Cour
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International
Criminal
Court

Original: **English**

No.: **ICC-01/09-01/11**

Date: **5 April 2016**

TRIAL CHAMBER V(A)

Before: **Judge Chile Eboe-Osuji, Presiding**
Judge Olga Herrera Carbuccia
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Public redacted version of:

Decision on Defence Applications for Judgments of Acquittal

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr Anton Steynberg

Counsel for William Samoei Ruto
Mr Karim Khan
Mr David Hooper

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

Legal Representatives of Victims
Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation or Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

CONTENTS

DECISION

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court (the 'ICC' or the 'Court'), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, having considered the applications for a ruling of 'no case to answer' and acquittal of the accused filed by the Defence for Mr Sang (ICC-01/09-01/11-1991-Red) and the Defence for Mr Ruto (ICC-01/09-01/11-1990-Corr-Red), and having considered the Prosecution's consolidated response (ICC-01/09-01/11-2000-Red2) and the observations of the Legal Representatives of Victims (ICC-01/09-01/11-2005-Red), and having heard the oral submissions made by the parties and participants on 12 to 15 January 2016 (ICC-01/09-01/11-T-209; ICC-01/09-01/11-T-210; ICC-01/09-01/11-T-211; ICC-01/09-01/11-T-212),

Following deliberations,

ON THE BASIS OF (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,

HEREBY DECIDES AS FOLLOWS (Judge Herrera Carbuccia dissenting):

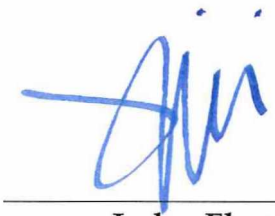
1. The charges against the accused are vacated and the accused discharged without prejudice to their prosecution afresh in future;
2. The Prosecution requests for legal re-characterisation of the charges are denied.

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

Judge Eboe-Osuji and Judge Fremr have given separate reasons for the majority, which are contained in the present document.

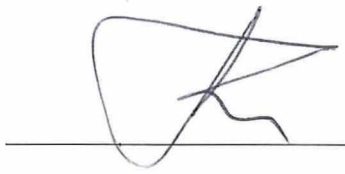
Judge Herrera Carbuccia appends a dissenting opinion.

A short overview of the proceedings including a chronological list of the key procedural moments and decisions is annexed.



Judge Eboe-Osuji
(Presiding)

Judge Herrera Carbuccia



Judge Robert Fremr

Dated 5 April 2016

At The Hague, The Netherlands

REASONS OF JUDGE FREMR

Preliminary remark

1. Having conducted a review of the evidence before Trial Chamber V(A) ('Chamber'), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, and having considered Articles 64, 66 and 67 of the Rome Statute ('Statute'), it is my view that at the present stage of the proceedings, after the Office of the Prosecutor ('Prosecution') has closed its case, there is no case to answer for the two accused. Accordingly, in my view, the charges against Mr Ruto and Mr Sang are to be vacated and the accused discharged from this case.

2. Below, I will first give a brief overview of the relevant procedural history of the case, and set out the standard of review that I have applied in assessing the evidence, before engaging in the said evidential review. After my conclusion as to the outcome of this review, some observations are made about the context in which the present case has been tried before the International Criminal Court ('Court').

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

3. On 31 March 2010, Pre-Trial Chamber II authorised the Prosecution to open an investigation into the situation in Kenya.[1] As a result of that investigation, the Prosecutor framed charges against, *inter alia*, William Samoei Ruto, Joshua Arap Sang, and Henry Kiprono Kosgey.[2] From 1 – 8 September 2011, the hearing on the confirmation of charges was held. On 23 January 2012, Pre-Trial Chamber II, by majority, confirmed the charges against Mr Ruto and Mr Sang, and dismissed the charges against Mr Kosgey.[3]

[1] Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr.
[2] Document Containing the Charges, 1 August 2011, ICC-01/09-01/11-242-AnxA. Following the confirmation proceedings, the Prosecution filed an updated Document Containing the Charges: ICC-01/09-01/11-533-Anx A, 7 January 2013 (to which a corrigendum was filed on 25 January 2015).
[3] Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11, 23 January 2012.

4. On 29 March 2012, the Presidency transferred the case to the Chamber.[4] The trial commenced on 10 September 2013, with the opening statements and the reading of the charges; and on 17 September 2013, the Prosecution called its first trial witness.[5]

5. Following submissions by the parties on this matter, the Chamber issued 'Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on "No Case to Answer" Motions)' on 3 June 2014 ('Decision No. 5'),[6] in which it set the deadline for the filing of any 'no case to answer' motions for 14 days after the last day of the Prosecution's case.[7]

6. On 19 August 2015, the Chamber, by majority, admitted, for the truth of their contents, the unsworn statements of five witnesses pursuant to Rule 68 of the Rules of Evidence and Procedure ('Rule 68 Decision').[8] The defence teams for Mr Ruto ('Ruto Defence) and Mr Sang ('Sang Defence'; together: 'Defence') appealed this decision.[9]

7. On 10 September 2015, the Prosecution closed its case.[10]

8. On 23 October 2015, having been granted additional time and an extension of page limit,[11] the Ruto Defence requested the Chamber to enter a judgment of acquittal in respect of the three counts of crimes against humanity

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[4] Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 29 March 2012, ICC-01/09-01/11-406. On 21 May 2013, the Presidency constituted Trial Chambers V(a) and V(b) and referred the case against Mr Ruto and Mr Sang to the former: Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and The Prosecutor v. Uhuru Muigai Kenyatta*, 21 May 2013, ICC-01/09-01/11-745.

[5] See Transcript of hearing on 17 September 2013, ICC-01/09-01/11-T-29-Red3-ENG.

[6] ICC-01/09-01/11-1334.

[7] Decision No. 5, ICC-01/09-01/11-1334, para. 37.

[8] Decision on the Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Corr-Red2.

[9] Decision on the Defence's Applications for Leave to Appeal the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony', 10 September 2015, ICC-01/09-01/11-1953-Conf-Corr. In light of the pending appeal, the Chamber instructed the parties to file their submissions on whether there was a case to answer for the Defence in the alternative, by including arguments taking into account the possibility that the Chamber's ruling on the admission pursuant to Rule 68 could be overturned by the Appeals Chamber: Decision on the Ruto Defence's request to modify the schedule for the submission of a 'no case to answer' motion, ICC-01/09-01/11-1955, 11 September 2015, para. 5.

[10] Notification of closure of the Prosecution's case, 10 September 2015, ICC-01/09-01/11-1954.

[11] Decision on Page and Time Limits for the 'No Case to Answer' Motion", 18 September 2015, ICC-01/09-01/11-1970 ('Page/Time Limit Decision').

Mr Ruto is charged with ('Ruto Defence Motion').[12] According to the Ruto Defence, the evidence led by the Prosecution is 'insufficient and deficient in material respects', even at the level of the crime base, and the Prosecution failed to prove the essential elements of the crimes charged, for all locations.[13] The Ruto Defence submits that the 'fundamental flaw' in the Prosecution's case against Mr Ruto is the failure to link him, under any mode of liability, to the alleged crimes, or the direct perpetrators.[14] It further contends that there is no evidence to show that Mr Ruto formed part of an organisation as required for the purposes of crimes against humanity, of the 'Network', or otherwise contributed to the crimes.[15] With respect to the standard of review, the Ruto Defence submits that at the 'no case to answer' stage, 'the Chamber is authorized, and indeed impelled', either because the Prosecution's case has 'completely broken down', or pursuant to the Chamber's powers under Article 64(2) of the Statute, to assess the credibility and reliability of the evidence admitted pursuant to Rule 68 of the Rules and the hearsay evidence of the *viva voce* witnesses.[16]

9. On 26 October 2015, with the same extensions of time and page limit,[17] the Sang Defence filed a motion requesting the Chamber to 'dismiss the case at this stage' ('Sang Defence Motion').[18] It submits that the Prosecution's case as it was presented at the confirmation hearing 'has fully collapsed', and that the Prosecution 'sought to replace this case by another, very weak and unconvincing case.'[19] According to the Sang Defence, this in itself constitutes 'sufficient grounds to throw the case out at this point'.[20] It further avers that the Prosecution's evidence 'is not capable of satisfying the reasonable doubt standard' because, even taking it at its highest, 'it does not establish criminal conduct, nor a nexus to criminal conduct, or Mr Sang's intent to carry out

[12] Corrigendum of Ruto Defence for Judgment of Acquittal, 26 October 2016, ICC-01/09-01/11-1990-Conf. On 26 October 2015, the Ruto Defence filed a corrected version: ICC-01/09-01/11-1990-Conf-Corr. A public redacted version of the motion was filed that same day: ICC-01/09-01/11-1990-Corr-Red.
[13] Ruto Defence Motion, ICC-01/09-01/11-1990-Corr-Red, paras 197-198.
[14] Ruto Defence Motion, ICC-01/09-01/11-1990-Corr-Red, paras 195-196.
[15] Ruto Defence Motion, ICC-01/09-01/11-1990-Corr-Red, para. 196.
[16] Ruto Defence Motion, ICC-01/09-01/11-1990-Corr-Red, para. 226.
[17] Page/Time Limit Decision, ICC-01/09-01/11-1970.
[18] Sang Defence 'No Case to Answer' Motion, 23 October 2015, ICC-01/09-01/11-1991-Conf. A public redacted version was filed on 6 November 2015: ICC-01/09-01/11-1991-Red.
[19] Sang Defence Motion, ICC-01/09-01/11-1991-Red, para. 209.
[20] Sang Defence Motion, ICC-01/09-01/11-1991-Red, para. 209.

criminal activities'.[21] In particular, the Sang Defence submits that 'evidence is lacking' for an organisational policy pursued by the alleged 'Network',[22] or any other organisation, as well as for Mr Sang's own conduct, 'be it as a contributor, solicitor, inducer or aider and abettor'.[23] It therefore argues that no reasonable trial chamber could sustain a conviction on the basis of the evidence and that the case should thus be dismissed.[24]

10. On 20 November 2015, having been instructed to do so by that date,[25] the Prosecution responded, opposing the two Defence motions ('Consolidated Response').[26] The Prosecution submits that the evidence presented, taken at its highest, is sufficient to satisfy a reasonable trial chamber that 'all of the essential elements required to secure a conviction of both Accused' are proved.[27] It avers that the Defence has not demonstrated any circumstances that would warrant an assessment of the credibility of the evidence at this stage. In the Prosecution's view, the Defence's submissions on this issue 'essentially amount to a series of speculative arguments and credibility challenges, which – individually or cumulatively – fail to provide adequate grounds to dismiss any of the charges at this juncture'.[28]

11. Moreover, the Prosecution submits that only in 'exceptional circumstances', namely when the Prosecution's case would be considered to have 'completely broken down', reliability or credibility assessments should be made. In the Prosecution's view, no such situation arises, and it argues that the Defence requests to assess the credibility of the evidence at the present stage therefore ought to be dismissed.[29]

12. As to the charged modes of liability, the Prosecution notes that the Chamber already gave formal notice to Mr Ruto of a possible re-characterisation of the facts to include participation under Article 25(3)(b), (c),

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[21] Sang Defence Motion, ICC-01/09-01/11-1991-Red, para. 210, and paras 176-203.
[22] Sang Defence Motion, ICC-01/09-01/11-1991-Red, para. 210, and paras 61-118.
[23] Sang Defence Motion, ICC-01/09-01/11-1991-Red, para. 210, and paras 123-134 and 204-208.
[24] Sang Defence Motion, ICC-01/09-01/11-1991-Red, para. 210.
[25] Page/Time Limit Decision ICC-01/09-01/11-1970.
[26] Prosecution's consolidated response to the 'Corrigendum of Ruto Defence Request for Judgment of Acquittal" and Sang Defence 'No Case to Answer Motion', 20 November 2015, ICC-01/09-01/11-2000-Conf. On 26 November and 22 December 2016, public redacted versions were filed: ICC-01/09-01/11-2000-Red and ICC-01/09-01/11-2000-Red2, respectively.
[27] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 436.
[28] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 436.
[29] Consolidated Response, ICC-01/09-01/11-2000-Red2, pars 18-20.

or (d),[30] and while noting that Mr Sang has not formally been given notice of any re-characterisation, it recalls that the Chamber did advise the Sang Defence to anticipate any of the possible modes of liability in its 'no case to answer' motion.[31] The Prosecution therefore submits that the appropriate inquiry at this stage would be whether there is 'sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber could find criminal responsibility: (i) under any of the modes of liability under articles 25(3)(a)-(d) for Mr Ruto; and (ii) under any of the modes of liability under articles 25(3)(b)-(d) in respect of Mr Sang'.[32]

13. As regards the admission of prior recorded testimony pursuant to Rule 68 of the Rules, the Prosecution submits that irrespective of the outcome of the Appeals Chamber's decision on the matter, 'even without the Rule 68 Statements the Prosecution has led sufficient evidence, upon which, on the basis of a *prima facie* assessment, a reasonable Trial Chamber could convict the Accused on at least one of the relevant modes of liability'.[33]

14. On 27 November 2015, the Common Legal Representative for Victims filed a joint response to the Ruto Defence Motion and the Sang Defence Motion, submitting that both ought to be rejected.[34]

15. From 12 to 15 January 2016, a status conference was held, during which the Chamber received oral arguments of the parties on the 'no case to answer' motions and the responses thereto.[35]

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[30] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 10, referring to Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, 12 December 2013, ICC-01/09-01/11-1122, in which the Chamber provided the following notice, pursuant to Regulation 55(2) of the Regulations of the Court: 'that, with respect to Mr Ruto, it appears to the Chamber that there is a possibility that the legal characterisation of the facts […] may be subject to change to accord with Article 25(3)(b), (c) or (d) of the Statute' (at page 20).

[31] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 10, referring to an e-mail from the Chamber to the parties and participants of 16 October 2015 at 15:18.

[32] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 12.

[33] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 24.

[34] Common Legal Representative for Victims' Joint Reply to the "Ruto Defence Request for Judgment of Acquittal" and to the "Sang Defence 'No Case to Answer' Motion", ICC-01/09-01/11-2005-Conf. A public redacted version was filed on 29 January 2016: ICC-01/09-01/11-2005-Red.

[35] Transcripts of hearings on 12-15 January 2016, ICC-01/09-01/11-T-209-ENG ET to ICC-01/09-01/11-T-212-ENG ET.

16. On 12 February 2016, the Appeals Chamber reversed the Rule 68 Decision.[36]

II. STANDARD OF REVIEW

17. It is recalled that the Chamber, in Decision No. 5, found that:

> [T]he test to be applied in determining a 'no case to answer' motion, if any, in this case is whether there is evidence on which a reasonable Trial Chamber *could* convict. In conducting this analysis, each count in the Document Containing the Charges will be considered separately and, for each count, it is only necessary to satisfy the test in respect of one mode of liability, as pleaded or for which a Regulation 55 of the Regulations notice has been issued by the Chamber. The Chamber will not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber.[37]

18. I wish to clarify here that in assessing whether *a reasonable Trial Chamber* could convict - in other words, could be satisfied beyond reasonable doubt of the guilt of the accused - the test as set out in Decision No. 5 envisages a situation, whereby different reasonable triers of fact at the 'no case to answer' stage could come to different conclusions concerning the guilt or innocence of the accused concerned. However, this does not mean that the Trial Chamber actually conducting the 'no case to answer' assessment cannot reach its own final conclusions, and would be forced to continue the proceedings, even if it has concluded that, on the basis of the evidence before it, it would not be satisfied beyond reasonable doubt of the accused's guilt.

19. Indeed, if the Chamber, after assessing the evidence in accordance with the above-stated standard, comes to the conclusion after the Prosecution has finished calling its evidence that it could not support a conviction beyond reasonable doubt, then it should enter an acquittal and therewith end the proceedings even if it were possible for a different trier of fact to be satisfied beyond reasonable doubt of the guilt of the accused on the basis of the same evidence. This is consistent with the rationale of 'no case to answer' litigation.

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[36] Appeals Chamber, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony', 12 February 2016, ICC-01/09-01/11-2024 ('Appeals Chamber Rule 68 Decision').
[37] Decision No. 5, ICC-01/09-01/11-1334, para. 32.

Continuing proceedings in such circumstances would be contrary to the rights of the accused, whose trial should not continue beyond the moment that it has become evident that no finding of guilt beyond all reasonable doubt can follow.[38]

20. With respect to the modes of liability charged, it is recalled that in Decision No. 5 the Chamber already highlighted, with respect to Mr Ruto:

> [T]hat notice pursuant to Regulation 55(2) of the Regulations was issued on 12 December 2013, notifying the parties and participants that, in respect of Mr Ruto's alleged individual criminal responsibility, it appears to the Chamber that the legal characterisation of the facts may be subject to change to accord with liability under Article 25(b), (c) or (d) of the Statute. The Chamber emphasises that the Regulation 55 Notice did not result in an actual legal re-characterisation of any facts at this time. It was simply a notice of the possibility of such re-characterisation. Nonetheless, the Chamber considers that 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.[39]

21. Before embarking upon the substantive assessment of the evidence, the following observations should be made. First, I take note of the Appeals Chamber's ruling of 12 February 2016, which reversed the Rule 68 Decision.[40] It follows from the Appeals Chamber's judgment that the evidence contained in the prior recorded testimony of the five key Prosecution witnesses concerned must be completely disregarded when deciding whether or not there is a case to answer for either of the accused.[41] Nevertheless, the prior recorded testimony, which had already been admitted for impeachment purposes only, may still be relied on for the purpose of assessing the trustworthiness of other evidence in the case record, such as when other Prosecution witnesses testify to facts based on hearsay from the five witnesses

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[38] In this regard, I am in full agreement with Judge Pocar of the International Criminal Tribunal for the former Yugoslavia, who has expressed this view on several occasions. See, e.g., Partial Dissenting Opinion of Judge Pocar to the *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Appeals Judgment, 5 July 2001, pp 70-72.

[39] Decision No. 5, ICC-01/09-01/11-1334, para. 30, referring to Decision on applications for notice of possibility of variation of legal characterisation, 12 December 2013, ICC-01/09-01/11-1122.

[40] Appeals Chamber Rule 68 Decision, ICC-01/09-01/11-2024.

[41] This concerns the prior recorded testimonies of Witnesses 397, 495, 516, 604, and 789.

concerned.

22. Relatedly, it is noted that the Prosecution indicated in its Consolidated Response, as reflected above, that even without the prior recorded testimony admitted pursuant to Rule 68 of the Rules, it has led sufficient evidence, to satisfy the 'no case to answer' standard.[42] Consequently, it can be concluded that the Prosecution is of the view that the removal of the prior recorded testimony of Witnesses 397, 495, 516, 604 and 789 from the evidentiary record is not fatal to its case.

23. I further note that the Prosecution has urged the Chamber to make several inferences as to the guilt of the accused on the basis of the information before it. In this regard, it is clarified that in assessing the circumstantial evidence that the Prosecution relies on to urge an inference, the exercise of deciding that a reasonable Trial Chamber could convict the accused would necessarily involve the rejection of all realistic possibilities consistent with innocence. In other words, the inference that the Prosecution wishes the Chamber to draw from the evidence should be the only, or most reasonable, inference; not one of several possible explanations for certain acts or behaviour.

24. Finally, I am mindful of the Chamber's authority to request the submission of evidence, or hear witnesses, that it considers necessary for the determination of the truth.[43] However, as a result of the information placed before the Chamber, I am not aware of any evidence that would have been appropriate for the Chamber to call at this stage. I therefore do not believe that the Chamber, at this stage, could call evidence that would bring a change to the outcome of the evaluation made below.

[42] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 24. It is further noted that the Prosecution has not taken any steps in this regard following the Appeals Chamber's ruling, and – in response to a query by the Sang Defence as to whether the Chamber wished the parties to re-file their submissions in light of the Appeals Chamber's reversal of the Rule 68 Decision – informed the Chamber and the parties that it did not consider it necessary to make further submissions following the Appeals Chamber's judgment (e-mail from the Prosecution to the Chamber of 19 February 2016 at 11:42).
[43] See Article 69(3) of the Statute.

III. REVIEW OF THE EVIDENCE

A. Introduction

25. The Prosecution's case, as confirmed by Pre-Trial Chamber II and as pleaded in the Updated Document Containing the Charges, is built around a central allegation that a 'Network' existed.[44] The existence of this Network is said to prove that there was an organisation in the sense of the organisational policy requirement in Article 7(2)(a) of the Statute, which mandates that the widespread or systematic attack against a civilian population must have been 'pursuant to or in furtherance of a State or organisational policy to commit such an attack'. At the same time, the reasons behind the creation of the Network are alleged to constitute the criminal common plan of the Network's 'key members'.[45] In my understanding of the Prosecution's case, the adoption of the common plan and organisational policy are one and the same and coincided with the constitution of the Network.[46] It seems, therefore, that according to the Prosecution the existence of the Network as an organisation with a policy and the existence of a common plan are dependent on each other. In other words, as pleaded by the Prosecution, the Network existed by virtue of there being a common plan pursued by the alleged members of the Network.[47]

26. It follows that the entire case against the two accused hinges upon there being enough evidence to prove the existence of the Network, regardless of whether or not other material facts have been proved to the relevant standard. The present review therefore commences with assessing the evidence that the Prosecution relies upon to prove the Network's existence. In this regard, I note

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[44] Updated Document Containing the Charges, ICC-01/09-01/11-533-Anx A, at paras 20-21.

[45] According to the Prosecution, the group acting with a common purpose in the sense of Article 25(3)(d) of the Statute is the same as the group of key members of the Network that is alleged to have acted in accordance with a common plan in the sense of Article 25(3)(a). See Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 302.

[46] See Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 147, in which the Prosecution submits that 'the "Network" – with Mr Ruto at its head and the Network members at its base – and an organisational policy, the "common plan" […] was constituted at the very latest by October 2007 and was comprised of tribal leaders, key youth leaders, ODM politicians, businessmen and a member of the media. The common plan pursued by members of the Network – and implemented through the Kalenjin youth during the PEV – was the targeting of the civilian population supporting, or perceived to be supporting, the PNU.'

[47] See, for example, the Prosecution's comparison of the 'organisation' with an 'organization in fact' for the purposes of the RICO Act of the United States: ICC-01/09-01/11-T-212-ENG, p. 46.

that it is the task of the Prosecution, and not the Chamber, to present a theory of the case, as supported by the evidence. The structure and scope of my assessment is therefore based on the Prosecution's theory of the case, as set out in its Consolidated Response.

B. The Network

27. At the outset, it should be noted that the designation of the alleged organisation as the 'Network' appears to have been made by the Prosecution itself, as there is no evidence on the record that suggests that the alleged members of this Network used this terminology to refer to themselves.

28. According to the Prosecution, there was a common plan between key Network members 'to evict members of the Kikuyu, Kisii, Kamba communities in particular, because they were perceived to be PNU supporters'.[48] This common plan is said to have 'encapsulated' the organisational policy;[49] or – as it appears – vice versa. The common plan was allegedly 'pursued by members of the Network' and implemented by 'the Kalenjin youth'.[50]

29. The Prosecution alleges that the Network was organised in three tiers. Mr Ruto is alleged to have stood at the top of the hierarchy (first tier), exercising *de facto* authority over the other Network members. Below him were '[v]arious political allies, prominent Kalenjin businessmen and tribal elders' (second tier), with 'authority, by virtue of their position in the Kalenjin tribal hierarchy' over the Kalenjin youth leaders that formed the third tier. Finally, the Kalenjin youth, subordinate to the Network members, are alleged to have occupied a fourth tier and to have been 'used to implement the common plan on the ground'.[51]

30. On the basis of my understanding of the Prosecution's theory of the case, the Network is supposed to have largely exploited existing social structures and customs within traditional Kalenjin society. The allegation does not go so far as to implicate the entire Kalenjin community, or even all Kalenjin elders, businessmen and youths, in the common plan. Rather, the

[48] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 144.
[49] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 144.
[50] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 147.
[51] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 149.

alleged Network must have existed as a separate entity within that community. Yet, the Prosecution did not present any evidence on the scope of the Network, such as on its size and/or formal structure.

31. The Prosecution does identify 13 individuals, amongst which the two accused, who are alleged to have been the 'main players of the Network'.[52] It is noteworthy that the list of individuals who are at this stage alleged to have been members of the Network differs significantly from the list presented by the Prosecution at the outset of the proceedings.[53] Moreover, even within the Prosecution's latest submissions on the matter, it is not clear whether the 'main players of the Network', as referred to in paragraph 150 of the Consolidated Response, are the same persons as the 'key members of the Network', mentioned in paragraph 144 of the same. Indeed, on the basis of the Prosecution's pleadings it is far from clear how the alleged Network would have been organised or would have operated. For example, besides Mr Ruto's position at the top of the hierarchy, it is not easily discernible from the Prosecution's submissions and evidence how authority or tasks were allegedly distributed among senior Network members. Whereas the Prosecution initially alleged that there was a military-style command structure, this has not been repeated in the current allegations about the Network.

32. As the Prosecution, throughout its case, has not been clear about the membership or functioning of the alleged Network, I was thus forced to myself try to ascertain, on the basis of the evidence before me, how the alleged Network functioned in practice, including how command and control was ensured within it. Given the central place of the Network in the Prosecution's case, it is problematic that the Prosecution has not attempted to show, in its submissions and with its evidence, a determinate entity, both in form and essence. I have nevertheless carefully assessed if the Prosecution's evidence supports the existence of the Network, in order to determine whether it could be found, at this stage of the proceedings, that such an entity existed.

33. However, the Prosecution hardly identified any concrete evidence showing the existence of either the Network or the common plan. Instead, the

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[52] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 150, where besides Mr Ruto and Mr Sang eleven persons are named.
[53] Updated Document Containing the Charges Pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522), 25 January 2013, ICC-01/09-01/11-533-AnxA-Corr, para. 20.

alleged existence of the Network – a central component of the Prosecution's case – is largely based upon circumstantial evidence. In the Consolidated Response, the Prosecution argues that the existence of the Network and the common plan is demonstrated by: i) a series of preparatory meetings held at Mr Ruto's Sugoi house; ii) the training of the Kalenjin youth; iii) the obtaining of firearms for the purpose of implementing the post-election violence; iv) the similar nature and patterns of the attacks, including indications of prior planning by and involvement of Network members with close links to Mr Ruto; and, v) the subsequent cleansing ceremony in Nabkoi Forest.[54] Before assessing whether a reasonable Trial Chamber could find that the existence of the Network is the only or even the most reasonable inference from these alleged facts, it will first be analysed whether there is sufficient evidence for each of these separate allegations.

1. Preparatory meetings

34. The Prosecution alleges that Mr Ruto held three important general preparatory meetings at his house in Sugoi. These meetings were said to have been aimed at mobilising and coordinating the Network members and the Kalenjin youth from different areas of the Rift Valley, and at obtaining weapons for the Kalenjin youth.[55] The Prosecution claims that during those three meetings '[i]t was planned that the attacks would be triggered if the Kikuyu stole the votes and won the elections'.[56] In this regard, I observe, however, that the allegations about the creation and content of the common plan lack concrete form. Indeed, the Prosecution itself acknowledged that there is a 'lack of direct evidence regarding certain specific details of the common plan discussed at preparatory meetings'.[57]

35. Although the Prosecution refers to a number of other meetings, where specific operations were allegedly discussed, it does not point to other occasions, apart from the aforementioned three meetings at Mr Ruto's house, during which the overall plan would have been on the agenda. While there is agreement between the parties that some meetings were held in Mr Ruto's

[54] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 152.
[55] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 153. The meetings themselves are discussed in paras 154-159.
[56] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 153.
[57] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 148.

house in Sugoi,[58] there is strong disagreement about the purposes of the meetings and what was said there. Moreover, it is recalled that Mr Ruto was at the relevant time a senior politician engaged in an on-going electoral campaign.

36. To prove the three meetings and what was discussed at them, the Prosecution relied exclusively on evidence contained in the prior recorded testimony of Witnesses 397, 604 and 495. As these witness statements no longer form part of the evidence in the case, none of the alleged preparatory meetings is supported by evidence. Accordingly, these allegations are to be disregarded for the purposes of the remainder of this evidentiary view.

37. Importantly, the three alleged preparatory meetings are the only factual basis for the overall common plan, creating an evidential difficulty for the Prosecution's theory as to the existence of a common plan and, by extension, the existence of the Network. However, the Prosecution also invokes a considerable amount of circumstantial evidence in support of its claim about the Network, to which the analysis now turns.

2. Training of Kalenjin youths

38. The Prosecution alleges that Network members organised, financed and completed the training of Kalenjin youths to carry out attacks against PNU supporters in order to drive them out of the Rift Valley.[59] The Prosecution relied on the evidence of Witnesses 516, 800 and 495 to prove these allegations. As a result of the Appeals Chamber's ruling, the prior-recorded statements of two of these witnesses, namely Witnesses 516 and 495, can no longer support the allegations.

39. The only remaining evidence relied on by the Prosecution as proof that the training of youths had in fact been done is that given by Witness 800. During examination-in-chief, Witness 800 stated that he witnessed first-hand from his home youths leaving in lorries and that he saw them returning some time later.[60] Directly upon their return, around November 2007, the witness claimed to have spoken to the youths and that they provided him with the

[58] "First Joint Submission by the Prosecution and the Defence as to Agreed Facts and Certain Materials contained in the Prosecution's List of Evidence", 3 September 2012, ICC-01/09-01/11-451-AnxA, Fact Ref. 17.
[59] Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 147, 152, 160-161.
[60] Transcript of hearing on 18 November 2014, ICC-01/09-01/11-T-155-CONF-ENG, pp 23-24.

details of the three-week training camp that they had just attended at the farm of a man named 'Muzuri' in Boronjo, five kilometres from Ziwa.[61]

40. In cross-examination, however, Witness 800 confirmed that he had, in fact, received information about the training from Witness 495. Witness 800 confirmed that the information had been contained in a report that Witness 495 had prepared for an organisation that both these witnesses worked for at the time.[62] Indeed, Witness 800 stated, 'I only even came to know about Boronjo and the people mentioned through that report'.[63] Witness 800 further confirmed that Witness 495 had told him that he had not attended the training personally, but had received the information from another unnamed source.[64] It is recalled that Witness 495 recanted his entire prior-recorded statement at trial and expressly denied knowledge of any training of Kalenjin youths.[65] Witness 495's recanting need not be of relevance, as the Chamber found in the Rule 68 Decision that this witness had been subject to interference and for that reason admitted Witness 495's own prior-recorded testimony. However, mindful that the statement itself is no longer evidence that can be relied on, it is important to note in this regard that Witness 495's statement does not mention the training of youths in Bronjo prior to the election.

41. As Witness 800 only admitted to the source of his information in cross-examination, he initially misled the court by first testifying under oath that he himself had spoken with the youth. Even if he had admitted to Witness 495 being his source from the outset, the training camp evidence would be just hearsay that originated from an anonymous source. No reasonable Trial Chamber could therefore rely on Witness 800's evidence for conviction.

42. Witness 800 has admitted to his involvement in witness interference under oath.[66] He testified that he provided the Prosecution with his initial statement in October 2012, but that in July 2013, following a number of

[61] ICC-01/09-01/11-T-155-CONF-ENG, pp 18-19, 26.
[62] Transcript of hearing on 25 November 2014, ICC-01/09-01/11-T-160-CONF-ENG, p. 39; and Witness 495's witness statement, initially admitted under Rule 68: KEN-OT0084-0236, p. 3.
[63] ICC-01/09-01/11-T-160-CONF-ENG, p. 40.
[64] ICC-01/09-01/11-T-160-CONF-ENG, p. 39.
[65] Transcript of hearing on 22 September 2014, ICC-01/09-01/11-T-141- CONF-ENG, p. 8.
[66] It is noted that the Prosecution relied on the fact that this witness was directly involvement in the (attempted) bribing of other Prosecution witnesses in its Prosecution's request for the admission of prior recorded testimony of six witnesses, 29 April 2015, ICC-01/09-01/11-1866-Conf, at Parts VI and VII.

meetings with certain individuals and in return for the payment of a bribe, he agreed to recant his statement, as well as to approach other Prosecution witnesses, including Witness 495, in order to convince them to also recant.[67] He further admitted to signing a pre-written affidavit, in which he recanted his earlier statement, despite knowing most of its contents to be untrue.[68] Moreover, Witness 800 testified that he had arranged for Witness 495 to meet with the aforementioned individuals, and that he had agreed to follow up on Witness 495, to ensure that this person would approach yet another Prosecution witness to induce her to recant.[69]

43. In addition to the untimely modification as to the source of information, discussed above, this raises serious questions regarding Witness 800's trustworthiness. He has demonstrated a willingness to lie in return for personal gain and induce others to lie as well, apparently without concern for the significant implications of such dishonesty. Moreover, it has not been suggested that Witness 800 acted under duress or fear of retribution. In circumstances where a witness has demonstrated such a far-reaching willingness to manipulate the truth, the resulting evidence is incapable of being relied upon by a reasonable Trial Chamber.

44. Therefore, in light of the Appeals Chamber's decision related to Witnesses 516 and 495 and my own assessment of the evidence given by Witness 800 and the issues discussed above, the conclusion must be that the Prosecution has not presented any evidence upon which a reasonable Trial Chamber could find 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.

3. Acquisition of weapons

45. The allegations concerning the acquisition of firearms appear to be a key pillar in the Prosecution's theory of the case. That aspect of the case theory is meant to show that the attacks were planned and prepared. Before going into the details of these allegations, it should be observed that the Prosecution has hardly presented any evidence of actual use of guns during the alleged attacks. Notably, by the Prosecution's own admission, namely based on the

[67] Transcript of hearing on 20 November 2014, ICC-01/09-01/11-T-157-CONF-ENG, pp 13-14.
[68] ICC-01/09-01/11-T-157-CONF-ENG, pp 21-22.
[69] ICC-01/09-01/11-T-157-CONF-ENG, pp 16-18.

records of one of the main hospitals in the area,[70] it appears that: i) gunshot wounds accounted for only a relatively small percentage of all types of injuries sustained during the post-election violence, at a time that State security forces were using armed force to quell the unrest;[71] ii) the majority of gunshot fatality victims were not Kikuyu;[72] and iii) most victims of gunshot trauma were admitted on 30 and 31 December 2007,[73] meaning that their injuries would have been sustained before the bulk of the alleged delivery of firearms to the Network.[74]

46. The evidence available does not show that the guns that were allegedly acquired by the Network were in fact used as part of the implementation of the common plan. Witness 356 testified that firearms were found on Kalenjin youth for use 'in a failed attempt to attack Moi's Bridge', an event that lies outside the scope of the charges and about which the Chamber has not received sufficient evidence in order to determine its potential relevance for the existence of the alleged Network.[75]

47. Similar considerations apply to the alleged acquisition of bows and (poisonous) arrows by members of the Network. Although a number of witnesses mentioned that bows and arrows were being acquired before the election results were announced,[76] only three fatalities related to injuries caused by arrows were recorded[77] and only six per cent of all injuries (lethal as

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[70] EVD-T-OTP-00083, which states that only 14 per cent of all types of injuries sustained during the post-election violence, that were seen at the Moi Teaching and Referral Hospital, resulted from firearms.

[71] See, e.g., the Report of the Commission of Inquiry into Post-Election Violence, EVD-T-OTP-00328, p. 417.

[72] In fact, on the basis of EVD-T-OTP-00083, it appears that none of the deceased victims of gunshot wounds were identified as Kikuyu, whereas three of the 13 victims were identified as Kalenjin. Unfortunately, the record of all gunshot injuries, including non-lethal ones, does not indicate the ethnicity of the victims.

[73] Six victims of gunshot wounds were admitted on 30 December 2007 and 14 such victims on 31 December 2007. However, over the two weeks period following the alleged acquisition of 82 firearms (including 12 assault rifles) by the Network, less victims of gunshot wounds were admitted than on each of these two days (i.e. 11 persons). See Moi Teaching and Referral Hospital, EVD-T-OT00083.

[74] Witness 356 testified that the transaction took place on 31 December 2007: ICC-01/09-01/11-T-82-CONF-ENG, pp 10-11. In this regard, I also note that Witness 423 testified that attackers had guns during on 30 or 31 December 2007 (Transcript of hearing on 7 November 2013, ICC-01/09-01/11-T-68-Red-ENG, p. 17).

[75] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 235 *juncto* 163, with reference to Witness 356, Transcript of hearing on 20 January 2014, ICC-01/09-01/11-T-76-Red-ENG, pp 48-50.

[76] Witnesses 800, 423, and 604.

[77] Moi Teaching and Referral Hospital, EVD-T-OT00083, Annex III.

well as non-lethal, 29 cases in total) were caused by arrows. It should be noted, also, that none of the deaths were identified as Kikuyu, Kisii, or Kamba.[78]

48. Even if the evidence related to the acquisition of weapons by the alleged Network is taken at its highest, it does not prove that the alleged attack was well planned or prepared. At best, a reasonable Trial Chamber might infer from this evidence that some persons acquired a relatively small amount of weapons, which may actually not have been used – at least not successfully – to attack the Kikuyu. However, the fact remains that the Prosecution is asking the Chamber to infer the existence of the plan from sparse evidence on the manner in which it was carried out. As the evidence does not show that the weapons alleged to have been acquired had in fact been used, another conclusion could be that the weapons had not been intended for use in attacks against the Kikuyu at large, but were acquired for defensive purposes. This other, reasonable, conclusion would cast doubt on the evidence relating to the alleged planning meetings or at least lead to a different interpretation of what was allegedly said during those meetings.[79]

(a) Fundraiser in Ziwa

49. The Prosecution relies on the prior recorded testimony of Witness 495 and the in-court testimony of Witness 658 to support an allegation that a *harambee* (i.e. fundraiser) was held in Ziwa on 31 December 2007, in order to collect funds, *inter alia*, to obtain weapons for Kalenjin youth that were to take part in the 'war' against Kikuyu.[80] Mr Ruto is said to have contributed money through Jackson Kibor, who also gave his own money.[81]

50. As Witness 495's statement is no longer in evidence, the analysis will focus on Witness 658's testimony. The evidence this witness gave about the Ziwa fundraiser is insufficient support for the Prosecution's allegations, as

[78] Moi Teaching and Referral Hospital, EVD-T-OT00083.
[79] In this regard, I note that the Prosecution invites the Chamber to accept that there is a case for the Defence to answer if one out of many possible inferences that could be made on the basis of the evidence would point to the guilt of the accused (see ICC-01/09-01/11-T-209-CONF-ENG, pp 15-16). I do not agree with that proposition. 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.
[80] Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 169-172.
[81] Transcript of hearing on 1 December 2014, ICC-01/09-01/11-T-164-CONF-ENG, at pp 91-93.

there is no (other) evidence showing that the money allegedly contributed was actually used to buy guns or, more importantly, that these weapons were actually used to commit crimes pursuant to the Network's alleged common plan to attack PNU supporters and the Kikuyu civilian population; rather than for other possible purposes, such as defending the Kalenjin community against perceived potential aggressors, like the Mungiki.

51. Furthermore, in relation to the personal involvement of both accused, there is insufficient evidence to suggest that Mr Sang, who allegedly promoted the event on his radio show, was aware of the alleged purpose of the fundraiser to raise money to buy weapons to be used against the Kikuyu civilian population.

52. As to Witness 658's evidence that Mr Ruto provided 200,000 KSH, it should be noted that – as discussed below – this is based on hearsay. This need not be problematic, but – more importantly – Witness 658's evidence does not prove that Mr Ruto knew that the money he allegedly donated would be used to buy guns that were intended for criminal activities. Even if the evidence provided by Witness 356, who will be discussed below, is taken at its highest and it is believed that Mr Ruto called Jackson Kibor on the day that a certain amount of guns was purchased, this cannot, without more, corroborate the proposition that Mr Ruto donated 200,000 KSH during the *harambee*; or the more far-reaching proposition that this donation was intended to be used for gun purchases to further the alleged common plan.

53. In addition, a number of general observations should be made about Witness 658. During the investigation stage, he told the Prosecution that he personally attended two events during which incriminating things happened. However, during his testimony before the Chamber, the witness admitted that this was not true. Instead, he claimed to have obtained the relevant information from another source.[82] Yet, the witness had initially offered a detailed, but apparently false, account of his personal involvement in both events and even went so far as to draw a layout of the relevant locations for the Prosecution's investigators, despite the fact that, according to his later in-court testimony, he had never set foot in at least one of those locations.[83] This strongly suggests that Witness 658 deliberately tried to mislead the

[82] Transcript of hearing on 11 December 2014, ICC-01/09-01/11-T-173-CONF-ENG, pp 15 and 18.
[83] ICC-01/09-01/11-T-173-CONF-ENG, p. 23.

Prosecution, while knowing that the consequence of his false statements would be the incrimination of Mr Ruto. Although the witness now claims that the information was nevertheless correct but that he obtained it from another source,[84] the fact still remains that he tried to purposely deceive the Prosecution, for which no acceptable reason was provided. Accordingly, besides the already limited evidentiary use of the information provided by Witness 658, these circumstances further diminish the value of his evidence.

(b) Purchasing of guns in late December 2007

54. The Prosecution relies on the testimony of Witness 356 to prove the allegation that Mr Ruto and Jackson Kibor acquired guns for the Network, with the purpose of using them in a criminal plan to attack Kikuyu and PNU supporters in the Rift Valley region.[85] Of the witnesses that remained after the expulsion of the Rule 68 statements from the record, Witness 356 is presented by the Prosecution as having provided the most incriminating evidence in relation to the alleged acquisition of firearms by the Network. His evidence directly implicated Mr Ruto in these transactions. Witness 356 testified that he had arranged the acquisition of 12 AK-47 assault rifles and 70 pistols of an unknown type, which were delivered on 31 December 2007.[86] He also testified about utterances that Mr Sang allegedly made on his radio show on Kass FM.[87] Given the centrality of Witness 356 to the allegation of the acquisition of guns, I will now turn to a separate analysis of this witness's testimony.

55. Witness 356 does not provide any information as to the time schedule for the acquisition of the guns. Whereas the Prosecution's theory of the case, and the organisational planning in particular, dictates that the weapons should be available prior to, or at least by the time the election results would be announced, Witness 356 does not mention any deadline for the alleged delivery of the firearms. Furthermore, there is no mention by Witness 356, or in any other evidence that the Chamber has been made aware of, of any ammunition for either type of firearm being (made) available. Moreover, there is a lack of clarity as to whether the weapons were even used in the commission of any crimes against the Kikuyu or PNU supporters in the Rift Valley. [REDACTED] Witness 356 also reported having heard that 'some

[84] ICC-01/09-01/11-T-173-CONF-ENG, p. 18.
[85] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 163.
[86] ICC-01/09-01/11-T-76-CONF-ENG, pp 6-24.
[87] Transcript of hearing on 21 January 2014, ICC-01/09-01/11-T-77-CONF-ENG, pp 34-35.

youths were given firearms' and that they went to Moi's Bridge or Eldoret to 'invade' the Kikuyu.[88] Leaving aside that this information is not corroborated, there is no indication that the weapons mentioned were the same ones for which Witness 356 allegedly brokered the purchase. There is also no evidence before the Chamber to indicate that they were actually used in the commission of any crimes in furtherance of the alleged organisational policy or the alleged Network's common plan.

56. The information provided by Witness 356, for the most part, stands on its own and is not corroborated by any other evidence before the Chamber. Whereas not every fact needs to be corroborated or to be supported by the testimony of two witnesses or more than one piece of evidence,[89] the core allegations should be proved by sufficiently solid evidence to enter a conviction. In light of the centrality of his testimony for the allegations against the accused, this witness's evidence does not afford the necessary solid basis upon which a reasonable Trial Chamber could rely for proper conviction.

57. The Prosecution acknowledged that at the moment the Prosecution's case has completely broken down, an assessment of the credibility of the evidence can be made at the 'no case to answer' stage.[90] The Prosecution nevertheless disputed that, as claimed by the Ruto Defence, its case had completely broken down.[91] It is noted that this statement was made at a moment that the Prosecution believed that it could rely on the prior recorded testimonies admitted pursuant to Rule 68, and I appreciate that one can differ in the understanding of when a case has 'completely broken down'. However, if 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.

58. Reiterating that in my view Witness 356's evidence, even when taken at

[88] ICC-01/09-01/11-T-76-CONF-ENG, pp 48-50.
[89] See Rule 63(4) of the Rules.
[90] Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 18-19.
[91] Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 35-39.

its highest, would not be evidence upon which a reasonable Trial Chamber could convict, I will now highlight some of the problematic issues with this witness's evidence that touch upon his credibility. To begin with, there is no obvious reason why the core Network members, and specifically Mr Ruto, would turn to Witness 356, who according to his own testimony worked as a tractor driver in a village, to obtain firearms, and the witness himself has not provided any explanation in this regard. With respect to the alleged acquisition of guns, Witness 356 repeatedly changed his testimony about significant aspects of his story, including the number of weapons that were allegedly transacted,[92] the precise chronology of events on the day of the transaction, as well as the exact whereabouts and role of a number of individuals involved.[93] However, I accept that several years after the events, a witness may have trouble recalling details and that certain discrepancies inevitably arise when a story is reproduced on multiple occasions. Notwithstanding the foregoing, any difficulties in remembering the precise details cannot explain that the first time he made a declaration about the alleged gun transaction, when he was interviewed by an NGO, Witness 356 left out the most essential part of the information relevant to this case, by not mentioning that he allegedly had a phone conversation with Mr Ruto shortly before the weapons were handed over.[94] Instead, he talked about a rather similar conversation he had at that time, but with another interlocutor and after the alleged transaction had already taken place.[95] During cross-examination, Witness 356 explained that he did not mention the accused to the interviewers of the NGO, because he did not trust them, but I find his explanation wholly unconvincing.

59. Witness 356's testimony also raises questions about the exact timing of the alleged gun transaction. While the witness maintains that it took place on 31 December 2007,[96] this proposition is incompatible with his testimony that he listened to the swearing in ceremony of President Kibaki [REDACTED] at

[92] Transcript of hearing on 27 January 2014, ICC-01/09-01/11-T-81-CONF-ENG, pp 85-97.
[93] ICC-01/09-01/11-T-81-CONF-ENG, pp 73-124; Transcript of hearing on 28 January 2014, ICC-01/09-01/11-T-82-CONF-ENG, pp 11-21. Witness 356 also provided inaccurate information about his own background as well as his personal relationship and interactions with Mr Ruto. See Transcript of hearing on 24 January 2014, ICC-01/09-01/11-T-80-CONF-ENG, pp 5-77.
[94] See Transcript of hearing on 28 January 2014, ICC-01/09-01/11-T-82-CONF-ENG; and EVD-T-D09-00111.
[95] ICC-01/09-01/11-T-82-CONF-ENG, pp 21-35 and EVD-T-D09-00111.
[96] ICC-01/09-01/11-T-82-CONF-ENG, pp 10-11.

the time of the transaction, because this ceremony took place one day earlier.[97]

60. Other than claiming to have been confused or to have made mistakes when giving different versions of events to Prosecution investigators and local NGOs,[98] Witness 356 was not able to provide a convincing explanation for these discrepancies. It should be further noted that Witness 356 appears to have been deceitful in some of his dealings with the Prosecution, as well as the Victims and Witnesses Unit of the Registry.[99] Although this does not mean that Witness 356 therefore lied about the gun purchase, it does show that he is capable of acting in a mendacious manner.

61. As mentioned above, also without assessing Witness 356's credibility, his evidence stands alone and cannot support a conviction. However, in light of the above considerations, a reasonable trier of fact would be well-advised to use this evidence with extreme caution.

(c) Conclusion on the acquisition of weapons

62. For the reasons set out above, I find that the Prosecution has not presented sufficient evidence upon which a reasonable Trial Chamber could find that the Network acquired firearms or other weapons for the purpose of attacking the Kikuyu and other perceived PNU supporters to drive them from the Rift Valley.

4. Similar pattern of attacks

63. According to the Prosecution, different Kalenjin attacks displayed 'a strikingly similar pattern'.[100] From this pattern, the Prosecution alleges, it is possible to infer that the attacks were both pre-planned and directed by the Network,[101] and show that an organisational policy existed.[102] In order to demonstrate this alleged pattern, the Prosecution relies on evidence that: a) the Kalenjin attackers were 'launched into action – often after war cries were

[97] The parties agree that the ceremony took place on 30 December 2007 (see facts agreed upon between the parties as contained in ICC-01/09-01/11-451-AnxA, p. 3).
[98] For example, Transcript of hearing on 23 January 2014, ICC-01/09-01/11-T-79-CONF-ENG, p. 94; Transcript of hearing on 24 January 2014, ICC-01/09-01/11-T-80-CONF-ENG, pp 7; 30, 68; Transcript of hearing on 27 January 2014, ICC-01/09-01/11-T-81-CONF-ENG, pp 32-34; 109-124
[99]ICC-01/09-01/11-T-80-CONF-ENG, pp 77-102.
[100] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 164.
[101] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 164.
[102] Consolidated Response, ICC-01/09-01/11-2000-Red2, para 422.

heard'; b) that 'armed Kalenjin attackers – many transported from outside regions – attacked Kikuyu and destroyed their property in an organised and surgical manner'; c) 'road blocks were erected'; and d) 'Network members assisted/directed the Kalenjin attackers on the ground'.[103]

64. Before considering whether the inference about the pre-planning and direction by the Network can be made, it will first be analysed whether the available evidence shows the existence of the alleged pattern.

(a) War cries

65. At the outset, I observe that it is not clear from the Prosecution's submissions whether it is alleged that the war cries were a means to launch the Kalenjin into action or whether the launching into action and the war cries simply coincided. In other words, it is not clear whether the alleged relation between the war cries and the start of attacks is one of causation or one of correlation. From the wording of the Consolidated Response, it appears that the Prosecution does not claim that war cries were used in every attack; and indeed, this does not follow from the evidence. For a substantial number of the alleged Kalenjin attacks, there is no evidence about war cries. In the absence of war cries, it is unclear how the Kalenjin would have been 'launched into action'. Yet, also to the extent that there is evidence of instances of 'war cries', their use does not appear to have been of such a systematic or regular nature so as to represent a (strikingly) similar pattern.

66. Moreover, it is far from clear from the evidence that what the Prosecution describes as 'war cries' actually qualify as such. Several witnesses testified before the Chamber that the *nduru* would be made – usually by women – to alert the community that it was being attacked.[104] Witness 508, for example, testified that a group of Kikuyu responded to hearing *nduru* by going towards the sounds in order to offer assistance.[105] Other witnesses mention hearing songs that were traditionally used during Kalenjin

[103] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 164.
[104] Such as Witness 658 (ICC-01/09-01/11-T-164-CONF-ENG, pp 21-23); Witness 508 (Transcript of hearing on 31 March 2014, ICC-01/09-01/11-T-104-CONF-ENG, pp 40-41); and Witness 673 (Transcript of hearing on 14 May 2014, ICC-01/09-01/11-T-113-CONF-ENG, p. 21).
[105] ICC-01/09-01/11-T-104-CONF-ENG, p. 37.

circumcision ceremonies.[106] It is thus not clear what the significance of the different songs, shouts and cries that were allegedly heard was and one can wonder whether the *nduru* would be more accurately described as alarm cries or calls for help instead of 'war cries'.

67. The available evidence does not clearly establish a connection between the cries and actual attacks, as there appears to have been a rather significant lapse of time between when the cries were heard and when the attack started. More importantly, however, there is no reliable evidence in the record that could prove that the persons making the cries were affiliated with the Network, or made the cries upon request of the Network, in furtherance of the alleged common plan. Therefore, even if it were accepted that offensive war cries were used to initiate a majority of attacks, this still could not be considered proof of a pattern that can only be attributed to the existence of a Network, or the alleged policy or common plan.

(b) Surgical attack by armed attackers who were often transported to the area

68. There are two aspects to this allegation: first, that Kalenjin attackers were often transported to the location of the attacks; and second, the surgical or targeted nature of the attacks. Each of these aspects will be addressed separately.

(i) Transportation of Kalenjin youths to the location of attacks

69. The Prosecution alleges that the Network organised, financed and provided transport for Kalenjin youths from different areas in order to carry out the attacks. Besides being an aspect of the alleged pattern, relied upon as proof of the existence of the alleged Network and common plan,[107] the transportation of the youth also forms part of other elements of the Prosecution's theory of the case. It is relied on, for the purposes of Article 25(3)(a), as proof of Mr Ruto's contribution to the common plan by his financing and coordination of logistics;[108] and the contributions of other members of the Network (namely, Jackson Kibor, Alex Kibenei and Mr Sang),

[106] Witness 613 (Transcript of hearing on 18 June 2014, ICC-01/09-01/11-T-118-Red-ENG, pp 90-92); and Witness 535 (Transcript of hearing on 21 November 2013, ICC-01/09-01/11-T-70-Red-ENG, pp 76-77).
[107] Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 147, 152, and 160-161.
[108] Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 237 and 240.

by acting as conduits for Mr Ruto's instructions.[109] Further, for the purposes of proving the contextual elements of crimes against humanity, the transportation of youths is relied on as proof of the existence of an organisation with the means to carry out the attacks, both in respect of the organisation of transport, and the provision of funds to cover the cost of doing so.[110]

70. The evidence presented can be divided into that which purports to show that youths were in fact transported to specific locations to carry out the attacks, and that which purports to show that the transporting of youths was planned and facilitated by the Network for the purpose of carrying out the common plan. This latter category of evidence is of the most interest. If it is only proven that youths were transported to the location of the attacks, then it could still reasonably be inferred that their transport was arranged in another manner than by the Network in accordance with the common plan. The Prosecution's allegations will therefore only be made out if it is also proved that the transportation of youths was planned or facilitated by the alleged Network.

71. Further, it must be stressed that evidence linking the transporting of youths to individuals alleged to be members of the Network will not, in itself, be sufficient to prove that the transportation of youths was facilitated by the alleged Network in accordance with a common plan. If the transportation of youths can be attributed in part or whole to a named individual, the membership of that individual within the Network and the fact that the transportation of youths was part of the common plan must still be proven. This is necessary to avoid circular reasoning and to ensure that potentially unconnected acts of individuals are not mistaken for organised acts without actual proof of that organisation's involvement.

72. Turning now to the assessment of the evidence that youths were transported to the location of attacks, I note that Witness 487 testified to seeing two white and cream lorries on two occasions on 31 December 2007. On the first occasion, he saw the lorries driving on the main road leading into Kapchumba early in the morning.[111] Later that day, in Kambi Thomas, he saw

[109] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 244; paras 170-171 and 248; and paras 327-335, respectively.
[110] Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 411, 416, and 418.
[111] Transcript of hearing on 22 October 2013, ICC-01/09-01/11-T-54-Red-ENG, pp 63-64.

people, that he believed to be youths, jumping out of what appeared to be the same lorries.[112] In respect of the first sighting, he gave no detail of the lorry passengers other than that he believed they were male. While in respect of the second sighting, the only evidence of the identity of the passengers is the witness's opinion, based on the behaviour of the persons he saw disembarking the lorry, that they were youth.[113] The witness mentioned that 'later when things came to cool', he 'came to know' that the lorries belonged to Jackson Kibor.[114] However, the Prosecution did not clarify how the witness came to know this,[115] while in cross-examination the witness merely confirmed that it was hearsay, but not who told him.[116]

73. As to the use of lorries, I note that Witness 487 told the Chamber that lorries were often used by Kalenjin to travel to ceremonies during the relevant time of year,[117] and that lorries were seen being used at the site of alleged attacks by both fleeing Kikuyu victims[118] and by the GSU police forces.[119] In addition, I note that the Prosecution has not ruled out other reasonable inferences than that the lorries seen by Witness 487 were transporting Kalenjin attackers to attack locations.

74. Witness 189 testified to seeing a lorry carrying armed Kalenjin attackers on Iten highway on 31 December. She described the passengers in detail,[120] and believed that the youths were Kalenjin, because they were speaking in Kalenjin.[121] However, according to a map provided by the witness herself, she was roughly two kilometres away from the highway at the time. Even from an

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[112] Witness 487 explained as follows: 'Well, I can't say that they were the real -- the ones I saw in the morning, but they resembled the lorries that I saw in the morning.': ICC-01/09-01/11-T-54-Red-ENG, p. 98.
[113] ICC-01/09-01/11-T-54-Red-ENG, pp 98-99.
[114] ICC-01/09-01/11-T-54-Red-ENG, p. 99.
[115] When returning to the topic, the Prosecution only asked to the following clarifying question: 'Q. You were telling us about whom you heard later on that these lorries belonged to. Do you remember saying they belonged to – you heard they belonged to Jackson Kibor? A. Yeah. Q. And you said he was a businessman, a lorry businessman. Did you know this before you spoke -- before you heard this information? A. I didn't knew him before.' ICC-01/09-01/11-T-54-Red-ENG, p. 100.
[116] Transcript of hearing on 24 October 2013, ICC-01/09-01/11-T-56-Red-ENG, p. 96.
[117] ICC-01/09-01/11-T-54-Red-ENG, p. 64.
[118] ICC-01/09-01/11-T-164-CONF-ENG, p. 95.
[119] KEN-OTP-0087-0031, para. 81.
[120] Transcript of hearing on 14 October 2013, ICC-01/09-01/11-T-48-Red-ENG, pp 80-81, and 84.
[121] ICC-01/09-01/11-T-48-Red-ENG, pp 81-82.

elevated vantage point,[122] at such a distance the witness could not possibly have been able to make out the identity of the passengers, observe details, such as their dress and weaponry, and hear the language they were speaking. Accordingly, no reasonable chamber could rely on Witness 189's testimony concerning transports.

75. I turn now then to Witness 508, who testified that he saw groups of 'arsonists' carrying out an attack on Kambi Thomas, Kambi Kemboi and Kambi Mwangi on 31 December 2007.[123] He was later told that they had been transported there from Ziwa.[124] Witness 508 also testified to seeing two lorries parked beside a meeting of youths and elders in Kambi Thomas on 1 January 2008. A number of youths were burning a nearby house. He concluded that the youths had been transported to the meeting site in the lorries.[125] Witness 508's evidence as to the use of lorries thus consists of (uncorroborated) hearsay and what he himself saw merely indicates that the lorries were parked at the time that he saw a meeting taking place and that they remained at that location until he had passed by. The witness speculated that the youths had been transported to the meeting site in the lorries,[126] but the presence of the lorries at the meeting may have been for other reasons.

76. Witness 658 testified that, while he was stopped at a roadblock in Kimumu on 31 December 2007, he saw a lorry that could not be identified dropping off some 300 youths armed with arrows and machetes some two metres from his vehicle.[127] Shortly after this, on the same day, the witness allegedly passed a long lorry that was travelling on the C48 highway between Eldoret and Ziwa in the direction of Eldoret and carrying some 200-300 youths armed with bows and arrows.[128] Witness 658 stated that he saw a black inscription, reading 'Mafuta farm', 'at the top' of this lorry. He further testified that part of the lorries owned by Jackson Kibor bore this inscription.[129] He recounts being passed by three vehicles (pickups and tractors) carrying small groups of youths armed with bows and arrows wearing shorts and t-shirts

[122] Witness 189 stated that the point on which she was located was higher than the road: ICC-01/09-01/11-T-48-Red-ENG, pp 87-88.
[123] ICC-01/09-01/11-T-104-CONF-ENG, p. 52.
[124] Transcript of hearing on 1 April 2014, ICC-01/09-01/11-T-105-Red-ENG, pp 2-3.
[125] ICC-01/09-01/11-T-105-Red-ENG, pp 4-5.
[126] ICC-01/09-01/11-T-105-Red-ENG, pp 4-5.
[127] ICC-01/09-01/11-T-164-CONF-ENG, pp 67-71.
[128] ICC-01/09-01/11-T-164-CONF-ENG, pp 73-74.
[129] ICC-01/09-01/11-T-164-CONF-ENG, pp 74-76.

also driving in the direction of Eldoret, on the evening of 31 December 2007, while driving back along the aforementioned road.[130] Upon arrival in Eldoret, he found youths were burning buildings.[131]

77. Witness 423 testified that 'at night time'[132] on 30 December 2007, 'Nandis' (Kalenjin) were dropped off at Yamumbi in ten large open lorries, and that shortly afterwards houses in Yamumbi began burning.[133] Sometime after 31 December, Witness 423 heard from a certain person, unknown to the Chamber, that the lorries in question belonged to 'some rich individuals', one of which was a 'Mr Maiyo'.[134]

78. If one leaves aside the above-noted discrepancies in Witness 658's testimony about 31 December 2007, taking at its highest, his testimony shows that some groups of youth were brought to, *inter alia*, Eldoret, a major city. However, this does not necessarily show that the transported youth were the ones perpetrating the crimes on the ground. Moreover, besides potential ownership of one of the vehicles by Jackson Kibor, an alleged Network member, Witness 658's testimony does not establish a sufficient link between the transportation of youth and the Network, nor does it prove any organising by the Network of the transport. While there is a lack of clarity as to the vantage point from which Witness 423 saw the events, at this stage of the proceedings, Witness 423's testimony indicates that lorries were used to transport Kalenjin attackers to an attack location in Yamumbi on 30 December 2007. However, in respect of the alleged ownership of the lorries, I note that this part of Witness 423's testimony is based on uncorroborated hearsay. I further note that the Chamber also heard evidence of attackers arriving by foot.[135] In sum, I conclude that a reasonable Trial Chamber could not find that the alleged Network facilitated the transporting of youths to attack locations. I now turn to the second part of the allegation: the surgical or targeted nature of the attacks.

(ii) Organised and surgical nature of the attacks

79. The main argument to support the part of the allegation appears to be

[130] ICC-01/09-01/11-T-164-CONF-ENG, pp 93-94.
[131] ICC-01/09-01/11-T-164-CONF-ENG, pp 105-106.
[132] Transcript of hearing 6 on November 2013, ICC-01/09-01/11-T-67-Red-ENG, p. 80.
[133] ICC-01/09-01/11-T-67-Red-ENG, p. 83; ICC-01/09-01/11-T-68-Red-ENG, pp 3-4.
[134] ICC-01/09-01/11-T-68-Red-ENG, p. 4.
[135] Witness 469, Transcript of hearing on 4 April 2014, ICC-01/09-01/11-T-107-Red-ENG.

that the attackers, on a number of occasions, were somehow pointed towards houses owned or occupied by Kikuyu and other PNU supporters, and away from houses owned or occupied by Kalenjin. It is recalled that the post-election violence in itself was largely based upon ethnic and political divisions within the country. However, the Prosecution – albeit rather implicitly – alleges that the Network actively decided which houses should be targeted and which ones spared. To prove this allegation, the Prosecution points to a number of incidents during which either lists of Kikuyu properties were allegedly provided to the attackers or to a code being used to identify Kalenjin properties. Before discussing the incidents, it is worth recalling that the existence of any lists, or the use of any code, can only point towards the existence of the Network if it is also proved that the lists or codes were produced and/or used at the behest of the Network.

List of Kikuyu houses in Kimumu

80. In relation to the alleged lists, the Prosecution relies upon the testimony of Witnesses 658 and 442. As to Witness 658, it is noted that he does not identify the person who allegedly showed the list to the people present at the Kimumu meeting and it cannot be established whether or not the individual was affiliated with the Network. The mere fact that the person spoke in between two alleged Network members, who were present at the meeting (i.e. Sammy Ruto and Lucas Sang), does not prove that he was also part of the Network. Moreover, according to Witness 658, the unknown speaker did not say what should be done to the houses.[136] The witness speculates that the person might have intended the houses to be attacked, or the tenants to be evicted, in case the election result would be unfavourable,[137] but this cannot be ascertained with sufficient certainty.

81. It is further worth noting that, although it is unclear how many houses were actually on the list, according to Witness 658, the person only pointed out five houses.[138] It is recalled that the alleged common plan was to evict all Kikuyu from the Rift Valley. As the Chamber does not have (reliable) information before it about the number of houses in Kimumu that were inhabited by Kikuyu, it is impossible to ascertain whether the list that was said

[136] Transcript of hearing on 28 November 2014, ICC-01/09-01/11-T-163-CONF-ENG, pp 101-103.
[137] ICC-01/09-01/11-T-163-CONF-ENG, p. 103.
[138] ICC-01/09-01/11-T-163-CONF-ENG, pp 101-103.

to contain 35 houses comprised all or only some of the Kikuyu houses in the area.

List of Kikuyu persons in Namgoi

82. Witness 442 stated that during the attack on Namgoi an unidentified person had a list of names of persons whose houses had to be torched. The witness testified to hearing four names being read out.[139] Two of the persons named were Kikuyu, whereas the other two were Kisii. There is no indication about who compiled the list or who gave it to the Kalenjin youth and for what purpose. The Prosecution's allegation that Witness 442's testimony shows that 'some of the Network's perpetrators were in charge of identifying houses that belonged to perceived PNU supporters to loot and destroy'[140] is thus based purely on conjecture. Furthermore, as with the list Witness 658 testified about, it has also not been established that the list seen by Witness 442 contained the names of all Kikuyu/Kissi, or the (known) PNU supporters, in the relevant area.

Use of code to identify Kalenjin houses and persons, as well as non-Kalenjin individuals

83. The Prosecution also relies on Witness 487's testimony for the allegation that Kalenjin youth applied specific methods to identify their targets, such as putting a sign saying 'ODM 41' on Kalenjin houses so that the attackers would leave them alone.[141] However, Witness 487 is the only witness mentioning the use of the 'ODM 41' sign. Taking his testimony at its highest and assuming that he is correct, it only indicates a localised practice. If the use of the designation 'ODM 41' had been a method adopted by the Network, there would undoubtedly have been more such signs in other locations.

84. I further note that there is nothing in the testimony of Witness 487 to confirm the allegation that it was the Kalenjin youth making the ODM 41 markings. In fact, there is no information at all about who put the signs; or indeed, when they were put.[142] It has not been ruled out that this was an election slogan, or that the markings were made by the occupants of the

[139] Transcript of hearing on 5 March 2014, ICC-01/09-01/11-T-99-CONF-ENG, pp 18-19.
[140] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 417.
[141] ICC-01/09-01/11-T-54-Red-ENG, pp 96-97.
[142] In this regard, I note that the phrase 'ODM 41' was apparently already in use during the 2005 constitutional referendum (ICC-01/09-01/11-T-56-Red-ENG, pp 10-12).

houses, because they perceived the symbol as affording protection.

85. Witness 487's testimony is also relied on to support the allegation that Kalenjin attackers addressed people in code in order to identify targets.[143] However, the relevant part of his testimony shows that the witness's assumption that Kalenjin attackers used code to identify victims was based on one specific incident involving a drunken person who quarrelled with the attackers.[144] Besides this rather unclear incident, there is no evidence before the Chamber about any other occasion where Kikuyu were being attacked because they could not answer a coded question or something similar. Moreover, the witness testified that he did not hear the actual code.

Conclusion on organised and surgical nature of attacks

86. The available evidence in support of this allegation is anecdotal and insufficiently linked to the Network. In my view, the evidence relied on by the Prosecution would not allow a reasonable Trial Chamber to conclude that the attacks were carried out in an organised manner, let alone that they were 'surgical'.

87. Although there is some evidence before the Chamber to support the Prosecution's allegation that the attackers were transported to the area where attacks took place, there is no evidence that the attacks were carried out in a surgical manner. Moreover, no (clear) link to the alleged Network has been established by the evidence. Consequently, I am therefore unable to follow the Prosecution in its allegation that armed Kalenjin attackers attacked Kikuyu and destroyed their property in an organised and surgical manner.

(c) Erection of Roadblocks

88. The third element of the alleged pattern is the erection of roadblocks. The purported relevance of the use of roadblocks for the existence of a pattern, from which it can be inferred that the Network existed, recurs in the Prosecution's submissions at various places.[145] According to the Prosecution, the use of roadblocks is evidence of discriminatory intent on the part of Kalenjin youth against Kikuyu and perceived PNU supporters.

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[143] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 424.
[144] Transcript of hearing on 23 October 2013, ICC-01/09-01/11-T-55-CONF-ENG, pp 9-10.
[145] See Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 77, 86, 94, 96, 172, 175, 215, 344, and 427.

89. Apart from two paragraphs of the CIPEV report,[146] the Prosecution relies on a number of witnesses to prove its allegations about the use of roadblocks. At the outset it should be noted that there is evidence that many roadblocks were indeed erected during the relevant period.[147] However, this evidence, although by no means negligible, does not clearly demonstrate that there was a pattern or any system behind the erection of roadblocks. However, what matters is not whether these roadblocks existed, but whether they were set up at the behest of the Network, for a certain purpose. Although the use of roadblocks seems to have been fairly widespread, there is little evidence to suggest that roadblocks were erected and used in a coordinated or pre-planned manner.

90. Furthermore, while there is some evidence of sporadic violence against and humiliation of Kikuyu and perceived PNU supporters at different roadblocks, I have not been able to discern a pattern in this regard. In fact, the pattern regarding what happened to people who arrived at the roadblocks appears to be rather that they had to give money before being allowed to pass.[148] From the evidence it also appears that most people, including Kikuyu and Kalenjin PNU supporters, were eventually permitted to pass the roadblocks they encountered. Witness 800 testified about the beating to death in early January 2008 of a Kikuyu man at a roadblock by Kalenjin youth and stated that this happened because of the victim's ethnicity.[149] However, apart from the issues related to this witness's testimony (as discussed above), it is unclear on what basis this witness made the assertion that the man was killed due to his ethnicity. Too little information is provided about this incident in order to permit any inference in this regard.

91. As regards any possible links to the alleged Network, the Prosecution

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[146] EVD-T-OTP-00328.

[147] It appears that the Ruto Defence agrees that roadblocks were erected in large areas. Transcript of hearing on 29 October 2013, ICC-01/09-01/11-T-61-Red-ENG, p. 84.

[148] See, e.g. the testimony of Witness 508, at ICC-01/09-01/11-T-104-CONF-ENG, pp 68-70. This witness, a Kikuyu, managed to pass a roadblock after giving 100 KSH. He also saw several other Kikuyu pass the roadblock in the opposite direction). Witness 442 states that money was asked but not paid. The witness's vehicle was eventually let through after the driver – a police officer – fired his gun in the air. Two subsequent roadblocks were passed without significant problems (ICC-01/09-01/11-T-99-CONF-ENG, pp 47-52). Witness 535 testified that thousand persons were stopped and told to carry ID cards in their mouths. They were robbed of their money and then told to leave for Othaya (T-71, pp 36-40). Naturally, it is possible that Kalenjin and ODM supporters were treated more favourably in this regard, but this does not emerge clearly from the evidence before the Chamber.

[149] ICC-01/09-01/11-T-155-CONF-ENG, pp 71-73.

relies on the testimony of Witness 356 concerning an encounter at a roadblock with Jackson Kibor in early January 2008. Jackson Kibor is said to have told the Kalenjin youth manning the roadblock that he was waiting to hear 'from above' whether or not the roadblock should be maintained.[150] Yet, the witness's understanding that this was a reference to the ODM party, and Mr Ruto more specifically, is pure speculation[151] and cannot reasonably be used as evidence of Mr Ruto's involvement. The fact that Jackson Kibor was present at a roadblock and seems to have instructed the youths to maintain them pending further instructions, does suggest that Mr Kibor was involved in the operation of roadblocks at that location. However, unless it is otherwise proved that Jackson Kibor was a Network member, the mere fact that he was involved in roadblocks in Moi's Bridge does not point towards the existence of the Network or a common plan, as alleged by the Prosecution.

92. Witness 356 also testified about having seen Isaac Maiyo speaking with the youths that were manning a particular roadblock.[152] However, he did not hear what they were speaking about[153] and his evidence therefore does not necessarily show any link between these youths and the alleged Network; even if it were established that Isaac Maiyo was indeed a Network member. More importantly, there is no clear indication as to the purpose of the roadblocks in that area,[154] or how they would have furthered the objective to evict the Kikuyu.

93. Witness 658 provided evidence about Mr Sang allegedly using his radio show to warn Kalenjin youths occupying roadblocks that they might be killed by the police,[155] and to ask them to open the roads in order to allow women to go to hospital.[156] I note that these two propositions do not establish that Mr Sang was involved in the organisation of the roadblocks. Moreover, the call to let women pass actually asks the youth to do a good thing instead of asking them to engage in any criminal conduct. In addition, leaving aside my above observations on the reliability of Witness 658's evidence, the fact that Mr Sang publicly would have called upon individuals manning the roadblocks to

[150] ICC-01/09-01/11-T-76-Red-ENG, pp 82-91.
[151] ICC-01/09-01/11-T-76-Red-ENG, pp 88 and 90.
[152] ICC-01/09-01/11-T-76-Red-ENG, pp. 96-97
[153] ICC-01/09-01/11-T-76-Red-ENG, p. 97
[154] The road between Moi's Bridge and Ziwa.
[155] ICC-01/09-01/11-T-164-CONF-ENG, pp 64-67.
[156] ICC-01/09-01/11-T-164-CONF-ENG, p. 58.

engage in certain conduct neither proves that Mr Sang was a member of the Network, nor that the individuals at the roadblock belonged to the Network, or were manning the roadblocks on account of the Network. In this regard, I also observe that the existence of the roadblocks appears to have been well-known at the time and the fact that a public figure made a comment about this on the radio does not mean that this public figure was therefore somehow involved or complicit in the use of the roadblocks.

94. On the basis of the foregoing, it can be concluded that the evidence shows that roadblocks were erected during the relevant period, but that it has not been established that the Network planned the roadblocks or directed the actions of the persons manning them.

(d) Network Members assisted/directed the Kalenjin attackers on the ground

95. The fourth and last element that, according to the Prosecution, shows a pattern is the alleged assistance and/or direction of the Kalenjin attackers on the ground by Network members.[157] On the basis of the evidence presented by the Prosecution in support of this allegation, I have interpreted this element to involve two aspects: first, that Network members held local implementation meetings with the purpose of mobilising the Kalenjin attackers to implement the common plan; and second, that Network members utilised a communications system to assist and direct the attackers. These aspects will be addressed in turn.

(i) Local implementation meetings

96. The Prosecution refers to evidence of a number of meetings held locally as proof that the Network mobilised the youth in order to implement the common plan. The Chamber has addressed the evidence presented in respect of each of these meetings in turn.

Meetings in Greater Eldoret

97. The Prosecution alleges that two implementation or mobilisation meetings took place in Greater Eldoret: one in Kimumu on 29 December 2007 and two days later, on 31 December, one in Ziwa. Each alleged meeting will be discussed in turn.

[157] Consolidated Response, ICC-01/09-01/11-2000-Red2, para 164.

98. Although around one hundred persons are alleged to have attended the meeting in Kimumu, the only evidence the Prosecution presented for it is the (uncorroborated) testimony of Witness 658. As already noted above, this witness admitted that he lied in his earlier statement about personally attending certain coordination meetings. Instead, he alleged that he had obtained the relevant information from another source.[158] This in itself, especially given that the witness did not provide a satisfactory explanation for his deception, would suffice to make Witness 658's testimony unsafe for a reasonable Trial Chamber to rely upon. However, even if this were to be ignored and Witness 658's testimony pertaining to the meeting in Kimumu is taken at its highest, his evidence is incapable of proving the Prosecution's allegation that the Network mobilised the youth to carry out the attacks, as Witness 658 does not provide any information that those present at the alleged meeting were told who was to participate in the attacks, the location they were to go to, or the date and time that they had to be there.

99. Indeed, apart from the allegations concerning the identification of Kikuyu houses by an anonymous man, which has already been dealt with above, the information before the Chamber as to what transpired during the Kimumu meeting consists of the attendees being told to wait to hear from their leader – who the witness presumed to have been Mr Ruto – before doing anything.[159] Witness 658 did not testify as to what should then be done.[160] In addition, it should be noted that there is no evidence to support the Prosecution's claim that Sammy Ruto and Lucas Sang, or any of the other individuals allegedly present during the Kimumu meeting, were affiliated with the Network.[161]

100. With regard to the second meeting in Greater Eldoret, the Prosecution

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[158] ICC-01/09-01/11-T-173-CONF-ENG, pp 15-23.
[159] ICC-01/09-01/11-T-163-CONF-ENG, pp 97-99.
[160] Sammy Ruto and Lucas Sang did not indicate what had to be done if it was confirmed that the elections result was unfavourable: ICC-01/09-01/11-T-163-CONF-ENG, pp 97 and 106-107. I am aware that, according to Witness 658, Lucas Sang was leading a large group of armed Kalenjin youth on the morning of 31 December 2007; and that the witness was allegedly forced to take part in one of the attacks carried out by this group (ICC-01/09-01/11-T-164-CONF-ENG, p. 28 and further). However, there is no evidence that (some of) the youth taking part in the meeting also took part in the attacks on 31 December. In the absence of further information, it cannot be inferred from the presence of Lucas Sang that the meeting in Kimumu was held to prepare the attacks on 31 of December 2007.
[161] In this regard, I note that even if the witness's speculation that the leader referred to was Mr Ruto were to be accepted, does not prove that either the persons present at the meeting or Mr Ruto were part of the same organisation referred to by the Prosecution as the Network.

alleges that a fundraiser was held in Ziwa Sirikwa on 31 December 2007, during which tribal leaders and youth were mobilised for the impending attacks on the Kikuyu in the Greater Eldoret area. The Prosecution submits that 'all the attacks on the Greater Eldoret region can be linked – at least in part – to the fundraiser in Ziwa'.[162]

101. For these allegations, the Prosecution relied on the testimony of Witness 658 and the prior recorded testimony of Witness 495. As the latter's statement is no longer in evidence following the Appeals Chamber's decision, I will only address Witness 658's evidence about the fundraiser. I should stress, again, the serious doubt surrounding Witness 658's testimony. He testified about attending a fundraiser in Ziwa on the afternoon of 31 December 2007. He also testified that Jackson Kibor and Fred Kapondi spoke to those in attendance and that Kibor spoke about the acquisition of 'things', which the witness understood to mean 'weapons'.[163] However, he did not testify that the youths were told where to go to carry out the common plan, or when they were to launch attacks.

Meetings in Kiambaa

102. The Prosecution further alleges that three implementation meetings were held at a private residence in Eldoret, namely on 23 November, 26 December and 31 December 2007. The Prosecution relies on the testimony of one witness, [REDACTED] for all three meetings. The witness did not provide evidence that those present were told who was to participate in attacks, or when and where these ought to take place. Moreover, this witness did not testify to what was said or discussed during any of the three alleged meetings. Therefore, while the witness's evidence shows that some form of meeting took place on the dates indicated, it does not prove the Prosecution's allegation that these meetings served to mobilise the youth to carry out the common plan.

Meetings in Langas and Turbo

103. The Prosecution alleges that three other implementation meetings were held in Kipkaren Salient on 4, 5 and 6 January 2008. The Prosecution further alleges that implementation meetings were held at Besiebor Junction on 30

[162] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 169.
[163] ICC-01/09-01/11-T-164-CONF-ENG, pp 61-62 and 88.

December, Besiebor Trading Centre on 31 December; and Kagarwet on 31 December 2007. As the Prosecution relied on the evidence of only one witness, Witness 604, for all of the foregoing meetings[164] and this witness's prior recorded testimony is no longer before the Chamber, I cannot make any findings about these alleged meetings.

(ii) Conclusion on local implementation/ mobilisation meetings

104. On the basis of the foregoing analysis of the evidence presented about implementation and/or mobilisation meetings, I conclude that no reasonable Trial Chamber could find that local meetings were used by the Network to mobilise the Kalenjin youth to implement the common plan.

(e) Utilisation by Network members of a communications system to assist/direct the Kalenjin attackers

105. The Prosecution alleges that the Network established and utilised a communications system through which Mr Ruto and other Network members directed and received reports from direct perpetrators carrying out the attacks.

106. The piece of evidence most heavily relied on by the Prosecution is the testimony of Witness 613. This witness testified about a conversation she had with an acquaintance, a Kalenjin youth, who participated in an attack on Turbo town, in January 2008. This person told her that Christopher Kisorio, Solomon Tirop and Farouk Kibet were in charge and were receiving directions from Mr Ruto. The witness understood that these directions were sent in text messages. Her acquaintance, who reported to Tirop, had told her that Mr Ruto would send Tirop messages containing messages such as 'where are they', and 'how far have they gone'.[165] She understood 'where are they' to be a question about the Kikuyu, but she did not explain the basis for this understanding. Similarly, Witness 613 assumed that the directions Mr Ruto was allegedly giving to Kisorio, Tirop and Kibet were to be passed on to the youths, but did not explain the basis for this assumption. It is therefore noted that Witness 613's testimony as to the meaning of the text messages and the fact that they were passed on to youths is mere speculation.

[164] Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 195, 199-200, and 203. I note that in para. 204 the Prosecution refers to Witness 613's evidence as corroboration of the meeting in Turbo on 31 December 2007, but this witness's testimony on its own does not provide any relevant information about the alleged meeting.
[165] Transcript of hearing on 19 June 2014, ICC-01/09-01/11-T-119-Red-ENG , pp 51-54.

107. I note that the witness did not herself see the content of the messages, but her knowledge of the words used is based on hearsay (and potentially double hearsay). Furthermore, she did not know when the messages had been sent.[166] Taken together, this means that the content may not have been exactly as reported to the Chamber, but – more importantly – that these messages may also have been sent during the election time, and thus refer to something entirely different, or general inquiries about the situation during the unrest following the announcement of the election results.[167]

108. Besides it not having been shown that the messages were being sent during or shortly before the attacks, I note that Witness 613's testimony is, for example, the only piece of evidence for the allegations that 'Mr Ruto was receiving reports on the progress of the attacks on Turbo directly from someone actually participating in the violence'.[168] However, in addition to it not being clear whether the timing of the messages coincided with the attacks, I note that there is no evidence suggesting that Solomon Tirop replied to the messages with updates of the attacks. Moreover, the allegation that Mr Ruto 'supervised the overall planning and was responsible for the implementation of the common plan to carry out crimes in the entire Rift Valley' is also entirely based on Witness 613's testimony.[169] Yet, nothing in her evidence suggests that the text messages concerned the planning of attacks, or shows any division of responsibility. Any inferences made on the basis of Witness 613's evidence must, at best, be geographically limited to Turbo and does not support the allegations related to 'the entire Rift Valley.' I therefore do not consider that a reasonable Trial Chamber could rely on the evidence of Witness 613 as proof of the Prosecution's allegations about communication.

109. The Prosecution further relies on Witness 356, who testified that at 7 pm on 4 January he came across a group of youths congregating in the middle of a road in Ziwa. Jackson Kibor was there, speaking with the youths in Kalenjin. The witness overheard Kibor telling the youths that they were still waiting to hear 'from above' if they were to stop the roadblocks or not. When asked,

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[166] ICC-01/09-01/11-T-119-Red-ENG, pp 51-54.
[167] Indeed, there are a number of reasonable alternative inferences from the meaning of the word 'they', other than that it having been a reference to the Kikuyu.
[168] Consolidated Response, ICC-01/09-01/11-2000-Red2, para 202. In addition to having no proof of the timing of the messages or that they concerned the attacks, I note that there is no proof that Solomon Tirop replied to the messages with updates of the attacks.
[169] Consolidated Response, ICC-01/09-01/11-2000-Red2, para 218.

Witness 356 stated that he understood 'from above' to be a reference to the ODM party because all the Kalenjin were in the ODM party. He assumed that, as Mr Ruto was elected the spokesperson for the Kalenjin community, Kibor must have meant that they were waiting to hear from Mr Ruto. Besides the fact that the reference to Mr Ruto is the witness' own speculation,[170] there are a number of other reasonable inferences that could be drawn from the phrase 'from above', other than that it referring to Mr Ruto. Similarly, with regard to Witness 658's testimony that Sammy Ruto, on 29 December 2007 in Kimumu, stated that they were 'waiting information from our leader' who was in Nairobi,[171] there are other reasonable inferences than the witness's speculation that 'our leader' referred to Mr Ruto.[172] The Chamber has heard no evidence, for example, excluding the possibility that it was a reference to ODM leader Raila Odinga.

110. The Prosecution further relies on the prior recorded statements of Witnesses 495, 516, and 604 as proof of the existence of a system of communications between Mr Ruto, the Network members and the Kalenjin attackers. As those statements are no longer in evidence, this part of the Prosecution's submissions need not be discussed.

111. In sum, I do not consider that a reasonable Trial Chamber could find that the Network established and utilised a communications system through which Mr Ruto and other Network members directed and received reports from direct perpetrators carrying out the attacks. To the extent that this allegation is relied on as proof of other elements of the Prosecution's case, I equally find that no reasonable Trial Chamber could find that they are supported by the evidence.

(f) Conclusion on the alleged pattern of attacks

112. The foregoing analysis has shown that the Prosecution has not substantiated most of the elements that should show the existence of a pattern. Nevertheless, even if all these elements were accepted, they would not be able

[170] I note that there is no other evidence to suggest that Jackson Kibor was involved in the erection of roadblocks, that this roadblock was used to attack the Kikuyu, or that Mr Ruto had anything to do with the roadblock.
[171] Specifically, he is alleged to have said: 'we are waiting information from our leader. He was -- he hear information, we are waiting.' ICC-01/09-01/11-T-163-CONF-ENG, p. 96.
[172] Witness 658 explained that he assumed that Mr Ruto was referred to, because he was the only leader in Nairobi at the time (ICC-01/09-01/11-T-163-CONF-ENG, pp 97 and 99).

to prove a pattern. The reason for this conclusion is twofold. First, in order to prove a pattern, it has to be established that the same things happened in the same manner on different occasions with sufficient frequency. Second, considering the geographical and temporal scope of the post-election violence in Uasin Gishu and Nandi districts, the number of samples of different elements provided by the Prosecution is too small to justify a conclusion that the Kalenjin attacks as a whole followed a pattern. Although there is, of course, no expectation of the Prosecution to show that each and every Kalenjin attack followed a similar pattern, the Prosecution must be able to demonstrate either that the examples it provides are a significant sample of the attacks as a whole or, if that is not feasible, that they constitute the majority of these attacks. However, the Prosecution has not shown such 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.

113. It therefore follows that 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.

5. Cleansing ceremony

114. The Prosecution alleges that the Network held a cleansing ceremony in Nabkoi Forest in May 2008, attended by Farouk Kibet on behalf of Mr Ruto. In addition to being relied upon as proof of the existence of the alleged Network and common plan,[173] the Prosecution submits with respect to Mr Ruto's individual criminal responsibility that the cleansing ceremony proves his control over the organisation, in particular through the provision of monetary rewards;[174] as well as the existence of an organised and hierarchical apparatus of power, specifically in respect of Kibet's role.[175] In addition, for the purposes of proving contextual elements of crimes against humanity, the training of youths is relied upon as proof of the existence of an organisation and the role played by elders in this regard.[176]

115. Witness 800 is the only witness to provide evidence of a cleansing

[173] Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 147 and 216.
[174] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 261.
[175] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 266.
[176] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 410.

ceremony for direct perpetrators that was allegedly held in Nabkoi Forest in May 2008.[177] He testified that the ceremony was attended by approximately 3000 people and lasted four hours.[178] According to Witness 800, Kibet stood up after an elder had asked 'if there was anyone who had been sent by Mheshimiwa Ruto'. Kibet told the crowd that Mr Ruto had sent him and passed on the message that Mr Ruto 'was happy for the unity of all the youths and Kalenjin people during that time of violence', after which Kibet supposedly said 'that he had been sent with a little cash to pay as a sign of thanks to the community'.[179] The attendees were asked to form groups 'according to where they come from' and then money was distributed; 300 KSH per person. Witness 800 further testified that during the subsequent ceremony a bull was slaughtered and elders performed certain rituals to chase away 'all types of curses'. [180] According to the witness, the cleansing ceremony related to the post-election violence and was to cleanse those who had participated in the attacks to prevent them from being cursed.[181]

116. I recall the above finding that the evidence provided by Witness 800 is incapable of belief. A reasonable Trial Chamber could therefore not make any findings on the alleged cleansing ceremony in May 2008 on the basis of his testimony. Even if his evidence was not fully incapable of belief, however, I note that it is highly implausible that such a large event could have gone unnoticed at the time alleged. On the basis of Witness 800's testimony there does not appear to have been any degree of secrecy about the event. Instead, the witness testified that news that the ceremony was to take place travelled by 'word of mouth',[182] and that in addition to 'all the youth' of the witness's village,[183] youth from Eldoret East, Eldoret South, Nandi and its neighbouring areas attended.[184] It is therefore implausible that no other reports of the event, if it indeed happened, are available. Especially since at the time the post-election violence received considerable local and international attention, including from the Kenya National Commission for Human Rights, which was

[177] Transcript of hearing on 19 November 2014, ICC-01/09-01/11-T-156-CONF-ENG, pp 22-23.
[178] ICC-01/09-01/11-T-156-CONF-ENG, pp 17 and 23.
[179] ICC-01/09-01/11-T-156-CONF-ENG, pp 20-22.
[180] ICC-01/09-01/11-T-156-CONF-ENG, p. 22.
[181] ICC-01/09-01/11-T-156-CONF-ENG, pp 24-25, and 12.
[182] ICC-01/09-01/11-T-156-CONF-ENG, p. 18.
[183] ICC-01/09-01/11-T-156-CONF-ENG, p. 20.
[184] ICC-01/09-01/11-T-156-CONF-ENG, p. 23.

carrying out investigations into the violence.[185]

117. It is further noted that, even if considered and taken at its highest, Witness 800's evidence about the ceremony does not support the inference the Prosecution asks us to draw. Cleansing or reconciliation initiatives are common practice in numerous cultures and religions. It cannot be assumed that participation in such ceremonies, especially by persons of significance within an affected community, is evidence of acquiescence or approval of the atrocities for which absolution is sought. Indeed, participation by a given individual may equally be interpreted as an expression of collective condemnation of the incidents in question. A reasonable trial chamber could therefore not find that the only inference that could be made from Mr Ruto's support for such a ceremony, if it indeed took place, shows his approval of the acts of violence, or his responsibility for the attacks that had been carried out.

6. Conclusion on the existence of the Network and the common plan

118. On the basis of the foregoing interim conclusions, I find that the Prosecution submission that the existence of the Network and the common plan is demonstrated by five factual elements that were assessed above,[186] is not supported by the evidence. As there is insufficient evidence to support the individual elements, no reasonable Trial Chamber could conclude that the alleged elements prove the existence of the Network and/or the common plan.

C. Discipline and punishment mechanisms

119. I now turn to the Prosecution submission that the Network set up so-called 'Nandi Tribunals', which were allegedly chaired by Network members.[187] By punishing suspected Kalenjin PNU supporters, this tribunal is alleged to have 'contributed to the implementation of the common plan by

[185] The improbability of such an event occurring without notice is further strengthened by the fact that, as Witness 800 acknowledged in cross-examination, a large camp of Kenyan General Services Unit police was based in Nabkoi Forest at the relevant time (ICC-01/09-01/11-T-160-CONF-ENG, p. 47).

[186] Namely: i) a series of preparatory meetings held at Mr Ruto's Sugoi house; ii) the training of the Kalenjin youth; iii) the obtaining of firearms for the purpose of implementing the post-election violence; iv) the similar nature and patterns of the attacks, including indications of prior planning by and involvement of Network members with close links to Mr Ruto; and, v) the subsequent cleansing ceremony in Nabkoi Forest. As set out in: Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 152.

[187] Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 206 and 262.

ensuring that all available Kalenjin men would fall in line with the Network and follow its instructions'.[188] Therefore, the Prosecution submits that the Kalenjin youth 'were compelled – through fear of punishment – to participate in attacks and meetings'.[189]

120. However, as the Prosecution's allegations about the Nandi Tribunal are solely based on witnesses that recanted their stories and whose prior recorded testimony is no longer in evidence,[190] only the Prosecution's allegation that the Network put in place 'a punishment mechanism which compelled people to participate in the meetings, attacks and deterred anyone from refusing to do so'[191] remains. In this regard, the Prosecution points to the evidence of Witnesses 495, 516, and 658.[192] As the prior recorded testimonies of Witnesses 495 and 516 are no longer in evidence, only Witness 658's testimony needs to be considered. This witness stated that on 31 December 2007 he was forced by a large group of armed Kalenjin, headed by Lucas Sang, to participate in an attack.[193] However, he insists that, despite being given a weapon and ordered to kill Kikuyu and destroy their property, he did not personally participate in the actual commission of any of the violence or destruction.[194] Moreover, the witness testified that he managed to bribe some persons he was with in order to let him 'sneak away' after less than an hour.[195]

121. Besides the fact that Witness 658's testimony does not demonstrate a very rigid discipline or good oversight, it is not clear how his evidence shows the existence of a punishment or disciplinary system set up by the Network. Indeed, the most this evidence can show is that a person external to the Network was coerced to take part in Network activities. However, it appears from the evidence that any such forced participation was limited to passive attendance and that there was no actual coercion to commit crimes. Moreover,

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[188] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 206.
[189] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 274.
[190] Namely, Witnesses 397, 516, and 604. Although it acknowledges that he is incapable of belief, the Prosecution also refers to Witness 743's testimony. However, besides the fact that this witness indeed must be considered as incapable of belief, he does not provide any clear information about the alleged tribunal in his testimony (see transcript of hearing 22 January 2014, ICC-01/09-01/11-T-183-CONF-ENG, pp 6-7).
[191] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 262.
[192] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 262.
[193] ICC-01/09-01/11-T-164-CONF-ENG, p. 31.
[194] ICC-01/09-01/11-T-164-CONF-ENG, pp 34, 37-38.
[195] ICC-01/09-01/11-T-164-CONF-ENG, pp 45-47.

unless it is accepted that Lucas Sang was a member of the Network, no involvement of the Network is shown. Yet, even if it would be proved that Lucas Sang was a member, this does not automatically mean that he acted on behalf of the Network when compelling Witness 658.

122. I therefore conclude that there is insufficient evidence on the record upon which a reasonable Trial Chamber could find that the alleged Network had pressed people into participation in the attacks through some form of punishment mechanism. In addition, I find little merit in the Prosecution's argument that the Network rewarded Kalenjin youths for carrying out the Network's common plan. The available evidence in this regard, to the extent that it is reliable, is much too ambivalent to support the proposition that money distributed at ODM political rallies, or other collective events, was intended to induce the recipients to evict the Kikuyu and other perceived PNU supporters from the Rift Valley, or to reward them for having done so. 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.

D. Overall evaluation of the evidence

123. Although a substantial part of the Prosecution's most incriminating evidence is insufficiently probative, it is still useful to assess whether a reasonable Trial Chamber could convict either of the accused on the basis of the evidence, looked at as a whole.

124. The Prosecution's case is to a considerable extent premised on the argument that it is improbable that the many incidents and events that took place during the post-election violence could have occurred randomly or spontaneously, 'without pre-meditated and coordinated activities of the Network's members acting pursuant to or in furtherance of the Network's policy to punish and expel the Kikuyus and other perceived PNU supporters out of the Rift Valley'.[196] According to the Prosecution, it must thus be the case that the attacks were somehow centrally planned and coordinated. In the

[196] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 401. Here the Prosecution states as follows: '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-meditated and coordinated activities of the Network's members acting pursuant to or in furtherance of the Network's policy to punish and expel the Kikuyus and other perceived PNU supporters out of the Rift Valley.'

Prosecution's theory of the case this planning and coordination was done by Mr Ruto together with a number of close associates – collectively referred to by the Prosecution as the key members of the Network – as only they would have been in a position to plan and coordinate the attacks as they were carried out.

125. With regard to the suggestion that the post-election violence was centrally planned, it is worth noting that, although the CIPEV report concludes that 'the pattern of violence showed planning and organization by politicians, businessmen and others who enlisted criminal gangs to execute the violence',[197] it does not say that this planning and organisation happened at the provincial or even the district level in the Rift Valley. This leaves open the possibility that the planning and organisation mentioned in the report occurred at a more localised level. Even if it were established that Kalenjin youths were transported from certain locations to places where attacks took place, this does not mean that they travelled at the behest of the Network. It is also possible that they took the initiative to go to places where they would find a higher concentration of Kikuyu/PNU supporters, like in Eldoret.

126. The CIPEV report and the Prosecution rely on the following factors: that warnings were issued and war cries were made; petrol and weapons were acquired and used; and that the attackers specifically targeted members of specific ethnic groups.[198] Both infer from these factors that the violence in the Rift Valley must have been organised.[199] However, none of the propositions relied upon, even when considered in conjunction, necessarily point to centralised organisation of the violence. Indeed, there is no evidence provided that shows a central distribution system for weapons or food, nor is there evidence that transportation was centrally organised. Moreover, no proper link has been proved in this regard to either Mr Ruto or Mr Sang.

127. The foregoing does not mean that there may not have been a certain degree of planning and organisation at the local level in places such as Ziwa and Besiebor, but evidence showing that the violence in different localities was centrally orchestrated, and linking it to the Network or alleged plan, is missing.

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[197] 'Report of the Commission of Inquiry into Post-Election Violence,' EVD-T-OTP-00328, p. 347.
[198] 'Report of the Commission of Inquiry into Post-Election Violence,' EVD-T-OTP-00328, p. 347.
[199] 'Report of the Commission of Inquiry into Post-Election Violence,' EVD-T-OTP-00328, p. 347.

128. Furthermore, to the extent that elders of different localities may have been in contact with each other about the violence, this does not establish that there was any structure behind the flow of information or that relevant information systematically found its way to a central coordination point. There is also nothing to suggest that only Mr Ruto could have brought the relevant individuals into contact with each other.

129. More importantly, in the absence of a Network, there is no evidence showing Mr Ruto was behind any of the local activity. Notwithstanding any official titles and/or titles under local custom that Mr Ruto may have had, there is not sufficient evidence that would, in my view, allow a reasonable Trial Chamber to conclude that he had such influence over the Kalenjin community that local initiatives to attack the Kikuyu could not have been taken without his express or tacit approval. To the contrary, the evidence shows that Mr Ruto called for an end to violence,[200] without this call being adhered to by a portion of the Kalenjin community. I note that the Prosecution does not deny that Mr Ruto made calls to end the violence but argues that Mr Ruto publicly projected an image of a man of peace, yet at the same time privately called for violence.[201] While there is no evidence to disprove that this was the case, there is only clear evidence of the former and not of the latter part of this proposition. Moreover, if a discord between Mr Ruto's private support for the idea of evicting all Kikuyu from the Rift Valley and his public utterances in the media indeed existed, it has not satisfactorily been explained how the many Kalenjin that took part in the violence would have known that they should disregard the public statements made by Mr Ruto. It cannot be simply assumed, in this regard, that those who disregarded the calls for peace had been present at one of the alleged planning meetings.

130. It is also highly significant that the only available evidence of Mr Ruto – and Mr Sang for that matter – calling for the violent eviction of Kikuyu and other perceived PNU supporters comes solely from witnesses. Given the extensive media attention and the audio/visual recording of election events at the time,[202] it is striking that not a single press report or recording of any of the alleged 'hate speeches' was entered into evidence. The Chamber has

[200] EVD-T-D11-00024; EVD-T-D11-00025; and EVD-T-D11-00026.
[201] ICC-01/09-01/11-T-212-ENG, p. 62
[202] As is shown by the various videos and newspaper articles covering the elections rallies, none of which indicate any hate speech or explicit utterances calling for violence against the Kikuyu.

experienced first-hand how pervasive Kenyan media coverage tends to be. It is therefore extremely unlikely that a plan to evict all Kikuyu from the Rift Valley could have been communicated to the thousands of alleged perpetrators without being picked up by the media, even if some witnesses claimed that the calls were made in coded language.[203] This conclusion is reinforced by the fact that a number of putative witnesses to the alleged speeches/meetings were in fact PNU supporters, who would have had ample reasons to bring this to the attention of PNU leadership, if not the wider Kenyan public. In addition, for negative language about the electorate of the opposing parties during election time – a time during which strong language is generally used to discredit other political parties and their voters – 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.

IV. CONCLUSION

131. Based on the above evidentiary analysis, it is my view that the available evidence does not allow a reasonable Trial Chamber to find that there was a Network, whose policy it was 'to evict members of the Kikuyu, Kisii, Kamba communities in particular, because they were perceived to be PNU supporters'.[204] Similarly, the evidence would not permit a reasonable Trial Chamber to find beyond reasonable doubt that there was a group of persons acting in accordance with a common plan to achieve the aforementioned objective, to which Mr Ruto and Mr Sang either belonged or had knowledge of. It therefore follows that the Prosecution's charges against Mr Ruto under Article 25(3)(a) of the Statute and those against Mr Sang under Article 25(3)(d) of the Statute could not be upheld by a reasonable Trial Chamber. Consequently, neither of the accused has a case to answer under the original charges. Given the conclusion that the evidence does not support the Network or existence of an organisational policy in the sense of Article 7(2)(a) of the Statute, as pleaded by the Prosecution, it appears unnecessary to consider whether the legal characterisation of the facts could be changed to accord with other forms of participation than the ones confirmed. Be that as it may, mindful of debate at the pre-trial stage and the lack of a definition of

[203] For example, Witnesses 409, 423, 442.
[204] Consolidated Response, ICC-01/09-01/11-2000-Red2, para. 144.

organisational policy in the Court's statutory framework, as well as my colleagues' views on the required level of organisation for the purposes of the commission of crimes against humanity, I will still consider the Prosecution's suggestion that it is possible to recharacterise the modes of liability of the two accused.

A. Possible recharacterisation of the facts and circumstances

132. As indicated in the section on the 'Standard of review', in order to decide whether or not there is a case to answer at all, it is necessary to consider the possibility that the legal characterisation of the facts and circumstances contained in the charges may be changed.[205] This means that the Chamber would have the option, but not the obligation, to discontinue the case on the basis of the original form of criminal responsibility for lack of evidence, but to pursue the trial on the basis of a different form of criminal responsibility.[206] However, if the Chamber would be inclined to use its discretionary power in this regard, it should only do so if all the required elements of the relevant other mode of liability are supported by the available evidence to such an extent as to conclude that a reasonable Trial Chamber could convict the accused on this alternative basis.

1. Mr Ruto

133. In relation to Mr Ruto, I have found insufficient evidence to support a possible conviction for ordering any of the crimes charged under Article 25(3)(b) of the Statute. In particular, there is no reliable evidence in the case record to suggest that Mr Ruto issued an order or otherwise instructed persons over whom he had *de facto* authority to kill or forcibly evict Kikuyu or other perceived PNU supporters. Nor is there sufficiently reliable evidence that Mr Ruto issued orders or instructions to any of the physical perpetrators who burned or otherwise destroyed the properties of Kikuyu or other perceived PNU supporters.

134. Equally, I have not found sufficient evidence in the case record that could support a conviction on the basis of soliciting or inducing the commission of any of the crimes charged under Article 25(3)(b) of the Statute. There is evidence before the Chamber which, under the no case to answer

[205] See above and Decision No. 5, ICC-01/09-01/11-1334, para. 29.
[206] In this regard, see Regulation 55(1) of the Regulations: 'In its decision under article 74, the Chamber *may* change the legal characterisation of the facts […]'.

standard, could lead a reasonable Trial Chamber to conclude that Mr Ruto used language at public events which denigrated Kikuyu and other perceived PNU supporters and expressed the political goal of having them expelled from the Rift Valley. He did so in the context of long-unresolved grievances related to the large scale eviction of Kalenjin from the province's most fertile land and concomitant shift in ownership and tenure of this land into the hands of Kikuyu. However, this evidence is not sufficient to support a possible finding that Mr Ruto actively called upon any of those present to engage in criminal conduct to bring about this goal.

135. Moreover, even if there were sufficient evidence in this regard, I have not been made aware of sufficiently probative evidence about an appropriately close causal link between Mr Ruto's alleged utterances and the conduct of those who physically engaged in violent conduct against Kikuyu and other perceived PNU supporters. Indeed, even if it were accepted that Mr Ruto's speeches contained a sufficiently clear message that he wanted others to engage in conduct that would, in the ordinary course of events, constitute any of the crimes charged, it still has to be established that this message was actually heeded by the physical perpetrators or that his speeches had a direct effect on their behaviour. The fact that crimes were actually committed against Kikuyu and other perceived PNU supporters in the Rift Valley does not allow a strong enough inference against Mr Ruto. The geographic and temporal distance between Mr Ruto's alleged speeches and the commission of the crimes is too large for this.

136. With regard to a possible recharacterisation under Article 25(3)(c) of the Statute, I have already found that none of the alleged contributions, such as the obtaining of weapons, organisation of transport, distribution of food, etc., for which there is evidence in the record, can be sufficiently clearly linked to the alleged Network. The same is true with regard to Mr Ruto's alleged personal contributions. Equally importantly, even if certain alleged contributions could be linked to Mr Ruto, there is insufficient evidence to show that any such contributions were made 'for the purpose of facilitating the commission' of one of the charged crimes.

137. Finally, since I have found that the available evidence would not allow a reasonable Trial Chamber to find that there was a common plan to commit the charged crimes, it is not possible to recharacterise under Article 25(3)(d) of the Statute. Even if there were evidence of a different group acting with a

common purpose, I would not be able to use this as a basis for recharacterisation, as such an allegation would exceed the facts and circumstances described in the charges.

2. Mr Sang

138. In relation to Mr Sang, I am of the view that the available evidence does not warrant a possible recharacterisation of the charges under either Article 25(3)(b) or (c) of the Statute.

139. With regard to solicitation or inducement pursuant to Article 25(3)(b), there is no reliable evidence in the record on the basis of which it could be concluded that any of the physical perpetrators were influenced in their decision to commit one or more of the underlying crimes by Mr Sang's broadcasts. In the absence of such evidence, Mr Sang could not be convicted under Article 25(3)(b), even if it would have been established that he called upon listeners to engage in conduct that would, in the ordinary course of events, result in the commission of one or more of the crimes charged.

140. Moreover, special concerns exist as to what a reasonable trier of fact could properly do for purposes of conviction where the charges arise from media broadcasts.

141. Care, in particular, must be taken to ensure that proof of a criminal broadcast or publication does not depend mostly or entirely on the oral evidence of witnesses whose own biases and sense of offence about the subject matter of discussion may have clouded their perception. The primary evidence of the actual broadcast or writing itself – rather than second-hand accounts of them – would be the safest basis for the proper evaluation of the material element of the criminality of the broadcast or publication charged as a crime.[207] In this case, the Prosecution has not produced any recording of a broadcast by Mr Sang in which he made the type of statements he is accused of. Instead, the Prosecution asks the Chamber to rely on the testimony of a number of witnesses who claim to have heard Mr Sang's radio show at relevant times. In my view, this evidence is not sufficiently reliable in this context. When it comes to allegations of solicitation or inducement through the media, it is of great import to know the exact words used by the accused, and the Prosecution's seeming failure to obtain any such evidence undercuts

[207] For example, the approach taken by the International Criminal Tribunal for Rwanda in *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Judgment, 28 November 2007.

its allegations of Mr Sang's popularity and influence during the post-election violence period. Moreover, in the present case, the relevant witnesses testified that the alleged language used by the accused was not a straightforward call for crimes to be committed, but rather a sort of coded language, which the witnesses understood to mean as instructions to act against the Kikuyu.[208] In such circumstances, in addition to the risk that the witnesses provide their own, incorrect, interpretation of the obscure wording, it is especially important for a chamber to have access to the actual words used by the accused, in order to assess whether such 'coded language' would amount to inflammatory or instigating speech.

142. As far as aiding and abetting pursuant to Article 25(3)(c) of the Statute is concerned, there is insufficient reliable evidence to suggest that Mr Sang's radio broadcasts made any contribution to the commission of the charged crimes. Moreover, even if Mr Sang's radio programme did provide one or more of the physical perpetrators with moral support, there is no evidence that shows that he made the relevant utterances for the purpose of facilitating the commission of the charged crimes.

3. Conclusion on the recharacterisation

143. In the present case, I find that the available evidence does not sufficiently support any of the alternative forms of criminal responsibility to warrant the continuation of the trial on this basis.

B. Reflections on the standard of review

144. While the above review was conducted on the basis of the standard set out in Decision No. 5, I wish to clarify that in my view a Trial Chamber is not prevented from entering into an assessment of the credibility of witnesses testimony at the no case to answer stage, beyond situations where the

[208] For example, Witness 442 testified that on 31 December 2007, Mr Sang was saying that some people in Kisumu were calling for their rights 'and were authorised to do so'. Mr Sang also allegedly spoke about Kisumu and said that they did 'good work' there and said that people should not remain quiet; they should call out and insist upon their rights (ICC-01/09-01/11-T-99-Red-ENG, p. 8). However, the main evidence against Mr Sang in this regard, the prior recorded testimony of Witness 789, is no longer part of the record and the witness has disavowed this entire statement under oath (Transcript of hearing on 15 January 2015, ICC-01/09-01/11-T-178-CONF-ENG ET, p. 89). With respect to Mr Ruto, Witness 409 claimed that Mr Ruto talked about 'madoadoa' and used phrases such 'removing grass' (or 'weeds'), and 'When the day comes, do the work according to our instructions' and that he said the 'work' should be done well (Transcript of hearing on 24 February 2014, ICC-01/09-01/11-T-93-Red-ENG WT).

Prosecution's case can be viewed as being on the brink of breaking down, as discussed above with respect to the testimony of Witness 356. In trials of this nature, with a significant duration, it cannot be the case that a Trial Chamber should only consider, as suggested by the Prosecution, the quantity of the evidence, and not the quality.[209] It would be against the interests of justice for a Trial Chamber to abstain from making a credibility assessment at the no case to answer stage where the evidence before it, at the close of the Prosecution case, is of an isolated nature and the falling away of any of the testimonies (if found that it could not be relied upon) 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. In such circumstances – and provided that the circumstances and the information available to the Trial Chamber allow for it – a Trial Chamber should make an evaluation of witness credibility, to avoid the trial continuing for another couple of years without any real prospect of a conviction.

145. In the present case, it is clear that the conclusion would have been the same if I had entered in such an assessment, instead of the less exacting standard as set out in Decision No. 5. However, I nonetheless observe that the Chamber's statutory powers under Article 64(2) are not constrained by its adoption (based on the proposal and agreement of the parties) of a procedure to guide the no-case submissions.

146. Article 64(2) of the Rome Statute imposes an obligation upon the Trial Chamber to conduct the trial fairly and expeditiously. It must further be observed that there is no provision in the ICC basic documents that requires a Trial Chamber to continue with the presentation of evidence on behalf of the defence, where the evidentiary case for the prosecution was not, in the judges' view, strong enough to warrant inviting the defence to present their case. Indeed, Article 64(2) of the Rome Statute must stand in the way of any proposition urged as involving any such requirement. Although the Chamber did not need to resort to its powers under Article 64(2) of the Statute, I would have had no difficulty in doing so in the present case, given the state of the Prosecution's evidence.

[209] ICC-01/09-01/11-T-209-CONF-ENG, pp 12-15; Consolidated Response, ICC-01/09-01/11-2000-Red2, paras 14-21.

C. Consequences of the finding that there is no case to answer

147. The normal consequence of a finding that there is no case to answer for Mr Ruto or for Mr Sang, would be for an acquittal of the accused to be pronounced at this half-way stage. Indeed, it would have been my preference for the Chamber, even if by majority, to do so, but there is no agreement between the judges on this point. Nevertheless, Judge Eboe-Osuji and I do agree that the proceedings against the accused should not continue beyond the Prosecution case. Judge Eboe-Osuji concludes that a mistrial should be declared and that the proceedings should end in this manner. I generally agree with my esteemed colleague that there was a disturbing level of interference with witnesses, as well as inappropriate attempts at the political level to meddle with the trial and to affect its outcome. Although these circumstances had an effect on the proceedings and appear to have influenced the Prosecution's ability to produce more (credible) testimonies, I do not consider the impact to have been of such a level so as to render the trial null and void.

148. Notwithstanding my above remark that in a normal state of affairs, I would have been in favour of entering an acquittal, rather than vacating the charges against both Mr Ruto and Mr Sang and discharging them, I can agree to this outcome, because of the special circumstances of the case. Although it has not been shown, or argued, that the accused were involved in the interference of witnesses, they did profit from the interference, *inter alia*, by the falling away of several key witnesses that this Chamber found to have been interfered with. Other evidence may have been available to the Prosecution – including evidence that possibly would demonstrate the accuseds' innocence of the charges – had it been able to prosecute the case in a different climate, less hostile to the Prosecution, its witnesses, and the Court in general. 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,[210] 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.

[210] See, for example, Part 10 of the Criminal Justice Act 2003 of England and Wales, Section 362(4) of the German Code of Criminal Procedure, Articles 482a-i of Dutch Code of Criminal Procedure (added on 11 April 2013), which – in certain circumstances – allow for re-prosecution in case of new evidence, not available to the prosecuting authority at the time of the trial. See also Article 4(2) of Optional Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedom.

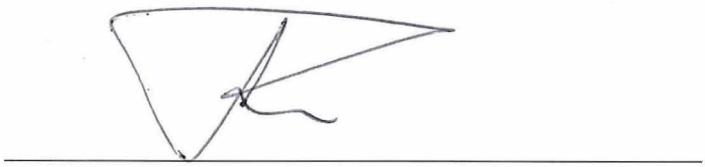
149. As a result of the case ending without a conviction, no reparations order can be made by this Court pursuant to Article 75 for the benefit of victims of the post-election violence.[211] While I recognise that this must be dissatisfactory to the victims, a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty.

150. In this regard, it must be stressed, as a final point, that the above conclusions about the existence of the alleged Network, in no way detract from the gravity of the post-election violence. The analysis of the evidence conducted above does not diminish the impact the wave of criminal violence that followed the announcement of the results of the 2007 elections has had on thousands of Kenyans. It is important to recall that the parties never contested this reality,[212] and no evidence has been brought before the Chamber that could cast doubt on the suffering and hardship of the victims of the post-election violence.

[211] See Article 75 of the Statute and Appeals Chamber, 'Judgment on the appeals against the 'Decision establishing the principles and procedures to applied to reparations' of 7 August 2012 with amended order for reparations', 3 March 2015, ICC-01/04-01/06-3129.

[212] The parties agreed that during the post-election violence approximately 1,000 persons died and over 300,000 persons were displaced; see, ICC-01/09-01/11-653-AnxA. They also agreed that houses and business were burnt and looted in several locations in Uasin Gishu during the post-election violence; see ICC-01/09-01/11-451-AnxA

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



Judge Robert Fremr

REASONS OF JUDGE EBOE-OSUJI

1. I have read the reasons[213] of my highly esteemed colleague, Judge Fremr. The evidential review laid out in his reasons amply shows that the case for the Prosecution has been apparently weak. To keep the length of my own reasons more manageable, I need conduct no further evidential review. I fully adopt the evidential review set out in Judge Fremr's reasons. It is, in my view, fully borne out by the legal principles that should guide decisions on no case to answer motions in this Court. I have discussed those legal principles, as I understand them, in Part II of these reasons. But, all this assumes 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.

2. My adoption of the evidential review exposed in Judge Fremr's reasons should not be seen as inconsistent with my eventual view that the preferable outcome in this case should be a declaration of mistrial. There is no inconsistency. To begin with, the value of the in-depth evidential review affords a definite answer to the no-case motions that immediately occasioned this intermission in the proceedings. However, the mistrial declaration, for its part, follows from the resulting question as to the just basis (viewed from the perspective of legal outcomes) to terminate the proceedings: given the weaknesses found in the prosecution case and taking into account what I consider to be serious tainting of the trial process by way of witness interference and political intimidation of witnesses. In this regard, I must make clear that however weak the case for the prosecution is found to be — either at the macro- or the micro-level or both — the incidence of tainting left me with the troubling question whether the Prosecution was allowed the

[213] My highly esteemed colleague, Judge Herrera Carbuccia noted in her first footnote that 'the decision of the majority of the Chamber contains insufficient reasoning, since Judge Eboe-Osuji and Judge Fremr have both given separate reasons.' With respect, I disagree. The decision of the majority has been more than amply explained in the separate reasons. While it may be the norm in some jurisdictions that judges must speak with one voice in their decisions, no value judgement is either appropriate or necessary to be made in the matter. Indeed, in many parts of the world, it is entirely normal and to be expected that judges who serve on a panel may express themselves separately. Notably, in Nigeria, judges who serve on a panel are constitutionally obligated to give their reasons separately: see s 294(2) of the Constitution of Nigeria: 'Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion.'

needed room to investigate freely and obtain further and better evidence beyond the ones they obtained and relied upon. To put it differently, was 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.

3. With the greatest respect, I regret my inability to share the opinion of my highly esteemed colleague, Judge Herrera Carbuccia, that the case should continue, and for the reasons she gave. In my respectful opinion, for the reasons indicated separately in Judge Fremr's opinion and in mine, continuation of the case will result in a waste of time, even as a practical matter of judicial economy — and, especially so in a manner that may be unfairly prejudicial to the overall interest of justice and the integrity of the processes of this Court. I also regret, with much respect, my inability to share the views of my learned friend Judge Fremr on the matter of reparation for victims, to the extent that he says at large that the question does not arise without a conviction. At a minimum, submissions on the matter are, in my view, necessary at this stage.

4. As there was more to see in this case than the weaknesses in the Prosecution case, in addition to the question of the proper basis to terminate the proceedings. I shall discuss that particular question. I shall also discuss the following further issues that I see as presented in this case: (i) the proper approaches to no-case adjudication in this particular Court; (ii) questions of reparation for victims of the Kenyan post-election violence; (iii) the question of immunity of State officials; and (iv) the proper approach to the interpretation of 'organisational policy' for purposes of crimes against humanity under the Rome Statute. While the last two topics are, admittedly, mostly *obiter*, the rest go to the very core of the disposition of the present matter.

GENERAL OVERVIEW

5. These reasons are relatively lengthy. But the gist of the substance is as follows.

6. In the circumstances of this still-new Court, it should be a proper course to terminate a trial at the close of the case for the Prosecution, if the case up to that point has been genuinely weak. This is providing that it can be fairly said that the weaknesses in the Prosecution case were unaided by conducts in the nature of obstruction of justice, in a manner capable of a prejudicial impact on the case for the Prosecution. Termination of the trial in the circumstances of genuine weaknesses in the prosecution case may be at the motion of a party or it may be *suo motu* by the Chamber. Given the indivisibility of judicial functions in the same judges of the Trial Chamber, as the tribunal of both fact and law, and the absolute absence of any question of usurpation of the credibility assessment functions of a jury, there is no essential obstacle to the Trial Chamber's freedom to engage in sensible evaluation of the credibility of Prosecution witnesses, for purposes of assessing whether the trial should be terminated at the close of the case for the Prosecution.

7. Where there has been conduct in the nature of obstruction of justice, such as troubling incidence of interference with witnesses or undue meddling from an outside source, that is capable of prejudicial impact on the case, it should be proper exercise of discretion for the Trial Chamber to declare a mistrial without prejudice. This is so even in the absence of evidence showing that the accused played any part in the interference or meddling. This means that the presumption of innocence remains unperturbed for the accused: but so too for the Prosecution the freedom to re-prosecute the accused at a later time without the constraint of double jeopardy. In the circumstances of the present case, this is the more appropriate and just basis upon which to terminate the trial.

8. To be clear, had there been no incidence of interference or political meddling that tainted the process, the juristic consequence of a finding of genuine weaknesses in the prosecution case, such that would justify termination of the trial on a no-case motion, would ordinarily be an outright pronouncement of judgment of acquittal, with all the legal consequences that may rightly follow such a pronouncement.

9. The termination of the trial in the circumstances should not obstruct the prospect of the victims' entitlement to reparation without further delay. Reparation for victims need not be solely dependent on conviction of accused persons. Specifically in this case, the question looms particularly large and strong as to whether or not the victims of Kenya's post-election violence of 2007-2008 are immediately due for reparation or assistance in lieu of reparation — either as a matter of the obligation of the Government of Kenya [hereafter the 'Government'], or, at the barest minimum, as a matter of grace from both that Government and from the international community.

10. Immunity of Heads of State and senior State officials is discussed extensively. This is because some of the diplomatic concerns raised by the African Union had engaged that question in relation to this case. The review shows there to be no real concern in that regard.

11. Finally, it is considered, *obiter dictum*, that there is a need to revisit the meaning of 'organisational policy' in the definition of what amounts to a widespread or systematic attack against a civilian population, for purposes of prosecuting crimes against humanity at the ICC. In light of the object and purpose of the Rome Statute, the literal construction must be rejected, to the extent that it sponsors a theory of centrally directed aggregate complicity in the attack against a civilian population. It is a misplaced theory. The better approach, in my view, is the purposive interpretation, which requires 'organisational policy' to mean nothing more than the 'coordinated course of action' — of an individual or an aggregate entity.

PART I: PRELIMINARY OBSERVATIONS

12. In due course, we will get to the purer legal discussion as outlined above. But, before that there are a few preliminary observations that I feel compelled to make, given the particular circumstances of this case and what this case is really all about.

A. The Dictates of Accountability as a Notion under the Rome Statute

13. 'Must we keep going?' was the question that the Defence asked that caused the Chamber to stop and wonder. The Prosecution and the Victims' Counsel agreed that the question was always proper to ask in a criminal case, notwithstanding the usual disagreement (as here) as to the answer.

14. As a cause of procedural action in this Court (this being the first occurrence of it in this Court), the no-case motions brought in this case, at the close of the Prosecution case, compel some general observations on the subject of accountability as a fundamental purpose of criminal law — a purpose centrally shared by this Court. The *raison d'être* of this Court, it must be recalled, is to ensure that those suspected of crimes proscribed in the Rome Statute are made accountable. This is in the sense of being 'brought to justice,' as the popular expression goes. The idea is to subject every accused person to the due process of the law — in a clear demonstration of the principle that no one is above the law, however high or low his or her status may be.

15. But, the due process of the law that is so brought to bear does not require that every criminal trial must continue until the very bitter end, whether or not the prosecution case has been strong enough to keep the trial going. Nor does it require that every accused must be found guilty of the crime charged, lest it be thought that the Prosecution — or indeed the Court — has failed in their essential function of serving the cause of justice. Such a view would indeed be a wholly impoverished view of law and justice, a complete misunderstanding of what it means to do justice. It helps, perhaps, to keep in mind at all times that the *due* process of the law is a golden yardstick of civilisation. And it is a yardstick that stands equally straight for both the prosecution and the accused in a criminal case.

16. In unison, the Defence have repeatedly protested that this case should not have been brought in the first place. They have complained that the

Prosecution lacked a solid basis in 'reasonable grounds to believe' that the accused in this case should be 'brought to justice.' As such, their protest continues, the Prosecution have ill-served the cause of justice. I reject the protest.

17. It is also possible, of course, that some may say that there is a failure that tarnishes the prosecutorial effort in the event that a Trial Chamber is not persuaded to continue a trial on account of no-case submissions or, for that matter, to secure a conviction should the case go that far. Again, I disagree.

18. The last view, in particular, would be entirely misplaced if held by anyone. Left unaddressed — and I address it anticipatorily — it may lend credence to the complaints rooted in the unfortunate perception in some quarters that there may be a tendency in international criminal courts to ensure, at all costs, the conviction of every accused person; and, that the emotive factor of the scale of atrocities that typically form the subject matter of such judicial inquiries, coupled with the international community's anti-impunity resolve against such crimes, may wrongly prime judges generally to cut corners consciously or unconsciously, to the detriment of the fundamental principles that properly guide a criminal trial.[214] Regardless of the correctness of the assumptions (as a question of law) that inform any particular commentator's view of what comprise 'fundamental principles' of (international) criminal law, much disservice is, nevertheless, done when (as a matter of fact) those who genuinely desire the Court's success lend credence, albeit unwittingly, to the regrettable view that justice will not be done at the ICC unless every trial proceeds to the end of the defence case and results in a conviction — regardless of the strength of the prosecution evidence.

19. Conviction in every criminal case is never the hallmark of success — or 'performance indicator,' to borrow a fashionable phrase — for a court of law. The hallmark of success for a court of law is, quite simply, to do justice. No more, no less. It does not matter which party is the beneficiary when justice is done.

20. The same general consideration goes for the purpose of prosecution. It has long been accepted that the prosecutorial purpose eschews the idea of

[214] See generally, D Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925, especially at pp 930—931.

'winning.' In a classic statement of the principle, Rand J of the Supreme Court of Canada expressed the matter in the following way:

> It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[215]

21. There may, of course, be times when certain interests of society may compel a prosecutor to persist with a particular prosecution, exceptionally without regard to the eventual verdict. Often, the ultimate goal is to achieve a general deterrence against the kind of crime involved.[216] It may also have the effect of 'promot[ing] an important message to the community.'[217] Those circumstances may give pride of place to the public's need to see the wheels of justice rolling along its course, without the prosecutor interposing her (or his) discretion to withdraw the charges. But even then, all is never lost in the cause of justice. The decision to terminate a weak case will be made by judges — especially on the basis of a no-case submission. And, thus, justice is still seen by all as being done. The better course then for lawyers who appear in this Court is to explore that avenue and leave it to judges to decide. Protests *ab initio* or in the course of the trial that the case should not have been brought can have the unfortunate — albeit wholly unintended — result of giving ammunition to politicians to use in a manner beyond the ability of the legal process itself to control. It can result in a mistrial.

22. In Canada, there used to be such a compulsory — or 'no drop' — prosecution policy for domestic abuse cases.[218] That may still be the case there. But the 'no drop' policy is not known to have resulted in any generalised

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[215] *Boucher v The Queen* (1954) 110 CCC 263 [Supreme Court of Canada], at p 270. See also *R v Puddick* (1865) 4 F & F 497, at p 499; *R v Banks* [1916] 2 KB 621, at p 623.
[216] See Trevor Brown, 'Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses' (2000) – a report to the Department of Justice Canada, at p 1.
[217] *Ibid*, at p 7.
[218] See *ibid*, generally.

negative perception of the Canadian criminal justice system. Judges regularly terminated weak cases or acquitted accused persons when there was insufficient evidence either to continue the case or to convict the accused.

23. While there is no reason to believe that a 'no drop' prosecution policy was implicated in the case at bar (considering especially that the Prosecutor has indeed dropped one or two cases arising from the 2007-2008 Kenya post-election violence), there is no reason at all to reproach the Office of the Prosecutor for persisting with this prosecution until the case is terminated in the ordinary course at the end of the case for the defence or by the judges at any time before.

24. Suffice it to say that in the case at hand, justice was served when the Prosecutor saw a substantial reason (based on the required level of evidence at that stage) to believe that the charges against Mr Ruto, Mr Sang and Mr Kosgey had to be brought to the Pre-Trial Chamber for investigation, review and confirmation; and having so found, robustly pursued confirmation of charges against them. Justice was done when the Pre-Trial Chamber, having reviewed the charges, declined to confirm the charges against Mr Kosgey, while confirming that the charges against Mr Ruto and Mr Sang must proceed to the trial stage for closer and more exacting judicial processing. Justice was amply served when (without fear or favour) the Prosecutor and her staff robustly mounted their case against Mr Ruto and Mr Sang before this Trial Chamber — in the face of irregularities (not of the Prosecution's making) that are discussed elsewhere in these reasons.

25. And justice would have been done had this Trial Chamber, at the close of the Prosecution case, terminated the case[219] and entered judgment(s) of acquittal on the basis of no-case submissions: had there been no disturbing incidence of conducts in the nature of obstruction of justice.

26. On that basis alone, these proceedings would have shown, as far as it had gone, that neither Mr Ruto (the current Deputy President of Kenya) nor Mr Sang (a former broadcast journalist with KASS FM in Kenya) is above the law. They have faced criminal proceedings in this Court — even as it now ends.

[219] As the Pre-Trial Chamber had done in relation to the charges against Mr Kosgey.

B. A Culture of Political Violence

27. Elsewhere in this opinion, the discussion engages two distinct issues separately. One is the matter of the aggressive political campaign that the Government involved itself in against this trial that was about the individual responsibility of the accused. The other is the matter of reparation for victims of the 2007-2008 Kenyan post-election violence. But one relevant consideration to both issues is the troubling matter of impunity for repeated cycles of post-election violence in Kenya. There was bloody violence in each of the 1992 and the 1997 elections. And, then, there was the 2007-2008 episode that is our immediate concern. As with the last episode, there were also national commissions of inquiry empanelled to investigate the first two — the Akiwumi Commission and the Kiliku Parliamentary Committee, respectively.

28. It is noted that the Commission of Inquiry into the Post-Election Violence of 2007-2008 (the 'Waki Commission') found that, as of the time of that episode, there was in place a culture of political violence in Kenya that fell along ethnic lines. As part of that culture, politicians would employ organised violence as a means of winning political power. The point is sufficiently made in the following passages, which deserve setting out at some length for careful consideration:

> Elections related violence occurred not just in 1992 but also in 1997. In spite of the death and destruction that these methods caused and the reports from NGOs such as the Kenya Human Rights Commission, Human Rights Watch, and two Government Inquiries — the Kiliku Parliamentary Committee and Akiwumi Commission — *no one was ever punished for this wanton killing* and destruction even though names of perpetrators to be investigated and those 'adversely mentioned' were contained in the reports of both Commissions. The Akiwumi Report was not made public until 2002, even though it was published in 1999.
>
> *This led to a culture of impunity whereby those who maimed and killed for political ends were never brought to justice. This changed Kenya's political landscape with regard to elections*, a point noted by Human Rights Watch. Each of these reports implicated politicians as the organizers of the violence and killing for political ends, and noted that the warriors and gangs of youth who took action were both paid and pressed into service. Aside from this youths were sometimes promised land and jobs after evicting up country dwellers. However, from testimony in the Akiwumi Report, it is not clear if they got either. *A pattern had been established of forming groups and using extra-state violence to obtain political power and of not being punished for it.*

> Some of the displaced individuals, including youth from Laikipia District, moved to Nairobi and became members of Mungiki, which up through the 1980s had been largely a cultural cum religious cult in the Kikuyu inhabited parts of the Rift Valley. Later it metamorphosed into a Mafioso style gang that grew and eventually became a shadow government in the slums of Nairobi and in parts of Central Province. Initially, the Mungiki were seen as substituting for a lack of public services in the slums. Later it started bullying individuals and businesses, including matatus and owners of real estate, into making payments for services which it would provide, including connecting electricity, providing pit latrines, and meting out justice. Mungiki and other gangs across the country (e.g. Taliban, Chinkororo, Kamjeshi, Baghdad Boys and many others) grew and multiplied within the context of a political culture that both used and tolerated extra state violence.
>
> *Gangs and militias continued to proliferate all over the country, thereby increasing the presence of institutionalized extra-state violence both during and after elections, a pattern that continued to increase up through the 2007 elections,* even after President Mwai Kibaki took over power in 2002. *Up through to the last elections, Mungiki and other political gangs continued to sell their services of violence on a willing buyer willing seller basis*. As late as 2007 long after the Government had banned a number of gangs including Mungiki, they continued to operate with their leader Maina Njenga telling his followers to engage in more robberies to compensate for the decrease in revenue from their traditional matatu shakedown operations that had occurred as a result of the crackdown by the Government.
>
> *As extra state violent gangs began to proliferate and continued to be used by politicians, the political terrain was transformed. Violence trickled down into daily life and the State no longer commanded the monopoly of force it once had in a previous era. As such diffused extra state violence existed all over the country, where it could be called up and tapped at any time, including being used to arbitrate over elections as it has been doing since the early 1990s. Once the Government itself used both its own and extra state violence for partisan political ends,* it lost its legitimacy, was not seen as dispassionate, and consequently has been unable either to maintain peace and security or to reform itself.[220]

29. The Mungiki — a violent gang comprising mostly of some Kikuyus — looms large in the passages set out above. But it is clear from the passages themselves and from other parts of the report that there were also violent gangs — comprising mostly of some Kalenjins — that had operated and been made use of in much the same way, particularly in the Rift Valley region. It is also noted that an expert witness for the Prosecution, Mr Maupeu, had

[220] 'Report of the Commission of Inquiry into Post-Election Violence,' EVD-T-OTP-00328 [hereafter the 'Waki Report'], at pp 26-28, emphasis added.

observed, among other things, that 'in the Rift Valley, violence was expected during every election.'[221]

30. Particular attention is deserving of the Waki Commission's reported finding that there were no prosecutions for the 1992 and 1997 episodes, and that this had resulted in a 'culture of impunity' and 'constant escalation of violence.'[222] The Commission found that culture of impunity to be '*at the heart of the post election violence*' of 2007-2008.[223] In the words of the Commission: 'Over time, this deliberate use of violence by politicians to obtain power since the early 1990s, plus the decision not to punish perpetrators has led to a culture of impunity and a *constant escalation of violence*.'[224]

31. Now, I must mark that the Waki Commission reported of 'the decision not to punish perpetrators' of previous episodes of electoral violence. In particular, they found that failing to have 'led to *a culture of impunity* and a *constant escalation of violence*.' It must be observed that this Chamber has seen no indication of zeal on the part of the Government — as, among other things, their attitude toward this trial loudly demonstrates — to prosecute persons suspected of serious complicity in the 2007-2008 post-election violence. This is a serious matter of every State's responsibility to protect its citizens. As far as can be seen, the only serious prosecutorial effort to speak of is that of the Office of the Prosecutor of this Court. She must be commended for it, not vilified.

32. But, why is that a particularly important observation to make? To answer the question, certain observations of Mr Maupeu, the expert witness, are to be kept in mind. He had observed that the hands of violence were largely stayed in the 2013 Kenyan elections, partly because the Office of the Prosecutor of the ICC showed a determination to prosecute cases arising from the 2007-2008 post-election violence. As Mr Maupeu put it, during the 2013 election, there was 'very little violence. It was organized very peacefully. And

[221] Expert Report by Mr H Maupeu, EVD-T-OTP-00044, at KEN-OTP-0093-1336.
[222] See Waki Report, *supra*, at p 26.
[223] See *ibid*, at p ix, emphasis added. See also at pp vii, 8, 16, and 22.
[224] *Ibid*, at p 22, emphasis added.

the *stakes involved in this very court was one of the factors contributing to the pacification of politics*.'[225]

33. An attempt was made, it seems, to dampen Mr Maupeu's observation: by noting a certain view to the effect that this trial may be viewed by some as 'a dysfunctional factor in Kenyan politics,' in the sense that the trial will, for example, 'increase at least a sense … amongst the Kalenjin group of persecution.'[226] It is of course wholly understandable that people do not embrace a circumstance that they view as disadvantageous to them. That is human nature. People are often stressed out by the justice system when a loved one is in its grips. But, such a subjective inclination could not override the possibilities of the objective circumstance in which the Prosecutor's stance in prosecuting this case may have tangibly contributed to the general good: of keeping violence at bay during the 2013 election; perhaps helping to break the cycle of the culture of violence that the Waki Commission reported as resulting from the decision to punish no one for participating in the violence episodes witnessed in 1992 and 1997.

34. But beyond that, political casuistry may make it convenient to disregard or degrade Mr Maupeu's observation, even deride it. But that would be a very strange thing to do indeed, on the part of anyone who claims to have at heart the best interests of Kenya and its citizens as an organic entity. To put it differently, unless a naysayer is able to present a demonstrable solution that permanently guarantees an end to the culture of electoral violence that the Waki Commission reported, it becomes wholly astonishing (to put it mildly) to protest and delete the prospect of an ICC prosecution as a potent measure of protection against such occurrences.

35. There has been much talk of Kenya's political leaders withdrawing her from the ICC fold. Apparently, a parliamentary resolution was even passed in that regard.[227] But at the foot of such talks of withdrawing necessarily lies the concern whether innocent and powerless Kenyans would be returned to the unhindered mercy of the deadly cycles of electoral violence that the Waki Commission reported — unleashed upon them in order that powerful people

[225] Transcript of hearing on 19 February 2014, ICC-01/09-01/11-T-90-ENG, at p 62, emphasis added.
[226] *Ibid.*
[227] See for example, extracts recorded in transcript of hearing on 18 September 2013, ICC-01/09-01/11-T-32-Red-ENG, at pp 5-8; http://www.bbc.com/news/world-africa-23969316.

may ascend to high political office. And then to be repeated at the next election. All with impunity, as the Waki Commission reported. It is a cross that no human population should have to bear anywhere in the world. Kenya and her citizens deserve a much better fate than cycles of electoral violence almost every five years.

36. It is a matter of judicial notice that not too long ago, the leader of an African State conceded defeat in an election that ousted him from power. He was reported as having insisted that his own political ambition was not worth the blood of any one of his compatriots.[228] The statement is remarkable in more ways than one, not least because it goes without saying. It must indeed be an elementary axiom of the democratic process in Africa — as elsewhere in the world — that no man's ambition for political office is worth the life of any of his fellow citizens.

37. The Waki Report *must* be considered with the greatest care in all that it says, to help make Kenya a truly leading democracy in the modern world — where the welfare of the people is given the first order of priority. But it must begin with real efforts in good faith — not mere lip service cheaply proclaimed as lip services go — to reverse the aberration of democracy noted as follows in the Waki report: '… the State is not seen as neutral but as the preserve of those in power.'[229] Regrettably, that impression was not at all assisted by the political campaign so visibly and unapologetically waged against this case in the course of its trial.

38. Based on all these considerations, the need must be stressed for the Kenyan Government and politicians, and the international community — including the African Union in particular and the United Nations and their caring partners beyond — to reflect upon these observations, for the sake of humanity whose heart beats in Kenya as fervently as it does elsewhere. No effort must be spared to find a lasting remedy for the *culture of political violence*

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[228] As Dr Goodluck Jonathan put it: 'My political ambition is not worth the blood of any Nigerian': see 'President Goodluck Jonathan and His Top Political Quotes', *The Guardian*, 28 March 2015 <http://guardian.ng/features/focus/president-goodluck-jonathan-and-his-top-political-quotes/>. See also 'Nigeria: Political Ambition Should Not Be Blood Thirsty, Says Jonathan,' *The Guardian*, 1 January 2015 ['Jonathan … restated his belief that his ambition and that of anybody was not worth the blood of the smallest Nigerian.'] <http://allafrica.com/stories/201501021522.html>

[229] See Waki Report, at p 28.

that goes unpunished, as the Waki Commission reported in a straightforward way. But, the critical matter is that such efforts must include the spotlight of serious national *and* international prosecutorial attention on electoral violence in a country so beautiful and with so much to offer the world.

39. The subject matter of this case is infinitely deeper and more involved than the average criminal case. It fully warrants these observations. Now, we go to the legal discussions.

PART II: APPROACHES TO NO-CASE ASSESSMENT

40. While the ultimate disposition of this litigation is based on legal principles other than those relating solely to the Defence's no-case motions, it is nevertheless appropriate to revisit aspects of the legal principles that should apply in no-case motions when made in this Court in the appropriate case. For now, the primary focus concerns the latitude that the Chamber should have in evaluating witness credibility, when assessing whether the case should be terminated on grounds of weaknesses in the prosecution case.

41. The following discussion assumes, of course, an absence of foul play capable of impeding the investigation or prosecution of the case.

A. Decision No 5

42. In the prelude to the Defence no-case motions, the Chamber had, in *Decision No 5 on the Conduct of Proceedings*, outlined the principles and procedure that should guide the no-case submissions in this trial.[230] That decision encapsulated the basic principles in this type of motion. In both their written and oral submissions, the Prosecution had been keen to stress that Decision No 5 is the only basis upon which it is correct to assess the sufficiency of the Prosecution evidence at this stage. In their understanding, the principles outlined in that decision impose marked restraint upon the Trial Chamber's freedom to assess credibility of the evidence. As the Prosecution pointedly insisted during oral arguments, it is the 'quantity' of the evidence that matters — not 'quality' — at this stage.[231] The Victims'

[230] *Prosecutor v Ruto and Sang (Decision No 5 on the Conduct of Trial Proceedings: Principles and Procedure on 'No Case to Answer' Motions)*, ICC-01/09-01/11-1334, 3 June 2014 [hereafter 'Decision No 5'].
[231] Transcript of hearing on 15 January 2016: ICC-01/09-01/11-T-212-ENG, at p 14.

counsel agreed. The Defence, on the other hand, insist that the Chamber must Consider 'quality' beyond mere 'quantity.' In other words, the Defence insist that the Chamber ought to be able to assess credibility more freely than the Prosecution's submissions envisage.

43. The effect of the Defence submissions is that Decision No 5 should be reconsidered to the extent that it objectively lends itself to the view that the powers of an ICC Trial Chamber to assess credibility of witnesses is constrained for purposes of determining a no-case motion. Since it is that question that separates the Defence counsel from the Prosecution and the Victims' counsel, I will consider the question under the subheading dealing with whether or not Decision No 5 is to be reconsidered.

44. In the meantime, it is important, in my view, to explain certain operative concepts that are engaged even in Decision No 5, but which had not been elaborated upon in that decision. These concern: (a) the proper understanding of the formulation of the crucial test; (b) the correct approach to the idea when it is said that 'no' reasonable tribunal of fact could properly convict or find a witness credible, or whether 'any' reasonable tribunal of fact could do so; and, (c) the principle involved in the drawing of an adverse inference.

1. The Proper Understanding of the Critical Test

45. It is important to clarify that the proper understanding of the critical test for a correct decision of a no-case submission involves, among other things, the statement of the proposition itself as well as the scope of the evidence to which that test is to be applied.

46. Much of the Prosecution's submissions are formulated in the manner of saying that they have presented 'evidence upon which a reasonable Trial Chamber *could convict*.' [Emphasis added.] It is not incorrect to state the basic principle in those terms (international criminal courts, including this Trial Chamber,[232] have been known to do so) provided the auxiliary verb 'could' is, in the context of the no-case test, understood as a composite terminology which assumes that conviction may only be brought about in accordance with the correct legal norms. In national case-law, that assumption is often spelt

[232] See Decision No 5, *supra*, at para 32. See also para 31.

out in the word 'properly'. The difference attending the elision or presence of that adverb in the proper understanding of the no-case law is not in the order of what a renowned scholar had in mind as 'minute and barren distinctions.'[233] Indeed, in the correct understanding of the no-case test, much turns on that nuance. Perhaps, not least because 'reasonable people' do not always do things 'properly.'

47. In more concrete terms, then, the point is about the presence of acceptable evidence upon which the reasonable trier of fact 'could *properly*' convict. Even in Lord Lane's much-travelled enunciation of the basic principle in *R v Galbraith*, there was always the concern that both the judge's direction to the jury, and their conviction on the basis of the evidence, must be done 'properly.'[234] Perhaps, the anxiety to ensure the correct understanding of the test may have driven some judges to reprise awkwardly that the task of the trial judge in a no-case motion is to answer the question 'which is stated simply and clearly in *Galbraith*: "Could a reasonable jury *properly* directed *properly be sure* of the defendant's guilt on the charge which he faces [?]".'[235]

48. One significant development in the progress of the jurisprudence, since Lord Lane's classic restatement of the no-case principle in *R v Galbraith* in 1981, is the adjustment to the principle inspired by the now famous 'plums and duff' aphorism that Turner J delivered in *R v Shippey*[236] (a rape case) in 1988. He was explaining the correct meaning of the well-worn *Galbraith*

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[233] See Sir Frederick Pollock, *The Law of Torts,* 4th edn (1895), at p 220.

[234] As Lord Lane CJ expressed the basic principle: 'How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury *properly* directed could not *properly* convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could *properly* come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge': *R v Galbraith* [1981] 1 WLR 1039 [England and Wales CA], at p 1042, emphasis added.

[235] *R v Pryer & ors* [2004] EWCA Crim 1163 [England and Wales CA], at para 28, emphasis added.

[236] *R v Shippey* [1988] Crim LR 767, reviewed in relevant detail in *R v Pryer & ors*, *supra*.

expression that the prosecution evidence is to be 'taken at its highest.' According to Turner J, 'taking the prosecution case at its highest did not mean picking out the plums and leaving the duff behind.'[237] According to him, *Galbraith* is not to be understood 'as intending to say that *if there are parts of the evidence which go to support the charge then no matter what the state of the rest of the evidence that is enough to leave the matter to the jury*. Such a view would leave part of the *ratio* of *Galbraith* tautologous.'[238] Rather, deciding on submissions of no case, the trial judge is '*to make an assessment of the evidence as a whole*.'[239] Against that background, Turner J proceeded 'to identify parts of the complainant's evidence which were found to be totally at variance with other parts. He labelled those parts as "frankly incredible" and as having "really significant inherent inconsistencies". He went on to say that they were: "strikingly and wholly inconsistent with the allegation of rape." He thus acceded to the submission and directed the jury to bring in verdicts of not guilty.'[240]

49. Whether or not Turner J's 'plums and duff' dictum is accepted as a defining principle of the no-case law,[241] there is no denying its minimum value as an important refinement of the paradigm. The case law of the Court

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[237] See *Pryer*, *supra*, at para 22, quoting Turner J.
[238] *Ibid*, at para 24, quoting Turner J, emphases added.
[239] *Ibid*, at para 25, quoting Turner J, emphasis added.
[240] *Ibid*, at para 26, quoting Turner J.
[241] In *R v Silcock & Ors* [2007] EWCA Crim 2176, at para 32, a panel of the Court of Appeal of England and Wales insisted that *Shippey* does not lay down a principle. [An observation registered earlier in *Pryer* (at para 27). Both the *Silcock* and the *Pryer* appeals were presided over by Hooper LJ.] But others disagree, insisting that *Shippey* does lay down a clear or near principle. Notably, the editors of *Blackstone's Criminal Practice* issued the following demurrer: 'With respect, there is surely a reason for the frequent use of *Shippey* in this way. There is in other words a principle involved here, and it is one that can be understood without regard to the particular facts of *Shippey* itself. It is little more than a gloss on *Galbraith*, but if so it may still be a useful gloss': *Blackstone's Criminal Practice Bulletin*, Issue 2, January 2008, at p 6. See also October 2007 update to *Blackstone's Criminal Practice*, at D15.56. The editors of *Blackstone's* may not be alone in their view. Notably, in *R v Broadhead*, a differently constituted panel of the Court of Appeal observed as follows: 'One of the most overworked phrases used by defence advocates at trial when making a submission of no case is that derived from the decision in *R v Shippey* … about not "picking out all the plums and leaving the duff behind". Overused it may be, but *Turner J's celebrated words in that case embody a valid and important point*, and one which is relevant to the present appeal. *The judge's task in considering such a submission at the end of the prosecution's case is to assess the prosecution's evidence as a whole. He has to take into account the weaknesses of the evidence as well as such strengths as there are. He needs to look at the evidence at that stage in the trial in the round therefore*': *R v Broadhead* [2006] EWCA Crim 1705 [England and Wales CA], at para 17, emphasis added.

of Appeal of England and Wales has now accepted it as a settled part of the law of no-case submissions. This is clearly the case for Turner J's insistence that the exercise involves a need 'to make an assessment of the case as a whole.' Indeed, even those English appellate judges who were inclined to deny the value of principle to the 'plums and duff' epigram are not known to have also denied its service in helping to resolve the application of the original principle *that appeared simply stated* in Galbraith *but often proved difficult to apply in practice*.[242] And other appellate judges have been even more welcoming of *Shippey*.[243]

50. The essence of the *Shippey* refinement is really the emphasis that a correct adjudication of a no-case submission requires the judge to take the prosecution evidence 'as a whole' — look at it 'in the round,'[244] as it were. As Thomas LJ put it on behalf of his panel in *R v P*: '[I]t seems to us that the correct approach is to look at the circumstantial evidence in the round and ask the question, no doubt employing the various tests that are suggested in some of the authorities, and ask the simple question, looking at all this evidence and treating it with the appropriate care and scrutinising it properly: is there a case on which a jury properly directed could convict? We do not think that anyone is assisted by a more refined test than that.'[245]

51. The emphasis now placed on the need to look at the evidence 'in the round' purposely eschews focussing only on the strengths or the weaknesses of the evidence, in isolation. The jurisprudence has ebbed and flowed in that respect — perhaps haltingly at times; but is now fairly settled, even to the point of resonance on the international stage. Recently, in *Prosecutor v Karadžić*, the ICTY Appeals Chamber held that in deciding a no-case submission at that Tribunal, a Trial Chamber 'cannot "pick and choose among parts of [the prosecution] evidence" in reaching its conclusion.'[246] As is often the case with much of the jurisprudence in this area, it is possible to complain

[242] See *R v Pryer*, *supra*, at para 29.
[243] *R v Broadhead*, *supra*, at para 17.
[244] See, for instance, *R v Broadhead*, *supra*, at para 17.
[245] *R v P* [2008] 2 Cr App R 6 [England and Wales CA], at para 23.
[246] *Prosecutor v Karadžić (Judgment)* 11 July 2013 [ICTY Appeals Chamber], at para 21.

respectfully that the pronouncement of the ICTY Appeals Chamber on the point may not be the best exemplar of internal unity.[247]

52. Notably, amidst the twists and turns in the no-case jurisprudence, a bench of five judges (an unusual arrangement) of the Court of Appeal of England and Wales, empanelled in 2011 in *R v F (S)*, felt it desirable to 'analyse a very large number of authorities, decisions of [that] court, which have not always been consistent, and thereafter, *if possible*, *to reconcile them*.'[248] One result of that exercise was what may be taken as a further restatement of the basic principle of 'no case to answer,' in the following way: **'[W]here the state of the evidence called by the prosecution, and *taken as a whole*, is *so unsatisfactory, contradictory, or so transparently unreliable*, that no jury, properly directed, could convict … it is the judge's duty to direct the jury that there is no case to answer and to return a "not guilty verdict."'**[249]

53. That restatement makes immediately plain that the impugnable flaw that may upset the case for the prosecution at its closing does not rest on 'so transparently unreliable' alone. The other flaws, expressed in the alternative, are 'so unsatisfactory' and '[so] contradictory.' The evidence in the case must be looked at as a whole in order to appreciate what the trier of fact could *properly* do as to conviction.

54. In *R v Jabber*, Moses LJ had observed that '[t]he correct test is the conventional test of what a reasonable jury would be *entitled* to conclude.'[250] The trial judge is thus required, in deciding a no-case motion, to make a determination as to what the jury would be *entitled* to conclude as to 'guilty' or 'not guilty,' where the state of the evidence called by the prosecution, and taken as a whole, is or is not so unsatisfactory, so contradictory, or so transparently unreliable.

55. But it bears emphasising, once more, that nuance which is not always uniformly clear in the jurisprudence. The nuance being that the trial judge's prevision of what the trier of fact is 'entitled' to do for purposes of conviction

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[247] The difficulty is apparent in the following text: 'a Trial Chamber is required to "assume that the prosecution's evidence [is] entitled to credence unless incapable of belief" and to "take the evidence at its highest"; it cannot "pick and choose among parts of that evidence" in reaching its conclusion': *ibid*.

[248] *R v F (S)* [2011] 2 Cr App R 28 [England and Wales CA], at para 13, emphasis added.

[249] *Ibid*, at para 36, emphasis added.

[250] *R v Jabber* [2006] EWCA Crim 2694 [England and Wales CA], at para 21, emphasis added.

of anyone is, fundamentally, an exercise that engages a question of law, about the correctness of the conviction on the basis of evidence that *properly* supports the conviction. It is not merely a question of fact, in the nature of an attempt at an accurate prediction of what the jury is likely or unlikely to do as to verdict,[251] in an exercise of discretion barely or not at all controlled by legal rules. New Zealand's Court of Appeal has correctly, in my view, explained that the judicial function in circumstances of no-case submissions 'is not to attempt to predict the outcome but to examine the evidence [if accepted] in terms of adequacy of proof.'[252] This understanding thus takes the matter back to the basic question: Does the evidence on the record of the Prosecution case, taken as a whole, entitle a trier of fact to convict the accused, if the case proceeded no further at that stage? Put differently, is that evidence *capable* of *securing* a conviction?[253] The concept of *securing* a conviction (either in the general sense of obtaining or in the stricter sense of making sure) is as important in the analysis as is the *capability* of the evidence in doing so a familiar idea.

56. In the application of the foregoing understanding, there is also authority for upholding no-case submissions on the grounds that the evidence for the prosecution was 'so unsatisfactory' or 'so contradictory' that the trial judge may find that a reasonable jury could not properly convict. One such authority is *R v Shire*.[254] It was the case of a London city bus driver, convicted of driving without due care and attention thereby causing death. The driver drove the bus through a pedestrian area of a street and drove over and killed the victim. The case for the Prosecution rested on the theory that the driver had deliberately used his bus as a weapon to push aside the victim and his friends who were walking innocently along the pedestrian street. That theory of the case was built upon the evidence of the victim's brother and their three friends who were present and in the company of the victim at the time of the incident. The alternative hypothesis favourable to the Defence was that the accused had not driven without due care and attention; rather, the victim and his group (comprising the Prosecution witnesses) had converged on the bus,

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[251] See *R v Flyger* [2001] 2 NZLR 721 [New Zealand Court of Appeal], at para 15.
[252] *Ibid*, at para 13. See also *R v Gallo* [2005] EWCA Crim 242 [England and Wales CA], at para 22.
[253] See *R v Hayter* [2005] UKHL 6 [House of Lords], at para 42, per Lord Roger of Earlsferry, indicating that the prosecution had to prove its case in 'order to secure the conviction' of the accused.
[254] *R v Shire* [2001] EWCA 2800 [England and Wales CA].

with the aim of stopping and boarding it. At the close of the case for the Prosecution, the Defence submitted that there was no case to answer, as the case for the Prosecution rested entirely on the evidence of the victim's brother and friends, which evidence was so *unreliable* that the case could not be left to the jury. According to the defence, no reasonable jury properly directed could have convicted on evidence so clearly partisan.[255] The trial judge rejected the submission, holding that the jury was entitled with the proper direction to convict on the basis of that body of evidence.[256] In their review of the case, the Court of Appeal thought it necessary to take a closer look at the evidence of the witnesses. Quite instructively, that review revealed a consideration of the *reliability* of the testimony of the victim's brother and his friends, in comparison to the evidence of the other witnesses. At the end of the review, the Court of Appeal considered that the evidence of the other witnesses did not support the theory that the victim and his brother and friends were walking innocently along when they got pushed by the driver using the bus;[257] that the cross-examination had revealed significant discrepancies in their evidence, including telling different accounts at other times; at least one or more among the victim's brother and friends was likely to have an interest in not giving a full account of the events, in light of an assault that one or more of them had apparently committed on the driver; and that they were brother and friends of the victim. In the circumstances, for their evidence to be left to the jury, it would have been necessary to preface it with so much caution as to deprive it of 'any proper value.'[258]

57. Thus, the Court of Appeal concluded that this was an example of the kind of case 'where the inherent risk of unreliability of the evidence' in support of the Prosecution's theory of the case 'was such that when considered in the light of the discrepancies in the evidence' would make it necessary (before leaving the case with the jury) to require some independent evidence which could justify the jury in concluding that the impugned Prosecution evidence 'could be reliable evidence. There was none as such.'[259]

[255] *Ibid*, at para 7.
[256] *Ibid*, at para 8.
[257] *Ibid*, at para 26.
[258] *Ibid*, at para 27.
[259] *Ibid*, at para 28.

That being so, held the Court of Appeal, the no-case submission should have been upheld and the case withdrawn from the jury.[260]

A Litmus Test

58. The foregoing discussion may, perhaps, allow a workable litmus test for no-case submissions that may assist in a further and better appreciation of the applicable principles; taking a realistic view of appellate scrutiny. Of note in that connection is the discussion, often encountered in common law no-case jurisprudence to the effect that there is no case to answer if the evidence of the prosecution cannot 'safely' sustain a conviction. Criticism has been expressed regarding whether safeness of conviction should be the proper focus of inquiry at the stage of no case to answer, since that evaluation is a matter for appellate review. The basis for the criticism results no doubt from the usual concern about separation of functions between judge and jury. The concern is that questions about the safeness of convictions may lead the judge to enter into credibility assessment, a matter reserved for the jury.[261]

59. But the criticism has not abated the safeness of conviction as a worry in the context of no-case submissions. As the matter was recently put in *Goring v R*, the trial judge 'should only withdraw [the case from the jury] if he considered it *unsafe* for the jury to conclude that the defendant was guilty on the totality of the evidence.'[262] And in *R v Flyger*, the Court of Appeal of New Zealand observed that the 'rationale' for a decision of no case to answer is 'the *unsafeness* of conviction having regard to the evidence.'[263]

60. It is right, in my view, that the safeness of conviction should remain a matter of concern at the stage of no-case submissions. There are at least two limitations to the criticism against it. The first relates to the irrelevance of its premise in cases involving no separation of functions between the judge and the trier of fact — i.e. where the judge is also the trier of fact. In such trials, the

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[260] *Ibid*, at para 29.

[261] 'If a judge is obliged to consider whether a conviction would be "unsafe" or "unsatisfactory", he can scarcely be blamed if he applies his views as to the weight to be given to the Crown's evidence and as to the truthfulness of their witnesses and so on': *R v Galbraith*, *supra*, at p. 1041. See also *Daley v R* [1994] 1 AC 117 [Privy Council], where Lord Mustill noted that concern as 'a much more solid reason for doubting the wisdom of the wider view of the judge's powers.'

[262] *Goring v R* [2011] EWCA Crim 2 [England and Wales CA], para 36, emphasis added.

[263] *R v Flyger*, *supra*, at para 15, emphasis added.

usual concern about separation of functions between judge and jury does not apply. The second relates to the fact that assessment of credibility *per se* may not be the only factor that may make a conviction unsafe. For instance, beyond the question of credibility as to the primary facts in circumstantial cases, the drawing of adverse inferences against the accused leading to conviction can also make the conviction unsafe. This is so if, in light of the totality of the evidence in the case, there remain competing viable inferences consistent with innocence, which are not overpowered by other solid evidence independently pointing to guilt in support of the adverse inference urged by the prosecution. It is part of the functions of a trial judge to worry about the safeness of conviction in such circumstances, and particularly so in a trial without a jury.

61. One notable instance of the criticism appears in the judgment of the Court of Appeal of England and Wales in the following words: 'Judges will find it easier to ensure that submissions of "no case" concentrate on correct principles if expressions such as "safe to convict" or "safely left to the jury" are avoided. The test enunciated in *Galbraith* is clear. If the jury does convict, and the conviction may be unsafe, it must be dealt with in this court.'[264]

62. This piece of advice may well be both unrealistic and unsatisfactory in the interest of justice. It is unrealistic, to the extent that it suggests that trial judges are no longer to be concerned (in a comprehensive way) about proper administration of justice according to law, since the reversal of a trial judgment on appeal often involves questions of correct administration of justice according to law in some respect. The advice may also appear a little paternalistic towards trial judges. But more importantly, the advice may be unsatisfactory in light of the interests of justice, since the incidence of wrongful conviction may not always be remedied at the appellate level, especially in cases where (for some reason, including affordability of legal representation) the defendant does not appeal.

63. In the final analysis, the ultimate litmus test of evidence upon which the trier of fact 'could properly convict' must take a realistic view of whether an appellate review is likely to sustain a conviction founded on that evidence. If the answer to that question is in the negative, it can then not be said that the

[264] *R v F (S)*, *supra*, at para 37.

evidence in question is one upon which the trier of fact 'could properly convict' as a matter of *entitlement* founded on the law.

64. Hence, the idea of taking the prosecution evidence at 'its highest' has no value that stands in isolation. It must take its bearing from this consideration.

2. That 'No' or 'Any' Reasonable Tribunal of Fact Could Properly Convict or Find a Witness Credible

65. Often in the context of law in general, and criminal law in particular, a closer view is taken of the actions and decisions of a reasonable person, as the standard bearer of correct behaviour. No-case submissions afford yet another instance of such a closer view. This concerns the question whether the prosecution has, according to the basic principle, led sufficient evidence upon which a reasonable trier of fact could properly convict. The angle of approach can reveal a degree of cumbrousness about the formulation of the basic principle, making further explanation necessary.

66. The explanation in this regard addresses the general idea in no-case jurisprudence (which is captured in Decision No 5) concerning the question whether the evidence thus far adduced is sufficient evidence upon which a reasonable tribunal of fact could properly convict.[265] Similarly explained is the idea (which is also captured in Decision No 5) that a trial judge may assess credibility when the evidence is '"incapable of belief" on any reasonable view.'[266]

67. The explanation offered in helpful jurisprudence is, as I understand and concur with it, that the focus of the inquiry is to be on what 'a' reasonable trier of fact could properly do (or not do). There is no requirement to account for what 'all' or 'every' reasonable trier of fact could properly do or not do.

68. In *R v Jabber*, for instance, Moses LJ made what is now a classic observation that a no-case submission does not require a judicial determination 'that anyone considering those circumstances would be *bound* to reach the same conclusion [as to the verdict on the basis of the evidence on the record]. That is not an appropriate test for a judge to apply on the

[265] See *ibid*, at para 32.
[266] See *ibid*, at para 24.

submission of no case. The correct test is the conventional test of what a reasonable jury would be *entitled* to conclude.'[267] And in *R v Hedgecock, Dyer and Mayers*, the Court of Appeal of England and Wales held that '[i]f at the close of the Crown's case the trial judge concludes that *a* reasonable jury could not reject all realistic explanations that would be consistent with innocence, then it would be his duty to stop the case.'[268] The point of the emphasis is that the requirement was not that before the judge could stop the case, she must be satisfied that *every* reasonable jury could not reject all realistic explanations that would be consistent with innocence. As will be seen later, it is the conclusion that *one* reasonable jury is entitled to make — not that which *all* reasonable juries are bound to make — that informs the decision.[269]

69. There is, of course, the further idea that a trial judge may be satisfied that the particular circumstances of a case have clearly exposed a conclusion as inescapable for any reasonable trier of fact. That conclusion will then become exigible in the circumstances as an entitlement — and, perhaps more so, an obligation of the concerned trier of fact to avoid a verdict that *no*

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[267] See *R v Jabber*, *supra*, at para 21, emphasis added. Moses LJ had been clarifying the proper understanding of the law on no-case submissions, particularly in relation to the drawing of inferences from primary facts. The focus of his discussion was the dictum of Lord Diplock in the Privy Council case of *Kwan Ping Bong & Anor v R* [1979] AC 609 at 615G, saying as follows: 'The requirement of proof beyond all reasonable doubt does not prevent a jury from inferring, from the facts that have been the subject of direct evidence before them, the existence of some further fact, such as the knowledge or intent of the accused, which constitutes an essential element of the offence; but the inference must be compelling — one (and the only one) that no reasonable man could fail to draw from the direct facts proved.' Moses LJ found no fault with Lord Diplock's primary proposition that an 'inference must be compelling' in order to satisfy the burden of proof beyond reasonable doubt. His concern rather relates to a difficulty attending a literal reading of Lord Diplock's explanation of what amounts to compelling inference. As he expressed the concern: '[T]he difficulty we have with the dicta … is that it suggests that at the close of the prosecution case the judge, if he is to allow the case to continue, must be satisfied not that the jury would be *entitled* to reject innocent explanations for the appellant's conduct, but would be *bound* to. Read literally, Lord Diplock's dicta might be understood to be saying that an inference was only to be regarded as compelling if all juries, assumed to be composed of those who are reasonable, would be *bound* to draw such an inference. In short, an inference could only be drawn if *no one would dissent* from it': *R v Jabber*, *supra*, at para 20, emphasis added.

[268] *R v Hedgcock, Dyer and Mayers* [2007] EWCA Crim 3486 [England and Wales CA], at para 21, emphasis added.

[269] Indeed, this was made very clear in many other post-*Jabber* cases, including *G & F v R* [2012] EWCA Crim 1756 [England and Wales CA], at para 36; *R v Anthony Darnley* [2012] EWCA Crim 1148 [England and Wales CA], at para 21.

reasonable jury could properly render in the particular circumstances of the case.[270] It does not follow, however, that a reasonable trier of fact is, in every case, denied entitlement to a given conclusion unless it can be said that every reasonable trier of fact is bound to come to the same conclusion as regards the evidence in a no-case submission.

70. Hence, all that the judge is required to do for purposes of a no-case submission is to make a determination as to what a reasonable trier of fact could properly decide, on a certain view of the evidence, in light of the principles of law that must control the verdict. When it comes time for the verdict, the judge is required to instruct the jury on those principles of law and to bear them in her own mind in a judge-only trial. It is those principles of law that inform the following proposition: 'There is no case to answer only if the evidence is not capable *in law* of supporting a conviction.'[271] It is right, therefore, to emphasise that the exercise is not about factual prediction of what a trier of fact might decide in the largeness of unregulated prerogatives. It is rather about making an informed determination of the course of conduct that is legally available to the trier of fact — 'in terms of adequacy of proof' — for the purpose of convicting an accused.[272] In *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993), Chief Justice King of the Supreme Court of South Australia pronounced that he did not understand the law to be 'that there can be a case to answer on circumstantial evidence which is incapable of producing in a reasonable mind a conviction of guilt beyond reasonable doubt. If the evidence is incapable of producing that state of mind, it is not *capable in law* of proving the charge.'[273] [As will be explained later, some caution is required in interpreting observations like this as directly importing

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[270] As Elias LJ correctly expressed the matter in *R v Anthony Darnley*: '[W]e think that the focus should be on the traditional question, namely whether there was evidence on which a jury, properly directed could infer guilt. It is an easier test, not least because it focuses on what a reasonable jury could do rather than what it could not do. Reasonable juries may differ because the assessment of the facts is not simply a logical exercise and different views may reasonably be taken about the weight to be given to potentially relevant evidence. The judge must be alive to that when considering a half-time application. *Of course, if the judge is satisfied that even on the view of the facts most favourable to the prosecution no reasonable jury could convict, then the case must be stopped*': *R v Anthony Darnley*, *ibid*, at para 21, emphasis added.

[271] See *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1 [Supreme Court of South Australia, Full Court], at para 18, per King CJ, emphasis added.

[272] See *R v Flyger*, *supra*, at para 13. See also *R v Gallo*, *supra*, at para 22.

[273] *Questions of Law Reserved on Acquittal (No 2 of 1993)*, *supra*, at para 18, emphasis added.

the standard of proof of guilt beyond reasonable doubt as the correct standard of assessment at the no-case stage.[274]]

71. The trial judge's determination (as to whether a reasonable trier of fact could legally convict upon the available prosecution evidence) is thus not rendered erroneous in the no-case decision by the possibility that a different reasonable trier of fact could have legally come to a different verdict upon the same evidence.[275] The error, rather, is that the judge had (in his no-case determination) been mistaken about the nature, content or application of the legal principle that informed his understanding that the trier of fact could convict (or not) on the basis of the prosecution evidence. This understanding is fully consistent with the view that reasonable persons can come to different views that may still be reasonable in their variance or diversity.[276] There is indeed futility in any exercise that seeks to account for and reconcile the views of 'all' or 'every' reasonable person as regards the correctness of any particular judicial decision, including a decision on a submission of no case to answer. And the futility of the exercise is particularly accentuated (and impermissibly academic) in a case in which there is no jury, if the aim of the exercise is to preserve for different juries the option of reasonable disagreement concerning what is a reasonable verdict at the end of the case.

72. It is possible to approach the analysis (of the question of what a reasonable trier of fact may properly do) from yet a different angle. It begins with accepting that a trial judge should be loath to conclude that the prosecution has, at the close of their case, proved guilt beyond reasonable doubt, when the defence has not been given a fair opportunity to present their case fully. That is the understood reason that a stream of case law has discouraged focussing on that standard of proof for purposes of no case to

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[274] See also Decision No 5, *supra*, Separate Further Opinion of Judge Eboe-Osuji.

[275] In *R v Anthony Darnley*, Elias LJ considered that the 'no case' test is more manageable in the context of administration of justice if 'it focuses on what a reasonable jury could do rather than what it could not do. Reasonable juries may differ because the assessment of the facts is not simply a logical exercise and different views may reasonably be taken about the weight to be given to potentially relevant evidence. The judge must be alive to that when considering a half-time application': *R v Anthony Darnley*, *supra*, para 21. Such a positive-oriented approach to critical questions in a criminal trial is an eminently sensible formula that equally applies in its effects — either way — to the question whether the jury *could* convict or *could* acquit, contrasted with the negative-oriented and more awkward approach involving the question whether the jury *could not* convict or *could not* acquit.

[276] See *R v Anthony Darnley*, *supra*, at para 21.

answer submissions.[277] But, the situation is appreciably different if the trial judge considers that the prosecution evidence, taken as a whole, raises a reasonable doubt about guilt, after the prosecution has been given a fair opportunity to present their case fully and they had done so. This is accepting, of course, that the prosecution is not entitled — possibly excepting where there is evidence tending to implicate the accused in obstruction of justice — to compel the defence to call any evidence for the sole purpose of affording a further opportunity to strengthen the prosecution case or remedy any deficiency in it. The reasonable doubt perceived in the case for the prosecution at its closing should then be a valid basis for the trial judge to determine that an acquittal should be the proper verdict for a reasonable trier of fact to render at that stage. This is especially significant in a judge-only trial where the view of the weaknesses in the prosecution case — hence the reasonable doubt — at half-time is necessarily the view of the trier of fact in the case. All this assumes, of course, the absence of serious incidence of obstruction of justice.

3. The Drawing of Adverse Inferences

73. A type of criminal case that often provokes the question whether the evidence is 'so unsatisfactory' as to result in the conclusion that a reasonable trier of fact could not properly convict, is the case where conviction crucially depends on the drawing of inferences pointing to the verdict of guilt. It is evident from the submissions of the Prosecution in the present litigation — and from the evidential review laid out in Judge Fremr's reasons — that the prosecution case depends to a large extent on the drawing of such inferences.

74. A proper appreciation of the question of law (as to what a reasonable trier of fact may properly do) must, among other things, take into account, as always, the value of the presumption of innocence — a notion that must always be given real significance for purposes of conviction[278] — and the level of evidence required to shake it. In circumstantial cases, the presumption of

[277] See generally Decision No 5, Separate Further Opinion of Judge Eboe-Osuji.
[278] Of course, the presumption of innocence has an absolute value against a conviction in the absence of proof of the charges beyond a reasonable doubt or other clear operation of law compelling a conviction. But, in my view, the presumption has no absolute value compelling an acquittal in the absence of proof beyond reasonable doubt — notwithstanding the specific circumstances of the particular criminal trial. Impurities in the trial process may make it unjust to acquit, without making it just to convict. Hence, the remedy of a mistrial.

innocence takes on a substantial value as a veritable barrier that obstructs triers of fact from engaging in leaps in the name of inferences that would justify a conviction. The height of that barrier in specific cases will depend, on the one hand, on the viability of any other hypothesis that is consistent with innocence and, on the other hand, the nature, quality and viability of any other independent evidence such as would assist the trier of fact in making sure of their entitlement to draw the particular inference urged in the direction of guilt.[279] That is to say, 'the inference supporting guilt must be compelling,'[280] in order to be seen as *properly* supporting a conviction.

75. In the recent case of *Masih v R*, the England and Wales Court of Appeal, an appellate court with extensive experience on the subject and law of no case to answer, had with clarity and precision stated the principle in the following way: 'It is agreed that in a circumstantial case it is a necessary step in the analysis of the evidence and its effect to ask: *Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?*'[281] To the same effect, the same appellate court had in an earlier case held as follows: 'Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer *does* involve the rejection of all realistic possibilities consistent with innocence.'[282]

76. In *Masih* (a case in which the appellant had been convicted of the murder of his visitor and a fellow drug abuser), the prosecution case had invited the inferences that the appellant had subjected the victim to a severe beating in the appellant's flat; that he tried to drag the victim into the lift; and that when the victim followed him back to his door, the appellant pushed him over the balcony rail to his death in a 75-foot fall. The prosecution accepted that only if the final inference could be drawn would the jury be able to

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[279] See *R v Jabber*, *supra*, at para 21 (per Moses LJ). See also *R v G and F* [2012] EWCA Crim 1756 [England and Wales CA]; *R v Hedgcock, Dyer and Mayers*, *supra*.
[280] See *Kwan Ping Bong & Anor*, *supra*, at 615G.
[281] See *Masih v R* [2015] EWCA 477 [England and Wales CA], at para 3, emphasis received.
[282] *G & F v R*, *supra*, para 36, emphasis received. Also in *Jabber*, Moses LJ had agreed that '[i]t is perfectly true that no jury could properly convict unless, on looking at the evidence as a whole, it rejected any other realistic possibility from which it might reasonably be inferred that there was an innocent explanation for his actions': *Jabber*, *supra*, at para 19.

convict of murder. On a no-case submission, the defence argued that the final inference could not safely be drawn from the evidence the jury had heard. What was missing, the defence argued, was any evidence that the appellant was outside his flat at or about the time the deceased fell to his death or any evidence that the deceased was pushed, manhandled or propelled to his death.

77. In their analysis of the case, the Court of Appeal observed as follows: 'The reasonably possible alternative to deliberate, unlawful action by the appellant was accident. It was this possibility that the circumstantial evidence was required to exclude before the appellant could be convicted of murder. The issue for the judge was whether on the evidence a reasonable jury could safely exclude the possibility of accident and *draw the inference of guilt so that they were sure*.'[283] And, in considering the factors relevant to the correctness of the inference of murder as urged, the Court of Appeal further observed as follows: 'For present purposes it must be assumed in favour of the prosecution's case that the third man and the use of the deceased's telephone were irrelevant distractions.[[284]] It must also be assumed that the appellant lied in his interview under caution about the degree of violence to which he had subjected his victim inside his flat. Finally, we shall assume that there were other features of the appellant's account in interview that the jury had cause to doubt, including that an attempt to climb the exterior of the building was palpably dangerous. Nonetheless, *the question for the judge was whether the jury could safely exclude an accidental fall whether it took place precisely as the appellant claimed or not*.'[285]

78. In reviewing a number of factors in the case that kept accident viable as an alternative hypothesis, the Court of Appeal, among other things, made the following crucial observations: '… Second, no-one saw or heard the appellant on the walkway outside the flat during the critical minutes after the lift incident. Had the appellant been outside when [the victim] was lying on the ground or standing on the walkway looking out over the balcony rail, Mr Barrow [a witness for the Prosecution] could hardly have missed him. The

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[283] *G & F v R*, *supra*, at para 21, emphasis added.
[284] Evidence was heard about a third man near the scene at the material time and about someone else's use of the deceased's telephone after his death. Without ruling these facts out as 'irrelevant distractions' they might have assisted a defence theory in a possible suggestion that a third person might have caused the victim's death.
[285] *Ibid*, at para 22, emphasis added.

walkway was just over a metre wide and there was no obvious hiding place. … Sixth, while the behaviour of the appellant after the fall was consistent with the actions of a man who was guilty of murder it was also consistent with a man who knew he had committed a serious offence of violence and might well be blamed for his victim's death. Either way, he was engaged in a hopeless quest for self-preservation. *There was nothing about the evidence that tended to exclude the motive the appellant gave in preference to that suggested by the prosecution*.'[286]

79. In the final analysis, the Court of Appeal concluded as follows: 'In our judgment, it is the absence of the appellant from the walkway once … he had regained his flat that created a *lacuna in the evidence that inference could not fill*. The jury was being invited to infer that, at the very moment Mr Barrow turned away from his window to speak to Ms Parnell [his partner], the appellant had emerged from Flat 44 and propelled his victim over the balcony. That was, of course, a theoretical possibility but as a conclusion we consider that it was no more than *speculation that filled a critical gap in the evidence*.'[287]

80. Another case constructed from circumstantial evidence and in which inference of guilt was urged to be drawn was *R v Hedgcock, Dyer and Mayers*.[288] It involved, among other things, the indictment of three men (in various alliances) with the crime of conspiracy. It was alleged in two counts that two of the men (Hedgcock and Dyer) had conspired to rape (in one count) and to murder (in another count) a girl younger than 16 years. The third allegation was that two of the men (Dyer and Mayers) had also conspired in a different pact to rape a girl under the age of 16. The case for the prosecution was built primarily on transcripts of internet chats, which clearly showed that the men (as charged) had engaged extensively in discussions, in sexually graphic detail, about raping and killing a girl under the age of 16 years.

81. At the end of the prosecution case, the defence made a no-case submission, as there was no independent solid evidence, other than the internet chats, that took the case beyond the sexual fantasies of the accused into the realms of any intention to carry out the agreements evident in the

[286] *Ibid*, at para 23, emphasis added.
[287] *Ibid*, at para 24, emphasis added.
[288] *R v Hedgcock, Dyer and Mayers, supra*.

internet chats. The trial judge dismissed the submissions, holding that the jury could, from the internet chats, infer the intent to carry out the agreements. But, the Court of Appeal disagreed, observing as follows: 'In our judgment the internet "chats" *in their particular context were plainly at least as consistent with the rape plots being fantasy as with their being reality*. The terms of these internet conversations (perhaps especially those between Dyer and Hedgcock) suggest or may be thought to suggest that they were fantasy only. The parties are making it up as they went along — encouraging each other into heightened states of sexual excitement. If that is right the probability may be in favour of a fantastical rather than a realistic explanation of what was said. Certainly there is no probability that the realistic explanation is the right one. Such consideration would ordinarily be wholly within the jury's province, but this view (or possible view) of the transcript made all the more pressing the need for an objective rationale if the jury were to find a real conspiracy proved. The position is in our view that it was not possible for a reasonable jury, looking only at the transcript, to exclude the fantasy scenario as being fanciful or unrealistic. There is no inherent probability in these particular circumstances that the apparent agreements were real. It might be otherwise in most (certainly many) other human situations. But these conversations were quite plainly so moved by sexual lust that it could not be said (again looking at the transcripts alone) that reality was any more probable than fantasy.'[289]

82. In the circumstances, the Court of Appeal considered it 'necessary to consider other evidence in the case and look to where other objective facts may point.'[290] In the outcome of that exercise, the Court of Appeal held that the trial judge should have upheld the no-case submission,[291] for the following reasons: 'In these highly unusual circumstances a reasonable jury could only conclude that the participants actually intended to carry out the agreement to rape if there was some extraneous evidence favouring that interpretation. The discs upon their own can only carry the matter so far. If anything, however, the objective circumstances as we have now described and summarised them point the other way.'[292]

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[289] *R v Hedgcock, Dyer and Mayers*, *supra*, at para 22, emphasis added.
[290] *Ibid*, at para 23.
[291] *Ibid*, at para 27.
[292] *Ibid*, at para 26.

83. *G & F v R* is also a paedophile case involving the charge of conspiracy by the two indicted men to rape a child younger than 13. The evidence comprised graphic text messages exchanged between the two men, revealing on their face an agreement to rape a six-year old boy whose descriptions and attributes bore striking resemblances to those of the son of a close female friend of one of the accused. The trial judge rejected the no-case submission. On appeal, the Court of Appeal found that 'the vital question for the judge to consider was whether a reasonable jury could be entitled to infer, on one possible view of the prosecution evidence, that *it was sure* that each of the defendants intended to carry out the agreement to rape a male child under 13.'[293] The defence accepted that the text messages were on their face capable of being read either as an agreement or as a fantasy.[294] The Court of Appeal reviewed the evidence in the case supporting the competing hypotheses.[295]

84. In the end, the Court of Appeal 'concluded that no reasonable jury, taking the prosecution evidence at its highest, could *surely infer* that the defendants intended to carry out the agreement. *The evidence is all equivocal; it is as consistent with fantasy as with an intent to carry out the plan.* It is particularly striking that these men never met at any stage, either before or after the text exchange nor did they even suggest meeting to discuss the plan further. Nor is there any evidence that they took any steps to advance the plan beyond suggesting "Friday night". No place or time or other practical details are identified. Nothing at all happened after the exchange of text messages. We appreciate that their silence in interviews and failure to mention that this was all a fantasy can be taken into account. But that is of very little weight given the other facts or rather lack of them.'[296]

85. Notably, in the much earlier case of *R v Varlack*, the Privy Council held that, in the context of a no case to answer submission, 'the fact that another view, consistent with innocence, could possibly be held does not mean that the case should be withdrawn from the jury. The [trial] judge was … justified in concluding that a reasonable jury might on one view of the evidence find the case proved beyond reasonable doubt and convict the respondent.'[297]

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[293] *G & F v R, supra*, at para 37, emphasis added.
[294] *Ibid*, at para 38.
[295] *Ibid*, at paras 37 - 39.
[296] *Ibid*, at para 40, emphasis added.
[297] See *R v Varlack* [2008] UKPC 56, at para 24 [Privy Council].

Hence, the Privy Council reversed the Court of Appeal of the British Virgin Islands who had been of the contrary view. But, care should be taken to avoid misapplying the Privy Council's pronouncement quoted above, especially for purposes of the ICC. First of all, it is immediately apparent in *Varlack* that the British Virgin Islands criminal trials recognise the separation of functions between judge and jury. No doubt, the Privy Council's pronouncement rested on the traditional concern about judicial usurpation of jury functions. Hence, their concern *a priori* that the Court of Appeal 'did not apply the test of determining what inferences a reasonable jury properly directed might draw, as distinct from those which they themselves thought could or could not be drawn.'[298] This concern would be likely out of place in a trial with no jury. Secondly, the Privy Council did not leave matters simply at the proposition that 'a reasonable jury might on one view of the evidence find the case proved beyond reasonable doubt and convict the respondent,' in spite of 'the fact that another view, consistent with innocence, could possibly be held.' On a close examination, it is clear that the Privy Council had also underscored some other evidence in the case in view of which they concluded that the jury was 'clearly entitled to draw the inference' that was found to be crucial in the case.[299] Hence, the view that the viability of the inference pointing to guilt, in a circumstantial case, must depend on other solid evidence independent of the primary fact upon which the inference is based.[300] And, finally, the Privy Council's decision is fully consistent with the proposition seen earlier, to the effect that the correct approach is for the trial judge to take a view of what a reasonable jury would be *entitled* to conclude — and not what every reasonable jury is *bound* to conclude.[301] Such a view when taken by the trial judge is not to be impugned merely because of the possibility that not all reasonable juries will so conclude.

86. The sum of the foregoing is the validation of the legal proposition, stated by the Privy Council in *Kwan Ping Bong*, that an inference 'must be compelling' to be drawn.[302] The correctness of that proposition has never been in doubt. Any dispute to speak of has, rather, revolved around its meaning.[303]

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[298] See *ibid*, at para 23.
[299] See *ibid*, at para 24.
[300] See *R v Hedgcock, Dyer and Mayers*, *supra*; *G & F v R*, *supra*.
[301] See *R v Jabber*, *supra*, at paras 20 and 21.
[302] See *Kwan Ping Bong & Anor*, *supra*, 615G.
[303] *R v Jabber*, *supra*, at para 20.

But, pending a comprehensive resolution to that particular dispute, it must be said that an inference does not become compelling merely by the spectre of its hypothetical possibility. What makes it compelling is its ability to speak forcefully for itself in the particular circumstances in which it is urged; especially given its objective power to displace realism from competing hypotheses, in view of the preponderance of attendant independent factors in its favour in the given circumstances, contrasted with those in favour of any competing hypothesis. In a criminal case, the burden of compellingness necessarily weighs heavier upon inferences in the direction of guilt than in the opposite direction; as a consequence of the presumption of innocence and the requisite burden of proof of guilt beyond a reasonable doubt.

4. The Request for Reconsideration

87. I turn now to the Defence request to reconsider Decision No 5. It should perhaps be made clear from the outset that a Trial Chamber should be neither shy nor afraid to take another look at a question of law that the Chamber had earlier passed upon; and to adjust or refine it as necessary to better serve the cause of justice, if the question of law is still with the Chamber and there is merit to the urge for the adjustment. Reconsideration of judicial decisions is not a foreign concept, and has occasionally been granted by the Trial Chambers of this Court (even at the instance of the Office of the Prosecutor).[304]

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88. During the oral arguments, the Prosecution contended that the Defence request and submissions in that regard came much too late in the proceedings – 'past the eleventh hour' — as it were. But, the contention is unpersuasive for at least three reasons. First, the Defence submissions engaging or re-engaging the question of the applicable evidential standard for purposes of a no-case motion were not late. Specifically, the closing of the case for the Prosecution does not alter that analysis in the least. This is because decisions on no-case litigation are normally issued at the close of the case for the prosecution — including pronouncements on the applicable legal principles. That the Chamber had issued its Decision No 5, outlining the principles and procedure

[304] See *Prosecutor v Kenyatta (Decision on the Prosecution's Motion for Reconsideration of the Decision Excusing Mr Kenyatta from Continuous Presence at Trial)* dated 26 November 2013 [Trial Chamber V(B)].

in advance at the request of the parties and participants, should justify no complaint that it is much too late for the Defence to invite the Chamber to look again at the applicable legal principles. Second, no prejudice is caused to the Prosecution, when the question is raised again at this juncture, particularly as it is in effect a request for reconsideration. This is because the questions engaged — i.e. the assessment of witness credibility and the application of the standard of proof beyond reasonable doubt — are constant requirements of criminal litigation; even if it is accepted, for the sake of argument, that they are not questions appropriately engaged at the stage of no case to answer litigation. From the beginning to the end, the Prosecution was always required to prove its case beyond reasonable doubt and with credible evidence. Decision No 5 did not alter those requirements — even if it is considered appropriate to hold off, until a later stage, the review of the evidence according to those standards. That being the case, it is only a matter of submission for the Prosecution to address, at *any* stage that they are called upon to do so, the constant question whether the prosecution evidence has met the requirements of credibility and the standard of proof beyond reasonable doubt. There is no prejudice involved. Finally, and relatedly, the Prosecution was, to all intents and purposes, put on notice in good time that an application for reconsideration had been made by the Defence, by virtue of their written submissions, for reconsideration of Decision No 5 in the relevant respect.

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89. The Prosecution failed, in my view, to respond persuasively to Judge Fremr's specific question during the oral hearing, calling upon the Prosecution to explain whether it considered that the 'assessment of quality of evidence presented so far by the Prosecution would be more positive [than] now or at least remain the same,' given the Prosecution's insistence that only quantitative assessment of the evidence may be made at this stage.[305] The Prosecution's failure to answer that question, in light of the concerns addressed above, was not helpful in my view, given another procedural occurrence in the case that I discuss immediately below.

[305] See transcript of hearing of 15 January 2016: ICC-01/09-01/11-T-212-ENG, *supra*, at pp 61-69.

90. The further procedural occurrence is the Prosecution's written argument that, at this stage of no-case adjudication, 'the Chamber does not have all the evidence at its disposal to make the appropriate credibility and reliability assessments.'[306] This was a submission written, reviewed (presumably) and filed by the Prosecution. In the unique circumstances of this case, I have much sympathy for the Prosecution's predicament concerning the incidence of interference and political meddling that may have reasonably impeded their ability to obtain and present further and better evidence. Even so, the appropriate remedy may not — in the absence of evidence tending to implicate the accused in the incidence of interference – entail an inference that there is a case for the Defence to answer.

91. But, beyond that, the Prosecution's submission (in the form in which it was made) necessarily raises a general question as to when the Chamber would, in a trial, have all the evidence at its disposal to enable it 'to make the appropriate credibility and reliability assessments.' Or, is it that a court of law could never make credibility assessments of the prosecution case unless the defence actually call their own evidence? Would this not amount, effectively, to *compelling* the defence to call evidence *in every case* — in order to make available to the Chamber 'all the evidence [that may enable it] to make appropriate credibility and reliability assessments' of the prosecution case? Is that approach consistent with accepted tenets of criminal law and procedure, which both (a) places on the prosecution the obligation to prove its case; and, (b) recognises for the defence the right to remain silent and to put the prosecution to the strictest proof of their case (with no help from the defence)?

92. The foregoing, in my view, underscores the importance of Judge Fremr's question that the Prosecution's answer did not address.

5. The Merits of the Reconsideration Request

93. In light of the submissions of the parties, I am persuaded to revisit the aspect of the applicable principles, regarding whether and to what extent a Trial Chamber of this Court should conduct a credibility or reliability assessment of the evidence presented by the Prosecution.

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[306] See Consolidated Response, *supra*, at para 18.

94. In Decision No 5, the Chamber stated that 'the test to be applied in determining a "no case to answer" motion, if any, in this case is whether there is evidence on which a reasonable Trial Chamber *could* convict.'[307] In enunciating the guiding approach when applying the indicated test, the Chamber stated as follows:

> The determination of a 'no case to answer' motion does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability. Such matters – which go to the strength of evidence rather than its existence – are to be weighed in the final deliberations in light of the entirety of the evidence presented. In the *ad hoc* tribunals' jurisprudence this approach has been usefully formulated as a requirement, at this intermediary stage, to take the prosecution evidence 'at its highest' and to 'assume that the prosecution's evidence was entitled to credence unless incapable of belief' on any reasonable view. The Chamber agrees with this approach.[308]

95. Although the Decision does indicate that the Chamber will conduct 'a *prima facie* assessment of the evidence,'[309] there may be an understandable concern that such an assessment may not involve an assessment of the credibility (or reliability) of prosecution evidence, except only where its destitution is evident beyond all dispute;[310] and that the Chamber may only focus on the apparent strengths of the prosecution evidence, while ignoring its apparent weaknesses.[311] The passage quoted above makes it necessary, in my view, to clarify the principle that should be followed either as appropriate under Decision No 5 or appropriate to be followed in any event in this Court. As will become clear, the clarification gives due regard to the unique features of this Court, including the differences between its trials and jury trials which largely inspired the sensitive formulations reflected in the foregoing quotation.

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[307] Decision No 5, *supra*, at para 32, emphasis received. See also at para 31.
[308] *Ibid*, at para 24.
[309] *Ibid*, at para 23.
[310] The basis for this concern will include the following pronouncement: 'The Chamber will not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber': *ibid*, at para 32.
[311] The basis for this concern will include the Chamber's indication that 'in the context of a "no case to answer" determination, it is more appropriate to consider whether or not there is evidence supporting any one of the incidents charged. The presence of … evidence on the record would defeat the "no case" motion …': *ibid*, at para 27.

6. Judges as the Triers of Facts

96. Consequently, I am persuaded that the partly dissenting opinions of Judge Pocar and Judge Shahabuddeen in the ICTY case of *Jelisić* indicate the more appropriate approach for both their tribunal and the ICC. The central consideration in that approach is that the judges called upon to determine a no-case motion at the ICTY are also the triers of facts in the case — and upon them rests the function of credibility assessment whenever considered appropriate to be made. There is, therefore, little that is improper in recognising for their purposes greater latitude to make that assessment at the conclusion of the prosecution case, in order to terminate a weak case. Judge Pocar expressed the point as follows:

> 4. [...] In my view, if a Trial Chamber employing the above articulated test finds that, while a different trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused, that Chamber itself would not, then it should enter an acquittal and put an end to the proceedings.
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> 5. It should be noted that the conclusion reached by the majority of the Appeals Chamber is certainly suited to a system in which cases are eventually sent to a jury or to a trier of fact other than the judge who evaluates the evidence at that stage. In such a system, if a judge finds that, while he himself cannot be satisfied of the guilt of the accused, a different trier of fact could come to a conclusion of guilt, he cannot stop the proceedings. Should he apply a higher standard of evaluation of the evidence, he would try the facts himself, instead of leaving the task of doing so to the jury.
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> 6. In this International Tribunal, however, there is no jury; the judges are the final arbiters of the evidence. There is no point in leaving open the possibility that another trier of fact could come to a different conclusion if the Trial Chamber itself is convinced of its own assessment of the case. Therefore, if at the close of the prosecution case, the judges themselves are convinced that the evidence is insufficient, then the Chamber must acquit. Such an approach is not only consistent with the text of Rule 98bis(B), which obliges the Chamber to acquit if it finds that the evidence is insufficient to sustain a conviction. It also preserves the fundamental rights of the accused, who is entitled not only to be presumed innocent during the trial, but also not to undergo a trial when his innocence has already been established. Further, the principle of judicial economy is also preserved, in that proceedings are not unnecessarily prolonged: for what is the point in continuing the proceedings if the same

> judges have already reached the conclusion that they will ultimately adopt at a later stage?[312]

97. Judge Shahabuddeen's analysis is to the same effect, culminating in the following observation: 'These considerations support the argument that, at the close of the case for the prosecution, a Trial Chamber has a right, in borderline cases, to make a definitive judgement that guilt has not been established by the evidence, even accepting that a reasonable tribunal could convict on the evidence (if accepted).'[313]

98. The approach shared by Judge Pocar and Judge Shahabuddeen is fully consistent with the powers belonging to the *trier of fact*, even in common law countries, to terminate a case at any time, after the close of the case for the prosecution.

99. Indeed, in national jurisdictions, there is a strong strain of authoritative pronouncements to the same effect. It is to the effect that in judge-alone trials (typified in most countries by trials before magistrates' courts), the sensitivity to separation of functions between judge and jury ought not control the adjudication of no-case submissions quite as much — because there are no juries in those kinds of trials. In Victoria, Australia, for instance, the power to terminate weak cases at the end of the prosecution case was restated in *Benney v Dowling*. There, it was noted as a 'common practice' — also 'convenient practice' — to say that the trier(s) of fact 'does or do not require to hear any evidence for the defence and to acquit at that stage.' In criminal trials before magistrates, that power is exercised by the magistrate; and by the jury in jury trials 'often at the suggestion of the trial judge.'[314]

100. In *R v Prasad* (now a classic case in Australian criminal law), King CJ of the Supreme Court of South Australia, articulated the same power with clarity, particularly in the context of what he described as 'a clear distinction … between a trial before a magistrate or other court which is the judge of both law and facts and a trial by a judge and jury.' It may assist to quote him at some length, though the critical point is in the last paragraph:

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[312] *Prosecutor v Jelisić (Judgment)* dated 5 July 2001 [ICTY Appeals Chamber], Partial Dissenting Opinion of Judge Pocar.
[313] *Prosecutor v Jelisić*, *ibid*, Partial Dissenting Opinion of Judge Shahabuddeen, at para 11.
[314] *Benney v Dowling* [1959] VR 237, at p 242, per O'Bryan J.

It was contended before us that although there is a case to answer there is nevertheless a discretion in the trial Judge to stop the case and direct a verdict of not guilty if he considers that the evidence for the prosecution is so unsatisfactory that it would be unsafe to convict upon it. This submission was based upon a practice which has grown up in England since the passing in that country in 1966 of an amendment to the Criminal Appeal Act, 1907, as a result of which the Court of Appeal is empowered to set aside a verdict of a jury on the grounds that it is unsafe and unsatisfactory. The history of the practice is set out in *Reg v Mansfield* … .

Whatever justification might exist for the practice in England where the change as to the grounds upon which the Court of Appeal may intervene is now embodied in the Criminal Appeal Act, 1968, I cannot see any basis in principle for the adoption of the practice in this State. There has been no corresponding change in this State as to the grounds upon which the Full Court may interfere with a conviction. The ground in this State, which corresponds with the altered ground in England, remains that the verdict is unreasonable or cannot be supported having regard to the evidence. It seems to me that to say that a judge can direct a jury to bring in a verdict of not guilty when there is evidence capable in law of supporting a conviction is to infringe one of the basic principles of trial by jury. It is fundamental to trial by jury that the law is for the judge and the facts for the jury. If there is no evidence which would justify a conviction then, as a matter of law, there must be an acquittal. That decision is for the judge and the jury must accept and act on his direction on that question of law. If, however, there is evidence which is capable in law of supporting a conviction, a direction to the jury to acquit would be an attempt to take from them part of their function to adjudicate upon the facts. That, as it seems to me, would be contrary to law.

It is, of course, open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard is insufficient to justify a conviction and to bring in a verdict of not guilty without hearing more. It is within the discretion of the judge to inform the jury of this right, and if he decides to do so he usually tells them at the close of the case for the prosecution that they may do so then or at any later stage of the proceedings … . He may undoubtedly, if he sees fit, advise them to stop the case and bring in a verdict of not guilty. But a verdict by direction is quite another matter. Where there is evidence which, if accepted, is capable in law of proving the charge, a direction to bring in a verdict of not guilty would be, in my view, a usurpation of the rights and the function of the jury. I think that there is a clear distinction for this purpose between a trial before a magistrate or other court which is the judge of both law and facts and a trial by judge and jury. I have no doubt that a tribunal which is the judge of both law and fact may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal considers that the evidence is so lacking in weight and reliability that no reasonable tribunal

> could safely convict on it. This power is analogous to the power of the jury, as judges of the facts, to bring in a verdict of not guilty at any time after the close of the prosecution's case. It is part of the tribunal's function as judge of the facts. It cannot, consistently with principle, exist in a judge whose function does not include adjudication upon the facts.[315]

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101. Indeed, in England and Wales, it is clearly recognised that the jury, as the trier of fact, has the power to terminate a criminal case at the close of the case for the prosecution on grounds that the case is tenuous, inherently weak or vague. Characterising the power as 'well established,' *Archbold* informs as follows: 'The right of the jury to acquit an accused at any time after the close of the case for the Crown, either upon the whole indictment or upon one or more counts, is *well established at common law*. Judges may remind juries of their rights in this respect at or after the close of the case for the Crown, pointing out that they can only acquit at that stage and must wait till the whole case is over before they can convict.'[316]

102. It is fair to point out, however, that some appellate judges in modern-day England and Wales have indicated disapproval of the practice of a trial judge reminding the jury of their power to terminate a criminal case after the case for the prosecution, on grounds that the case is weak.[317] In *R v Falconer-Atlee*, for instance, the Court of Appeal of England and Wales discouraged judges from issuing such a reminder. The criticism of the practice has been expressed in the terms that it is 'wrong for a judge who was not prepared to stop the case himself to cast that responsibility on to the jury.'[318]

103. There is some difficulty with this criticism. It is one thing to worry about an abusive reminder of the power,[319] and reproach it, as is generally done in other instances of abusive exercise of legitimate judicial power. But there is an apparent fallacy in the admonition of a judge for a *bona fide* reminder to the jury of their power to terminate a weak case. As a general

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[315] *R v Prasad* [1979] 23 SASR 161 [Supreme Court of South Australia, Full Court], at pp 162—163, emphasis added.
[316] *Archbold: Criminal Pleading, Evidence and Practice* (2011) at para 4-375, emphasis added.
[317] *Ibid*. See also *R v S H* [2010] EWCA Crim 1931 [England and Wales CA], at para 49.
[318] See *R v S H, supra*, at para 49. See also *R v Falconer-Atlee* (1973) 58 Cr App R 348 [England and Wales CA], at p 357.
[319] See *R v S H, supra*.

proposition the susceptibility of a right or power to abuse is not always a good reason to discourage its exercise. But, a unique fallacy as regards this particular criticism is implicit in the reasoning of King CJ in the *Prasad* case. To begin with, it was not always generally accepted that the responsibility to terminate a case on grounds of weakness was a responsibility that belonged to the judge in a jury trial. Hence, there was no real question of the trial judge 'cast[ing] that responsibility on the jury' because the judge was 'not prepared to stop the case himself.' It may be reasonably assumed that the judge would be quite prepared to stop the case himself, if he considered that it was his responsibility to do so. But reminding the jury of their power to terminate a weak case may be a judge's strategy of doing the next best thing in the absence of a judicial power to terminate the case, given the division of functions between judge and jury. Furthermore, the admonition that trial judges are to refrain from informing the jury of their power to terminate a weak case at any stage says nothing at all about the existence of such a power in the jury. It is either that the power exists or it does not. But, of course, its existence is not in doubt. It is 'well established.' Hence, the requirements of transparency would make it inconvenient to keep that information from the jury. Indeed, in the judge's capacity as the repository of legal knowledge (a status that is not presumed in the jury) — and legal knowledge must encompass the propriety of informing the jury of a right they have (as a matter of law) — it may be considered part of the functions of the trial judge to inform the jury of their right (as a matter of law).

104. More importantly, perhaps, substantive reasons have been advanced for discouraging the practice of trial judges reminding juries of their power to stop the case at any time after the case for the prosecution but before the conclusion of the trial in the regular course. Those reasons are set out in the footnote below.[320] It may confidently be observed, nevertheless, that those

[320] In *R v S H*, for instance, those reasons were indicated as follows: 'First and foremost this practice involves the jury in making a decision which will affect the future conduct of the trial without, as happened in this case, the benefit of speeches from all counsel or any legal directions from the judge. Secondly, the nature of the decision which the jury is asked to make is to decide whether or not the prosecution witnesses may be capable of belief. In other words the jury must reach a provisional conclusion. However, there is a risk that they may go further and decide at that stage that the witnesses are not just capable of belief but they are indeed telling the truth. Such a provisional conclusion, once reached, maybe very difficult to displace. Thirdly, … juries are often keen to register independence and may react against what might be perceived to be pressure from judge to acquit a defendant. Fourthly, even though a judge may strive to avoid inviting a jury to acquit, a practice which has always met

reasons do not engage serious concerns as regards trial judges exercising the power to terminate weak cases in trials in which there are no juries, and in which the judges are required to issue reasons that are reviewable on appeal, for deciding to terminate a criminal case on grounds of the weakness of the case against the accused.

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105. A particular worry in this regard concerns the need to ensure that justice is done at the instance of both the prosecution and the victims, and not just the accused. This certainly is always a serious worry, which trial judges sitting alone without juries will no doubt take into account before terminating a case at the conclusion of the case for the prosecution. Duration of the case — from the commencement of pre-trial proceedings up to the close of the prosecution case before the Trial Chamber — is part of what will be taken into account. The question in that regard is whether there is any lingering concern that the prosecution was given insufficient time to present their case — thus engaging a possible complaint of unfairness to them and the victims. But if the prosecution case remained genuinely weak after an appreciably lengthy period of time during which they would have presented their strongest case, the question arises whether it is fair and correct to maintain the case on life

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with disapproval, it may be very difficult to avoid giving that impression rather than simply informing a jury of its right to acquit, the latter conforming with the old practice before it also was disapproved. … "It may not be always very easy to distinguish between an invitation to acquit and a mere intimation of a right to stop the case". Fifthly, this practice is inherently more dangerous when a number of defendants are involved and the factual evidence is complex. Sixthly, it is unfair to the prosecution when it is given no opportunity to address either the judge or the jury and correct a mistaken impression of its case. The same applies to defendants, albeit in all such cases, the presumption will be that the judge has only adopted this procedure in order to obtain, more quickly, verdicts favourable to the defence. Seventhly, there may be particular dangers when as in this case the defence are contemplating not calling any evidence. Eighthly, since the coming into force of the provisions of s 58 of the Criminal Justice Act 2003 the prosecution has a right of appeal against a determinative ruling of a judge but will have no right of appeal against an acquittal by a jury following a judge informing them that they have a right to stop the case': *R v S H*, *supra*, at para 49. Additionally, 'There is also another reason which bites if the jury should stop the case. Although arguments have always been articulated as on the basis that fairness must be visited both on the defence and the prosecution, fairness to the prosecution is now well recognised as requiring a proper focus upon the legitimate rights and interests of victims and witnesses. Once there is a case to answer, they are entitled to know that the jury has heard the case through to its conclusion culminating in a fair analysis of the issues from the judge. The few words offering the jury the opportunity to stop the case do not provide this and can only be approached by the jury on the basis of the broadest of broad brushes': *ibid*, at para 50.

support, tethered on nothing more than a hope that a case for the defence — incompetently presented— might improve the prosecution's case that was so weak at is closing. It is doubtful that this is what is contemplated by the requirement to strike a fair balance between the rights of the accused on the one hand and the interest of the prosecution and the victims, on the other.

106. Indeed, the most authoritative criminal procedure texts in England and Wales appear to agree that it is appropriate for magistrates, being triers of fact, to exercise the power to stop a weak case, at any time after the close of the case for the prosecution. In *Archbold*, for instance, the matter was put as follows: 'In their summary jurisdiction magistrates are judges both of facts and law. It is therefore submitted that even where at the close of the prosecution case, or later, there is some evidence which, if accepted, would entitle a reasonable tribunal to convict, they nevertheless have the same right as a jury to acquit if they do not accept the evidence, whether because it is conflicting, or has been contradicted or for any other reason.'[321]

107. At the High Court of Australia, Callinan J noted this power of magistrates to terminate cases that are 'tenuous, inherently weak or vague' and wondered whether it is in the public interest to continue to deny similar powers to judges in jury trials, 'having regard to the expense of criminal proceedings and the jeopardy to an accused of permitting a tenuous, inherently weak or vague case to go to a jury.'[322]

108. From the foregoing review, therefore, there is a strong and credible basis to accept, as is apparent from *Prasad*, that when no-case submissions are made at the close of the case for the prosecution, trial judges sitting alone without a jury are fully in a position to assess whether and the extent to which it is not open to the reasonable trier of fact to still convict an accused, having fully taken into account the weaknesses in the case for the prosecution. In making that assessment, there is a total absence of any risk that they may usurp the functions of a trier of fact, as they are the triers of fact.

109. In my view, the regime of no case to answer, as applicable at the ICC, should take that approach. It should enable the termination of a weak case after the case for the prosecution. The power of an ICC Trial Chamber to

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[321] *Archbold*, *supra*, at 4-366. See also *Blackstone's*, *supra*, at D22.36.
[322] *Antoun v R* [2006] HCA 2 [High Court of Australia], at footnote 74.

follow that course — as the trier of fact — is precisely the same in its effect as the power of a jury (or magistrates) in common law jurisdictions to terminate a 'tenuous, inherently weak or vague' case, as triers of fact, following the conclusion of the case for the prosecution.

7. Two Concerns about Half-Time Evaluation of the Evidence

110. An appropriate approach to the evaluation of the evidence on a no-case submission requires the court to be duly sensitive to two overarching concerns. (1) On the one hand, any decision that dismisses the no-case motion and puts the accused to his defence should not involve an evaluation of the prosecution evidence in any manner that settles the question of proof of *guilt* beyond reasonable doubt, having only heard the case for the prosecution. The obvious danger of doing so is the concern about prejudgment of the case as of the close of the prosecution case. (2) On the other hand, any evaluation of the evidence that results in the termination of the case — and a resulting *acquittal* of the accused — must be one that has given proper regard to the evidence led by the prosecution. These two considerations should, in my view, define the essence of the exercise engaged in no-case adjudication.

111. Care must be taken to avoid viewing these two concerns as necessarily calling for one approach to evidential evaluation — especially a uniform approach that *always* discourages evaluation of credibility or reliability of the prosecution evidence. This is because the effects of the two concerns are not the same. Hence, one approach to evaluation may not be appropriate in both cases. It is the *audi alteram partem* notion and the attendant concerns about prejudgement that mark the difference. Here is how. From the point of view of the first concern, there may be a legitimate complaint if the evaluation of the evidence leads the court to pronouncements — specifically to the effect that the prosecution has proved its case beyond reasonable doubt — which may prove difficult to resolve in the end, in the light of evidence that the defence may call after those pronouncements. This is especially so if the pronouncements concern credibility or reliability: a prosecution witness whom the court has pronounced credible or reliable at the close of the prosecution case does not suddenly lose the attribute at the close of the defence case. But such a positive pronouncement when made at half-time raises concerns about judicial commitment to that pronouncement, hence questions of prejudgment, when the court has yet to hear the defence evidence.

112. But, the same difficulty does not arise from the perspective of the second concern — involving dismissal of the case because the prosecution evidence has been weak. Here, there will be no *legitimate* complaint from the prosecution if the case is terminated following a thorough review of the prosecution evidence that correctly reveals the case as too weak to continue. Nor will the defence complain, either because the court had sustained their no-case motion, or because the court terminated the case *suo motu* at the close of the prosecution case. It makes no difference that the weaknesses found in the prosecution case resulted from evaluation of credibility or reliability of the evidence. The appropriate pronouncements about such weaknesses in the prosecution case do not engage any concern of prejudgment of the case for the defence.

113. Perhaps, then, the more practical approach, in light of the foregoing, will be to approach any necessary half-time evidential evaluation predominantly from the perspective of the second concern. That is, a thorough evidential review of the prosecution case, including assessments of credibility or reliability, to see if the case is weak. If the case is weak — including by reason of lack of credibility or reliability of the prosecution case — the court trying the case without a jury should be free to say so fully. And, then terminate the case. But if after such a thorough review, the court does not find the case to be weak, the court need only say so — in the terms that the 'prosecution case is not weak' for purposes of the no-case evaluation and that the defence are invited to enter their defence. It may be that the court feels called upon to say more in its reasons, in the light of the test as to whether the jury 'could properly convict' upon the evidence presented. Even so, any requirement to say more does not make it necessary to make any pronouncement to the effect that the prosecution has proved its case beyond reasonable doubt. It may be that the most that can be safely said is that the evidence is 'capable' of supporting a conviction: with the notion of *capability* entailing a minimum of equal likelihood of conviction as of acquittal (see further discussion below). As the defence has yet to call its case, the equal likelihood of acquittal in this sense is only presumptive, justified by the need to give the defence an equal opportunity to present its case as required by the principle of the maxim *audi alteram partem*.

114. It is for the foregoing reasons that any regime of no-case adjudication that focuses only on the strengths of the prosecution case, to the exclusion of its weaknesses, will be inadequate in the particular circumstances of this

Court. It is possible to formulate appropriate principles that guide the regime of no-case submissions, in a manner that remains fully sensitive to the two concerns discussed above, while at the same time taking into account the requirements of the unique circumstances of the Court when called upon to apply those principles. The practice and principles of no-case submissions undeniably trace their origins to the national legal order, like much else in international criminal procedural law. It is, however, entirely appropriate that their evolution in the international sphere should require adaptation to the particular circumstances of the international court urged to employ them.

8. The Operative Approach: Provisional Evaluation of Credibility and Reliability

115. For purposes of a no-case motion at the ICC, then, a Trial Chamber should consider the case for the prosecution as a whole. In the process, a Chamber should, in my view, be free to conduct a provisional review of the strengths and weaknesses of the case for the prosecution, taking the following factors into account: corroborations, contradictions (both internal contradictions and contradictions revealed by cross-examinations), and other factors that positively or negatively affect credibility or reliability. In my view, the review should be provisional, in that its purpose is not to settle the question whether the case for the prosecution has established *guilt* beyond reasonable doubt at that stage. Yet, the review should be comprehensive, in order to rule out that the case for the prosecution is weak and that the trial must be stopped for that reason. The case for the prosecution should not be considered weak, and the trial may not be stopped for that reason, if the case is capable of resulting in conviction, if no further evidence is called in the case at that stage. The test of such *capability* need not address the question of proof of guilt beyond reasonable doubt. It is enough that the evidence in the prosecution case is seen to have raised only a likelihood of conviction that is equal to that of acquittal — making all due allowance, in full equality, for the presentation of the defence case.

116. Where, in spite of weaknesses in any respect, the provisional review shows that the case remains appreciably strong in certain material aspects, in a manner that satisfies a minimum of equal likelihood of both conviction and acquittal, it will be considered that the prosecution has raised a case for the defence to answer. But, where the provisional review reveals the case as generally tenuous, weak or vague, at an overall level that puts the prospect of

conviction below the minimum of equal likelihood with the prospect of acquittal, it should be proper to say that the prosecution has raised no case for the defence to answer.

117. This approach is in the best interest of justice. It strikes a fair balance between the rights of the accused on the one hand and the interests of the public on the other. From the perspective of the latter, it is not in the public interest to prolong a weak prosecution in an expensive legal process[323] that may have already dragged on for a considerably lengthy period; and, for which there is no concrete basis (beyond a mere hope for a hapless defence case) to foresee an improvement in the case against the accused, with further prolongation of the process.

118. It is, perhaps, important to mention in this regard that the prosecution is not entitled to have an accused compelled to present any evidence as part of the case for the defence, however strong the case for the prosecution has been. The extent of the prosecutor's entitlement is to be allowed a fair opportunity to present its own case in the strongest way, and to have its evidence accorded the fullest value. At the conclusion of the case for the prosecution, the defence may elect to call no evidence at all — in which event neither the prosecution nor the victims are entitled to insist otherwise — even when the Trial Chamber has determined that the prosecution evidence has been sufficient to raise a case for the defence to answer.

119. The approach of provisional review of the evidence strikes a fair balance at the instance of the prosecution and the victims: because it ensures that the case will not be terminated at the close of the case for the prosecution, without a careful consideration of the evidence presented thus far, in light of the need to avoid miscarriage of justice at the instance of the public.

120. The approach also strikes a fair balance at the instance of the accused. Particularly so because a determination that there is a case for the defence to answer (following such a provisional review) does not foreclose an ultimate outcome of acquittal (whether or not the defence choses to call evidence) at

[323] See *Antoun v R*, *supra*, per Callinan J [High Court of Australia] at footnote 74. At the ICC, the stringency of the concern about prolonging a weak case in an expensive legal process becomes the more acute in the circumstances of a court that operates under budgetary constraints at all times, such as make it difficult to accommodate and service all the trials that may need to be conducted with all the necessary speed.

the stage accepted as appropriate for the Chamber to give a definitive answer to the question whether *guilt* has been established beyond reasonable doubt; whether that stage occurs after the calling of evidence by the defence or sooner (upon a dismissal of a no-case submission but with limited evidence called for the defence or none at all).

9. Additional Systemic Features of the ICC

121. In addition to the role of the ICC trial judges as triers of fact, two additional statutory features of the ICC deserve mention in further justification of the approach of provisional evaluation of credibility and reliability of the evidence at the conclusion of the prosecution case. The first of these considerations stems from the Pre-Trial Chamber's statutory authority to confirm charges on the basis of the question whether there is sufficient evidence to establish substantial grounds to believe that the accused committed the crime charged.[324] The function necessarily imports evaluation of the evidence presented before the Pre-Trial Chamber. Notably, in this connection, the Pre-Trial Chamber has rejected the Prosecutor's position[325] that the Pre-Trial Chamber may not embark upon evaluation of credibility and reliability.[326] In their decision, the Pre-Trial Chamber considered that their task of answering the critical question involved in the confirmation of charges requires them to consider, among other things, the *probative value* of the evidence presented.[327] In the Pre-Trial Chamber's further reasoning, '[t]he determination of the probative value of a piece of evidence requires *qualitative assessment*.'[328] In consequence of that, the Pre-Trial Chamber 'shall give each piece of evidence the *weight* that it considers appropriate.'[329] And, all this, according to the Pre-Trial Chamber, entails assessment of the 'credibility' and 'reliability' of the evidence.[330] As '[i]ndicia of reliability,' in particular, the Chamber held that 'truthfulness and trustworthiness are considered' in addition to voluntariness.[331] The Pre-Trial Chamber took care to underline

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[324] See article 61(7) of the Rome Statute.
[325] See *Prosecutor v Ruto and Sang (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)*, dated 23 January 2012 [Pre-Trial Chamber II], at para 58.
[326] *Ibid*, at paras 55 and 56.
[327] *Ibid*, at para 61.
[328] *Ibid*, at para 67, emphasis added.
[329] *Ibid*, emphasis added.
[330] *Ibid*, at para 68.
[331] *Ibid*.

that any oral testimony that forms part of the evidence presented may be accorded 'a high or low probative value in light of the Chamber's assessment, *inter alia*, as a result of the questioning of the witness' credibility, reliability, accuracy, trustworthiness and genuineness.'[332] Continuing, the Pre-Trial Chamber held that the 'final determination on the probative value of the live testimony will thus depend on the Chamber's assessment on a case-by-case basis and *in light of the evidence as a whole*.'[333]

122. The systemic ICC arrangement that results in the Pre-Trial Chamber evaluating credibility and reliability of the evidence, for purposes of confirming the charges, must be inconvenient to a principle that requires the Trial Chamber to do less for purposes of determining whether the trial of those charges should continue after the prosecution has rested its case. The more sensible arrangement entails such an evaluation of credibility and reliability by the two levels of Chambers appropriately within their respective remits. In the end, the alignment of the two levels of assessments becomes this: At the close of the prosecution case at the level of the Trial Chamber (which entails an appreciably more robust process of inquiry) did the case for the prosecution remain as strong as the Pre-Trial Chamber had found it to be when the charges were confirmed? If so, there is a case for the accused to answer. If not, there is not.

123. A second feature of the ICC system stems from the provision of article 64(2) of the Rome Statute. It *requires* the Trial Chamber to '*ensure* that a trial is *fair and expeditious*' [emphasis added]. In the absence of a specific statutory provision that clearly compels the Trial Chamber to carry on trying a weak case after the prosecution has rested its case, the statutory norm that requires the Trial Chamber to 'ensure' that a trial is 'fair and expeditious' affords an important statutory basis to terminate a weak case at the conclusion of the case for the prosecution, particularly in an already lengthy criminal process. [I shall return to this later.] It may be observed, of course, that the requirement to ensure a fair and expeditious trial may not be unique to an ICC Trial Chamber. But, that observation is no valid argument against interpreting that requirement, for purposes of this Court, as justifying the termination of a weak case at the conclusion of the prosecution case.

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[332] *Ibid*, at para 73.
[333] *Ibid*, emphasis added.

10. Meaning of Taking Prosecution Case 'at its highest' at the ICC

124. In conclusion, it may be possible to consider the approach of provisional evaluation of credibility and reliability from the angle of the usual expression that the case for the prosecution is to be taken 'at its highest.' For purposes of a no-case submission made at the conclusion of the prosecution case in a trial at the ICC, to say that the prosecution's evidence is to be taken 'at its highest' need not amount to standing the prosecution's evidence up on a pedestal, despite its feet of clay. Appropriately considered in context, the meaning of the expression begins with the correct appreciation of the prosecution's case as a whole, taking its strengths and weaknesses into account. Having offset the weaknesses against the strengths, the exercise next requires a correct appraisal of what is left of the case at its remaining highest point. There is a case to answer if the remainder of the evidence is still strong enough to raise the case to the minimum level of equal likelihoods of conviction and acquittal. This is in the real sense of a readily appreciable choice of those ultimate outcomes as open to the trier of fact, when called upon *in the end* — not at halftime — to answer the question whether *guilt* has been proved beyond a reasonable doubt. It must of course be stressed that such a choice of ultimate outcomes is a matter of realistic possibilities in the actual administration of justice. It eschews academic mooting points. But a trial should not be prolonged if the exercise described above reveals the prosecution case, at its conclusion, as critically weak, tenuous or vague — making continuation a hopeless academic exercise.

125. There can be little doubt that the Prosecution's case faced serious problems in this regard, and not only because the Appeals Chamber decided that the Prosecution could not rely on the out-of-court statements of five key witnesses in the case. The Chamber might therefore well have found, in accordance with the evidential review set out in Judge Fremr's reasons, that there is no case for the defence to answer from an evidential perspective. Such a finding would effectively have ended the trial against both accused, resulting in a verdict of acquittal — in the purest sense of no-case adjudication. However, for the reasons expressed below (under the discussion as to mistrial), I am of the view that the ordinary consequences of a no-case finding would not be appropriate in the specific circumstances of this case, because of what amounts, in my view, to a serious tainting of the trial process beyond the capacity of the process to cure.

B. Power to Terminate Borderline Cases

1. Article 64(2) of the Rome Statute

126. The no-case procedure is one that the parties and participants urged and agreed for the Chamber to adopt. Doubtless, the procedure is entirely salutary, in appropriate cases, for its own purposes. But the procedure and the principles that have guided it in other fora (national and international) should not totally eclipse any statutory powers that a Trial Chamber may have pursuant to article 64(2) (as earlier indicated) — to terminate a genuinely weak prosecution case at its closing. In other words, the jurisprudence of no case to answer finds suitable tenancy — but not eminent domain — within the territory of article 64(2). There may be concentric operation between the two legal frameworks. Nevertheless, the no-case case-law does not control the reasonable incidence of article 64(2). In the end, the sensible proposal and agreement of the parties (made at the beginning at the proceedings) resulting in the Chamber's adoption of principles and procedure to guide the no-case submissions do not constrain the amplitude of statutory powers permitted the Chamber under article 64(2) in its own operation.

127. In light of the above, the fuller import of article 64(2) may now be considered. To recall, it provides as follows: '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.' It apparently imposes an obligation upon the Trial Chamber to conduct the trial *fairly* and *expeditiously*. That, to begin with, is a cardinal norm of the Rome Statute, always speaking in the matter of the conduct of a trial in this Court. It speaks, notably, in either (or both) of the footings of the majority's decision of today — i.e. on the shared no-case basis or on my preference for declaration of mistrial or both. Of marked significance, for present purposes, are the two concepts that animate the provision — i.e. the trial is to be conducted 'fairly' and 'expeditiously.' These concepts are squarely engaged in this no-case litigation.

128. Against that background, the following observation may then be made. Assuming a case in which concerns about obstruction of justice have not obscured the no-case litigation, there is no provision in the ICC basic documents that requires a trial to endure the presentation of a case on behalf of the defence, where the prosecution evidence was not, in the view of the

Chamber, strong enough to warrant inviting the defence to present their case. Indeed, article 64(2) must stand in the way of any proposition urged to the effect of such a requirement. Such a proposition would run against the grain of the idea of conducting a trial 'fairly' and 'expeditiously.' The significance of the *expeditious* norm would be obvious and needs no belabouring where a weak case is required to drag on beyond the presentation of the case for the prosecution.

129. As for the notion of *fairness* contemplated as the first operative concept in article 64(2), the question may be asked whether it is really *un*fair to the prosecution to terminate a weak case at the close of the presentation of their evidence, without calling upon the defence to present their case. No doubt, the answer to that question may vary in each case according to its own circumstances — also taking into account any incidence of undue interference. However, it must be accepted that the complaint of unfairness to the prosecution must be difficult to sustain *if* the prosecution has been given a fair opportunity to present their own case; and they have done so freely and fully — without any incidence of undue interference. If in those circumstances the prosecution case has remained weak, 'fairness' to the prosecution in continuing the weak case becomes a misnomer for a most curious *indulgence* to them. In any judicial process in which the defence have an equal right of participation, and they are not charity guests of the justice system, such an indulgence to the prosecution may quickly convert into unfairness to the defence when called upon to present their case — especially given the lengthy period that may have elapsed already.

130. Even 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. Possibly, evidence that the accused had instigated the interference or meddling may be the basis of an inference of consciousness of a case to answer, if not guilt. But 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.

2. Relevant Case Law

131. A careful synthesis of weighty legal views (both at the international and national levels) will yield the conclusion that no injustice is done, when a weak or borderline prosecution case results in judicial termination of the trial at the close of the prosecution case, even in spite of a stricter view of the no-case principles that may also come through in some other aspects of the case law that are acutely sensitive to the division of roles between judge and jury in a jury trial. Such judicial termination of weak cases will be fully consistent with this axiom: the consequences of a criminal conviction make it more tolerable that nine guilty persons are spared those consequences than that one innocent person suffers them by mistake.[334]

132. Authoritative opinions in favour of termination of weak or borderline cases include the following: Judge Shahabuddeen's pronouncement in *Jelisić*;[335] Lord Lane's pronouncement in *Galbraith*;[336] authorities such as *Prasad* that recognise the power of the jury as triers of fact to terminate weak cases;[337] and, authoritative views in *Archbold* and *Blackstone's Criminal Practice* to the effect that there is no reason of principle that prevents magistrates — as triers of both fact and law — from terminating weak cases at the close of the case for the prosecution.

133. The opinion of Judge Shahabuddeen has been noted earlier, saying that 'at the close of the case for the prosecution, a Trial Chamber has a right, in borderline cases, to make a definitive judgement that guilt has not been established by the evidence, even accepting that a reasonable tribunal could convict on the evidence (if accepted).'[338] That conclusion is consistent with an aspect of the earlier conclusion of Lord Lane CJ whose pronouncements in *R v Galbraith* have become the classic starting reference for the modern law on no case to answer in the context of jury trials. As will be recalled, having stated the guiding principles, he concluded as follows: 'There will of course, as

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[334] As Blackstone expressed the thought: 'All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent person suffer': William Blackstone, *Commentaries on the Laws of England*, Book IV, Chapter 27, at p 352 (1769).

[335] *Prosecutor v Jelisić*, *supra*, Partial Dissenting Opinion of Judge Shahabuddeen.

[336] *R v Galbraith* [1981] 1 WLR 1039 [England and Wales CA], at p 1042.

[337] *R v Prasad* [1979] 23 SASR 161 [Supreme Court of South Australia, Full Court], at pp 162—163.

[338] *Prosecutor v Jelisić*, *supra*, Partial Dissenting Opinion of Judge Shahabuddeen, at para 11.

always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.'[339]

134. All these will be consistent with a power inhering in a Trial Chamber, by virtue of article 64(2), to terminate weak or borderline cases at the close of the case for the prosecution.

C. Applying the Law to the Facts

135. Judge Fremr has made clear that he conducted the evidential review of the prosecution case (and found the case weak) on the basis of Decision No 5, taking into account the additional clarification that he made as to the applicable law. As I have made amply clear, I saw no need to replicate the evidential analysis, in a different way. I accept both the evidential review set out in his reasons and his resulting conclusion that the prosecution case has been weak. This remains the case even on the basis of a proper understanding of Decision No 5, as explained by Judge Fremr.

136. I hasten to add, however, that the principles of law reviewed above afford to me a fuller legal framework upon which no-case adjudication ought to be made in this Court. In my view, that additional legal framework fully applies in the circumstances of this case. I do not accept the narrower interpretation of the principles outlined in Decision No 5, as not supporting the conclusion that I share with Judge Fremr, to the effect that the prosecution case was weak on a proper assessment of the no-case submissions. Such narrower interpretation is not truly borne out by Decision No 5 itself, when read in the fuller context of the case-law[340] that inspired what it expresses in the outline. In addition, such a narrow reading does not, in my view, accord with the need to do justice fully according to law. That need permits reconsideration (if need be) or restatement of judicial decisions that may not have been fully considered or fully expressed at first. Indeed, in the nature of things, it is not beyond the realms of possibility that the Chamber did not get it fully right on the first occasion. And in that regard, it must be said that suppositions of judicial infallibility are never borne out by the corrective facilities of reconsiderations, reviews and appeals.

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[339] *R v Galbraith*, *supra*, at p 1042.
[340] Hinged as it were in the separation of functions between judge and jury.

137. In any event, as indicated earlier, the finding that the case for the prosecution has been weak is not the end of the inquiry in the particular circumstances of this case, as a matter of just outcomes — notwithstanding whether Decision No 5 or the foregoing legal analysis was brought to bear. That remainder to the inquiry, as a matter of just outcomes, will be reviewed next.

PART III: MISTRIAL AS THE PROPER BASIS FOR TERMINATION OF THE CASE

138. It is entirely understandable, it is to be expected, that defence counsel doing their job may urge a criminal court to terminate the case and *acquit* the accused, on the basis that the evidence presented by the prosecution has been insufficient to support the charges at the appropriate level of proof gauged at half-time. There is much to be said for that procedure in the present case. Judge Fremr's reasons expose at length the extent of the weakness in the Prosecution case. As already indicated, I concur with Judge Fremr that the Prosecution case has been weak as of its closing.

139. Ordinarily, the finding that the case for the prosecution has been weak should result in a judgment of *acquittal*, according to the applicable principles of no-case adjudication as discussed above. However, the particular circumstances of this case do not, in my view, permit that result. Judges called upon to acquit an accused at the conclusion of a weak prosecution case must satisfy themselves as to the validity of the basic forensic premise that no-case submissions assume. That basic assumption comprises the following propositions. The prosecution case was conducted freely, not only in the presentation but also the investigation; yet, untroubled by any incidence of undue interference or intimidation, the case remained weak. On that premise, the case must be terminated with a judgment of acquittal entered in favour of the accused.

140. Having carefully reviewed the evidence presented by the Prosecution, and having also carefully considered certain occurrences in the course of the trial, I am unable to conclude that such a premise is valid for the no-case motions in this case. A number of factors did combine to upset that premise in a material way in this case. In view of them, I feel compelled to declare a mistrial, without prejudice to the Prosecutor's right to start afresh, by laying new charges at a more convenient time in the future.

141. The starting point for that conclusion is the evidence of troubling direct interference with witnesses, some (but not all) of which is noted in the Chamber's decision in respect of the application of rule 68 — in both the majority and the partly concurring opinions. The Chamber was satisfied that the evidence presented by the Prosecution had amply demonstrated the incidence of witness interference at a disturbing scale, even discounting the additional evidence of witness interference that the Prosecution had submitted for purposes of their rule 68 application.[341] 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.

142. The incidence of interference was bolstered and accentuated by an atmosphere of intimidation, fostered by the withering hostility directed against these proceedings by important voices that generate pressure within Kenya at the community or national levels or both. Prominent among those were voices from the executive and legislative branches of the Government. It was plainly wrong for them to bring such voices to bear in the course of an on-going criminal trial.

143. The combined impact of these factors intolerably obscured the view that the case for the Prosecution has been so genuinely weak as to result in an acquittal of the accused, on their no-case motions.

144. But, mark this. The concern here is not that these conducts could possibly affect the ability of the Chamber *itself* to do justice in the case. It is rather that the conducts do not permit the Chamber, in my view, to conclude

[341] Notably, 21 items of evidence, comprising about 288 pages had been tendered into the record as evidence of witness interference. I am satisfied that these alone established a pattern of witness interference. And as part of their rule 68 application, the Prosecution attached 210 further items, comprising about 1,669 pages, as additional evidence of witness tampering. It was not necessary to consider these additional items of evidence for purposes of establishing a basis for the admission of the out-of-court statements that the Prosecution had sought to tender, pursuant to rule 68. But, they do afford additional — but only additional — support for a finding of interference for other purposes.

that *witnesses themselves* had been left free to come forward in the first place or to testify freely even when they appeared in person before the Chamber.

145. But more deserves to be said on the matter. In the course of this case, the Chamber had occasion to make it very clear that extra-judicial conducts, campaigns or demands could not influence the Chamber to acquit or convict the accused. Any such decision would be driven *solely* by the Chamber's assessment of the evidence presented in this case and the dictates of the applicable legal principles. Nothing else could influence the Chamber's decisions. That remains the case.

146. The need to make that clarification resulted mostly from the openly aggressive campaign that the Government and some opinion leaders in Kenya had mounted against the Court for the apparent purpose of ensuring that the case against the accused is peremptorily terminated. The extra-judicial campaign continued and reached a crescendo when the Defence filed their motions for a no-case judgment — a motion made pursuant to a procedure that was agreed upon much earlier in the trial.

147. I pause to note that no-case motions are nothing new in criminal procedure. As the review of the case-law in Part II of these reasons amply shows above, there are many cases in which no-case motions have succeeded. Those successful applications were wholly unassisted by any external interference at all: let alone the sort of political intervention seen in this case. It may safely be observed that the spectacle was unprecedented in modern democracies under the rule of law.

148. One goes back two and half centuries, in the English case of *Rex v Wilkes*, to find a comparable behaviour in an on-going criminal case. The case marks an early invocation of the legal maxim *fiat justitia ruat cœlum* (justice must be done though the heavens fall). But, it was also the case that gave a particular impetus to the subsequent development of the law of contempt of court in some jurisdictions, by forbidding intervention-orientated commentaries in the media in the course of on-going trials.[342] In *R v Wilkes*, Lord Mansfield CJ noted, among other things, 'the tumults which, in other places, have shamefully insulted all order and government. Audacious addresses in print

[342] See Ronald Goldfarb, 'The History of the Contempt Power' (1961) 1 *Wash U L Q* 1, at pp 11—14.

dictate to us, from those they call the people, the judgment to be given now, and afterwards upon conviction. Reasons of policy are urged, from danger to the kingdom, by commotions and general confusion.' But, he remained unimpressed. 'Given me leave,' he insisted, 'to take the opportunity of this great and respectable audience, to let the whole world know, all such attempts are vain. Unless we have been able to find an error which will bear us out, to reverse the outlawry[343]; it must be affirmed. The constitution does not allow reasons of State to influence our judgments: ... We must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say "*fiat justitia, ruat cælum*".'[344] Lord Mansfield said much more than that, and in eloquent prose indeed. There is much similarity between the circumstances he described and those observed in this case. And he spoke for this Chamber, in my view, in all that he said to ameliorate the circumstances, though he spoke so long ago.

149. The nature and manner of the political spectacle orchestrated against the present case take on a particularly regrettable aspect, given the possibility that the clamour for peremptory termination of the case may merely — and only *merely* — coincide with a decision that was always possible as the outcome of a no-case motion. But any hope of claiming credit for an acquittal in this case, as a result of political campaigns, was always a figment of the imagination of the campaigners. An acquittal in this case could never have resulted from political pressure. For reasons explained below, such a campaign could only result in a mistrial, in which the Prosecution would have the right to re-prosecute the case. And that is not necessarily an advantage for any accused intended as the beneficiary of such interventions: but it is the least that could be done in the name of justice in the face of such interventions. The message becomes this. When there is an on-going trial in this Court, the best interest of justice, for everyone's sake, is to leave the

[343] The case before Lord Mansfield and his colleagues was an application that the colourful John Wilkes had brought, upon his return from a self-imposed exile in France. By the application, he sought to have reversed a declaration of outlawry made against him during his sojourn in France resulting from his refusal at the time to submit to a judgment against him on the previous occasion of his trial for the misdemeanour charges. The misdemeanour charges against him were of seditious libel considered injurious to the King's reputation (published as North Briton 45) and *An Essay on Woman* (considered obscene by the standards of the era) in which he had impugned the chastity of women in sexually explicit language.
[344] *Rex v Wilkes* (1770) 4 Burr 2527, at pp 2561—2562.

lawyers and the judges alone to do their work. Political intervention does not work.

150. There is indeed much that is substantively wrong with such political campaigns in the course of an on-going trial, such as makes it unjust to acquit the accused on a no-case submission in a case in which such campaigns had occurred. For, it bears repeating, while the Chamber's imperviousness to such campaigns is to be assumed, the same could not be said of witnesses and potential witnesses who may possess evidence necessary for proper prosecution of the charges, such as would permit a fair inquiry into the charges laid against the accused. As set out more fully below, 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.

A. Direct Interference with Witnesses

151. The Prosecution had repeatedly complained and presented evidence suggesting that there had been afoot an orchestrated scheme of efforts to interfere with witnesses. The Prosecution's complaints in this regard started even well before the commencement of the trial. And immediately upon the commencement of the trial, with the very first witness, it became clear that there had been a concerted campaign to troll witnesses on the Internet, by publishing their perceived identities. This was done by persons who had made clear their intention to frustrate the trial, by engaging in conduct aimed at intimidating witnesses.

152. Later, evidence came to light tending to show a coordinated effort to bribe witnesses, in order to prevent them from appearing in court to give testimony. Findings of improper direct interference were made in respect of at least four witnesses,[345] including findings that some of these witnesses were themselves intermediaries engaged in the bribing and attempted bribing of others.[346] While the Chamber's findings in this regard were focused on interference leading to witnesses recanting (while on the stand) evidence outlined in statements previously given to the Prosecution, the Chamber has

[345] *Prosecution v Ruto & Sang ('Decision on the Prosecution Request for Admission of Prior Recorded Testimony)* dated 19 August 2015, ICC-01/09-01/11-1938 [hereafter the 'TC Rule 68 Decision'].
[346] *Ibid*, at para 107.

also not discounted evidence of interference that apparently occurred prior to certain witnesses providing their initial statements to the Prosecution.[347]

153. Now, it must be made clear that there was no evidence to the effect that Mr Ruto or Mr Sang had instructed or encouraged anyone to engage in witness interference. The Prosecution acknowledged that gap in the evidence.[348]

154. But it must also be pointed out that the appearance of credible evidence showing that an accused in a criminal case had in fact instigated interference or meddling, with the view to frustrating the inquiry, would potentially engage a more onerous outcome for such an accused than the mere declaration of mistrial without prejudice to re-prosecution. At a minimum, such evidence may afford the basis for an inference at half-time that there is a case for the accused to answer: on the theory that it was the consciousness of the existence of such a case that drove him to interfere with the witnesses for the Prosecution or disrupt the process through political meddling. Worse still, it is also possible that evidence showing that the accused had engaged in interference may be a basis to draw an inference of consciousness of guilt, depending on the circumstances.

155. Regardless, however, of where the blame may lie for the interference and political meddling seen in this case, their mere incidence has the real consequence of obstructing a clear judicial view that the Prosecution case had collapsed under the sheer weight of its own weakness. That is a legal reality that remains inescapable, especially when the urge is made to acquit the

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[347] See for example: TC Rule 68 Decision, *supra*, at para 79.

[348] As the lead counsel for the Prosecution observed: 'As the Counsel for the Prosecution expressed the matter: 'Your Honours, clearly if — well, if the Prosecution were able to prove beyond a reasonable doubt, I thought it was able to prove beyond reasonable doubt that the accused was in fact the person responsible, then the Prosecution might adopt a different attitude towards the consciousness of guilt argument.' See: ICC-01/09-01/11-T-212-ENG, *supra*, at p 58. That answer was given in the course of answering the question whether proof of causal link between the accused and witness interference was not required in support of an adverse inference against the accused arising from witness interference. Nothing should turn on the mention of 'beyond reasonable doubt.' There was simply no evidence showing, beyond the hinted suspicion of the Prosecution, that the accused had instructed anyone to interfere with witnesses. Nevertheless, the allusion in that submission to 'a different attitude towards the consciousness of guilt argument' relates to the possibility of an inference of consciousness of guilt, where there is evidence that an accused is implicated in witness interference.

accused on grounds of apparent weaknesses in the Prosecution case. In the absence of evidence of fault on the part of the accused, that reality can only have a neutral value relative to a verdict of acquittal or conviction of the accused. That is to say, the incidence of interference in this case does not — in the absence of evidence clearly attributing such interference to the accused — warrant an inference tending towards guilt nor does it make acquittal the just outcome.

156. A verdict of acquittal is particularly unjustifiable in the circumstances, not only because it *will* vindicate the illicit objectives of the unseen hands that had engaged in witness interference, the obvious aim of which is to frustrate the trial of the accused; but it may also encourage future unseen hands to interfere with a criminal trial. What was done against this trial — by way of direct witness interference or undue political meddling (discussed more fully below) or both — must not become a case study for others inclined to emulate such tactics in future cases of this Court. It may not be too much to speak of such tactics in terms of efforts whose aim is to hold justice hostage, with acquittals of accused persons as the envisaged ransom. Hence, for purposes of a mistrial — resulting from obstruction of justice intended to benefit the accused — it does not matter at all that there is no evidence showing the accused as a culprit of the interference. It is enough that the aim of a mistrial is to hold out some hope that justice may be seen to be done sooner or later. And those seeking to obstruct the course of justice, for the benefit of the accused, are made to realise that their efforts will come to nought. On the contrary, it may in the end only inconveniently prolong the process for the accused, as it does for the prosecution and the victims. No one is the winner. But a declaration of mistrial and allowing the case to start afresh in the future is better than rewarding the interference and political meddling with a verdict of acquittal.

157. To be sure, the law does not always require fault on the part of the accused, before a trial is nullified to start afresh. Nor is it really necessary to view the matter in terms that the proceedings were null and void. It should be enough, but perhaps still unnecessary, that what was once valid had been made voidable along the way by a course of irregularities; resulting in eventual nullification of the process by judicial declaration. What controls the appropriate result in the circumstances is the public's interest in seeing justice done — or conversely the need to avoid perversion of justice at all, let alone the scandal of it in the full public view of the whole wide world. In England

and Wales, for instance, a trial may be required to start afresh, when the jury fails to return a verdict. Notably, it has been held that no rule of law forbids a second retrial in cases where juries failed to reach verdicts in the first two trials. It is ultimately for the judge to consider whether the second retrial would be oppressive and unjust, or whether it would be justified in the public interest, the two questions being inextricably linked.[349] In the Privy Council case of *Bowe v R*, from The Bahamas, Lord Bingham of Cornhill had expressed the matter as follows in relation to the law and practice in England and Wales:

> There is plainly no rule of law in this country which forbids a prosecutor from seeking a second re-trial… there may of course be cases in which, on their particular facts, a second re-trial may be oppressive and unjust…whether a second re-trial should be permitted depends on an informed and dispassionate assessment of how the interests of justice in the widest sense are best served. Full account must be taken of the defendant's interests…account must also be taken of the public interest in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system […].[350]

158. Notably, the accused is not to blame for a jury's inability to reach a verdict. Similarly, mistakes by judges in the conduct of trials have been known to result in the nullification of a previous trial and the ordering of a new one, notwithstanding the absence of any fault on the part of the accused.[351] And, also, there was no need to view the proceedings as having been null and void. It was enough that the interest of justice required a fresh trial in the circumstances. As will be seen later, the same is very much the situation in the United States.

B. Indirect Pressure on Witnesses

159. I return now to discuss more fully another aspect of the tainting of this case by virtue of the political campaigns mentioned in passing in the foregoing discussion.

160. As already apparent from the discussion conducted thus far, apart from the incidence of direct interference, the willingness of witnesses to come forward and present evidence can also be inappropriately influenced through

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[349] *R v Bell* [2010] EWCA Crim 3. See also *Bowe v R* [2001] UKPC 19 [Privy Council] and *Benguit* [2005] EWCA Crim 1953 [England and Wales CA].
[350] *Bowe v R, ibid*.
[351] See *R v S H, supra*.

indirect interference that is reasonably likely to intimidate witnesses. The impact of such less direct influence is a matter of degree, to be considered in the particular circumstances of a given case. But it is no less troubling in its effect on the fairness of a criminal trial. No hard and fast rule can be laid down regarding what indirect influence can be said to be reasonably likely to affect the availability of witnesses (or their freedom to testify without intimidation) in any given case. It is all a matter of a margin of appreciation of the trial judges, regarding their ability to look past the incidence of interference and still see the prosecution case for its genuine weaknesses and strengths, in relation to the alleged criminal responsibility of the accused in the charges they face.

161. In the present case, I am of the view that the concerted efforts of influential voices within Kenya collectively contributed to the creation of an aggressive atmosphere that many a witness was reasonably likely to find intimidating. Such an atmosphere is not conducive to the search for the truth in a fair trial – one hallmark of which must be the freedom of witnesses to appear and testify freely without undue intimidation.

162. The first element that contributed to the creation of an atmosphere of intimidation was the open generation and promotion within Kenya of a strong current of hostility against the ICC processes. These sentiments included those expressed within the Kenyan Parliament during the course of these proceedings, [352] culminating in a vote in September 2013 in favour of withdrawing Kenya from adherence to the Rome Statute.[353]

163. The hostile rhetoric against the Court, a judicially noticeable fact,[354] was also pursued outside of Kenya by the Government in the campaigns to

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[352] See for example, extracts recorded at: ICC-01/09-01/11-T-32-Red-ENG ET, *supra*, at p.8.
[353] *Ibid*, at p 5—8. See http://www.bbc.com/news/world-africa-23969316.
[354] For example: *Daily Nation*, 'Allies plot to portray court as a tool of foreign nations and force pullout,' 10 March 2012, http://www.kenyanews.net/index.php/sid/204118837; *Daily Nation*, 10 September 2013 'Senate passes motion to withdraw from Rome Statute as Cord boycotts again,' http://www.nation.co.ke/news/politics/Senate-passes-motion-on-withdrawal-from-Rome-Statute/-/1064/1987220/-/ue2v9yz/-/index.html; *The Standard*, 'Pressure mounts on International Criminal Court to defer Uhuru Kenyatta, William Ruto trials,' 15 October 2013, http://www.standardmedia.co.ke/?articleID=2000095589&story_title=; *Daily Nation*, 'Kenya writes protest letter over handling of ICC cases,' 23 October 2014, http://www.nation.co.ke/news/Kenya-writes-protest-letter-over-handling-of-ICC-cases/-/1056/2497440/-/5ee32mz/-/index.html; *Daily Nation* , 'Senators ask Hague judges to terminate cases,' 11 October 2014, http://www.nation.co.ke/news/politics/Jubilee-Senators-ICC-Cases/-

persuade African States Parties to withdraw from the Court,[355] and a petition to the UN Security Council to exercise its powers under article 16 of the Statute to defer the proceedings.[356] It is no defence to say that these actions were perfectly legal under the Statute and in international relations. But, there is a proper time and place for even lawful conducts, lest they occasion wrongful consequences in other respects. A legitimate purpose is hard to see in the urgency with which the Government drove its campaign to withdraw from the Court in the course of the on-going criminal trial. It was open to them to bide their time until the completion of the case. It may be noted that before the commencement of this trial, Kenya was always a State Party to the Rome Statute. They were not known to seek or preach withdrawal from the Rome Statute. Why then the hurry for the sudden drumbeat of withdrawal in the course of the trial? Is it because sacred cows were now on trial and that must not be the case? But, in conducting the campaign as they did, it must have occurred to those engaged in it that they would come across as attempting to bully the Court into dropping a case that the campaigners did not want to go on. And it must also have occurred to them that such an attitude was reasonably likely to intimidate witnesses and their family members, in a manner that would discourage their participation in the trial as Prosecution witnesses.

164. It is also not a defence to say that the hostile campaign was not intended to intimidate witnesses. It is enough that it was reasonably likely to have that effect.

/1064/2483386/-/s3cp82/-/index.html; *Daily Nation* , 'Kenya's UN envoy launches stinging attack on ICC,' 1 November 2014, http://www.nation.co.ke/news/Kenya-UN-envoy-launches-stinging-attack-on-ICC/-/1056/2507206/-/ipvbfaz/-/index.html; *Daily Nation*, 'Demands for justice, diplomatic pressure expected at New York forum,' 8 December 2014, http://www.nation.co.ke/news/Assembly-of-States-meet-New-York/-/1056/2548768/-/3am35qz/-/index.html; *Daily Nation*, 13 December 2014, 'Court is not needed here, Kenya tells UN,' http://www.nation.co.ke/news/Kenya-tells-UN-that-court-is-not-needed/-/1056/2555586/-/142u0hj/-/index.html; *Daily Nation*, 13 June 2015, 'Kenya to rally Africa in plot against Hague court, UN' http://www.nation.co.ke/news/Kenya-to-rally-Africa-in-plot-against-Hague-court-UN/-/1056/2751270/-/c1l61vz/-/index.html.

[355] See *Daily Nation*, 12 October 2013, 'President Uhuru hits out at the West over the ICC,' http://www.nation.co.ke/news/-Uhuru-stinging-attack-at-the-West-and-ICC--Speech/-/1056/2029518/-/v0whudz/-/index.html.

[356] 'Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council,' 22 October 2013, S/2013/624.

165. In all of this, certain findings in the Waki Report are not insignificant. They are encapsulated in the observation that in Kenya 'the State is not seen as neutral but as the preserve of those in power.'[357]

166. Naturally, credit must go to flashes of heroism whenever they occur. But it will be too much to expect the average Kenyan witness to adopt a heroic stance in support of a criminal trial that may result in the conviction of the accused; when community leaders, religious leaders, the Kenyan Parliament, and the Government have so vocally and aggressively stood against that inquiry.

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167. Before proceeding, it must be noted that I also had occasion in the past to reproach inappropriate efforts from certain quarters whose apparent object had been to harass the trial process into convicting the accused, regardless of the judges' views as to how best to conduct the proceedings. Those efforts had also involved bullying tactics, using conventional and social media. To be recalled in this connection is an early admonition against an activist who had published an 'open letter' protesting a decision of the Chamber that the activist viewed as favourable to the accused.

168. To be clear, the concern here is not that people may have succumbed to their sentiments in a high profile criminal case, to the point of expressing hopes for conviction or acquittal as the case may be. Legitimate exercise of free speech permits them that much, though it is best that people keep their thoughts to themselves and leave judges and lawyers to do their work without distraction. What must be wrong, very wrong indeed, is to take sentiments to the point of deliberate harassment of a trial process or even attempting to abuse or bully the participants, in order to compel an outcome that is best left to expressions of hope. Such efforts, as made in the course of this trial, were wrong and remain so.

169. But the endeavours of even the pro-conviction bullies do not engage the same level of concern as do those of the Government and opinion leaders who were aligned on the pro-acquittal side. The pro-conviction camp appeared mostly to be made up of powerless and anonymous voices chanting

[357] See Waki Report, *supra*, at p 28.

'convict! convict!' from the side-lines. Their efforts were aimed more at seeking to influence the Chamber directly, by engaging in abusive shenanigans directed at the Judges for making decisions they did not like. They were thus more amenable to judicial control — which included admonition of the offensive conduct (in hopes of keeping it within limits in order that it does not encourage more of the same from the opposite camp), reassurance to the public that such campaigns amounted to nought, and the banishment of the behaviour from the judicial mind while conducting the case.

170. Viewed in that light, the statics generated by the pro-conviction campaign were not as troubling — in the particular circumstances of this case — as the impact of the pro-acquittal campaign. The principal difference, of course, had to do with the reasonably likely impact on witnesses. This is because the campaign to terminate and acquit the accused carried more apparent potency: given the formal structures of society deployed in its favour. In addition to the alignment of community leaders, what made the pro-acquittal campaign particularly troubling were the efforts of the Government in the vanguard and the distances (both literally and figuratively) to which the Government appeared ready to go in support of that campaign — even reportedly[358] going as far as lobbying other African States to withdraw en masse from the Rome Statute.

171. Hence, that the Government in power is seen by the average witness and his or her family to have expended so much effort and resources in campaigning against the proceedings carried a much greater risk of intimidating witnesses and their families without doing more. It also had an appreciable potential to embolden other persons engaged in interferences with the case in other nefarious ways. The pro-conviction campaign did not have similar attributes.

172. The principle of good faith codified in article 26 of the Vienna Convention on the Law of Treaties imposed on the Government an obligation of good faith towards the trial. But beyond that, basic considerations of good order and the rule of law required the Government positively to impress

[358] Even though these were reports in the media, prudence occasioned by the needs of a fair trial required the Government to deny these reports if they were wrong, in order to reduce their negative effect on the psychology of witnesses.

upon the population under its control — even those agitated by the trial process — the need to respect the due process of the law while the trial was in progress. That duty of good faith even did not leave the Government entirely free to stay silent in the face of vocal agitation against the trial by any segment of the population directly under the control of the Government and not of the Court. It required the Government to inform the population that there are able and experienced Defence counsel in the case who are capable of exploring all available appellate avenues against unfavourable decisions and judgments. Rather than do that, the Government itself openly joined in the agitation — even with clear indications of preparedness to counter the Chamber's efforts to control the agitation as best it could. In the result, the Government contributed to the general ferment of hostility that was bound to trouble the psychology of the average potential or actual witness for the Prosecution directly or through pressure from family members.

173. Once more, it must be said, a particularly remarkable thing about the Government's involvement of itself in this campaign against the case is that the case was about the individual responsibility of the accused. The Government is not a party in the case. Nor can the Government complain that the trial had presented any physical obstacle to Mr Ruto's ability to discharge his mandate as the Deputy President in that Government. Notably, Mr Ruto was not in detention for purposes of his trial. What is more, the Chamber had granted him excusal from continuous presence at trial, so that he could attend to his duties as the Deputy President. In the circumstances, it is very difficult to see where the good faith lay in the Government's involvement of itself in the campaign against the trial.

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174. A related factor that contributed to the creation of an atmosphere of intimidation is the enthusiastic media reporting of the aggressive conducts discussed above.

175. The media also reported the pressures and security concerns affecting witnesses, including concerns about the unlawful revelation of confidential information concerning the identity of witnesses,[359] and on intimidation,

[359] *The Nairobi Star*, 'Hackers Steal ICC Witness Emails, 10 September 2011, http://allafrica.com/stories/201109110046.html; *Daily Nation*, 'Kenya AG orders probe on Ocampo witnesses' claim,' 15 March 2012,

direct threats[360] or incidents of violence against witnesses and their families. Ironically, one of the relevant reports expressed it aptly when it stated: 'If the first set of witnesses are already being lined up for lynching, what chance is there that any other person required to ensure the ICC process is completed to the satisfaction of suspects as well as victims, would dare stick out their neck?'[361] That, really, is the essence of the matter. Indeed, in its decision pursuant to rule 68, the Chamber acknowledged the concern that witnesses may have been improperly influenced through pressure exercised by family members to persuade them to cease their involvement in the ICC trial process.[362] I am satisfied that part of the motivation for such pressures from family members was, in turn, in consequence of the pressure they felt from the hostility so clearly expressed by important voices within the country, as widely reported in the media.

176. There are some domestic jurisdictions where the law relating to contempt of court forbids media reporting and commentary that may have the effect of interfering with an on-going criminal trial. The forbidden conducts include not only original commentary, but also their publication through further reporting. Given the lack of uniform approaches at the domestic level, and the global reach of the Court's work, it was not considered appropriate (in the course of this trial) to explore the remedy of contempt of court in respect of all the types of reporting that may have

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http://www.nation.co.ke/News/politics/Kenya+AG+orders+probe+on+Ocampo+witnesses+claim/-/1064/1366944/-/xixlr2z/-/index.html.

[360] *Afrique en ligne*, 'Kenya: Kenyan MP risks ICC prosecution over alleged witness intimidation,' 11 September 2011, http://www.panapress.com/Kenyan-MP-risks-iCC-prosecution-over-alleged-witness-intimidation--15-794084-30-lang1-index.html; *The East African*, 'East Africa: Intimidation of ICC Victims, Witnesses - Call the Bluff,' http://www.theeastafrican.co.ke/OpEd/comment/Intimidation-of-ICC-victims--witnesses--Call-the-bluff/-/434750/1229934/-/xnditj/-/index.html; *The Standard*, 'Threats to harm witness must be condemned,' 13 October 2011, http://www.standardmedia.co.ke/article/2000044774/threats-to-harm-witness-must-be-condemned; *The Nairobi Star*, 'Kenya: Families of Ocampo witnesses get threats,' 7 November 2011, http://allafrica.com/stories/201111080075.html; *The Standard*, 'Ocampo warning over witnesses triggers alarm in Government,' http://www.standardmedia.co.ke/business/article/2000054159/ocampo-warning-over-witnesses-triggers-alarm-in-government.

[361] *The Standard*, 'Threats to harm witness must be condemned,' 13 October 2011, http://www.standardmedia.co.ke/article/2000044774/threats-to-harm-witness-must-be-condemned.

[362] TC Rule 68 Decision, *supra*, at para 126.

provoked such a sanction according to the laws of the more sensitive national jurisdictions.

177. But, two things must be kept separate in this regard: freedom of the press, on the one hand, and the negative by-products of even the legitimate exercise of that freedom, on the other. That media freedom must be firmly supported is not here in doubt. The fact that these reports were made is not necessarily to be reproved — as punishable conduct. It is even possible to accept that journalism was doing its job of reporting news and commentary, both good and bad. Yet, it is the effect that such reporting had on facilitating the publication and dissemination of the conducts and campaigns that caused concern. Depending on the circumstances, relentlessly vigorous media coverage of all aspects of a criminal case can occasion a miscarriage of the trial process. This tension between the needs of a fair trial and those of unrestrained media coverage and commentary engages, as indicated earlier, the risk of contempt of court proceedings in some jurisdictions. But, even in the absence of that corrective remedy, media reporting and commentary on an on-going criminal trial can result in a declaration of mistrial when media commentary, even with the best intentions, contributes to the tainting of the values of a fair trial.

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178. To conclude, the Prosecution had repeatedly complained about the chilling effect that some of the actions reviewed above have had on actual and potential witnesses.[363] At the very start of the trial the Prosecution stated that five witnesses had indicated that they were unwilling to testify, or not willing to do so at the time.[364] This was 'either due to direct intimidation or due to the combined effect of the pervasive atmosphere of intimidation, negative media reporting and hostile attitude of the Kenyan Government towards the ICC.'[365] The Prosecution also noted reports within Kenyan media regarding one of the witnesses who had indicated that he would not be testifying.[366] Later in the

[363] See transcript of hearing of 18 September 2013: ICC-01/09-01/11-T-32-Red-ENG, *supra,* at p 8; Prosecutor 'Public Redacted Version of Prosecution's Second Request for In-Court Protective Measures for Trial Witnesses,' 18 October 2013, ICC-01/09-01/11-1044-Red2.
[364] Transcript of hearing on 9 September 2009, at ICC-01/09-01/11-T-25-CONF-EXP-ENG, at p 4.
[365] *Ibid*, at p 3.
[366] *Ibid*, at p 6.

proceedings, the Prosecution indicated that in fact nine witnesses had either withdrawn from the proceedings or ceased contact with the Prosecution. While one of those witnesses mentioned did later agree to testify, the fact stands that eight witnesses who potentially possess evidence that the prosecution considered relevant to the case never appeared before the Court.

179. During the course of the proceedings, the Prosecution further informed the Court that witnesses who were still willing to participate had nevertheless expressed concern over the impact that political developments such as those detailed above may have on their own protection.[367]

180. I am persuaded to the view that the dictates of proper administration of criminal justice require the Chamber to be confident that there was no real potential that the developments reviewed above would generate concerns in the minds of witnesses or potential witnesses as to their own safety, in a way that discouraged them to come forward in the first place or to testify truthfully when they appeared before the Chamber. I am not confident.

181. Once more, as with the incidence of direct interference with witnesses (discussed in the previous subsection), it is immaterial that there is no evidence that any of the accused had instigated the political meddling. And here, it is possible to looking beyond the facts both that Mr Ruto is the Deputy President in the Government that engaged in the political meddling. As well it is possible to look beyond the fact that he had been specifically invited from the start to make his best efforts to discourage conducts that might lead to witness interference and intimidation.[368] It is not necessary to require him to account for what he did in that regard. It is enough that the atmosphere had been fostered — by persons and entities purporting to have his and Mr Sang's best interests at heart — in a way that was reasonably likely to intimidate witnesses.

C. The Outcome

182. There is no doubt in my mind that the circumstances discussed above constitute a serious impairment of the confidence with which it can be said

[367] See ICC-01/09-01/11-T-32-Red-ENG, *supra*, at p 10.
[368] See *Prosecutor v Ruto and Sang (Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial)* dated 18 June 2013, at paras 107 and 108.

that the case for the Prosecution has been so genuinely weak that the proceedings should be terminated with a verdict of acquittal.

183. In the result, the remedy that appears to me as appropriate in this case is a declaration of mistrial. There is a manifest necessity for that remedy in the circumstances of this case, 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.

184. The mistrial outcome is inspired by the remedy of a similar name in some jurisdictions around the world, where, in appropriate circumstances, a criminal court may declare a mistrial – even without the consent of the accused or over his objection.[369] In the classic case of *United States v Perez*, where the defence did not consent to the declaration of a mistrial, the US Supreme Court held that 'the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, *whenever, in their opinion*, *taking all the circumstances into consideration*, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest of caution, under urgent circumstances and for very plain and obvious causes. In capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.'[370]

185. That case essentially illustrates that a mistrial does not require fault-finding against a party in the case; nor a necessary characterisation of the circumstances in terms of null and void. For, a mistrial can be declared, as

[369] See *Illinois v Somerville*, 410 US 458 (1973) [US Supreme Court].
[370] *United States v Perez* 22 US (9 Wheat) 579 (1824), at p 580 [US Supreme Court], emphasis added.

with the equivalent outcome in England and Wales, even at the end of a jury trial if the jury proves unable to return a verdict. In such cases, a new jury is empanelled for a new trial. Another instance in which a mistrial is declared is when there is a serious procedural error or misconduct that would result in an unfair trial, and the judge adjourns the case without a decision on the merits and decides that a new trial may be held.

186. Indeed, the category of the circumstances that may result in a mistrial is not closed. As it was put in *Perez*, 'it is impossible to define all the circumstances, which would render it proper to interfere' by way of the mistrial remedy. It is a matter of broad discretion to be responsibly exercised by *the trial judge, who is best situated to make such a decision intelligently — to the effect that substantial justice cannot be attained without discontinuing the trial*. That was the point that the US Supreme Court made in their jurisprudence on mistrial. Notably, in *Illinois v Somerville* the Court reiterated that the *Perez* 'formulation … abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial. The broad discretion reserved to the trial judge in such circumstances has been consistently reiterated. … [I]n *Gori v United States*, … the Court again underscored the breadth of a trial judge's discretion, and the reasons therefor, to declare a mistrial. "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment."…'[371]

187. In light of the foregoing, I am satisfied that the appropriate result is to declare a mistrial in this case, vacate the charges and discharge the accused — without prejudice. This is so that the Prosecutor can start afresh another time, if she wishes. It will be up to the Prosecutor to decide whether to continue investigation now or in the future, as there is no statute of limitation to these charges. Vacation of the current charges and discharging the accused now means that any new charge to be brought in the future will require fresh confirmation before the Pre-Trial Chamber. In the meantime, Mr Ruto and Mr Sang will continue to enjoy their presumption of innocence undiminished.

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[371] *Illinois v Somerville*, *supra*, at p 462.

188. 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 have always enjoyed. 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.

189. I recognise fully that the disposition is unusual, but as indicated above the surrounding circumstances of the case fully compel the disposition.

190. The unusualness of the disposition will no doubt engage the question of the source of a Trial Chamber's power to declare a mistrial, given that there are no words spelling out the power in those precise terms either in the Rome Statute or in the Rules of Procedure and Evidence. But, a Trial Chamber's power to declare a mistrial is easy enough to see. It follows by necessary implication from the imperatives of article 64(2) combined with article 4(1) of the Rome Statute, which imposes upon the Chamber an obligation to ensure a fair trial. It is a necessary part of that authority to declare it to be so, if factors beyond the remedial power of the Chamber interfere to prevent what could possibly be described as a fair trial. The idea of a 'fair trial' — it must be stressed — is an objective notion. A trial must be fair to all the parties and participants in the case — the Defence and the Prosecution alike. And the victims, too.

191. In addition to article 64(2) as an obvious source of the power to declare a mistrial, the power is further supported by the doctrine of incidental or implied powers under international law. In an earlier decision, this Trial Chamber invoked eminent authorities, prominent among which are judgments of the ICJ, including in the *Reparation Case*,[372] saying that 'under international law,' an international body or organisation 'must be deemed to

[372] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) ICJ Reports 174 [International Court of Justice], at p 182. See also Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: International Organisations and Tribunals,' (1952) 29 *British Yearbook of International Law* 1, at pp 5—6.

have those powers' which, 'though not expressly provided' in the constitutive instrument, 'are conferred upon it by necessary implication as being essential to the performance of its duties.'[373] Article 4(1) of the Rome Statute is to the same effect.

192. 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.

D. The Irrelevance of Article 70 of the Rome Statute

193. It is true that the Rome Statute has proscribed obstruction of justice as a separately punishable offence under article 70. But any such charge is a very separate matter, to be adjudged on its own merits, where the Prosecution is able to investigate the obstruction and bring the suspects to trial. The possibility of collateral proceedings pursuant to article 70 has 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. In other words, the correct view of the verdict of acquittal of an accused is a particular question to be answered in the particular case that engages that question. Ultimately, that question comes to this. In acquitting the accused, in the face of troubling interference or political meddling meant to benefit the accused, has justice not only been done, but also been seen to be done?

194. And, as regards political interference, in particular, it may or may not be possible to proceed against particular individuals implicated in it, as a question of individual criminal responsibility under article 70. But that is a

[373] *Prosecutor v Ruto & Sang (Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation)* dated 17 April 2014, ICC-01/09-01/11-1274-Corr2, at para 67 *et seq.*

question that need not obscure the obstructing effects of political interference in the cardinal case, such as is attributable to the joint or several efforts of all those engaged in the conduct.

PART IV: QUESTIONS CONCERNING REPARATION

195. Finally, it must be stressed that finding that the level of interference and political meddling in this case has been such as to occasion a declaration of mistrial must not detract from the proven reality — indeed, the gravity — of the Kenyan post-election violence of 2007-2008. The miscarriage occasioned the judicial inquiry obscured only the question of *acquittal* of the accused: on the basis that the prosecution case, at its closing, has been too weak to warrant continuing the inquiry into the individual criminal responsibility of the accused.

196. It must be clearly said that there is no doubt at all as to the occurrence of the post-election violence. Nor is there any doubt that the violence occasioned serious harm to victims. To repeat, I am satisfied from the available evidence and the admissions of the parties that the post-election violence did occur and that it resulted in serious harm to victims. Notably, the parties never contested those facts,[374] and the Chamber has heard nothing that could cast doubt on the overall findings of the Waki Commission in this regard.[375]

197. Indeed, it is recalled that the Waki Commission reported that 'the pattern of violence showed planning and organization by politicians, businessmen and others who enlisted criminal gangs to execute the violence.'[376] It would betray a very grave misunderstanding on the part of anyone to cite the majority decision of this Chamber as contradicting the Waki Commission in their finding that the 2007 election was characterised by a culture of political violence in Kenya, or even that the violence in the Rift Valley region had been planned. The only matter of evidential difficulty implicated in the Chamber's majority decision concerns only the responsibility of the accused for that violence.

198. That being the case, I am of the firm view that the victims of the post-election violence should not be left in the cold, because the proceedings before

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[374] The parties agreed that during the post-election violence approximately 1,000 persons died and over 300,000 persons were displaced: see ICC-01/09-01/11-653-AnxA. They also agreed that houses and business were burnt and looted in several locations in Uasin Gishu during the post-election violence: see ICC-01/09-01/11-451-AnxA.
[375] See Waki Report, *supra*.
[376] Waki Report, *supra*, at p 347.

this Chamber were polluted by undue interference and political meddling which obscured an accurate assessment of the criminal responsibility of the accused.

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199. But before discussing the matter of reparation (or assistance in lieu of it) for victims of the post-election violence, it may be appropriate to say a few words about the pronouncements of the Appeals Chamber in the *Lubanga* reparation judgment.[377] It may be tempting to interpret that case as standing for a principle to the effect that, at the ICC, conviction is a prerequisite to reparation.

200. Such an interpretation would be both unnecessary and undesirable, in my view. It is unnecessary because, as a matter of *ratio decidendi*, a key factor of the *Lubanga* reparation appeal is that there had in fact been a conviction in the trial. But despite that conviction, the Trial Chamber did not lay the reparation obligation squarely at the foot of the convict. Rather, the Trial Chamber imposed upon the Trust Fund for Victims the reparation obligation in the case that should more appropriately encumber the convict. There is indeed much value in imposing the reparation obligation upon a convict, notwithstanding that there may also be an expectation on someone else to attend to assistance to victims (in lieu of or in addition to reparation) on *ex gratia* or no-fault basis. The value of laying the reparation obligation squarely at the foot of the convict includes the victims' *entitlement* to reparation from those individually responsible for the harm. That entitlement attaches — to be made good — upon the convict whenever possible. Hence, it was correct to require that the reparation obligation be imposed squarely upon the convict, despite his indigence, not least because he may later come into means. Seen in that light, the factor of conviction is an intrinsic feature of the *Lubanga* reparation appeal judgment. It thus makes it unnecessary to view that appellate judgment as establishing a general principle to the effect that conviction is a *sine qua non* to reparation at the ICC.

201. Another sense in which it is unnecessary to interpret the *Lubanga* reparation appeal judgment as establishing a principle of conviction as a

[377] See *Prosecutor v Lubanga Dyilo (Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012)* dated 3 March 2015, ICC-01/04-01/06-3129.

necessary condition of reparation at the ICC is because there is no general principle of law that requires conviction as a prerequisite to reparation. Notably, the criminal injuries compensation schemes in many national jurisdictions do not require conviction as a prerequisite to reparation.[378] The representative norm in this respect is adequately captured in the European Convention on Compensation of Victims of Violent Crimes. It provides in article 2(1) that when compensation is not fully available from other sources, the State shall contribute to compensate victims (and their survivors) for serious injuries occasioned by malicious crimes of violence. And, more importantly for present purposes, the Convention provides in article 2(2) that '[c]ompensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished.' The norm of compensation for victims regardless of prosecution or punishment of the offender is particularly significant in view of the provision of article 75(6) of the Rome Statute, which says that '[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law.'

202. It is also undesirable to require conviction as a prerequisite to reparation at the ICC. Reasons for that view include the following. First, the fact of victimhood as an incident of an attack against a civilian population is, in most cases, an objective reality that burdens the victims, regardless of the question of individual criminal responsibility for the harm inflicted upon them. Second, the traditional model of reparation for criminal injuries through tort law is often criticised for its social inefficiency, which depends on the expensive process of litigation. It is for that reason, among others, that some jurisdictions have adopted no-fault injuries compensation schemes, which also cover criminal injuries, such as seen earlier. That concern is compounded in a reparation scheme that depends on criminal conviction. For in such a conviction-based scheme, the inefficiencies of litigation for purposes of reparation are compounded by a standard of proof for conviction in criminal cases that is higher than the standard of proof in tort law. This is not necessarily to say that criminal litigation may be avoided for purposes of reparation at the ICC. It is rather that it is enough that the ICC litigation judicially establishes victimhood, for purposes of reparation (or assistance in lieu). It does not follow that reparation (or assistance in lieu) must depend on

[378] This is the case in New Zealand, Ontario (Canada), the United Kingdom, Western Australia, and under the European Convention on Compensation of Victims of Violent Crimes.

the conviction of the accused. Third, the prospects of conviction in an ICC case are wholly beyond the control of the victims: they do not control the matter of the prosecution theory of the case or choice of litigation strategy that may not lead to conviction; nor do they control the matter of competent prosecution of the case in general. Fourth, conviction may be frustrated, as in this case, by the conducts of persons or States that choose to interfere or intermeddle in the prosecution with the object or effect of frustrating the completion of the trial and the prospect of conviction. Finally, the often-lengthy criminal justice process may delay the process of rehabilitation that is associated with reparation for victims, even in the event of a conviction.

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203. The foregoing reasons and more compel me to the view that the question of reparation or *ex gratia* assistance in lieu of reparation for the victims of the Kenyan post-election violence of 2007-2008 is ripe for examination without further delay: notwithstanding the absence of a conviction.

204. In that connection, certain underlying questions necessarily arise to be considered as a next step in this case, possibly in the context of any views and concerns that the victims may see fit to raise through their counsel.

205. Regarding the victims' right to reparation, as a matter of entitlement, one question that may arise to be considered is whether there is an *obligation* upon the Government to make reparation to the victims. That question may arise from the following factors, among others: (a) as a factual matter, the Government failed to protect the victims from the post-election violence that fractured their lives in varying ways; (b) as found by the Waki Commission, there had been previous episodes of post-election violence that went unpunished, hence contributing to a culture of impunity that culminated in the 2007-2008 post-election violence. The testimony of expert Witness Mr Maupeu testified largely to the same effect; (c) what the Government has done by way of genuine investigation and prosecution of anyone for the 2007-2008 post-election violence remains to be seen — this is a critical step in the idea of guarantees of non-repetition, as a measure of reparation; (d) despite the foregoing failings, the Government engaged in a very high profile campaign with the sole object of peremptory termination of the prosecution of the cases brought against persons accused of responsibility in the 2007-2008

post-election violence; (e) the Government's campaign carried with it the reasonable likelihood of intimidating the actual or prospective prosecution witnesses and their families; and, (f) the result of the Government's campaign carried out to that effect entails the concern that the judicial inquiry may not produce a conviction, which may then attach the obligation of reparation to the accused persons charged with the conducts that injured the victims.

206. It is, of course, immediately apparent from these factors, that the question of the victims' entitlement as such to reparation and any obligation of the Kenyan Government in that regard result from actual acts and omissions on the part of the Government. They do not derive merely from the theory of social contract alone — a theory that some have argued as imposing reparation obligations on the State for failing to protect the victim from the criminal harm in question.[379]

207. There is also the related question whether the foregoing factors have in turn engaged serious questions of responsibility for an internationally wrongful act on the part of the Government, such as attracts the reparation obligation, as a matter of customary international law. It is noted that such an obligation need bear no connection to the breach of a treaty obligation as such. It has been expressed as follows: '[S]ince in the international law field there is no distinction between contractual and tortious responsibility, … any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation.'[380] This principle has now been codified in the International Law Commission's draft articles on the Responsibility of States for Internationally Wrongful Acts. Article 1 expresses the principle that '[e]very internationally wrongful act of a State entails the international responsibility of that State.' Does it or does it not then amount to an internationally wrongful act for the government of a State to set out to meddle with an on-going case before an international criminal court, with the view to occasioning its abortion without proper consideration of the charges? Is it material or not that such meddling may have occurred against both a history of failure to protect the victims of the harm that is the subject

[379] See Law Commission of New Zealand, Issue Paper 11: *Compensating Crime Victims* (2008), at pp 6-7.
[380] See *The Rainbow Warrior Arbitration (Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the 'Rainbow Warrior Affair'*) dated 30 April 1990, *Reports of International Arbitral Awards*, Vol XX, at para 75.

matter of the judicial inquiry and/or lack of indication that the meddling State had conducted genuine investigation or prosecution? Does such manner of interference raise serious questions of denial of justice for the victims, in relation to their right to the truth (also an element of reparation in international human rights law)? But does that denial not come with it a potential denial to victims of their *entitlement* to reparation from those individually responsible for the harm — as opposed to *ex gratia* compensation from the charitable instincts of the international community or a national government?

208. In the circumstances, the further question arises whether the Rome Statute leaves no scope for this Court to require the Government to make adequate reparation to the victims of the post-election violence without further delay. It may be considered that the jurisdiction of the ICC for purposes of a reparation order ordinarily engages only in relation to individuals and not a State. But even so, does the question not arise that a State that meddles in the prosecution of a case at the ICC, in a manner that is reasonably likely to frustrate a prosecution and conviction, has by such conduct meddled itself into the jurisdiction of the ICC for purposes of reparation? In those circumstances, does the opinion of the ICJ in the *Reparation Case*[381] afford judicial precedent for such an imposition on a State in the absence of explicit statutory provision?

209. These are all difficult questions on which submissions will be necessary. I offer no answers to them now. But there may be occasion to address them at some point, with submissions also received from the Government, given what had occurred in this case.

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.

[381] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, *supra*.

PART V: IMMUNITY

A. The African Union's Diplomatic Intervention

211. It has always been my position that it is a correct attitude for the Court to pay close attention to the views of States-men and -women, especially when they express concerns in good faith as a regional bloc. Good faith is of the essence. For, the concern in question may relate to a matter on which reasonable people may genuinely harbour differing views; let alone a matter of honest misunderstanding. The reason for my position includes the following. It is important to address their concerns and anxieties, to the extent reasonably possible.[382] Among other things, such an attitude augurs well for a better understanding of important legal questions on which the judges of this Court may be best placed to explain things, by virtue of their training, experience and pre-occupation on a daily basis. It is, however, important to stress that this does not mean acceding to any particular diplomatic call that has been made.

212. It is noted that the AU recently called upon the Court to terminate this case peremptorily.[383] This is not the first time that the call was made. A similar call was directed at the Court in October 2013 following the Extraordinary Summit of the Heads of State and Government, while the Kenyan post-election violence cases were with the judges.[384] But, in a separate opinion issued in the context of the companion case, I had endeavoured to explain that considerations of the rule of law left no room to heed the call merely because the AU had made it.[385] That remains the case.

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[382] See *Prosecutor v Kenyatta (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial)* dated 18 October 2013, ICC-01/09-02/11-830 [Trial Chamber V(B)] Concurring Separate Opinion of Judge Eboe-Osuji, at paras 4 — 13.

[383] See Decision of the African Union Assembly, following the 25th Ordinary Session, 14 — 15 June 2015, Johannesburg, Doc No Assembly/AU/Dec.586(XXV), at para 2(i).

[384] See African Union, 'Closing Remarks by H E Mr Hailemariam Dessalegn, Prime Minister of the Federal Democratic Republic of Ethiopia and Chairperson of the African Union at the Extraordinary Summit of Heads of State and Government of the African Union,' Addis Ababa, 12 October 2013, available at http://summits.au.int/en/icc/speeches/remarks-he-mr-hailemariam-dessalegn-prime-minister-federal-democratic- republic-ethiopia. See also African Union, Press Release No 177/2013, 'Africa to Request Deferment of Indictments against Kenyan President and Vice President,' at p 1.

[385] See *Prosecutor v Kenyatta (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial)*, *supra*, Concurring Separate Opinion of Judge Eboe-Osuji, at paras 27 — 43.

213. The call from the AU makes it necessary to explain as follows. The termination of this case, without prejudice, is not at all in heed to the AU call. It may be necessary to recall an explanation made earlier. To begin with, the trial had proceeded to the close of the case for the Prosecution. The Defence had made submissions of no case to answer at that stage. In common law jurisdictions, the criminal justice process permits defence counsel to make no-case submissions at the close of the case for the prosecution. The Rules of Procedure and Evidence at the ICTR, the ICTY and the SCSL permitted defence counsel to make no-case submissions at the close of the case for the prosecution. And in the case at bar, the Defence had, at the outset, sought to be able to make a similar motion at the close of the Prosecution case, if they felt that the case had been too weak. Both the Prosecution and the Victims' Counsel agreed to it, despite the absence of explicit provision for the procedure in the ICC basic documents. Against that background, there was nothing at all unusual in the fact that the Defence had made no-case submissions in this case. Nor is there anything extra-ordinary in upholding a no-case submission when the prosecution case is seen to be weak.

214. As the discussion in Part II of this opinion shows, no-case submissions succeed in many instances in which they are made in national jurisdictions. That being so, had there not been the incidence of obstruction in this case, and the case for the Prosecution remained as weak as the evidential review in Judge Fremr's reasons shows, the Defence no-case submissions would no doubt have succeeded according to the principles of no-case adjudication that should apply in this Court. But, the incidence of obstruction of justice, due to actions attributed to forces operating from and within Kenya, compels me to declare a mistrial as the proper basis to terminate this case. So, either on the basis of no-case analysis (according to the applicable principles) or on the basis of mistrial resulting from actions of forces within Kenya, this case would have been terminated at this stage. And the AU call had nothing at all to do with it.

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215. But the AU call to terminate the case makes it necessary to discuss now a key premise of that call: official position immunity. I discuss the matter at length in this Part, because the AU call may have raised a lingering question (perhaps in the minds of the African leaders who joined in that call) to the effect that the trial of Mr Ruto (after he became the Deputy President of

Kenya) may have been a departure from an important norm of international law — the norm of official position immunity — in an effort to 'target' African leaders.[386] There is no mistake in saying that customary international law does recognise official position immunity: the mistake rather is in the thinking that such immunity has any application at the ICC, even aside from the provisions of article 27 of the Rome Statute. But, beyond the specific relevance of discussing the question of immunity in the trial of Mr Ruto, there is also the matter of general policy of international criminal law in need of elucidation, for a proper understanding of a cardinal norm codified in article 27 of the Rome Statute — the norm that directly repudiates official position immunity as a bar to the jurisdiction of the ICC. The norm is called the 'Third Nuremberg Principle,' which crystallised as a principle of international law in the aftermath of the Nuremberg proceedings resulting from the atrocities committed during the Second World War.

216. At the AU, the understanding was expressed that customary international law does not permit prosecution of sitting Heads of State before an international criminal court. Notably, it was that understanding that motivated a certain latter-day amendment to the Statute of the African Court adopted in June 2014 — granting immunity to incumbent senior officials of African States should they be sought for prosecution before the African Court, in the event that its criminal jurisdiction should come into operation. By that amendment, article 46A*bis* of the Statute of the African Court now reads as follows: 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.'[387] A number of observations deserve to be made in relation to article 46A*bis*. First, ahead of its adoption, the AU leadership had made policy pronouncements that were eventually codified as article 46A*bis* in the 2014 amendment. One instance of that policy pronouncement appears in the following statement — made in October 2013:

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[386] See, for instance, text of President Jonathan's speech at the 11—12 October 2013 Extraordinary Session of the AU Assembly, published under the title 'Nigeria's President Jonathan seeks immunity for African leaders from ICC prosecution for war crimes, genocide,' *Premium Times*, 12 October 2013.

[387] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the Twenty-third Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, 27 June 2014.

> After reaffirming the principles deriving from national law and international customary law, by which sitting heads of state and government and other senior state officials are granted immunities during their tenure of office, the Assembly decided that, "No charges shall be commenced or continued before any international court or tribunal against any serving head of state or Government or anybody acting in such capacity during his/her term of office. To safeguard the constitutional order, stability and integrity of member states, no serving AU Head of State or Government or anybody acting or entitled to act in such a capacity, shall be required to appear before any international court or tribunal during their term of office".[388]

217. Second, article 46A*bis* is the only provision of its kind in any international instrument, in relation to the exercise of criminal jurisdiction by an international court. Third, the adoption article 46A*bis* in 2014 followed, among other things, the rejection of AU calls for the termination or suspension of proceedings against certain persons (including Mr Ruto).

218. The antecedents that culminated in the adoption of article 46A*bis* by the AU Assembly are well-known. They centrally concern the unfortunate perception that Africa had become the only region in which the ICC feels free to exercise its jurisdiction, riding roughshod over the sensibilities of some Africans and their leaders, in a manner that is not done elsewhere. That sentiment comes through in the following passage from an AU press statement:

> "On a number of occasions, we have dealt with the issue of the ICC and expressed our serious concern over the manner in which the ICC has been responding to Africa's considerations. While similar requests (for deferral of prosecution) by other entities were positively received, even under very controversial circumstances, neither the ICC nor the UNSC have heeded the repeated requests that we have made on a number of cases relating to Africa over the last seven years", Ethiopian Prime Minister who is the Chairperson of the African Union said in a statement to his colleagues today. *"Our goal is not and should not be a crusade against the ICC, but a solemn call for the organization to take Africa's concerns seriously"*, he added.[389]

219. But, this complaint will always be a double-edged one. Take for instance, the 'solemn call for the organisation [i.e. the ICC] to take Africa's

[388] See Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia, 11-12 October 2013, Press Statement of 12 October 2013, available at <www.margiti.com/images/5/56/Extraordinary_Session_of_the_Assembly_of_the_African_Union,_Addis_Ababa,_Ethiopia_African_Union.pdf>.
[389] See AU Press Statement of 12 October 2013, *supra*, emphasis added.

concerns seriously.' It is difficult to see African victims of atrocities sharing the concern that the ICC may not be taking 'Africa's concerns seriously.' The Court's purpose is to ensure accountability for gross atrocities expressed in certain proscribed crimes which have preyed upon Africans in very recent memory. Africans were victims of *apartheid* (in South Africa), of genocide (in Rwanda), of war crimes (in Sierra Leone), of sundry manner of crimes against humanity committed during periods of violence that followed African elections. Current affairs on the African continent show that the kinds of conflicts that result in these atrocities are still not a thing of the past. As long as that remains the case, the plight of current or prospective African victims remains a critical 'African concern.' The fact that these atrocities also occur elsewhere (as they no doubt do) is entirely immaterial to the need for justice at the instance of African victims of such atrocities. The apparent resolve of the Prosecutor to prosecute as much of these atrocities as she can, and to issue statements that aim to stave them off, are the clearest proof of her taking 'African concerns seriously' on behalf of the ICC. She deserves much credit, not denigration.

220. As I have written in a previous opinion,[390] African leaders are fully entitled, out of humanitarian instincts and as caring leaders in their broader membership of the international community, to insist that victims beyond the African region must also be permitted the benefits of the ICC as a foremost instrument of accountability for the harm that victims of atrocities suffer wherever they are. But that is a reason to strengthen and support the ICC, not worry its confidence, so that it can fulfil that mandate. As outlined in an earlier opinion, there is much value that the ICC holds for Africa, particularly in contributing to the pacification of an environment in which available resources and energy are not devoted to armed conflicts but to economic development and to the general improvement of conditions of life.[391] As a new institution conceived and operated by human beings, there will always be room for improvement at the Court. African leaders can play their rightful part in engendering those improvements. But care must be taken in conceiving that the first order of the needed improvement is in the creation of norms of immunity that stand on very doubtful legal grounds — or the

[390] *Prosecutor v Kenyatta (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial)*, *supra*, Concurring Separate Opinion of Judge Eboe-Osuji, at paras 21—22.
[391] *Ibid*, at paras 24—26.

amendment of the Rome Statute to that end.[392] It bears keeping in mind that the effect of such a norm is to protect only the ruling class, even when they are accused of turning the most sacred trust of public office violently on its head: in the manner of committing violent atrocities upon the very people whose protection is the very first reason for public office. Indeed, the logic of the immunity norm is much too counter-intuitive in its reaches to warrant support. Take for instance, the event of a popular uprising demanding the resignation of a kleptocrat whose compatriots have reason to consider as being in public office only for himself. If he is so troubled by the uprising that he decides to exterminate the critical population, he would not need to worry that he could ever be prosecuted at the African Court or the ICC as long as he remained in office. That is the logic of public office immunity. And it is very troubling.

B. An Inconvenient Norm for an AU Concern

221. Even from the perspective of the African Union, there is more that recommends a second thought to any regional development of a legal norm or usage that forbids the prosecution of a serving Head of State or senior official. This is because such a norm may prove ultimately inconvenient to the AU's own intention to eradicate the crime of treasonous usurpation of political power and the other crimes that flow from it. Notably, article 28C of the amended Statute of the African Court proscribes as a crime 'unconstitutional change of government.' Under article 28E(1) the crime is defined to include not only *coups d'états* against democratically elected governments, but also refusal to vacate office after loss of democratic elections, as well as manipulative revisions to the constitutional or the electoral laws in order to perpetuate stay in power.

222. The paradox of developing any norm that forbids prosecution of sitting Heads of State and their ministers may then mean that those who access and retain political power through the proscribed treasonous ways may never be prosecuted. They may thus be left in position to continue committing crimes proscribed by article 28C of the amended African Court Statute, as well as other international crimes against their own people as they see fit – without

[392] See, for instance, Decision on the Update of the Commission on the Implementation of Previous Decisions on the International Criminal Court, Assembly/AU/Dec.586(XXV), dated 14—15 June 2015, at para 2(i).

fear of prosecution before their national courts, the African Court or this Court.

C. A Mistaken Approach

223. With respect, it is, in my view, a mistaken understanding to say that customary international law recognises any such immunity for anyone before an international court in the exercise of criminal jurisdiction.

224. To begin with, the matter of immunity in the Kenya cases pending before the ICC is not governed by customary international law. It is governed by the terms of the treaty that Kenya and its fellow States Parties signed: the Rome Statute. All States Parties agreed in it that the 'Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government [etc] shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.'[393] The Statute also provides that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'[394] The point of these provisions is that they guide the question of immunity for officials of a State Party, regardless of what customary international law says. [But, I discuss extensively below what customary international law really says and how it got to saying that.]

225. It is important to stress in this connection that, contrary to the assertion in the AU press statement quoted above, it is not generally the case that incumbent Heads of State enjoy immunity from prosecution. Kenya is one country that does not recognise immunity for its Head of State in respect of certain offences. In particular, the Constitution of Kenya does not recognise immunity even for the President of Kenya with respect to prosecutions under the Rome Statute. Notably article 143(1) recognises immunity for the President or persons performing the functions of the President 'during his tenure.' But, in a specific exception, article 143(4) provides that '[t]he immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is

[393] Rome Statute, article 27(1).
[394] *Ibid*, article 27(2).

party and which prohibits such immunity.' Kenya is party to the Rome Statute, which prohibits immunity for a Head of State.

226. I now turn to the argument that customary international law does not permit the trial of a sitting Head of State or of senior State officials. That proposition lacks strong support. The legal developments that make it so will now be considered. First, the ICJ has rightly said that customary international law prevents the trial of officials of a State in the *national* courts of another State. But that rule does not operate when it comes to trying officials of States before *international* courts.[395] There is no precedent that supports the successful plea of immunity before an international criminal court. The point may be illustrated in this way. On the Scheveningen beach, on a warm summer day (a rare event that no one can help), any man may feel fully entitled to wear his own Speedo®. Custom may absolve him. But it is something else to say that there is — as yet — any custom that entitles the same man to dress the same way, as a lawyer, when representing clients further up the road in the courtrooms of the ICC. Second, even the review of international legal history leaves no room at all for the proposition that a Head of State, whether still in office or out, may claim immunity before an international criminal court.

227. The point may become clearer with a review of the historical development of the idea of individual criminal responsibility, particularly in the manner that culminated in the norm now codified in article 27(1) of the Rome Statute.[396] But, before delving into history, it may help to address certain provisions of the ICC basic documents that may lead to some head-scratching about the question of immunity at the ICC as a matter of customary international law.

228. My aim in this is to address what may be a temptation to deduce official position immunity as a customary norm that applies at the ICC, at the substrate or residual level, by inferring it from nothing more than the sheer

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[395] *Case concerning the Arrest Warrant of 11 April 2000 (Judgment)* (2002) ICJ Reports 3, at para 61.

[396] Article 27(1) provides: 'This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.'

logic of verbal contamination. That logic tends to ignore the need to establish customary law in the usual manner of evidence of consistent practice of States impelled by a sense of legal obligation. Rather, the deduction of customary law of official position immunity at the ICC proceeds along this reasoning strategy: because the basic documents of the ICC have provided against immunity, it must mean that there is customary law of immunity that would otherwise necessarily operate at the ICC, hence the need to provide against it. But this reasoning strategy is here referred to as the fallacy of 'verbal contamination,' in the manner of the infection that results when efforts are made — perhaps out of an abundance of caution — to ensure against a difficulty that is native to other places; the difficulty had to be addressed by name in order to identify it; but, by doing so, it is thought that the invocation of the name conjures up the difficulty as a necessary reality in the present sphere. But, such a thinking strategy creates only a holographic reality, by the diffraction of only words (the named difficulty) and intellect (that worries the difficulty into the present sphere). It is entirely unhelpful when the existence of a norm is required to be established by way of actual *evidence* of consistent practice that established the contemplated norm, coupled with the needed sense of legal obligation.

D. Contemplation of Immunity in ICC Basic Documents

229. The basic documents of the ICC do from time to time indicate how questions of immunity are to be resolved, should such questions arise (reasonably or unreasonably). Some of those provisions will be reviewed below. But, they do not obstruct the view that denies official position immunity as a viable plea against the jurisdiction of an international criminal court in modern international law. It is important to stress, in the first place, that to anticipate a *possibility* capable of causing distraction and lay down plans for dealing with it, should it arise, is always a good precautionary measure of efficiency; it is not a necessary acknowledgment of the viability of that possibility at all or in all the circumstances in which it may be purported to occur. That goes particularly for the provisions of articles 27(2)[397] and

[397] Article 27(2) provides: 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

98(1)[398] of the Rome Statute, as well as article 19[399] of the Relationship Agreement between the ICC and the UN. These are sensible provisions in at least two ways. First, they situate the Rome Statute (as it should be) within the broader tapestry of international law. In that way, allowance has been made for those occasions that international law truly recognises immunities (in spheres other than in the exercise of jurisdictions by international criminal courts). The allowance also pre-empts future developments of immunity in international law (States may indeed decide in future to, clearly, recognise official position immunity even before international criminal courts, perhaps following the AU lead in their introduction of the new article 46A*bis* of the amended Statute of the African Court). But none of this is to say that there *is* — in customary international law as it exists (*lex lata*) — immunity for Heads of State before international criminal courts.

230. There are indeed occasions when current international law recognises immunities for Heads of State and their representatives, in ways that may bog down an ICC process. That is so in relationships between States. No sovereign my exercise dominion or *imperium* over another sovereign. This is a matter of equality of sovereigns and their independence from one another. *Par in parem non habet imperium* [among equals none has dominium.] The upshot of the rule is that no sovereign may be impleaded before the court of another sovereign. The logic of the rule is impeccable in relations between or among States, when two related things are taken into account. First, in some States, the sovereign head is also the nominal head of the judiciary that applies the

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[398] Article 98(1) provides: 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'

[399] Article 19 of the ICC-UN Relationship Agreement provides: 'If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if, in the circumstances, such person enjoys, according to the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law, any privileges and immunities as are necessary for the independent exercise of his or her work for the United Nations, the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law.'

law,[400] the executive that enforces the law, and the legislature that makes the law. Next, and closely related to the preceding consideration, is that it used to be the case that sovereign heads could not be impleaded in their own courts of law, or bound by the laws made by parliament. This resulted in the principle that the monarch could do no wrong or was 'above the law.' These two considerations were the hallmarks of the sovereign's dominion in his or her own realm. It thus, logically, made it untenable in international law for a foreign sovereign to be put 'under the law' and impleaded in the courts of the sovereign of the forum. That would be to subject the foreign sovereign to the dominium or imperium of the sovereign of the forum.

231. It was in those circumstances that the rule of immunity became recognised in international law, to constrain how sovereign heads treated their fellows. The resulting immunity was first developed in customary international law, fostered by the landmark US Supreme Court case of *The Schooner Exchange*.[401] Aspects of that immunity were eventually codified into the Vienna Convention on Diplomatic Relations.

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[400] It may be appropriate to recall here the case of *Prohibitions del Roy* [1607] EWHC KB J23 (01 November 1607), (1607) 12 Co Rep 63, (1607) 77 ER 1342, which immortalised the famous showdown between Sir Edward Coke and King James I. The King had given a very literal meaning to the idea that the court of 'King's Bench' belonged to him. So, he took it upon himself, possibly inspired by the biblical legend of King Solomon the wise judge, to adjudicate in person a dispute between citizens. When politely told that it was only judges — not him — that could dispense justice according to the law, King James took royal umbrage and argued 'that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges.' With admirable courage and tact, Coke responded 'that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debed esse sub homine, sed sub Deo et lege* [That the King ought not to be under any man but under God and the law.].' The case stands for the principle that in the United Kingdom, though it was entirely for the monarch to sit on the 'King's or Queen's Bench,' if (s)he choses. But, it is only the judges that may exercise actual judicial power, though they do so in the name of the monarch: the monarch is prohibited from administering justice in person.

[401] *The Schooner Exchange v McFaddon*, 11 US 116 (1812).

232. Notably, the rules of immunity are traditionally expressed in the language of *inviolability* of foreign sovereigns — as regards their persons, premises and correspondence, and similar attributes of their representatives within the receiving State. A typical expression of the norm — most relevant for the present discussion — is seen in article 29 of the VCDR concerning the person of a diplomatic agent: 'The person of a diplomatic agent *shall be inviolable*. He shall not be liable to *any form of arrest or detention*. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.' [Emphasis added] The same inviolability is extended to family members of diplomatic agents forming part of his or her household.[402]

233. Article 98(1) of the Rome Statute recognises and respects that arrangement. But this — it must be stressed — is as regards the relationship between States, when that relationship and its baggage of immunity get tangled up in the matter of a State's cooperation with the ICC. When the Court makes such cooperation requests *to States*, the question may arise concerning whether the person (or legationary premises) of a foreign sovereign would be considered 'inviolable' and whether its official is protected against 'any form of arrest or detention' by the agents of the forum sovereign. That, of course, can be a wholly separate question from the question of immunity *before the ICC*. A legal solution had then to be found to enable the receiving State ['the Requested State' in article 98(1) parlance] to whom the ICC makes a cooperation request, with the view to overcoming the restraint that article 29 (for instance) of the VCDR places on that State relative to the principle of 'inviolability' of foreign sovereigns (and their officials) in the hands of the Requested State. That arrangement, as article 98(1) prescribes, is for the ICC to obtain the consent of the sending State ['the Third State' in article 98(1)], in order to enable the Requested State to 'violate' (so to speak) the person of an official of the Third State, by arresting him, detaining him and transferring him to the ICC. The waiver that article 98(1) contemplates is consistent with the waiver that article 32(1) of the VCDR contemplates.

234. But, all this says nothing really about the immunity of the officials of the Third State at the ICC itself. This is because the Requested State may

[402] See article 37(1) of the Vienna Convention on Diplomatic Relations.

decide to 'violate' its obligations to the Third State, by arresting an official of that State over its objections, despite the immunity codified in article 29 of the VCDR. Such a move may or may not give the Third State a cause of action against the Requested State — at the ICJ. In the event of such a lawsuit, the ICJ may or may not accept the argument of the Requested State that the absence of immunity before international criminal courts constitutes an exception[403] to the rule of *inter-State* immunity an aspect of which is codified in article 29 of the VCDR. It may be accepted, purely for purposes of argument, that the ICJ may possibly reject the defence and award reparation to the Third State. But, the question presented to the ICJ need not result in a decision that the ICC may not proceed with the exercise of jurisdiction over the official of the Third State now in the docks of the ICC. For one thing, the conclusion is not inevitable for purposes of the legal question presented to the ICJ. Additionally, just as the ICJ can by law, determine its own jurisdiction,[404] it is similarly the case that it is up to the ICC to determine its own jurisdiction.[405] As courts of coordinate jurisdiction, the one court cannot determine or delimit the jurisdiction of the other.

235. Considerations similar to those engaged in the purpose of article 98(1) are also generally engaged as regards article 19 of the relationship agreement between the ICC and the United Nations. Note, for instance, that not only are all UN officials, by treaty, 'immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity,'[406] but also 'the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.'[407]

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[403] The notion of 'exception' to immunity here must be taken with care. The 'exception' operates only to make cooperation with the ICC a justification for one State's failure to respect immunity that it owes another State. The 'exception' is not necessarily to say that the non-availability of immunity at the ICC is an exception to a general regime of immunity that also applies at the ICC. As customary international law had never developed with respect to immunity before international criminal courts, it is possible to view the non-availability of immunity at the ICC as part of a genre of self-contained norm in which immunity was always absent.

[404] See Statute of the ICJ, article 36(6).

[405] See Rome Statute, article 119(1).

[406] Convention on the Privileges and Immunities of the United Nations, s 18(a).

[407] *Ibid*, s 19.

236. Article 19 of the ICC-UN Relationship Agreement contemplates that the UN shall waive such immunity (where applicable) in the event that the ICC seeks to exercise jurisdiction over an accused that may otherwise enjoy UN personnel immunity, as established primarily in the Convention on the Privileges and Immunities of the United Nations. In some respects, the situation is similar to the State-to-State immunity discussed above. This is because the transfer of an accused — even UN personnel — to the ICC will typically require a State to arrest and detain the person concerned. But since the UN Privileges and Immunities Convention would ordinarily restrain the Requested State from violating the person or premises of the UN staff member, article 19 would thus require the UN to waive the immunity. Again, it is stressed, the immunity that the UN is waiving is not immunity that arises before an international criminal court. It is immunity that a State owes the UN in their relationship, which may stand in the way of that State's confidence in complying promptly with an ICC cooperation request.

237. But, apart from the foregoing considerations, it is good policy, as noted earlier, to make provisions out of an abundance of caution to ensure that there are no uncertainties that may needlessly trouble the ability of the ICC to exercise jurisdiction should the question of immunity even arise, regardless of the speciousness of that question in the end. Though claims of immunity may be legally baseless when presented as obstacles to the Court's work, it is nevertheless much more efficient to deal with any such claim of immunity within the framework of the ICC instruments discussed above. Better so than to encounter delays in the work of the Court that might otherwise result from extended litigation on such questions of immunity, in the absence of any guidance from provisions of the ICC instruments.

E. Historical Evolution of the Norm against Head of State Immunity

238. I shall now review history. Once more, it is recalled that the purpose of the review is to put to rest the AU concern that the trial of Mr Ruto, as the Deputy President of Kenya, might not have been in keeping with customary international law. In proceeding, it needs to be made clear that the felt need to engage in this discussion does not arise from any objection from Mr Ruto himself or from his Defence counsel in those terms. However, since the AU leadership has repeatedly raised the concern, due regard to their anxiety

recommends the wisdom of the discussion, in order to dispel their concern, hopefully once and for all.

239. As indicated earlier, the operation of customary international law on the matter does not even arise, given the explicit provisions of article 27 of the Rome Statute, which Kenya signed and ratified. As well, article 143(4) of the Constitution of Kenya does not recognise any such immunity.

240. Nevertheless, the discussion henceforth will focus on customary international law. For, the AU concerns about immunity are often made by reference to that source of international law, motivating their current apparent desire to push for an amendment to article 27 of the Rome Statute, in order to conform it to that understanding of customary international law. Notably, the gravamen of the matter is encapsulated in the following remarks attributed to a leading African statesman: 'Our position is that certain Articles of the Rome Statute are of grave concern to Africa. In particular, Article 27 which denies immunity to all persons without regard to customary international law, conventions and established norms, must be amended.'[408] It thus becomes necessary to review the development of customary international law from the perspective of the concern so expressed.

241. The review will, among other things, show two things: (i) it should dispel any lingering suspicion that article 27 of the Rome Statute — in its denial of official position immunity at the ICC — is something in the nature of an aberrant legal contraption with the untoward design of targeting African leaders for prosecution at the ICC; and, (ii) it should also make clear that article 27 is quite simply a codification of customary international law.

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242. The review necessary begins with the framework norm that outlines how international custom becomes a source of international law. That framework has now been famously codified in article 38(1)(b) of the Statute of the ICJ which speaks of 'international custom, as evidence of a general practice accepted as law.' In explaining the import of that provision, it is observed in *Oppenheim's* that the 'terms of article 38(1)(b) … make it clear that

[408] See text of President Jonathan's speech at the 11—12 October 2013 Extraordinary Session of the African Union Assembly, *supra*.

there are two essential elements of custom, namely practice and *opinio juris*.'[409] *Opinio juris* is Latin shorthand meaning that a particular practice grew up from the sense that it was required as a matter of legal obligation rather than mere grace. As further observed in *Oppenheim's*, 'This serves to distinguish custom from usage. In everyday life and language the terms are used synonymously, but in the language of the international jurist they have different meanings. A *custom* [in the sense of law] is a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right. On the other hand, a *usage* is a habit of doing certain actions which has grown up without there being the conviction that these actions are, according to international law, obligatory or right. Some conduct of states concerning their international relations may therefore be usual without being the outcome of customary international law.'[410]

243. It is thus that the ICJ held in the *Asylum* case that '[t]he party which relies on custom … must prove that this custom is established in such a manner that it has become binding on the other party … that the rule invoked … is in accordance with a constant and uniform usage, practised by the States in question, and that this usage is the expression of a right appertaining to the State … and a duty incumbent on the territorial State. …'[411]

244. It is, therefore, not enough simply to say that a norm is a rule of customary international law. It is necessary to identify in a specific way particular precedents of the past that not only established the practice in question, but also shows that the practice had developed out of a feeling of compliance with the law as opposed to mere grace.

245. In order, then, to consider that there is immunity for Heads of State and other State officials in cases before the ICC, as a matter of 'international custom, as evidence of a general practice accepted as law,' as it is put in article 38(1)(b) of the Statute of the ICJ, it is necessary to review history. That is the best way of seeing the extent to which the proponents of immunity can 'prove

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[409] R Jennings and A Watts (ed) *Oppenheim's International Law*, Vol 1, 9th edn, (1996) Introduction and Part 1, at p 27.
[410] *Ibid*, emphasis added.
[411] *Ibid*.

that this custom is established in such a manner that it has become binding' as a rule of law on the subjects of international law.

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246. Remarkably, the historical traces of the norm that forbids sovereign immunity before international criminal courts coincide with the germination of the idea of individual criminal responsibility in international law. They both go back, at least, as early as the Treaty of Versailles of 1919, following the First World War. As will become plain presently, none of this had anything to do with a case against an African leader. In its article 227, the States Parties 'publicly arraign[ed] William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.' That agreement also anticipated the creation of a 'special tribunal … to try the accused … .'[412] That marked the international community's earliest contemplation of an international criminal court.

247. Article 227 of the Versailles Treaty was no happenstance. It was the culmination of what apparently was a very spirited debate and deliberation at the Paris Peace Conference of 1919. Specifically, the question of immunity was squarely within the purview of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. They were the proponents of article 227. US Secretary of State Robert Lansing (the Chairman of the Commission) objected on behalf of the US delegation which he headed. Head of State immunity was a specific ground of his objection.[413]

248. Against the background of the American concern (which eventually became an entrenched objection) on grounds of immunity, it is notable that the British delegation to the Commission squarely addressed the matter. It may be worth noting that the British delegation included both of their most senior law officers of the day — the Attorney-General (The Rt Hon Sir Gordon Hewart KC) and the Solicitor-General (The Rt Hon Sir Ernest Pollock KC).[414] They both went on later to become Lord Hewart and Viscount Hanworth,

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[412] See the Treaty of Versailles, 28 June 1919, article 227.

[413] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 29 March 1919, published in the (1920) 14 *AJIL* 95, at pp 135 — 136.

[414] See US Department of State, *Papers relating to the Foreign Relations of the United States—Paris Peace Conference 1919*, vol III, Minutes of the Plenary Sessions of the Preliminary Peace Conference, 155, at p 204.

respectively, the Lord Chief Justice of England and the Master of the Rolls.[415] Apart from the professional seniority that Hewart and Pollock brought to bear, a further need to note the importance of their role in the British delegation is because it is generally accepted, for purposes of formation of customary international law, that the opinions of governments' legal advisers are part of what inform state practice in relation to their particular States.[416] In their memorandum to the Commission on Responsibility, they considered that the plea of sovereign immunity 'may' be raised as a difficult question of law standing in the way of the ex-Kaiser's prosecution. But they immediately rejoined that such immunity had 'never' been discussed in the context of an international criminal tribunal. As they put it in the relevant part:

> So far as the share of the ex-Kaiser in the authorship of the war is concerned, difficult questions of law and of fact may be raised. It might, for example, be urged that the ex-Kaiser, being a Sovereign at the time when his responsibility as an author of the war was incurred and would be laid as a charge against him, was and must remain exempt from the jurisdiction of any Tribunal. *The question of the immunity of a Sovereign from the jurisdiction of a foreign Criminal Court* has rarely been discussed in modern times, and *never in circumstances, similar to those in which it is suggested that it might be raised to-day*.[417] [Emphasis added.]

249. It is arguable that this memorandum may not have ruled out that what was in the minds of its authors was also the Kaiser's trial as a serving sovereign — 'being a Sovereign at the time when his responsibility as an author of the war was incurred *and would be laid as a charge against him*.' [Emphasis added.] Granted, the drafters of the British memo and of article 227 had clearly written in the terms of 'ex-Kaiser' and 'former German Emperor.' Indeed, the memorandum was deposited with the Commission on Responsibility,[418] when William II had already abdicated the German and

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[415] See the *Oxford Dictionary of National Biographies* (online edition).
[416] See Malcolm Shaw, *International Law*, 6th edn (2008), at p 82.
[417] The Memorandum submitted by the British Delegates, Annex IV to the Minutes of Second Meeting, p 28, available at Schabas blog <http://humanrightsdoctorate.blogspot.nl/2015/08/the-first-statute-of-international.html> [accessed 12 February 2016].
[418] The British Memo was deposited with the Commission on 13 February 1919. See *ibid*, at p 27.

Prussian thrones and was living in The Netherlands in asylum.[419] Still, those factors do not preclude an interpretation to the effect that the drafters of the British memo may not have ruled out his trial even as a persisting sovereign. For, it is not unknown for claims to sovereign title to be asserted from exile out of an arguable theory of right. Also, exiled sovereigns may be restored to active reign. Those are speculations, of course, and there is no evidence to show those to be what the memo's authors actually had in mind. But these considerations only go to show theoretical possibilities that are consistent with both the words of the British memo; and, more importantly, the fervour with which the British delegation seemed to have pressed the prosecution of William II. And, as will be seen below, the recurrence of this fervour at the end of the Second World War retroactively bears out the proposition that the trial of the Kaiser, even as a reigning sovereign, was not ruled out in 1919.

250. That the authors of the British memo saw no overriding difficulty with the question of sovereign immunity before the international tribunal was all too clear in their arduous determination to press ahead with the proposal to indict and prosecute the ex-Kaiser. As they insisted, without his prosecution, the 'vindication of the principles of International Law and the laws of humanity, which he has violated' would 'be incomplete,' 'if other offenders less culpable were punished.' This rationale for prosecuting the ex-Kaiser would seem to have precluded immunity for him even as a serving Head of State. For, where the aim is to vindicate the principles of international law and the laws of humanity which he violated, that vindication would be rendered nugatory if he was spared prosecution on any theory of immunity, such as immunity as a serving Head of State. What is more, they argued, failure to try him may even prejudice the trial of his subordinates, should they raise the defence of superior orders — again, a prosecution rationale that would preclude the theory of immunity on account of incumbency in power. We may look at the rationales, as they were put:

> First of all, we are of the opinion that it is desirable to take proceedings against the German ex-Kaiser.
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> We have already referred to the question of his being proceeded against as "the author of the war" and have indicated certain difficulties. In view,

[419] William II abdicated on 9 November 1918: see Michael Graham Balfour, 'William II: Emperor of Germany' in *Encyclopædia Brittanica* <www.britannica.com/biography/William-II-emperor-of-Germany> [accessed 12 February 2016].

> however, of the grave charges which may be preferred and established against the ex-Kaiser, the vindication of the principles of International Law and the laws of humanity, which he has violated, would be incomplete if he were not brought to trial, and if other offenders less culpable were punished. Moreover, the trial of other offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a Sovereign against whom no steps had been taken or were being taken.[420]

251. The American members of the Commission were not persuaded to withdraw their objection as founded on sovereign immunity.[421] The Japanese delegation agreed in principle that crimes had been committed by 'the enemy,' for which the responsibility rested 'in high places.'[422] They nevertheless entered a reservation against the prosecution by a victorious side, especially against defendants 'including the heads of states.'[423] Their reservations, however, were not clearly framed as a matter of sovereign immunity.

252. In the end, the position of the majority[424] of the Commission was clear and emphatic in rejecting the American and Japanese positions. That clarity is as evident in the report of the Commission as it is in the eventual text of article 227 (already noted above). The relevant text of the Commission's report reads as follows:

> ... It is quite clear from the information now before the Commission that there are grave charges which must be brought and investigated by a court against a number of persons.
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> In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, *however exalted*, should *in any circumstances* protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. *This extends even to the case of heads of states.* An argument has been raised to the contrary based upon the alleged immunity, and in particular *the alleged inviolability, of a sovereign of a state*. But this privilege, where it is

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[420] The Memorandum submitted by the British Delegates, *supra*, at p 29.
[421] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 29 March 1919, published in the (1920) 14 *AJIL* 95, at pp 135 — 136.
[422] *Ibid*, at p 151.
[423] *Ibid*, at p 152.
[424] In addition to Japan and the United States, the other States represented in the Commission were Belgium, France, Greece, Italy, Poland, Rumania, Serbia and the United Kingdom: see *ibid*, at pp 96 — 97.

> recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, *a sovereign is exempt from being prosecuted in a national court of his own country* the position from an international point of view is quite different.[****]
>
> We have later on in our Report proposed the establishment of a high tribunal composed of judges drawn from many nations, and included the possibility of the trial before that tribunal of a former head of a state with the consent of that state itself secured by articles in the Treaty of Peace. If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.[425]

253. It may be noted at this juncture that, just as the American objection on grounds of immunity had drawn no distinction that permitted the prosecution of a *former* Head of State, the insistence by the Commission majority that there was no such immunity in the circumstances drew no distinction that recognised immunity for a *serving* Head of State. Indeed, the general strain of the majority's contention, as seen in the first and second paragraphs above, left no room for such a distinction. What is more, their insistence that there was no immunity by reason of rank 'however exalted' and 'in any circumstances' and 'even to the case of heads of states' is enough to preclude any such distinction.

254. Consistent with the British position, the Commission continued as follows (a virtual repetition of the relevant part of the British memo): 'In view of the grave charges which may be preferred against — to take one case — the ex-Kaiser — the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished. Moreover, the trial of the offenders might be seriously prejudiced if

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**** To the extent that it is correct to understand the Commission as saying that sovereign immunity does not avail in an international criminal tribunal properly constituted, that position is consistent with the understanding expressed by the International Court of Justice in the *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (2002) ICJ Reports 3, at para 61.

425 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 29 March 1919, published in the (1920) 14 *AJIL* 95, at p 116, emphasis added.

they attempted and were able to plead the superior orders of a sovereign against whom no steps had been or were being taken.'[426]

255. In conclusion, the Commission declared as follows: 'All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.'[427]

256. In their own national report on the bill for the ratification of the Versailles Treaty, the French parliamentary commission declared that 'among the responsibilities incurred, none is higher and more grave than that of the German Emperor. He should be judicially prosecuted for having violated the laws and customs of war. "Supreme chief of the armed forces on land and sea", the "lord of war" not only knew, but tolerated and encouraged, the crimes which his troops committed on land and sea. History will demand that he be held responsible for these acts.'[428]

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257. It may be noted at this juncture that the Commission on Responsibility had mentioned, in their report, their proposal about 'the establishment of a high tribunal composed of judges drawn from many nations, and included the possibility of the trial before that tribunal of a former head of a state *with the consent of that state itself secured by articles in the Treaty of Peace*.' [Emphasis added.] Indeed, the Treaty of Versailles, with article 227 in it, was signed by Germany. But a vigorous protest against a document that the Germans called the 'Diktat',[429] even culminating in mass resignation of the post-war German cabinet, had preceded their signing of the Treaty.[430] Some of the German sentiments are memorably reflected in Count von Brockdorff-Rantzau's[431]

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[426] *Ibid*, at p 117.
[427] *Ibid*, at p 117.
[428] See James Garner, 'Punishment of Offenders against the Laws and Customs of Wars' (1920) 14 *AJIL* 70, at p 89.
[429] See Louise Chipley Slavicek, *The Treaty of Versailles* (2010) at p 70. See also William Young, *German Diplomatic Relations 1871-1945* (2006) at p 137.
[430] See Slavicek, *supra*, at pp 66-73. See also Young, *supra*, at pp 135-137.
[431] He was the German Foreign Minister and the leader of its delegation at the Paris Peace conference: see, for instance, <http://www.britannica.com/biography/Ulrich-Graf-von-Brockdorff-Rantzau>.

descriptions of the treaty as entailing 'a peace of violence and not of justice'[432] and that the 'fat volume was quite unnecessary. They could have expressed the whole thing more simply in one clause — "Germany surrenders all claims to its existence."'[433]

258. But the Allied and Associated Powers remained largely unimpressed. In a lengthy reply, they insisted, among other things, that '[t]he protest of the German Delegation shows that they utterly fail to understand the position in which Germany stands to-day';[434] that 'the war which began on August 1st, 1914, was the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilized, has ever consciously committed';[435] that 'Germany's responsibility, however, is not confined to having planned and started the war. She is no less responsible for the savage and inhumane manner in which it was conducted';[436] that '[j]ustice, therefore, is *the only possible basis* for the settlement of the accounts of this terrible war';[437] that 'those individuals who are most clearly responsible for German aggression and for those acts of barbarism and inhumanity which have disgraced the German conduct of the war, must be handed over to a justice which has not been meted out to them at home';[438] that '[i]f these things are hardships for Germany, they are hardships which Germany has brought upon herself';[439] and, that 'if mankind is to be lifted out of the belief that war for selfish ends is legitimate to any State, if the old era is to be left behind and *nations as well as individuals are to be brought beneath the reign of law*, even if there is to be early reconciliation and appeasement, it will be because those responsible for concluding the war have had the courage to see that justice is not deflected for the sake of convenient peace.' [440]

259. To a large extent, the German delegation had anticipated the foregoing verbal pushback, as evident in Brockdorff-Rantzau's earlier speech during the

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[432] See HMSO, Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, dated 16 June 1919, at p 2.
[433] David Woodward, *World War I Almanac* (2009), at p 438.
[434] See HMSO, Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, *supra*, at p 2.
[435] *Ibid*.
[436] *Ibid*, at p 3.
[437] *Ibid*, at p 5, emphasis added.
[438] *Ibid*.
[439] *Ibid*.
[440] *Ibid*, emphasis added.

presentation of the conditions of peace to the German delegates on 7 May 1919. Among other things, he insisted: 'We are required to admit that we alone are war guilty; such an admission on my lips would be a lie. We are far from seeking to exonerate Germany from all responsibility for the fact that this world war broke out and was waged as it was. … [B]ut we emphatically combat the idea that Germany, whose people were convinced that they were waging a defensive war, should alone be laden with the guilt.'[441] Returning a little later to the methods employed in the war, he maintained as follows: 'Moreover, as regards the methods of conducting the war, Germany was not alone at fault. Every European nation knows of deeds and persons on whose memory their best citizens are reluctant to dwell. … Crimes in war may not be excusable, but they are committed in the struggle for victory, in anxiety to preserve national existence, in a heat of passion which blunts the conscience of nations. The hundreds of thousands of non-combatants who have perished, since the 11th November through the blockade were killed with cold deliberation, after victory had been won and assured to our adversaries. Think of that, when you speak of guilt and atonement.'[442]

260. And back to the Allied reply seen earlier. With specific reference to the trial of persons chargeable before the proposed international court, the Allied and Associated Powers elaborated as follows:

> The Allied and Associated Powers have given consideration to the observations of the German Delegation in regard to the trial of those chargeable with grave offences against international morality, the sanctity of treaties and the most essential rules of justice. They must repeat what they have said in the letter covering this Memorandum, that they regard this war as a crime deliberately plotted against the life and liberties of the peoples of Europe. It is a war which has brought death and mutilation to millions and has left all Europe in terrible suffering. Starvation, unemployment, disease stalk across that continent from end to end, and for decades its peoples will groan under the burdens and disorganisation the war has caused. They therefore regard the punishment of those responsible for bringing these calamities on the human race as essential on the score of justice.
>
> They think it not less necessary as a deterrent to others who, at some later date, may be tempted to follow their example. The present Treaty is

[441] US Department of State, *Papers relating to the Foreign Relations of the United States—Paris Peace Conference 1919*, Vol III, Minutes of the Plenary Sessions of the Peace Congress, 413, at p 417.
[442] *Ibid*, at p 418.

> intended to mark a departure from the traditions and practices of earlier settlements which have been singularly inadequate in preventing the renewal of war. The Allied and Associated Powers indeed consider that the trial and punishment of those proved most responsible for the crimes and inhuman acts committed in connection with a war of aggression, is *inseparable from the establishment of that reign of law among nations* which it was the agreed object of the peace to set up.'[443]

261. To set out these exchanges as I have done above should not be seen as gratuitous rehashing of unpleasant history. It is an essential part of tracing faithfully and fully the evolution of the current norm of individual penal responsibility, with its attendant proscription of official position immunity, in international criminal law. These were robust statements of state-practice (with indications of *opinio juris*) by the States concerned, in the evolution of customary international law norms, specifically as concerns prohibition of official position immunity. The evolution had nothing at all to do with targeting African leaders for eventual prosecution at the ICC. In that connection, the exchange recalled above simply raises the question whether it could be said that Germany was left with any real choice than to accept article 227 of the Treaty of Versailles (as with any of the Treaty's other provisions that it eventually accepted in spite of initial vigorous protests). In other words, could it really be said that they had 'waived' the immunity of their former Head of State, even assuming that there was any such immunity to be waived? It is only a question.

262. Suffice it to say, in any event, that even assuming the consent of Germany to article 227 as deriving from free choice, there still remains the question whether such consent — notably a singular event — to the prosecution of their former Head of State was a development in favour of, or against, the historical development of the current norm concerning the question of immunity of Heads of State before an international criminal court, from the point of view of state practice. Considering in particular that the US had clearly objected to prosecuting the ex-Kaiser, could the German consent then not be taken as concurring with the majority of the Commission who appeared (from the exchanges recalled above among other considerations) clearly determined to reject the plea of immunity? It is recalled, once more, that the Allied and Associated Powers perceived the ex-Kaiser's prosecution

[443] HMSO, Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, *supra*, at p 30, emphasis added.

as 'inseparable from the establishment of [the] reign of law among nations'; in the sense that 'the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished.' Again, it is noted that these were statements of state practice in the creation of customary international law that started at a time when much of Africa was labouring under colonialism.

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263. The international tribunal contemplated by article 227 of the Versailles Treaty was not created in the end, due to international politics of the time.[444] Nevertheless, that provision and the memorandum explaining its origins marked two things in the annals of customary international law. First, it marked an early trend in international law's march in the direction of individual criminal responsibility. And it also marked the first step towards the development of a customary international law norm that rejects official position immunity — even for Heads of State — before international criminal courts. At any rate, the majority of the international community — to the extent represented in the most important international get-together of the period, to stitch up a global wound — had an opportunity to affirm uniformly (as a salutary part of the operation) the idea of Head of State immunity to the jurisdiction of an international criminal court. But they declined to do so. On the contrary, they positively rejected the idea in an emphatic way.

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264. From its vexed origins in 1919, the rejection of official position immunity (even for Heads of State) took a firmer foothold as a norm in 1945, after World War II. It was quite an irony that the Americans were, this time around, at the vanguard of the rejection.

265. In both the instruments establishing the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East in Tokyo, it was made clear that the official positions of the defendants, whether as Heads of State or as responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating

[444] See William Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (2010), at p 3.

punishment.[445] The Charter of the Tokyo Tribunal, in particular, left no doubt that the official position of the defendant 'at any time' did not afford immunity.[446]

266. Indeed, the US delegation championed this rejection in more ways than one. Their robust rejection of the plea will be considered in greater detail presently. But, for now, it may immediately be noted that the US played a leading role in the prosecution of the first Head of State and Head of Government in modern history. Notably, Grand Admiral Karl Dönitz was among the high officials of the Third Reich who were tried by the Nuremberg Tribunal. He had succeeded Hitler as Head of State and President of Germany upon Hitler's suicide.[447] Dönitz was convicted at the end of his trial[448] and sentenced to 10 years imprisonment.[449] He was, thus, the first Head of State who was tried by an international criminal court. Similarly, during World War II, Hideki Tojo was the Prime Minister[450] and Head of Government of Japan.[451] After the war, he was tried for war crimes before the Tokyo Tribunal, found guilty,[452] and sentenced to death by hanging.[453] These trials, it bears repeating, were conducted on the basis of international legal texts that provided that official capacity — including as Head of State — did not afford immunity from prosecution before the international criminal courts that tried them.

267. We may now examine in greater detail the particular role that the Americans played in the prohibition of the plea of official immunity. As said, it was a deliberate and sharp contrast, a clear reversal, with their position in relation to article 227 of the Versailles Treaty and the negotiations that led up to it. In 1919, US Secretary of State Lansing (and the leader of the US delegation to the Commission on Responsibility) had objected to the trial of the ex-Kaiser on grounds of Head of State immunity. Notably, he had

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[445] See Charter of the International Military Tribunal in Nuremberg, article 7.
[446] See Charter of the International Military Tribunal for the Far East, article 6.
[447] *USA, France, UK & USSR v Göring & ors* [1947] 1 Trial of the Major War Criminals before the International Military Tribunal, at p 310.
[448] *Ibid*, at p 315.
[449] *Ibid*, at p 365.
[450] *The Tokyo Major War Crimes Trial*, the Records of the International Military Tribunal for the Far East (R John Pritchard, ed) vol 103, transcript at p 49,844.
[451] *Ibid*, at p 49,845.
[452] *Ibid*, at p 49,848.
[453] *Ibid*, at p 49,857.

specifically invoked in aid the decision of the US Supreme Court in *The Schooner Exchange*,[454] classically credited with the development of the plea of sovereign immunity in international law.

268. But, in his own turn as the US representative at the London Conference of 1945, Justice Robert H Jackson (on secondment from the US Supreme Court) adopted a wholly opposite approach. Quite significantly, he had submitted an eight-page report to President Truman on 6 June 1945. Presumably looking past *The Schooner Exchange*[455] judgment, Jackson contended it to be inadmissible at the Nuremberg trials 'the obsolete doctrine that a head of state is immune from legal liability.' And, he continued, 'There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. *We do not accept the paradox that legal responsibility should be the least where power is the greatest.* We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still "under God and the law".'[456]

269. It is important to keep in mind that it was to his own Head of State that Justice Jackson had directly made these observations, repudiating Head of State immunity in the terms that he did. It would, of course, be unwise to overwork the value of Jackson's allusion to Sir Edward Coke's own intrepid determination to genuflect his own Head of State (King James I) to the rule of law in the case of *Prohibitions del Roy*.[457]

270. But, more to the point of generating emerging state practice that formed a rule of customary international law is that in an annotation to Justice Jackson's 6 June 1945 report to President Truman, it is indicated that the

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[454] *The Schooner Exchange v McFaddon*, 11 US 116 (1812).
[455] Jackson must be presumed to be aware of *The Schooner Exchange*. For, not only was he a former US Solicitor-General and a former US Attorney-General, but he was also (at the time of his functions as the US representative at the London Conference and US Chief of Counsel in Nuremberg) a justice of the same US Supreme Court that had decided the famous *Schooner Exchange* case.
[456] See 'Report to the President by Mr Justice Jackson, June 6, 1945' in US Department of State, *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials* (released February 1949) 42, at pp 46 — 47, emphasis added.
[457] *Prohibitions del Roy*, *supra*.

report 'was released to the press by the White House with a statement of the President's approval and was widely published through-out Europe as well as in the United States. This report was accepted by other governments as an official statement of the position of the United States and as such was placed before all of the delegations to the London Conference.'[458] Indeed, in a press conference of the very next day, 7 June 1945, President Truman expressed his 'entire agreement' with the Jackson report. This was in response to the question: 'Mr President, are you in complete agreement with Justice Jackson's report?'[459] And in that lies an important evidence of state practice from a powerful State, setting off customary international law along a course that rejects the plea of Head of State immunity before international criminal courts.

271. The foregoing was some of the relevant background to the repeated insistence in the American draft text for the Nuremberg Charter 'that any defense based upon the fact that the accused *is or was* the head or purported head or other principal official of a state is legally inadmissible, and will not be entertained.'[460] With the Soviet proposal of an equivalent provision,[461] the drafting subcommittee reported a text[462] that eventually settled in the final form of article 7 of the Nuremberg Charter, stated as follows: 'The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment,' following the deletion of the word 'various' in front of 'departments' appearing in an intermediate draft proposed by the British delegation.[463]

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[458] 'Report to the President by Mr Justice Jackson, June 6, 1945,' *supra*, *at* p 42.
[459] Harry S Truman Library and Museum, '52. President's News Conference – 7 June 1945,' available at <http://trumanlibrary.org/publicpapers/viewpapers.php?pid=59>.
[460] US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, *supra*, at pp 24, 33, 58, 124, and 180, emphasis added.
[461] The text was as follows: 'The official position of persons guilty of war crimes, their position as heads of states or as heads of various departments shall not be considered as freeing them from or in mitigation of their responsibility': *ibid*, at p 180.
[462] '7. The official position of defendants, whether as heads of State or responsible officials in various Departments, shall not be considered as freeing them from responsibility or mitigating punishment': *ibid*, at p 197.
[463] The British text read as follows: '7. The official position of Defendants, whether as heads of State or responsible officials in various Departments, shall not be considered as freeing them from responsibility or mitigating punishment': *ibid*, at p 205.

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272. Before proceeding, it may be helpful to return briefly to the judgment of the US Supreme Court in *The Schooner Exchange*. As mentioned earlier, Lansing (as the US representative on the Paris Peace Conference Commission on Responsibility) had relied on that case-law to object to the prosecution of the German Head of State during World War I. It may be recalled that in rejecting Lansing's objection, the other members of the Commission had expressed the view that 'this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.' [464]

273. And, as also mentioned earlier, Jackson (as the US representative at the London Conference) had insisted that the German Head of State during World War II must face prosecution and that the plea of Head of State immunity must specifically remain unavailable, being a 'relic' of a bygone era, when the King was above the law and could do no wrong.

274. This development (comprising the US reversal of position) may be looked at from three angles, none of which supports the proposition that customary international law recognises official position immunity (even for Heads of State) for purposes of trials before international criminal courts. First, the plea did not take hold in 1919, notwithstanding that the ex-Kaiser was not tried due to The Netherland's refusal to surrender him for trial. The American delegation had objected to the trial on grounds of Head of State immunity. The majority disagreed with the American objection. Hence, the plea did not take hold. Second, the 1945 rejection of immunity was a definitive confirmation of the plea's 1919 rejection by the majority of the parties to the Versailles Treaty, having now enlisted the US (the main 1919 hold-out) as new convert and with Japan (the second 1919 hold-out) having members of its Government and its Head of Government subjected to prosecutions in the Far East. And, third, even if the US objection in 1919 permitted the proposition of vestigial sustainability of the plea, its eventual rejection in 1945 marked, at the very least, a new point of departure for the

[464] See (1920) 14 *AJIL* 95, *supra*, at p 116.

development of customary international law, along the course of a new norm that rejects the plea's inadmissibility before an international criminal court.

275. Now, beyond the bottom-line shared by Jackson (in 1945) and the majority of the Commission on Responsibility (in 1919), both of which had repudiated Lansing's 1919 objection, there is also a seeming commonality of results. This is to the extent that both Jackson and the Commission (of 1919) were not persuaded that *The Schooner Exchange* posed authoritative obstruction to the prosecution of a Head of State before an international criminal court.

276. To begin with, from the perspective of 'international custom, as evidence of a general practice accepted as law,' the facts of *The Schooner Exchange* did not involve the question of immunity from a trial before an international criminal court. It only concerned the question of immunity before the District Court of the United States for the District of Pennsylvania. Thus, as a matter of *ratio decidendi*, the rule of immunity generated in *The Schooner Exchange* quite simply does not apply in the circumstances of trial of an international crime before an international criminal court. Hence, the majority of the Commission on Responsibility was correct in their view of the irrelevance of *The Schooner Exchange*.

277. The foregoing distinguishment of the case of *The Schooner Exchange* is amply borne out by the pronouncements of the Permanent Court of International Justice in *The Lotus* case[465] in 1927. For present purposes, the value of *The Lotus* case is simply for the lesson it teaches about how customary international law develops from the practice of states. It teaches the need to avoid mixing things up. A norm that has developed in respect of a particular problem may not casually be seen as applying to a really different situation, even though the two situations may look alike at an outer level of abstraction.

278. France had protested Turkey's exercise of criminal jurisdiction over Lieutenant Demons, a French citizen, for a maritime collision that occurred outside the territory of Turkey, involving boats of both nations. The PCIJ considered that the case cast in relief the 'very nature and existing conditions

[465] *The Case of the SS 'Lotus'* (1927) PCIJ Judgments, Series A, No 10.

of international law.' [466] In the end, the PCIJ held, among other things, that there is 'the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons. *And moreover ... this must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear.* ... The Court therefore must, in any event, ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts *to a situation uniting the circumstances of the present case*.'[467]

279. The PCIJ's requirement of 'a close analogy' and 'a situation uniting the circumstances of the present case', for the application of a rule of customary international law, recalls to service the Speedo® illustration given earlier. The same man in the same attire. Yet, different settings (the beach and the courtroom) that engage the question of propriety and custom differently — in a very radical way.

280. On the authority of *The Lotus* case, which requires 'a close analogy' between the facts and circumstances of the case at hand and those of a historical case that inspired the legal customary norm urged as applicable to the case at hand, it then stands to reason that the plea of immunity of Heads of State or of other State officials before an international criminal court, may not, as a matter of customary international law, readily derive from *The Schooner Exchange*. As the precedent involved the question of immunity from the jurisdiction of the US Federal Court for the District of Pennsylvania, *The Schooner Exchange* did not offer 'a close analogy to the case under consideration' before an international criminal court. There is no 'situation uniting the circumstances'.

281. A further consideration as regards the union of views between Justice Jackson in 1945 and the majority of the Commission on Responsibility in 1919, to the effect that the rule in *The Schooner Exchange* presented no obstacle to the prosecution of the ex-Kaiser, results from the fact that the pronouncements of Chief Justice Marshall in *The Schooner Exchange* do not readily accommodate

[466] *Ibid*, at p 18.
[467] *Ibid*, at p 21, emphasis added.

the view that pleas of sovereign immunity derived from something other than 'practical expedience in municipal law,' as the Commission on Responsibility put it. Notably, in 1812 when *The Schooner Exchange* was decided, the general rule was that sovereign heads of many realms could not be sued in the courts of their own countries. As noted earlier, it made sense then that their courts should not exercise jurisdiction over foreign sovereigns. For, that would give the sovereign of the forum *imperium* over the foreign sovereign. This is one sense in which it could be said that the privilege of immunity for foreign sovereigns in forum courts at the national level derived from a historical 'relic,' as Jackson described it. That anachronism, in its time, had the sensible effect of preventing the sovereign of the forum from supposing dominium over foreign sovereigns. That was the 'practical expedience in municipal law,' as the majority of the Commission on Responsibility described it in 1919. But, by 1945, as Jackson observed, that situation had either changed or started changing in many countries. This is in the sense that the sovereign could be sued in his or her own jurisdiction. It thus rendered 'obsolete,' as Jackson saw it, the need to maintain the derivative rule of immunity even at the national level,[468] let alone extend it to trials before an international criminal tribunal.

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282. The Americans were not alone in the repudiation of the plea of official position immunity at the London Conference of 1945. Together with France, the Soviet Union, the United Kingdom and the United States who were the main parties to the London Agreement (which adopted the Nuremberg Charter), the following governments of the 'United Nations' also expressed their adherence to the Agreement: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia.[469]

283. In addition to the American role, that of the post-war British Government also deserves a closer look, as regards the development of a

[468] It may not be insignificant that article II(4)(a) of the Control Council Law No 10 also prohibited official position immunity in proceedings before national or occupation courts exercising jurisdiction in Germany, pursuant to article 6 of the London Agreement of 8 August 1945.
[469] See *USA, France, UK & USSR v Göring & ors* [1947] 1 Trial of the Major War Criminals before the International Military Tribunal, at p 9.

customary international law norm that repudiated the plea of official position immunity in the Nuremberg and related prosecutions. The basic premise of the British Government's position was the assumption 'that it [was] beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into Allied hands, suffer the penalty of death for their conduct leading up to the war and for the wickedness which they have either themselves perpetrated or have authorized in the conduct of the war. *It would be manifestly impossible to punish war criminals of a lower grade by a capital sentence pronounced by a Military Court unless the ringleaders are dealt with with equal severity*.'[470] Here again, a statement of state practice (indicative of *opinio juris*) that had nothing to do with creating a customary international law norm aimed at targeting African leaders.

284. Looking past the reference to 'the penalty of death' and the 'preferred course'[471] for arriving at it (both of which would be considered awkward by today's sensibilities), it is more important to note that the same attitude of accountability regardless of official position had underlain the essential position of the British Government at the Paris Peace Conference in 1919.

285. In that regard, it is especially interesting to note that it was on 23 April 1945 that Sir Alexander Cadogan[472] delivered to the White House Counsel at the time, Judge Samuel Rosenman,[473] the *aide-mémoire* containing these ruminations. The significance of that circumstance was that Hitler was still alive at the time, as far as anyone was aware, and remained Germany's Head of State. [He is generally believed to have died on 30 April 1945.[474]] Yet, 'a capital sentence pronounced by a Military Court' was being contemplated for him — not an African leader — at the time, though 'execution without trial [was] the preferable course.' There was no question of Head of State immunity at all. It was thus not surprising that when the British abandoned

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[470] Aide-Mémoire from the United Kingdom, dated 23 April 1945, in US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, *supra*, at p 18, emphasis added.

[471] Regarding the manner of arriving at this penalty of death, the British Government had argued with vigour that summary 'execution without trial is the preferable course' — rather than trial before 'some form of tribunal claiming to exercise judicial functions': see *ibid*.

[472] Cadogan was the incumbent Permanent Secretary at the UK Foreign Office.

[473] US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, *supra*, at p 18.

[474] See John Lucas, 'Adolf Hitler: Dictator of Germany' in *Encyclopædia Britannica*, available at <http://www.britannica.com/biography/Adolf-Hitler>.

their idea of the 'preferable course,' they agreed that the American proposal was a good basis to proceed with the London Conference of 1945.[475] It was on that basis that the Nuremberg Charter was concluded; with article 7 excluding the plea of official position immunity in the following terms (as seen earlier): 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.'

286. It must be stressed that there are no words of limitation in article 7 of the Nuremberg Charter, to the effect that any immunity had been reserved for serving Heads of State or senior State officials. Immunity by reason of official position was precluded *simpliciter*.

287. In their judgment, the International Military Tribunal reiterated the absence of immunity for Heads of State. They put it this way: 'The principle of international law, which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as Criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. … He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.'[476] Clearly, the pronouncement was broad enough to exclude both the plea of official position immunity as well as the defence of act of state.

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288. A major event in the history of customary international law as regards not only individual criminal responsibility, but also the rejection of immunity for State officials including Heads of State, was the UN's approval of the principles of law distilled from both the Nuremberg Charter and judgment of the Nuremberg Tribunal. In their resolution 95(I) adopted on 11 December 1946, the UN General Assembly affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal. The UN had 55 member States at the time.[477] And the UN

[475] US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, supra, at p 41.
[476] *Ibid*, at p 223.
[477] They were: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia,

General Assembly tasked the International Law Commission to formulate the Nuremberg Principles 'as a matter of primary importance.'[478] During their second session in 1950, the ILC submitted to the UN General Assembly the Commission's report covering the work of that session. Included in the report were the Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, including commentaries.

289. Nuremberg Principle III appears as follows: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'[479] The development did not have African leaders in mind. It had Nuremberg in mind.

290. From then on, every international law basic document establishing an international criminal tribunal — from the ICTY,[480] to the ICTR,[481] to the SCSL,[482] to the ICC[483] — has repeatedly restated the Third Nuremberg

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Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, Siam, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela, and Yugoslavia: see UN, Growth in the United Nations membership, 1945 — present, available at <www.un.org/en/members/growth.shtml>.

[478] See UN GA resolution 95(I) adopted on 11 December 1946.

[479] See Yearbook of the International Law Commission, 1950, vol. II, at p 375.

[480] See the Statute of the International Criminal Tribunal for former Yugoslavia, article 7(2): 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[481] See the Statute of the International Criminal Tribunal for Rwanda, article 6(2): 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[482] See Statute of the Special Tribunal for Sierra Leone, article 6(2): 'The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[483] See article 27 of the Rome Statute: '1.This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.¶ 2. Immunities or special procedural rules which may attach to the official capacity of a person,

Principle. The repetition thus firmly established as a norm of customary international law, the exclusion of the plea of official position immunity including for Heads of State.

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291. It should then be clear from the foregoing review — which had also been outlined by a Pre-Trial Chamber to a similar effect[484] — that the idea of subjecting high officials of States to trials before international criminal courts, as codified in article 27 of the Rome Statute, was not a new-fangled idea. It was not contrived for the purpose of belittling the dignity of African Heads of State and Government. The modern practice clearly derives from the Third Nuremberg Principle, derived in turn from the post-war prosecution of high officials, including Heads of State or Government numbered among the most powerful States in Europe and Asia in the era of World War II.

292. It perhaps bears repeating what was stressed earlier that there are no words of limitation in the Third Nuremberg Principle, to the effect that any immunity had been reserved for serving Heads of State and senior State officials. Official position immunity is simply stated as unavailable, without regard to incumbency status.

293. As for the specific practice of investigating and prosecuting serving Presidents and Heads of State — a development directly linked to the exclusion of immunity for them — it bears keeping in mind that, in more recent times, President Slobodan Milošević of the Federal Republic of Yugoslavia was indicted at the ICTY.[485] He was European. But the trend did not stop with him. His indictment as a serving Head of State had set the precedent for the indictment of Charles Taylor when in power as the President of Liberia.[486]

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whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

[484] See *Prosecutor v Al Bashir (Decision pursuant to Article 87(7) …)* dated 12 December 2011, ICC-02/05-01/09-139-Corr [Pre-Trial Chamber I], at paras 13 *et seq*.

[485] Mr Milošević was the President of the Federal Republic of Yugoslavia from 15 July 1997 to 6 October 2000. The initial ICTY indictment against him (concerning the Kosovo case) was confirmed on 24 May 1999 and made public on 27 May 1999. He was then still in office as the Head of State of the Federal Republic of Yugoslavia. See <www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf>.

[486] See <www.rscsl.org/Taylor.html>.

294. There is, therefore, little or no room for the argument that customary international law recognises immunity for a Head of State or senior official of a State — whether in or out of office. The review reveals, in particular, that the continuation of the case against Mr Ruto, after he became the Deputy President of Kenya (in a case that was on-going before his election into office) could not possibly be seen in good faith as something of 'targeting' African leaders, in a manner that is not in keeping with any norm of immunity recognised by customary international law.

F. Excusal from Continuous Presence at Trial

295. It is a different matter, of course, for the AU to urge 'the ICC to give the elected leaders of Kenya the space to discharge their mandate in meeting the aspirations and needs of their people.'[487] That, indeed, is a perfectly legitimate urge. But, it does not require immunity from prosecution for the duration of the official's tenure of office. All that is required is for the Trial Chamber seised of the trial to consider the indulgence of excusal from continuous presence at trial, pursuant to rule 134*quater* of the Court's Rules of Procedure and Evidence.

296. It may be recalled that this Trial Chamber had considered and granted such an excusal to Mr Ruto with certain conditions, even before rule 134*quater* was adopted — and even before that diplomatic call came from the AU.[488] The excusal was restated under the regime prescribed by rule 134*quater*.[489] The indulgence granted him to attend to his duties as the Deputy President of Kenya, while his trial proceeded, permitted him to be on hand at home to attend to tragic security incidents such as the Westgate Mall terrorist attack, as well as happier events such as the papal visit of Pope Francis. This trial did not deprive him 'the space' he needed to discharge his mandate.

297. There should be no serious complaint that the mere fact of the trial is enough to deprive him space. It requires keeping in mind that everyone has personal obligations that they must accommodate. Such are the circumstances

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[487] See text of President Jonathan's speech at the 11—12 October 2013 Extraordinary Session of the AU Assembly, *supra*.
[488] See *Prosecutor v Ruto & Sang (Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial)* dated 18 June 2013, ICC-01/09-01/11-777 [Trial Chamber V(A)].
[489] See *Prosecutor v Ruto & Sang (Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*)* dated 18 February 2014, ICC-01/09-01/11-1186 [Trial Chamber V(A)].

of life. The most significant difference, with a dispensation that permitted him to stay largely away and attend to his official mandate while his trial continued, lay only with the risk of conviction at the end of the trial. But the administration of justice has ways of dealing with such matters, in a manner that may permit an office holder, depending on the circumstances, to complete his or her tenure without undue interference by the demands of any penal sentence imposed on him.

PART VI: INTERPRETING 'ORGANISATIONAL POLICY'

A. Introduction

298. Next to be addressed is the matter of interpreting the phrase 'organisational policy' as a contextual element required for crimes against humanity as defined in the Rome Statute. Though there was always a general need to engage the discussion, in light of the anxious development of the jurisprudence of this Court in the relevant respect. But the need for this discussion becomes more desirous in the circumstances of this case, given the weaknesses in the Prosecution case, as the evidential review in Judge Fremr's reasons shows, particularly in the aspect concerning proof of the alleged 'Network.'

299. The nature of no-case adjudication generally recommends a level of delicacy in making pronouncements about what may be perceived as shortcomings in the prosecution evidence; especially in those cases in which the no-case motion is rejected. This is because the judgment on such motions is *truly* not in the nature of the ultimate verdict in the case.[490] And it must be emphasised that the outcome of the Chamber's decision today is not in the nature of a judgment *in rem* relative to the involvement of an aggregate entity as the overarching agency in the Kenyan post-election violence of 2007-2008. By that I mean that the decision does not say that there was no aggregate entity that coordinated the violence. The finding is only to the effect that the Prosecution evidence fell short of establishing (to the appropriate level of proof at this stage) the essential pleading that such an organization had in fact existed and was the vehicle for the 2007-2008 post-election violence. The need for caution increases, given the finding of undue interference which impeded

[490] See *Prosecutor v Jelisić, (Judgment)* dated 5 July 2001 [ICTY Appeals Chamber]*supra*, at paras 38 and 39.

an accurate view of the weaknesses in the Prosecution case. Hence, the nature of a no-case adjudication – in general and in this case in particular – permits no definitive pronouncement to the effect that the Prosecution's failure to establish 'the Network' was a certain demonstration of the juristic risk that results from an interpretation of the Rome Statute as requiring the existence of an aggregate entity, without which no crime against humanity may be said to have occurred. And no such pronouncement is now being made.

300. However, candid legal analysis must be made — and particularly so where it serves to identify a general risk of miscarriage of justice, were the law to be applied in a certain way in every case. That is the essential concern with the interpretation that requires proof of the agentive complicity of an aggregate entity in the attack against a civilian population for purposes of the definition of crimes against humanity under the Rome Statute. The risk will be discussed more fully below. But, for a quick preview: it should not be difficult to imagine a situation in which a prosecutor is, in future, constrained to construct — possibly out of figmentary evidence — theories of an aggregate entity that is said to have been implicated in a crime against humanity. In the nature of things, such constructs and any failure to prove them may obscure the fact that victims suffered serious, undisputed harm — committed against them by *individuals* engaged in widespread or systematic attack against the victims. Yet, the case may collapse if the prosecution proves unable to establish at trial, as an 'essential requirement,' the complicity of the aggregate entity claimed in the indictment to have centrally directed the attack in question. And, if the thinking crystallises that there can be no reparation without conviction, it means that much injustice would have been occasioned to the victims. They would have been doubly victimised indeed: all because of a curious theory which insists that a crime against humanity cannot be committed unless an aggregate entity is shown to have fostered it.

B. Purposive Meaning of 'Organisational Policy' — an Overview

301. The analysis as to the proper meaning of 'organisational policy' may be vexed and lengthy. But it may be summarised as follows.

302. It is, of course, beyond dispute that article 7(2)(a) of the Rome Statute contemplates that a widespread or systematic attack committed pursuant to the policy of an aggregate entity that is a State or a corporeal organisation will

qualify as a crime against humanity. It may indeed be the quickest and most convenient proof of the widespread — certainly the systematic — nature of the attack. However, such an inductive view of *a* meaning of 'organisational policy' need not result in the exclusion (from the purview of crimes against humanity under the Rome Statute) of widespread or systematic attacks not readily attributed to such an aggregate entity. It is possible — and sensible — to construe 'organisational policy' to mean no more than 'coordinated course of action.' The concept will thus include, as an attack against a civilian population, the conduct of one individual who executed multiple large-scale attacks against innocent civilians in a systematic way, or one planned large-scale attack that inflicted a widespread harm to a civilian population.

303. From that perspective, it becomes ultimately possible to give article 7(2)(a) an interpretation that is more fit for purpose — in light of the context, object and purpose of the Rome Statute. That, after all, is the cardinal principle of treaty interpretation as codified under article 31 of the Vienna Convention on the Law of Treaties. Notably, the rule so codified had found ample expression in pronouncements of international courts, such as the following from the PCIJ: 'In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.'[491] It seems that the interpretation of 'organisational policy' in article 7(2) has thus far tumbled into that concern. It is being 'detached from the context' when indeed 'it may be interpreted in more than one sense,' as will be seen later, in a way that is better suited to the object and purpose of the Rome Statute.

304. But, that shouldn't be the case. The interpretation of 'organisational policy' must stay true to the object and purpose of the Rome Statute. Notably, in an early jurisprudence on the interpretation of the Rome Statute, the Appeals Chamber made it clear that the interpretation of the Rome Statute must conform to the rule of interpretation codified in article 31 of the VCLT. In the words of the Appeals Chamber:

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[491] *Competence of the ILO to Regulate Agricultural Labour*, PCIJ (1922), Series B, Nos 2 and 3, at p 23.

> The interpretation of treaties, *and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969)*, specifically the provisions of articles 31 and 32. The principal rule of interpretation is set out in article 31(1) that reads:
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> > A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> … The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.[492]

305. The rule of treaty interpretation codified in article 31 of the VCLT amply justifies the purposive or teleological interpretation in appropriate cases, in order to avoid miscarriage of injustice.

306. As I said earlier, the foregoing is only a summary of the discussion conducted in this part. The analytical basis of the purposive construction of 'organisational policy' as meaning no more than 'coordinated course of action' will now follow in fuller detail.

C. The Absurdities of the Theory of Centrally Directed Aggregate Complicity

307. It is an adherence to literal construction that occasioned the current orthodoxy, which insists upon an essential proof of complicity of an aggregate entity as the central agency of a widespread or systematic attack within the meaning of article 7(2)(a).

308. But, the siren call of literal reading (and the easy logic that it beckons) can lead judges and lawyers down the stream of absurd outcomes. That is why the most eminent authorities are agreed that whenever possible legislation is to be interpreted in a manner that avoids absurdities. For, the

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[492] *In re Situation in the Republic of the Congo (Judgment in the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision denying Leave to Appeal)* dated 13 July 2006 [Appeals Chamber] at para 31, emphasis added. See also *Prosecutor v Bemba (Judgment pursuant to Article 74 of the Statute)* dated 21 March 2006 [Trial Chamber III], at paras 75—77.

legislator should not to be presumed to intend absurdity. Grotius said so.[493] And Vattel, too.[494] To the same effect, it is explained in *Maxwell's* that between the real injustice of absurd consequences and the awkwardness of suggesting that the legislator has been less than felicitous in the use words, it is 'more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended.'[495] Notably, an experienced parliamentary counsel and a renowned authority in statutory interpretation has plainly acknowledged that legislators do get slovenly more often than may be supposed. Not only does Bennion counsel that '[t]he interpreter needs to remember that drafters are fallible,'[496] he has observed that '[d]rafting errors frequently occur.'[497] Misleading definitions is one of the many drafting errors that he has

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[493] Hugo Grotius taught that consequences are a proper clue to correct interpretation. As he put it: 'Another source of interpretation is derived the consequences, especially where a clause taken in its literal meaning would lead to consequences foreign or even repugnant to the intention of a treaty. For in an ambiguous meaning such an acceptation must be taken as will avoid leading to an absurdity or contradiction': Hugo Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations* (translated from the original Latin with notes and illustrations from political and legal writers, by A C Campbell) (1901), at p 179.

[494] Vattel begins by observing as many before and after him have done that '[t]here is not perhaps any language that does not also contain words which signify two or more different things, and phrases which are susceptible of more than one sense': Emer de Vattel, *The Law of Nations* (ed B Kapossy and R Whatmore (2008), at p 416. When that happens, the rules that may be employed in the interpretation process include this: '*Every interpretation that leads to an absurdity, ought to be rejected;* or, in other words, we should not give any piece a meaning from which any absurd consequences would follow, but must interpret it in such a manner as to avoid absurdity. As it is not to be presumed that any one means what is absurd, it cannot be supposed that the person speaking intended that his words should be understood in a manner from which an absurdity would follow. … We call *absurd* not only what is *physically impossible*, but what is *morally* so …': *ibid*, at p 418, emphasis added.

[495] According to *Maxwell*: 'BEFORE adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the real meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. *It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart, not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their primary or grammatical meaning actually express the real intention of the legislature.* It is regarded as more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended': *Maxwell on Interpretation of Statutes*, 12th edn by P St J Langan (1969) p 105, emphases added.

[496] F Bennion, *Bennion on Statutory Interpretation — A Code*, 5th edn (2008), at p 566.

[497] See F Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (2001), at p 48

identified: 'Sometimes a drafter causes confusion by defining an established term in a misleading way,' he wrote.[498] And, one way in which a misleading definition may occur is '…if a wide term is artificially cut down by an exclusionary definition'[499] — an exclusionary definition being one that 'deprives the term of a meaning it would or might otherwise be taken to have.'[500] Perhaps, that is a problem with article 7(2)(a) of the Rome Statute: it is capable of more meaning than the literal construction allows it.

309. But, as Bennion sensibly observed, '[s]uch human mistakes must not be allowed to frustrate Parliament's will. Occasionally Parliament itself steps in to correct them. … More usually, Parliament leaves rectification in the hands of the judiciary.'[501] No doubt, the lesson in that is that the judiciary can interpret statutory language in a way that avoids injustice and absurdity, if there is a risk of such a result from literal reading.

310. Much of the discussion in the following paragraphs is essentially devoted to showing the ever-present possibility — and strategies — of avoiding absurdum in the task of construction. This is not only by reason of the legendary flexibility of language, but also by reason of methods accepted as proper to avoid absurdities. But, before getting to those aspects of the discussion, it may be helpful to examine first the manner of absurdities, which the literal interpretation of 'organisational policy' — according to the existing orthodoxy — may produce.

311. Here is one absurdum that may not readily be presumed on the part of the States Parties to the Rome Statute. It lies in the following propositions: (1) However deeply shocking to the conscience of humanity, and however widespread the massacre of a civilian population might be, no one implicated in the massacre may be tried at the ICC for a crime against humanity, unless aggregate complicity can be shown to have driven the attack; and, (2) for the avoidance of doubt in relation to the foregoing proposition, it is wholly irrelevant that the national authority with sovereign jurisdiction over the crime has been unwilling or unable to investigate or prosecute the crime genuinely.

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[498] Bennion, *Bennion on Statutory Interpretation*, *supra*, at p 567.
[499] *Ibid*, at p 572.
[500] *Ibid*.
[501] Bennion, *Understanding Common Law Legislation: Drafting and Interpretation*, *supra*, at p 48.

312. The absurdity may further be viewed from the following illustrative angle. In Situation A, an attack against a civilian population left 1,000 victims dead. That amounts to a crime against humanity under the Rome Statute, because there is clear evidence of centrally directed aggregate complicity in the attack. In Situation B, an attack against a civilian population left 5,000 victims dead. But that could not amount to a crime against humanity under the Rome Statute, if there is no clear evidence of centrally directed aggregate complicity in the attack.[502] And it makes no difference in the latter Situation that the national authorities have proved unwilling or unable to prosecute the crime at all or genuinely.

313. The foregoing propositions betray absurdities that may not readily be presumed as the intendment of the States Parties to the Rome Statute in relation to article 7(2)(a). Yet, that is the logic of the theory of centrally directed aggregate complicity in a widespread or systematic attack against a civilian population. It is, indeed, such views of the law that once caused Lord Reid to say: 'Sometimes the law has got out of step with common sense. We do not want to have people saying: "if the law says that the law is an ass".'[503] It is possible to save the Rome Statute in a timely manner from such an uncharitable view. But that requires keeping in mind at all times that it is the protection of humanity that gave the Rome Statute its purpose. The Court should thus be slow to embrace the paradox of exanimate interpretations that banish the same considerations of humanity from the application of the very same statute's provisions on what amounts to crimes against humanity.

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[502] Some may think it a far-fetched example, that 10,000 people could ever be subjected to a 'widespread or systematic attack' without centrally directed aggregate complicity. But an atomic bomb dropped from a plane can kill many more. With the endless quest of science to shrink kinetic matter to the vanishing point, the conception of crimes against humanity cannot depend on the practical ability of States — acting together in good faith — to secure humanity physically against the ability of single individuals (even rogue scientists) to inflict casualty and destruction to a very large number of people, with weapons of mass destruction that come in small sleevings. Indeed, dependence on the ability of States to protect against such evil physically may confuse the question of responsibility for such harms should they occur. What is more, harm from 'lone wolves' need not come in the dramatic manner of exploding bombs. Depending on the circumstances, the release of injurious chemical or biological agents, for civilian populations to ingest or breathe in or permeate the human body in other ways, may properly raise questions of an attack against the civilian population such as may amount to a crime against humanity.

[503] Lord Reid, 'The Judge as Law Maker' (1972-73) 12 *Journal of Society of Public Teachers of Law* 22, at p 25.

314. There is, of course, a seductive simplicity to the logic of literal construction. Logic is indeed, for the most part, an eminently helpful instrument of justice. But logic is not justice, and there is no need to confuse the two. The confusion may be forgiven in a moot court exercise for aspiring lawyers, but not in a courtroom that deals with problems of real life; when legal professionals in the latter sphere know very well that life often defies logic and symmetry and still manages to carry on. Nothing less should be expected of justice. Hence, in the event of irreconcilable differences between justice and logic, justice must be done. The position is much the same in the relationship between justice and rules of court. It is said that rules of court are handmaidens of justice, not its mistress. The same goes for logic in its own relationship with justice.

315. Indeed, eminent jurists have said that the law need not lose its defining soul into the straightjacket of punctilious syllogism and exacting theories. Well over a century ago Oliver Wendell Holmes Jr wrote to that effect, in the following memorable observation: 'The life of the law has not been logic: it has been experience.'[504] As such, the law will not serve its purpose to society, when approached 'as if it contained only the axioms and corollaries of a book of mathematics.'[505] Holmes' observations adequately explain why it is that justice is regularly done on 'a case by case basis,' according to the particular circumstances of each case. The lessons of legal history also bear Holmes out. Many will recall the story of the reason for the development of equity in the common law world. The need was felt to ameliorate the rigidities of legalism that had got in the way of doing justice according to law. The Rome Statute need not go through a similar experience.

D. Two Alternative Approaches to Interpreting Organisational Policy

316. But, if literal interpretation must hold sway, and truly compel proof of complicity of centrally directed aggregate entity as an essential element of crimes against humanity under the Rome Statute, then it might have been possible to do the following jointly or severally: (a) acceptably proceed on the basis of centrally directed aggregate complicity of 'an organisation *unknown*'; and, (b) infer the centrally directed aggregate complicity from only the factual

[504] Oliver Wendell Holmes Jr, *The Common Law* (1881), at p 1.
[505] *Ibid*.

circumstances of the particular situation. The former approach is permissible in some national jurisdictions in the prosecution of conspiracies. There, it is permissible to try a case on the basis that the accused conspired with 'persons unknown.'[506] And the latter approach was accepted early in the jurisprudence of the *ad hoc* tribunals, to the extent that their case law recognised 'policy' when implicated (though not elementally required) in the facts and circumstances of a particular widespread or systematic attack against a civilian population.[507]

317. But, at the ICC, the adoption of the approach outlined above — for purposes of pleading that the attack against a civilian population was pursuant to or in furtherance of the policy of an organisation 'unknown' — may require a reconsideration of existing ICC jurisprudence that so far appears to lay down certain specific attributes and features[508] expected of an 'organisation' for purposes of a successful prosecution of crimes against humanity at the ICC.

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[506] See *Archbold: Criminal Pleading, Evidence and Practice* (2014) §33-47; and *Blackstone's Criminal Practice* (2012) §A5.38. See also Don Stuart, *Canadian Criminal Law*, 3rd edn (1995), at p 634.

[507] See *Prosecutor v Tadić (Judgment)* dated 7 May 1997 [ICTY Trial Chamber], at para 653; *Prosecutor v Akayesu (Judgment)* dated 2 September 1998 [ICTR Trial Chamber], at para 580; *Prosecutor v Bagilishema (Judgment)* dated 7 June 2001 [Trial Chamber], at para 78. Notably, pronouncements to a similar effect have been made by ICC Pre-Trial Chambers: see *Prosecutor v Katanga & Ngudjolo Chui (Decision on the Confirmation of Charges)* dated 30 September 2008, ICC-01/04-01/07-717 [ICC Pre-Trial Chamber], at para 396; *Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* dated 15 June 2009, ICC-01/05-01/08-424 [ICC Pre-Trial Chamber], at para 81; *Prosecutor v Ruto, Kosgey & Sang (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* dated 23 January 2012, ICC-01/09-01/11-373 [ICC Pre-Trial Chamber], at para 210.

[508] These include: '(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against a civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the above-mentioned criteria': *Re Situation in the Republic of Kenya (Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya)* dated 31 March 2010, ICC-01/09-19-Corr, [Pre-Trial Chamber II], at para 93.

E. Is There Really a Requirement for Proof of Centrally Directed Aggregate Complicity?

318. The more fundamental question, however, is this. Is centrally directed aggregate complicity in the attack against a civilian population really required for proof of crimes against humanity at the ICC, given the absurdities that lie in wait as foreseeable consequences of that interpretation? This question arises in light of what now appears to be the orthodoxy of ICC jurisprudence and academic commentary that support that interpretation. That interpretation is highly doubtful.

319. It is understandable that the interpretation results from a view at first sight of the wording of article 7(2)(a) of the Rome Statute that defines an 'attack' for purposes of a crime against humanity for the ICC. Here, we may keep in mind one of the drafting errors that Bennion identified (as seen above) — i.e. a misleading definition by artificially cutting down a wide term by employing an exclusionary definition. The drafters began by defining 'crime against humanity' under article 7(1) as certain acts and conducts 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.' Having done so, the drafters thought also to define the phrase 'attack directed against any civilian population.' And the definition runs thus: '"Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.'

320. But, the purposive approach requires accepting that this definition marks only the starting point of analysis, not its end. The answer to the question now engaged for discussion lies in deeper and harder analysis, in order to give article 7(2)(a) the construction that truly addresses not only the specific juristic concern that the provision itself was designed to resolve,[509] but also one that serves the overarching purpose of the Rome Statute as clearly articulated in its preamble. The sea of correct interpretation may be foggy. But in the end, the necessity of access to justice for victims of atrocities, when such access has remained unavailable at the national level, is the true beacon that shines through to guide the correct interpretation of article 7(2)(a).

[509] See discussion under section F below: 'The Purpose of the Phrase "Organisational Policy".'

321. To begin with, it is immediately apparent that the syntax of article 7(2)(a) of the Rome Statute does, in other respects, recall to mind the view expressed in *Maxwell's* to the effect that legislators can be 'slovenly' in their communication of meaning; Bennion's observation that drafting errors 'frequently occur' in legislation; and, *Oppenheim's* caution against the presumption of infallibility in legal drafting.[510] All of which militate against taking legislative text at face value. Take for instance, the formulation in the terms that an attack against a civilian population means the '*multiple* commission of acts referred to in paragraph 1 against any civilian population.' It is an awkward formulation. This is because some of the acts referred to in paragraph 1 — specifically, persecution, extermination and the crime of apartheid, even deportation or transfer of a *population* — are composite crimes that already involve 'multiple commission of acts' and conducts. But, a literal reading may present the definition under article 7(2)(a) as saying, for instance, that the crime of apartheid or extermination is a crime against humanity only when there has been 'multiple commission' of the crime of apartheid or the crime of extermination, as the case may be. Clearly, in this regard, article 7(2)(a) may not be taken at face value. It may be that any dispute in that regard is likely improbable. Yet the apparent slovenliness in the drafting is, significantly, an early warning against taking the definition provided in article 7(2)(a) literally in other respects. One of those other respects specifically concerns the face-value reading of 'State or organisational policy' as an element of a widespread or systematic attack against a civilian population. In other words, article 7(2)(a) bears no stamp of infallibility.

322. There are indeed a considerable number of difficulties with the theory that the 'organisational policy' results in a requirement of proof of centrally directed aggregate complicity in the attack against a civilian population.

323. As a general proposition, the trouble with the interpretation that requires proof of aggregate complicity goes beyond its sheer sterility of virtue, relative to the Rome Statute's central promise — so clearly declared in the preamble — of visiting the imperatives of accountability upon the crimes that deeply shock the conscience of humanity. It is, of course, bad enough that the

[510] '[A]n interpreter is likely to find himself distorting passages if he imagines that their drafting is stamped with infallibility': *Oppenheim's International Law*, vol 1, 9th edn [R Jennings and A Watts] (1996) Parts 2 to 4, at p 1273, fn 12, quoting the *Pertulosa Claim*, ILR, 18, 18 (1951), No 129, at p 418.

aggregate complicity interpretation fails to reflect the passion of that promise. But, the greater trouble lies in the rather affirmative danger of denial of either justice or access to it, which may result in the name of the Rome Statute when the phrase is construed literally.

324. It may be recalled, as a matter of first principles, that the jurisdiction of the ICC is triggered by the unwillingness or the inability of national authorities to investigate or prosecute genuinely. Assuming that eventuality in a particular situation, the following questions arise: Is it too difficult to imagine the possibility of: (a) the extermination or attempted extermination of a civilian population comprising one of the world's smaller States;[511] or (b) the extermination or attempted extermination of a civilian population (within a State) who are affined by nationality, race, ethnicity or religion — all of which may be found, as the mysteries of the world go, in small numbers that may be significantly vulnerable to violent attacks mounted by a very virulent 'gang' or by a single individual with, say, a weapon of mass destruction? Would the crime shock the conscience of humanity any the less because of the absence of proof of the involvement of an aggregate entity in the attack? What greater claim could there be for the ICC as the last guard of justice and accountability if it is unable to assert jurisdiction in any such circumstance, merely because of difficulty in proving centralised aggregation of complicity in the attack?

325. The possibility in the preceding example may of course be criticised by those so inclined, as only *imaginary*. But that is to ignore that the framers of the Rome Statute had recognised a human history of '*unimaginable* atrocities' that deeply shock the conscience of humanity. The atrocities had been 'unimaginable' until they were no longer so. It is thus right to guard against even the imaginary possibility of future atrocities that humanity may yet find 'unimaginable.' It requires leaving the definition of crimes against humanity sufficiently adaptable to redress such unimaginable atrocities when committed as widespread or systematic attacks against civilian populations, but national authorities prove unable or unwilling to investigate or prosecute genuinely.

[511] It bears keeping in mind that the total population of many a State is far smaller than the sitting capacity of the larger football stadiums around the world. Noting that it may require no aggregate complicity to engage in lethal attacks against a large football stadium, it becomes easy to see how persons operating with no aggregate complicity can deeply shock the conscience of humanity by engaging in attacks against a civilian population.

1. The Focal Interests of Criminal Law relative to those of Human Rights Law and Humanitarian Law

326. In an apparent effort to justify an enhanced theory of centrally directed aggregate complicity, an effort has been made to curb the value of teleological interpretation anchored in considerations of humanity in the international crime that bears its name. It has been argued that such a method of interpretation produces 'distortions,'[512] given the different focal interests of criminal law for its own part, contrasted to those of human rights law and humanitarian law. The argument's gravamen was expressed as follows: '[P]rinciples of culpability, fair warning, and fair labelling [that mark criminal law] are unknown to human rights and humanitarian law. Human rights and humanitarian law focus more simply on broad and liberal construction to maximize protection for beneficiaries, and are not accustomed to the special moral restraints which arise when fixing guilt upon an individual actor.'[513]

327. An aside. I pause to say that it would be wrong, of course, to intone generalised suggestions to the effect that the legal professionals in the courtrooms of modern international criminal law suffer(ed) from 'unfamiliarity with these special ... restraints'[514] that mark the substantive content of criminal law in its purpose of protection of society. The limitations of such a suggestion as an argument are put in relief by the very possibility of inverse intuition of the same charge. But such strategies in discourse will only stroke the sensibilities of the like-minded: they do not objectively persuade new converts to a point of view. It is entirely possible for very competent lawyers with comparable education and experience to disagree reasonably in their views of how the law works or should work. That must explain why eminent jurists who serve on their nations' supreme courts occasionally disagree with each other on legal interpretation or the correct way to decide a specific case or both.

328. But, now, to the point. To begin with, the argument seems overplayed, when made in the terms that the 'principles of culpability, fair warning, and fair labelling are *unknown* to human rights.' [Emphasis added.] One only needs to read the article 6 judgments of the European Court of Human Rights

[512] See Robinson, *supra*, generally.
[513] *Ibid*, at pp 928 — 929.
[514] *Ibid*.

to see that judges of human rights courts can be entirely at home with the 'principles of culpability, fair warning, and fair labelling' supposed by some as the preserve of criminal law. Indeed, purposive or teleological interpretation can guide the right blend between the two streams of law (i.e. criminal law on the one side and humanitarian law and human rights law on the other) in light of their joint interest in the province of international criminal law. This involves the starting point of embracing 'broad and liberal construction to maximise protection of beneficiaries' sought so to be protected by the sanctions of criminal law. Those beneficiaries are both victims of crimes and persons accused of crimes. However, in the application of the purposive or teleological construction, there will be the required insistence upon the exacting procedural rights of the accused, in order to avoid the fixing of individual guilt in an unfair way. That is the very essence of balancing the major interests at stake: giving to Paula and to Peter, as it were, what belongs to each. That is the true objective of the purposive or teleological interpretation.

2. A Nexus Redux — Armed Conflict and Crimes against Humanity Linkage Revisited

329. Another notable manner of the objection against teleological interpretation was registered in the form of the following question: Why insist on the contextual requirement of 'widespread or systematic' attack (to qualify a conduct as an international crime), if the chief consideration is to protect 'basic human values'? A proponent of that objection answers as follows: 'One possible explanation is that the contextual requirement establishes a link between the international law on crimes against humanity and the collective value of international peace and security.'[515] And he recalls correctly that the Charters of both the Nuremberg and the Tokyo tribunals had linked crimes against humanity therein prescribed (perhaps for the first time clearly known to the modern era) 'with a situation in which the international peace was disturbed.'[516] And he notes (correctly again) that in the current generation of international criminal law in which crimes against humanity are characterised 'as autonomous crimes, the old connection clause has come to be replaced

[515] See Claus Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement …' (2010) 23 *Leiden Journal of International Law* 855, at p 859.
[516] *Ibid*.

with the contextual requirement of a widespread and systematic attack against a civilian population.'[517] But, it is 'not entirely clear,' the argument continues, that 'this development implies a complete detachment of the law on crimes against humanity from the collective value of international peace and security.'[518] This is effectively a redux of the long discarded element of nexus between war and crimes against humanity.

330. There is much that makes the nexus redux wholly unpersuasive — thus correctly validating its continued rejection in the contemporary era of international criminal law. But before engaging that discussion, it may assist to address the question that inspired it. Recall that the particular query concerns the reason that an element of 'widespread or systematic' character is required for an attack to qualify as a crime against humanity. In other words, if the aim is to protect humanity, why qualify the attack at all? The answer is simple enough. First, it all begins with an appreciation that the concern of the international community is to prevent and punish attacks that deeply shock the conscience of humanity.[519] It is thus readily appreciated that there is a greater potential for an attack against a civilian population to deeply shock the conscience of humanity if the attack is widespread or systematic. That should be a sufficient reason to make 'widespread or systematic' the referent element in the definition of an attack for purposes of crimes against humanity. Second, for the purposes of a modern international criminal tribunal, especially the ICC, there is, indeed, also the additional value that the reference has in limiting the kinds of crimes over which the ICC may exercise jurisdiction. This is an entirely appropriate pragmatic consideration, given the potentially unlimited transnational scope of ICC jurisdiction, contrasted with the very limited scope of its resource-based ability to serve that large geographic scope meaningfully. But this consideration neither invites nor requires further reductionist theories of the definition of crimes against humanity, to the lowest point possible on a literal view of article 7(2)(a) — particularly in a way that may leave the Court legally powerless to intervene where a given attack would deeply shock the conscience of humanity in ways that the reductionist theory did not immediately contemplate. The better view is to accept that the notions of 'widespread' and 'systematic' are scalable concepts, capable of serving the purposes of the law in varying circumstances.

[517] *Ibid*, 860, *sic*.
[518] *Ibid*.
[519] See preamble to the Rome Statute.

And that is a very common philological phenomenon in the use of language in the regulation of society.

3. The Nexus Redux Reviewed

331. We may now return to the reasons that the nexus redux must remain rejected. First, it may be recalled that in the *Corfu Channel* case, the ICJ famously observed that it was a 'general and well-recognised [principle]' that 'elementary considerations of humanity [are] even more exacting in peace than in war.'[520] It remains a most sensible observation. Its triteness perhaps conceals far too much in the implication. Among them is the import of the maxim *inter arma enim silent leges*, which continued to attract some following into the modern era, long after Cicero inspired it well over 2000 years ago. Recall Brockdorff-Rantzau's argument in May 1919: '… Crimes in war may not be excusable, but they are committed in the struggle for victory, in anxiety to preserve national existence, in a heat of passion which blunts the conscience of nations. …'[521] The recently late Justice Scalia had also confronted the validity of the maxim in more recent times.[522] In the more acceptable form, the maxim explains the idea of military necessity as a defence to certain manner of harm caused even to civilians during war. But, neither the defence of military necessity nor its inspiring *inter arma* maxim avails anyone charged with crimes against humanity in peacetime; as there is no war that justifies it as legally necessary to attack civilians. And, that demonstrates just one aspect of the unchanging value of the ICJ dictum in the *Corfu Channel* case, and its particular relevance to the law of crimes against humanity.

332. Second, the nexus redux is essentially an argument of 'originalism' — that troubled insistence on confining or returning the law to the initial historical circumstances and impulses that gave it immediate impetus. But

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[520] See *Corfu Channel Case (Merits)* [1949) ICJ Reports 4, at p 22.

[521] US Department of State, *Papers relating to the Foreign Relations of the United States—Paris Peace Conference 1919*, Vol III, Minutes of the Plenary Sessions of the Peace Congress, 413, *supra*, at p 418.

[522] *Hamdi v Rumsfeld* 542 US 507 (2004) [Supreme Court of the United States] per Scalia J, dissenting: 'Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis – that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.'

such an argument fails adequately to account for social evolutions and the law's need to remain always relevant to them. Generally speaking, the constructive answer must be this. The fact that particular historical events — perhaps in the manner of 'big bang' occurrences — may have inspired the germination of the law, is a consideration that need not arrest law's development in other socially advantageous ways that are less dramatic. World War II, for instance, was certainly one such 'big bang event' that exposed great potentials for international criminal law. But no known rational principle requires the denial of the benefits of those potentials to the more prosaic circumstances, when generally welcomed there.

333. Third, the nexus redux seems to miss the critical point that *the protection of human beings* comprises international law's ultimate interest in making individuals — as victims and assailants — the direct subjects of international law. That remains the case even when the route to that particular arrangement runs through — or coincides with — another arrangement in which restraints are placed upon States for the sake of international peace and security. The Martens clause bears out the point, in its repeated reiteration in international law instruments that regulate armed conflicts. 'Until a more complete code of the laws of war is issued,' runs the clause, 'the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, *populations and belligerents remain under the protection and empire of the principles of international law*, as they result from the *usages established between civilized nations, from the laws of humanity and the requirements of the public conscience*.'[523] [Emphases added.]

334. Indeed, early traces of international law's interest in regulating armed conflicts (in the manner of *jus in bello*) firmly teach that it is the protection of humanity that has always controlled that regulatory interest. The objective, in other words, was always to conform the felt necessities of war (in the

[523] See the Preamble to the Hague Convention (II) 1899 with Respect to the Laws and Customs of War on Land; the Preamble to the Hague Convention (IV) 1907 Respecting the Laws and Customs of War on Land; 1977 Additional Protocol I (article 1.2); Preamble to the 1977 Additional Protocol II; and Preamble to the 1980 Excessively Injurious or Indiscriminate Weapons Convention 1980. See also the variation appearing in the limitations of denunciation in the four Geneva Conventions1949 for the protection of victims of war: GC I (article 63); GC II (article 62); GC III (article 142); GC IV (article 158).

infliction of harm) to the overarching imperatives of humanity.[524] It is not the other way round. The initial vignettes of that objective are amply clear, as the Declaration of St Petersburg (1868), for instance, bears witness. The International Military Commission, 'by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity.' And with the authorisation of their Governments, the Commission affirmed as follows:

> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
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> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
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> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity …

335. The concerns that animated the Declaration of St Petersburg were wholly borne out in the concerns that President Woodrow Wilson had articulated on behalf of the statesmen who gathered in Paris in 1919 after the First World War to create the League of Nations. As he stated it, to the full concurrence of all his colleagues, the purpose was not only to bring an end to a warring culture, but also to craft a treaty they hoped would maintain peace permanently among nations. The golden thread that ran through those purposes was the need to stop the real strains and burdens of war from being thrown back from the war front to 'where the heart of humanity beats.'[525]

336. These considerations, without a doubt, encapsulate the basic principles of international humanitarian law even today. But, beyond their affirmation

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[524] The imperatives of humanity are truly overarching. This is all too evident in our life cycle as warriors. We were human beings long before we became warriors, as warriors we remain human beings, and when we cease being warriors we remain human beings.

[525] See US Department of State, *Papers relating to the Foreign Relations of the United States—Paris Peace Conference 1919*, Vol III, Minutes of the Plenary Sessions of the Preliminary Peace Conference, *supra*, 155, at p 178.

in 1868, the Declaration of St Petersburg had set out the mutual engagement of the intended parties to renounce the military use 'of any projectile of weight below 400 grams, which is either explosive or charged with fulminating or inflammable substances.' Notably, the document ended with the declared aspiration of the parties to reach an understanding in future, as soon as 'a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to *conciliate the necessities of war with the laws of humanity*.'[526] [Emphasis added.] Indeed, the League of Nations was one prominent effort in the accomplishment of that objective. It was intended as a galvanising effort in order, as President Wilson put it, that 'the watchful, continuous cooperation of men can see to it that science, as well as armed men, is kept within the harness of civilization.'[527] No doubt, the 'harness of civilisation' thus contemplated at the Paris Peace Conference typically protrudes from considerations of humanity.

337. It is against the foregoing background that the wisdom of the ICJ in the *Corfu Channel* case, as noted earlier, continues to resonate when they observed that it is a general and well-recognised principle that elementary considerations of humanity, such as compelled the restraining hands of international law, are even more exacting in peacetime than in war.

338. Fourth, the nexus redux also appears to ignore the provenance of modern international law's stimulus and interest in the protection of human rights, even accepting that the stream of international human rights law flows

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[526] The Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, dated 29 November/ 11 December 1868, available at <www.icrc.org/ihl/INTRO/130?OpenDocument> Signed by 20 States at the time. Although most of them were from continental Europe, the signatories included Brazil, Persia, Turkey and the UK.

[527] *Ibid*, p 179. Indeed, the affinity between the Declaration of St Petersburg and President Wilson's concerns to bend the necessities of war to the imperatives of humanity is further evident in the following passages of his speech: 'Is it not a startling circumstance, for one thing, that the great discoveries of science, that the quiet studies of men in laboratories, that the thoughtful developments which have taken place in quiet lecture rooms, have now been turned to the destruction of civilization? The powers of destruction have not so much multiplied as gained facility. The enemy whom we have just overcome had at his seats of learning some of the principal centers of scientific study and discovery, and he used them in order to make destruction sudden and complete; and only the watchful, continuous cooperation of men can see to it that science, as well as armed men, is kept within the harness of civilization': *ibid*.

in a valley different from that of international criminal law. That provenance is generally traced to the same World War II events that propelled the development of modern international criminal law. That being so, it is no more plausible to tether international criminal law back to its original wagon of armed conflicts as it is to do the same for human rights law.

339. Finally, in any event, even accepting the suggestion (in the nexus redux) that threat to international peace and security must be a definitional factor for a crime against humanity, it should not be difficult to see that the requirement of 'widespread or systematic attack' against a civilian population will satisfy that factor in most cases; without a further need to require centrally directed aggregate complicity in the attack. Ethnic or religious massacres can pose a threat to international peace and security in many ways, notwithstanding the absence of the directing role of an aggregate entity. It can result in cross-border refugee problems which neighbouring States may find destabilising, even when those States do not seek to intervene to stop the killings; States may indeed intervene with military force to stop the killings, driven by humanitarian impulses or by the need to stem the displacement of populations across the border; (sub)regional bodies (as the AU has often done) or the UN may intervene with military force; attacks against members of a group in one country may have ramifications for peace and security in another country, given the distribution of racial, ethnic, religious or national groups across borders; and so on.

340. But it may even be enough to consider that the preamble to the Rome Statute appears to recognise that the 'grave crimes' — the 'unimaginable atrocities that deeply shock the conscience of humanity' — do presumptively 'threaten the peace, security and well-being of the world.'[528] Stated in that way in the preamble, that proposition becomes a legislative fact, which may be rightfully presumed in every situation of widespread or systematic attack against a civilian population involving the kinds of crimes listed under article 7(1) of the Rome Statute. The presumption is thus not further assisted by the nexus redux, as an additional element needing to be established separately as a matter of the definition of a crime against humanity.

[528] See the third paragraph in the preamble to the Rome Statute.

F. The Purpose of the Phrase 'Organisational Policy'

341. But, no review of the shortcomings of the orthodox interpretation of article 7(2)(a) — as requiring centrally directed aggregate complicity — will as such explain the provision fully. The question still lingers as to its proper purpose. The need to understand its purpose will help in according due value to that purpose in a manner that does not unduly undercut the overall purpose and objective of the Rome Statute. It may thus assist in selecting the more appropriate interpretive approach for the phrase — such as between the literal approach and the purposive approach.

342. It is said that the 'phrase "a State or organisational policy" … was introduced and adopted to prevent the Court from prosecuting singular atrocities not part of a widespread or systematic attack';[529] and that the debates during the drafting of the provision on crimes against humanity revealed that as regards 'the test of widespread or systematic … a significant number of States were concerned that an unqualified disjunctive test would be so broad so as to lead to the … consequence that crimes against humanity would encompass an *unconnected* "crime wave" which they clearly intended to keep outside the jurisdiction of the ICC.'[530] To begin with, it has to be presumed, of course, that the expression 'crime wave' relates to something less than criminal conduct (however provoked) involving many days of massacres of the members of a primordially-hated group and destruction of their property — driven by no clearer impetus than a common, instinctive understanding (needing no central direction) to attack the victims sharing a group identity: perhaps, an excuse for simmering revenge for an ancient grievance or injustice. Then, again, that underscores the essence of the matter, the purpose of the provision — that being the exclusion of *unconnected* crime waves from the concern of the ICC, for purposes of the prosecution of crimes against humanity. The question then becomes this: Is there a *connection* between the impugned conducts such that they may be said to constitute a 'course' of conducts that amounts to an attack against civilians in a widespread or systematic manner?

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[529] See the Defence brief in *Prosecutor v Ruto, Kosgey and Sang (Defence Challenge to Jurisdiction), supra*, at para 15.
[530] *Ibid*, at para 16, emphasis added.

343. In any event, it is accepted that the aim of article 7(2)(a) is to preclude from the Court's docket singular, random or sporadic instances of criminal conducts, or those committed during fleeting episodes of social unrest. Notably, the concern about keeping away from the Court's dockets 'singular atrocities not part of a widespread or systematic attack' has been a traditional concern of customary international law as regards crimes against humanity. But, at the *ad hoc* Tribunals it required nothing more than to say, as the ICTY Appeals Chamber did, that isolated or random acts do not amount to widespread or systematic attack for purposes of crimes against humanity.[531]

344. In the final analysis, then, the employment of the phrase 'State or organisational policy,' taking into account the context and purpose of the Rome Statute (as explained above) need not assume a meaning beyond simply this proposition: 'an attack which is planned, directed *or* organised — as opposed to spontaneous or isolated acts of violence — will satisfy this criterion.'[532] There ought to be nothing more to that understanding.

345. Since the object of article 7(2)(a) is to eliminate random and isolated acts, to give 'organisational policy' any wider meaning is to attract the censure that 'the draftsman has gone narrower than the object'[533] — in a manner that carries the risk of unfairly undermining the legitimate interest of society in ensuring a regime of accountability for those who commit widespread or systematic attacks against civilian populations, in circumstances in which States fail in their duty to investigate or prosecute such crimes genuinely.

346. In the end, it may be, as mentioned earlier, that the solution will lie in trying a case in the terms that the accused committed the attack pursuant to or in furtherance of the policy of an organisation 'known or unknown.'

347. However, an alternative approach, as will be seen later, is to adopt an extended grammatical construction of 'organisational policy,' which does not preclude the conditions or actions of individuals. That is the case when their

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[531] See *Prosecutor v Kunarac (Judgment)*, *supra*, at paras 94 and 96.
[532] See *Prosecutor v Katanga & Ngudjolo Chui (Decision on Confirmation of Charges)*, *supra*, at para 396, emphasis added. See also *Prosecutor v Bemba Gombo 'Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo'*, *supra*, at para 81.
[533] See F A R Bennion, *Statute Law*, 2nd edn (1983), at p 93.

conducts in the manner of widespread or systematic attack against a civilian population cannot be said to have been *unconnected* actions.

G. A Construction of 'Organisational Policy' — A Look at Three Interpretational Approaches

348. Although the discussion has thus far indicated a preference for the purposive or teleological interpretation as the better approach to the phrase 'organisational policy' as employed in article 7(2)(a), a more focused look at the circumstances of the different interpretive approaches may assist in a better appreciation of the benefits of the purposive or teleological approach.

349. While the Court is not bound to follow any particular approach favoured in any national jurisdiction or legal tradition, an examination of approaches in a national jurisdiction (or a combination of them) does have some value. It offers perspectives in solving what is, after all, a common difficulty that arises when the judicial task is to solve a problem in real life by applying a code in the form of words.

350. In the many national systems that comprise the common law tradition, there are three generally known approaches to the interpretation of legal texts. They are the 'literal' rule, the 'golden' rule and the 'mischief' rule. In their report of 1969, the British Law Commissions (of England and Wales and Scotland) observed that although these 'are sometimes called "rules", ... it would be more accurate to describe them as different approaches to interpretation, on which at different periods of our legal history greater or lesser emphasis has been placed.'[534]

351. In the ideological battle of interpretive approaches, the elephants are the literal approach and the purposive approach. The *golden* rule appears to enjoy only a remainder value, despite the allure of its name. But it may be explained very briefly.

352. Since the literal approach forms the point of contrast for both the golden and the purposive rules, it will be helpful to explain the literal rule first. The *literal* rule (also known as the 'textual' approach) insists that judges must give effect to the literal meaning of words, notwithstanding that the

[534] The Law Commission and the Scottish Law Commission, *The Interpretation of Statutes* (1969) [Law Com No 21; Scot Law Com No 11], at para 22.

outcome may be unreasonable or even absurd.[535] Lord Esher had put the matter in the following straightforward way in 1892: 'If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity.'[536]

353. The proponents of the *golden* rule disagree. They insist that the golden rule requires the interpreter to follow the literal approach until absurdity looms large. At that point, the literal rule is to be abandoned. It has been observed that the golden rule is an improvement on the literal rule, because 'the golden rule does at least have the saving grace that it may protect the court from egregious foolishness.'[537]

354. The *mischief* rule was laid down in *Heydon's Case*, as follows: 'That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

> '(1) what was the common law before the making of the Act;
>
> '(2) what was the mischief and defect for which the common law did not provide;
>
> '(3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and
>
> '(4) the true reason of the remedy, and then the office of all the judges is always to make such construction as shall:
>
> '(a) suppress the mischief and advance the remedy, and
>
> '(b) suppress subtle inventions and evasions for the continuance of the mischief *pro privato commodo* (for private benefit), and
>
> '(c) add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico* (for the public good).'[538]

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[535] See M Zander, *The Law-Making Process*, 6th edn (2004), at p 130.
[536] *R v Judge of the City of London Court* [1892] 1 QB 273, at p 290.
[537] Zander, *supra*, at p 148.
[538] F Bennion, *Statute Law*, 3rd edn (1990), at p 161, available at www.francisbennion.com/pdfs/fb/1990/1990-002-082-statute-law-pt2.pdf.

355. Ignoring the reference to 'the common law,' the lessons of *Heydon's Case* more universally come to this:

- STEP 1: As a starting point, the interpreter is to ascertain the following:
    - the pre-existing state of the law before the legislation under review
    - the mischief or defect that the pre-existing state of the law had failed to cure, and
    - the remedy that the legislation intended as a cure for the pre-existing mischief or defect, as well as the reason for that remedy.
- STEP 2: With the foregoing done, the judge's function is 'always' as follows:
    - suppress the mischief and advance the remedy
    - suppress selfish sophistic arguments and positions whose outcome will revive or perpetuate the mischief, and
    - add force and life to the cure and remedy according to the true intendment of the legislation, for the public good.

356. Bennion observes that *Heydon's Case*, as the 'basis of the so-called "mischief rule" of statutory interpretation, has been approved in many cases down to the present day.'[539] Stated simply, the point of the interpretive exercise that it prescribes is to identify the object and purpose of the legislation at hand, the mischief that the legislation set out to cure, and then adopt a reasonable construction that is best suited to suppress the mischief and promote the remedy. In that sense, the mischief rule is effectively the 'purposive' approach, also known among continental European jurists as the 'teleological' approach. The translation of the 'purposive' approach as the 'teleological' approach was once done by Lord Denning, in the context of the construction of a UK statute that domesticated the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road. In his words:

[539] *Ibid*.

> Some of us recently spent a couple of days in Luxembourg discussing it with the members of the European Court, and our colleagues in the other countries of the nine.
>
> We had a valuable paper on it by the President of the Court (Judge H Kutscher) which is well worth study: 'Methods of interpretation as seen by a judge of the Court of Justice, Luxembourg 1976.' They adopt a method which they call in English by strange words — at any rate they were strange to me — the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit — but not the letter — of the legislation, they solve the problem by looking at the design and purpose of the legislature — at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: What is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly. If you study the decisions of the European Court, you will see that they do it every day. To our eyes — shortsighted by tradition — it is legislation, pure and simple. But, to their eyes, it is fulfilling the true role of the Courts. They are giving effect to what the legislature intended, or may be presumed to have intended. I see nothing wrong in this. Quite the contrary. It is a method of interpretation which I advocated long ago in *Seaford Court Estates v Asher* (1949) 2 KB 481, 498-9. It did not gain acceptance at that time. It was condemned by Lord Simonds in the House of Lords in *Magor and St Mellons UDC v Newport Corporation* (1952) AC 189, 191 as a 'naked usurpation of the legislative power.' But the time has now come when we should think again.[540]

357. Lord Denning's advocacy for purposive or teleological interpretation may not have gained immediate acceptance in the UK in 1952. But, as will soon become clear, it eventually caught on, became the dominant approach and remains so.

H. The Contest of Two Approaches: Literal v Purposive

358. In modern times, the literal approach has experienced decline in followership,[541] in favour of the purposive approach. Lord Diplock memorialised the trend in the UK, when he observed in 1975 that an

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[540] *James Buchanan & Company Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] 2 WLR 107 [England and Wales CA].
[541] See Zander, *supra*, at p 146.

examination of the decisions of the House of Lords in the preceding 30 years on questions of statutory construction would show striking 'evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.'[542] And, in a similar observation three years later, Lord Denning finally had the occasion to celebrate the tidal change, in *Nothman v Barnet London Borough County Council*, a case involving legislated gender discrimination in the workplace. The statute in question had permitted employees to make complaints of unfair dismissal. But the right was extinguished when the employee reached retirement age, which the statute had set at 65 years for men but 60 for women. The words of the statute in the relevant text were these: '[T]he right to bring a complaint of unfair dismissal … "does not apply to the dismissal of an employee from" any employment if the employee … on or before the effective date of termination attained the age which, in the undertaking in which he was employed, was the normal retiring age for an employee holding the position which he held, or, if a man, attained the age of 65, or, if a woman, attained the age of 60."'[543]

359. Ms Nothman, a mathematics teacher, had brought her complaint of unfair dismissal when she was 61. The industrial relations tribunals denied her complaint on grounds that she was past the statutory retirement age set for women. They reasoned that the statutory retirement age was an obstacle she could not overcome regardless of what the customary retirement age had been for her profession. Remarkably, in making the ruling, the tribunals fully recognised the 'absurd and unjust situation,' 'a startling anomaly,' created by the legislative scheme that had set the retirement age differently for men and women. But they held that their hands were tied by the literal text of the statute. They were, they held, 'bound to apply provisions of an Act of Parliament however absurd, out of date and unfair they may appear to be ….'

360. The Court of Appeal, with Lord Denning presiding, disagreed. Following the purposive approach, they reasoned that the extinguishment of the right of action for unfair dismissal by operation of the statutory retirement age applied only when there was no customary retirement age for the profession or vocation concerned. But, where there was one, it would prevail over the statutory retirement age. Since Ms Nothman was employed in the

[542] *Carter v Bradbeer* [1975] 1 WLR 1204 [House of Lords], at pp 1206 — 1207.
[543] *Nothman v Barnet London Borough County Council* [1978] 1 WLR 220 [England and Wales CA].

teaching profession for which the customary retirement age was 65 years, her right of action (which she exercised at 61) was not statute barred. Lord Denning's pronouncements in this regard may be set out in some detail:

> A man teacher can go on to the age of 65. If he is dismissed unfairly before that age, he can complain. But a woman teacher is different. If she is dismissed unfairly at 61, 62, 63 or 64 she cannot complain.
>
> The Employment Appeal Tribunal realised this was most unjust, but felt they could do nothing about it. I will give their words …:
>
> > "The instant case provides as glaring an example of discrimination against a woman on the grounds of her sex as there could possibly be. The facts of this case point to a startling anomaly."
>
> Yet they thought the judges had their hands tied by the words of the statute. They said …:
>
> > "Clearly someone has a duty to do something about this absurd and unjust situation. It may well be, however, that there is nothing we can do about it. We are bound to apply provisions of an Act of Parliament however absurd, out of date and unfair they may appear to be. The duty of making or altering the law is the function of Parliament and is not, as many mistaken persons seem to imagine, the privilege of the judges or the judicial tribunals."[544]

361. In his classic and direct manner, Lord Denning repudiated as outmoded the literal approach that had guided the decisions of the tribunals below. And he observed that the purposive approach had become the guiding one. Again, he may be quoted in some detail:

> I have read that passage at large because I wish to repudiate it. It sounds to me like a voice from the past. I heard many such words 25 years ago. It is the voice of the strict constructionist. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach." He said so in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd.* [1971] AC 850, 899; and it was recommended by Sir David Renton and his colleagues in their valuable report on the Preparation of Legislation (1975) Cmnd 6053, pp 135-148. In all cases now in the

[544] *Ibid*, at p 227.

> interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision. It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it." Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done, had they had the situation in mind.[545]

362. Speaking during a lecture at Monash University, Melbourne, in September 1980, Lord Scarman observed that in England, 'no-one would now dare to choose the literal rather than a purposive construction of a statute: and "legalism" is currently a term of abuse.'[546] Lord Griffiths confirmed that position in 1993 in *Pepper v Hart*, a latter-day landmark, when he said that '[t]he days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation ….'[547]

363. The decline in followership of the literal, in favour of the purposive, approach is also a feature of Canadian jurisprudence. For instance, the Interpretation Act of Canada provides as follows: '*Every* enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.'[548] The Canadian Supreme Court has been duly guided. In the leading case of *Re Rizzo & Rizzo Shoes Ltd*, the Court accepted that in the modern Canadian practice of statutory interpretation, 'statutory interpretation cannot be founded on the wording of the legislation alone'; and that the singular approach is that 'the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.'[549] This approach was reiterated in *Bell ExpressVu Limited Partnership v Rex*.[550]

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[545] *Ibid*, at p 228.
[546] The Rt Hon Lord Scarman, 'The Common Law Judge and the Twentieth Century — Happy Marriage or Irretrievable Breakdown?' (1980) 7 *Monash U L R* 1, at p 6.
[547] *Pepper v Hart* [1993] AC 593 [House of Lords], at p 617.
[548] Interpretation Act (Canada), s 12, emphasis added.
[549] *Re Rizzo & Rizzo Shoes Ltd* [1998] 1 SCR 27 [Supreme Court of Canada], at para 21.
[550] *Bell ExpressVu Limited Partnership v Rex* [2002] 2 SCR 559 [Supreme Court of Canada], at para 26.

364. To the same effect, a new regime — a purposive regime — of statutory interpretation was legislated into effect in Australia in 1981. It appears in the language of s 15AA of the Acts Interpretation Act, which provides: 'In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.'[551] That regime was effectively ushered in judicially by the High Court of Australia in their judgment in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*,[552] rendered just ahead of the commencement of operation of s 15AA.[553] The High Court made clear that a literal interpretation is to be abandoned when there is 'ground for concluding that the legislature could not have intended' the outcome that results from such literal interpretation: in those circumstances 'an alternative interpretation must be preferred.'[554] 'But the propriety of departing from the literal interpretation is not confined to situations described by these labels [: "absurd", "extraordinary", "capricious", "irrational" or "obscure"]. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.'[555]

365. Professor Geddes' research shows the strong sway of the purposive approach in Australian jurisprudence.[556]

I. Some Instructive Criticisms of the Literal Approach

366. The 'swing … away from literal construction'[557] in the various jurisdictions indicated above is not surprising, given the 'severe criticism' to

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[551] Acts Interpretation Act (Australia), s 15AA.

[552] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26 [High Court of Australia] delivered 5 June 1981.

[553] Section 15AA of the Acts Interpretation Act received royal assent on 12 June 1981: see Commonwealth Consolidated Acts: Acts Interpretation Act 1901 — Notes: Endnote 3 (Legislative History) available at <http://www.austlii.edu.au/au/legis/cth/consol_act/aia1901230/notes.html>

[554] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation, supra,* at para 25.

[555] *Ibid*.

[556] See generally R S Geddes, 'Purpose and Context in Statutory Interpretation' (2005) *2 Univ of New England Law Journal* 5.

[557] See F A R Bennion, *Statute Law*, 3rd edn (1990), at p 163.

which it has been subjected.[558] Michael Zander QC (professor emeritus at the London School of Economics) usefully gives a detailed account of some of those criticisms in his book *The Law-Making Process*.[559]

367. A character-trait criticism of the rule is that it allows little or no room for (a) 'the natural ambiguities of language,' (b) fallibilities of even the most competent legal drafters, and (c) the impossibility of reasonable foresight of future events.[560] In that regard, the British Law Commissions observed as follows: 'To place undue emphasis on the literal meaning of the words of a provision is to assume an unattainable perfection in draftsmanship; it presupposes that the draftsmen can always choose words to describe the situations intended to be covered by the provision which will leave no room for a difference of opinion as to their meaning. Such an approach ignores the limitations of language, which is not infrequently demonstrated even at the level of the House of Lords when Law Lords differ as to the so-called "plain meaning" of words.'[561]

368. Perhaps a telling aspect of the rule's criticisms is Zander's observation that even some of the more prominent proponents of the approach were impelled to desert it in the face of absurdity and injustice that their sensibilities could no longer bear. The following instances are given:[562] 'Lord Tenterden, who fathered the doctrine, sometimes found that literal meanings could not have been intended.[563] And Lord Bramwell, who affirmed the doctrine with his usual vigour and challenged anyone to show him an absurdity so great as to entitle him to depart from the plain meaning, had some interesting lapses.[564] ... Lord Halsbury stated the doctrine of literalness as uncompromisingly as anyone. But in a case before the House of Lords in 1890 he deserted it and appealed to the "equity of the statute".'[565]

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[558] See Zander, *supra*, at p 141.
[559] *Ibid*, at pp 141 *et seq*.
[560] *Ibid*, at p 144.
[561] The Law Commission and the Scottish Law Commission, *supra*, at para 30.
[562] See Zander, *supra*, at p 142.
[563] *Margate Pier Co v Hannam* (1819) 3 B & Ald 266; *Edwards v Dick* (1821) 4 B & Ald 212; *Bennett v Daniel* (1830) 10B&C500.
[564] For example, *Twycross v Grant* (1877) 46 LJQB 636; *Ex p Walton* (1881) 17 Ch D 746; *Hill v East and West India Dock Co* (1884) 9 App Cas 448.
[565] *Cox v Hakes* (1890) 15 App Cas 506.

369. Such 'inevitable inconsistency' among its strong adherents eventually deprives the rule 'much of its claim to be the basis of greater certainty.'[566] Perhaps, the severest of the criticisms of the literal rule is one that Professor Ruth Sullivan set up in an interesting observation about what interpretation involves, but struck by Zander with full force. According to Sullivan, one implication of the approach is 'that statutory interpretation involves *work* and outcomes require *justification*. Interpreters are not entitled to simply read the text and declare that their personal linguistic intuition is what the legislature intended. Personal intuition must be tested against a range of considerations, which may or may not support the initial impression. The conclusion, often based on balancing competing considerations, must be justified by an account of the work the interpreter has done.'[567]

370. That statutory interpretation requires 'work' and that 'outcomes require justification' should be a truism for any approach to statutory interpretation. And this is a truism which, with much force, Professor Zander inverts upon the literal approach. He effectively described the literal approach as the rampart of indolency. In his words: 'A final criticism of the literal approach to interpretation is that it is defeatist and lazy. The judge gives up the attempt to understand the document at the first attempt. Instead of struggling to discover what it means, he simply adopts the most straightforward interpretation of the words in question — without regard to whether this interpretation makes sense in the particular context. It is not that the literal approach necessarily gives the wrong result but rather that the result is purely accidental. It is the intellectual equivalent of deciding the case by tossing a coin. The literal *interpretation* in a particular case may in fact be the best and wisest of the various alternatives, but the literal *approach* is always wrong because it amounts to an abdication of responsibility by the judge. Instead of decisions being based on reason and principle, the literalist bases his decision on one meaning arbitrarily preferred.'[568]

371. Putting to one side the hard feel of the criticism, Zander's essential point remains formidable. The point is that it amounts to a failure of the

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[566] Zander, *supra*, at p 142.
[567] Ruth Sullivan, 'Statutory Interpretation in Canada: the Legacy of Elmer Driedger,' at pp 110 — 111, emphasis added, available at <www.judcom.nsw.gov.au/publications/education-monographs-1/monograph4/06_sullivan.pdf>
[568] See Zander, *supra*, at p 145.

interpretive function for an interpreter to take one look a provision and declare with satisfaction words to the following effect: 'The text is plain to me. I must apply it in that plain meaning, out of deference to the legislature. For, my hands are tied.' To that message may be attached — or implied — the collateral one to the following effect: 'That the application of the plain meaning results in an absurdity or injustice is the fault of the legislature alone. It is not my problem.' That effect is so evident in Lord Esher's 1892 view of the matter: 'The court has nothing to do with the question whether the *legislature has committed an absurdity*.'[569]That attitude particularly runs against the grain of the conventional wisdom which holds that in the business of judging, complex questions are rarely resolved by simple answers. It is indeed a good policy to suspect an answer as being too good to be right if it looks so simple at first glance. But it is something worse when the absurdity of the simple view is all too evident just beneath the surface of plain words.

J. Basic Assumptions of the Literal Approach

372. The foregoing highlights the two essential assumptions of the literal approach: 'one about language and one about the proper role of the courts in a democracy.'[570] But, how valid are these assumptions? We shall see, next.

1. The First Assumption of the Literal Approach: Perfection in Legislative Drafting

373. A considerable number of commentators have impugned the first assumption as an unsafe foundation for justice in real life. As seen earlier, the British Law Commissions have criticised it for assuming 'unattainable perfection in draftsmanship.'[571] Justice G P Singh agreed: 'Words in any language are not scientific symbols having any precise or definite meaning, and language is but an imperfect medium to convey one's thought, much less of a large assembly consisting of persons of various shades of opinion. It is impossible even for the most imaginative Legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for.'[572] Professor Sullivan's point is to the same effect: '[T]extualists assume that the ordinary meaning of words and word

[569] *R v Judge of the City of London Court*, *supra*, emphasis added.
[570] See Sullivan, *supra*, at p 110.
[571] The Law Commission and the Scottish Law Commission, *supra*, at para 30.
[572] G P Singh, *Principles of Statutory Interpretation*, 8th edn (2001) , at p 3.

combinations constitute a fixed code, shared by everyone in a language community. This code enables authors to embody mental abstractions such as directives in a text and enables readers to extract the intended message simply by decoding the text. Modern linguists have acknowledged that, in practice, this model of communication bears little, if any, relation to reality. The construction of meaning from a text is a complex, multi-faceted process. It involves assumptions about the origin of the text, the genre in which it is written, its author, its intended audience, its purpose, the cultural tradition in which it has operated and operates, and more.'[573] She is right. And Professor Koskenniemi correctly concurs. According to him: 'The idea that law can provide objective resolutions to actual disputes is premised on the assumption that legal concepts have a meaning which is present in them in some intrinsic way, that at least their core meanings can be verified in an objective fashion. *But modern linguistics has taught us that concepts do not have such natural meanings. In one way or other, meanings are determined by the conceptual scheme in which the concept appears. ... [T]here is no one conceptual scheme in the way we use our legal language*.'[574]

374. To the same effect, Lord Diplock said in *Carter v Bradbeer* that 'the inherent flexibility of the English language may make it necessary for the interpreter to have recourse to a variety of aids or canons of construction, which are not merely lexicographical, in order to select from what may be a number of different meanings which the words as a matter of language are capable of bearing, the precise meaning in which the legislature intended them to be understood. Canons of construction may prove to be conflicting guide posts; they may point different ways. Fashions in parliamentary draftsmanship and the attitude of the legislature toward innovations in established law are not unchanging.'[575] And, according to Denning LJ (as he once was): 'Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold set of facts which may arise; and that, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an

[573] Sullivan, *supra*, at p 110.
[574] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), at p 503, emphasis added.
[575] *Carter v Bradbeer, supra,* at p 1206.

instrument of mathematical precision. Our literature would be much the poorer if it were.'[576]

375. Even from a seeming take-off point of the literal approach, Lord Reid could not escape landing at the same view that the inherent flexibility of the English language — notably the drafting language of most modern treaties — generally remains a quicksand for the literal approach. According to him: 'If words of an Act are so inflexible that they are incapable in any context of having any but one meaning, then the court must apply that meaning, no matter how unreasonable the result — it cannot insert other words. But such cases are rare because the English language is a flexible instrument.'[577] Indeed, he once lamented that '[i]f only lawyers realize that no language is a precision tool' they as drafters would stop aiming to cover in a comprehensive way every possible situation: for, that only results in more obscurity.[578]

376. Eminent American jurists have expressed the same view. Consider, for instance, Mr Justice Frankfurter's observation: 'Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts. With one of his flashes of insight, Mr Justice Johnson called the science of government "the science of experiment."'[579] These, in Justice Frankfurter's considerations are some of the 'human variables' that comprise the premises of statutory construction; and it is '[o]nly if its premises are emptied of their

[576] *Seaford Court Estates Ltd v Asher* [1945] 2 KB 461, at p 498.
[577] *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 [House of Lords], at p 859.
[578] Lord Reid, 'The Judge as Law Maker,' *supra*, at p 28.
[579] Felix Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47 *Columbia Law Review* 427, at p 528.

human variables, can the process of statutory construction have the precision of a syllogism.'[580] Accordingly, 'the bottom problem' of statutory interpretation involves the following approach: 'What is below the surface of the words and yet fairly a part of them? Words in statutes are not unlike words in a foreign language in that they too have "associations, echoes, and overtones." Judges must retain the associations, hear the echoes, and capture the overtones.'[581]

377. One of Frankfurter's predecessors, Oliver Wendell Holmes Jr, had observed long before that 'words are flexible.'[582] According to Holmes, 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.'[583] Consequently, judges, he warned, are 'apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.'[584] This was the continuation of his earlier thought: 'A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.'[585]

378. In his turn, Jerome Frank declared: 'Words often are unruly.'[586] Thus, 'The non-lawyer, when annoyed by the way judges sometimes interpret apparently simple statutory language, is the victim of the one-word-one-meaning fallacy, based on the false assumption that each verbal symbol refers to one and only one specific subject. If the non-lawyer would reflect a bit, he would perceive that such an assumption, if employed in the non-legal world, would compel the conclusion that a clothes-horse is an animal of the equine species, and would make it impossible to speak of "drinking a toast." Even around the more precise words, often there is a wide fringe of ambiguity

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[580] *Ibid*, at p 544.
[581] *Ibid*, at p 533.
[582] See *International Stevedoring Co v Haverty*, 272 US 50 at p 52 (1926) [US Supreme Court]. See also Frankfurter, 'Some Reflections on the Reading of Statutes,' *supra*, at p 538.
[583] See *United States v Whitridge*, 197 US 135 at p 143 (1905) [US Supreme Court]. See also Frankfurter, 'Some Reflections on the Reading of Statutes,' *supra*, at p 538.
[584] See *Olmstead v United States*, 277 US 438 at p 469 (1928) (dissenting) [US Supreme Court, dissenting]. See also Frankfurter, *loc cit*.
[585] *Towne v Eisner*, 245 US 418 (1918) [US Supreme Court].
[586] Jerome Frank, 'Words and Music: Some Remarks on Statutory Interpretation' (1947) 47 *Columbia Law Review* 1259, at p 1268.

which can be dissipated only by a consideration of the context and background.'[587]

379. International law teems with similar observations from authorities of the greatest eminence — ancient and modern. Vattel had observed that '[t]here is not perhaps any language that does not also contain words which signify two or more different things, and phrases which are susceptible of more than one sense.'[588] It is for that reason that '*[e]very interpretation that leads to an absurdity, ought to be rejected;* or, in other words, we should not give any piece a meaning from which any absurd consequences would follow, but must interpret it in such a manner as to avoid absurdity. As it is not to be presumed that any one means what is absurd, it cannot be supposed that the person speaking intended that his words should be understood in a manner from which an absurdity would follow. … We call *absurd* not only what is *physically impossible*, but what is *morally* so ….'[589]

380. More modern authorities in international law have expressed similar views. Here recalled is the observation in *Oppenheim's*, for instance, that 'an interpreter is likely to find himself distorting passages if he imagines that their drafting is stamped with infallibility.'[590] And Lord McNair wrote that the assertion that treaties are to be interpreted according to their 'plain terms,' or that words are to be construed according to their 'general and ordinary meaning' or their 'natural signification' is only 'a starting-point, a *prima facie* guide,' which 'cannot be allowed to obstruct the essential quest in the application of treaties, namely to search for the real intention of the contracting parties in using the language employed by them.'[591] In rejecting the suggestion that a provision may be so plain as to exclude judicial interpretation, he observed as follows: 'In short, it is submitted that while a term may be "plain" *absolutely*, what a tribunal adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term *relatively*, that is, in relation to the circumstances in which the treaty was made, and in which the language was used. If that is what is meant by the doctrine of "plain terms", no objection is raised to it. But if it means that tribunals must

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[587] *Ibid*, at p 1263.
[588] Vattel, *The Law of Nations, supra*, p 416.
[589] *Ibid*, at p 418, emphasis received.
[590] *Oppenheim's International Law*, vol 1, 9th edn [R Jennings and A Watts] (1996) Parts 2 to 4, p 1273, fn 12, quoting Pertulosa Claim, ILR, 18, 18 (1951), No 129, at p 418.
[591] Lord McNair, *The Law of Treaties* [Oxford: Clarendon Press, 1961 (reprinted 2003)], at p 366.

stop short at applying the term in its primary and literal sense and permit no inquiry as to anything further, it is submitted that the doctrine is wrong.'[592]

381. The views of Sir Hersch Lauterpacht on the matter include the following: 'The "plain" or "ordinary" or "natural" meaning of terms may provide no help; to assume it may amount to avoiding rather than to accomplish the true object of interpretation. There are, in the first instance, occasions in which the parties did not at all contemplate the cases or types of cases which present themselves to the Court. There are instances in which, largely for that very reason, although the language which the parties have used is clear, its automatic and literal application may lead to an absurdity or a travesty of what must reasonably be assumed to have been the intention of the parties. Finally, even in the absence of difficulties of that character, the judge is often confronted with a choice between conflicting and equally legitimate principles of interpretation. It is his duty to give effect to the intention of the parties. But he is bound to interpret that intention in accordance with the paramount principle of good faith which demands that, again within the limits determined by circumstances, the maximum effect must be given to the instrument in which the parties have purported to create legal obligations. At the same time he must take into account the fact that, especially in the international sphere, their intention may have been to create only a limited or even a nominal obligation. To what extent is that intention decisive? To what extent is it subject to the apparently overriding principle that the object of treaties is to create legal obligations?'[593]

382. Similarly, the European Court of Human Rights has repeatedly observed that 'however clearly drafted a provision of criminal law may be, in any legal system, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.'[594]

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[592] *Ibid*, at p 367.
[593] Hersch Lauterpacht, *The Development of International Law by the International Court* [London: Stevens and Sons, 1958, reprinted Cambridge: CUP 1996], at pp 395 — 396.
[594] *K-H W v Germany*, Application No 37201/97, Judgment of 22 March 2001, at paras 45 and 85, emphasis added [ECtHR, Grand Chamber]. See also *S W v United Kingdom*, Application No 20166/92, Judgment of 22 November 1995, at para 36 [ECtHR], and *C R v United Kingdom*, Application No 20190/92, Judgment of 22 November 1995 [ECtHR], at para 34.

383. It is for these reasons and more that the literal approach to interpretation no longer commands an arresting attraction in many jurisdictions. That is to say, it is safe to assume the intendment of the legislature for a just outcome according to the overall object and purpose of the given legislation. But it is not safe to assume that the particular words chosen or their arrangement in a given provision will always achieve that intendment. Thus, the first assumption of the literal approach — linguistic assurance — is unsafe.

2. The Second Assumption of the Literal Approach: the Democracy Argument

384. The second assumption is to the following effect. In failing to apply the literal text as it appears on its face and in interposing purposive views, the judiciary is improperly usurping the role of the legislature, which, in a democracy, is composed of the elected representatives of the people. In a democracy, it is the legislature and not the judiciary that makes the laws that order society. The second assumption of the literal approach fares no better as a fallacy.

385. The fallacy of that argument begins with the premise of schoolyard rivalry that the argument supposes in the relationship between the legislature and the judiciary. The fallacy comprises the following suppositions, among others: (a) that the legislature would disapprove of judicial construction that actually seeks to give operative meaning to the particular legislative language, but in a way that is consistent with the overall purpose and scheme of the very same legislation through which the legislature seeks to remedy a certain mischief; or (b) that it is in the interest of the legislature for judges to apply a literal text that produces absurdity or injustice, which would be blamed on the legislature.[595]

386. The second assumption of the literal approach is troubled by challenges of rational integrity. For one thing, it ignores the possibility that the circumstances of the legislative process (in which the language in question is used), which are necessarily political, may be such as could give the

[595] Notably, Zander detects something of chicanery in some of the profession of deference to the legislature: 'The draftsman is in effect punished for failing to do his job properly … "If the draftsman has not got it right, let him try again and do better next time"': Zander, *supra*, at p 144. The trouble, he points out, is that it is the wider community that bears the cost: *ibid.*

legislature some relief (and release!) that a difficult socio-political problem is now somebody else's headache — the judiciary's. As such, the problem is now in the hands of a responsible partner in the stewarding of an ordered society, for appropriate solution in a manner that is apolitical, thoughtful and impartial: with the aim of doing justice in actual cases.

387. At least two eminent jurists — Mr Justice Frankfurter and Lord Reid — have described the occasionally uneven circumstances in which the legislature employs language in the legislative process. According to Justice Frankfurter: '[G]overnment sometimes solves problems by shelving them temporarily. The legislative process reflects that attitude. Statutes as well as constitutional provisions at times embody *purposeful ambiguity* or are expressed with a generality for future unfolding.'[596] Justice Frankfurter may have left out (clearly inadvertently) treaty making from his observation. But, Lord Reid did not. 'So much of our time,' he wrote, 'is taken up in interpreting statutes that we are perhaps too much inclined to blame the draftsman. Sometimes he gets inadequate instructions from the department promoting the legislation. Sometimes the point for decision is one which could not have been foreseen. Sometimes a formula or compromise was agreed by the interests concerned or was inserted during the Committee Stage of the Bill, and such a formula is *generally ambiguous*. Here as in diplomacy the essence of a successful formula is that both sides can think they have won their point because it can be interpreted either way.'[597] What Justice Frankfurter had described as 'purposeful ambiguity,' and which Lord Reid echoed as 'generally ambiguous [formula],' is the same problem solving strategy known in the common parlance of diplomacy as '*constructive ambiguity*.'[598] But such ambiguities in legislation have an anchoring significance in the role of the judiciary in the construction of legislation for the purpose of doing justice in an actual case, in a manner that eschews vagueness or ambiguity. That significance becomes quite clear in the light of the more credible view of the relationship between the legislature and the judiciary.

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[596] Frankfurter, *supra*, at p 528, emphasis added.
[597] Lord Reid, 'The Judge as Law Maker' (1972-73) 12 *Journal of Society of Public Teachers of Law* 22 at p 28, emphasis added.
[598] See Dražen Pehar, 'The Use of Ambiguities in Peace Agreements,' in J Kurbalija and H Slavik (eds) *Language and Diplomacy* (2001) 163, at p 178, emphasis added.

388. And the more credible view involves the cooperative hypothesis. It is to accept that the task of judicial interpretation contemplates a grownup relationship, in the manner of a responsible partnership, between the judiciary and the legislature — driven by the betterment of society as the ultimate objective of all branches of government, the judiciary included. The judiciary have no ulterior motive or other purpose to their mandate than to add their own hands on deck — in a thoughtful way — in the work of ordering society. In that relationship, the legislature lead the way by carving out (as best as the nature of their own processes permit them) main roads[599] to new areas on the plains of human endeavours, good and bad.

389. But the judiciary, for their part, develop, improve and maintain the road in the daily use that their work involves. But they remain all along on the main road initially carved out by the legislature. The judiciary's road maintenance work may involve clearing away unhelpful debris that purposeful ambiguities, generally ambiguous formulas, constructive ambiguities and other imperfections in the legislative process have left behind. It may also entail general trimmings that become necessary as time goes on; as well as the occasional re-routing in the manner of obstacle get-around paths that become inevitable when unforeseen or sudden breaches or obstacles occur along the main road. And when a tectonic shift in social values makes it truly treacherous to keep travelling down the same old road, and the legislature have been slow or unable to react, the judiciary should be able to devise an *ad hoc* solution to immediate problems that justice must solve, pending the legislature's more permanent remedy that should come later. The gist of the point is, perhaps, adequately captured by Donaldson J's observation that judges as interpreters are 'not legislators'; but they are 'finishers, refiners, and polishers of legislation which comes to them in a state requiring varying degrees of further processing.'[600]

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[599] The most appropriate imagery comparable to the promulgation of a piece of legislation is a road across the plains of human endeavour. It is neither a concrete tunnel through a rocky mountain, nor a lane on the open sea. The practical impossibility of constraining judicial reasoning along fixed lines (evidenced by the limitless debates memorialised in copious literature and case-law on statutory interpretation) renders the tunnel comparison inapposite. Similarly inapposite is the imagery of a lane on the open sea: the inattentive, the inexperienced or the wilful interpreter can easily lose their way. '[T]oo much flexibility,' wrote Lord Reid, 'leads to intolerable uncertainty': Lord Reid, 'The Judge as Law Maker,' *supra*, at p 26.

[600] *Corocraft Ltd & Anor v Pan American Airways Inc* [1969] 1 QB 616, at p 638.

390. In the foregoing arrangement, the concerns of those who worry about judicial overreaching, through statutory construction, will be adequately addressed by the prerogative that always lies in the legislature to override, by appropriate legislation, the general effects of a judicial decision that is seen as out of line with the applicable legislation. That is a far better solution than to pay fealty to literalism even if it results in absurdity and injustice, pending further legislative action.[601]

391. Justice Singh also supports the cooperation hypothesis. As he wrote: 'In all real controversies of construction, if it were open to consult the Legislature as to its intention, the answer of most of the legislators in all probability will be: "such a problem never occurred to us, solve it as best as you can, consistent with the words used, and the purpose indicated by us in the statute."'[602]

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392. The democracy argument against purposive interpretation is often framed in terms to this effect. If the citizens wish the legislation varied, 'let them amend it.'[603] But the argument is much too simple. It is made so by the observations such as those of Justice Frankfurter and Lord Reid, as we have seen, about the nature of the legislative process that occasionally produces ambiguities — 'purposive,' 'general' or 'constructive' — even unintended ambiguities. But, beneath that is the further consideration that the circumstances of political or diplomatic compromises that produce those kinds of ambiguities in the relevant legislative process necessarily engage a deeper dimension of judges' role in society, as the impartial arbiters of disputes. And, here, the word 'arbiter' takes on its conventional meaning. That is in the sense that the judicial role does not retreat abruptly at the doorstep of difficult questions of a social or political nature. It is very much a

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[601] See, for example, the *Lilly Ledbetter Fair Pay Act* of 2009, 123 Stat 5, where the US Congress passed legislation for the specific purpose of overriding a 5:4 majority decision of the US Supreme Court in *Ledbetter v Goodyear Tire & Rubber Co*, 550 US 618 (2007) [US Supreme Court]. Another example is r 134*quarter* of the ICC Rules of Procedure and Evidence, adopted by the ICC Assembly of States Parties at the end of 2013, overriding the decision of the Appeals Chamber in their decision that overturned the initial decision of the Trial Chamber granting Mr Ruto conditional excuse from continuous presence at trial.

[602] Singh, *supra*, at p 7.

[603] See Stanley Fish, 'Intention is all there is: a Critical Analysis of Aharon Barak's Purposive Interpretation in Law' [2008] 29 *Cardozo Law Review* 1109, at p 1145.

part of the judge's burden of functions to take on and resolve — impartially and responsibly — those difficult social and political questions that unavoidably fall to be resolved in the case at hand. As the ICJ quite rightly held, as long as a court of law 'has before it sufficient information and evidence to enable it' to answer the judicial question presented, 'that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task.'[604]

393. There is, therefore, no appreciable normative reason to barricade or protect the judicial function from the province of seemingly intractable social or political disputes that occasion 'purposeful ambiguity' or 'constructive ambiguity' in the legislative process. It is in the very nature of their mandate to adjudicate them — without prejudice to the prerogative of the legislature to reverse judges as appropriate. Indeed, there is much reason to consider that if disputes were presented to a court of law for resolution in the course of the legislative process itself, with the view to avoiding an ultimate legislative result of 'purposeful' or 'constructive' ambiguity, the judges would surely be expected to do their best to resolve the given disputes responsibly and impartially — subject, of course, to any clear superior law that bars the court from entertaining particular questions. But the existence of any such superior law must be clearly established, not left to vague and subjective suppositions of what democracy requires. That being the case, there is hardly a material difference in the fact that the dispute — which was necessarily bound up and patched over *ab initio* in 'purposeful ambiguity' or 'constructive ambiguity' — had eventually materialised for judicial resolution after the fact of the particular legislative process; in the course of interpretation of the legislation, at the suite of a citizen entitled to both access to justice and to justice in fact. In that regard, the better solution would be for the judge — as an *arbiter* of even difficult socio-political disputes — to resolve the question as best as can be done, by way of purposive construction of the statute. As observed earlier, the democratic imperative retains for the legislature — in its represented socio-political factions — the option to agree later (if they can) to a different solution that they could legislate with the view to correcting any misgivings perceived in the judicial solution achieved by purposeful construction. But

[604] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 136, at para 58.

until then, justice for the citizen need not be delayed in the cause before the court.

394. Perhaps, the point may be made differently: by reference to the authority often granted judges to strike down laws that conflict with written constitutions or bills of right. That, no doubt, often involves social or political questions on which opinion in society may be strongly divided. And the incidence of the judicial mandate operates in non-negotiable terms, relative to the legislation under scrutiny. The power is exceptional, granted, in view of considerations of separation of powers between the various branches of government. As such, it does not signal a general judicial licence to strike down legislation at large, in the absence of express power positively granted. Yet, the typology of the power as exceptional has a kindred value in orienting the judicial function, when purposive construction beckons the judge to answer a question labelled as 'political,' though an answer is required in the actual case before the judge. Since the citizen (or a class of citizens) whose interests are represented in the litigation require the answer, it may indeed be the case that the just answer will not in the end come in the manner of a decision striking down the provision or statute in the absence of an expressly granted judicial power to strike down. But, it can — and should — come in the manner of a judge-made best-effort to construe the provision purposively, in a way that seeks to do two things: to give effect to the specific provision, while still remaining within the main road of the overarching remedy against the particular mischief that the statute had in the first place set out to address *pro bono publico* (as it was put in *Heydon's Case*).

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395. Further still, the term 'democracy,' it must be stressed, was never a talismanic word that evanesced every interest that citizens have in society — either as individuals or minority groups — to the extent to which such interests are inconsistent with those of other citizens or of the commonwealth itself. Nor should the word 'democracy' be brandished against a judge (as if the cross against Dracula) with the expectation that the judge would immediately retreat from purposive construction upon the mere invocation of the word.

396. This consideration engages one regard in which one of Oliver Wendell Holmes's famous aphorisms must be approached with care. In a commentary

about the Sherman Act, in a letter to Harold Laski, Holmes famously wrote: 'I hope and believe that I am not influenced by my opinion that it is a foolish law, I have little doubt that the country likes it and I always say, as you know, that if my fellow citizens *want* to go to Hell I will help them. It's my job.'[605] [Emphasis added.] Holmes's obvious interest in distancing his own prejudices from his judicial functions is as entirely understandable as it is unremarkable: but it need not support a fractured view of the judicial function in a democracy.

397. Notwithstanding that this story — about what his 'job' was supposed to be — may have contributed in ascribing to Holmes the reputation of a so-called judicial 'jobbist,'[606] it may be that the key to a fairer and more accurate appreciation of his point is in the signal word of freewill — 'want' — that appears in that aphorism. Free will is a personal attribute, notwithstanding that the bearer choses to align his own with a league of the similar-minded. No citizen is required to join his fellow citizens in a train ride to Hell, without making his best and reasonable efforts to be excused from the trip, if he does not *want* to go. It may even be that the fires of Hell wreak uncommon pain to those who decline to go there.[607] Access to justice is what the social contract, as

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[605] Letter to Harold Laski of 4 March 1920, in *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J Laski*, 1916-1935, vol 1, at pp 248 — 249 (Mark DeWolfe Howe, ed 1953). See also Richard Posner, *The Problems of Jurisprudence* (1990), at p 222.

[606] See William Brennan, 'In Memoriam: J Skelly Wright' (1988) 102 *Harvard Law Review* 361. Holmes's 'jobbist' reputation is chiefly attributed to the much reprised tale of his exchange with Learned Hand in their horse-carriage days. As Hand himself supposedly told the story: 'I remember once I was with [Holmes]; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupé. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here. Come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."' And Judge Robert Bork's version runs like this: 'There is a story that two of the greatest figures in our law, Justice Holmes and Judge Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, "Do justice, sir, do justice." Holmes stopped the carriage and reproved Hand: "That is not my job. It is my job to apply the law."' See Michael Herz, '"Do Justice!": Variations of a Thrice-told Tale' (1996) 82 *Virginia Law Review* 111.

[607] *Plessy v Ferguson* 163 US 537(1896) was a case in which some American citizens (blacks and whites) insisted on their right to be excused from a Hell-bound train known as racial segregation. The majority of the justices of the US Supreme Court took the view that it was their job to help everyone (including the petitioners) to stay the course, because the majority of the citizens through their elected representatives had adopted a law mandating segregation. Justice Harlan in a lone dissent refused to join his colleagues in their own train of thought. Finally, half a century later, in *Brown v Board of Education* 347 US 483 (1954), the

it were, promises every citizen, as the last order of civilised efforts to escape Hell on earth as an *unwanted* fate. And, it is *not* the judge's 'job,' then, to require him to go to Hell against his will, *on the simple reasoning* that since his fellow citizens *want* to go to Hell and have resolved to do so, he too, must go. Rather, the judge's mandate permits her to consider the matter very carefully and deeply, to see how the conflicting *wants* of one citizen or a few — who also share the privileges and obligations of their society no more or less so than any other citizen — may be reasonably accommodated with those of the rest. It may well be that purposive construction of any applicable legislation will not reprieve the citizen in the end, but it is a necessary starting point for a solution by a judge required by her mandate to adjudicate fairly, responsibly and impartially.

398. It helps, then, to stress that 'democracy' is not merely an emotive, ornate emblem that validates the polity. Perhaps more importantly, democracy does not mean only one thing, according to the intendment of the person who invokes its name. It is, rather, a service-oriented idea with variegated utility in infinite ways. One of its foremost purposes entails the

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Supreme Court unanimously agreed with Harlan that it is the judge's job to mediate with courage and responsibility serious conflicts, even those involving deep social and political divisions. Surely, the chronicles of inhumanities (from Jim Crow to Nazism and *apartheid*) hold stark lessons in how majoritarian legislatures promulgated statutes whose purposes had been to suppress and persecute those less powerful. As Lord Steyn put it: 'History has shown that majority rule and strict adherence to legality is no guarantee against tyranny. Hitler came to power by democratic vote. … The role of judges in this period is, of course, part of the Nuremberg story. … In the apartheid era millions of black people in South Africa were subjected to institutionalised tyranny and cruelty in the richest and most developed country in Africa. What is not always sufficiently appreciated is that by and large the Nationalist Government achieved its oppressive purposes by a scrupulous observance of legality. If the judges applied the oppressive laws, the Nationalist Government attained all it set out to do. That is, however, not the whole picture. In the 1980s during successive emergencies, under Chief Justice Rabie, almost every case before the highest court was heard by a so-called "emergency team" which in the result decided nearly every case in favour of the Government. Safe hands were the motto. In the result the highest court determinedly recast South African jurisprudence so as to grant the greatest possible latitude to the executive to act outside conventional legal controls': Lord Steyn, 'Democracy, the Rule of Law and the Role of Judges' (2006) *European Human Rights Law Review* 243, at p 245. Indeed, the annals of international criminal law reveals that the defence of judges doing their 'job' availed certain Nazi era judges no more than it did Adolf Eichmann the bureaucrat who was also doing his 'job': see respectively, the *Justice Case* (1947) 3 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10; and, the judgment in *Attorney-General v Eichmann* (1962) Case No 336/61 [Supreme Court of Israel], available at <www.internationalcrimesdatabase.org/Case/185/Eichmann/>.

constant work of socio-political accommodation: involving inhabitants and their commonwealth in any configuration in which a conflict of wants may arise among them. The judicial function occupies a central place in that democratic purpose: by virtue of the judge's mandate to adjudicate the conflicts that worry that accommodation. Purposive construction of statutes is an essential tool of that judicial function, whether or not there is a judicial power expressly granted to strike down a statutory provision for any reason.

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399. The circumstances of multilateral international relations reveal another dimension to the overly simplistic view of democracy as inconsistent with purposive construction. As seen earlier, it is often said as part of the democracy argument that the citizens can always amend any law, as they see fit, through their elected representatives. But, the argument fails to take into account that the realities and vagaries of international relations, in which different interests are often engaged, may induce in States Parties much anxiety over opening up a treaty in force. Regarding, say, a treaty constitutive of an international court, such as the Rome Statute, the fear in the minds of even the States with unquestionable *bona fides* may be that the treaty may unravel in whole or in part, once opened up again for any reason for further tinkering. To do so, even for a minor and essential correction (recommended by the judges who have since worked the treaty and identified flaws in need of the correction), with which all parties agree in good faith, may invite the floodgates in other more difficult areas. In those circumstances, purposive judicial construction of the treaty (in order to correct any identified flaws truly deserving of correction) acquires a cherished value, which States Parties themselves may even welcome.

400. All that is to say, there is an obstacle to the casual argument that citizens can always amend a legal text as they see fit, to make the necessary adjustments. Circumstances may recommend against opening up an existing treaty, for no better reason than the mere inclinations of pragmatism for the greater good.

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401. In any event, the democratic premise of the argument against purposive interpretation becomes a peculiar fiction in the context of the ICC. The fiction is sufficiently demonstrated by the much-misprized practice

involved in the selection of ICC judges. The practice in question now acquires a functional, jural value in their work. And the point begins with the fact that *all* ICC judges were nominated by their respective States and *elected* by the community of nations who share membership of the Rome Statute at any given time. The 'elected' badge is thus something they now share with the elected public officials who serve proper parliaments. That dimension to their role only enhances the general proposition that ICC judges are no errand robots lacking a mandate to bring thought to bear in their interpretation of the Rome Statute in a manner that gives sensible application to given words, but within the overall object and purpose of the Statute.

402. In addition, then, to all other considerations employed to justify the judicial role in purposive construction, the *elected* status of ICC judges may be fortifying to their authority to engage in purposive interpretation of the Rome Statute and to improve it along its overall path of bringing accountability to bear, whenever crimes that deeply shock the conscience of humanity have been committed and the States with the sovereign jurisdiction prove unwilling or unable to investigate or prosecute genuinely.

K. The Purposive or Teleological Approach to Article 7(2)(a) of the Rome Statute

403. Hence, a move away from the theory requiring proof of centrally directed aggregate complicity need not be explained by Rawls' earthy philosophy of justice, stated in the terms that 'an injustice is tolerable only when it is necessary to avoid an even greater injustice ….'[608] It may, however, assist in addressing any complaint of perceived imperfections that may be raised against the more desirable construction — complaints of imperfection which, in the nature of things, often trouble even the best human endeavours, as has been observed by not only eminent judges from the common law world, but also by legends of international law from continental Europe.

404. The far sounder route of analysis is the purposive or teleological method of interpretation of legal texts. As seen above, it is a wholly proper judicial method, not only according to the teachings of Grotius, Vattel, McNair and Lauterpacht. As noted earlier, the method has been codified in modern international law in article 31(1) of the VCLT. It provides, it will be

[608] John Rawls, *A Theory of Justice* (1999), at p 4.

recalled, as follows: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' As noted earlier, the ICC Appeals Chamber has held that the Rome Statute is not exempt from the province of article 31(1) of the VCLT.

405. But, how does all of this assist, in actual operation, in the construction of the phrase 'organisational policy' as employed in article 7(2)(a) of the Rome Statute? We may begin by recalling that the aim of article 7(2)(a) is to exclude from the Court's dockets 'singular atrocities not part of a widespread or systematic attack.' In other words, the purpose of the provision is to exclude '*unconnected* crime waves.' The question then is whether it is possible to adopt a construction that kills two birds with one stone: in the sense of construing the provision in a manner that at once excludes random atrocities, while suppressing at the same time the mischief that the Rome Statute centrally aimed to cure through the remedy of accountability. It is assumed that all agree that the need to promote the accountability remedy is a central focus of all interpretive efforts concerning the Rome Statute. This is keeping in mind that the jurisdiction of the ICC is complementary and triggered in the event of national inability or unwillingness to hold their own end of the bargain, by failing to investigate or prosecute the crime genuinely.

406. It is entirely possible to construe article 7(2)(a) in a manner that excludes random atrocities while at the same time seeking to ensure accountability for atrocities that deeply shock the conscience of humanity. The exercise may begin with always keeping at the back of the mind the dicta of eminent jurists who have accepted that a judge may choose from available meanings an interpretation that avoids absurdity or injustice. To be recalled in that respect is Lord Diplock's pronouncement that 'the inherent flexibility of the English language may make it necessary for the interpreter to have recourse to a variety of aids or canons of construction, which are not merely lexicographical, *in order to select from what may be a number of different meanings which the words as a matter of language are capable of bearing*, the precise meaning in which the legislature intended them to be understood.'[609] To same effect, Lord Reid said as follows: 'If the language is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an

[609] *Carter v Bradbeer, supra,* at p 1206, emphasis added.

unreasonable result, and adopt that interpretation which leads to a reasonable practicable result.'[610]

407. Such dicta should resolve the mind to the possibility that, purely as a matter of grammar, the noun phrase 'organisational policy' can quite readily bear the alternative meaning of *'coordinated course of action,'* notwithstanding the apparency of the meaning that points to a proprietary policy of an aggregate entity. Such *coordinated course of action* can comprise the handiwork of one individual who executes multiple large-scale attacks against innocent civilians, suggesting a system or one planned large-scale attack that causes widespread harm to the victims. A coordinated course of action can also comprise the multiple acts of several individuals who, without a centralised structure but with a common goal (perhaps viscerally shared), embark upon violent acts by adhesion to other acts of violence of the same kind that are occurring during the same period.

408. Since it is accepted that 'organisational policy' *does* have the meaning suggestive of a proprietary policy of an aggregate entity, it will not be necessary to discuss that aspect any further for present purposes. The focus of the ensuing discussion will concentrate on 'coordinated course of action' as the alternative meaning of 'organisational policy.' Indeed, proof that an attack was pursuant to the proprietary policy of an aggregate entity may greatly assist in proving that the attack was a 'coordinated course of action.'

409. The construction of 'organisational policy' as meaning a coordinated course of action does not inevitably require proof of centrally directed aggregate complicity in the attack against a civilian population, for purposes of crimes against humanity as set out in the Rome Statute. The possibility of that construction is apparent when the noun 'policy' and the adjective 'organisational' are considered in their various parts. It becomes clear that they are not the exclusive preserves of aggregate entities. But, how so? This is because 'policy,' notably, is defined in *The Shorter Oxford English Dictionary* in a number of ways including as follows: 'A course of action or principle adopted or proposed by a government, party, *individual*, etc.; *any course of action adopted as advantageous or expedient*.' [Emphasis added.] The omnibus *Oxford English Dictionary* gives the following illustrations amongst the usages of the word:

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[610] *Gill v Donald Humberstone & Co Ltd* [1963] 1 WLR 929 [House of Lords], at p 934.

- 'The project attributed … to Alexander, is not the less in perfect harmony with his general policy.'[611]

- 'He had read in novels and seen on the stage situations of this kind, where the father had stormed and blustered. The foolishness of such a policy amused him.'[612]

410. Notably, *Roget's Thesaurus II* (electronic version) lists the following words amongst the synonyms of 'policy':

> action, behaviour, circumspection, conduct, cool judgement, course, creed, design, discreetness, discretion, discrimination, game plan, guiding principles, judgement, judiciousness, line, management, method, plan of action, position, principles, procedure, prudence, reflection, reflectiveness, scheme, strategy, system, tactics, thoughtfulness, way, ways and means, weighing.

411. In light of the philological treatment that the *OED,* the *SOED,* and *Roget's II* have given the word 'policy,' it is thus clear that, if need be, the word 'policy' can also describe the conducts of individuals, as well as of aggregate entities.

412. For its own part, the word 'organisational' in its association with the noun 'organisation' is, as a matter of diction, not an adjective that exclusively describes the conduct or condition of aggregate entities. To illustrate the usage, in the story *The Death of the Lion*, Henry James wrote as follows: 'The princess is a massive lady with the organisation of an athlete and the confusion of tongues of a *valet de place*.' Also to be noted is the following critique of the work of a renowned artist: '"In the organization of forms, Rubens was a most extraordinary being: his hands and feet, and trunks, are as perfect in formation, — that is to say, in parts that are essential to motion, — as the Elgin marbles, — though, every one knows, most brutal and most disgusting in taste of design."'[613] The foregoing illustrations of the usage of the word 'organisation' appear in *The Shorter Oxford English Dictionary* and *The Oxford English Dictionary*, respectively — one relating to the *condition* of the individual, the other to individual *action*.

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[611] C Thirlwill, *A History of Greece*, 1st ed (1835-1844), at p 75.
[612] P G Wodehouse, *The Coming of Bill* (1920), at p 62.
[613] See John Scott, *A Visit to Paris in 1814; being a review of the moral, political, intellectual and social condition of the French Capital*, 5th ed (1816), at p 255.

413. The word 'organisation' in those usage illustrations is attributed to an individual — the princess and Rubens, respectively. Such remains a valid and correct usage of the word 'organisation.' It need not always relate to an aggregate entity. It is particularly instructive that in the *Oxford English Dictionary*, 'organisation' bears the following definitions, among others: 'The action of organising or putting into systematic form; the arranging and co-ordinating of parts into a systematic whole.' A similar definition of 'organisation' appearing in the *OED* is '[t]he condition of being organised; the mode in which something is organised; coordination of parts or elements in an organic whole; systematic arrangements for a definite purpose.'

414. Thus, the action of organising something, or the condition of the thing being organised, into a systematic form is not the exclusive attribute of aggregate entities in a manner that excludes the actions or conditions of individuals. That signification to the word 'organisation' is similarly apparent from the following amongst its synonyms as listed in *Roget's II*:

> approach, blueprint, buildup, calculation, categorization, categorizing, charting, classification, classifying, conception, construction, contrivance, coordination, creation, design, device, disposition, effectuation, envisagement, fabrication, fashion, fashioning, figuring, foresight, forethought, forging, form, framework, genetic individual, graphing, guidelines, harmony, idea, individual, intention, long-range plan, make, making, mapping, master plan, method, methodization, methodology, normalization, order, ordination, organizing, pattern, patterning, persuasion, physiological individual, piecing together, plan, planning, prearrangement, procedure, production, program, program of action, rationalization, regularity, routine, routinization, schedule, schema, scheme, scheme of arrangement, setting up, set up, shape, shaping, strategic plan, strategy, structure, structuring, symmetry, system, systematization, systematizing, tactical plan, tactics, texture, the big picture, the picture, uniformity, working plan, zoon.

415. Thus, purely from the point of view of grammar, no violence at all is done to the phrase 'organisational policy' appearing in article 7(2)(a), if it is sensibly construed to mean nothing more than a *coordinated course of actions* of one or more persons in the manner of a widespread or systematic attack against a civilian population. That, surely, is one serviceable sense of usage

that is firmly within the 'range of possible meanings'[614] of the phrase 'organisational policy.' Individuals, possibly acting as 'lone wolves,' can systematically employ sophisticated (chemical or biological) weapons of mass destruction in attacks against a civilian population, resulting in as much or more casualty as may be the case when a large group of persons embark upon widespread or systematic attack in the more tedious and laborious manner of close-contact assault using bladed or blunt weapons. There is no rational basis to exclude from the jurisdiction of the ICC the crimes of the former, while including those of the latter — in the event of unwillingness or inability of the national authorities to prosecute the attendant crime genuinely.

L. 'Strained' Construction

416. It is foreseeable that the approach indicated above may provoke 'the voice of the strict constructionist' and 'the voice of those who go by the letter' (as Lord Denning would say) — the puritans of tabulated syllogism and symmetry — into complaints about imperfections in the construction. It is also foreseeable that some of those criticisms may be that the construction is 'strained,' given its evident lack of syntactic flow with the coordinate notion of 'State' policy, apparent in the composite phrase 'State or organisational policy' appearing in the relevant text of article 7(2)(a).

417. Such complaints are understandable, but they say nothing about the justice of the resulting construction. They must be put in perspective. First, as concerns the incidence of coordinate appearance of 'organisational' policy and 'State' policy in the same phrase, it helps to recall the observations of Bennion's that drafting errors 'frequently occur,'[615] in *Oppenheim's* that 'an interpreter is likely to find himself distorting passages if he imagines that their drafting is stamped with infallibility,'[616] and in *Maxwell's* that it is 'more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended.'[617] Also to be recalled as an instance of such slovenliness is the evident awkwardness of the definition of an attack in article 7(2)(a) as '*multiple* commission of acts referred to in paragraph 1 against any civilian

[614] See Lord Steyn, '*Pepper v Hart*; A Re-examination' (2001) 21 *Oxford Journal of Legal Studies* 59, at p 60, emphasis added.
[615] Bennion, *Understanding Common Law Legislation: Drafting and Interpretation, supra,* at p 48.
[616] *Oppenheim's International Law, supra,* at p 1273, fn 12.
[617] *Maxwell on Interpretation of Statutes, supra,* at p 105.

population,' given that some of those acts referred to in article 7(1) — such as extermination or persecution — already involve *multiple* commissions of acts. That being the case, it cannot be presumed that the phrase 'State or organisational policy' is entirely free of syntactic error, when considered from the perspective of object and purpose of the Rome Statute. This is to say, the phrase 'State or organisational policy' is a slovenly phrase. It is in the same order of slovenliness as a definition that suggests that apartheid, extermination and persecution are crimes against humanity only when there have been multiple crimes of apartheid, extermination and persecution, respectively.

418. Furthermore, any complaints about the imperfections of the proposed construction could override neither the need to avoid absurdity and injustice, nor the role of justice in an appropriate interpretation in the light of the overall object and purpose of the Statute. Notably, they are adequately resolved by the understanding that a 'strained construction', as will become presently evident, is a perfectly proper interpretive approach. It may be adopted for the good cause of justice, if to do so would avoid an absurdity that defeats the purpose of the statute, while still giving statutory language an alternative meaning that it can bear. As Mackinnon LJ observed: 'When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used ...'.[618] Bennion agrees, observing: 'There are very many decided cases where courts have attached meanings to enactments which in a grammatical sense they cannot reasonably bear. Sometimes the arguments against a literal construction are so compelling that even though the words are not, within the rules of language, capable of another meaning, they must be given one.'[619] The House of Lords judgment in *R v A (No 2)* is notable in that regard. The case involved the construction of a provision of a UK statute that restricted the right of the accused to cross-examine the complainant in a rape case. The issue was whether to read the statute in a manner that makes it either compliant or incompatible with the European Convention on Human Rights. As regards compliant reading of UK legislation, s 3(1) of the UK Human Rights Act 1998 provided as follows: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect

[618] *Sutherland Publishing Co v Caxton Publishing Co* [1938] Ch 174, at p 201.
[619] Bennion, *Statute Law* (1990), at p 91.

in a way which is compatible with the Convention rights.' In the lead opinion, Lord Steyn observed both that '[u]nder ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences.' But he also observed that for the sake of the compliance contemplated by s 3, it will be necessary occasionally to adopt an interpretation which may appear linguistically 'strained': this is achieved by reading down express statutory language or the necessary implications of the provision in question. As he put it:

> Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of interpretation of legal instruments that the text is a primary source of interpretation: other sources are subordinate to it ... . Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so ... . In accordance with the will of Parliament as reflected in section 3 *it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions*.[620]

419. Doubtless, if Lord Steyn was prepared to 'read down' express language in a statute or its necessary implications, in order to achieve the contemplated compatibility, he should be prepared to *read in* words to the express language in the statute, in order to achieve its overall purpose and avoid absurdity.

420. Lord Hope, for his part, did not necessarily see much 'difficulty with a solution which reads down' certain of the provisions of the statute in question, 'to make them compatible. That, it seems to me, is what the rule of construction requires. The court's task is to read and give effect to the legislation which it is asked to construe.'[621] He was, however, unprepared to go so far as to endorse any interpretational approach that would, in the name of compatibility with the ECHR, result in naked amendment of legislation by the judiciary, in a manner that negates the very remedy to a specific mischief that the legislature had, in the first place, addressed in the given legislation.[622]

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[620] *R v A (No 2)* [2002] 1 AC 45 [House of Lords], at para 44, emphasis added.
[621] See *ibid*, at para 110.
[622] *Ibid*, at para 109.

'The compatibility,' he wrote, 'is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible.'[623] This was the essence of Lord Hope's position in another case, where he had insisted that s 3(1) of the UK HRA 1998 'preserves the sovereignty of Parliament. It does not give power to the judges to overrule decisions which the language of the statute shows have been taken on the very point at issue by the legislator.'[624] Thus, to be acceptable, the task of reading in words to make a UK statute compatible with ECHR would require judges to employ precise language 'as the parliamentary draftsman would have done if he had been amending the statute. It ought to be possible for any words that need to be substituted to be fitted in to the statute as if they had been inserted there by amendment. If this cannot be done without doing such violence to the statute as to make it unintelligible or unworkable, the use of this technique will not be possible.' The only option in such circumstances would be declaration of incompatibility, if unavoidable.[625]

421. But, he explained, it may not always be necessary to engage in 'a strained or non-literal construction,' nor to 'read in' or 'read down' words. He identified the following three broad categories of situations, not all of them requiring those approaches to construction. They are: (1) cases in which '[i]t may be enough simply to say what the effect of the provision is without altering the ordinary meaning of the words used …'; (2) cases in which 'the words used will require to be expressed in different language in order to explain how they are read in a way that is compatible. The exercise in these cases is one of translation into compatible language from the language that is incompatible'; and, then (3) the cases in which 'it may be necessary for words to be read in to explain the meaning that must be given to the provision if it is to be compatible,' a careful distinction must be kept in mind between 'the interpretation of a statute by reading words in to give effect to the presumed intention' as compared to judicial 'amendment' of a statute. 'Amendment is a legislative act. It is an exercise which must be reserved to Parliament.'[626]

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[623] *Ibid*, at para 108.
[624] *R v Lambert* [2001] UKHL 37 [House of Lords], at para 79.
[625] *Ibid*, at para 80.
[626] *Ibid*, at para 81.

422. Ultimately, it seems that what divided the two judges is whether a 'strained construction' — or a construction that required 'reading in' or 'reading down' words — may go so far as to override the legislator as regards the very remedy that the legislator had specifically intended for a particular mischief, where all aids to construction had clearly identified that remedy as the intendment of the legislator. Lord Steyn, it seems, was prepared to go that far, but not Lord Hope.

423. But, Lord Hope's objection will clearly engage its own matter of inquiry. It will not be enough to say that the intended construction appears on its face to contradict the legislator. The construction exercise necessarily requires proceeding further: to ascertain the specific mischief for which the legislator had intended the remedy appearing in the statutory language as formulated. That task of ascertaining the specific mischief and remedy will have to be done both in relation to the particular provision being construed and in relation to the overall object and purpose of the legislation in which the particular provision appears. Once the mischief and remedy are identified, it becomes easier to see if the contemplated construction — whether it involves the 'strained construction' approach or that of 'reading in' or 'reading down' words — is one that really contradicts the legislator. It may be that the legislator had employed awkward formulation that garbled the object or went much further than the intended object, or did not go far enough. Such an exercise becomes necessary, in order to maintain harmony between the different parts of the statute in question, as a statute must be read as a whole, in context, and in the light of its object and purpose.

424. It is noted that these cases concerned the application of a provision that required all UK statutes to be read, to the extent possible, in a manner that would make them compliant with the ECHR. But, it would be incorrect to think that such are the only cases in which it would be permissible to adopt the 'strained' approach to statutory construction. The approach has also been encouraged as a general approach in the construction of legislation, in order to avoid absurdity or injustice. As will be recalled, in *Nothman v Barnet London Borough County Council*, Lord Denning had pronounced that judges 'can and should use their good sense' to bring the appropriate remedy 'by reading words in,' as necessary, '*[w]henever* the strict interpretation of a statute gives

rise to an absurd and unjust situation.'[627] In *Cutter v Eagle Star Insurance*,[628] that approach was accepted as a technique permissible to be employed 'to enable the object and purpose of legislation to be fulfilled.' At issue in the case was whether a car park was a 'road' for purposes of an insurance policy 'in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of a vehicle on a road.' The plaintiffs in the two cases had suffered injuries in car parks. One had been struck by a car while sitting on a kerb abutting a car park. The other had sustained burn injuries while sitting in the front passenger seat of a car that suffered fire damage while parked in a multi-storied car park. The Court of Appeal had upheld the claims of the plaintiffs by construing the word 'road' so broadly as to include a car park. The insurance companies appealed to the House of Lords. In allowing the appeal, Lord Clyde accepted that, within sensible limits, 'strained' construction is a permissible approach to statutory interpretation. As he put it:

> By giving a purposive construction to the word "road" what is meant is a strained construction, beyond the literal meaning of the word or beyond what the word would mean in ordinary usage, sufficient to satisfy that expression of the purpose of the legislation.
>
> It may be perfectly proper to adopt even a strained construction to enable the object and purpose of legislation to be fulfilled. But it cannot be taken to the length of applying unnatural meanings to familiar words or of so stretching the language that its former shape is transformed into something which is not only significantly different but has a name of its own. This must particularly be so where the language has no evident ambiguity or uncertainty about it. While I have recognised that there could be some exceptional cases where what can reasonably be described as a car park may also qualify as a road, it is the unusual character of such cases which would justify such a result in the application of the statutory language rather than any distortion of the language itself.

425. Lord Clyde's point is that the need to fulfil the object and purpose of legislation may make it 'perfectly proper' to adopt a strained construction, 'beyond the literal meaning of the word or beyond what the word would mean in ordinary usage,' sufficient to satisfy the concern for which the word was used. But, his limit as to what is permissible coincides with what Lord Steyn, for his part, had expressed elsewhere in the following way: 'What falls

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[627] *Nothman v Barnet London Borough County Council, supra,* at p 228, emphasis added.
[628] *Cutter v Eagle Star Insurance* [1998] 4 All ER 417 [House of Lords].

beyond that *range of possible meanings* of the text will not be a result attainable by interpretation.'[629]

426. In *Wentworth Securities v Jones*, Lord Diplock accepted that the purposive interpretation may rightly require words to be read in: 'I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it.'[630] That was the point that Mackinnon LJ made in 1938, with which Bennion fully agreed, as seen earlier.

427. The approach of 'strained construction' by 'reading in' or 'reading down' words, in order to fulfil the objects and purposes of legislation, is also followed in Australia.[631]

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428. From the foregoing review, it is thus the case that 'strained' construction may be perfectly proper, when necessary in order to avoid consequences that may be unreasonable, absurd or unjust. But, it may not even be necessary to speak in terms of 'strained construction,' as the right construction in a given circumstance; where there is more than one possible meaning to the word or phrase under consideration. It may be simple enough, then, to adopt an alternative meaning that avoids absurdity, unreasonableness or injustice — even if it results in discarding the 'more natural' or 'primary' or 'literal' meaning. This is because the legislator is not to be presumed to have intended injustice, absurdity or unreasonableness. That was the course that Lord Diplock[632] and Lord Reid,[633] among many judges of the modern era, recommended when they held that judges may adopt available alternative meanings to words and phrases in order to avoid injustice or absurdity. It is a course of construction approved of by classic

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[629] Johan Steyn, '*Pepper v Hart*; A Re-examination' (2001) 21 *Oxford Journal of Legal Studies* 59, at p 60, emphasis added.
[630] *Wentworth Securities Ltd & Anor v Jones* [1980] AC 74 [House of Lords], at p 105.
[631] Geddes, 'Purpose and Context in Statutory Interpretation,' *supra*, at pp 28 — 30.
[632] *Carter v Bradbeer, supra,* at p 1206.
[633] *Gill v Donald Humberstone & Co Ltd*, *supra*, at p 934.

legal texts from Grotius[634] and Vattel[635] in the past, down to *Maxwell's*[636] in more modern times.

429. Finally, the Scylla and Charybdis rationale — explained in *Maxwell's* in the terms that it is 'more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended'[637] — has been held as justifying the approach of 'strained construction,' or rejecting the literal or less natural meaning.

M. The Rule of Lenity

430. Another possible spectre of objection to the construction of the phrase 'organisational policy' as meaning *coordinated course of actions of one or more persons* may be anchored in the rule of lenity codified in article 22(2) of the Rome Statute. It provides: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.' The objection may claim that (a) since article 7(2)(a) involves a definition, article 22(2) requires that definition to be strictly construed in favour of the accused; and, (b) strict construction must favour the definition that has the greater likelihood of removing or insulating the accused from the risk of criminal culpability — that being (for present purposes) the definition that requires proof of centrally directed aggregate complicity in the attack against a civilian population.

431. That objection, however, is not a silver bullet against its intended target. To begin with, it is to be remembered that article 22(2) itself is a provision in the Rome Statute. As such, it, too, is subject to construction, in light of the object and purpose of the Rome Statute. And central to that task of construing it is the question about its real intendment. Does it mean to do more than forbid punishment according to a provision of the Rome Statute, merely by invoking by analogy the underlying spirit or principle of the provision, when there is no specific provision that more directly applies to the

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[634] See Grotius, *supra*.
[635] See Vattel, *supra.*
[636] See Maxwell, *supra*.
[637] *Ibid*.

conduct being so punished?[638] That being the case, does article 22(2) apply in cases where the crime is already provided for in the Rome Statute, with the remaining question being whether the same definition (which unquestionably ensnares certain individuals) truly was intended to leave out others (not left out in other iterations of the same crime in international law), for no apparent reason besides technicality or possible eccentricity in legislative text, if not erroneous drafting?

432. Whatever be the answers to these questions, and they are not easily answered in a few pages, if at all, it should be correct to take the view that article 22(2) may not be a novel legal proposition, after all. It is reminiscent of the old rule of lenity expressed in the Latin maxim *in dubio pro reo*.

433. But that old rule of lenity has been held to be only a rule of construction, which applies when there is 'real ambiguity' following the application of other rules of construction. Judge Shahabuddeen expressed that view in *Prosecutor v Hadžihasanović & Ors*. According to him:

> As I understand the injunctions of the maxim *in dubio pro reo* and of the associated principle of strict construction in criminal proceedings, those injunctions operate on the result produced by a particular method of interpretation but do not necessarily control the selection of the method. The selection of the method in this case is governed by the rules of interpretation laid down in the Vienna Convention on the Law of Treaties. It is only if the application of the method of interpretation prescribed by the Convention

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[638] A notorious historical instance of crimes by analogy were the Nazi laws that permitted prosecution and punishment of conducts not forbidden by criminal law, according to the following analogy: 'Whoever commits an act which the law declares as punishable or which deserves *punishment according to the fundamental idea of a penal law or the sound sentiment of the people*, shall be punished. *If no specific penal law can be directly applied to this act, then it shall be punished according to the law whose underlying spirit can be most readily applied to the act*': article 2 of the Penal Code of Germany, as amended in 1935, emphasis added. Similarly, articles 170a and 267a were added to the Criminal Procedure Code, in the following terms:

> 'Article l70a: — If an act deserves punishment according to *the sound sentiment of the people, but is not declared punishable in the code*, the prosecution must investigate whether *the underlying principle of a penal law* can be applied to the act and whether justice can be helped to triumph by the proper application of this penal law. …
>
> 'Article 267a: — If the main proceedings show that the defendant committed an act which deserves punishment according to the sound sentiment of the people, but which is not declared punishable by the law, then the court must investigate whether the underlying principle of a penal law applies to this act and whether justice can be helped to triumph by the proper application of this penal law': see the Justice Case, *supra*, p 45, emphasis added.

> results in a doubt which cannot be resolved by recourse to the provisions of the Convention itself — an unlikely proposition — that the maxim applies so as to prefer the meaning which is more favourable to the accused.[639]

434. Other jurists of the highest pedigree have also concurred that the rule of lenity is not the first port of call in statutory construction. It only comes into play when other applicable rules of construction have failed to settle the doubt that has troubled the meaning of a given provision. In the view of Lord Parker CJ: 'It may well be that many sections of Acts are difficult to interpret, but can be interpreted by the proper canons of construction. A provision can only be said to be ambiguous, in the sense that if it be a penal section it would be resolved in a manner most favourable to the citizen, where having applied all the proper canons of interpretation the matter is still left in doubt.'[640]

435. Also to the same effect, Lord Reid observed as follows at the House of Lords: 'The Court of Appeal (Criminal Division) refer to the well-established principle that in doubtful cases a penal provision ought to be given that interpretation which is least unfavourable to the accused. I would never seek to diminish in any way the importance of that principle within its proper sphere. But it only applies where after full inquiry and consideration one is left in real doubt.'[641] The Lord Chief Justice of England also said the same thing in *Reference by the Attorney-General under Section 36 of the Criminal Justice Act (No 1 of 1988)*, describing the *in dubio pro reo* rule as one of 'limited application.' As he put it:

> Finally, it is submitted on behalf of the respondent that this being a penal enactment any ambiguity should be resolved in favour of the defence. This principle of construction is of limited application. As stated in *Halsbury's Laws of England*, Vol 44, para 910, it "... means no more than that if, after the ordinary rules of construction have first been applied, as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt."[642]

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[639] *Prosecutor v Hadžihasanović and Ors (Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility)* dated 16 July 2003 [ICTY Appeals Chamber], Separate Opinion of Judge Shahabuddeen, at para 12.
[640] *Bowers v Gloucester Corporation* [1963] 1 QB 881, at p 887 [Divisional Court].
[641] *Director of Public Prosecution v Ottewell* (1968) 52 Cr App R 679, at p 686 [House of Lords].
[642] *Reference by the Attorney-General under Section 36 of the Criminal Justice Act (No 1 of 1988)* (1989) 88 Cr App R 191, at p 201 [England and Wales CA].

436. Similar pronouncements abound in Canadian case law. In *Bell ExpressVu Limited Partnership v Rex*, the Supreme Court held that the rule of purposive interpretation enjoys priority over the rule of strict construction of penal statutes, with the rule of lenity applying if, following the purposive interpretation, an ambiguity still exists.[643]

437. Hence, the rule of lenity does not overcome the requirement to construe the statute as a whole in all its parts, in a manner that is in harmony with its object and purpose. That is to say, it does not enjoy a right of precedence over purposive interpretation.

N. The Object and Purpose according to the Preamble

438. In the specific context of the Rome Statute, the Appeals Chamber has held that the purposes of a treaty 'may be gathered from its preamble and general tenor of the treaty.'[644] Therefore, the preamble to the Rome Statute must be consulted for the object and purpose of the Statute. It must inform a proper construction of the meaning to be given to the phrase 'organisational policy' as employed article 7(2)(a) of the Rome Statute, especially given all the incongruences and absurdities reviewed above and (further) below as resulting from the theory of centrally directed aggregate complicity.

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[643] *Bell ExpressVu Limited Partnership v Rex*, *supra*. [Supreme Court of Canada], at para 27. In *R v Goulis*, the Court of Appeal for Ontario expressed the approach to the rule of lenity as follows: 'This Court has on many occasions applied the well-known rule of statutory construction that if a penal provision is reasonably capable of two interpretations, that interpretation which is the more favourable to the accused must be adopted … . I do not think, however, that this principle always requires a word which has two accepted meanings to be given the more restrictive meaning. Where a word used in a statute has two accepted meanings, then either or both meanings may apply. The Court is first required to endeavour to determine the sense in which Parliament used the word from the context in which it appears. It is only in the case of an ambiguity which still exists after the full context is considered, where it is uncertain in which sense Parliament used the word, that the above rule of statutory construction requires the interpretation which is the more favourable to the defendant to be adopted. This is merely another way of stating the principle that the conduct alleged against the accused must be clearly brought within the proscription': *R v Goulis* (1981) 60 CCC (2d) 347 [Court of Appeal for Ontario, Canada]. In *R v Brode (K)*, the Court of Appeal insisted that a statute must be read in its entirety, in harmony with its object and purpose. Consequently, the Court refused to accept the accused's argument of 'restrictive interpretation,' given the 'illogical outcome that would ensue': *R v Brode (K)* 2012 ONCA 140, at para 46.

[644] *In re Situation in the Republic of the Congo (Judgment in the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision denying Leave to Appeal)*, *supra*, at para 31.

439. A review of the preamble seldom supports the view that only centrally directed aggregate complicity may be prosecuted at the ICC as crimes against humanity, even when States prove unable or unwilling to (genuinely) investigate or prosecute deeply shocking widespread or systematic attacks of no lesser severity but which lack ready proof of centrally directed aggregate complicity. The reason that the preamble hardly supports such a theory is immediately apparent from: (a) the concern of the international community about the mischief that had existed in terms of subjection of 'children, women and men' to 'unimaginable atrocities that deeply shock the conscience of humanity'; (b) the recognition that 'such grave crimes threaten the peace, security and well-being of the world'; (c) the affirmation 'that the most serious crimes of concern to the international community as a whole must not go unpunished'; and, (d) the determination 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.'

O. Further Incongruences of the Theory of Centrally Directed Aggregate Complicity

440. The review of the benefits of the purposive approach in the foregoing discussions has engaged some of the shortcomings of the literal approach to the construction of article 7(2)(a) which favours the theory of centrally directed aggregate complicity. Before concluding this discussion, I must return to that theme, from yet another perspective. Ten shortcomings may be reviewed from this perspective.

441. First, it may be noted that in the jurisprudence of modern international criminal law that preceded ICC jurisprudence, it was settled in the *Kunarac* case that '[t]here was nothing in the [ICTY] Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy' to commit crimes against humanity.[645] This is notwithstanding that plan or strategy may, of course, be relevant in determining criminal liability for crimes against humanity.[646] For good measure, the ICTY Appeals Chamber further observed as follows: 'The practice reviewed by the Appeals Chamber overwhelmingly supports the

[645] See *Prosecutor v Kunarac (Judgment)* dated 12 June 2002 [ICTY Appeals Chamber], at para 98.
[646] *Ibid*.

contention that no such requirement exists under customary international law.'[647] As is often the case, the finding has attracted objections from certain quarters of academia — unsurprisingly on grounds that the finding falls short of how legal scholars approach their own work.[648] Some of the critics in this regard are very prominent scholars indeed.[649] But the *Kunarac* precedent remains an approach that attracted virtually uniform judicial following at the *ad hoc* tribunals,[650] implicating no known instance of injustice. Quite the

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[647] *Ibid*, footnote 114.

[648] There is much commentary about the occasional dyspepsia between the academic branch of the legal profession on the one hand and the legal practitioners on the bench and bar on the other. Sir Robert Megarry had dealt with it with much charm in the first *Miscellany-at-Law*, recalling the verse that runs as follows:

> In the cloistered calm of Cambridge
> I write books about the Law
> Criticising Oxford colleagues
> Making points they never saw.
> …
> In a peaceful Cambridge college
> Far remote from active law
> I dissect the Courts' decisions —
> I of course detect the flaw …'

R E Megarry, *Miscellany-at-Law: A Diversion for Lawyers and Others* (1955), at p 52. But, none of this should detract from the extremely important function that legal scholars perform in their helpful research and often thought provoking commentaries on the law. All that may be necessary is to understand that the exigencies of the administration of 'active law' are not always conducive to judicial analyses that will please the academic sensibilities of every legal scholar, every time. Perhaps, there is much to recommend the following observations of Francis Bennion: '[J]udges are denied by the nature of their function the opportunity of drawing up satisfactory rules. The court's duty is to apply the law in the case before it. A judge cannot easily essay general principles when anxious litigants, looking no further than their own case, stand before him. Fragmentary *obiter dicta* are the best he can manage. Some judges have given up altogether': Bennion, *Statute Law*, 2nd edn (1983), at p 88.

[649] See W Schabas, 'State Policy as an Element of International Crimes' (2007-2008) 98 *J Crim L & Criminology* 953, generally.

[650] See *Prosecutor v Krstić (Judgment)* dated 19 April 2004 [ICTY Appeals Chamber], at para 225; *Prosecutor v Kordić & Čerkez (Judgment)* dated 17 December 2004 [ICTY Appeals Chamber], at para 98; *Prosecutor v Blaškić (Judgment)* dated 29 July 2004 [ICTY Appeals Chamber], at para 120; *Prosecutor v Semanza (Judgment)* dated 20 May 2005 [ICTR Appeals Chamber], at para 269; *Prosecutor v Gacumbitsi (Judgment)* dated 26 July 2006 [ICTR Appeals Chamber], at para 84; *Prosecutor v Nahimana & Ors (Judgment)* dated 28 November 2007 [ICTR Appeals Chamber], at para 922; *Prosecutor v Sesay (Judgment)* dated 2 March 2009 [SCSL Trial Chamber], at para 79; *The Case of KAING Guek Eav alias 'Duch' (Judgment)* dated 26 July 2010 [ECCC Trial Chamber], at para 301. Notably, at the Special Court for Sierra Leone, the Appeals Chamber observed that the Court's jurisprudence did not require the Trial Chamber 'to make findings on the RUF/AFRC's Operational Strategy in order to establish the crimes that were committed and Taylor's criminal responsibility. However, an organisation's policy, plan or strategy may, of course, be relevant in determining criminal liability for crimes under the Statute': *Prosecutor v*

contrary, it is an approach that stands the better chance of enabling victims of atrocities with their much deserved access to justice. The theory of centrally directed aggregate complicity may not fare so well for long. Some may rightly see it as miscarriage of justice waiting to happen unnecessarily.

442. There is, of course, no question now that the Rome Statute does require the connecting string of 'policy' in the attack against a civilian population, regardless of the ICTY Appeals Chamber's finding that customary international law required no such thing. But that does not compel the further step of attaching the policy to an aggregate entity.

443. Second, for purposes of the next point, it may be recalled, once more, that a cardinal principle of treaty interpretation requires words and phrases to be interpreted in their context and in light of the object and purpose of the treaty in question. This, in turn, entails taking into account the context of crimes against humanity as proscribed in the Rome Statute; and, whether the

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Taylor (Judgment), dated 26 September 2013 [SCSL Appeals Chamber], at para 257. But, the Appeals Chamber declined to make further pronouncements on the matter, noting the apparent dissonance between the *Kunarac* pronouncement and the text of article 7(2)(b) of the Rome Statute. For their own part, the Supreme Court Chamber (the appellate body) of the ECCC did not overrule the Trial Chamber's finding that policy was not a separate element of crimes against humanity. To the contrary, the Supreme Court Chamber simply restated the definition of crimes against humanity in the basic document of the ECCC, which in terms of the contextual elements of crimes against humanity captured the requirement of 'widespread or systematic' attack against a civilian population, while saying nothing about 'policy.' As the Supreme Court Chamber put it:

> 105. Regarding the second issue, namely, how crimes against humanity were defined under customary international law by 1975, the Supreme Court Chamber recalls that under Article 5 of the ECCC Law, crimes against humanity are:
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> > any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts.
>
> 106. Not only does this definition specify the underlying acts that constitute a crime against humanity, but it also lays out the contextual or *chapeau* requirements that must be found to exist in order to set crimes against humanity apart from domestic crimes or other international crimes. The *chapeau* requirements here are: 1) the existence of a widespread or systematic attack; 2) directed against a civilian population; 3) on national, political, ethnical, racial or religious grounds; and 4) the underlying acts were committed as "part of" the attack.

The Case of KAING Guek Eav alias 'Duch' (Judgment) dated 3 February 2012 [ECCC Supreme Court Chamber], at paras 105 and 106.

proscription was intended to require proof of aggregate complicity in the attack against a civilian population.

444. In taking context into account, it must be significant to keep in mind that in the Rome Statute, genocide is the crime indicated before crimes against humanity. There are no words of limitation in the genocide provision to any effect that requires aggregate complicity as an essential element of genocide. That must then underscore a certain level of incongruity in holding an accused accountable at the ICC for the crime of genocide (with no requirement of group complicity), but not for crimes against humanity. The incongruousness is perhaps put in starker relief in relation to extermination as a crime against humanity, if it is accepted that extermination as a crime against humanity may not be prosecuted without proof of aggregate complicity, although that is not an impediment for the prosecution of genocide.

445. A third incongruence engages the concern that the insistence on proof of centrally directed aggregate complicity for purposes of crimes against humanity may result in a prosecutorial temptation to lay a charge of genocide, when a crime against humanity charge might have sufficed. If, say, extermination cannot be prosecuted as a crime against humanity, because of the view that article 7(2)(a) requires proof of centrally directed aggregate complicity in the attack against a civilian population, there will be the temptation to prosecute the same crime as genocide, whose own provision does not require proof of aggregate complicity.

446. Fourth, another concern is that the insistence of proof of centrally directed aggregate complicity in the attack against a civilian population may result in some pressure to devise theories of the case relating to 'State policy', when a determined prosecutor is confronted with the difficulty of proving that any other aggregate entity was complicit in the attack. A State's inability to contain a widespread or systematic attack against a civilian population may, in addition to one or two possibly fortuitous factors, be framed as a 'State policy' involving culpable omission that permitted the attack or criminal toleration of the attack.

447. Fifth, similarly to be considered, as a matter of context, is the thematic significance that must be attached to the development of international criminal law since Nuremberg, in the specific manner of focussing on the

criminal responsibility of the individual. A signal pronouncement in that regard remains the following memorable words in the leading *Nuremberg Judgment*: 'Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[651] There is evident dissonance in the theory according to which a crime that undoubtedly shocks the conscience of humanity deeply — and which would qualify as a crime against humanity, but for the language of article 7(2)(a) — escapes both characterisation as an international crime and the attendant consequences of such characterisation. This, because no aggregate entity is easily identified as having given the crime purpose, direction and/or coordination. The dissonance occurs in the newfound emphasis on the conduct of an aggregation and the concomitant diminution of the significance of individual conducts, courtesy of the theory of centrally directed aggregate complicity.

448. A sixth incongruence concerns yet another consideration of context, the Sang Defence's extended argument that the Rome Statute does not cover widespread or systematic attack by 'gangsters, motorcycle gangs, drug cartels, or even serial killers' or 'mafia-type group' against a civilian

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[651] *USA, France, UK & USSR v Göring & ors* [1947] 1 Trial of the Major War Criminals before the International Military Tribunal, at p 223. In *R v Finta*, Justice LaForest (joined by Justice L'Heureux-Dube and Justice MacLachlin) observed that the pronouncement 'well stated' the proposition that although 'a state must obviously act through individuals,' it 'would frustrate the prosecution and punishment of war crimes and crimes against humanity if individuals could be absolved of culpability for such crimes by reason only that it was not illegal under the law of the state on behalf of which they acted': *R v Finta* [1994] 1 SCR 701 [Supreme Court of Canada], at p 729. But a most eminent scholar has expressed worry that 'the famous pronouncement about "abstract entities" may mislead … in suggesting that the State's role is irrelevant or even secondary to the discussion about crimes against international law': W Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (2010), at p 150. The caution may be kept in mind, of course, perhaps out of an abundance of caution against misreading or misunderstanding the pronouncement. But it is possible to see no misleading suggestion. For, it does not suggest at all that the role of State is irrelevant or even secondary in the understanding or analysis of international crimes. As made clear by the accurate explanation of the proposition in *Finta*, it only says that the role of State must not become the red herring that leads focus away from individual criminal responsibility. The statement is a valid legal proposition that applies when the *presence* of positive act of State is pleaded as a defence (as in the *Nuremberg Trial*); so, too, when the *absence* of positive act of State (as in the requirement proof of 'State-like' organisation complicity) is pleaded in a bid to 'frustrate' prosecution. The essence of the 'abstract entities' pronouncement is that there must be accountability in the manner of individual criminal responsibility, when crimes that deeply shock the conscience of humanity have been committed and states prove unable or unwilling to investigate or prosecute.

population, whether or not they acted further to an organisational policy.[652] The argument is to the effect that it is not enough that an aggregate entity is complicit in the attack against a civilian population; but, more remarkably, the aggregate entity in question must have 'State-like' characteristics. In support of this argument, the Sang Defence relied on the following reasoning: 'Further elements are needed for a private entity to reach the level of an "organization" within the meaning of article 7 of the Statute. For it is not the cruelty or mass victimization that turns a crime into a *delictum iuris gentium* but the constitutive contextual elements in which the act is embedded.'[653]

449. The argument is unpersuasive for a number of reasons amongst which are these. The preamble to the Rome Statute does not support the general theory that seems inclined to overlook the level of cruelty and mass victimisation as critical indicia of an international crime. It is true that these are not the only factors to be taken into account. They have, however, been prime movers of the conception of what amounts to an international crime. The Declaration of St Petersburg of 1868, President Wilson's articulation of the motivations for creating the League of Nations, article 227 of the Versailles Treaty and its antecedent negotiations, the Martens Clause, the Nuremberg Charter, to name but a few, all make it very clear that considerations of humanity have always underlain the motives of international law in its directional growth in the area of international humanitarian law, international human rights law and international criminal law. Particularly to be noted in this respect is the Rome Statute's concern about a history of the world in which 'children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.' In the end, the question, of course, is: What constitutes an international crime? In that regard, the problem is not so much that the impugned reasoning asks the question; it is rather in the assumption that cruelty or mass victimisation are all too readily separable from the constitutive contextual elements that make an act a *delictum iuris gentium*, so much so that it is always possible to conceive of the latter without the former, in any way that makes much sense beyond merely legalistic theories.

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[652] Defence brief of the 'Sang Defence "No Case to Answer" Motion', at paras 67 and 68.
[653] *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya)* dated 31 March 2010, ICC-01/09-19-Corr [Pre-Trial Chamber II, Dissenting Opinion of Judge Kaul], at para 52.

450. Perhaps, valuable lessons may be found in legal history and customary international law. Such lessons will reveal that the first generation of international criminals were pirates and slave traders — persons whose entities may not have been larger than a modern day mafia organisation, a criminal gang or even a small band of serial killers with an ability to decimate a large number of innocent civilians. In that sense, virulent criminal gangs with such capabilities and inclinations can become the modern day pirates and slave traders, with size making little or no difference in the ability to commit international crimes.

451. Ultimately, then, the levels of cruelty and mass victimisation may constitute the key that unlocks a conduct's connection to international criminal law. Hence, the unwillingness or inability of a State to investigate or prosecute genuinely cruel and deeply shocking attacks against a civilian population is the more important consideration than the proof of aggregate complicity in the attack against a civilian population that results in mass victimisation.

452. Seventh, the insistence upon an element of centrally directed aggregate complicity in the attack against a civilian population would result in denying a State (with sovereign jurisdiction over the crime) its interest in prosecuting the offence as an international crime. It may be noted, in this connection, that arguments of state sovereignty have been made in support of the aggregate complicity theory. As the argument goes, the theory is compliant with sovereignty of States, as the theory serves to ensure that the crime in question is treated as a crime under national law, with no fear of usurpation by the ICC in the name of the Rome Statute.[654] The Ruto Defence have incorporated that argument into their no-case submissions,[655] by reference to the Defence brief filed before the Pre-Trial Chamber challenging the jurisdiction of the Court in this case. And they relied on the following reasoning 'a gradual downscaling of crimes against humanity towards serious ordinary crimes ... might infringe

[654] See the Defence brief in *Prosecutor v Ruto, Kosgey and Sang (Defence Challenge to Jurisdiction)* dated 30 August 2011, ICC-01/09-01/11-305, at paras 26 and 27.
[655] See main text and footnote text to footnote 34 of the brief of the Ruto Defence Request for Judgment of Acquittal.

on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute.'[656]

453. But, with the greatest respect to my highly esteemed late colleague whose reasoning may have inspired this argument of sovereignty, the argument is much troubled. Its most basic problem is this. The mere characterisation of a conduct as an international crime (proscribed in the Rome Statute) never denies States their sovereign jurisdiction to prosecute that international crime. On the contrary, according to the doctrine of complementarity, under the Rome Statute, the first option belongs to States — as a matter of both right and duty — to investigate and prosecute international crimes genuinely. Doing so renders the case inadmissible at the ICC. It is only when the State with sovereign jurisdiction has failed to investigate or prosecute genuinely that the ICC jurisdiction is properly triggered, as a court of last resort.[657] The bona fide embrace of the doctrine of

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[656] *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya),* dated 31 March 2010, [Dissenting Opinion of Judge Kaul] *supra,* at para 10.

[657] The following view may be relied upon by the proponents of the sovereignty objection: '*Most States* are both willing and able to prosecute the terrorist groups, rebels, mafias, motorcycle gangs, and serial killers who operate within their own borders. At best, international law is mainly of assistance here in the area of mutual legal assistance. For example, there is little real utility in defining terrorism as an international crime because, as a general rule, the States where the crimes are actually committed are willing and able to prosecute. Usually, they have difficulty apprehending the offenders. *However, this problem is addressed through international cooperation rather than by defining the acts as international crimes so that they may be subject to universal jurisdiction or by establishing international tribunals for their prosecution*': W Schabas, 'State Policy as an Element of International Crimes,' *supra*, at p 974 (emphasis added). With the greatest respect to Professor Schabas whose views must always command maximum respect, I see some difficulty. To begin with, it may ask too much of judicial notice to say that 'most States' are able to investigate or prosecute the crime of terrorism — at all, let alone genuinely. But even accepting the proposition, the fact that most States would be able to investigate and prosecute — even the crime of genocide — is a doubtful reason to restrict the definition of a conduct as an international crime; particularly under the Rome Statute, in light of its critical doctrine of complementarity. Nor should the factor of international cooperation be that material. For, those States (either on their own or with mutual assistance of other States) would also, under the Rome Statute, be able to investigate or prosecute nationally even the most glaring case of an international crime. As general propositions go, the better reason — and it is only a general proposition which judges are able to refine by jurisprudence — must be humanity's need of access to justice in the hopefully rare case where the concerned State is unable or unwilling to investigate or prosecute genuinely, despite the best offers of international cooperation. That access to justice is best served by complementary jurisdictions of the ICC and other States (through universal

complementarity, is, therefore, the best and most just way for States to assert jurisdiction over crimes that may fall under the Rome Statute. The best solution does not lie with stilty theories of centrally directed aggregate complicity.

454. That consideration introduces yet another difficulty of the argument to the effect that sovereignty lends validity to the theory of centrally directed aggregate complicity. It may result in the correlative oddity of (a) the 'locking in,' within the exclusive domain of the State, questions of justice and accountability arising from an attack against a civilian population; and, (b) the 'locking out' of the ICC from assuming jurisdiction in the matter in the event of national inability or unwillingness to investigate or prosecute genuinely. All this notwithstanding that the factual matter of the crime may be even more deeply shocking than another case before the ICC for which aggregate complicity is readily established. Such an outcome is a manner of turning back the progress of international law to the days before it was accepted that respect for human rights was *obligatio erga omnes*. Part of the purpose of the ICC is to give some teeth to such responsibility owed the whole world.

455. Indeed, the sovereignty argument highlights a particular need for constant reminder that accountability is a defining notion in the conception of modern international criminal law. The defining idea is to ensure that there is a court of last resort, which will assert jurisdiction over crimes that deeply shock the conscience of humanity when States fail to do so genuinely. And that idea is specifically driven home in the doctrine of complementarity. The theory of centrally aggregate complicity appears to miss that point.

456. In the end, however, all the international crimes nominated in the Rome Statute are reduced to national crimes, at a certain level of abstraction. This results from practical questions of enforcement of international criminal norms, united with the dictates of state sovereignty (and the derivative norms of complementarity, R2P and, indeed, universal jurisdiction). That juristic phenomenon is aptly encapsulated in the Criminal Code of Australia, which in domesticating the Rome Statute crimes in Division 268, was careful to provide as follows:

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jurisdiction) over *international crimes*, where States with sovereign jurisdiction prove unable or unwilling to investigate or prosecute.

> ***268.1*** Purpose of Division
>
> (1) The purpose of this Division is to create certain offences that are of international concern and certain related offences.
>
> (2) It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court.
>
> (3) Accordingly, the *International Criminal Court Act 2002* does not affect the primacy of Australia's right to exercise its jurisdiction with respect to offences created by this Division that are also crimes within the jurisdiction of the International Criminal Court.

457. It can be said with some confidence that ICC States Parties will say that Australia's Criminal Code s 268.1 speaks on behalf of all. And that effectively negates any concern that the recognition of any crimes as falling under the Rome Statute would result in the usurpation of the legitimate sovereign jurisdiction to prosecute that crime.

458. The eighth incongruence of the centrally directed aggregate complicity is this. One of the attendant consequences of characterising a crime as a crime against humanity is that other States may exercise universal jurisdiction in the investigation or prosecution of such crimes. As recognised in the preamble to the Rome Statute, it is, as noted above, 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.' But the denial of an attack against a civilian population as not amounting to a crime against humanity at the ICC (unless there is proof of aggregate complicity) may result in the negation of the right and duty of other States to prosecute such crimes in their exercise of national jurisdiction over an international crime, by virtue of the doctrine of universal jurisdiction.

459. Ninth, the requirement of proof of the complicity of an aggregate entity also has particularly worrying implications from the perspective of responsibility to protect. It may be recalled that 'crimes against humanity' are one of the crimes for which the responsibility mutually exists between States (in their respective parts) and the international community.[658] History holds

[658] See United Nations, General Assembly resolution, UN World Summit Outcome Document (2005), dated 24 October 2005, Doc No A/RES/60/1, at paras 138-140. See also UN, Report of

lessons in which the international community failed to take action in the face of an unfolding international crime.[659] Notably, during the Rwandan Genocide one of the arguments employed to sustain international inaction was that while 'acts of genocide' may have been evident, it was unclear to all that the 'legal definition' of the crime has been met.[660] An independent commission of inquiry into the failure of the international community during the Rwandan Genocide expressed the matter as follows:

> The lack of will to act in response to the crisis in Rwanda becomes all the more deplorable in the light of the reluctance by key members of the International Community to acknowledge that the mass murder being pursued in front of the global media was a genocide. The fact that what was occurring in Rwanda was a genocide brought with it a key international obligation to act in order to stop the killing. ... [A]s the mass killings were being conducted in Rwanda in April and May 1994, and although television was broadcasting pictures of bloated corpses floating down the river from Rwanda, there was a reluctance among key States to use the term genocide to describe what was happening. ... *The delay in identifying the events in Rwanda as a genocide was a failure by the Security Council*.[661]

460. There is a real danger that such 'deplorable' failure of the international community may recur in the future, if the ICC jurisprudence is left to develop

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the Secretary-General, Implementing Responsibility to Protect, dated 12 January 2009, Doc No A/63/677, generally.

[659] African Union, *Rwanda: The Preventable Genocide*, July 2000, available at: http://www.refworld.org/docid/4d1da8752.html [accessed 23 January 2016].

[660] *Ibid*, para 12.44. In her essay 'Bystanders to Genocide,' published in the *Atlantic Monthly* in September 2001, Samantha Power recalls the following exchange between Alan Elsner (a Reuters correspondent) and a US Government spokesperson:

> *Elsner*: How would you describe the events taking place in Rwanda?
> *Shelly*: Based on the evidence we have seen from observations on the ground, we have every reason to believe that *acts of genocide* have occurred in Rwanda.
> *Elsner*: What's the difference between "acts of genocide" and "genocide"?
> *Shelly*: Well, I think the — as you know, there's *a legal definition* of this ... *clearly not all of the killings that have taken place in Rwanda are killings to which you might apply that label* ... But as to the distinctions between the words, we're trying to call what we have seen so far as best as we can; and based, again, on the evidence, we have every reason to believe that acts of genocide have occurred.
> *Elsner*: How many acts of genocide does it take to make genocide?
> *Shelly*: Alan, that's just not a question that I'm in a position to answer (emphasis added).

See <www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571>.

[661] United Nations, Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, Doc No S/1999/1257 dated 15 December 1999, at p 38, emphasis received.

so insouciantly in the direction of requiring proof of aggregate complicity in the attack against a civilian population, for purposes of crimes against humanity. Such a prospect becomes normatively indefensible, given both (a) the absence of such a requirement in customary international law, according to the jurisprudence of the *ad hoc* tribunals who came before the ICC; and, (b) the fact that it is entirely possible to avoid such a requirement through a purposive interpretation of the Rome Statute in a manner that is also wholly consistent with correct linguistic usages in the manner explored above — i.e. to the effect that it is entirely possible to construe 'organisational policy' to mean no more than 'coordinated course of action.'

461. Finally, as indicated in the motif of this discussion there is concern that the requirement of proof of aggregate complicity for purposes of crimes against humanity under the Rome Statute may result in miscarriages in the administration of justice in this Court. A case may collapse, regardless of the fact of widespread or systematic attack against a civilian population and regardless of the complicity of the accused in the attack. Victims will be fairly heard to complain of injustice with justifiable feelings in terms that may make calling the law 'a ass' seem wholly charitable: where the collapse of such a case resulted merely from the failure to satisfy the requirement that an aggregate entity had centrally directed the attack in which the accused had taken part.

P. Conclusion

462. It is for the foregoing reasons that I would hold that the more credible meaning of 'organisational policy' is a 'coordinated course of actions' regardless of the number of accomplices involved.

463. In concluding, it is important to stress that the foregoing analysis concerning the deficiencies of the centrally directed aggregate complicity theory is merely done by way of *obiter dictum*. It gives guidance only for future prosecution of crimes against humanity at the ICC. The analysis would not otherwise assist the Prosecution in the present case, which has already been pleaded and proceeded on the basis that there was aggregate complicity centrally directed in the material respects. The case has to be adjudicated according to the facts and circumstances pleaded in its governing indictment.

PART VII: GENERAL CONCLUSION

464. Taking into account all that has been said in these reasons, with particular regard to Parts II, III, and IV, I would be disposed to decide as follows:

i. The proceedings are declared a mistrial due to a troubling incidence of witness interference and intolerable political meddling that was reasonably likely to intimidate witnesses;

ii. The charges are hereby vacated and the accused are discharged from the process, without prejudice to their presumption of innocence or the Prosecutor's right re-prosecute the case at a later time; and

iii. The Victims should be invited to express views and concerns in relation to reparation or assistance in lieu of reparation.

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

Judge Eboe-Osuji
(Presiding)