

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**



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Date: 23 January 2012

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE REPUBLIC OF KENYA  
IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY  
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

**Public Document**

**Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the  
Rome Statute**

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

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**Counsel for Joshua Arap Sang**  
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**Legal Representatives of the Victims**  
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**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

## **REGISTRY**

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Silvana Arbia, Registrar  
Didier Preira, Deputy Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**



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**PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “Court”), by majority, hereby renders this decision on the confirmation of charges pursuant to article 61(7) of the Rome Statute (the “Statute”).

## I. PROCEDURAL HISTORY

1. On 26 November 2009, the Prosecutor filed a request for authorization to commence an investigation into the situation in the Republic of Kenya.<sup>1</sup> On 31 March 2010, the Chamber authorized, by majority, the commencement of an investigation into the situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009 (the “31 March 2010 Decision”).<sup>2</sup>
2. On 15 December 2010, the Prosecutor submitted an application requesting the Chamber to issue summonses to appear for William Samoei Ruto (“Mr. Ruto”), Henry Kiprono Kosgey (“Mr. Kosgey”) and Joshua Arap Sang (“Mr. Sang”) (collectively “the Suspects”).<sup>3</sup>
3. On 8 March 2011, the Chamber, by majority, decided that there were reasonable grounds to believe that the Suspects are criminally responsible for the crimes against humanity of murder, forcible transfer of population and persecution and summoned the Suspects to appear before it (the “Decision on Summons to Appear”).<sup>4</sup>
4. Pursuant to this decision, the Suspects voluntarily appeared before the Court at the initial appearance hearing held on 7 April 2011. During the initial appearance, in accordance with articles 60 and 61 of the Statute and rule 121, of the Rules of Procedure and Evidence (the “Rules”), the Chamber, *inter alia*, satisfied itself that the Suspects had been informed of the charges against them and of their rights under the

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<sup>1</sup> ICC-01/09-3 and its annexes.

<sup>2</sup> Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr.

<sup>3</sup> ICC-01/09-30-Red.

<sup>4</sup> Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-1.

Statute and set the date of the commencement of the confirmation of charges hearing for 1 September 2011.<sup>5</sup>

5. Since the initial appearance of the Suspects, the Chamber has been seized of a variety of procedural and legal issues, of which only the most important are outlined in the following sections. In total, the Chamber has received over 270 filings and has issued 85 decisions, including the present decision.

**A. *The Government of the Republic of Kenya's challenge to the admissibility of the case***

6. On 31 March 2011, the Government of the Republic of Kenya filed the "Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute", wherein it requested the Chamber to find that the case against the Suspects is inadmissible.<sup>6</sup> On 21 April 2011, the Government of the Republic of Kenya filed 22 annexes of additional material, amounting to over 900 pages, with which it sought to buttress its initial challenge.<sup>7</sup>

7. On 30 May 2011, the Chamber issued the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", wherein it determined that the case against the Suspects is admissible.<sup>8</sup> On 30 August 2011, this decision was upheld by the Appeals Chamber.<sup>9</sup>

**B. *Disclosure of evidence***

8. With the aim of proactively managing the disclosure of evidence and its communication to the Chamber prior to the confirmation of charges hearing, the Chamber, on 6 April 2011, issued the "Decision Setting the Regime for Evidence

<sup>5</sup> ICC-01/09-01/11-T-1-ENG ET pp. 9, 11-15, 17.

<sup>6</sup> ICC-01/09-01/11-19, para. 80.

<sup>7</sup> ICC-01/09-01/11-64.

<sup>8</sup> ICC-01/09-01/11-101, p. 28.

<sup>9</sup> Appeals Chamber, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", ICC-01/09-01/11-307.

Disclosure and Other Related Matters".<sup>10</sup> It established a principled approach to disclosure, wherein the parties were encouraged to disclose items of evidence in advance of the minimum requirements stipulated in rule 121(3) to (6), and (9) of the Rules. Subsequently, on 20 April 2011, the Chamber issued a decision establishing a calendar for disclosure.<sup>11</sup> It set a series of timelimits, which accommodated the estimated volume of evidence to be disclosed by the parties, as well as the Defence right to have adequate time and facilities to prepare, in accordance with article 67(1)(b) of the Statute.

9. As part of the disclosure process, the Chamber issued a number of decisions on the Prosecutor's requests for redactions under rule 81(2) and (4) of the Rules. On 24 June 2011, the Chamber issued the "First Decision on the Prosecutor's Requests for Redactions and Related Requests",<sup>12</sup> wherein it, *inter alia*, outlined the principled approach of the Chamber with respect to the Prosecutor's proposals for redactions as well as *proprio motu* redactions pursuant to rule 81(4) of the Rules. The disclosure process, as organized by the Chamber, developed in three tiers and the Chamber received 50 filings from the parties<sup>13</sup> and issued 17 decisions on issues of evidence disclosure and redactions. The Defence teams sought no redactions to their evidence. Following the first decision on redactions, the Chamber issued five further decisions concerning redactions between 28 June 2011 and 27 July 2011.<sup>14</sup>

<sup>10</sup> Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-01/11-44, p. 10.

<sup>11</sup> Pre-Trial Chamber II, "Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties", ICC-01/09-01/11-62, pp. 10-13.

<sup>12</sup> Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-01/11-145-Conf-Red.

<sup>13</sup> A total of 5900 pages were submitted for redaction along with 794 documents with over 15000 pages of disclosed evidence overall.

<sup>14</sup> Pre-Trial Chamber II, "Redacted Second Decision on the Prosecutor's Requests for Redactions", ICC-01/09-01/11-152-Conf-Red; Pre-Trial Chamber II, "Redacted Third Decision on the Prosecutor's Requests for Redactions", ICC-01/09-01/11-195-Conf-Red; Pre-Trial Chamber II, "Redacted Fourth Decision on the Prosecutor's Requests for Redactions", ICC-01/09-01/11-218-Conf-Red; Pre-Trial Chamber II, "Redacted Fifth Decision on the Prosecutor's Request for Redactions", ICC-01/09-01/11-229-Conf-Red.



10. On 1 August 2011, the Prosecutor filed the Document Containing the Charges and its List of Evidence,<sup>15</sup> and on 15 August 2011 an amended version thereof (the "Amended DCC").<sup>16</sup> On 16 August 2011, the Defence teams of the Suspects filed their Lists of Evidence.<sup>17</sup> Together the parties have placed before the Chamber several thousand pages of evidence for the purpose of making a determination under article 61(7) of the Statute.

**C. Participation of victims in the proceedings**

11. On 30 March 2011, the Chamber issued the "First Decision on Victims' Participation in the Case",<sup>18</sup> with a view to regulating the submission to the Chamber of applications to participate in the proceedings.

12. The Chamber received and assessed 394 victims' applications for participation in the present proceedings.<sup>19</sup> On 5 August 2011, the Chamber issued its decision on these applications,<sup>20</sup> wherein it, *inter alia*, admitted 327 victims as participants at the confirmation of charges hearing and in the related proceedings, appointed the Legal Representative of victims, and specified the scope of participatory rights of victim participants to be exercised, through the Legal Representative of victims, during the confirmation of charges hearing.

13. Beside the assessment of victims' applications for participation in the proceedings, the Chamber decided on a number of other victim-related issues, including the representation of victims' interests at the initial appearance hearing,<sup>21</sup>

<sup>15</sup> ICC-01/09-01/11-242 and confidential annexes.

<sup>16</sup> ICC-01/09-01/11-261 and confidential annexes.

<sup>17</sup> ICC-01/09-01/11-266-Conf-AnxA and its *corrigendum*; ICC-01/09-01/11-268-AnxA; ICC-01/09-01/11-268-AnxB.

<sup>18</sup> Pre-Trial Chamber II, ICC-01/09-01/11-17.

<sup>19</sup> ICC-01/09-01/11-91; ICC-01/09-01/11-141; ICC-01/09-01/11-170.

<sup>20</sup> Pre-Trial Chamber II, "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", ICC-01/09-01/11-249.

<sup>21</sup> Pre-Trial Chamber II, "Second Decision on the Motion of Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings and Article 19 Admissibility Proceedings", ICC-01/09-01/11-40; Pre-Trial Chamber II, "Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings", ICC-01/09-01/11-14.

the access to confidential information by the Legal Representative of victims,<sup>22</sup> the access by the Prosecutor to unredacted victims' applications and the scope of the Chamber's assessment of the applications,<sup>23</sup> the reconsideration of appointment of the Legal Representative of victims<sup>24</sup> and the possibility for the Legal Representative of victims to make written submissions on specific issues of law and/or fact.<sup>25</sup>

**D. Preparation for the confirmation of charges hearing**

14. In preparation for the confirmation of charges hearing, the Chamber issued a number of case management decisions. Though the Prosecutor elected not to call live witnesses, the Defence teams initially proposed to call a maximum of 43 witnesses.<sup>26</sup> The Chamber, in light of the limited scope and purpose of the confirmation of charges hearing, instructed the Defence teams to call a maximum of 2 witnesses per suspect.<sup>27</sup> On 25 August 2011, the Chamber established the schedule for the confirmation of charges hearing, taking into account the observations of the parties, with a view to regulating the presentation of evidence, submissions, and witnesses.<sup>28</sup>

15. Pursuant to the decision on the schedule, on 30 August 2011, the Defence teams of Mr. Ruto and Mr. Sang filed the joint "Defence Challenge to Jurisdiction" ("Mr. Ruto's and Mr. Sang's Joint Jurisdictional Challenge").<sup>29</sup> On the same date, the

<sup>22</sup> ICC-01/09-01/11-337. For the participant's submission see ICC-01/09-01/11-335.

<sup>23</sup> ICC-01/09-01/11-169. For the parties' submissions see ICC-01/09-01/11-102 and its annex and ICC-01/09-01/11-107-Conf.

<sup>24</sup> ICC-01/09-01/11-330. For the motion see ICC-01/09-01/11-314.

<sup>25</sup> ICC-01/09-01/11-274 and ICC-01/09-01/11-338. For the parties' submissions see ICC-01/09-01/11-263 and ICC-01/09-01/11-333.

<sup>26</sup> ICC-01/09-01/11-202-Conf-Exp; ICC-01/09-01/11-203-Conf-Exp-Anx; ICC-01/09-01/11-204-Conf-Exp-Anx.

<sup>27</sup> Pre-Trial Chamber II, "Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses", ICC-01/09-01/11-221.

<sup>28</sup> Pre-Trial Chamber II, "Decision on the Schedule for the Confirmation of Charges Hearing", ICC-01/09-01/11-294.

<sup>29</sup> ICC-01/09-01/11-305 and its annexes.

Chamber received the challenge filed by Mr. Kosgey ("Mr. Kosgey's Jurisdictional Challenge").<sup>30</sup>

16. In compliance with the Chamber's oral directions,<sup>31</sup> on 16 September 2011, the Prosecutor<sup>32</sup> and the Legal Representative of victims<sup>33</sup> submitted their written observations on the Defence jurisdictional challenges.

17. In addition to the major topics as presented above, the Chamber considered other issues and rendered decisions in preparation for the confirmation hearing, in particular the parties' requests for the postponement of the confirmation hearing;<sup>34</sup> the request by Mr. Ruto to waive his right to be present at the confirmation hearing;<sup>35</sup> and witness familiarization issues.<sup>36</sup>

#### *E. The confirmation of charges hearing*

18. The confirmation of charges hearing commenced on 1 September 2011 and concluded on 8 September 2011. The parties first presented their submissions regarding procedural matters and then presented their respective cases, with two Defence teams calling two *viva voce* witnesses each. On the first day of the hearing, during the opening statement of their respective Defence teams, Mr. Ruto and Mr. Sang exercised their right under article 67(1)(h) of the Statute to make an unsworn oral statement. Further, consistent with the Chamber's ruling in its first decision on victims, the Chamber entertained and granted oral requests from the Legal Representative of victims to question witnesses.

<sup>30</sup> "APPLICATION ON BEHALF OF HENRY KIPRONO KOSGEY PURSUANT TO ARTICLE 19 OF THE ICC STATUTE", ICC-01/09-01/11-306.

<sup>31</sup> ICC-01/09-01/11-T-5-ENG ET, pp. 15-16.

<sup>32</sup> ICC-01/09-01/11-334.

<sup>33</sup> ICC-01/09-01/11-332.

<sup>34</sup> ICC-01/09-01/11-260; ICC-01/09-01/11-286; ICC-01/09-01/11-301. For the parties' and participants' submissions see ICC-01/09-01/11-255 and its annexes, ICC-01/09-01/11-256; ICC-01/09-01/11-258; ICC-01/09-01/11-280; ICC-01/09-01/11-283; ICC-01/09-01/11-284; ICC-01/09-01/11-287 and its annexes; ICC-01/09-01/11-288 and its annex; ICC-01/09-01/11-295.

<sup>35</sup> ICC-01/09-01/11-302. For the respective party's submission see ICC-01/09-01/11-299 and its annex.

<sup>36</sup> See ICC-01/09-01/11-259 and its annex on the Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony, accepted by the Chamber, and the corresponding three reports of the Victims and Witnesses Unit; ICC-01/09-01/11-304.

19. Furthermore, at the close of the confirmation of charges hearing, the Chamber set time limits for the parties' final written submissions. In particular, the Chamber granted the Prosecutor and the Legal Representative of victims until 30 September 2011<sup>37</sup> and the Defence teams of the Suspects until 24 October 2011<sup>38</sup> to submit their final written observations.

20. On 30 September 2011, the Prosecutor<sup>39</sup> and the Legal Representative of victims<sup>40</sup> filed their final written observations (the "Prosecutor's/Legal Representative's Final Written Observations"). On 24 October 2011, the Defence teams of Mr. Ruto,<sup>41</sup> Mr. Kosgey<sup>42</sup> and Mr. Sang<sup>43</sup> filed their final written observations ("Mr. Ruto/Mr. Kosgey/Mr. Sang Final Written Observations").

#### *F. Issuance of the decision on the charges*

21. On 26 October 2011, the Chamber issued the "Decision on the Issuance of the Decision Pursuant to article 61(7) of the Rome Statute", wherein it decided to vary exceptionally the time limit prescribed by regulation 53 of the Regulations of the Court ("the Regulations"), to the effect that the present decision would be issued at the same time as the decision in the case of *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*.<sup>44</sup>

## **II. THE CHARGES**

22. In the Amended DCC, the Prosecutor charges the Suspects for the alleged crimes against humanity committed in different locations of the Republic of Kenya as follows:

<sup>37</sup> ICC-01/09-01/11-T-12-ENG, p. 76, line 25; p. 77, lines 1-4.

<sup>38</sup> ICC-01/09-01/11-T-12-ENG, p. 76, line 25; p. 77, lines 1-4.

<sup>39</sup> ICC-01/09-01/11-345.

<sup>40</sup> ICC-01/09-01/11-344.

<sup>41</sup> ICC-01/09-01/11-355.

<sup>42</sup> ICC-01/09-01/11-353.

<sup>43</sup> ICC-01/09-01/11-354.

<sup>44</sup> Pre-Trial Chamber II, "Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute", ICC-01/09-01/11-357.



**Count 1 (RUTO and KOSGEY)**  
**Murder constituting a crime against humanity**  
**(Article 7(1)(a) and Article 25(3)(a) of the Rome Statute)**

From on or about 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO and HENRY KIPRONO KOSGEY committed or contributed to the commission of crimes against humanity in the form of murder in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute.

**Count 2 (SANG)**  
**Murder constituting a crime against humanity**  
**(Article 7(1)(a) and Article 25(3)(d) of the Rome Statute)**

From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG, as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of murder in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(d) of the Rome Statute.

**Count 3 (RUTO and KOSGEY)**  
**Deportation or forcible transfer of population**  
**constituting a crime against humanity**  
**(Article 7(1)(d) and Article 25(3)(a) of the Rome Statute)**

From on or about 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO and HENRY KIPRONO KOSGEY as co-perpetrators, committed or contributed to the commission of crimes against humanity in the form of deportation or forcible transfer of population in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya in violation of Articles 7(1)(d) and 25(3)(a) of the Rome Statute.

**Count 4 (SANG)**  
**Deportation or forcible transfer of population**  
**constituting a crime against humanity**  
**(Article 7(1)(d) and Article 25(3)(d) of the Rome Statute)**

From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, acting with a common purpose, committed or contributed to the commission of crimes against humanity

in the form of deportation or forcible transfer of population in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya in violation of Articles 7(1)(d) and 25(3)(d) of the Rome Statute.

**Count 5 (RUTO AND KOSGEY)**  
**Persecution as a crime against humanity**  
**(Article 7(1)(h) and Article 25(3)(a) of the Rome Statute)**

From 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO, and HENRY KIPRONO KOSGEY as co-perpetrators, committed or contributed to the commission of crimes against humanity in the form of persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, torture, and deportation or forcible transfer of population, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(a) of the Rome Statute.

**Count 6 (SANG)**  
**Persecution as a crime against humanity**  
**(Article 7(1)(h) and Article 25(3)(d) of the Rome Statute)**

From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG, as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, torture, and deportation or forcible transfer of population, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(d) of the Rome Statute.

### III. JURISDICTION AND ADMISSIBILITY

23. Article 19(1) of the Statute provides that “[T]he Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17”.

24. This Chamber has stated on different occasions that, regardless of the mandatory language of article 19(1) of the Statute, which requires an assessment of whether the Court has the competence to adjudicate the case *sub judice*, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect.<sup>45</sup> This is an essential component in the exercise of any judicial body of its functions and is derived from the well-recognized principle of *la compétence de la compétence*.<sup>46</sup>

25. The Chamber considers that the phrase "satisfy itself that it has jurisdiction" also entails that the Court must 'attain the degree of certainty' that the jurisdictional parameters under the Statute have been met.<sup>47</sup> Therefore, the Chamber's determination as to whether it has jurisdiction over the case against the Suspects is a prerequisite for ruling on the Amended DCC, and in turn, the confirmation or not of one or more of the charges against the Suspects pursuant to article 61(7) of the Statute.

26. In this regard, the Chamber recalls its previous finding in the Decision on Summons to Appear, in which it stated that:

In the 31 March 2010 Decision, the Chamber has examined the different facets of jurisdiction in terms of place (*ratione loci*, i.e. in the Republic of Kenya), time (*ratione temporis*, i.e. crimes allegedly committed after 1 June 2005), and subject-matter (*ratione materiae*, i.e. crimes against humanity). It has also defined the scope of the Prosecutor's investigation with respect to the situation under consideration in view of the above-mentioned three jurisdictional prerequisites, namely the territorial, temporal and material parameters of the situation. It found that all the requirements have been met which led it to authorise the Prosecutor to commence an investigation into the situation in the Republic of Kenya in relation to "crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009". [The Chamber] is of the view that, since the Prosecutor has adhered to the Court's territorial, temporal and material parameters defining the situation as confirmed in its 31 March 2010 Decision, it finds no

<sup>45</sup> Pre-Trial Chamber II, Decision on Summons to Appear, ICC-01/09-01/11-1, para. 8; Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo" (the "Bemba Confirmation of Charges Decision"), ICC-01/05-01/08-424, para. 23.

<sup>46</sup> Pre-Trial Chamber II, Decision on Summons to Appear, ICC-01/09-01/11-1, para. 8; Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, para. 23.

<sup>47</sup> Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", ICC-01/09-01/11-1, para. 9; Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 24.



need to reiterate its finding and provide a further detailed assessment of the question of jurisdiction of the case arising from that situation at this stage.<sup>48</sup>

27. Thus, in the context of the present decision and based on a review of the Amended DCC, the Chamber considers that the Court's territorial and temporal parameters are still satisfied, and accordingly, there is no reason to repeat its previous finding on these two aspects of jurisdiction.

28. With respect to the Court's material jurisdiction (*ratione materiae*), the Chamber recalls that the Defence teams of the Suspects challenge this particular facet of jurisdiction in their filings of 30 August 2011.<sup>49</sup> Accordingly, the Chamber must first rule on said challenges before proceeding with an examination on the merits of the case.

29. In Mr. Ruto's and Mr. Sang's Joint Jurisdictional Challenge, as well as in Mr. Kosgey's Jurisdictional Challenge, the Defence teams argue, in principle, two main points: the first relates to the legal definition of an organisation for the purpose of article 7(2)(a) of the Statute,<sup>50</sup> while the second concerns the facts presented by the Prosecutor in support of said definition.<sup>51</sup>

30. With respect to the first point, the Defence teams of the Suspects argue that the Chamber adopted a new liberal interpretation of 'organisational policy', which is inconsistent with the intention of the drafters and customary international law.<sup>52</sup> In developing their arguments, the Defence teams of the Suspects quote several paragraphs from the 31 March 2010 Decision, which set out the majority's understanding of said term and the legal requirements satisfying it.<sup>53</sup> The Defence teams of the Suspects also refer to the *travaux préparatoires*,<sup>54</sup> the jurisprudence of the *ad hoc* tribunals and some scholarly work on the subject to argue in favour of a

<sup>48</sup> Pre-Trial Chamber II, Decision on Summons to Appear, ICC-01/09-01/11-1, paras 10-11.

<sup>49</sup> ICC-01/09-01/11-305 and its annexes; ICC-01/09-01/11-306.

<sup>50</sup> ICC-01/09-01/11-305, paras 7, 9-61; ICC-01/09-01/11-306, paras 3-5 and 15-69.

<sup>51</sup> ICC-01/09-01/11-305, paras 62- 81; ICC-01/09-01/11-306, paras 71-97.

<sup>52</sup> ICC-01/09-01/11-305, paras 7, 25, 36, 41, 43, 55, 56, 60, 61; ICC-01/09-01/11-306, paras 3, 5, 23-25, 50.

<sup>53</sup> ICC-01/09-01/11-305, paras 41, 48; ICC-01/09-01/11-306, paras 42-43.

<sup>54</sup> ICC-01/09-01/11-305, paras 14-16, 34, 35, 38; ICC-01/09-01/11-306, paras 23-25, 27.

narrow construction of the term 'organisational policy'.<sup>55</sup> Having disputed at length the definition of 'organisational policy', the Defence teams of the Suspects conclude that the Chamber erred in its legal finding.

31. As to the second point, the Defence teams of Mr. Ruto and Mr. Sang aver that regardless of following a liberal or strict interpretation of the term 'organisation', the facts relied upon by the Prosecutor "do not amount to substantial grounds to believe that the defendants acted within an organisation in the context of Article 7(2)(a) of the Statute".<sup>56</sup> In substantiating their arguments, the Defence teams of Mr. Ruto and Mr. Sang claim, *inter alia*, that the Prosecutor failed to provide sufficient "evidence supporting [...] [his] assertion that there was an organization, sufficient to meet the structural criteria necessary",<sup>57</sup> since there is a lack of detailed information "about the operation, purpose, structure and membership of the 'The Network'".<sup>58</sup> According to the Defence, the Prosecutor's witnesses provided contradictory statements concerning "the existence of the organization [and its] hierarchy".<sup>59</sup> After delving into an examination of the facts presented by the Prosecutor,<sup>60</sup> the Defence requests the Chamber to "re-evaluate the evidence on the issue of whether there was an 'organizational policy' with the higher standard of 'substantial grounds to believe' in mind".<sup>61</sup>

32. Similarly, the Defence team of Mr. Kosgey argues that even under the correct legal test which favours a strict interpretation, the Prosecutor's case cannot meet the requirements of an 'organisation' within the meaning of article 7(2)(a) of the Statute.<sup>62</sup> Quoting a number of paragraphs from the Amended DCC concerning the creation of an organisation or the alleged "Network", the Defence of Mr. Kosgey challenges its

<sup>55</sup> ICC-01/09-01/11-305, paras 19-20, 30, 37, 39, 44-47 and 56-57; ICC-01/09-01/11-306, paras 27-29 and 37-41.

<sup>56</sup> ICC-01/09-01/11-305, para. 62.

<sup>57</sup> ICC-01/09-01/11-305, para. 64.

<sup>58</sup> ICC-01/09-01/11-305, para. 64.

<sup>59</sup> ICC-01/09-01/11-305, para. 66.

<sup>60</sup> ICC-01/09-01/11-305, paras 62-80.

<sup>61</sup> ICC-01/09-01/11-305, para. 81.

<sup>62</sup> ICC-01/09-01/11-306, para. 70.

various components namely, the Political, Media, Financial, Tribal and Military.<sup>63</sup> For the Defence, these five components “do not establish an ‘organization’ or ‘organizational policy’ falling within Article 7(2)(a) of the ICC Statute”.<sup>64</sup> The Defence of Mr. Kosgey also challenges a number of meetings presented by the Prosecutor in his Amended DCC, which attempt to prove the existence of a common plan to attack the Party of National Unity (“PNU”) supporters as well as the establishment of a Network of perpetrators.<sup>65</sup>

33. Turning to the first part of the challenges concerning the legal definition of the term ‘organisation’, the Chamber endorses the interpretation of the term ‘organisational policy’ as developed extensively in the 31 March 2010 Decision. This interpretation was recently followed by Pre-Trial Chamber III in its decision authorizing the commencement of an investigation in the situation of Côte d’Ivoire.<sup>66</sup>

34. Thus, the majority does not find a persuasive reason to revisit its previous finding on the question or to reverse its original approach, given that the majority remains in favour of providing an effective interpretation to article 7(2)(a) of the Statute. Moreover, the Chamber observes that the Defences’ submissions disputing the legal findings of the 31 March 2010 Decision are actually an attempt to obtain a right to appeal on this point of law and at this stage of the proceedings. In this respect, although not determinative of the issue under examination, the Chamber finds it rather notable that the Suspects failed to avail themselves of the right to appeal the Decision on Summons to Appear, which reiterated the same legal findings of the 31 March 2010 Decision, pursuant to article 82(1)(a) of the Statute and rule 154(1) of the

<sup>63</sup> ICC-01/09-01/11-306, paras 71, 73-92.

<sup>64</sup> ICC-01/09-01/11-306, paras 79, 97 and 103.

<sup>65</sup> ICC-01/09-01/11-306, paras 93-94.

<sup>66</sup> Pre-Trial Chamber III, “Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’”, ICC-02/11-14-Corr. In paragraphs 45 and 46 of the decision, Pre-Trial Chamber III stated: With regard to the definition of the terms “State or organisational”, the Chamber agrees with the criteria established by Pre-Trial Chamber II [...]. With regard to the term “organisational”, the Chamber agrees with the approach of Pre-Trial Chamber II in the sense that the determination of whether a group qualifies as an “organisation” under the Statute must be made on a case-by-case basis. Pre-Trial Chamber II has identified a number of factors that could, inter alia, be taken into account and which may assist this Chamber in its determination in the present case, namely [...].

Rules. Accordingly, the Chamber rejects this part of the Defences' jurisdictional challenges.

35. With regard to the second point presented by the Defence teams of the Suspects and after examining the Prosecutor's as well as the Legal Representative of victims' observations on the Defences' jurisdictional challenges,<sup>67</sup> the Chamber is of the view that the Defences' second point cannot be qualified as a jurisdictional challenge under article 19(2)(a) of the Statute, despite the Defences' arguments expressed in their Final Written Observations.<sup>68</sup> It is clear from the Defences' submissions that the essence of this part of their filings is to challenge the merits of the Prosecutor's case on the facts. In the Chamber's opinion, this part of the Defences' submissions is in effect an evidentiary challenge under article 61(5) and (6) of the Statute which, in principle, should be resolved pursuant to the standard provided for in article 61(7) of the Statute in the relevant part of the decision, namely, under the section concerning the contextual elements of the crimes against humanity. Moreover, although the Chamber initially invited the Prosecutor and the Legal Representative of victims to submit written observations pursuant to rule 58(3) of the Rules, this does not necessarily mean that, at the time, it had decided to treat the Defences' applications as challenges under article 19 of the Statute. Rather, the rationale behind such an invitation was to receive all the necessary information in order for the Chamber to be in a position to arrive at an informed decision by way of determining the actual nature of the challenge.

36. Having said the above, the Chamber therefore considers that this second part of the Defences' challenges to jurisdiction of the Court, based on the merits of the case, should be dismissed *in limine*.

37. In light of the above, the Chamber does not find an impediment concerning its jurisdiction and remains competent to adjudicate the case *sub judice*.

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<sup>67</sup> ICC-01/09-01/11-334; ICC-01/09-01/11-332.

<sup>68</sup> ICC-01/09-01/11-355, paras 185-188; ICC-01/09-01/11-353, paras 8-13.



38. Regarding admissibility, the second sentence of article 19(1) of the Statute implies that, in the absence of a challenge by any of the parties referred to in article 19(2) of the Statute, an admissibility determination of the case by the Chamber is not mandatory but is, in principle, discretionary. In the context of the present case, the Chamber notes that none of the parties has challenged the admissibility of the case. Moreover, since its previous finding of admissibility was rendered on 30 May 2011<sup>69</sup> and upheld by the Appeals Chamber on 30 August 2011,<sup>70</sup> no information has become available to the Chamber of any change in circumstances with respect to domestic investigations, which would prompt it to change its previous determination. Accordingly, the Chamber determines that the case against the Suspects is admissible.

#### IV. PROCEDURAL MATTERS

##### A. *Purpose and scope of the present decision*

##### (i) Evidentiary threshold under article 61(7) of the Statute

39. In the present decision, the Chamber shall determine, pursuant to article 61(7) of the Statute, whether there is sufficient evidence to establish substantial grounds to believe that the Suspects committed each of the crimes alleged in the Amended DCC.

40. The Chamber notes that the drafters of the Statute established progressively higher evidentiary thresholds in articles 15, 58(1), 61(7) and 66(3) of the Statute.<sup>71</sup> The evidentiary threshold applicable at the present stage of the proceedings (*i.e.* substantial grounds to believe) is higher than the one required for the issuance of a warrant of arrest or summons to appear, but lower than that required for a final determination as to the guilt or innocence of an accused. The Chamber concurs with the definition of the term “substantial” within the meaning of article 61(7) of the

<sup>69</sup> Pre-Trial Chamber II, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-01/11-101, p. 28.

<sup>70</sup> Appeals Chamber, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, ICC-01/09-01/11-307.

<sup>71</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 27.



Statute as articulated in the previous jurisprudence of the Court, according to which, in order to meet the requisite threshold, the Prosecutor “must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations”.<sup>72</sup> The Chamber further adheres to the existing jurisprudence of the Court to the effect that the purpose of the determination under article 61(7) of the Statute is primarily to protect the suspect against wrongful prosecution and ensure judicial economy by distinguishing between cases that should go to trial and those that should not.<sup>73</sup>

41. In making this determination, the Chamber will be guided by the principle of *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage.

42. Based on the determination as to the sufficiency of the evidence to establish substantial grounds to believe that the Suspects committed each of the crimes charged, the Chamber shall: (i) confirm the charges pursuant to article 61(7)(a) of the Statute; (ii) decline to confirm the charges pursuant to article 61(7)(b) of the Statute; or (iii) adjourn the hearing and request the Prosecutor, pursuant to article 61(7)(c) of the Statute, to consider (a) providing further evidence or conducting further investigation with respect to a particular charge; or (b) amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

43. In performing its functions under article 61(7) of the Statute, the Chamber relies on the evidence disclosed between the parties and further communicated to the

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<sup>72</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 29; Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/07-717, para. 65; Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/06-803-tEN, para. 39.

<sup>73</sup> Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-01/04-01/10-465-Red, para. 41; Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-02/05-03/09-121-Corr-Red, para. 31; Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-02/05-02/09-243-Red, para.39; Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 28; Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/07-717, para. 63; Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/06-803-tEN, para. 37.

Chamber in compliance with rule 121(2)(c) of the Rules and the Chamber's decisions.<sup>74</sup>

(ii) Scope of the assessment of facts

44. The purpose of the present decision is confined to determining whether sufficient evidence has been placed before the Chamber to meet the requisite threshold for the confirmation of the charges presented. In this respect, the Chamber observes that in line with article 74(2) of the Statute a "charge" is composed of the facts and circumstances underlying the alleged crime as well as of their legal characterisation. In order to determine the scope of the required assessment of facts in the decision on the confirmation of charges, the Chamber wishes to clarify its understanding with respect to the nature of such decision as setting the factual subject matter of the trial. In fact, the charges confirmed fix and delimit, to a certain extent, the scope of the case for the purposes of the subsequent trial.<sup>75</sup>

45. This clearly emerges from article 74(2) of the Statute, which mandates that "the decision at trial shall not exceed the facts and circumstances described *in the charges* and any amendments to the charges" (emphasis added). In the same vein, according to regulation 55 of the Regulations, the Trial Chamber is vested with the authority to modify the legal characterisation of facts "without exceeding the facts and circumstances described *in the charges* and any amendments to the charges" (emphasis added).

46. The "facts described in the charges" have been defined by the Appeals Chamber as those "factual allegations which support each of the legal elements of the crime charged".<sup>76</sup> Furthermore, according to the Appeals Chamber, the facts described in

<sup>74</sup> Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-01/11-44; Pre-Trial Chamber II, "Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties", ICC-01/09-01/11-62.

<sup>75</sup> See Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, para. 34.

<sup>76</sup> Appeals Chamber, "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and

the charges shall be distinguished from “the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision does not support the legal elements of the crime charged”.<sup>77</sup>

47. In light of the above, the Chamber observes that, among the different facts placed before the Chamber for its consideration, a distinction must be made between the facts underlying the charges – *i.e.* the “facts described in the charges”, which, as such, are the only ones that cannot be exceeded by the Trial Chamber once confirmed by the Pre-Trial Chamber – and facts or evidence that are subsidiary to the facts described in the charges, serving the purpose of demonstrating or supporting their existence. Notably, subsidiary facts, although referred to in the document containing the charges or in the decision on the confirmation of charges, are of relevance only to the extent that facts described in the charges may be inferred from them.<sup>78</sup>

48. In order to confirm the charges pursuant to article 61(7)(a) of the Statute, the Chamber shall be satisfied that the evidence establishes to the requisite threshold each of the facts described in the charges. If the charges are then confirmed, article 74(2) of the Statute and regulation 55 of the Regulations, as noted above, make clear that the factual subject matter of the case will be settled for the purposes of the trial in light of the confirmed charge(s) and, therefore, in light of the facts and circumstances described therein. Conversely, given the nature of the subsidiary facts the Chamber will not engage in an examination of each and every subsidiary fact which is mentioned in the document containing the charges and upon which the Prosecutor relies to prove the existence of one or more facts described in the charges.

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participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, ICC-01/04-01/06-2205, para. 90, footnote 163.

<sup>77</sup> Appeals Chamber, “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”, ICC-01/04-01/06-2205, para. 90, footnote 163.

<sup>78</sup> See Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-02/05-03/09-121-Corr-Red, para. 36.

More appropriately, the Chamber shall analyze subsidiary facts only to the extent that this is necessary, in light of the parties' submissions or the Chamber's own assessment, to ascertain whether the facts described in the charges are sufficiently established to the threshold required at this stage of proceedings. In the understanding of the Chamber, this does not prevent the Prosecutor from relying on these or other subsidiary facts in the future, in the same way that the parties are not precluded from relying at trial upon new or additional evidence from that presented at the pre-trial stage of the case.

(iii) Defence challenge to the conduct of the investigation

49. At this juncture, the Chamber finds it appropriate to address an argument raised by the Defence teams of the Suspects that directly relates to the scope and purpose of the present decision. During the confirmation hearing and in their respective final submissions, the Defence teams of the Suspects raised the issue of the Prosecutor's alleged failure to comply with his investigative obligations in accordance with article 54(1) of the Statute, thereby requesting the Chamber to decline to confirm the charges against them.<sup>79</sup>

50. In his final submission, the Prosecutor contended that "the purpose of the confirmation of charges hearing is not to assess whether the Prosecution has fulfilled its duty under Article 54(1)".<sup>80</sup>

51. The Chamber accepts the argument of the Prosecutor that his alleged investigative failure does not fall within the scope of the Chamber's determination pursuant to article 61(7) of the Statute. In fact, the Chamber recalls that the Statute clearly delimits the roles and the functions of the different organs of the Court. In particular, the Chamber's role at the current stage of the proceedings is to determine whether sufficient evidence has been adduced to establish substantial grounds to

<sup>79</sup> ICC-01/09-01/11-353, para. 73; ICC-01/09-01/11-354, para. 38; ICC-01/09-01/11-355, para. 29.

<sup>80</sup> ICC-01/09-01/11-345, para. 67. For submissions during the confirmation hearing see ICC-01/09-01/11-T-12-ENG ET, p.13, lines 19-25 and p. 14, lines 1-3.

believe that the Suspects committed the crimes charged.<sup>81</sup> Such evidence adduced is, in fact, the outcome of the Prosecutor's investigations. If he has failed to investigate properly, this will certainly have a bearing on the quality and sufficiency of the evidence presented and the matter will be finally decided by way of an examination of the said evidence pursuant to article 61(7) of the Statute. Therefore, under no circumstances will a failure on the part of the Prosecutor to properly investigate automatically justify a decision of the Chamber to decline to confirm the charges, without having examined the evidence presented. In other words, the scope of determination under article 61(7) of the Statute relates to the assessment of the evidence available and not the manner in which the Prosecutor conducted his investigations.

52. This is also in line with the view expressed by Pre-Trial Chamber I, according to which:

[A]t this stage of the proceedings, the Defence's objections to the manner in which the investigations were conducted can only be viewed in the context of the purpose of the confirmation hearing, and should thus be regarded as a means of seeking a decision declining to confirm the charges. It follows, therefore, that the Defence's objection raised in this instance cannot in itself cause the Chamber to decline to confirm the charges on the basis of an alleged investigative failure on the part of the Prosecution. Rather, this objection may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the "substantial grounds to believe" threshold.<sup>82</sup>

53. Accordingly, the Chamber will not address any of the complaints in this regard and will exclusively conduct an assessment of the evidence proffered by the parties in order to determine whether the evidentiary threshold required by article 61(7) for confirmation of the charges brought against the Suspects has been met or not.

***B. Admissibility, relevance and probative value of evidence***

54. In this part, the Chamber will set out a number of general evidentiary principles underpinning the present decision in light of articles 21, 64, 67 and 69 of the Statute,

<sup>81</sup> See Pre-Trial Chamber II, "Decision on the 'Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims'", ICC-01/09-01/11-371, para. 16.

<sup>82</sup> Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-02/09-243-Red, para. 48.

and rules 63, 64, 68, 70, 71, 76 to 78, 121 and 122 of the Rules. The Chamber recalls its previous interpretation of the evidentiary principles,<sup>83</sup> as well as internationally recognised human rights standards as provided for in article 21(2) and (3) of the Statute.

55. In his Final Written Observations, the Prosecutor asserts that:

[F]or purposes of confirmation, the Pre-Trial Chamber should accept as reliable the Prosecution's evidence, so long as it is relevant. It should avoid attempting to resolve contradictions between the Prosecution and Defence evidence, because such resolution is impossible without a full airing of the evidence from both sides and a careful weighing and evaluation of the credibility of the witnesses. That will occur at trial.<sup>84</sup>

56. In support of his argument, the Prosecutor also relies on the jurisprudence of the *ad hoc* tribunals concerning the review of mid-trial motions for acquittal, asserting that the latter is a "comparable, albeit more comprehensive screening of the case", and submitting that the *ad hoc* tribunals, "in evaluating a Rule 98bis motion for acquittal, [do] not assess the reliability or credibility of the evidence presented in the case-in-chief, nor [do they] give lesser weight to the evidence that [they deem] 'suspect, contradictory or in any other way unreliable'".<sup>85</sup>

57. The Defence of Mr. Kosgey contends that "there is no basis upon which it can be suggested that the evidence disclosed by the Prosecution can be granted any particular preference over all the other disclosed evidence".<sup>86</sup> The Chamber also notes that the Defence of Mr. Sang asserts that while "the Chamber must analyse and assess the Prosecution evidence presented as a whole that does not mean that individual aspects of the evidence should not be scrutinised".<sup>87</sup>

58. The Chamber does not accept the argument of the Prosecutor. At the outset, the Chamber emphasizes, as previously held by Pre-Trial Chamber I, that the jurisprudence of the *ad hoc* tribunals concerning mid-trial motions of acquittal cannot

<sup>83</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, paras 32-62.

<sup>84</sup> ICC-01/09-01/11-345, para. 5.

<sup>85</sup> ICC-01/09-01/11-345, para. 6.

<sup>86</sup> ICC-01/09-01/11-353, paras 16-17, 19, 21-28 and 32-34.

<sup>87</sup> ICC-01/09-01/11-354, paras 12-13.



guide the Chamber in determining the object and purpose of the confirmation of charges, due to the fundamentally incomparable nature of the two procedural regimes.<sup>88</sup>

59. The Chamber further recalls the paramount principle of free assessment of evidence as enshrined in article 69(4) of the Statute and rule 63(2) of the Rules and observes that these provisions are equally applicable at the pre-trial and trial stages of the proceedings.<sup>89</sup> As stated by Pre-Trial Chamber I, this principle is “a core component of judicial activity both at the pre-trial stage of the case and at trial”.<sup>90</sup>

60. At the same time, the Chamber recalls that its discretion in line with the principle of free assessment of evidence is limited to determining, pursuant to article 69(4) and (7) of the Statute, the admissibility, relevance and probative value of the evidence placed before it.<sup>91</sup>

61. Thus, in determining whether there are substantial grounds to believe that the Suspects committed each of the crimes charged, the Chamber is not bound by the parties’ characterisation of the evidence. Rather, the Chamber will make its own independent assessment of each piece of evidence.<sup>92</sup> Moreover, the Chamber will assess the relevance and probative value of the evidence, regardless of its type or which party relied upon it.

(i) Admissibility of evidence

62. With respect to the admissibility of evidence, the Chamber notes that neither the Statute nor the Rules provide that a certain type of evidence is *per se* inadmissible. Depending on the circumstances, the Chamber is vested with discretion or statutorily mandated to rule on the admissibility of the evidence. On the one hand, the Chamber

<sup>88</sup> See also Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-01/04-01/10-465-Red, para. 45.

<sup>89</sup> See rule 122(9) of the Rules and the heading of Chapter 4 of the Rules.

<sup>90</sup> Pre-Trial Chamber I, “Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’”, ICC-02/05-02/09-267, para. 8.

<sup>91</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, paras 61-62.

<sup>92</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 42.

*may*, pursuant to article 69(4) of the Statute, “rule on the [...] admissibility of any evidence”. On the other hand, the Chamber *shall*, pursuant to article 69(7) of the Statute and rule 63(3) of the Rules, rule on the admissibility of the evidence on an application of a party or on its own motion, if grounds for inadmissibility appear to exist.

63. With regard to evidence derived from summaries of statements of persons who testified before entities other than the Court (“non-ICC witnesses”), the Defence of Mr. Ruto contended that the persons who initially provided the statements to other entities have not given consent for their statement or summary to be used in proceedings before the Court. Thus, these summaries must be excluded from the evidence at this stage.<sup>93</sup> In support of such contention, the Defence of Mr. Ruto relies on a decision issued by Pre-Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, according to which:

In the view of the Chamber, the first and foremost measure required under article 68(1) of the Statute and rule 86 of the Rules is to inform each prospective witness of the fact that a party intends to rely on his or her statement, or the report or transcript of his or her interview for the purpose of the confirmation hearing in a specific case. Hence, as is the case before the Chamber with respect to witnesses [...] the information was not provided to the said witnesses. In order to protect them appropriately, the Chamber considers that their statement, transcript or reports of their interview must be ruled inadmissible for the purposes of the confirmation hearing.<sup>94</sup>

64. Further, the Defence of Mr. Kosgey submitted that in the absence of a solemn undertaking the said witness summaries shall be inadmissible.<sup>95</sup>

65. The Chamber considers that the jurisprudence relied upon by the Defence is not applicable to the present circumstances, as it relates to “witnesses of the Court”. The Defence challenge under consideration relates to the use of summaries of statements provided by individuals who have not been interviewed by the Prosecutor. The Chamber does not find any grounds in the statutory documents precluding the use of such documentary evidence, nor is there any indication that this evidence is otherwise inadmissible. Accordingly, the Chamber concludes that the summaries of

<sup>93</sup> ICC-01/09-01/11-355, paras 76-77.

<sup>94</sup> Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/06-803-tEN, para. 59.

<sup>95</sup> ICC-01/09-01/11-353, paras 98-99.



the statements provided by non-ICC witnesses are admissible as evidence in the present case.

(ii) Relevance and probative value of evidence

66. Relevance requires a nexus between the specific piece of evidence and a charge or a fact of the case to be proven, in the sense that a piece of evidence is relevant to the Chamber's determination of a specific fact if it tends to make the existence of such fact more or less probable.<sup>96</sup> Therefore, in assessing the relevance of the evidence, the Chamber shall establish the extent to which this evidence is rationally linked to the fact that it tends to prove or to disprove.<sup>97</sup>

67. Furthermore, the Chamber will also assess whether each piece of evidence has probative value. The determination of the probative value of a piece of evidence requires a qualitative assessment. In this respect, the Chamber recalls the general principle of free assessment of evidence as enshrined in article 69(4) of the Statute and rule 63(2) of the Rules. Accordingly, the Chamber shall give each piece of evidence the weight that it considers appropriate.

68. The Chamber takes a case-by-case approach in assessing the relevance and probative value of each piece of evidence.<sup>98</sup> In doing so, the Chamber is guided by various factors, such as the nature of the evidence, its credibility, reliability, and source as well as the context in which it was obtained and its nexus to the charges of the case or the alleged perpetrator. Indicia of reliability such as voluntariness, truthfulness, and trustworthiness are considered.<sup>99</sup> In this respect, the Chamber wishes to clarify that it is not the amount of evidence presented but its probative value that is essential for the Chamber's final determination on the charges presented by the Prosecutor.<sup>100</sup>

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<sup>96</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 41.

<sup>97</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 41.

<sup>98</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 58.

<sup>99</sup> Trial Chamber I, "Decision on the admissibility of four documents", ICC-01/04-01/06-1399, paras 28-29.

<sup>100</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 60.

69. The Chamber identifies the evidence either as direct or indirect. Indirect evidence encompasses hearsay evidence, reports of international and non-governmental organisations (NGOs), as well as reports from national agencies, domestic intelligence services and the media. Pursuant to rule 76 of the Rules, evidence may also be oral, in particular when it is rendered by witnesses called to testify, or written, such as copies of witness statements or material covered by rule 77 of the Rules, such as books, documents emanating from various sources, photographs, and other tangible objects, including but not limited to video and/or audio recorded evidence.

70. On the other hand, direct evidence provides first-hand information. Regardless of the party that presented it, direct evidence which is relevant and trustworthy has a high probative value. It follows that a single piece of direct evidence may be decisive for the Chamber's determination in the present decision.<sup>101</sup>

71. In this respect, the Chamber observes that in the present case all the parties adduced, *inter alia*, eyewitness testimonies emanating from known or anonymous witnesses or presented summaries of witness statements. The Defence teams of Mr. Ruto and Mr. Sang also relied on live (*viva voce*) witnesses during the confirmation hearing.

72. In relation to the testimony of *viva voce* witnesses, the Defence of Mr. Sang argues that "*viva voce* evidence, if found credible, typically has greater probative value than statements, due to the fact that it has been cross-examined and tested".<sup>102</sup>

73. The Chamber recalls its earlier findings, whereby it clarified that "the fact that witnesses' testimonies are elicited through oral questioning does not *per se* entail that they be attached a higher probative value than that they would be given if provided in writing".<sup>103</sup> In this regard, the Chamber underlines that an oral testimony can have

<sup>101</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 49.

<sup>102</sup> ICC-01/09-01/11-354, paras 58-59.

<sup>103</sup> Pre-Trial Chamber II, "Decision on the Defence Applications for Leave to Appeal the Single Judge's Order to Reduce the Number of Viva Voce Witnesses", ICC-01/09-02/11-275, paras 26-27. See also Pre-

a high or low probative value in light of the Chamber's assessment, *inter alia* as a result of the questioning, of the witness' credibility, reliability, accuracy, trustworthiness and genuineness. The final determination on the probative value of the live testimony will thus depend on the Chamber's assessment on a case-by-case basis and in light of the evidence as a whole.

74. With respect to indirect evidence, the Chamber is of the view that, as a general rule, such evidence must be accorded a lower probative value than direct evidence. The Chamber highlights that, although indirect evidence is commonly accepted in the jurisprudence of the Court, the decision on the confirmation of charges cannot be based solely on one such piece of evidence.<sup>104</sup>

75. In considering indirect evidence, the Chamber follows a two-step approach. First, as with direct evidence, it will assess its relevance and probative value. Second, it will verify whether corroborating evidence exists, regardless of its type or source. The Chamber is aware of rule 63(4) of the Rules, but finds that more than one piece of indirect evidence, which has low probative value, is preferable to prove an allegation to the standard of substantial grounds to believe. In light of this assessment, the Chamber will then determine whether the piece of indirect evidence in question, when viewed within the totality of evidence, is to be accorded a sufficient probative value to substantiate a finding of the Chamber for the purposes of the decision on the confirmation of charges.<sup>105</sup>

76. At this juncture, the Chamber will address a number of issues that have been raised by the parties and that directly relate to the probative value to be accorded to certain pieces of evidence adduced in the present case.

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Trial Chamber II, "Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses", ICC-01/09-01/11-221, para. 14.

<sup>104</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 51

<sup>105</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 52.

a) Anonymous, summary evidence, and redacted witness statements

77. The Chamber notes that the Defence teams of the Suspects argue that a lower probative value should be accorded to evidence emanating from an anonymous source and/or provided in a summary of a witness statement.<sup>106</sup>

78. The Chamber is aware that the use of anonymous witness statements and summaries is permitted, pursuant to article 61(5) and 68(5) of the Statute and rule 81(4) of the Rules, at the pre-trial stage. However, the Chamber shares the view, adopted in other pre-trial decisions,<sup>107</sup> that the use of evidence emanating from anonymous sources or from summaries of witnesses statements – regardless of its direct or indirect nature – may impact the ability of the Defence to challenge the credibility of the source and the probative value of such evidence. Therefore, to counterbalance the disadvantage that this might cause to the Defence, such evidence is considered as having a lower probative value than that attached to the statements of witnesses whose identity is known to the Defence and for which a full statement has been made available to it. The Chamber will thus analyse anonymous witness statements and summaries on a case-by-case basis and evaluate them for the purposes of the present decision taking into account whether there is corroboration by other evidence.<sup>108</sup>

79. The Defence of Mr. Kosgey and Mr. Sang further submit that the heavily redacted witness statements that were disclosed by the Prosecutor prevent the Defence from challenging the reliability of the evidence given by these witnesses. Thus, the Defence submits that heavily redacted statements should be given weight similar to summaries or anonymous hearsay evidence, *i.e.* low probative value, which require

<sup>106</sup> ICC-01/09-01/11-355, paras 4, 118; ICC-01/09-01/11-353, paras 29-31; ICC-01/09-01/11-354, paras 47-50; ICC-01/09-01/11-355, para. 132.

<sup>107</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 50; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, ICC-01/04-01/07-717, para. 119; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/06-803-tEN, para. 106.

<sup>108</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, paras 50-51; Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, para. 41; Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-02/09-243-Red, para. 52; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, paras 160.

corroboration.<sup>109</sup> The Chamber is mindful of the difficulties that such evidence may cause to the Defence and will exercise caution when making its final determinations as to the probative value of these witness statements.

b) Reports produced by other entities

80. Regarding reports of other entities,<sup>110</sup> the Defence of Mr. Sang argues:

[T]he Pre-Trial Chamber should not place great reliance on these materials. Given the anonymous and unknown nature of the witnesses who gave information to CIPEV, KNCHR and HRW (some of whom may be the same witnesses being relied on by the Prosecution), and given the organisations largely opaque investigative processes, these materials have a low probative value and do not assist the Chamber in any substantial regard.<sup>111</sup>

81. The Chamber takes note of the Defence's concern and reiterates that the assessment of any piece of evidence whether direct or indirect will be subject to the principles outlined in paragraphs 69-70 and 74-75.

c) Motive behind witness statements

82. With regard to possible political or other underlying motives of witnesses, the Defences of Mr. Kosgey and Mr. Sang claim that the Prosecutor failed to question the motives of his witnesses.<sup>112</sup> In response, the Prosecutor acknowledged that witness motivation is an appropriate consideration, though one primarily for the trial.<sup>113</sup>

83. The Chamber will evaluate whether motives cast doubt on the reliability and, by implication, on the probative value of the witnesses.<sup>114</sup> Accordingly, the Chamber does not automatically reject evidence solely because the witness might be politically

<sup>109</sup> ICC-01/09-01/11-353, paras 53 and 55; ICC-01/09-01/11-354, paras 2, 39, 47-50.

<sup>110</sup> The Commission of Inquiry into Post-Election Violence (CIPEV), Kenya National Commission on Human Rights (KNCHR) and Human Rights Watch (HRW).

<sup>111</sup> ICC-01/09-01/11-354, paras 22-27.

<sup>112</sup> ICC-01/09-01/11-353, paras 46, 75 and 121; see also Defence submissions in this regard during the confirmation hearing, ICC-01/09-01/11-T-9-Red-ENG, page 33.

<sup>113</sup> ICC-01/09-01/11-345, para. 62.

<sup>114</sup> See for example Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 57; ICTY, *Prosecutor v. Tadic*, Case No. IT-97-1-T, "Opinion and Judgment", 7 May 1997, para. 541; see also ICTY, *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, "Judgment", 30 November 2005, para. 15; ICTY, *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, "Judgment", 26 February 2009, para. 61.

or otherwise motivated, but assesses the witness' reliability and probative value in light of the issue to be decided upon and taking into account the totality of the evidence.<sup>115</sup>

d) Inconsistencies in the evidence

84. The Chamber notes that the Defence teams of the Suspects have raised issues about possible inconsistencies within one or amongst several pieces of evidence.<sup>116</sup> In particular, the Defence of Mr. Ruto underlines that "the witnesses speaking of [...] meetings contradict each other on significant issues relating to who was present, what was said and done by whom, and who was in charge".<sup>117</sup> The Defence of Mr. Kosgey argues that "material parts of Witness 6's testimony do not accord with core parts of the Prosecution's case".<sup>118</sup> Lastly, the Defence of Mr. Sang contended that "major contradictions [...] on significant points of evidence [...] undermines the veracity and reliability of the entirety of the Prosecution evidence [and] cannot be relied upon to confirm the charges".<sup>119</sup>

85. The Prosecutor responded that "[w]hile the internal and external consistency of evidence is relevant to its probative value, inconsistencies do not require the wholesale rejection of a piece of evidence [...] [n]or is evidence to be rejected in its entirety because a portion of it is seemingly inconsistent either with other parts of the statement or with other evidence".<sup>120</sup>

<sup>115</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, paras. 50-51; Banda and Jerbo Decision, para. 41; Pre-Trial Chamber I, "Decision on the Confirmation of Charges", ICC-02/05-02/09-243-Red, para. 52; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, paras 160. For individual accounts see for example Witness 1 stating that he wishes to "save our country" at KEN-OTP-0028-1630 at 1663; Witness 6 stating his motivation as "to prevent these crimes in the future", at KEN-OTP-0044-0003 at 0009; Witness 8 "wants to help", "peace", "justice".

<sup>116</sup> ICC-01/09-01/11-353, paras 68-70; ICC-01/09-01/11-355, para. 118; ICC-01/09-01/11-354, paras 42-45.

<sup>117</sup> ICC-01/09-01/11-355, para. 118.

<sup>118</sup> ICC-01/09-01/11-353, paras 68-70.

<sup>119</sup> ICC-01/09-01/11-354, paras 42-45.

<sup>120</sup> ICC-01/09-01/11-345, paras 32-33. For the Prosecutor's responses to the Defence's allegations of inconsistencies with regard to specific pieces of evidence see paras 34-48.

86. The Chamber considers that inconsistencies may have an impact on the probative value to be accorded to the evidence in question. However, inconsistencies do not lead to an automatic rejection of the particular piece of evidence and thus do not bar the Chamber from using it.<sup>121</sup> The Chamber will assess whether potential inconsistencies cast doubt on the overall credibility and reliability of the evidence and, therefore, affect the probative value to be accorded to such evidence.<sup>122</sup> This assessment must be conducted with respect to the nature and degree of the individual inconsistency as well as to the specific issue to which the inconsistency pertains. In fact, inconsistencies in a piece of evidence might be so significant as to bar the Chamber from using it to prove a specific issue, but might prove immaterial with regard to another issue, which, accordingly, does not prevent the Chamber from using it regarding that issue.

e) Reliability and credibility of Witnesses 4 and 8

87. The Defences of Mr. Ruto and Mr. Sang also asserted that Witnesses 4 and 8 were coached and induced to implicate Mr. Ruto; thus, they are neither reliable nor credible.<sup>123</sup> The two Defence teams presented evidence in support of their allegations in the form of newspaper articles and a video clip.<sup>124</sup>

88. The Chamber is not convinced by the Defences' assertion that Witnesses 4 and 8 were coached. Nor is the Chamber convinced that said witnesses are not reliable or credible. Rather, the Chamber, having examined the matter on the basis of the evidence presented, finds that there is no evidence to demonstrate that the witnesses

<sup>121</sup> This approach is followed as well in Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 55; Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 116.

<sup>122</sup> See for a similar approach Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, para. 55.

<sup>123</sup> ICC-01/09-01/11-355, para. 19. ICC-01/09-01/11-354, paras 34-35; see also submissions during the hearing at ICC-01/09-01/11-T-10-CONF-ENG, pp. 30, 32-33; ICC-01/09-01/11-T-10-CONF-ENG, pp. 35, 36; ICC-01/09-01/11-T-10-CONF-ENG, pp. 36, 38.

<sup>124</sup> Media press articles at KEN-D09-0009-0001, at 0002-0003; video KEN-OTP-0047-0144.



were actually coached to “renew and adjust all [their] previous testimonies so that they could be almost similar and could corroborate each other”.<sup>125</sup>

89. In particular, the Defence teams of the two suspects refer to a newspaper article, which includes excerpts from statements previously given to two commissions. According to the Defence these excerpts were provided by Witnesses 4 and 8, who are anonymous. Notwithstanding the Defences’ assertion during the confirmation hearing that they are aware of their identity, the Chamber remains of the view that they are anonymous and shall be treated as such throughout the decision. Even assuming *arguendo* that the Defence has correctly identified Witnesses 4 and 8, the excerpt referred to in the newspaper article actually proves that the witnesses did not change their accounts, contrary to the Defences’ assertion. Instead, these excerpts reveal that the statements provided to the commissions are in essence the same as those subsequently given to the Office of the Prosecutor. Thus, even if said witnesses were approached, their previous statements’ concurrence with the statements presented to the Court shows that these witnesses have not adjusted their views in order to implicate Mr. Ruto. This assessment of the facts makes it difficult to argue that Witnesses 4 and 8 are neither reliable nor credible.

90. Therefore, the Chamber will rely on the statements of Witnesses 4 and 8 for the purposes of the present decision.

f) Witnesses 1, 2, 6 and 8 are allegedly self-confessed criminals

91. The Defence teams of Mr. Ruto and Mr. Sang submitted that Witnesses 1, 2, 6 and 8 should not be considered by the Chamber as reliable or credible witnesses because they are self-confessed criminals, who participated in the post-election violence.<sup>126</sup> The Prosecutor responded that “insiders” commonly provide highly relevant

<sup>125</sup> KEN-D09-0009-0001 at 0002.

<sup>126</sup> ICC-01/09-01/11-354, para 2 and 40; see also ICC-01/09-01/11-T10-CONF-ENG, p. 11-12, lines 16-25. ICC-01/09-01/11-355, paras 16-18; see also ICC-01/09-01/11-T12-CONF-ENG, p. 37, lines 12-15.



information accessible only to individuals involved in the crimes or close to the accused.<sup>127</sup>

92. The Chamber considers that the witnesses' possible involvement in the commission of the crimes does not automatically render them unreliable and/or not credible, such that their evidence should be excluded or provided a lower probative value. Instead, the assessment of the evidence provided by those witnesses and the weight to be given will depend on a case-by-case basis. The same holds true in relation to evidence provided by the Suspects, which will be equally treated on the basis of the same principle. In other words, the Suspects or Defence witnesses who are allegedly implicated through one way or another in the crimes will not be automatically considered unreliable and/or not credible. Nor will their evidence be granted a lower probative value, as a matter of principle. Rather, their final assessment and the weight to be given will depend on a case-by-case basis.

*C. Issues raised by the Defence as to the form of the Amended DCC*

93. At the confirmation hearing and in the Final Written Submissions, the Defence teams of the Suspects contended that the Amended DCC is insufficient on its face and failed to provide notice to the suspects of the charges alleged.<sup>128</sup>

94. The Defence teams of Mr. Ruto and Mr. Sang argue that the use of the term "including" in the description of the counts is impermissibly vague because it does not set any geographical limits.<sup>129</sup> They also claim that the characterisation of the facts as deportation *or* forcible transfer of population within the same count created a prejudice to the Defence.<sup>130</sup> Moreover, the exclusion from the Amended DCC "of the names or identifying features of [...] the Network-members, 'other' co-perpetrators, the suspect's subordinates or the actual perpetrators, renders it impossible for the

<sup>127</sup> ICC-01/09-01/11-345, para. 60.

<sup>128</sup> ICC-01/09-01/11-T-6-Red-ENG, p. 126, lines 6-10, p. 127, lines 6-9; ICC-01/09-01/11-T-6-Red-ENG, p. 152, lines 8-14; ICC-01/09-01/11-354; ICC-01/09-01/11-353, paras 76-85; ICC-01/09-01/11-354, paras 140-152; ICC-01/09-01/11-355, paras 30-75.

<sup>129</sup> ICC-01/09-01/11-354, para. 149, and ICC-01/09-01/11-355, para. 33.

<sup>130</sup> ICC-01/09-01/11-355, para. 33; ICC-01/09-01/11-354, para. 145.

suspect to defend himself adequately".<sup>131</sup> The Defence of Mr. Kosgey observes that the Amended DCC does not include the dates of the meetings that he is alleged to have participated in, which impedes his ability to respond to the charges.<sup>132</sup> Moreover, the Defence of Mr. Ruto argues that the Prosecutor failed to provide in detail the methods of the suspect's essential contribution to the commission of the crimes.<sup>133</sup> Finally, the Defence of Mr. Sang contends in relation to the charges of murder and deportation or forcible transfer that there are "contradictions within the DCC itself as regards numbers of victims [...] [and] that such disparities should have been clarified in order [...] to know in detail the allegations [...]".<sup>134</sup>

95. The Prosecutor responds that the Amended DCC is sufficient to meet the requirement under regulation 52 of the Regulations.<sup>135</sup> He argues that he is not legally required to set out his evidence including dates of meetings in the Amended DCC.<sup>136</sup> The Prosecutor, recalling the previous jurisprudence of this Chamber,<sup>137</sup> contends that "the Amended DCC when read as a whole and in conjunction with the List of Evidence and the In-Depth Analysis Chart provides ample notice to the Defence of the nature of the crimes charged".<sup>138</sup> In addition, the Prosecutor asserts that he is required to include in the Amended DCC and to prove only sufficient material facts supporting the crimes alleged, which does not encompass the preparatory meetings as a method of planning these crimes.<sup>139</sup>

96. The Chamber recalls rule 121(3) of the Rules, which states:

<sup>131</sup> ICC-01/09-01/11-355, para. 38.

<sup>132</sup> ICC-01/09-01/11-T-9-RED-ENG, p. 33, line 10, p.35, line 8; ICC-01/09-01/11-353, paras 76-85.

<sup>133</sup> ICC-01/09-01/11-355, paras 57-64.

<sup>134</sup> ICC-01/09-01/11-354, paras 146-148.

<sup>135</sup> ICC-01/09-01/11-345, paras 75-79.

<sup>136</sup> ICC-01/09-01/11-345, para. 81.

<sup>137</sup> Pre-Trial Chamber II, "Decision on the "Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to refile an Amended DCC & LoE" and the "Defence Request for a Status Conference Concerning the Prosecution's Disclosure of 19<sup>th</sup> August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute"", ICC-01/09-02/11-315, para. 12.

<sup>138</sup> ICC-01/09-01/11-345, paras 78-79.

<sup>139</sup> ICC-01/09-01/11-345, paras 80-83.

The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

97. Further, regulation 52 of the Regulations states that the document containing the charges shall include, *inter alia*, "a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court".

98. The Chamber considers that the Amended DCC complies with the requirements set out in the Statute and the Rules. The Chamber is of the view that the requirement, whereby the Amended DCC shall contain a "sufficient legal and factual basis", pursuant to regulation 52 of the Regulations, implies that the DCC may not be exhaustive in all the information in support of the charges. However, it has to provide the Defence with a sufficiently clear picture of the facts underpinning the charges against the Suspects and in particular in relation to the crimes, the dates and locations of their alleged commission. A reading of the Amended DCC in light of the evidence disclosed by the Prosecutor, the list of this evidence and the In-Depth Analysis Chart puts the Defence in position to acquire sufficient knowledge of the nature of the crimes charged.<sup>140</sup>

99. With regard to the term 'including' the Chamber considers, on the basis of the Prosecutor's submissions at the confirmation of charges hearing and in the Amended DCC, that the use of the expression "in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town" shall be understood as encompassing exclusively these locations. This does not mean, however, that the Prosecutor is correct, in principle, in using this broad formulation, which might have an impact on expanding the

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<sup>140</sup> For an approach along this line see Pre-Trial Chamber II, "Decision on the "Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE" and the "Defence Request for a Status Conference Concerning the Prosecution's Disclosure of 19<sup>th</sup> August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute", ICC-01/09-02/11-315, para. 12.

parameters of his case before the Trial Chamber.<sup>141</sup> To the contrary, the Prosecutor should provide a proper degree of specificity in his document containing the charges, which refers to the precise locations of the alleged incidents where crimes took place. Therefore, the Chamber will only assess the evidence with respect to the events that according to the Prosecutor's allegations took place in the locations explicitly referred to in the Amended DCC.

100. As for the charge of "deportation or forcible transfer of population", the Chamber is of the view that this formulation is not prejudicial to the Defence as will be explained in the relevant part dealing with acts constituting crimes against humanity.

101. The Chamber will now turn to alleged defects of the Amended DCC concerning the exclusion of the identities of members, at various levels, of the alleged Network as well as the withholding of the dates of meetings in which the Suspects allegedly participated. With regard to the former, the Chamber considers that this information can be clearly detected from the evidence disclosed to the Defence. There is no requirement for the Prosecutor to spell out the exact composition of the Network in order for the Suspects to challenge the allegations against them. This holds true, *a fortiori*, when other members of the alleged Network are not charged with any crime within the jurisdiction of the Court. As for the redaction of the dates of the preparatory meetings, the Chamber observes that, although information about the exact date of a planning meeting can be of importance to the Defence, the redactions of certain dates within one witness' statement were necessary for security reasons and were authorized under rule 81(4) of the Rules.

102. Moving to the alleged failure of the Prosecutor to specify in the Amended DCC the methods of Mr. Ruto and Mr. Kosgey's essential contributions pursuant to article 25(3)(a) of the Statute, the Chamber underlines that the Prosecutor has duly listed the categories of contributions that Mr. Ruto and Mr. Kosgey are alleged to

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<sup>141</sup> See also the findings of Pre-Trial Chamber I in the *Mbarushimana* case, "Decision on the confirmation of charges", ICC-01/04-01/10-465-Red, paras 81-83.

have carried out. When read together with the evidence disclosed, the Amended DCC is sufficient to provide the Defence with enough information about the allegations against the suspects.

103. Lastly, the Chamber recalls that at this stage the Prosecutor is requested to substantiate his allegations that the crimes charged were committed with as precise as possible data. However, in the circumstances of the present case, the Chamber is of the view that the discrepancies in the numbers of victims provided in the Amended DCC are not of such nature so as to prevent the Defence teams of the Suspects to challenge whether the crimes charged were allegedly committed.

104. Any additional allegations concerning possible defects of the Amended DCC will be addressed in the subsequent parts of the present decision.

#### **V. EVIDENCE OF ALIBI AND CHALLENGES TO THE EXISTENCE OF PREPARATORY MEETINGS**

105. The Chamber notes that during the confirmation hearing and in the Amended DCC, the Prosecutor contended that a series of meetings were allegedly organized between late December 2006 and the days preceding the 2007 presidential election. According to the Prosecutor, these meetings were convened with a view toward organizing the commission of the crimes with which the Suspects are charged. The meetings were allegedly held under the supervision of Mr. Ruto and with the participation of Mr. Kosgey, Mr. Sang, politicians, businessmen, and Kalenjin elders. Before delving into a discussion on the evidence of *alibi* asserted by the Defence regarding these meetings, the Chamber wishes to point out that, by reason of judicial economy, it shall refrain from addressing the evidence of *alibi* related to Mr. Kosgey, given that in Section VIII of the present Decision it will determine that there is not sufficient evidence to establish substantial grounds to believe that Mr. Kosgey is criminally responsible in this case.

106. The Chamber notes that the Defence teams have presented evidence of *alibi* in order to challenge the presence of the Suspects in some preparatory meetings held between 30 December 2006 and 22 December 2007. The Chamber is aware of rule 79 of the Rules, which governs the presentation of evidence of *alibi* and the conditions to present such evidence, in particular the requirement that “notification [...] [of the existence of an *alibi*] shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond”.

107. In this regard, the Chamber disagrees with the Prosecutor’s contention that “the Defence presented a factual dispute concerning material issues that can only be properly resolved by a full airing of the evidence, which can only be done at trial”.<sup>142</sup> By contrast, the Chamber believes that an *alibi* may equally be raised during the pre-trial stage, and thus rule 79 of the Rules shall equally apply. It also follows that the argument raised by the Prosecutor that the Chamber “need not engage in the weighing of competing versions at this stage”<sup>143</sup> cannot stand. This is because even if the Defence failed to notify the Prosecutor of the existence of an *alibi* pursuant to rule 79(1)(a) of the Rules, rule 79(3) does not provide for an explicit remedy, which in any case would not prevent the Chamber from addressing the merits of the said *alibi*.

108. This is not to say that the Defence is relieved from its statutory obligations to provide the Prosecutor with a notification concerning the existence of an *alibi* “sufficiently in advance to enable [him] to prepare adequately and to respond”. The reference to the words “sufficiently in advance” suggests that the notification should preferably take place prior to the commencement of the confirmation hearing in order to ensure that the Prosecutor is in a position to respond to the Defence and his case is not prejudiced due to raising an *alibi* at a late stage. However, the circumstances of the present case reveal that despite the lack of an explicit notification regarding the existence of an *alibi* on the part of the Defence, the Prosecutor did not suffer any prejudice. Had he suffered prejudice, the Prosecutor

<sup>142</sup> ICC-01/09-01/11-345, para. 49.

<sup>143</sup> ICC-01/09-01/11-345, para. 50.

would have raised the issue during the confirmation hearing when the Defence teams started addressing their *alibi*. But this is not the case and the first time the Prosecutor brought the matter to the attention of the Chamber was in his Final Written Observations. Thus, weighing the two competing interests at stake, the Chamber takes a balanced approach that considers the rights of both parties. Such an approach makes it fair to address the evidence of *alibi* raised by the Defence.

109. The Chamber is aware that during the confirmation hearing and on the basis of the evidence disclosed by the Defence of Mr. Ruto and Mr. Sang, a large part of the Defence strategy focused on challenging the presence of the Suspects at the planning meetings and, by implication, the very existence of the meetings themselves.

110. Bearing in mind that the core of the case *sub judice* is meeting-based, the Chamber finds it appropriate to start with addressing the Defences' *alibi*, in particular, whether there is sufficient evidence to establish substantial grounds to believe that the planning meetings which form the basis of the Prosecutor's case against Mr. Ruto and Mr. Sang effectively took place. If, upon examination, it turns out that the Defences' assertions are correct, the Chamber shall not use any evidence based on those meetings. This approach ensures not only judicial economy, but also the fairness of the proceedings as a whole. Thus, in this section of the present decision, the Chamber shall consider: (i) the evidence of *alibi* challenging the presence of the Suspects in those meetings; and (ii) those meetings in relation to which no *alibi* was raised during the confirmation hearing, but there exists evidence that may nonetheless undermine, in the Chamber's view, the Prosecutor's allegations that the Suspects attended certain planning meetings.

111. The Chamber wishes to clarify that the determination as to whether there are substantial grounds to believe that some or all of these meetings occurred does not constitute a finding on the crimes charged or on the criminal responsibility of the Suspects. These are elements that the Chamber shall assess under the relevant sections in the present Decision.



112. Lastly, the Chamber wishes to point out that, as a matter of principle, it will assess each meeting individually and on the basis of all the evidence available to the Chamber, so as to decide, in accordance with the required evidentiary threshold, the existence of such meeting. The Chamber will also have to take into account the entire range of planning meetings known from the existing evidence. In the Chamber's view, this is the appropriate approach because most of the witnesses who testified about the meetings were allegedly present at more than one of them. Therefore, a comprehensive and comparative examination of the different meetings and their topics individually and jointly with the rest of the meetings is essential to provide the Chamber with a broad and substantial overview on the events at issue for the purposes of making its final determination.

**A. 30 December 2006 meeting**

113. The Prosecutor alleges that, on 30 December 2006, the first planning meeting was held at Mr. Ruto's house. According to Witness 8, the attendees of this meeting included, *inter alia*, Mr. Sang and the organizer of the meeting Mr. Ruto.<sup>144</sup> In his recollection, Witness 8 states that the 30 December 2006 meeting took place at 2:00 p.m.<sup>145</sup> Moreover, Witness 8 mentioned that Samson Cheramboss ("Mr. Cheramboss") and Reverend Jackson Kipkemoi Kosgei ("Reverend Kosgei") took part.<sup>146</sup> The Chamber recalls that Mr. Cheramboss and Reverend Kosgei respectively testified as live witnesses.<sup>147</sup>

114. During the confirmation hearing, Mr. Cheramboss testified that he has never been to Mr. Ruto's house.<sup>148</sup> With regard to Reverend Kosgei, he testified that he

<sup>144</sup> See the sketch produced by Witness 8, KEN-OTP-0035-0078.

<sup>145</sup> Statement of Witness 8, KEN-OTP-0052-0483 at 0519.

<sup>146</sup> See the sketch produced by Witness 8, KEN-OTP-0035-0078.

<sup>147</sup> Witness KEN-D09-P-0001; ICC-01/09-01/11-T-7-CONF-ENG ET, pp. 6-63, line 14; Witness KEN-D09-P-0002; ICC-01/09-01/11-T-7-CONF-ENG ET, pp. 65-102.

<sup>148</sup> ICC-01/09-01/11-T-7-CONF-ENG ET, pp. 11-12.

“was in Nairobi on the 30<sup>th</sup> [December 2006]”.<sup>149</sup> In his unsworn statement, Mr. Ruto stated that “Mr. Cheramboss ha[s] never been to my house”.<sup>150</sup>

115. In addition, the Defence team of Mr. Sang submitted a statement signed by Mr. Sang, affirming that he attended a football tournament throughout 30 December 2006.<sup>151</sup> The Defence of Mr. Sang also submitted five witness statements given by individuals who were allegedly present at the football pitch in order to confirm the whereabouts of Mr. Sang on that particular day.<sup>152</sup> The Chamber observes that, out of the five witness statements submitted by the Defence, four statements reveal that Mr. Sang had attended the abovementioned football tournament from around 10:00/11:00 a.m. to 7:00/8:00 p.m.<sup>153</sup> As to the fifth witness statement, the information provides that Mr. Sang had lunch at his house together with others and, subsequently, they all went to the tournament at around 2:00 p.m. on 30 December 2006.<sup>154</sup> The Defence also provided pictures of Mr. Sang taken during the football tournament.<sup>155</sup>

116. The Chamber, having examined the statement of Witness 8 and the statements presented by the Defence in support of Mr. Sang’s *alibi*, is not persuaded to the required evidentiary threshold that Mr. Sang attended the 30 December 2006 meeting. In particular, despite the inconsistency between the fifth Defence witness statement and the four other statements in terms of the time of Mr. Sang’s presence at the football tournament, the Chamber is of the view that, given the coherence of their accounts, this discrepancy is not of such significance as to undermine the Defence witnesses’ statements. As such, the Chamber is satisfied that Mr. Sang might not have attended the 30 December 2006 meeting.

<sup>149</sup> ICC-01/09-01/11-T-11-CONF-ENG ET, p. 21.

<sup>150</sup> ICC-01/09-01/11-T-5-ENG ET, p. 98.

<sup>151</sup> Statement of Mr. Sang, KEN-D11-0007-0001 at 0002.

<sup>152</sup> KEN-D11-0005-0037 at 0037-0038; KEN-D11-0005-0051 at 0055; KEN-D11-0005-0097 at 0097-0100; KEN-D11-0005-0131 at 0131-0133; KEN-D11-0005-0167 at 00167.

<sup>153</sup> KEN-D11-0005-0051 at 0054.

<sup>154</sup> KEN-D11-0005-0097 at 0098.

<sup>155</sup> KEN-D11-0001-0001 at 0001 to 0009.

117. Nevertheless, the Chamber wishes to emphasize that this finding does not render Witness 8 unreliable. Nor does it negate the occurrence of the 30 December 2006 meeting itself. The Chamber finds that the evidence furnished by Witness 8 with respect to other parts of the 30 December 2006 meeting is persuasive. Moreover, other witnesses report about follow up meetings of the 30 December 2006 meeting, including the role of other members of the alleged Network and the topics that were discussed in a similar manner as described by witness 8.<sup>156</sup>

118. Further, the Chamber recalls that in their live testimonies Mr. Cheramboss and Reverend Kosgei denied their presence at the 30 December 2006 meeting. However, given the *circumstances* surrounding Mr. Cheramboss, in terms of his alleged involvement in the planning of the attack during the different meetings as one or more of the Prosecutor's witnesses testified, the Chamber considers that the probative value to be attached to his testimony is lowered. In particular, and as will be explained in more detail later, the Chamber underlines that different witnesses described in detail the active role played by Mr. Cheramboss during the various meetings within the alleged Network. With regard to Reverend Kosgei, due to the circumstances surrounding his alleged involvement, which implies an interest in denying his presence in the meeting, his testimony will also be accorded lower probative value. Moreover, Reverend Kosgei is reported to have made a derogatory speech during a planning meeting, passages of which are quoted in detail by Witness 8.<sup>157</sup>

119. In light of these considerations, the Chamber is satisfied that there are substantial grounds to believe that the 30 December 2006 meeting took place in the presence of Mr. Ruto. Consequently, the Chamber may rely on this meeting for the purposes of subsequent findings in the present decision.

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<sup>156</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0794, 0804-0805 (on the issue of availability of funding); KEN-OTP-0028-0776 at 0796, 0800-0801 (on the role of the three commanders allegedly responsible for the attack in the South Rift Valley, Central Rift Valley and North Rift Valley); KEN-OTP-0028-0776 at 0806-0808 (on transportation issues and purchase of guns).

<sup>157</sup> Statement of Witness 8, KEN-OTP-0052-0694 at 0715.

**B. 15 April 2007 meeting**

120. The Prosecutor contends that on 15 April 2007, an oath ceremony took place at the Molo milk plant, as purported by Witness 8.<sup>158</sup> Witness 8 testified that both Mr. Ruto and Mr. Sang were present and that the oath took place “at night”.<sup>159</sup> Reverend Kosgei is also mentioned by the witness as among those attending the ceremony.<sup>160</sup> The Chamber notes that Witness 8 explained in detail the procedure of the ceremony, according to which Mr. Ruto and other important representatives of the Kalenjin community were sprinkled with blood of dogs previously slaughtered under the supervision of a traditional elder.<sup>161</sup> Mr. Ruto and others allegedly took an oath “to kill the Kikuyu mercilessly, the Kisiis mercilessly, the Kambas mercilessly. We will kill them mercilessly.”<sup>162</sup>

121. At the confirmation hearing, Reverend Kosgei denied his participation in the 15 April 2007 meeting.<sup>163</sup> He also denied that taking oaths falls within any practice relied on by Kalenjins and specified that “[i]t is an abominable to have oaths in Kalenjin. They [...] they don't take oath. They fear oath”.<sup>164</sup> Reverend Kosgei also pointed out that dogs are considered abominable animals and that Kalenjins “don't do ceremonies using dogs. During sacrifices that used to be done on mountains, the only blood that could be shed is for[sic] ram [...] that is what was used commonly by Kalenjins about 50 [...] 60 years ago”.<sup>165</sup>

122. Furthermore, the Defence of Mr. Ruto produced a video showing him at a public rally in Eldoret.<sup>166</sup> As to Mr. Sang, the Chamber notes his written statement wherein he declared that on 14 April 2011 he was 100 kilometers away from Molo milk plant

<sup>158</sup> Statement of Witness 8, KEN-OTP-0052-0652 at 0676-0678.

<sup>159</sup> Statement of Witness 8, KEN-OTP-0052-0613 at 0672.

<sup>160</sup> Statement of Witness 8, KEN-OTP-0052-0652, at 0684; KEN-OTP-0035-0087.

<sup>161</sup> Statement of Witness 8, KEN-OTP-0052-0613 at 0674-0677.

<sup>162</sup> Statement of Witness 8, KEN-OTP-0052-0652 at 0677.

<sup>163</sup> ICC-01/09-01/11-T-11-CONF-ENG ET, pp. 88-89.

<sup>164</sup> ICC-01/09-01/11-T-11-CONF-ENG ET, pp. 28.

<sup>165</sup> ICC-01/09-01/11-T-11-CONF-ENG ET, p. 29.

<sup>166</sup> KEN-D09-0013-0009 at 0011.

with other people, including Kass FM staff, attending the funeral of a prominent musician.<sup>167</sup> The day after, Mr. Sang avers, he went back to Nairobi.<sup>168</sup>

123. The Chamber considers that the video disclosed by the Defence of Mr. Ruto, which allegedly shows the first Suspect at a public rally in Eldoret is not authenticated and the date and place of the event are simply added by way of a cover page inserted at the beginning of the video. In addition, taking into consideration that Witness 8 used the expression "at night" as the temporal framework for the 15 April 2007 meeting, the Chamber is of the view that the attendance of Mr. Ruto at the rally in Eldoret would not be *per se* incompatible with the gathering alleged by Witness 8. The same holds true for Mr. Sang, who declared to be traveling back to Nairobi from a location which is 100 kilometers away from the place of the alleged 15 April 2007 meeting. This does not preclude, in principle, Mr. Sang from attending the 15 April 2007 meeting as recollected by Witness 8.

124. With regard to the live testimony of Reverend Kosgei, the Chamber has already explained in paragraph 118 its position on the testimony given by this particular witness in the specific circumstances outlined above. Accordingly, the Chamber does not consider that the asserted discrepancy between the references to dogs as the animals used during the 15 April 2007 meeting and the testimony of Reverend Kosgei in that regard is of such a nature as to invalidate the credibility of the testimony of Witness 8 in relation to the 15 April 2007 meeting.

125. The Chamber wishes to point out that its finding, according a higher probative value to the account of Witness 8, is supported by the detailed description provided by the witness, which reflects consistency and clarity. Moreover, the Chamber underlines that within the series of other planning meetings, Witnesses 1, 2, 6 and 8 reiterate that Mr. Ruto had the alleged intention to kill members of the Kikuyu

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<sup>167</sup> KEN-D11-0007-0001 at 0003.

<sup>168</sup> KEN-D11-0007-0001 at 0003.

community.<sup>169</sup> Therefore, having considered all the evidence related to the 15 April 2007 meeting, the Chamber is satisfied that there are substantial grounds to believe that such meeting took place in the presence of Mr. Ruto and Mr. Sang. Consequently, the Chamber may rely on this meeting for the purposes of subsequent findings in the present decision.

**C. Meeting at Sirikwa Hotel (2 September 2007)**

126. The Chamber notes that a meeting that allegedly took place at the Sirikwa Hotel on 2 September 2007 is disputed by the parties. This meeting and its contents are described by witnesses 1 and 8.<sup>170</sup> Both Mr. Ruto and Mr. Sang are said to have participated.<sup>171</sup> The meeting was allegedly sponsored by Kass FM.<sup>172</sup> According to Witness 8, Reverend Kosgei and Mr. Cheramboss both made a speech.<sup>173</sup>

127. In Mr. Sang's Final Written Observations, the Defence of Mr. Sang submitted that Witnesses 1 and 8 presented inconsistent information to the effect that the same alleged meeting at the Sirikwa hotel was held on two different dates.<sup>174</sup> In this respect, the Chamber after having reviewed these statements, observes that Witnesses 1 and 8 subsequently rectified the mixed-up dates.<sup>175</sup>

128. Turning to Witness 8's assertion that Reverend Kosgei and Mr. Cheramboss attended this meeting, the Chamber recalls that at the confirmation hearing, Reverend Kosgei maintained that he has never been in any meeting with Mr. Cheramboss.<sup>176</sup> For his part, Mr. Cheramboss declared that he has never participated

<sup>169</sup> Statement of Witness 8, KEN-OTP-0052-0652 at 0677; See for example KEN-OTP-0052-0729 at 0737; Statement of Witness 1, KEN-OTP-0028-1532 at 1543; KEN-OTP-0028-1532 at 1546; KEN-OTP-0028-1587 at 1593-1594; Statement of Witness 6, KEN-OTP-0051-0226, line 642 and ff; statement of Witness 2, KEN-OTP-0055-0211 at 0214-0215.

<sup>170</sup> Statement of Witness 1, KEN-OTP-0028-0495 at 0548; KEN-OTP-0028-00776 at 0786 to 0824; KEN-OTP-0028-1358 at 1372-1373; Statement of Witness 8, KEN-OTP-0052-0694 at 0706 to 0717.

<sup>171</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0786, 0794, 0803, 0805 and 0824.

<sup>172</sup> Statement of Witness 8, KEN-OTP-0052-0694 at 0705.

<sup>173</sup> Statement of Witness 8, KEN-OTP-0052-0694 at 0715.

<sup>174</sup> ICC-01/09-01/11-354, paras 43(a) and 101.

<sup>175</sup> Statement of Witness 1, KEN-OTP-0057-0040, at 0042-0045 and KEN-OTP-0057-0234, at 0240-0241. Statement of Witness 8, KEN-OTP-0052-0694, at 0699, 0706-0707.

<sup>176</sup> ICC-01/09-01/11-T-11-CONF-ENG ET, pp. 22-23.



in any meeting at the Sirikwa Hotel<sup>177</sup> and, more generally, that he has never taken part in any meeting with Mr. Ruto.<sup>178</sup>

129. The Defence team of Mr. Sang relies on three statements from the General Manager, the Front Office Manager and another employee of the Sirikwa Hotel. All three witnesses declared that no event was booked, under the sponsorship of Kass FM, by either Mr. Ruto or Mr. Sang during the month of September 2007.<sup>179</sup>

130. The Chamber stresses that the testimonies of Witnesses 1 and 8 concerning the 2 September 2007 meeting corroborate each other to a significant extent. More specifically, the Chamber observes that both witnesses gave evidence about the same topics that were allegedly discussed by Mr. Ruto and other participants in the 2 September 2007 meeting, including: (i) an update on the weapons obtained thus far;<sup>180</sup> (ii) money and fundraising;<sup>181</sup> and (iii) the issue of transportation of material perpetrators to and from the target locations.<sup>182</sup> The Chamber also notes that these topics are consistently referred to by the same witnesses as well as by Witnesses 2, 4 and 6 in relation to different planning meetings.<sup>183</sup>

131. In addition, the description of Witness 8 about the 2 September 2007 meeting, including the speech made by Reverend Kosgei, is precise and detailed. Further, the reference of Witness 1 to the role that Mr. Cheramboss allegedly played during the

<sup>177</sup> ICC-01/09-01/11-T-7-CONF-ENG ET, p. 31.

<sup>178</sup> ICC-01/09-01/11-T-7-CONF-ENG ET, pp. 52-55.

<sup>179</sup> KEN-D11-0005-0042 at 0042-0043; KEN-D11-0005-0085 at 0087; KEN-D11-0005-0140 at 0140-0141.

<sup>180</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0806-0808. Statement of Witness 8 KEN-OTP-0052-0694 at 0709-0712.

<sup>181</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0794, 0804 and 0805. Statement of Witness 8, KEN-OTP-0052-0694 at 0706.

<sup>182</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0806, 0807 and 0808. Statement of Witness 8, KEN-OTP-0052-0694 at 714.

<sup>183</sup> Statement of Witness 6, KEN-OTP-0044-0003 at 0015-0016, 0025, 0027; KEN-OTP-0051-0135 at 0193, 0195; KEN-OTP-0051-0207 at 0219-0220, 0226, 0227; KEN-OTP-0051-0256 at 0271; KEN-OTP-0051-0349 at 0368-0369, 0395-0400. Statement of Witness 2, KEN-OTP-0029-0131 at 0141, 0143; KEN-OTP-0053-0256 at 0267. Statement of Witness 4, KEN-OTP-0031-0085 at 0092-0093.

2 September 2007 meeting and more generally within the alleged Network is compatible with other references made by other witnesses such as Witness 6.<sup>184</sup>

132. In light of all these considerations, the Chamber is of the view that the three statements provided by the Defence of Mr. Sang do not undermine the probative value to be attached to the evidence given by Witnesses 1 and 8 as explained above. Therefore, the Chamber finds that there are substantial grounds to believe that the 2 September 2007 meeting took place in the presence of Mr. Ruto and Mr. Sang and, thus, the Chamber may rely on such meeting for the purposes of subsequent findings in the present decision.

*D. 2 November 2007 meeting*

133. The next preparatory meeting which is challenged by the Defence of Mr. Ruto and Mr. Sang had purportedly taken place at Mr. Ruto's residence, in his presence, on 2 November 2007. Witnesses 1 and 8 gave evidence about this meeting, in which Mr. Sang and Mr. Cheramboss, among others, allegedly participated.<sup>185</sup> Both witnesses refer to 10:00 a.m. as the time when they arrived at the 2 November 2007 meeting.<sup>186</sup> In addition, Witness 1 specified that the meeting lasted until the evening.<sup>187</sup>

134. As already recalled, during the confirmation hearing, Mr. Cheramboss testified that he has never been to Mr. Ruto's house and, more generally, that he has never had any meeting with Mr. Ruto.<sup>188</sup> In his unsworn statement Mr. Ruto also denied that Mr. Cheramboss has ever "stepped in [...] [Mr. Ruto's] house".<sup>189</sup> In addition, the Defence team of Mr. Ruto disclosed a video showing his whereabouts in Kapkatet,

<sup>184</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0796, 0800, 0801 and 0824; KEN-OTP-0028-1358 at 1372-1373. Statement of Witness 6, KEN-OTP-0044-0003 at 0015-0016, 0022-0023, 0027; KEN-OTP-000044-0142; KEN-OTP-0051-0207 at 0222, 0223; KEN-OTP-0051-0256 at 0262-0267; KEN-OTP-0051-0349 at 0374; KEN-OTP-0051-0405 at 0415-0420, 0450 and 0461; KEN-OTP-0051-0993 at 1012-1013.

<sup>185</sup> See the sketch of Witness 8, KEN-OTP-0035-0092. Statement of Witness 1, KEN-OTP-0028-0776 at 0783-0784 and KEN-OTP-0028-1358 at 1366-1367.

<sup>186</sup> Statement of Witness 1, KEN-OTP-0028-0713 at 0751. Statement of Witness 8, KEN-OTP-0052-0729 at 0733.

<sup>187</sup> Statement of Witness 1, KEN-OTP-0028-0713 at 0751.

<sup>188</sup> ICC-01/09-01/11-T-7-CONF-ENG ET, pp. 11-12; ICC-01/09-01/11-T-7-CONF-ENG ET, pp. 52-55.

<sup>189</sup> ICC-01/09-01/11-T-5-ENG ET, p. 98.

addressing the audience during an ODM rally.<sup>190</sup> The Chamber notes that Witness 8 mentioned, among the attendees of this meeting, Frederick Kapondi (“Mr. Kapondi”).<sup>191</sup> In this regard, the Defence of Mr. Ruto produced a letter from the prison service certifying that Mr. Kapondi was allegedly incarcerated between 17 April 2007 and 14 December 2007.<sup>192</sup> The letter is accompanied by two newspaper articles commenting on his release, which occurred on 14 December 2007.<sup>193</sup>

135. The Defence team of Mr. Sang also challenged the presence of the suspect at Mr. Ruto’s house and presented, to that effect, a statement of the Managing Director of Kass FM, who stated that Mr. Sang “was at Kass FM studio on the days [2 November, 6 December and 14 December 2007]” and that “any allegation that he was somewhere else from the Station is untrue”.<sup>194</sup> This, in the view of the Defence, would corroborate the statement of Mr. Sang himself, in which he declared that on 2 November 2007 he was working at Kass FM.<sup>195</sup>

136. With regard to the video showing Mr. Ruto at Kapkatet, the Chamber recalls its reasoning in paragraph 123 above, and observes that the video at issue lacks authentication with regard to the date of the event, which is displayed only by way of cover page added at the beginning of the video file. This, in the view of the Chamber, undermines the probative value of such item of evidence. Concerning the letter from the prison services and the newspaper articles allegedly proving that one of the attendees, namely Mr. Kapondi, was incarcerated on 2 November 2007 and thus not in a position to participate in the meeting under discussion, the Chamber is satisfied that this might have been the case. Nevertheless, the Chamber notes the

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<sup>190</sup> KEN-D09-0013-0009 at 0020.

<sup>191</sup> See the sketch of Witness 8, KEN-OTP-0035-0092.

<sup>192</sup> KEN-D09-0008-0001 at 0001.

<sup>193</sup> KEN-D09-0008-0001 at 0002-0003.

<sup>194</sup> See KEN-D11-0005-0136 at 0136.

<sup>195</sup> KEN-D11-0007-0001 at 0003.

presence of Mr. Kapondi at a subsequent meeting on 14 December 2007, again at Mr. Ruto's house, as reported by both Witnesses 2 and 8.<sup>196</sup>

137. Under these circumstances, the Chamber is of the view that the reference by Witness 8 to Mr. Kapondi as one of the attendees of the 2 November 2007 meeting may be the result of an oversight about the recollection of the events between this meeting and the one held on 14 December 2007, both hosted by Mr. Ruto. Moreover, the Chamber notes that Mr. Kapondi was not among the speakers of these two meetings and that in both instances the lists of attendees include several individuals, thus increasing the possibility of oversight between two events reported by the same witness.

138. Thus, the assertion that Mr. Kapondi was not in attendance at the 2 November 2007 meeting due to his detention does not undermine the very existence of such meeting, as supported by the testimony of Witnesses 1 and 8.

139. In this regard, the Chamber stresses that the testimonies of Witnesses 1 and 8 regarding the 2 November 2007 meeting corroborate each other. In addition, the topics discussed during this meeting, including the role of Mr. Cheramboss, match with the topics of the different meetings planning the events under consideration as recollected by the same witnesses.<sup>197</sup> This information is corroborated by Witnesses 2, 4 and 6.<sup>198</sup> In this respect, the Chamber recalls its previous finding in paragraph 118 on the probative value to be attached to Mr. Cheramboss' testimony, and as such, his testimony shall be accorded low probative value.

140. Lastly, the Chamber considers that the temporal reference provided by Witness 1 for the 2 November 2007 meeting, namely that it lasted until the evening, does not

<sup>196</sup> Statement of Witness 8, KEN-OTP-0052-1007 at 1036 and Statement of Witness 2, KEN-OTP-0055-0136 at 0152.

<sup>197</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0796, 0800, 0801 0805; 0806, 0807 and 0808. Statement of Witness 8, KEN-OTP-0052-0729 at 0752-0753, 0753, 0765.

<sup>198</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0141; KEN-OTP-0055-0163 at 0166-0167; Statement of Witness 6; KEN-OTP-0051-0207 at 0219, 0226; KEN-OTP-0051-0349 at 0395-0396; Statement of Witness 4; KEN-OTP-0031-0085 at 0090, 0092-0093.

rule out the possibility that Mr. Sang, although normally at work, had made arrangements to participate in the gathering.

141. In light of these considerations, and having weighed the evidence presented by the Defence teams of Mr. Ruto and Mr. Sang against the testimonies of Witnesses 1 and 8, the Chamber is satisfied that there are substantial grounds to believe that the 2 November 2007 meeting took place in the presence of Mr. Ruto and Mr. Sang. Accordingly, the Chamber may rely on said meeting for the purposes of subsequent findings in the present decision.

*E. Kipkarren Salient Trading Center meeting (6 December 2007)*

142. On 6 December 2007, a meeting at Kipkarren Salient Trading Center is alleged to have taken place by Witness 8.<sup>199</sup> The witness contends that the gathering lasted from 9:30 a.m. to 2:00 p.m.<sup>200</sup> According to Witness 8, Mr. Sang was the master of ceremony;<sup>201</sup> Mr. Ruto made a speech,<sup>202</sup> and Mr. Cheramboss was also in attendance.<sup>203</sup>

143. During his questioning, Mr. Cheramboss declared that, on 6 December 2007, he was not in the company of Mr. Ruto.<sup>204</sup> In a statement under inquiry given by Mr. Ruto, the suspect declared that “[he does] not remember the specific date. However, [he] remembers conducting a rally at Kipkaren [...] and there is not a single time [...] [he] incited [...] Kenyans against the Kikuyus”.<sup>205</sup> Mr. Sang contested his presence at such meeting by relying on his written statement as well as on the abovementioned statement of the Managing Director of Kass FM.<sup>206</sup>

<sup>199</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0829-0836.

<sup>200</sup> Statement of witness 8, KEN-OTP-0052-0821 at 0831.

<sup>201</sup> KEN-OTP-0052-0821 at 0835.

<sup>202</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0831.

<sup>203</sup> KEN-OTP-0052-0974 at 0831.

<sup>204</sup> ICC-01/09-01/11-T-7-CONF-ENG ET, p. 62.

<sup>205</sup> KEN-D09-0007-0057 at 0062.

<sup>206</sup> See KEN-D11-0005-0136 at 0136.

144. The Chamber recalls its previous finding in paragraph 118 regarding the probative value of Mr. Cheramboss's testimony, and as such, it considers that his testimony shall be accorded low probative value.

145. With respect to the written statement of Mr. Sang, the Chamber also recalls its earlier finding that the suspect's mere alleged involvement in the commission of crimes does not automatically lead to the exclusion of his/her evidence. Nor does this result, as a matter of principle, in providing the evidence low probative value. Rather, the weight to be accorded to such evidence will depend on a case-by-case assessment. However, having weighed the statements provided by Mr Sang and the Managing Director of Kass FM against the evidence presented as a whole, the Chamber is persuaded that Mr. Sang was present in this meeting.

146. The Chamber points out that in his recollection of the meeting, Witness 8 mentions in detail some passages of the speech made by Mr. Ruto.<sup>207</sup> The Chamber considers that the expressions and topics allegedly spelled out by Mr. Ruto during the 6 December 2007 meeting as described by Witness 8 match with those recollected by him with respect to other preparatory meetings. Moreover, the information provided by Witness 8 is corroborated by the testimony of other witnesses, including Witnesses 1, 2, 4 and 6, who attended different planning meetings.<sup>208</sup>

147. In light of the above, the Chamber considers that the evidence presented by the Defence teams of Mr. Ruto and Mr. Sang does not undermine the probative value to be attached to the evidence provided by Witness 8 in relation to the 6 December 2007 meeting. Therefore, the Chamber is of the view that there are substantial grounds to believe that this meeting took place in the presence of Mr. Ruto and Mr. Sang.

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<sup>207</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0832.

<sup>208</sup> Statement of Witness 1, KEN-OTP-0028-0713 at 0760-0768 and 0770; KEN-OTP-0028-0776 at 0794, 0804 and 0805; KEN-OTP-0028-1246 at 1297; KEN-OTP-0057-0162 at 0174-0175; KEN-OTP-0057-0181 at 0187-0188, 0200, 0203 and 0212. Statement of Witness 6, KEN-OTP-0044-0003 at 0015-0016, 0025 and 0027; KEN-OTP-0051-0207 at 0226-0227; KEN-OTP-0051-0256 at 0271; KEN-OTP-0051-0349 at 0368-0369, 0395-0396, 0400; KEN-OTP-0051-0467 at 0498. Statement of Witness 2, KEN-OTP-0029-0131 at 0140-0141; KEN-OTP-0053-0256 at 0264. Statement of Witness 4, KEN-OTP-0031-0085 at 0092-0093.



Accordingly, the Chamber may rely on this meeting for the purposes of subsequent findings in the present decision.

*F. Meetings at Mr. Cheramboss' house (December 2007)*

148. The Prosecutor alleges that Mr. Cheramboss hosted two planning meetings with Mr. Ruto and other members of the alleged Network during the month of December 2007. The evidence about these meetings is given by Witness 6.<sup>209</sup> At the confirmation hearing, Mr. Cheramboss denied having ever hosted meetings in his house in the presence of Mr. Ruto or others.<sup>210</sup>

149. The Chamber stresses that, in recollecting the two meetings which allegedly took place at Mr. Cheramboss' house, Witness 6 gives evidence on several different aspects pertaining to the structure, functioning, activities and roles of the members of the alleged Network, including Mr. Ruto and Mr. Cheramboss. The Chamber observes that the description of these topics by Witness 6 finds corroboration in the testimony of other witnesses who report about different preparatory meetings, including the testimony of Witnesses 1, 2, 4 and 8.<sup>211</sup> Moreover, the Chamber recalls its previous finding at paragraph 118 that Mr. Cheramboss' testimony will be given low probative value.

150. Having weighed the evidence presented by the parties concerning these two meetings, the Chamber finds that there are substantial grounds to believe that said meetings took place in the presence of Mr. Ruto. Accordingly, the Chamber may rely on them for the purposes of the present decision.

<sup>209</sup> Statement of Witness 6, KEN-OTP-0051-0135 at 0169-0223; sketch of Witness 6 on the list of attendees at KEN-OTP-0044-0044; KEN-OTP-0044-0003 at 0026; KEN-OTP-0051-0944 at 0964-0965; KEN-OTP-0044-0003, at 0015, 0016, 0022-0025, 0027; KEN-OTP-0051-0199 at 0200-0203; KEN-OTP-0051-0207 at 0216 and 0224; KEN-OTP-0051-0256, at 0275-0278; KEN-OTP-0051-0405 at 0417 and 0421; KEN-OTP-0051-0467 at 0519; KEN-OTP-0051-0524 at 0528-0529 and 0578; KEN-OTP-0051-0993 at 1012-1013; KEN-OTP-0051-0349 at 0366-0403; KEN-OTP-0051-0405 at 0441-0459.

<sup>210</sup> ICC-01/09-01/11-T-7-CONF-ENG ET, p. 15.

<sup>211</sup> Statement of Witness 1, KEN-OTP-0028-0713 at 0760-0770; KEN-OTP-0028-0776 at 0794, 0800, 0803-0808; KEN-OTP-0028-0973 at 1038; KEN-OTP-0028-1358 at 1365 and 1372-1373, Statement of Witness 8 KEN-OTP-0052-0613 at 0649, KEN-OTP-0052-0694 at 0706, 0711, 0712; KEN-OTP-0052-0821 at 0843, 0871, and KEN-OTP-0052-0850 at 0852. Statement of Witness 2, KEN-OTP-0029-0131 at 0140-0141; KEN-OTP-0053-0256 at 0264. Statement of Witness 4, KEN-OTP-0031-0085 at 0092-0093.

**G. 14 December 2007 meeting**

151. On 14 December 2007, according to the Prosecutor, a meeting at Mr. Ruto's house took place in the presence of, *inter alia*, Mr. Sang, Mr. Cheramboss and several others.<sup>212</sup> Witnesses 2 and 8 report on this meeting.<sup>213</sup> The Chamber notes a certain discrepancy between the two witnesses on the timing of the meeting. Whereas Witness 2, in one interview session, declared that the meeting was underway when he arrived at about 7:30 p.m.,<sup>214</sup> in another interview the witness stated that he arrived at around 2:00 p.m. and that the meeting concluded between 3:00 and 4:00 p.m.<sup>215</sup> On the other hand, Witness 8 described the 14 December 2007 meeting as lasting between 10:00/11:00 a.m. and 2:00/2.30 p.m.<sup>216</sup>

152. The Chamber recalls that at the confirmation hearing, Mr. Cheramboss denied his participation in any meeting at Mr. Ruto's house on 14 December 2007 or elsewhere during that period.<sup>217</sup> Mr. Ruto, in his unsworn statement, contended that Mr. Cheramboss has never been to his house.<sup>218</sup> Moreover, the Defence team of Mr. Ruto disclosed a video showing him arriving by helicopter at an ODM rally in Amagoro.<sup>219</sup>

153. The Defence of Mr. Sang also raised an *alibi* by presenting the statement of Mr. Sang himself, supported by the statement of the Managing Director of Kass FM, confirming the presence of Mr. Sang at work on 14 December 2007.<sup>220</sup> The Defence team of Mr. Sang pointed out that Mr. Kapondi, one of the attendees alleged at the meeting by both Witnesses 2 and 8, was released from jail on that very same day at

<sup>212</sup> Statement of Witness 8, KEN-OTP-0052-1007 at 1038, 1041.

<sup>213</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0837-0849 and KEN-OTP-0052-0850 at 0851 to 0876. Statement of Witness 2, KEN-OTP-0029-0131 at 0140-0143; KEN-OTP-0053-0256 at 0263-0264, 0266-0268; KEN-OTP-0055-0136 at 0150-0154; KEN-OTP-0055-0163 at 0182-0183; KEN-OTP-0055-0211 at 0212-0215.

<sup>214</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0140.

<sup>215</sup> Statement of Witness 2, KEN-OTP-0053-0256 at 0266.

<sup>216</sup> KEN-OTP-0052-0821 at 0839 and KEN-OTP-0052-0821 at 0842.

<sup>217</sup> ICC-01/09-01/11-T-7-CONF-ENG ET, p. 62.

<sup>218</sup> ICC-01/09-01/11-T-5-ENG ET, p. 98.

<sup>219</sup> KEN-D09-0013-0009 at 0013.

<sup>220</sup> See KEN-D11-0005-0136 at 0136.

11:00 a.m.<sup>221</sup> Such detail, in the view of the Defence of Mr. Sang, is incompatible with Mr. Kapondi's attendance at the meeting at issue.<sup>222</sup>

154. At the outset, the Chamber wishes to stress that the testimonies of Witnesses 2 and 8 as to the 14 December 2007 meeting corroborate each other to a considerable extent. More specifically, the Chamber notes that the two witnesses speak in depth about several topics allegedly discussed during the meeting, including: (i) the terms of the alleged plan to evict members of Kikuyu, Kamba and Kisii communities in order to return the land to the Kalenjins;<sup>223</sup> (ii) the amount and type of weapons available and their purposes;<sup>224</sup> and (iii) the sum of money distributed by Ruto to the attendees.<sup>225</sup>

155. With regard to the video of Mr. Ruto landing by helicopter and addressing an audience in Amagoro, the Chamber reiterates its argument in paragraph 123 above. Accordingly, the Chamber considers that since the video disclosed by the Defence of Mr. Ruto is not authenticated, its probative value is significantly diminished.

156. On the other hand, while cognizant of the inconsistency between Witness 2 and 8 as to the timing of the meeting at stake, the Chamber is equally attentive to the remaining parts of the testimonies of the two witnesses, as well as the detailed and coherent description provided by them. In light of this, said inconsistency does not appear sufficient to undermine the value of the testimonies of Witnesses 2 and 8 as a whole.

157. Turning to the argument of the incongruity of Mr. Kapondi's attendance of the 14 December 2007 meeting with his detention and release from prison, the Chamber is of the view that the discrepancy between the time of his release and the time in

<sup>221</sup> ICC-01/09-01/11-T-9-CONF-ENG ET, p. 80.

<sup>222</sup> ICC-01/09-01/11-T-9-CONF-ENG ET, p. 80.

<sup>223</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0846. Statement of Witness 2, KEN-OTP-0029-0131 at 0140, 0145; KEN-OTP-0053-0256 at 0264.

<sup>224</sup> Statement of Witness 8, KEN-OTP-0052-0850 at 0852, 0855, 0871. Statement of Witness 2, KEN-OTP-0029-0131 at 0141, 0143-0144; KEN-OTP-0053-0256 at 0267-0268; KEN-OTP-0053-0256 at 0267.

<sup>225</sup> Statement of Witness 8, KEN-OTP-0052-0850 at 0851-0852. Statement of Witness 2, KEN-OTP-0029-0131 at 0141.

which the meeting took place is not, in principle, irreconcilable. According to his statement, Witness 2 stated that said meeting took place sometime between 2:00 p.m. and 4:00 p.m. Witness 8 stated that the meeting started between 10:00 and 11:00 a.m. and ended sometime between 2:00 and 2.30 p.m. This suggests that despite the slight time discrepancy mentioned by the two witnesses, their statements reveal a common view, namely that this meeting was ongoing at 2:00 p.m. Thus, the fact that Mr. Kapondi was released at 11:00 a.m. does not negate the possibility that he could have attended said meeting which was underway almost three hours later.

158. Finally, as regards the statement presented by the Managing Director of Kass FM that Mr. Sang was working at the seat of Kass FM on 14 December 2007, the Chamber finds the testimonies of Witnesses 2 and 8 to have a higher probative value due to the detailed and comprehensive description of the meeting they provide. Thus, the evidence provided by the Prosecutor, when weighed against that of the Defence, is sufficient for the Chamber to find that there are substantial grounds to believe that said meeting took place in the presence of Mr. Ruto and Mr. Sang. It follows that the Chamber may rely on this meeting for the purposes of the present decision.

#### *H. 22 December 2007 meeting*

159. On 22 December 2007, another planning meeting was allegedly organized at Mr. Ruto's house, as alleged by Witness 4.<sup>226</sup> The Defence team of Mr. Ruto disclosed a video which allegedly shows Mr. Ruto in attendance of a political rally in Kisumu on that date.<sup>227</sup>

160. The Chamber recalls its reasoning in paragraph 123 above and considers that the lack of authentication of the video relied upon by the Defence team of Mr. Ruto undermines the probative value of such item. Moreover, the Chamber considers that the recollection of topics discussed by Witness 4 regarding said meeting is detailed, coherent and matches with the information provided by Witnesses 1, 2 and 8

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<sup>226</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0091 and ff.

<sup>227</sup> KEN-D09-0013-0009 at 0019.

concerning the same topics discussed in other planning meetings.<sup>228</sup> Thus, the Chamber is satisfied that there are substantial grounds to believe that the 22 December 2007 meeting took place in the presence of Mr. Ruto. Accordingly, the Chamber may rely on this meeting for the purposes of subsequent findings in the present decision.

## **VI. CONTEXTUAL ELEMENTS OF CRIMES AGAINST HUMANITY**

161. The Chamber will hereunder advance its analysis as to whether or not the Prosecutor has provided sufficient evidence to establish substantial grounds to believe that the contextual elements common to all crimes against humanity are fulfilled. Only if there is an affirmative finding, the Chamber will proceed to examine the specific elements concerning each of the crimes charged.

162. For the purposes of this section and subsequent sections of the Decision, the Chamber recalls its legal analysis and findings on the law concerning the contextual and specific elements of crimes against humanity as conducted in its previous decisions, including the 31 March 2010 Decision, and sees no reason either to reiterate them to the full extent or to depart from them.<sup>229</sup> The Chamber will analyze only issues that are controversial and/or unexplored in the jurisprudence of the Court.

163. In accordance with article 7(1) and (2)(a) of the Statute and with the assistance of the Elements of Crimes, all crimes against humanity require contextual elements to be satisfied, namely that: (i) an attack against the civilian population took place; (ii) such attack was widespread or systematic; and (iii) such attack was committed pursuant to or in furtherance of a State or organisational policy to commit such attack.

<sup>228</sup> See the previous references in this Section.

<sup>229</sup> Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 77-99; See also Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, paras 73-88.



*A. Existence of an attack against the civilian population*

164. Under article 7(2)(a) of the Statute, an ‘attack’ is defined as “a course of conduct involving the multiple commission of acts [...]”.<sup>230</sup> This Chamber has previously held that an attack may also be defined as a campaign or operation.<sup>231</sup> The Chamber also notes that the qualifier “any civilian population” has been previously interpreted to mean “groups distinguishable by nationality, ethnicity or other distinguishing features”.<sup>232</sup> In the view of the Chamber, the civilian population targeted can include a group defined by its (perceived) political affiliation.

165. In the Amended DCC, the Prosecutor alleges that from on or about 30 December 2007 through 31 January 2008 “Network perpetrators were responsible for no less than 9 attacks in different locations targeting PNU supporters”.<sup>233</sup> These attacks, according to the Prosecutor, were carried out in Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas and Yamumbi), Kapsabet town and Nandi Hills town, in the Uasin Gishu and Nandi Districts.<sup>234</sup>

166. At the outset, the Chamber notes that the Defence teams of the Suspects did not challenge the fact that Kenya, including the Uasin Gishu and Nandi Districts, experienced intense violence during the period referred to in the Amended DCC, but strongly opposed the alleged, organized and policy-driven nature of such violence.<sup>235</sup> In the course of the questioning by the Legal Representative of victims, the live witnesses proffered by the Defence of Mr. Ruto and Mr. Sang also acknowledged that the Rift Valley, among other Kenyan provinces, was a theatre of criminal acts as of

<sup>230</sup> Article 7(2)(a) of the Statute.

<sup>231</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 75; Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr, para. 80.

<sup>232</sup> Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya” (the “31 March 2010 Decision”), ICC-01/09-19-Corr, para. 81; Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 76; Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/07-717, para. 399.

<sup>233</sup> ICC-01/09-01/11-261, para. 37.

<sup>234</sup> ICC-01/09-01/11-261, para. 38.

<sup>235</sup> ICC-01/09-01/11-T-5-ENG ET, pp. 86, 99-100 and 103.

the end of December 2007, in which people were injured, killed or displaced and had their houses and businesses destroyed, burnt or looted.<sup>236</sup>

167. Having reviewed the evidence as a whole, the Chamber considers that there are substantial grounds to believe that, from 30 December 2007 to 16 January 2008, large gangs of Kalenjin individuals armed with, *inter alia*, machetes, pangas, bows, arrows, petrol cans and firearms, carried out an attack in the specific locations referred to in the counts, within the meaning of article 7(1) and 7(2)(a) of the Statute, against particular ethnic groups of the civilian population (primarily Kikuyu, Kamba and Kisii), who were perceived to be PNU supporters. The Chamber, however, is not satisfied that the Prosecutor has provided sufficient evidence to establish substantial grounds to believe that an attack within the meaning of said provisions occurred after 16 January 2008.

168. In order to properly substantiate its findings with regard to the existence of an attack against the civilian population as well as the analysis of the other contextual and specific elements of the crimes against humanity charged in the Amended DCC, the Chamber stresses that the evidence as a whole indicates that there are substantial grounds to believe that the attack referred to above is attributable to one and the same group of Kalenjin perpetrators, which did not act randomly and in a disconnected manner. Rather, the Chamber finds that different groups of perpetrators carried out the attack against the specific subset of the civilian population, namely perceived PNU supporters, in the four locations included in the counts following a unified, concerted and pre-determined strategy. To reach this conclusion, the Chamber relies on the testimonies of insider witnesses, specifically Witnesses 1, 2, 4, 6 and 8 as well as other pieces of evidence.

169. The Chamber highlights, in particular, two factors. First, groups of the civilian population and the target locations included in the counts were identified in

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<sup>236</sup> See also the questioning by the Legal Representative of victims to witness KEN-D09-P-0001 (ICC-01/09-01/11-T-7-Red-ENG WT, pp. 40-42), witness KEN-D11-P-0002 (ICC-01/09-01/11-T-10-Red-ENG WT, pp. 79-81); and witness KEN-D11-P-0001 (ICC-01/09-01/11-T-11-Red-ENG WT, pp. 63-65).

advance.<sup>237</sup> The Chamber observes that Witness 8 testified that during the 30 December 2006 meeting, maps marking locations densely inhabited by members of Kikuyu, Kamba and Kisii communities were distributed by Mr. Ruto himself.<sup>238</sup> According to the witness, these locations included, *inter alia*, Turbo town, Kiambaa, Kapsabet and Nandi Hills town.<sup>239</sup> These locations, as previously found, were made the object of the attack between 30 December 2007 and 16 January 2008. The evidence also indicates that within each location, houses and business premises associated with specific ethnic groups perceived to be supporters of the PNU were singled out to be targeted, as opposed to others to be kept safe.<sup>240</sup> With regard to the latter category, for example, properties owned by Kalenjins were marked with numbers, symbols or branches in order to be immunized from attacks.<sup>241</sup> The identification of the target locations and the houses and businesses therein was done during the months preceding the attack and/or during the execution of the attack. The Chamber underlines that those tasked with identifying “enemy” properties were regularly giving updates to their superiors during some of the planning meetings which took place in December 2007.<sup>242</sup>

<sup>237</sup> Statement of Witness 1, KEN-OTP-0028-0556 at 0568; KEN-OTP-0028-0915 at 0922, 0931-0936, 0944-0946; KEN-OTP-0028-1358 at 1397-1398, 1417-1422; and KEN-OTP-0057-0250 at 0255-0257. Statement of Witness 2, KEN-OTP-0055-0083 at 0089. Statement of Witness 6, KEN-OTP-0051-0207, at 0224; KEN-OTP-0051-0256, at 0275-0278; KEN-OTP-0051-0405, at 0415 and 0422 to 0424; KEN-OTP-0051-0524 at 0528 and 0578 to 0580.

<sup>238</sup> Statement of Witness 8, KEN-OTP-0052-0526 at 0559, 0562 and ff. See also exhibit produced by the witness at KEN-OTP-0035-0081.

<sup>239</sup> Statement of Witness 8, KEN-OTP-0052-0571 at 0584-0586.

<sup>240</sup> Statement of Witness 1, KEN-OTP-0028-0915 at 0960 to 0963; KEN-OTP-0028-0973 at 0980-0981, 0993 to 0995. Statement of Witness 2, KEN-OTP-0055-0083 at 0089. Statement of Witness 4, KEN-OTP-0031-0085 at 0098. Statement of Witness 5, KEN-OTP-0037-0039 at 0055. Statement of Witness 6, KEN-OTP-0051-0405, at 0421 to 0424, 0528; KEN-OTP-0051-0467 at 0511 to 0514; KEN-OTP-0051-0524 at 0528-0529 and 0578 to 0580; KEN-OTP-0051-0590 at 0604 to 0606; KEN-OTP-0051-0622 at 0633 to 0639; KEN-OTP-0051-0993 at 1009; KEN-OTP-0001-0002 at 0066.

<sup>241</sup> Statement of Witness 5, KEN-OTP-0037-0039 at 0055. The witness testified that Kalenjin people were identifying and marking Kalenjin houses with numbers 4 or 6 as well as with calabashes. The witness explains that the calabash is a Kalenjin symbol, commonly used to mark Kalenjin houses and properties. On the symbolic role of the calabash see also the statement of witness 6, KEN-OTP-0051-0301 at 0320-0321. In the Summary of a non-ICC Statement of Witness, it is reported that “properties belonging to Kalenjins were being marked with branches so as they would not be attacked or looted” (KEN-OTP-0051-0724).

<sup>242</sup> Statement of Witness 6, KEN-OTP-0051-0256, at 0275-0278.

170. Second, some of the perpetrators who were in charge of such identification during the preparatory phase were subsequently deployed on the ground to materially execute the attack and/or to assist and direct others to do so.<sup>243</sup> This would ensure that, during the attack, physical perpetrators would exclusively target enemy communities.<sup>244</sup>

171. In the view of the Chamber, the evidence demonstrates that the physical perpetrators approached the target locations from the nearby areas and started burning properties, looting, injuring and killing people.<sup>245</sup> The existence of an attack is confirmed by Witnesses 1, 2, 4, 5 and 6.<sup>246</sup> The evidence provided by these witnesses corroborate each other and provide a clear picture of the events on the ground from the perspective of either participants in the attack or people who personally saw physical perpetrators carrying out acts of burning, destruction, looting and killing. In addition, the Chamber notes that several sources of indirect evidence reflect the devastation and amount of victims created by the attack in the locations mentioned in the charges.<sup>247</sup>

172. The Chamber is also satisfied that there are substantial grounds to believe that the attack aimed at targeting the civilian population, primarily members of the

<sup>243</sup> Statement of Witness 6, KEN-OTP-0051-0256, at 0275-0278; KEN-OTP-0051-0405, at 0421; KEN-OTP-0051-0524 at 0528-0529 and 0578; KEN-OTP-0051-0590 at 0615.

<sup>244</sup> In the Summary of a statement of a non-ICC Witness, it is stated that after the church in Kiambaa was burnt some Kalenjin leaders present on the ground "criticized the youth for having burned women and children when they were only supposed to kill Kikuyu men" (KEN-OTP-0051-0719).

<sup>245</sup> Witness 5 states that he obtained information "from different people that Kalenjins from the rural area were organising themselves to come to town to attack the Kikuyus" (see Statement of Witness 5, KEN-OTP-0037-0039 at 0053).

<sup>246</sup> Statement of Witness 1, KEN-OTP-0028-0556 at 0578-0599; KEN-OTP-0028-0915 at 0949-0950, 0964-0972; KEN-OTP-0028-0973 at 0974-1039; KEN-OTP-0028-1104 at 1142-1149, 1156-1162; KEN-OTP-0028-1358 at 1416-1419, 1422-1428; KEN-OTP-0036-0098; KEN-OTP-0057-0234 at 0248-0249; KEN-OTP-0036-0095. Statement of Witness 2, KEN-OTP-0029-0131 at 0149; KEN-OTP-0053-0256 at 0266; KEN-OTP-0055-0062 at 0071-74. Statement of Witness 4, KEN-OTP-0031-0085 at 0097-0101. Statement of Witness 5, KEN-OTP-0037-0039 at 0053-0059. Statement of Witness 6, KEN-OTP-0051-0467 at 0503, 0505, 0511; KEN-OTP-0051-0524 at 0528-0538, 0478-0480; KEN-OTP-0051-0590 at 0596-0598, 0610 to 0611, 0633-0635.

<sup>247</sup> KEN-OTP-0001-0364 at 0725; KEN-OTP-0001-0893 at 0895, 0896, 0899; KEN-OTP-0003-0592 at 0610; KEN-OTP-0011-0196; KEN-OTP-0011-0987; KEN-OTP-0038-0023 at 0024; KEN-OTP-0041-0679 at 0690, 0697 and 0707; KEN-OTP-0045-0217 at 0245; KEN-OTP-0051-0003 at 0003, 0024; KEN-D10-0001-0006; KEN-D10-0001-0021; KEN-D10-0001-0028; KEN-D10-0001-0107; KEN-D10-0001-0004.

Kikuyu, Kamba and Kisii communities believed to be supporting the PNU.<sup>248</sup> There are no indications in the evidence before the Chamber that the physical perpetrators specifically targeted combatants or individuals other than civilians. In some instances, the evidence tends to show that physical perpetrators victimised people belonging to the Kalenjin community who, however, were believed to be PNU supporters.<sup>249</sup> Thus, viewed as a whole, the evidence shows that the criterion used by the perpetrators to identify and attack their victims was essentially their perceived political affiliation with the PNU.

173. As mentioned above, on the basis of witnesses' testimonies and other pieces of evidence, there was a well-established strategy aiming at identifying the areas most densely populated by communities believed to be supporting the PNU and, within these areas, properties belonging to PNU supporters. In a complementary manner, premises owned by Kalenjins were marked in order to be kept safe, unless their owners were found to be PNU supporters.<sup>250</sup> Viewed as a whole, this strategy would ensure that, during the attack, physical perpetrators would exclusively target members of those communities perceived to be PNU supporters.<sup>251</sup>

174. In light of the above, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that between 30 December 2007 and 16

<sup>248</sup> Statement of Witness 1, KEN-OTP-0028-1532 at 1546; KEN-OTP-0028-1587 at 1593; KEN-OTP-0057-0162 at 0178 and 0179. Summary of statement of non-ICC Witness, KEN-OTP-0051-0756, Statement of Witness 8, KEN-OTP-00052-0880, at 0083 and 0893.

<sup>249</sup> Summary of Statement of a non-ICC Witness, KEN-OTP-0051-0698; Summary of Statement of a non-ICC Witness, KEN-OTP-0051-0730 at 0730; Summary of Statement of a non-ICC Witness, KEN-OTP-0051-0738. Statement of Witness 1, KEN-OTP-0028-1532 at 1546; KEN-OTP-0028-1587 at 1593; KEN-OTP-0057-0162 at 0179; KEN-OTP-0057-0181 at 0197; KEN-OTP-0057-0234 at 0243. Statement of Witness 2, KEN-OTP-0029-0131 at 0151, 0153; KEN-OTP-0053-0256 at 0264. Statement of Witness 4, KEN-OTP-0031-0085 at 0092 and 0097.

<sup>250</sup> Statement of Witness 5, KEN-OTP-0037-0039 at 0055. The witness testified that Kalenjin people were identifying and marking Kalenjin houses with numbers 4 or 6 as well as with calabashes. The witness explains that the calabash is a Kalenjin symbol, commonly used to mark Kalenjin houses and properties. On the symbolic role of the calabash see also the statement of Witness 6, KEN-OTP-0051-0301 at 0320-0321. In the Summary of a non-ICC Witness, it is reported that "properties belonging to Kalenjins were being marked with branches so as they would not be attacked or looted" (KEN-OTP-0051-0724).

<sup>251</sup> In the Summary of a non-ICC Witness, it is stated that after the church in Kiambaa was burnt some Kalenjin leaders present on the ground "criticized the youth for having burned women and children when they were only supposed to kill Kikuyu men" (KEN-OTP-0051-0719).



January 2008, an attack took place against specific groups of the Kenyan civilian population, namely perceived PNU supporters, in the four locations referred to in the counts.

**B. *Widespread and systematic nature of the attack***

175. In the Amended DCC, the Prosecutor alleges that “[t]he crimes alleged occurred in the context of a widespread or systematic attack against members of the civilian population, within the meaning of Article 7(1) of the Statute”.<sup>252</sup>

176. On the basis of the material provided to the Chamber, there are substantial grounds to believe that the attack perpetrated was widespread. Viewed as a whole, the evidence shows that the attack was massive, frequent, carried out collectively with considerable seriousness and directed against a large number of civilian victims.

177. This is demonstrated by the geographical scope of the attack, which covered four different locations in two districts (Uasin Gishu and Nandi) of the Rift Valley Province.<sup>253</sup> Moreover, as recalled in paragraphs 167-172 above, the evidence indicates that in the locations included in the charges presented by the Prosecutor, the amount of burning and destruction of properties, injuries and murders is among the highest in the whole Kenyan territory. As a consequence, the Uasin Gishu and Nandi Districts registered a number of victims which is among the largest of the post-election violence in Kenya.<sup>254</sup>

178. In particular, there are substantial grounds to believe that the violence in the Uasin Gishu District (encompassing Turbo town and the greater Eldoret area) resulted in the death of more than 230 people, the injury to 505 and the displacement

<sup>252</sup> ICC-01/09-01/11-261-AnxA, para. 37.

<sup>253</sup> Statement of Witness 1, KEN-OTP-0028-0556 at 0595-0597; KEN-OTP-0028-0915 at 0970; KEN-OTP-0028-1040 at 1074; KEN-OTP-0036-0095; KEN-OTP-0036-0018. Statement of Witness 6, KEN-OTP-0051-0405 at 0426-0427; KEN-OTP-0051-0467 at 0511. Statement of Witness 8, KEN-OTP-0052-1057 at 1069-1071. KEN-OTP-0001-0002 at 0013, 0075, 0107, 0143, 0161; KEN-OTP-0028-0025 at 0026; KEN-OTP-0052-2204 at 2205; KEN-D10-0001-0004, at 0004.

<sup>254</sup> CIPEV Report, KEN-OTP-0001-0364 at 0707, 0719.

of more than 5000 persons.<sup>255</sup> In the Nandi District (encompassing Kapsabet town and Nandi Hills town) at least 7 people were murdered<sup>256</sup> and a number of houses and business premises were looted and burnt.<sup>257</sup> Thousands of people in Kapsabet and in Nandi Hills were forced to seek refuge at the respective police stations or in IDP camps in the surrounding areas.<sup>258</sup>

179. In addition, there are substantial grounds to believe that the attack was systematic. An attack is systematic when it implies the “organised nature of the acts of violence and the improbability of their random occurrence”.<sup>259</sup> Several factors lead the Chamber to this conclusion, which is supported by the testimonies of various witnesses as well as by pieces of indirect evidence. First, the Chamber reiterates that, in the preparatory phase of the attack as well as during its execution, coordinators were in charge of identifying houses belonging to PNU supporters to be attacked in the different target locations.<sup>260</sup> Some of these coordinators were later deployed on the ground to assist the perpetrators and make sure that the selected properties were

<sup>255</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0149; KEN-OTP-0053-0256, at 0266; KEN-OTP-0055-0062, at 0071-0074; Statement of Witness 4, KEN-OTP-0031-0085, at 0097-0105; CIPEV Report, KEN-OTP-0041-0679, at 0695-0707; “Kenya: Darkest Day in History of a Humble Church”, Daily nation, KEN-OTP-0038-0023 at 0024.

<sup>256</sup> Statement of Witness 6, KEN-OTP-0051-0467 at 0516-0520; KEN-OTP-0051-0524 at 0569-0570. Summary of statement of a non-ICC Witness, KEN-OTP-0051-0728 at 0728; Summary of statement of a non-ICC witness, KEN-OTP-0053-0248 at 0248; Kenya National Commission of Human Rights, Report, KEN-OTP-0001-0002 at 0075.

<sup>257</sup> Summaries of Statements of a non-ICC Witness, KEN-OTP-0051-0738 at 0738.

<sup>258</sup> Statement of Witness 4, KEN-OTP-0031-0085, at 0105; Statement of Witness 6, KEN-OTP-0044-0003 at 0029; KEN-OTP-0051-0467 at 0511; and KEN-OTP-0051-0590 at 0610-0614; Summary of Statements of a non-ICC Witness, KEN-OTP-0051-0751, at 0571; Summary of Statement of a non-ICC Witness, who says that 7478 people, mostly Kikuyu and Kisii, took refuge at the Kapsabet police station, KEN-OTP-0051-0756 at 0756; Summary of Statement of a non-ICC witness, who reports that dozens of people working at the Kapsabet hospital were under threat and became IDPs, KEN-OTP-0051-0760 at 0760; Summary of Statement of a non-ICC witness, KEN-OTP-0051-0724 at 0724; Summary of Statement of a non-ICC witness, KEN-OTP-0051-0738 at 0738; Summary of Statement of a non-ICC witness, KEN-OTP-0051-0740 at 0740; CIPEV report, also reporting that 8000 IDPs took shelter in Kapsabet police station, KEN-OTP-0001-0364 at 0422-0423.

<sup>259</sup> Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr, para. 96.

<sup>260</sup> Statement of Witness 1, KEN-OTP-0028-0556 at 0568; KEN-OTP-0028-0915 at 0922, 0931-0936, 0944-0946; KEN-OTP-0028-1358 at 1397; KEN-OTP-0057-0234 at 0246; KEN-OTP-0057-0250 at 0255-0256. Statement of Witness 2, KEN-OTP-0055-0083 at 0089. Statement of Witness 4, KEN-OTP-0031-0085 at 0098. Statement of Witness 5, KEN-OTP-0037-0039 at 0055. Statement of Witness 6, KEN-OTP-0051-0207, at 0224; KEN-OTP-0051-0256, at 0275-0278; KEN-OTP-0051-0405, at 0421 to 0422; KEN-OTP-0051-0524 at 0528 and 0578 to 0580; KEN-OTP-0001-0002 at 0066.

attacked and burnt down and that PNU supporters were victimized.<sup>261</sup> Second, the evidence shows that the perpetrators approached the target locations simultaneously, in large numbers, and from different directions, by vehicles or on foot, or both.<sup>262</sup> Third, the perpetrators erected roadblocks around such locations with a view toward intercepting PNU supporters attempting to flee, with the aim of eventually killing them.<sup>263</sup> Finally, the evidence indicates that, in the actual implementation of the attack, the physical perpetrators used petrol and other inflammable material to systematically burn down the properties belonging to PNU supporters.<sup>264</sup>

180. In light of the foregoing, there are substantial grounds to believe that the attack carried out by Network perpetrators from 30 December 2007 to 16 January 2008 against members of the communities believed to be supporting the PNU was both widespread and systematic.

### *C. State or organisational policy*

181. The Prosecutor submits that from at least 2006, up until January 2008, Mr. Ruto and Mr. Kosgey, with the contribution of Mr. Sang and others, developed an

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<sup>261</sup> Statement of Witness 4, (describing how subordinates of Mr. Ruto were helping the Kalenjin youths involved in the attack in Turbo town to identify Kikuyu houses and properties to be burnt), KEN-OTP-0031-0085 at 0098. See also Statement of Witness 6, KEN-OTP-0051-0256 at 0275-0278.

<sup>262</sup> Statement of Witness 1, KEN-OTP-0028-1358 at 1402-1404. Statement of Witness 4, KEN-OTP-0031-0085 at 0097-0099 (the witness took part in the attack in Turbo town where, according to him, more than 1000 perpetrators were involved and moved on the ground. The witness adds that Turbo was attacked from three sides). Statement of Witness 6, KEN-OTP-0051-0405 at 0414. Statement of Witness 8, KEN-OTP-0052-1007 at 1022-1025 (the witness describes that he saw a tractor pulling a big trailer carrying between 40 and 60 youths armed with arrows, machetes, material which was used to kill people).

<sup>263</sup> Statement of Witness 1, KEN-OTP-0028-0915 at 0949-0950; KEN-OTP-0028-1040 at 1044. Statement of Witness 2, KEN-OTP-0029-0131 at 0150-0151. Statement of Witness 4, KEN-OTP-0031-0085 at 101. Statement of Witness 5, KEN-OTP-0037-0039 at 0056. Statement of Witness 6, KEN-OTP-0051-0467 at 0476-486, 0498; KEN-OTP-0051-0524 at 0530-0531, 0533, 0562-0569; KEN-OTP-0051-0590 at 0610; KEN-OTP-0044-0145 (the witness adds that on the election day the additional purpose fulfilled by the road blocks was to avoid circulation of fake ballots). Statement of Witness 8, KEN-OTP-0052-0880 at 0893; KEN-OTP-0052-0904 at 0916 to 0917.

<sup>264</sup> Statement of Witness 1, KEN-OTP-0028-0973 at 0981-0986 (detailed description of the petrol can used), 0993 to 0994. Statement of Witness 2, KEN-OTP-0029-0131 at 0144 (discussing the Network's intent to use gas to "burn the big houses belonging to Kikuyus."). Statement of Witness 4, KEN-OTP-0031-0085 at 0098; Summary of statement of non-ICC Witness 23, KEN-OTP-0051-0728 at 0728. Statement of Witness 6, KEN-OTP-0051-0590 at 0598-0599, 0618, 0634-0635.

organisational policy directed to: (i) punish and expel from the Rift Valley those perceived to support PNU, namely, Kikuyu, Kamba and Kisii civilians; and (ii) gain power and create a uniform ODM voting block.<sup>265</sup> The method used to punish and expel PNU supporters and drive them away was to inflict fear and to systematically destroy their homes and other property, leaving them with no alternative but to permanently relocate.<sup>266</sup>

182. The Prosecutor contends that Mr. Ruto, Mr. Kosgey and Mr. Sang established a Network of perpetrators belonging to the Kalenjin community in order to implement the agreed-upon policy.<sup>267</sup> This Network was comprised of eminent ODM political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders.<sup>268</sup>

183. The Chamber will hereunder make its assessment, first, as to whether the Network, as alleged by the Prosecutor, qualifies as an organisation under the terms of the Statute and, second, as to whether there existed a policy to commit the attack against PNU supporters.

(i) The existence of an organisation within the meaning of article 7(2)(a) of the Statute

184. The Chamber deems it appropriate to briefly recall its legal analysis of the meaning of the term 'organisation' under article 7(2)(a) of the Statute, as established in the 31 March 2010 Decision. In that instance, the Chamber, by majority, stated that "a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values".<sup>269</sup> Accordingly, it determined that "organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population".<sup>270</sup>

<sup>265</sup> ICC-01/09-01/11-261-AnxA, para. 41.

<sup>266</sup> ICC-01/09-01/11-261-AnxA, para. 41.

<sup>267</sup> ICC-01/09-01/11-261-AnxA, para. 25.

<sup>268</sup> ICC-01/09-01/11-261-AnxA, paras 25, 43-64.

<sup>269</sup> Pre-Trial Chamber II, 31 March 2010 Decision, ICC-01/09-19-Corr, para. 90.

<sup>270</sup> Pre-Trial Chamber II, 31 March 2010 Decision, ICC-01/09-19-Corr, para. 92.

185. The Chamber also recalls that the determination of whether a given group qualifies as an organisation under the Statute must be made on a *case-by-case* basis.<sup>271</sup> In making its determination, the Chamber may take into account a number of factors, *inter alia*: (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 abovementioned criteria.<sup>272</sup> Lastly, the Chamber stresses that, while the above factors may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.<sup>273</sup>

186. Having reviewed the evidence, the Chamber is of the view that there are substantial grounds to believe that as of late December 2006, Mr. Ruto, together with others, began establishing the Network referred to above and that, by December 2007, such Network qualified as an organisation within the meaning of article 7(2)(a) of the Statute. This is supported by the evidence of Witnesses 1, 2, 4, 6 and 8. All these witnesses provided evidence about crucial steps in the development of the Network and their statements in that regard corroborate each other. Thus, in the following paragraphs, the Chamber will lay out, in a chronological order, the main meetings which mark the development of the plan for the establishment of the Network.

187. According to the evidence available, the Chamber finds that on 30 December 2006, Mr. Ruto hosted a meeting at his house in Sugoi where several members of the Network were present.<sup>274</sup> These members included, *inter alia*, aspiring members of the

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<sup>271</sup> Pre-Trial Chamber II, 31 March 2010 Decision, ICC-01/09-19-Corr, para. 93.

<sup>272</sup> Pre-Trial Chamber II, 31 March 2010 Decision, ICC-01/09-19-Corr, para. 93.

<sup>273</sup> Pre-Trial Chamber II, 31 March 2010 Decision ICC-01/09-19-Corr, para. 93.

<sup>274</sup> Statement of Witness 8, KEN-OTP-0052-0526, at 0530, 0532-0534, 0539-0544.



Parliament, youth representatives, Kalenjin elders, farmers and businessmen. Among those attendees were Mr. Cheramboss and Reverend Kosgei.<sup>275</sup> The purpose of the meeting aimed at “plan[ning] for war”<sup>276</sup> and accordingly set up all necessary factors for the success of the planned attack. In so doing, the first step agreed upon was to recruit field commanders, who would be in charge of three different areas, namely North Rift Valley, Central Rift Valley and South Rift Valley. Among the three commanders was Mr. Cheramboss, who was assigned to the Central Rift Valley.<sup>277</sup> During the meeting, Mr. Ruto distributed maps covering areas densely populated by members of the Kikuyu, Kamba and Kisii communities.<sup>278</sup> The locations of these communities were marked on the maps in red, blue and black.<sup>279</sup> In addition, the issue of securing means for transportation for the physical perpetrators to and from the target locations was discussed.<sup>280</sup> In particular, Mr. Ruto explained that the means for transportation would be obtained through two companies owned by two businessmen, one of whom was present at the meeting.<sup>281</sup> Further, the issue of weapons supply was a matter of priority for Mr. Ruto, who delegated the purchase of weapons from neighboring countries to a high level member of the Network.<sup>282</sup>

188. This first organisational meeting was followed by a number of other meetings each implementing substantial factors of the attack as planned during the said meeting. Thus, a secret oath ceremony took place on 15 April 2007 in a milk plant located in Molo<sup>283</sup> where Mr. Ruto, Mr. Sang, Mr. Cheramboss and Reverend Kosgei, among several others, were present.<sup>284</sup> During the ceremony, Mr. Ruto, MPs, and the

<sup>275</sup> Statement of Witness 8, KEN-OTP-0052-0526, at 0452.

<sup>276</sup> Statement of Witness 8, KEN-OTP-0052-0526, at 0555.

<sup>277</sup> Statement of Witness 8, KEN-OTP-0052-0526, at 0553.

<sup>278</sup> Statement of Witness 8, KEN-OTP-0052-0526, at 0562.

<sup>279</sup> Statement of Witness 8, KEN-OTP-0052-0526, at 0563-0564.

<sup>280</sup> Statement of Witness 8, KEN-OTP-0052-0571, at 0589 to 0590.

<sup>281</sup> Statement of Witness 8, KEN-OTP-0052-0571, at 0589 to 0590.

<sup>282</sup> Statement of Witness 8, KEN-OTP-0052-0571, at 0588.

<sup>283</sup> Statement of Witness 8, KEN-OTP-0052-0652, at 0671.

<sup>284</sup> Statement of Witness 8, KEN-OTP-0052-0652, at 0677, 0684; KEN-OTP-0035-0087 at 0087.

three commanders were sprinkled with animals' blood and took an oath to kill Kikuyu, Kamba and Kisiis "mercilessly".<sup>285</sup>

189. The oath ceremony was followed by another meeting at the Sirikwa Hotel on 2 September 2007 organized by Mr. Ruto.<sup>286</sup> This meeting was a follow-up to the issues discussed and agreed upon during the 30 December 2006 meeting. Apart from Mr. Ruto, the meeting was attended by Mr. Sang,<sup>287</sup> Reverend Kosgei,<sup>288</sup> the three commanders and several other members of the Network.<sup>289</sup> During the meeting, Mr. Ruto provided an update on the progress concerning logistical matters such as the issue of obtaining weapons and transportation.<sup>290</sup> According to the evidence available, it became clear that Mr. Ruto worked closely with at least six members of the Network, including the three commanders, to arrange for the purchase of weapons.<sup>291</sup> Mr. Ruto also gave an update on the state of planned transportation and revealed that he was in the process of gathering a greater number of volunteers for that purpose.<sup>292</sup> The role of the three commanders was also reiterated in this meeting.<sup>293</sup> Further, another core issue of funding the Network was discussed, whereby Mr. Ruto made clear that "money was not an issue, [and] I am there to help you" as well as "for money, I am ready".<sup>294</sup> In this context, one of the three commanders requested funding, because "people will be taken to be trained" and

<sup>285</sup> Statement of Witness 8, KEN-OTP-0052-0652 at 0676-0677.

<sup>286</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0793 to 0794; KEN-OTP-0057-0040 at 0045; Statement of Witness 8, KEN-OTP-0052-0694 at 0706 to 0707.

<sup>287</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0794. Statement of Witness 8, KEN-OTP-0052-0694 at 0707.

<sup>288</sup> Statement of Witness 8, KEN-OTP-0052-0694 at 0715.

<sup>289</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0795 to 0796. Statement of Witness 8, KEN-OTP-0052-0694 at 0709-0711.

<sup>290</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0794, 0806-0808.

<sup>291</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0800 to 0801, 0805 to 0808. Statement of Witness 8, KEN-OTP-0052-0694 at 0711-0712.

<sup>292</sup> Statement of Witness 8, KEN-OTP-0052-0694 at 0714.

<sup>293</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0800 to 801.

<sup>294</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0804 -0805.

they “needed petrol [...] for vehicles”.<sup>295</sup> Finally, Mr. Ruto announced that the next meeting would take place at his house on 2 November 2007.<sup>296</sup>

190. On 2 November 2007, as planned, the next meeting took place at Mr. Ruto’s house in the presence of, *inter alia*, Mr. Ruto,<sup>297</sup> Mr. Sang,<sup>298</sup> several members of the Parliament, the three commanders, Kalenjin elders, traditional elders, and a number of coordinators who were assigned to gather the persons who would carry out the attack against members of the Kikuyu, Kamba and Kisii communities.<sup>299</sup> During the meeting, Mr. Ruto reminded those present that the lands and farms in Rift Valley, which historically belonged to the Kalenjins, are currently owned by the Kikuyu.<sup>300</sup> Thus, people must be united and ready to fight for power.<sup>301</sup> Mr. Ruto, as the leader of the Network, declared that he was “going to lead this war by the front”.<sup>302</sup> As a follow-up, he ordered the three commanders to line up and present their respective lists of coordinators.<sup>303</sup> Thereafter, he gave guns and ammunition to the three commanders in a symbolic distribution<sup>304</sup> and mentioned that the next meeting at his house would take place on 14 December 2007.<sup>305</sup>

191. Prior to the 14 December 2007 meeting, two other related meetings were held at the beginning of December 2007, one at the Kipkarren Salient Trading Center, which was also announced by Mr. Ruto on the 2 November meeting,<sup>306</sup> followed by another one at Mr. Cheramboss’ house. In the first meeting, Mr. Ruto instructed youths to

<sup>295</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0805-0808.

<sup>296</sup> Statement of Witness 8, KEN-OTP-0052-0694 at 0706-0707.

<sup>297</sup> Statement of Witness 1, KEN-OTP-0028-1358 at 1364, KEN-OTP-0057-0040 at 0045 to 0046. Statement of Witness 8, KEN-OTP-0052-0729 at 0734.

<sup>298</sup> Statement of Witness 8, KEN-OTP-0052-0694 at 0769, at 0772.

<sup>299</sup> Statement of Witness 8, KEN-OTP-0052-0729 at 0764 to 0765 and KEN-OTP-0035-0092.

<sup>300</sup> Statement of Witness 1, KEN-OTP-0028-0713 at 0760-0764. According to Witness 8, a similar speech was made by Reverend Kosgei during the meeting that took place at Sirikwa Hotel on 2 September 2007, in which he was advocating to expel other tribes in order to reclaim the land for the Kalenjin; Statement of Witness 8, KEN-OTP-0052-0694 at 0715.

<sup>301</sup> Statement of Witness 1, KEN-OTP-0028-0713 at 0763 and 0765. Statement of Witness 8, KEN-OTP-0052-0729 at 0752 to 0753.

<sup>302</sup> Statement of Witness 8, KEN-OTP-0052-0729 at 0752.

<sup>303</sup> Statement of Witness 8, KEN-OTP-0052-0729 at 0764 -0765.

<sup>304</sup> Statement of Witness 8, KEN-OTP-0052-0729 at 0753.

<sup>305</sup> Statement of Witness 8, KEN-OTP-0052-0729 at 0753.

<sup>306</sup> Statement of Witness 8, KEN-OTP-0052-0729 at 0753.

converge to all trading centers to receive instructions.<sup>307</sup> Mr. Sang acted as “Master of Ceremony”<sup>308</sup> and the message was delivered that if Kibaki wins the election, the youths should barricade the streets, destroy properties and kill the Kikuyu.<sup>309</sup> Mr. Ruto reiterated his invitation to his rural home for the 14 December 2007 meeting.<sup>310</sup>

192. At the beginning of December 2007, the second meeting took place at Mr. Cheramboss’ house,<sup>311</sup> where it was reiterated that the Kalenjin farms were taken away by the Kikuyu and members of this community must be removed, together with those of the Kisii community, either by warning them through leaflets or by force, namely by killing, looting and burning their properties.<sup>312</sup> In this context, the developed operational structure of the Network was announced. Within this structure, four divisional commanders were tasked with the implementation and the coordination of the attack on the ground in locations including Kapsabet and Nandi Hills towns.<sup>313</sup> The divisional commanders were subordinate to the three commanders, who were initially assigned during the 30 December 2006 meeting, with the responsibility in North Rift Valley, Central Rift Valley and South Rift Valley.<sup>314</sup> Following this announcement, Mr. Ruto confirmed receipt of a large number of weapons through a high ranking member of the Network.<sup>315</sup> He also confirmed that material for crude weapons was stored at a shop belonging to one of the divisional commanders.<sup>316</sup> Further, Mr. Ruto emphasized the “need to have weapons to allow the former soldiers to do their work and [...] Mr. Cheramboss to

<sup>307</sup> Statement of Witness 8, KEN-OTP-0052-0974 at 0978.

<sup>308</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0835.

<sup>309</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0832.

<sup>310</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0832.

<sup>311</sup> KEN-OTP-0051-0135 at 0198 (according to Witness 6, it was a secret meeting to the extent that workers in the compound were not allowed in). Statement of Witness 6, KEN-OTP-0051-0944 at 0964.

<sup>312</sup> Statement of Witness 6, KEN-OTP-0044-0003, at 0022; KEN-OTP-0051-0135 at 0177 to 0178 and 0223.

<sup>313</sup> Statement of Witness 6, KEN-OTP-0044-0003 at 0015 and 0022-0023; KEN-OTP-0051-0199 at 0203, KEN-OTP-0051-0993 at 1012-1013; KEN-OTP-0044-0039; KEN-OTP-0044-0142.

<sup>314</sup> Sketchs produced by Witness 6, KEN-OTP-0044-0142 and KEN-OTP-0044-0039. Statement of Witness 6, KEN-OTP-0044-0003 at 0022-0023; KEN-OTP-0051-0199 at 0203; KEN-OTP-0051-0993 at 1012-1013;

<sup>315</sup> Statement of Witness 6, KEN-OTP-0051-0135 at 0195-0196.

<sup>316</sup> Statement of Witness 6, KEN-OTP-0051-0135 at 0193.

give training youth".<sup>317</sup> At the close of the meeting, Mr. Ruto called again for the next meeting to take place at his house on 14 December 2007.<sup>318</sup>

193. The next meeting was convened as planned at Mr. Ruto's house on the announced date,<sup>319</sup> at which Mr. Sang, the three commanders and several other members of the Network were present.<sup>320</sup> Mr. Sang introduced the attendees via microphone, presenting their names and their assigned duties within the Network.<sup>321</sup> As in all previous planning meetings, the purpose of the attack, namely to evict the enemy communities, including Kikuyu, was confirmed.<sup>322</sup> Mr. Ruto addressed the attendees as follows: "[...] we have done big things. These people we are going to kill. The Kikuyus, and the Kisiis and the Kambas in vicinity. Do you promise me we will do that or not?" In response, people promised to obey his orders.<sup>323</sup> Apart from these assurances regarding the attack as planned, the meeting was mainly focused on the logistical and financial arrangements for the purposes of the execution of the attack. More specifically, arrangements were made for the transportation of gas cylinders to Eldoret town "to burn the big houses belonging to the Kikuyus".<sup>324</sup> Also, weapons and ammunitions were distributed to representatives of different regions where the attack should take place.<sup>325</sup> Moreover, a stipendiary scheme was established based on the rank of the perpetrators, whereby former soldiers were paid higher than the youths.<sup>326</sup> This salary scheme was supposed to be integrated into a

<sup>317</sup> Statement of Witness 6, KEN-OTP-0044-0003 at 0015.

<sup>318</sup> Statement of Witness 6, KEN-OTP-0051-0207 at 0216.

<sup>319</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0140. Statement of Witness 8, KEN-OTP-0052-0821 at 0838.

<sup>320</sup> Statement of Witness 2, KEN-OTP-0053-0256 at 0263. Statement of Witness 8, KEN-OTP-0052-1007 at 1036, 1041.

<sup>321</sup> Statement of Witness 8, KEN-OTP-0052-1007 at 1045-1046.

<sup>322</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0140, 0145. Statement of Witness 8, KEN-OTP-0052-0821 at 0846.

<sup>323</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0846.

<sup>324</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0143-0144, in a more general manner: Statement of Witness 8, KEN-OTP-0052-0850 at 0853, 0857-0859.

<sup>325</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0141. Statement of Witness 8, KEN-OTP-0052-0850 at 0872 to 0873.

<sup>326</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0141. Statement of Witness 8, KEN-OTP-0052-0850 at 0855.



rewarding mechanism according to which a given sum of money was paid for every Kikuyu,<sup>327</sup> Kamba and Kisii killed during the attack.<sup>328</sup>

194. The frequency of preparatory meetings of the Network intensified in the period between 14 December 2007 and 22 December 2007, when at least three gatherings took place. In the course of these meetings, the final arrangements for the execution of the attack were made. The first one of these meetings took place in Kabongwa, more specifically in the residence of one of the members of the Network, whose house had been designated to stock the weapons to be used during the attack.<sup>329</sup> The meeting was attended by, *inter alia*, Mr. Ruto, at least one of the three commanders, the four divisional commanders, politicians and former soldiers.<sup>330</sup> Updates about the weaponry obtained to date were provided and one of the three commanders gave a demonstration on how to use hand-grenades.<sup>331</sup> Moreover, the same commander informed the participants that the leaflets, referred to in another meeting at Mr. Cheramboss' house, had been duly distributed with a view to threaten the enemy communities.<sup>332</sup>

195. In a subsequent meeting hosted by Mr. Cheramboss, at which Mr. Ruto and several other members of the Network were present,<sup>333</sup> the core thrust of the meeting was to reiterate the intention to attack the PNU supporters and to give final instructions as to the means to execute this attack.<sup>334</sup> It was specified that, in light of the different types of weapons available to the Network, most of the physical perpetrators would use bows and arrows; it was reminded that the material to produce these crude weapons could be found in the shop belonging to one of the divisional commanders, as decided during the first meeting held at Mr. Cheramboss'

<sup>327</sup> Statement of Witness 2, KEN-OTP-0053-0256 at 0270.

<sup>328</sup> Statement of Witness 8, KEN-OTP-0052-0850 at 0855.

<sup>329</sup> Statement of Witness 6, KEN-OTP-0051-0207 at 0216-0219; KEN-OTP-0044-0140 (list of attendees).

<sup>330</sup> Statement of Witness 6, KEN-OTP-0044-0140 (list of attendees). Statement of Witness 6, KEN-OTP-0051-0256 at 0257-0260.

<sup>331</sup> Statement of Witness 6, KEN-OTP-0051-0207 at 0222.

<sup>332</sup> Statement of Witness 6, KEN-OTP-0051-0207 at 0223.

<sup>333</sup> Statement of Witness 6, KEN-OTP-0051-0405 at 0441 to 0443, 0448 to 0449.

<sup>334</sup> Statement of Witness 6, KEN-OTP-0051-0405 at 0401, 0441 to 0444.

house.<sup>335</sup> It was also agreed that guns would be resorted to in areas where the fight required them.<sup>336</sup> Furthermore, physical perpetrators were chosen to contact Kass FM by phone in order to incite violence in the days immediately preceding the execution of the attack.<sup>337</sup>

196. The last of the whole set of preparatory meetings of the Network took place at Mr. Ruto's house on 22 December 2007, where people from different regions were organized in separate tents.<sup>338</sup> High ranking members of the Network, including at least two of the three commanders, were present.<sup>339</sup> Weapons purchased from neighbouring countries and introduced into the Kenyan territory through Mount Elgon, as anticipated as early as the 30 December 2006 meeting, were distributed to former soldiers.<sup>340</sup> Moreover, as commonly done within the Network, money was paid to the attendees on the basis of their rank, namely whether they were former soldiers or youths.<sup>341</sup>

197. In light of the above, the Chamber considers that the evidence presented indicates that there are substantial grounds to believe that the first factor to prove the existence of an organisation is met. The evidence reveals that the Network was under responsible command and had an established hierarchy, with Mr. Ruto as the designated leader, in charge of securing the establishment and efficient functioning of the Network as well as the pursuit of its criminal purposes.<sup>342</sup> The evidence available to the Chamber establishes substantial grounds to believe that the hierarchical structure of the Network was comprised of three commanders (or

<sup>335</sup> Statement of Witness 6, KEN-OTP-0051-0349 at 0396 to 0397, 0400.

<sup>336</sup> Statement of Witness 6, KEN-OTP-0051-0349 at 0368-0369.

<sup>337</sup> Statement of Witness 6, EN-OTP-0051-0405 at 0443-0447.

<sup>338</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0091-0092.

<sup>339</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0092.

<sup>340</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0092-0093.

<sup>341</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0093.

<sup>342</sup> Statement of Witness 1, KEN-OTP-0028-0713 at 0763-0770; KEN-OTP-0028-0776 at 0805-0808; KEN-OTP-0028-1246 at 1297; KEN-OTP-0057-0140 at 0156; KEN-OTP-0057-0162 at 0174-0175, 0178, 0179 and 0197; KEN-OTP-0057-0181 at 0187-0188, 0197-0198, 0200, 0203; KEN-OTP-0057-0205 at 0212-0215. Statement of Witness 6, KEN-OTP-0044-0003, at 0022; KEN-OTP-0051-0135 at 0169-0170, 00176, 0178 and 0223; KEN-OTP-0051-0207 at 0226; KEN-OTP-0051-0349 at 0368-0369, 0395-0396.

generals),<sup>343</sup> in charge of the attack in the North Rift Valley, Central Rift Valley and South Rift Valley, as well as four divisional commanders, who were responsible for the execution of the attack in the field.<sup>344</sup> According to the evidence available, the three generals and the four divisional commanders all reported to Mr. Ruto.<sup>345</sup> Subordinate to the divisional commanders, other members of the Network who acted as coordinators were tasked with more specific functions, such as organizing the material perpetrators on the ground, identifying the targets during the attack.<sup>346</sup>

198. In this regard, the Chamber recalls that the Defence teams of Mr. Kosgey and Mr. Sang assert that Witness 6 provided a structure of the Network that is not in accordance with the submissions of other witnesses.<sup>347</sup> In response, the Prosecutor contends that the sketch provided by Witness 6 is just a line of reporting and not an organigram of authority over the Network.<sup>348</sup>

199. The Chamber considers that Witness 6's description of the structure of the alleged Network reflects the witness' understanding on the basis of his alleged attendance in some preparatory meetings. As such, Witness 6's recollection does not necessarily contradict the structure of the alleged Network as described by other witnesses who had taken part in different planning meetings.

200. With respect to the second factor to prove the existence of an organisation, there are also substantial grounds to believe that, by December 2007, the Network possessed the means to carry out a widespread or systematic attack against the

<sup>343</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0796, 0800 and 0801. Statement of Witness 2, KEN-OTP-0055-0163 at 0166-0169. Statement of Witness 6, KEN-OTP-0044-0003 at 0015 and 0022-0023; KEN-OTP-0051-0199 at 0203; KEN-OTP-0051-0993 at 1012-1013; KEN-OTP-0044-0039; KEN-OTP-0044-0142.

<sup>344</sup> Statement of Witness 6, KEN-OTP-0044-0003 at 0027; KEN-OTP-0051-0207, at 0224; KEN-OTP-0051-0256, at 0275-0278; KEN-OTP-0051-0405, at 0421; KEN-OTP-0051-0467 at 0519; KEN-OTP-0051-0524 at 0528-0529 and 0578; KEN-OTP-0044-0039; KEN-OTP-0044-0044 (sketch of Witness 6); KEN-OTP-0044-0142.

<sup>345</sup> Statement of Witness 2, KEN-OTP-0055-0188 at 0192-0196. Statement of Witness 6, KEN-OTP-0044-0003, at 0027. Statement of Witness 8, KEN-OTP-0052-0946 at 0969 to 0970.

<sup>346</sup> Statement of Witness 2, KEN-OTP-0053-0256 at 0264, 0266; KEN-OTP-0055-0048 at 0057-0060. Statement of Witness 4, KEN-OTP-0031-0085 at 0098. Statement of Witness 6, KEN-OTP-0051-0207 at 0220; KEN-OTP-0051-0256 at 0276. Statement of Witness 8, KEN-OTP-0052-00946 at 0969 to 0970.

<sup>347</sup> ICC-01/09-01/11-353, paras 58-66; ICC-01/09-01/11-354, para. 43(b).

<sup>348</sup> ICC-01/09-01/11-345, paras 40-41; making reference to evidence at EVD-PT-OTP-00399 at 0142.

civilian population, as its members had access to and utilised a considerable amount of capital, guns, crude weapons and manpower as explained in the previous paragraphs.<sup>349</sup>

201. Based on the details of the meetings discussed earlier, members of the Network, including Mr. Ruto, gave regular assurances that money was available to cover the expenses needed to carry out the attack, including buying weapons and providing the youths without military experience with operational training and transportation to and from the target locations.<sup>350</sup>

202. The Chamber underlines that Witness 4 and Witness 6 corroborate each other in declaring that members of the Network were paid according to their rank, namely based on whether they were former soldiers or not.<sup>351</sup> Such payment was meant to be a form of salary and also served the purpose of motivating the perpetrators.<sup>352</sup> In the Chamber's opinion, the evidence shows that the main funding channels of the Network were essentially constituted by consistent private contributions by businessmen and members of the parliament, including Mr. Ruto.<sup>353</sup>

203. With regard to the purchase of weapons, the evidence shows that one of the main channels through which the Network obtained weapons was facilitated by

<sup>349</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0092-0093 (regarding access to guns). Statement of Witness 2, KEN-OTP-0029-0131 (regarding access to guns).

<sup>350</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0804 to 0805. Statement of Witness 6, KEN-OTP-0044-0003 at 0015-0016, 0025, 0027; KEN-OTP-0051-0135 at 0193-0195; KEN-OTP-0051-0207 at 0219-0220, 0226, 0227; KEN-OTP-0051-0256 at 0271; KEN-OTP-0051-0349 at 0368-0369, 0395-0400; KEN-OTP-0051-0405 at 0414. Statement of Witness 8, KEN-OTP-0052-0694 at 0706.

<sup>351</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0093. Statement of Witness 8, KEN-OTP-0052-0850 at 0852.

<sup>352</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0794. Statement of Witness 6, KEN-OTP-0051-0301 at 0304-0305; KEN-OTP-0051-0405 at 0417 to 0418.

<sup>353</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0793 and 0804. Statement of Witness 2, KEN-OTP-0053-0256 at 0267 (Ruto supplied money to pay meeting attendees); KEN-OTP-0055-0048 at 0056 (Ruto provided money for the purchase of food for the fighters). Statement of Witness 4, KEN-OTP-0031-0085 at 0097, 0100 (funding came from businessmen).

Statement of Witness 1, KEN-OTP-0028-0776 at 0793 and 0804. Statement of Witness 2, KEN-OTP-0053-0256 at 0267 (Ruto supplied money to pay meeting attendees); Statement of Witness 4, KEN-OTP-0031-0085 at 0097, 0100 (funding came from businessmen); KEN-OTP-0055-0048 at 0056 (Ruto provided money for the purchase of food for the fighters). Statement of Witness 6, KEN-OTP-0051-0135 at 0173; KEN-OTP-0051-0301 at 0304-0305, 0311.

Mr. Kapondi's position and influence in the Mount Elgon area, where weapons coming from neighbouring countries were allegedly introduced into the Kenyan territory.<sup>354</sup> In this regard, the Defence of Mr. Ruto challenged the role of Mr. Kapondi as the supplier of weapons – and by analogy the Network's capability to have access to firearms – by adducing, as mentioned earlier in paragraph 134, that since Mr. Kapondi was detained between 17 April 2007 and 14 December 2007, it would have been impossible to supervise the supply of weapons to the Network.<sup>355</sup>

204. The Chamber notes that, as testified by Witness 8 in connection to the 2 September 2007 meeting, Mr. Ruto was working closely with at least 6 other people to obtain weapons.<sup>356</sup> Thus, although Mr. Kapondi appeared to be the main weapons supplier, the evidence indicates that he was not the only one to perform such a task within the Network.

205. The Chamber recalls its earlier finding in paragraph 157, whereby the evidence suggests that Mr. Kapondi could have been present at the 14 December 2007 meeting at Mr. Ruto's house. The evidence further suggests that Mr. Kapondi was also the focal point for the weapons supply to the Network. This information finds support in the statements of Witnesses 8 and 6 concerning, respectively, the 30 December 2006 meeting and one of the two Nandi meetings held at Mr. Cheramboss' house in December 2007.<sup>357</sup> Moreover, the Chamber notes that according to a NSIS Situation Report dated 11 January 2008 "Kalenjin youth [...] ha[d] acquired firearms from Mt. Elgon and Marakwet Districts, which they intend[ed] to use in evicting Kikuyus from Rift Valley Province".<sup>358</sup> As stated in another NSIS Situation Report dated 23 November 2007 "William Ruto [was] funding SLDF [Sabaot Land Defence Forces]

<sup>354</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0092 (indicating that the weapons came from Uganda, Sudan and Mount Elgon). Statement of Witness 6, KEN-OTP-0044-0003 at 0025; KEN-OTP-0051-0349 at 0395-0396.

<sup>355</sup> ICC-01/09-01/11-T-12-ENG ET, p. 39.

<sup>356</sup> Statement of Witness 8, KEN-OTP-0052-0694 at 0709-0712.

<sup>357</sup> Statement of Witness 6, KEN-OTP-0044-0003 at 0025; KEN-OTP-0051-0349 at 0395-0396. Statement of Witness 8, KEN-OTP-0052-0571, at 0588.

<sup>358</sup> NSIS Situation Report, KEN-OTP-0002-0015 at 0063.

through Kapondi who [was] reportedly living a luxurious lifestyle in Bungoma GK prison with access to satellite phones and newspapers".<sup>359</sup>

206. On the basis of this evidence, the Chamber considers that there are substantial grounds to believe that there existed a close connection between Mr. Kapondi, the SLDF and the Network, also given that the leader of the SLDF was present during the 14 December 2007 meeting at Mr. Ruto's house.<sup>360</sup> In light of the foregoing, the Chamber is satisfied that there are substantial grounds to believe that Mr. Kapondi, notwithstanding his incarceration between 17 April 2007 and 14 December 2007, was in a position to arrange the purchase and supply of weapons to the Network.

207. Finally, regarding the third factor considered in demonstrating the existence of an organisation, the Chamber finds that there are substantial grounds to believe that the Network identified the criminal activities against the civilian population as its primary purpose, and that it articulated an intention to attack the civilian population.<sup>361</sup> More specifically, as the Chamber will elaborate in greater detail below, Mr. Ruto and others established the Network for the sole purpose of committing criminal activities, namely to plan the attack against PNU supporters in connection with the 2007 presidential elections.<sup>362</sup>

208. For these reasons, the Chamber is of the view that there is sufficient evidence to establish substantial grounds to believe that the Network qualifies as an organisation within the meaning of article 7(2)(a) of the Statute. Having arrived at this conclusion, the Chamber shall proceed with its examination of the remaining elements of crimes against humanity as charged by the Prosecutor in the Amended DCC.

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<sup>359</sup> NSIS Situation Report, KEN-OTP-0002-0015 at 0090. On 28 November 2007, the NSIS indicates that "William Ruto is reported to have sent several post paid Safaricom lines to Fred Kapondi to enhance his communication capability" (KEN-OTP-0002-0015 at 0088).

<sup>360</sup> Statement of Witness 2, KEN-OTP-0055-0136 at 0150-0153. See also the sketch of the list of attendees prepared by Witness 8, KEN-OTP-0042-0461.

<sup>361</sup> Statement of Witness 1, KEN-OTP-0028-0713 at 0763-0766; KEN-OTP-0057-0162 at 0178. Statement of Witness 2; KEN-OTP-0029-0131 at 140; Statement of Witness 6, KEN-OTP-0051- 0135 at 0176-0177; KEN-OTP-0051-0207 at 0226 to 0227; KEN-OTP-0051-0590 at 0597.

<sup>362</sup> Statement of Witness 1, KEN-OTP-0028-0845 at 0898; KEN-OTP-0028-1532 at 1546; KEN-OTP-0028-1587 at 1593-1594; KEN-OTP-0057-0162 at 0178, 0179 and 0197; KEN-OTP-0057-0234 at 0243.



(ii) Existence of a policy to commit the attack

209. With regard to the policy element, the Chamber notes that although the requirement of a policy is distinct from that of a plan, in the circumstances of the present case they seem to overlap.

210. The Chamber also considers that an attack which is “planned, directed or organised”, as opposed to “spontaneous or [consisting of] isolated acts”, satisfies the policy requirement.<sup>363</sup> The implementation of a policy can consist of a deliberate failure to take action, which is consciously aimed at encouraging such attack.<sup>364</sup>

211. The Chamber wishes to emphasize that, according to article 7(2)(a) of the Statute, the organisational policy must be directed to commit “such attack”. In the present circumstances, the Chamber must be satisfied that the Network, which has been found above to be responsible for the attack in Turbo town, the greater Eldoret area, Kabsabet town and Nandi Hills town from 30 December 2007 to 16 January 2008, had acted pursuant to a policy to commit that attack.

212. In this regard, the Chamber notes that the Prosecutor, in the Amended DCC, frames the policy allegedly followed by the Network as being two-fold. The first limb of such policy is, according to the Prosecutor, “to punish and expel from the Rift valley those perceived to support PNU, namely, Kikuyu, Kamba and Kisii civilians”.<sup>365</sup> The second limb of the policy, as asserted, is “to gain power and create a uniform ODM voting block”.<sup>366</sup>

213. In light of the consideration in paragraph 211 above, according to which article 7(2)(a) of the Statute stipulates that the policy must be directed to commit the *attack*, the Chamber considers that the second limb of the policy purported by the Prosecutor is merely political in nature and may not aim at committing an attack against the civilian population, as required under the Statute. Rather, gaining power

<sup>363</sup> Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/07-717, para. 396.

<sup>364</sup> Elements of Crimes, article 7, Introduction, footnote 6.

<sup>365</sup> ICC-01/09-01/11-261-AnxA, para. 41.

<sup>366</sup> ICC-01/09-01/11-261-AnxA, para. 41.

and create a uniform ODM voting block can be considered to be the motive or the purpose of a potential policy to commit the attack. However, the Statute does not envisage any requirement of motive or purpose to prove that a policy to commit an attack against the civilian population exists. Thus, the second limb of the policy as presented by the Prosecutor falls outside the legal framework of crimes against humanity and is therefore not to be considered by the Chamber.

214. At the confirmation hearing, the Defence opposed the existence of a policy to commit an attack against PNU supporters on the basis that the alleged meetings – where such policy as well as its bearer, namely the Network, would have been developed – never took place. Moreover, the Defence of the Suspects provided evidence, including the live testimony of Mr. Cheramboss, Reverend Kosgei and Mr. Chepkwoni,<sup>367</sup> written statements and other pieces of evidence, to demonstrate that the post-election violence was a spontaneous reaction to the perception that the elections were rigged and, as such, it could not have been planned.<sup>368</sup>

215. In addition, the Defence challenged the Prosecutor's contention that the policy to attack PNU supporters was developed as of December 2006.<sup>369</sup> According to the Defence, the PNU came to existence only between August and September 2007.<sup>370</sup> Therefore, contrary to the allegations presented in the Amended DCC, a policy, if any, to attack PNU supporters could have been promoted only as of that date, the Defence argues.

216. Having reviewed the evidence submitted by the parties, the Chamber considers that there are substantial grounds to believe that the Network promoted a policy

<sup>367</sup> See respectively ICC-01/09-01/11-T-7-Red-ENG, pp. 48-49; ICC-01/09-01/11-T-11-Red-ENG, p. 15; ICC-01/09-01/11-T-10-Red-ENG, p. 64, 83-84;

<sup>368</sup> KEN-D10-0001-0004 at 0004; KEN-D10-0001-0107 at 0107; KEN-D10-0001-0112 at 0112; KEN-D10-0002-0074 at 0082; KEN-D10-0001-0006; KEN-D10-0001-0016; KEN-D10-0001-0028; KEN-D10-0001-0030; KEN-D10-0001-0088. KEN-D10-0001-0004 at 0004; KEN-D10-0001-0107 at 0107; KEN-D10-0001-0112 at 0112; KEN-D10-0002-0074 at 0080; KEN-OTP-0002-0197 at 0204, 0223, 0229, 0235, 0284, 0285, 0304, 0316; KEN-OTP-0003-0592 at 0594; KEN-OTP-0005-8975 at 8989; KEN-OTP-0011-0420 at 0440, 0445, KEN-OTP-0014-0177 at 0177; KEN-D10-0001-0006; KEN-D10-0001-0016; KEN-D10-0001-0028; KEN-D10-0001-0030; KEN-D10-0001-0088; KEN-OTP-0029-0099.

<sup>369</sup> ICC-01/09-01/11-T-6-CONF-ENG ET, p. 138

<sup>370</sup> KEN-D10-0002-0058 at 0065; KEN-D10-0002-0074 at 0079 and exhibit 2 at 0085.

aimed at targeting members of the civilian population supporting the PNU, in order to punish them and evict them from the Rift Valley.

217. More specifically and as described above in paragraphs 187-196, there are substantial grounds to believe that between late December 2006 and the end of December 2007, a series of preparatory meetings were held among Mr. Ruto and other members of the Network at various levels, to discuss, organize and arrange the modalities of the implementation of the said policy. The Chamber has already exhaustively addressed the issue of whether or not some of these planning meetings have effectively taken place and does not consider it necessary to analyse the matter further. The Chamber observes the considerable amount of evidence emanating from Witnesses 1, 2, 4, 6 and 8. All those witnesses took part in more than one preparatory meeting and provided the Chamber with a thorough insider's view of the development of the abovementioned policy.

218. In this regard, the Chamber is not persuaded by the arguments of the Defence. In particular, the evidence provided by the insider witnesses is consistent. The evidence provided by these witnesses also corroborates each other. When assessed as whole, such evidence is not undermined by the fact that a number of witnesses put forward by the Defence, including those who appeared before the Chamber, may have stated that they believe that the violence was not planned.<sup>371</sup>

219. The Chamber finds that there are substantial grounds to believe that, over the course of these meetings, several issues which were crucial for the implementation of the policy were dealt with, including: (i) the appointment of commanders and divisional commanders responsible for the operations on the field;<sup>372</sup> (ii) the production of maps marking out the areas most densely inhabited by

<sup>371</sup> ICC-01/09-01/11-T-7-Red-ENG WT, p. 48 to 49 (live testimony of Mr. Cheramboss). ICC-01/09-01/011-T-10-Red-ENG WT, p.64 (live testimony of Mr. Chepkwoni). ICC-01/09-01/11-T-11-Red-ENG WT, p. 63 to 64 (live testimony of Reverend Kosgei).

<sup>372</sup> Statement of Witness 1, KEN-OTP-0028-0713, KEN-OTP-0028-0776 at 0796, 0800-0803; KEN-OTP-0028-1358 at 1373-1375. Statement of Witness 2, KEN-OTP-0053-0256 at 0263; KEN-OTP-0055-0163 at 166-169. Statement of Witness 6, KEN-OTP-0051-0256, at 0275-0278. Statement of Witness 8, KEN-OTP0052-0526 at 0555-0556.

communities perceived to be or actually siding with the PNU;<sup>373</sup> (iii) the identification of houses and business premises owned by PNU supporters with a view to target them;<sup>374</sup> (iv) the purchase of weapons as well as of material to produce crude weapons and their storage before the attack;<sup>375</sup> (v) the transportation of the perpetrators to and from the target locations;<sup>376</sup> and (vi) the establishment of a stipendiary scheme and a rewarding mechanism to motivate the perpetrators to kill and displace the largest number of persons belonging to the target communities as well as to destroy their properties.<sup>377</sup>

220. The Chamber recalls that all the abovementioned aspects of the policy, as developed during the planning meetings, are consistently recalled by different witnesses in connection with distinct planning meetings. This, in the opinion of the Chamber, increases their probative value.

221. Finally, as to the Defence's challenge with regard to the formal establishment of the PNU and the incompatibility of the time of its constitution with the development of a policy as alleged by the Prosecutor, the Chamber considers it appropriate to make the following clarifications. The evidence indicates that the Network set up a policy to commit an attack against those communities which were perceived to be political opponents to the members of the Network. These communities are identified as the Kikuyu, Kamba and Kisii. The fact that the PNU was established

<sup>373</sup> Statement of Witness 8, KEN-OTP-0052-0526 at 0562.

<sup>374</sup> Statement of Witness 1, KEN-OTP-0028-0915 at 0960 to 0963; KEN-OTP-0028-0973 at 0980-0981, 0993 to 0995. Statement of Witness 2, KEN-OTP-0055-0083 at 0089. Statement of Witness 4, KEN-OTP-0031-0085 at 0098. Statement of Witness 5, KEN-OTP-0037-0039 at 0055. Statement of Witness 6, KEN-OTP-0051-0405, at 0421 to 0424, 0528; KEN-OTP-0051-0467 at 0511 to 0514; KEN-OTP-0051-0524 at 0528-0529 and 0578 to 0580; KEN-OTP-0051-0590 at 0604 to 0606; KEN-OTP-0051-0622 at 0633 to 0639; KEN-OTP-0051-0993 at 1009; KEN-OTP-0001-0002 at 0066.

<sup>375</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0806-0808. Statement of Witness 2, KEN-OTP-0029-0131 at 0141, 0143. Statement of Witness 6, KEN-OTP-0051-0135 at 0193, 0195; KEN-OTP-0051-0207 at 0219-0220. Statement of Witness 8, KEN-OTP-0052-0694 at 0711 to 0712.

<sup>376</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0806-0808. KEN-OTP-0028-1358 at 1402-1404, 1407-1408. Statement of Witness 8, KEN-OTP-0052-0571, at 0589 to 0590 and KEN-OTP-0052-0694 at 0714.

<sup>377</sup> Statement of Witness 1, KEN-OTP-0028-0845 at 0905. Statement of Witness 2, KEN-OTP-0055-0111 at 0116-0117; KEN-OTP-0029-0131 at 0141; KEN-OTP-0053-0256 at 0267. Statement of Witness 4, KEN-OTP-0031-0085 at 0093; KEN-OTP-0031-0085 at 0100. Statement of Witness 6, KEN-OTP-0051-0405 at 0417. Statement of Witness 8, KEN-OTP-0052-0850 at 0855.

between August and September 2007 does not conflict with the development of the policy insofar as members of the three communities above were later perceived to be supporters of the PNU.

## VII. ACTS CONSTITUTING CRIMES AGAINST HUMANITY

222. Having determined that there are substantial grounds to believe that the contextual elements of crimes against humanity are met, the Chamber will now turn to the analysis of whether the Prosecutor has provided sufficient evidence to reach the evidentiary threshold required by article 61(7) of the Statute with regard to the objective elements of the specific acts constituting crimes against humanity. The analysis in this part is limited to the conduct of the direct perpetrators. The attribution of this conduct to the Suspects and the subjective elements of the crimes are examined further below.<sup>378</sup>

### A. *Murder*

223. In the Amended DCC, the Prosecutor alleges that from on or about 30 December 2007 to the end of January 2008, acts of murder constituting crimes against humanity were committed in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts.<sup>379</sup> The Chamber will address whether the Prosecutor has provided sufficient evidence to establish substantial grounds to believe that acts of killing were committed in each of the abovementioned locations.

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<sup>378</sup> See below Section VIII.

<sup>379</sup> ICC-01/09-01/11-261-AnxA, paras 75, 79, 83, 89, 97 and 133.

(i) Turbo town

224. With regard to the first location, Turbo town, the Prosecutor contended that on 30 and 31 December 2007 perpetrators attacked the town and that “[a]t least 4 people were killed during the attack”.<sup>380</sup>

225. The Chamber considers that there are substantial grounds to believe that Network perpetrators killed PNU supporters in Turbo town on 31 December 2007, as part of the widespread and systematic attack directed against the civilian population. The Chamber, however, is not satisfied that the Prosecutor has provided sufficient evidence to establish substantial grounds to believe that Network perpetrators killed PNU supporters in Turbo town after 31 December 2007.

226. The Chamber notes the testimony of Witness 2 who stated that, on 31 December 2007, he took part in the attack at Turbo town together with other Kalenjin youth members of the Network.<sup>381</sup> The witness testified that as soon as he entered the town from a peripheral neighbourhood,<sup>382</sup> he saw four bodies and subsequently another two, out of which he recognized one as having been Kikuyu.<sup>383</sup> This information is corroborated by the testimony of Witness 4, who was also present on the ground and saw four dead bodies, which he was told had been Kikuyu.<sup>384</sup> Moreover, according to the same witness, when he entered Turbo town, he recognized the Network perpetrators armed with machine guns (AK 47) similar to the ones he saw during one of the meetings which took place at Mr. Ruto’s house on 22 December 2007.<sup>385</sup> The Chamber also draws attention to the fact that Witness 2 estimated the number of

<sup>380</sup> ICC-01/09-01/11-261-AnxA, para. 75.

<sup>381</sup> Statement of Witness 2, KEN-OTP-0055-0035 at 0036-0039 and ff; KEN-OTP-0055-0062, at 0069 and ff.

<sup>382</sup> Statement of Witness 2, KEN-OTP-0055-0035 at 0039. As already stated above, Network perpetrators were approaching the target areas from the peripheral areas. In this regard, the evidence indicates that a pastor from a community outside Turbo area knew about the murder of about 20 Kikuyu men while attempting to defend their houses (see KEN-OTP-0001-0248 at 0292).

<sup>383</sup> Statement of Witness 2, KEN-OTP-0055-0035 at 0040; KEN-OTP-0055-0062 at 0072-0073. From the same testimony, see also KEN-OTP-0055-0083 at 0086-0087.

<sup>384</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0097-0098.

<sup>385</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0098 (also noting that some of the Network perpetrators were also equipped with bows and arrows).



dead bodies that he saw in Turbo town area to be “more than 200”,<sup>386</sup> which could be ascribed to be Kikuyu.<sup>387</sup> Furthermore, Witness 2 stated that most of the victims were women and children and not young people, since in the witness’ view the latter were able to flee from the attackers.<sup>388</sup>

(ii) The Greater Eldoret area

227. With regard to the second location included in the charges of murder, the Chamber notes that the Prosecutor chose to identify the specific estates around Eldoret town where such acts have allegedly taken place, namely Huruma, Kiambaa, Kimumu, Langas, and Yamumbi.<sup>389</sup> Collectively, the Prosecutor alleged that the attack in the different estates of Eldoret resulted in 70 to 87 victims.<sup>390</sup>

228. Viewed as a whole, the evidence relating to the greater Eldoret area indicates that there are substantial grounds to believe that Network perpetrators killed PNU supporters in the greater Eldoret area between 1 January 2008 to 4 January 2008, as part of the widespread and systematic attack directed against the civilian population.<sup>391</sup> Conversely, there is not sufficient evidence to establish substantial grounds to believe that Network perpetrators killed PNU supporters in the greater Eldoret area after 4 January 2008.

229. Witness 4 states that he witnessed “more than 2000” physical perpetrators gathering on 1 January 2008 in the outskirts of Eldoret town and that one Kalenjin elder told them that they “had just attacked Turbo and finished so [...] [they] were now to proceed to Eldoret [...] [to] attack the Kikuyu”.<sup>392</sup>

<sup>386</sup> Statement of Witness 2, KEN-OTP-0055-0083 at 0087.

<sup>387</sup> Statement of Witness 2, KEN-OTP-0055-0062 at 0071-0074.

<sup>388</sup> Statement of Witness 2, KEN-OTP-0055-0083 at 0086-0087.

<sup>389</sup> ICC-01/09-01/11-261, para. 79.

<sup>390</sup> ICC-01/09-01/11-261, paras 79 and 88.

<sup>391</sup> Statement of Witness 1, KEN-OTP-0028-0556 at 0580, 0598-0599; KEN-OTP-0028-0915 at 0966 to 0968; KEN-OTP-0028-0973 at 0989-0993, 1001-1002; KEN-OTP-0028-1104 at 1158-1161.

<sup>392</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0099-0100. In the same passage of the statement, Witness 4 points out that, presumably on 2 January 2008, he was told that the attack to Eldoret was successful, “people were killed by bows and arrows” and that they “would return at night to attack again”.

230. Several sources of evidence support the findings as to the acts of killing in this location as of that date.

231. The Chamber notes that Witness 1 is an eyewitness to the murder of a Kikuyu woman together with her newborn baby in Langas, on 1 January 2008.<sup>393</sup> The witness testifies that he saw a group of three perpetrators armed with arrows and machetes running after the woman, who gave birth to her baby on the spot, due to the trauma.<sup>394</sup> As soon as the perpetrators saw that the baby was a boy, they said that “we don’t want to have another Mungiki” and they cut the throat of the baby and killed the mother.<sup>395</sup>

232. The Chamber also recalls the evidence of Witness 8 who was with a group of perpetrators in Yamumbi on 1 January 2008. The witness was in the same vehicle with one of the attackers who later executed two babies in front of Witness 8.<sup>396</sup> On the same day, Witness 8 saw a woman being killed after she resisted a rape.<sup>397</sup> With regard to this victim, Witness 8 declared that she was a Kikuyu.<sup>398</sup>

233. Concerning the allegations related to Kiambaa, the Prosecutor contended that Kiambaa was attacked from different directions by a group of perpetrators who forced several people to take refuge inside the local church.<sup>399</sup> The Church was subsequently locked from outside and burnt down.<sup>400</sup> According to the Prosecutor, between 17 and 35 persons were burnt alive.<sup>401</sup> Those who attempted to flee were allegedly hacked to death.<sup>402</sup>

<sup>393</sup> Statement of Witness 1, KEN-OTP-0028-0556 at 0598-0599, KEN-OTP-0028-1104 at 1156-1161.

<sup>394</sup> Statement of Witness 1, KEN-OTP-0028-0556 at 0598-0599; KEN-OTP-0028-1104 at 1156-1161.

<sup>395</sup> Statement of Witness 1, KEN-OTP-0028-1104 at 1159.

<sup>396</sup> Statement of Witness 8, KEN-OTP-0052-0880 at 0898.

<sup>397</sup> Statement of Witness 8, KEN-OTP-0052-0880 at 0898.

<sup>398</sup> Statement of Witness 8, KEN-OTP-0052-0880 at 0902

<sup>399</sup> ICC-01/09-01/11-261-AnxA, paras 82-83.

<sup>400</sup> ICC-01/09-01/11-261-AnxA, para. 83.

<sup>401</sup> ICC-01/09-01/11-261-AnxA, para. 83.

<sup>402</sup> ICC-01/09-01/11-261, para. 84.

234. The Chamber considers that there are substantial grounds to believe that Network perpetrators killed PNU supporters in Kiambaa on 1 January 2008.<sup>403</sup>

235. The Chamber notes that Witness 1 recalls a discussion he had with another individual who reported that the Kiambaa church had been set on fire with people inside.<sup>404</sup> This information finds support in a subsequent passage of the same testimony. Witness 1 states that, after being informed of the events in Kiambaa church, he visited the local hospital and saw a number of bodies being brought there, “including bodies from Kiambaa. [He] couldn’t count them”.<sup>405</sup> This is also corroborated by the statement of Witness 5, who was present at the hospital and confirmed that bodies were brought there.<sup>406</sup> In addition, the Chamber notes the considerable amount of indirect evidence reporting the incident in Kiambaa church.<sup>407</sup>

236. An account of the events occurring in another estate within Eldoret, namely Huruma, comes from Witness 4. The witness encountered a group of about 20 perpetrators returning from Eldoret on 4 January 2008. According to Witness 4, the attackers told him that “they broke into the Kikuyu houses, took them

<sup>403</sup> Statement of Witness 1, KEN-OTP-0028-0556 at 0595; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0702; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0705; Summary of statement of non-ICC Witness, KEN-OTP-0051-0707; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0709; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0711; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0713; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0715; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0717; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0719.

<sup>404</sup> Statement of Witness 1, KEN-OTP-0028-0556 at 0595-0596.

<sup>405</sup> Statement of Witness 1, KEN-OTP-0028-0556 at 0596.

<sup>406</sup> Statement of Witness 5, KEN-OTP-0037-0039 at 0059.

<sup>407</sup> See Summary of statement of a non-ICC Witness, KEN-OTP-0051-0702; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0705; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0707; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0709; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0711; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0713; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0715; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0717; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0719; Summary of Statement of a non-ICC Witness, KEN-OTP-0051-0721 at 0721. See also Kenyan National Commission of Human Rights (KNCHR) report, “On the Brink of the Precipice. A Human Rights Account of Kenya’s Post-2007 Election Violence”, 15 August 2008, KEN-OTP-0001-0002, at 0073-0074; HRW report, “Ballots to Bullets. Organized Political Violence and Kenya’s Crisis of Governance”, March 2008, KEN-OTP-0001-0248, at 0291. KEN-D10-0001-0006 media article adduced by the Defence.

out and hacked them to death and then burnt their houses. The ones who tried to escape were shot by arrows".<sup>408</sup>

(iii) Kapsabet town

237. The Prosecutor alleges in the Amended DCC that "no less than 3 people [were left] dead" in Kapsabet.<sup>409</sup>

238. Upon review of the evidence, the Chamber finds that there are substantial grounds to believe that Network perpetrators killed PNU supporters in Kapsabet town from 30 December 2007 to 16 January 2008, as part of the widespread and systematic attack directed against the civilian population.<sup>410</sup>

239. In particular, Witness 6 testified that between 30 and 31 December 2007, he personally saw dead bodies with arrows wounds which were found by the police in the bush close to Kapsabet and were brought to the local mortuary.<sup>411</sup> The witness gave this information in connection with his description of the purpose of the roadblocks erected around the target locations, including Kapsabet town. According to Witness 6, those Kikuyu or Kisii who did not succeed in passing through the roadblock were killed.<sup>412</sup> The evidence furnished by Witness 6 concerning the acts of killings in Kapsabet town during the time frame specified above is corroborated by other pieces of evidence.<sup>413</sup>

<sup>408</sup> Statement of Witness 4, KEN-OTP-0031-0085, at 0101.

<sup>409</sup> ICC-01/09-01/11-261-AnxA, para. 89.

<sup>410</sup> Witness 6, in describing the attack to Kapsabet points out that at least two members of the Network, who are listed among participants in some preparatory meetings, were deployed on the field to coordinate and direct the physical perpetrators: Statement of Witness 6, KEN-OTP-0051-0590 at 0614-0615.

<sup>411</sup> Statement of Witness 6, KEN-OTP-0051-0524 at 0570.

<sup>412</sup> Statement of Witness 6, KEN-OTP-0051-0524 at 0569.

<sup>413</sup> According to KNCHR Report, perpetrators "left three people dead on 8 January 2008", KEN-OTP-0001-0002 at 0075; see also, Summary of statement of non-ICC Witness, KEN-OTP-0051-0728 at 0728.

(iv) Nandi Hills town

240. In the Amended DCC, the Prosecutor avers that “[a]t least three people were killed, one person was burned alive in his car, while others were cut into pieces” in Nandi Hills town.<sup>414</sup>

241. The Chamber finds that there are substantial grounds to believe that Network perpetrators killed PNU supporters in Nandi Hills town from 30 December 2007 to 2 January 2008, as part of the widespread and systematic attack directed against the civilian population. However, there is not sufficient evidence to establish substantial grounds to believe that Network perpetrators killed PNU supporters in Nandi Hills town after 2 January 2008.

242. The Chamber recalls that Witness 6 reports, when the electoral results were announced, on 30 or 31 December 2007, “the incidents started [...] first in Kapsabet and then in Nandi Hills”.<sup>415</sup> According to the witness, he heard from the police as well as from eyewitnesses that one of the members of the Network, who indeed was among the attendees in some planning meetings,<sup>416</sup> killed a Kikuyu in Nandi Hills town close to the Samoei Secondary school.<sup>417</sup> In addition, the evidence indicates that on 2 January 2008, a man was burnt in a car and three other persons cut to pieces along the street connecting Nandi Hills town and Kapsabet town.<sup>418</sup>

**B. *Deportation or forcible transfer of population***

243. Pursuant to article 7(2)(d) of the Statute, deportation or forcible transfer means the “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”.

<sup>414</sup> ICC-01/09-01/11-261-AnxA, para. 97.

<sup>415</sup> Statement of Witness 6, KEN-OTP-0051-0524 at 0558.

<sup>416</sup> Statement of Witness 6, KEN-OTP-0044-0140 (list of attendees). Statement of Witness 8, KEN-OTP-0042-0461 (list of attendees, 14 December 2007 meeting).

<sup>417</sup> Statement of Witness 6, KEN-OTP-0051-0467 at 0517-0520.

<sup>418</sup> Summary of statement of non-ICC Witness, KEN-OTP-0053-0248 at 0248.

244. At the outset, the Chamber deems it appropriate to make some clarifications with regard to the legal interpretation of the crime of deportation or forcible transfer of population. According to the Elements of Crimes, the first element of the crime against humanity of deportation or forcible transfer of population requires that “the perpetrator deported or forcibly transferred [...] one or more persons [...] by expulsion or other coercive acts”. A literal interpretation of the wording used by the Elements of Crimes to define the *actus reus* of the crime leads to the conclusion that deportation or forcible transfer of population is an open-conduct crime. In other words, the perpetrator may commit several different conducts which can amount to “expulsion or other coercive acts”, so as to force the victim to leave the area where he or she is lawfully present, as required by article 7(2)(d) of the Statute and the Elements of Crimes.

245. Accordingly, in order to establish that the crime of deportation or forcible transfer of population is consummated, the Prosecutor has to prove that one or more acts that the perpetrator has performed produced the effect to deport or forcibly transfer the victim. Absent such a link between the conduct and the resulting effect of forcing the victim to leave the area to another State or location, the Chamber may not establish that deportation or forcible transfer of population pursuant to article 7(2)(d) of the Statute has been committed.

246. In the Amended DCC, the Prosecutor alleges that from on or about 30 December 2007 to the end of January 2008, Network perpetrators committed acts of deportation or forcible transfer of population in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts.<sup>419</sup>

247. Following its approach with regard to the charges of murder as assessed above, the Chamber will consider whether there is sufficient evidence to meet the threshold required under article 61(7) of the Statute in respect of the allegations of deportation

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<sup>419</sup> ICC-01/09-01/11-261-AnxA, paras 75, 79, 85, 88-89, 97 and 133.



or forcible transfer of population in each of the locations mentioned by the Prosecutor in the Counts presented.

(i) Turbo town

248. The Prosecutor alleges that, when attacking Turbo town from 30 December 2007 to 31 December 2007, Network perpetrators “poured petrol onto houses and businesses believed to belong to PNU supporters and set them on fire”.<sup>420</sup> In the view of the Prosecutor, “the attack resulted in the destruction of houses and businesses”.<sup>421</sup> The Prosecutor asserts that “[t]housands of displaced persons took shelter at local police posts”.<sup>422</sup>

249. Upon review of the evidence, the Chamber considers that there are substantial grounds to believe that Network perpetrators forcibly displaced PNU supporters in Turbo town on 31 December 2007, as part of the widespread and systematic attack directed against the civilian population. However, there is not sufficient evidence to establish substantial grounds to believe that Network perpetrators forcibly displaced PNU supporters in Turbo town after 31 December 2007.

250. On the basis of the factual examination entertained in paragraphs 167-172 and 225-226 above, the Chamber finds that the evidence provides substantial grounds to believe that the Network perpetrators participating in the attack in Turbo town committed acts of burning and destruction of property as well as acts of killing.

251. In the view of the Chamber, there are substantial grounds to believe that acts of burning, destruction of property and killing targeted PNU supporters and resulted in coercing them to flee the area. The Chamber is also satisfied that the evidence does not indicate that PNU supporters were unlawfully present in the Turbo town area from which they were deported or forcibly transferred.

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<sup>420</sup> ICC-01/09-01/11-261-AnxA, para. 74.

<sup>421</sup> ICC-01/09-01/11-261-AnxA, para. 75.

<sup>422</sup> ICC-01/09-01/11-261-AnxA, para. 75.

252. The Chamber observes that Witness 4, who was on the ground during the attack on Turbo town, personally saw groups of people heading to the local police station to take refuge and to flee from the attackers.<sup>423</sup> At a later stage, the witness declared that he visited the IDP camp set up in the police compound, which hosted about 5000 Kikuyus.<sup>424</sup> This information is corroborated by Witness 2, who also saw the displaced persons in Turbo town police station.<sup>425</sup>

(ii) The Greater Eldoret area

253. In the greater Eldoret area (encompassing Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), the Prosecutor alleges that, in the course of the attack that occurred from 30 December 2007 to 4 January 2008, the perpetrators used petrol to burn “homes and businesses belonging to PNU supporters, destroying their property and leaving them with no alternative but to relocate”.<sup>426</sup> The Prosecutor asserts that PNU supporters were forced to flee and relocate to safer places, such as police stations or IDP camps.<sup>427</sup>

254. Having reviewed the evidence, the Chamber considers that there are substantial grounds to believe that Network perpetrators forcibly displaced PNU supporters in the greater Eldoret area from 1 January 2008 to 4 January 2008, as part of the widespread and systematic attack directed against the civilian population. However, there is not sufficient evidence to establish substantial grounds to believe that Network perpetrators forcibly displaced PNU supporters in the greater Eldoret area after 4 January 2008.

255. The Chamber recalls its findings in paragraphs 167-172 and 228-236 above, and considers that there are substantial grounds to believe that Network perpetrators who took part in the attack in the greater Eldoret area carried out acts of burning and

<sup>423</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0097.

<sup>424</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0104.

<sup>425</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0149.

<sup>426</sup> ICC-01/09-01/11-261-AnxA, paras 79 and 85.

<sup>427</sup> ICC-01/09-01/11-261-AnxA, paras 79, 82, 85.

destruction of property as well as acts of killing.<sup>428</sup> There are also substantial grounds to believe that these acts targeted PNU supporters and forced them to relocate elsewhere.<sup>429</sup> In particular, Witness 1 provides that he saw several Kikuyu escorted by the police to the safety of the Eldoret police station.<sup>430</sup> In addition, the Chamber considers that the evidence does not indicate that PNU supporters were unlawfully present in the greater Eldoret area from which they were deported or forcibly transferred.

256. The Chamber draws the attention to the testimony of Witness 5, who recollected that after the official announcement of the electoral results, on 30 December 2007<sup>431</sup>, “Kikuyus [...] started leaving to go to the police station”.<sup>432</sup> More specifically, between 1 and 3 January 2008, Witness 5 visited the Eldoret police station and saw over 500 Kikuyus who had taken refuge there.<sup>433</sup>

257. This information is corroborated by other pieces of evidence which demonstrate that, as a consequence of the attack in the greater Eldoret area, people were forced to flee and to relocate to IDP camps or to other safer places.<sup>434</sup>

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<sup>428</sup> On burning and destruction of property: Statement of Witness 1, KEN-OTP-0028-0556 at 0579-0580; KEN-OTP-0028-0915 at 0931-0936, 0944-0946, 0960-0963; KEN-OTP-0028-0973 at 0980-0981; detailed description of the petrol can used at KEN-OTP-0028-0973 at 0981-0986. On murder: Statement of Witness 1, KEN-OTP-0028-0556 at 0580, 0598-0599; ; KEN-OTP-0028-0915 at 0966 to 0971; KEN-OTP-0028-0973 at 0989-0992.

<sup>429</sup> Statement of Witness 1, KEN-OTP-0028-0845 at 0898; KEN-OTP-0028-1532 at 1546; KEN-OTP-0028-1587 at 1593-1594; KEN-OTP-0057-0162 at 0178, 0179 and 0197; KEN-OTP-0057-0234 at 0243. Statement of Witness 2, KEN-OTP-0029-0131 at 0151, 0153; KEN-OTP-0053-0256 at 0264. Statement of Witness 4, KEN-OTP-0031-0085 at 0099. Summary of statement of a non-ICC Witness, KEN-OTP-0051-0698; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0756.

<sup>430</sup> Statement of Witness 1, KEN-OTP-0028-1104 at 1118-1121.

<sup>431</sup> Statement of Witness 5, KEN-OTP-0037-0039 at 0052-0053.

<sup>432</sup> Statement of Witness 5, KEN-OTP-0037-0039 at 0052.

<sup>433</sup> Statement of Witness 5, KEN-OTP-0037-0039 at 0053.

<sup>434</sup> Summary of statement of a non-ICC Witness, KEN-OTP-0051-0713 at 0713; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0736 at 0736; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0743 at 0743; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0758 at 0758; UNICEF/UNFPA report, “A Rapid Assessment of Gender Based Violence during the Post-Election Violence in Kenya”, January-February 2008, KEN-OTP-0001-0973 at 1025-1026. CIPEV Report, KEN-OTP-0001-0364 at 0419. KNCHR Report, KEN-OTP-0001-0002 at 0070.

(iii) Kapsabet town

258. With regard to the charges of deportation or forcible transfer of population in Kapsabet town, the Prosecutor alleges that “[a]fter the results of the presidential election were announced, perpetrators started attacking, looting and burning businesses and properties believed to belong to PNU supporters”.<sup>435</sup> The Prosecutor contended that “IDPs fled to Kapsabet town police station which, at its peak, sheltered approximately 7,500 IDPs from Kapsabet town and surrounding areas”.<sup>436</sup>

259. In the opinion of the Chamber, there are substantial grounds to believe that Network perpetrators forcibly displaced PNU supporters in Kapsabet town from 30 December 2007 to 16 January 2008, as part of the widespread and systematic attack directed against the civilian population.

260. The Chamber recalls its findings in paragraphs 167-172 and 237-239 above, and considers that there are substantial grounds to believe that Network perpetrators who took part in the attack in Kapsabet town perpetrated acts of killing, looting, burning and destruction of property.<sup>437</sup>

261. The Chamber considers that there are substantial grounds to believe that these acts targeted PNU supporters and forced them to relocate elsewhere.<sup>438</sup> In addition, the evidence does not indicate that PNU supporters were unlawfully present in the Kapsabet town area from which they were deported or forcibly transferred.

262. To further support its finding, the Chamber refers to the testimony of Witness 1, who stated that all Kikuyus living in Kapsabet left the town to take refuge in the local police station or were otherwise transported to Eldoret, “otherwise they would have

<sup>435</sup> ICC-01/09-01/11-261-AnxA, para. 88.

<sup>436</sup> ICC-01/09-01/11-261-AnxA, para. 89.

<sup>437</sup> Statement of Witness 6, KEN-OTP-0051-0524 at 0569-0570; KEN-OTP-0051-0590 at 0597-0598, at 0604-0606. Summary of statement of a non-ICC Witness, KEN-OTP-0051-0728 at 0728. KEN-OTP-0001-0002 at 0075.

<sup>438</sup> Summary of Statement of a non-ICC Witness, KEN-OTP-0051-0730 at 0730. KNCHR Report, KEN-OTP-0001-0002 at 0071.

been killed [...] on their way to Eldoret".<sup>439</sup> This evidence is corroborated by Witness 6, who was in Kapsabet town at the peak of violence, namely on 3 and 4 January 2008.<sup>440</sup> The witness testified that thousands of people, mainly Kikuyu and Kisii, took refuge at the local police station.<sup>441</sup> This evidence corroborates other sources of evidence, which report the flow of IDPs resulting from the violence broken out in Kapsabet.<sup>442</sup>

(iv) Nandi Hills town

263. In the Amended DCC, the Prosecutor alleges that "[o]n or about 30 December 2007 Nandi Hills was attacked".<sup>443</sup> According to the Prosecutor "[a]ttackers looted and burned PNU supporters' houses and businesses" and "PNU supporters sought refuge at a Nandi Hills police station which eventually hosted approximately 32,000 IDPs".<sup>444</sup>

264. On the basis of the evidence available to the Chamber, there are substantial grounds to believe that Network perpetrators forcibly displaced PNU supporters in Nandi Hills town from 30 December 2007 to 2 January 2008, as part of the widespread and systematic attack directed against the civilian population. The Chamber, however, is not satisfied that there is sufficient evidence to establish substantial grounds to believe that Network perpetrators forcibly displaced PNU supporters in Nandi Hills town after 2 January 2008.

265. The Chamber recalls its findings in paragraphs 167-172 and 241-242 above, and considers that there are substantial grounds to believe that Network perpetrators

<sup>439</sup> Statement of Witness 1, KEN-OTP-0057-0181 at 0200.

<sup>440</sup> Statement of Witness 6, KEN-OTP-0051-0405 at 0427-0428.

<sup>441</sup> Statement of Witness 6, KEN-OTP-0044-0003 at 0029 and KEN-OTP-0051-0590 at 0610-0614.

<sup>442</sup> Summary of statement of a non-ICC Witness, KEN-OTP-0051-0756 at 0756, said that 7478 people, mostly Kikuyu and Kisii, took refuge at the Kapsabet police station. Summary of statement of a non-ICC Witness, KEN-OTP-0051-0760 at 0760, reported that dozens of people working at the Kapsabet hospital were under threat and became IDPs. CIPEV report, KEN-OTP-0001-0364 at 0422-0423, reporting that 8000 IDPs took shelter in Kapsabet police station.

<sup>443</sup> ICC-01/09-01/11-261-AnxA, para. 94.

<sup>444</sup> ICC-01/09-01/11-261-AnxA, para. 97.

who took part in the attack in Nandi Hills town perpetrated acts of killing, looting, burning and destruction of property.<sup>445</sup>

266. The Chamber considers that there are substantial grounds to believe that these acts targeted PNU supporters and forced them to relocate elsewhere.<sup>446</sup> Furthermore, the evidence does not indicate that PNU supporters were unlawfully present in the Nandi Hills town area from which they were deported or forcibly transferred.

267. The Chamber notes that Witness 6 was in Nandi Hills before moving to Kapsabet town. The witness reported that as a consequence of the acts of looting and burning “Kikuyus [were] seeking refuge in the police station”.<sup>447</sup> This information is corroborated by other pieces of evidence, consistently reporting that people started fleeing from Nandi Hills town due to acts of burning and looting, which were targeting members of non-Kalenjin communities believed to be PNU supporters.<sup>448</sup>

268. In this regard, the Chamber recalls the Defence’s challenge concerning the Amended DCC’s formulation of “deportation or forcible transfer of population”. As the Chamber has mentioned earlier, there is no apparent prejudice caused by this formulation at this particular stage of the proceedings and in relation to this unique crime, given that a concrete determination on either of the two labels will be better decided by the Trial Chamber due to the requisite threshold to be proved and all the evidence to be presented and considered. In the context of the case *sub judice*, the evidence presented before the Chamber does not and should not indicate with any sort of certainty where the victims ultimately relocated. It suffices to say that at this stage and based on the evidence available there are substantial grounds to believe that the PNU supporters were forcibly displaced without grounds permitted under international law from the areas where they were lawfully present. The factor of where they have finally relocated as a result of these acts (i.e. within the State or

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<sup>445</sup> Statement of Witness 6, KEN-OTP-0051-0467 at 0516-0519.

<sup>446</sup> Summary of Statement of non-ICC Witness 28, KEN-OTP-0051-0738.

<sup>447</sup> Statement of Witness 6, KEN-OTP-0051-0467 at 0505.

<sup>448</sup> Summary of statement of a non-ICC Witness, KEN-OTP-0051-0724 at 0724; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0738 at 0738; Summary of statement of a non-ICC Witness, KEN-OTP-0051-0740 at 0740.



outside the State) in order to draw the distinction between deportation and forcible transfer is thus to be decided by the Trial Chamber, which will be presented more concrete evidence in this regard. Therefore, the Chamber will retain the formulation presented by the Prosecutor in his Amended DCC. Accordingly and in light of the above, the Chamber finds substantial grounds to believe that deportation or forcible transfer of population was committed in the locations referred to in the counts.

### *C. Persecution*

269. The crime against humanity of persecution is defined by article 7(2)(g) of the Statute as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. According to article 7(1)(h) of the Statute, persecution must be committed “against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any acts referred to in this paragraph or any crime within the jurisdiction of the Court”.

270. In Counts 5 and 6, the Prosecutor alleges that from on or about 30 December 2007 to the end of January 2008, persecution was committed in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts.<sup>449</sup> According to the Prosecutor, perpetrators belonging to the Network “intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, torture, and deportation or forcible transfer of population”.<sup>450</sup>

271. The Chamber underlines that the Prosecutor alleges that persecution has been committed through acts of murder and deportation or forcible transfer of population, which have been already assessed as separate charges of crimes against humanity. In this regard, the Chamber recalls its findings in paragraphs 225-226, 228-236, 237-

<sup>449</sup> ICC-01/09-01/11-261-AnxA, para. 133.

<sup>450</sup> ICC-01/09-01/11-261-AnxA, para. 133.

239, 241-242, 248-251 and 253-266 above. Accordingly, the Chamber is satisfied that there are substantial grounds to believe that Network perpetrators killed and forcibly displaced PNU supporters in Turbo town, the greater Eldoret area, Kapsabet and Nandi Hills town during the timeframe specified in the previous paragraphs.

272. Therefore, for the purposes of establishing whether the crime of persecution has been committed, the Chamber does not consider it necessary to make an individual assessment of each location included in the charges of persecution, insofar as these locations are the same as those listed in the counts of murder and deportation or forcible transfer of population.

273. The Chamber observes that the evidence indicates that the Network perpetrators killed and forcibly displaced persons primarily belonging to the Kikuyu, Kamba and Kisii communities on the basis that they were perceived as PNU supporters. In this respect, the Chamber recalls what has been stated in paragraph 172 above, namely that the criterion used by the Network perpetrators to identify and attack their victims was, in essence, their perceived political affiliation to the PNU. The Chamber wishes to stress that, based on the evidence, Network perpetrators also targeted members of other communities, including Kalenjin, believed to be siding with the PNU.<sup>451</sup> Testimonies of various witnesses who attended preparatory meetings consistently indicate that members of the Network, including Mr. Ruto, made speeches and instructed perpetrators to target Kikuyu, Kamba and Kisii on the basis that “these people [...] don’t vote for us the only thing is to kill them and evict them from the Rift Valley”.<sup>452</sup> Most of these witnesses were also present on the ground immediately before and during the attack to the target locations, and stated that local leaders coordinating the groups of raiders instructed the perpetrators to “attack the

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<sup>451</sup> See for example the Statement of Witness 4, KEN-OTP-0031-0085 at 0097.

<sup>452</sup> Statement of Witness 2, KEN-OTP-0055-0211 at 0214-0215.

Kikuyu because they stole the votes”,<sup>453</sup> or said that after the Kikuyu had fled or been killed, the target was “those who were supporting Kibaki”.<sup>454</sup>

274. Considering the evidence submitted, the Chamber is satisfied that there are substantial grounds to believe that Network perpetrators severely deprived perceived PNU supporters of their rights in Turbo town on 31 December 2007, as part of the widespread and systematic attack directed against the civilian population. There are substantial grounds to believe that Network perpetrators severely deprived PNU supporters of their rights in the greater Eldoret area from 1 January 2008 to 4 January 2008, as part of the widespread and systematic attack directed against the civilian population. Further, the Chamber considers that there are substantial grounds to believe that Network perpetrators severely deprived PNU supporters of their rights in Kapsabet town from 30 December 2007 to 16 January 2008, as part of the widespread and systematic attack directed against the civilian population. Finally, there are substantial grounds to believe that Network perpetrators severely deprived PNU supporters in Nandi Hills town from 30 December 2007 to 2 January 2008, as part of the widespread and systematic attack directed against the civilian population.

275. In this context, the Chamber recalls the request put forward by the Legal Representative of victims during the confirmation hearing<sup>455</sup> and reiterated in subsequent filings, including the Final Written Observations, whereby she requests the Chamber “to exercise its power under Article 61(7)(c)(ii) of the Statute [to adjourn the confirmation hearing and][...] request the Prosecutor to consider amending the charges”. In developing her request, the Legal Representative of victims calls upon the Prosecutor to:

[E]xpressly specify[...] that Count 5 and Count 6 encompass additionally acts of destruction of property, and looting, and the infliction of physical injuries; and [to] add[...] counts of the crime against humanity of other inhumane acts of a similar character intentionally causing great suffering, or serious

<sup>453</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0096-0097.

<sup>454</sup> Statement of Witness 2, KEN-OTP-0055-0111 at 0013-0014, 0124.

<sup>455</sup> ICC-0/09-01/11-T-12-ENG ET, pp. 33-34.

injury to body or mental or physical health (Article 7(1)(k) of the Statute, in relation to the acts of destruction of property, and looting, and the infliction of physical injuries.<sup>456</sup>

276. At the outset, the Chamber acknowledges the suffering that victims have faced as a result of the attack against the Kenyan civilian population and wishes to express its dismay of such practices. However, being a judicial body, the Chamber must always reflect its opinions through the scope of law, and thus, perform its functions within the parameters dictated by the Court's statutory provisions.

277. The Chamber observes that, contrary to the Legal Representative of victims' claim that the acts of destruction of property, looting, and the infliction of physical injuries were "ignored",<sup>457</sup> the reference to these acts is actually acknowledged by the Prosecutor in different paragraphs in his Amended DCC as means that the Network perpetrators employed to forcibly displace and persecute the PNU supporters.<sup>458</sup> In Sections VI(A) and VII(B) above, the Chamber found that there are substantial grounds to believe that members of the Network perpetrated acts of looting, burning and destruction of property, which forced PNU supporters to relocate elsewhere. Thus, the Chamber has already made a determination that the acts of burning, looting and destructing property were the "coercive acts" (see in this regard the first element of deportation or forcible transfer in the Elements of Crimes) through which forced displacement actually occurred. Since the Chamber has already found that the acts of forced displacement also constitute acts of persecution as they were directed against a particular group for reason of their perceived political affiliation, the Chamber is of the view that the acts of destruction of property and looting are already encompassed in counts 5 and 6, contrary to what the Legal Representative of victims argues.

278. Moreover, the Chamber is of the view that article 61(7)(c)(ii) of the Statute only allows the Chamber to request the Prosecutor to consider amending a charge. Accordingly, the Chamber cannot, on the basis of this provision, request the

<sup>456</sup> ICC-01/09-01/11-344 and in particular, paras 11-13.

<sup>457</sup> ICC-01/09-01/11-344, para. 12.

<sup>458</sup> ICC-01/09-01/11-261-AnxA, paras 31, 37, 39, 41, 44,74-75, 79, 88-89, 94.

Prosecutor to consider adding a new charge as the Legal Representative of victims requests. For these reasons, the Chamber rejects the request of the Legal Representative of victims.

279. Finally, at this juncture the Chamber should recall that in the confirmation hearing Mr. Ruto's Defence argued against the practice of cumulative charging on the basis of an earlier finding of this Chamber in the Bemba Confirmation of Charges Decision. Accordingly, the Defence of Mr. Ruto requested that the Chamber confirm, if any, only the charge of persecution.<sup>459</sup> Similarly, in Mr. Sang's Final Written Observations, the Defence also argued in favour of confirming, if any, solely the charge of persecution as "the elements of murder and deportation or forcible transfer are subsumed within the charge of persecution".<sup>460</sup>

280. The Chamber disagrees with the Defences' argument. The definition of persecution contains materially distinct elements not present in the definition of murder, namely the requirement of proof that a particular group was targeted on the basis of certain discriminatory grounds described in article 7(1)(h) of the Statute. Murder, by contrast, requires proof that the accused caused the death of one or more persons, regardless of whether the act or omission causing the death discriminates in fact or was intended as discriminatory.

281. The same holds true with respect to persecution and deportation or forcible transfer; the former requires, as "materially" distinct elements not included in the definition of deportation or forcible transfer, proof of intent to discriminate. On the contrary, deportation or forcible transfer requires, *inter alia*, proof that the perpetrator displaced one or more persons, regardless of whether the conduct was intended as discriminatory. Accordingly, the practice of cumulative or multiple charging as to these crimes on the basis of the same conduct is permissible.<sup>461</sup>

<sup>459</sup> ICC-01/09-01/11-T-6-Red-ENG, p. 119.

<sup>460</sup> ICC-01/09-01/11-354, paras 134-135, 140-148.

<sup>461</sup> See also, *Prosecutor v. Dario Kordić and Mario Čerkez*, "Judgement", Case No. (IT-95-14/2-A), 17 December 2004, paras 1040-1042; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, "Judgement", Case

### VIII. INDIVIDUAL CRIMINAL RESPONSIBILITY

282. In light of the findings reached in sections VI and VII above, the Chamber's assessment with respect to the attribution of criminal responsibility to Mr. Ruto, Mr. Kosgey and Mr. Sang shall be confined to those acts constituting crimes against humanity in respect of which the Chamber has found sufficient evidence to establish substantial grounds to believe that they were committed, namely, those set out in counts 1-6 of the Amended DCC to the extent specified in the relevant sections of the present decision.

283. The Chamber will first address the challenge to the Prosecutor's inconsistent labeling of criminal responsibility of the Suspects. In paragraph 98 of the Amended DCC, the Prosecutor alleges that Mr. Ruto and Mr. Kosgey are criminally responsible as 'co-perpetrators' pursuant to article 25(3)(a) of the Statute for the crimes against humanity set out in counts 1-6.<sup>462</sup> Later, in presenting his charges in paragraph 133 and in particular in counts 1, 3, and 5, the Prosecutor avers that Mr. Ruto and Mr. Kosgey "committed or contributed to the commission of crimes against humanity [...]" in the forms and locations described under these counts, "in violation of Articles [...] and 25(3)(a) of the Statute".<sup>463</sup> The same holds true in relation to counts 2, 4 and 6 concerning Mr. Sang where the Prosecutor charges him under article 25(3)(d) of the Statute, but still claims in these counts that Mr. Sang, "as part of a group of persons, including [Mr. Ruto and Mr. Kosgey], acting with a common purpose, committed or contributed to the crimes against humanity [...]" (emphasis added).<sup>464</sup>

284. In this regard, the Chamber notes these inconsistencies and also recalls the Decision on Summons to Appear in which it stated:

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No. (IT-02-60-T), 17 January 2005, paras 807-810; *Prosecutor v. Milomir Stakić*, "Judgement", Case No. (IT-97-24-A), 22 March 2006, para. 358.

<sup>462</sup> ICC-01/09-01/11-261-AnxA, para. 98.

<sup>463</sup> ICC-01/09-01/11-261-AnxA, para.133.

<sup>464</sup> ICC-01/09-01/11-261-AnxA, para. 133; The issue was also raised by the Defence of Mr. Sang during the confirmation of charges hearing, see ICC-01/09-01/11-T-5-ENG ET WT, p. 52, lines 1-8.



Although the Prosecutor may generally charge in the alternative, he should be consistent throughout his Application about the actual mode(s) of liability that he intends to present to the Chamber. Moreover, the possibility for the Prosecutor to charge in the alternative does not necessarily mean that the Chamber has to respond in the same manner. In particular, the Chamber is not persuaded that it is best practice to make simultaneous findings on modes of liability presented in the alternative. A person cannot be deemed concurrently as a principal and an accessory to the same crime. Thus, it is the Chamber's view that an initial decision has to be made on the basis of the material provided, as to whether there are reasonable grounds to believe that Ruto, Kosgey and Sang bear criminal responsibility for the crimes against humanity that occurred in the specific locations in the Republic of Kenya, as discussed in section II above, either as co-perpetrators, indirect co-perpetrators, or any other form of liability presented or that the Chamber finds appropriate.<sup>465</sup>

285. Thus, although such inconsistency or lack of precision may raise an issue of deficiency of the Amended DCC,<sup>466</sup> the Prosecutor's clarification that the two suspects are charged under article 25(3)(a) of the Statute by way of presenting the elements underlying indirect-co-perpetration cures the apparent inconsistency.<sup>467</sup> The same reasoning applies to the situation of Mr. Sang since the Prosecutor actually developed the legal elements of article 25(3)(d) of the Statute. It follows that the Chamber shall proceed with its examination on the basis of these particular modes of liability.

286. Nevertheless, before doing so, the Chamber shall respond to the argument raised by the Defence of Mr. Ruto during the confirmation hearing, whereby it challenged the underlying theory of indirect co-perpetration or joint commission of a crime through another person as inconsistent with the text of article 25(3)(a) of the Statute.<sup>468</sup>

<sup>465</sup> Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", ICC-01/09-01/11-1, para. 36.

<sup>466</sup> ICC-01/09-01/11-355, paras 31-32; ICC-01/09-01/11-354, para. 60.

<sup>467</sup> ICC-01/09-01/11-261-AnxA, pp. 25-32.

<sup>468</sup> ICC-01/09-01/11-T-6-CONF-ENG ET, p. 157, lines 1-8.

287. In this context, the Chamber concurs with the finding of Pre-Trial Chamber I in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,<sup>469</sup> in which it stated:

The Chamber notes that article 25(3)(a) uses the connective “or”, a disjunction (or alternation). Two meanings can be attributed to the word “or” - one known as weak or inclusive and the other strong or exclusive. An inclusive disjunction has the sense of “either one or the other, and possibly both” whereas an exclusive disjunction has the sense of “either one or the other, but not both”. Therefore, to interpret the disjunction in article 25(3)(a) of the Statute as either “inclusive” or “exclusive” is possible from a strict textualist interpretation. In the view of the Chamber, basing a person’s criminal responsibility upon the joint commission of a crime through one or more persons is therefore a mode of liability “in accordance with the Statute”.<sup>470</sup>

288. However, referring to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the Special Tribunal for Lebanon (“STL”), the Defence of Mr. Ruto argues that the ICTY and the STL found that this mode of liability “does not exist under customary international law”.<sup>471</sup>

289. The Chamber disagrees with the Defence’s argument relying on the jurisprudence of other international or hybrid tribunals. According to article 21 of the Statute, “the Court shall apply: (a) [i]n the first place, [the] Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) [i]n the second place, *where appropriate*, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict” (emphasis added). The jurisprudence of other international or hybrid tribunals is not, in principle, applicable law before the Court and may be resorted to only as a sort of persuasive authority, unless it is indicative of a principle or rule of international law. But even then, applying a customary rule of international law only “where appropriate” limits its application to cases where there is a lacuna in the Statute and the other sources referred to in article 21(1)(a). In other words, the Chamber should

<sup>469</sup> ICC-01/04-01/07-698, para. 24; Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/07-717, para. 490.

<sup>470</sup> Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/07-717, para. 491.

<sup>471</sup> ICC-01/09-01/11-T-6-CONF-ENG ET, p. 159, lines 14-17, 21-25.

not resort to applying article 21(1)(b), unless it has found no answer in paragraph (a). This is not the case as the modes of liability of co-perpetration and indirect perpetration are already captured by the language of article 25(3)(a); Pre-Trial Chamber I merely provided a dynamic or effective interpretation of the provision by way of merging the two modes of participation, which is, in the opinion of this Chamber, consistent with the rules of treaty interpretation envisaged by article 31 of the Vienna Convention on the Law of Treaties.<sup>472</sup>

290. Having said the above, this Chamber finds no reason to depart from Pre-Trial Chamber I's finding on this issue, and accordingly, it shall examine the relevant part of the Prosecutor's Amended DCC against the mode of responsibility of indirect co-perpetration relevant to the charges against Mr. Kosgey and Mr. Ruto.

291. In this regard, the Chamber also recalls its finding in the Bemba Confirmation of Charges Decision, where it acknowledged that the concept of co-perpetration (joint commission) whether direct or indirect, embodied in article 25(3)(a) of the Statute and reflected in the words "[committing] jointly with another or through another person", must go together with the notion of "control over the crime".<sup>473</sup>

292. The Chamber consequently recalls that the mode of participation of indirect co-perpetration consists of the following objective and subjective elements: (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential

<sup>472</sup> International Court of Justice (ICJ), *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276(1970)*, ICJ Reports 1971, p. 35; *ibid.*, *Aegean Sea Continental Shelf*, ICJ Reports 1978, p. 22; *Territorial Dispute (Libyan Arab Jamahiriya/ Chad)*, Judgment of 3 February 1994, ICJ Reports 1994, p. 25; Inter American Court of Human Rights (IACtHR), *Fairen Garbi and Solis Corrales Case, Preliminary Objections*, Judgment of 26 June 1987, *ibid.*, (Ser. C) No. 2, para. 35; *Constantine et al. v Trinidad and Tobago Case, Preliminary Objections, Judgment of 1 September 2001*, *ibid.*, (Ser. C) No. 82, para. 73; European Court of Human Rights (ECtHR), *Mamatkulov and Abdurasulovic v. Turkey, (Merits) App. No. 46827/99*, Judgment of 6 February 2003, paras. 93-94; *ibid.*, *Loizidou v Turkey (Preliminary Objections)*, App. No.1531/89, 23 March 1995, para. 72.

<sup>473</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 348. Pre-Trial Chamber I, *Lubanga* decision, ICC-01/04-01/06-803-tEN, paras 326-341; Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, paras 480-486; Pre-Trial Chamber I, *The Prosecutor v Omar Hassan Ahmad Al Bashir*, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-3, para. 210.

contributions in a coordinated manner which result in the fulfillment of the material elements of the crime; (iii) the suspect must have control over the organisation; (iv) the organisation must consist of an organised and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).<sup>474</sup>

*A. Criminal Reponsibility of Mr. Kosgey*

293. Having examined the evidence available as a whole, the Chamber does not find sufficient evidence to establish substantial grounds to believe that Mr. Kosgey is criminally responsible as an indirect co-perpetrator with Mr. Ruto and others in accordance with article 25(3)(a) of the Statute or under any other alternative mode of liability for the crimes against humanity referred to in counts 1, 3 and 5. The Chamber reaches this finding upon evaluation of the evidence available before it, provided by both parties. In particular, the Prosector primarily relies on the detailed description of one anonymous witness (Witness 6) to prove the allegations regarding Mr. Kosgey's role within the organisation. As the Chamber stated in paragraph 78 of the present decision, anonymous witness statements have lower probative value and, in the absence of corroboration of the key facts alleged by the Prosecutor, the evidence presented might not be deemed sufficient to commit a person to trial.

294. More specifically, with a view to supporting Mr. Kosgey's role within the organisation, the Prosecutor presents the statement of Witnesses 2 and 4 as well as

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<sup>474</sup> Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-0105-01/08-424, paras. 350-351; Pre-Trial Chamber I "Decision on the confirmation of charges" against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, paras. 500-514, 527-539; Pre-Trial Chamber I, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-3, paras 209-213.

the summaries of statements of six non-ICC witnesses and a NSIS report. However, the Chamber considers that this evidence does not corroborate Witness 6's detailed description of Mr. Kosgey's role within the organisation. Based on a review of the evidence, the Chamber finds that Witness 2 merely mentions Mr. Kosgey's presence in a meeting which took place on 14 December 2007 at Mr. Ruto's house and says that "every time R[uto] had to organize an event, [Mr. Kosgey] was the ODM chairperson...and he never challenged Ruto on any issue".<sup>475</sup> Furthermore, Witness 4 refers to Mr. Kosgey's attendance at an ODM rally at Stadium in 2005, but never refers to his alleged involvement during the 2007/2008 post-election violence.<sup>476</sup> With regard to the six non-ICC witnesses, the Chamber underlines that they alleged, in general terms, that Mr. Kosgey was involved in the planning of the 2007/2008 post-election violence in Kenya.<sup>477</sup> None of them, however, provided information corroborating the detailed statement of Witness 6 with regard to Mr. Kosgey's alleged involvement in the commission of the crimes and particularly his specific role within the organisation. Lastly, the NSIS Report dated 7 January 2008 also indicates, without specification, that Mr. Kosgey is "reported to be funding post-election violence in parts of Rift Valley".<sup>478</sup> As the Defence of Mr. Kosgey correctly observes "[t]he evidence from that one witness [Witness 6] in relation to Mr. Kosgey is not corroborated or supported in any meaningful way by any other part of the Prosecution case".<sup>479</sup>

295. Furthermore, in Mr. Kosgey's Final Written Observations, the Defence complained about the redaction of the dates of four planning meetings, at which Mr. Kosgey was allegedly present.<sup>480</sup> According to the Defence, such redactions impaired its right to rebut the Prosecutor's allegations concerning the suspect's alleged

<sup>475</sup> Statement of Witness 2, KEN-OTP-0055-0136, at 0150-0153.

<sup>476</sup> Statment of Witness 4, KEN-OTP-0031-0085, at 0108.

<sup>477</sup> Summary of statement of non-ICC Witness, KEN-OTP-0051-0724; Summary of statement of non-ICC Witness, KEN-OTP-0051-0726; Summary of statement of non-ICC Witness, KEN-OTP-0051-0728; Summary of statement of non-ICC Witness, KEN-OTP-0051-0734; Summary of statement of non-ICC Witness, KEN-OTP-0053-0248; Summary of statement of non-ICC Witness KEN-OTP-0053-0250.

<sup>478</sup> NSIS Situation Report, KEN-OTP-0002-0015, at 0067.

<sup>479</sup> ICC-01/09-01/11-353, paras 4, 47, 50.

<sup>480</sup> ICC-01/09-01/11-353, pp. 28-30.

presence in these meetings and, by implication, the charges against him. In the view of the Defence, two out of the four dates related to these meetings were revealed to the Defence by the Prosecutor only in his Final Written Observations. In the Defence's opinion, the lack of information about the dates of these meetings and in particular the late knowledge of the two dates caused great prejudice.

296. The Chamber acknowledges the Defence's concern over the lack of crucial dates, which is unique to Mr. Kosgey; it recalls paragraph 101 of the present decision in which it explained that the "redactions of certain dates within one witness statement" was justified and "necessary for security reasons".

297. However, the Chamber must assess the alleged prejudice suffered by the Defence in light of all the circumstances of this case, in particular the redaction of the dates of the meetings and the prejudice resulting from these specific redactions as well as the lack of sufficient corroboration to the evidence provided by anonymous Witness 6. Having evaluated the evidence as a whole, in view of the prejudice experienced by the Defence, the Chamber finds that the Prosecutor has not met the evidentiary standard required at this stage of the proceedings. It follows that the Chamber needs neither to engage with the Defence challenges related to Mr. Kosgey's involvement, nor to proceed with an examination of the elements concerning his alleged criminal responsibility as provided in the Amended DCC. Instead, the Chamber shall provide its findings only in relation to the criminal responsibility of Mr. Ruto and Mr. Sang.

298. At this point, the Chamber underlines that the above finding regarding the charges of the Prosecutor against Mr. Kosgey does mean that the Chamber cannot rely on the statement provided by Witness 6 as well as the other witnesses referred to above for the purposes of the present decision. As clarified under section IV, the admissibility, relevance and probative value of each piece of evidence is assessed on a case-by-case basis in regard of every distinct issue and the available evidence related thereto. Thus, in some instances, one and the same piece of evidence might be



insufficient to justify a certain allegation or fact (if it stands isolated from any other evidence, as is the current case) while, in other circumstances, the same evidence might prove to be a valuable component of an aggregate of evidence relevant to a specific charge. Consequently, the information provided by Witnesses 2, 4 and 6 as well as the non-ICC witnesses, though insufficient to prove the charges against Mr. Kosgey, appears to be consistent with other pieces of evidence. Thus, they could substantiate other allegations.

299. The Chamber does find that there is sufficient evidence to establish substantial grounds to believe that Mr. Ruto is criminally responsible as an indirect co-perpetrator with others pursuant to article 25(3)(a) of the Statute for the crimes against humanity of murder (article 7(1)(a)), deportation or forcible transfer of population (article 7(1)(d)) and persecution (article 7(1)(h)) as specified under section VII of the present decision. The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that Mr. Sang is criminally responsible under article 25(3)(d) of the Statute for the crimes against humanity of murder (article 7(1)(a)), deportation or forcible transfer of population (article 7(1)(d)) and persecution (article 7(1)(h)) as specified under section VII of the present decision. The Chamber arrived at its conclusion on the basis of an examination of the legal elements underlying the relevant modes of liability together with the evidence available as elaborated in the following paragraphs.

300. The Chamber recalls that the Defence of Mr. Ruto and Mr. Sang challenged the existence of a number of planning meetings in an attempt to demonstrate the absence of the suspects in these meetings and, by implication, the lack of their criminal responsibility for the crimes against humanity committed in the different locations specified in section VII above. The Chamber has addressed the evidence of *alibi* and other related issues pertaining to the Suspects' possible absence from these meetings on the basis of the evidence available and has concluded that the evidence, viewed as a whole, does not support such a conclusion. Since the Chamber has

already dealt with these challenges as preliminary matters, there is no need to re-address them in the present section.

## **B. Criminal responsibility of Mr. Ruto**

### (i) Objective elements

#### a) The suspect must be part of a common plan or an agreement with one or more persons

301. The first objective element for indirect co-perpetration is the existence of a common agreement or a plan among those who fulfill the elements of the crime through another person.<sup>481</sup> As established in the jurisprudence of the Court, the agreement or plan must include an element of criminality,<sup>482</sup> meaning that it must involve the commission of a crime with which the suspect is charged.<sup>483</sup> The agreement or plan does not necessarily need to be explicit.<sup>484</sup> Rather, its existence may be inferred from the 'concerted action' of the indirect co-perpetrators.<sup>485</sup>

302. The Chamber considers that there is sufficient evidence to establish substantial grounds to believe that between 30 December 2006 and 22 December 2007, a criminal plan was developed and set in place by Mr. Ruto and other members of the organisation (the Network) with the purpose of evicting members of the Kikuyu, Kisii, and Kamba communities in particular because they were perceived as PNU supporters. Mr. Ruto hosted a series of meetings, some at his house in Sugoi, where other high-ranking members of the organisation, including politicians, businessmen and former police and military officials, were present.

<sup>481</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 350. Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/06-803-tEN, para. 343. Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/07-717, para. 522. ICTY, *The Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, paras 470-477.

<sup>482</sup> Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/06-803-tEN, para. 344.

<sup>483</sup> Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/06-803-tEN, para. 344; Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/07-717, para. 523.

<sup>484</sup> Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/06-803-tEN, para. 345; Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/07-717, para. 523.

<sup>485</sup> Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/06-803-tEN, para. 345; Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/07-717, para. 523.

303. As demonstrated in greater detail under paragraphs 187-196 of the present decision, over the course of these meetings, Mr. Ruto, together with other key members of the organisation, agreed upon several aspects which were crucial for the development and implementation of the criminal plan. These aspects include:

(a) The appointment of commanders and divisional commanders responsible for the operations on the field;<sup>486</sup>

(b) The production of maps marking out the areas most densely inhabited by communities perceived to be or actually siding with the PNU as well as the identification of houses and business premises owned by PNU supporters with a view toward targeting them.<sup>487</sup> In this regard, Witness 8 stated that Mr. Ruto distributed maps which mark the locations where PNU supporters reside.<sup>488</sup> Moreover, Witness 6 confirms that in the Kabongwa meeting in December 2007, two members of the organisation, including one divisional commander, were requested to provide an update on the identification of Kikuyu and Kisii houses in Kapsabet and Nandi Hills towns.<sup>489</sup> This approach of identifying houses belonging to the PNU supporters to be targeted has also been confirmed by other witnesses such as Witness 5 and a non-ICC Witness;<sup>490</sup>

<sup>486</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0796, 0800-0804. Statement of Witness 2, KEN-OTP-0055-0163 at 0166-0169; KEN-OTP-0053-0256 at 0263. Statement of Witness 6, KEN-OTP-0044-0003 at 0022-0023, 0027; KEN-OTP-052-0349 at 0383-0390 (for division of the area between the three commanders); KEN-OTP-0051-0993 at 1012-1013. Statement of Witness 8, KEN-OTP-0052-0526 at 0556-0558.

<sup>487</sup> Maps and sketches provided by Witness 6, KEN-OTP-0044-0039, KEN-OTP-0044-0038. Statement of Witness 1, KEN-OTP-0028-0915 at 0922, 0931-0936, 0944-0946; KEN-OTP-0028-1358 at 1397; KEN-OTP-0057-0234 at 0246; KEN-OTP-0057-0250 at 0255-0257. Statement of Witness 2, KEN-OTP-0053-0256 at 0266; KEN-OTP-0055-0083 at 0089; Statement of Witness 4, KEN-OTP-0031-0085 at 0098, 0101. Statement of Witness 5, KEN-OTP-0037-0039 at 0055. Statement of Witness 6, KEN-OTP-0051-0256, at 0275-0278; KEN-OTP-0051-0405, at 0415, 0421 to 0424, 0528; KEN-OTP-0051-0524 at 0528-0529 and 0578 to 0581. Summary of a Statement of a Non-ICC witness, KEN-OTP-0051-0724.

<sup>488</sup> Statement of Witness 8, KEN-OTP-0052-0526 at 0562-0564.

<sup>489</sup> Statement of Witness 6, KEN-OTP-0051-0256, at 0275 to 0278.

<sup>490</sup> Statement of Witness 5, KEN-OTP-0037-0039 at 0055. Summary of statement of non-ICC Witness, KEN-OTP-0051-0724.

(c) The purchase of weapons as well as material to produce crude weapons and their storage before the attack, which is clear from the findings made earlier by the Chamber;<sup>491</sup>

(d) The transportation of the perpetrators to and from the target locations. According to Witness 8, Mr. Ruto expressed that two companies belonging to two members of the organisation would provide the means for transportation.<sup>492</sup> Regarding the implementation phase of the common plan, the same witness avers that he saw a tractor pulling a trailer carrying between 40 and 60 youths armed with arrows and machetes, material which was used to kill people.<sup>493</sup> In addition, the Chamber notes that Witness 4 gathered with more than 2000 physical perpetrators in the outskirts of Eldoret town before the attack and reports that one Kalenjin elder indicated that “there would be some vehicles to transport people”;<sup>494</sup> and

(e) 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 targeted communities as well as to destroy their properties.<sup>495</sup> This information is corroborated by a statement made by Witness 2 who said that Mr. Ruto promised that perpetrators would get “fifty thousand Kenyan shillings for killing a Kikuyu” as well as “a piece of land”.<sup>496</sup> Although Witness 8 states that “this money [...] promised was never given”,<sup>497</sup> he equally asserts that people felt

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<sup>491</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0806 to 0808. Statement of Witness 2, KEN-OTP-0029-0131 at 0141, 0143 to 0144; KEN-OTP-0053-0256 at 0267; Statement of Witness 6, KEN-OTP-0044-0003 at 0015 to 0016, 0025; KEN-OTP-0051-0135 at 0193, 0195; KEN-OTP-0051-0207 at 0219 to 0220, 0227; KEN-OTP-0051-0256 at 0271.

<sup>492</sup> Statement of Witness 8, KEN-OTP-0052-0571 at 0589 to 0590.

<sup>493</sup> Statement of Witness 8, KEN-OTP-0052-1007 at 1023-1025.

<sup>494</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0100. See also the hearsay evidence from Witness 5, who was told that lorries were provided to ferry Kalenjin youths to the target locations (Statement of Witness 5, KEN-OTP-0037-0039 at 0055)

<sup>495</sup> Statement of Witness 1, KEN-OTP-0028-0845 at 0905. Statement of Witness 2, KEN-OTP-0055-0111 at 0116-0117; KEN-OTP-0029-0131 at 0141; KEN-OTP-0053-0256 at 0267. Statement of Witness 4, KEN-OTP-0031-0085 at 0093; KEN-OTP-0031-0085 at 0100. Statement of Witness 6, KEN-OTP-0051-0405 at 0417. Statement of Witness 8, KEN-OTP-0052-0850 at 0855.

<sup>496</sup> Statement of Witness 2, KEN-OTP-0055-0111 at 0116-0117.

<sup>497</sup> Statement of Witness 8, KEN-OTP-0052-0904 at 0917.

motivated to kill because of the promised reward.<sup>498</sup> Therefore, it is irrelevant if the money has actually been paid, since the pecuniary promise served its purpose of motivating the direct perpetrators to commit the crimes.

304. Thus, the Chamber is satisfied that the first objective element of indirect co-perpetration, the existence of a common plan, has been met.

b) The suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime

305. The second objective element for indirect co-perpetration is that the suspect and the other co-perpetrators must carry out coordinated essential contributions that result in the satisfaction of the material elements of the crime.<sup>499</sup>

306. The Chamber recalls that, according to the jurisprudence of the Court, where the persons commit the crimes through others, their essential contribution may consist of activating the mechanisms which lead to automatic compliance with their orders and, thus, the commission of the crimes.<sup>500</sup> Moreover, the Statute does not require that the essential character of a task be linked to its performance at the execution stage.<sup>501</sup> In this regard, the Chamber concurs with the finding reached in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* where Pre-Trial Chamber I stated:

Designing the attack, supplying weapons and ammunitions, coordinating and moving the activities of the direct perpetrators may constitute contributions that must be considered essential regardless of when they are exercised (before or during the execution stage of the crime).<sup>502</sup>

307. The Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that Mr. Ruto, in his capacity as the top of the hierarchal structure of the organisation, together with other high-ranking members

<sup>498</sup> Statement of Witness 8, KEN-OTP-0052-0850 at 0857 and KEN-OTP-0052-0904 at 0917.

<sup>499</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 350. Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/06-803-tEN, para. 346. Pre-Trial Chamber I, Confirmation of Charges Decision, ICC-01/04-01/07-717, para. 524.

<sup>500</sup> Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 525.

<sup>501</sup> Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 526.

<sup>502</sup> Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 526.

of the Network, provided essential contributions to the implementation of the common plan to commit the crimes against humanity referred to in section VII above and in the locations specified therein, namely, Turbo town, the greater Eldoret area, Kapsabet town, and Nandi Hills town.

308. The Chamber also considers that there is sufficient evidence to establish substantial grounds to believe that, in the absence of Mr. Ruto's essential contribution, which included activating the mechanisms leading to almost automatic compliance with his orders,<sup>503</sup> the common plan to commit said crimes would have been frustrated. The Chamber arrives at this conclusion based on the central role played by Mr. Ruto in organizing, coordinating and planning the attack directed against a particular part of the civilian population, namely perceived PNU supporters.

309. According to the evidence available, there are substantial grounds to believe that Mr. Ruto created the Network or the organisation for the purpose of 'evicting' the PNU supporters. Mr. Ruto also supervised the overall planning and was responsible for the implementation of the common plan to carry out crimes committed in the entire Rift Valley. This role can be clearly detected throughout the series of meetings carried out between 30 December 2006 and 22 December 2007 as well as during the post-election violence period. With respect to the latter, Witness 4 said that on the morning following the announcement of the electoral results, one Kalenjin leader received a message from Mr. Ruto saying that the "votes had been rigged" and that the Kikuyu should be attacked.<sup>504</sup> According to the witness, the "discussion" was to attack Turbo town. Witness 5 also reports that Mr. Ruto continued funding the organisation during the attack by sending 200.000 Kenyan Shillings to one of the field coordinators.<sup>505</sup>

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<sup>503</sup> See sub-sections c(1) and (2).

<sup>504</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0096-0097. See also Statement of Witness 1, KEN-OTP-0028-0845 at 0851-0854; KEN-OTP-0028-0915 at 0922.

<sup>505</sup> Statement of Witness 5, KEN-OTP-0037-0039 at 0054.



310. Moreover, throughout the period between 30 December 2006 and the post-election violence, Mr. Ruto negotiated and supervised the purchase of guns and crude weapons to implement the criminal plan.<sup>506</sup> He also gave instructions to the perpetrators as to who they had to kill and displace and whose property they had to destroy.<sup>507</sup>

311. Mr. Ruto also established a rewarding mechanism with fixed amounts of money to be paid to the perpetrators upon successful murder of PNU supporters or destruction of their properties. The Chamber has presented the information and evidence that support these facts in more detail in paragraphs 187-196 of the present decision.

312. Therefore, the Chamber is satisfied that the second objective element of indirect co-perpetration has been met.

c) The suspect must have control over the organisation – the organisation must consist of an organised and hierarchal apparatus of power – the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect

313. The Chamber notes that the last three objective elements for the satisfaction of indirect co-perpetration are that: (i) the suspect must have control over the organisation; (ii) the organisation must consist of an organised and hierarchal apparatus of power; and finally (iii) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect.<sup>508</sup> With respect to these elements, the Chamber shall address them collectively given the nature of the facts of this case and the interrelation between these elements.

314. The Chamber considers that for the purpose of satisfying these elements the evidence available must demonstrate, to the threshold required under article 61(7) of

<sup>506</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0805-0808. Statement of Witness 2, KEN-OTP-0029-0131 at 0141, 0143. Statement of Witness 6, KEN-OTP-0044-0003 at 0025; KEN-OTP-0051-0135 at 0193; KEN-OTP-0051-0207 at 0226, 0227; KEN-OTP-0051-0349 at 0395-0396.

<sup>507</sup> Statement of Witness 1, KEN-OTP-0028-0845 at 0904 to 0905; KEN-OTP-0028-1358 at 1390, 1401. Statement of Witness 8, KEN-OTP-0052-0946 at 0969 to 0970.

<sup>508</sup> Pre-Trial Chamber I, *Katanga* decision, ICC-01/04-01/07-717, paras 510-518.

the Statute, that Mr. Ruto had control over the organisation, which should consist of an organised and hierarchal apparatus of power. Moreover, the evidence must show substantial grounds to believe that Mr. Ruto's orders to commit the crimes were secured by almost automatic compliance.

315. In this regard, the Chamber recalls its previous finding under section VI whereby it established that the Network of perpetrators constituted an organisation within the meaning of article 7(2)(a) of the Statute. The Chamber also recalls by way of reference to paragraph 197 of the present decision that said organisation featured a hierarchal structure and apparatus of power.

316. The Chamber, having examined the evidence as a whole, finds that there is sufficient evidence to establish substantial grounds to believe that Mr. Ruto, by virtue of his position at the top of the Network and the dominant role he played, had control over the organisation and his orders to carry out the crimes committed in the different locations specified in section VII above were secured by almost automatic compliance.

317. In particular, the Chamber finds substantial grounds to believe that Mr. Ruto exercised his control over the organisation in a manner that assured that his orders were carried out by almost automatic compliance by way of at least a two-fold strategy: (1) a payment mechanism; and (2) a punishment mechanism.

318. In this context, the Chamber recalls that, during the confirmation of charges hearing, the Defence of Mr. Ruto challenged the existence of any control by the suspect over the organisation on the basis of the fact that Mr. Ruto disseminated peace messages during the violence, but that these did not stop the violence. Thus, according to the Defence, this means that Mr. Ruto had no control over the organisation.

319. The Chamber disagrees with the logic underlying the Defence's argument. The fact that Mr. Ruto may have disseminated peace messages does not obliterate the

evidence supporting the Prosecutor's allegation that Mr. Ruto planned, coordinated and supervised the implementation of the plan to commit the acts of violence. The issue at stake is a question of the availability and quality of evidence that supports one interpretation of the events against the other. Based on the evidence available, the Chamber is convinced to the degree of substantial grounds to believe that Mr. Ruto played a major role in the development, coordination and implementation of the plan to attack PNU supporters, and thus, the Defence's argument is without merit.

(1) Payment mechanism:

320. The Chamber found above, on the basis of the evidence available, that Mr. Ruto established a scheme of payment to the members of the organisation including the physical perpetrators who committed the crimes against humanity. Such scheme involved two different categories of payment. The first was a stipend or a sort of a salary to be paid to the members of the organisation (for the purpose of motivation),<sup>509</sup> while the second was a sort of a reward to be given upon the successful killing of any PNU supporter and the destruction of his/her property.<sup>510</sup>

321. As to the stipend, the evidence indicates that Mr. Ruto regularly paid members of the organisation. He either paid them himself during the preparatory meetings as explained earlier in paragraph 193 of the present decision, or through his coordinators on the ground during the implementation phase of the plan.<sup>511</sup> In particular, according to Witness 8, Mr. Ruto paid a sum of money to members of the organisation.<sup>512</sup> This sum varied depending on whether the person was a former soldier or not. Those who were ex-soldiers were paid a higher amount than those

<sup>509</sup> Statement of Witness 6, KEN-OTP-0051-0405 at 0417-0418.

<sup>510</sup> See Section VI (C)(i) of the Decision.

<sup>511</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0141. Statement of Witness 4, KEN-OTP-0031-0085 at 0100.

<sup>512</sup> Statement of Witness 8, KEN-OTP-0052-0850 at 0851-0853.

who were not. Witness 2, who was part of the same meeting on 14 December 2007, also confirms the information about the payment of said salary.<sup>513</sup>

322. Moreover, money provided by Mr. Ruto was also distributed through his coordinators. According to Witness 2, Mr. Ruto provided one of his coordinators with a sum of money to pass on to another coordinator on the ground for the purpose of securing food and transportation for the physical perpetrators.<sup>514</sup> With regard to the issues of food and transportation, the Chamber recalls that Witness 5 provides evidence that, during the commission of the crimes, perpetrators were provided with food, drinks and transportation.<sup>515</sup> The issue of regular payment is also confirmed by Witness 4 who said that he received a message from Mr. Ruto *via* one of the coordinators encouraging them to fight for their community and that the coordinator had a “bundle of notes”, meaning money to distribute to the physical perpetrators, which came directly from Mr. Ruto.<sup>516</sup>

323. With respect to the rewarding practice, Witness 2 states that Mr. Ruto established a reward practice for those who participated in the killing of Kikuyus. According to the witness, “to kill a Kikuyu was rewarded with 50000 shillings”; these perpetrators would also “acquire a piece of land”.<sup>517</sup>

(2) Punishment mechanism

324. The Chamber also finds, on the basis of the evidence, that in addition to the reward practice, Mr. Ruto created a punishment mechanism in situations of non-compliance. Witness 2 stated that “during the war, people were forced to fight [...]. Anyone who did not want to participate was considered a traitor and was to be killed”.<sup>518</sup> When receiving money from Mr. Ruto at the close of the 14 December 2007 meeting, the same witness confirms that “there was no way to refuse the money”.

<sup>513</sup> Statement of Witness 2, KEN-OTP-0053-0256 at 0267.

<sup>514</sup> Statement of Witness 2, KEN-OTP-0055-0062 at 0064-0069.

<sup>515</sup> Statement of Witness 5, KEN-OTP-0037-0039 at 0055.

<sup>516</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0100.

<sup>517</sup> Statement of Witness 2, KEN-OTP-0055-0111 at 0116; KEN-OTP-0053-0256 at 0265 (providing a list of people who acquired land through their participation in the violence).

<sup>518</sup> Statement of Witness 2, KEN-OTP-0053-0256 at 0270.

Witness 2 stresses that “[i]f [he] had rejected the money, it could have been seen suspicious and [he would have] been seen as a spy [...]”.<sup>519</sup>

325. Moreover, in the context of the attack on Turbo Town on 31 December 2007, Witness 4 “was told that everyman had to go to Turbo.” He felt this was “compulsory” and he would have “been beaten” if he refused to go.<sup>520</sup> Said witness learned of a boy who was beaten for refusing to participate in the attack on Turbo town.<sup>521</sup> Additionally, he said that the coordinator who was leading the group in this area “had authority to order everything [...] even order a person to be killed if he thought that person was not in support”.<sup>522</sup> In this respect, the Chamber draws the attention to the testimony of Witness 8 who states that one man was killed because he was voting for PNU instead of the Kalenjin-backed ODM.<sup>523</sup>

326. Furthermore, Witness 2 reports an alternative method of sanctioning those who did not comply and did not join the violence against the PNU supporters. According to the said witness, when the violence started on 30 December 2007, those who refused to join were punished by being obligated to “donate something to help feed [...] the youths participating in the looting”.<sup>524</sup> Additionally, Witness 4 reports that at least one person was spared from beatings by giving a bull as appeasement.<sup>525</sup>

327. The Chamber finds, moreover, that the twofold mechanism established was strengthened by an additional element, namely Mr. Ruto’s position within the organisation and the dominant role he played during the preparatory and implementation phases of the plan.

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<sup>519</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0141.

<sup>520</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0097.

<sup>521</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0097.

<sup>522</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0098.

<sup>523</sup> Statement of Witness 8, KEN-OTP-0052-0880 at 0883.

<sup>524</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0148.

<sup>525</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0097. Witness 8 recounts a similar case, where people who voted for the PNU had to “give a cow for the youth to slaughter when they were going to war”, Statement of Witness 8, KEN-OTP-0052-0880 at 0883.

328. In particular, based on the evidence, and as explained in greater detail in paragraph 197 above, Mr. Ruto was in charge of appointing commanders and divisional commanders and assigning them to specific areas and locations respectively. Mr. Ruto also had full control to decide on where and how the weapons he distributed should be used.<sup>526</sup> Moreover, immediately before and during the implementation phase of the plan, Mr. Ruto's control over the organisation can be demonstrated by the orders he gave to the physical perpetrators *via* the coordinators on the ground. Witness 1 reports that during a meeting on 28 December 2007, it was mentioned that the attendees were waiting for instructions from "above", meaning Mr. Ruto.<sup>527</sup> Further, according to Witness 4, during the attack which took place on 31 December 2007 in Turbo town, Mr. Ruto had told one of his coordinators "to take charge of the attacks".<sup>528</sup> Again, Witness 1 reports that during the Kapsabet demonstration which took place on 3 January 2008, Mr. Ruto gave instructions to one of the divisional commanders to burn the PNU supporters.<sup>529</sup> These pieces of evidence reveal that Mr. Ruto was, in fact, in overall control of the organisation and that his orders were secured by almost automatic compliance.

329. Finally, the Chamber takes note of the challenge put forward by Mr. Sang's Defence team during the confirmation hearing, in which it argues that Mr. Ruto is neither "an elder of the Kalenjin community [nor their] leader"<sup>530</sup> and as such, cannot exercise control over it.

330. The Chamber does not concur with the Defence's logic on this point. The issue at stake is not whether Mr. Ruto was actually "the elder" in the Kalenjin community as the Defence witness testified. Rather, the issue is whether Mr. Ruto was

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<sup>526</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0143 (According to said witness, while Ruto was distributing the guns he said, "These are for Mount Elgon, these for South Rift, etc."; see also Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/07-717, para. 518 (noting this as one of the alternative factors on the basis of which the Chamber may determine the existence of automatic compliance).

<sup>527</sup> Statement of Witness 1, KEN-OTP-0028-0845 at 0903-0904; KEN-OTP-0028-1358 at 1390.

<sup>528</sup> Statement of Witness 4, KEN-OTP-0031-0085, at 0098.

<sup>529</sup> Statement of Witness 1, KEN-OTP-0028-1185 at 1232-1233.

<sup>530</sup> ICC-01/09-01/11-T-11-CONF-ENG ET, p. 25, lines 22-25 ; p. 26, lines 1-9, 22.



recognized among his community as such. In this regard, the Chamber observes that although Reverend Kosgei, during his questioning at the confirmation hearing, argued that Mr. Ruto was not “the elder among the elders of Kalenjin”,<sup>531</sup> the witness acknowledged that Mr. Ruto has been “honoured as an elder” and “as a leader in his time”.<sup>532</sup> The evidence available before the Chamber proves this leadership aspect at least in practice. Even if Mr. Ruto was not formally given the title of a leader of the Kalenjin community, according to several witness statements he was *de facto* their leader and to this extent he had control over members of this community.

331. For example, according to Witness 6, Mr. Ruto was accepted as President by the Kalenjin.<sup>533</sup> This information also finds support in the statement of Witness 1 who states that during the various meetings, Mr. Ruto was referred to as the leader, given that they took instructions from him as to how to proceed.<sup>534</sup> These statements are further corroborated by other pieces of evidence which reveal how he was chosen to be a leader of this community.<sup>535</sup>

332. Therefore, the Chamber is satisfied that there are substantial grounds to believe the remaining three objective elements of indirect co-perpetration have been met.

(ii) Subjective elements

333. The Chamber stresses that in order to hold a person criminally responsible for a crime within the jurisdiction of the Court, namely the crimes against humanity committed as outlined in section VII of the present decision, it is not enough to satisfy the objective elements of the crimes. The evidence must also show, to the required standard of proof set out in article 61(7) of the Statute, that there exists the necessary *mens rea*, generally referred to as the subjective elements. As stated earlier,

<sup>531</sup> ICC-01/09-01/11-T-11-CONF-ENG ET, p. 26, lines 2-3.

<sup>532</sup> ICC-01/09-01/11-T-11-CONF-ENG ET, p. 26, lines 1-2.

<sup>533</sup> Statement of Witness 6, KEN-OTP-0044-0003 at 0020-0021.

<sup>534</sup> Statement of Witness 1, KEN-OTP-0028-0845 at 905, 912. See also KEN-OTP-0028-0915 at 0924-0926, 0939; KEN-OTP-0028-1358 at 1390.

<sup>535</sup> KEN-OTP-0045-0020, at 0020; KEN-OTP-0045-0021 at 0021; KEN-OTP-0045-0023 at 0023.

attributing criminal responsibility to Mr. Ruto under article 25(3)(a) of the Statute for the crimes against humanity committed requires the fulfillment of the following subjective elements: (a) the suspect must satisfy the subjective elements of the crimes namely, (i) intent and knowledge as defined in article 30 of the Statute, unless otherwise provided in the Statute or the Elements of Crimes; and where applicable, (ii) specific intent, where certain crimes require that the suspect fulfils the subjective elements together with an additional one known as ulterior intent or *dolus specialis*; (b) the suspect must be aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (c) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).

334. In this respect, during the confirmation hearing and in Mr. Ruto's Final Written Observations, the Defence points to paragraphs 99 and 117 of the Amended DCC wherein the Prosecutor allegedly applied the concept of *dolus eventualis*, as a legal requirement to satisfy the subjective elements of the crimes, to the facts of this case.<sup>536</sup>

335. The Chamber takes note of the Defence's argument and recalls that in the Bemba Confirmation of Charges Decision, the Chamber explicitly stated:

[A]rticle 30(2) and (3) of the Statute embraces two degrees of *dolus*. *Dolus directus in the first degree* (direct intent) requires that the suspect knows that his or her acts or omissions will bring about the material elements of the crime and carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime. According to the *dolus directus in the first degree*, the volitional element is prevalent as the suspect purposefully wills or desires to attain the prohibited result. *Dolus directus in the second degree* does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions, i.e., the suspect "is aware that [...] [the consequence] will occur in the ordinary course of events" (article 30(2)(b) of the Statute). In this context, the volitional element decreases substantially and is overridden by the cognitive element, i.e. the awareness that his or her acts or omissions "will" cause the undesired proscribed consequence. With respect to *dolus eventualis* as the third form of *dolus*, recklessness or any lower form of culpability,

<sup>536</sup> ICC-01/09-01/11-T-6, p. 150-151, lines 11-25 and line 1; ICC-01/09-01/11-355, paras 34-36.

the Chamber is of the view that such concepts are not captured by article 30 of the Statute. This conclusion is supported by the express language of the phrase “will occur in the ordinary course of events”, which does not accommodate a lower standard than the one required by *dolus directus in the second degree* (oblique intention).<sup>537</sup>

336. Therefore, the Chamber’s findings regarding the subjective elements in the present case are based on this earlier interpretation of article 30 of the Statute. To the extent that the Amended DCC may appear to rely on *dolus eventualis* to establish individual criminal responsibility, such reliance is unfounded based on article 30.

337. After having reviewed the evidence as a whole, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that the subjective elements for indirect co-perpetration have been satisfied. The Chamber has reached this conclusion due to the reasons explained in the following paragraphs.

338. According to the evidence available, the Chamber finds substantial grounds to believe that Mr. Ruto fulfils the subjective elements of the crimes against humanity set out under counts 1, 3 and 5. The evidence reveals that during the planning meetings and thereafter during the phase of the implementation of the criminal plan, Mr. Ruto gave oral as well as written instructions *via* phone messages through the coordinators to the physical perpetrators to carry out acts of killings and displacement against the PNU supporters.

339. In particular, Witness 8 recollected that Mr. Ruto said at the first planning meeting that the agenda was “to plan the war” and sensitize people for the plan.<sup>538</sup> According to the same witness, in a meeting that took place on 15 April 2007 as well as in two subsequent meetings, Mr. Ruto and other members of the organisation said that they would “expel” or “evict” the Kikuyu, Kamba, and Kisii and Mr. Ruto took

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<sup>537</sup> Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, paras 358-360.

<sup>538</sup> Statement of Witness 8, KEN-OTP-0052-0571 at 0587.

an oath "to kill [these] tribes mercilessly".<sup>539</sup> The witness describes Mr. Ruto's commitment to eradicate the PNU supporters at any cost during an ODM rally in Kipkarren on 6 December 2007. Based on Witness 8's testimony, Mr. Ruto said that "in case Kibaki wins the election the youths should barricade the streets, destroy the property and kill the Kikuyus".<sup>540</sup> The witness also testified that in a meeting held at Mr. Ruto's house on 14 December 2007, Mr. Ruto made the crowd promise to kill the Kikuyu, Kamba, and Kisii.<sup>541</sup>

340. This information is supported by the testimony of Witness 2 who quotes Mr. Ruto during a ceremony saying that "Kikuyu must be evicted from the Rift Valley".<sup>542</sup> The witness said that Mr. Ruto made a statement in the tribal language, which means "[I]et us remove the Kikuyu from our land, the Rift Valley".<sup>543</sup> In the witness' comprehension, Mr. Ruto meant to get them out by using force which leads to death,<sup>544</sup> destroying their houses "by arson to prevent them from coming back".<sup>545</sup>

341. Witness 6 also confirms the plan for eviction by way of committing crimes, as he testified that in one of the meetings that took place in early December 2007, Mr. Ruto "envisaged the plan to remove the Kikuyu and Kisii" by two ways: first, by way of warning through leaflets that they should leave and second, if this did not work then removing them by force.<sup>546</sup> According to the witness, "force" meant killing, looting and burning their properties.<sup>547</sup> The witness added that he saw the distribution of the leaflets between 18 and 25 December 2007 in the newspapers and heard similar warnings on the radio.<sup>548</sup> Moreover, in a meeting which took place around mid-December at the house of one high-ranking member of the organisation,

<sup>539</sup> Statement of Witness 8, KEN-OTP-0052-0652 at 0677; KEN-OTP-0052-0821 at 0832; KEN-OTP-0052-0821 at 0846.

<sup>540</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0832

<sup>541</sup> Statement of Witness 8, KEN-OTP-0052-0821 at 0846

<sup>542</sup> Statement of Witness 2, KEN-OTP-0029-0131, at 0137, 0140.

<sup>543</sup> Statement of Witness 2, KEN-OTP-0053-0256, at 0258.

<sup>544</sup> Statement of Witness 2, KEN-OTP-0053-0256, at 0259.

<sup>545</sup> Statement of Witness 2, KEN-OTP-0053-0256, at 0259.

<sup>546</sup> Statement of Witness 6, KEN-OTP-0044-0003, at 0022.

<sup>547</sup> Statement of Witness 6, KEN-OTP-0044-0003, at 0022.

<sup>548</sup> Statement of Witness 6, KEN-OTP- 0051-0135 at 0177-0182.

Witness 6 quoted Mr. Ruto saying that “he was [...] ready for war and [...] [he] ha[d] already distributed these weapons to some people”.<sup>549</sup> Witness 2’s statement also confirms, in principle, the accuracy of this information. According to said witness, on 14 December 2007, Mr. Ruto told the “young people [...] to be on standby, and that they would be told later when to implement the plan to evict the Kikuyu”.<sup>550</sup> Mr. Ruto also said that “these people [Kikuyus] because they do not vote for us the only thing is to kill them [...],” the same witness added.<sup>551</sup>

342. Witness 6 also refers to a subsequent meeting, again around mid-December 2007, whereby Mr. Ruto said that he “had already managed to get some guns, and, for the most part, bows and arrows [would] be used to carry out the plan”.<sup>552</sup> Witness 4 also confirms this information when he refers to a public rally convened by Mr. Ruto at Besiebor Trading Centre on 16 December 2007, in which he told local leaders to “evict all the Kikuyus living in Eldoret North Constituency because they were campaigning against him and the ODM party [...] [and that] he had already bought arms to fight the Kikuyu as well as the Kibaki administration”.<sup>553</sup>

343. Moreover, in a demonstration which took place subsequently on 3 January 2008 in Kapsabet, Witness 1 said that Mr. Ruto gave instructions, transmitted through the divisional commander for Kapsabet town, to burn the PNU supporters.<sup>554</sup>

344. Furthermore, the evidence available reveals that the common plan of Mr. Ruto and other members of the organisation was to “evict” the PNU supporters in the entire Rift Valley, including Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills town. This can be demonstrated by several pieces of evidence as presented in the next paragraph.

<sup>549</sup> Statement of Witness 6, KEN-OTP-0051-0207 at 0226.

<sup>550</sup> Statement of Witness 2, KEN-OTP-0053-0256, at 0264.

<sup>551</sup> Statement of Witness 2, KEN-OTP-0055-0211, at 0215.

<sup>552</sup> Statement of Witness 6, KEN-OTP-0051-0349 at 0368-0369.

<sup>553</sup> Statement of Witness 4, KEN-OTP-0031-0085, at 0090-0091.

<sup>554</sup> Statement of Witness 1, KEN-OTP-0028-1185 at 1232-1233.

345. Witness 8 confirms that Mr. Ruto distributed during the 30 December 2006 meeting maps marking locations densely inhabited by members of Kikuyu, Kamba and Kisii communities. According to the witness, the locations included, *inter alia*, Kiambaa (which is located within Eldoret town), Kapsabet, Turbo and Nandi Hills towns.<sup>555</sup> As already determined by the Chamber in section VI, these locations were subjected to the attack, which took place between 30 December 2007 and 16 January 2008. Moreover, as previously determined by the Chamber on the basis of information provided by Witnesses 1, 2, 6 and 8, Mr. Ruto appointed divisional commanders or coordinators tasked with the implementation and coordination of the attack on the ground in the four locations.<sup>556</sup>

346. In light of the foregoing facts, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Mr. Ruto was aware that the crimes against humanity committed in the different locations discussed in sections VI and VII were part of a widespread and systematic attack directed against the civilian population, namely the perceived PNU supporters.

347. With respect to the remaining subjective elements of the crimes charged under counts 1, 3, and 5, based on the facts and evidence presented above, the Chamber finds that there are substantial grounds to believe that, as a primary goal of the common plan, Mr. Ruto intended to attack particular parts of the civilian population, due to their perceived political affiliation, by way of murdering, forcibly displacing and persecuting the PNU supporters in the different locations specified in the section VII (*dolus directus* in the first degree). Thus, there are substantial grounds to believe that the required *mens rea* has been met, including the discriminatory intent required for the crime against humanity of persecution.

<sup>555</sup> Statement of Witness 8, KEN-OTP-0052-0571 at 0581-0585

<sup>556</sup> Statement of Witness 1, KEN-OTP-0028-0776 at 0796, 0800 to 0804. Statement of Witness 2, KEN-OTP-0053-0256 at 0263; KEN-OTP-0055-0163 at 0166-0169. Statement of Witness 6, KEN-OTP-0044-0003 at 0022-0023, 0027; KEN-OTP-052-0349 at 0383-0390 (for the division of the area between the three commanders). Statement of Witness 8, KEN-OTP-0052-0526 at 0556-0558.



348. Having established the subjective elements for crimes against humanity, the Chamber turns to the two additional elements concerning indirect co-perpetration laid out in paragraph 292. Regarding the first element concerning the suspect's awareness and acceptance that implementing the common plan would result in the realization or fulfillment of the material elements of the crimes, the Chamber does not find it necessary to discuss it in view of its previous findings on the subjective elements of the crimes. As the Chamber has already determined, Mr. Ruto intended to implement the common plan which involved as its primary goal the commission of the crimes referred to above to the effect that he meant to engage in the conduct and cause the consequence (*dolus directus in the first degree*). The Chamber's above findings deem it also evident that the second additional element of indirect co-perpetration has been met. In other words, Mr. Ruto by virtue of his status in the organisation and the dominant role described in the previous paragraphs, was aware that his role was essential to the implementation of the common plan, and aware that due to the essential nature of his tasks, he could have frustrated its implementation by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes.

349. For these reasons, the Chamber finds sufficient evidence to establish substantial grounds to believe that:

- a. On 31 December 2007 Mr. Ruto jointly with other members of the organisation committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, pursuant to articles 7(1)(a), (d) and (h) of the Statute;
- b. Between 1 January 2008 and 4 January 2008 Mr. Ruto jointly with other members of the organisation committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and

persecution in the greater Eldoret area, pursuant to articles 7(1)(a), (d) and (h) of the Statute;

c. Between 30 December 2007 and 16 January 2008 Mr. Ruto jointly with other members of the organisation committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Kapsabet town, pursuant to article 7(1)(a), (d) and (h) of the Statute;

d. Between 30 December 2007 and 2 January 2008 Mr. Ruto jointly with other members of the organisation committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Nandi Hills town, pursuant to articles 7(1)(a), (d) and (h) of the Statute.

### **C. *Criminal responsibility of Mr. Sang***

350. With respect to the criminal responsibility of Mr. Sang, the Prosecutor charged him in the Amended DCC under article 25(3)(d) of the Statute for the crimes against humanity of murder, deportation or forcible transfer of population and persecution as specified in counts 2, 4 and 6.

351. Article 25(3)(d) of the Statute sets out specific requirements that must be met in order to trigger the responsibility of Mr. Sang under this mode of liability. Thus, the Chamber must ascertain in light of the required evidentiary threshold that: (i) a crime within the jurisdiction of the Court was attempted or committed; (ii) a group of persons acting with a common purpose attempted to commit or committed this crime; (iii) the individual contributed to the crime, in any way other than those set out in article 25(3)(a) to (c) of the Statute (objective elements); (iv) the said contribution was intentional; and (v) was made either (a) with the aim of

furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime (subjective elements).

352. First, the Chamber recalls its earlier findings that there are substantial grounds to believe that crimes within the jurisdiction of the Court were committed, namely the crimes against humanity committed in the different locations specified above. Second, the Chamber has also found in paragraphs 302-304 of the present decision that there are substantial grounds to believe that these crimes were committed pursuant to a common plan by Mr. Ruto and others as members of a group of persons belonging to the organisation established. In this respect, the Chamber wishes to clarify that, based on the factual circumstances of the present case, the intention of Mr. Ruto as a member of the group is in itself a sufficient indication of the intention of the group as a whole.<sup>557</sup> This is due to the major role played by Mr. Ruto in creating the group, leading the group, and organising its criminal activities.

353. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Mr. Sang intentionally contributed to the commission of the crimes and his contribution was made with the aim of furthering the criminal activity and criminal purpose of the group led by Mr. Ruto. In this respect, the Chamber recalls that in Mr. Sang's Final Written Observations, the Defence argues that the language of article 25(3)(d) of the Statute is ambiguous, and as such, must be "strictly construed" to the effect that "a contribution [under this provision] [...] must be substantial".<sup>558</sup>

354. The Chamber disagrees with the Defence's logic regarding this point. Article 25(3)(d) of the Statute begins with the phrase "[i]n any other way contributes to the commission or attempted commission of the crime". Thus, the provision must be understood as a residual mode of accessorial liability, which is triggered only when subparagraphs (a)-(c) are not satisfied. This particular interpretation has also

<sup>557</sup> See in this regard, Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/10-465-Red, para. 278 (noting that "article 25(3)(d) of the Statute is aimed at combating group criminality").

<sup>558</sup> ICC-01/09-01/11-354, pp. 23-24, 26.

been followed by Pre-Trial Chamber I in its latest decision under article 61(7) of the Statute in the case of the *Prosecutor v. Callixte Mbarushimana*.<sup>559</sup> In practice, this means that the provision is a catch all form of liability, which applies when the suspect contributes to the commission or attempted commission of the crime “in any other way”. As one commentator correctly puts it, “[s]ubparagraph (d) establishes [...] the lowest objective threshold for participation according to article 25 since it criminalizes ‘any other way’ that contributes to a crime”.<sup>560</sup> Even assuming, *arguendo*, that the contribution under subparagraph (c), for the mode of participation of aiding and abetting, should be “substantial”,<sup>561</sup> this does not mean that the required contribution under subparagraph (d) must be equally “substantial”. If both subparagraph (c) and (d) required a “substantial” contribution, the hierarchal structure of the different modes of participation envisaged by article 25(3) would be rendered meaningless. As a result, the contribution under subparagraph (d) is satisfied by a less than “substantial” contribution, as far as such contribution results in the commission of the crimes charged. It follows that the Defence’s challenge on this point is without merit.

355. Turning to the facts, the Chamber considers that the evidence available provides substantial grounds to believe that Mr. Sang, by virtue of his position within Kass FM as a key broadcaster, intentionally contributed to the commission of the crimes against humanity referred to above by: (i) placing his show *Lee Nee Emet* at the disposal of the organisation; (ii) advertising the meetings of the organisation; (iii) fanning the violence through the spread of hate messages explicitly revealing desire to expel the Kikuyus; (iv) broadcasting false news regarding alleged murders of Kalenjin people in order to inflame the atmosphere in the days preceding the elections; and (v) broadcasting instructions during the attacks in order to direct the physical perpetrators to the areas designated as targets.

<sup>559</sup> See the detailed analysis of Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/10-465-Red, paras 278-279.

<sup>560</sup> Ambos, Triffterer, 2<sup>nd</sup> ed., p. 758.

<sup>561</sup> ICC-01/09-01/11-354, 68, 70.

356. In this context, the Defence of Mr. Sang disclosed written statements and other pieces of indirect evidence in an attempt to rebut the allegations that the suspect contributed to the commission of the crimes against humanity with which he is charged. These pieces of evidence purportedly demonstrate that Mr. Sang: (i) never incited violence through Kass FM, nor used any coded language; (ii) only disseminated peace messages during the period of the post-election violence; and (iii) respected the ban on live coverage imposed by the government, by broadcasting music or pre-recorded messages.<sup>562</sup>

357. Upon examination of the Defence's challenges and the evidence as a whole, the Chamber remains of the view that there are substantial grounds to believe that Mr. Sang intentionally contributed to the crimes against humanity referred to above. The Chamber's finding is supported by the testimonies of Witnesses 1, 2, 4, 6 and 8. Witness 8 states that between 3 November 2007 and 27 December 2007, Mr. Sang broadcasted false news regarding murders or more general offences allegedly committed against members of the Kalenjin community in order to instill fear within the Kalenjins and prepare them to fight the enemy communities.<sup>563</sup> Moreover, Witness 6 asserts that during one of the preparatory meetings held in December 2007 at Mr. Cheramboss' house, one high-ranking member of the organisation invited people to call Mr. Sang during his morning program on Kass FM in order to spread inciting messages.<sup>564</sup> Said witness named one person who was designated for this task.<sup>565</sup> This information is corroborated by the statement of Witness 8, who named

<sup>562</sup> See ICC-01/09-01/11-T-10-Red-ENG, p 55; KEN-D11-0005-0001 at 0001 to 0005; KEN-D11-0005-0008 at 0013 and 0014; KEN-D11-0005-0016 at 0016 to 0024; KEN-D11-0005-0031 at 0031 to 34; KEN-D11-0005-0045 at 0045 to 0046; KEN-D11-0005-0056 at 0063 to 0064; KEN-D11-0005-0065 at 0065 to 0070; KEN-D11-0005-0074 at 0074 to 0079; KEN-D11-0005-0080 at 0080 to 0081; KEN-D11-0005-0088 at 0094 to 0096; KEN-D11-0005-0108 at 0108 to 0109; KEN-D11-0005-0115 at 0115 to 0121; KEN-D11-0005-0125 at 0129 to 0130; KEN-D11-0005-0136 at 00136 to 0137; KEN-D11-0005-0144 at 0144 to 0145; KEN-D11-0005-0150 at 0156 to 0158; KEN-D11-0005-0160 at 0160 to 0163.

<sup>563</sup> Statement of Witness 8, KEN-OTP-0052-0729 at 0757 and ff.

<sup>564</sup> Statement of Witness 6, KEN-OTP-0051-0349 at 0372-0373; KEN-OTP-0051-0405 at 0443-0447; KEN-OTP-0051-1019 at 1020-1024.

<sup>565</sup> Statement of Witness 6, KEN-OTP-0051-0349 at 0372.

the same person as being instructed, among others, to call Mr. Sang at Kass FM.<sup>566</sup> According to Witness 1, close to the day of the election, Mr. Sang asserted through Kass FM that Kikuyus would “rig the election”.<sup>567</sup>

358. In the view of the Chamber, this information should be read in conjunction with other statements allegedly made by Mr. Sang immediately before the eruption of violence. As reported by Witnesses 1, 2, 6 and 8, Mr. Sang broadcasted inciting statements.<sup>568</sup> According to Witnesses 2 and 8, Mr. Sang said that “if Kibaki wins, we will carry out our work”<sup>569</sup> and “we will give the instructions”.<sup>570</sup> Witness 2 elaborates on the word “work” and explains that this term was used in the three months preceding the election instead of explicitly using the word “kill”.<sup>571</sup> Witness 2 further clarified that “to carry out the work” meant to make sure that Kikuyus “have been evicted [...] and] have been killed”.<sup>572</sup>

359. Witness 2 also reports that on 30 December 2007, as soon as the electoral results were announced, Sang said that “the elections had been stolen and our rights denied” and that people “should get their weapons from where they were [sic] kept and, if necessary, to use any arm at their disposal to evict the Kikuyus”.<sup>573</sup> This information is corroborated by the statement of Witness 4, who stated that, after the announcement of the newly elected President, Mr. Sang told Kass FM listeners that “they should resist the Kibaki administration because Kibaki had stolen the votes” and that “Kikuyu in Eldoret and Kapsabet had been attacked and rightly so

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<sup>566</sup> Statement of Witness 8, KEN-OTP-0052-0329 at 0333-0337. See also Statement of Witness 8, KEN-OTP-0052-1121 at 1134.

<sup>567</sup> Statement of Witness 1, KEN-OTP-0057-0100, at 0127.

<sup>568</sup> Statement of Witness 1, KEN-OTP-0057-0100 at 0104 and ff and 0127 and ff. Statement of Witness 6, KEN-OTP-0044-0003 at 0012-0013; KEN-OTP-0051-0405 at 0406 and ff, 0426-0427; KEN-OTP-0051-0524 at 0553, 0557.

<sup>569</sup> Statement of Witness 2, KEN-OTP-0053-0256 at 0269.

<sup>570</sup> Statement of Witness 8, KEN-OTP-0052-0880 at 0883.

<sup>571</sup> Statement of Witness 2, KEN-OTP-0055-0035 at 0043.

<sup>572</sup> Statement of Witness 2, KEN-OTP-0055-0035 at 0043.

<sup>573</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0146.



because the votes had been stolen”.<sup>574</sup> Witness 1 further provides that he heard Sang on air telling the Kalenjin to “why aren’t you going out to stop the Kikuyus?”.<sup>575</sup>

360. Furthermore, Witness 2 recalls a broadcast made by Mr. Sang on 31 December 2007, according to which Mr. Sang said: “[C]ome out, go to Turbo, you know their whereabouts in Turbo”. The witness pointed out that after listening to Mr. Sang’s words, he “had no choice [...] [he] had to go to Turbo. [...]. Those who came to Turbo came to kill the Kikuyu and destroy their houses. If we had not gone there, they would have turned on us”.<sup>576</sup> The Chamber also notes that according to the same witness, Mr. Sang’s statements through Kass FM had the effect that the physical perpetrators divided themselves into two groups “some going to Eldoret and others [...] to Turbo”.<sup>577</sup>

361. With regard to the evidence presented by Mr. Sang’s Defence, the Chamber observes that a large number of the witness statements presented appear to be drafted in a systematic manner. The Chamber notices that these statements use exactly the same wording or employ sophisticated legal terminology, which is not common for non-lawyers, reflecting the charges against Mr. Sang and/or denying that any broadcasting made by Mr. Sang “show[s] [...] liability for acts of omission or commission that would cause or perpetuate murder or deportations or transfer of population”.<sup>578</sup> Moreover, these statements were mostly collected during the same day, and many of these witnesses, when stating that Mr. Sang was broadcasting peace messages or was not otherwise inciting violence, do not provide a precise

<sup>574</sup> Statement of Witness 4, KEN-OTP-0031-0085 at 0104.

<sup>575</sup> Statement of Witness 1, KEN-OTP-0057-0100 at 0104.

<sup>576</sup> Statement of Witness 2, KEN-OTP-0053-0256 at 0271.

<sup>577</sup> Statement of Witness 2, KEN-OTP-0053-0256 at 0271.

<sup>578</sup> KEN-D11-0005-0088 at 0096. See also KEN-D11-0005-0001 at 0001 to 0005; KEN-D11-0005-0008 at 0013 and 0014; KEN-D11-0005-0031 at 0031 to 34; KEN-D11-0005-0016 at 0016 to 0024; KEN-D11-0005-0045 at 0045 to 0046; KEN-D11-0005-0065 at 0065 to 0070; KEN-D11-0005-0080 at 0080 to 0081; KEN-D11-0005-0085 at 0087; KEN-D11-0005-0088 at 0094 to 0096; KEN-D11-0005-0108 at 0108 to 0109; KEN-D11-0005-0115 at 0115 to 0121; KEN-D11-0005-0125 at 0129 to 0130; KEN-D11-0005-0150 at 0156 to 0158; KEN-D11-0005-0160 at 0160 to 0163.

temporal reference. Instead, these witnesses confined themselves to generic expressions such as “during the 2007/2008 [post-election violence]”.<sup>579</sup>

362. On the other hand, the Chamber notes that the witness statements presented by Mr. Sang’s Defence team are corroborated by other pieces of evidence showing the schedule of programmes and the transcripts of the peace messages aired on Kass FM during the days when the crimes were committed.<sup>580</sup> However, the list of programs which were allegedly on air is merely presented in a hand-written document listing, *inter alia*, that peace messages were broadcasted on 29 December 2007, without any sort of authentication.<sup>581</sup> The transcripts of these messages calling for the termination of violence were also provided, but they lack the date of effective broadcasting.<sup>582</sup>

363. In light of the foregoing, the Chamber is not convinced that the evidence disclosed by the Defence to rebut Mr. Sang’s contribution to the commission of the crimes against humanity charged can undermine the probative value of the evidence emanating from Witnesses 1, 2, 4, 6 and 8. The witness statements collected by the Defence, denying that Mr. Sang broadcasted any inciting messages and only disseminated peaceful appeals, do not rule out the possibility that, beside these peaceful messages, the instructions and speeches reported by Witnesses 1, 2, 4, 6 and 8 could have also been broadcasted, despite of the existence of the ban. This conclusion finds support in the witnesses’ detailed explanations regarding the content, nature and timing of Mr. Sang’s broadcasting during the period immediately preceding the election and in the course of the commission of the crimes. In this respect, the Chamber underlines that according to Witness 2, Mr. Sang’s programme

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<sup>579</sup> KEN-D11-0005-0001 at 0001 to 0005; KEN-D11-0005-0008 at 0013 and 0014; KEN-D11-0005-0031 at 0031 to 34; KEN-D11-0005-0045 at 0045 to 0046; KEN-D11-0005-0056 at 0063 to 0064; KEN-D11-0005-0065 at 0065 to 0070; KEN-D11-0005-0074 at 0074 to 0079; KEN-D11-0005-0080 at 0080 to 0081; KEN-D11-0005-0088 at 0094 to 0096; KEN-D11-0005-0108 at 0108 to 0109; KEN-D11-0005-0115 at 0115 to 0121; KEN-D11-0005-0125 at 0129 to 0130; KEN-D11-0005-0136 at 00136 to 0137; KEN-D11-0005-0144 at 0144 to 0145; KEN-D11-0005-0150 at 0156 to 0158; KEN-D11-0005-0160 at 0160 to 0163.

<sup>580</sup> KEN-D11-0006-0001 and KEN-D11-0006-0010, at 0011, 0014-0015.

<sup>581</sup> KEN-D11-0006-0001.

<sup>582</sup> KEN-D11-0006-0010, at 0011, 0014-0015.

on Kass FM was on air between 30 December 2007 and 1 January 2008.<sup>583</sup> Additionally, according to Witness 1, Mr. Sang was transmitting inciting messages through Kass FM at least between 30 December 2007 and mid January 2008.<sup>584</sup>

364. Having found that Mr. Sang's contribution was intentional, the Chamber next turns to the evidence concerning the aim of furthering the criminal activity or criminal purpose of the group, as required under article 25(3)(d)(i) of the Statute. The Chamber considers that, on the basis of the evidence available, Mr. Sang's contribution was also done with the aim of furthering the criminal activity and purpose of the group established by Mr. Ruto to commit the crimes against humanity referred to above. Mr. Sang participated in five preparatory meetings between 15 April 2007 and 14 December 2007. As already discussed in paragraphs 187-196, the evidence shows that during the course of these meetings, the different facets of the plan to attack the PNU supporters in Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills town were developed. The evidence examined in the previous paragraphs also supports the finding that Mr. Sang aimed at furthering not only the criminal purpose of the group but also its criminal activity.

365. In this regard, the Chamber recalls the challenges put forward by the Defence of Mr. Sang concerning the suspect's participation in these preparatory meetings. As the Chamber has already ruled on them, there is no further need to reopen the discussion.

366. Having said the above, the Chamber finds substantial grounds to believe that Mr. Sang is criminally responsible under article 25(3)(d)(i) of the Statute for the crimes against humanity committed in the different locations and dates specified under section VII above.

367. In conclusion, the Chamber is satisfied that there are substantial grounds to believe that:

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<sup>583</sup> Statement of Witness 2, KEN-OTP-0029-0131 at 0146.

<sup>584</sup> Statement of Witness 1, KEN-OTP-0028-1438 at 1478 and ff, 1510; KEN-OTP-0057-0100 at 0104, 0110, 0120, 0127.

- a. On 31 December 2007 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, pursuant to articles 7(1)(a), (d) and (h) of the Statute;
- b. Between 1 January 2008 and 4 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in the greater Eldoret area, pursuant to articles 7(1)(a), (d) and (h) of the Statute;
- c. Between 30 December 2007 and 16 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Kapsabet town, pursuant to articles 7(1)(a), (d) and (h) of the Statute;
- d. Between 30 December 2007 and 2 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Nandi Hills town, pursuant to articles 7(1)(a), (d) and (h) of the Statute.

**FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY**

- a) **REJECTS** the first part of the Defence challenge to the jurisdiction of the Court, in accordance with paragraph 34 of the present decision;
- b) **DISMISSES** *in limine* the second part of the Defence challenge to the jurisdiction of the Court, in accordance with paragraph 36 of the present decision;
- c) **DECIDES** that the Chamber has jurisdiction with respect to the present case;
- d) **DETERMINES** that the case is admissible;
- e) **CONFIRMS** the charges presented against Mr. Ruto under Counts 1, 3 and 5 of the Amended Document Containing the Charges, to the extent specified in paragraph 349 of the present Decision;
- f) **CONFIRMS** the charges presented against Mr. Sang under Counts 2, 4 and 6 of the Amended Document Containing the Charges, to the extent specified in paragraph 367 of the present Decision;
- g) **DECLINES** to confirm the charges presented against Mr. Kosgey under Counts 1, 3 and 5 of the Amended Document Containing the Charges;
- h) **DECIDES** to commit Mr. Ruto and Mr. Sang to a Trial Chamber for trial on the charges as confirmed.
- i) **DECIDES** that the conditions imposed on Mr. Ruto and Mr. Sang in the Decision on Summons to Appear remain in effect;
- j) **DECIDES** that the conditions imposed on Mr. Kosgey in the Decision on Summons to Appear cease to have effect.

Judge Hans-Peter Kaul appends a dissenting opinion.

Done in both English and French, the English version being authoritative.



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Judge Ekaterina Trendafilova  
Presiding Judge



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Judge Cuno Tarfusser  
Judge

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Judge Hans-Peter Kaul  
Judge

Dated this Monday, 23 January 2012

At The Hague, The Netherlands



## Dissenting Opinion by Judge Hans-Peter Kaul

### **I. Introduction**

1. Today, on the basis of the hearing held from 1 to 8 September 2011 and the disclosed evidence, the Majority of Pre-Trial Chamber II (the "Chamber") affirmed the Court's jurisdiction in the case of the *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, confirmed the charges against William Samoei Ruto ("Mr Ruto") and Joshua Arap Sang ("Mr Sang") and committed them for trial. The Chamber declined to confirm the charges against Henry Kiprono Kosgey ("Mr Kosgey").

2. I am unable to accept this decision of the Majority and the analysis that underpins it. I continue to believe that the International Criminal Court (the "ICC" or the "Court") lacks jurisdiction *ratione materiae* in the situation in the Republic of Kenya, including in the present case. Contrary to the Majority's findings, I am not satisfied that the crimes, for which Mr Ruto and Mr Sang are held accountable pursuant to articles 25(3)(a) and 25(3)(d) of the Rome Statute (the "Statute") respectively, occurred pursuant to or in furtherance of a policy of an *organization* within the meaning of article 7(2)(a) of the Statute. Thus, I am not satisfied that the crimes charged constitute crimes against humanity as set out in article 7 of the Statute.

3. Accordingly, having regard to article 19(1), first sentence, of the Statute, I shall first set out my own conclusion on jurisdiction *ratione materiae*, focusing on the notion of 'organization' which is the subject of my difference of opinion with the

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Majority (see sections II.1-II.3 below). I shall thereafter address the challenge to jurisdiction lodged by Mr Ruto and Mr Sang (see section II.4 below).<sup>1</sup>

4. Having sat in the confirmation of charges hearing (the "Hearing") notwithstanding my principled position on the lack of jurisdiction *ratione materiae* in the situation in the Republic of Kenya, including the present case, I wish to make further observations (see section III below) on certain issues which arose during the Hearing, namely the impact of the Prosecutor's respect for article 54(1)(a) of the Statute during his investigation on the proceedings conducted by the chambers of this Court, and the rights of the Defence during the Hearing pursuant to article 61(6) of the Statute.

## **II. The Issue of Jurisdiction *Ratione Materiae***

### *1. The Charges Presented by the Prosecutor*

5. I note that the Prosecutor presented the same case hypothesis and line of argument both in the amended document containing the charges<sup>2</sup> and at the Hearing as he did when requesting the Chamber to summon Mr Ruto, Mr Kosgey and Mr Sang in this case: he maintains his contention that crimes against humanity were committed from on or about 30 December 2007 through 31 January 2008 in Uasin Gishu and Nandi District, Rift Valley Province, pursuant to or in furtherance of an organizational policy adopted by the "Network" consisting of five components (formerly referred to by the Prosecutor as "branches"), namely (1) Political, (2) Media, (3) Financial, (4) Tribal; and (5)

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<sup>1</sup> ICC-01/09-01/11-305. Since the Majority declined to confirm all charges against Mr Kosgey, I do not deem it necessary to entertain Mr Kosgey's submission in that regard (ICC-01/09-01/11-306).

<sup>2</sup> ICC-01/09-01/11-261-AnxA.

Military.<sup>3</sup> He contends that Mr Ruto was the “head of the multi-faceted ‘Network’”,<sup>4</sup> and that Mr Ruto and Mr Kosgey, together with Mr Sang, “capitalized on existing structures and roles in Kalenjin society to create the Network”.<sup>5</sup> He maintains that the “Network” meets the statutory contextual legal requirement of an ‘organization’ within the meaning of article 7(2)(a) of the Statute. The “Network” perpetrators affiliated with the Orange Democratic Movement Party (the “ODM”) implemented the policy by attacking supporters of the Party of National Unity (the “PNU”) “with the criminal purpose of expelling PNU supporters from the Rift Valley by inflicting fear, killing them and systematically destroying their property, leaving them with no alternative but to flee”.<sup>6</sup>

6. As regards the five components of the “Network”, the Prosecutor further explains their function and submits that: (i) the political component “provided the Network with leadership, funding and a forum for [Mr] Ruto and [Mr] Kosgey to develop their plan and organize the Network’s subordinates and direct perpetrators”.<sup>7</sup> Other ODM-affiliated members of parliament participated in the planning and preparatory meetings;<sup>8</sup> (ii) “[t]he media component, including [Mr] Sang in his role as a broadcaster on Kass FM, furthered the Network’s organizational policy”<sup>9</sup> by broadcasting propaganda and information on preparatory meetings and attacks, and organizing fundraising events;<sup>10</sup> (iii) the financial component, consisting of, alongside Mr Ruto and Mr Kosgey, ODM

<sup>3</sup> ICC-01/09-01/11-261-AnxA, paras 25 and 43.

<sup>4</sup> ICC-01/09-01/11-261-AnxA, para. 43; ICC-01/09-01/11-T-6-RED-ENG WT, p. 10, lines 13-14.

<sup>5</sup> ICC-01/09-01/11-261-AnxA, para. 44.

<sup>6</sup> ICC-01/09-01/11-261-AnxA, paras 37 and 44.

<sup>7</sup> ICC-01/09-01/11-261-AnxA, para. 46.

<sup>8</sup> ICC-01/09-01/11-261-AnxA, para. 48.

<sup>9</sup> ICC-01/09-01/11-261-AnxA, para. 49.

<sup>10</sup> ICC-01/09-01/11-261-AnxA, paras 50-53; ICC-01/09-01/11-T-6-RED-ENG WT, p. 12, lines 19-23.

supporters, supporting organizations and businessmen, supplied the Network with funding;<sup>11</sup> (iv) the tribal component through tribal elders of the Kalenjin community, ensured respect and obedience from the youth by supporting, planning, coordinating and conducting “blessings” which contributed to the attacks;<sup>12</sup> and lastly, (v) the military component, headed by Mr Ruto, consisted of former members of the Kenyan military and police.<sup>13</sup> Three “Commanders” or “Generals”, who reported to Mr Ruto or Mr Kosgey,<sup>14</sup> “led hierarchical organizations (hierarchies) in their respective geographical areas”.<sup>15</sup> The military component “advised Mr Ruto on logistical issues, obtained weapons, identified financial resources, and mobilized direct perpetrators”.<sup>16</sup>

7. According to the Prosecutor, Mr Ruto, Mr Kosgey and Mr Sang, together with others, “held no less than nine preparatory meetings and events” in which the plan to attack PNU supporters was formulated.<sup>17</sup>

## 2. *The Applicable Law*

8. My fundamental disagreement with the Majority stems from the differing interpretation of the notion of ‘organization’ within the meaning of article 7(2)(a) of the Statute. It is worth recalling that under the Statute crimes alleged to be part of an attack against any civilian population must be committed pursuant to the policy of a State or ‘organization’. In my 31 March 2010 dissenting opinion on the

<sup>11</sup> ICC-01/09-01/11-261-AnxA, paras 53 and 54; ICC-01/09-01/11-T-6-RED-ENG WT, p. 13, lines 4-10, 12-14, 18-19; p. 14, lines 9-13.

<sup>12</sup> ICC-01/09-01/11-261-AnxA, para. 56; ICC-01/09-01/11-T-6-RED-ENG WT, p. 14, lines 21-25; p. 16, lines 19-20.

<sup>13</sup> ICC-01/09-01/11-261-AnxA, para. 57; ICC-01/09-01/11-T-6-RED-ENG WT, p. 17, lines 2-7.

<sup>14</sup> ICC-01/09-01/11-261-AnxA, para. 58.

<sup>15</sup> ICC-01/09-01/11-261-AnxA, para. 60.

<sup>16</sup> ICC-01/09-01/11-261-AnxA, para. 57.

<sup>17</sup> ICC-01/09-01/11-261-AnxA, paras 26 and 65.

Majority's "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" (the "31 March 2010 Dissenting Opinion") I set out in appropriate detail my understanding of the applicable law governing this constitutive contextual requirement.<sup>18</sup> The relevant parts of my interpretation of this specific statutory legal requirement are briefly rehearsed below:

51. I read the provision such that the juxtaposition of the notions 'State' and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities. These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.

52. In contrast, I believe that non-state actors which do not reach the level described above are not able to carry out a policy of this nature, such as groups of organized crime, a mob, groups of (armed) civilians or criminal gangs. They would generally fall outside the scope of article 7(2)(a) of the Statute. To give a concrete example, violence-prone groups of persons formed on an ad hoc basis, randomly, spontaneously, for a passing occasion, with fluctuating membership and without a structure and level to set up a policy are not within the ambit of the Statute, even if they engage in numerous serious and organized crimes. Further elements are needed for a private entity to reach the level of an 'organization' within the meaning of article 7 of the Statute. For it is not the cruelty or mass victimization that turns a crime into a *delictum iuris gentium* but the constitutive contextual elements in which the act is embedded.

53. In this respect, the general argument that any kind of non-state actors may be qualified as an 'organization' within the meaning of article 7(2)(a) of the Statute on the grounds that it "has the capability to perform acts which infringe on basic human values" without any further specification seems unconvincing to me. In

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<sup>18</sup> Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, pp. 84 *et seq.*

fact this approach may expand the concept of crimes against humanity to any infringement of human rights. I am convinced that a distinction must be upheld between human rights violations on the one side and international crimes on the other side, the latter forming the nucleus of the most heinous violations of human rights representing the most serious crimes of concern to the international community as a whole.<sup>19</sup>

9. In the 15 March 2011 “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang’” (the “15 March 2011 Dissenting Opinion”)<sup>20</sup> I also rehearsed this interpretation of the law, against which I assessed the facts of the case.

10. Hereinafter I shall assess the Prosecutor’s presentation of the facts in light of my interpretation of article 7(2)(a) of the Statute as set out above. In so doing, I am guided by the standard established by this Chamber when “satisfy[ing] itself that it has jurisdiction in any case brought before it” pursuant to article 19(1) of the Statute. I recall the Chamber’s interpretation of this provision to posit “that the Court must ‘attain the degree of certainty’ that the jurisdictional parameters set out in the Statute have been met”.<sup>21</sup> I will develop that standard further when considering the Defence challenge to jurisdiction.<sup>22</sup>

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<sup>19</sup> The footnotes in this excerpt are omitted.

<sup>20</sup> Pre-Trial Chamber II, ICC-01/09-01/11-2.

<sup>21</sup> See paragraph 25 of the Majority decision. See also Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 24; Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-1, para. 9.

<sup>22</sup> See para. 26 below.



### 3. Findings

11. As summarised above in paragraphs 5 to 7, the Prosecutor's presentation of the case in the amended document containing the charges is premised on the assumption that the "Network", consisting of five components, qualifies as an 'organization' within the meaning of article 7(2)(a) of the Statute.

12. Mindful of the Prosecutor's allegations and arguments, and having heard the Defence arguments and presentation of evidence during the Hearing, I remain unconvinced by the Prosecutor's allegation that the "Network" as a whole, qualifies as an 'organization' within the meaning of article 7(2)(a) of the Statute. At the Hearing no sufficiently compelling new argument, fact or piece of evidence was presented for me to reconsider my previous assessment of the facts in this case. This concerns in particular my finding as to the alleged existence of the various components of the "Network" which, according to my reading of the evidence, did either not exist in that form or are reflective of the tribal component of the "Network".<sup>23</sup> My conclusion therefore was that the violence during the 2007/2008 violence was in essence ethnically driven. That said, I reaffirm my previous finding that the "Network", as portrayed, is "essentially an amorphous alliance" of "coordinating members of a tribe with a predisposition towards violence with fluctuating membership"<sup>24</sup> which existed temporarily for

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<sup>23</sup> See for an elaborate analysis of the evidence, Pre-Trial Chamber II, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', ICC-01/09-01/11-2, paras 18-44.

<sup>24</sup> Pre-Trial Chamber II, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', ICC-01/09-01/11-2, para. 46.

a specific purpose.<sup>25</sup> The “Network”, characterized by the ethno-political affiliation of its members, emerged only in connection with the 2007/2008 post-election violence and, in my opinion, was “created *ad hoc* solely to assist, admittedly in an abhorrent way, the community’s aspiring and existing political leaders in gaining or maintaining political power in the Rift Valley on the occasion of the 2007 presidential elections”.<sup>26</sup> Nevertheless, I maintain my view that “members of a tribe [...] do not form a state-like ‘organisation’, unless they meet additional prerequisites. By the same token, those members of a tribe who instigated violence cannot alone constitute an ‘organisation’”.<sup>27</sup> Lastly, I maintain that the planning and coordination of violence in a series of meetings during the time period relevant to this case “does not transform an ethnically-based gathering of perpetrators into a State-like organization”.<sup>28</sup>

13. In conclusion, I am not satisfied to the ‘degree of certainty’ that the crimes were committed pursuant to the policy of a State-like ‘organisation’, which is an indispensable constitutive contextual element and inherent characteristic of crimes against humanity under article 7 of the Statute. Without the crimes alleged having been embedded in an “organizational policy”, I maintain that the

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<sup>25</sup> Pre-Trial Chamber II, “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang’”, ICC-01/09-01/11-2, para. 47.

<sup>26</sup> Pre-Trial Chamber II, “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang’”, ICC-01/09-01/11-2, para. 47.

<sup>27</sup> Pre-Trial Chamber II, “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang’”, ICC-01/09-01/11-2, para. 48.

<sup>28</sup> Pre-Trial Chamber II, “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang’”, ICC-01/09-01/11-2, para. 49.

Court has no jurisdiction *ratione materiae* over the situation in the Republic of Kenya, including in the present case.

#### 4. *The Challenge to Jurisdiction of the Court by the Defence*

14. I note that on 30 August 2011, the Defence for Mr Ruto and Mr Sang brought together a challenge to jurisdiction of the Court in this case under article 19(2)(a) of the Statute.<sup>29</sup> On the first day of the Hearing, the Chamber rendered an oral decision on the conduct of proceedings pursuant to rule 58(2) of the Rules of Procedure and Evidence and ordered the parties and victims to provide their written submissions within the prescribed time-limit.<sup>30</sup>

15. The Defence for Mr Ruto and Mr Sang (hereinafter also collectively “the Defence”) requests the Chamber to decline to exercise jurisdiction in respect of the case against Mr Ruto and Mr Sang as the Prosecutor

(...) has failed to produce sufficient evidence to establish all contextual elements of crimes against humanity under Article 7 of the ICC Statute. Notably, the Prosecut[or] failed to establish on a ‘substantial grounds to believe’ standard, the existence of an ‘organizational policy’ behind the crimes charged. (...)

Accordingly, the Defence requests that the Pre-Trial Chamber declines to exercise jurisdiction in respect of the case against Mr. Ruto and Mr. Sang.<sup>31</sup>

16. In the text of its submission, the Defence avers that the Majority “draw an erroneous conclusion by adopting a new, liberal and too wide a definition of “organizational policy”.<sup>32</sup> In the following it comments extensively on the opinions voiced by the Judges of this Chamber and academics as to the

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<sup>29</sup> ICC-01/09-01/11-305; Mr Henry Kiprono Kosgey, against whom the Chamber ultimately declined to confirm all charges, equally lodged a challenge to jurisdiction of the Court, see ICC-01/09-01/11-306.

<sup>30</sup> ICC-01/09-01/11-T-5-ENG ET, p. 15, lines 11-17; and p. 38, lines 19-24.

<sup>31</sup> ICC-01/09-01/11-305, paras 82 and 83.

<sup>32</sup> ICC-01/09-01/11-305, para. 7.

interpretation of 'organisation'.<sup>33</sup> Subsequently, the Defence avers that "irrespective of whether one accepts the minority or majority test, or an alternative test, the facts on which the Prosecut[or] relies do not amount to substantial grounds to believe" that Mr Ruto and Mr Sang "acted within an organization in the context of article 7(2)(a) of the Statute".<sup>34</sup>

17. The Prosecutor seeks the summary dismissal of the Defence jurisdictional challenge on the grounds that it is wrongly argued to be a "jurisdictional" challenge.<sup>35</sup> To begin with, he argues that the "[s]uspects are charged with committing crimes against humanity".<sup>36</sup> Thus, he contends, the Court has jurisdiction "because the crimes against humanity alleged under [a]rticle 7 [of the Statute] are within the Court's subject matter jurisdiction".<sup>37</sup> He further purports that the Majority's analysis of article 7 of the Statute is an issue of "statutory construction" and not jurisdiction.<sup>38</sup> As to the interpretation of the notion of 'organization' in article 7(2)(a) of the Statute, the Prosecutor maintains that the Majority's established definition is correct.<sup>39</sup> Likewise, whether the Prosecutor's evidence establishes the requisite elements of crimes against humanity, including that of "organizational policy", is, in his view, a "sufficiency issue", not jurisdiction.<sup>40</sup> As to the issue of alleged insufficiency of evidence, the Prosecutor submits that "necessary factual determinations related [to] the charges must be left for the confirmation decision (...) and, if charges are confirmed, for the

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<sup>33</sup> ICC-01/09-01/11-305, paras 10-61.

<sup>34</sup> ICC-01/09-01/11-305, para. 62.

<sup>35</sup> ICC-01/09-01/11-334-Corr, paras 9 and 15.

<sup>36</sup> ICC-01/09-01/11-334-Corr, para. 12.

<sup>37</sup> ICC-01/09-01/11-334-Corr, para. 13.

<sup>38</sup> ICC-01/09-01/11-334-Corr, paras 13 and 17.

<sup>39</sup> ICC-01/09-01/11-334-Corr, paras 16-32.

<sup>40</sup> ICC-01/09-01/11-334-Corr, para. 13.

trial”.<sup>41</sup> Finally, the Prosecutor buttresses his submission by adding a reference to a decision of the Appeals Chamber of the International Criminal Tribunal (the “ICTY”).<sup>42</sup>

18. The victims participating in this case submit observations on various issues in the context of the present challenge.<sup>43</sup> In essence, the victims claim that the Court has jurisdiction as each of the suspect has been charged with crimes falling under the subject-matter, personal, and territorial jurisdiction of the Court.<sup>44</sup> They aver that the requirements of article 7 of the Statute, including that of “organizational policy”, are not jurisdictional requirements but substantive law “applied by the [Court] in exercise of its jurisdiction”.<sup>45</sup> Similarly, the victims suggest that any discussion of insufficiency of evidence must be undertaken by the Chamber in exercise of its jurisdiction in the context of deciding on the merits of the case pursuant to article 61(7)(b) or (c) of the Statute.<sup>46</sup> As a result, the victims take the view that the Defence challenge is actually not a challenge to jurisdiction.<sup>47</sup>

19. In the final written submissions after the close of the Hearing, the Defence for Mr Ruto provides further arguments to its jurisdictional challenge in reply to the arguments advanced by the Prosecutor and the victims.<sup>48</sup> It underlines that the

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<sup>41</sup> ICC-01/09-01/11-334-Corr, para. 35.

<sup>42</sup> ICC-01/09-01/11-334-Corr, para. 14. The full name of the tribunal is “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991”, UN Doc. S/RES/827 (1993).

<sup>43</sup> ICC-01/09-01/11-332.

<sup>44</sup> ICC-01/09-01/11-332, para. 21.

<sup>45</sup> ICC-01/09-01/11-332, para. 22.

<sup>46</sup> ICC-01/09-01/11-332, paras 35 and 36.

<sup>47</sup> ICC-01/09-01/11-332, para. 44.

<sup>48</sup> ICC-01/09-01/11-355, paras 181-197.

issue of jurisdiction *ratione materiae* is a jurisdictional question.<sup>49</sup> Further it maintains that “there must be an evidentiary test when considering whether the policy requirement has been complied with, which can only be tested if the factual circumstances are considered”.<sup>50</sup>

20. The Majority decision in the present case addresses two points that have been raised by the Defence in the jurisdictional challenge. The first issue relates to the notion of an ‘organization’ within the meaning of article 7(2)(a) of the Statute; and the second issue relates to the facts presented by the Prosecutor in support of the said notion.<sup>51</sup> With regard to the first issue, relating to the interpretation of ‘organization’ within the meaning of article 7(2)(a) of the Statute, the Majority rejects this part of the challenge since it “does not find a persuasive reason to revisit its previous finding on the question or to reverse its original approach”.<sup>52</sup> The Majority further suggests that the challenge on this issue amounts to an “attempt to obtain a right to appeal on this point of law and at this stage of the proceedings” and remarks that “the Suspects failed to avail themselves of the right to appeal the Decision on Summons to Appear, which reiterated the same legal findings of the 31 March 2010 Decision”.<sup>53</sup> With regard to the second issue, relating to the alleged insufficiency of evidence presented, the Majority dismisses *in limine* this part of the challenge.<sup>54</sup> It takes the view that this “point cannot be qualified as a jurisdictional challenge” as this part relates in

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<sup>49</sup> ICC-01/09-01/11-355, para. 185.

<sup>50</sup> ICC-01/09-01/11-355, para. 186.

<sup>51</sup> See para. 29 of the Majority decision.

<sup>52</sup> See para. 34 of the Majority decision.

<sup>53</sup> See para. 34 of the Majority decision.

<sup>54</sup> See para. 36 of the Majority decision.



essence to the merits of the Prosecutor's case on the facts which should be "resolved pursuant to the standard provided for in article 61(7) of the Statute".<sup>55</sup>

21. Before all else, I wish to comment on the manner in which this Defence challenge has been formulated. I agree with the Majority's finding on the need to distinguish two issues. However, this distinction is not made clear by the Defence in their final request to the Chamber. I note that while the Defence engages in an extensive and almost purely academic discussion concerning the definition of 'organization' within the meaning of article 7(2)(a) of the Statute, it actually requests the Chamber to decline jurisdiction over this case on the basis that the Prosecutor "failed to produce sufficient evidence to establish all contextual elements of crimes against humanity".<sup>56</sup> This pertains clearly to the second issue concerning the presentation of facts presented by the Prosecutor, as identified by the Majority, in the context of this challenge. Admittedly, when commenting on the legal interpretation of 'organization' given by the Majority and the dissenting Judge, the Defence expresses its agreement with the more restrictive interpretation adopted by the dissenting Judge. But the Defence does not actually *request* in clear terms that the Chamber reconsider its previous interpretation of the notion of 'organization'. What is not requested or couched in forthright terms, however, cannot be adjudicated. Nonetheless, taking the Defence submission as a whole, and bearing in mind that any assessment of facts must be made in light of the law as interpreted first, it appears that the Defence wishes the Chamber to reconsider its interpretation of the notion of

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<sup>55</sup> See para. 35 of the Majority decision.

<sup>56</sup> See para. 15 above.

'organization' in the context of this challenge as well.<sup>57</sup> I shall therefore examine both issues presented by the Defence, as identified by the Majority.

22. Turning now to the substance of the challenge, I express my disagreement with the position taken by the Majority in the present case for the reasons set out below. From the outset, I must make it clear that I do not wish to embark anew upon a discussion of the correct interpretation of the notion of 'organization'. I have set out my understanding of the law in sufficient detail in both dissenting opinions in which I have analysed the facts as presented by the Prosecutor. I shall therefore only respond to new arguments advanced in relation to the following two preliminary questions:

- (a) Whether the interpretation of the contextual element of "organizational policy" as a matter of law is part of the jurisdictional challenge; and
- (b) Whether and to what extent an assessment of facts, and by extension of evidence, can be part of a jurisdictional challenge.

a) Issue of law: the correct interpretation of "organizational policy" is part of the jurisdictional challenge

23. Although I disagree with the Majority's finding to reject this part of the challenge, I note that this first issue has been decided on the merits. The Majority therefore acknowledges that this first issue can be part of the jurisdictional challenge, a finding with which I associate myself entirely. For the following reasons, I consider this approach to be correct.

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<sup>57</sup> ICC-01/09-01/11-305, paras 7, 8, 9, 31, 33, 40, 60 and 62; ICC-01/09-01/11-355, paras 182-184.

24. The established jurisprudence of this Court, including that of this Chamber, clearly shows that jurisdiction is composed of four requirements, namely subject-matter (*ratione materiae*), temporal (*ratione temporis*), personal (*ratione personae*) and territorial (*ratione loci*), with the last two requirements being in the alternative.<sup>58</sup> Jurisdiction *ratione materiae* refers to the crimes which fall within the jurisdiction of the Court – as enumerated in articles 6, 7 and 8 and article 8bis of the Statute, which has yet to enter into force – and encompasses the constitutive contextual elements in which the specific crimes are embedded. Thus, the contextual legal requirement of an ‘organization’ within the meaning of article 7(2)(a) of the Statute falls entirely within the ‘jurisdiction test’. Obviously, this includes any issue of interpretation which may affect the applicability of the contextual elements.

25. The Prosecutor’s and victims’ argument that the contextual elements, such as that of ‘organization’ under article 7(2)(a) of the Statute, do not in any way fall within the ambit of the ‘jurisdiction test’ but concern matters of substance relating to the merits of the case is as astonishing as it is misconceived. It disregards the inseparable, twofold nature of contextual elements which are both

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<sup>58</sup> Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, paras 21 and 22; Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, paras 38 and 39; Pre-Trial Chamber III, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, para. 12; Pre-Trial Chamber III, Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, ICC-02/11-01/11-9-Red, para. 9; Pre-Trial Chamber I, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC-01/04-01/07-4, para. 11; Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, para. 36.

elements of the crimes as stated in the Elements of Crimes<sup>59</sup> relating to the merits *and* jurisdictional in nature insofar as the Court cannot exercise jurisdiction over the underlying acts in the absence of such contextual elements. The presence of contextual elements differentiates the crimes within the jurisdiction of the Court from ordinary crimes. As I explained in the 31 March 2010 Dissenting Opinion:

It is even more crucial to determine that (...) the contextual elements of crimes against humanity appear to be present as it is this decisive element which triggers the jurisdiction of the Court, elevates the acts concerned, which otherwise would fall exclusively under the responsibility of national jurisdictions, to international crimes and sets aside considerations of State sovereignty.<sup>60</sup>

26. Article 19(1), first sentence, of the Statute instructs the Judges of this Court in unequivocal terms to determine their competence to adjudicate a case: “The Court *shall* satisfy itself that it *has* jurisdiction in any case before it” (emphasis added). As explained above, this Chamber has interpreted this provision to imply “that the Court must ‘attain the degree of certainty’ that the jurisdictional parameters set out in the Statute have been met”.<sup>61</sup> I draw two conclusions therefrom. Firstly, the answer to the question of whether the Court has such jurisdiction is, in principle, not subject to the progressively higher evidentiary thresholds which apply at the different stages of the proceedings. Secondly, an affirmative answer to that question is a pre-condition to the Court’s discussion of

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<sup>59</sup> In this respect it is noteworthy to recall the second introductory paragraph to crimes against humanity in the Elements of Crimes which confirms that “[t]he last two elements for each crime against humanity describe the context in which the conduct must take place”.

<sup>60</sup> Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, p. 93, para. 18.

<sup>61</sup> Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 24; Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-1, para. 9; Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-1, para. 9; see also para. 25 of the Majority decision.

the merits.<sup>62</sup> Consequently, the question cannot be deferred to the merits but must be ruled upon definitively *ab initio*. In other words, the Court does not have limited jurisdiction when issuing a warrant of arrest or summons to appear; slightly more jurisdiction at the confirmation of charges stage; and jurisdiction 'beyond reasonable doubt' at trial, after the merits have been fully adjudged. The Court either has jurisdiction or does not.

27. That being said, I am fully aware that issues of jurisdiction may be intimately bound up with the merits of the case. To avoid unnecessarily prolonging the proceedings on jurisdiction, I take the view that a careful assessment of the contextual elements – which are decisive in triggering the Court's intervention – should or must only be carried out where it appears that the 'degree of certainty' may not be attained. Such situations warrant an immediate resolution without delving into and prejudging the merits of the case and can only be assessed on a case-by-case basis. In the circumstances of the present case, I deemed it both appropriate and necessary for the contextual elements of crimes against humanity, which form part of jurisdictional *ratione materiae*, to be entertained in greater detail when examining jurisdiction and at the early stage of the initiation of the investigation into the situation in the Republic of Kenya. I took that view because the degree of certainty appeared not to have been attained. At the same time, I found it necessary to save the Court from entertaining further time-consuming and expensive proceedings without jurisdiction.

28. In support of his claim that the issues raised by the Defence are not proper challenges to jurisdiction, the Prosecutor refers to a recent ICTY Appeals

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<sup>62</sup> See also paras 25 and 28 of the Majority decision.

Chamber decision,<sup>63</sup> arguing that the ICTY, when “faced with an almost identical defence argument in the *Gotovina* case, refused to consider the claim as one addressing jurisdiction”.<sup>64</sup> A careful review of the Appeals Chamber decision concerned compels me to conclude that the Prosecutor misrepresents the issues at stake. In that decision, the *sub judice* matter raised by the defence for Ante Gotovina was whether or not the objective elements of the crimes of deportation and forcible transfer, cruel treatment and inhumane acts had been established. Indeed, the establishment of the *actus reus* component of a specific crime, the underlying act, is an issue of substance relating to the merits of a case which should not, in principle, be prejudged when examining jurisdiction but instead considered with the merits. The question in the present case is wholly different: have the *contextual* elements of crimes against humanity been established? As elaborated above, I believe this matter to fall squarely under the ‘jurisdiction test’ since these contextual elements confer jurisdiction on the Court when established.

29. The necessity for a correct determination on jurisdiction finds support in the jurisprudence of the Court which has frequently affirmed its jurisdiction after satisfying itself that the jurisdictional parameters, including the contextual elements of the alleged crimes, had been met.<sup>65</sup> Admittedly, no chamber has yet

<sup>63</sup> ICTY, *Prosecutor v Ante Gotovina et al.*, Case No. IT-06-90-AR72.1, “Decision on Ante Gotovina’s Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction”, 6 June 2007.

<sup>64</sup> ICC-01/09-01/11-334-Corr, para. 14.

<sup>65</sup> See for example: Pre-Trial Chamber I, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-8-Corr, para. 25, considering the contextual elements of war crimes; Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, para. 39, in which explicit reference is made to the contextual elements of crimes against humanity; Pre-Trial Chamber III, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, para. 13, in which explicit reference is made to the contextual



embarked upon an in-depth analysis of facts in the context of determining jurisdiction *ratione materiae*. However, this may be explained by the fact that no chamber until the present day was faced with a similar clear necessity to determine whether or not the Court has jurisdiction *ratione materiae*.

30. The Prosecutor himself follows the very same approach. He clearly assesses jurisdiction *ratione materiae*, including the contextual elements of the crimes allegedly committed, when determining whether there is “a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed” pursuant to article 53(1)(a) of the Statute. Most remarkably, the Prosecutor declined to initiate an investigation into the situation in Venezuela on the grounds that crimes against humanity did not appear to have taken place. He explained:

(...) In order to constitute a crime against humanity, Article 7(1) of the Rome Statute provides that particular acts must have been committed as part of a widespread or systematic attack directed against any civilian population. This test creates a stringent threshold. Even on a generous evaluation of the information provided, the available information did not provide a reasonable basis to believe that the requirement of a *widespread or systematic attack against any civilian population* had been satisfied (emphasis added).<sup>66</sup>

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elements of crimes against humanity and war crimes; Pre-Trial Chamber III, Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, ICC-02/11-01/11-9-Red, para. 11, in which explicit reference is made to the contextual elements of crimes against humanity.

<sup>66</sup> See pages 3-4 of the Prosecutor’s response to the communications received concerning the situation in Venezuela, available at: [http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP\\_letter\\_to\\_senders\\_re\\_Venezuela\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf) (last visited on 10 January 2012). I also note that in this response the Prosecutor appears to have gone even so far as to examine, based on the communications received, the specific elements of the crime of persecution pursuant to article 7(1)(h) of the Statute, concluding that “[m]any of the allegations of persecution did not appear to satisfy the elements for the crime of persecution”, see p. 3.

31. I find no logical or legal reason why the Prosecutor may decline to initiate investigations based on an alleged lack of jurisdiction *ratione materiae* due to the absence of the required contextual elements of crimes against humanity, whereas the Chamber should be barred from entertaining this issue or reviewing the Prosecutor's preliminary assessment on jurisdiction altogether. Rather, it is my view that the Chamber has full competence to consider issues of jurisdiction in order to discharge fully the duty cast on it by article 19(1) of the Statute.

32. The Prosecutor's and the victims' further argument that the Court *has* jurisdiction because he has *charged* the suspects with crimes against humanity under article 7 of the Statute is legally and procedurally untenable. The charges, which imply jurisdiction, are merely *presented* by the Prosecutor. Again, it is ultimately for the Judges of this Court to decide on jurisdiction, not the Prosecutor. Were it otherwise, the Prosecutor could label any crime as a crime within the jurisdiction of the Court thus removing the subject-matter jurisdiction (*ratione materiae*) from the scope of article 19(1), first sentence, of the Statute and limiting any challenges or questions raised respectively under article 19(2) and 19(3) of the Statute to jurisdiction *ratione temporis* and *ratione loci/ratione personae*. In my opinion, such an interpretation would render articles 19(1), 19(2) and 19(3) of the Statute largely ineffective.

33. In this respect, I am mindful of the interpretation of article 19 of the Statute of Pre-Trial Chamber I in the *Mbarushimana* case. Pre-Trial Chamber I clearly underlined the importance of the remedy provided to a suspect by that provision:

The Chamber observes that a suspect's right to challenge the jurisdiction of the Court is a special remedy enshrined in article 19 of the Statute, as such autonomous and independent from any other remedy which the suspect might have by virtue of other statutory provisions.<sup>67</sup>

The above finding highlights the general importance of the jurisdictional challenges under article 19 of the Statute which should not be diminished. Hence, the function of article 19 of the Statute must not be significantly reduced by excluding matters of jurisdiction *ratione materiae*.

34. Mindful of the "autonomous and independent" nature of the article 19 remedy, I find it difficult to agree with the Majority's suggestion that the Defence may attempt with this challenge to obtain a right to appeal on this point law. I also do not support the Majority's sentiment that Mr Ruto and Mr Sang failed to appeal pursuant to article 82(1)(a) of the Statute the 8 March 2011 Majority decision on summons to appear.

35. Rather, I hold the view that the Defence had the right to challenge jurisdiction pursuant to article 19(2) of the Statute at this stage in which it was entitled to raise any issue relating to the four jurisdictional requirements. Naturally, a challenge to jurisdiction in accordance with article 19(2) of the Statute inevitably may call into question any of the chamber's previous findings which it sequentially may have to revisit. The argument of reconsideration alone cannot be advanced, in my opinion, to reject such a challenge. Further, arguing that the suspects could have appealed the 8 March 2011 decision on summons to appear ignores the fact that a suspect, up until the notification of a warrant of

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<sup>67</sup> Pre-Trial Chamber I, Decision on the 'Defence Challenge to the Jurisdiction of the Court', ICC-01/04-01/10-451, para. 11.

arrest or summons to appear, is not a party to the proceedings. Pre-Trial Chambers of this Court have taken the view that the proceedings triggered by the Prosecutor's application for a warrant of arrest or summons to appear are conducted on an *ex parte* basis.<sup>68</sup> Expecting the Defence to appeal a decision in relation to which it was effectively not heard by the first-instance court raises issues of fairness. In fact such an approach means that the suspect makes his first submissions on jurisdiction before the Appeals Chamber. Moreover, from a practical point of view, such an approach also compels the Defence to exercise an important remedy – which according to article 19(4) of the Statute can be made only once by any person, unless leave is granted by the Chamber to bring a challenge more than once – at an early stage of the proceedings in the absence of knowledge of the material relied upon in the decision. It is important to recall that initially the suspect is served only with a warrant of arrest or a summons to appear. No supporting documentation is attached thereto.<sup>69</sup> In order to effectively challenge jurisdiction it must be ensured that the suspect has been granted access to documents that are essential for the preparation of his or her defence.<sup>70</sup>

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<sup>68</sup> Pre-Trial Chamber II, Decision on Application for Leave to Submit *Amicus Curiae* Observations, ICC-01/09-35, para. 10; Pre-Trial Chamber II, Decision on a Request for Leave to Appeal, ICC-01/09-43, para. 9; Pre-Trial Chamber II, Decision on the 'Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)', ICC-01/09-42, para. 6; Pre-Trial Chamber II, Decision on Application for Leave to Participate under Articles 58, 42(5), (7)-(8)(a) of the Rome Statute and Rule 34(1)(d) and (2) of the Rules of Procedure and Evidence, ICC-01/09-47, para. 5. This view was also endorsed by Pre-Trial Chamber I, Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-1, para. 12.

<sup>69</sup> It is recalled that the suspects in this case were granted access to the Prosecutor's article 58 application in redacted form only on 26 July 2011, see ICC-01/09-01/11-224.

<sup>70</sup> In this context it is recalled that pursuant to rule 121(3) of the Rules of Procedure and Evidence, the "Prosecutor shall provide to (...) the person, *no later than 30 days* before the date of the confirmation hearing, (...) a list of the evidence which he or she intends to present at the hearing" (emphasis added).

b) Issue of fact: an assessment of facts, and by extension evidence, is part of the jurisdictional challenge

36. Another related preliminary question to the Defence challenge is the issue whether and to what extent facts, and by extension evidence, may be assessed with regard to jurisdiction *ratione materiae*, which, as demonstrated above, is part and parcel of the ‘jurisdiction test’. The Majority declines to undertake such a discussion as “[i]t is clear from the Defences’ submissions that the essence of this part of their filings is to challenge the merits of the Prosecutor’s case on the facts”. The Majority held that an assessment of the facts would be dealt with “in the relevant part of the [article 61(7)] decision”.<sup>71</sup> I disagree with this position taken for the following two reasons.

37. First, I observe in general that a court of law does not address legal questions, including that of jurisdiction, for the sake of having a legal discussion but interprets the law with a view to appraise the facts *sub judice* in light thereof. As the establishment of the facts *sub judice* may prove to be controversial, evidentiary issues may arise at any stage of the proceedings.<sup>72</sup>

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<sup>71</sup> See para. 35 of the Majority decision.

<sup>72</sup> See also Appeals Chamber, Judgment on the appeals of the Defence against the decisions entitled ‘Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06’ of Pre-Trial Chamber II, ICC-02/04-01/05-371, para. 36: “The Appeals Chamber observes that it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.”

38. Secondly, I note the Chamber's duty to pronounce itself on jurisdiction by having attained the 'degree of certainty' which it can only logically satisfy by assessing facts presented by the Prosecutor. As the 'jurisdiction test' consists of four requirements (see paragraph 24 above), an assessment of facts must necessarily extend to all those four requirements, including jurisdiction *ratione materiae*.

39. In light of the foregoing, I find it difficult to accept that an assessment of the facts, and by extension evidence, cannot take place for the purposes of determining jurisdiction *ratione materiae* but must be deferred to the stage of the merits. In my opinion, the issue of fact raised by the Defence falls, in principle, under the ambit of this challenge.

40. In conclusion, I am of the firm view that the Defence challenge must be fully entertained. Against the backdrop of my previous findings with regard to jurisdiction, I hold that the Defence challenge should be granted and jurisdiction over this case be denied. I further opine that the issues raised by the Defence are appealable under article 82(1)(a) of the Statute and, therefore, leave to appeal pursuant to article 82(1)(d) of the Statute need not be sought.

### **III. Further Observations**

41. Notwithstanding my view on the lack of jurisdiction *ratione materiae* in the situation in the Republic of Kenya, and therefore in the present case, I have followed attentively the entirety of these confirmation of charges proceedings. In this part of the dissent, I wish to provide some more thoughts on two issues which merit particular attention. First, I shall set forth my thoughts on the impact



of the Prosecutor's respect for article 54(1)(a) of the Statute during his investigation on the proceedings conducted by the chambers of this Court. Secondly, I will set out my views as to the rights of the Defence during the Hearing pursuant to article 61(6) of the Statute.

*1. Prosecutor's Respect for Article 54(1)(a) of the Statute*

42. At the Hearing, the Prosecutor is called upon, in conformity with article 61(5) of the Statute, to support each charge with "sufficient evidence" as gathered during the investigation.

43. On the basis of my observations and experiences at the Court until the present day, I use this opportunity to clarify and summarise my views and expectations with regard to any investigation undertaken by the Office of the Prosecutor on behalf of the Court. I do so as a Judge who is fully aware of the serious responsibility to take such a far-reaching decision as to confirm or to decline to confirm the charges on which the Prosecutor intends to seek trial for the person(s) charged. I note that such an important decision and the entire process leading to it will have in any given situation, including the present case, far-reaching consequences not only for the person(s) concerned but also for the Court itself, and the fulfillment of its mandate to promote lasting respect for and the enforcement of international justice.

44. Having said that, it is in my view an absolute, indispensable necessity that any such investigation must be as comprehensive, professional, expeditious and thereby as effective as possible. With regard to this necessity, I recall, firstly, article 54(1)(a) of the Statute, which reads:

**Article 54****Duties and powers of the Prosecutor with respect to investigations**

## 1. The Prosecutor shall

- (a) In order to *establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally*; (emphasis added)

45. It is my understanding that this crucial provision demonstrates in particular the following for any proceedings before this Court:

- (1) Already the investigation undertaken from its initiation into the situation until the confirmation of the charges has the decisive purpose to establish the truth and to provide a solid basis for a future judicial assessment whether there is indeed individual criminal responsibility which will require, pursuant to article 66(3) of the Statute, that the Judges “must be convinced of the guilt of the accused beyond reasonable doubt”;
- (2) The scope of the investigation must be *extended* to cover *all* facts and evidence to make possible such a judicial assessment as referred above under (1);
- (3) The investigation undertaken shall cover incriminating and exonerating circumstances equally as the Prosecutor is conceived in the Statute as an objective truth seeker and not as a partisan lawyer.

46. These are, in my view, fundamental requirements which set out clear, if not high standards for proper investigations carried out by the Prosecutor on behalf of the Court and with regard to which he or she shall take, pursuant to article 54(1)(b) of the Statute, appropriate measures to ensure their effectiveness while fully respecting the rights of persons concerned, as required by article 54(1)(c) of the Statute.

47. I do not find it difficult to conclude that any investigation which does not meet these standards is not in conformity with the letter and spirit of article 54(1) of the Statute. Likewise, I do not find it difficult to assume that any investigation meeting these standards only partially and unsatisfactorily will probably lead to problems and difficulties not only for an effective and successful prosecution but also for the work of the Chamber concerned and for the Court in general. This may be the case, for example, if the investigation in a concrete case *de facto* does not cover all facts and evidence of that case, or if not all possible measures are taken to make the investigation effective; then the consequence may be that there will be only a limited amount of evidence or – *in extremis* – scarcity of evidence. Another example of such unsatisfactory investigation would be an approach which *de facto* is aiming, in a first phase, (only) at gathering enough evidence to reach the “sufficiency standard” within the meaning of article 61(7) of the Statute, maybe in the expectation or hope that in a further phase after the confirmation proceedings, additional and more convincing evidence may be assembled to attain the ‘beyond reasonable doubt’ threshold, as required by article 66(3) of the Statute. I believe that such an approach, as tempting as it might be for the Prosecutor, would be risky, if not irresponsible: if after the confirmation of the charges it turns out as impossible to gather further evidence to attain the decisive threshold of ‘beyond reasonable doubt’, the case in question may become very difficult or may eventually collapse at trial, then with many serious consequences, including for the entire Court and the victims who have placed great hopes in this institution.

48. I submit that it is therefore the duty of the Prosecutor to conduct any investigation *ab initio* as effectively as possible with the unequivocal aim to

assemble as expeditiously as possible relevant and convincing evidence which will enable ultimately the Trial Chamber to consider whether criminal responsibility is proven 'beyond reasonable doubt'. Such determined Prosecution action without delay is also necessary because of the well-known experience that the chances of investigations to be effective and successful are gradually diminishing and fading away the more time is passing since the commission of the crime(s) in question. Furthermore, having regard to article 21(3) of the Statute which imposes on the Court to interpret and apply the Statute, among others, consistent with "internationally recognized human rights", I note the jurisprudence of the European Court of Human Rights which clearly establishes a requirement of "promptness and reasonable expedition" in the conduct of a criminal investigation as a *conditio sine qua non* of its effectiveness.<sup>73</sup>

49. In this context, I hold that my view as summarised above is, generally consistent with the Appeals Chamber judgement of 13 October 2006<sup>74</sup>. I note that this decision was concerned with the specific question whether and to what extent post-confirmation investigations are permitted under the Statute; it was not concerned with the general and different question of the duties of the Prosecutor, pursuant to article 54(1) of the Statute, to ensure that the investigations undertaken are as proper, expeditious and effective as possible.

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<sup>73</sup> European Court of Human Rights, *Bazorkina v. Russia*, Judgment of 27 July 2006, Application n°69481/01, para. 119; *Tanrikulu v. Turkey*, Judgment of 8 July 1999, Application n°23763/94, para. 109.

<sup>74</sup> Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence', ICC-01/04-01/06-568.

50. I am aware that the Appeals Chamber permitted (only) “in certain circumstances” further investigations after confirmation, in particular “in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing [...]”.<sup>75</sup> With regard to this case I note that there is, according to the information available, currently no ongoing conflict in the Republic of Kenya.

51. While I have nothing to say with regard to the above reasoning of the Appeals Chamber, I see the possibility, if not the risk, that this limited permission of post-confirmation investigations in practice might be too broadly interpreted by the Prosecutor, possibly as some kind of license to investigate whenever, even after confirmation, thus enabling the Prosecutor also to follow a phased approach for the gathering of evidence as exemplified above. This would in my view amount to a serious misinterpretation of the Appeals Chamber judgment of 13 October 2006.

52. Given this situation, I underline once again the absolute necessity for the Prosecutor to exhaust all ways and means to make the investigation *ab initio* as comprehensive, expeditious and thus as effective as possible, as required by article 54(1) of the Statute. I hold that it is not only desirable, but necessary that the investigation is complete, if at all possible, at the time of the Hearing, unless the Prosecutor justifies further investigations after confirmation with compelling reasons, such as those mentioned above in paragraph 50. In case a Pre-Trial Chamber is not convinced that the investigation is complete, it may use its powers under articles 61(7)(c) and 69(3) of the Statute in order to compel the

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<sup>75</sup> *Ibid.*, para. 54.

Prosecutor to complete his investigation before considering committing any suspect to trial. I consider this issue to be of utmost importance for the success of this Court.

## *2. Rights of the Defence*

53. I will, at first, deal with the Prosecutor's persistent demand that the Pre-Trial Chamber should not embark on an in-depth examination of the evidence, in particular the reliability and credibility of the Prosecutor's evidence. Rather, the Chamber "should accept as dispositive the [Prosecutor's] evidence, so long as it is relevant", leaving any analysis of the evidence to the Trial Chamber.<sup>76</sup>

54. While I concur with the Majority's view that this argument is not acceptable in light of the fundamental authority of the Chamber to freely assess all evidence available,<sup>77</sup> I find it necessary to provide some clarifying observations on the rights of the Defence with respect to the confirmation of charges procedure. I am firmly convinced that a proper understanding of these rights, especially in light of the purpose of pre-trial proceedings, is of fundamental importance not only in the present case but also in future pre-trial proceedings. Such a proper understanding is, in my view, indispensable for sound and fair decisions on the confirmation of charges pursuant to article 61 of the Statute.

55. I hold that article 61(6) of the Statute is the decisive provision to delineate the rights of the Defence at the confirmation of charges stage. I note in particular the quite clear wording of article 61(6)(b) and (c), namely that the person may "(b)

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<sup>76</sup> ICC-01/09-01/11-345, para. 5; ICC-01/09-02/11-361, para. 5.

<sup>77</sup> See para. 60 of the Majority decision.



*Challenge the evidence presented by the Prosecutor; and (c) Present evidence.*” Consequently, I have no doubt that according to this provision, the Defence may not only provide rebuttal evidence but may also challenge and contest the relevance, reliability and credibility of all evidence presented by the Prosecutor.<sup>78</sup> Otherwise, the rights as set out in article 61(6) of the Statute would be deprived of any real meaning.

56. I submit further that these rights of the Defence and the related necessity of a proper assessment of all evidence presented are in full conformity with the purpose of the confirmation proceedings. It is undisputed that one of the main purposes of the confirmation phase is to filter the cases that should go to trial from those which should not. Bearing in mind the enormous consequences of a trial for the person charged, this filtering function not only ensures fairness but also avoids, when the “sufficiency standard” cannot be met, unnecessary public stigmatisation and other negative consequences for the person over the foreseeable long time span of a trial. In such a case, unwarranted lengthy proceedings would also lead to huge expenses and amount to a violation of the necessity to ensure, as much as possible, judicial economy in the interest of justice. Needless to say, it remains the responsibility of the Chamber to ensure that the nature and purpose of the confirmation are not overstretched or distorted in particular through possible Defence attempts to turn the confirmation in a “trial before the trial”.

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<sup>78</sup> This thought was also expressed by Judge Georghios M. Pikis in his Separate Opinion, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’, ICC-01/04-01/06-1486, pp. 56-57 at para. 43.

57. 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. 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.

#### IV. Concluding Remarks

58. My dissent to the Majority's decision must not be misconstrued as any determination on my part as to the commission of crimes in the Republic of Kenya during the 2007/2008 post-election violence or the individual criminal responsibility of Mr Ruto and Mr Sang. In fact, the Defence arguments and evidence as presented during the Hearing have not upset my views previously made in the 15 March 2011 Dissenting Opinion. To all Kenyan citizens who have been following those proceedings to the present day, I wish to emphasise anew that:

[t]here are, in law and in the existing systems of criminal justice in this world, essentially two different categories of crimes which are crucial in the present case. There are, on the one side, international crimes of concern to the international community as a whole, in particular genocide, crimes against humanity, and war crimes pursuant to articles 6, 7 and 8 of the Statute. There are, on the other side, common crimes, albeit of a serious nature, prosecuted by national criminal justice systems, such as that of the Republic of Kenya.

(...)

[A] demarcation line must be drawn between international crimes and human rights infractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation.<sup>78</sup>

59. That said, and while I do not question that abhorrent crimes, as described in the amended document containing the charges, have been committed, my doubts pertain to their correct qualification. Consequently, my principled disagreement with the Majority centres on the question of whether the ICC is the right *forum* before which to investigate and prosecute those crimes.

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<sup>78</sup> Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, pp. 87, paras. 8 and 65.

60. I remain convinced and reiterate that the crimes and atrocities described by the Prosecutor in the amended document containing the charges concerning Mr Ruto and Mr Sang fall within the competence of the Kenyan criminal justice authorities as a matter to be investigated and prosecuted under Kenyan criminal law forthwith. I join the victims participating in this case in their desire to see justice delivered.<sup>79</sup>

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Kaul 23/1/12', written over a horizontal line.

Judge Hans-Peter Kaul

Dated this Monday, 23 January 2012

The Hague, the Netherlands

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<sup>79</sup> ICC-01/09-01/11-T-5-ENG ET, p. 79, lines 17-19.