Annex I

Dissenting Opinion of Judge Herrera Carbuccia

Contents

I. Introduction

1. In my view, the charges against both accused should not be vacated in the present case.[1] It is my opinion that such outcome departs from the legal standard established in Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer Motions') ('Decision No. 5').[2]

2. It is my opinion that the case of the Office of the Prosecutor ('Prosecution') has not 'broken down', and I will address the reasons for which I conclude that there is sufficient evidence upon which, if accepted, a reasonable Trial Chamber could convict the accused. I will, however, not explore all aspects of my disagreement, but only the fundamental ones.

3. Moreover, my analysis is based on the two 'no case to answer' motions filed by the Defence of Mr Ruto ('Ruto Defence') and the Defence of Mr Sang ('Sang Defence'), together the ('Defence'), and the responses from the Prosecution and the Legal Representative for Victims ('LRV'). I do not, at this stage, analyse the totality of the evidence that could be taken into consideration in an eventual decision pursuant to Article 74 of the Rome Statute ('Statute'). Neither do I attempt, at this stage, to come to a determination of the truth nor a decision based on a 'beyond reasonable doubt' standard. In essence, a 'no case to answer' motion should be expeditious and superficial (*prima facie*) in order not to preclude the judges from continuing with the trial (or be disqualified) if the Chamber decides to dismiss the 'no case to answer' motion and carry on with the trial.

[1] I note that the decision of the majority of the Chamber contains insufficient reasoning, since Judge Eboe-Osuji and Judge Fremr have both given separate reasons.
[2] Decision No. 5, 3 June 2014, ICC-01/09-01/11-1334.

II. Procedural History[3]

4. On 23 January 2012, the Pre-Trial Chamber confirmed against Mr Ruto and Mr Sang, the charges of crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town (31 December 2007), Greater Eldoret area (1 to 4 January 2008), Kapsabet town (30 December 2007 to 16 January 2008) and Nandi Hills town (30 December 2007 to 2 January 2008), pursuant to Articles 7(1)(a), (d) and (h) of the Statute. It confirmed Mr Ruto's individual criminal responsibility under Article 25(3)(a) of the Statute, whereas Mr Sang's participation was confirmed pursuant to Article 25(3)(d)(i) of the Statute ('Confirmation of Charges Decision').[4]

5. On 3 June 2014, the Trial Chamber issued the aforementioned Decision No. 5.[5]

6. On 19 August 2015, upon request of the Prosecution, the Chamber, by majority, issued its 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'.[6]

7. On 23 October 2015, at the end of the presentation of evidence by the Prosecution, and pursuant to the Decision No. 5, the Sang Defence filed the 'Sang Defence 'No Case to Answer' Motion' ('Sang Defence Motion').[7]

8. On the same date, the Ruto Defence filed the 'Ruto Defence Request for Judgment of Acquittal' ('Ruto Defence Motion').[8]

[3] Although some of the filings and transcripts referred to in this dissenting opinion are confidential, the references are general enough or relate to publicly available information.
[4] Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, paras 349 and 367.
[5] Decision No. 5, ICC-01/09-01/11-1334.
[6] ICC-01/09-01/11-1938-Corr.
[7] Sang Defence Motion, ICC-01/09-01/11-1991-Conf.

9. On 20 November 2015, the Prosecution filed the 'Prosecution consolidated response to the "Corrigendum of Ruto Defence Request for Judgment of Acquittal" and "Sang Defence 'No Case to Answer' Motion"' ('Prosecution Response').[9]

10. On 27 November 2015, the LRV filed the 'Common Legal Representative for Victims' Joint Reply to the "Ruto Defence Request for Judgment of Acquittal" and to the "Sang Defence 'No Case to Answer' Motion"' ('LRV Response').[10]

11. From 12 to 15 January 2016, a hearing was held in order to hear further oral submissions.[11]

12. On 19 January 2016, the Ruto Defence and the LRV submitted further material referred to during the aforesaid hearing.[12]

13. On 12 February 2016, the Appeals Chamber reversed the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'.[13] Accordingly, none of the prior statements admitted by way of the reversed decision are considered for the purpose of the 'no case to answer' motions at hand.

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[8] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr (a corrigendum was filed on 26 October 2015).
[9] Prosecution Response, ICC-01/09-01/11-2000-Conf.
[10] LRV Response, ICC-01/09-01/11-2005-Conf.
[11] Transcripts of hearings held from 12 to 15 January 2016, ICC-01/09-01/11-T-209-CONF-ENG ET, ICC-01/09-01/11-T-210-CONF-ENG ET, ICC-01/09-01/11-T-211-CONF-ENG ET and ICC-01/09-01/11-T-212-ENG ET.
[12] Submission of material referred to by the Ruto Defence during the Status Conference on 14 January 2016 with Annex A, ICC-01/09-01/11-2017 and ICC-01/09-01/11-2017-AnxA; Further Submission of Material Referred to by the Common Legal Representative for Victims' on 15 January 2016 during the Status Conference on the "Ruto Defence Request for Judgment of Acquittal" and to the "Sang Defence 'No Case to Answer' Motion, ICC-01/09-01/11-2018-Conf.
[13] Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11-2024.

III. Standard of Review

A. Decision No. 5

14. There is no explicit provision in either the Statute or the Rules of Procedure and Evidence ('Rules') specifying the 'no case to answer' procedure. Nonetheless, pursuant to Article 64 of the Statute, and in light of the parties' agreement that such a motion is permitted, the Chamber set out the guiding rules for a 'no case to answer' motion in Decision No. 5.[14]

15. The Chamber established that, while the practice of domestic and other international jurisdictions may provide guidance, any 'utilisation of a 'no case to answer' motion in the present case must be derived from the Court's statutory framework, having regard to the purpose such a motion would be intended to fulfil in the distinctive institutional and legal context of the Court'.[15]

16. In Decision No. 5, the Chamber unanimously determined that a distinction needs to be made between this 'halfway stage' determination and the ultimate verdict on the guilt of the accused at the end of a case.[16] The Chamber concluded that this intermediate decision should entail a quantitative assessment: 'whether the Prosecution has lead [sic] sufficient evidence to necessitate a defence case' (emphasis added).[17] The Chamber further added that this assessment is of a *prima facie* nature, 'in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber could convict the accused' (emphasis added).[18]

[14] Decision No. 5, ICC-01/09-01/11-1334.
[15] Decision No. 5, ICC-01/09-01/11-1334, para. 11.
[16] Decision No. 5, ICC-01/09-01/11-1334, para. 23.
[17] Decision No. 5, ICC-01/09-01/11-1334, para. 23.
[18] Decision No. 5, ICC-01/09-01/11-1334, para. 23.

17. It is important to note that the words 'if accepted' entail also the theoretical nature of this *prima facie* determination, as the Chamber cannot establish at this stage of the proceedings whether it 'could' (with certainty) convict on the basis of the evidence submitted.[19] Moreover, the term 'reasonable Chamber' should be understood as of sound judgment, fair, and not unfounded. Namely whether, based upon objective criteria, a Trial Chamber could draw a sound conclusion and convict the accused. This does not mean that conviction would be the only reasonable conclusion of the Chamber as in essence, it is a theoretical question put at this point in the proceedings. The determination at this stage is based on a *prima facie* analysis, *ergo* superficial and 'on the first appearance' of the evidence submitted in trial up until now, which would have to be proved or disapproved at the end of the case, and on the basis of a decision pursuant to Article 74 of the Statute.

18. Decision No. 5 is clear that the 'no case to answer' motion 'does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability. The Chamber clearly set out that the standard was one of 'existence' rather than 'weight'. Guided by the jurisprudence of the ad-hoc tribunals, the Chamber adopted the standard of taking the Prosecution evidence 'at its highest'.[20] As regards which evidence should be considered for this assessment, the Chamber determined that it would only take into account the evidence submitted and discussed at trial, and admitted by the Chamber.[21] The evidence submitted in trial thus far includes not only testimonies of witnesses, both *viva voce* and via video-link, but also documentary

[19] *See*, International Tribunal for the Former Yugoslavia ('ICTY'), *Prosecutor v*, *Kunarac et al*, Case No. IT-96-23 & 23/1, Trial Chamber II, Decision on Motion for Acquittal, 3 July 2000, para. 7.
[20] Decision No. 5, ICC-01/09-01/11-1334, paras 24 and 31-32.
[21] Decision No. 5, ICC-01/09-01/11-1334, para. 25.

evidence (including reports, photographs and maps) as well as audio-visual material.

19. The Chamber further stated that both the legal and factual components of the alleged crime (each charge separately, but not each individual incident) and the individual criminal responsibility of the accused (for any one mode of liability) must be established.[22] The Chamber finally concluded that it 'will not consider questions of reliability or credibility relating to the evidence [the general rule], save where the evidence in question is incapable of belief by any reasonable Trial Chamber' [the exception].[23]

20. Accordingly, and guided by the jurisprudence of the ad-hoc tribunals,[24] the Chamber determined that it should only exceptionally be obliged to consider matters of credibility and reliability: namely when the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through examination as to the reliability and credibility of witnesses that the Prosecution is left without a case.[25]

21. Accordingly, it is my view that the Defence's submissions requesting the analysis of credibility and reliability of the evidence must be rejected.[26] In

[22] Decision No. 5, ICC-01/09-01/11-1334, paras 26-30.
[23] Decision No. 5, ICC-01/09-01/11-1334, para. 32.
[24] Decision No. 5, ICC-01/09-01/11-1334, paras 24 and 31-32.
[25] ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Trial Chamber, Decision on Motions for Acquittal, 6 April 2000, para. 28.
[26] The Ruto Defence has argued in the context of these 'no case to answer' proceedings that the Prosecution case is 'built almost entirely on hearsay' and has therefore 'completely broken down'. In its view, the Chamber should assess the credibility and reliability of the evidence admitted pursuant to Rule 68 of the Rules, as well as the hearsay evidence of the *viva voce* witnesses in determining whether there is a case to answer. The Sang Defence similarly argues that there is a need for caution and for corroboration when relying on recanted statements or on evidence given by a co-perpetrator. The Sang Defence contends that without such corroboration, no reasonable Chamber can convict Mr Sang. It is to be noted that the Ruto Defence made exactly the same submissions in the context of Decision No. 5, whilst the Sang Defence did not contest at that

fact, albeit having the opportunity to do so, the Defence did not request leave to appeal Decision No. 5 to contest this standard of review. As a result, the Chamber cannot depart from the legal standard established at an earlier stage of the trial, pursuant to the statutory framework, but also in accordance with the consistent jurisprudence of the ad-hoc tribunals.[27] To do otherwise, would be contrary to the principle of legal certainty and overall fairness of proceedings, as it would deliberately contradict the Chamber's own findings on the principles and procedures that regulate such a 'no case to answer' motion. It would also be inconsistent with the expeditious conduct of proceedings to suggest that a Trial Chamber should assess witness credibility and enter a 'beyond reasonable doubt' standard twice in the proceedings, first at the 'no case to answer' stage and then at the end of the trial.[28] Needless to say the implications that such high standard would have on the impartiality of the judges, if and when the no case to answer findings would be reversed in appeal and referred back to the Trial Chamber.

B. Evidentiary Assessment

22. In my view, the evidence submitted in trial must be considered in its entirety, where different testimonies and exhibits, when pieced together with other evidence, provide a basis for a particular charge.[29] At this

time that the standard was that the Prosecution evidence should be taken at its highest. *See*, Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 201-211 and 226; Sang Defence Motion, ICC-01/09-01/11-1991-Conf, paras 23-34; Decision No. 5, ICC-01/09-01/11-1334, para. 21. *See* also, Ruto Defence 'Submissions on the Conduct of the Proceedings', 3 July 2013, ICC-01/09-01/11-795, para. 18 and 'Sang Defence Submissions on the Conduct of the Proceedings', 3 July 2013, ICC-01/09-01/11-796, para. 10.

[27] *See*, Richard May and Marieke Wierda, International Criminal Evidence, Transnational Publishers, 2002, pages 126-130. The authors refer, among others, to the Appeals Chamber's judgment in the ICTY *Jelisic* case, in which it was determined that the 'Trial Chamber had misconstrued the test in Rule 98 *bis* to require that the Prosecution evidence prove guilt beyond reasonable doubt at the end of its case in chief.

[28] *Prosecutor v. Jelisic*, Case No. IT-95-10, Appeals Chamber, Judgment, 5 July 2001, para. 37.

[29] Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 27 February 2015, ICC-01/04-02/12-271-AnxA, para. 31. *See also*, Judgment on the appeal of Mr

midway point of the proceedings, the Chamber must not apply a 'beyond reasonable doubt' standard. Moreover, the analysis of evidence, regardless of the standard, must not be done in relation to every single individual piece of evidence, without considering it as a whole.[30] Although some individual items of evidence may be themselves insufficient to establish guilt (particularly circumstantial[31] and hearsay[32] evidence), I consider that, taking them together, their effect may be telling.[33]

23. Regardless of my view against reconsidering Decision No. 5 to evaluate the credibility and reliability of witnesses at this stage in the proceedings, it is my opinion that credibility assessment is a subjective and discretional exercise, which is left to the common sense and experience of judges. However, this judicial discretion is not unlimited and if abused, could affect the outcome of the trial and the search for the truth.[34]

24. There are many factors to take into account when evaluating the credibility and reliability of witnesses, including their culture and their socio-economic context. The individual circumstances of each witness,

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Thomas Lubanga Dyilo against his conviction ('Lubanga Appeals Judgment'), 1 December 2014, ICC-01/04-01/06-3121-Red, paras 22 and 57; ICTY, *Prosecutor v. Fatmijr Limaj et al*, Appeals Chamber Judgment, Case No. IT-03-66-A, 27 September 2007, para. 153.

[30] *Case of the Prosecutor v Jean-Pierre Bemba Gombo ('Bemba case')*, Judgment pursuant to Article 74 of the Statute ('Bemba Judgment'), 21 March 2016, ICC-01/05-01/08-3343, paras 215, 218, 225 and 227. Trial Chamber III referred to the 'holistic evaluation and weighing of *all the evidence*'.

[31] Nothing in the Statute prevents the Chamber from relying on circumstantial evidence. *See*, Bemba Judgment, ICC-01/05-01/08-3343, para. 239.

[32] A cautious approach must be taken when assessing indirect evidence, taking into account the context and conditions in which such evidence is obtained and with due consideration of the impossibility of questioning the information source in court. However, indirect or hearsay evidence should not be ruled out *ab initio*. *See*, Bemba Judgment, ICC-01/05-01/08-3343, para. 238.

[33] *See*, Richard May and Marieke Wierda, International Criminal Evidence, Transnational Publishers, 2002, pages 111-112. 'It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link of the chain, but that is not so, for then, if any one link broke, the chain would fall, It is more like the case of a rope comprised of several cords. One strand of the cord may be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. Thus it may be circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or a mere suspicion, but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of'.

[34] Vladimir Tochislovsky, Jurisprudence of the International Criminal Courts and the European Court of Human Rights, Procedure and Evidence, Martinus Nijhoff, 2008, pages 585-586.

including their relationship with the accused, age, vulnerability, involvement in the events, and their risk of self-incrimination, must be taken into consideration when assessing credibility.[35] As regards reliability, the Chamber may consider, *inter alia*, the capacity and quality of the witness's recollection, including, consistency and precision, plausibility of the information provided, conflict with prior statements, and the witness's conduct during testimony.[36] The Chamber may also take into account whether the witness suffered trauma and therefore had difficulty providing a coherent, complete and logical account.[37] Evidence does not arise and cannot be analysed in a vacuum. The Chamber must assess evidence in the context of the entire trial proceedings and the circumstances of each individual testimony. Moreover, the Trial Chamber could accept parts of a witness' testimony while rejecting others.[38] In doing so, judges acknowledge that it is possible for a witness to be accurate on some issues and less accurate on others.[39]

25. As regards the Defence's submissions that some evidence requires corroboration, it is important to note that Rule 63(4) of the Rules explicitly prohibits the Chamber to 'impose a legal requirement that corroboration is required'. Accordingly, a single piece of evidence may be sufficient, on its own, to prove a fact, depending on the issue in question and the strength of the evidence. The Chamber's finding in this regard will depend on the circumstances of the facts to be proven and the entirety of the evidence

[35] Bemba Judgment, ICC-01/05-01/08-3343, para. 229.
[36] Bemba Judgment, ICC-01/05-01/08-3343, para. 230.
[37] Bemba Judgment, ICC-01/05-01/08-3343, para. 230.
[38] *See*, Richard May and Marieke Wierda, International Criminal Evidence, Transnational Publishers, 2002, page 167.
[39] Bemba Judgment, ICC-01/05-01/08-3343, para. 231.

presented, and thus, needs to be analysed on a case-by-case basis at the end of the case.[40]

26. Moreover, in evaluating the evidence, the 'Trial Chamber has the main responsibility to resolve any inconsistencies that may arise within and/or among witnesses' testimonies'.[41] Additionally, if some discrete areas of the charges require more evidence, the Chamber has the power and duty to call evidence in order to establish the truth pursuant to Articles 69 (3) and 64(6)(d) of the Statute.

27. I believe that the duty of the Chamber is to ensure a fair and expeditious trial and that the conduct of the proceedings is within the discretion of the Trial Chamber. However, the right to a fair trial[42] must be interpreted in a flexible and comprehensive manner, as fairness pertains to all parties: on the one hand the accused, and on the other, the Prosecutor, who acts on behalf of the international community, including the victims.

28. The principle of expeditiousness and the right of the accused to be tried without undue delay requires a balance between the rights of the accused and the need to ascertain the truth about serious crimes within the jurisdiction of the Court.[43] Judges should not only seek to find what the parties assert. They also need to determine the truth, and in their task '[i]nterpretation may then not only be about finding what the parties

[40] Bemba Judgment, ICC-01/05-01/08-3343, paras 245 and 246.
[41] Lubanga Appeals Judgment, ICC-01/04-01/06-3121-Red, para. 23.
[42] Article 64 (2) of the Rome Statute; International Covenant on Civil and Political Rights (article 14(1)), European Convention on Human Rights (article 6(1)), American Convention on Human Rights (article 8)).
[43] International Criminal Tribunal for Rwanda ('ICTR'), *Case of Bizimungo et al*, ICTR-99-50-T, 3 November 2004, para.30.

wanted, but also what interests the community, what is required by human rights, or what is morally the best answer'.[44]

29. Finally, the power of the Chamber to call evidence in order to search the truth must not be ignored. Although the Chamber cannot compel the accused to call evidence, it has the power and the obligation, pursuant to Articles 64(6)(d) and 69(3) of the Statute, to request the submission of evidence it considers necessary for the determination of the truth.

30. In the case at hand, and in light of the Appeal's Chamber's judgment disallowing the admission of prior recorded statements pursuant to Rule 68 of the Rules, the Chamber could have requested the submission of evidence, including *inter alia*, these prior recorded statements, by way of Article 69(3) of the Statute.[45] This is particularly significant, since the findings of the Chamber as regards the interference of witnesses in this case remain unscathed despite the Appeals Chamber's judgment.

IV. Analysis of the 'No Case to Answer' Motion

31. In light of the above, I have analysed the evidence submitted in the trial, although, as already noted, primarily based on the particular issues raised by the parties in their different submissions related to the 'no case to answer' motions filed by the Defence. Evidently, a decision pursuant to Article 74 of the Statute would require a more in-depth analysis of the evidence and a higher evidentiary threshold.

[44] Ingo Venzke, The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 34:99, page. 114. The author refers here to: Ronald Dworkin, *Law as Interpretation*, 60 CRITICAL INQUIRY 179–200 (1982).
[45] ICC-01/09-01/11-2024, para. 87.

32. I have thus analysed the contextual elements, the underlying acts and the link with the accused (including a preliminary conclusion on possible modes of liability) within the limited framework of the 'no case to answer' motions.

C. Contextual Elements of Crimes against Humanity

i. Submissions

33. The Ruto Defence states that the contextual elements have not been proven, namely: (a) the existence of a Network, which is pivotal to the Prosecution case;[46] (b) the 'organisational policy';[47] (c) the alleged 'preparatory meetings' to establish the existence of an organisation;[48] the 'policy' element, since the post-election violence ('PEV') was a 'spontaneous, nationwide reaction to 'rigged' elections'.[49] The Ruto Defence challenges the in-court testimony of witnesses P-0536, P-0423, P-0800, P-0613, P-0356 and P-0658 (and the Rule 68 Statements of P-0397, P-0604, P-0495 and P-0516).[50] In its view, the totality of evidence provided by all the aforementioned witnesses is unable to prove the existence of a highly organised group, with an established structure and the means to necessary means to commit the crimes charged.[51]

34. The Sang Defence argues that the Prosecution has failed to prove the contextual elements, namely: the existence of either (i) an organisation (the Network) or its (ii) policy to commit an attack against a civilian population, within the terms of Article 7(2)(a) of the Statute.[52] It argues

[46] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 7-9.
[47] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 13-14.
[48] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 17-22.
[49] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 39-48.
[50] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 21-36.
[51] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 37 and 38.
[52] Sang Defence Motion, ICC-01/09-01/11-1991-Conf , para. 61-118.

that, irrespective of the definition of 'organisation' adopted, the evidence is insufficient to establish this contextual element.[53] Finally, the Sang Defence argues that, even if the existence and policy of the Network could be proven, there is not sufficient evidence as to Mr Sang's knowledge of the attack.[54] The Sang Defence challenges the evidence of the following witnesses: P-0743,[55] P-0326,[56] P-0658,[57] P-0536,[58] P-0604,[59] P-0356,[60] and P-0495.[61]

35. The Prosecution submits that the Chamber should dismiss the Defence arguments on a narrow definition of 'organisational policy'.[62] It contends that although some factual allegations contained in the Confirmation of Charges Decision[63] may no longer be supported by the evidence, their absence is not fatal, as elements for the existence of an organisation were sufficiently proved.[64] The Prosecution submits that both of the accused's knowledge of the attack can be inferred from the evidence on their participation within the Network, particularly in preparatory meetings.[65] The Prosecution relies, *inter alia*, on the evidence produced by the following witness to prove the existence of both the organisation and the policy elements: P-0516, P-0613, P-0789, P-0495, P-0356, P-0536, P-0800, P-

[53] Sang Defence Motion, ICC-01/09-01/11-1991-Conf , paras 72-118.
[54] Sang Defence Motion, ICC-01/09-01/11-1991-Conf , paras 119-122.
[55] Sang Defence Motion, ICC-01/09-01/11-1991-Conf , para. 74.
[56] Sang Defence Motion, ICC-01/09-01/11-1991-Conf , paras 91-93.
[57] Sang Defence Motion, ICC-01/09-01/11-1991-Conf , para. 95.
[58] Sang Defence Motion, ICC-01/09-01/11-1991-Conf , para. 98.
[59] Sang Defence Motion, ICC-01/09-01/11-1991-Conf , para. 102.
[60] Sang Defence Motion, ICC-01/09-01/11-1991-Conf , para. 103
[61] Sang Defence Motion, ICC-01/09-01/11-1991-Conf , para. 121.
[62] Prosecution Response, ICC-01/09-01/11-2000-Conf, para. 398.
[63] Confirmation of Charges Decision, ICC-01/09-01/11-373.
[64] Prosecution Response, ICC-01/09-01/11-2000-Conf, para. 402-428.
[65] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 429-435.

0423, P-0658, P-0189, P-0508, P-0487, P-0464, P-0128, P-0409, P-0397, P-0604, P-0326, P-0442, P-0268, P-0409, and P-0469.[66]

36. The LRV first submits that, given the disjunctive nature of the contextual element 'widespread or systematic' attack against a civilian population, proof of the existence of an organisation (the Network) and of its plan or policy to commit crimes is not a *sine qua non* requirement for establishing the commission of acts listed in Article 7 of the Statute.[67] The LRV further argues that, nonetheless, in his view, the existence of the Network and its policy to commit crimes was established.[68] Finally, as to the knowledge of the attack, the LRV submits that is not a matter to be determined at the present stage.[69]

ii. Applicable Law

37. Pursuant to Article 7 of the Statute, crimes against humanity have two main contextual elements. First, the conduct must be committed as part of a widespread or systematic attack against any civilian population. Article 7(2)(a) of the Statute further describes that the aforesaid 'attack' means a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack. Second, the crimes against humanity require a mental element, namely that the perpetrator 'knew that the conduct was part of or intended the conduct to be part of the' aforesaid attack, in addition to the general *mens rea* in Article 30 of the Statute.

[66] LRV Response, ICC-01/09-01/11-2005-Conf, paras 150, 154, 156, 176, 213-215, 227, 229, 232, 315, 403-428.
[67] LRV Response, ICC-01/09-01/11-2005-Conf, paras 78-82.
[68] LRV Response, ICC-01/09-01/11-2005-Conf, para. 118.
[69] LRV Response, ICC-01/09-01/11-2005-Conf, para. 83.

38. The Elements of Crimes give further guidance as to the application and interpretation of Article 7 of the Statute, which 'must be strictly construed'. However, pursuant to Articles 9 and 21 of the Statute, the Elements of Crimes shall be applied and interpreted in a manner that is consistent with the Statute and internationally recognised human rights. Thus, interpretation of the contextual elements of crimes against humanity shall be strictly construed, but not to the point that it would be contrary to the object and purpose of the Statute or contrary to internationally recognised human rights.[70] Thus, the Elements of Crimes should not be read as creating additional requirements (or adding two legal elements of crimes), but solely as relevant and useful factors that may be considered when trying to prove the contextual elements.[71]

39. In relation to the **attack**, which may be widespread or systematic, the term 'widespread' should be understood as requiring a minimum scale of crimes, while the term 'systematic' refers to the methods and policy of the crimes.[72] Thus, 'systematic attacks' require a clearer or more complex plan or policy than 'widespread attacks'. However, this same logic should be used to interpret that the general requirement of 'policy' applicable to both widespread and systematic attacks should not be of such a high threshold or degree that would obviate the need to distinguish between these two types of attacks.[73] In essence, regardless of whether the attack is widespread or systematic, single isolated acts or a mere aggregate of

[70] Kai Ambos, Treatise on International Criminal Law, Vol. II: The Crimes and Sentencing (2014), page 47.
[71] ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber, Appeals Judgment, 12 June 2002 ("*Kunarac* Appeals Judgment"), para. 98. For contrary reasoning: *See* William A. Schabas, "State Policy as an Element of International Crimes", 98 Journal of Criminal Law and Criminology (2008).
[72] Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), pages 234-235.
[73] Leila N. Sadat, "Crimes Against Humanity in the Modern Age", 108 American Journal of International Law (2013), page 42.

random acts should be excluded, as a minimum quantitative and qualitative threshold is required.[74]

40. The **widespread** component refers to the scope of the attack, on the basis of the number of targeted civilians or the geographical area.[75] However, the 'widespread' nature of the attack can also be the result of a series of inhuman acts with cumulative effect or a singular effect of an inhumane act of extraordinary magnitude.[76]

41. The **systematic** requisite, on the other hand, refers to the organised nature of the attack, for example, its patterns, and its non-accidental and non-isolated nature.[77] What makes an attack systematic will depend on the specificities of each case, namely whether there was some kind of preconceived guidance to the direct perpetrators to carry out the attack against the civilian population.[78]

42. In relation to the term 'civilian population', it should be understood as referring to a number of persons, but not necessarily encompassing the

[74] Bemba Judgment, ICC-01/05-01/08-3343, paras 149 and 150.
[75] ICTY, *Prosecutor v. Tadić,* Case No. IT-94-1-T, Trial Chamber, Trial Judgment, 7 May 1997 ("*Tadić* Trial Judgment"), para. 648; ICTR, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber II, Trial Judgment, 21 May 1999, para. 123. *See* also, Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), page 235.
[76] *Tadić* Trial Judgment, para. 648; ICTY, *Prosecutor v. Blaškić,* Case No. IT-95-14, Trial Chamber, Trial Judgment, 3 March 2000 ("*Blaškić* Trial Judgment"), para. 206. *See* also, Gerhard Werle and Florian Jessberger, Principles of International Criminal Law (2014), page 338 and 339; Christopher Hall *et al*., Article 7, Crimes against humanity, In: Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article, Third Edition (2016), page 169; Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), page 235; *Situation in the Republic of Kenya*, 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, 31 March 2010, ICC-01/09-19, para. 95.
[77] Some examples of factors that may be considered to evaluate whether this contextual element is met, are: (a) the existence of a political objective, an ideology or policy against a community; (b) the preparation and organisation of criminal acts, to be committed on a large scale or repeated and linked to one another; (c) a pattern or methodical plan; (d) the preparation and use of significant public or private resources; (e) the implication of high-level political or military authorities in the plan; (f) the consequences of the attack upon the targeted population. *See*, *Blaškić* Trial Judgment, para. 203; ICTR, *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, Trial Judgment, 2 September 1998, para. 580. *Kunarac* Appeals Judgment, para. 95; *Tadić* Trial Judgment, para. 648. *See* also, Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), page 235.
[78] Kai Ambos, Treatise on International Criminal Law, Vol. II: The Crimes and Sentencing (2014), page 61.

entire civilian population of a given location, or an identifiable group of people (for example, based on racial, religious or other characteristics).[79] It must thus be understood as an adjective to the collective and plural nature of the attack.[80]

43. An '**organisation'** for the purpose of Article 7 of the Statute must be understood as a group of persons or an organised body of people with a particular purpose, and enough resources, means and capacity to bring about the commission of the crimes.[81] However, this does not mean that each individual's exact level or command within the structure should be known. Organisations can be fluid and adaptable to the common plan or policy to commit the attack.[82] Hence, the structure does not necessarily need to be strictly defined or formalised.[83] Accordingly, the concept should be based 'on whether a group has the capability to perform acts which

[79] Kai Ambos, Treatise on International Criminal Law, Vol. II: The Crimes and Sentencing (2014), pages 63-64; Gerhard Werle and Florian Jessberger, Principles of International Criminal Law (2014), pages 334-335. *See* also, *Tadić* Trial Judgment, para. 644; Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), pages 240-241.
[80] Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), page 241.
[81] Bemba Judgment, ICC-01/05-01/08-3343, para. 158; *Prosecutor v. Germain Katanga*, Jugement rendu en application de l'article 74 du Statut ('Katanga Judgment'), 7 March 2014, ICC-01/04-01/07-3436, para. 1119.
[82] *See* Leila N. Sadat, "Crimes Against Humanity in the Modern Age", 108 American Journal of international Law (2013), page 44.
[83] *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, ICC-02/11-01/656-Red ("Gbagbo Confirmation of Charges Decision"), para. 215. *See* also, Tilman Rodenhäuser, "Beyond State Crimes: Non-State Entities and Crimes against Humanity", 27 Leiden Journal of International Law (2014), pages 916-918.

infringe on basic human values',[84] and not on its form or level of organisation.[85]

44. Furthermore, the definition of crimes against humanity has to be understood in the context of each particular case, bearing in mind that the classical relationship between a state and its citizens may not be so clear-cut or where non-state actors play a significant role.[86] Thus, the concept of crimes against humanity should focus on the impact the attack had on the affected civilian population's fundamental rights, namely whether the civilian population was targeted (contrary to focusing on the state or organisation behind these crimes).[87] This concept stresses the distinctive perversion of politics underlying crimes against humanity, criminalising violations of the most fundamental human rights, regardless of whether there is a precise governmental or organisation behind them.[88] Likewise,

[84] *Situation in the Republic of Kenya*, 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, 31 March 2010, ICC-01/09-19, paras 90-93. *See* also, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ("*Katanga and Ngudjolo* case"), Pre-Trial Chamber I, Decision on the confirmation of charges ("Katanga and Ngudjolo Confirmation of Charges Decision"), 30 September 2008, ICC-01/04-01/07-717, para. 396; *Bemba* case, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo ('Bemba Confirmation of Charges Decision'), 15 June 2009, ICC-01/05-01/08-424, para. 81; Katanga Judgment, ICC-01/04-01/07-3436, paras 1119-1122.
See also, Gerhard Werle and Florian Jessberger, Principles of International Criminal Law (2014), page 343.
[85] *See* Tilman Rodenhäuser, "Beyond State Crimes: Non-State Entities and Crimes against Humanity", 27 Leiden Journal of International Law (2014), pages 921-923.
[86] Some underlying acts of crimes against humanity (*i.e.* apartheid) may require a narrower interpretation of the 'organisation', most likely a State or State-like structure, while other underlying acts may accept a broader interpretation (*i.e.* murder).
[87] *See* Tilman Rodenhäuser, "Beyond State Crimes: Non-State Entities and Crimes against Humanity", 27 Leiden Journal of International Law (2014), page 916.
[88] Kai Ambos, Treatise on International Criminal Law, Vol. II: The Crimes and Sentencing (2014), pages 47-49. Other authors that have taken this broader approach include: Gerhard Werle and Florian Jessberger, Principles of International Criminal Law (2014), pages 344-345; Leila N. Sadat, "Crimes Against Humanity in the Modern Age", 108 American Journal of international Law (2013), page 44; Tilman Rodenhäuser, "Beyond State Crimes: Non-State Entities and Crimes against Humanity", 27 Leiden Journal of International Law (2014), page 916. The contrary doctrine, which adopts an approach that is stricter, as it requires that the organisation 'partakes characteristics of a State', is best illustrated in the late Judge Hans-Peter Kaul's dissenting opinion in the aforesaid Kenya Situation Decision, but also in the doctrine of the following authors: Claus Kress, "On the Outer Limits of Crimes against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision", 23 Leiden Journal of International Law, 2010, pages 857-861, William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute (2010), page

one single act could constitute crimes against humanity if other elements of these crimes are present.[89]

45. As regards the **plan or policy**, there has been historical contention, both in the case law and the doctrine, as to whether it is an element of crimes against humanity and, if so, its relation with the disjunctive elements of 'widespread or systematic', the plan or policy of non-State actors as well as the degree of definition, formality and structure required for such a plan or policy.[90] However, there has been overall agreement that crimes against humanity are not isolated events that randomly occur (not spontaneous), but are the result from a deliberate attempt to target a civilian population, either by taking actions against civilians or deliberately abstaining to take action against such an attack.[91]

46. The Statute, contrary to its predecessors of the ad-hoc tribunals, crystallised in Article 7(2)(a) of the Statute the need for a 'policy' in the commission of crimes against humanity.[92] However, the policy does not need to be defined or formalised,[93] and its existence can be determined by

152 and M. Cherif Bassiouni, Crimes against humanity: historical evolution and contemporary application (2011), pages 24-28. *See* also, Katanga Judgment, ICC-01/04-01/07-3436, paras 1104-1105.

[89] *See*, Katanga Judgment, ICC-01/04-01/07-3436, para. 1101.

[90] *See*, Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), pages 236-238.

[91] Elements of Crimes, Crimes against Humanity, footnote 6. *See* also, Bemba Judgment, ICC-01/05-01/08-3343, para. 159; Katanga Judgment, ICC-01/04-01/07-3436, paras 1108-1110; *See also*, ICTY, *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-R61, Trial Chamber, Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, para. 26; *Tadić* Trial Judgment, para. 653. *See also*, Tilman Rodenhäuser, "Beyond State Crimes: Non-State Entities and Crimes against Humanity", 27 Leiden Journal of International Law (2014), page 918; Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), page 236.

[92] Christopher Hall *et al*., Article 7, Crimes against humanity, In: Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article, Third Edition (2016), page 245. *See also*, Tilman Rodenhäuser, "Beyond State Crimes: Non-State Entities and Crimes against Humanity", 27 Leiden Journal of International Law (2014), page 924.

[93] Katanga and Ngudjolo Confirmation of Charges Decision, ICC-01/04-01/07-717, para. 396; Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424, para. 81. *See also*, *Blaškić* Trial Judgment, para. 204; Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), page 239; Tilman Rodenhäuser, "Beyond State Crimes: Non-State Entities and Crimes against Humanity", 27 Leiden Journal of International Law (2014), page 925.

analysing the circumstances in which the crimes were committed, for example by the identification of patterns, trends or similarities that could only derive from coordination among previously agreed platforms or structures.[94]

iii. Analysis of the Evidence

47. The main allegation of the Prosecution throughout this trial has been the existence of a 'Network', which allegedly Mr Ruto headed and Mr Sang formed part of (particularly in its 'Media component'), along with other members, who were labelled by the Prosecution as 'key members', 'commanders', 'elders' and subordinates. It is alleged that this Network had meetings/rallies in preparation for the PEV, during the PEV and after the PEV. In the submission of the Prosecution, this Network was able to carry out a widespread and systematic attack against the civilian population, pursuant to an organisational policy. As noted above, the main contention of the Defence is that the Prosecution has not provided sufficient evidence to prove the existence of the Network (and thus an organisational policy) to carry out a systematic attack. In the Defence's view, the PEV was spontaneous.

[94] For those jurisdictions that apply a policy element, the element must be interpreted, in accordance with previous jurisprudence, as a modest threshold that excludes random action. First, as noted in the jurisprudence, a 'policy' need not be formally adopted or expressly declared, or even stated clearly and precisely. Thus, it must be given an ordinary meaning such as 'a course of action adopted as advantageous or expedient', rather than any connotation of a formal and official strategy. Second, the element may be satisfied by inference from the manner in which acts occurs; it is sufficient to show the improbability of random occurrence. Third, it is not required to show action by a State or organisation; case law indicates that the requirement is satisfied by 'explicit or implicit approval or endorsement' or that the conduct is 'clearly encouraged' or 'clearly fits within' a general policy. Thus, inaction designed to encourage crimes would also suffice. *See*, Robert Cryer et al, An Introduction to International Criminal Law and Procedure (2014), page 239. *See also*, Bemba Judgment, ICC-01/05-01/08-3343, para. 160. Trial Chamber III identified as factors the following: (i) attack was planned, directed or organised; (ii) recurrent pattern of violence; (iii) use of public or private resources to further the policy; (iv) involvement of the State or organisation forces in the commission of crimes; (v) statements, instructions or documentation attributable to the State or the organisation condoning or encouraging commission of crimes; and/or (vi) underlying motivation.

48. Although the Network has been the centre of the Prosecution's litigation theory, the Chamber is not bound by it. The Chamber's findings should be limited to the facts and circumstances described in the charges but certainly the Chamber's findings should not be limited by a 'case theory' or concepts used by the Prosecution in the litigation of the case. Moreover, in cases of mass crimes like this one, it may be impossible to produce evidence concerning exact identities of direct perpetrators, victims, precise dates or even specific locations.[95]

49. Pursuant to Article 7(2)(a) of the Statute, the Chamber must analyse whether enough evidence exists upon which a reasonable Chamber could conclude that there was some degree of organisational policy to commit the attack. It is thus necessary to determine whether there is evidence to sustain that a group of persons had some degree of coordination, planning and structure. Evidence as regards a formal hierarchy or a common plan for the purpose of Article 7(2)(a) of the Statute is not necessary (although it may be necessary for the purpose of some modes of liability).

50. Accordingly, and pursuant to Article 7(2)(a) of the Statute, it is my view that a reasonable Chamber could conclude that a systematic and/or widespread attack against the civilian population occurred pursuant to an organisational policy based on the following:

    a. There was a group of persons based on existing tribal roles and structures of Kalenjin society in which elders played a key role. The elders would administer oaths to youth who later participated in

[95] Bemba Judgment, ICC-01/05-01/08-3343, paras 43 and 88.

the attack. After the PEV, the elders led a 'cleansing ceremony' for youth who had participated in the PEV.[96]

b. Mr Ruto was at the top of the group, as he had been appointed the leader, king and spokesperson of the Kalenjin community. In general, what Mr Ruto said was respected by the Kalenjin community.[97]

c. Below Mr Ruto, the group was comprised of several prominent Kalenjin individuals, including Joshua Sang, Solomon Tirop, Jackson Kibor, Isaac Maiyo, Fred Kapondi, Christopher Kisorio, Farouk Kibet, Lucas Sang, Samuel Ruto and Mark Too, among others.[98]

d. This group of persons intended to expel Kikuyus and other PNU supporters from the Rift Valley by whatever means necessary.[99]

e. Mr Ruto and Mr Sang, and other group members organised political rallies and meetings where they encouraged the attendees to attack PNU supporters by using inflammatory speech against Kikuyus.[100]

f. Mr Ruto and Mr Sang and other group members also participated in planning and financing the PEV attacks or otherwise participated in preparatory meetings, trainings and events before and during the attacks.[101]

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[96] **P-0658**, T-163; **P-0536**, T-34 and T-39; **P-0800**, T-156; **P-0613**, T-118 and T-119 ; **P-0789**, T-178 ; **P-0487**, T-54, T-56 ; **P-0268**, T-62**, P-0356**, T-76, T-77, T-78, T-79.

[97] **P-0356**, T-77; **P-0409**, T-91; **P-0658**, T-166; **P-0800**, T-155; **P-0326**, T-44; (EVD-T-OTP-000066/ KEN-OTP-0045-0021); **P-0658**, T-168; **P-0326**, T-44; **P-0405**, T-121; (EVD-T-OTP-00065/ KEN-OTP-0045-0020).

[98] **P-0613**, T-118 and T-119; **P-0469**, T-107; **P-0536**, T-34 ; **P-0326**, T-44, T-45**; P-0423**, T-67, T-68; **P-0376**, T-51 ; **P-0487**, T-54; **P-0268**, T-61, T-62 ; **P-0356**, T-75, T-76, T-77 ; **P-0128**, T-83 ; **P-0516**, T-142, T-144, **P-0658**, T-163.

[99] **P-0464**, T-89, EVD-T-OTP-00044/ KEN-OTP-0093-1308; **P-0326**, T-43 and T-44; **P-0658**, T-163; **P-0268**, T-60; **P-0469**, T-106; **P-0658**, T-164; **P-0487**, T-56; **P-0464**, T-89; **P-0356**, T-77; **P-0423**, T-67.

[100] **P-0658**, T-162 and T-163; **P-0409,** T-91 and T-92; **P-0128**, T-83; **P-0268**, T-61; **P-0487**, T-53 and T-55.

[101] **P-0536**, T-34 and T-39; **P-0800**, T-155; **P-0658**, T-163 and T-164 ; **P-0423**, T-67; **P-0376**, T-51; **P-0487**, T-54, T-56; **P-0268**, T-61, T-62, T-64, T-65; **P-0356**, T- 75, T-76, T-77, T-78, T-80 ; **P-0128**, T-83, T-85; **P-**

g. Mr Sang, through KASS FM, facilitated and promoted the perpetration of the crimes charged.[102]

51. All of the above elements must be analysed within the context of the Rift Valley, particularly that it is a rural area. It is also important to analyse this evidence taking into consideration the ethnic divide of politics, which had already resulted in previous episodes of electoral violence in the province, as well as the historical context provided by the 2005 referendum.[103]

52. Turning to the nature of the attack, and particularly whether it was widespread or systematic, it is an agreed fact and there is ample evidence that there was an attack against the civilian population during the PEV. Hence, the widespread nature of the attack pursuant to Article 7(2) of the Statute is unquestionable.

53. As rightly noted by the Prosecution, the parties have agreed to certain facts, including that there was an attack against the civilian population, in which civilians were killed in Turbo and Nandi Hills, and houses and other properties were burned or destroyed in the following locations: Turbo, Kimumu, Langas, Yamumbi, Huruma, Kiambaa, Kapsabet, and Nandi Hills during the PEV.[104] Moreover, the Report of the Commission of Inquiry Into Post-Election Violence (CIPEV) also refers to the nature and the extent of the PEV, locations where the violence allegedly took place and injuries suffered by civilians, displacement of people as a result of the

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0613, T-118, T-119, T-120; **P-0637**, T-146, T-147, T-150; **P-0743**, T-180, T-181, T-189; **P-0326**, T-43, T-44, T-45; **P-0442**, T-98, T-99.

[102] **P-0658**, T-163 and T-164; **P-0268**, T-62, **P-0442**, T-100; **P-0800**, T-161; **P-0356**, T-77 and T-78; **P-0326**, T-44, **P-0604**, T-137; **P-0789**, T-175, T-176, T-177, T-179.

[103] **P-0268**, T-60, T-63; **P-0487**, T-53; **P-0535**, T-70, T-71; **P-0442**, T-98; **P-0613**, T-118, T-119, T-120 ; KEN-OTP-0001-0364.

[104] First Joint Submission by the Prosecution and the Defence as to Agreed Facts and Certain Materials contained in the Prosecution's List of Evidence, 3 September 2012, ICC-01/09-01/11-451-AnxA.

PEV, deaths and their causes during the PEV, properties destroyed during the PEV, as well as the tribes most affected by the PEV.[105]

54. In addition to the evidence discussed above in support of an organisational policy within the meaning of Article 7(2)(a) of the Statute, the Prosecution has provided evidence in support of its allegation that the attack was systematic, and thus not spontaneous.

55. There is evidence upon which a reasonable Chamber could conclude that the attacks in the locations included in the charges followed a similar pattern that excludes the possibility of them being spontaneous and isolated acts of violence.

56. These patterns included, *inter alia*: (a) the direct perpetrators were, in general, Kalenjin youth who were trained and mobilised from other regions prior to the PEV and often were dressed in similar manner; (b) the weapons used were namely bows, arrows and stones; (c) traditional Kalenjin war cries were used; (d) properties belonging to Kikuyus were targeted; (v) the attacks were led by individuals who were familiar with the geographical areas and who would identify properties that belonged to PNU supporters to destroy and loot; and (vi) roadblocks were erected and manned by Kalenjin youths.[106]

57. There is also evidence that Mr Ruto and others organised and financed the procurement of weapons, including firearms, before and during the

[105] KEN-OTP-0001-0364.
[106] **P-0658**, T-163, T-164, T-165 and T-166; **P-0189**, T-48 and T-49. *See also*, EVD-T-OTP-00013/ KEN-OTP-0076-0532) ; **P-0405**, T-121; **P-0508**, T-104; **P-0487**, T-54 and T-55; **P-0800**, T-155; **P-0423**, T-67, T-68; **P-0442**, T-99; **P-0535**, T-70 and T-71; **P-0536**, T-29, T-34 and T-39; **P-0673**, T-113; (EVD-T-OTP-00060/ KEN-OTP-0011-0640); (EVD-T-OTP-00328/ KEN-OTP-0001-0364); (EVD-T-OTP-00332/ KEN-D10-0001-0250);**P-0268**, T-61; **P-0356**, T-76; **P-0469**, T-107; **P-0376,** T-5. *See also*, Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, para. 162.

attacks,[107] as well as transport, food and other provisions for the direct perpetrators.[108] Likewise, there is evidence to support the allegation that Mr Ruto and other rich Kalenjin gave financial support to the PEV, including the contribution of Kalenjin families upon demand of village elders.[109]

58. Accordingly, there is evidence upon which a reasonable Chamber could determine that the PEV, which mainly targeted Kikuyu civilians and properties, and other perceived PNU supporters in (at least) Greater Eldoret area, but also in Turbo town, Kapsabet town and Nandi Hills town, from 30 December 2007 until 16 January 2008, was systematic and hence not a random or spontaneous attack.

D. Individual Criminal Responsibility of Mr Ruto and Mr Sang

i. Submissions

59. The Ruto Defence submits that the Prosecution 'has failed to prove the existence of a causal nexus between Mr Ruto's alleged personal acts and conduct and the crimes'.[110] It states that the Prosecution has failed to adduce sufficient evidence to support its allegations that Mr Ruto: (a) is liable for the crimes charged by virtue of his authority;[111] (b) incited the commission of crimes;[112] and (c) contributed to the Network, including by financial means.[113]

[107] **P-0658**, T-164; **P-0423**, T-67; **P-0356**, T-75; **P-0508**, T-105; **P-0800**, T-155, T-160.
[108] **P-0658,** T-164; **P-0189**, T-48; **P-0423**, T-68; **P-0405**, T-121; **P-0487**, T-54; **P-0508**, T-105; **P-0800**, T-155; **P-0356,** T-76.
[109] **P-0356**, T-76; **P-0800**, T-155; **P-0658**, T-164; **P-0536**, T-34 and T-39.
[110] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 49-58.
[111] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 59-72.
[112] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 73-118.
[113] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 119-136.

60. The Sang Defence alleges that the Prosecution has failed to show that there was any Network and/or that Mr Sang was affiliated with any of the alleged Network members or participated in the Network meetings. It also submits that the Prosecution has failed to adduce any evidence of criminal utterances by Mr Sang, including of those that led to the commission of the crimes. Alternatively, the Sang Defence requests that, should their motion be rejected, Mr Sang be put on notice as to which mode(s) of liability he is being charged under and on what counts.[114] As regards Article 25(3)(d) of the Statute, the Sang Defence submits that the Prosecution has failed to show criminal conduct, any knowledge by Mr Sang of the attack, any significant or substantial contribution by Mr Sang to the commission of the crimes, and any intention to make such a contribution.[115] The Sang Defence considers that there must be a direct nexus between Mr Sang's broadcasts and the crimes which occurred. It further argues that Mr Sang's statements fall within the protected freedom of speech and were not meant to incite listeners to commit violence.[116]

61. As to the criminal liability of Mr Ruto, the Prosecution submits that he could be held responsible for the crimes in question under any of the modes of liability provided for in Article 25(3) of the Statute.[117] Regarding the responsibility of Mr Ruto under Article 25(3)(a) of the Statute, the Prosecution submits that there is ample evidence as to elements of this mode of liability.[118] According to the Prosecution, these elements are established by evidence of, *inter alia*: (i) Mr Ruto's recognised leadership

[114] Sang Defence Motion, ICC-01/09-01/11-1991-Conf, paras 2-7.
[115] Sang Defence Motion, ICC-01/09-01/11-1991-Conf, paras 56-58; 61-208.
[116] Sang Defence Motion, ICC-01/09-01/11-1991-Conf, paras 45-55.
[117] Prosecution Response, ICC-01/09-01/11-2000-Conf, para. 143.
[118] Prosecution Response, ICC-01/09-01/11-2000-Conf, para. 144.

within the Kalenjin community;[119] (ii) Mr Ruto's use of his authority to hold preparatory meetings;[120] (iii) one preparatory meeting held just one day before the election results were announced;[121] (iv) organisation of preparatory meetings by Network members immediately after the presidential election results were announced;[122] (v) the similar pattern of the attacks;[123] and (vi) the distribution of money by Mr Ruto to those involved in the post-election violence.[124] As to Mr Ruto's responsibility under Article 25(3)(b), (c) and (d) of the Statute, the Prosecution refers to the evidence that, through inciting speeches in preparatory meetings, rallies and other events, he induced the Kalenjin youth to commit the offences charged.[125]

62. In relation to Mr Sang's individual criminal responsibility, the Prosecution submits that there is sufficient evidence to establish his liability for the charged crimes under Article 25(3)(b), (c) or (d)(i) of the Statute.[126] As to Mr Sang's liability under Article 25(3)(d)(i), the Prosecution argues that the evidence sufficiently demonstrates that: (i) Article 7 crimes were committed by a group of persons acting with a common plan or purpose established by Mr Ruto and other members of the Network;[127] (ii) Mr Sang contributed to the crimes charged mainly by (a) broadcasting propaganda against PNU supporters, (b) advertising the Network's preparatory meetings and event locations, (c) using hate speech, (d) calling to violence

[119] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 253-255.
[120] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 153-159.
[121] Prosecution Response, ICC-01/09-01/11-2000-Conf, para. 167.
[122] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 168-172, 199-201.
[123] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 164-216.
[124] Prosecution Response, ICC-01/09-01/11-2000-Conf, para. 169-172 and 239.
[125] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 279-292.
[126] Prosecution Response, ICC-01/09-01/11-2000-Conf, para. 294.
[127] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 301-303.

and (e) transmitting coded instructions to direct perpetrators;[128] and (iii) Mr Sang's contribution was intentional and made with the aim of furthering the criminal activity of the Network.[129] The Prosecution further submits that the same evidence is also sufficient to establish Mr Sang's liability under Article 25(3)(b) and (c) of the Statute, as his conduct was intentional,[130] included both positive acts and incitement statements which prompted the direct perpetrators to commit crimes,[131] had a direct impact on the commission of the crimes,[132] and was made with purpose of facilitating the commission of such crimes.[133]

63. In relation to the relevant modes of liability of both accused, the LRV first submits that, for the purpose of Article 25(3)(c) of the Statute, membership of a group is not required and knowledge of one's contribution or facilitation to the commission of crimes is sufficient.[134] The LRV further argues that, for the purpose of Article 25(3)(d) of the Statute, there is no requirement of causal nexus between incitement, as the individual's contribution to the relevant crime, and the commission of such crime.[135] Finally, the LRV submits that it would be misleading to state that, in the context of the present case, the broadcasted speeches, referring to individuals as enemies, do not necessarily indicate an intention to incite violence against such individuals.[136]

[128] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 304-359.
[129] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 360-382.
[130] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 388 and 393.
[131] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 383-386.
[132] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 392 and 387.
[133] Prosecution Response, ICC-01/09-01/11-2000-Conf, para. 393.
[134] LRV Response, ICC-01/09-01/11-2005-Conf, para. 100.
[135] LRV Response, ICC-01/09-01/11-2005-Conf, para. 101 and 102.
[136] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 103 and 104.

ii. Applicable Law

64. As with all other crimes within the Court's jurisdiction, there must be a **nexus** between the acts of the accused and the attack. However, this does not mean that the criminal conduct needs to be committed in the midst of the attack (*i.e.* the PEV), but could be committed before or after the attack or even geographically far away from the attack, as long as it has a connection to it, explicitly or which can be inferred as forming part of the attack.[137] In this regard, the victim does not necessarily need to be part of a discriminated group and the direct perpetrators could be in fact of the same group or even part of the civilian population targeted by the attack. Thus, an adequate test may be to 'analyse whether the act would have been *less dangerous* for the civilian victim if the attack and the underlying policy had not existed'.[138] The nexus or relationship between the conduct and the attack will ultimately be dependent on the facts of the case,[139] for example, whether there are similarities/connection between the acts of the accused and the attack; the events and circumstances surrounding the accused's acts; the proximity of the accused with the attacks (not only temporal and geographical, but also ideological), among others. The position of the accused in the society, and thus their ability to have an impact on the attack against the civilian population, including the ability to deter or stop it, should also be taken into consideration.

65. Lastly, as regards the **mental element** of crimes against humanity, Article 7 of the Statute and the Elements of the Crimes require that the accused: (a) knows of the existence of the attack; and (b) knows that his individual

[137] ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, Appeals Chamber, Appeals Judgment, paras 41. *See also*, Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), pages 242-243.
[138] Kai Ambos, Treatise on International Criminal Law, Vol. II: The Crimes and Sentencing (2014), page 76.
[139] Christopher Hall *et al*., Article 7, Crimes against humanity, In: Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article, Third Edition (2016), page 167.

act forms part of the attack. It is to be noted that this mental element is different from the general *mens rea* required pursuant to Article 30 of the Statute. However, this knowledge of the attack may be general, that is, without possessing detailed information of its specific characteristics and circumstances.[140] This is particularly relevant for cases such as the present one, in which it is alleged that the accused's acts were in preparation for a forthcoming attack. Likewise, it may suffice to prove that the accused knew that he was in a position to stop the attack, but deliberately and knowingly decided not to stop it, thus furthering the attack.[141]

66. The perpetrator must have knowledge that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. However, the Elements of the Crimes explain that this mental element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation. Also, in the case of an emerging widespread or systematic attack against a civilian population, the intent clause indicates that the mental element is satisfied if the perpetrator intended to further such an attack. *Contrario sensu*, the mental element would be absent if the perpetrator thought that his/her conduct was random or isolated. In addition, although the element of discrimination is not required for all crimes against humanity, it is required for the act of persecution, which is an underlying act included in the charges against the accused.[142] Likewise, knowledge may also be extended, depending on the circumstances and

[140] Kai Ambos, Treatise on International Criminal Law, Vol. II: The Crimes and Sentencing (2014), page 78. *See also*, Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), page 243-244.
[141] Bemba Judgment, ICC-01/05-01/08-3343, paras 161, 167 and 168.
[142] Robert Cryer *et al*, An Introduction to International Criminal Law and Procedure (2014), page 234.

facts of a case, to the concept of 'constructive knowledge', which exists when the perpetrator is aware of the risk that his conduct can be objectively construed as part of the broader attack.[143]

67. When analysing the above factors it must be borne in mind the particular circumstances and facts of this case.[144] It should be a general evaluation that focuses on the preparation, the incidents (their patterns and repetition), the affected civilian population, the nature of the attack and the perpetrators, all of which when examined together allow the Chamber to determine whether the attack was widespread or systematic and whether the acts of the accused had a nexus with that attack and were carried out with knowledge of the attack. Hence, the analysis of the contextual elements cannot be isolated from the underlying acts. Some underlying acts will have a direct impact on how the contextual elements need to be interpreted, namely with a stricter or broader approach, and even whether the systematic/widespread elements are to be interpreted as disjunctive or cumulative.[145] Moreover, the subjective or mental element must be analysed taking into consideration that this is a halfway decision, and not a decision pursuant to Article 74 of the Statute, which would require a higher evidentiary standard vis-à-vis the mental element.

[143] Christopher Hall *et al*., Article 7, Crimes against humanity, In: Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article, Third Edition (2016), page 176.
[144] Christopher Hall *et al*., Article 7, Crimes against humanity, In: Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article, Third Edition (2016), page 172.
[145] For example, one could rarely imagine an underlying act of apartheid that would not meet both the State or state-like policy and a systematic and widespread attack. Another clear example is the underlying act of extermination, which would naturally require a widespread attack, as it is namely the underlying act of murder, with the added element of 'mass killing'.

iii. Analysis of the Evidence

68. As noted in paragraphs 50 to 57 above, there is evidence to support the allegations that: (a) Mr Ruto was at the top of the organisation (the group or 'Network') and that he was the leader of the Kalenjin community and was followed as such; (b) Mr Ruto and Mr Sang organised political rallies and meetings in which the PEV, particularly the targeting of PNU supporters and Kikuyus, was encouraged; (c) Mr Ruto and Mr Sang deliberately exacerbated the ethnic divide between Kalenjin and other ethnic groups, namely the Kikuyus, with speeches;[146] and (d) Mr Ruto and Mr Sang, among others, participated in the planning of the PEV through their respective roles (namely political and financial for Mr Ruto and as a journalist via KASS FM for Mr Sang).

69. In my view, a reasonable Chamber could convict the two accused for their participation in an organisational policy, for the purposes of Article 7 of the Statute: a policy intended to displace PNU supporters, namely the Kikuyus, out of the Rift Valley.

70. Concerning the mode of liability charged against the accused and the application of Regulation 55(2) of the Regulations of the Court ('Regulations'), it is necessary to take into account that the same evidence may be used to establish all these modes of responsibility.

71. As regards Article 25(3)(a) of the Statute, particularly the responsibility of Mr Ruto under the mode of liability of indirect co-perpetration, it appears, *prima facie*, that the Prosecution has not provided enough evidence to

[146] The Chamber could consider, for example, whether Mr Ruto and Mr Sang had moral authority over the direct perpetrators of the crimes. *See*, ICTY, *Prosecutor v Vojislav Šešelj*, Case No. IT-03-67-T, Trial Chamber III, Judgment, 31 March 2016, footnote 94 (with reasons of dissenting opinion of Judge Lattanzi).

support this mode of liability.[147] The Prosecution submits that Mr Ruto had control over the Network and its supporters and his orders were carried out by 'almost automatic compliance'. The Prosecution alleges that the automatic compliance with orders was established by way of a two-fold strategy: a) a payment mechanism; and, b) a punishment mechanism. The Prosecution relied mainly on the evidence of witnesses P-658; P-743; P-800; and P-536 for its allegation in this regard.

72. In my view, although there is evidence as to Mr Ruto's leadership among the Kalenjin population, the Prosecution has not submitted evidence of a Network in a sense of a strict hierarchical organisation controlled by Mr Ruto. The theory of control over the crime cannot be considered in abstract or according to a theoretical analysis. It is necessary to apply it to the specific evidence presented by the Prosecution, which in this case appears insufficient to demonstrate that Mr Ruto, together with other high-hierarchy members of the Network, exercised complete authority over the conduct of individuals at the lower levels of the hierarchy. In fact, the evidence seems to show that other alleged members of the group, including the elders, but also some direct perpetrators, enjoyed considerable discretion in the exercise of their functions within the group. Accordingly, there appears to be insufficient evidence upon which a reasonable Chamber could establish Mr Ruto's effective contribution to the joint control over the direct perpetrators and their almost automatic compliance, as purported by the Prosecutor.

73. The evidence produced in relation to Mr Ruto's involvement, including that he provided financial assistance to youth after the PEV, does not

[147] Lubanga Appeals Judgment, ICC-01/04-01/06-3121-Red, para. 473.

appear to prove either his effective control over the youth's actions, and much less their almost automatic compliance. Likewise, although the Prosecution submitted evidence on the training of Kalenjin youths, there is no evidence that the training was of intensity, strictness or violence that would result in automatic compliance of the direct perpetrators, namely the youth.[148]

74. However, the absence of a Network with strict hierarchical organisation or an automatic compliance by subordinates is independent of the findings that the Chamber could make in relation to the contextual elements of crimes against humanity, particularly the organisational policy. Moreover, the evidence produced at trial and adduced by the Prosecution, namely as summarised in paragraphs 50 to 57 above, reveal that a reasonable Chamber could convict Mr Ruto for other forms of participation pursuant to Article 25 of the Statute.[149]

75. In my view, there is evidence upon which a reasonable Chamber could convict Mr Ruto under Article 25(3)(b) of the Statute – ordering, soliciting or inducing–, or under Article 25(3)(c) – aiding, abetting or otherwise assisting –, or under Article 25(3)(d) – in any other way contributing to the commission of the crime. However, a final determination on the precise mode of liability can only be made upon an evaluation of the totality of the evidence submitted in trial pursuant to Article 74 of the Statute.

[148] Héctor Olásolo, Tratado de Autoría y Participación en Derecho Penal Internacional, Tirant lo blanch, 2013, page 213. The author states: 'The application of indirect co-perpetration through the control over the crime theory requires a superior-subordinate relationship in which the superior has a sufficient degree of control over the organisation that affirms the direct perpetrators automatic compliance with his orders […] consequently, any activity that does not initiate or urge the organisation towards the commission of the objective elements of the crime, due to lack of control over the crime, can only give rise to accessory liability'[translation from Spanish].
[149] ICTY, *Prosecutor v Vojislav Šešelj*, Case No. IT-03-67-T, Trial Chamber III, Judgment, 31 March 2016, footnote 414. In this footnote, Judge Lattanzi explains her reasons for dissenting with the majority of the Trial Chamber, in its analysis of the mode of liability. In her view, the legality of the assistance is not pertinent from the point of view of the analysis criteria of whether someone assisted or induces, particularly whether that activity substantially contributed to the commission of the crimes.

76. With regard to the responsibility of Mr Sang and according to Decision No.5, it is my view that the Prosecution has presented enough evidence upon which a reasonable Chamber could conclude that Mr Sang, via KASS FM and his programme *Lene Emet*, contributed to the commission of the crimes charged.[150] In my view, the objective element that the contribution should be related to a 'group of persons acting with a common purpose' does not require that such a group is formally organised or structured. Article 25(3)(d) of the Statute is a residual mode of liability, and as such, should not interpreted in a sense where it would require proving stricter elements as other modes of liability. Notwithstanding previous jurisprudence of the Court,[151] it is my view that the elements under Article 25(3)(d) of the Statute are not analogous to the elements under Article 25(3)(a) of the Statute.

77. A certain level or threshold of contribution is necessary,[152] in light of the residual nature of this mode of liability, the level of contribution required for this provision must be lower than the ones contemplated in all other modes of liability under Article 25 of the Statute.[153] The assessment of which contribution amounts to the required level is to be made on a case-by-case basis.[154] In my opinion, the Prosecution has produced evidence upon which a reasonable Chamber could conclude that Mr Sang is criminally liable for the PEV. There is evidence that Mr Sang had a political and ethnical relationship with Mr Ruto and other members of the Kalenjin community. There is evidence that through KASS FM, Mr Sang

[150] Mbarushimana Confirmation of Charges Decision, ICC-01/04-01/10-465-Red, para. 270-287.
[151] Mbarushimana Confirmation of Charges Decision, ICC-01/04-01/10-465-Red, para. 271; Katanga Judgment, ICC-01/04-01/07-3436, para. 1624-1625.
[152] Mbarushimana Confirmation of Charges Decision, ICC-01/04-01/10-465-Red, paras 276-277.
[153] Confirmation of Charges Decision, ICC-01/09-01/11-373, para. 354; Mbarushimana Confirmation of Charges Decision, ICC-01/04-01/10-465-Red, paras 278 and 279.
[154] Mbarushimana Confirmation of Charges Decision, ICC-01/04-01/10-465-Red, para. 284.

was able to mobilise direct perpetrators to commit the crimes in question. There is also evidence that through his interventions on the radio, and given his programme's popularity in the Kalenjin community, Mr Sang at least tacitly could have given indications prior to and during the PEV which contributed to the commission of the crimes charged.[155]

78. Moreover, considering that his participation could also have elements of other modes of liability, I would also give notice to Mr Sang pursuant to Regulation 55(2) of the Regulations, that the legal characterisation of the facts in the Confirmation of the Charges Decision may be subject to change to include his liability under Article 25 (3)(b) and (c) of the Statute.

E. The Underlying Acts

i. Submissions

79. The Sang Defence considers that most of the evidence presented by the Prosecution relates to events that occurred outside the scope of the charges. The Sang Defence states that Regulation 55 of the Regulations does not allow the Chamber to alter factual allegations and that the Chamber cannot rely on evidence touching upon events outside the temporal and geographical scope of the charges although such evidence can be relevant for other purposes. The Sang Defence concludes that, as the factual allegations made by the Prosecution are not supported by sufficient evidence so as to warrant a defence case, Mr Sang should be acquitted.[156]

[155] **P-0326**, T-44; **P-0268**, T-61, T-62, T-65; **P-0800**, T-155, T-156, T-161; **P-0789**, T-175, T-176, T-177, T-178, T-179; **P-356**, T-77, T-78, T-79; **P-0442**, T-98, T-99, T-100, T-102, T-103; **P-0604**, T-137, **P-0658**, T-162, T-163, T-164, T-165, T-166, T-167, T-168, T-169.
[156] Sang Defence Motion, ICC-01/09-01/11-1991-Conf, paras 35-43.

80. The Ruto Defence submits that the Prosecution has 'failed to prove the essential ingredients of the crimes charged in relation to the locations specified in the charges' and that 'no evidence has been led that links Mr Ruto with any of the crimes alleged in the locations charged'.[157] The Ruto Defence recalls that any evidence adduced during trial that falls outside the 'express temporal and geographical framework of the charges' must be disregarded.[158] The Ruto Defence submits that the Chamber has the opportunity to consider individual incidents included within a count and that in its determination, the Chamber 'should be permitted to enter partial acquittals, including in respect of locations'. It therefore challenges that there is no evidence linking Mr Ruto and the charges of murder in Turbo, Huruma, Kimumu, Langas, Yamumbi, Kiambaa and Kapsabet; the charges of deportation or forcible transfer in Turbo, Huruma, Kimumu, Langas and Yamumbi, Kiambaa, Kapsabet, Nandi Hills; and the charges of persecution in Turbo, Kimumu, Langas, Yamumbi, Kapsabet and Nandi Hills town.[159]

81. The Prosecution submits that there is sufficient evidence with which a reasonable court might determine the presence of all the requisite elements of the crimes of murder, deportation or forcible transfer and persecution as crimes against humanity.[160] The Prosecution highlights the existent evidence for the charge of murder in: (a) Kiambaa Church, on 1 January 2008, for which the Prosecution relies, *inter alia*, on the evidence of P-0536 and P-0673;[161] and (b) Huruma, on or after 1 January 2008, for which the

[157] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, para. 137.
[158] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, para. 138.
[159] Ruto Defence Motion, ICC-01/09-01/11-1990-Conf-Corr, paras 139-199.
[160] Prosecution Response, ICC-01/09-01/11-2000-Conf, para. 64.
[161] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 69-73.

Prosecution relies, *inter alia*, on the evidence of P-0487, P-0508 and P-0604.[162]

82. As regards forcible transfer, the Prosecution refers to: (a) Kiambaa, between 1 and 4 January 2008, and rejects the need to establish that perceived PNU supporters were transferred *outside the Rift Valley*. The Prosecution relies on the evidence of attacks with stones, bows and arrows, arson and forcible transfer to 'another location', such as IDP camps, as testified by P-0673 and P-0536,[163] (b) Kapsabet town, Nandi District, from 30 December 2007 to 16 January 2008, for which the Prosecution relies on the evidence of the torching of Kikuyu houses and of displacement to Kapsabet, Eldoret police stations and Eldoret showgrounds, as testified by, *inter alia*, P-0442,[164] (c) and also other areas, including Yamumbi, Huruma and Turbo, for which the Prosecution relies, *inter alia*, on the evidence of attackers burning and looting houses and businesses.[165]

83. In relation to the charge of persecution, the Prosecution refers to Kiambaa, from 1 January 2008, for which it relies on the evidence of murder and forcible displacement of PNU supporters by reason of their political affiliation, as testified by P-0536,[166] and Huruma, from 1 January 2008, for which it relies on the evidence of burned houses and other types of attacks to PNU supporters by reason of their political affiliation, as testified by P-0487 and P-0508.[167]

[162] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 74-78.
[163] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 81-84.
[164] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 85-89.
[165] Prosecution Response, ICC-01/09-01/11-2000-Conf, para. 90.
[166] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 93-94.
[167] Prosecution Response, ICC-01/09-01/11-2000-Conf, paras 95-98.

84. The LRV submits that, for the purpose of a 'no case to answer' decision, each count must be considered separately and should be uphold if at least one incident is supported by the evidence.[168] The LRV further argues that the totality of the evidence available, taken at its best, points towards the commission of Article 7 crimes against perceived PNU supporters by means of inflicting fear, killing, looting, burning or otherwise destroying the property of such population.[169] In particular, the LRV highlights the evidence related to: (a) the attacks in Turbo town, as testified by P-0613;[170] (b) the links between these attacks and the accused, established, *inter alia*, by the evidence provided by P-0397, P-0743, P-0495;[171] and (c) the attacks in other areas within the Rift Valley.[172]

ii. Applicable Law

85. Pursuant to Article 7 (1)(a) of the Statute and the Elements of Crimes murder encompasses the killing or one or more persons.

86. In accordance with Article 7(1)(d) of the Statute and the Elements of Crimes, deportation or forcible transfer must be understood as not requiring physical force, but including threat of force or coercion, such as fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of the environment. Moreover, the conduct must be impermissible under international law and the victims must be lawfully present in the area from which they were deported or transferred. For the conduct of forcible transfer, it is not required to cross international borders.

[168] LRV Response, ICC-01/09-01/11-2005-Conf, para. 121.
[169] LRV Response, ICC-01/09-01/11-2005-Conf, para. 105, 106 and 117
[170] LRV Response, ICC-01/09-01/11-2005-Conf, para. 109.
[171] LRV Response, ICC-01/09-01/11-2005-Conf, paras 110-116.
[172] LRV Response, ICC-01/09-01/11-2005-Conf, paras 105 and 117.

87. Article 7(1)(h) of the Statute and the Elements of Crimes define persecution as severely depriving, contrary to international law, one or more persons of fundamental rights by targeting a person(s), group or collectivity by reason of the identity of a group or collectivity, based on political, racial, ethnic, national, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law. The conduct must be committed in connection with any other crime within the jurisdiction of the Court (in this case, murder and/or forcible transfer or deportation).

iii. Analysis of the Evidence

88. As noted above, the counts against the accused, namely the crimes of murder, deportation or forcible transfer and persecution, are temporally and geographically limited. Within these limits, evidence has been presented upon which a reasonable Chamber could convict the accused for all three counts, albeit not in respect of all geographical locations or within the totality of the time limit provided for in the charges.

89. In this regard, there is evidence for at least the following underlying acts committed within the relevant time limit of the charges:

    a. Murder in Greater Eldoret area (Kiambaa and Huruma area) between 1 and 4 January 2008;[173]

    b. Forcible transfer, in Kapsabet, Greater Eldoret area (Kiambaa, Yamumbi and Huruma), and Turbo;[174]

[173] **P-0536**, T-29 and T-33; **P-0673**, T-113; **P-0405**, T-121 and T-122; **P-0189**, T-49, (EVD-T-OTP-00328/ KEN-OTP-0001-0364); **P-0487**, T-55 and T-56; **P-0508**, T-104; **P-0535**, T-70 and T-71.

[174] For Kiambaa, *see* evidence above on murder. *See also*, **P-0488**, T-109; **P-0442**, T-98, T-99 and T-100; **P-0423**, T-68; (EVD-T-OTP-00004/ KEN-OTP-0080-0731); (EVD-T-OTP-00005/ KEN-OTP-0026-4599); P-**0268**, T-61 and T-62; (EVD-T-OTP-00078/ KEN-OTP-0012-0478); **P-0508**, T-104 and -105; **P-0405**, T-121 and T-122; (EVD-T-OTP-00116/ KEN-OTP-0080-1227); (EVD-T-OTP-00117/ KEN-OTP-0080-1228); (EVD-T-OTP-00118/ KEN-OTP-0080-1229); (EVD-T-OTP-00119/ KEN-OTP-0080-1230); (EVD-T-OTP-00120/ KEN-OTP-0080-1231); **P-0189**, T-49; (EVD-T-OTP-00060/ KEN-OTP-0011-0640); (EVD-T-OTP-00029/

c. Persecution in the areas described above (namely Turbo town on 31 December 2007, Greater Eldoret area, between 1 and 4 January 2008, Kapsabet town, between 30 December 2007 and 16 January 2008), in light of the above evidence, coupled with the evidence on the organisational policy targeting Kikuyu or other perceived PNU supporters.

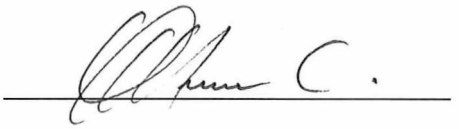
90. As regards other evidence submitted that may go beyond the scope of the charges, it is my view that the Chamber could still take it into consideration to determine the existence of the contextual elements of the crimes against humanity, particularly the requirement of the organisational policy pursuant to Article 7(2)(a) of the Statute. Likewise, some of the incidents challenged by the Defence which may not be directly linked to Mr Ruto and Mr Sang could nevertheless be relevant to determine the context in which the alleged crimes were committed. Other incidents may be relevant to prove the accused persons' position within the Network and their contribution to the organisational policy.

KEN-OTP-0080-0155); **P-0487**, T-54 and T-55; **P-0613**, T-119; (EVD-T-OTP-00107/ KEN-OTP-0033-0009); **P-0469**, T-106 and T-107.

V. Conclusion

91. Accordingly, in my view the Ruto Defence Motion and the Sang Defence Motion should be rejected.

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



Judge Olga Herrera Carbuccia

Dated 5 April 2016

At The Hague, The Netherlands