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Date: **27 January 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 the Common Legal Representative for Victims' Joint Reply to the "Ruto Defence Request for Judgment of Acquittal" and to the "Sang Defence 'No Case to Answer' Motion"

Source: **Wilfred Nderitu, Common Legal Representative for Victims**

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A. INTRODUCTION

1. From the outset, the Common Legal Representative for Victims ("the CLR") underscores the fact that submissions of 'no case to answer' should be premised solely on oral, documentary and other evidence that was given before the Trial Chamber during the Prosecution's case. As such, any submissions that cannot find their genesis in the evidence given in court are irrelevant to that extent.

2. Secondly, the CLR submits that no one single case can be expected to play out in exactly the same manner as the statements and the Document Containing Charges on which the case is based. In other words, it is inevitable that from time to time there will be points of departure between witness statements, the Document Containing Charges, the Pre-Trial Brief, evidence presented during the Confirmation hearing, the Trial Brief, the Prosecutor's Opening Statement, and in-court evidence. It is submitted that so long as any departure is not of a significant or overriding nature, the difference is not considered to be fatal.

3. Indeed, it has been recognized by this Trial Chamber that "the nature and content of the evidence may change between the confirmation hearing and completion of the Prosecution's presentation of evidence at trial"[1], and that "the Prosecution need not introduce the same evidence at trial as it did for confirmation".[2] This is the common sense approach to the issue since, at any rate, evidence given at the Confirmation hearing is merely a 'sample' of the

[1] Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), ICC-01/09-01/11-1334, para. 14
[2] *ibid*

evidence ultimately given at the trial. It is worth noting that the Sang Defence has cited with approval in their 'No Case to Answer' Motion[3] the fact that evidence at the two stages may differ materially.

4. That said, the CLR submits that *in fact*, it is incorrect to suggest or state that "[t]he case confirmed for trial… bears little resemblance to the case which has emerged during the course of trial"[4]. More importantly, it is incorrect to state- as shall be demonstrated later in these submissions- that "[t]here is no evidence upon which a reasonable Trial Chamber could find that Mr. Ruto "create[d] a community-backed organization – the Network – to attack multiple locations, in order to expel the targeted communities from the Rift Valley",[5] or that "without the Network there is no case and the charges must be dismissed"[6].

5. In determining whether a submission of 'no case to answer' succeeds or not, the approach is one of taking the evidence in its totality, rather than 'cherry-picking' the witnesses and their evidence. Although the CLR shall later in these submissions deal with this issue, it is worthwhile to note at this stage what was said in one of the *ad hoc* international tribunals. In determining a Defence Motion for Judgment of Acquittal in *Independent Counsel v. Hassan Papa Bangura et al.*[7] before a Single Judge of the Special Court for Sierra Leone, it was observed that each of the Accused had made specific objections to parts

[3] ICC-01/09-01/11-1991-Conf, at para. 16
[4] Para. 2 of the Corrigendum of Ruto Defence Request for Judgment of Acquittal, ICC-01/09-01/11-1990-Conf-Corr
[5] *ibid*
[6] *ibid*
[7] SCSL-2011-02-T, Decision on Defence Motions on Behalf of Hassan Papa Bangura, Santigie Borbor Kanu and Brima Bazzy Kamara for Judgment of Acquittal Pursuant to Rule 98, dated 10 August 2012

of the evidence. The Single Judge stated as follows:

> *"in deciding whether there is "no evidence capable of supporting a conviction", I look at the evidence as a whole. This is not an appropriate stage of the proceedings to decide whether an individual witness's evidence is inconsistent- either inherently or in relation to another witness's evidence- in minor details as the Trial Chamber should not be "drawn into fine assessments of credibility" when deciding whether there is no evidence capable of supporting a conviction…*
>
> *…[T]he evidence must be considered as a whole and… alleged inconsistencies and the alleged failure to adduce specific evidence do not render the entire evidence to the level of "no evidence capable of supporting a conviction" ".*

6. While a consideration of the question whether there is any correlation between the evidence given during the Confirmation hearing and that given during trial cannot be disregarded altogether, it is submitted that such evidence gradually fades and gives way to a consideration of the question whether there is evidence on which the Trial Chamber could convict, based on crimes charged, as further interpreted in the Elements of Crime pursuant to Article 9 of the Rome Statute.

7. Additionally, while it may have been said of a witness that he or she was necessary to prove the Prosecution's case, it is the evidence of such a witness and that of other witnesses (taken in totality), rather than the assertion by the Prosecution that the witness is necessary to prove its case, that the Trial Chamber ought to take into account. The CLR shall demonstrate later in these

submissions that the testimony of Prosecution witnesses who testified before the Trial Chamber, taken in its totality, meets the required threshold for the Chamber not to acquit the Accused persons at this stage.

8. Accordingly, the CLR submits that the Prosecution has produced sufficient evidence upon which a reasonable Trial Chamber could convict.

B. THE STANDARD APPLICABLE

a. The Legal Parameters for a 'No Case to Answer' Motion: An Overview

9. The Trial Chamber is required to enter a judgment of acquittal in respect of counts in relation to which "there is no evidence capable of supporting a conviction"[8] Although the Special Court for Sierra Leone uses different language from the language previously used in Rule 98*bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, the Special Court held that "there is no contextual difference between 'no evidence capable of supporting a conviction' and 'evidence insufficient to sustain a conviction'"[9] The reliability or credibility of the evidence is also not a primary or crucial consideration at this stage: what is

[8] Rule 98 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 14 May 2005.
[9] *The Prosecutor v. Alex Tamba Brima et al.*, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-04-16-469-T, para. 8

important is the capability of the evidence to support a conviction[10]. Thus, what the Trial Chamber has to deal with is the effect of such evidence ***if*** *it were to be believed, rather than* ***whether*** *it is believable*. In *United States v. Cohen*[11], it was said that "[the Court] must view the evidence in a light most favourable to the [government]; it is not for the trial judge to assess the credibility of witnesses, nor to weigh the evidence, nor to draw inferences of fact from the evidence."

b. The Legal Standard Applicable:

10. From the outset, it is submitted that it is a misapprehension of the law to suggest that the applicable standard of proof in international *ad hoc* tribunals and in domestic common law jurisdictions is proof beyond reasonable doubt.[12] It is also not true, as a general proposition, that "[i]n common law jurisdictions, the ultimate finders of fact tend to be lay jurors who are under no obligation to provide a reasoned written decision" and that "[t]he 'No Case to Answer' procedure protects an accused from a wrongful conviction if, in the mind of the judge, there is insufficient evidence that could sustain a conviction"[13]. The truth of the matter is that in many common law jurisdictions, the trier of both law and fact is a professionally trained judge (or magistrate, for that matter). To that extent, therefore, there is essentially no

[10] In *Independent Counsel v. Hassan Papa Bangura*, SCSL-2011-02-T, Decision on Defence Motions on Behalf of Hassan Papa Bangura, Santigie Borbor Kanu and Brima Bazzy Kamara for Judgment of Acquittal Pursuant to Rule 98, dated 10 August 2012, a Single Judge of the Special Court noted that "the court shall not assess reliability and credibility of the evidence in this decision and it is inappropriate to comment on the credibility…". See also, for example, the Zambian case of *Shamwana and 7 Others v People* (S.C.Z. Judgment No. 12 of 1985) [1985] ZMSC 9 (2 April 1985); (1985) Z.R. 41 (S.C.) where it was held that finality of assessment as to a witness's credibility, especially as to the veracity of his evidence, should be reserved until the final judgment stage.

[11] 455 F.Supp. 843, 851-52 (E.D. Pa. 1977

[12] See, for example, the Sang Defence Motion, at para. 17

[13] Sang Defence Motion, at para. 20

difference in the decision-making structure whether before international courts and tribunals or in most municipal jurisdictions. Thus, the argument that a different approach to the 'No Case to Answer' Motions from that undertaken in courts in municipal common law jurisdictions should be adopted in the current circumstances lacks a factual and legal basis.

11. The international tribunals and special international courts have dealt with the set out what the applicable standard of proof is in respect of evidence considered for the purposes of a motion for judgment of acquittal. In *The Prosecutor v. Théoneste Bagosora et al.*,[14] the Chamber took the view that it must assume that the Prosecution's evidence is entitled to being believed unless it was incapable of belief. Thus, the Chamber should not be preoccupied with a determination of issues of credibility and reliability of the evidence, but simply whether or not the evidence received as at the end of the Prosecution's case is such as could sustain a finding of guilt. It is well settled by the jurisprudence of international courts and tribunals that an acquittal at this stage is made only if there is no evidence which proves one or more of the elements of any one of the crimes charged.

12. As observed earlier in these submissions, it has been suggested by the Sang Defence that the proper degree of proof at this stage is "beyond reasonable doubt"[15]. As argued by the CLR, this is a misapprehension. The International Criminal Tribunal for the former Yugoslavia (ICTY) observed in *The Prosecutor v. Kordić and Čerkez*,[16] that an analysis of the Tribunal's

[14] ICTR-98-41
[15] Para. 9 and fn. 12
[16] Trial Chamber Decision on Defence Motions for Judgment of Acquittal, 6 April 2000

jurisprudence showed "a consistent pattern in determining motions for acquittal at the close of the Prosecution's case, not on the basis of a Trial Chamber being satisfied beyond a reasonable doubt of the guilt of the accused on the basis of the Prosecution's case, but on a different and lower standard". This standard of proof is discernible once an identification has been made of the purpose of Rule 98*bis*, namely, to determine whether the Prosecution has put forward a case sufficient to warrant the Defence being called upon to answer it. The threshold required at the end of the Prosecution's case is much lower than the standard of proof beyond a reasonable doubt which is ultimately required before a decision on the guilt of the accused can be made at the end of the case.

13. The CLR submits that given the different standard of proof at the "half-time" stage as opposed to the end stage, the suggestion by the Sang Defence to the effect the Trial Chamber should (automatically) grant the 'no case to answer' motion (rather than potentially have to make another determination on the guilt or innocence of the accused persons years down the line)[17] is fallacious. Additionally, such an argument cannot be entertained at this stage given the fact that the parties and participants were given the opportunity to make representations on whether they considered it appropriate for the Trial Chamber to adopt the 'no case to answer' procedure, and they all argued in favour of such a procedure. *A fortiori*, that argument is untenable by the mere fact that it suggests that "in the event that the judges are already in a position to determine that they will not convict the accused on the Prosecution's evidence…, they should grant the 'no case to answer Motion' "[18]. The

[17] Para. 21, Sang Defence Motion
[18] Sang Defence Motion, para. 21

underlying implication in this statement is that a determination on the 'no case to answer' Motions is therefore a *fait accompli* and an exercise in futility.

14. In the *Kordić* case, the Chamber remarked that applying the standard of proof beyond a reasonable doubt at the 'No Case to Answer' stage had the potential of making it more difficult to acquit the accused at the end of the case. Such a finding at the end of the Prosecution's case would then require the accused to call evidence in order to, as it were, disprove the preliminary finding of his guilt arising from the standard of proof applied, despite the fact that an accused person has no obligation to call evidence. Such an approach would negate the fundamental principle of presumption of innocence by making it impossible to acquit the accused at the close of the case if he called no evidence. This would also go against an accused person's other fair trial rights under the Rome Statute, including the right to raise defences and to present other evidence admissible under the Statute[19].

15. By contrast, applying a lower threshold of evidence necessary to place an accused on his defence allows for the Chamber to make a finding that the accused has a case to answer, but nevertheless leaving room for his acquittal at the end of the case if he calls no evidence, on the ground that the Trial Chamber is not satisfied of the accused's guilt beyond a reasonable doubt.

16. In *The Prosecutor v. Tadić*, the Trial Chamber took the test to be the availability of evidence which, if accepted by the Chamber, could result in a conviction of

[19] See Article 67(1)(e) of the statute in this regard

the accused,[20] while in *The Prosecutor v. Blaskić,* the Trial Chamber found that it would only dismiss counts of the indictment "if it deemed that the Prosecution has so clearly failed to satisfy its obligation as to the prosecuting party, that, commencing with this stage of the proceedings, it is no longer even necessary to review the Defence evidence regarding the counts covered in the Motion.[21] In yet another case[22] before the ICTY, it was said that the Trial Chamber would need to be "satisfied that, as a matter of law, there is evidence before it relating to each of the offences in question for the accused persons to be invited to make their defence."[23]

17. From all these cases, it is clear that for a Trial Chamber to properly order that an accused person be put on his defence, a standard of proof that is lower than "proof beyond reasonable doubt" is required. This is consistent with the level of proof discernable from statutes and case law from many national jurisdictions, including the United Kingdom[24], the United States[25], Zambia[26]

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[20] Decision on Defence Motion to Dismiss Charges, *Prosecutor v. Dusko Tadić,* Case No. IT-94-1-T, T. Ch. II, 13 Sept. 1996

[21] Decision of Trial Chamber I on the Defence Motion to Dismiss, *Prosecutor v. Tihomir Blaskić,* Case No. IT-95-14-T, T. Ch. I, 3 Sept. 1998

[22] *Prosecutor v. Delalić et al.*

[23] Order on the Motions to Dismiss the Indictment at the Close of the Prosecution's Case, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, T. Ch. II, 18 Mar. 1998

[24] In England, for instance, Lord Parker, C.J., had issued Practice Direction (Submission of No Case) (see [1962] 1 WLR 227; [1962] 1 All ER 448, DC) to the effect that:

> *"A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence, (b) when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it."*

[25] In *United States v. Cerilli* 418 F.Supp. 557, 565 (W.D. Pa. 1976), the Court said the following of the applicable standard:

> *A trial judge can grant a motion for judgment of acquittal only when the evidence as a whole is insufficient to support a conviction as a matter of law . . . . However, where there is evidence upon which a jury may reasonably base and find guilt beyond a reasonable doubt, the trial judge can not intrude on the function of the jury as the trier of fact. The evidence need not be of such overwhelming magnitude that the jury must inevitably find guilt beyond a reasonable doubt; there*

and Kenya[27]. In *R v. Galbraith*,[28] Lord Lane, C.J., gave a number of scenarios which serve to drive the point home that the degree of proof required to have an accused placed on his defence is low. In answering the question 'How should the judge approach a submission of 'no case'?, he stated that:

i. If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty and the judge will stop the case;

ii. 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; and

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need only be sufficient, legal evidence which when viewed in a light most favourable to the government, a jury can reasonably and in good faith make a finding of guilt beyond a reasonable doubt.

See also *United States v. Boatwright*, 425 F.Supp. 747, 749-50 (E.D. Pa. 1977); *United States v. Miah*, 433 F.Supp. 259, 264 (E.D. Pa. 1977), *aff'd*, 571 F.2d 573 (3d Cir. 1978)

[26] In the Zambian Supreme Court case of *Shamwana and 7 Others v People* (S.C.Z. Judgment No. 12 of 1985) [1985] ZMSC 9 (2 April 1985); (1985) Z.R. 41 (S.C.), it was held that finality of assessment as to a witness's credibility, especially as to his truthfulness, should be reserved until the final judgment stage, after both sides have been heard, and that it was wrong to make final assessment in the ruling on no case to answer submissions.

[27] Section 210 of the Kenyan Criminal Procedure Code provides as follows:

"If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

[28] [1981] 1 WLR 1039

b. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' 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.

18. From the foregoing, it is clear that the only evidence that the Trial Chamber ought not to take into account at this stage would be evidence that was utterly manifestly incapable of belief[29]. As demonstrated in the evaluation of the evidence later in these submissions, no Prosecution evidence qualifies to be classified in this manner.

19. The Sang Defence has argued that ''if on the basis of the evidence, no substantial grounds exist to believe that Mr. Sang is guilty of the charges, then the case should not have been brought at all, let alone proceed to a defence case"[30]. In making this argument, it is respectfully submitted that the Sang Defence errs in equating "*substantial grounds to believe* that someone committed crimes charged" with *proof* that someone committed such crimes. In other words, all that is required at the confirmation stage is *belief*, while at the end of the Defence case cogent *proof* would be required. During the 'no

[29] In the Malawian High Court case of *Republic v. Suleman* [2003] MWHC 88, Mwaungulu, J., spoke of "evidence shorn of debilitating contradictions and inconsistencies", and went on to state that "[e]vidence with mortal inconsistencies or contradictions or undermined by cross-examination does not raise a case sufficiently requiring a defendant to make a defence."
[30] Sang Defence Motion, para. 22

case to answer' procedure, no *proof* of any sort (in the legal sense of the word) is required of the Prosecution in relation to the crimes charged. While the incidence of the burden of proof is generally on the Prosecution, a consideration of the question of *proof* is undertaken by the Trial Chamber at the end of the trial. No *proof* can also be said to be required of the Trial Chamber as it is not expected at that stage to go into the rigours of determining the credibility and reliability of the Prosecution's evidence. In a 'no case to answer' determination, the Trial Chamber merely makes a decision based on an assumption of the Prosecution's evidence if it were to be believed, rather than on an actual determination of whether such evidence should be believed or not.

c. <u>Questions of Reliability, Credibility and Weight:</u>

i. Incriminating Evidence Produced at Trial is not "Incapable of Belief"

20. Throughout their motions, the Ruto Defence and Sang Defence have attempted to assess the strength and weight of the evidence provided by the Prosecution's witnesses.[31] The CLR takes objection to this approach. In its Decision on Principles and Procedure on "No Case to Answer' Motions", the Trial Chamber held 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*

[31] See for example; Ruto Motion, paras. 166, 168, and 186. Sang Motion, paras. 204 and 209.

> *the ad hoc tribunal 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*. […] *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*.[32]

21. Indeed, this rationale was convincingly explained by the ICTY in the following fashion:

> *It is important to emphasise that, for the purposes of* [conducting its analysis in mid-trial judgment], *the Trial Chamber does not generally reach any conclusion as to the credit of the witnesses called by the prosecution. It is a fundamental rule in relation to determining issues of fact that no conclusion should ever be reached in relation to the credit of a witness until* <u>all</u> *the evidence has been given. A tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of* <u>all</u> *the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case. Conversely, apparently credible evidence of another witness may lose that appearance in the light of evidence given by other witnesses*. […] *If the Trial Chamber were*

[32] See Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), No. ICC-01/09-01/11-1334, 3 June 2014, paras. 24 and 32.

> *entitled to weigh questions of credit generally when determining whether a judgment of acquittal should be entered, and if it found that such a judgment was not warranted, the perception would necessarily be created (whether or not it is accurate) that the Trial Chamber had accepted the evidence of the prosecution's witnesses as credible. Such a consequence would then lead to two further perceptions: (1) that the accused will bear at least an evidentiary onus to persuade the Trial Chamber to alter its acceptance of the credibility of the prosecution's witnesses, and (2) that the accused will be convicted if he does not give evidence himself. He would virtually be required to waive the right given to him by the Tribunal's Statute to remain silent*. [Therefore] [t]*he Trial Chamber does not propose to reach any conclusions at this stage concerning the credibility of the prosecution witnesses*. […][33]

22. Therefore, at the *ad hoc* Tribunals, the Trial Chambers have unswervingly rejected attempts to go into the questions of credibility of witnesses when entertaining no case to answer motions. At the ICTR, for instance, it was held that:

> *In spite of the requirements of Rule 98bis* [governing procedure for no case to answer motions] *the Defence is not even seeking to show that the evidence, if accepted, is not sufficient for the Chamber to be satisfied of the guilt of the Accused. Rather, the Defence has concentrated its efforts on demonstrating that the evidence produced by the Prosecutor is not credible or reliable because the testimonies are contradictory and inconsistent.*

[33] See ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Decision on Motion for Acquittal, Case No. IT-96-23 & 23/1, 3 July 2000, paras. 4 - 6. (Emphasis in the original.)

> *There are, from the point of view of the Defence, fabrications and fraud*. […] *What the Defence had to show to satisfy the requirements of Rule 98bis is that the Prosecutor's evidence, if believed, is insufficient for a conviction. Having failed in this, the Chamber will not order the entry of a judgement of acquittal* […].[34]

23. The strength or weakness of the Prosecution's evidence is therefore not in issue at this juncture. In this regard, the ICTY held that:

> *While Rule 98bis is an important procedural safeguard, the object and proper operation of the Rule should not be lost sight of. Its essential function is to separate out and bring to an end only those proceedings in respect of a charge for which there is no evidence on which a Chamber could convict, rather than to terminate prematurely cases where the evidence is merely weak*.[35]

24. This Trial Chamber has itself ruled that at this stage, the Prosecution evidence is required to be taken *"at its highest"*, and that the Chamber must *"assume that the Prosecution's evidence was entitled to credence unless incapable of belief' on any reasonable view"*. This pronouncement begs the question what the words "*taken at highest*" mean.

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[34] See ICTR, *The Prosecutor v. Laurent Semanza*, Decision on the Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza after Quashing the Counts contained in the Third Amended Indictment (Article ***98bis*** of the Rules of Procedure and Evidence) and Decision on the Prosecutor's Urgent Motion for Suspension of Time-Limit For Response to the Defence Motion For Judgement of Acquittal, Case No. ICTR-97-20, 27 September 2001, paras. 16 – 17.
[35] See ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, 21 June 2004, par. 20.

25. According to the jurisprudence of the ICTR and ICTY, the Prosecution's case must be assessed "*as a whole, looking to the totality of the evidence*"[36] and the Trial Chamber is not authorized to "*pick and choose among parts of that evidence*".[37] The SCSL also takes the same position.[38]

26. Apart from determining 'No Case to Answer' Motions on what the CLR terms the "totality of the evidence" criterion, the Motions are also determined on the assumption that the body of incriminating evidence is true or, to coin two more phrases, on the "assumption [or presumption] of truth" or "face value of the evidence" criterion. In this regard, ICTR has held that "*the object of the inquiry under Rule 98bis is not to make determinations of fact having weighed the credibility and reliability of the evidence; rather, it is simply to determine whether the evidence — assuming that it is true — could not possibly sustain a finding of guilt beyond a reasonable doubt*."[39] The SCSL takes the same position.[40] Moreover, "*the significance of* [the Prosecution's evidence] *should not be viewed narrowly, and is entitled to any inferences or presumptions which a reasonable trier*

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[36] See ICTR, *The Prosecutor v. Tharcisse Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant To Rule 98Bis, Case No. ICTR-2000-55A-T, 13 October 2005, par. 40.

[37] See ICTY, *The Prosecutor v. Goran Jelisic*, Appeals Judgement, Case No. IT-95-10-A, 5 July 2001, par. 55.

[38] See SCSL, *The Prosecutor v. Sam Hinga Norman et al*, Decision on Motions for Judgment of Acquittal pursuant to Rule 98, Case No.SCSL-04-14, 21 October 2005, par. 45; See also, *Independent Counsel v. Hassan Papa Bangura et al.*, Decision on Defence Motions on Behalf of Hassan Papa Bangura, Santigie Borbor Kanu and Brima Bazzy Kamara for Judgment of Acquittal Pursuant to Rule 98, dated 10 August 2012, SCSL-2011-02-T

[39] See ICTR, *The Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Decision on Motions for Judgement of Acquittal, Case No. ICTR-98-41-T, 2 February 2005, par. 6. (Emphasis added.)

[40] See SCSL, *The Prosecutor v. Alex Tamba Brima et al*, Decision on Defence Motions for Judgement of Acquittal pursuant to Rule 98, Case No.SCSL-04-16-T, 31 March 2006, par. 11. See also SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Oral Decision, Case No. SCSL-2003-01-T, 4 May 2009, p. 24195, lines 11 – 24.

of fact could make.[41] The ICTY also ruled that the purpose of entertaining no case to answer motion is to determine "*whether a reasonable trier of fact could, upon the evidence presented by the Prosecutor, taken together with all reasonable inferences and applicable legal presumptions and theories that might be applied to it, convict the accused*".[42]

27. Having established that the Prosecution's evidence is entitled to credence unless incapable of belief, we find that according to the jurisprudence of the ICTR, "[t]*o be incapable of belief, the evidence must be obviously incredible or unreliable*".[43] This is the same position taken by the SCSL.[44] The ICTY has also held that, in its analysis, the Chamber will only reject evidence which is "*so unreliable that no reasonable trier of fact could credit it*".[45] Such evidence must have "*so little credibility*"[46] or be "*so inherently incredible that no Trial Chamber could accept its truth*."[47] The ICTY also cited some domestic cases in support of the decisions dealing with no case to answer motions, according to which, a

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[41] ICTR, *The Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Decision on Motions for Judgement of Acquittal, Case No. ICTR-98-41-T, 2 February 2005, par. 10. See also ICTR, *The Prosecutor v. Tharcisse Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant To Rule 98Bis, Case No. ICTR-2000-55A-T, 13 October 2005, par. 40.

[42] See ICTY, *The Prosecutor v. Kvocka et al*., Decision on Defence Motions for Acquittal, Case No. IT-98-30/1, 15 December 2000, par. 13.

[43] See ICTR, *The Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Decision on Motions for Judgement of Acquittal, Case No. ICTR-98-41-T, 2 February 2005, par. 6. (Emphasis added.)

[44] See SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Oral Decision, Case No. SCSL-2003-01-T, 4 May 2009, p. 24195, lines 11 – 24.

[45] See ICTY, *The Prosecutor v. Kvocka et al*., Decision on Defence Motions for Acquittal, Case No. IT-98-30/1, 15 December 2000, paras. 15 - 20. (Emphasis added.)

[46] See ICTY, *The Prosecutor v. Enver Hadzihasanovic, Amir Kubura*, Decision on Motions for Acquittal Pursuant to Rule 98Bis of the Rules of Procedure and Evidence, Case No. IT-01-47-T, 27 September 2004, par. 16.

[47] See ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, 21 June 2004, par. 17. (Emphasis added.)

judge should intervene and put an end to the prosecution of a case where "*the evidence was of "a tenuous character, for example, because of inherent weakness or vagueness"*[48] or where it was *"so slight or tenuous that it would be incapable of supporting a verdict of guilty*".[49]

28. It has been stated that while there could theoretically be situations in a typical case where the Prosecution's evidence is, as qualified above, so inherently incredible or so tenuous and unreliable or so obviously unbelievable, "*such situations would arise only rarely*."[50] It is easy to see why such situations would be isolated when one considers the fact that evidence is to be looked at in its totality. Thus, an isolated piece of evidence in the testimony of a specific witness might not have any (or any significant) effect on the overall reliability of that witness's testimony, or when considered in relation to the totality of the Prosecution evidence.

29. The Ruto Defence has specifically argued that certain testimonies of Prosecution witnesses are inconsistent and thus the Trial Chamber should not rely on them.[51] The jurisprudence of the Court and the *ad hoc* Tribunals however shows that minor inconsistencies in the accounts given by witnesses do not render the whole testimony unreliable and that it is within the

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[48] See ICTY, *The Prosecutor v. Slobodan Milosevic*, Decision on Motion for Judgement of Acquittal, Case No. IT-02-54-T, 16 June 2004, par. 12, footnote 23 (citing *R v. Galbraith).*

[49] See ICTY, *The Prosecutor v. Goran Jelisic*, Appeals Judgement, Case No. IT-95-10-A, 5 July 2001, par. 37, footnote 67 (citing MacKinnon A.C.J.O. in *R. v. Syms* (1979) 47 C.C.C. (2d) 114 at 117). (Emphasis added.)

[50] See ICTR, *The Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Decision on Motions for Judgement of Acquittal, Case No. ICTR-98-41-T, 2 February 2005, par. 6 (citing ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, 21 June 2004, par. 17)

[51] See Ruto Motion, paras. 4, 92, 103, and 217.

discretion of Trial Chambers to consider whether the evidence taken as a whole is reliable and credible. For example, Trial Chamber I held in the *Lubanga* case that:

> *When evaluating the oral testimony of a witness, the Chamber has considered the entirety of the witness's account; the manner in which he or she gave evidence; the plausibility of the testimony; and the extent to which it was consistent, including as regards other evidence in the case. The Chamber has assessed whether the witness's evidence conflicted with prior statements he or she had made, insofar as the relevant portion of the prior statement is in evidence. In each instance the Chamber has evaluated the extent and seriousness of the inconsistency and its impact on the overall reliability of the witness.* […] *The Chamber has made appropriate allowance for any instances of imprecision, implausibility or inconsistency, bearing in mind the overall context of the case and the circumstances of the individual witnesses. For example, the charges relate to events that occurred in 2002 and 2003. Memories fade, and witnesses who were children at the time of the events, or who suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account. There are other potential reasons why a witness's evidence may have been flawed and the Chamber, when assessing his or her testimony, has taken these considerations into account and they are reflected in its overall assessment of the account in question.*[52]

[52] See Judgment pursuant to Article 74 of the Statute, No. ICC-01/04-01/06-2842, 14 March 2012, paras 102- 103.

30. Similarly, in the *Katanga* case, the Trial Chamber took a similar position.[53] The Appeals Chamber also recalled in the *Lubanga* case that according to the jurisprudence of the *ad hoc* tribunals, "[i]*t is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence*."[54]

31. Case law at the ICTY and ICTR is replete with precedent recognizing that minor inconsistencies do "*commonly occur*" in witness testimony, and that such inconsistencies do not necessarily render the evidence unreliable.[55] For example, the Appeals Chamber of the ICTY has held that:

> *The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence.*

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[53] See Judgment pursuant to article 74 of the Statute, No. ICC-01/04-01/07-3436-tENG, 7 March 2014, par. 83. See paras. 375, 992 and 994 for examples of the Chamber accepting testimonies as credible regardless of their minor inconsistencies.

[54] See Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, par. 23

[55] See ICTY, *The Prosecutor v. Milan Lukic and Sredoje Lukic*, Appeals Judgement, Case No. IT-9832/1-A, 4 December 2012, par. 135

> *However, the Trial Chamber should consider such factors as it assesses and weighs the evidence*.[56]

32. At the ICTR, the Appeals Chamber also held as follows:

> *It should also be stressed that with regard to the assessment of the credibility of a witness and the reliability of testimony, the Trial Chamber may accept a witness's testimony despite the existence of contradictory statements. It therefore falls to the Trial Chamber to assess the contradictions pointed out and determine whether the witness - in the light of his entire testimony - was reliable, and his testimony credible.* […] *Moreover, the jurisprudence of both Tribunals recognises that a Trial Chamber has the discretion to accept a witness' evidence, notwithstanding inconsistencies between said evidence and his previous statements, as it is up to the Trial Chamber to determine whether the alleged inconsistency is not sufficient to substantially cast doubt on the evidence of the witness concerned*.[57]

33. The ICTR Appeals Chamber has also held that "[i]*t is not a legal error per se to accept and rely on evidence that varies from prior statements or other evidence. However, a Trial Chamber is bound to take into account inconsistencies and any*

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[56] See ICTY, *The Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, and Vladimir Santic*, Appeals Judgement, Case No. IT-95-16-A, 23 October 2001, par. 31. See also ICTY, *The Prosecutor v. Zejnil Delalic et al*., Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, par. 498. "*Small inconsistencies cannot suffice to render the whole testimony unreliable*."

[57] See ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Appeals Judgement, Case No. ICTR-96-3-A, 26 May 2003, paras. 353 and 443. See also ICTR, *The Prosecutor v. Yussuf Munyakazi*, Appeals Judgement, Case No. ICTR-97-36a-A, 28 September 2011, paras. 71, 118, and 154.

explanations offered in respect of them when weighing the probative value of the evidence."[58]

34. Thus, minor inconsistencies, which commonly occur during judicial proceedings, do not render the whole testimonies unreliable. Consequently, the Trial Chamber must reject this line of argument raised by the Defence.

35. The CLR submits that the alleged inconsistencies which the Defence has relied upon in its argument are inconsequential. In any case, it is incumbent upon the Defence to raise "*convincing arguments* [that the Prosecution's evidence is] *obviously unbelievable, such that no reasonable trier of fact could rely upon it*"[59] either generally or as a result of alleged inconsistencies. It is submitted that the Defence has failed to make convincing arguments in that regard.

36. Accordingly, the CLR submits that it would not be open to the Trial Chamber accept the Defence's approach in assessment of the Prosecution's evidence going, as it were, exhaustively into the questions of strength or weakness, credibility, or reliability of the evidence presented. By the same token, there is no basis for the Defence to argue that the evidence presented is "incapable of belief" on account of alleged minor inconsistencies as this is diametrically opposed to the "assumption of truth" criterion. Nor indeed can the Defence adopt a piecemeal approach to the evidence presented. It is submitted that all

[58] See ICTR, *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-A, Appeals Judgement, 9 July 2004, par. 96. See also ICTR, *The Prosecutor v. Siméon Nchamihigo*, Appeals Judgement, Case No. ICTR-2001-63A, 18 March 2010 and 201.

[59] See ICTR, *The Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Decision on Motions for Judgement of Acquittal, Case No. ICTR-98-41-T, 2 February 2005, par. 11.

those approaches must be rejected *in limine*.

ii. Hearsay Evidence:

37. The CLR submits that both the Ruto Defence and the Sang Defence have in their respective filings[60] adopted an incorrect legal standard and approach in relation to evaluation of hearsay evidence for the purpose of a 'No Case to Answer' Motion. In the first place, the Defence has argued that the Prosecution's case is based largely on hearsay evidence and thus the Chamber must not rely on such evidence[61]. This position is, respectfully, misconceived. According to Article 69(3) and (4) of the Rome Statute, the parties may submit evidence relevant to the case and the Chamber may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence. There is no bar whatsoever in the Statute and other statutory instruments of the Court which would prohibit the admission of hearsay evidence and prevent the Trial Chamber from relying on such evidence.

38. According to the jurisprudence of the ICC and the *ad hoc* international tribunals, hearsay evidence is admissible and judges may rely on it even in their decision for conviction. At the ICC, for example, in the *Katanga* case,

[60] See Corrigendum of Ruto Defence Request for Judgment of Acquittal, with Public Annexes A and B, No. ICC-01/09-01/11-1990-Conf-Corr, 26 October 2015 ("Ruto Motion") Sang Defence 'No Case to Answer' Motion, No. ICC-01/09-01/11-1991-Conf, 23 October 2015 ("Sang Motion")
[61] See Ruto Motion, paras. 4, 22, 23, 24 - 26, 32, 33, 70, 71, 96, 98 - 100, 111, 122 – 126, 134, 136, 143, 148, 156, 158, 163, 166, 167, 174, 177, 180, 184, 185, and 200 - 223 See also Sang Motion, paras. 99, 100, 144, 164, 181, and 188.

"[Trial Chamber] *did not rule out* [hearsay] *evidence immediately but evaluated its probative value on the basis of the context and conditions in which it was obtained and with due consideration of the impossibility of cross examining the information source*."[62] In the *Ngudjolo* case, the Appeals Chamber ruled that the "*fact that evidence is hearsay does not necessarily deprive it of probative value, but does indicate that the weight or probative value afforded to it may be less, 'although even this will depend upon the infinitely variable circumstances which surround hearsay evidence'*".[63] This is consistent with abundant case law established by the *ad hoc* tribunals. For example; the Appeals Chamber of the ICTY held that:

> *It is well settled in the practice of the Tribunal that hearsay evidence is admissible. Thus relevant out of court statements which a Trial Chamber considers probative are admissible under Rule 89(C).* […] *Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence. The fact*

[62] See Judgment pursuant to article 74 of the Statute, No. ICC-01/04-01/07-3436-tENG, 7 March 2014, par. 90.
[63] See Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", No. ICC-01/04-02/12-271-Corr A01, 7 April 2015, par. 226.

> *that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence*.[64]

39. The Appeals Chamber of the ICTR has also held that "[w]*ith regard to hearsay evidence, it should be pointed out that this is not inadmissible. The Trial Chamber has the discretion to cautiously consider this kind of evidence and, depending on the circumstances of each case, in accordance with the provisions of Rule 89 of the Rules*."[65] Therefore, hearsay evidence is admissible and the Trial Chamber is fully authorized to rely on such evidence in relation to the charges challenged by the accused persons.

40. There exists no rule governing the admissibility of hearsay before the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone[66]. To

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[64] See ICTY, *The Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence Case No. IT-95-14/1-AR73, 16 February 1999, par. 15. See also ICTY, *The Prosecutor v. Milan Lukic and Sredoje Lukic*, Appeals Judgement, Case No. IT-9832/1-A, 4 December 2012, paras. 303 and 387. ICTY, *The Prosecutor v. Vujadin Popovic et al*., Case No. IT-0588-A, Appeals Judgement, 30 January 2015, par. 1307.

[65] See ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, par. 34. See also ICTR, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Appeals Judgement, Case No. ICTR-99-52-A, 28 November 2007, par. 509. ICTR, *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-A, Appeals Judgement, 20 October 2010, par. 96. ICTR, *The Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva*, Appeals Judgement, Case No. ICTR-98-41-A, 14 December 2011, par. 226. ICTR, *The Prosecutor v. Yussuf Munyakazi*, Appeals Judgement Case No. ICTR-97-36a-A, 28 September 2011, par. 77.

[66] See *Archbold's International Criminal Courts: Practice, Procedure and Evidence, 3rd Edition* (Karim Khan, Rodney Dixon and Judge Sir Adrian Fulford edn., 2005), at p.452

that extent, it is argued on this basic legal principle that hearsay evidence is impliedly allowed.

41. More importantly, it has been said that the Chambers of the two *ad hoc* Tribunals and the UN-backed Court "have refrained from adopting as practice to exclude all hearsay evidence", and that "[t]here is in effect no rule declaring hearsay evidence *per se* inadmissible."[67] In fact, case law developed in the international tribunals and courts has settled the fact that hearsay evidence is admissible in international criminal proceedings[68]. Some decisions of those judicial bodies have even gone to the extent of declaring that hearsay evidence can even found a conviction[69]. The jurisprudence of the ICTY, the ICTR and other *ad hoc* bodies shows that legal challenges to hearsay evidence are mainly on the *weight or probative value* to be attached to such evidence, rather than to its *admissibility*.[70] Hearsay evidence is also admissible in

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[67] *Ibid*

[68] See, for example, *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-T, Judgment of the Trial Chamber of 31 March 2003, para. 11, where it was stated that "[t]he Chamber has accepted hearsay evidence as being generally admissible under the Rules…"

[69] See, for example, *Muvunyi* Appeals Chamber Decision of 29 August 2008, at para. 70, Other decisions on the admissibility of hearsay evidence include the *Nahimana, Barayagwiza and Ngeze* Appeals Decision of 28 November 2007, at para. 507 at the ICTR. See also similar conclusions made by the respective Chambers at the ICTR in the *Ndindabahizi* Appeals Chamber Decision of 16 January 2007 at para. 115, the *Rutaganda* Appeals Chamber Decision of 26 May 2003 at para. 34 and the *Ndindabahizi*, Trial Chamber Decision of 15 July 2004 at para. 23. For the ICTY, see para. 27 of the Appeals Chamber Decision of 7 June 2002 on Interlocutory Appeal Concerning Rule 92*bis*(C) in the *Galić* case, and para. 7 of the Decision of 5 August 1996 on Defence Motion on Hearsay in the *Tadić* case. See also the Trial Chamber Decision of 21 January 1998 on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability in the *Tadić* case.

[70] See, amongst others, *The Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15; *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, and *Tadic* Trial Judgment, para. 555; *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 26 January 1998; *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T-2, 2

proceedings before the Special Panel for Serious Crimes in East Timor see, for example, the *Jose Cardoso* case.[71] The question whether such evidence was admissible arose during the course of trial in that case, and the Panel held that *"[t]he only issue that may arise is the weight to be attached to such evidence"*.[72] This holding was consistent with the jurisprudence of the ICTR in *The Prosecutor v. Jean-Paul Akayesu*[73] where the Trial Chamber held that hearsay is not inadmissible. In *Tadic*, the Trial Chamber held that the mere fact that particular testimony was in the nature of hearsay did not operate to exclude it from the category of admissible evidence.

42. In a 'No Case to Answer' Motion, questions of reliability and credibility of the evidence (and hence the issue of weight or probative value) are far removed from the procedure.

43. By way of example regarding the approach the international tribunals have taken on hearsay evidence, the ICTY Appeals Chamber pronounced itself in the *Galić* case by defining the extent to which such evidence may be applied. The Chamber stated that the relevant rule, Rule 89(C):

> *"permits the admission of hearsay evidence (that is, evidence of statements made out of court), in order to prove the truth of such statements rather than merely the fact that they were made. Hearsay evidence may be oral, as where a witness relates what someone else had told him out of court, or*

September 1998; and *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para 56

[71] SPSC 4c/2001, Judgment, 5 April 2003, at para. 296

[72] Ruling on Defence Motion of Hearsay and Leading Question — 31 October 2002

[73] Case No. ICTR-96-4-T

written, as when (for example) an official report written by someone who is not called as a witness is tendered in evidence."

44. As the 3rd edition of *Archbold's International Criminal Courts: Practice, Procedure and Evidence*[74] notes:

> *"[h}earsay evidence can… be admitted to prove the truth of its contents, and the fact that it is hearsay does not necessarily deprive the evidence of its probative value. The Chamber must be satisfied of its reliability given the context and character of the evidence for it to be admitted. In addition, the absence of the opportunity to cross-examine the witness is a factor to be taken into account when assessing the probative value of the evidence, and if it is admitted, the weight to be attached to such evidence…"*[75]

45. At this stage, the Trial Chamber is making no more than a preliminary determination on the evidence, and that determination does not exhaustively involve the question of the weight to be attached to the evidence adduced during the Prosecution's case. The conviction or acquittal of the Accused persons is also not being determined at this stage, and for the purpose of the 'no case to answer' motion, the standard of proof is lower than the 'proof beyond reasonable doubt' required at the conviction/acquittal stage. It is submitted on this ground, *a fortiori*, that hearsay evidence is admissible for the purpose of the 'no case to answer' motion. It has been stated that, "[a] Chamber . . . has a broad discretion to admit hearsay evidence, even when it cannot be examined at its source and when it is not corroborated by direct

[74] Karim Khan, Rodney Dixon and Judge Sir Adrian Fulford edn., 2005
[75] At Chapter 9, para. 42 (p. 453)

evidence."[76] In addition to this, the question of the admissibility of the hearsay evidence in this case is (subject to the decision on Rule 68 pending before the Appeals Chamber) indeed a *fait accompli*.

46. All that matters is that hearsay evidence should be of probative value, and be credible and relevant. In the *Kamuhanda* Trial Chamber Decision of 22 January 2004[77], the Chamber stated that Rule 89(C) of the Tribunal's Rules of Procedure and Evidence:

> *"…makes provision for the admission of hearsay evidence even when it cannot be examined at its source and when it is not corroborated by direct evidence. The Chamber, however, notes that though evidence may be admissible, the Chamber has discretion to determine the weight afforded to this evidence. The Chamber makes its decision as to the weight to be given to testimony based on tests of 'relevance, probative value and reliability.' Accordingly, the Chamber notes that evidence, which appears to be 'second-hand,' is not, in and of itself, inadmissible; rather it is assessed, like all other evidence, on the basis of its credibility and its relevance."*[78]
> (Underline added)

iii. Corroboration, a Requirement?

47. Throughout their motions, the Ruto Defence and Sang Defence also argue that evidence provided by the Prosecution's witnesses is "*uncorroborated*" or

[76] *Rwamakuba* Trial Decision of 20 September 2006, at para. 34
[77] See para. 42
[78] See a similar holding in the *Kajelijeli* Trial Chamber Decision of 1 December 2003, para. 45

"*uncorroborated hearsay*" and urges the Trial Chamber to reject the evidence.[79] At the outset, the CLR submits that the issue of corroboration, being a matter of the weight to be ultimately given to a particular bit of evidence, is *stricto sensu*, a matter that is more relevant at the end of the Defence case rather than at the stage of a 'No Case to Answer' motion.

48. Whichever way one looks at the issue of corroboration, arguing, as a statement of legal principle, that evidence given before the Court requires corroboration, is in direct contradiction to Rule 63(4) of the Rules. The provision states that without prejudice to Article 66(3) of the Statute, "*a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence*." Moreover, according to jurisprudence of the Court, various Trial Chambers have given effect to Rule 63 in relation to the lack of a requirement for the corroboration of witness testimony.

49. For instance, in the *Lubanga* case, Trial Chamber I noted that **"***Rule 63(3) of the Rules prohibits the Chamber from 'impos[ing] a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court'. The extent to which a piece of evidence, standing alone, is sufficient to prove a fact at issue is entirely dependent on the issue in question and the strength of the evidence.*

[79] See Ruto Motion, paras. 4, 24, 25, 27, 71, 73, 92, 93, 96, 97, 99, 101, 103, 111, 117, 129, 134, 157, 158, 162, 186, and 225. See also Sang Motion, paras. 4, 30 – 34, 60, 87, 90, 121, 132, 144, 164, 181, and 188.

Accordingly, once again the Chamber has adopted a case-by-case approach".[80] In the *Katanga* case, Trial Chamber II also reiterated this position.[81]

50. The issue of corroboration of evidence was litigated on appeal in the *Lubanga* case, where the Appeals Chamber also held as follows:

> *The first question that arises in that regard is whether the Trial Chamber could reach conclusions on the age of individuals based on the video excerpts in the absence of any corroborating evidence. The Appeals Chamber notes that article 66(3) of the Statute provides that the Trial Chamber must be convinced beyond reasonable doubt of the facts that constitute the legal elements of the crime, and that article 74(2) of the Statute provides that "the Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings". Rule 63(4) of the Rules of Procedure and Evidence states: Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence. Accordingly, the Appeals Chamber finds that there is no strict legal requirement that the video excerpts had to be corroborated by other evidence in order for the Trial Chamber to be able to rely on them. Depending on the circumstances, a single piece of evidence, such as a video image of a person, may suffice to establish a specific act. However, as*

[80] See Judgment pursuant to Article 74 of the Statute, No. ICC-01/04-01/06-2842, 14 March 2012 , par. 110.
[81] See Judgment pursuant to article 74 of the Statute, No. ICC-01/04-01/07-3436-tENG, 7 March 2014, par. 110.

recognised by the Trial Chamber, this does not mean that any piece of evidence provides a sufficient evidentiary basis for a factual finding.[82]

51. In the *Ngudjolo* case, the Appeals Chamber also ruled that "[…] *as stated by the ICTY Appeals Chamber, while corroboration is 'an element that a reasonable trier of fact may consider in assessing the evidence', the question of whether or not to consider it forms part of the Trial Chamber's discretion.*"[83]

52. Indeed, the Appeals Chamber of the ICTY held that "[…] *corroboration of testimonies, even by many witnesses, does not establish automatically the credibility, reliability or weight of those testimonies. Corroboration is neither a condition nor a guarantee of reliability of a single piece of evidence. It is an element that a reasonable trier of fact may consider in assessing the evidence. However, the question of whether to consider corroboration or not forms part of its discretion*."[84] Similarly, the Appeals Chamber of the ICTR has ruled that "[t]*he Chamber may freely assess the relevance and credibility of all evidence presented to it. The Chamber notes that this freedom to assess evidence extends even to those testimonies which are*

[82] See Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, No. ICC-01/04-01/06-3121-Red, A5, 01 December 2014, par. 218.
[83] See Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015, ICC-01/04-02/12-271-Corr, par. 148. In this appeal, the Appeals Chamber also held, albeit in different context that "[…] *the evidence of a witness in relation to whose credibility the Trial Chamber has some reservations may be relied upon to the extent that it is corroborated by other reliable evidence. However, the Appeals Chamber also finds that there may be witnesses whose credibility is impugned to such an extent that he or she cannot be relied upon even if other evidence appears to corroborate parts of his or her testimony*." p. 6.
[84] See ICTY, *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Appeals Judgement, Case No. It-03-66-A, 27 September 2007, par. 203.

corroborated: the corroboration of testimonies, even by many witnesses, does not establish absolutely the credibility of those testimonies."[85]

53. Moreover, the ICTY Appeals Chamber has also held that "[n]*othing prohibits a Trial Chamber from relying on uncorroborated evidence; it has the discretion to decide in the circumstances of each case whether corroboration is necessary or whether to rely on uncorroborated, but otherwise credible, witness testimony*."[86] Additionally, the Appeals Chamber of the ICTR held that: "[...] *a Trial Chamber has full discretion to assess the appropriate credibility and weight to be accorded to the testimony of a witness; corroboration is one of many potential factors relevant to this assessment. A Trial Chamber retains discretion to decide, in the circumstances of each case, whether corroboration of evidence is necessary and to rely on uncorroborated, but otherwise credible, witness testimony*.[87]

54. It does appear that it is settled practice of the ICTY, the ICTR and this Court that the testimony of a single witness on <u>*a material fact*</u> is accepted as evidence without the need for corroboration.[88] In this regard, the Appeals Chamber of the ICTY held that "[n]*either the Statute nor the Rules obliges a Trial Chamber to require medical reports or other scientific evidence as proof of a material fact. Similarly, the testimony of a single witness on a material fact does not require, as a*

[85] See ICTR, *The Prosecutor v. Alfred Musema*, Appeals Judgement, Case No. ICTR-96-13-A, 16 November 2001, paras. 37 – 38.
[86] See ICTY, *The Prosecutor v. Dragomir Milosevic*, Appeals Judgement, Case No. IT-98-29/1-A, 12 November 2009, par. 215.
[87] See ICTR, *The Prosecutor v. Dominique Ntawukulilyayo*, Appeals Judgement, Case No. ICTR-05-82-A, 14 December 2011, par. 21.
[88] See ICTY, *The Prosecutor v. Ducko Tadic*, Appeals Judgement, Case No. IT-94-1-A, 15 July 1999, par. 65.

matter of law, any corroboration."[89] In addition, the ICTY Appeals Chamber has held that "[a Trial Chamber] *is at liberty to rely on the uncorroborated evidence of a single witness when making its findings, even if it is related to a material fact*."[90] Thus, according to the ICTY Appeals Chamber, "*a Trial Chamber may enter a conviction on the 'basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness*.'"[91]

55. In sum, therefore, it is strongly submitted that corroboration is not a requirement as a matter of law, or as a matter of practice before this Court and the *ad hoc* international tribunals, and this Trial Chamber is therefore entitled to rely on uncorroborated witness testimony even if it is related to a material fact of the case. As observed from case law above, the uncorroborated evidence of a single witness may even be the basis for a conviction.

iv. Circumstantial Evidence:

56. Throughout their motions, the Ruto Defence and Sang Defence have argued that the Prosecution failed to adduce "*independent evidence*" [92] or evidence that

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[89] See ICTY, *The Prosecutor v. Zlatko Aleksovski*, Appeals Judgement, Case No. IT-95-14/1-A, 24 March 2000, par. 62. See also ICTY, *The Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, and Vladimir Santic,* Appeals Judgement, Case No. IT-95-16-A, 23 October 2001, par. 220. ICTR, *The Prosecutor v. Ignace Bagilishema*, Appeals Judgement (Reasons), Case No. ICTR-95-1A-A, 3 July 2002, par. 79. ICTR, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Appeals Judgement, Case No. ICTR-99-52-A, 28 November 2007, par. 949.

[90] See ICTY, *The Prosecutor v. Milan Lukic and Sredoje Lukic*, Appeals Judgement, Case No. IT-9832/1-A, 4 December 2012, par. 375.

[91] See ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Appeals Judgement, Case No. IT-04-84-A, 19 July 2010, par. 145

[92] See Ruto Motion, paras. 76, 85, and 111. See also Sang Motion, par. 90.

is "*obtained in an independent manner*" or "*independently verified*".[93] However, no statutory provisions governing trial proceedings at the Court create such requirements. Moreover, according to the jurisprudence of the ICC and *ad hoc* tribunals, there is no requirement, as a matter of law, for the Prosecution to provide so called "independent" or, in other words, "smoking gun" type of evidence. The Prosecution is allowed to present circumstantial evidence and Trial Chambers may rely on such evidence, provided that the rules concerning "*proof by inference*" are respected. For instance, in the *Lubanga* case, Trial Chamber I held that "[n]*othing in the Rome Statute framework prevents the Chamber from relying on circumstantial evidence. When, based on the evidence, there is only one reasonable conclusion to be drawn from particular facts, the Chamber has concluded that they have been established beyond reasonable doubt*".[94] Trial Chamber II also adopted the same approach in the *Katanga* case.[95] In the *Ngudjolo* case, the Appeals Chamber similarly found that Trial Chamber II's reliance on circumstantial evidence was not erroneous.[96]

57. At the *ad hoc* tribunals, reliance on circumstantial evidence or "*proof by inference*" is regularly accepted. For example, the ICTY Appeals Chamber has held that:

> *A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the*

[93] See Sang Motion, paras. 31 and 181.
[94] See Judgment pursuant to Article 74 of the Statute, No. ICC-01/04-01/06-2842, 14 March 2012, par. 111.
[95] See Judgment pursuant to article 74 of the Statute, No. ICC-01/04-01/07-3436-tENG, 7 March 2014, par. 109.
[96] See Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", No. ICC-01/04-02/12-271-Corr A1, 07 April 2015, par. 117.

> *accused person because they would usually exist in combination only because the accused did what is alleged against him* […]. *Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available.*[97]

58. Equally, the ICTR Appeals Chamber has held that:

> *It is settled jurisprudence that the conclusion of guilt can be inferred from circumstantial evidence only if it is the only reasonable conclusion available on the evidence. Whether a Trial Chamber infers the existence of a particular fact upon which the guilt of the accused depends from direct or circumstantial evidence, it must reach such a conclusion beyond reasonable doubt. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn.*[98]

59. Moreover, the ICTY Appeals Chamber also held that "[…] *the mode of liability of ordering can be proven, like any other mode of liability, by circumstantial or direct*

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[97] See ICTY, *The Prosecutor v. Zejnil Delalic et al*., Appeals Judgement Case No. IT-96-21-A, 20 February 2001, par. 458. See also ICTY, *The Prosecutor v. Mitar Vasiljevic*, Appeals Judgement, Case No. IT-98-32-A, 25 February 2004, par. 120. ICTY, *The Prosecutor v. Milomir Stakic*, Appeals Judgement, Case No. IT-97-24-A, 22 March 2006, par. 219. ICTY, *The Prosecutor v. Milan Lukic and Sredoje Lukic*, Appeals Judgement, Case No. IT-9832/1-A, 4 December 2012, par. 149.
[98] See ICTR, *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Appeals Judgment, 7 July 2006, par. 306.

evidence, taking into account evidence of acts or omissions of the accused."[99] The ICTR also takes the same position.[100]

60. Finally on this point, even in a situation in which the conviction is based entirely on circumstantial evidence, the theory that the verdict cannot be supported if the evidence is as consistent with innocence as with guilt was laid to rest a long time ago at least in the US, and evidence equally consistent with innocence as with guilt does not require granting a motion for judgment of acquittal.[101] It has also been held that Judgment of Acquittal should be entered only when there is no evidence from which a trier of fact could render a verdict of guilty.[102]

v. Rule 68 Evidence:

61. As a preliminary point, it is submitted that there is no legal basis for treating Rule 68 evidence any differently from other evidence for the purpose of a 'No Case to Answer' Motion. The Sang Defence has argued that evidence admitted pursuant to Rule 68 is unreliable and should not be considered by the Trial Chamber it in its no case to answer analysis.[103] Contrary to this argument, Article 74(2) clearly states that "[t]*he Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings.* […] *The Court may base its decision only on evidence submitted and discussed before it at the trial*." In this regard, Trial Chamber II held, in the *Katanga* case that:

[99] See ICTY, *The Prosecutor v. Stanislav Galic*, Appeals Judgement, Case No. IT-98-29-A, 30 November 2006, par. 178. See also ICTY, *The Prosecutor v. Ljube Boskoski and Johan Tarculovski*, Appeals Judgement, Case, No. IT-04-82-A, 19 May 2010, par. 160.
[100] See ICTR, *The Prosecutor v. Tharcisse Renzaho*, Appeals Judgement, Case No. ICTR-97-31-A, 1 April 2011, par. 318.
[101] Schino v. U.s., 209 Fed.2d. 67, 72 (9th, 1954)
[102] State v. Lyons, 838 P.2d 397 (Mont. 1992)
[103] See Sang Motion, par. 225.

> […] *This judgment is based on "the entire proceedings" and on the Chamber's "evaluation of the evidence" pursuant to article 74(2) of the Statute*. […] *This statutory provision requires the Chamber to rely "only on evidence submitted and discussed before it at the trial." In the Chamber's view, the phrase "discussed before it at the trial" encompasses not only oral testimonies, together with any documents and other exhibits such as video recordings which were discussed during the hearings, but also any piece of evidence "discussed" in the written submissions of the parties and participants at any stage of the trial (such as documents introduced by counsel pursuant to a prior written application). The principal consideration is that the evidence on which the Chamber's article 74 decision is based was tendered at trial, becoming an integral part of the trial record, after assignment of an evidence number ("EVD" number) and that the parties had the opportunity to make submissions as to each item of evidence*.[104]

62. Thus, the Trial Chamber is required to assess all evidence presented by the Prosecution in its analysis while entertaining "no case to answer" motions, without treating any evidence received by it differently on the ground of its provenance or nature, and irrespective of the question whether the evidence is oral, documentary or Rule 68 evidence. In fact, Trial Chamber V(A) has explicitly stated that the Defence may file "no case to answer" motions "*at the*

[104] See Judgment pursuant to article 74 of the Statute, No. ICC-01/04-01/07-3436-tENG, 7 March 2014, paras. 77 – 78.

close of the case for the Prosecution" or "*at the end of the Prosecution's presentation of evidence.*"[105]

63. On another note, it is important to note that in accordance with the jurisprudence of the ICTY, even evidence led by the Defence during the Prosecution's case is considered in the assessment of the sufficiency of the incriminating evidence, in the context of "no case to answer" proceedings. In this regard, the ICTY Appeals Chamber had this to say in the *Hadžihasanovic et al.* case:

> ***"Evidence favourable to the Defence***
>
> […] *The Appeals Chamber considers that the Trial Chamber's finding that it 'did not consider evidence which might be favourable to the Accused', if interpreted as implying that it completely ignored the evidence presented by the Defence in its favour during the Prosecution case, would amount to an error of law. For example, where the Defence has cross-examined a witness to good effect or has obtained evidence in an accused's favour during cross-examination, this evidence must be used to assess whether the Prosecution evidence is incapable of belief.* […]."[106]

64. The Sang Defence further argues that "even though the Rule 68 Statements have been admitted at trial (and irrespective of what happens on appeal), where the contents of the Statements have not been submitted and discussed

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[105] See the "Decision on the Conduct of Trial Proceedings (General Directions)", No. ICC-01/09-01/11-847, 12 August 2013, par. 32.

[106] See ICTY, *The Prosecutor v. Enver Hadžihasanovic and Amir Kubura*, Judgement, (Appeals Chamber), Case No. IT-01-47-A, 22 April 2008, para. 55. ICTY, *The Prosecutor v. Enver Hadzihasanovic, Amir Kubura*, Decision on Motions for Acquittal pursuant to Rule 98*Bis* of the Rules of Procedure and Evidence, Case No. IT-01-47-T, 27 September 2004, paras. 15, 16 and 18.

in Court while the witness was on the stand under oath, the Chamber should not consider them in its no case to answer analysis"[107]. The CLR respectfully submits that this argument is based on an erroneous understanding of the purport of the Trial Chamber's *No Case to Answer Directions*.

65. The *No Case to Answer Directions* must be understood within their rightful context, that is to say, Articles 69(4), 74(2) and 64(6)(d) of the Rome Statute. Article 64(6)(d) gives the Trial Chamber power to "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties". It is submitted that the Rule 68 evidence rightly (and squarely) fits either as evidence "already collected prior to the trial", or as evidence "presented during the trial by the parties". The evidence should therefore be rightly considered by the Trial Chamber in its determination of the 'No Case to Answer' Motions. Additionally, given that the principle is that evidence in relation to such Motions should be analyzed *in its totality*, it is submitted that it would be an error in principle to disregard such evidence.

66. On a related note, it is to be observed that while the old common law rule was to exclude of hearsay evidence in criminal proceedings, various common law jurisdictions have gradually relaxed this rule in order to safeguard against the exclusion of important information for no good reason. The 'blanket' exclusion of hearsay evidence would be inimical to the dispensation of justice, rather than serve the ends of justice. The United Kingdom, for example, has included such evidence in its Criminal Justice Act 2003[108] in

[107] Sang Defence Motion, para. 27
[108] Sections 114 to 136 of the Act.

recognition of the underlying danger in totally excluding hearsay evidence, and leaves the question of the weight to be attached to such evidence to the jury or magistrates' court.

67. In essence therefore, there ought to be no distinction between hearsay evidence and any other evidence in connection with *admissibility* in contradistinction to the *weight* to be attached to such evidence. To all intents and purposes relevant to a 'No Case to Answer' Motion, there is no dissimilarity between Rule 68 evidence and any other evidence. It is submitted that the question of the credibility, reliability, weight or probative value to be attached to the Rule 68 evidence would be a relevant and perhaps important consideration during Closing Submissions only in the event that the Ruto Defence and Sang Defence Motions are denied[109].

68. Accordingly, the CLR submits that the Trial Chamber should reject the Sang Defence argument and consider fully Rule 68 evidence in its analysis.

vi. Notice of Possibility of Legal Re-Characterization of Facts: Have the Facts and Circumstances of the Updated Document

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The Act is available online at http://www.legislation.gov.uk/ukpga/2003/44/contents

[109] As a parting remark on the question of hearsay evidence, the CLR states that both the Ruto Defence and the Sang Defence filings have addressed the question of *weight or probative value* of Rule 68 evidence *in extenso*. Even in connection with in-court testimony, the Defence teams have made several references to the question of "determination of guilt of the accused persons". Many of the cases cited and arguments made relate to scenarios where the court is making a determination on conviction, rather than on whether a Defendant should be put on his defence. To that extent, those cases and arguments are of little relevance. The CLR has therefore not gone into a comprehensive rebuttal of the arguments raised in the respective filings based on the cases cited, as the principle at the 'No Case to Answer' stage is to make a determination based on an assumption of belief in the Prosecution's evidence, without going into an in-depth analysis of the merits or demerits of the specific evidence.

Containing Charges Been Exceeded?

67. It has been alleged in the Sang Defence Motion[110] that most of the evidence presented by the Prosecution relates to events occurring outside the temporal and/or geographical scope of the charges. However, no specific instances have been mentioned in the Motion to support that allegation and the Sang Defence claims that the factual allegations have been altered, without setting out the basis for the claim. That said, although one may not be indicted for a crime committed on a date not mentioned in the Document Containing Charges, this does not prevent reference to events occurring outside the temporal or even geographical scope of the Document Containing Charges, either for historical or information purposes.

68. Indeed, "information that falls outside the temporal jurisdiction of the [Tribunal] may be useful in helping the accused and the Chamber to appreciate the context of the alleged crimes…"[111] In *The Prosecutor v. Anatole Nsengiyumva*,[112] the Trial Chamber made a distinction between facts of the *case* and facts of the *crime*, holding that the former was a wider concept allowing for the stating of facts even if they were not facts of the crime.

69. Regulation 55 provides that a Trial Chamber may change the legal characterization of facts to accord with crimes (within the Court's jurisdiction) which are not previously charged, or to accord with a different mode of participation other than the one initially charged, so long as the facts and circumstances described in the charges are not exceeded. The question

[110] Para. 35
[111] *The Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-T, para. 4, Decision on the Defence Preliminary Motion Pursuant to Rule 72 of the Rules of Procedure and Evidence, 12 July 2000
[112] ICTR-96-12-I, 13 April 2000

then arises whether an instance of "exceeding facts and circumstances" is established where reference has been made at length to the existence of a Network in the Updated Document Containing Charges, and the existence of the Network is subsequently not addressed at similar length in the evidence. It is the CLR's submission that to speak of an "exceeding" of facts and circumstances in such a situation would be a misnomer. If anything, such a situation can only be termed as a "reducing", "diminishing", or "lessening" of the facts and circumstances. At any rate, if the reduced reference to the Network had any legal consequences at all, the consequences would be cured by the legal re-characterization of the facts to provide for a different form of participation under Article 25 of the Rome Statute, of which the Sang Defence already has due notice.

70. The Sang Defence argument that the facts and circumstances have been exceeded also does not stand to scrutiny when looked at against the objective of Regulation 55. The objective of the said Regulation is, firstly, to obviate the need for amendment of the Document Containing Charges after trial has commenced or if, in the course of the trial, the evidence points shows that the Prosecutor could have charged the accused with a different crime within the Court's jurisdiction, or could have charged him with a different mode of criminal responsibility upon the same facts and circumstances. Secondly, the Regulation has the objective of ensuring that in charging the accused with a different crime or a different form of participation in the crime, no prejudice or detriment is occasioned to the accused, through the exceeding of the facts and circumstances surrounding the charges.

71. In a situation where the facts and circumstances described in the charges are

in fact reduced, diminished or lessened, then no prejudice or detriment can be said to have been occasioned to the accused. Accordingly, it would not be open to such an accused person to challenge either the reduced facts and circumstances merely because they did not strictly conform to the Updated Document Containing Charges, or the re-characterization of the facts and circumstances to provide for a different form of participation. It is reemphasized that in the present situation, due notice was given by the Trial Chamber of the possibility of the legal re-characterization of facts, and the Sang Defence was directed to anticipate possible re-characterization in the preparation of its 'No Case to Answer' Motion.

72. The CLR further submits that the legal re-characterization of facts is ultimately a matter for the Trial Chamber and that as long as notice has been given to an accused person of the possibility of re-characterization, then such a person cannot claim prejudice. Indeed, a re-characterization of the facts does not amount to an alteration or amendment of the facts and circumstances and all that the Trial Chamber would be doing is to merely give the facts another lawful meaning. It is therefore not necessary that the Trial Chamber re-characterizes the facts before an accused person is said to be capable of adequately making a 'no case to answer' application.

73. In the above regard, it is instructive to note that all that Regulation 55 requires is that the Trial Chamber gives notice to the participants in the proceedings of the possibility that the legal characterization of facts may be subject to change, and having heard the evidence, to give them at an appropriate stage of the proceedings the opportunity to make oral or written submissions. Once the Trial Chamber has discharged these obligations (as it

has done in the present case), the rest is for it to decide *without the need for any further input from or participation by the parties and participants* on whether to *in fact* re-characterize the facts and, if the Trial Chamber makes the decision to re-characterize the facts, to apply the law to the facts accordingly.

74. In this case, Mr. Sang was in fact put on notice on the need to anticipate any of the possible modes of liability, based on the facts and circumstances of the evidence adduced. Moreover, the notice was given at the appropriate time, that is to say, when all the Prosecution evidence had been received by the Trial Chamber. It is submitted that the question of whether to re-characterize the facts is now one that is solely and squarely in the hands of the Trial Chamber.

75. That said, it is submitted that a Motion for Judgment of Acquittal is not the proper forum for raising the question whether due notice of possible re-characterization was given. If Mr. Sang was aggrieved by the direction by the Trial Chamber that he should "anticipate any of the possible modes of liability in their litigation of the 'no case to answer' " then this is a matter that should have been taken up on appeal.

76. Further, the CLR submits that no nexus need be drawn between the existence of the Network having a criminal intent and words capable of giving rise to the commission of crimes. If such a nexus were indeed necessary, then the legal re-characterization of facts would cure any anomaly by providing for Mr. Sang's liability under Article 25(3)(b) and (c) of the Rome Statute.

C. MATTERS RELATING TO ELEMENTS OF CRIMES COMMITTED UNDER ARTICLE 7 OF THE ROME STATUTE

a. Elements of the Crime of Deportation or Forcible Transfer of Population:

77. For the crime of deportation or forcible transfer of population to be said to have been committed, it needs to be shown that the accused intended to unlawfully deport or transfer a population or group of people from their lawful place of residence. Secondly, it needs to be shown that he knew of the lawful residence of the population or group in the place from which the accused expelled them. It also needs to be shown that the accused caused the population or group to be forcibly deported or transferred. Further, it needs to be proved that the deportation or transfer was without, and the accused knew it was without, justification based on security considerations, other imperative reason of public welfare, or other lawful authority. Lastly, it needs to be shown that the forcible movement was carried out with conscious participation in a widespread and/or systematic attack.

b. Whether the Attacks Need to be Both "Widespread" and "Systematic":

78. The Rome Statute[113] does not require that an attack on a civilian population be *both* widespread *and* systematic. It is sufficient that the attack meets one of the two requirements. ICTY case law has also dealt with this issue and in *The Prosecutor v. Tadic*, for example, it was held that "acts… can… occur on either a widespread basis or in a systematic manner"[114]. The purpose of requiring

[113] Article 7

[114] Trial Chamber Judgment, 7 May 1997, at para. 646

that the attack be either widespread *or* systematic is simply to rule out isolated or random acts, and in the *Tadic* case it was further said that "widespread" refers to "the number of victims"[115]. In *The Prosecutor v. Jean-Paul Akayesu*, the Trial Chamber held that "widespread attacks" included "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims"[116]. In the present case, the fact that the attacks were "widespread" cannot be gainsaid.

79. Given that the Rome Statute requires that attacks be *either* widespread or systematic, the existence of 'the Network' (or of organizational policy) is not a *sine qua non* for establishing the commission of acts listed in Article 7 of the Rome Statute as crimes against humanity. In *The Prosecutor v. Dragoljub Kunarac et al.* Appeals Judgment at the ICTY[117], it was stated as follows:

> *"…[N]either the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the 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 these crimes… [P]roof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was*

[115] See para. 648
[116] See para. 580 of the Trial Chamber Judgment of 2 September 1998
[117] IT-96-23 & IT-96-23/1-A, 12 June 2002

> *widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime."*

80. Notwithstanding this, the Sang Defence has argued that "the Prosecutor must prove the existence of an organizational policy",[118] and the Elements of Crimes have been cited in support of this contention. The CLR submits that if there is any conflict in this regard between the Rome Statute and the Elements of Crimes, then the Statute prevails since, under Article 9(3) "[t]he Elements of Crimes… shall be consistent with this Statute". Additionally, in Introduction (1) of the General Introduction to the Elements of Crimes, the Elements "shall assist the Court in the interpretation and application of Articles 6, 7 and 8, *consistent with the Statute*". (*italics* added)

81. Thus, even if it could be successfully argued that no reasonable Chamber could find the existence of a Network based on the Prosecution's evidence (although it is submitted that there is sufficient evidence to show the existence of a Network), this would not dispense with the existence of Article 7 crimes based on other facts contained in the Updated Document Containing Charges and supported by the received evidence.

82. It is therefore a fallacy to claim that without the Network [although it is submitted that on the evidence its existence was established] there would be no case and the charges must be dismissed. It is submitted that what is

[118] See para. 61 of the Motion

important is evidence that supports the commission of crimes by the Accused, as interpreted in the Elements of Crime pursuant to Article 9 of the Rome Statute, and that even if the Network were to be proved not to have existed, that would not alter the situation as long as "an organizational policy" could otherwise be discerned (e.g., through the ODM) based on any or a combination of the considerations set out by the Pre-Trial Chamber[119]. It is submitted, at any rate, that while organizational policy is relevant, it is not an indispensable element to proving the commission of crimes against humanity.

83. It has also been said that Mr. Sang was unaware of any widespread or systematic attack against a civilian population. This, it is submitted, is not a matter for determination at this stage. It however suffices to say that the Elements of Crimes clarify that knowledge of such an attack "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack…"[120]

84. Despite Mr. Sang's lack of awareness of any widespread or systematic attack, it is worth mentioning that the Decision Authorizing an Investigation and the Decision on Confirmation of Charges both established the attacks to be "widespread" in terms of the number of victims that resulted from them (both as direct victims of the attacks (e.g., the maimed, the displaced)), and indirectly as people who lost dependency upon the people who were killed. The attacks were also "widespread" in terms of the number of houses and

[119] See para. 10 of the Ruto Defence Request
[120] See Elements of Crimes, Introduction (2) of the Introduction on Article 7- Crimes Against Humanity

other property destroyed, burned or pillaged. The widespread character of the attacks was also evident in the sense of their geographical distribution, and this is supported by evidence from various Prosecution witnesses during the trial, who testified that the attacks occurred at various locations including Kiambaa, Huruma, Eldoret (and the Greater Eldoret Area including Turbo), Nandi Hills and Kapsabet. From the evidence, the attacks were also "systematic", targeting the lives of victims or injury to them or their property on the ground of the victims' ethnicity or (real or perceived) political affiliation. Evidence was presented to indicate that the purpose and plan to attack was accomplished through the creation of a Network, a group of people interconnected by their ethnicity and drawn from various occupations, including politics and the media, and was intended to permanently expel the targeted members of the civilian population (the victims) from their habitual residences. Reference to specific Prosecution evidence in this regard is made later in these submissions.

c. The Meaning of the Word "Area" as Understood in Article 7(2)(d) of the Rome Statute:

85. The Ruto Defence argues[121] as follows:

> *Article 7(2)(d) of the Statute explains that ""[d]eportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law" (emphasis added). Based on the OTP's*

[121] See para. 164 of the Sang Defence Motion

> *case theory that the common plan was to punish and expel from the Rift Valley those perceived to support the PNU in order to gain power and create a uniform ODM voting bloc, "the area" for the purposes of Article 7(2)(d) must mean the Rift Valley – and at the very least the North Rift Valley area. Notwithstanding the massive internal displacement that took place throughout Kenya during the PEV and the terrible suffering experienced, the OTP has failed to lead any evidence that Kikuyus or perceived PNU supporters who were attacked within the temporal and geographical scope of the charges were forcibly transferred outside the Rift Valley. Instead, the evidence shows that such individuals sought refuge in local police stations and churches and that IDP camps were set up at locations such as Eldoret Showground. Therefore, it appears the OTP has not considered, let alone attempted to satisfy, this element of Article 7(2)(d). On this basis alone, Count 2 must fail.*

86. In addition to the foegoing, the Ruto Defence has argued that various Prosecution witnesses including **[REDACTED]** and **[REDACTED]** failed to establish that persons were forcibly transferred "*from the area*".[122]

87. The question the Ruto Defence raises has legal and factual components. The legal component is further comprised of the following questions: What does the term "area" provided in Article 7(2)(d) of the Rome Statute mean? Does it indicate any specific geographical zone or require the act of crossing any national, political (*de jure or de facto*) borders or administrative boundaries? In

[122] See Ruto Motion, paras. 169, 172, 175, 177 - 179, 186, 189 and 190.

answer to these questions, we find that Article 7(2)(d) provides that "[*D]eportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."* Further, the relevant part of the elements of crimes under Article 7 (1) (d) states the following:

> ***Crime against humanity of deportation or forcible transfer of population***
>
> ***Elements***
>
> *1. The perpetrator deported or forcibly* [Footnote 12] *transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.* [Footnote 13]
>
> *2. Such person or persons were lawfully present in the area from which they were so deported or transferred*
>
> [Footnote 12] *The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.*
>
> [Footnote 13] *"Deported or forcibly transferred" is interchangeable with "forcibly displaced".*[123]

[123] See Element of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (Emphasis added)

88. Irrespective of what the Prosecution case theory might be, it is clear both from Article 7(2)(d) of the Statute and from the Elements of Crimes that the words "*from the area*" must be read conjunctively with the phrase *"in which they are lawfully present"*. Neither the Statute nor the Elements of Crimes suggest that the common plan "to punish and expel" must be proved. Indeed, it would be absurd to suggest that the forcible transfer or displacement of persons from the area in which they are lawfully present ceases to be a crime on account of the fact that the persons are not displaced to locations far away from their habitual residences or from where they were otherwise lawfully present at the time of their forcible expulsion. This approach would make nonsense of the jurisprudence of the *ad hoc* tribunals and of this Court that attacks directed at a civilian population (and, by extension, the act of forcible transfer) need not be <u>both</u> widespread and systematic.

89. Looking at the legislative history of international criminal justice systems, we find that the crime of deportation was included as a war crime and crime against humanity in various international conventions and agreements.[124]

[124] The crime of deportation or forcible transfer of population was first included in The Hague Conventions of 1899 and 1907 which provided the protection of civilian population against deportation in time of war. See The Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899 and the Convention (IV) respecting the Laws and Customs of War on 18 October 1907. See also BASSIOUNI (M. C.), *Crimes against Humanity in International Criminal Law,* Kluwer Law International, The Hague/ London/ Boston, 1999, p. 312. Moreover, Article 6 of the Nuremberg Charter, Article II(c) of the Control Council Law No. 10, Article 5(c) the Tokyo Charter also criminalised deportation as a war crime. See the Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, Protocol to Agreement and Charter, 6 October 1945. The Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and against Humanity, 20 December 1945. The Charter of the International Military Tribunal for the Far East, 19 January 1946, (General Orders No. 1), as amended, General Orders No. 20, 26 April 1946. Deportation is also a grave breach of

Moreover, the Statutes of the ICTY and ICTR criminalize deportation as a crime against humanity.[125] Deportation is also listed as a crime against humanity in the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia.[126] The documents developed by the International Law Commission ("ILC"), such as the Draft Code of Crimes against the Peace and Security of Mankind and the Draft statute for an international criminal court which formed the genesis of the Rome Statute, also defined deportation or forcible transfer as a crime against humanity.[127] In 1991, the ILC noted that that "[deportation] *implies expulsion from the national territory, whereas the forcible transfer of population could occur wholly within the frontiers of one and the same State*."(underline added)[128] This clarification was incorporated *verbatim* into the Commentary on the 1996 ILC Draft Code which includes, as a crime against humanity, "*arbitrary deportation or forcible transfer of population*."[129]

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the Fourth Geneva Convention. See Article 49 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

[125] See Article 5 of the Statute of ICTY, UN Doc. S/RES/827, 25 May 1993 and Article 3 of the Statute of the ICTR, UN doc. S/RES/955, 8 November 1994.

[126] See Article 5 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, NS/RKM/1004/006, 27 October 2004.

[127] See Article 2 of the Draft Code of Offences against the Peace and Security of Mankind, Report of International Law Commission at its Sixth Session, U.N. Doc. A/2693, 1954. See also the Draft Code of Offences against the Peace and Security of Mankind, U.N. Doc. A/46/10, 30 September 1991. See Article 22 of the Draft Statute for an international criminal court, "Report of the International Law Commission on the work of its forty-fifth session", UN Doc. A/48/10, 3 May – 23 July 1993, pp. 106-107. See also Article 20 of the Draft Code on International Criminal Court in the Report of the International Law Commission on the work of its forty-sixth session", UN Doc. A/49/10, 2 May-22 July 1994, pp. 43-157.

[128] See the Report of the International Law Commission on the work of its forty-third session, 29 April–19 July 1991, UN Doc. A/46/10, p. 104.

[129] See the Report of the International Law Commission on the work of its forty-eighth session, 6 May–26 July 1996, UN Doc. A/51/10, p. 100, par. 13.

90. In 1996, during the meetings of the Preparatory Committee for the Establishment of the ICC, the USA submitted a proposal on article 20 (crimes under the jurisdiction of the Court) of the ILC's Draft Code criminalizing "*…the unlawful expulsion of a person from the territory or area where that person lawfully resided…"*. All that was necessary was that *"the accused knew or should have known the inhabitant's status as lawful resident of the territory or area*; […][130] The US delegation later submitted another proposal known as "Elements Related to Article on Crimes Against Humanity" which defined the crime of deportation as a crime against humanity in the following terms: *"mass deportation or forced transfer of persons from the territory of a State [or from an area within a State] of which such persons are nationals or lawful permanent residents, except where the acts constituting deportation or transfer are for purposes of an evacuation for safety or other legitimate and compelling reasons."*[131] In footnote 7 of the proposal, it was noted that:

> "*Two aspects of this provision should be noted for further discussion. First, we note that some texts refer only to deportation, which we understand to mean removal or forced departure from the territory of the State, while this formula also includes forcible transfer of persons within the territory of a particular State. Second, since deportations under some (if not many) circumstances are perfectly lawful, it will be necessary to*

[130] See proposal of the United States of America, Redraft of ILC Article 20 on ICC Jurisdiction with Proposed Elements, unofficial document, 22 March 1996, pp. 8-12. (Emphasis added.)

[131] See Proposal of United States of America, Elements Related to Article on Crimes against Humanity, unofficial document, 2 April 1996, p. 2. (Emphasis added.) This proposal was included in the Report on definition of crimes under the jurisdiction of the Court, UN Doc. A/AC.249/CRP.9/Add.4, 11 April 1996, pp. 11-16. See also the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I and II, Proceedings of the Preparatory Committee during March-April and August 1996, UN Doc. A/51/22, 13 September 1996, p. 24, par. 95.

define those deportations (or transfers) which, when committed as part of a widespread and systematic attack, should be considered crimes against humanity. […]."[132]

91. Ultimately, Article 7(2)(d) of the Statute was formulated without an explicit definition of the term "*area*", but in circumstances where the *travaux préparatoire*s clearly indicated that the drafters of the Statute intended to mean that "deportation or forcible transfer of population" was sufficiently established as long as the victims were displaced from the locations where they had lived or habitually resided.[133] A plain reading of the Article in question and of the Elements of Crimes also leads to the conclusion it was never contemplated that victims of acts of forcible transfer had to be transferred across national borders or administrative boundaries.

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[132] *Ibid.*, (Emphasis added.)

[133] Other input on the *travaux préparatoires* on the crime of deportation include Amnesty International advocating that "*the statute should criminalize the systematic or large scale forcible relocation of people within the borders of their own country when this is done for reasons of their race, religion, language, ethnic, or social origin, or political opinion*". See Amnesty International, the International Criminal Court Making the Right Choices –Part I, Defining the Crimes and Permissible Defences and Initiating a Prosecution, AI Index: IOR 40/01/97, January 1997, p. 45, and footnote 146.
In 1998, the US also submitted another proposal on the crime of deportation or forcible transfer specifically referring to victims' "lawful place of residence". At the United Nations Diplomatic Conference on the Establishment of the ICC, the International Commission of Jurists also submitted a commentary on the definition of crime in question which stated that *"deportation or forcible transfer of population means the movement of persons from the area in which the persons are lawfully present under international law for a purpose contrary to international law*." The Nepalese delegation also submitted a proposal on the definition of the crime of deportation or forcible transfer of population using the words "*the expulsion or displacement otherwise of a population or a group of populations from the area in which it is habitually resident…".* Germany and Canada also submitted a joint proposal on the crime of deportation and forcible transfer which described the crime as involving "persons [who]… *were lawfully present in the area from which they were deported or displaced*…", and "*the forcible transfer of groups of persons concerned to another location, within the same State*. See the Proposal submitted by Canada and Germany on article 7, UN Doc. PCNICC/1999/WGEC/DP.36, 23 November 1999, p. 4. (Emphasis added.)

92. In analysing Pre-Trial Chamber II's Decision authorizing of an investigation into the situation in Kenya, which has a direct bearing on this case, we observe that the Pre-Trial Chamber found that there was reasonable basis to believe that crime of deportation or forcible transfer of population had been committed.[134] While not providing an exhaustive definition of the term "*area*", the Pre-Trial Chamber never required the Prosecution to establish as matter of law that those victims of deportation or forcible transfer did indeed cross any national borders or administrative boundaries.

93. In its Decision on the Confirmation of Charges, Pre-Trial Chamber II noted that the proper labelling of the reproached acts as either "*deportation*" or *"forcible transfer of population*" should not be decided at the confirmation stage but should be left to be better decided by a Trial Chamber due to the requisite threshold to be proved and all the evidence to be presented and considered.[135] The Pre-Trial Chamber emphasised that:

> "[i]*n the context of the case sub judice, the evidence presented before the Chamber does not and should not indicate with any sort of certainty where the victims ultimately relocated. It suffices to say that at this stage and based on the evidence available there are substantial grounds to believe that the PNU supporters were forcibly displaced without grounds permitted under international law from the areas where they were lawfully present. The factor of where they have finally relocated as a result*

[134] See Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, No. ICC-01/09-19, 31 March 2010, paras. 156 - 165.
[135] See Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, No. ICC-01/09-01/11-373, 23 January 2012, par. 268.

> *of these acts (i.e. within the State or outside the State) in order to draw the distinction between deportation and forcible transfer is thus to be decided by the Trial Chamber, which will be presented more concrete evidence in this regard. Therefore, the Chamber will retain the formulation presented by the Prosecutor in his Amended DCC. Accordingly and in light of the above, the Chamber finds substantial grounds to believe that deportation or forcible transfer of population was committed in the locations referred to in the counts*."[136]

94. Again, while not providing an exhaustive definition of the term "*area*", the Pre-Trial Chamber found it sufficient, in relation to meeting the elements of Article 7(2)(d), that the victims were removed their homes or places where they habitually resided. The Pre-Trial Chamber therefore never required the Prosecution to establish as matter of law that those victims of deportation or forcible transfer did indeed officially cross any national borders or administrative boundaries. Similarly, the Pre-Trial Chamber in the *Muthaura et al.* case adopted the same approach in the Confirmation of Charges Decision.[137] This same reasoning has been applied in cases arising from the Sudan situation where the accused persons are charged with the same crime, including Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-

[136] *Idem*. (Emphasis added.)
[137] See Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, No. ICC-01/09-02/11-382-Red, 23 January 2012, paras. 241- 252.

Rahman[138], Omar Hassan Ahmad Al Bashir[139] and Abdel Raheem Muhammad Hussein.[140]

95. In Article 5 of the Statute of the ICTY, deportation is a crime against humanity. However, forcible transfer, while not explicitly mentioned, is found to constitute a crime against humanity as a form of "other inhuman acts" provided in Article 5 of the Statute of the ICTY. Recent jurisprudence of the ICTY defines these two crimes in the following manner:

> *Article 5(d) of the Statute recognises deportation as a crime against humanity.* […] *The protected interests underlying the prohibition against deportation include the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location. The same protected interests underlie the criminalisation of acts of forcible transfer, an "other inhumane act" pursuant to Article 5(i) of the Statute.* […] *The Appeals Chamber is of the view that the actus reus of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a de jure state border or, in certain circumstances, a de facto border, without grounds permitted under international law. The Appeals Chamber considers that the mens rea of the offence does not require that the perpetrator intend to displace the*

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[138] See Decision on the Prosecution Application under Article 58(7) of the Statute, No. ICC-02/05-01/07-1, 27 April 2007, paras. 69 and 75.
[139] See Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09-3, 04 March 2009, paras. 98 – 100 and 109.
[140] See Public redacted version of "Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein", No. ICC-02/05-01/12-1-Red, 1 March 2012, paras. 68 – 75.

individual across the border on a permanent basis. […] [After having surveyed relevant international law and jurisprudence, the Appeals Chamber concludes] *that deportation as a crime against humanity under Article 5(d) of the Statute requires that individuals be transferred across a state border or, in certain circumstances, a de facto border. The Appeals Chamber notes that certain sources to which it refers clearly concern deportation as a war crime rather than as a crime against humanity. The Appeals Chamber believes that reference to these sources is instructive because deportation as a crime against humanity developed out of deportation as a war crime – as a way of extending the scope of the crime's protection to civilians of the same nationality as the perpetrator.* […]. *In the view of the Appeals Chamber, the crime of deportation requires the displacement of individuals across a border. The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a de jure border to another country* […] *The Appeals Chamber also accepts that under certain circumstances displacement across a de facto border may be sufficient to amount to deportation. In general, the question whether a particular de facto border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law.* […] *In the instant case, the Prosecution charged forcible transfer (in Count 8 of the Indictment) as the act underlying Article 5(i). Forcible transfer has been defined in the jurisprudence of the Tribunal as the forcible displacement of persons which may take place within national boundaries. The mens rea does not require the intent to transfer permanently. The Appeals Chamber notes that Article 2(g) of the Statute, Articles 49 and 147 of Geneva Convention IV, Article 85(4)(a) of*

> *Additional Protocol I, and Article 18 of the 1996 ILC Draft Code all condemn forcible transfer. The notion of forcible transfer had therefore clearly been accepted as conduct criminalised at the time relevant to this case, such that it does not violate the principle of* nullum crimen sine lege. *Furthermore, acts of forcible transfer have been accepted in other cases before the Tribunal as specifically substantiating the notion of other inhumane acts pursuant to Article 5(i). In view of the foregoing, the Appeals Chamber finds that acts of forcible transfer may be sufficiently serious as to amount to other inhumane acts.*[141]

96. The Appeals Chamber of the ICTY has also held that:

> *When finding that specific acts of forcible transfer amount to "other inhumane acts" under Article 5(i) of the Statute, a Trial Chamber has to be convinced that the forcible transfer is of a similar seriousness to other enumerated crimes against humanity.* […] *The acts of forcible transfer were of similar seriousness to the instances of deportation, as they involved a forced departure from the residence and the community, without guarantees concerning the possibility to return in the future, with the victims of such forced transfers invariably suffering serious mental harm.*[142]

97. In the determination of the question relating to the application of the word "area" the CLR invites the Trial Chamber to take judicial notice, as a matter of

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[141] See ICTY, *The Prosecutor v. Milomir Stakic*, Appeals Judgement, Case No. IT-97-24-A, 22 March 2006, paras. 276 -278, 289, 300, 317. See also ICTY, *The Prosecutor v. Vlastimir Dordevic*, Appeals Judgement, Case No. IT-05-87/1-A, 27 January 2014, paras 533 – 536.

[142] See ICTY, *The Prosecutor v. Momčilo Krajisnik*, Appeals Judgement Case No. IT-00-39-A, 17 March 2009, par. 331.

public notoriety, the seriousness of the forcible transfer of the victims in this case, based on the *Krajisnik* Appeals Judgement[143]. This is due to the lack of guarantees concerning the possibility to return in the future, and the serious trauma that the victims of the forced transfers have suffered.

98. Perhaps the ICTY Appeals Chamber in *The Prosecutor v. Milorad Krnojelac*[144] best resolves the question of "area". In that case, it was held that:

> *The Appeals Chamber holds that acts of forcible displacement underlying the crime of persecution punishable under Article 5(h) of the Statute are not limited to displacements across a national border. The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent*.[145] (underline added)

99. The Extraordinary Chambers in the Courts of Cambodia also followed similar reasoning in dealing with the forced displacement of individuals from an area in which they are lawfully present. The Chambers noted that:

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[143] ibid

[144] Case No. IT-97-25-A, 17 September 2003, par. 218

[145] See also ICTY, *The Prosecutor v. Tihomir Blaškic*, Appeals Judgement, Case No. IT-95-14-A, 29 July 2004, par. 153. ICTY, *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Appeals Judgement Case No. IT-98-34-A, 3 May 2006, par. 154.

> *"The Nuremberg Tribunal and domestic courts applying international law before 1975 entered numerous convictions for forced movements of population including displacement within national boundaries perpetrated on grounds not recognised in international law, namely civilian security or military necessity. Between 1949 and 1975, international instruments recognised forms of displacement, without regard for the crossing of any boundary, as war crimes and crimes against humanity…"*[146]

It is submitted that none of the authorities mentioned above supports the Ruto Defence's argument in relation to the term "*area*" as an element of the crime of deportation or forcible transfer as a crime against humanity. Therefore, the Trial Chamber should reject this argument.

D. RELEVANT MODES OF CRIMINAL RESPONSIBILITY UNDER ARTICLE 25 OF THE ROME STATUTE:

100. Article 25(3)(c) of the Rome Statute criminalizes the aiding, abetting or otherwise assisting in the commission of a crime within the jurisdiction of the Court. Such action does not require that the person be a member of the group, and knowledge that his acts facilitate the commission of a crime is sufficient. Article 25(3)(d) of the Statute entails three objective and two subjective requirements. The objective elements are:

(i) a crime within the jurisdiction of the Court is attempted or committed;

(ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose;

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[146] See ECCC, *Co-Prosecutors v. Khieu Samphan, Nuon Chea*, Trial Judgment, Case 002/01, Case File/Dossier No. 02/19-09-2007/ECCC/TC, 7 August 2004, paras. 449 – 450, and 454 – 455. (Emphasis added.)

(iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute.

The subjective elements are:

(i) the contribution shall be intentional; and

(ii) shall either (a) be made with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime"[147].

Contribution to a crime "in any other way" as contemplated by Article 25(3)(d) is defined as "*a residual form of accessory liability which makes it possible to criminalise those contributions to a crime which cannot be characterized as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of Article 25(3)(b) or article 25(3)(c) of the Statute*".[148]

101. It has been suggested that for criminal liability to attach to Mr. Sang under Article 25(3)(d) of the Statute, he "must have made a significant contribution to the Network through his radio program"[149], and that his "conduct must have substantially contributed to the crimes charged"[150]. It has also been submitted that "[i]ncitement… is not a choate offence and is therefore punishable only if the incitement resulted in the commission of crimes. If not, such conduct at most amounts to an attempt."[151]

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[147] See "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana" (Pre-Trial Chamber I), No. ICC-01/04-01/10-1, 28 September 2010, para. 39.
[148] See "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/06-803, 29 January 2007, para. 337).
[149] Para. 44, Sang Defence Motion
[150] Para. 45 of the Sang Defence Motion
[151] *ibid*

102. On the contrary, it has been held that "as an inchoate crime"[152], public and direct incitement is punishable even if no crime resulted therefrom, and it is not necessary to show that direct and public incitement was followed by actual consequences.[153] There need be no causal relationship at all between incitement and the commission of a crime. More importantly, the context within which broadcasts are made is important in determining whether the broadcasts are inciting. One has to look at the time, place, circumstances, intent and other contextual factors. In this case, the specifics would include the proximity in time between the broadcasting and the 2007 General elections, the rising ethnic and political tensions in the run-up to the elections, cultural and linguistic differences, the meaning of broadcasted words within the specific context, etc. As was said in *The Prosecutor v. Simon Bikindi*:[154]

> *"To determine whether a speech rises to the level of direct and public incitement [to commit genocide], context is the principal consideration, specifically: the cultural and linguistic content; the political and community affiliation of the author; its audience; and how the message was understood by its intended audience, i.e. whether the members of the audience to whom the message was directed understood its implication. A direct appeal [to genocide] may be implicit; it need not explicitly call for extermination, but could nonetheless constitute direct and public incitement [to commit genocide] in a particular context."*

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[152] *The Prosecutor v. Simon Bikindi*, ICTR-01-72-T, Trial Chamber Judgment of 2 December 2008, para. 419

[153] See *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 766, where the Appeals Chamber summarily dismissed the Appellant's (Ngeze) argument that the Rwanda genocide would have occurred even if the *Kangura* [newspaper] articles had never existed.

[154] ICTR-01-72-T, Trial Judgment of 2 December 2008, at para. 387

103. It has been argued that "[i]nflammatory speeches, even if intended to mobilize anger against an ethnic group does not necessarily amount to a call to commit violence",[155] and reliance has been made on paragraph 742 of the Appeals Judgment in *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*[156]. It is submitted that this submission is misleading, and was taken out of the proper context of the *Nahimana et al.* Appeals Judgment. To set the record right, there was in fact no such broad proposition of law made in the cited paragraph of the said Appeals Judgment. The Appeals Chamber simply made reference to *a specific broadcast* and found, *on the specific facts relating to the broadcast*, that it contained no direct and public incitement to commit genocide against the Tutsi. For similar reasons, the argument made to the effect that "a warning against a threat or a plan on the part of the enemy is not tantamount to a call to commit violence"[157] is equally misleading. Every case must turn on its own facts.

104. Again, the argument that '[c]alling individuals by name as being part of the 'enemy' group does not necessarily have the intention to incite people against such individuals"[158] cannot be allowed to stand. As earlier submitted, broadcasted speech should be viewed in its specific context, including nuances in language, and how the speech was understood by its audience.[159]

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[155] Sang Defence Motion, para. 54
[156] ICTR-99-52-A, 28 November 2007
[157] Sang Defence Motion, para. 54, and fn. 74, making reference to paras. 741 and 747 of the *Nahimana et al.* Appeals Judgment
[158] Sang Defence Motion, para. 55
[159] For this, see the *Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, paras. 698, 700-03

E. DOES THE EVIDENCE PRESENTED DISCLOSE COMMISSION OF THE CRIMES CHARGED?

105. In the Updated Document Containing Charges (UDCC)[160], it is stated that the crimes charged occurred in the context of an attack that was both widespread and systematic against members of the civilian population, thereby satisfying one of the elements as required by Article 7(1) of the Rome Statute. The UDCC charges that from 30 December 2007 through 16 January 2008, Network perpetrators were responsible for attacks in four locations in two districts (Uasin Gishu and Nandi) within the Rift Valley, targeting PNU supporters, and that direct perpetrators implemented the Network's policy of attacking PNU supporters by systematically inflicting fear, killing, looting, burning or otherwise destroying their property.[161] The UDCC further charges that the express purpose of the perpetrators was to punish PNU supporters and to expel them from the Rift Valley using whatever means necessary, including the commission of crimes.[162]

106. Having set out various aspects of the law applicable in respect of 'No Case to Answer' Motions, it is time now to consider whether the totality of the evidence received during the Prosecution's case is such as to disclose the commission of the crimes charged. It is submitted that the evidence available, taken at its best, points towards the existence of a common purpose to commit crimes under Article 7 of the Rome Statute. The evidence, taken at its face value, is also sufficient to show the existence of the Network, with a common and well-coordinated plan to balkanize the Rift Valley and to

[160] ICC-01/09-01/11-533-AnxA-Corr
[161] Para. 32 of the Updated document Containing Charges
[162] *ibid*

permanently expel various members of the civilian population on account of their ethnicity and (real or perceived) political affiliation.

107. The evidence also demonstrated the manner in which Mr. Ruto was regarded among the Kalenjin population, and the level of influence he had as a leader over other leaders in the community, and over the general Kalenjin community. The evidence, assuming it to be true, also points towards an intention to commit crimes within the jurisdiction of the Court or, at the very least, indicates a sufficient awareness on the part of the Accused persons that such crimes would be committed through their aiding, abetting or otherwise assisting in their commission.

108. Below are brief summaries of evidence which, if assumed to be true, would provide a sufficient basis upon which a reasonable Chamber could convict. The summaries are not intended to be comprehensive, but are merely indicative and sufficient to meet the standard applicable to 'No Case to Answer' Motions.

109. **[REDACTED]** testified about having been informed in January 2008 by **[REDACTED]** that he had participated in the attacks on Turbo town, and that he reported to **[REDACTED]** who in turn reported to Mr. Ruto.[163] **[REDACTED]** also testified that **[REDACTED]** was informed by **[REDACTED]** that the people burning the houses were able to identify Kikuyu property because people like **[REDACTED]** and a certain **[REDACTED]** were there to point out the houses and shops belonging to the

[163] **[REDACTED]**

Kikuyu. In **[REDACTED]** evidence, **[REDACTED]** and **[REDACTED]** were together and participated in the burning of property.[164]

110. In his statement, **[REDACTED]** reported having heard Mr. Sang say the following words in the Kalenjin language: "We don't want any PNU member around here, even a Kalenjin". The witness also stated that Mr. Sang was preaching hate messages from October to December 2007 and that he (Sang) encouraged the Kalenjin to attack the Kikuyu.[165] He stated that he was threatened by an ODM supporter named **[REDACTED]** (who was the **[REDACTED]**) with words to the effect that: "You, the PNU members, this year we will do astonishing things to you. Why are you opposing our MP?", and that by "our MP", **[REDACTED]** meant Mr. Ruto. The witness also stated that **[REDACTED]** told him that PNU members would have to move out of the area. [166] He further stated that he had heard Mr. Ruto remark that in his time in government he had come to realize that only one ethnic group had benefitted and they were the "*kamama*" - referring to the Kikuyu. Further, he that he had heard it spoken in Kalenjin in parables that "you know the dog that is used to staying near the fire doesn't know that fire is harmful until its tail gets burnt. He also reported that Mr. Ruto had stated that Kikuyu were to "go home" whether they won or lost, that the Kikuyu were thieves and should commit evil in their own area, and that they were bad people.[167] He also said that he had heard Mr. Ruto use words to the effect that if the Kalenjin were not careful, even their farms would be taken, and that Mr. Ruto

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[164] **[REDACTED]**
[165] **[REDACTED]**
[166] **[REDACTED]**
[167] **[REDACTED]**

had reminded the participants at a meeting of the former Kenyatta regime which had allegedly taken a lot of Kalenjin owned farms, and stated that they would use all means to get back their land, including war.[168] The witness also reported that Mr. Ruto had remarked that the Kikuyu were to be chased and people in attendance at the meeting had applauded him. Further, that he had heard Mr. Ruto say that there were rich people who were able to finance and assist them in every way including sending guns to be distributed to the youth.[169] The witness also reported that Mr. Ruto had demanded that the Kikuyu must go as no Kalenjin lived in Kikuyuland, and that he had said that he would fight or die rather than see a Kikuyu rule. The witness also stated that Mr. Ruto had said that Kalenjin PNU supporters were sick in the head for supporting (former President) Kibaki.[170]

111. This witness also stated that he had heard **[REDACTED]**, then **[REDACTED]**, speak at the meeting in the **[REDACTED]** dialect and demanding that the Kikuyu must go to Central (Province) and that he was certain that the Kikuyu would go home as the Kalenjin young men would see to it.[171] He further reported having heard Mr. **[REDACTED]** ask if the young men from Nandi were ready and if the elders had been prepared the young men. Mr. **[REDACTED]** had reportedly added that the message he brought from Kipsigis was that they support Mr. (William) Ruto and that they were ready to support him even if war broke out. He stated that he had heard Mr. **[REDACTED]** state that Kipsigis were good warriors and that a Kikuyu in

[168] **[REDACTED]**
[169] **[REDACTED]**
[170] **[REDACTED]**
[171] **[REDACTED]**

the face of a Kipsigis was 'a very small insect'.[172] He further stated that Mr. **[REDACTED]** had said that he wanted the Kikuyu to go back to their home in 2007, and that he had challenged participants at the meeting whether they were ready to fight. He said that **[REDACTED]** had spoken harshly and in an angry tone and that he had remarked that everyone must be ready with weapons such as arrows.[173] The witness also reported having seen leaders distributing money that had come from Mr. (William) Ruto to the participants at the end of the meeting, with some participants arriving on foot and others in vehicles.[174] The witness stated that he did not see Mr. Ruto personally handing over the money at the meeting, but that the people distributing the money included **[REDACTED]**, Councillor **[REDACTED]**, Councillor **[REDACTED]**, **[REDACTED]**, and **[REDACTED]** who were Ruto's right hand men. According to the witness, **[REDACTED]** had handed the money to the other leaders who distributed it to meeting participants.[175]

112. The witness also stated that he had seen many people at the meeting carrying wooden hammers and Mr. Ruto with a toy hammer in his hand, and that he had heard Mr. Ruto say in his speech to the participants that they had to walk with a hammer and a matchbox which were to be used to set alight and destroy houses belonging to the Kikuyu.[176] He stated that he saw Mr. Ruto brandishing the toy hammer, saying that it was a sign that they did not like PNU party and its followers. He also stated that Mr. Ruto had said that there were many PNU supporters in **[REDACTED]** and that these were

[172] **[REDACTED]**
[173] **[REDACTED]**
[174] **[REDACTED]**
[175] **[REDACTED]**
[176] **[REDACTED]**

uncivilized people; that PNU supporters were to be harassed or even killed, and their property destroyed. According to the witness, Mr. Ruto had spoken in Nandi,[177] and that he had used words to the effect that 'this year, *kimurgelda* will know us, who does Turbo belong to? These people they don't vote for us at any time […] they don't know us, but this time they will know us, they will have to go their home because in their home there are no Kalenjin.' Finally, the witness stated that ODM supporters had cheered, while PNU supporters could not say anything.[178]

113. For his part, **[REDACTED]** testified that he had heard Mr. Ruto state at a rally words to the effect that "no one would have any reason to go to another political party, the Kikuyu party, when we had our political party…" and further that "…we have no reason to follow the Kikuyu and, if necessary, we will drive the Kikuyu out."[179] He said that the words "onge mande Kokoechu", meaning "Drive out those Kikuyu"[180] were spoken in the Nandi dialect. The witness further testified that on **[REDACTED]** November 2007 during **[REDACTED]**, he had heard Mr. Ruto addressing his supporters at the **[REDACTED]** when he (Ruto) made the claim that PNU might be preparing to steal the vote. The witness testified that Mr. Ruto had said that no matter what party won the election, the Kikuyu as well as those who supported PNU would have to pack up and go home.[181]

114. **[REDACTED]** stated that he had heard **[REDACTED]**, a councillor for

[177] [REDACTED]
[178] [REDACTED]
[179] [REDACTED]
[180] [REDACTED]
[181] [REDACTED]

[REDACTED] and campaigner for Mr. Ruto deliver a message in Kalenjin from Mr. Ruto to the effect that the Kalenjin must vote as a bloc for ODM and that anyone who would vote against ODM would be dealt with.[182] He further stated that Mr. Ruto would deliver messages to the public through councillors representing the wards and the people would communicate to him (Ruto) through the local councillors as well as his campaigners and personal assistants. He identified Mr. **[REDACTED]** as the middleman between the local community and Mr. Ruto in Turbo.[183] In his statement, the witness said that that he had seen Mr. Ruto with other politicians of the ODM at a rally at Kipchoge Stadium on **[REDACTED]** 2007. He stated that he heard Mr. Ruto say in Kiswahili that "this is an ODM zone and everybody should understand this and vote ODM." On that occasion, he also heard Mr. Ruto speak in Kalenjin and describe the Kikuyu using terms such as *kamaama* – which means uncles – and *Kiplemet* which means people who wear the white hat or have white hair. He stated that this was language commonly used in campaigns to refer to Kikuyu when in mixed company while trying to hide who one was talking about.[184]

115. The witness stated that he attended another meeting on the same day, this time at Mr. Ruto's Sugoi home, where there were between 400 and 500 Kalenjin youth from different parts of the Rift Valley. He identified prominent individuals at that meeting, including Colonel **[REDACTED]** from **[REDACTED]**, **[REDACTED]** from **[REDACTED]**, **[REDACTED]**, and both Mr. William Ruto and Mr. Joshua Sang, as well as **[REDACTED]** and

[182] [REDACTED]
[183] [REDACTED]
[184] [REDACTED]

[REDACTED] from Keiyo[185] The witness further stated that Mr. Ruto welcomed the participants and passed the meeting over to **[REDACTED]**, and left the room with the prominent individuals. According to the witness, **[REDACTED]** told the youth that they needed to be ready to evict the Kikuyu from Rift Valley if they stole the votes, and that Mr. Ruto and other business men would provide the funds to facilitate the youth.[186] The witness stated that those who attended the meeting received KShs. 500/= pocket money and were informed that the money was from Mr. Ruto.[187] The witness also gave an account of an incident at Brookside Dairies, where a crowd was gathered fearing rigging of the vote, with the crowd then moving to the Eldoret Police Station where Mr. Ruto was. The witness stated that Mr. Ruto spoke in Kiswahili saying: "We know these people have plans to steal votes but if they steal they will 'see it'", upon which **[REDACTED]** who was also at the station asked the crowd whether the Kikuyu should go or stay, and the crowd chanted that they should go.[188]

116. The witness also gave an account of happenings on 30th December 2007 after the announcement of the election results. He stated that there was a meeting at the farm of **[REDACTED]** with about 300-400 youth. **[REDACTED]**, **[REDACTED]**, **[REDACTED]** – a village elder – **[REDACTED]**, **[REDACTED]**, **[REDACTED]**, **[REDACTED]** and **[REDACTED]** were at the meeting.[189] **[REDACTED]**, the chair of the meeting told the youth that the Kikuyu must leave the Rift Valley and informed the

[185] [REDACTED]
[186] [REDACTED]
[187] [REDACTED]
[188] [REDACTED]
[189] [REDACTED]

participants that they were to attack Mukunga and Moi's Bridge. **[REDACTED]** also informed the gathering that there were other meetings going on in Bukale and Ziwa Sirikwa.[190] The witness stated that **[REDACTED]** divided the group into two separate groups one with youth and the other with older men (married men), and selected two men with military training to **[REDACTED]** and **[REDACTED]** to train the youth in the use of bows and arrows. He further stated that Kalenjin youth are typically trained in the use of bows and arrows in the traditional circumcision ceremony.[191]

117. Looking at this specific evidence, together with the evidence of other Prosecution witnesses[192], we submit that the totality of the evidence attains

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[190] [REDACTED]

[191] [REDACTED]

[192] See, in this regard, for example, **[REDACTED]** who testified that Mr. Ruto had made a speech in October 2005 at a primary school in Eldoret where he first spoke in Kiswahili and then later switched to Kalenjin. In his Kiswahili speech, he was said to have asked people to vote against the proposed Constitution, and that people should turn out and vote. The witness however said that when Mr. Ruto switched to the Kalenjin language, he said that he was seeing "white mushrooms" in that area and that "the white mushrooms should be uprooted or eaten". The witness testified that he understood the words 'white mushrooms should be eaten' to mean that the Kalenjin people should send away the Kikuyu. The witness testified Mr. Ruto was speaking on behalf of the Kalenjin people at that time, as he was being as a spokesperson of the Kalenjin people. He also testified that were over 1,000 people in attendance at the event and that the persons who attended the function were pleased to hear what Mr. Ruto had said, because to them this amounted to liberation as they believed that the Kikuyu had taken land from them.
See also **[REDACTED]**. This witness largely disavowed his statement, but he nevertheless confirmed that Mr. Ruto was installed as a Kalenjn elder sometime in the year 2007. See also **[REDACTED]**, who linked Mr. Ruto to public speeches in which it was said that land grabbers would be put into pick-up trucks and sent back to Central Province, upon which the people started shouting that the Kikuyu should go back to Central Province. It was the witness's testimony that the reaction of the people made him afraid. Another witness, **[REDACTED]**, testified that Mr. Ruto had spoken in the Kalenjin language at a public rally in Kapsabet on 5th December 2007 when he said that the Kikuyu were enemies and that whoever supported President Kibaki was a witch. The witness went on to explain that a

the threshold required to refuse to grant the Accused an acquittal at this stage on any of the counts.

FINAL REMARKS:

a. The Alleged Spontaneity of the Violence *versus* Planned Violence:

118. Both the Ruto Defence and the Sang Defence submitted that the 2007/2008 post-election violence occurred spontaneously. However, the testimony of a number of Prosecution witnesses demonstrated that the crimes with which the Accused have been charged were planned, instigated or ordered and also gave details of the role played by the Accused persons in contributing to the crimes. In *The Prosecutor v. Jean Paul Akayesu* ICTR Trial Chamber Judgment, it was said that "planning" occurs when "one or several persons contemplate designing the commission of a crime at both the preparatory and execution phase". The CLR submits that taking the evidence at its highest, the violence occurred within a milieu of considerable participation and sophistication, with distinguishing characteristics that are indicative of planning, instigation or ordering, including:

i. Rapid deployment and mobilization of perpetrators;

ii. Similar mode of dressing and ornamentation amongst the perpetrators;

iii. Evidence of provision of funds and logistical support; and

iv. Selective, directed and systematic targets of attack on the basis of ethnic origin and/or (perceived) political affiliation.

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witch was seen in negative light by the society, as a bad person, and that it was customary that a house belonging a witch would be burnt down. He said that he interpreted this to mean that the Kikuyu were enemies; people one cannot relate with. The witness also testified that the venue of the Kapsabet rally was a "no-go-zone" for supporters of the Party of National Unity (PNU), and that the speeches made at the rally were aired on KASS FM.

119. Additionally, there was evidence that in at least two previous General Election periods there had been ethnic violence related to the elections. It is submitted that this, coupled with remarks made during the period immediately preceding the 2007 General Elections, created the awareness that the commission of crimes against humanity was likely. As held in *The Prosecutor v. Kordić and Čerkez*,[193] the *mens rea* element is satisfied once there is "the awareness of the substantial likelihood that a crime will be committed in the execution of that plan", and that such awareness bespeaks acceptance of the crime in question[194].

b. <u>As to Incitement to Violence:</u>

120. In Mr. Sang's Motion for Judgment of Acquittal,[195] it appears to have been conceded that words attributed to him about supporters of the PNU party and/or the Kikuyu ethnic group during radio programs were derogatory[196]. Departing on this concession, it is submitted that Mr. Sang would intend the natural and probable consequences of the words. Derogatory words are words that show a critical and disrespectful attitude towards others, and it is submitted that given the time, place and circumstances within which such words were uttered, it would be hardly imaginable that they could be said not to have been inciting people to criminal conduct. Such words would, even

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[193] ICTY Case No. IT-95-14/2-A, Appeals Chamber Judgment of 17 December 2004, at para. 31

[194] *ibid*

[195] ICC-01/09-01/11-1991-Conf

[196] See para. 4, generally. Mr. Sang submits that:

> "…At worst, these comments, of which no broadcast has been produced and which Mr Sang denies in any event, are a poor choice of words. While they might be considered derogatory, they certainly not criminal (sic) in the sense of being inciting. They were not meant to be inciting, nor did they incite anyone to commit violence against the Kikuyu population during the post-election violence…"

as "stand-alones", i.e., even independently of the existence or non-existence of the Network, would be capable of incitement. To be clear, and as earlier submitted, a causal connection need not necessarily be drawn between the existence of the Network having a criminal intent and the words capable of giving rise to the commission of crimes.

c. Each Count Should be Considered Separately:

121. As noted in "Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)",[197] the appropriate analysis in the context of a 'no case to answer' motion would be for each count to be considered separately. Thus, where a count includes multiple incidents then it is not necessary to consider each individual incident pleaded. It is sufficient "to consider whether or not there is evidence supporting any one of the incidents charged"[198]

CONCLUSION, AND RELIEF SOUGHT:

122. For the above reasons, the CLR submits that neither Defence team has made out a case justifying the granting of Judgment of Acquittal on any of the counts charged. Accordingly, the CLR prays that the Ruto Defence Request for Judgment of Acquittal and the Sang Defence 'No Case to Answer' Motion be rejected.

Respectfully submitted,

[197] ICC-01/09-01/11-1334
[198] Para. 68 of the Decision

WILFRED NDERITU

Common Legal Representative for Victims

Dated this 29th day of January, 2016

At Nairobi, Kenya