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### Prosecuting speech acts

*An examination of the trial of the Prosecutor v. William Amoei Ruto and Joshua Arap Sang*

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PROSECUTING SPEECH ACTS: AN EXAMINATION OF THE TRIAL  
OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO AND JOSHUA  
ARAP SANG

Clare Lawson

Rogier Bartels

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# **Prosecuting Speech Acts: an examination of the trial of *The Prosecutor v.***

## ***William Samoei Ruto and Joshua Arap Sang***

**Clare Lawson and Rogier Bartels\***

### **1. INTRODUCTION**

Joshua Arap Sang (Sang) was a broadcaster on Kenyan radio station KASS FM, where he hosted a popular call-in show called “Lene Emet.”<sup>1</sup> In 2011, after the Pre-Trial Chamber of International Criminal Court (ICC) authorised the ICC Office of the Prosecutor (Prosecution) to open an investigation,<sup>2</sup> Sang was charged with the crimes against humanity of murder, deportation or forcible transfer and persecution.<sup>3</sup> The charges arose out of post-election violence occurring in Kenya’s Rift Valley after the 2007 general election, where over 700 people died and more than 400,000 were forcibly displaced.<sup>4</sup> In January 2012, Pre-Trial Chamber II, by majority, confirmed the charges against Sang, as well as William Samoei Ruto (Ruto), and declined to confirm the charges against the third suspect, Henry Kiprono Kosgey.

The Prosecution alleged that the accused “planned and organized the violence in an attempt to seize political power should they not succeed in the elections.”<sup>5</sup> According to the Prosecution, Ruto headed a network for this purpose, of which Sang was part.

Ultimately, the Prosecution was unsuccessful. On 5 April 2017, following a motion by the defence teams contending that there was no case for them to answer, Trial Chamber V(A), by majority, vacated the charges against the accused and discharged them.<sup>6</sup>

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This chapter addresses the speech act aspects of the case against Ruto and Sang. Following a brief background, it analyses the charged modes of liability, before turning to the evidence relied upon by the Prosecution and how that evidence materialised (or failed to materialise) at trial. Thereafter, the particular speech acts alleged are discussed, focusing on the use of metaphors and coded language. The chapter addresses, in particular, the charges against Sang but also discusses specific words or phrases allegedly used by Ruto to illustrate the challenges and limitations of prosecuting alleged speech acts in the manner attempted by the Prosecution.

## **2. THE CASE AGAINST SANG**

### **Background**

When the incumbent Party of National Unity (PNU) candidate, Mwai Kibaki, was announced as the winner of the Kenyan presidential election on 30 December 2007, a wave of violence erupted. The ICC Prosecution alleged that the violence was aimed at permanently expelling PNU supporters (predominantly members of the Kikuyu, Kamba and Kisii ethnic groups) from the Rift Valley in order to establish a pro-Kalenjin voting block.<sup>7</sup> The violence was allegedly planned and orchestrated by a network of key individuals and entities, within the Kalenjin ethnic community, who were supportive of the PNU's main political rivals, the Orange Democratic Movement (ODM).<sup>8</sup> The network, led by Ruto, was alleged to include pro-ODM political figures, media representatives (including Sang), financiers; tribal elders, local leaders, and former members of the Kenyan police and army.<sup>9</sup>

In immediate response to the violence, mediation between the PNU and ODM occurred under the auspices of a panel chaired by former United Nations Secretary General Kofi Annan. On 28 February 2008 a power-sharing agreement, for a coalition government comprising the PNU and ODM, was reached. By the time the trial against Ruto and Sang commenced at the ICC, in September 2013, Ruto had been elected Vice President of Kenya.<sup>10</sup>

### **The Charges**

Of particular relevance in analysing the speech components of the case against Ruto and Sang are two factual aspects underlying the charges: (i) the media component of the alleged network, which was stated to include Sang and to have contributed to the crimes by way of public broadcasts; and (ii) the anti-PNU rhetoric allegedly used by Ruto at public meetings

and rallies in the lead up to the election, in order to incite anti-PNU sentiment amongst direct perpetrators of the crimes.

Ruto, as an alleged key member of the network,<sup>11</sup> was charged with co-perpetration of the crimes against humanity of murder, deportation or forcible transfer and persecution, pursuant to Article 25(3)(a) of the ICC Statute.<sup>12</sup> The speech aspects of his conduct – including the alleged use of derogatory language against PNU supporters (discussed further in the final section) – were charged merely as one factor in a wider range of conduct which cumulatively amounted to the ‘essential contribution’ required for co-perpetration.<sup>13</sup>

By contrast, Sang was charged under Article 25(3)(d) of the ICC Statute. Article 25(3)(d) has been described as a ‘residual form of accessory liability,’ which acts as a catch-all for criminal contributions which would not fulfil the requirements of other accessory forms of liability, such as ordering, soliciting, inducing, and aiding or abetting.<sup>14</sup> It requires proof of the following elements, three objective (*actus reus*) and two subjective (*mens rea*):<sup>15</sup>

- (i) a crime within the jurisdiction of the ICC was committed (or attempted);
- (ii) a group of persons acting with a common purpose committed (or attempted to commit) that crime;
- (iii) the individual in question made a significant contribution to the crime, in any way other than those set out in article 25(3)(a) to (c);
- (iv) the individual’s contribution was intentional; and
- (v) was made either (a) with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime.

While the ICC Statute includes a separate mode of liability for incitement in Article 25(3)(e), it only applies to the crime of genocide.<sup>16</sup> Although proposals were made to extend the draft of what would become Article 25(3)(e) to cover incitement to commit war crimes and crimes against humanity, “[a] clear majority of delegations to the Rome Conference in 1998 rejected [these] proposals.”<sup>17</sup> However, even if paragraph (3)(e) had included crimes against humanity, the Prosecution may still have opted to bring charges under (3)(d). Consistent with its role as a residual form of liability, Article 25(3)(d) presents a number of potential advantages relative to other modes of liability, especially in the context of speech acts. First,

although in this case the Prosecution made factual assertions that Sang was a member of the alleged network,<sup>18</sup> proof of such membership is not required for prosecution under Article 25(3)(d). It is necessary to prove that a group of persons acting with a common purpose (in this case the alleged network) existed, but a person charged under Article 25(3)(d) need not necessarily be a member of that group.<sup>19</sup>

Second is the issue of causation, which is typically considered in the context of the degree of contribution that an accused's act made to the commission of the crime(s). In contrast to a charge of co-perpetration under Article 25(3)(a), where the accused must make an "essential contribution,"<sup>20</sup> or of aiding and abetting or instigation under Article 25(3)(b) or (c),<sup>21</sup> where a "substantial" contribution is required,<sup>22</sup> under Article 25(3)(d) only the lesser standard of a "significant" contribution must be proven.<sup>23</sup>

As can be seen from the *Mbarushimana* case at the ICC, even the significant contribution standard under Article 25(3)(d) can be difficult to achieve in the context of certain speech acts. Callixte Mbarushimana was charged with contributing to the commission of crimes by the FDLR [*Forces Démocratiques pour la Libération du Rwanda*] "by encouraging the troops on the ground through his press releases and speeches."<sup>24</sup> The Pre-Trial Chamber, by majority, did not find there to be substantial grounds to believe that Mbarushimana had done so, and "therefore, he could have not provided through his radio communications and press releases a significant contribution to the commission of crimes by the FDLR within the meaning of article 25(3)(d) of the Statute."<sup>25</sup> However, the potential relevance of the distinction between the different standards of contribution has become apparent in a number of cases, including that against Charles Blé Goudé at the ICC and against Vojislav Šešelj at the International Criminal Tribunal for the former Yugoslavia (ICTY). Blé Goudé held official positions in various so-called "Pro-Gbagbo groups" in Côte d'Ivoire and was appointed by then President Laurent Gbagbo as the Minister for Youth, Vocational Training and Employment. Blé Goudé had been charged in the alternative under the modes of liability provided for in Articles 25(3)(a), (b), (c) and (d) of the ICC Statute. A key component of Blé Goudé's alleged conduct was that in speeches broadcast by pro-Gbagbo media, he had used his "charisma and oratorical skills" to mobilise youth for violent acts. Further, through the use of xenophobic and other rhetoric, Blé Goudé had incited hatred against perceived opposition supporters, identifying them as the enemy and as legitimate targets for attack. In considering the charges, the ICC Pre-Trial Chamber found that certain of Blé Goudé's

alleged contributions did not meet the essential contribution standard required for Article 25(3)(a).<sup>26</sup> Similarly, Vojislav Šešelj was convicted by the IRMCT/ICTY Appeals Chamber of instigating the crimes of persecution, deportation and other inhumane acts, through speech acts which made a ‘substantial’ contribution to those crimes.<sup>27</sup> However, the Appeals Chamber simultaneously acquitted him of a charge of having physically perpetrated those crimes, having not been persuaded that Šešelj’s speech was an “integral part” of what caused the Croatian population of Hrtkovci to leave.<sup>28</sup>

It has, consequently, been noted that,<sup>29</sup> given the difficulty in proving that crimes would not have been committed without speech act contributions,<sup>30</sup> Article 25(3)(d) presents a potential alternative means of nonetheless prosecuting such acts as contributions to a crime. And, as mentioned above, it was the mode of liability initially charged in respect of Sang’s conduct.

In confirming the charges against Sang, the Pre-Trial Chamber had, by majority, found substantial grounds to believe that, by virtue of his position as a key broadcaster within KASS FM, Sang intentionally contributed to the commission of the crimes against humanity by:

- (i) placing his show Lene Emet at the disposal of the network;
- (ii) advertising the meetings of the network;
- (iii) fanning the violence through the spread of hate messages explicitly revealing desire to expel the Kikuyus;
- (iv) broadcasting false news regarding alleged murders of Kalenjin people in order to inflame the atmosphere in the days preceding the elections; and
- (v) broadcasting instructions during the attacks in order to direct the physical perpetrators to the areas designated as targets.<sup>31</sup>

However, on 8 September 2015, just two days before the Prosecution formally closed its presentation of evidence, it filed a request asking the Trial Chamber to issue a notice of possible variation of the charges against Sang to include the possibility of, alternatively, finding Sang criminally responsible under Articles 25(3)(b) (ordering, soliciting or inducing) or (c) (aiding, abetting or otherwise assisting).<sup>32</sup> As discussed above, Articles 25(3)(b) and (c) require proof of a higher level of contribution than Article 25(3)(d) does. Nonetheless, amending the charged mode of liability in the manner requested could, in particular, have

enabled Sang to be found guilty regardless of whether or not the existence of a group of persons acting with a common purpose was proven. The Trial Chamber did not rule on the request for notice of possible recharacterisation prior to consideration of the defence ‘no case to answer’ motions, instead advising the parties to address those additional modes of liability in their submissions.

### **3. THE EVIDENCE**

#### **The Nature of The Evidence Presented at Trial**

In respect of the evidence presented to support the charges against Sang, in so far as they related to speech acts, the following portion of Judge Fremr’s reasons for vacation of the charges is particularly instructive (footnotes omitted):

Care, in particular, must be taken to ensure that proof of a criminal broadcast or publication does not depend mostly or entirely on the oral evidence of witnesses whose own biases and sense of offence about the subject matter of discussion may have clouded their perception. The primary evidence of the actual broadcast or writing itself – rather than second-hand accounts of them – would be the safest basis for the proper evaluation of the material element of the criminality of the broadcast or publication charged as a crime. In this case, the Prosecution has not produced any recording of a broadcast by Mr Sang in which he made the type of statements he is accused of. Instead, the Prosecution asks the Chamber to rely on the testimony of a number of witnesses who claim to have heard Mr Sang’s radio show at relevant times. In my view, this evidence is not sufficiently reliable in this context. When it comes to allegations of solicitation or inducement through the media, it is of great import to know the exact words used by the accused [...].<sup>33</sup>

From the outset, the Prosecution case had been built primarily on the basis of witness evidence, including a number who claimed to have heard Sang’s broadcasts. In confirming the charges against Sang, the Pre-Trial Chamber relied specifically upon the evidence of five witnesses, four of whom were “insider” witnesses who had admitted participation in the post-election violence.<sup>34</sup> However, even at the pre-trial stage, the accounts of those witnesses were being challenged by the production by the defence teams of (unauthenticated) documentary evidence, including what was purported to be schedules of programmes and transcripts of peace messages broadcast on KASS FM during the time period when the crimes were



committed.<sup>35</sup> At trial, the case against Sang continued to rest on the testimony of a relatively small number of witnesses.<sup>36</sup> This left the case vulnerable to a range of challenges, including – as will be discussed below – the risk of recantation.

### **(I) The Broadcasting Ban**

Evidence disclosed and presented by the Prosecution indicated that a ban on live broadcasting had been imposed by the Kenyan government on 30 December 2007, in the immediate aftermath of the announcement of the election results. The defence teams naturally argued that the existence of this ban severely undermined the evidence of Prosecution witnesses who claimed, amongst other things, that: (i) as the election result was being broadcast live on 30 December 2007, Sang called on his Kalenjin listeners to be ready “to demand their rights”; (ii) on 31 December 2007, Sang called on people to “fight for their rights” and for those who has stolen the vote “to be punished”; (iii) he congratulated people for a “good job” in Kisumu, which had already been attacked; and (iv) called upon Kalenjin to “show resentment” and “demonstrate against the stolen vote,” which the listener understood to refer to “violent demonstration.”<sup>37</sup>

Indeed, certain of the Prosecution witnesses appeared to acknowledge the existence of the ban. For example, one witness apparently stated that KASS FM was only playing music while violence was occurring in Nairobi.<sup>38</sup> Similarly, Witness P-0268 – albeit recanting from his prior statement to the Prosecution – stated before the Trial Chamber that “for a while immediately after results were announced, I didn’t listen to KASS FM. I heard somebody say that KASS FM is no longer there for a while.”<sup>39</sup> The Defence also introduced the statement of a witness relating to events at KASS FM in the aftermath of the election, which included assertions that at KASS FM the broadcasting ban lasted at least eight days, during which people could not come to the studio and normal programming could not continue.<sup>40</sup>

The Prosecution countered that there was no evidence that the ban was “anything more than a government directive” or that it in fact prevented media from broadcasting.<sup>41</sup> The Permanent Secretary of the Ministry of Information had stated that the ban was “resisted” by media at the time. A government spokesperson had explained that the ban was designed to require vernacular radio stations, in particular, to listen to their own content before broadcasting it, as people calling-in live were inciting others to take up arms and burn houses. Moreover, the District Commissioner covering the Central Rift Valley area had stated that he could not

monitor vernacular stations such as KASS FM, as he did not speak Kalenjin. The Prosecution, therefore, submitted that the ban was merely intended to impose self-censorship by the broadcasters, and there was nothing to suggest it had in fact prevented broadcasting on KASS FM. While the Prosecution pointed to evidence that at least one radio station had defied the ban and continued to operate, only the testimony of witnesses who claimed to have heard the broadcasts was relied upon in respect of KASS FM specifically.<sup>42</sup>

## **(II) Recordings / Transcripts of Broadcasts**

The Prosecution did not have any recordings or transcripts of the actual broadcasts allegedly made by Sang on KASS FM, and was reliant on witness accounts of those broadcasts. By contrast, the defence teams used their cross-examination of Prosecution witnesses to introduce documentary and audio evidence. These included audios and transcripts of various peace messages allegedly broadcast on KASS FM during the relevant time period, such as:<sup>43</sup>

- 1 January 2008: recordings of appeals for peace by notable members of the Kalenjin community, as well as members of the KASS FM staff, including Sang, who was recorded saying:
  - “[...] This is Joshua Arap Sang, telling you we are fine, and to implore that we keep peace everywhere – peace in Kenya. May peace be promoted today and forever. Let us keep on maintaining peace”; and
  - “We should keep the peace. To all people, or anyone in Kenya who may be engaged in wrongdoing and is not keeping peace, or is breaching the peace, we would like to pray for peace; that please, all of us, let us keep peace as Kenyan people. Let us keep peace wherever we are. Peace is what we need. [...] So we are pleading for peace, peace, peace. Please, please, at Kass FM we are appealing for peace. [...]”
- 3 January 2008: two recordings of Ruto saying, amongst other things:
  - “ODM believes that the loss of lives, the destruction of property that is ongoing in our country is unnecessary, unwarranted and should stop immediately”; and
  - “[...] I would like to appeal to the Kalenjin people wherever they are, and the people of Kenya to persevere and renounce violence. Let us desist from any action that may ruin peace in our country Kenya, so that we may find a peaceful solution to these issues and that every voter in the just concluded elections may find justice. [...] We appeal that, please, let us exercise restraint: let there be

peace in this land. We do not want to use unlawful methods. We want to use peaceful means, until we find justice. So I would like to appeal to the Kalenjin people, wherever they are, and all the people of Kenya that we refrain from violence and pursue peace so that our country may prosper [...].”

- 4 January 2008: a recording of an appeal by Sang for people to “open the roads” so that people could travel, including for food and medical assistance.

The Sang defence also introduced audio recordings purportedly demonstrating that from August-November 2007, in the lead up to the election, a number of PNU and other non-ODM politicians were featured on Sang’s radio shows.<sup>44</sup> These recordings were presented in response to the allegation of certain Prosecution witnesses that Sang would not allow PNU supporters to call-in or appear in his show to express their views, and “when that occurred unexpectedly he would immediately change tone, cut them off, ridicule, openly attack or verbally insult them.”<sup>45</sup>

Several Prosecution witnesses had referred to reports on KASS FM of fake ballot papers being transported on 25 and 26 December 2007. For example, a witness known as P-0658 claimed that Sang called on people to “be on alert” for vehicles carrying fake ballots, and that Sang had read out the number plates of the vehicles suspected of being involved. The Sang defence, in addition to arguing that Sang was merely covering what was in fact a news story at the time,<sup>46</sup> produced an audio recording in respect of the incident. The audio confirmed that Sang had invited one of his callers to read out the vehicle registration plates, but also included Sang stating that people should remain peaceful.<sup>47</sup>

Admission of material into evidence is without prejudice to the weight that will ultimately be attached to it, especially where there may be limited authentication information available to the Trial Chamber, as appears to have been the case with certain of these recordings. Further, it is clear that the mere existence of such public peace messages may carry little weight where it is established that the speakers in question were otherwise actively engaged in directly contrary conduct. In such circumstances, depending on the facts, it may be possible to prove that the public statements were merely a “show” for political or other purposes. The Prosecution, in fact, argued that in the historical context of longstanding ethnic tension between the Kalenjin and Kikuyu in the Rift Valley, where there was a real possibility for

violence, and when considered against Sang's prior inciting statements, any calls for peace he may have made were mere 'window dressing'.<sup>48</sup>

A full weighing of evidence, which would consider such factors, normally occurs only upon conclusion of the presentation of evidence by both parties, and at the time of issuance of the final judgment. The case against Ruto and Sang concluded at the end of the Prosecution case by way of a successful 'no case to answer' motion by the defence teams.<sup>49</sup> It is therefore not known what weight the Trial Chamber would ultimately have given to the recordings and transcripts presented by the Sang defence, or any other similar material which may have been presented during the course of a defence case. Nonetheless, it is apparent from the remarks of Judge Fremr, as quoted above, that, where specific statements of the accused were at issue, he considered reliance on witness recollection alone insufficiently reliable in the particular circumstances. An additional factor in this case, as noted in the following section, is that in a context of intimidation and active witness interference many of the witnesses recanted their prior statements to the Prosecution when called to testify at trial.

### **(III) Witness Evidence**

An atmosphere of witness intimidation and interference was a key feature of the trial from the outset. The witness interference efforts were summarised by Judge Eboe-Osuji in his reasons for vacation of the charges, which included sections entitled "Direct Interference with Witnesses" and "Indirect Pressure on Witnesses."<sup>50</sup> For example, during the testimony of the very first witness, who had been granted protective measures, there were concerted efforts made on social media to establish and publish the witness's identity. Subsequently, in the context of a request to introduce into evidence the prior statements of certain recanting Prosecution witnesses, the Trial Chamber made findings that improper direct interference occurred in respect of at least four witnesses, some of whom themselves acted as intermediaries to interfere with other witnesses.<sup>51</sup> During the course of the trial, three individuals were charged by the Prosecution with obstruction of justice offences.

The case also suffered from what Judge Eboe-Osuji termed "political meddling." He referred in that context to aggressive anti-ICC sentiment and "hostile rhetoric" promoted by Kenyan politicians, which he considered many witnesses were likely to have found intimidating.<sup>52</sup>

Ultimately, approximately half of the relatively small number of witnesses relevant to the case against Sang recanted their prior statements to the Prosecution when called to testify. The Prosecution has stated that in fact 17 witnesses who had agreed to testify against the two accused withdrew their cooperation entirely.<sup>53</sup> Notably, the context of interference was such that Judge Eboe-Osuji indicated it had been impossible to determine whether or not the Prosecution case had collapsed simply as a result of its own inherent weakness.<sup>54</sup>

The risk of witness interference and recantation is a vulnerability that will attach to any case that is solely or predominantly reliant on evidence in the form of witness testimony. However, as highlighted by Judge Fremr, sole reliance on witness testimony may create additional evidentiary challenges in the context of charges relating to speech acts. Recordings or transcripts of the actual words used are likely to be the most reliable form of evidence for the purpose of ascertaining what was actually said. Alternatively, other contemporaneous records, such as press or official reports, addressing the speech acts may be available, especially where the speeches were publicly broadcast. Witness testimony will form a crucial evidentiary component in confirming that the speech acts were heard by their intended audience, in explaining how the words were understood by that audience and in demonstrating that the words in fact had a connection to the crimes by influencing the direct perpetrators. But for the purpose of proving the nature of the speech itself, witness testimony is vulnerable to difficulties in recollection and particular (conscious or unconscious) biases of the witnesses in question. Certain of these may be overcome, for example, where especially distinctive or memorable phrasing is alleged, or where there is a high degree of consistency amongst the accounts of multiple witnesses. However, the allegations in the case against Ruto and Sang were that coded and metaphorical speech was used. As considered in the following section, that in itself gives rise to further evidential challenges.

#### **4. THE NATURE OF THE ALLEGED SPEECH ACTS**

##### **Metaphors or Coded Language**

The Prosecution alleged, and the Pre-Trial Chamber found there to be substantial grounds to believe, that Sang and Ruto had incited those listening to KASS FM, or attending rallies, to commit crimes against the Kikuyu and associated ethnic groups,<sup>55</sup> *inter alia*, by using messages that did not call for any direct criminal conduct but instead used metaphors. In addition, Sang was alleged to have “broadcast instructions during the attacks through the use

of coded language in order to direct the physical perpetrators to the areas designated as PNU targets.”<sup>56</sup> The relevant speech acts thus consist of two different parts: (i) inciting language and (ii) veiled or coded instructions.

As noted above, demonstrating the connection between speech acts and subsequent crimes is challenging. This is even more so in case of speech acts that do not directly call for the commission of crimes. Indirect incitement, for example, may also be done by stating that committing a particular crime is morally justified or to be applauded, or by communicating messages using metaphors.<sup>57</sup> The present section will not address the legal classification of the use of speech metaphors or the standard for when such metaphors may qualify as incitement. Instead it will consider the evidentiary challenges and consequences of alleging inciting language based, in part, on metaphors or – what was referred to by the Prosecution as – “coded” or “veiled” language.

Generally, coded language forms part of an unrelated body of information, which acts as the carrier of the code, meant to obscure the use of the code for anyone else than the intended recipient(s). It is therefore suitable, and indeed often used, to transmit information about (planned) criminal conduct, including international crimes. Indeed, a well-known scholar has observed that “history shows that those who attempt to incite genocide speak in euphemisms.”<sup>58</sup> Those who know the “key” can encode the language and have the real meaning revealed to them. Some form of prior relation or contact between the person deciphering the code and the encoder is therefore required. Such was indeed alleged in *Ruto and Sang*. According to the Prosecution, Sang had “broadcast coded language signalling that PNU supporters were to be attacked [...]. Listeners who had attended the previous meetings or events understood the coded language and proceeded to the previously identified locations to execute their plans for attack.”<sup>59</sup> Incitement or hate speech cases generally address situations where inciting of hateful language is used to persuade persons outside any pre-existing organisation<sup>60</sup> to commit crimes,<sup>61</sup> the Rwandan genocide being a case in point. However, the way the Prosecution charged Sang’s conduct meant that his (alleged) coded speech acts were not what persuaded, or indeed incited, the direct perpetrators but rather the mere indication for persons (who – apparently – had already been persuaded to commit crimes) to commence their criminal conduct.

Metaphors can be used in a context that leaves no doubt as to their meaning. Indeed, Julius Streicher, who was convicted for incitement to persecution of Jews by the International Military Tribunal at Nuremberg, was found to have written in *Der Sturmer*, *inter alia*, that “[t]he Jews in Russia must be killed. They must be exterminated root and branch.”<sup>62</sup> However, when the allegedly inciting language is less straightforward and the meaning to be given to metaphors or (allegedly) coded language depends on the cultural context, it may be appropriate for the prosecution, or for the chamber, to call expert witnesses to explain the cultural meaning of the words used.<sup>63</sup> In *Akayesu*, at the International Criminal Tribunal for Rwanda (ICTR), for example, the trial chamber relied on the testimony of an expert witness on Kinyarwanda linguistics, called by the prosecution.<sup>64</sup> The term “Inkotanyi,” which was used by Akayesu in his public speaking, translates as ‘warriors’. However, according to the expert witness, “it should be assumed that the basic meaning of the term Inkotanyi is the RPF army,” but at the time it had more extended meanings, namely “RPF sympathizer or supporter” or it would even refer to the “Tutsi as an ethnic group.”<sup>65</sup> Relying on the expert’s explanations, the *Akayesu* Trial Chamber found that the accused urging a crowd to fight the “Inkotanyi” was construed by the addressees “as a call to kill the Tutsi in general.”<sup>66</sup>

### **Alleged Use of Metaphors and Coded Language**

Sang was charged with encouraging and coordinating the attacks against PNU supporters through his broadcasts on KASS FM.<sup>67</sup>

Inciting messages allegedly used on his radio show included asserting shortly before election day that “the Kikuyu would rig the election,”<sup>68</sup> stating that “if Kibaki<sup>69</sup> wins, we will carry out our work,” adding that “we will give the instructions.”<sup>70</sup> With regard to the latter, the Pre-Trial Chamber observed that the relevant witness indicated that during the three months preceding the election, the word “work” was used “instead of explicitly using to the word ‘kill’.”<sup>71</sup> “[T]o carry out the work” was alleged to have meant “mak[ing] sure that Kikuyus ‘have been evicted [...] and] have been killed’.” Following the announcement of the election results, declaring Kibaki as the winner, Sang supposedly said that “the elections had been stolen and our rights denied,” calling listeners to “get their weapons from where they were kept and, if necessary, to use any arm at their disposal to evict the Kikuyus.”<sup>72</sup>

The latter statement leaves little room for misinterpretation and could – if he had indeed made such a statement – constitute incitement to use violence against the Kikuyu, had it been charged in that manner. However, Sang’s alleged instructions also included far more

ambiguous statements, such as, when the violence was already ongoing, “come out, go to Turbo, you know their whereabouts in Turbo.”<sup>73</sup>

Ruto was similarly alleged to have used metaphors or coded language to incite crowds of supporters and convey instructions. In its pre-trial brief, the Prosecution alleged that Ruto, in a rather direct way, incited a crowd by “holding a toy hammer, telling them that they needed to walk with a hammer and a matchbox so they can demolish the houses of the Kikuyu and then set them alight.”<sup>74</sup> During the same speech, he was alleged to have used the word *madoadoa*, which translates as “stains,” indicating that he did not want any *madoadoa*.<sup>75</sup>

Prior to the commencement of the trial stage, the Prosecution had alleged that during ODM rallies, Ruto “addressed the crowds passionately and incited them, declaring either directly or through parables that non-ODM supporters should be evicted from the Rift Valley.” It submitted that he

used parables, stating that the Kikuyu were birds whose nests needed to be destroyed, weeds growing near Kalenjin houses which needed to be removed, or witches who should be burned. He said further that if the ODM won the elections they would ‘uproot the tree stumps that are among the people’ and they would ‘get rid of and send back to where they came from’ all the people who had taken over local farms and businesses.<sup>76</sup>

Only a part of the evidence the Prosecution had relied on at the pre-trial stage remained following presentation of its case at trial. For example, according to a witness who testified at trial, Ruto had used phrases at a rally such as not wanting the “trees which were brought by the white people” and “do not allow the grass [or ‘weeds’]<sup>77</sup> to creep right into your houses.”<sup>78</sup> Sang was claimed to have said similar things on his radio show, but that evidence was removed from the case record following an Appeals Chamber ruling that prior recorded testimony could not be admitted.<sup>79</sup> Ruto allegedly further asked the crowd “to do the work that I asked you to do.”<sup>80</sup>

During the same rally, he allegedly referred to *madoadoa* and had stated that ‘[w]e do not want two different types of clothing’.<sup>81</sup> The latter is interesting in light of the fact that the Prosecution had charged both Sang and Ruto with referring to the Kikuyu as *madoadoa*, alleging that this was a derogatory term.<sup>82</sup> *Madoadoa* was supposedly used in combination



with another metaphor: “a three piece suit.” However, the Ruto Defence submitted that the phrase “three piece suit” referred to “three piece voting,” which was supposed to symbolise the ODM desire to win the elections for both the parliament and the presidency.<sup>83</sup>

Following presentation of its case at trial, and the withdrawal or recantation of a number of key witnesses, the Prosecution appeared to acknowledge that no evidence about Sang using code was in fact before the trial chamber.<sup>84</sup> Nonetheless, Judge Fremr considered that some witnesses had “testified that the alleged language used by the accused was not a straightforward call for crimes to be committed, but rather a sort of coded language, which the witnesses understood to mean as instructions to act against the Kikuyu.”<sup>85</sup> He mentioned as examples the testimony of a witness that Sang spoke about people in Kisumu being “authorised to” call for their rights, “good work” being done in Kisumu, and that “people should not remain quiet” but instead “call out and insist upon their rights.”<sup>86</sup>

The allegations of the Prosecution, and findings of the Pre-Trial Chamber, had relied upon the meaning that fact witnesses had given to particular words/phrases. No expert witness was called either during the pre-trial or trial stage to explain the use of certain words at the relevant time. With regard to the concept of “work,” for example, it is interesting to note that the *Akayesu* Trial Chamber of the ICTR, guided by the testimony of the expert witness on Rwandan linguistics, interpreted Akayesu’s use of the phrase “go to work” as meaning “go kill the Tutsis and Hutu political opponents of the interim government.”<sup>87</sup> The interpretation of euphemisms by that trial chamber may have been referred to as “capacious,”<sup>88</sup> but at least it was grounded on evidence by an expert witness who interpreted the meaning of the relevant words in the applicable context. Conversely, in *Ruto and Sang*, Judge Fremr noted that in case of indirect or coded language, there is a “risk that the witnesses provide their own, incorrect, interpretation of the obscure wording.”<sup>89</sup>

As discussed above, the use of witness testimony alone meant that the Chamber could not itself assess the manner in which the metaphors were used. Judge Fremr observed that it is “especially important for a chamber to have access to the actual words used by the accused, in order to assess whether such ‘coded language’ would amount to inflammatory or instigating speech.”<sup>90</sup> In *Ruto and Sang*, the witnesses concerned therefore had to recount both the actual words, as well as their interpretation of these words in the relevant context. Witnesses may be able to testify about the reaction of other persons to the speeches and/or

broadcasts, on the basis of which it could have been possible to somewhat objectify the understanding given by the witness to the words used. However, Judge Fremr's observation raises the question of whether the use of metaphors or words that do not in and of themselves have a clear and objective derogatory meaning, or inciting appearance, can ever be adequately proven on the basis of the testimony of one or a few witnesses alone.

A further challenge may arise if not all speech is inflammatory or inciting. In the case of Sang, his radio show purportedly broadcast peace messages during the relevant days, and – due to the time of the year – his shows included many (ostensibly peaceful) Christmas carols.<sup>91</sup> The Pre-Trial Chamber considered that evidence indicating the broadcasting of “peaceful appeals” by Sang does “not rule out the possibility that, beside these peaceful messages, the instructions and speeches reported by Witnesses 1, 2, 4, 6 and 8 could have also been broadcasted.”<sup>92</sup> It is certainly true that a broadcast would not need to be inciting in its entirety, and broadcasting non-violent information may be purposely done to obscure the inciting messages for the general public. Yet, where the majority of the speech concerned in fact says the opposite of what is allegedly being incited (namely, peace rather than violence), a question arises as to whether the language can actually work in an inciting manner. Can potentially inciting language that is fully enclosed in non-violent words be considered as having an inciting effect? Moreover, if the alleged inciting language is not straightforward, but instead uses metaphors and must be interpreted in a certain manner in order to consider it inciting, it may be argued that in analysing whether the metaphor actually called for unlawful behaviour, one must take the context in which the words were used, namely an otherwise non-violent message, into account.

## 5. CONCLUSION

*Ruto and Sang* presents a case study of the multiple challenges that can arise in prosecuting speech acts. Recent guidelines, drawn up by a group of scholars and practitioners,<sup>93</sup> in part in reaction to the failure to successfully prosecute alleged hate speech before the Court in *Mbarushimana* and in *Ruto and Sang*,<sup>94</sup> recommended including hate speech in the *actus reus* of the crime against humanity of persecution,<sup>95</sup> and amending and extending the mode of liability of incitement included in Article 25(3)(e) of the ICC Statute.<sup>96</sup> These are useful proposals, which – if adopted by the Assembly of State Parties – may assist the prosecution of speech acts in the future, but even if already in place at the time would not have made a

difference in *Ruto and Sang*, where evidentiary deficiencies led to the acquittal following the presentation of the prosecution case. Some of the challenges in that case, such as the risk of politicisation, are hazards of any high-profile case. Witness intimidation and recantation are similarly not risks that are unique to the prosecution of speech acts. However, the Prosecution's almost exclusive reliance on witness evidence in this case made it particularly vulnerable to such factors, and the contrast between the evidence presented at the confirmation stage and that which materialised at trial underline the associated risks. Moreover, the limitations of exclusive reliance on the testimony of witnesses to prove speech act components are evident. This is especially so where the alleged speech is ambiguous, metaphorical or coded. The use of social media and mobile phones (with cameras) may reduce the need to rely on witness testimony in future speech act cases. The *Ruto and Sang* case is nonetheless a pertinent reminder of the need for careful attention to the particular characteristics of speech, including in making charging decisions, evidencing the allegations and contextualising the speech acts in question. While the absence of a final trial judgment may limit the jurisprudential value of the case, significant evidentiary and practical lessons can and should still be drawn from it.

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<sup>1</sup> There are a range of alternative spellings including Le Nee Emet, Lee Ne Emet, Leneemet and Lee Nee Emet. It was variously translated as 'How is the country?' or 'What is the opinion of the country?'

<sup>2</sup> Kenya Situation, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Situation No.ICC-01/09, 31 March 2010.

<sup>3</sup> Prosecutor v William Samoei Ruto and Joshua Arap Sang, Updated Document Containing the Charges Pursuant to the Decision on the Confirmation of Charges, Case No.ICC-01/09-01/11, 21 August 2012 (UDCC). References to filings and transcripts in these endnotes refer to those in the *Ruto and Sang* case, unless indicated otherwise.

<sup>4</sup> UDCC, para.17.

<sup>5</sup> Public redacted version of Prosecution's Updated Pre-Trial Brief, Case No.ICC-01/09-01/11, 9 September 2013 (Pre-Trial Brief), para.3.

<sup>6</sup> Decision on Defence Applications for Judgments of Acquittal, Case No.ICC-01/09-01/11, 5 April 2016 (Decision on NCTA), p.1.

<sup>7</sup> UDCC, para.20.

<sup>8</sup> UDCC, para.21. The ODM had also run a presidential candidate, Raila Odinga, in the 2007 elections.

<sup>9</sup> UDCC, para.21. A second case arising from the Kenyan post-election violence was also brought before the ICC. However, the charges against Mohammed Hussein Ali (Commissioner of the Kenyan police) were not confirmed, and the charges against Francis Kirimi Muthaura (Chairman of the National Security and Advisory Committee) and Uhuru Muigai Kenyatta (a leading politician during the relevant time and current President of Kenya) were both withdrawn by the Prosecution prior to trial.

<sup>10</sup> Ruto ran for election in a "Jubilee Alliance" with Uhuru Muigai Kenyatta, who, as noted above, was also, at that time, facing prosecution before the ICC.

<sup>11</sup> See, for example, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No.ICC-01/09-01/11, 23 January 2012 (Confirmation Decision), paras 352-353 (referring to the "major role played by Mr. Ruto in creating the group, leading the group, and organising its criminal activities").

<sup>12</sup> Confirmation Decision, para. 349; UDCC, Section VIII. However, shortly after the start of trial the Trial Chamber gave notice of the possibility of re-characterisation of the charges against Ruto, in particular, to

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include the modes of liability provided for under Article 25(3)(b), (c) and (d), see Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, Case No.ICC-01/09-01/11, 12 December 2013.

<sup>13</sup> The charges against Ruto were based on conduct including having allegedly created the network, supervised overall planning for the common plan to carry out the crimes, provided/assisted in obtaining funding, weapons and other logistics. See, for example Confirmation Decision, paras 309-311.

<sup>14</sup> See, for example, Confirmation Decision, para. 354; Prosecutor v. Lubanga, Decision on the Confirmation of charges, Case No.ICC-01/04-01/06, 29 January 2007, para.337; Prosecutor v Mbarushimana, Decision on the confirmation of charges, Case No.ICC-01/04-01/10, 16 December 2011, paras 278-279; Prosecutor v Katanga, Judgment, Case No.ICC-01/04-01/07, 7 March 2014, para.618.

<sup>15</sup> ICC Statute, Article 25(3)(d). See, for example, Confirmation Decision, para.351; Prosecutor v Katanga, Judgment, Case No.ICC-01/04-01/07, 7 March 2014, paras 1616-1620; Prosecutor v Ntaganda, Decision on the Confirmation of charges, Case No.ICC-01/04-02/06, 14 June 2014, para.158

<sup>16</sup> ICC Statute, Article 25(3)(d) reads, in relevant part: “[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...] [i]n respect of the crime of genocide, directly and publicly incites others to commit genocide”.

<sup>17</sup> Ines Peterson, ‘International Criminal Liability for Incitement and Hate Speech’, in Martin Böse *et al* (eds), *Justice Without Borders: Essays in Honour of Wolfgang Schomburg* (Brill 2018), p.340, referring, *inter alia*, to William Schabas, *Genocide in International Law*, (2<sup>nd</sup> ed., Cambridge University Press 2009).

<sup>18</sup> See, for example, UDCC, paras 21, 40 and 44.

<sup>19</sup> See, for example, Prosecutor v. Katanga, Judgment, Case No.ICC-01/04-01/07, 7 March 2014, para.1631; Prosecutor v. Mbarushimana, Decision on the confirmation of charges, Case No.ICC-01/04-01/10, 16 December 2011, paras.272-275.

<sup>20</sup> Prosecutor v. Lubanga, Appeal Judgment, Case No.ICC-01/04-01/06, 1 December 2014, paras 469, 473. The Appeals Chamber held that an essential contribution to a crime entailed the ‘power to frustrate its commission’ (para.473). However, the essential contribution need not be made during the execution of the crime. It could, for example, also be made during the planning or preparation stage (paras 469 and 473).

<sup>21</sup> The term “instigation” is not directly used in the ICC Statute, however, an ICC Trial Chamber has held that soliciting and inducing, as used in Article 25(3)(b), fall under the concept of “instigating”, see Prosecutor v. Bemba *et al*, Judgment, Case No.ICC-01/05-01/13, 19 October 2016, para.73.

<sup>22</sup> Confirmation Decision, para.354.

<sup>23</sup> See, for example, Prosecutor v. Katanga, Judgment, Case No. ICC-01/04-01/07, 7 March 2014, paras 1620, 1632-1633; Prosecutor v. Mbarushimana, Decision on the confirmation of charges, Case No.ICC-01/04-01/10, 16 December 2011, para.284.

<sup>24</sup> Prosecutor v. Mbarushimana, Decision on the confirmation of charges, Case No.ICC-01/04-01/10, 16 December 2011, para.312 and further.

<sup>25</sup> Prosecutor v. Mbarushimana, Decision on the confirmation of charges, Case No.ICC-01/04-01/10, 16 December 2011, para.339.

<sup>26</sup> Prosecutor v. Blé Goudé, Decision on the confirmation of charges, Case No.ICC-02/11-02/11, 11 December 2014, paras 145-148.

<sup>27</sup> Prosecutor v. Šešelj, Judgment, Case No.MICT-16-99-A, 11 April 2018, para.154.

<sup>28</sup> Prosecutor v. Šešelj, Judgment, Case No.MICT-16-99-A, 11 April 2018, para.151. Šešelj was, however, separately found guilty of having committed the act of persecution by violating the right to security of the Croatian population of Hrtkovci through his speech acts, see Prosecutor v. Šešelj, Judgement, Case No.MICT-16-99-A, 11 April 2018, paras 163-165.

<sup>29</sup> R. A. Wilson and M. Gillett, *The Hartford Guidelines on Speech Crimes in International Criminal Law* (2018), paras 222 and 243.

<sup>30</sup> As noted above, the ICC Appeals Chamber defined an essential contribution as one that gives a person the power to frustrate the commission of the crime. See Prosecutor v. Lubanga, Appeal Judgment, Case No.ICC-01/04-01/06, 1 December 2014, paras 469, 473.

<sup>31</sup> Confirmation Decision, para.355.

<sup>32</sup> Prosecution’s Request for notice under regulation 55(2) of possibility of variation with respect to individual criminal responsibility of Mr Joshua Arap Sang, Case No.ICC-01/09-01/11, 8 September 2015.

<sup>33</sup> Decision on NCTA, Reasons of Judge Fremr, para.142.

<sup>34</sup> Referred to at the pre-trial stage as witnesses 1, 2, 4, 6 and 8.

<sup>35</sup> Confirmation Decision, para.362.

<sup>36</sup> In identifying the scope of the Prosecution case which it needed to address in making arguments for a judgment of acquittal, the Sang Defence highlighted ten (10) prosecution witnesses. See Public Redacted Version of Sang Defence ‘No Case to Answer’ Motion, Case No.ICC-01/09-01/11, 23 October 2015 (Sang Defence NCTA Motion), paras 130-131.

- <sup>37</sup> Second Public Redacted version of ‘Prosecution’s consolidated response to the “Corrigendum of Ruto Defence Request for Judgment of Acquittal” and “Sang Defence ‘No Case to Answer’ Motion”’, (ICC-01/09-01/11-2000-Conf), Case No. ICC-01/09-01/11, 20 November 2015 (public redacted version filed on 22 December 2015) (Consolidated Response), paras 341-345.
- <sup>38</sup> Sang Defence NCTA Motion, para. 194.
- <sup>39</sup> Transcript of hearing of 30 October 2013, ICC-01/09-01/11-T-62-Red2-ENG, p.50.
- <sup>40</sup> The identity of this witness is not public. See reference to this evidence in Sang Defence NCTA Motion, para. 195.
- <sup>41</sup> Consolidated Response, para. 348.
- <sup>42</sup> Consolidated Response, paras 348-352.
- <sup>43</sup> Sang Defence NCTA Motion, paras 200-202.
- <sup>44</sup> Sang Defence NCTA Motion, para. 143.
- <sup>45</sup> Consolidated Response, para. 313.
- <sup>46</sup> A newspaper article from 24 December 2007 was presented to demonstrate that ODM politicians were making allegations of vote rigging, which were being reported on in national newspapers, before the matter was mentioned on KASS FM.
- <sup>47</sup> Consolidated Response, para. 322; Sang Defence NCTA Motion, para. 153.
- <sup>48</sup> Consolidated Response, para. 322.
- <sup>49</sup> A consideration of the “no case to answer” standard, and its application by the Trial Chamber in the case against Ruto and Sang, is beyond the scope of this paper.
- <sup>50</sup> Decision on NCTA, Reasons of Judge Eboe-Osuji. See also Statement of the Prosecutor following vacation of the charges, in which she highlighted that the case had been “severely undermined by witness interference and politicisation of the judicial process”, and referred to “a relentless campaign to identify individuals who could serve as Prosecution witnesses in this case and ensure that they would not testify.” (*Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber’s decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future*, 6 April 2016, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406>).
- <sup>51</sup> Decision on the Prosecution Request for Admission of Prior Recorded Testimony, Case No. ICC-01/09-01/11, 19 August 2015.
- <sup>52</sup> Decision on NCTA, Reasons of Judge Eboe-Osuji, paras 161-164.
- <sup>53</sup> <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406>.
- <sup>54</sup> Decision on NCTA, Reasons of Judge Eboe-Osuji, para. 155.
- <sup>55</sup> UDCC, paras 61, 99, 101, 116, and 130.
- <sup>56</sup> UDCC, p.42 and para. 128.
- <sup>57</sup> See Joseph Jaconelli, ‘Incitement: A Study in Language Crime’, 12(2018) *Criminal Law and Philosophy*, p. 248. Gordon refers to speaking in coded language as a ‘separate incitement technique’: Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (OUP 2017), p.289, referring to Susan Benesch, Vile Crime in Inalienable Right: Defining Incitement to Genocide, 48 (2007) *Virginia Journal of International Law*, p.506.
- <sup>58</sup> William Schabas, ‘Hate Speech in Rwanda: The Road to Genocide’, 46 (2000) *McGill Law Journal*, p.160.
- <sup>59</sup> UDCC, para.46.
- <sup>60</sup> Organisation as used to assign criminal liability.
- <sup>61</sup> Jaconelli observes that ‘[t]he most salient characteristic of incitement [...] is the existence of a communication that is made with a view to persuading the addressee(s) to commit an offence.’ Joseph Jaconelli, ‘Incitement: A Study in Language Crime’, 12(2018) *Criminal Law and Philosophy*, p.245.
- <sup>62</sup> IMT Nuremberg, Trial of the Major War Criminals, 14 November 1945 – 1 October 1946 (1947), para. 303.
- <sup>63</sup> For such a call to rely on expert witnesses, albeit with regard to domestic hate speech cases, see Terence Carney, ‘Being (im)polite: A forensic linguistic approach to interpreting a hate speech case’, 45(2014) *Language Politics in Africa*, pp 325-341.
- <sup>64</sup> E.g., Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para.146.
- <sup>65</sup> Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para.147.
- <sup>66</sup> Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para.673.
- <sup>67</sup> UDCC, para.25.
- <sup>68</sup> Confirmation Decision, para.357.
- <sup>69</sup> Kibaki was running for the party mostly supported by Kikuyu.
- <sup>70</sup> Confirmation Decision, para.358.
- <sup>71</sup> Confirmation Decision, para.358.
- <sup>72</sup> Confirmation Decision, para.358.
- <sup>73</sup> Confirmation Decision, para.359. Turbo was known as a Kikuyu town.

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- <sup>74</sup> Pre-Trial Brief, para.68.
- <sup>75</sup> Pre-Trial Brief, para.68.
- <sup>76</sup> Pre-Trial Brief, para. 59. See also UDCC, para.87.
- <sup>77</sup> Ambiguity arose about the translation of the relevant Kalenjin word used by Ruto. See *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Transcript of hearing of 24 February 2014, ICC-01/09-01/11-T-93-Red-ENG.
- <sup>78</sup> Transcript of hearing of 24 February 2014, ICC-01/09-01/11-T-93-Red-ENG, pages 21 and 25. Decision on NCTA, Reasons of Judge Fremr, footnote 208.
- <sup>79</sup> As noted by the Prosecution in the Consolidated Response, a witness heard Sang calling the Kikuyu ‘labotwet’ (i.e. alleged to mean ‘weeds’) and calling for them to be rooted out: ‘Remove that plant. It is not supposed to enter your compound. You are not a man if you let this plant in.’ The Prosecution submits that a reasonable Trial Chamber could conclude that, in the context, this was a veiled call for the expulsion of the Kikuyu from the Rift Valley, which was considered to be the ancestral home of the Kalenjin people. Consolidated Response, para.309.
- <sup>80</sup> Transcript of hearing of 24 February 2014, ICC-01/09-01/11-T-93-Red-ENG, page 20. See also Reasons of Judge Fremr, footnote 208.
- <sup>81</sup> Transcript of hearing of 24 February 2014, ICC-01/09-01/11-T-93-Red-ENG, page 27.
- <sup>82</sup> UDCC, para.22.
- <sup>83</sup> Public redacted version of “Corrigendum of Ruto Defence Request for Judgment of Acquittal”, Case No. ICC-01/09-01/11, 26 October 2015, para.102.
- <sup>84</sup> Consolidated response, para. 359, in which the Prosecution states: ‘Although there is no specific evidence on record that Mr Sang’s statement described above was broadcast using specific codes, the evidence establishes that in general Mr Sang spoke guardedly, using veiled language that would only be understood by ethnic Kalenjin. In any event, even if the use of coded language is not established, ...’ (footnote omitted).
- <sup>85</sup> Decision on NCTA, Reasons of Judge Fremr, para.141.
- <sup>86</sup> Decision on NCTA, Reasons of Judge Fremr, footnote 208. Judge Fremr further noted that ‘the main evidence against Mr Sang in this regard, the prior recorded testimony of Witness 789, is no longer part of the record and the witness has disavowed this entire statement under oath’. Ibid.
- <sup>87</sup> *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para.349.
- <sup>88</sup> Richard Ashby Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (CUP 2017), p.36.
- <sup>89</sup> Decision on NCTA, Reasons of Judge Fremr, para.141.
- <sup>90</sup> Decision on NCTA, Reasons of Judge Fremr, para.141.
- <sup>91</sup> See the messages listed above under “(ii) RECORDINGS / TRANSCRIPTS OF BROADCASTS”. See also the transcript of the testimony of Witness 326 (Transcript of hearing of 11 October 2013, ICC-01/09-01/11-T-47-Red2-ENG) for a discussion of recordings of portions of Sang’s Lene Emet radio show, which contained peace messages and Christmas songs. See further Sang Defence NCTA Motion, para.94.
- <sup>92</sup> Confirmation Decision, para.363.
- <sup>93</sup> Wilson and Gillett.
- <sup>94</sup> See the blog post introducing the guidelines by one of its authors: Richard Ashby Wilson, ‘The Hartford Guidelines on Speech Crimes in International Criminal Law’, EJILTalk!, 31 August 2018.
- <sup>95</sup> ICC Statute, Article 7(2)(h).
- <sup>96</sup> The recommendation is to amend Article 25(3)(e) to read as follows: “Intentionally, directly, and publicly incites others to commit any of the crimes in the Statute, thereby significantly increasing the likelihood of their occurrence. For the purpose of this provision it is not necessary that the incited crime(s) be committed or attempted.” (Wilson and Gillett, para.101).