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International Criminal Court

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Date: **3 June 2014**

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

Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto
Mr Karim Khan
Mr David Hooper
Mr Essa Faal
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Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

Legal Representatives for Victims
Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court (the 'Court'), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, having considered Articles 64, 66 and 67 of the Rome Statute (the 'Statute'), Rules 134, 140 and 142 of the Rules of Procedure and Evidence (the 'Rules'), and Regulations 34, 37(1) and 55 of the Regulations of the Court (the 'Regulations'), renders its 'Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)'.

I. Introduction and Procedural History

1. On 19 June 2013, the Chamber issued an order requesting submissions from the parties and the Common Legal Representative for Victims (the 'Legal Representative') on a number of issues related to the conduct of proceedings, pursuant to Article 64(3)(a) of the Statute.[1] The order included a direction to file submissions on whether '"no case to answer" motions requesting dismissal of one or more counts at the conclusion of the prosecution's case should be allowed in the case'.[2]

2. On 3 July 2013, the Office of the Prosecutor (the 'Prosecution'),[3] the defence for Mr Ruto (the 'Ruto Defence'),[4] the defence for Mr Sang (the 'Sang Defence', and together with the Ruto Defence: the 'Defence')[5] and the Legal Representative[6] filed their submissions.

[1] Order requesting submissions on the conduct of the proceedings, ICC-01/09-01/11-778.
[2] ICC-01/09-01/11-778, para. 2 (v).
[3] Prosecution submission on the conduct of proceedings, ICC-01/09-01/11-794.
[4] Defence Submissions on the Conduct of Proceedings, ICC-01/09-01/11-795.
[5] Sang Defence Submissions on the Conduct of Proceedings, ICC-01/09-01/11-796.
[6] Submissions of the Common legal Representative for Victims Pursuant to the "Order Requesting Submissions on the Conduct of the Proceedings" issued on 19 June 2013, ICC-01/09-01/11-797; a corrigendum was filed on 3 July 2013, ICC-01/09-01/11-797-Corr.

3. On 9 August 2013, having considered the submissions of the parties and Legal Representative, the Chamber issued its 'Decision on the Conduct of Trial Proceedings (General Directions)',[7] in which, amongst other things, it held that, in principle, it would 'permit the Defence to enter submissions, at the close of the case for the Prosecution, asserting that there is no case for it to answer at the end of the Prosecution's presentation of evidence'.[8] The Chamber indicated that it would provide the reasons for permitting 'no case to answer' motions, and guidance as to the procedure and applicable legal test, in due course.[9] In the present decision, the Chamber provides these reasons and guidance.

4. In the following section the Chamber will consider: (i) the legal basis and rationale for allowing a 'no case to answer' motion; (ii) the legal standard to be applied, including the scope of any such motions; and (iii) the timing and procedure for the bringing of such motions in the present case.

II. Submissions and Analysis

A. Legal Basis and Rationale for allowing a 'No Case to Answer Motion'

i. Relevant Submissions

5. The Prosecution submits that the Chamber is competent to hear a 'no case to answer' motion pursuant to the Chamber's general authority under Article 64(3)(a) of the Statute and that such competency can also be considered to be inherent in the powers of the Chamber under Articles 64(2) and 64(6)(f) of the Statute.[10]

[7] ICC-01/09-01/11-847 ('Conduct of Proceedings Decision').
[8] ICC-01/09-01/11-847, para. 32.
[9] ICC-01/09-01/11-847, para. 32.
[10] ICC-01/09-01/11-794, para. 7.

6. The Ruto Defence submits that the Chamber can, and should, hear 'no case to answer' motions pursuant to its inherent powers, notwithstanding the lack of an express provision in the Court's statutory framework.[11] It lists Articles 64(2) - (3), 64(6)(e) - (f), 64(8)(b) and 67 of the Statute, as well as Rule 134 of the Rules, as possible sources of authority.[12] The Ruto Defence notes that at the International Criminal Tribunal for the former Yugoslavia ('ICTY'), even before the adoption of a specific governing rule, motions to dismiss counts were filed and considered pursuant to the general powers of the tribunal's trial chambers to control trial proceedings.[13] It is submitted that permitting 'no case to answer' motions would promote trial efficiency and secure the rights of the accused.[14]

7. The Ruto Defence notes that the confirmation stage in the Statute does not preclude the making of a 'no case to answer' submission because of the lower evidentiary standard at the confirmation of charges stage, and the possibility that at the trial stage, live testimony might result in a collapse of the Prosecution's case.[15]

8. The Sang Defence submits that a 'no case to answer' motion should be permitted at the conclusion of the Prosecution's case in order to protect the right of the accused to be tried without undue delay and to prevent the waste of court resources.[16] Moreover, it submits that a 'no case to answer' motion does not prejudice any party or participant to the proceedings. Regarding the Chamber's authority, the Sang Defence argues that the lack of an express provision - equivalent to that of Rule 98 at the Special Court for Sierra Leone ('SCSL') and Rule 98*bis* at the ICTY and the International Criminal

[11] ICC-01/09-01/11-795, para. 13.
[12] ICC-01/09-01/11-795, para. 14.
[13] ICC-01/09-01/11-795, para. 15.
[14] ICC-01/09-01/11-795, para. 16.
[15] ICC-01/09-01/11-795, para. 17.
[16] ICC-01/09-01/11-796, para. 10.

Tribunal for Rwanda ('ICTR') - does not bar the Chamber from allowing 'no case to answer' motions.[17]

9. The Legal Representative submits that 'no case to answer' motions should be permitted by the Chamber.[18] He submits that the filing of such motions is 'consistent with the need to keep victims appraised of developments in the case and will further help to manage victims' expectations, based on the evidence that shall have been adduced by the close of the Prosecutions' case'.[19] More generally, the Legal Representative recognises that the practice is consistent with the right to a fair trial, and the procedure adopted by the *ad hoc* tribunals, as well as the criminal courts of Kenya. He submits that the participating victims are therefore likely to be familiar with and aware of the practice.[20]

ii. Analysis

10. At the outset, the Chamber notes that the parties and participants are in agreement that a 'no case to answer' motion is consistent with the statutory framework and should be permitted in this case.

11. The Chamber is mindful of the fact the procedural device of a 'no case to answer' motion is innately linked to an adversarial model where opposing parties present their own cases, and the term 'no case to answer' motion is itself a colloquial expression drawn from the common law tradition.[21] In some jurisdictions it is also known as motion for 'judgement of acquittal', motion for 'directed verdict of acquittal', motion

[17] ICC-01/09-01/11-796, para. 10.
[18] ICC-01/09-01/11-797-Corr, para. 3.
[19] ICC-01/09-01/11-797-Corr, para. 4.
[20] ICC-01/09-01/11-797-Corr, para. 3.
[21] See e.g. ICTY, *Prosecutor v. Goran Jelisić, Case No. IT-95-10-A*, Appeals Chamber, Judgement, 5 July 2001, para. 33 ('*Jelisić* Appeals Judgement').

for 'non-suit' or 'half-time' motion.[22] The procedural system of the Court, that combines elements from both civil law and common law, is the result of the compromise struck in the negotiations on the Statute and the subsequent negotiations on the Rules.[23] Naturally, the Court is not bound by the test or modalities adopted in domestic jurisdictions. Similarly, while the jurisprudence of the *ad hoc* tribunals, whose procedural rules are an amalgamation of common law and civil law procedure, may provide relevant guidance, it is not controlling. Any utilisation of a 'no case to answer' motion in the present case must be derived from the Court's statutory framework, having regard to the purpose such a motion would be intended to fulfil in the distinctive institutional and legal context of the Court.

12. The primary rationale underpinning the hearing of a 'no case to answer' motion – or, in effect, a motion for a judgment of (partial) acquittal – is the principle that an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need for the defence to mount a defence case.[24] This reasoning flows from the rights of an accused, including the fundamental rights to a presumption of innocence and to a fair and speedy trial, which are reflected in Articles 66(1) and 67(1) of the Statute.

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[22] See e.g. in the U.K., *Doe on the demise of Armstrong v Wilkinson*, 113 E.R. 995, in Australia, *Swain v Waverley Municipal Council*, 220 CLR 517 (2005), in Canada, *R. v. Chartrand*, [1994] 2 S.C.R. 864 and in the United States, the Connecticut General Statutes Annotated, Title 52 -210 (each using the term motion for 'nonsuit'); the United States Federal Rules of Criminal Procedure, Rule 29 (referring to 'Motion for Judgment of Acquittal'); in the United States, *State v. Boger*, 170 Wash.App. 1017, Not Reported in P.3d, 2012 WL 3797608 and *State v. VELAZQUEZ-MEDINA*, 156 Wash.App. 1023, Not Reported in P.3d, 2010 WL 2283548 (each using the term 'halftime' motion); in the United States, the Michigan Court Rules, 1985, Rule 6.419 (using the term 'Motion for Directed Verdict of Acquittal').

[23] See, e.g., Claus Kress, "The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise", 3 Journal of International Criminal Justice (2003), page 603 and further.

[24] ICTY, *Prosecutor v Slobodan Milosević, Case No. IT-02-54-T,* Trial Chamber Decision on Motion for Judgement of Acquittal, 16 June 2004, para.11; ICTY, *Prosecutor v Pavle Strugar, Case No. IT-01-42-T*, Trial Chamber, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98*bis*, 21 June 2004, para. 13. See also Vladimir Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Martinus Nijhoff Publishers 2008), pages 538-539, considering the procedure in the context of Rule 98*bis* of the *ad hoc* tribunals.

13. It is also noted that the Statute places the onus on the Prosecution to prove the guilt of an accused.[25] This is consistent with the underlying premise of a 'no case to answer' motion, which is appropriately brought in cases where the Prosecution has failed to fulfil that burden by not having presented evidence for the elements that would be required to be proven in order to support a conviction.

14. In this context, it is appropriate to note that the filtering function fulfilled by the confirmation of charges stage,[26] whereby it must be determined that there is 'sufficient evidence to establish substantial grounds to believe that the person committed the crime charged', does not obviate a potential subsequent need for a 'no case to answer' motion. The lower evidentiary standard, limited evidentiary scope and distinct evidentiary rules applicable at the confirmation of charges stage do not preclude a subsequent consideration of the evidence actually presented at trial by the Prosecution in light of the requirements for conviction of an accused. Furthermore, the nature and content of the evidence may change between the confirmation hearing and completion of the Prosecution's presentation of evidence at trial. In addition, the Prosecution need not introduce the same evidence at trial as it did for confirmation.

15. The Statute and Rules do not currently explicitly provide for 'no case to answer' motions.[27] However, Article 64(3)(a) of the Statute sets out that the Chamber shall '[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings'. It has also been correctly suggested that the Chamber could entertain 'no case to answer' motions pursuant to its power to

[25] Article 66(2) of the Statute.
[26] See e.g. *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803, para.37.
[27] The parties in the first cases before the Court (i.e. *The Prosecutor v. Thomas Lubanga Dyilo*; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*; and *The Prosecutor v. Jean-Pierre Bemba Gombo*) did not file or request permission to file 'no case to answer' motions.

'rule on any other relevant matter', as contained in Article 64(6)(f) of the Statute.[28] Similarly, Rule 134 of the Rules confers broad powers on the Chamber to rule on 'any issue concerning the conduct of the proceedings' and on 'issues that arise during the course of the trial'.[29] These provisions grant the Chamber the necessary authority to consider 'no case to answer' motions in appropriate circumstances.

16. Moreover, the Chamber considers that permitting such motions, in principle, would be consistent with its general obligation, pursuant to Article 64(2) of the Statute, to ensure that the trial is fair and expeditious and conducted in a manner which respects the rights of the accused and has due regard for the protection of victims and witnesses. By paring away charges which are found not to be sufficiently supported by evidence after the conclusion of the presentation of evidence by the Prosecution, a 'no case to answer' motion has the potential to contribute to a shorter and more focused trial, thereby providing a means to achieve greater judicial economy and efficiency in a manner which promotes the proper administration of justice and the rights of an accused. The Chamber is cognisant that victim participation is a special feature of this Court, but this participation does not in itself form an inhibition to a 'no case to answer' motion.

17. The Chamber observes that the Statute does not prescribe a fixed structure for the manner or order in which evidence should be presented at trial.[30] It is therefore for individual Trial Chambers, in light of the structure adopted in any particular case, to consider whether or not a 'no case to answer' motion would be apposite for such proceedings. The trial in this case has proceeded according to the general practice in the administration of international criminal justice, which involves an arrangement in

[28] See Karin N. Calvo-Goller, *The Trial Proceedings on the International Criminal Court, ICTY and ICTR Precedents* (Martinus Nijhoff Publishers 2006), page 287.
[29] Rule 134(1) and (3) of the Rules.
[30] See Article 64(8) of the Statute and Rule 140 of the Rules.

which the defence presents its own case following the conclusion of the case for the prosecution. Consequently the structure adopted is conducive to the hearing of a 'no case to answer' motion in this case.[31]

18. In light of the foregoing, the Chamber considers that enabling, in principle, a determination on whether or not the Defence has a case to answer, could contribute to a more efficient and expeditious trial, and as such is fully compatible with the rights of the accused under the Statute, while not derogating from the rights of the Prosecution and the victims.

B. Applicable Legal Standard for, and Scope of, any 'No Case to Answer Motion'

i. Relevant Submissions

19. The Prosecution submits that an application for 'no case to answer' should treat each count as alleged in the Document Containing the Charges individually.[32]

20. The Ruto Defence argues that the appropriate test to be used by the Chamber in considering the merits of such a motion is whether 'there is no evidence upon which a reasonable tribunal of fact could be satisfied beyond a reasonable doubt of the guilt of the accused on the particular charge in question'.[33] The Ruto Defence submits that where the Prosecution's evidence, 'taken at its highest, cannot sustain a conviction', it would be contrary to fair trial rights and the proper administration of justice to allow the trial to continue.[34] The Ruto Defence notes that 'no case to answer' submissions are not the appropriate time for 'a general weighing of issues of credibility', which should

[31] See Conduct of Proceedings Decision.
[32] ICC-01/09-01/11-794, para. 7. The Chamber notes that the Prosecution filed the 'Updated Document Containing the Charges Pursuant to the Decision on the content of the updated document containing the charges', ICC-01/09-01/11-522, on 7 January 2013, a corrigendum was filed on 25 January 2013, ICC-01/09-01/11-533-AnxA-Corr.
[33] ICC-01/09-01/11-795, para. 12, referring to ICTY and ICTR case law.
[34] ICC-01/09-01/11-795, para. 16.

'be left to deliberations at the end of the case'.[35] However, it is submitted that in applying the test, issues of reliability and credibility should be noted by the Chamber in circumstances where the Prosecution's case has 'completely broken down', either during presentation or through fundamental issues raised by the defence's cross-examination, such that the Prosecution is 'left without a case'– a practice akin to that of the ICTY and ICTR.[36]

21. The Sang Defence submits that the appropriate standard for the 'no case to answer' motion is whether the Prosecution's case, following the presentation of evidence, 'even taken at its highest [...] is not sufficient to sustain a conviction on one or more of the counts'.[37]

ii. Analysis

22. As previously noted, there is no explicit provision setting out the applicable legal standard for a 'no case to answer' motion before the Court. It is therefore necessary for the Chamber to determine an appropriate legal standard, consistent with the statutory framework. As discussed above, a 'no case to answer' motion pleads that there has been insufficient evidence, or 'no case', presented which could reasonably support a conviction. The effect of a successful 'no case to answer' motion would be the rendering of a full or partial judgment of acquittal.

23. As an initial point, a distinction needs to be made between the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to

[35] ICC-01/09-01/11-795, para. 18.
[36] ICC-01/09-01/11-795, para. 18.
[37] ICC-01/09-01/11-796, para. 10.

be made at the end of the case.[38] Whereas the latter test is whether there is evidence which satisfies the Chamber beyond a reasonable doubt of the guilt of the accused,[39] the Chamber recalls that the objective of the 'no case to answer' assessment is to ascertain whether the Prosecution has lead sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted on one or more of the counts[40] before commencing that stage of the trial. It therefore considers that the test to be applied for a 'no case to answer' determination is whether or not, on the basis of a *prima facie* assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber *could* convict the accused. The emphasis is on the word 'could' and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial. For the present purposes, the Chamber therefore need not elaborate on the standard of proof for conviction at the final stage.

24. 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.[41] 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.[42] In 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

[38] As discussed in para. 14 above, the Chamber considers that the existence of a confirmation stage, for which the evidentiary standard is 'sufficient evidence to establish substantial grounds to believe', does not form an impediment to a 'no case to answer' procedure.
[39] Article 66(3) of the Statute.
[40] Whereas a Document Containing the Charges and a Decision on the Confirmation of Charges can refer to 'charges' or 'crimes' rather than 'counts', the relevant filings in the present case are arranged by 'counts' (see ICC-01/09-01/11-373, para. 22 and page 138). The Chamber will therefore follow that language.
[41] As also submitted by the Ruto Defence at ICC-01/09-01/11-795, para. 18.
[42] Compare Article 74(2) of the Statute. See also, in support, United Kingdom, Court of Appeal of England and Wales, *Regina v. Galbraith*, 1981 1 WLR 1039 ('*Galbraith* U.K. Appeal Judgment').

was entitled to credence unless incapable of belief' on any reasonable view.[43] The Chamber agrees with this approach.

25. It is useful, at this stage, to clarify the scope of 'evidence' to be considered for the purposes of the Chamber's assessment of a 'no case to answer' motion. Based on a combined reading of Articles 69(4) and 74(2) of the Statute and Rule 64(3) of the Rules, the Chamber shall consider as evidence only what has been 'submitted and discussed [...] at trial',[44] and has been found to be admissible by the Chamber, whether originally submitted by the parties or ordered for production by the Chamber pursuant to Article 64(6)(d) of the Statute.[45]

26. In respect of the elements required to be proved in order to sustain a conviction before the Court (i) both the legal and factual components of the alleged crime and (ii) the individual criminal responsibility of the accused must be established.[46] Therefore, evidence which could support both of those aspects must be present.

27. In respect of the components of the alleged crime(s), it is recalled that Rule 142(2) of the Rules provides that where there is more than one charge the Trial Chamber shall, in its deliberations, reach a verdict separately on each charge.[47] In that light, the Chamber considers that the appropriate analysis in the context of a 'no case to answer' motion would be for each count to be considered separately. That a count is alleged to include multiple incidents does not mean that each individual incident pleaded within

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[43] *Jelisić* Appeals Judgement, para. 55 (cited above); See also *Prosecutor v. Ferdinand Nahimana, et al., ICTR-99-52-T*, Trial Chamber I, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal, 25 September 2002, para. 18; *Prosecutor v. Augustin Bizimungu et al., ICTR-00-56-T*, Trial Chamber II, Decision on Defence Motions Pursuant to Rule 98*bis*, 20 March 2007, para. 8.
[44] Article 74(2) of the Statute.
[45] Article 69(4) of the Statute and Rule 64(3) of the Rules. See also *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842 ('Lubanga Judgment'), para. 101.
[46] See Article 25 of the Statute and Regulation 52(c) of the Regulations.
[47] See also Article 78(3) of the Statute which provides that where a person has been convicted of more than one crime the Court shall pronounce a sentence for each crime.

the charges would be considered. Rather, in the context of a 'no case to answer' determination, it is more appropriate to consider whether or not there is evidence supporting any one of the incidents charged. The presence of such evidence on the record would defeat the 'no case' motion, provided there is also evidence which could support the alleged form of participation, as discussed next.

28. For a conviction at the end of trial, once it is determined that the evidence for the relevant crime and its underlying context are satisfied to the required standard, it is sufficient to establish individual criminal responsibility for those crimes through only one mode of liability. Consequently, in the context of a 'no case to answer' determination, once it is established that there is evidence which could support any one pleaded mode of liability, in respect of each count, that aspect of the required elements would be satisfied and there is no need to consider other modes of liability.[48]

29. However, it is recalled that pursuant to Regulation 55 of the Regulations a Chamber may change the legal characterisation of facts to accord with the crimes or forms of participation specified in the Statute, provided such re-characterisation does not exceed the facts and circumstances described in the charges. The Trial Chamber could therefore refuse to grant a 'no case to answer' motion on the basis that, although no evidence was presented which could support the legal characterisation of the facts as set out in the document containing the charges, it appears to the Chamber at the time of rendering its decision on the 'no case to answer' motion that the legal characterisation of the facts may be subject to change, in accordance with Regulation 55 of the Regulations.

[48] This rationale is also supported by the approach adopted at the *ad hoc* tribunals, see e.g. ICTY, *Prosecutor v. Milan Milutinović et al., Case No. IT-05-87-T,* Trail Chamber, Oral Decision, Transcript of hearing on 18 May 2007, pages 12771-12808; *Prosecutor v. Mile Mrkšić et al, Case No, IT-95-13/1-T,* Trail Chamber II, Oral Decision, Transcript of hearing on 28 June 2006, pages 11311-11325.

30. In the present case, Pre-Trial Chamber II confirmed only one mode of liability for each of the accused.[49] However, with respect to Mr Ruto, it is recalled that notice pursuant to Regulation 55(2) of the Regulations was issued on 12 December 2013, notifying the parties and participants that, in respect of Mr Ruto's alleged individual criminal responsibility, it appears to the Chamber that the legal characterisation of the facts may be subject to change to accord with liability under Article 25(b), (c) or (d) of the Statute.[50] The Chamber emphasises that the Regulation 55 Notice did not result in an actual legal re-characterisation of any facts at this time. It was simply a notice of the possibility of such re-characterisation.[51] Nonetheless, the Chamber considers that in the context of considering a 'no case to answer' motion it would be sufficient, in respect of Mr Ruto, for it to be established that there is sufficient evidence of facts which could support a conviction under the mode of liability as pleaded in the Document Containing the Charges, or any one of the modes as specified in the Regulation 55 Notice.

31. The Chamber observes that the general standard outlined hitherto is consistent with the jurisprudence of the *ad hoc* tribunals, which hear motions for judgments of acquittal in a similar legal framework. The ICTY rule governing 'judgements of acquittal' sets out that '[a]t the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction'.[52]

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[49] Article 25(3)(a) of the Statute for Mr Ruto, and Article 25(3)(d) of the Statute for Mr Sang. See Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, paras 249 and 267.
[50] ICC-01/09-01/11-1122 ('Regulation 55 Notice').
[51] ICC-01/09-01/11-1122, para. 18.
[52] Rule 98 *bis* "Judgement of Acquittal" of the ICTY Rules of Procedure and Evidence, adopted 10 July 1998, amended 17 Nov 1999, further amended 8 Dec 2004. The ICTR Rule 98 *bis* ('Motion for Judgement of Acquittal'), which has been interpreted as requiring the same standard of analysis, provides that: 'If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of

The ICTY Appeals Chamber has formulated the applicable test as being '"whether there is evidence (if accepted) upon which a reasonable [trier] of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question", not whether the accused's guilt has been established beyond reasonable doubt'.[53] That test has been applied consistently by ICTY and ICTR trial chambers when assessing motions pursuant to Rule 98*bis* of their respective Rules of Procedure and Evidence.[54]

32. In light of each of the matters considered above, the Chamber finds that the test to be applied in determining a 'no case to answer' motion, if any, in this case is whether there is evidence on which a reasonable Trial Chamber *could* convict. In conducting this analysis, each count in the Document Containing the Charges will be considered separately and, for each count, it is only necessary to satisfy the test in respect of one mode of liability, as pleaded or for which a Regulation 55 of the Regulations notice has

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acquittal in respect of those counts.' The relevant rule before the Special Court for Sierra Leone, Rule 98 of the Rules of Procedure and Evidence, states: 'If, after the close of the case for the prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on those counts.'

[53] ICTY, *Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-AR98bis.1*, Appeals Chamber, Judgement, 11 July 2013 ('*Karadžić* Appeals Judgement'), para. 9 (emphasis in original); *Jelisić* Appeals Judgement, para. 37; ICTY, *Prosecutor v. Zedravco* Mucić *et al., Case No. IT-96-21-A*, Appeals Chamber, 20 February 2001, para. 434.

[54] See e.g. *Karadžić* Appeals Judgement; ICTY, *The Prosecutor v. Vojislav Šešelj IT-03-67-T,* Trial Chamber III, Oral Decision Transcript of hearing on 4 May 2011, pages 16826-16924; ICTY, *Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Trial Chamber I,* Oral Decision, Transcript of hearing on 19 August 2005, pages 17112-17133; ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T,* Trial Chamber I section A, Judgement On Motions For Acquittal Pursuant To Rule 98 bis, 5 April 2004; ICTR, *Prosecutor v. Augustin Ndindiliyimana et. al., ICTR-00-56-T,* Trial Chamber II, Decision on Defence Motions Pursuant to Rule 98bis, 20 March 2007, para. 6. See also ICTR, *Prosecutor v. Jean Mpambara, Case No. ICTR-2001-65-T,* Trial Chamber I, Decision on the Defence's Motion for Judgement of Acquittal, 21 October 2005, para. 4; ICTR, *Prosecutor v. Bagosora et al, Case No. ICTR-98-41-T,* Decision on Motions for Judgement of Acquittal, 2 February 2005, paras 3 and 6; ICTR, *Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T,* Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis, 13 October 2005, paras 35-36; ICTR, *Prosecutor v. Semanza, Case No. ICTR-97-20-T,* 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 98 bis 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 a Judgement of Acquittal, 27 September 2001, para. 15. Similarly, the test whether there is evidence on which a reasonable trier of fact *could* convict, is consistent with the established jurisprudence of common law jurisdiction, from which the concept of a 'no case to answer' motion originates (see , e.g., England and Wales: *Galbraith* U.K. Appeal Judgement (cited above); Canada: *United States of America v. Shephard*, 1976 CanLII 8, [1977] 2 SCR 106, page 1080; *R. v Monteleone*, [1987] 2 S.C.R. 154, 1998 CanLII 819 at p. 161; *R. v. Arcuri*, 2001 SCC 54 (CanLII), [2001] 2 S.C.R. 828, paras 1 and 21; United States of America: *U.S. v. Consolidated Laundries Corp.*, C.A.2 (N.Y.) 1961, 291 F.2d 563, 575).

been issued by the Chamber.[55] 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.

C. *Timing of and Procedure for any 'No Case to Answer Motion'*

i. Relevant Submissions

33. The Prosecution,[56] Sang Defence[57] and Legal Representative[58] each submit that any 'no case to answer' motion should be made at the conclusion of the Prosecution case. The Ruto Defence suggests that the submission of a 'no case to answer' motion could take place at the close of the Prosecution's case, or even later in the proceedings.[59] Moreover, the Ruto Defence argues that irrespective of submissions made by the defence, if it would appear to the Chamber that there would be no case to answer for a particular charge, it should raise this matter *proprio motu*, seek submissions, and possibly acquit the accused on that particular charge.[60]

ii. Analysis

34. It follows from the analyses in the previous sections that the Chamber considers the appropriate moment in the current proceedings to file 'no case to answer' motions, if any, is after the close of the Prosecution case and prior to the presentation of evidence by the Defence. However, should the Legal Representative be granted permission to present separate evidence,[61] any 'no case to answer' motion should instead be brought

[55] As noted above, this is without prejudice to the power of the Chamber pursuant to Regulation 55 of the Regulations.
[56] ICC-01/09-01/11-794, para. 7.
[57] ICC-01/09-01/11-796, para. 10.
[58] ICC-01/09-01/11-797-Corr, para. 4.
[59] ICC-01/09-01/11-795, para. 12.
[60] ICC-01/09-01/11-795, para. 12.
[61] Conduct of Proceedings Decision, para.21.

only after the completion of the presentation of such evidence by the Legal Representative.

35. It is additionally recalled that, although the burden to prove the guilt of the accused rests on the Prosecution,[62] the Chamber may request the submission of evidence or hear witnesses when it considers this necessary for its determination of the truth.[63] Should the Chamber decide that it wishes to request the submission of additional evidence following completion of the Prosecution's case, and prior to presentation of evidence by the Defence, appropriate directions will be given at the relevant time, including whether or not such evidence is to be produced prior to considering any 'no case to answer' motion.

36. The Chamber notes that differing modalities have been adopted for the hearing of motions for judgments of acquittal at the *ad hoc* tribunals. The relevant rule at the ICTY, for example, specifies that decisions on such motions are to be rendered orally, following hearing the oral submissions of the parties.[64] By contrast, Rule 98*bis* at the ICTR envisages the filing of a written motion. The Chamber considers that, in this case, being provided with concise and focused written submissions would be most conducive to the efficient consideration of any 'no case to answer' motion.

37. The Chamber therefore directs the Defence to notify the Chamber orally no later than the last day of the Prosecution's case – or completion of the presentation of any evidence by the Legal Representative or as requested by the Chamber, as applicable – of their intention to file 'no case to answer' motions, if any. Any such 'no case to answer' motion shall be filed no later than 14 days after said day. Such a motion, not

[62] See Article 66(2) of the Statute.
[63] Articles 64(6) and 69(3) of the Statute.
[64] Rule 98*bis* of the Rules of Procedure and Evidence of the ICTY. Rule 98 of the Rules of Procedure and Evidence of the SCSL similarly specifies an oral procedure.

exceeding 40 pages in length, shall specify the particular counts being challenged. Responses by the Prosecution and the Legal Representative, at a length to be determined by the Chamber at the relevant time, shall be filed within 14 days after notification of the motion, or if considered more efficient by the Chamber, such responses will be made during an oral hearing which will be scheduled within a similar time frame.[65]

38. As to the Ruto Defence's submission that the Chamber should *proprio motu* request submissions if it were to appear to the Chamber that the applicable legal standard had not been met at the end of the Prosecution case, the Chamber notes that it would be within its discretion to raise this matter with the parties, if it considers it appropriate to do so.

39. Finally, the Chamber considers it appropriate to note that the decision to, in principle, allow 'no case to answer' motions is not intended to in any way pre-judge whether or not a motion of that kind should actually be pursued in this case. Bearing in mind that the purpose of permitting such motions is to promote the rights of an accused by providing a means to create a shorter, more focused and streamlined trial, the Defence should carefully consider – in light of the legal standard which will be applied, as specified above, and the evidence actually presented by the Prosecution at trial – whether or not a 'no case to answer' motion is warranted in the circumstances. Such motions should not be pursued on a merely speculative basis or as a means of raising credibility challenges that are to be considered at the time of final deliberations. Nor should they be filed merely to shape the Chamber view as to the strength of the Prosecution case thus far presented.

[65] The Chamber already considered that such a hearing would be considered a 'critical juncture' for which the Legal Representative's presence is required, Decision No. 2 on the Conduct of Trial Proceedings (General Directions), 3 September 2013, ICC-01/09-01/11-900, para. 31.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS that any motion of 'no case to answer' to be filed in this case shall be guided by the principles and procedure set out above.

Judge Eboe-Osuji appends a Separate Further Opinion.

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

Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccia

Judge Robert Fremr

Dated 3 June 2014

At The Hague, The Netherlands