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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 Document

**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"**

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Defence

William Samoei Ruto
Henry Kiprono Kosgey
Joshua Arap Sang

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy-Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction and Main Conclusions

1. The Majority of Pre-Trial Chamber II (the “Chamber”), having examined the “Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang” (the “Application”)¹ and the evidence and other information submitted, issued on 8 March 2011² three summonses for William Samoei Ruto (“William Ruto”), Henry Kiprono Kosgey (“Henry Kosgey”) and Joshua Arap Sang (“Joshua Sang”) to appear before the International Criminal Court (the “ICC” or the “Court”) pursuant to article 58(7) of the Rome Statute (the “Statute”). The Majority is satisfied that there are reasonable grounds to believe that, from 30 December 2007 to the end of January 2008, those three suspects are criminally responsible for crimes against humanity in the form of murder, forcible transfer of population and persecution pursuant to an organizational policy in locations, including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of articles 7(1)(a), 7(1)(d) and 7(1)(h) of the Statute.

2. I am unable to accept the decision of the Majority and the analysis that underpins it. I continue to believe that the ICC lacks jurisdiction *ratione materiae* in the situation in the Republic of Kenya, including in the present case. I am not satisfied that there are reasonable grounds to believe that the crimes alleged, which occurred during the violence that took place between 30 December 2007 and the end of January 2008 in Uasin Gishu and Nandi Districts, were committed pursuant to the policy of an *organisation* within the meaning of article 7(2)(a) of the Statute. Thus, I am not satisfied that the crimes alleged constitute crimes against humanity pursuant to article 7 of the Statute.

¹ ICC-01/09-30-Red; ICC-01/09-30-Conf-Exp and annexes.

² Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-1.

3. I wish to confess that I have taken this position with a heavy heart. I am profoundly aware of the crimes and atrocities described in the Application for summonses to appear for the three suspects William Ruto, Henry Kosgey and Joshua Sang pursuant to article 58(7) of the Statute. I understand and sympathise with the hopes and expectations of the victims of the crimes committed in different locations, including Turbo town, the greater Eldoret area (Huruma, Kyambaa, Kimumu, Langas and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts. I am aware of the victims' expectation that those responsible for these crimes should be brought to justice. I am also painfully aware that there are currently many citizens in the Republic of Kenya who hope for and support the intervention of the Court in this country because they do not have confidence in their own criminal justice system.

4. In these circumstances, I would like to reiterate my request to all those in the Republic of Kenya who yearn for justice and support the intervention of the ICC with regard to the crimes alleged in this Application to understand and accept the following:

[T]here are, in law and in the existing systems of criminal justice in this world, essentially two different categories of crimes which are crucial in the present case. There are, on the one side, international crimes of concern to the international community as a whole, in particular genocide, crimes against humanity, and war crimes pursuant to articles 6, 7 and 8 of the Statute. There are, on the other side, common crimes, albeit of a serious nature, prosecuted by national criminal justice systems, such as that of the Republic of Kenya.

(...)

[A] demarcation line must be drawn between international crimes and human rights infractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation.³

5. Consequently, I have no doubt that the crimes alleged in the Application concerning William Ruto, Henry Kosgey and Joshua Sang fall within the competence

³ Dissenting Opinion of Judge Hans-Peter Kaul to the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, paras 8 and 65.

of the criminal justice authorities of the Republic of Kenya as a matter to be investigated and prosecuted under Kenyan criminal law.

6. It is essentially on this point alone that I must separate myself from the Majority of the Chamber. As I am of the considered view that the Court lacks jurisdiction *ratione materiae* in the present case because the crimes alleged do not amount to crimes against humanity pursuant to article 7 of the Statute, I also feel barred, at least in principle, from pronouncing a view on whether there are reasonable grounds to believe, as required by article 58(7) of the Statute, that (1) the three suspects are criminally responsible for crimes against humanity in the form of murder, forcible transfer of population and persecution; and (2) that summonses are sufficient to ensure the suspects' appearance.

7. I wish, however, to clarify and draw the attention of all concerned in the Republic of Kenya to the following: I do not question in this dissenting opinion that abhorrent crimes, as described in the Application, have been committed. Rather, my dissent concerns the fundamental issue whether the crimes alleged in the present case constitute crimes against humanity within the meaning of *article 7 of the Statute*. I reiterate that these offences are serious common crimes to be investigated and prosecuted by the competent authorities of the Republic of Kenya under Kenyan criminal law. Thus, it is the responsibility of the Republic of Kenya to initiate, without delay, genuine criminal proceedings to bring the main culprits, masterminds and perpetrators of the crimes committed during the 2007/2008 violence to justice.

8. In the following, I shall set out my understanding of the law and my analysis of the evidence as to the existence of the constitutive contextual requirement of "organizational policy" pursuant to article 7(2)(a) of the Statute.

II. The Law and its Interpretation

9. The chapeau of article 7(1) of the Statute reads:

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack: (...)

10. Article 7(2)(a) of the Statute stipulates:

'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack[.]

11. In my dissenting opinion to the Majority's decision of 31 March 2010 authorizing the commencement of the Prosecutor's *proprio motu* investigation into the situation in the Republic of Kenya,⁴ I set out in appropriate detail my understanding of the law governing, in particular, the constitutive contextual requirement of crimes against humanity in accordance with article 7(2)(a) of the Statute.

12. For the purposes of the present dissenting opinion, I briefly recall that crimes alleged as part of an attack against any civilian population must be carried out pursuant to a policy of an '*organisation*' in accordance with article 7(2)(a) of the Statute. In my previous dissenting opinion, I set out my understanding of this statutory requirement as follows:

51. I read [article 7(2)(a) of the Statute] such that the juxtaposition of the notions "State" and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities. These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.

52. In contrast, I believe that non-state actors which do not reach the level described above are not able to carry out a policy of this nature, such as groups of

⁴ Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr.

organized crime, a mob, groups of (armed) civilians or criminal gangs. They would generally fall outside the scope of article 7(2)(a) of the Statute. To give a concrete example, violence-prone groups of persons formed on an *ad hoc* basis, randomly, spontaneously, for a passing occasion, with fluctuating membership and without a structure and level to set up a policy are not within the ambit of the Statute, even if they engage in numerous serious and organized crimes. Further elements are needed for a private entity to reach the level of an 'organization' within the meaning of article 7 of the Statute. For it is not the cruelty or mass victimization that turns a crime into a *delictum iuris gentium* but the constitutive contextual elements in which the act is embedded.

53. In this respect, the general argument that any kind of non-state actors may be qualified as an 'organization' within the meaning of article 7(2)(a) of the Statute on the grounds that it "has the capability to perform acts which infringe on basic human values" without any further specification seems unconvincing to me. In fact this approach may expand the concept of crimes against humanity to any infringement of human rights. I am convinced that a distinction must be upheld between human rights violations on the one side and international crimes on the other side, the latter forming the nucleus of the most heinous violations of human rights representing the most serious crimes of concern to the international community as a whole.⁵

13. It is against this standard that I have carried out a full, genuine and substantive analysis of the Prosecutor's Application and evidence submitted. In doing so, I was instructed by article 58(7) in conjunction with article 21(3) of the Statute to assess the facts provided in the Prosecutor's Application and the evidence and other material against the rather low threshold of "reasonable grounds to believe".

14. The Prosecutor supported his Application, to a large extent, with the same public reports of non-governmental organisations and commissions that he already submitted on 26 November 2009 when seeking the Chamber's authorization for the commencement of the investigation into the situation in the Republic of Kenya pursuant to article 15 of the Statute.⁶ Additionally, he submitted a table, following

⁵ Dissenting Opinion of Judge Hans-Peter Kaul to the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr (footnotes omitted).

⁶ ICC-01/09-3 and annexes. The material submitted in the present case includes the reports of Human Rights Watch, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Governance" ("HRW Report"), March 2008, ICC-01/09-30-Conf-Exp-Anx5; International Crisis Group, "Kenya in Crisis" ("ICG Report"), February 2008, ICC-01/09-30-Conf-Exp-Anx6; Commission of Inquiry into Post Election Violence, "Final Report" ("CIPEV Report"), 16 October 2008, ICC-01/09-30-Conf-Exp-Anx8; and Kenya National Commission on Human Rights, "On the Brink of the Precipice: A Human Rights

the structure and language of the Application, which contained only excerpts or a series of sentences, selected by the Prosecutor, from witness statements, reports, press articles and other material. Pursuant to a decision of the Chamber,⁷ on 23 February 2011 the Prosecutor provided the Chamber with audio-recorded or written statements of those witnesses on whose statements he relies in the present Application. He also submitted additional related material.⁸

15. The Prosecutor's Application has been submitted in confidential *ex parte* and public redacted forms; in the latter form, the Prosecutor has redacted all submissions under Part C "Standard of Proof" and Part G "Summary of the Evidence and Other Information Establishing Reasonable Grounds to Believe that William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang Committed Crimes Within the Jurisdiction of the Court Pursuant to Article 58(2)(D) of the Rome Statute". Mindful of the need for proper reasoning and the principle of publicity of proceedings, I make reference to those parts. However, special care has been taken not to disclose any information identifying witnesses or any other person who might be put at risk on account of the activities of the Court.

III. Findings

16. The Prosecutor contends that there are reasonable grounds to believe that crimes against humanity were committed during the violence in Uasin Gishu and Nandi Districts between 30 December 2007 to the end of January 2008 pursuant to or in furtherance of an organizational policy. In his Application, the Prosecutor alleges that William Ruto, Henry Kosgey and Joshua Sang "coordinated a series of actors

Account of Kenya's Post-2007 Election Violence. Final Report" ("KNCHR Report"), 15 August 2008, ICC-01/0-9-30-Conf-Exp-Anx9.

⁷ Pre-Trial Chamber II, "Decision Requesting the Prosecutor to Submit the Statements of the Witnesses on which he Relies for the Purposes of his Applications under Article 58 of the Rome Statute", ICC-01/09-45-Conf-Exp. The information revealed from the confidential *ex parte* decision of the Chamber does not affect its level of classification as "confidential".

⁸ ICC-01/09-48-Conf-Exp. The information revealed from the confidential *ex parte* filing of the Prosecutor does not affect its level of classification as "confidential".

and institutions”⁹ to establish a “multi-faceted Network”¹⁰, using it to “implement an “organizational policy to commit crimes”¹¹ in order “(1) to gain power in the Rift Valley, and (2) to punish and expel from the Rift Valley those perceived to support [the Party of National Unity]”¹². The Network comprised “[t]housands of members (...) (‘perpetrators’) cultivated by [William] RUTO, [Henry] KOSGEY and [Joshua] SANG”.¹³ The “Network”, headed by William Ruto,¹⁴ was understood to consist of five branches, namely “(1) Political, (2) Media, (3) Financial, (4) Tribal, and (5) Military”.¹⁵ The Prosecutor maintains that each of the branches existed and had legitimate purposes prior to the post-election violence in 2007/2008. However, “[a]s early as 2006”, the three suspects had “capitalized on [the] existing structures and roles in Kalenjin society to create a Network with a criminal purpose”.¹⁶ He emphasises that the “Network” “developed neither ‘randomly’ nor ‘spontaneously’ but was specifically and purposefully developed”¹⁷ by the three suspects. The Prosecutor contends that the “characteristics identified by the Dissenting Opinion (...) have been met”.¹⁸

17. I shall now first analyse the nature of the five branches of the “Network”, before concluding whether overall the “Network” has met the requirements of an ‘organisation’ as set out in article 7(2)(a) of the Statute.

The Political Branch of the “Network”

18. The Prosecutor contends that the “Network used the ODM [Orange Democratic Movement] party’s structure to plan and organize the attacks”.¹⁹ He purports that

⁹ ICC-01/09-30-Conf-Exp, para. 1.

¹⁰ ICC-01/09-30-Conf-Exp, para. 55.

¹¹ ICC-01/09-30-Conf-Exp, para. 1.

¹² ICC-01/09-30-Conf-Exp, para. 54.

¹³ ICC-01/09-30-Conf-Exp, para. 3.

¹⁴ ICC-01/09-30-Conf-Exp, para. 55.

¹⁵ *Ibid.*

¹⁶ ICC-01/09-30-Conf-Exp, para. 56.

¹⁷ ICC-01/09-30-Conf-Exp, para. 53.

¹⁸ *Ibid.*

¹⁹ ICC-01/09-30-Conf-Exp, para. 57.

William Ruto and Henry Kosgey were “both senior ODM politicians”.²⁰ While William Ruto was a “member of the five-person ODM leadership structure called the Pentagon”, Henry Kosgey was the “chairman of ODM”.²¹ Joshua Sang was a “vocal supporter of ODM and its candidates”.²²

19. The Prosecutor further adds that William Ruto was “the single most authoritative ODM figure”²³ and that Henry Kosgey was second to William Ruto, and was responsible for the post-election violence in Nandi District.²⁴ William Ruto allegedly attended meetings to “endorse KOSGEY and ODM’s position”.²⁵ The Prosecutor also maintains that in December 2007 “ODM [members of parliament] financially supported the [post-election violence] attacks and/or hosted/attended meetings or rallies in the Uasin Gishu and Nandi Districts”.²⁶

20. I am not satisfied by the evidence supporting the allegation that the three suspects used the ODM structure to plan and organise the attacks against the Kenyan civilian population. It is unclear to me whether the Prosecutor considers the ODM in its entirety to be the Network’s Political Branch or only individual ODM politicians. Admittedly, William Ruto and Henry Kosgey were leading ODM political figures at the time in question²⁷ and were, according to the evidence provided, involved in the planning of crimes. However, there is no evidence to suggest that the *ODM party structure* was an integral part of the “Network”. Moreover, the evidence does not tend to demonstrate that the national ODM leadership, besides William Ruto and Henry Kosgey, was involved in the events under judicial consideration. More specifically, the Prosecutor has not proven to my satisfaction that the national ODM

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ ICC-01/09-30-Conf-Exp, para. 59.

²⁴ ICC-01/09-30-Conf-Exp, para. 58.

²⁵ *Ibid.*

²⁶ ICC-01/09-30-Conf-Exp, para. 59.

²⁷ HRW Report, ICC-01/09-30-Conf-Exp-Anx5, p. 43 (KEN-OTP-0001-0248 at 0293); ICG Report, ICC-01/09-30-Conf-Exp-Anx6, p. 8 (KEN-OTP-0001-1076 at 1087); Witness 24, ICC-01/09-30-Conf-Exp-Anx19, at pp. 19-20.

leadership or ODM's "Pentagon" adopted a political programme to commit crimes or to oust the non-Kalenjin population of the Rift Valley. One reference in the evidence alleging that support and assistance was provided by Raila Odinga²⁸ is contrasted by other information in the evidence suggesting that the national ODM leadership was not directly implicated in the events.²⁹ The fact that William Ruto, Henry Kosgey or other local ODM politicians planned crimes does not, in itself, implicate the ODM party.

21. According to the Prosecutor, Joshua Sang was not an ODM political figure but a "vocal supporter of ODM and its candidates". Two witness statements were provided according to which it appears that Joshua Sang was actively supporting the ODM in his radio programme.³⁰ However, no information or facts are submitted as to the exact role of Joshua Sang within the Political Branch of the "Network" which was allegedly used to plan and organise the attacks. In fact, the Prosecutor failed to establish any role that Joshua Sang may have played within the Political Branch of the "Network".

22. In light of the foregoing, and in the absence of any evidence of the involvement of the ODM party or its leadership, I am unconvinced that the "Network" relied on the ODM structure as its Political Branch and that such a Political Branch of the "Network" existed, as presented by the Prosecutor. The evidence submitted leads me to conclude that it appears that, in particular, two leading ODM politicians, on the occasion of the 2007 presidential elections in the Republic of Kenya, abused their position and conceived a criminal plan, outside the ODM structure, with a view to achieving their own, personal political goals.

²⁸ Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 11-12, 21-22, and 39-40.

²⁹ HRW Report, ICC-01/09-30-Conf-Exp-Anx5, p. 43 (KEN-OTP-0001-0248 at 0293); KNCHR Report, ICC-01/09-3-Conf-Exp-Anx9, paras 393 and 396 (KEN-OTP-0001-0002 at 0109 and 0110). See also CIPEV Report, ICC-01/09-30-Conf-Exp-Anx8, p. 155 (KEN-OTP-0001-0364 at 0529).

³⁰ Witness 16, ICC-01/09-30-Conf-Exp-Anx19, p. 9; Witness 25, ICC-01/09-30-Conf-Exp-Anx19, p. 45.

The Media Branch of the "Network"

23. The Prosecutor avers that Joshua Sang used Kass FM, a vernacular Kalenjin-speaking radio station for a Kalenjin audience, residing primarily in rural areas in the Rift Valley, as the second branch of the "Network".³¹ Joshua Sang allegedly used his role as a broadcaster on Kass FM to further the organizational policy he shared with William Ruto and Henry Kosgey by (1) broadcasting propaganda, (2) broadcasting meeting and rally locations, and (3) organising fundraising.³² Through Joshua Sang at Kass FM, the Prosecutor maintains, the "Network" was provided "with an avenue to broadcast their views to the general public".³³

24. More specifically, the Prosecutor contends that Joshua Sang was involved in designing the plan to attack supporters of the Party of National Unity ("PNU"), by personally attending three meetings at William Ruto's home.³⁴ On Kass FM, Joshua Sang purportedly aired inflammatory statements and used coded language that combined derogatory terms and a specific location designated for attack, which the perpetrators listening to the programme understood.³⁵ Propaganda against perceived PNU supporters often came from those who called Joshua Sang's daily talk show "Lene Emet".³⁶ "At one meeting, a perpetrator was handpicked to repeatedly call "Lene Emet" to broadcast the Network's propagandist views. (...) Others were also instructed to call for the same purpose".³⁷ Kass FM purportedly ensured that callers shared the "Network's" views.

25. The Prosecutor further alleges that during the planning of the post-election violence, Kass FM was used "to mobilize perpetrators to attend planning meetings and rallies (...) by broadcasting them in advance".³⁸ He also contends that William

³¹ ICC-01/09-30-Conf-Exp, para. 60.

³² ICC-01/09-30-Conf-Exp, paras 61 and 62.

³³ ICC-01/09-30-Conf-Exp, para. 61.

³⁴ ICC-01/09-30-Conf-Exp, para. 61.

³⁵ ICC-01/09-30-Conf-Exp, paras 63 and 68.

³⁶ ICC-01/09-30-Conf-Exp, para. 62.

³⁷ ICC-01/09-30-Conf-Exp, para. 62.

³⁸ ICC-01/09-30-Conf-Exp, para. 64.

Ruto “directed that Kass FM participate in fundraising events to solidify his community” against PNU supporters.³⁹ Those Kass FM-organised events purportedly gave William Ruto a platform to pass on certain messages⁴⁰ and were a forum in which the violence was allegedly organised. With respect to the execution of the attacks, Joshua Sang and Kass FM allegedly encouraged and coordinated the attacks by calling on perpetrators to erect roadblocks, at which non-Kalenjins risked being severely assaulted or killed.⁴¹ It is further alleged that Joshua Sang “called on young men to come out to the road” saying, for example, “‘What are you doing? ‘What are you waiting for?’ to encourage people to start the war”.⁴² Joshua Sang also purportedly “sought updates on perpetrators’ attacks and broadcasted live calls from perpetrators reporting on their progress” so that the audience “knew about the progress that had been made by groups operating in other locations in the Rift Valley”.⁴³

26. First, it is my understanding from the Prosecutor’s submission that the Media Branch of the “Network” was composed of both Joshua Sang and Kass FM. With regard to the suspect Joshua Sang, I am satisfied that he used his call-in radio show “Lene Emet” on Kass FM to support the ODM party and ODM politicians during the 2007 presidential election campaign.⁴⁴ I am also satisfied by the evidence provided that, in his daily talk show, Joshua Sang spread propaganda instigating violence against the non-Kalenjin population⁴⁵ and calling for their eviction.⁴⁶ Evidence is also available that he urged listeners to take action, using expressions such as “vita

³⁹ ICC-01/09-30-Conf-Exp, para. 65.

⁴⁰ In sum, the Prosecutor maintains that William Ruto used the slogan “Kenyans vs Kikuyus”, that he informed attendees that the elections would be rigged, that he urged them to fight other communities at all costs and that resources, such as money and weapons, were available, ICC-01/09-30-Conf-Exp, para. 65.

⁴¹ ICC-01/09-30-Conf-Exp, para. 66.

⁴² ICC-01/09-30-Conf-Exp, para. 67.

⁴³ ICC-01/09-30-Conf-Exp, para. 69.

⁴⁴ Statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, para. 106 (KEN-OTP-0029-0131 at 0146).

⁴⁵ Witness 24, ICC-01/09-30-Conf-Exp-Anx19, at pp. 153-154 and pp. 157-158.

⁴⁶ Witness 28, ICC-01/09-30-Conf-Exp-Anx19, at pp. 91-92; witness 15, ICC-01/09-30-Conf-Exp-Anx19, at pp. 130-131; statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, para. 104 (KEN-OTP-0029-0131 at 0146).

imetokea (“the war has begun”), “What are you doing at home?” and “What are you waiting for?”,⁴⁷ soon after the presidential election results were announced.

27. With regard to Kass FM, I am satisfied that meetings⁴⁸ and ODM rallies⁴⁹ were announced by Kass FM in the context of the ODM election campaign, which may have resulted in perpetrators attending meetings where the violence was discussed. The evidence also shows that Kass FM was used as a communication channel by the Kalenjin audience to express inflammatory remarks and discriminatory views against non-Kalenjin communities.⁵⁰ Lastly, information is also available that messages were broadcasted on Kass FM for the erection of roadblocks.⁵¹

28. However, the evidence compels me to conclude that during the events in question the perpetrators communicated with each other through Kass FM,⁵² and other radio stations,⁵³ letters of invitation,⁵⁴ SMS,⁵⁵ loudspeaker announcements,⁵⁶

⁴⁷ KNCHR Report, ICC-01/09-30-Conf-Exp-Anx9, p. 81 (KEN-OTP-0001-0002 at 0081); Witness 24, ICC-01/09-30-Conf-Exp-Anx19, p. 173.

⁴⁸ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, pp. 87-91.

⁴⁹ Witness 28, ICC-01/09-30-Conf-Exp-Anx19, pp. 131-132; Witness 25, ICC-01/09-30-Conf-Exp-Anx19, at p. 160; Security Brief of the District Security Intelligence Committee, ICC-01/09-30-Conf-Exp-Anx19, p. 160.

⁵⁰ Statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, para. 111 (KEN-OTP-0029-0131 at 0147). Human Rights Watch observed: “There is no clear evidence that the station actively sought to disseminate hate speech but it did not prevent guests from using the airwaves to do so.”, HRW Report, ICC-01/09-30-Conf-Exp-Anx5, pp. 40-41 (KEN-OTP-0001-0248 at 0290-0291); the Kenyan National Commission for Human Rights confirms that “(...) especially (...) Kass FM in this region contributed in fanning the violence by facilitating the spread of such hate messages.”, KNCHR Report, ICC-01/09-30-Conf-Exp-Anx9, p. 81 (KEN-OTP-0001-0002 at 0088). Witness 15, ICC-01/09-30-Conf-Exp-Anx19, pp. 93-97; Witness 24, ICC-01/09-30-Conf-Exp-Anx19, p. 151; ICG Report, ICC-01/09-30-Conf-Exp-Anx6, p. 18 (KEN-OTP-0001-1076 at 1097).

⁵¹ Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 164-165 (“make sure that no fake ballot papers are being transported”); statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, para. 136 (KEN-OTP-0029-0131 at 0150 and 0151), who states that “the purpose of the barriers was to prevent people from escaping. (...) The aim now was to prevent the Kikuyus from fleeing. That is the reason why the youth blocked the roads now; they wanted to kill the Kikuyus now if possible”.

⁵² Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at pp. 104-105; Witness 16, ICC-01/09-30-Conf-Exp-Anx19, p. 192.

⁵³ KNCHR Report, ICC-01/09-30-Conf-Exp-Anx9, p. 81 (KEN-OTP-0001-0002 at 0081).

⁵⁴ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 221.

⁵⁵ Statement of Witness 15, ICC-01/09-48-Conf-Exp-Anx2, p. 11; statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, para. 124 (KEN-OTP-0029-0131 at 0149).

and, to a large extent, by word of mouth⁵⁷. The evidence reveals that Joshua Sang and Kass FM were only one type of the communication channels that perpetrators used when organising themselves to commit crimes.

29. Moreover, the evidence tends to demonstrate that Kass FM as the second branch of the “Network” represents essentially a Kalenjin platform from which, for example, Joshua Sang, callers to his show “Lene Emet”⁵⁸ and an unknown number of people,⁵⁹ spread propaganda and disseminated certain messages within their community. It appears that the “Network” was partly dependent on Kass FM and other communication means in order to reach the wider community of loosely associated perpetrators in the Kalenjin community. Having said this, I conclude overall from the evidence presented that in fact Kass FM and its broadcasters served as instruments of the Kalenjin community to promote the community’s interests.⁶⁰ The true nature of the Media Branch is characterised by the affiliation of its members with the Kalenjin ethnicity. I therefore deem the nature of this branch of the “Network” to be actually more reflective of the Tribal Branch of the “Network”. I will therefore examine the information in relation to this branch in my analysis of the Tribal Branch.

⁵⁶ Witness 25, ICC-01/09-30-Conf-Exp-Anx19, pp. 159-160; in another context, statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, para. 50 (KEN-OTP-0029-0131 at 0139).

⁵⁷ Witness 28, ICC-01/09-30-Conf-Exp-Anx19, at p. 98; Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 119; Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 135 and 136. Witness 15 also states that participants in the meeting were informed about the next gathering, ICC-01/09-30-Conf-Exp-Anx19, at p. 239; statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, para. 39 (KEN-OTP-0029-0131 at 0138) and at para. 94 (KEN-OTP-0029-0131 at 0144), who states: “I found out about the meeting date thanks to the people in the village”; statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, para. 166 (KEN-OTP-0044-0003 at 0025).

⁵⁸ Witness 24, ICC-01/09-30-Conf-Exp-Anx19, p. 151.

⁵⁹ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 94 (“You hear today in the KASS FM, people were discussing such things openly”).

⁶⁰ Witness 28, ICC-01/09-30-Conf-Exp-Anx19, pp. 244-245; statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, para. 100 (KEN-OTP-0029-0131 at 0145 and 0146); 2008 article in the “African Affairs”, ICC-01/09-30-Conf-Exp-Anx19, p. 55; Witness 28 at ICC-01/09-30-Conf-Exp-Anx19, pp. 56, 97-100; Witness 15, ICC-01/09-30-Conf-Exp-Anx19, pp. 59-62; “About Kass FM”, Kass FM, ICC-01/09-30-Conf-Exp-Anx19, pp. 48-49; statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, para. 78 (KEN-OTP-0044-0003 at 0012).

The Financial Branch of the "Network"

30. The Prosecutor alleges that the "Network received financial support from a variety of sources, including (1) [William Ruto's] personal funds, (2) personal funds of [Henry] Kosgey and other ODM supporters, (3) the Emo Foundation and (4) local businessmen".⁶¹ He maintains that William Ruto gave money to attendees of meetings, including those at the 14 December 2007 meeting at his home, for food and transport. He also allegedly funded training for perpetrators of the attacks.⁶² Henry Kosgey purportedly announced that funding was "guaranteed by ODM leaders including himself".⁶³ The Prosecutor further submits that the Emo Foundation, a community-based organisation, and of which Joshua Sang was a member, had merged with Kass FM in order to "maximize fundraising efforts to support the Network"⁶⁴. The Emo Foundation purportedly attracted large audiences to the Network under the pretext of sharing a community message. At Emo-sponsored events, derogatory language was used by the Network members.⁶⁵

31. I am satisfied that William Ruto distributed or otherwise provided money to attendees of the meetings.⁶⁶ I am also satisfied by the evidence provided that William Ruto distributed money for training purposes.⁶⁷ The evidence leads me to conclude that, on account of his tribal and political position, William Ruto played a key role in managing the movement of money at the time.⁶⁸ The evidence also shows that Henry Kosgey distributed money to participants in meetings.⁶⁹ The evidence reveals that the purpose of this money was to motivate people to attend the meetings and/or join in

⁶¹ ICC-01/09-30-Conf-Exp, para. 70.

⁶² ICC-01/09-30-Conf-Exp, para. 71.

⁶³ ICC-01/09-30-Conf-Exp, para. 72.

⁶⁴ ICC-01/09-30-Conf-Exp, para. 73.

⁶⁵ ICC-01/09-30-Conf-Exp, para. 73.

⁶⁶ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at pp. 254-255, and at pp. 255-257; statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, paras 53 and 102 (KEN-OTP-0031-0085 at 0093 and 0100); Witness 28, ICC-01/09-30-Conf-Exp-Anx19, p. 267; statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, paras 68 and 74 (KEN-OTP-0029-0131 at 0141-0142).

⁶⁷ Statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, para. 121 (KEN-OTP-0031-0085 at 0102).

⁶⁸ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 221; Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 222-224.

⁶⁹ Witness 24, ICC-01/09-30-Conf-Exp-Anx19, p. 247 and at p. 265; statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, paras 150 and 158 (KEN-OTP-0044-0003 at 0024-0025).

the violence,⁷⁰ for bribery,⁷¹ to simply pay for food and drinks,⁷² entertainment⁷³ or to reimburse transportation costs incurred⁷⁴ by attending meetings. The evidence tends to show that the Emo Foundation organised so-called “Kass FM Nights” or “Kalenjin Nights” during which ODM politicians, such as William Ruto and other Kalenjin figures, gathered and campaigned for their objectives.⁷⁵

32. However, I fail to see in the evidence how the distribution of money by two ODM politicians, the assistance in kind by some businessmen⁷⁶ and the Emo Foundation’s organisation of night events for the Kalenjin community around the 2007 presidential election campaign⁷⁷ can be considered as the financial pillar of a state-like ‘organisation’ within the meaning of article 7 (2)(a) of the Statute. The evidence shows that contributions were made by some Kalenjin businessmen and community members with a view to ultimately promoting the Kalenjin community and its interests through support for the political party with which it was affiliated, the ODM. With regard to the role of the Emo Foundation, the evidence tends to demonstrate that it is first and foremost an ethnic- and community-based organisation⁷⁸ tasked with promoting Kalenjin interests and which provided the appropriate forum in which the Kalenjin community gathered.⁷⁹ The evidence

⁷⁰ Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 21-22, p. 159 and at pp. 264-265; Witness 19, ICC-01/09-30-Conf-Exp-Anx19, at p. 266.

⁷¹ Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 21-22.

⁷² Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 235 and p. 248; Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 21-22, and 247; statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, para. 54 (KEN-OTP-0031-0085 at 0093).

⁷³ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 238.

⁷⁴ Witness 24, ICC-01/09-30-Conf-Exp-Anx19, p. 247; Witness 19, ICC-01/09-30-Conf-Exp-Anx19, at p. 266.

⁷⁵ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, pp. 100 *et seq.*, at pp. 105-107.

⁷⁶ Witness 19, ICC-01/09-48-Conf-Exp-Anx83, para. 84 (KEN-OTP-0031-0085 at 0097); statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, paras 103, 111 and 112 (KEN-OTP-0044-0003 at 0016, 0019-0020); exhibit 6 to the statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx92; Witness 24, ICC-01/09-30-Conf-Exp-Anx19, at p. 537; Witness 28, ICC-01/09-30-Conf-Exp-Anx19, at pp. 608-609.

⁷⁷ One such event has been referred to by Witness 15 as a “come together party”, ICC-01/09-48-Conf-Exp-Anx2, p. 7 (KEN-OTP-0027-0163 at 0168).

⁷⁸ Witness 28, ICC-01/09-30-Conf-Exp-Anx19, pp. 196-198; Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at pp. 198-199.

⁷⁹ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at pp. 212-213, p. 227 (“your contribution will be used: 1- will be used to construct a milling machine, (...) 2 – they were saying they want to buy other farms that

presented does not support the Prosecutor's allegation that the Emo Foundation contributed to collecting money from its members, which was used for purposes related to the so-called post-election violence.⁸⁰

33. In light of the foregoing, I conclude that the Financial Branch of the "Network" was a temporary *ad hoc* undertaking of some individuals – William Ruto in particular – for offering financial inducements to members of the Kalenjin community to join and commit crimes. The Financial Branch, as depicted by the Prosecutor, existed only prior to and in connection with the 2007 presidential elections. The evidence presented reveals that the true nature of the Financial Branch is characterised by the affiliation of its members with the Kalenjin ethnicity. I therefore deem the nature of this branch of the "Network" to be actually more reflective of the Tribal Branch of the "Network". I will therefore examine the information in relation to this branch in my analysis of the Tribal Branch.

The Military Branch of the "Network"

34. The Prosecutor maintains that the Military Branch of the "Network", consisting of former members of the Kenyan police and military, contained a Strategic-Military Team, which advised William Ruto on logistical issues, and a Military Field Command Structure, headed by William Ruto.⁸¹ The role of those two entities was to mobilise and recruit "warriors", obtain weapons, and identify financial resources.⁸² Furthermore, it is alleged that the "Network" "included three former Kenyan military officials, below William Ruto, referred to as 'Commanders' or 'Generals'" who were each responsible for specific geographic areas of the Rift Valley, where they led hierarchical organisations comprising horizontal layers of subordinates and

belong to Europeans"); see also Witness 15 stating "[t]he purpose of this organisation is to unify all the Kalenjin against what Hon. Ruto had said the Kikuyus had against us Kalenjin.", in ICC-01/09-48-Conf-Exp-Anx2, p. 4 (KEN-OTP-0027-0163 at 0165).

⁸⁰ In the evidence, one reference to that effect is made by Witness 15 who states that "(...) the KASS FM and EMMO Society or Foundation (...) had managed to raise approximately Ksh 1.5 [billion] to accomplish the business to come", ICC-01/09-48-Conf-Exp-Anx2, at p. 6 (KEN-OTP-0027-0163 at 0168).

⁸¹ ICC-01/09-30-Conf-Exp, paras 78 and 81.

⁸² ICC-01/09-30-Conf-Exp, para. 78.

a reporting system.⁸³ Subordinates were allegedly responsible for tasks, “including identifying PNU supporters’ homes and businesses for future attacks, obtaining weapons, training and leading perpetrators during the attacks”.⁸⁴ Perpetrators were strategically deployed in the area concerned according to the needs for skilled manpower.⁸⁵

35. William Ruto purportedly supported the “Military Structure” by providing (1) telephones, (2) guns, grenades and gas/fuel to perpetrators, and (3) coordinating lorry owners to transport perpetrators to and from locations identified for attacks.⁸⁶ The Prosecutor further maintains that the “Network” “instilled a fear of punishment, real or perceived”, making perpetrators believe that they were forced to participate and, if they refused, they would be punished.⁸⁷ The Prosecutor further contends that William Ruto, Henry Kosgey and others promised perpetrators attending various meetings immunity for the crimes, and monetary reward or land, if they succeeded, thus ensuring the participation of the pro-ODM community in the commission of crimes.⁸⁸

36. Before all else, I wish to note that the Prosecutor did not provide any information in the table supporting the allegations made in the Application with regard to the Military Branch of the “Network”, as the information enlisted in the relevant part of the table appears to relate to the “Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (ICC-01/09-31-Red).⁸⁹ However, the Prosecutor’s submission of the evidence on 23 February 2011, has allowed me to assess the allegations of the Prosecutor in the present case.

⁸³ ICC-01/09-30-Conf-Exp, paras 79-81.

⁸⁴ ICC-01/09-30-Conf-Exp, para. 82.

⁸⁵ ICC-01/09-30-Conf-Exp, para. 88.

⁸⁶ ICC-01/09-30-Conf-Exp, para. 83.

⁸⁷ ICC-01/09-30-Conf-Exp, paras 84 and 85.

⁸⁸ ICC-01/09-30-Conf-Exp, para. 86.

⁸⁹ ICC-01/09-30-Conf-Exp-Anx19, pp. 292-309.

37. I am satisfied that William Ruto made available guns,⁹⁰ grenades⁹¹ and gas cylinders⁹² to selected perpetrators. The evidence tends to show that William Ruto promised perpetrators monetary reward in exchange for the destruction of Kikuyu buildings and every Kikuyu person killed.⁹³ I am also satisfied that William Ruto was part of the coordinating efforts prior to the outbreak of the violence in Uasin Gishu and Nandi Districts between 30 December 2007 to the end of January 2008.⁹⁴ The evidence also tends to demonstrate that Henry Kosgey promised the perpetrators immunity for the crimes.⁹⁵ I note that the Prosecutor makes no allegation of Joshua Sang's involvement in the Military Branch.

38. However, the Prosecutor's allegation that three former Kenyan Army "Generals" or "Commanders"⁹⁶ participated in the "Network" is apparently meant to imply that the Kenyan Army was somehow involved. The contrary is the case: the evidence shows that the three "Commanders" were retired officials of the Kenyan Army or the General Services Unit and were not representing the Kenyan Army. Equally, the evidence does not demonstrate that the structures or facilities of the Kenyan Army were used in any way. In fact, references in the evidence suggest that the Kenyan

⁹⁰ Statement of Witness 15, ICC-01/09-48-Conf-Exp-Anx2, pp. 9 and 10 (KEN-OTP-0027-0163 at 0170-0171); statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, paras 63-65 and 81-87 (KEN-OTP-0029-0131 at 0141 and 0143); statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, paras 48-51 (KEN-OTP-0031-0085 at 0092 and 0093); statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, para. 166 (KEN-OTP-0044-0003 at 0025).

⁹¹ Statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, para. 50 (KEN-OTP-0031-0085 at 0093).

⁹² Statement of Witness 15, ICC-01/09-48-Conf-Exp-Anx2, p. 10 (KEN-OTP-0027-0163 at 0171); statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, paras 76 and 88 (KEN-OTP-0029-0131 at 0142-0143).

⁹³ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 35 and at pp. 146-148.

⁹⁴ Statement of Witness 15 ICC-01/09-48-Conf-Exp-Anx2, p. 6 (KEN-OTP-0027-0163 at 0167); see also exhibit 9 provided by Witness 15, ICC-01/09-48-Conf-Exp-Anx41 (KEN-OTP-0035-0081); Statement of Witness 15, ICC-01/09-48-Conf-Exp-Anx2, p. 6 (KEN-OTP-0027-0163 at 0167).

⁹⁵ Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 1830-1831.

⁹⁶ Witness 15 refers to the three individuals as the „coordinators“, ICC-01/09-30-Conf-Exp-Anx19, at p. 115.

Army actually assisted the police to calm the situation in some parts of the country.⁹⁷ In fact the participation and alleged assistance of the three “Commanders” to coordinate and train the youth in the violence was due to their ethnic affiliation with the Kalenjin community and desire to support the ODM party and its politicians.⁹⁸ According to the evidence, the three “Commanders” were appointed by “people” present at the meeting of 30 December 2006 for purposes of the violence in connection with the 2007 presidential elections.⁹⁹ The perpetrators coordinated¹⁰⁰ their activities in their community for a specific occasion, namely the 2007 presidential elections. That being said, I doubt whether the coordination, *per se*, of perpetrators on the ground amounts to the establishment of an ‘organisation’, or part thereof, established for a common purpose over a prolonged period of time. The fact that the perpetrators on the ground knew each other from their community¹⁰¹ facilitated the supervision of activities on the ground but does not prove to my satisfaction that a reporting system within a hierarchical ‘organization’ had been established. The perpetrators united due to their affiliation with the Kalenjin community, at times because they felt compelled to participate.¹⁰² This is confirmed by witnesses who stated that they felt forced to join,¹⁰³ were made to donate if they refused,¹⁰⁴ or that it was a “forceful affair”¹⁰⁵. However, another witness reports that

⁹⁷ Statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, paras 127-129 (KEN-OTP-0031-0085 at 0103); KNCHR Report, ICC-01/09-30-Conf-Exp-Anx9, para. 315 and 347 (KEN-OTP-0001-0002 at 0093 and 0101); HRW Report, ICC-01/09-30-Conf-Exp-Anx5, p. 29 (KEN-OTP-0001-0248 at 0275).

⁹⁸ Statement of Witness 24 (“We can all join together to support our leaders.”), ICC-01/09-48-Conf-Exp-Anx85, para. 94 (KEN-OTP-0044-0003 at 0014).

⁹⁹ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, pp. 314-318.

¹⁰⁰ See exhibit 20 provided by Witness 15, ICC-01/09-48-Conf-Exp-Anx52 (KEN-OTP-0035-0094); Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 622, at pp. 638-640 and at pp. 648-649; statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, para. 104 (KEN-OTP-0031-0085 at 0100); statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, paras 136-139, 174 and 178 (KEN-OTP-0044-0003 at 0022, 0023 and 0027); Witness 24, ICC-01/09-30-Conf-Exp-Anx19, at pp. 533-535; Witness 28, ICC-01/09-30-Conf-Exp-Anx19, at pp. 619-620.

¹⁰¹ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 329; Witness 24, ICC-01/09-30-Conf-Exp-Anx19, at p. 544.

¹⁰² Statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, para. 115 (KEN-OTP-0031-0085 at 0102).

¹⁰³ Statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, para. 85 (KEN-OTP-0031-0085 at 0097); Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 755-756; Witness 28, ICC-01/09-30-Conf-Exp-Anx19, pp. 1175-1176.

¹⁰⁴ Statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, paras 119 and 152 (KEN-OTP-0029-0131 at 0148 and 0153); Witness 24, ICC-01/09-30-Conf-Exp-Anx19, at p. 157.

not everyone “went to war”.¹⁰⁶ The evidence, therefore, shows the “Network” members’ willingness to organise themselves and to assist, according to their personal skills,¹⁰⁷ in what was perceived to be in the community’s interest.

39. In light of the foregoing, I deem the nature of this branch of the “Network” to be actually more reflective of the Tribal Branch of the “Network”. I will therefore examine the information in relation to this branch in my analysis of the Tribal Branch.

The Tribal Branch of the “Network”

40. The Prosecutor maintains that tribal elders within the Kalenjin community, who decide political, social and economic issues for the community, were instrumental to the “Network”.¹⁰⁸ William Ruto was allegedly crowned Kalenjin leader in 2006 and was thus vested with the authority to decide on matters affecting the Kalenjin community in the Rift Valley.¹⁰⁹ The Prosecutor further emphasised that elders attended meetings in which the violence was planned and coordinated and even led the violence. Elders also purportedly performed traditional ceremonies, blessing weapons and perpetrators.¹¹⁰

41. Before all else, I wish to note that the Prosecutor did not provide any information in the table supporting the allegations made in the Application with regard to the Tribal Branch of the “Network”, as the information enlisted in the relevant part of the table appears to relate to the “Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”

¹⁰⁵ Witness 15, ICC-01/09-3-Conf-Exp-Anx19, at p. 347.

¹⁰⁶ Statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, paras 182-183 (KEN-OTP-0044-0003 at 0028); see also Witness 24, ICC-01/09-30-Conf-Exp-Anx19, at p. 156 and at p. 755.

¹⁰⁷ Statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, paras 103, 136 and 170-171 (KEN-OTP-0044-0003 at 0015, 0022 and 0027).

¹⁰⁸ ICC-01/09-30-Conf-Exp, para. 74.

¹⁰⁹ ICC-01/09-30-Conf-Exp, para. 75.

¹¹⁰ ICC-01/09-30-Conf-Exp, paras 76-77.

(ICC-01/09-31-Red).¹¹¹ However, the Prosecutor's submission of the evidence on 23 February 2011, has allowed me to assess the allegations of the Prosecutor in the present case.

42. Indeed, I am satisfied that the Tribal Branch played a pivotal, if not decisive role in the violence in Uasin Gishu and Nandi Districts which erupted on the occasion of the 2007 presidential elections. The evidence tends to demonstrate that elders and other leaders of the Kalenjin community were present at meetings, directed the youth and participated in the attacks.¹¹² In fact, the evidence suggests that the perpetrators from the "Network", alongside Kalenjin elders and other community leaders, belonged predominantly to the Kalenjin tribe.¹¹³ The ethnic origin of the perpetrators was decisive and united all members of the "Network". A strong sense of allegiance and obligation was felt by members of the "Network" towards their ethnic community, its leaders and the community's interests.¹¹⁴ Thus, the members of the "Network" identified with the ODM party which, it was said,¹¹⁵ promoted Kalenjin interests. Targeted communities were perceived as supporting the opposing political party, the PNU. This ethno-political affiliation confirms, in the present case, that the attacks were actually fought along ethnic lines.

¹¹¹ ICC-01/09-30-Conf-Exp-Anx19, pp. 270-292.

¹¹² Statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, paras 84, 92 and 101 (KEN-OTP-0031-0085 at 0097, 0098 and 0100); Witness 16, ICC-01/09-30-Conf-Exp-Anx19, p. 581; Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 501-502.

¹¹³ Witness 24, ICC-01/09-30-Conf-Exp-Anx19, pp. 188-189; statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, para. 178 (KEN-OTP-0044-0003 at 0027); statement of Witness 19, ICC-01/09-49-Conf-Exp-Anx83, paras 85-92 (KEN-OTP-0031-0085 at 0097-0098); statement of [REDACTED], ICC-01/09-30-Conf-Exp-Anx19, at p. 671; statement of [REDACTED], ICC-01/09-30-Conf-Exp-Anx19, at p. 666; statement of [REDACTED], ICC-01/09-30-Conf-Exp-Anx19, at p. 659; KNCHR Report, ICC-01/09-30-Conf-Exp-Anx9, paras 234, 236 and 239 (KEN-OTP-0001-0002 at 0071 and 0073).

¹¹⁴ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 88 ("Other people attended voluntarily, (...) we are supposed to attend (...), without attendance it means you are doing something against these people, there must be something.").

¹¹⁵ Statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, para. 32 (KEN-OTP-0029-0131 at 0137); Witness 28, ICC-01/09-30-Conf-Exp-Anx19, at p. 603.

43. More specifically, people primarily rallied around William Ruto during the 2007 presidential elections because they belonged to the *Kalenjin* community.¹¹⁶ Businessmen offered financial assistance because they belonged to the *Kalenjin* community.¹¹⁷ The retired Army “Generals” or “Commanders” trained the *Kalenjin* youth because they belonged to the *Kalenjin* community¹¹⁸ and wished to assist the community’s political leaders.¹¹⁹ The Emo Foundation and Kass FM are instruments of the *Kalenjin* community with the goal of promoting *Kalenjin* culture and interests, and supporting *Kalenjin* politicians in the election campaign.¹²⁰ Local politicians gathering at the meetings and rallies belonged to the *Kalenjin* community.¹²¹ *Kalenjin*

¹¹⁶ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 241 (“...now we are heeding Honorable William (...) RUTO, and we have to follow him at all means”) and at p. 234; statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, paras 49-50 (KEN-OTP-0029-0131 at 0139), who states that “[t]he youth, fully packed in trucks, were trying to advertise to vote for William RUTO. It was more a show than meeting. They were moving around the town, carrying William Ruto’s photos and saying that William Ruto had to go to Parliament and the ones who were not supporting him should be evicted.”; statement of witness 16, ICC-01/09-48-Conf-Exp-Anx61, para. 92 (KEN-OTP-0029-0131 at 0144), who states that “[a]ll the youth present were Kalenjins”; statement of Witness 19, ICC-01/09-48-Conf-Exp-Anx83, paras 32 and 47 (KEN-OTP-0031-0085 at 0090 and 0092); statement of Witness 24 ICC-01/09-48-Conf-Exp-Anx85, para. 78 (KEN-OTP-0044-0003 at 0012), who states that “[b]efore the elections of 2007, there were political announcements going on local radios in local language that everybody should help his own ethnic group.”; statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, paras 105-106, 113 (KEN-OTP-0044-0003 at 0018 and 0020); Witness 24, ICC-01/09-30-Conf-Exp-Anx19, at p. 323.

¹¹⁷ Statement of Witness 16, ICC-01/09-48-Conf-Exp-Anx61, paras 52-53 (KEN-OTP-0029-0131 at 0139), who states that “[REDACTED] put vehicles at the disposal of the youth because he was going to get money from William RUTO for this later on. (...) The [REDACTED] was supporting William RUTO in his campaign. They put a lorry at the disposal of the youth because it was their way to support William RUTO in his campaign.”; Witness 19, ICC-01/09-48-Conf-Exp-Anx83, para. 84 (KEN-OTP-0031-0085 at 0097); statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, paras 111 and 112 (KEN-OTP-0044-0003 at 0019-0020); exhibit 6 to the statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx92; Witness 24, ICC-01/09-30-Conf-Exp-Anx19, at p. 537; Witness 28, ICC-01/09-30-Conf-Exp-Anx19, at pp. 608-609.

¹¹⁸ See exhibit 7 provided by Witness 15, ICC-01/09-19-48-Conf-Exp-Anx39 (KEN-OTP-0035-0078).

¹¹⁹ Statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, para. 94 (KEN-OTP-0044-0003 at 0014).

¹²⁰ Witness 28, ICC-01/09-30-Conf-Exp-Anx19, pp. 244-245; statement of Witness 16, ICC-01/09-30-Conf-Exp-Anx61, para. 100 (KEN-OTP-0029-0131 at 0145 and 0146); 2008 article in the “African Affairs”, ICC-01/09-30-Conf-Exp-Anx19, p. 55; Witness 28 at ICC-01/09-30-Conf-Exp-Anx19, pp. 56, 97-100; Witness 15, ICC-01/09-30-Conf-Exp-Anx19, pp. 59-62; “About Kass FM”, Kass FM, ICC-01/09-30-Conf-Exp-Anx19, pp. 48-49; statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, para. 78 (KEN-OTP-0044-0003 at 0012).

¹²¹ Witness 15, ICC-01/09-30-Conf-Exp-Anx19, at p. 228; article in the African Affairs, “Courting the Kalenjin”, ICC-01/09-30-Conf-Exp-Anx19, pp. 954-955.

elders and other opinion leaders of the community supported William Ruto as he belonged to their tribe.¹²²

44. Taking into consideration the evidence as a whole, I believe that the violence committed by the perpetrators of the “Network” in Uasin Gishu and Nandi Districts between 30 December 2007 to the end of January 2008 was in essence ethnically-driven. In light of the evidence submitted, I am of the view that the Tribal Branch did exist within the “Network”. The crucial question, therefore, arises as to whether the Tribal Branch alone - members of a tribe - can be considered as an ‘organisation’ within the meaning of article 7(2)(a) of the Statute.

Overall assessment of the “Network”

45. Having analysed the above-mentioned five branches, I will now turn to an overall assessment of the “Network”. I conclude from the above that the various branches of the “Network” either do not exist, or, rather reflect the Tribal Branch of the “Network”. The question therefore arises as to whether, for the sake of argument, the five branches taken together meet the characteristics of an ‘organisation’ in terms of structure, membership, duration and capacity to attack a civilian population, as set out in paragraph 12. Having analysed the evidence in relation to the five branches of the “Network”, I am not satisfied that the “Network” as a whole meets the legal requirements of an ‘organisation’ pursuant to article 7(2)(a) of the Statute.

46. It has been duly noted that in his Application the Prosecutor avoids using the term ‘organisation’ altogether and instead develops the concept of a “multi-faceted Network”. The “Network”, as presented, is essentially an amorphous alliance for coordinating members of a tribe with a predisposition towards violence with membership of its different branches fluctuating. The members of the “Network” meet, as described by the Prosecutor, at eleven meetings and election rallies whose

¹²² Statement of Witness 24, ICC-01/09-48-Conf-Exp-Anx85, para. 114 (KEN-OTP-0044-0003 at 0020); Witness 19, ICC-01/09-30-Conf-Exp-Anx19, p. 580.

composition varied. To a certain degree, members of the different branches, such as members of the Financial Branch or the Media Branch, acted independently but in coordination. No hierarchy existed between the different branches. Consequently, 'coordination' of the activities of the perpetrators at a horizontal level is put forward as a substitute for the prerequisite of 'responsible command' within a vertical hierarchical structure.

47. A further striking feature of the proposed "Network" is its temporary existence for a specific purpose. Arguably, some components of the "Network", such as ODM politicians, Kass FM and the Emo Foundation, existed prior to the violence of 2007/2008. However, these branches existed to support the Kalenjin community and not to contribute to the commission of crimes. The "Network" only emerged in connection with the violence in Uasin Gishu and Nandi Districts between 30 December 2007 and the end of January 2008. I therefore conclude that the "Network" was created *ad hoc* solely to assist, admittedly in an abhorrent way, the community's aspiring and existing political leaders in gaining or maintaining political power in the Rift Valley on the occasion of the 2007 presidential elections.

48. Furthermore, analysis of the "Network" in terms of its individual branches reveals a group of perpetrators with a pre-disposition to violence engaged in a regional campaign of aggressive inter-ethnic violence, at the instigation of those persons within their tribe who were seeking to achieve their political aims at all costs. Members of a tribe, however, do not form a state-like 'organisation', unless they meet additional prerequisites. By the same token, those members of a tribe who instigated violence cannot alone constitute an 'organisation'.

49. I am satisfied that the violence was planned and organised; preparatory steps and measures of an organisational nature were taken to coordinate the attacks. However, as made clear in my first dissenting opinion in the situation in the Republic of Kenya, the mere act of planning and organising violence will not alone

determine whether an “organizational policy” exists pursuant to article 7(2)(a) of the Statute. What is of crucial importance is that the attack directed against the civilian population is attributable to a *state-like ‘organisation’*, the intellectual author that established or at least endorsed a policy to commit such an attack.¹²³ Accordingly, I hold that the planning and coordination of violence in Uasin Gishu and Nandi Districts between 30 December to the end of January 2008 alone does not transform an ethnically-based gathering of perpetrators into a state-like ‘organisation’.

50. Regrettably, the Prosecutor failed to prove that the crimes were committed pursuant to the policy of a state-like ‘organisation’, which is an indispensable element and inherent characteristic of crimes against humanity under article 7 of the Statute. My previous overall assessment of the facts relating to the post-election violence in the Republic of Kenya, as set out in my first dissenting opinion of 31 March 2010, has not been shattered and therefore remains unchanged. In the absence of any evidence proving that the crimes alleged are embedded in an “*organizational policy*”, I continue to hold that the Court has no jurisdiction *ratione materiae* over the situation in the Republic of Kenya, including the present case.

51. I therefore decline to issue summonses to appear for William Ruto, Henry Kosgey and Joshua Sang pursuant to article 58(7) of the Statute. Proceedings in this case shall not unfold before this Court.

¹²³ Dissenting Opinion of Judge Hans-Peter Kaul to the “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr, para. 41.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Kaul 15/3/11', is written over a horizontal line.

Judge Hans-Peter Kaul
Judge

Dated this Tuesday, 15 March 2011

At The Hague, The Netherlands