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PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

PUBLIC
with Public Annex A and Confidential Annex B

Joshua Arap Sang Defence Brief following the Confirmation of Charges Hearing

Source: **Defence for Mr. Joshua Arap Sang**

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

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I. INTRODUCTION

1. The Prosecution case against Mr. Joshua Arap Sang ("Sang") relies primarily on witnesses that are not credible and whose testimony is uncorroborated. Strikingly, the Prosecution has not produced any incriminating broadcasts made by Sang or others, though the Prosecution alleges that Sang (and others he allowed on air during his show *Lene Emet*) made inciting remarks broadcast by the KASS FM radio station, thereby contributing to the commission of crimes against humanity during the Kenyan Post-Election Violence in 2007-8.

2. The Prosecution case in its entirety is premised on a number of Prosecution witnesses whose evidence is heavily redacted. Virtually all the witnesses admit to criminal activities. There is absolutely nothing to corroborate what the witnesses said. The reliance on the Prosecution's witnesses' recollection of what was broadcasted is in vain, as the same witnesses contradict each other. Outside the witnesses, the material including transcripts of the broadcasts supplied by the Prosecution is exonerating.

3. The Defence submits this brief on behalf of Sang, in conjunction with the arguments made by the Defence at the confirmation of charges hearing and in light of the evidence submitted by the Defence teams. The Defence notes that in several respects, this brief incorporates or refers to arguments or evidentiary analysis as set out in the brief on behalf of Mr. Ruto, and vice-versa.

4. The Prosecution's failure to investigate the credibility and reliability of its own witnesses, as well as its failure to procure any incriminating broadcasts against Sang has resulted in a Prosecution case which does not provide sufficient grounds to believe that Sang bears individual criminal responsibility for the murder, forcible transfer, or persecution of individuals perceived to be pro-PNU, as part of a common plan with Ruto and Kosgey. As such, the charges against Sang should not be confirmed.

II. LEGAL FRAMEWORK FOR THE CONFIRMATION PROCESS

5. For the Confirmation of Charges hearing, the Prosecution was expected to "select its best pieces of evidence in order to convince the Chamber that the charges brought against the

suspects shall be confirmed, or conversely, that they shall not".[1] In order for the Prosecution to meet its evidentiary burden under Article 61(7) of the Statute, it must present concrete and tangible evidence which "demonstrate[s] a clear line of reasoning underpinning its specific allegations".[2]

6. The Defence accepts that Confirmation is not intended to be a mini-trial,[3] but submits that this does not constrain the Chamber's ability, indeed its duty, to determine whether the Prosecution evidence, on its own merit and in light of Defence evidence and assertions, is sufficiently credible to meet the required threshold of "substantial grounds to believe". At the outset, the Defence notes that "substantial grounds to believe" is higher than the standard "prima facie case" or "reasonable grounds to believe" which are the standards at the ICTY/R, SCSL and STL in order to confirm indictments. By the time the Prosecution seeks confirmation of the charges, it has, on the material provided to the Pre-Trial Chamber, satisfied that Chamber that the ICC's "reasonable grounds to believe" standard, per Article 58(7), is satisfied and thus a higher standard clearly applies to this second stage.

7. The Prosecution has repeatedly tried to limit the role and the ability of the Pre-Trial Chamber to assess its evidence. For instance, the Prosecution has, on several occasions, suggested that its evidence should be taken "at its highest" at this stage.[4] It insists that the Chamber must "reject any invitation at this stage to begin weighing the evidence and resolving contradictions".[5] Such submissions are unsupported in law and in practice at the ICC, as set out below.

8. The Prosecution's approach flies in the face of the statutory ability of the Defence to challenge charges, present evidence and contest the Prosecution's evidence within the meaning of Article 61(7) of the Statute, with a view to testing the extent of the Prosecution's evidence as being concrete, tangible and containing a clear line of

[1] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-153, Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, 29 June 2011, para. 8.
[2] *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEng, Decision on the confirmation of charges, January 19, 2007, para. 39 ('Lubanga Confirmation Decision'); confirmed in *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para. 65 ('Katanga & Ngudjolo Confirmation Decision').
[3] Katanga & Ngudjolo Confirmation Decision, para. 64 (the confirmation hearing has a limited scope and purpose and should not be seen as a "mini-trial" or a "trial before the trial").
[4] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-279, Prosecution's Observations on the Schedule of the Confirmation Hearing, 22 August 2011, para. 3.
[5] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-297, Prosecution's Observations on the Scope of the Confirmation of Charges Hearing, 26 August 2011, para 8; see also, ICC-01/09-01/11-279 at para. 4.

reasoning. The confirmation proceedings might as well be *ex-parte* if the court was to adopt the Prosecution's position. The Prosecution's position would in practice repeal Article 61(7) and defeat the intention of member states. This attempt to shield its evidence from proper evaluation only serves to emphasize the weakness of the Prosecution case.

9. The Prosecution argues that the confirmation of charges process is analogous to the Rule 98*bis* procedures at the ad hoc tribunals.[6] This is incorrect, given that the Statute allows the Defence the right not only to object to the charges, but to challenge Prosecution evidence and present evidence.[7] This requires the Chamber to base its decision on the record of the hearing as a whole.[8] Conversely, at the ICTY/R, the Rule 98*bis* process takes place at the end of the Prosecution case and before hearing or considering any Defence evidence which may challenge the Prosecution case or build its own. The Rule 98*bis* application is adjudicated in accordance with the standard of beyond reasonable doubt, and if successful, results in an acquittal.

10. Furthermore, the Pre-Trial Chambers in the *Lubanga* and *Abu Garda* cases implicitly decided that the Rule 98*bis* jurisprudence and standards could not be applied to the ICC confirmation hearing process. In *Lubanga*, the Prosecution advanced a test for the confirmation hearing which was clearly modelled on the ICTY Rule 98*bis* standard: "a credible case, which would, if not contradicted by the Defence, be a sufficient basis to convict the accused on the charge".[9] The Chamber declined to adopt this test and instead based its evidentiary test on the standards employed by the ECHR to determine "substantial grounds to believe".[10]

11. Additionally, the Prosecution argues that for the purpose of confirmation, the Chamber should accept its evidence as reliable so long as it is relevant and admissible, citing Rules 63 and 64 in support of this proposition.[11] In doing so, the Prosecution fails to recall that

[6] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-345, Prosecution's Written Submsisions Following the Hearing on the Confirmation of Charges, 30 Sept 2011 ("Prosecution Confirmation Brief"), paras 6 et seq.
[7] Rome Statute, Article 61(6).
[8] See also, Andrew Burrow, 'The Standard of Proof in Pre-Trial Proceedings' in K. Khan, C. Buisman, C. Gosnell (eds.) Principles of Evidence in International Criminal Proceedings (Oxford University Press, 2010) at pp. 690-691.
[9] Lubanga Confirmation Decision, para. 34.
[10] Lubanga Confirmation Decision, para. 38.
[11] Prosecution Confirmation Brief, para. 5.

reliability is a fundamental component of an admissibility assessment under Article 69(4).[12]

12. The Defence accepts that Article 61(5) specifies that the Prosecution *may* rely on documentary evidence at the confirmation hearing; ie that the Prosecution does not have to call live evidence. As noted in *Katanga & Ngudjolo*, Article 61(5) – as the *lex specialis* governing the confirmation hearing – displaces the general principle of orality set out in Article 69(2) of the Statute.[13] Nonetheless, Article 61(5) does not stipulate that such statements and documents shall be deemed admissible in the sense that they are exempt from the requirements of relevance and probative value set out in Article 69(4). In this regard, a rule permitting the parties to rely on certain types of evidence in principle does not mean that specific items of evidence falling within this category will be admissible or that equal weight necessarily be attached. As a matter of statutory interpretation, it is also clear that had the drafters intended to provide for a principle of admissibility, or to exempt the Chamber from considering issues concerning probative value and credibility at the confirmation hearing, then either (I) Rule 122(8) would not have explicitly stated that Article 69 shall apply *mutatis mutandis*, or (II) Article 61 would have included an explicit exception to the Article 69(4) principle that in determining admissibility, the Chamber shall take into consideration the probative value of the evidence and the prejudicial impact on the rights of the Defence.

13. In short, the Prosecution seeks to curtail the Chamber's authority to evaluate the evidence. This is contrary to both the letter and the spirit of Article 61 of the Rome Statute, and has previously been rejected by the Pre-Trial Chamber in *Abu Garda*. Indeed, that Pre-Trial Chamber emphasised that the "free assessment of evidence" is, pursuant to the Statute, a "core component of the judicial activity both at the pre-trial stage of a case and at trial".[14] As such, the Prosecution's argument that Prosecution evidence should be viewed in the

[12] Since Article 69(4) applies at the confirmation stage, the Defence submits that the PTC would be obliged to assess the reliability of the evidence as part of its determination of the admissibility of the evidence in question. See for example, *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para. 20 ("Probative value is determined by two factors: the reliability of the exhibit and the measure by which an item of evidence is likely to influence the determination of a particular issue in the case. The first factor which the Chamber must consider when determining probative value, is the inherent reliability of an item of evidence. If an item of evidence does not display sufficient indicia of reliability, it may be excluded." See also, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1399, Decision on the admissibility of four documents, 13 June 2008, para. 30.

[13] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-412, Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12, 18 April 2008, p. 5.

[14] *Prosecutor v. Abu Garda*, ICC-02/05-02/09-267, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", 23 April 2010, para. 8.

light most favourable to the Prosecution – and without regard to possible inconsistencies, ambiguities, absence of corroboration, or the fact that it comes from anonymous sources – has already been explicitly rejected.[15] While the Defence recognises that the Chamber must analyse and assess the Prosecution evidence presented as a whole,[16] that does not mean that individual aspects of the evidence should not be scrutinised.[17]

14. Significantly, the purpose of the confirmation hearing is "to ensure that no case proceeds to trial without sufficient evidence to establish substantial grounds to believe that the person committed the crime or crimes with which he has been charged. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges".[18] Cases which are lacking in merit should be filtered out at this stage.[19] The filtering mechanism can only function properly if the Chamber conducts a thorough review of the evidence on behalf of the suspects.

15. In previous confirmation of charges decisions before the ICC, the Pre-Trial Chambers have embarked on an analysis of the Prosecution evidence which included assessing probative value, credibility, reliability, and inconsistencies. No less should be done in the case at hand. The Pre-Trial Chamber in *Katanga & Ngudjolo* has acknowledged that the probative value of evidence is a relevant consideration in reaching the confirmation decision and that where the probative value of evidence is affected, "the Chamber will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution".[20] Furthermore, the Pre-Trial Chamber was of the view that reliability should be a consideration determining the weight of evidence.[21] Naturally, inconsistencies in the evidence may make the evidence unreliable, and "the Chamber retains discretion in evaluating any inconsistencies and in considering whether the

[15] *Ibid*, para. 1 and paras 8-10.
[16] Lubanga Confirmation Decision, para. 39; Katanga & Ngudjolo Confirmation Decision, para. 66.
[17] Bemba Confirmation Decision, paras 55-59, 15 June 2009.
[18] Katanga & Ngudjolo Confirmation Decision, para. 63.
[19] ICC-01/04-01/07-412, p. 4 (Indeed, the confirmation should by no means seen as "an end in itself, but it must be seen as a means to distinguish those cases that should go to trial from those that should not go to trial").
[20] Katanga & Ngudjolo Confirmation Decision, para. 70
[21] Katanga & Ngudjolo Confirmation Decision, para. 78 (The Pre-Trial Chamber opined that such an approach would be most consistent with Rule 63(2) of the Rules of Evidence and Procedure, pursuant to which "[a] Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance and admissibility in accordance with article 69").

evidence, assessed as a whole, is reliable and credible. Similarly, the Chamber retains the discretion to accept or reject any of the 'fundamental features' of the evidence".[22]

16. The underlying purpose of the confirmation hearing is to ensure that no case goes to trial unless there are substantial grounds to believe that the person committed the crime for which he or she has been charged, and therefore "in principle, the Prosecution should not be allowed to rely at the confirmation hearing on the evidence given by a witness (be it in a written format or through oral testimony), if the Prosecution cannot subsequently rely on the evidence of the said witness for the purpose of the trial".[23] Thus the difference between confirmation and trial is not that at confirmation Prosecution evidence is taken at its highest and at trial Prosecution evidence can be assessed for credibility, reliability, etc. Rather at confirmation the Prosecution has a lower evidentiary burden to meet than at trial, though the analysis of evidence applies *mutatis mutandis* to both stages. The Prosecution cannot prevent its evidence being scrutinised with the care appropriate to such serious charges and to the integrity of the ICC itself. The suspects themselves necessarily regard the Pre–Trial Chamber as discharging a protective function.

III. FAILED INVESTIGATIONS

Prosecution's Statutory Obligation to Establish the Truth

17. The Prosecution has a statutory duty, per Article 54(1)(a), to establish the truth.[24] To achieve this, the Prosecution is required to investigate exonerating and incriminating circumstances equally, extending its investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute.[25] The Prosecution cannot ignore evidence which is not convenient to its theory of the case.[26] The Defence submits that in this regard the Prosecution has failed entirely. The Prosecution

[22] Katanga & Ngudjolo Confirmation Decision, para. 116, footnotes omitted (finding that the inconsistencies could impact on the manuscript's probative value, if not its admissibility).
[23] ICC-01/04-01/07-412, p. 4-6.
[24] The ICTR has opined that the purpose of the Prosecution's investigations is "to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused." *Prosecutor v. Karemera et al*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 9.
[25] In this regard, comments from the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1 (1996) at para. 226, are to the effect that: "…the Prosecutor should conduct an independent and impartial investigation on behalf of the international community and should collect incriminating and exonerating information to determine the truth of the charges and to protect the interests of justice".
[26] Daniel D. Ntanda Nsereko, "Prosecutorial Discretion Before National Courts and International Tribunals, 2 J. In'l Crim. Just. 136 (2005) (the Prosecution "must not abandon [exculpatory evidence] merely because it does not assist in establishing the guilt of the suspect").

did not even seek to interview Sang regarding his alleged role in the post-election violence, though Sang and Mr. Ocampo were together at a press conference[27] one week before the summons to appear was issued and Sang was listed as a suspect.

18. The drafters of the Statute vested the Prosecution with this strong obligation because they recognised:

> "This is one area where the civil law approach of an investigative judge showed the way to a workable solution to the problem of potential inequality between the resources of the Prosecutor and of the suspect or accused. The result was a **clear and binding mandate for the Prosecutor to investigate both sides of the case equally**."[28]

19. At paragraph 73 of its Brief, the Prosecution attempts to justify its investigative approach into the Kenyan Situation. It asserts that it has no reason to question the credibility of witnesses if they have been interviewed by experienced investigators and the evidence is consistent with other information within the control of the Prosecution.[29] This statement ignores the fact that they have a clear duty to investigate exculpatory evidence, and that Article 67(2) of the Statute defines exculpatory evidence as evidence concerning the credibility of Prosecution evidence. Nor can the *per se* status of investigators necessarily be a safeguard.

20. The obligation of the Prosecution to investigate the credibility of anonymous witnesses is an essential component of the adversarial nature of the confirmation hearings. This must be done in order to counterbalance the inability of the Defence to fully investigate issues of credibility, since the Defence has a limited ability to investigate the motives or knowledge of the anonymous witnesses relied on for purposes of confirmation (ie, Witnesses 1, 2, 3, 5, 6 and 8).

21. While the Chamber does not have the authority to direct the Prosecution's investigations – a task which the Defence is not suggesting the Chamber should undertake – the Chamber has accepted that it has the authority to "assess the quality of evidence".[30] The Defence

[27] EVD-PT-D09-00052.
[28] M. Bergsmo and P. Krueger, 'Duties and Powers of the Prosecutor', pgs 1077 to 1080 in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer 2nd ed. 2008) at p. 1078, para 2. Furthermore, Triffterer (at p. 1080, para. 9) states that the use of this terminology was an indication that "proceedings should not descend to the level of a competition where winning the case is the only goal".
[29] It is noteworthy that the Prosecution's alleged "experienced investigators" are unknown and the basis of their alleged experience is not demonstrated. Additionally the "other information" allegedly in the possession of the Prosecution is unreferenced and if it has not been produced at confirmation, should not be considered.
[30] ICC-01/09-01/11-T-12, 8 Sept 2011, p. 75-6.

submits that part of the assessment of the quality of evidence is necessarily determining whether the Prosecution has investigated thoroughly so as to bring forth corroborating and/or exonerating accounts where available. This is especially so when they are otherwise relying on largely anonymous witness statements or reports.

Over-Reliance on Reports from CIPEV, KNCHR and HRW

22. The Defence notes that in its List of Evidence, the Prosecution relies heavily on references to the Waki or CIPEV Report[31] and/or the KNCHR Report[32] and/or the Human Rights Watch Report[33]. It is this over-reliance on such reports, instead of reliance on first-hand investigations done by the Prosecution, that led the Defence to suggest that the Prosecution's case and specifically its notion of a "Network" was drafted into being on the Prosecutor's desk.[34]

23. These are commissions or organisations which conducted investigations for particular advocacy or reconciliation purposes, and whose research methods are often not identifiable[35] or are questionable[36]. It would appear that the Prosecution has simply picked up these collections of materials, essentially compilations of anonymous or unidentifiable sources, and has attempted, without appropriate caution, to refer to them in support of its theory of a criminal common plan involving Ruto, Kosgey and Sang.

24. The Prosecution appears blind to the fact that these reports contain significant caveats. For instance, the Waki Commission acknowledged its own shortcomings by stating:

> "The evidence the Commission has gathered so far is not, in our assessment, sufficient to meet the threshold of proof required for criminal matters in this country: that it be *'beyond a reasonable doubt'*. It may even fall short of the proof required for international crimes against humanity. We believe, however, that the Commission's evidence forms a firm basis for further investigations of alleged perpetrators,

[31] The Prosecution references the Waki Commission or CIPEV Report (EVD-PT-OTP-00004) twenty-five times in its List of Evidence accompanying the DCC (ICC-01/09-01/11-261-AnxB-CONF).
[32] The Prosecution references the KNCHR "On the Brink of the Precipice" Report (EVD-PT-OTP-00001) forty-one times in its List of Evidence accompanying the DCC (ICC-01/09-01/11-261-AnxB-CONF).
[33] The Prosecution references the HRW "Ballots to Bullets" Report (EVD-PT-OTP-00002) twenty-nine times in its List of Evidence accompanying the DCC (ICC-01/09-01/11-261-AnxB-CONF).
[34] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 136.
[35] The Defence notes that in respect of the Waki Commission, however, there are a few statements from Witness 42 (EVD-PT-OTP-00371 and EVD-PT-OTP-00373) and a few related exhibits (EVD-PT-OTP-00377) which provide some detail as to the workings and guidelines of the commission.
[36] See for instance, Ruto's criticism of the Prosecution's reliance on the Waki and KNCHR Reports: EVD-PT-OTP-00410 at 0086-8; EVD-PT-OTP-00412 at 0097-0100.

> especially concerning those who bore the greatest responsibility for the post-election violence."[37] (emphasis added)

25. The Prosecution partially justifies its reliance on anonymous sources contained in these reports by stressing the need for protective measures of witnesses at this stage. Yet the practice of relying on such reports, even when balanced against concerns of witness safety, has been soundly criticized by the Appeals Chamber of the Special Court for Sierra Leone. There Justice Robertson QC stated:

> "Courts must guard against allowing prosecutions to present evidence which amounts to no more than hearsay demonisation of defendants by human rights groups and the media. The right of sources to protection is not a charter for lazy prosecutors to make a case based on second-hand media reports and human rights publications."[38]

26. Likewise, the Defence submits that these reports alone, or even in corroboration with other unreliable witness testimonies, cannot provide substantial grounds to believe that Sang was part of a criminal common plan.

27. The Defence notes that where the Prosecution has relied exclusively on these reports to support one of its allegations, or where the Prosecution attempts to use the evidence contained in these reports to corroborate its witness statements,[39] the Pre-Trial Chamber should not place great reliance on these materials. Given the anonymous and unknown nature of the witnesses who gave information to KNCHR, CIPEV 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.

Selective Investigations

28. The Prosecution was authorised by the Court to investigate the 2007/2008 Post Election Violence in Kenya, yet has presented charges in respect to only two Districts in the Rift Valley. There is no explanation for this selective focus. The Prosecution has not given a logical explanation for the violence in the other forty or more Districts in Rift Valley where violence was experienced and where the suspects were not present. The Prosecution has not established how violence in Uasin Gishu and Nandi Districts in Rift Valley

[37] EVD-PT-OTP-00004 at 0391.
[38] *Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-AR73-506, Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, to the Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006, para. 35 (emphasis added).
[39] See Annex B.

province was other than spontaneous, as compared to the violence that took place in five out of eight of the other Kenyan Provinces. The Prosecutor has not explained how the spontaneous violence of 1992 and 1997 is so distinct from that of 2007-8. The Prosecutor's own evidential material, the KNCHR Report, states that the 2007/2008 violence was similar to the 1992 and 1997 election violence in their spontaneity.[40]

Failure to Investigate Credibility and to Follow-Up Investigative Leads

29. The Prosecution was obligated to question the credibility of the accounts given to it by the witnesses from whom its investigators took statements. This would at a minimum include verifying the dates of alleged meetings and rallies in relation to the possible presence of the suspects.[41] Certainly the Prosecution should have obtained audio copies of the broadcasts that Prosecution witnesses allege Sang to have made on air at Kass FM. Here, the Prosecution did not make even a cursory search of public records to corroborate or test the credibility of its witnesses. As demonstrated by defence presentations in both *Prosecutor v. Ruto et al* and *Prosecutor v. Muthaura et al*, Kenya is a functional state and public records, especially in relation to public figures, were and are easily available and obtainable.

30. The bulk of the allegations against Sang pertain to his conduct in relation to his role at Kass FM -- a vernacular radio station whose daily broadcasts are available to the Prosecution. In fact, the Prosecution was able to present as evidence selected translated summaries of Kass FM broadcasts from 18 January 2008 through the present. It is unimaginable that a diligent Prosecution could not have produced either audio recordings or translated summaries of Kass FM broadcasts. These are necessary to corroborate otherwise anonymous allegations about broadcasts Sang made on air during the period leading up to or encompassing the post-election violence. The Defence submits that the absence of these records (whether incriminating or exculpatory) is a good indication that the Prosecution has not taken its duty to assess the credibility of its witnesses' accounts seriously. In any event, without the broadcasts, the Prosecution cannot be said to have met the substantial grounds threshold and the charges should not be confirmed. The significance of having such transcripts is amply illustrated by the closing oral remarks made by the Victims' Representative. The content of the transcripts of that allegedly

[40] EVD-PT-OTP-00001 at 0137, para 522.
[41] See also Ruto Confirmation Brief, paras 24-9.

inciting broadcast, now available to the Chamber, bears no relation to what was alleged. The need for the 'best' evidence in such a situation could not be better demonstrated. It does not take an 'experienced investigator' to recognise the need for such material at a Court of this standing.

31. The Chamber will recall submissions to the effect that the Prosecution did not follow up on evidentiary leads provided to them by their own witnesses. For instance, Witnesses 6 and 8, who make broad allegations against Sang, purported that their account could be independently corroborated, and yet it seems no follow-up was conducted.[42]

32. As noted during the hearing, it was often the case that when the Prosecution did check contemporaneous accounts, the information did not corroborate the evidence given to the Prosecution by its witnesses.[43] The Defence submits that this demonstrates that, had the Prosecution critically examined its witnesses' accounts and investigated the existence of corroborating information, it could not in good faith have put forth many of the allegations that it now relies upon. Consequently, in the absence of proper follow-up with respect to investigative leads which, if pursued, may have undermined the Prosecution case, the Chamber ought not to find that the totality of the evidence provides a sufficiency of evidence to establish substantial grounds.

.**Failure to Investigate Clearly Exculpatory Information**

33. The Prosecution's duty with regard to exculpatory evidence is not limited to the disclosure of exculpatory evidence, but extends to the investigation of exculpatory evidence. Contrary to the Prosecution claims at paragraph 72 of its Brief, the disclosure of potentially exculpatory material without further reasonable investigation of the same is not sufficient to fulfill this duty.

34. The evident bias of Witness 4 as highlighted by Ruto in his statement to the Prosecution was not counter-checked by the Prosecution, in breach of its statutory duty. The Chamber should accordingly approach the entirety of the evidence of Witness 4 with great caution and circumspection.

[42] See examples provided in Ruto Confirmation Brief, paras 22-23.
[43] See, for instance, evidence of Witness 1: EVD-PT-OTP-00159 at 1221 andat 1259-60 and EVD-PT-OTP-00305 and 00130 (alleging that at a rally in Kapsabet, Councillor Ishmael Choge was speaking and received a call from Ruto who told Choge that they should "set fire". Witness 1 gave his CD copy of the rally to the Prosecution (who belatedly and only upon request disclosed it to the Defence) but the Prosecution nor Witness 1 could find the part where Choge received a phone call from Ruto).

35. The contentions made by witnesses for CIPEV and KNCHR, Rono and Wekesa, stating that they were coached, induced, enticed and rewarded to implicate suspects by Hassan Omar Hassan and others, were not investigated.[44] It is unknown how far this contamination may have spread.

36. All parties, including the Prosecution, acknowledge that there was a media ban on live coverage in Kenya in the period beginning 30 December 2007.[45] As detailed below, Kass FM complied with the ban and had no live coverage on, *inter alia*, 30 December 2007, 31 December 2007, 1 January 2007, 2 January 2008, and 3 January 2008 as purported by the Prosecution's witnesses. Yet the Prosecution failed to fully investigate and acknowledge this ban in its presentations to the Chamber in a forthright manner, disregarding the extent to which it exculpates Sang.

37. When the Prosecution did address the issue of the ban in its Closing Submissions, it alleges that Kass FM did not adhere to the ban.[46] The Prosecution failed to present evidence of Kass Fm's breach of the ban or the fact that Sang did or had the ability to disregard the State-imposed ban from 30-31 December 2007 and from 1-3 January 2008. However, and without providing evidentiary support, the Prosecution claims that the suspension was not lifted until February 2008. It then points to the fact that Kass FM made broadcasts from 18 January 2008 onwards, inorder to prove that Kass FM made broadcasts throughout the period of the ban. This inference cannot be drawn in light of the fact that the Prosecution have failed to properly investigate this aspect of its case.

38. The Defence submits that all of the above failures with respect to the investigation into the charges against Sang cumulatively show that the evidence put forth by the Prosecution is not sufficient for the case to be confirmed. The investigation was not comprehensive enough to come close to establishing the truth, which should be the goal of the Prosecution, as required by the Statute.

IV. ANALYSIS OF EVIDENCE

39. In addition to a handful of NGO and Government reports, the Prosecution case rests on the anonymous and heavily redacted statements of just six witnesses: Witness 1, Witness 2, Witness 3, Witness 5, Witness 6 and Witness 8. The Prosecution also relies on the

[44] EVD-PT-OTP-00464; ICC-01/09-01/11-T-10-CONF, 6 Sept 2011, p. 29-43.
[45] EVD-PT-OTP-00040.
[46] ICC-01/09-01/11-T-12, 8 Sept 2011, p. 8.

redacted statements of Witness 4, whose identity was inadvertently disclosed by the Prosecution to the Defence.

40. Of these witnesses, Witness 3 is a visitor passing through Kenya who only gives a passing account of what he experienced during the post-election violence and who states that the violence seemed spontaneous.[47] Witness 4 is a biased individual with a long-standing vendetta against Ruto.[48] Witness 5 is hardly referenced. Witnesses 1, 2, 6 and 8 are self professed criminals[49] and are thus inherently unreliable.

41. Furthermore, Witness 2[50] and Witness 8[51] through providing allegedly 'eyewitness' accounts, strain credibility by their implausible omnipresence at various events and places. Witnesses 4 and 6 also seem to be omnipresent. They are in all meetings and observe all incidents, travelling great distances with cameras and video tapes serendipitously on hand. It is unrealistic for individuals to be omnipresent, to have infinite financial resources and time, and to have the professional training to achieve the results purported by the Prosecution's witnesses herein. The Defence urges the Chamber to find that the omnipresence of these witnesses casts doubt as to whether they can be credibly viewed as insiders to the alleged common plan to commit crimes.

42. The Defence submits that none of these individuals' evidence, when considered alone or against the accounts given by others, can be relied upon by this Chamber to show substantial grounds to believe that there was a common plan and that the suspects had the intention to commit murder, forcible transfer or persecution. This is due to a number of factors, including the anonymous nature of the statements and their lack of internal and referencial consistency.

43. A few of the major contradictions between witnesses, noting where the Prosecution has inexplicably decided to favour one account over another, include:

[47] EVD-PT-OTP-00220 at 0106.
[48] See Ruto Confirmation Brief, paras 16-18.
[49] Witness 1: EVD-PT-OTP-00790 at 0015 (admits to setting house alight); Witness 2: EVD-PT-OTP-00382 at 0028, EVD-PT-OTP-00483 at 0136 and EVD-PT-OTP-00489 at 0435 (admits to participating in the Turbo incidents), Witness 6: EVD-PT-OTP-00382 at 0028, EVD-PT-OTP-00483 at 0136 and EVD-PT-OTP-00489 at 0435 (admits to joining a riot and fighting in Langas) and Witness 8: EVD-PT-OTP-00561 at 1117 and EVD-PT-OTP-00561 at 1118 (admits to participating in looting in 1992 and 1997); EVD-PT-OTP-00554 at 0917 and EVD-PT-OTP-00559 at 1011 (participating in the 2007 violence).
[50] Witness 2 gives detailed explanation of events in Turbo Town, Nandi Hills, and Kiambaa Church.
[51] Witness 8 gives detailed explanation of events in Turbo Town and the Greater Eldoret Area. He also allegedly attended three of the planning meetings.

a. the date for the alleged Sirikwa Hotel fundraising meeting: Witness 8 gives the date as 2 September 2007, yet Witness 1 gives the date as 2 November 2007 (the Prosecution for unknown reasons has chosen to go with the earlier date);

b. the different versions of the Network hierarchy: Witness 6 puts Hon. Raila Odinga at the top[52] followed by Kosgey and Ruto and then followed by three commanders (Cheruiyot, Cherambos and Koech), followed by divisional commanders while Witness 8 puts Hon. Ruto at the top[53] followed by commanders, administrative coordinators, and local coordinators in that descending order;

c. the oathing ceremony for members of the 'Network': Witness 2 states that on 14 April 2007 an oath was administered using the blood of a dog,[54] while Witness 8 claims that the same oath was administered at Sugoi on 14 December 2007 using some sort of blood,[55] and Witness 6 talks of an oathing ceremony held at the home of Mr Mberia on a date that is redacted, during which the participants simply lifted up their hands;

d. the fight at Langas: Witness 8, who purported to be an insider in a group of Kalenjin aggressors, said that he went to Langas with others and killed Kikuyus. However, the CIPEV Report determined that Langas was not a Kalenjin problem, and the KNCHR[56] and HRW[57] Reports states that the fighting in Langas was between the Luos and Kikuyus.

44. In order to choose what version to put forth during the confirmation process, the Prosecution must have made its own credibility assessment of its witnesses' evidence. For instance, Prosecution witnesses had named three commanders of the alleged Network (Cheruiyot, Cherambos and Koech), but for purposes of the hearing, the Prosecution no longer made reference by name to Koech.[58] If the Prosecution does not believe its witnesses' accounts, neither should the Chamber.

45. These glaring contradictions, on significant points of evidence, alongside the Prosecution's cherry-picking of which version is more convenient for them to adopt,

[52] EVD-PT-OTP-00399.
[53] EVD-PT-OTP-00286.
[54] EVD-PT-OTP-005446 at 0019.
[55] EVD-PT-OTP-00441 at 0023.
[56] EVD-PT-OTP-00001 at 0073 and 0082.
[57] EVD-PT-OTP-00004 at 0292 to 0293.
[58] ICC-01/09-01/11-321-Conf-AnxA.

undermines the veracity and reliability of the entirety of the Prosecution evidence, such that it cannot be relied upon to confirm the charges.

Insufficient Evidence Regarding Meetings: Anonymity, *Viva Voce* Testimony, 'Alibis'

46. The core of the Prosecution case revolves around several planning meetings and rallies during which the suspects were allegedly present and during which they are alleged to have distributed weapons, distributed money and incited people to violence.[59] The Prosecution evidence on its face, and when compared to Defence evidence, does not establish substantial grounds to believe that the meetings or rallies took place. This is significant because it is primarily through these meetings that the Prosecution claims Sang demonstrated his intention to commit or contribute to the ensuing post-election violence. The alleged meetings are the nexus which, according to the Prosecution theory, link the suspects to the direct perpetrators of the post-election violence. If the Chamber does not find sufficient grounds to believe that the meetings occurred as alleged, then the charges should not be confirmed.

Anonymity of Witness Accounts

47. The Prosecution primarily relies on anonymous Witnesses 1, 2, 6 and 8 to demonstrate the occurrence of the preparatory meetings. Contrary to the Prosecution's claims,[60] the anonymity of these witnesses, and the heavily redacted nature of their statements, prevents the Defence from fully challenging the reliability of their evidence.

48. At paragraph 20 of its Brief, the Prosecution seeks to argue that anonymous statements have more probative value than anonymous summaries. However, as noted by the Single Judge in *Katanga & Ngudjolo*, "the difference in probative value between a summary and the unredacted parts of heavily redacted statements, interview notes or interview transcripts is minimal".[61] Thus the Pre-Trial Chamber acknowledged that highly-redacted statements can prejudice the Defence to the same extent as anonymous summaries do, concluding that redacted statements (such as all of those interview transcripts of

[59] The main dates in contention are 2 November 2007, 6 December 2007, and 14 December 2007.
[60] Prosecution Confirmation Brief, paras 26 and 27.
[61] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-428-Corr, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 21 April 2008, para. 89, citing ICC-01/04-01/06-517, p. 4-6.

Witnesses 1, 2, 6 and 8, disclosed to the Defence in this case) do not necessarily have any higher probative value than an anonymous summary.[62]

49. Furthermore, the fact that the Prosecution is using anonymous witnesses to corroborate other anonymous witnesses mitigates unfairly against the suspects. ICC jurisprudence suggests that anonymous witness statements can only be used to corroborate "other", ie, non-anonymous evidence. In *Lubanga*, the Trial Chamber held in respect of anonymous statements, hearsay and summaries, that "mindful of the difficulties that such evidence may present to the Defence in relation to the possibility of ascertaining its truthfulness and authenticity, the Chamber decides that, as a general rule, it will use such anonymous hearsay evidence only to corroborate other evidence".[63]
50. The Defence attaches as an annex, a chart indicating which allegations from the Prosecution's Document Containing the Charges ("DCC") and List of Evidence ("LOE")[64] are supported only by anonymous accounts and asks that, out of fairness to the Defence, the Chamber place a very low probative value on this evidence.

Alibi Evidence

51. Pursuant to Article 61(6)(b) and (c), which allow the Defence to challenge evidence presented by the Prosecution and to present evidence, the Defence has filed a significant amount of evidence with the Court showing that the suspects or other personalities were not present at the meetings and/or rallies as alleged by the Prosecution.

52. Firstly, the Defence submits that to call the defence evidence adduced 'alibi evidence' is a misnomer. An alibi, its latin meaning being 'elsewhere' or 'another place', is an evidential issue raised by the Defence. It is the subject of due notice so as not to ambush the Prosecution with an assertion that may require investigation. There is no burden on the

[62] *Ibid*, para. 89; see also Katanga & Ngudjolo Confirmation Decision, paras 119 and 140.
[63] Lubanga Confirmation Decision, paras 102 and 106. The use of the word 'other' juxtaposed with the general category of anonymous hearsay evidence (as opposed to a reference to a singular item of anonymous hearsay evidence, such as an anonymous summary), clearly evidences the intention of the Pre-Trial Chamber that the anonymous hearsay evidence – irrespective of whether it was comprised of one or more statements and summaries – must be corroborated by a category of evidence other than anonymous hearsay evidence. In accordance with this formulation, one anonymous summary cannot corroborate another anonymous summary or statement. This is consistent with the fact that in reaching the conclusion that anonymous hearsay evidence must be corroborated, the Pre-Trial Chamber relied upon the approach of the ECHR concerning anonymous witnesses, in particular, the finding in the Kostovski case that a conviction based to a decisive extent on anonymous testimony would be incompatible with the right to a fair trial under article 6 of the Convention. *Kostovski v. The Netherlands*, Application No. 11454/85, Judgment, 20 November 1989, §44.
[64] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-261, Prosecution's Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rules 121(3), (4), and (5), 15 Aug 2011 ("DCC" and "LOE").

Defence at a trial to prove an alibi. Once raised, the evidential burden rests with the Prosecution to disprove it to the standard of proving it false 'beyond a reasonable doubt'.

53. Secondly, 'alibi' is only the subject of evidential notice where presence of an accused elsewhere necessarily precludes commission of the crime. It is inappropriate when charges are of the nature found in this case and where absence at specific crime scenes is, of itself, no defence. It would be clearly unfair on a suspect to require him to provide 'alibi' notice in respect of over-arching charges, extending over a relatively extensive period of time such as found in this case. In a recent oral decision in the *Ngudjolo* case, the Trial Chamber noted that such evidence is not necessarily fully exculpatory and therefore cannot be considered to be a complete alibi defence, which attracts the requirements of Rule 79.[65]

54. Nevertheless, the evidential issues are clearly relevant to the confirmation hearing. The Prosecution submits, at paragraph 49 of its Brief, that "alibi" evidence can only be properly addressed at the trial stage. In *Abu Garda*, the Defence relied upon evidence that the suspect was absent at meetings. The Chamber accepted the evidence and relied upon it in its findings not to confirm the case.[66] In *Lubanga*, the Single Judge concluded that "Rule 79 of the Rules makes it clear that the Defence may raise any alibi or any other defence, under Article 31(1) of the Statute, either at the confirmation hearing or at the trial."[67] The suspects do not have to wait until trial to show that the Prosecution evidence of attendance at planning meetings and rallies is insufficient on its face.

55. The Prosecution argues that the Defence did not provide sufficient advance notice of its intent to raise an alibi defence. The Defence do not accept, as indicated above, that the defence evidence is of a nature that requires notice of alibi. In any event, the Defence filed all relevant evidence in accordance with the statutory disclosure deadline and even in cases where notice is necessary the express terms of Rule 79(3) states that the "failure of the defence to provide notice under this rule shall not limit its right to raise [such] matters … and to present evidence."

[65] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-290-Red-ENG, 12 July 2011, p. 64-65.
[66] *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Public Redacted Version - Decision on the Confirmation of Charges, 8 February 2010 ('Abu Garda Confirmation Decision'), para. 214.
[67] *Prosecutor v. Lubanga*, ICC-01/04-01/06-102, Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, para. 53.

56. The Suspects have provided evidence that they were elsewhere at the time when Prosecution witnesses allege their presence and participation at various planning or preparatory meetings. The nature of that evidence is such as to raise, at this stage, a significant doubt as to the reliability of their accusers. The Defence submits that, taken with other matters, the evidence adduced does not provide substantial grounds for belief.

57. A strong motive for the Defence in presenting the 'alibi' evidence was to demonstrate that the Prosecutor had breached the statutory duty imposed upon him under Article 54 to investigate in equal measure incriminating and exculpatory evidence. In all likelihood, the Defence submits, had the Prosecutor discharged his statutory duty and investigated the allegations appropriately, he would have come to the realisation that he was misled by his witnesses and that the alleged preparatory meetings were a pure fiction. Accordingly, it would have been highly unlikely that a summons would have been sought or issued.

Viva Voce *Evidence*

58. The Defence chose to call live witnesses and to present testimonial evidence by way of written statements. The Prosecution attempted to limit the potential impact that Defence evidence should have *vis-à-vis* the sufficiency of the Prosecution evidence, but it is clear 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. In *Lubanga*, the Chamber recognised that:

> "there can be material advantages in testimony being given in its entirety *viva voce* before the Court, particularly when evidence of significance is challenged or requires comprehensive investigation. The live questioning of a witness in open court on all aspects of his or her evidence can have a material impact on the Chamber's overall assessment of the evidence, since oral testimony is, for obvious reasons, of a different nature to a written statement: most importantly the evidence can be fully investigated and tested by questioning, and the Court is able to assess its accuracy, reliability and honesty, in part by observing the conduct and demeanour of the witness."[68]

59. Thus the Defence's reliable and credible *viva voce* testimony which was not controverted in its fundamental features has greater probative value than written evidence of the Prosecution.[69]

[68] Ibid, para 21.
[69] This position does not contradict the Single Judge's clarification that witness statements elicited through oral testimony are not *per se* given a higher probative value than written statements. *Prosecutor v. Muthaura et al*, ICC-01/09-02/11-275, Decision on the Defence Applications for Leave to Appeal the Single Judge's

V. SANG'S INDIVIDUAL CRIMINAL RESPONSIBILITY - ARTICLE 25(3)(d)

60. In the DCC, the Prosecution charges Sang with contributing to three types of crimes against humanity – murder (Count 2), forcible transfer (Count 4) and persecution (Count 6) – under Article 25(3)(d).[70] However, the Prosecution incorrectly refers in Counts 2, 4, and 6, to Sang as having 'committed or contributed to the commission of' the crimes. Count 6 additionally refers to 'co-perpetrators and/or persons belonging to their group'. The Defence submits that given the elements of Article 25(3)(d), the charges are defectively pleaded against Sang and should not be confirmed on that basis. The description of the counts should have been unambiguous and leave no room for confusion and/or embarrassment to the suspect in his defence.

61. In its Summons Decision, the Pre-Trial Chamber listed several specific requirements that must be met in order to trigger Sang's responsibility under Article 25(3)(d), finding reasonable grounds to believe that they indeed had been met.[71] The Pre-Trial Chamber made these findings without hearing from the Defence and on the basis of the "reasonable grounds to believe" standard, which is a significantly lower standard of proof than the "substantial grounds to believe" standard which the Pre-Trial Chamber must currently apply. The Defence respectfully submits that, on this higher standard, the Pre-Trial Chamber cannot reasonably impose criminal liability on Sang under Article 25(3)(d) on the basis of the factual allegations.

62. As discussed throughout the Brief, the Prosecution evidence is unreliable and can thus not be relied upon to demonstrate Sang's liability. The Defence additionally submits that, even taking the evidence at its highest, the Prosecution fails to establish the existence of

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Order to Reduce the Number of Viva Voce Witnesses, 1 Sept 2011, para. 26.

[70] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-261-AnxA, DCC, p. 35-6. Initially, Sang, along with Ruto and Kosgey, was charged under article 25(3)(a) and, in the alternative, under article 25(3)(d). The Pre-Trial Chamber held that there were no reasonable grounds to believe that Sang's involvement was of such an essential nature, to the extent that he had the power to frustrate the commission of the crimes, that he could be held responsible as an indirect co-perpetrator similarly to Ruto and Kosgey. *Prosecutor v. Ruto et al*, ICC-01/09-01/11-1, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ('Summons Decision'), paras. 37, 44, 50.

[71] The requirements were listed as follows: a crime within the jurisdiction of the Court is attempted or committed; a group of persons acting with a common purpose attempted to commit or committed this crime; Sang contributed to the crime, in any way other than those set out in article 25(3)(a) to (c) of the Statute (objective elements); the said contribution is intentional; and has been made either with the aim of furthering the criminal activity or criminal purpose of the group; or in the knowledge of the intention of the group to commit the crime (subjective element). Summons Decision, para. 51; these objective and subjective elements of the liability mode under article 25(3)(d) are set out in a similar fashion in the *Mbarushimana Arrest Warrant Decision*, para. 39.

substantial grounds to believe that Sang is criminally liable under Article 25(3)(d) for contributing to the commission of crimes against humanity.

63. First, the crimes charged do not qualify as crimes against humanity because they were not committed pursuant to an organisational policy. Rather, the Defence submits, the violence was essentially spontaneous. Second, the crimes were not committed pursuant to a common plan, by a group of persons acting in a concerted manner. The Prosecution has failed to establish that this criminal group, ie the "Network" even existed or that Sang was associated with it. What they have qualified as the "Network" is a group of five legitimate branches of society pursuing legitimate purposes. One of these branches is the media branch consisting only of Sang and Kass FM. The Prosecution has failed to establish substantial grounds to believe that Ruto and Kosgey through the "Network" acted pursuant to a common plan to expel and punish PNU supporters from the Rift Valley by means of murder, persecution and forcible transfer. Third, the factual allegations do not amount to a contribution within the meaning of Article 25(3)(d). Fourth, the factual allegations fail to demonstrate that Sang intended to make a contribution to the commission of crimes against humanity.

64. Arguments in support of the first and second submission are set out elsewhere.[72] Arguments in support of the third and fourth submission were set out during the confirmation hearing[73] and now in more detail below.

Contribution under Article 25(3)(d): Substantial, Intentional, Nexus to Crime

65. In considering Sang's liability under Article 25(3)(d), the Pre-Trial Chamber did not define what sort of contribution is required for liability under Article 25(3)(d). During the confirmation hearing, the Prosecution refers to "significant" contributions made by Sang.[74] The Defence, however, submits that it is not legally sufficient for a contribution to be only "significant". In order to trigger liability under Article 25(3)(d), the contribution must be "substantial".

66. This follows from the fact that article 25(3)(d) constitutes a "residual form of accessory liability",[75] which should require the typical characteristics of accessory liability, that the

[72] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-305, Defence Challenge to Jurisdiction, 30 August 2011; Ruto Confirmation Brief, sections on jurisdiction and common plan.
[73] ICC-01/09-01/11-T-10, 6 Sept 2011, p. 46-7.
[74] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 62.
[75] As the Court referred to it in the Lubanga Confirmation Decision, para. 347. Also see Summons Decision, paras 37-38; also see *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-1, Decision on the Prosecutor's

"person's act had a substantial effect on the commission of the crime by someone else, while in the case of commission as a principal, the crime is ascribed as one's own conduct."[76] This is also consistent with academic views on this mode, including that of Kai Ambos who recently made oral submissions about article 25(3)(d) before this Court.[77]

67. In addition, Article 25(3)(d) criminalises any "other" behaviour of persons outside the criminal group and plan that cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting under Articles 25(3)(b) or (c).[78] From the ambiguous wording of Article 25(3)(d), it appears that this mode of liability potentially has a very wide reach and risks being used as a "catch-all" liability mode. For this reason, it has been severely criticised as a mode of liability.[79]

68. In order to ensure that only persons who deserve to be brought to international justice, as a result of their individual, intentional, blameworthy conduct, can be held liable under the Rome Statute, Article 25(3)(d) must be strictly construed and ambiguities should be resolved in favour of the defendant. On that same reasoning, the Defence submits that, in order for a contribution within the meaning of Article 25(3)(d) to amount to a criminal offence, such a contribution must be substantial. Indeed, the drafters surely did not intend for a person, not part of the common plan or criminal group, to be criminally liable if his contribution was anything less than substantial. This is particularly clear, given that the standard for aiding and abetting under Article 25(3)(c) requires a substantial contribution.

69. Any other reading of Article 25(3)(d) would infringe upon fundamental principles of fairness, in particular the principle of *in dubio pro reo*, requiring that the interpretation to be given is the one which most favours the prospective defendants; and the principle of legality requiring the law to be clear, ascertainable and non-retrospective.

Application for Warrant of Arrest against Callixte Mbarushimana, 11 October 2010, ('Mbarushimana Arrest Warrant Decision'), para. 38.

[76] Werle, 955. *See also* Werle, 957 (noting that "the wording of the provision clearly reflects the difference between commission, as liability for the crime as the result of one's own conduct, and all other modes of participation, as accessory liability for a crime committed by someone else" and thus suggesting (d) to be part of the latter category).

[77] *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-T-8, 20 Sept 2011, p. 4-32.

[78] Cassese, International Criminal Law, at p. 213. See also: Ohlin, Joint Criminal Confusion, p. 411.

[79] For criticism in respect of Article 25(3)(d) liability, see Vincenzo Militello, *The Personal Nature of Individual Criminal Responsibility and the ICC Statute*, JICJ 5 (2007) 941-952, at p. 950; also see: Gerhard Werle: *Individual Responsibility in Article 25 ICC Statute*, JICJ 5 (2007) 953-975, at p. 970; Albin Eser, 'Individual Criminal Responsibility' in 'The Rome Statute of the International Criminal Court: A Commentary', pp. 767, 802. See also, K. Ambos, Article 25: Individual Criminal Responsibility, in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, (Hart Publishing 2nd ed. 2008) at pp. 743, 754, 759; and Ohlin, Joint Criminal Confusion, p. 417.

70. The meaning of 'substantial' was discussed in the ICTY case of *Tadic*: "[T]he criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed". Substantial was read to cover "all acts of assistance by words or acts that lend encouragement or support."[80] Easily exchangeable acts may not be considered substantial.[81] The Defence requests the Pre-Trial Chamber to adopt a similar definition of a contribution under Article 25(3)(d).

71. The Defence submits that the Prosecution must show a significant nexus, not just "the making of any voluntary contribution"[82] as was the definition proposed by the Prosecution in *Mbarushimana*. The use of the word "contribute" further suggests clearly that the actions of the defendant must form some part of the causal nexus of the commission or attempted commission of the crime. This has recently been stated authoritatively by Kai Ambos before this Court.[83]

72. Articles 25(3)(d)(i) and (ii) embody the subjective elements of the crime. These provisions require knowledge, not only of the general criminal purpose of the group, but also knowledge that the group had the intention of committing specific crimes under the ICC Statute; as well as the intent to contribute to the commission of these specific crimes.

73. These provisions clearly exclude 'foreseeability'. Indeed, Article 25(3)(d) seems to require that the contribution be directed toward a crime that is specifically contemplated by the criminal group. That would rule out being held liable for contributing to an unplanned but foreseeable crime. This reading of Articles 25(3)(d)(i) and (ii) is consistent with Article 30 requiring generally that defendants before the Court had knowledge and intent to commit the crimes charged under the ICC jurisdiction, unless otherwise provided.[84]

74. Thus, the Defence submits that a person can be held liable under Article 25(3)(d) only if his conduct constituted a substantial contribution to a crime under the ICC jurisdiction; that there was a nexus between his conduct and the actual commission of a crime under the ICC jurisdiction; and he intended to contribute to a crime under the ICC jurisdiction.

[80] Eser, p. 800, citing to *Prosecutor v. Dusko Tadic*, IT-94-1-T, Judgment, 7 May 1997, para. 689.
[81] Eser, p. 801.
[82] *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Public Redacted Version of Prosecution's Application under Article 58, 20 August 2010, para. 131.
[83] *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-T-8, 20 Sept 2011, p. 26.
[84] Article 30 only incorporates dolus directus in the first degree (intention directed towards commission of crimes charged) or second degree (intention directed towards other purpose, but with knowledge that crimes charged will occur in the ordinary course of events), but not dolus eventualis (crimes were foreseeable).

Failure to demonstrate Sang's liability pursuant to Article 25(3)(d)

75. In the present case, in order to impute criminal liability to Sang under Article 25(3)(d), the Prosecution must demonstrate that his actions contributed to the implementation of Ruto's and Kosgey's alleged common plan to punish and expel PNU supporters from the Rift Valley by murdering, persecuting and forcibly transferring them.

76. At the Confirmation hearing, the Prosecution laid out its analysis of how it seeks to attribute responsibility to Sang.[85] Essentially, these allegations fall into three categories of alleged contributions: broadcasts (containing coded language), fund raising and attendance at meetings.

77. In respect of each of these categories, the Defence points out that the allegations in the DCC are very vague. The Prosecution does not provide any dates of any broadcasts or details of what sort of coded language was used. The specific dates of meetings and fundraising events that Sang attended personally have also been omitted from the DCC. Such details are important in order to present an adequate defence. These details are essential to determine whether the contribution was substantial, whether there was a nexus between Sang's action and the crimes committed, and whether Sang intended them to result in the commission of the crimes charged.[86] Some of the details have been provided by witnesses. However, the Defence submits that the details should be specifically pleaded because the witnesses may change and thus their specific allegations too.

No Substantial Contribution: Broadcasts

78. The Kenyan media in general, and vernacular radio stations particularly, have been blamed for inciting ethnic tensions and for spreading messages that inflamed the violence before and during the post-election violence in 2007-2008.[87] For instance, the KNCHR Report includes a section on the "Role of the Media" in which vernacular radio stations such as KASS FM and Inooro FM were named as having contributed to fanning the violence by facilitating the spread of hate messages.[88] However, Sang should not be sacrificed to stand trial for the sins of the media generally. This is especially true since the HRW reports acknowledges, "there is no clear evidence that the station actively sought to

[85] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 60-69.
[86] See for example, *Prosecutor v. Bikindi*, ICTR-01-72-T, Judgement, 2 December 2008, para. 17.
[87] EVD-PT-D11-00002; EVD-PT-OTP-00001 at 01144-5.
[88] EVD-PT-OTP-00001 at 0081. See also at 0198 (there are five vernacular radio stations which KNCHR claims acted inappropriately during the PEV: Inooro FM, Coro FM, and Kameme FM (Kikuyu language stations), Kass FM (Kalenjin language station), and Radio Injili).

disseminate hate speech but it did not prevent guests from using the airwaves to do so… 'what was on the radio depended on who was in the studio at any given moment'."[89] The Prosecution must therefore prove that Sang as an individual made a substantial contribution to the commission of crimes under Article 25(3)(d).

79. With respect to Sang as an individual, the non-testimonial evidence makes few direct references. The Prosecution seeks to attribute responsibility to Sang on the basis of him being a popular Kalenjin radio broadcaster for Kass FM in 2007,[90] alleging that he held a prominent position which allowed him to make significant contributions to the crimes charged during the pre-election period and during the execution of crimes.[91] The Defence submits that none of the information in relation to Sang being a well-known radio personality is controversial; nor does it have any probative value with respect to the allegations.

80. The Prosecution further alleges that Sang used derogatory terms to describe PNU supporters, thereby indoctrinating his listeners against PNU supporters.[92] However, the Prosecution has not produced one broadcast to corroborate claims of Sang using anti-PNU rhetoric; the broadcasts which they have produced are exonerating.[93] The Prosecution relies on anonymous, generalised statements from Witness 8 to allege that Sang used his platform to indoctrinate listeners against the PNU and its supporters, calling them "weeds" and suggesting that they should be removed from the Rift Valley.[94] In a recent ICTR judgement in *Bizimungu et al,* where the defendant was alleged to have made inciting comments over the radio, the Chamber dismissed the charges in light of the Prosecution's failure to provide transcripts of the broadcast to corroborate allegations by a witness.[95]

81. The Prosecution also alleges that Sang pressured his listeners to support the ODM and threatened that "anybody going against this should be dealt with".[96] Again, there is no independent proof of such a statement. As can be recalled from the inaccurate information

[89] EVD-PT-OTP-00001 at 0286.
[90] EVD-PT-OTP-00222 at 0147 and EVD-PT-OTP-00146 at 0397-8.
[91] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 62.
[92] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 63.
[93] EVD-PT-OTP-00471.
[94] EVD-PT-OTP-00540 at 0434-0438.
[95] *Prosecutor v. Casimir Bizimungu et al,* ICTR-99-50-T, Summary of Judgment, 30 September 2011, para. 55.
[96] Witness 5: EVD-PT-OTP-00306 at 0059.

relayed to Sureta Chana by her field officers, people often claim to have heard something on the radio which turns out to not have been said at all.[97]

82. Even if Sang broadcasted derogatory, indoctrinating or messages, such messages do not necessarily amount to substantial contributions to the crimes charged. For each and every broadcast, the Prosecution must establish a direct nexus with the crimes alleged.[98] This nexus will only be satisfied if the Prosecution can demonstrate a) that the broadcasts called on persons to commit specific actions against the victims; b) that the physical perpetrators listened to Sang's broadcasts; and c) that the broadcast caused them to commit these specific crimes.[99] The Prosecution cannot rely on expert reports or other indirect hearsay to establish such nexus.[100]

83. The mere use of derogatory terms or a vague or indirect suggestion that the opponents should be attacked is insufficient to establish such a nexus.[101] Nor is it sufficient that a broadcast contributed to the "general climate of violence in a country",[102] and was widely listened to.[103] It must be established that crimes were committed as a consequence of the broadcast. Indeed, as the ICTR Appeals Chamber correctly pointed out, "a speech cannot, in itself, directly kill members of a group, imprison or physically injure them."[104]

84. In line with ICTR jurisprudence, the Prosecution must also establish a temporal nexus between the broadcast and attacks on specific persons. The attack must have occurred almost immediately subsequent to the public statement. Indeed, the Appeals Chamber in *Nahimana* held that "the longer the lapse of time between the broadcast and the killing of the person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it".[105] The Appeals Chamber therefore refused to take into consideration publications which were issued before the time frame of the attacks in question.[106]

[97] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-343, Defence Request Regarding Prejudicial Comments Made by Victims' Legal Representative Sureta Chana during Closing Statement, 30 September 2011.
[98] *Prosecutor v. Nahimana*, ICTR-99-52-A, Judgement and Sentence, 28 November 2007, para 505.
[99] At para 509.
[100] At para 509.
[101] At para 692.
[102] At para 519.
[103] At para 513.
[104] At para 986.
[105] At para 513.
[106] At paras 513 and 1015. See also Bikindi Trial Judgement, paras. 141-142.

85. Such a temporal nexus is difficult to show in the case of Sang as many of the alleged broadcasts relate to the pre-election period and it is therefore difficult for the Prosecution to link statements allegedly made by Sang (and those who call in on his radio programme) in the pre-election period as being a cause of the later post-election violence. For example, conclusory evidence from the KNCHR Report to the effect that Sang used KASS FM to mobilize and plan for violence by branding those who did not vote with the rest of the Kalenjin community as traitors,[107] is not sufficient to provide substantial grounds to believe that Sang's pre-election statements on Kass FM contributed to the crimes, as it lacks a temporal nexus. As Judge Kaul indicated, the physical perpetrators of the post-election violence in Kenya acted with a range of motives, including economic opportunism, disenfranchisement, and retaliation.[108]

86. Accordingly, the Defence requests that the Pre-Trial Chamber disregard any broadcasts from Kass FM which were not issued during the actual electoral violence.

87. The Prosecution further alleges that Sang broadcasted the calls of designated network perpetrators during his program. The Prosecution evidence on this point, at its highest, only shows that callers promulgated the notion that Kikuyus had oppressed the Kalenjin and should leave the area.[109] This does not show that Sang had a deliberate intention of broadcasting these people on air, only that they were on air. Sang did not have the ability to select pre-determined callers on air. The Defence has produced photos of the equipment Sang uses in the studio ("hybrid telos"), in order to show that the equipment does not have the capacity to identify incoming numbers or callers.[110] Therefore, Sang cannot be said to have contributed in this way.

88. In any event, he should not be held liable for the expressed views of others, even if he had intentionally allowed them to express their sentiments on air. The European Convention on Human Rights has issued decisions concerning whether State parties can prosecute journalists or media outlets for conveying the views of others. In the case of *Jersild v. Denmark,*[111] the ECHR found that a journalist could not be fined for disseminating the

[107] EVD-PT-OTP-00001 at 0209.
[108] *Situation in the Republic of Kenya,* ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, para. 148.
[109] Witness 28: EVD-PT-0T-00514 at 0738. This is an anonymous summary from a Non-ICC witness who has not given consent for his statement to be used in this way, and therefore the summary should be excluded.
[110] EVD-PT-D11-00048 at 0002; EVD-PT-D11-00009.
[111] *Jersild v. Denmark,* Judgment of 23 September 1994, Series A No. 298

racist statements of persons who appeared in a documentary prepared by the journalist because that "would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so".[112]

89. Furthermore, in the ICTR case of *Nahimana et al* the fact that the defendant played an active role in making broadcasts and selecting radio content, giving orders to journalists in the radio station, was considered insufficient to impute liability to the defendant unless the Prosecution can demonstrate that the defendant played an active role in specific broadcasts which constituted instigation to commit genocide.[113] Similarly, the Pre-Trial Chamber cannot find Sang liable for any alleged broadcasts made by other callers to *Lene Emet.*

90. The Prosecution also states that Sang used Kass FM to broadcast information about dates and places of Network events.[114] The Defence submits that, in addition to failing to provide any documentary proof of such broadcasts, the Prosecution has misconstrued routine announcements of political rallies and events as something of a criminal nature. The Defence has provided examples of Kass FM announcement sheets, demonstrating that all political parties (not just the ODM) could pay to make announcements on air.[115]

91. Many of the broadcasts Sang allegedly made during the post-election violence, ie after the announcement of the election results on 30 December 2007, were to have occurred when Kass FM was actually off air. The fact that the government imposed a ban on live broadcasts directly after the announcement of the election results is supported by ample evidence, and contradicts the Prosecution witness statements entirely. A contemporaneous UNHRC article states that soon after the PEV broke out on 30 December, the Kenyan Government imposed a ban on live broadcasts of many vernacular radio stations.[116] Moses Rono of Kass FM speaking at an Internews workshop in 2008 stated that an hour after the election results were announced, live broadcasts were banned.[117] Cherambos

[112] Ibid, paras 31 and 35 See further *Özgür Gündem v. Turkey*, No. 23144/93, Judgment of 16 March 2000, Reports 2000-III at para. 63, where it was held that a newspaper cannot automatically be held accountable for statements made by terrorist organizations or a terrorist leader.
[113] Nahimana Appeal Judgement, para 596.
[114] Witness 8: EVD-PT-OTP-00542 at 0516-21; Witness 5: EVD-PT-OTP-00306 at 0046; Witness 1: EVD-PT-OTP-00152 at 0749-757 and EVD-PT-OTP-00153 at 0826-8.
[115] EVD-PT-D11-00008 and EVD-PT-D11-00007.
[116] EVD-PT-OTP-00040 (noting only one newstation, Kiss FM, continued live broadcasts during the blackout).
[117] EVD-PT-D11-00002 at 0020; see also at 0014 (Kenyan Minister of Information states that the Government imposed a month long live media ban when the violence first started).

testified that he remembers there was a ban on live media stations shortly after the elections.[118] Sang confirms that Kass FM and other radio stations were given notice at 7pm on 30 December 2007 to suspend live coverage until further notice.[119] He states that Kass FM complied with the ban and only played music and pre-recorded peace messages all week.[120]

92. In light of the fact that Kass FM was not conducting live broadcasts from late 30 December 2007 until sometime in mid-January 2008, all of the Prosecution allegations that Sang was on air, directing perpetrators to begin the attacks, and signalling where attacks should begin, broadcasting live calls from direct perpetrators and generally coordinating network perpetrators,[121] have to fail. The Prosecution evidence is wholly deficient. The plain need for 'best' evidence, being transcripts or recordings rather than hearsay, is particularly apposite to allegations concerning broadcasts.

93. Sang cannot be said to have made any contribution to the attacks made during the post-election violence itself, since he was off air. Even if Sang was on air during this period and made the comments alleged, the nexus between his comments and the actions has not been proven. As was observed by the Dissenting Judge of this Pre-Trial Chamber, messages were mostly spread by word of mouth.[122] Other publications point to the role of SMSs sent using mobile phones, as well as emails and blogs, during the post-election violence, given that the radio stations were off air.[123]

94. Thus, the Prosecution failed to establish substantial grounds to believe that any of the alleged broadcasts amounted to a contribution within the meaning of Article 25(3)(d).

No Substantial Contribution: Fundraising

95. The Prosecution further alleges that Kass FM (an entity which the Prosecution apparently equates with the individual Joshua Sang) contributed to fund raising.[124] The Kass FM fund raising event at the Sirikwa Hotel, at which Sang was alleged to be the Master of Ceremonies, never occurred, as explained below. Reverend Kosgei testified that Kass FM

[118] ICC-01/09-01/11-T-7, 3 Sept 2011, p. 57-8.
[119] EVD-PT-D11-00048 at 0004.
[120] EVD-PT-D11-00011 (transcripts of some of the peace messages, including those from Behtwel Kiplagat and Arap Sumbweiyo); EVD-PT-D11-00013 (a list showing the programs on various dates during the ban).
[121] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 65-7 (internal citations omitted).
[122] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-2, Public 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, 15 March 2011, para. 28.
[123] EVD-PT-D11-00002 at 0016-0023.
[124] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 64.

was not associated with the Emo Foundation and did not raise any significant amount of funds for use during the violence.[125]

96. In any event, the Prosecution failed to establish substantial grounds to believe that this fund raising was done for any illegitimate purpose; or if it was, that Sang was aware of that. In accordance with the ICTR case of *Bikindi*, where the Chamber refused to impute liability to the defendant because the Prosecution failed to prove that the money collected at the defendant's concerts were used to purchase weapons,[126] the Defence requests the Pre-Trial Chamber not to impute any liability on Sang for his alleged participation in fund raising events, especially in the absence of any evidence showing that money allegedly raised at this event was used to commit crimes of murder, forcible displacement and persecution.

No Substantial Contribution: Meetings

97. Sang is alleged to have attended several preparatory meetings: 30 December 2006 (at Ruto's house in Sugoi), 15 April 2007 (in Molo Town), 2 September 2007 (at Sirikwa Hotel), 2 November 2007 (at Ruto's house in Sugoi), 6 December 2007 (at Kipkarren), and 14 December 2007 (at Ruto's house in Sugoi). Additionally, Sang was said to have attended the 24 January 2008 funeral of athlete Lucas Sang. Sang has unequivocally stated that he was not present at any of the alleged meetings.[127] As shown below, there are no substantial grounds to believe that the meetings ever occurred. Therefore the Prosecution cannot use Sang's attendance at, and his alleged role as "Master of Ceremonies", at meetings with Ruto and the "Network" to show that his alleged contributions were intentional with the aim of furthering criminal activity.[128] Nor can the Prosecution use his alleged presence to show that perpetrators who attended the meetings understood the "coded language" which Sang allegedly used on air during the violence.[129]

98. During the 30 December 2006 meeting, allegedly held in Sugoi at Ruto's house, Sang was presiding over the 'Arap Sang Football Tournament' in Trans-Nzoia. This tournament was actually sponsored by him, making it most unlikely that he would be absent or anything

[125] ICC-01/09-01/11-T-11, 7 Sept 2011, p. 20-1.
[126] Bikindi Trial Judgement, para. 376.
[127] EVD-PT-D11-00048.
[128] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 67 (Prosecution: "That Sang's contributions were intentional and were aimed at furthering the network's crimes is first demonstrated by Sang's participation in at least four meetings and other events with Ruto and other network members at which speakers incited violence against perceived PNU supporters and planned the network's crimes").
[129] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 65.

other than preoccupied with it. The Defence has provided pictures from the Tournament.[130] Further, four people who were with Sang on 30 December have provided statements that he was preparing for, or present at, the football tournament from early morning until at least 8:00pm.[131] These signed statements are handwritten, detailed, and corroborate each other as to their and, more importantly, Sang's presence at the Tournament throughout the day. In light of this credible and reliable evidence, the Defence submits that the Prosecution, through its anonymous and redacted statements of Witness 8,[132] has not shown substantial grounds to believe that Sang was present at the meeting. Therefore, he cannot be linked to the events in Turbo,[133] the Greater Eldoret Area,[134] and the Kiambaa Church,[135] that allegedly occurred as a result of that meeting.

99. Sang is alleged by Witness 8 to have been present on 15 April 2007 at Kapkatet and the Molo Milk Plant, for an "oathing" ceremony during which dogs were slaughtered and politicians and youths drank dog's blood. Sang vehemently denies this, explaining that he was 100 kilometres away from the milk plant, having travelled for the weekend with several other people, including Kass FM staff, to attend the funeral of a prominent musician.[136] Witness 8 testifies that there was an electric fence at the Molo Milk Plant,[137] plainly contradicted by Defence who produced pictures of the Milk Plant demonstrating that there was no such fence.[138] Taking all matters together the Defence submits that there is insufficiency of credible, relevant material to find that Sang contributed to the preparation of Kalenjin warriors as part of this common plan.

100. The next meeting Sang allegedly attended was a fund raiser at the Moiben Hall of Sirikwa Hotel in Eldoret Town. Witness 1 states that this meeting happened on 2 November

[130] EVD-PT-D11-00001. Though the Prosecution claims that the pictures are unauthenticated and thus unreliable, the Defence submits that though it does not bear the burden of proving where Sang was on 30 December 2006, it has attempted in good faith to provide evidence to the court of Sang's whereabouts on this date. Further, witnesses Boniface Walumbe and Davis Omariba stated that pictures were taken at the tournament: EVD-PT-D11-00021 at 0037 and EVD-PT-D11-00024. Furthermore, the Prosecution should have raised any objection to authenticity prior to the hearing: ICC-01/09-01/11-44, 6 April 2011, para. 16.
[131] EVD-PT-D11-00031 (Statement from lawyer Simon Lilan who assisted Sang during the tournament and was with him from the morning hours to around 8:00pm when the tournament finished), EVD-PT-D11-00021 (Statement from Boniface Wambwile Walumbe stating that he saw Sang at the tournament up through the time that prizes were awarded at the end), EVD-PT-D11-00035 (Statement from Julius Kosgei Kinyor that Sang and other Kass FM figures were present the whole day of the tournament), and EVD-PT-D11-00024 (Statement from Davis Bosire Omariba who was the Chairman of the Tournament).
[132] EVD-PT-OTP-00273, see also EVD-PT-OTP-00543.
[133] DCC, para. 76.
[134] DCC, para. 80.
[135] DCC, para. 86.
[136] EVD-PT-D11-00048 at 0003.
[137] EVD-PT-OTP-00279.
[138] EVD-PT-D09-00025.

2007[139] and that Sang was the Master of Ceremonies[140] and that William Ruto, General Koech, Cheruiyot, and Cherambos were all present.[141] Witness 1 explains that the meeting was announced on radio saying that Kass FM and the EMO foundation would organise the meeting.[142]

101. At first glance, it appears that Witness 8 corroborates the occurrence of the Sirikwa Hotel meeting on 2 November, allegedly held jointly by Kass FM and EMO Foundation.[143] Sang is said to have announced and publicised the meeting for the purpose of raising funds to support post-election violence.[144] However, Witness 8 contradicts himself and later changes the date of this meeting from 2 November 2007 to 2 September 2007,[145] saying that Ruto invited them for another meeting to be held at Ruto's Sugoi home on 2 November 2007.[146] Witness 8 says that a couple of people spoke at Sirikwa during the meeting, including Reverend Jackson Kosgey who allegedly told them that it is "It is godly for us to expel these people."[147] Notably, Reverend Kosgey testified that he has never been in any sort of meeting with Cheruiyot, Koech or Cherambos.[148]

102. Aside from the obvious contradictions within the Prosecution evidence, additional Defence evidence also undermines the allegations. This is to the plain effect that Sang has never been part of any fund raiser at the Sirikwa Hotel, neither on 2 September 2007 nor 2 November 2007. Furthermore, the General Manager of Sirikwa Hotel submitted a statement stating that no such meeting took place at the hotel in September 2007.[149] The Front Office Manager and the Operations Manager of Sirikwa Hotel also state that no such meeting took place and that Hotel Records (kept in accordance with Kenyan law's

[139] EVD-PT-OTP-00153 at 0787.
[140] EVD-PT-OTP-00153 at 0794.
[141] EVD-PT-OTP-00153 at 0796 (This was apparently to be a "coordination meeting" to appoint the different 3 commanders to "lead young men on how to fight in war" at 0803).
[142] EVD-PT-OTP-00153 at 0793.
[143] EVD-PT-OTP-00547 at 0699-0700.
[144] EVD-PT-OTP-00547 at 0707.
[145] The Prosecution has apparently chosen to put the date of the meeting as September 2007, rather than 2 November. The Defence is unclear as to what credibility assessment the Prosecution has made of its own evidence to come to this determination.
[146] EVD-PT-OTP-00547 at 0707.
[147] EVD-PT-OTP-00547 at 0715.
[148] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-11, 7 Sept 2011, p. 22
[149] EVD-PT-D11-00022 (Statement from Brian Kiprotich Chemjor that neither Ruto nor Sang booked, hosted, nor sponsored any such event in September 2007).

statutory obligations) confirm this.[150] The allegations pertaining to Sang's contribution to the common plan through fundraising must therefore fail.

103. With respect to the meeting of 2 November 2007, allegedly at Ruto's house in Sugoi, Witness 8 states that Sang was present, along with Ruto, Kosgey, Cherambos, and Fred Kapondi.[151] The purpose of this meeting was, in part, to distribute weapons sourced by Kapondi.[152] However, Sang was on air in the Kass FM studio in Nairobi from 7am to 9am and again at 7pm on that day.[153] Broadcasts to prove this were submitted as evidence but were rejected because they were in Kalenjin.[154] It should also be noted that it would take 6 hours for Sang to drive from the studio in Nairobi to Ruto's house in Sugoi.

104. As for other people allegedly present at the meeting, the Defence has shown convincingly that several were elsewhere. William Ruto, the alleged host of the meeting, was not at his house in Sugoi but in Kapkatet – 160 kilometres away - attending a large ODM rally with other leaders, including Raila Odinga and others who were supposedly present at Sugoi -- Cheruiyot, Franklin Bett and the late Kipkalya Kones. The Defence showed a video clip showing Ruto's presence at this rally,[155] contemporaneous real evidence, easily accessible and a matter of public record.

105. Reverend Kosgey, who was also alleged to be in the meeting, testified that on 2 November 2007, he was in Nairobi in a meeting with the Ministry of Sports preparing for a celebration to be held on 4 November 2007 at which the President would welcome Kenyan athletes.[156] Cherambos testified in open court that he has never been to Ruto's home;[157] he was not challenged by the Prosecution.[158]

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[150] EVD-PT-D11-00029 (Statement from Jennifer Kibias that there was no Kass Night at Sirikwa in Sept 2007) and EVD-PT-D11-00037 (Statement from Kipkemboi Maiyo that neither Kass FM, Arap Sang, nor Hon Ruto organized any function in Sept 2007 at Sirikwa Hotel).
[151] EVD-PT-OTP-00285.
[152] EVD-PT-OTP-00548 at 0736.
[153] EVD-PT-D11-00048 (hosting a debate between PNU's Dr. Rotich and ODM's Hon. Isaac Ruto regarding the desirability of federalism).
[154] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-300, Decision on Prosecutor's Request for an Order Excluding the Evidence Intended to be Relied Upon at the Confirmation of Charges Hearing by the Defence for Ruto and Sang, and the Defence forKosgey, 29 August 2011 ("Decision on Exclusion"), para. 28 and p. 15.
[155] EVD-PT-D09-00054 at 0020.
[156] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-11, 7 Sept 2011, p. 23.
[157] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-7, 3 Sept 2011, p. 16.
[158] All of the evidence put forth by the Prosecution in support of this meeting is based on heavily redacted and anonymous interview transcripts. The Abu Garda Pre-Trial Chamber noted that "that all statements relied upon by the Prosecution, apart from that of Witness 442, were given by witnesses whose identity is unknown to the Defence and have been presented in the form of summaries of interview transcripts. As stated in the previous

106. In addition, Kapondi could not have been at this meeting. Neither was he in a position to source weapons on behalf of the Network. According to a letter from the Commissioner of Prisons in Kenya, Kapondi was in jail from 17 April to 14 December 2007, during the alleged period.[159]

107. The Defence submits that it is inconceivable that Sang was present at a meeting at Ruto's house on 2 November 2007. Indeed no such meeting occurred. Sang cannot therefore be liable for contributing to any common plan as discussed at that meeting.

108. Sang is next alleged to have been the Master of Ceremony at an ODM rally held by Ruto at the Kipkarren Salient Trading Center on 6 December 2007.[160] Witness 8 claims that Ruto gave instructions to the youth to barricade roads, destroy property and kill the Kikuyus and Kisiis, in the event that Kibaki is announced President.[161] Witness 8 also says that Ruto had to leave early to go to another meeting at Cherambos's house in Aldai Constituency.

109. First, it should be pointed out that Witness 8 is the only one who talks about this alleged rally -- a rally he says was attended by over 2000 people.[162] Significantly, the Prosecution was unable to call any of the alleged 2000 attendees to corroborate Witness 8's account. This anonymous account, uncorroborated by additional statements or contemporaneous media reports, does not provide substantial grounds to believe that the meeting occurred. Secondly, the presence of Sang in this rally is disputed by Defence evidence. Sang in his statement has said that he was at the Kass FM studio in Nairobi the entire day.[163] His statement is corroborated by that of the Kass FM Managing Director who also stated that Sang was in the studio the entire day.[164] The Defence has also filed a list of programmes that Sang ran on that date which included interviews with three people: Dr. Joseph Misoi, Professor Edward Kigen and Mr. Isaiah Cherutich.[165] All three are people of high standing in society and were accessible to the Prosecution had they wanted to establish the truth about Sang's whereabouts on 6 December 2007. Kipkarren is approximately 330 km (or

section of this Decision, both of these aspects lower the probative value of those statements at issue." Abu Garda Confirmation Decision, para. 173.
[159] EVD-PT-D09-00043.
[160] EVD-PT-D09-00551 at 0829 and 0835.
[161] EVD-PT-D09-00551 at 0832.
[162] EVD-PT-D09-00551 at 0829.
[163] EVD-PT-D11-00048.
[164] EVD-PT-D11-00036.
[165] EVD-PT-D11-00013.

over six hours away) from Nairobi, and the Prosecution have not shown how Sang would have managed to be in two locations at the same time.

110. Lastly, Witness 8 says that another meeting was to be held the same day at Samson Cherambos's house. Cherambos gave *viva voce* evidence at the Confirmation Hearing and said that he has never held a meeting at his house with the suspects on the alleged date or at all in years 2006 to 2008 (the material period).[166] The Defence submits that Witness 8's account of this meeting cannot be relied upon and therefore any allegations with respect to Sang stemming from this meeting must fail.

111. Sang is alleged to have been the MC at one final meeting, allegedly with over 20,000 people present, on 14 December 2007 at Ruto's Sugoi home.[167] Witness 2 and Witness 8 allege that Sang as Master of Ceromony announced the roles that attendees would play in the planning and execution of the attacks,[168] and that Ruto was publicly distributing weapons, money, and grenades, and that there were gas cylinders.[169]

112. The Defence submits that no such meeting was held. Firstly, Sang was in the Kass FM studios in distant Nairobi. His programme *Lene Emet* finishes at 9am and the next day's preparation starts again at 6pm every day. This is evidenced by Sang's statement,[170] the statement from his employer at Kass FM,[171] as well as his broadcasts from this date.[172] Secondly, Witness 2 says that Ruto had to leave the meeting early in order to submit his nomination papers to the electoral commission.[173] It should be noted that 14 December 2007 was not the day set by the electoral commission to submit nomination papers; the date set was 23 and 24 November 2007,[174] a matter of public record and knowledge. In any event, the Defence submits that Ruto, the supposed host of the meeting was not in Sugoi but in Amagoro, while his wife, the supposed hostess, was in Mombasa.[175]

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[166] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-7, 3 September 2011, p. 16
[167] EVD-PT-OTP-00763 at 0263. The fact that a meeting was held at Ruto's Sugoi home is partially corroborated by Witness 5, who provides a hearsay account of the meeting, at which the youth were "told to prepare themselves in case the elections was rigged. They were told to protest against this". EVD-PT-OTP-00306 at 0045.
[168] Witness 2: EVD-PT-OTP-00763 at 0263 and Witness 8: EVD-PT-OTP-00559 at 1043-7.
[169] EVD-PT-OTP-00763 at 0267 and EVD-PT-OTP-00551 at 0839, 843, 849 and 855.
[170] EVD-PT-D11-00048.
[171] EVD-PT-D11-00036.
[172] KEN-D11-0003-0001. Decision on Exclusion, para. 38 and p. 15.
[173] EVD-PT-OTP-00763 at 0266.
[174] EVD-PT-D09-00002 at 0112.
[175] EVD-PT-D09-00054 at 0013.

113. Witness 8 claims that Cherambos attended the alleged meeting.[176] Yet Cherambos testified that he has never set foot in Ruto's house.[177] His statement was corroborated by another Defence witness, Murei, who said that in all his years as Ruto's neighbour and in any meetings he attended at Ruto's house, he never saw Cherambos or Sang present.[178]

114. Finally, the alleged gun-supplier Fred Kapondi was allegedly in attendance, yet he had only been released from prison at 11am that very morning, and was driven away from the prison by his lawyer.[179] It is inconceivable that after seven months in prison, the first thing Kapondi did upon being released was to rush to a meeting hours away in Sugoi. In any event, given the distance, he could not have arrived before Ruto was said to have left to present his nomination papers.[180]

115. The Defence notes that Prosecution investigators did not visit the Kass FM studio nor contact any of its staff to ascertain and verify the particulars of Sang's whereabouts on any of these occasions. Based on the Prosecution's abject failure to put forth credible accounts of meetings wherein Sang was alleged to have been present and acted as Master of Ceremony, these meetings cannot be used as a basis to show that Sang intended to contribute to the commission of crimes.

116. Likewise, Prosecution allegations that on 14 January 2008 Sang acted as the MC and made inciting remarks at the funeral of Lucas Sang (no relation), must fail. The Defence have demonstrated that this is patently untrue. Lucas Sang was in fact buried on 10 January 2008. Additionally, Joshua Sang did not attend the funeral. In support of these facts, the Defence has produced Joshua Sang's statement,[181] the funeral programme,[182] and athlete Daniel Komen's statement.[183]

117. However, even if the Chamber finds that these unreliable witnesses can be relied upon, they fail to demonstrate that Sang made a substantial contribution to the commission of the crimes charged. Moreoever, the Prosecution has produced insufficient evidence to

[176] EVD-PT-OTP-00379.
[177] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-7, 3 Sept 2011, p. 16.
[178] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-7, 3 Sept 2011, p. 72.
[179] EVD-PT-D09-00043.
[180] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-9, 5 Sept 2011, p. 80.
[181] EVD-PT-D11-00048.
[182] EVD-PT-D11-00047.
[183] EVD-PT-D11-00045 (stating that he was present at the funeral of fellow athlete Lucas Sang, that he knows Joshua Sang very well, and that Joshua Sang was neither present nor the MC).

demonstrate that there was any nexus between his attendance at preparatory meetings and the post-election violence.

No Intention to Contribute

118. The Prosecution has failed to establish that Sang intended to contribute to the commission of the crimes charged. His intent cannot be inferred from the fact that post-election violence occurred,[184] but rather must be explicit from his own conduct. It is submitted that his mere alleged attendance at meetings is insufficient to establish intent that the crimes charged be committed. His mere association with members of the "Network", if at all, does not demonstrate that he collaborated with them for the specific purpose of committing or contributing to crimes against humanity.[185] As was similarly held by an ICTR Chamber,[186] the defendant's presence at a meeting with leading political figures is inconclusive as to a possible collaboration with them to commit the crimes charged.

119. As for his alleged broadcasts, even if the Chamber finds that Sang made anti-PNU remarks, this of itself does not demonstrate an intent to contribute to the murder, forcible transfer and persecution of PNU supporters. Broadcasting anti-PNU propaganda, particularly in a pre-election period, falls squarely within protected political speech and is therefore wholly legitimate.[187]

120. Freedom of speech, including political discourse, is regarded as one of the fundamental cornerstones of a democratic society and is protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[188] The Human Rights Committee recently affirmed that this provision encompasses political discourse and commentary on public affairs, and that, subject to paragraph 3 and Article 20, it also protects expression "that may be regarded as deeply offensive".[189] As Judge Meron has stated, "to criminalise

[184] Nahimana Appeal Judgement, para. 709.
[185] Bikindi Trial Judgment, para. *72*. See also paras 374-377.
[186] Bikindi Trial Judgment, para. 374.
[187] Bikindi Trial Judgment, para. 171.
[188] Article 19: 1. Everyone shall have the right to hold opinions without interference; 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice; 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.
[189] General Comment No. 34, 21 July 2011, ICCPR/C/GC/34, at para 11. See also General Comment No. 25: the right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12 July 1996, CCPR/C/21/Rev. 1/Add. 7, paras 12 and 25-6 (the Human Rights Committee held that "[f]reedom of

unsavoury speech that does not constitute actual imminent incitement might have grave and unforeseen consequences."[190]

121. The European Court of Human Rights has also recognised that political debate is prone to personal invective and strong, exaggerated and polemical language, even provocation, but that such language is nonetheless protected as a guarantee for a democratic society.[191] The ECHR has, for instance, held that the following type of expressions, should not have been restricted: "If they want us to leave our territory, they must know that we will never agree to it"; or "The war will go on until there is only one single individual left on our side"; or "The Turkish State wants to oust us from our territory. It is driving people out of their villages"; or "They want to annihilate us".[192] Likewise, the Pre-Trial Chamber ought not to find that any alleged broadcasts or statements or political rhetoric allegedly made by Sang suggesting that the Kikuyus should be forced out of the Rift Valley can be considered as a substantial contribution to a crime.

122. The Prosecution must demonstrate that substantial grounds exist to believe that Sang intended to contribute to murder, persecution and forcible transfer on large scale. In light of the above, the Defence submits that the Prosecution does not even come close to showing such an intent.

123. To the contrary, there is ample evidence of Sang calling out for peace during the violence. In many pre-recorded broadcasts played over Kass FM during the violence, Sang repeatedly asked for calm and peace and to "shun anything that would encourage people to do what is unacceptable."[193] Additionally, the Kass FM broadcasters came together to call for peace.[194] Immediately after the announcement by the ICC Prosecutor that Joshua Sang was among those responsible for the post-election violence, Sang made a number of other broadcasts where he expressed shock at being named and again called for peace to prevail.[195]

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expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected."

[190] Nahimana Appeals Judgment, Dissenting Opinion, para. 12.

[191] *Surek and Ozdimir v. Turkey* Case **(**application nos. 23927/94 and 24277/94) Judgement, 8 July 1999, para. 34 (also paras. 57-60); see also *Prager and Oberschlick v. Austria*, Judgment, 26 April 1995, Series A no. 313, p. 19; *Lopes Gomes da Silva v. Portugal*, No. 37698/97, Judgment, 28 September 2000, Reports 2000-X.

[192] *Ibid*, at pp 30-31, also paras 57-60.

[193] EVD-PT-D11-00011 at 0014.

[194] EVD-PT-D11-00010 at 0005.

[195] EVD-PT-D11-00010 at 0004.

124. The Defence also introduced into evidence written statements from various people who were frequent listeners of Kass FM during the 2007-8 period. Many have stated that Sang repeatedly called for peace[196] and for the roads to be opened up.[197] This is completely contrary to anonymous witness statements that Sang was directing and updating perpetrators as to the progress of attacks.

125. The evidence concerning Sang's calls for peace on the radio during the violence fully contradicts any allegation of his intending to contribute to the commission of crimes against humanity.

VI. GENERAL OBJECTIONS TO THE CHARGES

126. Given the Prosecution's failure to set out its case with sufficient logic and clear reasoning, none of the charges against Sang should be confirmed.

Charges Should Not be Confirmed - Case Lacks Clear Line of Reasoning and Logic

127. The Prosecution's theory of the common plan or policy to which Sang allegedly contributed is constantly shifting and lacks a clear line of reasoning and logic. The allegation that the suspects wanted to obtain political power through violent means is illogical and incoherent, especially considering that a violent means to obtaining power in Rift valley would alienate any perpetrator from gaining support from the rest of the country, hence defeating any effort to gain power.

128. The Prosecution alleged that the intention of the suspects was to forcibly remove perceived PNU-supporters or otherwise remove Kikuyus and Kisiis from the Rift Valley so as to obtain power.[198] The Prosecution suggests that they succeeded.[199] The Prosecution however failed to show what political or other power that Sang had, desired to have, or otherwise has obtained pursuant to the alleged crimes and violence. In addition, the Prosecution's case does not clearly establish whether the goal of this common plan was to target perceived PNU-supporters or people of Kikuyu, Kisii and Kamba ethnic communities. Likewise, the Prosecution's case is unclear as to whether the aggressors

[196] EVD-PT-D11-00018 at 0010, EVD-PT-D11-00019 at 0021, EVD-PT-D11-00023 at 0046, EVD-PT-D11-00025 at 0061, EVD-PT-D11-00026 at 0072, EVD-PT-D11-00028 at 0081, EVD-PT-D11-00032 at 0109.
[197] EVD-PT-D11-00017 at 0007.
[198] DCC, para. 41. But compare to DCC, paras. 100 and 101.
[199] ICC-01/09-01/11-T-5, 1 Sept 2011, p. 63-8.

were ODM political party members or Kalenjin community members invoking their cultural structures and systems.

129. Furthermore, the Prosecution's case lacks logic in alleging that the suspects organised the post-election violence to influence the 2007 election voting pattern. This is illogical considering that the dates the Prosecution alleges that the violence was committed (from 30 December 2007 onward) are all dates that are after the elections had been held (27 December 2007), hence the violence could not have served the purpose the Prosecution alleged.

130. After the Defence raised this point at Confirmation, the Prosecution shifted its theory and then suggested that the elections sought to be influenced were not the 2007 elections, but were future elections.[200] None of the Prosecution's witnesses alleged this. This theory was the Prosecution's own fabrication, made in an attempt to shift and adjust the case as it went on and as its weaknesses were exposed. There is no logical reason for suspects to plan violence from as early as 2006 in order to target future general elections, when in fact there was an election in the year 2007.

131. In any event, it is unrealistic to conceive of a situation, such as the Prosecution is attempting to portray, where the victims (Kikuyus) of a planned violence are in fact the ones in charge of security and intelligence apparatus but would sit back indolently as violence is planned and executed against its own people. This is despite having the intelligence network and the security apparatus (both in terms of human resource and infrastructure) to quell such a plan, which, according to the Prosecution, was being publicly discussed at large meetings over the course of a year.

132. The Prosecution, illogically and without evidentiary support, suggests that Sang had a high degree of power and authority over the entire Kass FM station, which enabled him to hold out and peddle his own views and goals, to the exclusion and in disregard of the management of the station.

133. The Prosecution also made the unrealistic allegation that Sang was at the radio station for eight days continuously, and that he was alone from 28 to 31 December 2007, and from 1 to 3 January 2008.[201] This is not possible; such charges have no credibility.

[200] ICC-01/09-01/11-T-5, 2 Sept 2011, p. 9-10 ('We emphasise here that the end goal, if you will, for this network was not this particular election, the election that occurred in 2007. Instead, the organisational policy, as well as their common plan, was focused on obtaining a large amount of voters favourable to their case for the long term, for this election and for others that followed.')
[201] Witness 8: EVD-PT-OTP-00561 at 1099.

Cummulative Charges Should Not be Confirmed

134. The Prosecution charged the suspects with the crimes against humanity of murder, deportation or forcible transfer of population, and persecution. More particularly, with regard to the charge of persecution, it is alleged that the Suspects:

> "(...) 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".[202] (Emphasis added)

135. Thus the underlying acts of the charge of persecution are the acts of murder, forcible transfer or deportation, and torture, as crimes against humanity. The Defence highlights that the factual allegations concerning persecution are identical to those concerning murder and forcible transfer; the geographical and temporal scope defined for each crime is exactly the same. Therefore, the elements of murder and deportation or forcible transfer are subsumed within the charge of persecution.[203]

136. Specific material elements of murder and forcible transfer are subsumed within the charge of persecution, which per Article 7(1)(h) of the Elements of Crimes, requires an additional element, the targeting of certain persons or groups based on political, racial, national, ethnic, cultural, religious, or gender grounds. The suspects' right to procedural fairness have been fundamentally violated by the Prosecutor charging the suspects cumulatively. The defence submits that none of the charges should be confirmed.

137. Cumulative charging is prejudicial to the rights of the suspects to be informed promptly, and in detail, of the nature, cause and content of the charges, to have adequate time and facilities to prepare his defence, and to be tried without undue delay. As noted by a Prosecution expert paper, "an excessive charging policy will lead on to lengthy trials and extensive evidence".[204]

138. The reluctance to allow cumulative charging was adopted by the current Pre-Trial Chamber in the *Bemba* case, which underlined that it was detrimental to the rights of the

[202] DCC, p. 37.
[203] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 119.
[204] Informal expert paper: Measures available to the International Criminal Court to reduce the length of proceedings, para. 41: http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281982/length_of_proceedings.pdf.

Defence since it places an undue burden on the Defence. Relying on the principles of fairness and expeditiousness of the proceedings, it clarified that only distinct crimes could justify a cumulative charging approach, and that this was possible "only if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other."[205]

139. In addition to the above arguments reference is made by the presentations made at the confirmation hearing by the defence highlighting the fundamental defects in the charges. Premised on these defects the charges should not be confirmed.

Charge of Persecution with underlying Acts of Torture Should Not be Confirmed

140. The underlying alleged acts of torture for the crime of persecution (Count 6) should be dismissed by the Pre-Trial Chamber. The charge as such was not retained in the Decision to Summon the Suspects, the evidence is insufficient, the DCC is deficient, and its confirmation would violate Article 101.[206]

141. The Defence first underlines that the Pre-Trial Chamber, in the Summons Decision, refused to issue the summons with respect to the allegations of torture on the ground that there was no sufficient evidence.[207] No evidence was availed to the Chamber at confirmation hearing to justify the reconsideration of the count of torture, and thus it should not be confirmed.

142. As regards acts of torture, the DCC is deficient. The purpose of the DCC, as admitted by the Prosecution, is to notify "the specific facts and allegations", the "factual allegations that support each of the legal elements of the crime charged",[208] yet the word 'torture' simply appears in the final pages of the DCC, in the definition of Count 6. The

[205] *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 202. Further, at paras 204-5 the Pre-Trial Chamber refused to confirm the charge of torture because it considered that in this particular case, the specific material elements of the act of torture (severe pain and suffering, control by the perpetrator over the person) were the inherent specific material elements of the act of rape, and that given that the act of rape required an additional specific material element (penetration), it was the most appropriate characterisation. Similarly, at para 312, it refused to confirm the charge of outrage upon personal dignity because it considered that in this particular case it was fully subsumed by the count of rape, which was the most appropriate characterisation of the alleged conduct.

[206] These arguments apply with equal force on behalf of Mr. Ruto.

[207] Summons Decision, para. 33 ("Finally, in relation to the Prosecutor's allegations of acts constituting torture as a crime against humanity (Count 3), the Chamber considers that the material presented is not sufficient to establish reasonable grounds to believe that acts of torture as a crime against humanity were committed in the relevant locations and at the relevant time referred to in the Prosecutor's Application. This is without prejudice to the possibility that the Prosecutor presents new evidence in the future substantiating this alleged crime"). This was raised at the confirmation hearing: ICC-01/09-01/11-T-6, 2 Sept 2011, p. 118.

[208] Prosecution Confirmation Brief, para. 77.

Prosecution neither detailed the material facts of torture nor the method of commission of the alleged acts of torture. A similar omission led the Pre-Trial Chamber in the *Bemba* case to dismiss a charge of torture.[209]

143. Finally, the Defence contends that to charge the suspects with the alleged acts of torture would be contrary to Article 101 and the principle of speciality[210] pursuant to which a person was surrendered to the Court shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered. This article must similarly apply to a person who has surrendered himself to the Court. Given that the suspects did not surrender themselves with regards to any alleged acts of torture and that the Prosecution has not requested any waiver from Kenya, the Prosecution cannot add the allegations of torture at this stage. Therefore, the Pre-Trial Chamber should not rely on any evidence concerning underlying acts of torture in relation to the charge of persecution and should not confirm any alleged acts of torture.

144. The Defence is alive to the fact that the Single Judge in the *Prosecutor v. Muthaura et al* has taken the view that 'the application of the rule of speciality is limited to the scenarios in which the person is arrested and is surrendered as a result of a request submitted by the Court to the State.'[211] The Defence respectfully submits that, in fact, the speciality principle is applicable considering the underlying complimentary principle. Furthermore, the Defence maintains that this rule should also apply to the person who surrendered itself because otherwise it may dissuade the suspect from appearing before the Court, for fear that the charges would be enlarged once he has surrendered. A different application of the principle, depending on whether the suspect has surrendered itself or has been surrendered by a State, would be unfair for the suspect who voluntarily accepts to appear before the Court. The Defence requests that the Pre-Trial Chamber consider the applicability of the speciality principle to summonses under ICC.

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[209] See ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras 208-9.
[210] ICC-01/09-01/11-T-6, 2 Sept 2011, p. 119.
[211] *Prosecutor v. Muthaura et al,* ICC-01/09-02/11-315, 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 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute", 12 September 2011, para. 16.

Charge of Deportation Should Not be Confirmed

145. There are a number of problems with the manner in which the specific charges against Sang have been described.[212] In Count 4, the Prosecution charges Sang with deportation and forcible displacement in the alternative, yet deportation and forcible transfer have distinct elements. Forcible transfer is the internal displacement of persons.[213] Deportation on the other hand is the cross-border displacement of persons.[214] Hence the Defence has been prejudiced by the Prosecution's choice to maintain the two in the same count and in the alternative.

Charges of Murder and Forcible Displacement Should Not be Confirmed

146. In relation to the charge of murder and forcible displacement, there are a number of contradictions within the DCC itself as regards the numbers of victims. For instance, at DCC paragraph 38, the Prosecution refers to approximately 230 deaths in the Uasin Gishu and Nandi Districts and over 400,000 displacements of civilians from those Districts. In paragraph 39, the Prosecution refers to the killings in Uasin Gishu District of over 200 people and of at least 7 people in the Nandi District. Paragraph 39 also mentions 7800 displacements from the Uasin Gishu District and over 30,000 displacements from the Nandi District amounting to a total of 37,800 displaced persons from the Uasin Gishu and Nandi Districts.

147. It is unclear how the Prosecution went from over 207 killings in the Uasin Gishu and Nandi Districts in paragraph 39 to approximately 230 deaths in these two Districts in paragraph 38. Most strikingly is the disparity between 37,800 displaced persons from the Uasin Gishu and Nandi Districts in paragraph 39, and over 400,000 displaced persons in paragraph 38.

148. The Defence submits that such disparities should have been clarified in order for the suspect to know in detail the allegations against him. Relying on Regulation 52 of the Regulations of the Court (RoC), this Pre-Trial Chamber in *Bemba* confirmed that "a DCC

[212] ICC-01/09-01/11-T-3, 1 Sept 2011, p. 51 – 55.

[213] *Prosecutor v. Stakic*, No. IT-97-24-A, Judgement, 22 March 2006, para. 317 ("...Forcible transfer has been defined in the jurisprudence of the Tribunal as the forcible displacement of persons which may take place within national boundaries"), citing the *Krnojelac* Trial Judgement, para. 474 and the *Krstić* Trial Judgement, para. 521.

[214] *Ibid*, para. 278 ("The Appeals Chamber is of the view that the *actus reus* of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law"), *see also* para. 289; *Prosecutor v. Blagojevic & Jokic*, IT-02-60-T, Trial Judgment, 17 January 2005, para. 595 ("Traditionally, the distinction between forcible transfer and deportation is that the first one consists of forced displacements of individuals within state borders, while the second one consists of forced displacement beyond internationally recognised state borders...").

must state the material facts underpinning the charges and […] the material facts underpinning the charges shall be specific enough to clearly inform the suspect of the charges against him or her, so that he or she is in a position to prepare properly his or her defence."[215]

Impermissively Inclusive Charges Should Not be Confirmed

149. The Defence submits that the term 'including' in the description of the counts is impermissibly vague because it sets no geographical limits. The term 'including' is also used in other parts of the DCC, for instance at paragraph 38. The use of such a non-exhaustive term does not sufficiently identify the allegations against which Sang must defend himself.[216]

150. In accordance with the above legal principles, the DCC must be framed in a clear and unambiguous manner, and contain only the relevant material facts which the Prosecution will seek to establish. The open-ended term 'including', which is included in the description of the counts, does not meet these standards. The inclusion of this term is prejudicial to the Defence as it allows the Prosecution to mould the case depending on how the evidence unfolds.[217] Charges with such open ended formulation should not be confirmed. The Single Judge of the Pre-Trial Chamber in *Katanga and Ngudjolo* found that the term 'in at least the following ways' was impermissibly vague due to its open-endedness.[218]

151. Trial Chamber II found that "that strict compliance with the provisions of articles 64(2) and 67(1)(a) of the Statute requires that the decision should set out, with a maximum of precision, the facts and circumstances in terms of times and locations and also, as far as possible, the precise numbers and identities of the victims and the means employed to commit the crimes. This is information which the accused is entitled to know if he is to be in a position effectively to prepare his defence. To that same end, he is also entitled to

[215] *Ibid*, para. 208 [footnotes omitted]. See also: ICC-01/05-01/08-836, Bemba - Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, para. 12, reiterating the requirements of a DCC under Regulation 52, namely that it includes: (a) The full name of the person and any other relevant identifying information; (b) 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; (c) A legal characterisation of the facts to accord both with the crimes under Articles 6, 7, or 8 and the precise form of participation under Articles 25 and 28.

[216] *Prosecutor v. Blaskic*, Decision on the Defence Motion to Dismiss the Indictment based upon Defects in the Form thereof, 4 April 1997, paras. 22-24.

[217] *Prosecutor v. Kupreskic et al*, IT-95-16-A, Appeals Chamber Judgment, 23 October 2001, para. 92.

[218] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-648, Public Urgent Decision Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, paras 31, 33, 34.

expect of the Pre-Trial Chamber that, in the context of a particular charge, it will specify not only the facts and circumstances on which it expressly relies but also those which it considers should be dismissed from the scope of the prosecution".[219]

152. On these grounds the Defence reiterates that it was entitled to "a certain degree of precision in terms of the charges or in the alternative … that it be deemed that the Prosecutor is unable to make out its case."[220] In this respect, it is noteworthy that the Pre-Trial Chamber has held that any deficiencies in the DCC "cannot be compensated by the Chamber",[221] thus inevitably leading to a non-confirmation of non-specific charges.

VII. CHARGES SHOULD NOT BE ADDED

153. The Victims' Representative invited the PTC to exercise its powers under Article 61(7)(c)(ii) to consider amending the charges by the addition of new underpinning acts within the charge of persecution and by the addition of the count of inhumane acts as a crime against humanity.

154. The Defence submits that this request does not fall within the scope of the Article 61(7)(c)(ii) whereby the Pre-Trial Chamber may, on the basis of the confirmation hearing and the evidence presented, adjourn the proceedings and request the Prosecutor to consider "amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court."

155. The Defence submits that this provision allows the Chamber to ask the Prosecution to replace a charge by a different, more appropriate charge, but not to add a new, additional charge, nor to add new, additional facts underpinning the charges. As noted by the Pre-Trial Chamber in the *Bemba* case with respect to Article 67(1)(c):

> "[t]he sole purpose of the provision is to adjourn the hearing in order to overcome deficiencies concerning the evidence (sub-paragraph(c)(i)) or the legal characterisation of the facts presented (sub-paragraph (c)(ii)), which prevented the Chamber from issuing a final decision on the merits at this stage."[222]

156. In the current case the Victims' Representative does not appear to argue that the current charges are incorrect or deficient but that they be augmented, through new charges and

[219] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1547-tENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, para. 31. See also: *Prosecutor v. Banda & Jerbo*, ICC-02/05-03/09-227, Decision on the Joint Submission regarding the contested issues and the agreed facts, 28 September 2011, para. 33.
[220] ICC-01/09-01/11-T-5, 1 Sept 2011, p. 55.
[221] Bemba Confirmation Decision, para. 208.
[222] Bemba Adjournment, para. 14.

through new factual allegations underpinning the charges. This is not the situation defined by Article 61(7)(c)(ii) and clarified by the *Bemba* Pre-Trial Chamber.

157. The Defence submits that a power to re-qualify the legal characterisation of a crime does not equate to a general power to alter the material facts underpinning the crime. If the Prosecution wishes to alter the material facts supporting a charge, then the appropriate method would be to utilise Article 61(4) prior to the confirmation hearing, or Article 61(9) after the confirmation hearing.

158. if the Prosecution seeks to amend the charges under Article 61(4) or to add additional charges or to substitute more serious charges pursuant to Article 61(9), a new hearing to confirm those charges must be held, where the Defence can produce further evidence in response to the additional/more serious charges.[223] The right to produce further evidence to other charges cannot be bypassed by relying on Article 61(7)(c)(ii). It is submitted that that Article cannot be used as a vehicle for the Prosecution to introduce more serious or additional charges.

159. The Defence observes that the elements of inhumane acts are to be distinguished from those of murder, forcible transfer or persecution (for example, the intention to cause "great suffering, or serious injury to body or to mental or physical health"[224]). The Defence has not had the opportunity to lead evidence about the defendant's lack of intent to commit these crimes. The Defence will be materially prejudiced at this stage by the inclusion of additional charges.

160. It is submitted that the power allocated to the Chamber by Article 61(7)(c)(ii) should not be percieved as permitting the Chamber to interfere with Prosecutorial discretion, or to act as a prosecuting entity itself. This may arise by requiring the Prosecution to consider a range of charges, which the Prosecutor may have already considered, and declined to incorporate. In the present case, the Prosecution might have already envisaged the addition of the crime of inhumane acts, and decided against it for lack of sufficient evidence to establish the intention to cause great suffering or serious injury.

161. Most importantly, he Defence submits that the Victims' Representative failed to establish that any charges should be added. The Representative seems to rely on the fact that the occurrence of some alleged facts of destruction of properties or looting have been discussed during the confirmation hearing.[225] This is insufficient. She does not submit any

[223] See rules 121(6) and 128(3) of the Rules of Procedure and Evidence, and Article 61(9) of the Statute.
[224] Wording of Article 7(1)(k).
[225] ICC-01/09-01/11-344, para. 12.

observations on the following issues: whether there was a common plan to commit such crimes, whether the crimes were committed by members of the organisation, or whether the suspects possessed the requisite intent and essential contribution in relation to such crimes. Significantly, the Victims' Representative also relied substantially on victims applications,[226] but they do not form part of the evidence to be considered for the confirmation of charges,[227] and therefore cannot be relied upon to determine whether the threshold of Article 61(7)(c)(ii) has been met.

162. Furthermore, the underpinning acts of destruction of properties, looting and physical injuries, as defined by the Victims' Representative, do not support the charges of persecution and inhumane acts. The Defence submits that in this case acts of destruction of properties and looting cannot support a charge of persecution pursuant to Article 7(1)(h). According to this Article, the persecution must be connected with an act referred to in Article 7. Destruction of property and pillage do not fall within any of the acts defined in Article 7.

163. The Defence further submits that acts of destruction of properties, looting, and physical injuries, as defined by the Victims' Representative, cannot support a charge of inhumane acts. According to Article 7(1)(k), crimes against humanity include "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The Prosecution must prove that the inhumane act is of a similar gravity to the other acts defined in Article 7, that it caused great suffering or serious injury to mental or physical health, and that the perpetrator intended it to cause great suffering or serious injury to mental of physical health. It is not sufficient that an injury was caused, the injury must have been severe and intended.

164. Pursuant to the Elements of Crimes,[228] the provision of Article 7 "must be strictly construed, taking into account that the crimes against humanity as defined in Article 7 are among the most serious crimes of concern to the international community as a whole (…)." In light of these provisions and of the definition of inhumane act, the Defence submits that it is highly questionable whether destruction of property and looting fall within this category. It can be argued that the other acts defined by Article 7, murder, extermination, enslavement, torture, sexual slavery, rape, etc., are of a graver nature.

[226] ICC-01/09-01/11-333, para. 11.
[227] *Prosecutor v. Ruto et al*, ICC-01/09-01/11-249, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, para. 107.
[228] ICC-ASP/1/3.

165. With respect to the infliction of physical injuries, the Defence submits that given the lack of any specification of the charges concerning the occurrence, details, degree and intent to commit such injuries, it is not possible to conclude that such injuries would fall within the category of acts of a similar character to the other acts defined in Article 7.

166. For all these reasons, the Defence submits that the victims request should be denied in its entirety.

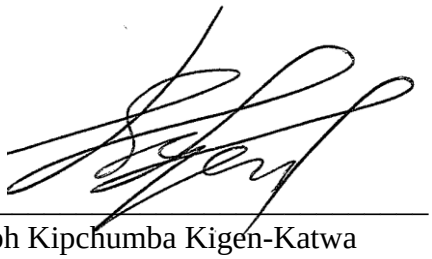
VIII. CONCLUSION

167. The Defence recalls that the Single Judge has stated:

> "if even one of the cumulative constituent elements of the crimes charged is not established to the required threshold under article 61(7) of the Statute, this would be sufficient for the Chamber to decide not to confirm the charges. The burden of proof lies indeed with the Prosecutor who is statutorily called, pursuant to article 61(5) of the Statute, to support each charge - and therefore each and every constituent element of the crimes and the mode of liability as charged - with sufficient evidence to convince the Chamber to the requisite threshold."[229]

168. In light of all the foregoing, the Defence of Mr. Joshua Arap Sang submits that the Prosecutor has spectacularly failed to demonstrate substantial grounds upon which to believe any of the constituent elements of the crimes or mode of liability should be confirmed. The Prosecution's case does not follow a clear and coherent line of reasoning and logic. The Defence has demonstrated through real evidence, ie. contemporaneous recordings not tailor-made for ICC proceedings, publicly available material, and live witnesses, that the Prosecution's case theory is illogical, misconceived, and without a basis in fact.

169. The Defence therefore invites the honourable Pre-Trial Chamber to find that the case against Mr. Joshua Arap Sang cannot be confirmed and should not be committed to trial.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua Arap Sang
Dated this 24th day of October 2011,
At Nairobi, Kenya

[229] *Prosecutor v. Muthaura et al*, ICC-01/09-02/11-226, 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, 10 August 2011, para. 26.