

Mistakes, Misgivings, Mistrial?
The Early Termination of
Proceedings in the Case Against
William Ruto and Joshua Sang



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Edited by Penelope Van Tuyl



WSDHANDACENTER
FOR HUMAN RIGHTS & INTERNATIONAL JUSTICE
Stanford University

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THE EARLY TERMINATION OF PROCEEDINGS IN THE CASE AGAINST
WILLIAM RUTO AND JOSHUA SANG

By Laura Marschner

Report for the WSD HANDA Center for
Human Rights and International Justice, Stanford University
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List of Acronyms and Abbreviations

AC	Appeals Chamber
<i>ad hoc</i> Tribunals	The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda
Art.	Article(s)
CUP	Cambridge University Press
edn.	Edition
ed(s).	Editor(s)
e.g.	Exempli Gratia
<i>et seq.</i>	Et sequens/sequentes
ibid.	Ibidem
ICC	International Criminal Court
Rome Statute (or ‘the Statute’)	Statute of the International Criminal Court
ICC Regulations (or ‘the Regulations’)	Regulations of the International Criminal Court
ICC Rules (or ‘the Rules’)	Rules of Procedure and Evidence of the International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTR Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
LRV	Common Legal Representative for Victims
n.	Note
NCTA	No case to answer
OTP	Office of the Prosecutor of the ICC
OUP	Oxford University Press
p.	Page
para(s).	Paragraph(s)
pp.	Pages
TC	Trial Chamber
UDCC	Updated Document Containing the Charges

I. Introduction

On 5 April 2016, the majority of Judges in Trial Chamber (V)(a) at the International Criminal Court (hereinafter “ICC” or “Court”) decided to vacate the charges against William Samoei Ruto and Joshua Arap Sang at the halfway stage of the trial, after the Prosecution had presented its case in full.¹ Defense teams argued that the two accused had “no case to answer” (hereinafter “NCTA”), and that both should be acquitted due to the weakness of the Prosecution evidence.² Two of the three-judge panel agreed that Prosecution evidence was insufficient to continue the trial, but instead of acquitting the accused, the majority chose to vacate the charges “without prejudice” to the possibility of the Prosecution later re-charging the accused with the same offenses and beginning trial anew.³ Each of the three Judges presiding over the case wrote separate opinions, and it is clear from a close reading of the two majority opinions that both Judges were concerned with allegations of widespread witness interference having led to witnesses’ non-cooperation and withdrawal of evidence. Judge Eboe-Osuji, one of the majority Judges, was of the opinion that witness interference so gravely undermined Prosecution efforts that the case merited a declaration of “mistrial,” although no direct link was ever actually established in Court between the accused and known instances of witness interference.⁴ Had the majority responded to the NCTA motions with the more traditional remedy of acquittal, then the principle of *ne bis in idem* (or “double jeopardy”) would have protected the defendants from subsequent renewal of charges for the crimes alleged in this case, either before the ICC or a national criminal court.⁵ However, because of the unusual final disposition of the Trial Chamber on these mid-trial motions, the accused do not enjoy that level of finality, and re-prosecution remains an open possibility.

Before this decision, the case against Ruto and Sang was the only remaining ongoing case before the International Criminal Court addressing the post-election violence in Kenya from 2007-2008, and many victims set their hope on the Court.⁶ The trial was also noteworthy in that it was one of the very few recent criminal prosecutions of a sitting Head of State or active member of a government for violations of international law (Ruto has been Deputy President of the Republic of Kenya since 2013). The investigations and the trial gave rise to intense political controversy, in which the legitimacy of the proceedings, and even of the ICC as an institution, was questioned.⁷

¹ TC V(a), decision of 5 April 2016, ICC-01/09-01/11-2027-Red-Corr.

² Ruto Defense, request of 26 October 2015, ICC-01/09-01/11-1990-Corr-Red ; Sang Defense, motion of 6 November 2015, ICC-01/09-01/11-1991-Red.

³ TC V(a), decision of 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, p. 1.

⁴ TC V(a), decision of 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, opinion of Judge Fremr, para. 148.

⁵ See Art. 20 of the Rome Statute.

⁶ For an overview, see <https://www.icc-cpi.int/kenya>.

⁷ See, e.g., <http://allafrica.com/stories/201604110962.html>, <https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court>, http://www.the-star.co.ke/news/2016/04/12/african-states-to-persist-with-push-for-exodus-from-the-icc_c1330054, http://www.the-star.co.ke/news/2016/04/09/in-seeking-justice-kenyans-have-crippled-the-icc_c1328287, <http://www.ft.com/cms/s/0/1a33f4a2-fff7-11e5-ac98-3c15a1aa2e62.html#axzz4JTabBShl>.

Against this backdrop, the decision of 5 April 2016 raised a number of complex and controversial legal questions about when and on which grounds a trial chamber may decide to stop an ongoing criminal trial at the ICC, and what sort of consequences the chosen remedy has for the accused. This report assesses the quality of reasoning for the decision to terminate the case, in light of the Trial Chamber's unanimous unwillingness to acquit the accused, despite what the majority found to be inadequate proof of guilt from the prosecution evidence. It focuses on whether there existed a legal basis for terminating the case by vacating the charges and granting the possibility for the Prosecution to re-prosecute the accused. As will be detailed in the analysis below, the majority's classification of the evidence as weak and insufficient to justify continuing the trial seems reasonable insofar as this conclusion was based on a systematic and cogent analysis of the evidence. Nevertheless, several aspects of the decision raise concerns, in particular the lack of a clear legal basis for not entering a judgment of acquittal. Far from a mere legal technicality, the Chamber's majority decision to dispose of the charges in this particular way will have ongoing implications for victims, for the accused, and potentially for the future prosecution of witness interference.

Given the serious concerns about witness interference that, although not proven to be linked to the two accused, certainly redounded to their benefit, the alternative concept of mistrial that one Judge relied upon to dismiss the charges seems appealing on first glance. However, it bears noting that this remedy had never been applied in an international criminal tribunal previously, nor is the concept explicitly included in the ICC's legal framework. Moreover, the parties were never given any opportunity to make submissions about the possibility of a mistrial, so there is cause for concern that one of the Judges would summarily grant this unusual final disposition in lieu of the more traditional and straightforward judgment of acquittal in response to an NCTA motion.

Section II of this report gives a brief procedural overview of the case, along with background about the legal foundation for NCTA decisions at the ICC. This was the first time that this particular type of mid-trial termination motion has been considered by the ICC. By hearing an NCTA motion in the Kenya case, a common law trial practice was adopted similar to what we have seen at the *ad hoc* Tribunals, so the rulings of the Chamber on matters such as the applicable standard of review might potentially have an impact on future trial procedure at the Court in general. Section III of this report summarizes the submissions of the parties, while Section IV critically analyzes the Trial Chamber's decision, considering each of the separate findings and opinions of the three Judges of the Trial Chamber.

The report draws on an analysis of the publicly available written and oral submissions in the NCTA proceedings, the decision of 5 April 2016, as well as pertinent jurisprudence and literature to contextualize the Chamber's findings.⁸ The aim of this report is to provide an overview and legal analysis of the decision's less-than-straightforward reasoning. It focuses on the quality of the legal reasoning in the decision of 5 April 2016, without venturing too deep into the broader political context around the case. Since the WSD Handa Center did not conduct trial monitoring throughout the entirety of the trial

⁸ The report mainly addresses developments and materials issued through May 2016.

proceedings and has no access to confidential material, the report also cannot provide any definitive explanation for the factual deficiencies of the evidence that led the Trial Chamber majority to dismiss the case.

II. Procedural Background

Before discussing the details of the 5 April 2016 decision that ended the case against Ruto and Sang, it is helpful to lay a foundation for the trial by providing a brief procedural summary, along with background about the legal foundation for NCTA decisions at the ICC. As mentioned before, this was the first time that this particular type of mid-trial termination motion was considered by the ICC, so it is instructive to consider analysis of the legal foundation and standard of review for NCTA established in prior jurisprudence from Trial Chamber V(a), earlier in the *Ruto and Sang* case.

1. History of the Case Against Ruto and Sang⁹

On 31 March 2010, the majority of Pre-Trial Chamber II authorized the Prosecution to open an investigation into alleged crimes against humanity committed during the post-election violence in Kenya in 2007-2008.¹⁰ On 8 March 2011, Pre-Trial Chamber II, by majority, had summoned William Samoei Ruto, Joshua Arap Sang, and Henry Kiprono Kosgey to appear before the Court. It held that there were “reasonable grounds to believe” that they had committed the crimes against humanity of murder, forcible transfer of population and persecution.¹¹ The

Prosecution’s Theory of the Case

(<https://www.icc-cpi.int/kenya/rutosang/Documents/RutoSangEng.pdf>)

The Prosecution alleged that the post-election violence in Kenya, from 30 December 2007 until 16 January 2008, was a planned and organized attack carried out by groups of Kalenjin ethnicity, which supported the “Orange Democratic Movement” (ODM) party against civilians, namely against perceived PNU supporters from the Kikuyu, Kamba and Kisii communities. The locations of this attack included Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills town.

According to the OTP, a Network of perpetrators was created, which planned to punish “Party of National Unity” (PNU) supporters in the event the 2007 elections were rigged. This plan allegedly extended to expelling PNU supporters from the Rift Valley and ultimately, to create a uniform ODM voting block. The Prosecution described the Network as a hierarchical organization under responsible command, which had the means (e.g. the weapons, manpower and capital) to carry out a widespread and systematic attack against the civilian population (i.e. crimes against humanity, Art. 7 of the Rome Statute).

Ruto was said to have created the Network and to have been at the top. He allegedly provided essential contributions to the implementation of a common plan to evict PNU supporters, including *inter alia* being responsible for the overall implementation of the plan in the Rift Valley, giving instructions to direct perpetrators, being involved in the logistics (e.g. in the purchase of weapons) and financing of the Network, and establishing reward and punishment mechanisms for direct perpetrators. According to the OTP, Sang also was a member of the Network and used his influence as a Kass FM radio broadcaster to contribute to the common plan. He allegedly fueled violence through hate speech, broadcast false news to inflame the anti-PNU atmosphere, advertised the Network’s meetings, and generally placed his radio show Lene Emet at its disposal.

⁹ For a detailed overview, see also TC V(a), decision of 5 April 2016, Annex A – Procedural History, ICC-01/09-01/11-2027-AnxA; all case material can be found on the ICC’s website at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/Pages/icc01090111.aspx.

¹⁰ PTC II (ICC), decision of 31 March 2010, ICC-01/09-19-Corr. The time span covered by the PTC’s decision to authorize investigations ranges from 1 June 2005, when the Rome Statute entered into force for Kenya, and 26 November 2009, when the Prosecutor filed his request.

¹¹ PTC II (ICC), decision of 8 March 2011, ICC-01/09-01/11-1.

suspects voluntarily appeared at the initial appearance hearing on 7 April 2011.¹² Just prior to this, on 31 March 2011, the Government of the Republic of Kenya had filed an application to challenge the admissibility of the case pursuant to Art. 19 of the Rome Statute, which was rejected by Pre-Trial Chamber II.¹³ This decision was confirmed by the Appeals Chamber on 30 August 2011.¹⁴ The confirmation of charges hearing took place before Pre-Trial Chamber II from 1 to 8 September 2011.¹⁵ On 23 January 2012, Pre-Trial Chamber II, by majority, confirmed the charges against Ruto and Sang.¹⁶

Charges against Ruto and Sang, as confirmed by Pre-Trial Chamber II		
	William Samoei Ruto	Joshua Arap Sang
Crimes against humanity charged	Murder; Art. 7(1)(a) Rome Statute	
	Deportation/forcible transfer, Art. 7(1)(d) Rome Statute	
	Persecution, Art. 7(1)(h) Rome Statute	
Modes of liability charged	Art. 25(3)(a) Rome Statute: ¹⁷ “Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible”	Art. 25(3)(d) Rome Statute: ¹⁸ “In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.”

¹² See Art. 60 Rome Statute as well as Rule 121 ICC Rules; PTC II (ICC), decision of 23 January 2012, ICC-01/09-01/11-373, para. 4.

¹³ PTC II (ICC), decision of 30 May 2011, ICC-01/09-01/11-101.

¹⁴ AC (ICC), judgment of 30 August 2011, ICC-01/09-01/11-307.

¹⁵ PTC II (ICC), decision of 23 January 2012, ICC-01/09-01/11-373, para. 18.

¹⁶ PTC II (ICC), decision of 23 January 2012, ICC-01/09-01/11-373.

¹⁷ On the notice of the possibility of the legal re-characterization of facts pursuant to Regulation 55 ICC Regulations, see TC V(a) (ICC), decision of 3 June 2014, ICC-01/09-01/11-1334, paras. 30-32 (liability under Art. 25(b), (c) or (d) Rome Statute).

¹⁸ On the possibility of a notice of potential legal re-characterization of facts pursuant to Regulation 55 ICC Regulations, see ICC-01/09-01/11-1991-Red; para. 9 (liability under Art. 25(b), (c) Rome Statute [“any of the possible modes of liability”]).

The trial before Trial Chamber V(a) (hereinafter also referred to as the ‘Trial Chamber’) opened on 10 September 2013. During 157 days, the Prosecution sought to prove its case against the accused by presenting incriminating evidence. 30 witnesses, amongst them two expert witnesses, testified for the Prosecution.¹⁹ The Trial Chamber had also admitted the prior recorded testimony of five witnesses for the truth of their content, pursuant to Rule 68 of the Rules, finding that there had been witness interference.²⁰ According to the Chamber, more than 8,000 pages of documentary evidence, 92 photographs, 77 items of audio-visual material and 27 maps were added to the evidentiary record during the Prosecution case.²¹ On 10 September 2015, two years after the opening of the trial, the Prosecution gave notification that it had closed its case.²²

After the close of the Prosecution case, both the Defense for Ruto and the Defense for Sang filed requests for judgments of acquittal of the accused (also referred to as “no case to answer” motions).²³ They argued that there was no case to answer since the OTP did not present evidence “on which a reasonable Trial Chamber could convict.”²⁴ The Chamber heard oral submissions from 12 to 15 January 2016.²⁵

On 12 February 2016, the Appeals Chamber issued a highly consequential decision on a separate but related matter; a panel of appellate judges reversed the Trial Chamber’s decision to admit the prior recorded testimony of five witnesses.²⁶ The Appeals Chamber decision to suppress the evidence had an immediate impact on the NCTA motions, because the Trial Chamber was no longer at liberty to rely on these statements when evaluating the strength of the Prosecution case.²⁷ The Trial Chamber deliberated and drafted its decision over the course of the next two and a half months. With the Prosecution evidence considerably weakened by the Appeals Chamber’s decision, the Trial Chamber announced on 5 April 2016 that it had decided, by majority, to vacate the charges without prejudice to later re-prosecution of the accused for the same crimes originally charged in the case.²⁸

¹⁹ TC V(a), decision of 5 April 2016, Annex A – Procedural History, ICC-01/09-01/11-2027-AnxA, 1.

²⁰ TC V(a), decision of 19 August 2015, ICC-01/09-01/11-198-Red-Corr.

²¹ TC V(a), decision of 5 April 2016, Annex A – Procedural History, ICC-01/09-01/11-2027-AnxA, 1.

²² Ibid.; OTP, Notification of closure of the Prosecution’s case, 10 September 2015, ICC-01/09-01/11-1954.

²³ Ruto Defense, request of 26 October 2015, ICC-01/09-01/11-1990-Corr-Red ; Sang Defense, motion of 6 November 2015, ICC-01/09-01/11-1991-Red.

²⁴ TC V(a), decision of 3 June 2014 (‘Decision No. 5’), ICC-01/09-01/11-1334, para. 32 (emphasis omitted).

²⁵ OTP, Notification of closure of the Prosecution’s case, 10 September 2015, ICC-01/09-01/11-1954.

²⁶ AC, judgment of 12 February 2016, ICC-01/09-01/11-2024. For an overview of the judgment, see L Marschner, [Recent Jurisprudential Developments at the ICC on Retroactivity and the Admissibility of Evidence in the Case against William Ruto and Joshua Sang](#), 29 March 2016.

²⁷ See also TC V(a), decision of 5 April 2016, Annex A – Procedural History, ICC-01/09-01/11-2027-AnxA, 1.

²⁸ TC V(a), decision of 5 April 2016, ICC-01/09-01/11-2027-Red-Corr.

Timeline of the NCTA proceedings²⁹

On 3 June 2014, Trial Chamber V(a) issued its ‘Decision No. 5’, in which it set out the principles and procedure to be applied in ‘no case to answer’ motions in the Ruto and Sang case.³⁰

On 4 June 2015, the Prosecution finished the presentation of its evidence in support of the charges against the accused and on 10 September 2015, it filed its notification of closure of the Prosecution’s case.³¹

On 23 October 2015, the Sang Defense and the Ruto Defense respectively filed requests for judgment of acquittal (i.e., no case to answer motions).³²

On 20 November 2015, the Prosecution responded to these Defense requests, arguing that the case should continue and the accused should not be acquitted at this stage of the trial.³³

On 27 November 2015, the Common Legal Representative for Victims (LRV) filed his reply to the Defense requests, averring that they should be rejected.³⁴

From 12 to 15 January 2016, the Trial Chamber head oral submissions of the parties and the LRV.³⁵

On 12 February, the Appeals Chamber reversed a previous ruling of the Trial Chamber³⁶ and held that five prior written witness statements, which incriminate the accused, are not admissible and consequently cannot be relied upon by the Trial Chamber in determining the no case to answer motions.³⁷

On 5 April 2016, Trial Chamber V(a) issued its decision, holding by majority that the charges are vacated without prejudice to re-prosecution at a later stage.

2. “No Case to Answer” Motions: A Novel Procedure at the ICC

The Rome Statute and the ICC Rules of Procedure and Evidence are both silent on the matter of NCTA submissions, and as of the date when the Prosecution rested its case in the *Ruto and Sang* trial, no ICC Trial Chamber had ever considered this type of mid-trial motion for acquittal. Accordingly, the Court had to decide a number of novel legal and procedural matters, including whether there was an adequate legal basis for NCTA motions at the ICC, and if so, what should be the applicable burden and standard of proof. The Trial Chamber had previously laid a procedural foundation for NCTA motions. On 19 June 2013,

²⁹ See TC V(a), decision of 5 April 2016, Annex A – Procedural History, ICC-01/09-01/11-2027-AnxA.

³⁰ TC V(a), decision of 3 June 2014, ICC-01/09-01/11-1334.

³¹ OTP, Notification of closure of the Prosecution’s case of 10 September 2015, ICC-01/09-01/11-1954.

³² Ruto Defense, request for judgment of acquittal, ICC-01/09-01/11-1990-Corr-Red, Sang Defense, NCTA motion, ICC-01/09-01/11-1991-Red.

³³ OTP, consolidated response, ICC-01/09-01/11-2000-Red2.

³⁴ LRV, joint reply, ICC-01/09-01/11-2005-Red.

³⁵ See transcripts of hearings from 12 January to 15 January 2016, ICC-01/09-01/11-T-209-212.

³⁶ TC V(a), decision of 19 August 2015, ICC-01/09-01/11-198-Red-Corr.

³⁷ AC, judgment of 12 February 2016, ICC-01/09-01/11-2024.

several months before trial began in the *Ruto and Sang* case, the Trial Chamber announced that it intended to issue directions on the conduct of proceedings, pursuant to Article 64(3)(a) of the Statute. The Trial Chamber issued an order requesting written submissions from the parties and the LRV on a range of trial procedure matters, including the question of whether NCTA motions should be allowed at the conclusion of the Prosecution case in chief.³⁸

In their July 2013 submissions, all parties agreed on the general permissibility of NCTA motions.³⁹ Mid-trial motions like these are not unusual in many other criminal tribunals. NCTA submissions have been established practice at the *ad hoc* Tribunals, and they are an ordinary part of criminal trial proceedings in domestic systems operating under the common law tradition.⁴⁰ Transposing this into the ICC context without explicit statutory authority or procedural guidance, the Trial Chamber considered *inter alia* whether the rationale underlying NCTA motions, and the respective modalities in these jurisdictions, could also apply to the ICC.⁴¹ The Chamber issued its “Decision on the Conduct of Trial Proceedings (General Directions)” approximately one month after hearing party submissions. The decision held *inter alia* that the Court would permit NCTA motions in principle, but the Chamber did not give detailed reasons or a full legal basis for the decision, promising instead to provide guidance as to the procedure and applicable legal test in due course.⁴² Ten months after issuing the general directions on the conduct of trial proceedings, the Chamber elaborated on its NCTA reasons in “Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions).”⁴³ In the 3 June 2014 decision, Trial Chamber V(a) set out the framework to determine the merits of a hypothetical “no case to answer” motion.

3. Rationale and Legal Basis for NCTA Motions at the ICC According to Decision No. 5

Decision No. 5 reiterated the Trial Chamber’s unanimous finding that NCTA submissions could be filed in the case at the close of Prosecution evidence.⁴⁴ The Trial Chamber held that permitting NCTA motions in the case is consistent with the ICC’s legal framework.⁴⁵ Since is no explicit rule on NCTA motions in either the Rome Statute or the Rules of Procedure and Evidence, the Judges referred to and interpreted the

³⁸ TC V(a), order of 19 June 2013, ICC-01/09-01/11-778, para. 2(v).

³⁹ See Prosecution Submissions on the conduct of proceedings, 3 July 2013, ICC-01/09-01/11-794, para. 7; Defence Submissions on the Conduct of Proceedings, 3 July 2013, ICC-01/09-01/11-795, paras. 12-18; Sang Defence Submissions on the Conduct of Proceedings, 3 July 2013, ICC-01/09-01/11-796, para. 10; Corrigendum to the Submissions of the Common Legal Representative for Victims, 4 July 2013, ICC-01/09-01/11-797-Corr, paras. 3-5.

⁴⁰ Boas *et al.*, International Criminal Procedure (CUP 2011), p. 287; Friman *et al.*, Charges, in: Sluiter *et al.* (eds.), International Criminal Procedure (OUP 2013), pp. 424, 425-427, 450; Tochilovsky, Jurisprudence of the International Criminal Courts and the European Court of Human Rights : Procedure and Evidence (Nijhoff 2008), p. 535.

⁴¹ TC V(a), decision of 3 June 2014, ICC-01/09-01/11-1334.

⁴² ICC-01/09-01/11-847-Corr („Conduct of Proceedings Decision“), para. 32.

⁴³ TC V(a), decision of 3 June 2014, ICC-01/09-01/11-1334 (“Decision No. 5”).

⁴⁴ TC V(a), decision of 3 June 2014, ICC-01/09-01/11-1334 (“Decision No. 5”).

⁴⁵ Decision No. 5, paras. 10-18.

sources of applicable law set out in Art. 21 Rome Statute. The Trial Chamber inferred authority to consider NCTA motions from its powers pursuant to Art. 64(3)(a) and Art. 64(6)(f) of the Rome Statute and Rule 134 of the ICC Rules.⁴⁶ The Chamber's interpretation was consistent with arguments made by the parties and the LRV.⁴⁷

a. Dual Purpose: Efficiency and Fairness

The Trial Chamber noted that the purpose of making NCTA motions available to the Defense was not just expediency, but also fundamental fairness to the accused. Art. 64(2) of the Rome Statute obliges the Court “to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses,” and accordingly, the Judges noted that the “primary rationale” of NCTA motions “is the principle that an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need for the defence to mount a defence case.”⁴⁸ Mirroring the *ad hoc* Tribunal jurisprudence on the matter,⁴⁹ Trial Chamber V(a) concluded that NCTA motions support the rights of the accused, including the right to be presumed innocent as well as the right to a fair and expeditious trial,⁵⁰ and that the central premise of NCTA motions would be compatible with the Statute's fundamental rule that the burden lies on the Prosecution to prove the guilt of the accused.⁵¹

Even as the Trial Chamber acknowledged the right of the accused to file NCTA motions, the Court stressed that the Defense is under no *obligation* to do so. The Defense is urged, at the close of the Prosecution case, to “carefully consider [...] whether or not a ‘no case to answer’ motion is warranted in the circumstances”⁵² in light of the central objectives of permitting NCTA motions: “to promote the rights of the accused by providing a means to create a shorter, more focused and streamlined trial.”⁵³ The Chamber furthermore noted that it would lie within its discretion to raise the matter *proprio motu*.⁵⁴

⁴⁶ Ibid., para. 15.

⁴⁷ Ibid., para. 12. See Ruto Defense, submissions of 3 July 2013, ICC-01/09-01/11-795, paras. 14-15; Sang Defense, submissions of 3 July 2013, ICC-01/09-01/11-796, para. 10; OTP, submissions of 3 July 2013, ICC-01/09-01/11-794, para. 7.

⁴⁸ Decision No. 5, paras. 12, 16.

⁴⁹ For an overview, see for example Tochilovsky, *supra*, p. 536 *et seq*; Friman *et al.*, Charges, in: Sluiter *et al.* (eds.), International Criminal Procedure (OUP 2013), pp. 424 *et seq*.

⁵⁰ Decision No. 5, paras. 12, 17; these rights of the accused are enshrined in Art. 66(1) and Art. 67(1) of the Rome Statute.. See also LRV, submissions of 4 July 2013, ICC-01/09-01/11-797-Corr, para. 3; Sang Defense, submissions of 3 July 2013, ICC-01/09-01/11-796, para. 10.

⁵¹ Decision No. 5, para. 13; Art. 66(2) of the Rome Statute.

⁵² Decision No. 5, para. 39.

⁵³ Ibid.

⁵⁴ Ibid., para. 38.

b. NCTA Practices in Other Tribunals

In Decision No. 5, the Trial Chamber took note of the fact that NCTA motions are typical in the adversarial (or common law) model of criminal procedure.⁵⁵ Trials in common law jurisdictions generally follow a “party led” or “two-case approach,” which means that the prosecution and the defense successively present separate cases.⁵⁶ The prosecution bears the burden of proof to establish guilt of the accused “beyond a reasonable doubt,” and so the prosecutor is given the first opportunity to present and examine evidence in support of his own theory of the case. Once the prosecution’s case is closed, the defense reacts to, or “answers,” the prosecution’s allegations in its case. The role of the judge in common law systems is as “tribunal of law,” distinct from juries who act as “tribunal of fact,” and decide ultimate innocence or guilt of the accused in criminal cases.⁵⁷ In the “party led” approach, the defense may file a “no case to answer” motion once the Prosecution has presented its evidence. It seeks to achieve a judgment of acquittal for all or some charges by arguing that the prosecution has not presented sufficient evidence to warrant the defense to mount a defense case.⁵⁸ A successful NCTA motion thus leads either to a restriction of the material scope of the remainder of the trial by the judge, or can even result in the judge stopping the trial entirely and entering a full judgment of acquittal.⁵⁹

NCTA motions have become standard practice at the UN *ad hoc* Tribunals and the Special Court for Sierra Leone (“SCSL”).⁶⁰ Originally, neither the Statutes nor the Rules of the ICTY or ICTR contained explicit rules on NCTA proceedings, but NCTA motions were deemed appropriate because of the predominantly adversarial structure of the trials at the *ad hoc* Tribunals.⁶¹ As with common law national systems, the *ad hoc* Tribunals generally followed a party-led, two-case approach to the presentation of evidence, although they have also incorporated some features of civil law systems, for example using judges instead of juries as the finders of fact, and granting greater judicial control to intervene in proceedings.⁶² The basis for NCTA motions at the *ad hoc* Tribunals is Rule 98*bis*, added to the respective Rules and Procedure and Evidence of the ICTY and the ICTR in 1998,⁶³ to permit a finding of acquittal on some or all charges at the close of the prosecution case an accused when “the evidence is found to be insufficient to sustain a conviction.” While Rule 98*bis* was meant to help “streamlining and expediting”

⁵⁵ *Ibid.*, para. 11; Friman *et al.*, Charges, in: Sluiter *et al.* (eds.), *supra*, pp. 466-467, 482.

⁵⁶ Schuon, *International Criminal Procedure: A Clash of Legal Cultures* (Asser 2010), pp. 3-5.

⁵⁷ *Ibid.*; Tochilovsky, *supra*, p. 535. In comparison, civil law systems, like the German or French systems, follow a unified case approach wherein the judge(s) play the key role in examining the evidence presented and in uncovering the truth (Schuon, *supra*, p. 4). Because there are no party-led cases, civil law systems generally do not provide for NCTA proceedings; Friman *et al.*, Charges, in: Sluiter *et al.* (eds.), *supra*, p. 467.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ For an overview, see for example Boas *et al.*, *supra*, pp. 287-290. See also AC (ICTY), *Prosecutor v. Jelisić*, judgment of 5 July 2011, IT-95-10-A, paras. 30 *et seq.*

⁶¹ Boas *et al.*, *supra*, p. 288; Friman *et al.*, Charges, in: Sluiter *et al.* (eds.), *supra*, p. 467; Tochilovsky, *supra*, p. 535.

⁶² Friman *et al.*, Charges, in: Sluiter *et al.* (eds.), *supra*, pp. 425-427; Tochilovsky, *supra*, p. 538.

⁶³ http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev13_en.pdf.

the proceedings, NCTA motions have, in practice, frequently led to delays.⁶⁴ The written submissions by the parties and the decisions by the chambers have been criticized as lengthy and sometimes deal extensively with evidentiary issues.⁶⁵ As a result, ICTY Judges amended Rule 98*bis* a second time in December 2004, to require that submissions and decisions be exclusively oral. The SCSL's Rules of Procedure and Evidence were similarly amended, but the Rules of the ICTR continued to allow written NCTA submissions and decisions.⁶⁶

c. How Trial Chamber V(a) Interpreted NCTA Procedure at the ICC

In Decision No. 5, Trial Chamber V(a) interpreted the ICC's procedural regime, taking into account the particular nature and features of its trial structure, considering whether the Chamber has authority to rule on the matter, as well as whether NCTA motions would be conducive to the fairness and efficiency of trial.⁶⁷ The procedural system of the ICC is based on a compromise reached between States and not modeled solely after either the common law or civil law tradition.⁶⁸ Neither domestic law nor the law of the *ad hoc* Tribunals is binding on the ICC, but both may serve as persuasive authority.⁶⁹

An interesting and unusual feature of the Rome Statute and the ICC Rules is that they do not proscribe the way in which the evidence is to be presented at trial, so Judges are given some discretion to decide whether the evidence is presented in a two-case approach or a unified case approach.⁷⁰ In practice, ICC Trial Chamber Judges have thus far mainly adopted a predominantly adversarial approach, including in the case against *Ruto* and *Sang*.⁷¹ Nevertheless, certain distinctive features of the ICC's procedure, which distinguish it from the *ad hoc* Tribunals and domestic adversarial proceedings, need to be taken into consideration as well, as was recognized by Trial Chamber V(a).⁷² For example, the confirmation of charges stage is a unique procedural feature of ICC criminal trials.⁷³ Confirmation of charges is a judicial review process that serves to filter out any counts where there is not "sufficient evidence to establish

⁶⁴ Tochilovsky, *supra*, p. 536.

⁶⁵ Boas *et al.*, *supra*, p. 288; Tochilovsky, *supra*, p. 536.

⁶⁶ Boas *et al.*, *supra*, p. 288. See also Decision No. 5, para. 356.

⁶⁷ On the timing and procedural requirements regarding NCTA motions in the case, see Decision No. 5, paras. 34 *et seq.* (highlighting, *inter alia*, that the Chamber could proprio motu request NCTA submissions, *ibid.*, para. 38).

⁶⁸ Decision No. 5, para. 11; Zappalà, Comparative Models and the Enduring Relevance of the Accusatorial-Inquisitorial Dichotomy, in: Sluiter *et al.* (eds.), *supra*, p. 47, 49; Broomhall, Art. 51, in: Triffterer and Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck/Hart/Nomos, 3rd edn.), n. 42 (speaking of "a unique compromise").

⁶⁹ Decision No. 5, para. 11; Mégret, The Sources of International Criminal Procedure, in: Sluiter *et al.* (eds.), *supra*, p. 70. See also Art. 21 of the Rome Statute.

⁷⁰ Decision No. 5, para. 11.

⁷¹ *Ibid.*, para. 15. Art. 64(3)(a) Rome Statute.

⁷² See also Decision No. 5, para. 11.

⁷³ Friman *et al.*, Charges, in: Sluiter *et al.* (eds.), *supra*, p. 430.

substantial grounds to believe that the person committed the crime charged.”⁷⁴ In the interests of trial efficiency and fairness, NCTA proceedings should not replicate the confirmation stage.⁷⁵

Trial Chamber V(a) highlighted that the confirmation of charges stage and the NCTA option are distinct in a number of ways.⁷⁶ First, the evidentiary standard applied in the confirmation phase is lower.⁷⁷ Second, the object and purpose of the confirmation phase is entirely different from mid-trial proceedings at the *ad hoc* Tribunals.⁷⁸ Finally, as pointed out by the Trial Chamber in Decision No. 5, both the content and the nature of the evidence may change between the confirmation proceedings and the presentation of the prosecution’s case at trial.⁷⁹ The Trial Chamber therefore ruled that confirmation of charges proceedings do not obviate the possible need for NCTA motions in a case.⁸⁰

Victim participation is another distinct feature of the ICC’s procedural regime, which distinguishes it from the *ad hoc* Tribunals.⁸¹ The LRV has argued that the filing of NCTA motions would be “consistent with the need to keep victims apprised of developments in the case and [would] further help to manage victims’ expectations.”⁸² He further contended that the procedure would be fair in this case because participating victims would likely be aware of the practice, which is used in the criminal courts in Kenya.⁸³ Trial Chamber V(a) noted that it was “cognizant that victim participation is a special feature,”⁸⁴ and went on to hold that this “does not in itself form an inhibition to a ‘no case to answer’ motion.”⁸⁵

4. Applicable Legal Standard of Review According to Decision No. 5

The interpretation of the applicable standard of review became particularly controversial in the written and oral NCTA submissions, especially arguments over whether the Trial Chamber should assess the credibility of witnesses, and reliability of specific evidence when deciding upon the merits of the NCTA

⁷⁴ See Art. 61(5) of the Rome Statute, as cited in Decision No. 5, para. 14.

⁷⁵ Friman *et al.*, Charges, in: Sluiter *et al.* (eds.), *supra*, p. 450.

⁷⁶ Decision No. 5, para. 14.

⁷⁷ *Ibid.*; Ruto Defense, submissions of 3 July 2013, ICC-01/09-01/11-795, para. 17.

⁷⁸ PTC II, decision of 23 January 2012, ICC-01/09-02/11-382-Red, para. 72: “[...] At the outset, the Chamber emphasizes, as previously held by Pre-Trial Chamber I, that the jurisprudence of the *ad hoc* tribunals concerning mid-trial motions of acquittal cannot guide the Chamber in determining the object and purpose of the confirmation of charges, due to the fundamentally incomparable nature of the two procedural regimes.”

⁷⁹ Decision No. 5, para. 14. The Ruto Defense mentioned in this regard that *viva voce* testimony could lead to the collapse of the OTP’s case, see Ruto Defense, submissions of 3 July 2013, ICC-01/09-01/11-795, para. 17.

⁸⁰ Decision No. 5, para. 14.

⁸¹ *Ibid.*, para. 16.

⁸² LRV, submissions of 4 July 2013, ICC-01/09-01/11-797-Corr, para. 4.

⁸³ *Ibid.*, para. 3.

⁸⁴ Decision No. 5, para. 16.

⁸⁵ *Ibid.*

motion.⁸⁶ As such, before this report turns to the party submissions and the judicial opinions on the NCTA motions, it is worth recalling which standards the Trial Chamber originally articulated in Decision No. 5.

a. Standard of Proof for NCTA Motions

In Decision No. 5, the Judges unanimously agreed to distinguish mid-trial NCTA assessments from the ultimate decision about the guilt or innocence of the defendant.⁸⁷ According to Art. 66(3) of the Rome Statute, in order to enter a post-trial conviction, the Chamber has to be persuaded “beyond reasonable doubt” of the guilt of the accused, based on an evaluation of the probative weight of the evidence presented at trial.⁸⁸ By contrast, the Chamber concluded that NCTA motions serve a distinct purpose: “to ascertain whether the Prosecution has lead sufficient evidence to necessitate a defense case.”⁸⁹ Accordingly, the Chamber concluded that they would only use the “beyond a reasonable doubt” standard to weigh evidence at the final judgment stage. At the “no case to answer” stage, the Judges agreed that they only needed to assess whether there was *prima facie* evidence to warrant hearing a Defense case in response to prosecution evidence.⁹⁰ The relevant question, according to the Court, was “[w]hether or not, on the basis of a *prima facie* assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber *could* convict the accused.”⁹¹ The Chamber stressed that the emphasis lies on the word “could,” which indicates the different character of the NCTA standard as compared to the ultimate standard for conviction.⁹² The question is therefore not whether Trial Chamber V(a) *should* convict the accused on the basis of the evidence presented by the Prosecution, but whether a reasonable trier of fact *could* convict.⁹³ Trial Chamber V(a) noted that the probative standard would be consistent with the standards applied by the *ad hoc* Tribunals.⁹⁴

⁸⁶ See, e.g., OTP, consolidated response, ICC-01/09-01/11-2000-Red, paras. 40-46; Sang Defense, NCTA motion, ICC-01/09-01/11-1991-Red, paras. 14-34.

⁸⁷ Decision No. 5, para. 23. Judge Eboe-Osuji made further comments in support of the reasoning in Decision No. 5 in a Separate Further Opinion, in which he extensively discussed common law jurisprudence and the law and decisions of the *ad hoc* Tribunals as persuasive authorities; see TC V(a), decision of 3 June 2014, separate further opinion of Judge Eboe-Osuji, ICC-01/09-01/11-1334-Anx-Corr.

⁸⁸ See also Decision No. 5, para. 24.

⁸⁹ Decision No. 5, para. 23.

⁹⁰ *Ibid.*

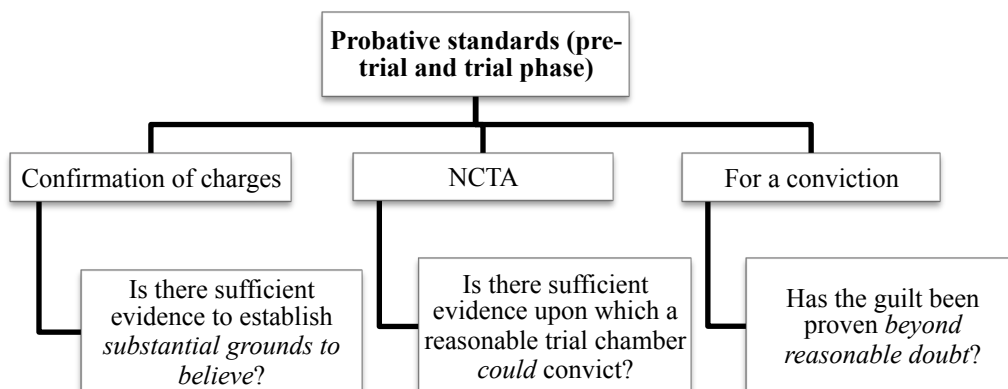
⁹¹ *Ibid.* (emphasis in the original). See also *ibid.*, para. 31.

⁹² *Ibid.*, para. 23.

⁹³ Tochilovsky, *supra*, pp. 544-545; Decision No. 5, paras. 23, 32.

⁹⁴ Decision No. 5, para. 31. For a discussion on the standard at the ICTY, see for example AC (ICTY), *Prosecutor v. Jelisić*, judgment of 5 July 2011, IT-95-10-A, para. 37; AC (ICTY), *Prosecutor v. Delalić*, judgment of 20 February 2001, IT-96-21-A, para. 434 (“The test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question”).

Overview of the probative standards in the pre-trial and trial phases



In Decision No. 5, the Trial Chamber wrote that it did not expect to engage in an in-depth assessment of issues of reliability and credibility at the halfway stage. Such questions would be left to the final determination of the guilt or innocence at the end of the case.⁹⁵ The Judges stressed that in deciding on the sufficiency of the evidence presented, the Court would focus on the existence of evidence, without accounting for the strength of the evidence, especially as regards questions of witness credibility, unless a witness' testimony was entirely "beyond belief."⁹⁶ The Trial Chamber embraced the principle that the Prosecution's evidence should be taken "at its highest"⁹⁷ when considering an NCTA motion, and that the Court should "assume that the prosecution's evidence was entitled to credence unless incapable of belief on any reasonable view."⁹⁸

b. Possible Effect of a Legal Re-Characterization of Facts for an NCTA Decision⁹⁹

ICC "Regulation 55" provides that a "Chamber may change the legal characterization of facts to accord with the crimes [...] or to accord with the form of participation of the accused [...] without exceeding the facts and circumstances described in the charges and any amendments to the charges."¹⁰⁰ The regulation is meant to promote judicial efficiency (by reducing the likelihood that prosecutors will overburden the Chamber by strategically charging cumulatively or in the alternative) and enable the Judges to remedy a situation where the prosecution's charges do not match the facts heard at trial, yet there is proof beyond a reasonable doubt that the accused has indeed committed a crime within the jurisdiction of the court.¹⁰¹

⁹⁵ Decision No. 5, para. 24.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ See Sang Defense, NCTA motion, ICC-01/09-01/11-1991-Red, paras. 8-13.

¹⁰⁰ Regulation 55 of the Regulations of the International Criminal Court.

¹⁰¹ For a critical appraisal of the provision, see for example M. Dastugue, *The Faults in Fair Trials: An Evaluation of Regulation 55 at the International Criminal Court*, 48 *Vand. J. Transnat'l L.* 273 (2015). See also International Bar Association, *Evidence Matters in ICC Trials*, August 2016, p. 61 *et seq.*

Because of Regulation 55, the Trial Chamber determined in Decision No. 5 that the Court could hypothetically refuse to grant an NCTA motion if it found sufficient factual evidence upon which a reasonable chamber could convict the accused, provided the facts were legally re-characterized at the end of trial and the accused had prior notice of the possibility of such an action.¹⁰² In the case against Ruto and Sang, this was a possibility at the NCTA stage, because notice had been given to Ruto on 12 December 2013 of the possibility of a legal re-characterization of facts to accord with liability under Art. 25(3)(b),(c), or (d).¹⁰³ Pre-Trial Chamber II originally only confirmed one mode of liability for Ruto (criminal responsibility pursuant to Art. 25(3)(a)).¹⁰⁴ According to the Trial Chamber, “in the context of considering a 'no case to answer' motion it would be sufficient, in respect of Mr. Ruto, for it to be established that there is sufficient evidence of facts which could support a conviction under the mode of liability as pleaded in the Document Containing the Charges, or any one of the modes as specified in the Regulation 55 Notice.”¹⁰⁵ Notice was also given to Sang about a potential legal re-characterization of the facts concerning the mode of liability under which he was charged.¹⁰⁶

¹⁰² Decision No. 5, para. 29.

¹⁰³ Art. 25(b) describes liability for a perpetrator who, “Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.” Art. 25(c) described liability for a perpetrator who, “For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.” Art 25(d) describes liability for a perpetrator who, “In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.”

¹⁰⁴ See Decision No. 5, para. 30. Art. 25(a) of the ICC Rules provides liability for a perpetrator who, “Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.”

¹⁰⁵ Decision No. 5, para. 30.

¹⁰⁶ See ICC-01/09-01/11-1991-Red; para. 9 (liability under Art. 25(b), (c) Rome Statute [“any of the possible modes of liability”]); Decision No. 5, para. 29; ICC-01/09-01/11-2027-Red-Corr, fn. 30-31.

III. “No Case To Answer” Submissions

As noted above, the Trial Chamber issued its NCTA decision only after receiving lengthy written submissions from the parties and the LRV. The Ruto Defense filed its 95-page long request for judgment of acquittal on 26 October 2015.¹⁰⁷ The Sang Defense filed its 85-page long NCTA motion on 23 October 2015.¹⁰⁸ The Prosecution filed a consolidated response, which is 140 pages long, on 26 November 2015.¹⁰⁹ This section provides a brief overview of key arguments found in the party submissions, in order to illustrate the two main narratives that shaped the discussions before the Court.¹¹⁰ On the one hand, the Prosecution emphasized witness interference by persons in Kenya, which undermined Prosecution investigations, and worked to the benefit of the accused.¹¹¹ On the other hand, the Defense alleged that the Prosecution had investigated and examined the witnesses poorly, and argued that the accused were entitled to full acquittals, because evidence was insufficient and too weak from a qualitative perspective to warrant the Defense having to mount its own case in response.¹¹²

During trial, allegations about the existence of an organized network, working in concert to further the crimes alleged in the indictment were a cornerstone of the Prosecution’s case theory. Network allegations are essential to proving both the contextual elements (organizational policy) of the crimes under Art. 7 of the Statute, and the common plan charged as a liability theory under Art. 25(3) of the Statute.¹¹³ Both Defense teams argued in their NCTA submissions that the Prosecution failed to prove the existence of a network.¹¹⁴ They emphasized that the deficient quality of the evidence presented (namely, that the case was based on hearsay and uncorroborated circumstantial evidence), ultimately rendered the evidence “incapable of belief.”¹¹⁵ The Defense position effectively asked the Trial Chamber to go beyond *prima facie* review, and make a mid-trial assessment of the reliability and credibility of evidence. Defense for

¹⁰⁷ Ruto Defense, request for judgment of acquittal, 26 October 2015, ICC-01/09-01/11-1990-Corr-Red.

¹⁰⁸ Sang Defense, NCTA motion, 6 November 2015, ICC-01/09-01/11-1991-Red.

¹⁰⁹ Prosecution, consolidated response, ICC-01/09-01/11-2000-Red.

¹¹⁰ This section does not address any submissions made concerning the specific witness statements the Appeals Chamber suppressed from evidence on 12 February 2016, because the Appeals Chamber decision rendered those submissions moot; the Trial Chamber was not at liberty to rely on these statements for the truth of their content in reaching its decision on the motions for judgment of acquittal.

¹¹¹ E.g., Prosecution, consolidated response, ICC-01/09-01/11-2000-Red, paras. 28, 39.

¹¹² In a submission after the termination of the trial, the Ruto Defense even argued that members of the Prosecution had influenced witnesses in an inappropriate manner; see Ruto Defense request of 2 May 2016, ICC-01/09-01/11-2028-Red. A request by the Ruto Defense to therefore appoint an amicus prosecutor to investigate the issues was rejected by Trial Chamber V(a), decision of 2 June 2016, ICC-01/09-01/11-2034.

¹¹³ Prosecution, consolidated response, ICC-01/09-01/11-2000-Red, para. 144.

¹¹⁴ See Ruto Defense, request for judgment of acquittal, 26 October 2015, ICC-01/09-01/11-1990-Corr-Red, para. 9; Sang Defense, NCTA motion, 6 November 2015, ICC-01/09-01/11-1991-Red, para. 58.

¹¹⁵ See Sang Defense, NCTA motion, 6 November 2015, ICC-01/09-01/11-1991-Red, paras. 23-34.

Ruto and Sang also averred that an acquittal was appropriate because a legal re-characterization of the facts to fit within a different mode of liability was not warranted in this case.¹¹⁶

The Prosecution countered that the Trial Chamber should dismiss the requests of the Defense since they failed to meet the standard of review for NCTA motions set out in Decision No. 5.¹¹⁷ The Prosecution maintained that it had introduced sufficient evidence on which a reasonable Chamber could convict the accused,¹¹⁸ and the consolidated response stressed that there were no circumstances to merit the Chamber entering into an assessment of the credibility and reliability of the evidence already at the halfway stage of the trial. Per the standard of review adopted by the Trial Chamber in Decision No. 5, the Prosecution argued that the Chamber should take the evidence “at its highest.”¹¹⁹ The LRV also submitted that the Chamber should reject the NCTA motions.¹²⁰

1. Ruto Defense Grounds for Judgment of Acquittal

The Ruto Defense argued that there was no evidence on the existence of a network,¹²¹ insufficient evidence on the causal nexus between Ruto’s conduct and the crimes,¹²² and insufficient evidence on Ruto’s contribution to the crimes charged.¹²³ The Defense further challenged the crime base evidence¹²⁴ and criticized the OTP’s extensive reliance on hearsay evidence.¹²⁵ According to the Defense, the Prosecution’s failure to establish a link between Ruto and the alleged crimes, or to the direct perpetrators, constituted “the fundamental flaw in the OTP’s case.”¹²⁶ Defense criticized the quality of the OTP’s investigations, which Defense argued had led the Prosecution to wrongly identify both the causes for the violence and the perpetrators.¹²⁷

The Defense for Ruto submitted that the case presented by the Prosecution at trial differed greatly from the case confirmed by the Pre-Trial Chamber, which had allegedly built mainly on the evidence given by six

¹¹⁶ See Ruto Defense, request for judgment of acquittal, 26 October 2015, ICC-01/09-01/11-1990-Corr-Red; Sang Defense, NCTA motion, 6 November 2015, ICC-01/09-01/11-1991-Red.

¹¹⁷ Prosecution, consolidated response, ICC-01/09-01/11-2000-Red, para. 1.

¹¹⁸ *Ibid.*, para. 2.

¹¹⁹ *Ibid.*, para. 3.

¹²⁰ LRV, joint reply, ICC-01/09-01/11-2005-Red.

¹²¹ See Ruto Defense, request for judgment of acquittal, 26 October 2015, ICC-01/09-01/11-1990-Corr-Red, paras. 2-48.

¹²² See *ibid.*, paras. 49-57.

¹²³ See *ibid.*, paras. 58-136: The Defense for Ruto submitted that the Prosecution evidence on Ruto’s alleged contributions (under Article 25(3)(a), (3)(b), 3(c) and/or 3(d)), were insufficient and Mr. Ruto should have no case to answer. Defense *inter alia* refuted the allegations that Ruto’s high position would have allowed him to “command, authorize, urge, incite request or advise Network members and direct perpetrators to attack PNU supporters in order to expel them from the Rift valley” (*ibid.*, paras. 59, 72). Defense averred that evidence adduced by the OTP in this regard was highly deficient (i.e. confused, uncorroborated, disavowed, hearsay, and lacking in detail).

¹²⁴ See Ruto Defense, request for judgment of acquittal, 26 October 2015, ICC-01/09-01/11-1990-Corr-Red, paras. 137-199.

¹²⁵ See *ibid.*, paras. 201-223.

¹²⁶ *Ibid.*, paras. 137, 195-196, 198.

¹²⁷ *Ibid.*, paras. 197, 199.

witnesses (the so-called “Confirmation Six”).¹²⁸ Defense submitted that the Prosecution case, when regarded as a whole, had “completely broken down [...] because of the collapse of the ‘Confirmation Six’ and subsequent reliance on hearsay evidence – both the core evidence of the *viva voce* witnesses and the rule 68 evidence.”¹²⁹ Even if the Chamber did not find that the case had completely broken down, it still had the power to assess credibility and reliability and determine whether the proceedings needed to be ended in the interests of the fairness and justice for excessive reliance on hearsay, based on Art. 64(2) of the ICC Statute.¹³⁰

Defense averred that no reasonable Trial Chamber could find, based on the evidence presented at trial, that the alleged network (which Ruto allegedly created) actually existed.¹³¹ The Defense for Ruto submitted that the OTP had not presented sufficient evidence on which a reasonable Trial Chamber could hold that an “organizational policy” existed.¹³² Defense took the position that the post-election violence (PEV) was spontaneous and nationwide and a reaction to reports that the elections were rigged.¹³³ They argued that the Prosecution had failed to adduce evidence that supported the allegation of a well-coordinated and organized plan, carried out with sufficient funds and logistics.¹³⁴ They pointed to witnesses’ testimony about the *ad hoc* nature of the preparations and attacks that were committed spontaneously by members of various ethnic groups all over Kenya.¹³⁵ Defense further submitted that the Prosecution had not proven “the essential ingredients of the crimes charged in relation to the locations specified in the charges.”¹³⁶

The Defense for Ruto argued that the material defects of the OTP evidence were the result of “serious deficiencies in the OTP’s investigations.”¹³⁷ They chose not to challenge the interpretation of the modes of

¹²⁸ Ibid., para. 2.

¹²⁹ Ibid., para. 211. See also *ibid.*, paras. 141. Defense stressed that only three of the Confirmation Six appeared before Trial Chamber V(a), and their evidence would be so deficient that it should not be relied upon; *ibid.*, para. 3.

¹³⁰ Ibid., paras. 213-215 (referring also to common law jurisprudence and the partial dissenting opinion of Judge Shahabuddeen in the *Jelisić* case at the ICTY).

¹³¹ Ibid., para. 2.

¹³² Ibid., paras. 12-13.

¹³³ Ibid., paras. 44-48.

¹³⁴ Ibid., para. 47.

¹³⁵ Ibid., paras. 46-48.

¹³⁶ Ibid., para. 137. It noted that the charges should be construed narrowly, and should be confined, both temporally and geographically, to the charges explicitly mentioned in the UDCC (*ibid.*, para. 138). Defense acknowledged the Trial Chamber’s position to not assess specific incidents at the NCTA stage, and only determine whether the evidence adduced would support any of the incidents that had been charged (*ibid.*, 139) However, they argued that, in the interest of the fairness and efficiency of the trial, the Chamber should nevertheless make use of the opportunity to determine whether the trial should proceed with respect to those locations for which the Prosecution had not presented evidence sufficient to prove the “essential ingredients of the crimes charged” (*ibid.*, para. 140) Referring to ICTY jurisprudence as persuasive authority, Defense submitted that the Trial Chamber could issue partial acquittals in respect of locations (*ibid.*, para. 141). It explained in detail the alleged deficiencies and insufficiencies of the evidence on the three counts of murder (*ibid.*, paras. 142-163), deportation or forcible transfer (*ibid.*, paras. 164-190), and persecution (*ibid.*, paras. 191-194).

¹³⁷ Ibid., para. 5.

liability or the elements of crimes in detail at this stage of the trial.¹³⁸ The Ruto Defense requested that the Trial Chamber render a judgment of acquittal and terminate the trial.

2. Sang Defense Grounds for Judgment of Acquittal

Like the Defense for Ruto, the Defense for Sang submitted that their client should be acquitted of all charges.¹³⁹ They argued *inter alia* that qualitative deficiencies rendered the evidence presented “incapable of belief,”¹⁴⁰ the Prosecution failed to prove existence of a “network” with any sort of criminal policy,¹⁴¹ and moreover, the Prosecution evidence failed to prove that Sang’s conduct gave rise to criminal liability under Art. 25 of the Rome Statute.¹⁴²

Defense for Sang averred that evidence would be “incapable of belief” because of several quantitative deficiencies.¹⁴³ Referring to jurisprudence of the *ad hoc* Tribunals and the European Court for Human Rights, the Sang Defense averred that untested evidence relied on by the OTP to directly implicate the accused, particularly if it was recanted,¹⁴⁴ should be corroborated.¹⁴⁵ Defense further argued that several of the replacement witnesses, whom the OTP had called in lieu of four of the six “Confirmation Witnesses,” had recanted their statements.¹⁴⁶ Defense emphasized that the Prosecution case against Sang relied on only a small number of witnesses, who talked about different incidents and did not corroborate each other.¹⁴⁷ Furthermore, the Sang Defense submitted that evidence presented by the OTP would exceed the facts and circumstances of the confirmed charges both temporally and geographically.¹⁴⁸

¹³⁸ Ibid., para. 6.

¹³⁹ Sang Defense, NCTA motion, 6 November 2015, ICC-01/09-01/11-1991-Red. Should the NCTA motion be rejected, the Sang Defence requested “to be put on notice as to which mode(s) of liability [Sang] is being charged under [...] and on which counts”, *ibid.*, para. 7.

¹⁴⁰ Ibid., paras. 23-34.

¹⁴¹ Ibid., paras. 58-118.

¹⁴² Ibid., paras. 6, 45-55, 123 *et seq.* The Sang Defense stressed that it had not yet been put on any notice of a potential re-characterization of the facts pursuant to Regulation 55. It however acknowledged to have been put on notice of a potential future notice; see *ibid.*, paras. 12-13. In regard to the standard of review, the Defense argued that “in the event that the judges are already in a position to determine that they will not convict the accused on the basis of the Prosecution’s evidence, even if they could hypothetically convict them, they should grant the ‘no case to answer’ Motion” (*ibid.*, para. 21). The NCTA standard should not be lower than the standard applied at the confirmation stage; *ibid.*, para. 22.

¹⁴³ Ibid., paras. 23-34.

¹⁴⁴ Ibid., para. 34.

¹⁴⁵ Ibid., paras. 30-32. Any reliance on evidence of co-perpetrators and individuals having an interest in incriminating the accused would also depend on the existence of corroborating evidence (*ibid.*, para. 33). The Sang Defense further emphasized that Chambers had only rarely relied on uncorroborated hearsay evidence (*ibid.*). It further stated that no reasonable Trial Chamber could convict the accused based on recanted allegations, which were made by witnesses having a motive to incriminate Sang or which were untested, if corroboration was lacking (*ibid.*, para. 34).

¹⁴⁶ ICC-01/09-01/11-1991-Red, paras. 129-131 (the admissibility of these statements was rejected by the Appeals Chamber in February 2016). Defense went on to argue that the Trial Chamber should also consider the motives which led the OTP to not actually call most of the “Confirmation Witnesses.”

¹⁴⁷ ICC-01/09-01/11-1991-Red, para. 132.

¹⁴⁸ Ibid., paras. 35-55.

Defense for Sang also argued that the OTP had not proven the existence of “a Network as the organization with a policy to orchestrate the commission of crimes against PNU supporters,”¹⁴⁹ to which Sang allegedly belonged.¹⁵⁰ Like Ruto, the Defense for Sang averred that the OTP had failed to prove the requirement of an “organizational policy” to commit an attack against a civilian population as set out by Art. 7(2)(a) of the Rome Statute.¹⁵¹

Even if Trial Chamber V(a) were to find that there was sufficient evidence on the existence of a Network at the midway point of the trial, the Defense submitted that Sang should nevertheless be acquitted as no evidence had been shown suggesting he had knowledge of the attacks.¹⁵² According to the Defense, the OTP did not provide evidence establishing a link between Sang and the alleged Network.¹⁵³ Defense contended that Sang could not be found liable “as a contributor, solicitor, inducer or aider and abettor.”¹⁵⁴ They emphasized that the OTP had failed to prove that a direct link existed between Sang’s broadcasts and the crimes that were allegedly committed.¹⁵⁵ Defense referred to the guarantee of freedom of speech and maintained that a determination of the inciting character of broadcasts would depend on whether language used could incite violence and whether they were made with the intent to spark ethnic hatred.¹⁵⁶ Defense submitted that Sang could only be found liable under Art. 25(3)(d) of the Rome Statute if his radio program was found to have substantially contributed to the Network by inciting or soliciting listeners to support it and to participate in its criminal activity.”¹⁵⁷

¹⁴⁹ Ibid., para. 58.

¹⁵⁰ Ibid., paras. 61-118.

¹⁵¹ Ibid., para. 61. Like the Ruto Defense, the Defense for Sang criticized the non-exhaustive list of factors, which, according to Pre-Trial Chamber II, should be taken into account on a case-by-case basis in determining the existence of an “organization” under Art. 7(2). Defense took issue with these factors for being too wide in light of the principle of strict construction enshrined in Art. 22(2) of the Rome Statute; *ibid.*, paras. 62-66.¹⁵¹ Defense maintained that “at least a number of the factors” identified by the PTC should be proven (*ibid.*, para. 66). It further contended that the Prosecution had failed to support its allegation that a policy existed “to punish and expel from the Rift Valley those perceived to support PNU, namely, Kikuyu, Kamba, and Kisii civilians” (*ibid.*, paras. 111-116).

¹⁵² Ibid., paras. 120-122.

¹⁵³ Ibid., para. 121. In particular, Sang could not be placed at any meeting or rally, nor was it established that he discussed the attack of PNU supporters with Ruto.¹⁵³ For instance, according to the Sang Defense, the only witness who had stated that Sang had met Ruto at Sugo house on 23 December 2007, recanted the initial statement when under oath and the evidence would be both untested and uncorroborated (*Ibid.*, para. 121).

¹⁵⁴ Ibid., paras. 210, 123.

¹⁵⁵ Ibid., paras. 45-55.

¹⁵⁶ Ibid., paras. 46-47, 51, 55.

¹⁵⁷ Ibid., para. 44. The Defense for Sang criticized the Pre-Trial Chamber’s ruling that “the contribution under [Article 25(3)(d)] is satisfied by a less than “substantial” contribution, as far as such contribution results in the commission of the crimes charged.” See *ibid.*, para. 126 (referring to ICC-01/09-01/11-373, para. 354). It referred to the judgment in the *Katanga* case and the confirmation of charges decision in the *Mbarushimana* case, according to which at least a significant contribution would be required (*ibid.*, para. 127).

3. Consolidated Response of the Prosecution

The Prosecution asked for the Trial Chamber to dismiss the NCTA motions and let the trial continue.¹⁵⁸ Its consolidated response to the Defense motions argued, in relevant part, that the Defense arguments had misrepresented the NCTA threshold,¹⁵⁹ and that the Prosecution had in fact presented sufficient evidence that the crimes charged were committed,¹⁶⁰ “ample evidence” demonstrating the accused’s criminal responsibility to be held criminally liable under Article 25,¹⁶¹ and a strong basis of proof for the contextual element of crimes against humanity.¹⁶²

Referring to Decision No. 5 and jurisprudence of the *ad hoc* Tribunals, the Prosecution contended that the Chamber should only examine whether it had presented evidence supporting each count and “any one pleaded mode of liability in respect to each count” (i.e. the “existence” of evidence); there would be no reason for the Chamber to assess the strength of the evidence presented.¹⁶³ The Prosecution also rejected the argument made by the Ruto Defense that a Chamber should discount uncorroborated, hearsay or contradictory evidence on a no case to answer motion.¹⁶⁴

The Prosecution maintained that only exceptionally should issues of credibility and reliability arise at the

Key Paragraphs About the OTP’s “Network Theory”

(Source: Prosecution, consolidated response, ICC-01/09-01/11-2000-Red)

400. *The Prosecution submits that there is sufficient evidence on record at this stage that a reasonable Chamber may find establishes the existence of an organization (hereinafter “Network”). As further demonstrated below, the evidence shows that Network was a well-coordinated and hierarchical organisation with ample means at its disposal to carry out a widespread or systematic attack. The Network identified the criminal activities against PNU supporters as its primary purpose and articulated an intention to attack them.*

401. *The evidence, when viewed in aggregate, also demonstrates the improbability that the violence of the magnitude, geographical scope and duration as the attack on the charged locations could have been possible without pre-mediated and coordinated activities of the Network’s members acting pursuant to or in furtherance of the Network’s policy to punish and expel Kikuyus and other perceived PNU supporters out of the Rift Valley.*

402. *While the Prosecution acknowledges that some of the relevant factual allegations contained in the UDCC are no longer supported by the evidence, their absence is not fatal to the Prosecution’s ability to prove the existence of the organisational policy. In this respect, the Prosecution submits that it is not required to provide direct evidence of the actual meetings where the Network was formed, its policy to attack PNU supporters adopted, and the crucial steps for the implementation of the policy taken. It is sufficient to show that a reasonable Chamber may conclude that the Network of perpetrators who committed the attack on PNU supporters satisfied the six-factor test above and that it was improbable that the criminal acts committed by them in the charged locations occurred randomly.*

¹⁵⁸ Prosecution, consolidated response, ICC-01/09-01/11-2000-Red, para. 436.

¹⁵⁹ The Prosecution’s remarks on Rule 68 evidence (*ibid.*, paras.22-30) will not be addressed, as they have become moot following the Appeals Chamber’s judgment of 12 February 2016.

¹⁶⁰ Prosecution, consolidated response, ICC-01/09-01/11-2000-Red, paras. 68-98.

¹⁶¹ *Ibid.*, paras. 143-394.

¹⁶² *Ibid.*, paras. 396-403.

¹⁶³ *Ibid.*, paras. 4-8.

¹⁶⁴ *Ibid.*, para. 17.

NCTA stage—namely, when the Prosecution case can be considered to have “completely broken down” and the evidence to be “incapable of belief.”¹⁶⁵ The Prosecution argued that no such exceptional circumstances were present in this case,¹⁶⁶ thus it would therefore be inappropriate for the Chamber to assess the weight of the admitted evidence at this stage of the trial.¹⁶⁷ The Prosecution emphasized that hearsay evidence in the *viva voce* testimony and the rule 68 statements should not render the evidence either “incapable of belief” or “completely broken down.”¹⁶⁸

The Prosecution emphasized the Chamber’s ruling in Decision No. 5 that it could reject an NCTA motion if the legal characterization of facts might change under Regulation 55. It referred to the formal notice given to Ruto and the informal advice given to Sang that facts could be re-characterized to include other modes of participation.¹⁶⁹ The Prosecution maintained that the Chamber should assess whether evidence was presented that supported any of the modes set out in article 25(3)(a) to (d) for Ruto and article 25(3)(b)-(d) for Sang.¹⁷⁰

The Prosecution suggested that the Defense motions had effectively requested judicial reconsideration of the NCTA standard articulated in Decision No. 5,¹⁷¹ but that such a request was inappropriate, because the Defense failed to demonstrate “any concrete circumstances, or credible fair trial concerns,” which would warrant a departure from the established standard.¹⁷² The Prosecution submitted that the Defense arguments ignored the distinction between the determination at the halfway stage of the trial and the final decision on the guilt or innocence, thereby conflating the different standards of review articulated in Decision No. 5.¹⁷³ The Prosecution advocated application of the NCTA standard in Decision No. 5, and stressed that this approach would be “entirely consistent” with the jurisprudence of the *ad hoc* Tribunals and take due account of the fundamental differences between determinations at the confirmation stage and the NCTA stage.¹⁷⁴

The OTP averred that the Chamber should not consider individual allegations or incidents in its NCTA assessment. Such an approach would contradict current practice at the *ad hoc* Tribunals and the NCTA standard set out in Decision No. 5, according to which it would be sufficient to assess whether evidence existed in support of a charge.¹⁷⁵ The Prosecution acknowledged “the lack of direct evidence regarding certain specific details of the alleged common plan discussed at preparatory meetings of the network

¹⁶⁵ Ibid., paras. 18-19.

¹⁶⁶ Ibid., paras. 19-20.

¹⁶⁷ See *ibid.*, para. 34.

¹⁶⁸ Ibid., paras. 31-39.

¹⁶⁹ Ibid., paras. 9-10.

¹⁷⁰ Ibid., para. 11.

¹⁷¹ Ibid., para. 40.

¹⁷² Ibid., para. 41.

¹⁷³ Ibid., para. 42.

¹⁷⁴ Ibid., paras. 44-46.

¹⁷⁵ Ibid., para. 47.

members,” but nevertheless averred that sufficient direct and circumstantial evidence were presented in support of the common plan.¹⁷⁶ The consolidated response maintains that “the nature and pattern of the Kalenjin attacks in the relevant areas – including the clear indicia of organization and the direct involvement of network members – constitutes a sufficient bases on which a reasonable Chamber could conclude that the material aspects of the common plan had been agreed upon prior to the PEV.”¹⁷⁷ The Prosecution argued that the common plan was demonstrated, *inter alia*,¹⁷⁸ by (1) several preparatory meetings; (2) the training of Kalenjin youth; (3) the procurement of firearms for the purpose of the attacks; and (4) the similar pattern of the attacks.¹⁷⁹

The Prosecution noted that the Defense motions had challenged whether the Prosecution had adequately proven the existence of an organization and organizational policy and the *mens rea* required under article 7 of the Statute.¹⁸⁰ In response, it first stressed that the broad interpretation of the “organizational policy” requirement of Art. 7(2)(a) of the Statute would comply with consistent jurisprudence of the ICC Pre-Trial Chambers.¹⁸¹ Furthermore, the Prosecution argued that the interpretation of the criterion should be a question left for the final judgment on the guilt of the accused, and not fall within the ambit of an NCTA motion.¹⁸² The OTP claimed to have shown sufficient evidence for the Trial Chamber to be satisfied of the existence of the “network” as an organization within the meaning of Art. 7(2) of the Statute.¹⁸³ As regards the structure of the network, the Prosecution argued that the evidence showed it was “a well-coordinated and hierarchical organization with Mr. Ruto at the top.”¹⁸⁴ According to the OTP, the network “was based on existing tribal roles and structures of Kalenjin society.”¹⁸⁵ The consolidated response argued that the Prosecution had shown that Ruto had been “the leader and spokesperson of the Kalenjin community” and “was the controlling force in the Network,” leading to “almost automatic compliance with his instructions.”¹⁸⁶ Based on these arguments, the Prosecution asked the Trial Chamber to dismiss the Defense requests.¹⁸⁷

¹⁷⁶ Ibid., para. 148.

¹⁷⁷ Ibid., para. 148. Noting further that “the amount of preparation and coordination necessary for thousands of Kalenjin youth [...] to conduct surgical and organized attacks on specific Kikuyu houses in predominantly Kikuyu areas” would contradict the Defense argument that the attacks were spontaneous (ibid.).

¹⁷⁸ One criterion was redacted; see ibid., para. 149.

¹⁷⁹ Ibid., para. 149.

¹⁸⁰ Ibid., para. 396.

¹⁸¹ Ibid., para. 398.

¹⁸² Ibid.

¹⁸³ Ibid., para. 400.

¹⁸⁴ Ibid., para. 403.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid., para. 436.

4. Joint Reply of the Common Legal Representative for Victims (LRV)¹⁸⁸

In his submissions, the Common Legal Representative for Victims averred that the trial should continue because the Prosecution had presented sufficient evidence to meet the standard of review for NCTA proceedings.¹⁸⁹ In reply to the Sang Defense, the LRV submitted that the standard of proof should be lower than “proof beyond reasonable doubt.”¹⁹⁰ Only if the evidence were “utterly manifestly incapable of belief” should it not be taken into consideration by the Trial Chamber.¹⁹¹ In particular, the LRV submitted that the Chamber should take into account the totality of the evidence presented, and take the evidence “at its highest” (*i.e.* assume that the evidence is true), rather than “cherry-pick” and analyze specific witnesses and their testimony.¹⁹²

Referring to jurisprudence from common law countries, and to that of international criminal courts, the LRV contended that the Chamber need not enter into an assessment of the reliability and credibility of the evidence at this stage.¹⁹³ The LRV argued that neither the “minor inconsistencies” alleged by the Defense, nor the hearsay nature of some evidence render the evidence “incapable of belief.”¹⁹⁴ Similarly, the issues of corroboration and circumstantial evidence should not arise at the NCTA stage, because they are meant to be considered in the ultimate determination of the weight of the evidence at the end of the trial. The LRV cited jurisprudence from the *ad hoc* Tribunals and the ICC, indicating that a trial chamber considering an NCTA motion should not be prevented from relying on uncorroborated and circumstantial evidence.¹⁹⁵

In the opinion of the LRV, the Prosecution evidence met the required standard for the Chamber to decide not to acquit the accused at the halfway stage of the trial.¹⁹⁶ “Taken at its best,” the evidence would suggest the existence of a common purpose to commit crimes under Art. 7, as well as the existence of a network, with the common plan to evict civilians based on their ethnicity and political affiliation.¹⁹⁷ The LRV’s view of the evidence indicated that the attacks were not committed spontaneously, but rather that they were planned.¹⁹⁸ Like the Prosecution, the LRV stressed that each count should be considered separately,¹⁹⁹ and asked the Chamber not to grant the NCTA motions of the Defense.²⁰⁰

¹⁸⁸ LRV, joint reply, ICC-01/09-01/11-2005-Red.

¹⁸⁹ *Ibid.*, para. 122.

¹⁹⁰ *Ibid.*, paras. 10, 12-18.

¹⁹¹ *Ibid.*, para. 18.

¹⁹² *Ibid.*, paras. 5, 24.

¹⁹³ *Ibid.*, paras. 20 *et seq.*

¹⁹⁴ *Ibid.*, para. 36.

¹⁹⁵ *Ibid.*, paras. 55, 59-60.

¹⁹⁶ *Ibid.*, para. 7.

¹⁹⁷ *Ibid.*, para. 106.

¹⁹⁸ *Ibid.*, paras. 118-119.

¹⁹⁹ *Ibid.*, para. 121.

²⁰⁰ *Ibid.*, para. 122.

IV. Summary and Analysis of the Trial Chamber’s Decision

On 5 April 2016, two of the three Judges in Trial Chamber V(a) vacated the charges against the accused and denied the OTP’s request for a legal re-characterization of the charges.²⁰¹ However, the majority declined to grant a full acquittal, which is the traditional disposition for an NCTA motion. Instead, the majority ruled that Ruto and Sang were “discharged without prejudice to their prosecution afresh in future.”²⁰² All three Judges of the Chamber wrote separate opinions. Judge Fremr and Judge Eboe-Osuji formed a majority decision insofar as they both favored the same final disposition (dismissal of charges), although it might also be called a “plurality decision”²⁰³ since their analytical approaches and the legal rationale they gave for arriving at their respective opinions varied almost as much as they did from the dissenting member of the Chamber—Judge Herrera Carbuccia. Contrary to the majority opinions, she favored rejecting the NCTA motions and hearing the Defense cases.²⁰⁴

Any decision to terminate the trial by vacating the charges without prejudice to re-prosecution is of far-reaching importance for the accused and of great interest for the public and victims. Nevertheless, the decision of 5 April 2016 was not announced in public or even in the presence of the accused. Instead, it was subsequently transmitted in writing to the parties and participants via an internal, non-public communication mechanism at the Court, and published in redacted form on the website of the Court for the public. Rule 144(1) of the ICC Rules requires Trial Chambers to render decisions on “the admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations [...] in public and, wherever possible, in the presence of the accused, the Prosecutor, [...] the legal representatives of the victims participating [...], and the representatives of the States which have participated in the proceedings.” The provision does not explicitly refer to NCTA decisions or judgments of acquittal, so whether one of these notions encompasses decisions on requests for judgments of acquittal and decisions terminating the proceedings midway through trial is open to interpretation. However, terminating a case without prejudice for re-prosecution is arguably of similar significance, for the accused and the case, to those circumstances explicitly mentioned in Rule 144.

²⁰¹ TC V(a), decision of 5 April 2016, ICC-01/09-01/11-2027-Red, p. 1 (a corrigendum to the decision was published on 16 June 2016, ICC-01/09-01/11-2027-Red-Corr).

²⁰² Ibid.

²⁰³ For this report, we will refer to the decision as a “majority decision” although in the language of the common law tradition, the decision might also technically be called a “plurality decision.” see, e.g. James F. Spriggs II and David R. Stras, “Explaining Plurality Decisions,” *The Georgetown Law Journal* Vol. 99 (2011), 515, 516, <http://georgetownlawjournal.org/files/pdf/99-2/StrasSpriggs.pdf> (“Plurality decisions occur when a majority of Justices agree upon the result or judgment in a case but fail to agree upon a single rationale in support of the judgment.”) See also Marc Alan Thurmon, “When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions,” *Duke Law Journal* Vol. 42 (1992), 419, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3205&context=dj> (“[L]ower courts not only have to find the rationale of each opinion, but must also decide which opinion’s rationale governs. With all these choices, it is not surprising that plurality decisions often do ‘more to confuse the current state of the law than to clarify it.’” [footnote omitted]).

²⁰⁴ TC V(a), decision of 5 April 2016, Annex I: Dissenting Opinion of Judge Herrera Carbuccia, ICC-01/09-01/11-2027-AnxI.

This section takes a close look at the text of the three separate judicial opinions, and probes whether, from a legal perspective, the decision was a well-reasoned contribution to the existing international jurisprudence on early termination of criminal trials. Similar to the analytical approach taken in previous Handa Center trial monitoring publications, this report will not endeavor to provide a full retrospective of the decision and the trial,²⁰⁵ but rather will offer focused analysis of key aspects of the NCTA judgment in order to draw lessons applicable to future international criminal trial proceedings at the ICC and elsewhere.

The report considers the unusual form of the decision that resulted from each of the Judges writing separately. Namely, in Judge Eboe-Osuji's 197 pages long opinion, important pieces of consequential judicial analysis were unfortunately buried amidst many *obiter dicta*, making it cumbersome to discern the jurisprudence on important foundational subjects (such as standards of review), which one might reasonably anticipate will be referenced in future cases. Of course, the mere scope of the decision does not alone indicate whether the reasoning on the core legal issues is sound or inadequate. Nevertheless, the length of the decision (including all three opinions) is noteworthy, as it spans more than 300 pages and, hence, is comparable in length to a judgment under Art. 74 of the Rome Statute.²⁰⁶ Also puzzling is the divergence of judicial opinions about the standard of review and about what impact the finding of witness interference should have had.²⁰⁷ As will be argued in greater detail below, there is a doubtful basis in law for the specific remedy (mistrial) offered by one of the three judges, and this problem is compounded by concerns about procedural unfairness since none of the parties ever had the opportunity to be heard on the subject of mistrial as a remedy. The careful analysis of the weight and credibility of the Prosecution evidence in Judge Fremr's opinion deserves to be mentioned as a positive example of sound and transparent judicial reasoning.²⁰⁸ Ultimately however, this NCTA decision represents a troubling piece of

²⁰⁵ See e.g. David Cohen *et al.*, *A Well-Reasoned Opinion? Critical Analysis of the First Case Against the Alleged Senior Leaders of the Khmer Rouge*, https://handacenter.stanford.edu/sites/default/files/report-documents/A%20Well%20Reasoned%20Opinion%20%28Cohen%20Van%20Tuy%20Hyde%20Nov%202015%29_0.pdf.

²⁰⁶ The separate opinion of Judge Fremr is 55 pages long, that of Judge Eboe-Osuji even has 197 pages, and the dissenting opinion of Judge Herrera Carbuca (an annex to the majority's opinion) spans 44 pages. A two-page long section (termed "decision"), signed by all three judges, precedes the two majority opinions. It merely states the decision of the majority to (a) vacate the charges against the accused and discharge them "without prejudice to their prosecution afresh in future" and (b) reject the Prosecution's requests for legal re-characterisation of the charges. It further notes that this decision is based on "(a) the evidential review set out in Judge Fremr's reasons; and, (b) the reasons indicated separately below by Judge Fremr and Judge Eboe-Osuji." TC V(a), decision of 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, pp. 1-2.

²⁰⁷ Only Judge Eboe-Osuji favored the remedy of mistrial. Judge Fremr and Judge Herrera Carbuca both rejected declaring a mistrial.

²⁰⁸ The fact that he undertook such a detailed credibility assessment in the first place is however controversial, because one might argue (as Judge Herrera Carbuca wrote in her dissent; TC V(a), decision of 5 April 2016, Annex I: Dissenting Opinion of Judge Herrera Carbuca, ICC-01/09-01/11-2027-AnxI,) that the Court departed from the NCTA standard of review it had previously adopted through its own jurisprudence (Decision No. 5). See also International Bar Association, *Evidence Matters in ICC Trials*, August 2016, p. 57-58.

jurisprudence in a number of respects, which were unfortunately not immediately clarified by the Appeals Chamber since both sides of the case had strategic disincentives to appeal the Trial Chamber's decision.²⁰⁹

This section begins by addressing the rather unusual structure of the decision, and Judge Herrera Carbuca's criticism that the majority's decision "contains insufficient reasoning, since Judge Eboe-Osuji and Judge Fremr have both given separate reasons."²¹⁰ The section then analyzes whether the majority *de facto* reconsidered the Decision No. 5 standard of review for NCTA motions, and considers whether or not it was appropriate for the majority to look at the quality of the evidence and make specific credibility assessments when determining whether or not the Prosecution had met its burden of proof for the halfway point in the trial. The section concludes with critical analysis of the majority's decision to vacate the charges without entering an acquittal.

1. Unusual Form of the Decision

It is a matter of fairness that the parties receive a sound legal decision, which contains a clear, systematic, and comprehensive factual and legal analysis.²¹¹ Poorly reasoned decisions may create confusion for the parties and the public, and hinder meaningful appellate review.²¹² Furthermore, the ICC has tried only few cases thus far, and the body of ICC jurisprudence is still small and evolving. Accordingly, the jurisprudential effect of this first decision on a midtrial request for judgment of acquittal should not be underestimated. If a key decision, especially one relating to the conviction or acquittal of the accused, is poorly reasoned, it creates confusion amongst the parties, the public, and States Parties, and in so doing, threatens the Court's reputation, authority, and legitimacy.²¹³ It is therefore incumbent upon judges at the ICC to comply with high standards and best practices when drafting opinions, particularly if they are final. After all, these decisions affect more than just the liberty and public reputation of one or two individual accused; as foundational pieces of international jurisprudence that set rules and expectations about international accountability processes, they may also have an impact on how societies deal with the aftermath of systemic violence and conflict.²¹⁴

²⁰⁹ If either of the Defense teams appealed the "mistrial" issue to get a more straightforward judgment of acquittal, they would run the risk of having the Appeals Chamber overturn the decision altogether, reinstate the charges, and order the case to proceed with Defense evidence. The Prosecution faces a similar but inverse risk. The existing decision dismisses the charges without prejudice, so it leaves open the possibility for the OTP to bring the case anew, with stronger evidence, if they can find it. If the Prosecution were to appeal the decision, they run the risk that the Appeals Chamber will simply issue a traditional judgment of acquittal, and foreclose the possibility of future re-prosecution. See also Part VIII of the Rome Statute.

²¹⁰ TC V(a), decision of 5 April 2016, Annex I: Dissenting Opinion of Judge Herrera Carbuca, ICC-01/09-01/11-2027-AnxI, fn. 1.

²¹¹ David Cohen *et al.*, *A Well-Reasoned Opinion? Critical Analysis of the First Case Against the Alleged Senior Leaders of the Khmer Rouge*, https://handacenter.stanford.edu/sites/default/files/report-documents/A%20Well%20Reasoned%20Opinion%20%28Cohen%20Van%20Tuy%20Hyde%20Nov%202015%29_0.pdf.

²¹² *Ibid.*

²¹³ See, e.g., <http://www.standardmedia.co.ke/ureport/story/2000197744/why-the-icc-is-useless-to-kenya>; <http://allafrica.com/stories/201604110962.html>.

²¹⁴ On the foregoing, see David Cohen *et al.*, *A Well-Reasoned Opinion? Critical Analysis of the First Case Against the Alleged Senior Leaders of the Khmer Rouge*, p. 35 https://handacenter.stanford.edu/sites/default/files/report-documents/A%20Well%20Reasoned%20Opinion%20%28Cohen%20Van%20Tuy%20Hyde%20Nov%202015%29_0.pdf.

Brief overview of TC V(a)'s decision of 5 April 2016

Trial Chamber V(a), by majority, vacated the charges against the accused and denied the OPT's request for a legal re-characterization of the charges. Ruto and Sang were "discharged without prejudice to their prosecution afresh in future." Judge Fremr and Judge Eboe-Osuji gave separate reasons leading to this majority decision, Judge Herrera Carbuccia added a dissenting opinion.

The reasons of Judge Fremr: Judge Fremr outlined the procedural history of the NCTA motions and made some clarifications as to the standard of review applicable in NCTA proceedings. Based on a detailed analysis and discussion of the evidence presented, Judge Fremr concluded that the evidence would not allow a reasonable trial chamber to find that the alleged Network existed, nor could a reasonable trial chamber find evidence of a common plan pursuant to article 7(2)(a) of the Statute. He also considered a legal re-characterization of the facts unwarranted. Consequently, Judge Fremr held that neither Sang nor Ruto had a case to answer under the original charges. He agreed with Judge Eboe-Osuji to vacate the charges given the particular circumstances of this case, but would have preferred a judgment of acquittal. While there would be no direct link between the accused and the witness interference, he opined that they have benefitted from it since, *inter alia*, key witnesses have been interfered with. Unlike Judge Eboe-Osuji, Judge Fremr did not consider the witness interference to have affected the proceedings or the OPT's ability to produce more evidence in such a way as to warrant declaring the trial "null and void."

The reasons of Judge Eboe-Osuji: Judge Eboe-Osuji found it necessary to "revisit" and clarify the standard applied in Decision No. 5, giving "due regard to the unique features" of the ICC. He declared that he "fully" adopted the evidential assessment made by Judge Fremr. Although he found that the Prosecution case in *Ruto and Sang* was weak, Judge Eboe-Osuji expressed misgivings about the ordinary outcome of a no case to answer finding (i.e. a judgment of acquittal). The Judge considered acquittal to be inappropriate in light of the specific circumstances of the case. He instead favoured declaring a mistrial, based on his finding that there was "a troubling incidence of witness interference and intolerable political meddling." Judge Eboe-Osuji stated that the charges should be vacated and the accused discharged, albeit without prejudice to their presumption of innocence or the right of the Prosecution to re-prosecute them in the future. He further considered that submissions should be heard on reparations for victims.

The dissenting opinion of Judge Herrera Carbuccia: Judge Herrera Carbuccia emphasized that the standard of review, as adopted in Decision No. 5, called only for a *prima facie* assessment focusing on the existence of the evidence and not on its weight. Judge Herrera Carbuccia's evidentiary analysis was therefore limited to the question whether evidence existed on the particular charges, not on the quality of such evidence. She found that the Prosecution had presented evidence to the Chamber upon which a reasonable trial chamber could conclude that the post-election violence was a systematic and widespread attack against Kikuyu and PNU supporters following an organizational policy, and not merely spontaneous in nature. She also opined that evidence had been presented on the individual criminal responsibility of the accused (with the exception of Ruto's liability as an indirect co-perpetrator according to article 25(3)(a)) as well as the underlying acts charged (murder, deportation or forcible transfer and persecution). Judge Herrera Carbuccia would therefore have rejected the NCTA motions and heard the Defense cases.

As noted, the decision of 5 April 2016 is structured in a rather unusual manner, when compared to similar decisions in modern international criminal courts, because each of the three Judges gave a separate opinion outlining his or her respective reasons. The common ground of the majority Judges in finding that the charges should be vacated has to be discerned from their respective separate opinions, which may lead to confusion.²¹⁵ The reasoning in the separate opinions of the majority Judges on the legal basis for vacating the charges is a core matter of concern. While the majority Judges agreed that the Prosecution evidence was insufficient to merit a response from the Defense, they did not write together even on fundamental issues like on the standard of review for the assessment of evidence and the factual analysis. Instead, each Judge made his own observations on and “clarifications” of the standard previously articulated in Decision No. 5.

While the respective opinions of Judges Fremr and Herrera Carbuccia focus largely on factual and legal questions that are directly related to the core matters raised by the NCTA motions, the opinion of Judge Eboe-Osuji also addresses a number of issues that are not directly linked to the legal question whether the accused should be acquitted at this stage of the trial.²¹⁶ For instance, neither the issue of immunity of Heads of State, nor his preliminary remarks²¹⁷ or interpretation of “organisational policy” are materially relevant to deciding the motions. These portions of the decision constitute *obiter dicta*, which, especially given the overall length of the analysis, makes it difficult for the reader to discern what the key themes and arguments of the opinion are meant to be. This seems to have also contributed to the rather critical reception of the opinion by academic commentators.²¹⁸

Overall, the decision raises two questions in terms of the quality of reasoning. First, is the reasoning deficient, as dissenting Judge Herrera Carbuccia criticized, because each majority Judge has given a separate opinion? Second, was the reasoning of the majority legally sound, *i.e.* did it sufficiently outline the legal basis for finding that the charges should be vacated without prejudice for a re-prosecution of the accused?

No provision in the ICC’s statutory framework expressly regulates how midtrial judgments of acquittal or NCTA decisions should be rendered (there is indeed no provision on NCTA motions at all, as mentioned previously).²¹⁹ It is therefore necessary to refer to the general principles and rules on the structure of Trial Chamber’s decisions at the ICC. There exists no provision in the Rome Statute or the Rules explicitly prohibiting judges from writing separately, as a matter of principle. For final judgments, separate concurring and dissenting opinions have become established practice in international criminal trials

²¹⁵ See, e.g. <http://www.theafricareport.com/East-Horn-Africa/kenyatta-and-ruto-claim-vindication-after-collapse-of-icc-case.html>. The majority Judges agreed in regard to the evidential review; see TC V(a), decision of 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, pp. 1-2.

²¹⁶ See TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, para. 4.

²¹⁷ *Ibid.*, paras. 12-39.

²¹⁸ See for example <http://humanrightsdoctorate.blogspot.nl/2016/04/the-mistrial-innovation-in.html>, <http://opiniojuris.org/2016/04/08/the-icc-invents-the-possibility-of-a-mistrial/>.

²¹⁹ In contrast, rule 98*bis* of the ICTR Rules states that judgments of acquittal are to be rendered orally.

generally, including at the ICC,²²⁰ However, Article 74 of the Rome Statute requires judges to attempt to achieve unanimous final decisions on the guilt or innocence of the accused. Pursuant to this provision, judges shall only issue one decision. If there is no unanimity, the decisions shall contain the views of the majority and the minority. Article 74 pertains to the ultimate decision on the guilt or innocence of the accused, yet its rationale underlying the preference for unanimity is also relevant to decisions on midtrial requests for judgment of acquittal.²²¹

There is a debate among legal practitioners over the appropriateness of (extensive) separate concurring and dissenting opinions. Underlying the different approaches are also the divergent principles and priorities preferred by those trained in common law jurisdictions on the one hand, and civil law jurisdictions on the other.²²² As U.S. Supreme Court Justice Ruth Bader Ginsburg has pointed out, these differences are influenced by the respective understanding of the role of the judge and the scope of individuality to be permitted.²²³ In short, while common law jurisdictions are generally said to emphasize transparency, the individuality and accountability of the individual judge, civil law jurisdictions can be described as valuing clarity and certainty quite highly.²²⁴

On the one hand, separate opinions at the ICC can foster transparency, which is important particularly for an international court and organization. They may make it easier for the public, legal practitioners, and the Appeals Chamber to discern the motivation of an individual Judge announcing a particular finding and holding them individually accountable for any poor reasoning. However, all Judges writing separately can also suggest a dysfunctional chamber and therefore be detrimental to the authority of the ruling. If a Trial Chamber produces a single common reasoning, at least speaking for a majority of the Court, this could arguably support greater legal certainty and more meaningful appellate review. Whichever approach a court favors, at a minimum, decisions should fulfill the most basic requirement to be sufficiently clear to be understood by the accused and the public. In an international context, this also means that it is written in an adequately concise manner and, as far as possible, in an accessible language.²²⁵

Based on these considerations, it could be said that the decision of 5 April 2016 fosters transparency, insofar as it does allow readers to clearly differentiate and, consequently, appraise the respective reasons of the individual Judges. However, only the ultimate disposition of the majority is clearly stated – the

²²⁰ See Nina H.B. Jorgensen and Alexander Zahar, *Deliberation, Dissent, Judgment*, in: G Sluiter *et al.* (eds.), *supra*, 1151, 1183, 1186-1187; 1190-1193, 1196, 1199.

²²¹ Particularly since NCTA motions are not regulated in the ICC's legal instruments.

²²² Furthermore, caution should be exercised in making inferences from the structure of rulings in constitutional cases for criminal cases given the different nature of the proceedings compared to a criminal trial. For a discussion, see Jorgensen and Zahar, *Deliberation, Dissent, Judgment*, in: Sluiter *et al.* (eds.), *supra*, 1151, 1186-1187.

²²³ Ruth Bader Ginsburg, *Remarks on Writing Separately*, *Washington Law Review* Vol. 65 (1990), 133, pp. 133-134.

²²⁴ *Ibid.*, pp. 139-140, 143-145. See also the discussion in Jorgensen and Zahar, *Deliberation, Dissent, Judgment*, in: Sluiter *et al.* (eds.), *supra*, 1151, 1186-1187.

²²⁵ For the foregoing, see Jorgensen and Alexander Zahar, *Deliberation, Dissent, Judgment*, in: Sluiter *et al.* (eds.), *supra*, 1151, 1186-1187; M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, John M. Olin Program in Law and Economics Working Paper No. 363, 2007.

underlying rationale must be laboriously discerned by looking for confluence in reasoning between the two separate opinions of the majority Judges. As will be discussed below, it is not at all clear the majority Judges in fact agreed on important matters such as the standard of review or the appropriate legal remedy, so similarly situated future defendants at the ICC will be left with less certainty rather than more as a result of this decision.

2. *De Facto* Reconsideration of the Standard of Review for NCTA Motions?

Trial Chamber V(a) articulated a standard of review for NCTA motions over two years ago in Decision No. 5. The previously articulated standard embraced a similar approach to the one favored by the *ad hoc* Tribunals electing “not [to] consider questions of reliability and credibility [...] save where the evidence in question is incapable of belief by any reasonable Trial Chamber.”²²⁶ In her dissent, Judge Herrera Carbuccia emphasized that this standard would only entail a *prima facie* assessment of the evidence, focusing just on the existence of the evidence.²²⁷ Judge Herrera Carbuccia therefore concluded that Defense submissions asking the Chamber to analyze the credibility and reliability of evidence should be rejected.²²⁸ In her opinion, the majority Judges seem to have applied a qualitative standard, which evaluates the degree to which they found individual evidence reliable. This alternate analytical approach, the dissenting Judge suggested, amounted to backdoor or *de facto* a reconsideration of Decision No. 5.²²⁹

The standard for reconsideration, according to Trial Chamber V(a)’s jurisprudence, is relatively strict:

Reconsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.²³⁰

In her dissenting opinion, Judge Herrera Carbuccia noted that the Defense did not request leave to appeal Decision No.5. She therefore concluded that the Chamber could not at this stage depart from its previous rulings on the standard of review, without violating principles of legal certainty, overall fairness, and expeditiousness of the proceedings.²³¹ The high standard for reconsideration does not seem to be met in this case: No clear error of reasoning is discernible in the standard adopted in Decision No. 5, which, as noted, draws on established jurisprudence of the *ad hoc* Tribunals.²³² It is also questionable whether reconsideration would be necessary to prevent an injustice in this case. That said, it may be noted that the standard set out in paragraph 23 of Decision No. 5 is rather abstract and short, which makes interpretation and clarification indispensable. Assessing the quality of the evidence would also not contradict another provision in the ICC’s legal framework. Bearing in mind the Court’s distinct procedural system and the

²²⁶ Decision No. 5, para. 23.

²²⁷ TC V(a), decision of 5 April 2016, dissenting opinion of Judge Herrera Carbuccia, ICC-01/09-01/11-2027-AnxI, paras. 17-18.

²²⁸ *Ibid.*, para. 21.

²²⁹ *Ibid.*, para. 23.

²³⁰ TC V(a), decision of 10 February 2015, ICC-01/09-01/11-1813, para.19.

²³¹ TC V(a), decision of 5 April 2016, dissenting opinion of Judge Herrera Carbuccia, ICC-01/09-01/11-2027-AnxI, para. 21.

²³² See also International Bar Association, Evidence Matters in ICC Trials, August 2016, p. 56.

sources of law mentioned in Art. 21 of the Rome Statute, the standard also does not require that the judges follow the jurisprudence of the *ad hoc* Tribunals or domestic interpretations. If it “has become evident that no finding of guilt beyond all reasonable doubt can follow”²³³ because of the weakness of the evidence, it indeed appears reasonable to end the trial in order to guarantee the rights of the accused to be tried fairly and expeditiously.²³⁴

In his separate opinion, Judge Fremr did recall the standard of review applicable to NCTA decisions, as established by Decision No. 5,²³⁵ but he then proceeded to “clarify” the standard as giving the Trial Chamber the power to acquit the accused and end the trial at the halfway stage if, after having assessed the evidence, it is not persuaded that the evidence could support a conviction beyond reasonable doubt.²³⁶ Whether *another* trial chamber could potentially be satisfied beyond reasonable doubt of the accused’s guilt, after having evaluated the very same evidence, would not be decisive in the opinion of Judge Fremr. He concluded that such an interpretation of the standard of review would conform to the rationale of NCTA litigation and protect the rights of the accused.²³⁷ Judge Fremr considered that his interpretation complied with the standard set out in Decision No. 5.²³⁸ He further opined that in the interests of justice and “provided that the circumstances and the information available to the Trial Chamber allow for it,” the Chamber “should” assess not only the quantity, but also the quality of the evidence when deciding on whether there is a case to answer.²³⁹ According to him, this type of credibility assessment is warranted “where the evidence [...] is of an isolated nature and the falling away of any of the testimonies [...] would cause (significant) gaps in the Prosecution’s theory of the case that would make it unlikely that a conviction in the case could ultimately follow.”²⁴⁰

Judge Eboe-Osuji, meanwhile, did consider that the Defense request—asking the Chamber to take into account the *quality* as well as the quantity of the evidence—amounted to a request for reconsideration of the NCTA standard of review.²⁴¹ However, it was nonetheless a request toward which he was positively disposed.²⁴² As he wrote in his separate opinion, he found it necessary to “revisit” and clarify the standard

²³³ TC V(a), decision of 5 April 2016, opinion of Judge Fremr, ICC-01/09-01/11-2027-Red-Corr, para. 19.

²³⁴ *Inter alia* given the length and high cost of international criminal trials. See also *ibid.*, para. 144; TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, para. 123. This standard would still be distinct from the assessment at the end of trial as it examines whether *no* finding of guilt beyond reasonable doubt can possibly be made, rather than asking whether guilt has actually been established beyond reasonable doubt. *Contra*, TC V(a), decision of 5 April 2016, dissenting opinion of Judge Herrera Carbuca, ICC-01/09-01/11-2027-AnxI, para. 21. See also TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, para. 124; Tochilovsky, *supra*, p. 539.

²³⁵ TC V(a), decision of 5 April 2016, opinion of Judge Fremr, ICC-01/09-01/11-2027-Red-Corr, paras. 17-18, 144 *et seq.*

²³⁶ *Ibid.*, paras. 18-19.

²³⁷ *Ibid.*, paras. 17-19 (referring to the partially dissenting opinion of Judge Pocar in the *Jelisić* case).

²³⁸ *Ibid.*, para. 144.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, paras. 87 *et seq.*

²⁴² *Ibid.*, paras. 93 *et seq.*

applied in Decision No. 5, giving “due regard to the unique features” of the ICC:²⁴³ namely the fact that the Pre-Trial Chamber embarks on a qualitative assessment of the evidence in the confirmation of charges proceedings at the beginning of trial, and the duty of the Trial Chamber to ensure the fairness and expeditiousness of the trial proceedings pursuant to Art. 64(2).²⁴⁴ Following an extensive discussion of case law from common law countries, as well as references to jurisprudence of the *ad hoc* Tribunals, Judge Eboe-Osuji found that the appropriate “operative approach” to NCTA assessments would be to “consider the case for the Prosecution as a whole.”²⁴⁵ In his opinion, such an approach could entail “a provisional review of the strengths and weaknesses” of the Prosecution evidence, which should take into account factors affecting credibility and reliability.²⁴⁶ Judge Eboe-Osuji stressed that the assessment should be provisional, but nevertheless be comprehensive to allow terminating weak Prosecution cases.²⁴⁷ He noted that a case should not be regarded as weak “if the case is capable in resulting in a conviction.”²⁴⁸ Such capability would already be present when it follows from the Prosecution evidence that a conviction is equally likely as an acquittal.²⁴⁹

It is noteworthy that Art. 64(2) of the Rome Statute plays a key role in the reasoning of the Chamber’s majority Judges. It is cited as legal basis for NCTA determinations, which would normally end with an acquittal when the evidence is found insufficient.²⁵⁰ Furthermore, Judge Fremr argued that this article provides a basis for assessing the quality of the evidence at the halfway stage of the trial, even if there were no NCTA motion, although he does not specify whether the result of such a finding, absent an NCTA motion, should then also be an acquittal.²⁵¹ According to Judge Eboe-Osuji, Art 64(2) of the Rome Statute would constitute “an important statutory basis to terminate a weak case at the conclusion of the case for the Prosecution, particularly in an already lengthy

**Art. 64(2) of the Rome Statute (excerpt):
Functions and powers of the Trial Chamber**

The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

²⁴³ Ibid., paras. 93, 95.

²⁴⁴ Ibid., paras. 121-123.

²⁴⁵ Ibid., para. 115.

²⁴⁶ Ibid. In conclusion, Judge Eboe-Osuji considered it possible to interpret the notion of taking the Prosecution case “at its highest” in a manner that would allow an assessment of the reliability and credibility of Prosecution evidence at the halfway stage of the trial (ibid., paras. 124-125). Such approach would consist of the following two steps: (1) An assessment of the Prosecution case “as a whole”, which takes into account the strengths and weaknesses of the evidence; and (2) an “appraisal of what is left of the case at its remaining highest point”, which examines whether “the remainder of the evidence is still strong enough to raise the case to the minimum level of equal likelihoods of conviction and acquittal” (ibid., para. 124).

²⁴⁷ Ibid., para. 115.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ See, e.g., ibid., para. 123. Decision No. 5, paras. 12 *et seq.*

²⁵¹ TC V(a), decision of 5 April 2016, opinion of Judge Fremr, ICC-01/09-01/11-2027-Red-Corr, paras. 145-146. He noted that “the Chamber’s statutory powers under Article 64(2) are not constrained by its adoption (based on the proposal of the parties) of a procedure to guide the no-case submissions” (ibid., para. 145).

process.”²⁵² Judge Eboe-Osuji also relied on Art. 64(2) of the Statute as legal basis for declaring a mistrial without prejudice for future re-prosecution, in lieu of an acquittal, as will be scrutinized in greater detail below.

3. Specific Evidentiary Assessments and Their Respective Consequences

In their separate opinions, each of the Judges conducted his or her own assessment of the Prosecution evidence, to the extent that fit within their own conclusions about the standard of review, thus the opinions differed not just in conclusion but in approach. Before analyzing the divergent conclusions the Judges reached on specific remedies in this case, it makes sense to review the individual findings from each opinion on the strength of the evidence.

a. Evidentiary Assessment of Judge Fremr

As noted in the previous section, Judge Fremr concluded that article 64(2) of the Statute would provide a basis for the Trial Chamber to end the trial even absent an NCTA motion, if the evidence presented by the Prosecution was simply too weak.²⁵³ Judge Fremr specified that he would have made use of this power *proprio motu*, had there not been a NCTA motion.²⁵⁴ After having addressed the applicable standard of review,²⁵⁵ Judge Fremr proceeded with an examination of the evidence that the Prosecution had adduced at trial.²⁵⁶ He noted that the Prosecution’s case depended on the existence of the so-called “network,” which had allegedly planned to evict PNU supporters from the Rift Valley. Judge Fremr further noted that Ruto was alleged by the Prosecution to have been at the top of the Network’s hierarchy and Sang to have been a prominent member.²⁵⁷ Judge Fremr criticized the Prosecution for not providing clear evidence on the membership and functioning of the alleged Network, but rather basing the allegation largely on circumstantial evidence.²⁵⁸ Unlike his colleague Judge Herrera Carbuca, writing in dissent, Judge Fremr did not believe that, based on the available information, the Chamber was in a position to call any additional evidence under Art. 69(3) of the Rome Statute, which would have changed the outcome of his assessment.²⁵⁹ Based on a detailed analysis and discussion of the evidence presented,²⁶⁰ Judge Fremr found that there was not sufficient evidence to support the separate allegations on which the OTP relied to prove the network *qua* inference (namely, on preparatory meetings, training of Kalenjin youth, the acquisition of

²⁵² Ibid., para. 123.

²⁵³ Ibid., paras. 145-146.

²⁵⁴ Ibid.

²⁵⁵ In this context, he *inter alia* stressed that convicting the accused on the basis of an inference drawn from circumstantial evidence would necessarily require that “all realistic possibilities consistent with innocence” have had to be rejected as unreasonable. Ibid., para. 23.

²⁵⁶ Ibid, paras. 25-131.

²⁵⁷ Ibid., para. 29.

²⁵⁸ Ibid., paras. 27-33.

²⁵⁹ ICC-01/09-01/11-2027-Red-Corr, para. 24.

²⁶⁰ This also included an overall evaluation of the evidence; *ibid.*, paras. 123 *et seq.*

weapons to be used in the attacks, the similar pattern of the attacks, a cleansing ceremony after the violence, as well as discipline and punishment mechanisms).²⁶¹

Preparatory meetings: The Prosecution’s allegations that an overall common plan had been established rested on the existence of three preparatory meetings in Ruto’s house in Sugoi. To prove this assertion, the OTP relied on the prior recorded testimony of witnesses 397, 60, and 495. Since these were, however, suppressed from evidence following the Appeals Chamber’s decision of February 2016, Judge Fremr concluded that the OTP had failed to produce direct evidence on the existence of a common plan.²⁶² He then examined whether circumstantial evidence presented at trial would show that a common plan existed amongst the alleged Network members.²⁶³

Training: Judge Fremr noted that following the Appeals Chamber’s judgment, the only remaining evidence on the training of Kalenjin youth was the testimony of witness 800. However, this testimony was hearsay in nature,²⁶⁴ and moreover the witness had intentionally misled the Court by only revealing the source of his information in cross-examination.²⁶⁵ Witness 800 also admitted to having been involved in witness tampering.²⁶⁶ The witness’s “willingness to lie in return for personal gain”²⁶⁷ and his admitted involvement in witness tampering led Judge Fremr to conclude that the testimony could not be relied upon by a reasonable Trial Chamber.²⁶⁸ In his view, the OTP had consequently not adduced any evidence showing “that Kalenjin youths were trained in anticipation of the post-election violence for the purpose of attacking the Kikuyu and other perceived PNU supporters to drive them from the Rift Valley.”²⁶⁹

Procurement of weapons:²⁷⁰ Judge Fremr found that the OTP had failed to lead sufficient evidence for a reasonable Trial Chamber to find that the network bought weapons, including firearms, in order to attack the Kikuyu and supporters of the PNU.²⁷¹ The evidence presented could not support the assertion that the weapons allegedly bought had actually been used, which might be because they had not been intended to

²⁶¹ Ibid., paras. 33-122.

²⁶² Ibid., paras. 34-37.

²⁶³ Ibid., para. 37.

²⁶⁴ Ibid., paras. 39-40 (pointing to the source of the information, witness 495, whose statement, which albeit is no longer in evidence, would not refer to the training of Kalenjin youths in Bronjo before the election; *ibid.*, para. 40).

²⁶⁵ Ibid., paras. 40-41.

²⁶⁶ Ibid., para. 42.

²⁶⁷ Ibid., para. 43.

²⁶⁸ Ibid., paras. 42-43.

²⁶⁹ Ibid., para. 44.

²⁷⁰ Footnote 79 is particularly noteworthy as regards Judge Fremr’s approach to inferences pointing to the guilt or innocence to the accused, which rejects the approach proposed by the OPT: “If multiple other reasonable inferences can be made that would indicate towards the accused’s innocence, or at least do not support a finding of guilt, there would be no case to answer. At this stage, after which the Prosecution has presented all its evidence, the inference that the Prosecution wishes the Chamber to draw upon their evidence should be the only, or most reasonable, inference; not one of several possible explanation for certain acts or behaviour.”

²⁷¹ Ibid., para. 62.

carry out attacks.²⁷² Judge Fremr stressed that “[a]t best, a reasonable Trial Chamber might infer [...] that some persons acquired a relatively small amount of weapons, which may actually not have been used [...] to attack the Kikuyu.”²⁷³ He noted, for instance, that the only remaining witness who directly implicated Ruto in the purchasing of guns in late December 2007 was witness 356.²⁷⁴ The witness also testified about alleged broadcasts of Sang on Kass FM.²⁷⁵ Judge Fremr did not consider that the testimony provided a “sufficiently solid”²⁷⁶ basis “for a proper conviction.”²⁷⁷ He criticized the witness’s account for not mentioning when the guns were acquired and whether they were actually used in the crimes charged according to the alleged network’s common plan.²⁷⁸ Judge Fremr also noted that the testimony was not corroborated.²⁷⁹ The Judge then gave additional explanation about why it was appropriate in this context to consider the credibility of the testimony of the witness:

*[I]f the entirety of the Prosecution’s case hinges on the testimony of one witness, where it initially intended to rely on a number of witnesses, it can certainly be argued that the case teeters on the brink of breaking down. In such circumstances, the question as to whether the one key witness provides a credible account becomes a central issue in determining whether or not there is any point in continuing the trial proceedings. It is then appropriate – as the Prosecution appears to acknowledge – to consider the weight that is to be accorded to the testimony of the witness concerned.*²⁸⁰

Judge Fremr explicitly pointed out several deficiencies in the witness’s testimony that affected his credibility, including a repeated change in key aspects of his account.²⁸¹ Witness 356 could not sufficiently explain these inconsistencies, and furthermore “appear[ed] to have been deceitful in some his dealings with the Prosecution [and] the Victims and Witnesses Unit of the Registry [...] show[ing] that he is capable of acting in a mendacious manner.”²⁸² Judge Fremr emphasized that even if the witness’s credibility were not taken into consideration, the testimony stands alone and could not be the basis of a conviction.²⁸³

Pattern of the attack: The OTP had maintained at trial that the alleged pattern of the attack would show they were planned and directed by the Network and conducted in furtherance of an organizational policy.²⁸⁴ As regards the OTP’s alleged pattern of attacks, Judge Fremr however concluded that the

²⁷² Ibid., para. 48.

²⁷³ Ibid., para. 48.

²⁷⁴ Ibid., para. 54 (outlining that the evidence of other witnesses could not be relied upon following the Appeals Chamber’s decision on Rule 68).

²⁷⁵ Ibid., para. 54.

²⁷⁶ Ibid., para. 56.

²⁷⁷ Ibid., para. 56.

²⁷⁸ Ibid., para. 55.

²⁷⁹ Ibid., para. 56.

²⁸⁰ Ibid., para. 57.

²⁸¹ Ibid., paras. 58-59 (most notably did the witness not mention an alleged phone conversation with Ruto).

²⁸² Ibid., para. 61.

²⁸³ Ibid., para. 61.

²⁸⁴ Ibid., para. 63.

number of samples was too narrow to prove “a recurrence of the same events or elements in the same manner on different occasions or in different places for the majority, or at least a significant number, of the attacks.”²⁸⁵ In his opinion, “no reasonable Trial Chamber could infer from the available evidence that the attacks against Kikuyu and other perceived PNU supporters in Uasin Gishu and Nandi districts followed a regular, let alone a ‘strikingly similar’ pattern.”²⁸⁶ Judge Fremr considered the evidence adduced to be “anecdotal and insufficiently linked to the Network.”²⁸⁷ Accordingly, he rejected the allegation that the attacks followed an organized and surgical pattern.²⁸⁸ Furthermore, while there was evidence on the existence of roadblocks in the record, Judge Fremr did not believe it clearly showed that roadblocks were erected and used in a manner that demonstrated a pattern coordinated and planned by the network and with discriminatory intent.²⁸⁹ Judge Fremr also found that the OTP had not presented evidence sufficiently supporting the allegation that Network members had provided assistance and direction to Kalenjin attackers on the ground, first through local meetings “with the purpose of mobilizing the Kalenjin attackers to implement the common plan,”²⁹⁰ and second through using a communications system.²⁹¹

Cleansing ceremonies: Judge Fremr addressed the sufficiency of the evidence presented in support of the allegation that the network had held a cleansing ceremony for direct perpetrators in Nabkoi Forest in May 2008.²⁹² He noted that the assertion again rested only on the deficient testimony of witness 800, which he considered rendered the allegation “incapable of belief.”²⁹³ Judge Fremr questioned why other observers did not note such a big event, and, in any event, he concluded that the evidence given by the witness, taken at its highest, only supported the interference that the participation at such ceremony might entail approval of the violence. However, it could also point to the condemnation of the acts.²⁹⁴

Discipline and punishment mechanisms: The OTP’s assertions relating to the “Nandi Tribunals” (which allegedly were set up to punish Kalenjin supporting the PNU and were presided by Network members), could not be upheld as they were essentially based on recanted testimony that was judged inadmissible by

²⁸⁵ Ibid., para. 112.

²⁸⁶ Ibid., para. 113.

²⁸⁷ Ibid., para. 86.

²⁸⁸ Ibid., paras. 86-87.

²⁸⁹ Ibid., paras. 88-94. The incriminating evidence of witness 800 was found to be speculative, incapable of showing that Ruto was involved in the operation of the roadblocks. Neither would the testimony of witness 658 show that Sang’s involvement in the organization of the roadblocks. Indeed, Judge Fremr noted that mere commenting on the roadblocks in broadcasts would not be an indication of Sang’s participation in the alleged Network as their existence was already public knowledge.

²⁹⁰ Ibid., para. 95.

²⁹¹ Ibid., paras. 95-110. Judge Fremr furthermore rejected the OTP’s argument that war cries were or could be proof of a pattern of the attacks (ibid., paras. 65-67).

²⁹² Ibid., para. 114.

²⁹³ Ibid., para. 116.

²⁹⁴ Ibid., para. 117 („Cleansing and reconciliation initiatives are common practice in numerous cultures and religions. [...] Indeed, participation by a given individual may equally be interpreted as an expression of collective condemnation of the incidents in question.“).

the Appeals Chamber.²⁹⁵ Judge Fremr noted that the allegation of the existence of punishment mechanisms rested only on the testimony of witness 658.²⁹⁶ Yet, in his view, the evidence showed neither firm discipline nor oversight, and was inadequate to prove that the network had established a punishment or disciplinary system.²⁹⁷ Evidence on the record was also too “ambivalent”²⁹⁸ to show the existence of a rewarding system for Kalenjin youths.²⁹⁹

Based on this evidentiary assessment, which included both an analysis of the evidence presented in support of the existence of the network and an overall evaluation of the evidence,³⁰⁰ Judge Fremr concluded that the evidence would not allow a reasonable trial chamber to find that the alleged network existed, nor could a reasonable trial chamber “find beyond reasonable doubt that there was a group of persons acting in accordance with a common plan to [evict perceived PNU supporters from the Rift Valley]” pursuant to article 7(2)(a) of the Statute.³⁰¹ Consequently, Judge Fremr held that neither Sang nor Ruto had a case to answer under the original charges.³⁰² His reasoning on why, as a consequence of this finding, the charges should be vacated instead of entering a judgment of acquittal will be outlined below.

b. Concurring Opinion of Judge Eboe-Osuji

Judge Eboe-Osuji did not conduct the same lengthy evidentiary assessment as Judge Fremr, however, he stated at the outset of his opinion that he “fully” adopted the evidentiary assessment made by Judge Fremr.³⁰³ He discussed the legal principles underlying NCTA motions in detail, but emphasized that

²⁹⁵ Ibid., paras. 119-120.

²⁹⁶ Ibid., para. 120.

²⁹⁷ Ibid., para. 121.

²⁹⁸ Ibid., para. 122.

²⁹⁹ Ibid., para. 122 (“Bearing in mind that the rallies and alleged meetings took place in election time, one can also reasonably infer that such money was given in order to win the recipients’ votes.”).

³⁰⁰ Ibid., paras. 123-130.

³⁰¹ Ibid., para. 131. In assessing the evidence “as a whole”, Judge Fremr again emphasized that the OTP’s case theory rested on the assertion that the violence was planned and coordinated by the Network members. Yet, the evidence presented by the OTP in this regard was deemed “insufficiently probable.” The CIPEV report would also not specify that the organization and planning of the attacks had been done at the provincial or district levels in the Rift Valley; it could thus have happened locally. There would be no evidence showing that the transportation or the distribution of food and weapons was centrally orchestrated and linked to the alleged Network. Importantly, no link could be established to Ruto and Sang. The only connection would be evidence proving that Sang and Ruto had made calls for an end to the violence. Judge Fremr noted that despite “the extensive media attention and the audio/visual recording of election events at the time, [...] not a single press report or recording of any of the alleged ‘hate speeches’ was entered into evidence.” He furthermore emphasized that “for negative language about the electorate of the opposing parties during election time [...] to amount to hate speech or calls for violence or crimes, it would need to be of a significantly different level and nature than the words the relevant witnesses attributed to Mr Ruto and Mr Sang.” Ibid., paras. 124-130.

³⁰² Ibid., para. 131. Since there was insufficient evidence on the contextual element of crimes against humanity as enshrined in article 7(2)(a) of the Statute and as pleaded by the Prosecution, Judge Fremr considered a re-characterization of the facts to accord with other forms of individual criminal responsibility under article 25(3) to be unwarranted. He furthermore noted that the evidence presented by the Prosecution would not support the elements of the other forms of liability. See *ibid.*, paras. 131-143.

³⁰³ TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red., para. 1. Judge Eboe-Osuji delivered a separate opinion spanning 201 pages in total. It addresses several topics, which go beyond the specific questions raised in the NCTA motions. This report will therefore not address the remarks made in the preliminary observations and those

applying these principles would assume “an absence of conduct tending to obstruct the course of justice and, thus, the Chamber’s ability to be sure that the Prosecution’s case has been truly weak.”³⁰⁴ Judge Eboe-Osuji stressed that a “critically weak, tenuous or vague” Prosecution case should, at its conclusion, not be prolonged.³⁰⁵ Like Judge Fremr, Judge Eboe-Osuji concluded that the Defense had no case to answer at the close of the Prosecution case, however, as will be detailed in the next section,

Judge Eboe-Osuji considered the ordinary outcome of an NCTA finding (i.e. a judgment of acquittal) to be inappropriate in light of the specific circumstances of the case with respect to witness intimidation, which he concluded led to “a serious tainting of the trial process beyond the capacity of the process to cure.”³⁰⁶ In light of witness interference and political meddling, Judge Eboe-Osuji preferred to terminate the proceedings by declaring a mistrial:³⁰⁷

*[W]as the Prosecution’s case weak because there really was no better evidence left to be obtained and tendered without the factor of witness interference and political intimidation? Or was it weak because the Prosecution did the best they could with the only evidence they could eke out amidst difficult circumstances of witness interference and political intimidation? Because of the tainted process, I am unable to say. It is for that reason that I prefer declaration of a mistrial as the right result.*³⁰⁸

c. Dissenting Opinion of Judge Herrera Carbuccia

Writing in dissent, Judge Herrera Carbuccia emphasized her position that that, given the standard of review previously established by the Chamber, analysis “must not be done in relation to every single individual piece of evidence, without considering them as a whole.”³⁰⁹ She also referred to the power of the Chamber to call evidence under Art. 69(3) and Art. 64(6)(d) of the Rome Statute, which she concluded would have permitted the Judges to request the submission of the written statements that the Appeals Chamber found inadmissible pursuant to Rule 68 of the ICC Rules.³¹⁰ Following her remarks on the general approach to assessing evidence, Judge Herrera Carbuccia’s analysis was limited to the question whether evidence existed at all, pertaining to the particular charges, not to the quality of such evidence. She emphasized that judges are not bound by any case theory proposed by the Prosecution. In her opinion, the scope of the Chamber’s analysis is only limited by the facts and circumstances as stated in the charges.³¹¹ She noted that the Chamber must determine whether sufficient evidence had been presented upon which a reasonable trial chamber could hold that there existed “some degree of organizational policy

pertaining to head of state immunity. It will also not review Judge Eboe-Osuji’s considerations on the interpretation of ‘organizational policy’, which he himself qualified as merely an *obiter dictum* (ibid., para. 463). See also ibid., para. 4.

³⁰⁴ Ibid., para. 1.

³⁰⁵ Ibid., para. 124.

³⁰⁶ Ibid., para. 125.

³⁰⁷ Ibid., para. 2.

³⁰⁸ Ibid.

³⁰⁹ TC V(a), decision of 5 April 2016, dissenting opinion of Judge Herrera Carbuccia, ICC-01/09-01/11-2027-AnxI, paras. 22-24.

³¹⁰ Ibid., paras. 26-30.

³¹¹ Ibid., para. 48.

to commit the attack” pursuant to article 7(2)(a).³¹² The Prosecution would need to present evidence that “a group of persons had some degree of coordination, planning and structure,” but not that the group had a formal hierarchy or common plan.³¹³

Judge Herrera Carbuccia concluded that the Prosecution had presented evidence to the Chamber upon which a reasonable trial chamber could conclude that the PEV was a systematic attack against Kikuyu and PNU supporters following an organizational policy, and not merely spontaneous in nature.³¹⁴ In particular, she noted that evidence was presented that:

- A group of persons existed, structured according to tribal roles, and in which elders played an important role by administering oaths to Kalenjin youths later participating in the PEV, and by leading so-called ‘cleansing ceremonies’ for the youth after the attacks.
- Ruto was the leading figure of this group, as “leader, king and spokesperson of the Kalenjin community.”
- A number of prominent Kalenjin, including Sang, occupied positions below Ruto in the group.
- The aim of the group was to expel PNU supporters and Kikuyus from the Rift Valley, using whatever means necessary.
- Ruto and Sang, with other members of the group, organized rallies and meetings, where they used inflammatory speech against Kikuyus to encourage the participants to attack PNU supporters.
- Ruto and Sang, with other members of the group, planned and financed the attacks and participated in preparatory meetings, events and trainings before and during the PEV.
- Sang promoted and facilitated the attack through KASS FM.³¹⁵

Judge Herrera Carbuccia stressed that an analysis of these elements must take into account the particular context of the Rift Valley, especially its rural character, as well as the ethnic divide that had characterized politics and the circumstances of the 2005 referendum.³¹⁶ She considered the widespread nature of the attack to be “unquestionable,” referring *inter alia* to the facts which the parties had agreed on (that relate to killings and destruction of property in certain areas) and the CIPEV report.³¹⁷ She also found evidence that the attacks followed a similar pattern and thus were systematic.³¹⁸ She *inter alia* referred to the ethnicity and age of most direct perpetrators (who were Kalenjin youth), the weapons used (bows, stones and arrows), the use of traditional Kalenjin war cries, the attacking of Kikuyu properties, the familiarity of

³¹² Ibid., para. 49.

³¹³ Ibid., para. 49.

³¹⁴ Ibid., paras. 50, 58.

³¹⁵ Ibid., para. 50.

³¹⁶ Ibid., para. 51.

³¹⁷ Ibid., paras. 52-53.

³¹⁸ Ibid., paras. 54-55.

the attackers with the geographical areas and the Kikuyu properties, and the erection of roadblocks manned by Kalenjin youths.³¹⁹

Further evidence was presented which Judge Herrera Carbuccia believed supported the allegations that Ruto and other members of the group organized and financed weapons prior and during the PEV, as well as food and transport for the direct perpetrators.³²⁰ She considered that a reasonable trial chamber could convict Ruto and Sang for participating in an organizational policy aimed at displacing PNU supporters and Kikuyu from the Rift Valley.³²¹ She stated, however, that the Prosecution had not shown sufficient evidence on the hierarchical structure of the network and the automatic compliance of the direct perpetrators to prove that Ruto was an indirect co-perpetrator according to Art. 25(3)(a) of the Statute.³²² Nevertheless, Judge Herrera Carbuccia found there to be sufficient evidence for a reasonable trial chamber to find Ruto criminally liable under Art. 25(3)(b) to (d) of the Rome Statute. However, she noted that a final determination could only be made after having been shown the totality of the evidence at the end of the trial pursuant to Art. 74.³²³ She also considered that a reasonable trial chamber could conclude that Sang is criminally liable under Art. 25(3)(d) (which she qualified as a residual mode of liability) for having contributed to the crimes through his radio program *Lene Emet* on Kass FM.³²⁴ Judge Herrera Carbuccia favored giving notice to Sang under regulation 55 that the legal characterization of facts could change to extend to liability under Art. 25(3)(b) and (c).³²⁵ This stands in contrast to Judge Fremr who concluded that, because he found insufficient evidence on the contextual element of crimes against humanity as pleaded by the Prosecution, a re-characterization of the facts to accord with other forms of individual criminal responsibility under Art. 25(3) was unwarranted.³²⁶ Judge Fremr had further concluded that, in any event, the evidence presented by the Prosecution would not support the elements of the other forms of liability.³²⁷

Judge Herrera Carbuccia concluded that a reasonable trial chamber could convict Ruto and Sang for the counts of murder, deportation or forcible transfer and persecution, as follows:³²⁸ (1) Murder in the Kiambaa and Huruma area between 1 and 4 January 2008; (2) forcible transfer, in Kapsabet, the Greater

³¹⁹ Ibid., para. 56.

³²⁰ Ibid., para. 57 (referring also to evidence on financial support to the PEV).

³²¹ Ibid., para. 69.

³²² Ibid., para. 71.

³²³ Ibid., para. 75.

³²⁴ Ibid., paras. 76-77.

³²⁵ Ibid., para. 78.

³²⁶ Ibid., para. 131.

³²⁷ Ibid., paras. 132-143.

³²⁸ Ibid., paras. 88-90.

Eldoret area and Turbo; and (3) persecution in Kapsabet, the Greater Eldoret area and Turbo.³²⁹ For this reason, she would have favored proceeding with the Defense evidence in the case.³³⁰

4. Unusual Remedy Offered: Termination of Charges Without Acquittal

The majority was in agreement that the evidence presented by the Prosecution was too weak to require the Defense to present its case – Judge Eboe-Osuji agreed with Judge Fremr’s evaluation of the evidence in this regard. Both Judges also agreed that, as a remedy, the “special circumstances” of the case warranted vacating the charges rather than acquitting the accused, which would have been the usual consequence of a finding that the evidence is insufficient. However, Judge Eboe-Osuji and Judge Fremr took distinct approaches to evaluating the impact of witness interference. Unlike Judge Fremr, Judge Eboe-Osuji went so far as to declare the proceedings a “mistrial” for witness interference. Although the evidentiary analysis in Judge Fremr’s opinion was laudably detailed, and supported the finding that the trial should not continue, the reasoning on the legal basis for vacating the charges “without prejudice” is not particularly convincing from either of the majority Judges’ opinions. This section considers whether, according to the ICC’s legal framework, it is legitimate for the judges to take into account factors like witness interference as a basis for refusing to acquit an accused, even where the evidence presented was insufficient to prove their guilt.

a. Judge Fremr’s Reasons for Terminating the Case Without a Judgment of Acquittal

In his separate opinion, Judge Fremr noted that the “normal consequence” of a successful NCTA motion would be the pronouncement of an acquittal, and he stated that this is the outcome he would have preferred in the instant case.³³¹ However, Judge Fremr explained that he was alone in this opinion, so there was no majority of judges willing to vote for a judgment of acquittal. Nevertheless, he and Judge Eboe-Osuji agreed that the case should not continue, and so that was the remedy they would offer.³³² Unlike Judge Eboe-Osuji, Judge Fremr did not consider that witness interference had affected the proceedings and the OTP’s ability to produce more evidence so acutely as to warrant that the trial be declared “null and void.”³³³ Judge Fremr opined that he could agree with Judge Eboe-Osuji to vacate the charges given the particular circumstances of this case.³³⁴ While there was no direct link established between the accused and the witness interference, the Judge acknowledged that the accused have benefitted from it since, *inter alia*, key witnesses have been interfered with.³³⁵ Judge Fremr stated that “[o]ther evidence may have been available to the Prosecution - including evidence that possibly would demonstrate the accused’s innocence

³²⁹ Ibid., para. 89.

³³⁰ Ibid., para. 91.

³³¹ Ibid., para. 147.

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid., para. 148.

³³⁵ Ibid.

of the charges – had it been able to prosecute the case in a different climate.”³³⁶ He further qualified the wording of Article 20 of the Statute (*ne bis in idem*) as “overly strict” and “no longer in line with the contemporary criminal laws of numerous national jurisdictions.”³³⁷ Since the accused were not acquitted, Judge Fremr found that no reparation order could be made pursuant to article 75 of the Statute.³³⁸

*b. Judge Eboe-Osuji’s Reasons for Terminating the Case Without a Judgment of Acquittal*³³⁹

According to Judge Eboe-Osuji, the basic forensic assumption of NCTA submissions is that the Prosecution case had been conducted “freely,” not only in the presentation but also the investigation.”³⁴⁰ If the case would remain weak when no interference or intimidation had taken place, then it should be terminated and the accused acquitted.³⁴¹ Judge Eboe-Osuji found that this assumption was not true in the present case, because of what he described as direct interference with witnesses “at a disturbing scale,” “an atmosphere of intimidation,” and hostility against the proceedings in particular by the Kenyan Government and media.³⁴² Because he believed there was “a troubling incidence of witness interference and intolerable political meddling,”³⁴³ he concluded that it would have been unjust to acquit as a result of the NCTA assessment.³⁴⁴

*I am of the opinion that the pressure exercised – directly as well as indirectly – over those who may possess material evidence to this case has been so serious as to impede a neutral appreciation of the genuine weaknesses of the Prosecution case assessed at the appropriate standard of proof at this stage.*³⁴⁵

Judge Eboe-Osuji stressed that it would be wrong to conclude that the Judges themselves were affected by the interference. Rather, he opined, conduct by external parties had influenced witnesses in their decision to testify freely before the Court.³⁴⁶ He took notice of the fact that no evidence had directly implicated the

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid., para. 149.

³³⁹ TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, paras. 134 et seq.

³⁴⁰ Ibid., para. 139.

³⁴¹ Ibid.

³⁴² Ibid., paras. 141-181.

³⁴³ Ibid., para. 464.

³⁴⁴ Ibid., paras. 149, 181 and 141 (“While the full breadth of the interference is yet unknown — and may never be known — I am satisfied (with the fullest confidence) that the extent of the evidence of interference is enough to make acquittal of the accused grossly unjust, merely because the Defence no-case submissions have resulted in an assessment that compelled the finding that the case for the Prosecution was too weak to justify continuing the trial”).

³⁴⁵ Ibid., paras. 150.

³⁴⁶ Ibid., para. 144.

accused in any witness interference, but concluded that it was enough that the witness interference had worked in the interests of the accused.³⁴⁷

In light of these factors, he felt compelled to declare a mistrial, as only this remedy would convey the message that political intervention cannot influence ICC trial proceedings.³⁴⁸ He declared that there was a “manifest necessity” for the remedy of mistrial “not least because to acquit in the circumstances will make a perfect mockery of any sense of the idea that justice has been seen to be done in this case. But, more importantly, the prejudicial conducts reviewed above are beyond the corrective facilities of the trial process at the ICC, in any manner that still permits a safe judicial pronouncement of a judgment of acquittal as a result of any weaknesses perceived in the Prosecution case.”³⁴⁹

In cognizance of the fact that he was advocating a less orthodox remedy to the NCTA motion, Judge Eboe-Osuji took some space to address his view of the legal basis for mistrial, referring to jurisprudence in selected common law countries as “inspiration” for applying this concept at the ICC even when the accused do not consent.³⁵⁰ He referred to *United States v. Perez* as authority that, “manifest necessity for the act” would be required, meaning that without recourse to the remedy of mistrial “the ends of justice” would be frustrated.³⁵¹ According to Judge Eboe-Osuji, judges enjoy “a sound discretion” in their assessment whether to declare mistrial, because it is not possible to define all circumstances in which the remedy of mistrial is appropriate, at the outset.³⁵² He admonished that judges, while being in the best position to make such decisions, should be cautious in making use of the remedy of mistrial and resort to it only in “very plain and obvious cases,” namely when “substantial justice cannot be attained without discontinuing the trial.”³⁵³ Judge Eboe-Osuji does not believe that fault-finding against a party should be a precondition for a finding of mistrial.³⁵⁴ He acknowledged the existence of Art. 70, which makes obstruction of justice a criminal offense falling within the jurisdiction of the ICC, but opined that this article would be irrelevant for deciding whether mistrial should be declared, because Art. 70 proceedings would be a “separate matter,” having “no bearing whatsoever on whether or not the view as to the correct verdict of acquittal in the cardinal case (especially on a no-case submission) has been appreciably impaired by the conducts that gave rise to the collateral proceedings under article 70.”³⁵⁵

Within the statutory framework of the ICC, Judge Eboe-Osuji found that the power of Trial Chambers to declare mistrial stems from Art. 64(2) and Art. 4(1) of the Rome Statute, both of which require the

³⁴⁷ Ibid., paras. 155-158, 181

³⁴⁸ Ibid., paras. 140, 149.

³⁴⁹ Ibid., para. 183.

³⁵⁰ Ibid., paras. 182 *et seq.*

³⁵¹ Ibid., para. 184.

³⁵² Ibid., paras. 184, 186 (making reference to US jurisprudence).

³⁵³ Ibid., paras. 184, 186.

³⁵⁴ Ibid., para. 185.

³⁵⁵ Ibid., paras. 193-194 (also emphasizing that it may in some cases not be possible to prosecute the individuals responsible for the obstruction of justice).

Chamber to ensure that the trial is fundamentally fair.³⁵⁶ He further argued and emphasized that Art. 64(2) of the Rome Statute provides a legal basis for the Chamber to conclude *proprio motu* that a trial should be terminated in situations when the evidence presented by the Prosecution is weak. He concluded that it would not be unfair to the Prosecution to terminate the proceedings, provided that it had had “a fair opportunity to present their own case.”³⁵⁷ According to Judge Eboe-Osuji, these provisions, together with the “doctrine of incidental or implied powers under international law,”³⁵⁸ necessarily imply a Chamber’s authority to declare a mistrial if the trial proceedings cannot be regarded as “fair” anymore. In this context, he noted that fair trial extends to all parties and participants in the case (Defense, Prosecution, and victims).³⁵⁹

Judge Eboe-Osuji stated that “[e]ven in cases of troubling incidence of interference including political meddling, fairness to the prosecution within the meaning of article 64(2) may not readily compel continuation of the trial at the close of a weak prosecution case, in the absence of evidence clearly pointing to the accused as a culprit in the interference or meddling.”³⁶⁰ In the opinion of Judge Eboe-Osuji, “to continue a weak trial on the basis of interference that is evidentially unattributed to the accused may result in a distortion of the principles of the no-case analysis.”³⁶¹ He made reference to Art. 21 as permitting the introduction of an alternate common law remedy of mistrial into the ICC’s legal system:

*As article 21 of the Rome Statute shows, the processes of the ICC are not vacuum-sealed against the inspirational influences of domestic legal methods for the legal solutions to similar difficulties that may arise in this Court, when such domestic methods do not contradict the Court’s own legal texts which offered no ready solutions to the problem at hand. It was on that basis that the judges of this Court accepted the remedy of stay of proceedings, at the instance of accused persons, in consequence of abuse of process. It was also on that basis that the Chamber accepted that no-case motions might be made in this case. And it is on that basis that declaration of mistrial may be made in this case.*³⁶²

Judge Eboe-Osuji was of the opinion that a mistrial should be declared in the case, as a way to vacate the charges, but release the accused without a judgment of acquittal,³⁶³ so as not to “automatically engage” the principle of double jeopardy set out in Art. 20 of the Rome Statute.³⁶⁴ Judge Eboe-Osuji considered that this remedy would allow the Prosecutor to continue investigations in the future and bring new charges for

³⁵⁶ Ibid., para. 190.

³⁵⁷ ICC-01/09-01/11-2027-Red-Corr, paras. 128-129. See also *ibid.*, paras. 131-134.

³⁵⁸ Ibid., para. 191 (referring in this context also to Art. 4(1) of the Rome Statute).

³⁵⁹ Ibid., para. 190.

³⁶⁰ ICC-01/09-01/11-2027-Red-Corr, para. 130. See also *ibid.*, paras. 126-129.

³⁶¹ Ibid., para. 130.

³⁶² Ibid., para. 192.

³⁶³ Ibid., para. 187.

³⁶⁴ Ibid., para. 188. Whether or not fresh charges would in fact be prohibited by double jeopardy is a question that a competent Chamber would have to decide should a fresh case be brought against the accused again at the ICC (see *ibid.*, para. 188).

confirmation before the Pre-Trial Chamber,³⁶⁵ while “[i]n the meantime,” the accused would continue to be entitled to the presumption of innocence.³⁶⁶

Unlike Judge Fremr, Judge Eboe-Osuji was of the opinion that submissions should be heard on reparations for victims, notwithstanding the dismissal of the criminal charges against the accused.³⁶⁷ He cited the *Lubanga Appeals Chamber* judgment on reparations to establish that a conviction is not a necessary precondition to reparation.³⁶⁸ He further opined that no general principle of law would require conviction as a condition to reparation,³⁶⁹ and argued that such a prerequisite would be “undesirable,” *inter alia* because tort law, described as the “traditional” avenue for reparation, would have been “socially inefficient[t].”³⁷⁰ Noting the particular circumstances of the case (in particular, witness interference and political meddling), he eventually raised the question whether there should be responsibility of the Kenyan state for internationally wrongful act in the form of denying victims their entitlement to reparation.³⁷¹

c. Ne Bis In Idem

In their respective opinions, it is apparent that the majority Judges considered it inappropriate to acquit the accused largely because doing so would have triggered *ne bis in idem* or “double jeopardy,” thereby barring future prosecution for the same charges. The Judges seem to be of the opinion that only a judgment of acquittal would trigger the *ne bis in idem* rule, but not necessarily a decision to vacate the charges. As Judge Fremr wrote:

Article 20 : Ne bis in idem (excerpt)

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

*Noting the overly strict wording of Article 20 of the Statute, which is no longer in line with the contemporary criminal laws of numerous national jurisdictions, I therefore find it appropriate to leave open the opportunity to re-prosecute the accused, should any new evidence that was not available to the Prosecution at the time of the present case, warrant such a course of action.*³⁷²

Judge Eboe-Osuji made a similar observation:

³⁶⁵ Ibid., para. 187.

³⁶⁶ Ibid., para. 187.

³⁶⁷ Ibid., paras. 3, 464.

³⁶⁸ Ibid., paras. 199-201.

³⁶⁹ Ibid., para. 201.

³⁷⁰ Ibid., para. 202.

³⁷¹ Ibid., paras. 206-210 (In any event, the obligation to make reparation as a matter of an internationally wrongful act on the part of a State may well be a gravamen of a remedy that may be open for victims to pursue before an appropriate international human rights body, even beyond the ICC.” Ibid., para. 210).

³⁷² TC V(a), decision of 5 April 2016, opinion of Judge Fremr, ICC-01/09-01/11-2027-Red-Corr, para. 148.

*I pause to make very clear my view of the consequence of the order to vacate and discharge being made ‘without prejudice.’ It simply means that this decision does not impair the presumption of innocence that the accused has always enjoyed. But, on the other hand, the decision does not automatically engage the doctrine of double jeopardy or autrefois acquit codified in article 20 of the Statute under the heading of ne bis in idem. It will be a matter for a Pre-Trial Chamber or Trial Chamber of this Court or of a national court, as the case may be, to review the circumstances and decide whether there is a question of double jeopardy, in the event of a future proceeding on the same charges.*³⁷³

The principle of *ne bis in idem* (also referred to as the “double jeopardy” rule in common law jurisdictions) is a fundamental rule of criminal law, both domestically and internationally.³⁷⁴ Its objective is to protect the individual accused from being subjected to several attempts to convict him or her for the same offense (or conduct). Public authorities are required from the start to investigate thoroughly and conduct the trial diligently, as the *ne bis in idem* principle usually allows them no second chance. The principle also protects the resources of the criminal justice system and seeks to secure public confidence in the finality of decisions.³⁷⁵

Article 20 of the Rome Statute prescribes the *ne bis in idem* principle in regard to subsequent proceedings before the ICC (paragraph 1), and proceedings before other national or international courts (paragraph 2). Paragraph 3 of the article addresses when the ICC may try a person who has already been subject to criminal proceedings by another court. Under Art. 20 of the Rome Statute, a judgment of acquittal that was requested by the Defense in the *Ruto* and *Sang* case would have therefore, in principle, banned any future re-trial of the accused before the ICC for “the conduct which formed the basis of” the crimes for which they would have been acquitted (see Art. 20(2)), and banned any future re-trial of the accused before another court (e.g. Kenyan courts) for the crimes against humanity (Art. 7) for which they would have been acquitted. (See Art. 20 (3)).

By prohibiting re-trial for the “conduct” underlying the crimes for which the accused had been acquitted (or convicted) and not merely for the specific crime referred to in Art. 5, the scope of the *ne bis in idem* principle established in Art. 20 is stricter about re-trial before the ICC than before other courts. It is also noteworthy in this context, as referred to by Judge Fremr, that Art. 84 of the Rome Statute only allows the revision of conviction or sentence (for example if new evidence has been discovered per Art. 84(1)(b) of the Rome Statute). It does not allow for a revision of an acquittal (for example if witness interference is found). In contrast, some national system procedures, like §54 of the UK’s Criminal Procedure and Investigations Act of 1996, allow an appellate court to quash acquittals that have been tainted by intimidation.³⁷⁶

³⁷³ TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, para. 188.

³⁷⁴ See, for example, Lorraine Finlay, Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute, University of California, Davis Vol. 15:2 (2009), 221, 222-224.

³⁷⁵ Ibid., 222-223; Gerard Conway, Ne Bis In Idem in International Law, *International Criminal Law Review* Vol 3 (2003), 217, 222-224.

³⁷⁶ See <http://www.legislation.gov.uk/ukpga/1996/25/section/54>.

Had the accused been acquitted, neither the ICC, nor any domestic court could have re-prosecuted Ruto and Sang for the crimes against humanity charged. However, a judgment of acquittal would not have banned prosecution by other (domestic) courts for the conduct charged, provided that the conduct was not given the same legal qualification as a crime as in the proceedings before the ICC. One rationale behind this difference in limiting re-prosecution is the fact that the Court only has jurisdiction for very specific crimes according to Art. 5 of the Statute (war crimes, crimes against humanity, genocide, the crime of aggression).³⁷⁷ For instance, a judgment of acquittal in the Ruto and Sang case would not have barred domestic prosecution for hate speech. Although domestic prosecutions against Ruto would, in any event, be barred as long as he enjoys immunity by being Deputy Head of State and minister.³⁷⁸

d. Unclear Legal Basis for Vacating the Charges Without Prejudice to Future Re-Prosecution

Having outlined why, pursuant to Art. 20(1) and Art. 84 of the Rome Statute, a judgment of acquittal would prevent the ICC Prosecutor from re-prosecuting the accused for the conduct underlying the crimes in the future, the question arises whether there was a legal basis *de lege lata* for the Judges to vacate the charges without prejudice to re-prosecution in the future by citing the particular circumstances of the case (in this circumstance, in particular because of witness intimidation concerns). Judge Eboe-Osuji acknowledges in his opinion that no provision in the ICC’s statutory framework expressly provides for such an alternate remedy.³⁷⁹ Evidently, it is not enough in a criminal trial that the judge considers a certain resolution of the case to be more “just” or to blur the distinction between *lex lata* (“the law as it is”) and *lex ferenda* (“the law as it should be”).³⁸⁰ Any decision, in particular if it deviates from the typical outcome and has significant implications for the accused, must have a legal basis and respect fair trial rights, including the presumption of innocence. If the guilt is not proven beyond reasonable doubt, it would seem to follow from the presumption of innocence that the accused must be acquitted and not be left in a limbo as to potential future re-prosecution. Both majority Judges indeed acknowledge that NCTA motions, if granted, generally lead to an acquittal.³⁸¹ But the legal basis for their decision to vacate the charges is either unclear (in Judge Fremr’s reasons) or questionable (in Judge Eboe-Osuji’s preference for a declaration of “mistrial”). In his reasons, Judge Fremr did not appear to resort to the powers of the Chamber under Art. 64(2) to vacate the charges. He only mentioned Art. 64(2) as a legal basis to determine, at the halfway stage of the trial, whether the Prosecution case was sufficiently strong to require inviting the Defense to present their evidence.³⁸² Indeed, while Judge Fremr clearly articulates the

³⁷⁷ Art. 70 offenses are not explicitly mentioned in Art. 20(2) and (3) of the Rome Statute.

³⁷⁸ On immunity, see Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn., OUP 2015), paras. 721 et seq.

³⁷⁹ See also TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, para. 190.

³⁸⁰ Judges may only interpret the law, but not create new laws under the ICC’s legal framework.

³⁸¹ TC V(a), decision of 5 April 2016, opinion of Judge Fremr, ICC-01/09-01/11-2027-Red-Corr, para. 147; TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, para. 139.

³⁸² TC V(a), decision of 5 April 2016, opinion of Judge Fremr, ICC-01/09-01/11-2027-Red-Corr, para. 146.

desirability of vacating the charges without prejudice to re-prosecution in the future in light of the special circumstances of this case, the precise legal basis for his finding is unfortunately not addressed in detail.³⁸³

e. Doubtful Legal Basis for Declaring a Mistrial in the Case

To not amount to an abuse of discretion, finding a mistrial for witness interference and political meddling must have a legal basis within the statutory framework of the ICC. Determining its permissibility requires an interpretation of the applicable law, as determined in Article 21 of the Rome Statute.³⁸⁴ As a legal basis for mistrial Judge Eboe-Osuji referred to “the imperatives of article 64(2) combined with article 4(1) of the Rome Statute.”³⁸⁵ Assessing the validity of this line of reasoning requires an interpretation of these provisions, in line with the interpretative methods applicable before the ICC. Close scrutiny of the legal basis for the decision raises some doubts about the soundness of the legal reasoning.

Article 4(1) of the Rome Statute clearly does not provide a legal basis for declaring a mistrial, but makes the ICC a subject of international law. The provision establishes the international legal personality of the ICC and, similar to Article 104 of the UN Charter, clarifies the scope of the legal capacity of the Court.³⁸⁶ Taking into consideration its negotiation history, the context, wording, and purpose of the provision, the Article was not meant to specifically empower judges to adopt certain procedural remedies.

Article 64(2) of the Rome Statute refers to the obligation of the Chamber (and not only of an individual Presiding Judge) to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” The wording does not explicitly bestow powers to stop the trial and vacate the charges, nor to declare a mistrial for witness interference. A contextual interpretation of the

Article 21: Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

³⁸³ See *ibid.*, paras. 147 *et seq.*

³⁸⁴ See generally on Art. 21 of the Rome Statute, Margaret McAuliffe deGuzman, Article 21, in: Ambos and Triffterer (eds.), *supra*.

³⁸⁵ TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, para. 190.

³⁸⁶ Rückert, Article 4, in: Ambos and Triffterer (eds.), *supra*, paras. 2, 7-8.

scope of powers arising under Art. 64(2) must take due account of the other rules and principles of enshrined in the ICC's statutory framework. It is therefore questionable, whether recourse could be made to Art. 64(2) of the Rome Statute without at least discussing whether this would actually circumvent Art. 20(1)³⁸⁷ of the Statute and therefore be *contra legem*.³⁸⁸ Taking into account the requirement of Art. 21(3)³⁸⁹ of the Rome Statute, it seems also problematic from the perspective of procedural fairness that the submissions of the parties were not heard on the matter of a mistrial remedy. In light of Art. 66 and Art. 67 of the Rome Statute, declaring a mistrial without prejudice to future re-prosecution clearly would need to remain a disposition of last resort. Judge Eboe-Osuji does not analyze in detail whether prejudice could be caused to the accused by the finding of mistrial.

Scant Basis in National Law for Declaring a Mistrial in Lieu of a Judgment of Acquittal³⁹⁰

While citing articles 64(2) and 4(1) as legal bases, Judge Eboe-Osuji also pointed out that the concept of mistrial stems from common law, which could be relevant under Art. 21(1)(b) and (c). Domestic law can be an expression of *opinio juris* and state practice and therefore indicate the existence of a rule of customary international law in the sense of Article 38 of the Statute of the International Court of Justice and Art. 21(1)(b) of the Rome Statute. This however requires more than just a few legal systems to have adopted the same rule.³⁹¹ It is also important to stress that the law of a particular domestic jurisdiction, in itself, has no sway as binding precedent – the mere fact that there exists a certain solution for example in England and Wales or the United States does not mean that it is necessarily valid to resort to the concept in the context of the ICC. This is because Art. 21(1)(c) of the Rome Statute refers to “general principles of law derived [...] from national laws of legal systems [...] provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”³⁹² Recourse to general principles derived from national laws is also only permitted if the statutory texts of the ICC (Art. 21(a) of the Statute) or the sources mentioned in Art. 21(1)(b) of the

³⁸⁷ Art. 20(1) of the Rome Statute describes the *ne bis en idem* principle as follows: “Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.”

³⁸⁸ It must be stressed in this context that a teleological interpretation (being the method largely relied upon by Judge Eboe-Osuji) may also not lead to a result that contradicts written law.

³⁸⁹ Art. 20(3) of the Rome Statute states: “No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

³⁹⁰ The author would like to acknowledge the valuable research assistance that Katherine Vessels (University of Hawaii, Richardson School of Law) contributed in support of this section.

³⁹¹ Werle and Jessberger, *supra*, paras. 185-187; Margaret McAuliffe deGuzman, Article 21, in: Ambos and Triffterer (eds.), *supra*, mn. 23 *et seq.*

³⁹² Emphasis added. See also Werle and Jessberger, *supra*, para. 204.

Statute do not provide for a solution. Art. 21(1)(c) therefore can have some value to address *lacunae* and to avoid a situation where there simply is no applicable law (*i.e.* a *non liquet* situation).³⁹³

One scholar has described the provision as the result of a compromise struck in Rome, and considered Art. 21(1)(c) of the Statute to be “the most controversial aspect of article 21.”³⁹⁴ The difficulty in applying Art. 21(1)(c) lies in determining which scope of the comparative exercise is required.³⁹⁵ Is it sufficient to merely refer to few (maybe even only one) national laws(s)? And to what extent do Chambers at the ICC may directly apply the national law which they regard to be relevant? Do they have to consider particular procedural safeguards? These questions are relevant in analyzing the reasoning given by Judge Eboe-Osuji, because he only referred to some cases and jurisdictions as persuasive authority for the concept of mistrial, and did not consider in detail procedural aspects of declaring a mistrial under US law. Judges resorting to national laws in one case may also lead to an inconsistent application of the law, as judges in another case might not resort to the national laws and are not required to follow the same approach pursuant to Art. 21(2) of the Rome Statute.³⁹⁶ This problem arising from the unclear wording of Art. 21(1)(c) also impacts the present case.

Key Factors Domestic Courts have Considered Relevant to Granting or Denying a Mistrial

Judge Eboe-Osuji relies on U.S. domestic criminal law, which explicitly recognizes the remedy of “mistrial.” According to U.S. case law, a hung jury is considered the “paradigmatic example” of mistrial,³⁹⁷ but it is a remedy also used when something is considered to have tainted the objectivity of the jury, such as jury tampering, inappropriate press exposure, or various forms of attorney misconduct. As Judge Eboe-Osuji pointed out, declaring a mistrial requires a “manifest necessity” to do so, meaning that, “the ends of public justice would otherwise be defeated.”³⁹⁸ However, key cases suggest that judges should be cautious and apply “scrupulous exercise of judicial discretion.”³⁹⁹

In determining whether there was “manifest necessity,” some Circuits have analyzed, *inter alia*, “a timely objection by the defendant, the length of the trial,” “whether the court provided counsel and opportunity to be heard,” “whether the court considered alternatives to a mistrial,” and “whether the court’s decision was made after adequate reflection.”⁴⁰⁰ The procedural factor, which inquires whether the parties have been given the opportunity to be heard, seems particularly noteworthy in the present context. Here, a mistrial was declared without giving the parties an opportunity to be heard on the legal merits of such a remedy.

³⁹³ McAuliffe deGuzman, Article 21, in: Ambos and Trifferer (eds.), *supra*, mn. 37.

³⁹⁴ *Ibid.* p. 708.

³⁹⁵ Werle and Jessberger, *supra*, para. 205.

³⁹⁶ McAuliffe deGuzman, “Article 21,” in: Ambos and Trifferer (eds.), *supra*, mn. 38 *et seq.*

³⁹⁷ See e.g. *United States v. McIntosh*, 380 F.3d 548, 553 (1st Cir. 2004).

³⁹⁸ *United States v. Perez*, 22 U.S. 579, 580, 6 L.Ed. 165 (1824).

³⁹⁹ *United States v. Jorn*, 400 U.S. 470, 485, 91 S. Ct. 547, 557, 27 L. Ed. 2d 543 (1971). See also *Arizona v. Washington*, 434 U.S. 497, 510, 98 S. Ct. 824, 832, 54 L. Ed. 2d 717 (1978), referring to the need for “sound discretion”.

⁴⁰⁰ *United States v. Darui*, 614 F. Supp. 2d 25, 33 (D.D.C. 2009), *aff’d*, 368 F. App’x 153 (D. C. Cir. 2010).

These factors are also enshrined in Rule 26.3 of the Federal Rules of Criminal Procedure (as added in 1993 and amended in 2002), which states that “[b]efore ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.”⁴⁰¹ Several appellate courts have previously quashed findings of mistrial for failure to hear the parties’ submissions.⁴⁰² Hearing submissions benefits both defendants and the prosecution and may help avoid abuse of discretion by the judges when determining whether declaring a mistrial is the appropriate remedy.⁴⁰³ It is unclear why this important factor, whose underlying rationale appears to be equally valid in international criminal trials, is not considered in Judge Eboe-Osuji’s opinion.

National Jurisprudence: Mistrial as the Remedy for an NCTA Motion?

Declaration of mistrial does not trigger the double jeopardy rule in the U.S. system, so an accused may lawfully be re-tried on the same charges.⁴⁰⁴ In the U.S., a defendant may file a motion for acquittal mid-trial by arguing that the prosecution failed to make its case because its evidence would be “insufficient to sustain a conviction.”⁴⁰⁵ According to the Federal Rules of Criminal Procedure, it would violate the double jeopardy clause (as the principle of *ne bis in idem* is referred to in US law) if, following an acquittal, a prosecutor subjected “the defendant to postacquittal factfinding proceedings going to guilt or innocence.”⁴⁰⁶ In fact, it would even violate the double jeopardy clause if a prosecutor were to appeal an acquittal. In the U.S. system, prosecutorial appeals of an acquittal from the trial stage are not allowed, because they would amount to such a “postacquittal factfinding proceeding.” Declaring a mistrial where the accused would appear to have been entitled to an acquittal is providing a considerably less complete remedy, since it vacates the charges against the accused but leaves the defendant at risk of a future fact finding proceeding on the same charges.

Declaring a mistrial when the Defense has brought a no case to answer motion also skips several steps in the procedure foreseen in the United Kingdom. It would however not violate the interpretation of double jeopardy according to UK law based on the Criminal Justice Act 2003. Under §54 and §55 of the Criminal Justice and Investigations Act 1996, an appellate court may reverse an acquittal if it was tainted by witness

⁴⁰¹ United States Federal Rules of Criminal Procedure, Rule 26.3.

⁴⁰² https://www.law.cornell.edu/rules/frcrmp/rule_26.3.

⁴⁰³ https://www.law.cornell.edu/rules/frcrmp/rule_26.3.

⁴⁰⁴ *Richardson v. United States*, 468 U.S. 317, 326, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).

⁴⁰⁵ United States Federal Rules Criminal Procedure, Rule 29 (a).

⁴⁰⁶ *Smalis v. Pennsylvania*, 476 U.S. 140, 145, 106 S. Ct. 1745, 1749, 90 L. Ed. 2d 116 (1986) (*citing* *Arizona v. Rumsey*, 467 U.S. 203, 211-212, 104 S.Ct. 2305, 2310-11, 81 L.Ed.2d 164 (1984).) (“Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.”) *See also* *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 829, 54 L. Ed. 2d 717 (1978) (“The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal.”).

intimidation or interference.⁴⁰⁷ From a procedural perspective, a trial court would first acquit the defendant following a no case to answer motion, then the prosecutor would need to appeal this acquittal and the higher court would quash the acquittal based on §54 and §55 of the Criminal Justice and Investigations Act 1996. Under the British system, the approach adopted by Judge Eboe-Osuji would seem to have taken witness interference (and the charges brought forward for offences against the administration of justice) into consideration when determining the remedy, blended the procedures allowed in the Criminal Justice Act of 2003 and the Criminal Procedure and Investigations Act of 1996, and imposed a remedy that leaves open the chance to readdress the charges in the future without having a higher chamber make a ruling on the trial court’s judgment that the defendant had no case to answer. In this context it also seems noteworthy that the reasoning on witness interference by Judge Eboe-Osuji remains rather general and frequently cites arguments of the Prosecution.⁴⁰⁸ It does not make reference to and discuss specific witnesses (in redacted form). Furthermore, no person has yet been convicted for an Art. 70 offense in the Kenya situation. In the British system, at least, such conviction would be a precondition for allowing recourse to §54 of the Criminal Justice and Investigations Act 1996.⁴⁰⁹

Summary

It is regrettable that the parties were not given a chance to be heard on the prospect of using mistrial as a remedy for the issues in the trial, since this remedy is entirely distinct from acquittal. Hearing the parties on such a consequential matter would have been required by the rules of criminal procedure in many jurisdictions, including for instance the United States (from where the remedy originates).

In light of the many instances of witness interference in this and other cases, it is valid to ask whether it would make sense for the Court to have the power to declare a mistrial for witness interference and/or political meddling. However, the distinction between *lex lata* (“the law as it is”) and *lex ferenda* (“the law as it should be”) as well as the limit of the power of judges to “make” law as imposed by the Rome Statute have to be respected. From the perspective of procedural fairness, an opportunity for the parties to make submissions on the question whether a mistrial should and could be declared is of a key importance and reflects practice in the US legal system.

In terms of legal basis, it is questionable whether Art. 64(2) of the Rome Statute could be regarded as a panacea when the Rome Statute did not provide for a specific remedy. At the very least, when discussing the appropriateness to make recourse to Art. 64(2) of the Rome Statute for declaring a mistrial, a thorough analysis of the parameters set out in Art. 21 is needed. This requires, on the one hand, that principles of

⁴⁰⁷ <http://www.legislation.gov.uk/ukpga/1996/25/section/54>. § 54 *inter alia* requires that “a person has been convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal”.

⁴⁰⁸ See TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, sections “Direct Interference with Witnesses” (p. 117 *et seq.*) and “Indirect Pressure on Witnesses” (p. 120 *et seq.*).

⁴⁰⁹ § 54 of the Criminal Justice and Investigations Act 1996 specifies in paragraph 1 that it “applies where – (a) a person has been acquitted of an offence, and (b) a person has been convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal.”

national law are discerned thoroughly and, on the other hand, that the specific safeguards enshrined in the Rome Statute, notably the fundamental principle of *ne bis in idem* enshrined in Art. 20, and the rights of the accused under Art. 66 and Art. 67, are duly respected. Furthermore, a cautious approach appears to be appropriate to the purposive (or teleological) interpretation of the scope of powers under Art. 64(2) of the Rome Statute to avoid that it eventually overstretches them contrary to law. As desirable as it might be, including based on a comparative law perspective, to have a less stringent approach to *ne bis in idem* than the one currently in force under Art. 20(1) of the Rome Statute, it is not for judges to implicitly change written law or circumvent it. Only the States Parties have the mandate to amend the Rome Statute.

V. Conclusion

The NCTA proceedings in the *Ruto and Sang* case, in particular the decision of 5 April 2016, are noteworthy for two major reasons and merit close scrutiny by practitioners and commentators:⁴¹⁰ First, this was the *first* NCTA decision at the ICC, so it was laying an important foundation for procedure to be applied at the midway point of future trials. Unfortunately, this disjointed trio of separate opinions that form the Trial Chamber’s final decision in the *Ruto and Sang* case sets an example that may ultimately create more confusion and less certainty for future cases applying the Statute of the Court.⁴¹¹ This for instance concerns the interpretation of the standard of review to be applied in no case to answer proceedings, namely under which circumstances the credibility of evidence can be assessed.⁴¹² Second, the unusual final disposition offered by the Judges writing from the majority, seems to have been a response to witness intimidation and other difficulties in the evidence collection, which have been ubiquitous concerns at the ICC,⁴¹³ and will likely continue to be a challenge. The Court needs meaningful remedies and effective procedures with a sound basis in law if it is to effectively confront these types of issues in the future.⁴¹⁴

The final disposition of the case was also of course noteworthy to stakeholder populations in Kenya whose lives were impacted by the post-election violence that was the subject of these investigations and trials. Since all ICC cases addressing the post-election violence have now been terminated without leading to a judgment under Art. 74 of the Rome Statute, the victims of the attacks, including those who enjoyed special victim status before the ICC through the LRV, have been left with a rather unsatisfactory resolution of the justice process. On 1 July 2016, Trial Chamber V(a), by majority, rejected a request by the LRV to decide on reparation matters for lack of standing.⁴¹⁵ At least theoretically, there still exist some avenues for remedy, but they are more limited. Assuming that the withdrawal of charges does not trigger Art. 20(1) of the Rome Statute, the ICC and domestic courts could re-prosecute the accused for the crimes already charged. Further, if the decision is interpreted as triggering the *ne bis in idem* principle, then criminal proceedings against the accused by domestic courts for conduct already charged in the ICC

⁴¹⁰ See, for example, International Bar Association, Evidence Matters in ICC Trials, August 2016.

⁴¹¹ It must be noted that, per Art. 21(2) of the Rome Statute, other Trial Chambers of the ICC are not bound by the findings of the Judges of Trial Chamber V(a), including for example its interpretation of the legal standards to be applied in NCTA motions or on the appropriateness to resort to the concept of mistrial.

⁴¹² International Bar Association, Evidence Matters in ICC Trials, August 2016, p. 59.

⁴¹³ Including problems in securing state cooperation, as were also present in the Kenya situation, see most recently, TC V(b), Second decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute, 19 September 2016, ICC-01/09-02/11-1037.

⁴¹⁴ See also International Bar Association, Evidence Matters in ICC Trials, August 2016.

⁴¹⁵ TC V(a), Decision on the Requests regarding Reparations, ICC-01/09-01/11-2038 (“[...] Trial Chamber V(A) is no longer seised of proceedings against [Ruto and Sang] before the Court. Accordingly, this Chamber cannot take any decision on reparation matters related to the *Ruto and Sang* case under Article 75 of the Statute.” Ibid., para. 6). Judge Eboe-Osuji appended a dissenting opinion, ICC-01/09-01/11-2038-Anx. See also LRV, Victims’ Views and Concerns on the Issue of Reparation or Assistance in Lieu of Reparation Pursuant to the Trial Chamber Decision of 5 April 2016 on the Defence Motions on “No Case to Answer,” 15 June 2016, ICC-01/09-01/11-2035.

proceedings (qualified e.g. murder or hate speech, but not as the same crimes against humanity as before the ICC) are a possible avenue. In domestic proceedings, the immunity of Ruto as minister though bars proceedings as long as he is in office. Lastly, if Kenya itself does not investigate criminal conduct linked to the post-election violence and thereby acts in contradiction to human rights obligations, then victims might have a claim before human rights mechanisms, which address state responsibility. The ICC, as an international *criminal* court dealing with individual criminal responsibility, is not the appropriate forum to adjudicate such state responsibility.

As noted, witness intimidation and interference have been notable issues in several cases at the ICC so far. The case against Ruto and Sang is no exception, but nevertheless seems to be an example of particular concern. The Prosecution case was weak, especially after the Appeals Chamber suppressed several out-of-court witness statements from evidence. NCTA motions are premised on the idea that when the prosecution has failed to present adequate proof during its case-in chief, the appropriate remedy from the perspective of judicial economy and fairness is to enter a judgment of acquittal for the accused. The remedy of acquittal is perhaps less palatable when a Judge suspects that the reason the Prosecution has failed to discharge its burden of proof is that witness intimidation (possibly involving, or at the very least to the benefit of the accused) had a “chilling effect”⁴¹⁶ on witness cooperation and evidence collection. Judge Eboe-Osuji seemed to be outcome-driven to resolve this uncomfortable tension in a particular way that he thought was fair and reasonable given the specifics of this case. However, since there are no convictions on witness interference yet, nor are there proven direct links between the interference and the accused, it is legally questionable to deny a judgment of acquittal to the accused when the evidence was found to be insufficient to warrant the Defense mounting a case. The outcome gives further cause for concern in terms of the procedure and quality of legal reasoning. The parties were never heard on the legal and factual basis of the remedy given (i.e. vacating the charges without prejudice to future re-prosecution), and, as was argued above, the majority Judges’ reasoning on the legal basis for the remedy does not withstand scrutiny.

It is to be hoped that the Prosecution will thoroughly investigate the allegations of witness interference and bring charges under Art. 70 of the Rome Statute, as has already been done against Walter Barasa, Paul Gicheru and Philip Kipkoech Bett.⁴¹⁷ Any impression that the Kenya cases are examples of how witness interference is a successful means to end a case and go un-investigated should be countered.

⁴¹⁶ TC V(a), decision of 5 April 2016, reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red-Corr, para. 178.

⁴¹⁷ For further information, see <https://www.icc-cpi.int/kenya/gicheru-bett>, <https://www.icc-cpi.int/kenya/barasa>.

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