trial Evidence of P-0326 regarding Mr. Ruto's broadcast on Kass FM on 25 December 2007 and in the [REDACTED] of [REDACTED] regarding a message sent by Mr. Ruto via [REDACTED] on [REDACTED] 2007 that "we must vote as a bloc for ODM and anyone who voted against ODM would be dealt with" that could be relied on by a reasonable Trial Chamber to find that Mr. Ruto contributed to the crimes charged.[408] P-0326's evidence is hearsay plus there is no evidence before the Chamber to determine with certainty the accuracy of [REDACTED] of the broadcast. In any event, P-0326 agreed that what was broadcast was campaign talk and not objectionable and no link is made between the broadcast and the crimes charged.[409] In addition, to being yet another example of double hearsay, [REDACTED] evidence that "*Mushimiwa*" could refer only to Mr. Ruto is speculative. It is a term used for all MPs. Further, no evidential basis is provided for [REDACTED] bare assertion that local counsellors and campaigners such as [REDACTED] or Ruto's personal assistants were used by Mr. Ruto to deliver messages to local constituencies. Moreover, no link is established between Mr. Ruto's purported statement and its effect or contribution to the crimes charged.

IV. CRIMEBASE: MR. RUTO IS NOT RESPONSIBLE FOR THE CRIMES CHARGED

137. An analysis of the crime base evidence establishes two key points. First, while violence undoubtedly erupted throughout Kenya after the announcement of the

[407] EVD-T-OTP-00174, para. 84.
[408] P-0326: T-44, 36:12-42:5, 82:21-84:9; T-47, 10:18-15:24; [REDACTED].
[409] T-47, 10:18-15:24.

2007 Presidential election results,[410] the OTP has failed to prove the essential ingredients of the crimes charged in relation to the locations specified in the charges. Second, no evidence has been led that links Mr. Ruto with any of the crimes alleged in any of the locations charged. The charges should, therefore, be dismissed.

138. The charges must be strictly construed. Specifically, the geographical scope and temporal scope of the charges are limited to those expressly pleaded in the UDCC.[411] In this regard, this Chamber confirmed the PTC's finding that "the 'greater Eldoret area' [is]…confined to the locations specified in the Confirmation Decision, namely Huruma, Kiambaa, Kimumu, Langas and Yamumbi."[412] In respect of the temporal scope, the OTP's request to amend the charges concerning the greater Eldoret area to include 30 and 31 December 2007 was rejected.[413] The result, as acknowledged by the OTP, is that it "is not permitted to charge and prosecute the accused for crimes committed in those locations during those dates."[414] Accordingly, any evidence which has been adduced during trial which falls outside the express temporal and geographical framework of the charges is not directly relevant to the proof of the charges and must be disregarded.[415]

139. The Defence acknowledges that at this stage of proceedings the Chamber has determined that it will not consider individual incidents included within a count and will "consider whether or not there is evidence supporting any one of the incidents charged."[416] However, reconsideration of this approach is warranted

[410] *E.g.*, ICC-01/09-01/11-451-AnxA, agreed fact 99.
[411] This approach is consistent with the Court's jurisprudence. *See* ICC-01/04-01/10-465-Red, paras. 82-83; ICC-01/04-02/06-450, para. 72.
[412] ICC-01/09-01/11-522, para. 33 citing to Confirmation Decision, para. 227. *See also* the Chamber's statement in this paragraph that it "is therefore of the view that the charges have been confirmed only with regard to the locations specified in….paragraphs" 349 and 367 of the Confirmation Decision.
[413] ICC-01/09-01/11-859. *See also* ICC-01/09-01/11-1123.
[414] ICC-01/09-01/11-880, para. 41.
[415] This evidence may be relevant to prove the contextual elements of the crimes.
[416] ICC-01/09-01/11-1334, para. 27.

because it is "manifestly unsound and its consequences…manifestly unsatisfactory".[417]

140. As stated above and more fully explained below, the OTP has failed to prove the essential ingredients of the crimes charged in relation to many of the locations subject to the charges. It would be unfair to continue the trial in respect of those locations where there is patently no relevant evidence on the record to support them or it is insufficient.[418] The Defence submits that it is no answer to this unfairness to assert that the Defence has the "possibility not to answer to all of the allegations contained in a count for which it feels that the Prosecution failed to lead any evidence".[419] Instead, the Chamber has the opportunity to determine the matter now and, thus, to promote the spirit and letter of the 'no case to answer' motion which is to enhance trial efficiency and ensure the accused's fair trial rights.

141. Support for the Defence approach can be found in the older decisions of the ICTY.[420] It appears that this approach was only departed from following amendments made in 2004 to ICTY Rule 98*bis* whereby the procedure for dealing with 'no case to answer' motions moved from a written to an oral one in an attempt to enhance efficiency.[421] However, as observed by Judge Antonetti, the objective of the 2004 reform was never intended to bar a possible decision of partial acquittal.[422] His Honour reasoned that to prevent partial acquittals would be "paradoxical" to this very reform.[423] Accordingly, the Defence submits that

[417] *E.g.*, ICC-01/04-01/06-2705, para. 18.
[418] *See* Judge Antonetti's dissenting opinion in *Prosecutor v. Šešelj*, IT-03-67-T, Rule 98*bis* Judgment, Transcript, 4 May 2011 ("*Šešelj*"), pp. 16901-1907.
[419] *Šešelj*, p. 16830, lines 5-8.
[420] *E.g., Prosecutor v. Kordić et al*, IT-95-14/2, Judgment on Defence Motions to Acquit, Trial Chamber, 6 April 2000, para. 35; *Prosecutor v. Galić*, IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galic, 3 October 2002, *Prosecutor v. Blagojević et al*, IT-02-60-T, Judgment on motions for acquittal pursuant to Rule 98bis, 5 April 2004 ("*Blagojević*"), para. 22.
[421] *Šešelj*, p. 16829-16830.
[422] *Šešelj*, p. 16902.
[423] *Šešelj*, p. 16902.

this Chamber should be permitted to enter partial acquittals, including in respect of locations.

A. Count 1, Murder

142. A review of the trial record establishes that, in respect of the murder charge, there is: (i) no relevant evidence for Turbo town, Kapsabet town and Nandi Hills town; and (ii) insufficient evidence for Kimumu, Langas and Yamumbi. Whilst some evidence of murder has been led in relation to Huruma and Kiambaa which may fall within the scope of the charges, there is no evidence linking Mr Ruto to those killings. Therefore, Count 1 must be dismissed in its entirety.[424]

(1) Turbo

143. No *viva voce* witness has testified that any, let alone four, "civilians perceived to be supporters of the PNU" were killed during the violence.[425] The only evidence of deaths in Turbo during the PEV is unrelated to the charges. In this regard, P-0613,[426] [REDACTED][427] and [REDACTED][428] all provided hearsay accounts of the killing of a Kalenjin boy (Kevin Kipchumba) by a policeman in Turbo sometime in January 2008.[429] P-0613 also provided a hearsay account of the killing of a Luhya man by the police in Turbo on an unspecified date.[430] However, there is no evidence that either of these victims were PNU supporters. [REDACTED] evidence on this point is consistent with the aforementioned Trial Evidence.[431] Accordingly, there is no evidence of murder in Turbo town committed by Kalenjin youths or other ODM supporters on 31 December 2007.

[424] In the alternative, and pursuant to the submissions made in paragraphs 139-141 above, the Defence submits count 1 should be confined to Kiambaa and Huruma.
[425] UDCC, p. 42.
[426] T-120, 23:17-25:23.
[427] [REDACTED].
[428] [REDACTED].
[429] T-120, 22:12-25:12; [REDACTED]; [REDACTED].
[430] T-120, 22:12-23:1.
[431] [REDACTED].

(2) Huruma

144. At the outset, it is important to understand the proper geographical limits of Huruma, an exercise which was undertaken by the Defence and, despite bearing the burden of proof, not by the OTP. While P-0487, P-0508, and P-0535 testified about events in [REDACTED],[432] [REDACTED],[433] [REDACTED][434] and [REDACTED],[435] the OTP's own evidence establishes that none of these locations are in Huruma.

145. During cross-examination, P-0487 delineated the geographical boundaries of Huruma on a map.[436] P-0487 placed [REDACTED] and [REDACTED] and, thus, outside Huruma's [REDACTED] boundary.[437] Additionally, P-0487 indicated that [REDACTED] is located east of [REDACTED] and [REDACTED]; thus, putting [REDACTED] even further away from Huruma.[438] P-0535 testified that: (i) [REDACTED], [REDACTED] and other villages are in Kilimani sub-location, which is part of Kibulgenyi location, which in turn is part of the larger administrative unit, Soy division; and (ii) Huruma is a sub-location within Kapyemit location.[439] This position was reinforced by P-0508 who testified that Huruma is in Turbo division and [REDACTED], [REDACTED] and [REDACTED] are in Soy Division.[440] P-0508 agreed that [REDACTED] is "geographically and administratively in a completely different location from Huruma."[441]

[432] [REDACTED].
[433] [REDACTED].
[434] [REDACTED].
[435] [REDACTED].
[436] [REDACTED].
[437] [REDACTED].
[438] [REDACTED].
[439] [REDACTED]. Note in examination-in-chief, [REDACTED] testified that [REDACTED] was in Huruma ([REDACTED]). However, the position was clarified in cross-examination where the witness put the village in a completely different administrative unit. The witness' position conforms to the testimony of [REDACTED] and [REDACTED].
[440] [REDACTED].
[441] [REDACTED]. *See also* [REDACTED].

146. Accordingly, the evidence of P-0487, P-0508 and P-0535 about events in [REDACTED], [REDACTED], [REDACTED], and [REDACTED] on 31 December 2007 is outside the geographical scope and, in fact, the temporal scope of the charges and must be disregarded. Only evidence which concerns places within the boundaries of Huruma is relevant to the charges and this evidence is considered below.

147. The only Trial Evidence relevant to murder is provided by [REDACTED] who testified that on or after 1 January 2008 [REDACTED] saw one [REDACTED] Kikuyu killed in Huruma by Luos, Kalenjins and Luhyas.[442] In contrast, P-0508's testimony about seeing a total of six dead bodies at various locations in Huruma is insufficient because no evidence was elicited as to the ethnicity of the victims or when, how and by whom they were killed.[443]

148. Equally insufficient is [REDACTED] evidence about the shooting of a Kikuyu youth in Huruma.[444] Not only is the evidence double hearsay, but no information was provided about: (i) whether the youth died as a result of the alleged shooting; (ii) how the youth's ethnicity was determined; or (iii) when the incident occurred. [REDACTED] evidence is clearly devoid of the necessary detail which is required for evidence to be sufficiently probative of any of the facts in issue in Count 1. In addition, [REDACTED] testified under oath that [REDACTED] falsified [REDACTED] written account on the instruction of [REDACTED].[445]

(3) Kimumu

149. Only three *viva voce* witnesses, P-0469, P-0189 and P-0658, provided evidence which the OTP could seek to rely on to support its allegations that PNU

[442] [REDACTED].
[443] T-104, 64:1-11.
[444] [REDACTED].
[445] [REDACTED].

supporters were killed in Kimumu.[446] However, as explained below, the evidence of each witness is insufficient.

150. P-0469 testified about events in Kimumu including the beating of a Kikuyu called [REDACTED] at [REDACTED] on 30 December 2007 by five Kalenjins, a Turkana and other unidentified persons.[447] The witness was unclear about [REDACTED] fate.[448] However, hospital records show that a person called [REDACTED], a [REDACTED] from Kimumu, was admitted on 31 December 2007, treated and discharged.[449] Based on the same first name and location of the incident being Kimumu, this individual is possibly the same person referred to by P-0469. But, even if it is not accepted that it is the same person, the incident spoken to by P-0469 allegedly occurred on 30 December 2007, which is outside the temporal scope of the charges and, thus, should be disregarded.

151. P-0189 testified that she saw the bodies of three Kikuyus near Rock Primary, between Munyaka and Eldoret on 31 December 2007[450] and about 10-20 bodies of unidentified individuals at Kahoya Estate on or about 4-5 January 2008.[451] The OTP failed to establish that the area near Rock Primary or Kahoya Estate is within Kimumu or any other location charged. Further, in relation to all the bodies allegedly seen by P-0189, there is no evidence as to when, why or how the individuals died. Nor, in respect of the bodies at Kahoya Estate, is there any evidence as to the ethnicity of these victims. In any event, the deaths of the three individuals whose bodies were seen at Rock Primary are outside the temporal scope of the charges relating to Kimumu and cannot be the basis of a *prima facie* case for the charge under Count 1.

[446] UDCC, pp. 22, 43.
[447] T-106, 67:24-68:9, 69:10, 69:15-23.
[448] T-106, 71:16-17.
[449] [REDACTED].
[450] T-49, 40:7-41:16, 43:10-13.
[451] T-49, 59:7-12, 59:7-12.

152. [REDACTED] testified that [REDACTED].[452] The witness testified that [REDACTED].[453] Although the witness claimed that [REDACTED].[454] From the skeletal evidence adduced, it is not possible to conclude to the required standard that [REDACTED]. In any event, the OTP failed to establish that the place where [REDACTED] allegedly observed this incident is in Kimumu plus the incident occurred outside the temporal scope of the charges and is irrelevant to Count 1.

153. Of note it is that the conclusion that there is no evidence that Kikuyus or PNU supporters were murdered in Kimumu between 1 and 4 January 2008 is supported by independent medical evidence admitted by the OTP.[455]

(4) Langas

154. There is no evidence, whether Trial or R68, concerning killings in Langas on which a reasonable Trial Chamber could convict because the evidence is irrelevant, insufficient or incapable of belief.

155. The evidence of P-0376,[456] P-0405,[457] P-0189[458] and P-0442[459] regarding the killing of Kalenjins and Luos in Langas is irrelevant to the charges because no evidence was elicited that any of the victims were PNU supporters. P-0189 also testified that the decapitated heads of Luos was possibly the work of the Mungiki.[460]

156. Similarly, P-0376's hearsay evidence about: (i) the death of the [REDACTED] at Nairobi Ndogo in Langas on 29 or 31 December 2007;[461] and (ii) the killing of two Kikuyus, [REDACTED] and [REDACTED], by Kalenjin warriors on 31 December

[452] [REDACTED].
[453] [REDACTED].
[454] [REDACTED].
[455] EVD-T-OTP-00060.
[456] T-51, 51:19-53:13, 72:11-78:1.
[457] T-122, 8:19-10:2.
[458] T-49, 51:8-11, 92:4-7, 93:19-23, 95:3-5, 97:8-13.
[459] T-102, 80:3-22; T-103, 67:23-69:5.
[460] T-49, 94:3-96:15.
[461] T-51, 51:19-23, 53:5-10.

2007,[462] is also irrelevant because all these incidents are outside the temporal scope of the charges relating to Langas.

157. P-0658 testified about the killing of a Kikuyu lady and her new-born baby in Langas on 1 January 2008.[463] This evidence is incapable of belief. Specifically, what is, if true, a shocking and significant incident is uncorroborated by any other evidence in this case including contemporaneous news reports, the CIPEV report and hospital records. Clearly, the event, as recounted by P-0658, would have been infamous. The fact that such an event is not reported anywhere, by anyone else, is highly significant. Furthermore, it is reasonable to assume that, if true, such a memorable event would have formed part of any information P-0658 provided about the PEV. However, this incident is not mentioned in any of his pre-ICC statements, *i.e.* his statement to the Waki Commission given just months after the PEV or his statement to CHRD in 2010.[464] In addition, for the reasons stated in paragraph 95 above, any incriminatory evidence provided by P-0658 must be received with the greatest caution and only where it is corroborated by other credible evidence.

158. Finally, [REDACTED] uncorroborated, [REDACTED] evidence about the killing of three Kikuyu men in Langas is insufficient because it is double hearsay and no information was provided about how the men's ethnicity was determined or when the incident occurred.[465] [REDACTED] evidence is clearly devoid of the necessary detail which is required for evidence to be sufficiently probative of any of the facts in issue in Count 1.

[462] T-51, 72:13-77:7.
[463] T-165, 4:21-10:6-13.
[464] T-173, 9:5-8; EVD-T-D09-00325; EVD-T-D09-00311.
[465] [REDACTED].

(5) Yamumbi

159. All the evidence of alleged killings in Yamumbi, provided by three witnesses, must be disregarded as outside the temporal scope of the charges.

160. [REDACTED], P-0423 and P-0658 testified about the killing of [REDACTED], a Kikuyu, by Kalenjin youths.[466] [REDACTED] evidence, objectively supported by the victim's death certificate, establishes that the date of [REDACTED] death was 31 December 2007 in Yamumbi.[467] Indeed, the OTP conceded that this event occurred on 31 December 2007.[468]

161. P-0423 also testified about the killing of [REDACTED][469] and [REDACTED][470] by Kalenjin youths in Yamumbi on 30 or 31 December 2007.[471] Both alleged killings occurred outside the temporal scope of the charges and should be disregarded.

(6) Kiambaa

162. There is sufficient evidence to establish that Kalenjin youths attacked Kiambaa on 1 January 2008, killing Kikuyus. Both [REDACTED] and [REDACTED] provided direct evidence of the attack[472] and are corroborated by the hearsay evidence of P-0189, [REDACTED] and P-0376.[473] That said, as detailed below, there is no evidence that Mr. Ruto was in any way responsible for this tragic incident.

[466] [REDACTED]; P-0658, T-164, 17:20-18:5; T-172, 101:19-103:8; P-0423, T-68, 17:1-19:15; T-69, 8:2-12:8.
[467] [REDACTED]. Note P-0658's evidence, while wrong, puts the event on 30 December 2007 which is still outside the temporal scope (T-164, 17:20-24)).
[468] T-69, 9:1-13.
[469] T-68, 16:9-17:13.
[470] T-68, 23:14-24:8.
[471] T-68, 30:6-31:24; T-69, 7:16-9:3.
[472] [REDACTED].
[473] P-0189, T-49, 56:21-57:12, 58:20-59:6; [REDACTED]; P-0376, T-51, 79:12-80:25.

(7) Kapsabet Town & Nandi Hills Town

163. In light of the OTP's concession not to rely on the evidence of P-0128 regarding the alleged killing of the Kikuyu OCS in Nandi Hills Town,[474] no evidence relevant to the charge of murder in the two charged locations in Nandi District was adduced. Indeed, the independent evidence on the record establishes that the only recorded deaths in the District occurred after 28 January 2008 and so irrelevant to the charges in this case.[475]

B. Count 2, Deportation or Forcible Transfer

164. Article 7(2)(d) of the Statute explains that ""[d]eportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law" (emphasis added). Based on the OTP's case theory that the common plan was to punish and expel from the Rift Valley those perceived to support the PNU in order to gain power and create a uniform ODM voting bloc,[476] "the area" for the purposes of Article 7(2)(d) must mean the Rift Valley – and at the very least the North Rift Valley area. Notwithstanding the massive internal displacement that took place throughout Kenya during the PEV and the terrible suffering experienced, the OTP has failed to lead any evidence that Kikuyus or perceived PNU supporters who were attacked within the temporal and geographical scope of the charges were forcibly transferred outside the Rift Valley. Instead, the evidence shows that such individuals sought refuge in local police stations and churches and that IDP camps were set up at locations such as Eldoret Showground. Therefore, it appears the OTP has not considered, let alone attempted to satisfy, this element of Article 7(2)(d). On this basis alone, Count 2 must fail.

[474] *Supra*, para. 6.
[475] EVD-T-OTP-00085.
[476] UDCC, paras. 36, 40.

165. In addition, a review of the evidence establishes that the only locations for which some evidence has been led which may fall within the scope of the charges for Count 2 are Kiambaa and Kapsabet. However, as discussed above and in sub-section D below, there is no evidence linking Mr Ruto to the crimes. Therefore, Count 2 must be dismissed in its entirety.[477]

(1) Turbo

166. The OTP's Count 2 case for Turbo rests primarily on one witness. Weak and unreliable evidence, based mostly on hearsay, speculation and assumption, is provided by P-0613 about the burning of Kikuyu houses in Turbo on 31 December 2007 and Kikuyus fleeing to Turbo police station.[478] P-0613 testified that she watched events from a distance.[479] Therefore, she did not see who burned the houses but assumed it was Kalenjin youth.[480]

167. [REDACTED] *viva voce* testimony only corroborates P-0613's evidence to the extent that it confirms that houses were burning in Turbo town on or around 31 December 2007 and that residents, including Kikuyus, fled to the Police station.[481] Otherwise, [REDACTED] denied that Kalenjin ODM supporters were responsible for the attacks. In the face of this denial, recourse cannot be made to [REDACTED] prior statement because the double hearsay evidence therein about burnings in Turbo[482] relates to the "day on which the results were announced",[483] 30 December 2007, and so falls outside the temporal scope of the charges.

[477] In the alternative, and pursuant to the submissions made in paragraphs 139-141 above, the Defence submits count 2 should be confined to such locations for which the OTP is found to have led sufficient evidence.
[478] T-118, 90:11-95:2; T-119, 4:23-6:1, 8:19-2:11, 23:1-24:15, 83:13-84:3.
[479] T-119, 5:14-18.
[480] T-119, 8:22-9:3, 24:9-15. *See also* T-118, 91:7-92:2, 93:9-11.
[481] [REDACTED].
[482] [REDACTED].
[483] [REDACTED].

168. Given the weaknesses of P-0613's evidence and the limits of [REDACTED] evidence combined with the failure to prove that perceived PNU supporters were forcibly displaced "from the area in which they are lawfully present", means this evidence is not sufficient to satisfy Count 2 in Turbo to the 'half-time' standard.

169. Any other evidence, whether Trial or R68, ostensibly concerning the burning of property in Turbo must be disregarded as deficient because it: (i) falls outside the temporal scope and/or geographic scope of the charges; (ii) fails to properly identify the perpetrators; (iii) fails to properly identify the victims as PNU supporters; and/or (iv) fails to establish that persons were forcibly transferred "from the area".

(2) Huruma

170. Bearing in mind the evidence of the OTP's witnesses regarding the geographical limits of Huruma detailed above, there is insufficient evidence on which a reasonable Trial Chamber could find that from, 1 to 4 January 2008, "[i]n Huruma, perpetrators burned houses and killed PNU supporters, causing residents to flee because of the attack."[484]

171. This absence of evidence correlates with the analysis above regarding Count 1 where the only evidence of killing relates to an incident involving an isolated attack on a [REDACTED] Kikuyu. Further, the Trial Evidence of P-0508 and P-0487 and the [REDACTED] evidence of [REDACTED] shows quite clearly that, while there was fighting on the outskirts of Huruma, there was no fighting inside Huruma because of the strong resistance put up by the Kikuyu youth who protected the location and erected roadblocks to keep the attackers out.[485]

[484] UDCC, p. 44.
[485] P-0487, T-55, 7:24-8:21, 12:25-14:20; P-0508, T-104, 66:13-22; [REDACTED].

172. Any reliance placed on P-0487 is misplaced because his evidence is insufficient. While he testified that Kikuyus who owned plots in Huruma left and went to Eldoret Police station, he did not provide any evidence as to when or why they left.[486] Nor did he provide any evidence linking Kikuyu residents leaving the location with Kalenjin attacks involving the burning of houses and the killing of PNU supporters within Huruma itself.[487] P-0487 also did not testify that Huruma residents were forcibly transferred "from the area".

173. The evidence of OTP expert, P-0488, establishes burnings, but confirms that none of these burnings were in the area identified by OTP witnesses or in the area which the Defence submit is Huruma.[488]

174. [REDACTED] evidence about the burning of "some" properties in Huruma is also insufficient.[489] It is double hearsay, [REDACTED],[490] and, other than the report of the incident being made on 4 January 2008, provides no information as to when the incident occurred. Even taking this evidence at its highest, the OTP has failed to establish that Kikuyus were forcibly displaced from Huruma due to Kalenjin attacks. A nexus must be established between the alleged attacks and any displacement. There is no reasonable basis on which to link [REDACTED] evidence with P-0487's equally unspecific evidence.

175. Any other evidence ostensibly concerning the forcible transfer of PNU supporters from Huruma must be disregarded as deficient because it: (i) falls outside the temporal and/or geographic scope of the charges; (ii) fails to properly identify the perpetrators and/or the victims; (iii) fails to provide sufficient evidence as to why individuals sought refuge at various locations; and/or (iv) fails to establish that persons were forcibly transferred from "the area". It was

[486] T-55, 9:2-14.
[487] T-55, 6:1-9:19.
[488] T-110, 39:12-43:17. *See also supra*, paras. 144-146.
[489] [REDACTED].
[490] [REDACTED].

for the OTP to properly adduce all the evidence necessary to support the Count 2 charge relating to Huruma. The above establishes that it clearly failed.

(3) Kimumu

176. Given that the temporal scope of the charges for Kimumu is "on or after 1 January to 4 January 2008", there is no evidence on which a reasonable Trial Chamber could find that PNU supporters were forcibly transferred from Kimumu.[491]

177. P-0189's testimony that [REDACTED] house in Kimumu had been looted and burned by a mixed group (Kalenjins, Luos and Luhyas) during the night of 31 December 2007 and 1 January 2008 is insufficient.[492] Not only is the evidence hearsay but it is ambiguous as to when the incident occurred. If it occurred on 31 December, then the evidence falls outside the temporal scope of the charges. In the case of ambiguity, the evidence must be disregarded on the basis of the principle *in dubio pro reo* or insufficiency.[493] In any event, there is also no evidence that P-0189's [REDACTED] was forcibly transferred "from the area" as a result of this terrible incident.

178. Additionally, the evidence adduced concerning P-0189's observations of events on 1 January 2008 when she went to Kimumu is insufficient.[494] While she testified that she saw the burned homes of Kikuyus, she provided no evidence as to the identities of the perpetrators. She testified that she saw youths in Kimumu but could not tell which ethnic groups they belonged to and did not see them do anything out of the ordinary.[495] It is, therefore, unclear who burned the houses, when they were burned down or whether the owners were deported or forcibly transferred "from the area".

[491] UDCC, p. 44.
[492] T-49, 43:20-23, 49:8-50:9.
[493] ICC-02/05-02/09-243-Red, para. 43.
[494] T-49, 43:20-48:18.
[495] T-49, 43:20-47:24.

(4) Langas

179. Proper scrutiny of the evidence purportedly relevant to the OTP's allegations that "[t]he targeted population of Langas" was forcibly transferred as a result of an attack allegedly carried out on 1 January 2008 shows that it is deficient in certain material respects.[496] More specifically, it falls outside the geographic and/or temporal scope of the charges, fails to identify the perpetrators, fails to identify victims as members of the "targeted population" and/or fails to establish that they were forcibly transferred "from the area".

180. The Trial Evidence of P-0405, while ostensibly relevant to the charges, is, in addition to being hearsay, insufficient. P-0405 testified that, on 1 January 2008, [REDACTED] many Kikuyus and Luhyas fleeing from Langas towards Kisumu Ndogo Police Station because they had been attacked by Luos and Kalenjins.[497] However, P-0405 testified that the Kikuyus around Kisumu Ndogo "were saying they were attacked by Luos, while the rest who came from the farm where I lived had been attacked by Kalenjins."[498] Given that [REDACTED],[499] it follows that, according to him, the attack on Kikuyus in Langas (Kisumu Ndogo) was by Luos and the attack on [REDACTED] was by Kalenjins. The attack by Luos on Kikuyus in Kisumu Ndogo is irrelevant to the charges, particularly when the Kikuyus were fleeing to a location within the Rift Valley and no evidence was elicited that the attackers were ODM supporters or when the attack occurred.

181. In short, the evidence fails to establish a *prima facie* case of forcible displacement of PNU supporters from Langas by Kalenjin youth and other ODM supporters on 1 January 2008.

[496] UDCC, pp. 44-45.
[497] T-122, 9:11-10:17.
[498] T-122, 10:3-17.
[499] T-121, 12:25-13:4.

(5) Yamumbi

182. Again, the OTP has failed to adduce sufficient evidence to establish a *prima facie* case of the forcible transfer of PNU supporters by Kalenjin youth and other ODM supporters following an attack which "began and ended on or about 1 January 2008."[500]

183. While P-0423 testified mainly about 31 December 2007, he also indicated that the violence started in Yamumbi on 30 December and lasted for four days.[501] However, a review of his evidence reveals that any relevant evidence is limited to 30 and 31 December 2007.[502] He provided no clear evidence of events that occurred "on or about 1 January 2008". Accordingly, his evidence must be disregarded as insufficient.

184. [REDACTED] evidence regarding [REDACTED] to a large extent concerns events from 30 to 31 December 2007.[503] However, [REDACTED], [REDACTED]". This evidence is not sufficient because it is hearsay and does not indicate when Yamumbi was attacked. Considering that the evidence on the record primarily concerns events in Yamumbi on 30 and 31 December 2007 (outside the temporal scope of the charges), it cannot be assumed that the attack which [REDACTED] was informed about occurred on or about 1 January 2008. Also, it appears that the people were fleeing to a location within the Rift Valley.

(6) Kiambaa

185. On the basis of the direct evidence of [REDACTED] and [REDACTED] and the hearsay evidence of [REDACTED] and P-0376, there is sufficient evidence to establish that Kalenjin youths attacked Kiambaa on 1 January 2008, killing

[500] UDCC, p. 45. Note Yamumbi is one of the locations for which the OTP tried unsuccessfully to expand the temporal scope to 30 December 2007 (ICC-01/09-01/11-859).
[501] T-68, 19:7-15.
[502] T-68, 8:1-25:10.
[503] [REDACTED].

Kikuyus and forcing others to flee.[504] That said, and whilst it is accepted that many individuals were forced to flee their homes in the PEV, the OTP have failed to lead any *viva voce* evidence at trial that Kikuyus from Kiambaa were forced to flee outside the Rift Valley.[505] This is legally significant for the reasons detailed at paragraph 164 above. Most crucially and as further detailed below, there is no evidence that Mr. Ruto was in any way responsible for this tragic incident.

(7) Kapsabet Town

186. [REDACTED].[506] [REDACTED].[507] P-0268 provides weak corroboration of [REDACTED] evidence because he testified that, on [REDACTED] Kapsabet in early February 2008, he saw that properties had been broken into and looted.[508] P-0268 was told the perpetrators were Kalenjin.[509] No other information was provided by P-0268 as to when the properties were attacked or who owned them. Taken as a whole and at its highest, this evidence is not sufficient, even at this stage of proceedings to establish a *prima facie* case of forcible transfer of Kikuyus from Kapsabet town by Kalenjin youths within the charged timeframe because there is no evidence that persons were forcibly transferred "from the area". Notably, P-0268 [REDACTED] in mid-February 2008. Further, as argued below, the OTP has failed to lead any cogent evidence to establish Mr. Ruto's responsibility for events at this location.

(8) Nandi Hills Town

187. There is limited evidence on the record regarding events in Nandi Hills town. What little evidence there is comes from [REDACTED], [REDACTED] and P-0128. However, this evidence is not sufficient to establish a *prima facie* case of

[504] [REDACTED]; [REDACTED]; [REDACTED]; P-0376, T-51, 79:12-80:4.
[505] [REDACTED] left the Rift Valley to seek medical treatment ([REDACTED]).
[506] [REDACTED].
[507] [REDACTED].
[508] T-63, 63:10-64:8.
[509] T-61, 95:19-99:21; T-62, 2:15-3:6.

forcible displacement of PNU supporters in Nandi Hills for the following reasons.

188. First, [REDACTED] testimony about seeing Kalenjin youths coming from Nandi Hills passing by with "stolen goods" on or after 29 December 2007 is not sufficiently precise in terms of the date when the goods were allegedly "stolen" and no information is provided about the identity of the victims.[510] [REDACTED] was also told the goods were stolen and appears to speculate that the goods were taken from Nandi Hill town based on the direction of the youth's travel alone. This evidence is also not linked to any displacement.

189. Second, [REDACTED].[511] [REDACTED].[512] [REDACTED].

190. Finally, P-0128 testified that in early January 2008, Kalenjins looted some stores belonging to Kikuyus in Nandi Hills town.[513] He also testified that he heard that a petrol station owned by a Kikuyu was burned down, albeit by unnamed perpetrators.[514] However, P-0128 did not provide any evidence about seeing any PNU supporters being attacked, forcibly transferred "from the area" or about any IDPs at all. Therefore, his evidence fails to provide any link or nexus between the few properties he saw or heard were attacked with any displacement of civilians.

C. Count 3, Persecution

191. The OTP alleges that Kalenjin youth and other ODM supporters committed persecution through acts of murder and deportation or forcible transfer of persons perceived to be PNU supporters by reason of their perceived political affiliation. Therefore, persecution only arises in locations where the evidence

[510] [REDACTED].
[511] [REDACTED].
[512] [REDACTED]
[513] T-83, 43:13-44:21, 46:20-47:22.
[514] T-83, 43:25-44:10, 48:14-23.

adduced is sufficient to establish a *prima facie* case of at least one of the underlying acts. It also has to be shown that the underlying act(s) was committed with discriminatory intent based on the political affiliation of the victim.[515]

192. In this context, the evidence reviewed above shows that there is insufficient evidence to establish a *prima facie* case that one or both of the underlying acts of persecution was committed in Turbo, Kimumu, Langas, Yamumbi, Kapsabet and Nandi Hills Town.

193. The evidence adduced with regards to Kiambaa town indicates that the victims killed were mainly Kikuyus, perceived supporters of the PNU. However, the crime of murder *per* Count 1 is not established to the 'half-time' standard at this location, because, as discussed throughout this motion, there is no evidence linking Mr. Ruto to the underlying crimes. Accordingly, the crime of persecution in count 3 must fail. With respect to Huruma, in addition to Count 1 not being established because of the OTP's failure to link Mr. Ruto to the underlying act, the requisite discriminatory intent required for persecution has not been made out.

194. The evidence on Huruma is only sufficient to establish a *prima facie* case that one Kikuyu man, who was [REDACTED] and became embroiled in an argument with Kalenjijn youths, was killed. However, the circumstances surrounding this killing do not evidence the requisite discriminatory intent required for persecution. [REDACTED] testified that the victim was asked questions but that he could not answer them and was attacked.[516] It is not known what questions the victim was asked and what, if any, answers he gave. Further, there is no evidence that the perpetrators identified him as a Kikuyu or linked him to the

[515] Confirmation Decision, para. 270.
[516] [REDACTED].

PNU. Significantly, [REDACTED] states that the reason the victim was killed was because the victim, [REDACTED], "was arguing with them, like, trying to fight them and abusing them".[517] In the absence of any evidence establishing that the victim was killed by reason of his perceived membership of the PNU, the evidence is not sufficient to ground a charge of persecution.

D. No link between the crimes and Mr. Ruto

195. The fundamental flaw in the OTP's case is its failure to link Mr. Ruto to the crimes. This failure applies irrespective of the nature of the crime or when or where it was committed. Therefore, even if, *arguendo*, the Chamber does not accept the Defence's assessment of the crimebase evidence and whether it falls within the proper scope of the charges, the OTP's case must fail because it has failed to establish the necessary nexus to Mr. Ruto under any mode of liability.

196. As is repeatedly stated above, there is no evidence which links Mr. Ruto to the direct perpetrators of the crimes. More specifically, there is no evidence that Mr. Ruto formed part of an Article 7(2) 'organisation', the so-called 'Network', or that he contributed in any way to the crimes.

E. Conclusion

197. Whilst violence undoubtedly erupted throughout Kenya after the 2007 elections, including in the North Rift, causing untold suffering to thousands of Kenyans, the OTP failed to investigate it properly. As a result it failed to identify correctly the causes of the violence and its perpetrators. The OTP's failings have continued at trial where it has failed to prove the essential ingredients of murder, deportation or forcible transfer and persecution within the geographic and temporal scope of the charges and Mr. Ruto's responsibility therefor in respect of all locations charged. As detailed above, the evidence led by the OTP

[517] [REDACTED].

is insufficient and deficient in material respects. This is highlighted by the example of Count 1 where the only killings which fall within the proper scope of the charges confirmed for trial is the killing of one Kikuyu in Huruma and those at Kiambaa.

198. However, more importantly, in relation to the Kiambaa and Huruma killings, and, indeed, in respect of all crimes committed in all areas irrespective of temporal or geographic scope, the OTP has failed to adduce sufficient evidence on which a reasonable Trial Chamber could find Mr. Ruto responsible under any mode of liability for the attacks that took place.

199. In conclusion, even at the level of the crime base, serious deficiencies in the OTP's investigation and prosecution of this case are exposed. The result is that the OTP has not established that there is a case for Mr. Ruto to answer.

V. THE OVERWHELMINGLY HEARSAY CONTENT OF THE PROSECUTION CASE

200. In making this submission of 'no case to answer' the Defence bears in mind the guidance provided in the Chamber's *Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)* ("Decision").[518] However, the Defence submits that the circumstances of this case provide a compelling reason for the Chamber to stop the case.

201. In particular, the Chamber is presented with a situation not specifically addressed in its Decision, nor at any other international criminal tribunal – namely a case built almost entirely on hearsay, whether it be in respect of the core testimony of the *viva voce* witnesses or the R68 evidence. The extent of the

[518] ICC-01/09-01/11-1334.

OTP's reliance on hearsay evidence demonstrates a case that has 'completely broken down'.[519]

202. Additionally, in the particular framework of the ICC,[520] the Chamber's general obligation to ensure that the trial is fair and expeditious and conducted in a manner which respects the rights of the accused,[521] authorises the Chamber to intervene and consider whether "'the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak,'"[522] "to engage the need for the defence to mount a defence case".[523] The Defence submits that under either avenue of examination, and as demonstrated by analysis of the OTP evidence both here and in the Defence response to the OTP application for admission of the R68 evidence,[524] no reasonable Trial Chamber could convict Mr. Ruto on the basis of this overwhelmingly hearsay case. A judgment of acquittal is in the interests of justice whether it be from the perspective of Mr. Ruto or from that of the victims, who should not be led to believe that a conviction could result in this case, or from the standpoint of judicial efficiency and economy.

203. In finding itself competent to entertain a 'no case to answer' motion the Chamber recognised that the primary rationale to intervene is based on the principle that "an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need for the defence to mount a defence case", and is consistent with "the rights of an 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

[519] *See*, *e.g.*, *Blagojević*, para. 15; *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on the Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza after Quashing the Counts Contained in the Third Amended Indictment (Article 98 *bis* of the Rules of Procedure and Evidence) and Decision on the Prosecutor's Urgent Motion for Suspension of Time-Limit for Response to the Defence Motion for a Judgement of Acquittal, 27 September 2001 ("*Semanza*"), para. 17.
[520] Decision, paras. 11-13, 15-16.
[521] Decision, para. 16.
[522] Separate Further Opinion to the Decision, ICC-01/09-01/11-1334-Anx-Corr ("Separate Opinion"), fn. 94 (quoting from Royal Commission on Criminal Justice, Report (Cm 2263, 1993), Ch. 4, para. 42.
[523] Decision, para. 12.
[524] ICC-01/09-01/11-1908-Conf-Corr ("Response to the R68 Application").

Statute".[525] The Chamber "also noted that the Statute places the onus on the Prosecution to prove the guilt of an accused"[526] and that "the objective of the 'no case to answer' assessment is to ascertain whether the Prosecution has lead sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted".[527]

204. In particular, the Chamber found that

> *the test to be applied for a 'no case to answer' determination is whether or not, on the basis of a prima facie assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber could convict the accused.*[528]

205. What constitutes 'sufficient evidence' is not further defined other than being "such evidence upon which a reasonable Trial Chamber could convict".[529] The Defence notes the Chamber's "observ[ation] that the general standard outlined hitherto is consistent with the jurisprudence of the ad hoc tribunals" and that the "ICTY Appeals Chamber [citing the *Jelisic* case among others] has formulated the applicable test as being 'whether there is evidence (if accepted) upon which a reasonable [trier] of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question'".[530]

206. While the Chamber, citing Article 66(3) of the Statute, rightly distinguishes the 'beyond a reasonable doubt' test applicable at the end of the case from the test for a 'no case to answer' motion,[531] 'sufficient evidence' at the 'no case to answer' stage must necessarily have a direct relationship to the standard of proof for conviction. Such was the view of the ICTY Appeals Chamber when dealing with

[525] Decision, para. 12.
[526] Decision, para. 13.
[527] Decision, para. 13.
[528] Decision, para. 23 (emphasis added). See also para. 32.
[529] See Decision, paras. 23, 30.
[530] Decision, para. 31, referring to *Prosecutor v. Karadzić,* IT-95-5/18-AR98bis.l, Judgement, 11 July 2013, para. 9 (emphasis in original); *Prosecutor v. Jelisić*, No. 11-95-10-A, Judgement, 5 July 2001 ("*Jelisić*"), para. 37; *Prosecutor v. Mucić et al.*, IT-96-21-A, Judgment, 20 February 2001, para. 434.
[531] Decision, para. 23.

a very similar situation in *Jelisić*, a case cited with approval by the Chamber. In considering the phrase 'no evidence capable of supporting a conviction',[532] the ICTY Appeals Chamber stated "that those words must of necessity import the concept of guilt beyond reasonable doubt, for it is only if the evidence is not capable of satisfying the reasonable doubt test that it can be described as 'insufficient to sustain a conviction'"[533] – and – "[if] the evidence does not reach that standard, then the evidence is…'insufficient to sustain a conviction'".[534]

207. The necessity of the Trial Chamber finding evidence capable of satisfying a nominal 'reasonable' tribunal 'beyond a reasonable doubt' is the essential element of the 'no case to answer' standard. As was observed in *Jelisic*: "The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could."[535]

208. In assessing the OTP's evidence at this half way stage the Chamber has stated that its role will be limited: "The Chamber will not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber."[536] The Chamber adopted the position taken by the *ad hoc* Tribunals in this regard: "In the ad hoc tribunal jurisprudence this approach has been usefully formulated as a requirement, at this intermediary stage, to take the prosecution evidence 'at its highest' and to 'assume that the prosecution's evidence was entitled to credence unless incapable of belief' on any reasonable view."[537]

[532] ICTY Rules of Procedure and Evidence, Rule 98*bis*(B).
[533] *Jelisić*, para. 35
[534] *Jelisić*, para. 36.
[535] *Jelisić*, para 37.
[536] Decision, para. 32.
[537] Decision, para. 24.

209. In addition to evidence that is 'incapable of belief', the jurisprudence of the *ad hoc* tribunals,[538] including the decisions relied upon by the Chamber,[539] also addressed the situation where it could be considered that the case has 'completely broken down'. For example, as stated in *Kordić*:

> *[T]here is one situation in which the Chamber is obliged to consider such matters [the credibility or reliability of evidence at the 'no case' stage]; it is where the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross examination as to the reliability and credibility of witnesses that the Prosecution is left without a case.*[540]

210. This approach, overlapping with the 'incapable of belief' test, is equally valid within the ICC system. Taken together, the two approaches most properly encapsulate the established set of circumstances under which a Chamber should consider the credibility and/or reliability of OTP evidence at the halfway stage of trial.

211. The Defence submits that, viewed as a whole, the OTP case has 'completely broken down'. This is because of the collapse of the 'Confirmation Six' and subsequent reliance on hearsay evidence - both the core evidence of the *viva voce* witnesses and the R68 evidence. While, as the Chamber notes, the OTP need not rely on the same evidence at trial as it did for confirmation,[541] and there is no explicit bar on reliance upon hearsay evidence, the confluence of these factors, fairly and impartially considered, results in such a finding.

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[538] *See, e.g.*, *Prosecutor v. Bikindi*, ICTR-2001-72-T, Decision on Defence Motion for Judgement of Acquittal, Rule 98 *bis* of the Rules of Procedure and Evidence, 26 June 2007, para. 13 (internal citations omitted); *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on the Defence Motion Pursuant to Rule 98Bis of the Rules of Procedure and Evidence, 21 February 2007, para. 11 (citing to *Semanza*); *Prosecutor v. Ndindiliyimana*, ICTR-00-56-T, Decision on Defence Motions Pursuant to Rule 98bis, 20 March 2007, para. 7 (internal citations omitted); *Prosecutor v. Galić*, IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galic, 3 October 2002, para. 11 (internal citations omitted); *Prosecutor v. Kvocka & al.*, IT-98-30/1-T, Decision on Defence Motions for Acquittal, 15 December 2000, para. 17 (internal citations omitted); *Prosecutor v. Kordić et al.*, IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000 ("*Kordić*"), para. 28.
[539] *See Blagojević*, para. 15; *Semanza*, para. 17. Both cases are cited at footnote 54 of the Decision.
[540] *Kordić*, para. 28.
[541] Decision, para. 14.

212. Indeed, the Chamber has properly and repeatedly placed the OTP on notice that extensive reliance on hearsay evidence may implicate the statutory fair trial rights of the accused: "[I]t's one thing…to receive hearsay on matters of community folk-law or background information, but when hearsay starts cutting close to suggestions of criminal responsibility, we would like to have that matter addressed, how we get around Article 67(1)(e) at some point."[542] The Defence submits that in the circumstances of this case the 'point' of review identified by the Presiding Judge is now reached and justifies an examination of the credibility and reliability of the hearsay evidence relied on by the OTP. It is fair to place on the OTP the burden of addressing how such heavy reliance on hearsay evidence comports with an accused's fundamental statutory right to confront the witnesses against him.

213. Should the Chamber determine that the OTP's case has not 'completely broken down', then the Defence submits that "the Court's statutory framework", from which any "utilisation of a 'no case to answer' motion in the present case must be derived",[543] empowers the Chamber, given the extent of reliance on hearsay evidence, to intervene and determine whether it is fair, proper and in the interests of justice for such a case to continue. Firstly, such a mandate falls within the "general obligation" identified by the Chamber "pursuant to Article 64(2) of the Statute, to ensure that the trial is fair and expeditious and conducted in a manner which respects the rights of the accused".[544] Of relevance, and as Trial Chamber V held after surveying the relevant jurisprudence of the Court, while the Statute does not expressly provide such authority, a Chamber retains the power to stay or terminate proceedings where an accused's fair trial rights are at

[542] T-119, 59:25-60:10 (emphasis added). *See also* T-48, 75:14-18 ("I know in this Court there is no ban on hearsay evidence, but we have to exercise some discretion in how much of it we bring in, especially if we are not being told what may be hearsay and what may be directly perceived evidence."); T-62, 40:1-4 ("It is one thing to say that the Statute does not strictly prohibit hearsay...The difficulty is where there is too much hearsay in the witness's testimony, which everyone knows that will not be given a lot of weight in the end.") (emphasis added).
[543] Decision, para. 11.
[544] Decision, para. 16.

stake.[545] In the circumstances of this case, and as noted at paragraph 212, the Chamber has already identified the risk posed by hearsay evidence when it creeps close to the core matters of individual responsibility AND is relied upon to such an overwhelming extent.

214. Secondly, as acknowledged in the Decision, the general concepts underlying a 'no case to answer' motion are drawn from the common law tradition[546] and cannot be overlaid directly on the Court's statutory framework, which combines elements from both civil law and common law.[547] Of particular relevance is the case of *Galbraith*,[548] which is referred to in the Decision and in relevant *ad hoc* tribunal decisions. *Galbraith* (as well as the American and Canadian cases cited)[549] is a case from a domestic jurisdiction where the jury is the finder of fact and where the English Appeal Court was concerned to preserve the jury's role and not have it usurped by the trial judge. Such separation of function does not arise when judges are the finders of fact.

215. As recognized in the Separate Opinion, "the theory [of preserving the role of the jury] vanishes in value in non-jury trials", and accordingly there "is no reason to continue the pretence, unquestioned in utility, before international criminal courts that neither feature that separation nor recognise its incidence in many instances where it would ordinarily apply in national jurisdictions".[550] The Separate Opinion correctly notes in this respect "that in England and Wales, the Royal Commission on Criminal Justice has recommended a reversal of *R. v Galbraith*, so that a judge may stop any case if he or she takes the view that the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak to be

[545] ICC-01/09-02/11-728, para. 74.
[546] Decision, para. 11.
[547] Decision, para. 11.
[548] *R v Galbraith*, 1981 1 WLR 1039 ("Galbraith").
[549] *See* Decision, fn. 54.
[550] Decision, para. 88.

allowed to go to the jury'".[551] Judge Shahabuddeen, in his Partial Dissenting Opinion in *Jelisić*, similarly recognized the fiction of the judge-jury separation at the ICTY, and suggested that "at the close of the case for the prosecution, a Trial Chamber has a right, in borderline cases, to make a definitive judgement that guilt has not been established by the evidence, even accepting that a reasonable tribunal could convict on the evidence (if accepted)".[552]

216. The present case, so reliant on hearsay evidence, presents the exceptional type of case referred to above and requires the Chamber to evaluate the evidence when determining whether or not proceedings should continue. The Court has the responsibility to manage cases in such a manner that injustice is not done to either party.[553] It would be highly prejudicial to leave an accused, particularly one charged with such offences, to be subject to further proceedings in the absence of evidence of sufficient quality.

217. While the issue for consideration is the Chamber's capacity to intervene in circumstances where the OTP case is overwhelmingly founded on hearsay evidence, it is relevant to note that there are other circumstances where judicial intervention is deemed appropriate <u>even in the presence of 'prima facie' evidence</u>. Within the context of a 'Galbraith' common law/jury system judicial intervention is not proscribed. On the contrary, intervention may not only be permitted but mandatory, including, as will be seen below, in the case of hearsay evidence. One example is where the inconsistencies in the witnesses' accounts are so profound that they are 'out of all reason' the case should be stopped (e.g. *R. v. Shippey*[554]). Judicial intervention can be formalised by judicial decision. For

[551] Decision, fn. 94 (citing to Royal Commission on Criminal Justice, Report, (Cm 2263, 1993), Ch 4, para 42).
[552] Partial Dissenting Opinion of Judge Shahabuddeen to the *Jelisić* Appeal Judgment, paras. 3-11 (citing with approval to Blackstone's Criminal Practice (London, 2001), p. 1562, para. D19.8 ("[I]n borderline cases, it may be thought pedantic to require them [the Judges] to go through the motions of hearing defence evidence if they have found the prosecution evidence so unconvincing that they will not convict on it in any event.")).
[553] Statute, Article 64(2).
[554] *R v. Shippey* [1988] Crim. L.R. 767.

example, where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken. The English Court of Appeal, recognising the inherent dangers of identification evidence, laid down stringent guidelines,[555] among which is that when, in the judgment of the trial judge, the quality of the identifying evidence is poor, then the judge should intervene and withdraw the case from the jury and direct an acquittal.

218. An example of a statutory duty to intervene and stop a case is found in Section 125 of the Criminal Justice Act 2003 ("CJA 2003"). Hearsay is now admissible in England and Wales. The legislation is pertinent to the present case as it aims at mitigating the dangers inherent in admitting hearsay. By Section 125(1) the judge has a duty to intervene to stop a case where the case rests substantially on unconvincing hearsay evidence such that any conviction would be 'unsafe'.[556] The relevant section reads as follow:

125 – Stopping the case where evidence is unconvincing

(1) If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that—

(a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and

(b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe,

the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.

[555] *R v. Turnbull* [1977] QB 224.

[556] This provision only applies to jury trials on the basis that in criminal trials heard by a Magistrate, in such circumstances, the Magistrate would have to acquit the accused.

219. In the Supreme Court case of *R v Horncastle*,[557] Lord Phillips described Section 125 of the CJA 2003 as being an important exception to the rule in *Galbraith:*

> *[A]t the close of all the evidence, the judge is required, in a case where there is a legitimate argument that the hearsay is unconvincing and important to the case, to make up his own mind, not as a fact finder (which is the jury's function), but whether a conviction would be safe. That involves assessing the reliability of the hearsay evidence, its place in the evidence as a whole, the issues in the case as they have emerged, and all the other individual circumstances of the case*.

220. The law recognised the particular difficulties presented by hearsay evidence for both the finder of fact and the fair trial rights of the accused and, consequently, the need for safeguards, including review of the reliability of the hearsay at the close of the prosecution case. It should be noted that Section 125 exists in addition to the extensive safeguards contained in Section 114 of the CJA 2003, which sets out the criteria that must be addressed before the hearsay evidence is admitted.[558]

221. The ICC has no rule specific to hearsay. By Article 69 of the Statute, "the testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence" as long as these measures are not "prejudicial to or inconsistent with the rights of the accused". Out of court statements are accordingly admissible

[557] *R v Horncastle* [2010] 2 AC 373.

[558] Section 114(2) of the CJA 2003 states: "In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant) –
(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
(b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
(c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
(d) the circumstances in which the statement was made;
(e) how reliable the maker of the statement appears to be;
(f) how reliable the evidence of the making of the statement appears to be;
(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
(h) the amount of difficulty involved in challenging the statement;
(i) the extent to which that difficulty would be likely to prejudice the party facing it.

under the ICC framework, but remain an exception to the core principle of orality.

222. Article 69 states simply that: "The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth." There are, consequently, few explicit safeguards concerning the admission and evaluation of hearsay evidence, a lacuna that, in the Defence's submission, it is appropriate for the Chamber to fill, in the interests of the party against whom it is led, but in particular the accused whose fair trial rights are to be safeguarded.

223. The Chamber's competency to intervene at the close of the OTP case must take account of the nature of the evidence upon which the case is based. If this were not so, then the application of the 'no case' standard at the ICC would occasion the absurd result of the Pre-Trial Chamber's filtering function at the lower confirmation stage of proceedings being applied with greater rigour and effect than the Trial Chamber's filtering function at the end of the OTP case.[559] Where this is largely or substantially founded on hearsay evidence then it is appropriate for the Chamber, in assessing whether the evidence is sufficient to enable a reasonable trial chamber to convict, to have in mind the particular need for care when dealing with out of court statements. The Chamber reserved to itself the weight to be attached to the R68 evidence. An assessment of the reliability of those statements is necessary at this stage. Is the statement of sufficient quality such as to provide a 'reasonable chamber' with evidence upon which it could convict? The Chamber must look at the history and content of such statements in

[559] In this regard, His Honour, the late Judge Hans-Peter Kaul's Dissenting Opinion from the Confirmation Decision is particularly on point: "In sum, the Chamber cannot satisfy itself solely with the evidence, which the Prosecutor claims to be relevant and reliable, in order to effectively and genuinely exercise its filtering function [at confirmation]. Such a general approach would have, in my view, the untenable consequence that Prosecution evidence would be considered as credible almost by default through the formal act of its presentation. Likewise, it would have the equally untenable consequence that the role and rights of the Defence would be dramatically and unfairly curtailed" (Dissenting Opinion, ICC-01/09-01/11-373, para. 57).

making that assessment, whether that exercise be regarded as part of the process of assessing whether "sufficient evidence on which…a reasonable Trial Chamber could convict", or an additional and necessary step particular to hearsay statements, especially in circumstances where the core of the OTP case is founded on hearsay.

224. The wording of Section 125 of the CJA 2003, that "where the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe", is appropriate and necessary judicial practice. When the statement is 'unconvincing', and the sole basis for an essential element of the charges, it would be wholly inappropriate to enable the case to continue. Whatever the particular circumstances, the objective should remain the same, with the Trial Judges acting as 'Keepers of the Gate', keeping fundamentally weak and inadequate prosecution cases from progressing further.

225. The Defence submits that it is incumbent upon the OTP to satisfy the Chamber that the admitted Rule 68 interview is sufficiently cogent and reliable. One way of its doing that is to provide the Chamber with corroboration of relevant, core details in the statements – something completely absent. The relevant facts or assertions contained in the R68 evidence stand rejected and unsupported by their makers. The Defence, in contrast, has demonstrated that significant material elements in the accounts were untrue.[560] In such circumstances, the view expressed in the minority opinion to the *Katanga* judgment has a particular resonance:

> *[T]o my mind, a witness who has been willfully dishonest in one material part of his or her testimony should not be trusted with regard to other parts of it unless there are very strong indications that the witness' mendacity was confined to a particular part of his or her testimony or in case certain parts of the testimony are corroborated by*

[560] See Response to the R68 Application.

independently strong and reliable evidence. In light of the scope and seriousness of P-28's dishonesty, I firmly believe that the requirement of corroboration, partially endorsed by the Majority itself, should have been applied rigorously.[561]

226. The Defence submits that the Chamber is authorized, and indeed impelled, either as a result of the OTP case having 'completely broken down', or pursuant to the Chamber's Article 64(2) mandate within the Court's wider statutory framework, to assess the credibility and reliability of the R68 evidence and the hearsay evidence of the *viva voce* witnesses in determining whether there is a case for Mr. Ruto to answer.

CLASSIFICATION

227. This request is filed on a confidential basis because it refers to confidential evidence. A public redacted version will be submitted shortly.

CONCLUSION

228. For the reasons set out above, the Defence respectfully requests the Trial Chamber to enter a judgment of acquittal in respect of the three counts of crimes against humanity with which Mr. Ruto is charged.

Respectfully submitted,

Karim A.A. Khan QC
Lead Counsel for Mr. William Samoei Ruto

Dated this 26th Day of October 2015
At The Hague, Netherlands

[561] ICC-01/04-01/07-3436-AnxI, para. 157.