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Republic v. Lieutenant Mohammed Juma

MOCK TRIAL

Wayamo training – Nairobi, Kenya – March 6-8, 2024

Prosecution case closed – Defence position raises issue:

Whether the Incident in question, an attack on a single day, can be characterised as Crimes Against Humanity and thus trigger the application of the *International Crimes Act* (and Kenya’s jurisdiction).

[Submissions to be led by internationals primarily focused on whether the facts cited in the incident, on their face, meet or address the chapeau elements of CAH and any other relevant requirements.]

SUBMISSIONS

Opening

Your Honour(s), when conduct involves the killing of more than a thousand civilians over the course of a single day, and the driving away, in terror, of many more thousands across a border 35 kilometres distant – doesn’t such conduct amount to crimes against humanity?

We submit that it very clearly does, and would ask you to find this to be the case.

The charges here meet the threshold requirements of Crimes Against Humanity, and thus trigger the application of Kenya’s *International Crimes Act*.

Plan

For the moment, I am not focusing on the evidence that establishes the individual criminal responsibility of the Accused, Lieutenant Mohammed Juma, for the Crimes Against Humanity charged against him of Murder and Forcible Transfer.

I am focusing on the threshold question of whether his conduct was committed “as part of widespread or systematic attack against a civilian population.”

The evidence will be fresh in the mind of the Court, so I need only touch on it to make my point.

Attack directed against a civilian population pursuant to a policy

On the evidence, the QAF directed an attack against a civilian population, pursuant to, or in furtherance of, an organisational policy.

The QAF, a military formation, having seized control of Al Jamima, directed an attack, on June 15, 2023, against civilians, specifically, members of the Nasalid ethnic group, who were part of the civilian population of the city.

Hundreds of Nasalid families had gathered in Al Jamima to plan their escape to the neighbouring country of Khad, some 35 kilometres away. They were fearful due to summary executions and persistent hate speech directed against them. As the Nasalid civilians – men, women, and children – made their move early on the morning of June 15 to escape from the violence, the QAF ambushed them and shot at them. About 1,000 people were killed in this attack.

As survivors headed toward Khad, the QAF shot at them as they fled into the Wadi Caga, which was running high, killing, among other victims, children and elderly people. A number of victims drowned, because they could not swim. About 120 dead bodies of civilians were recovered in the aftermath.

At Chutri, near the Khadian border, the QAF ambushed fleeing Nasalid civilians again, telling them to run away, and shooting at them as they did – one witness described the death of an eight-year-old boy.

As this same witness also put it, “To say you were a Nasalid was a death sentence.” He escaped, because he convinced the attackers he was a member of an Arab-aligned tribe.

Some 10,000 Nasalid refugees fled into Khad, many of them exhibiting wounds that suggest they were shot at from behind.

There is no issue that all these victims were civilians.

The attack involved multiple killings, done by an armed group acting in a coordinated fashion, so that it had sufficient scale and organisation to qualify and as an “attack”.

Clearly, the QAF targeted Nasalid civilians. The QAF, as an organised military formation, had sufficient resources and means to carry out an attack, and was thus capable of creating or executing a policy, in this case, a policy to attack Nasalid civilians.

That the attack was, in fact, carried out in furtherance of an organisational policy may be inferred from the evidence of the organised nature of the attack and its targeting of a specific civilian group.

In support of the above submissions, see, for example, *Bemba* (Trial Chamber), March 21, 2016, paras, 158-161 (ICC), for factors going into the determination of the existence of an organisation, and from which an organisational policy underlying an attack may be inferred.

In sum, we submit, therefore, that the attack in question here *must* qualify as an “attack directed against a civilian population, pursuant to, or in furtherance of, an organisational policy” within the scope of the *International Crimes Act*.

Widespread

Such an attack must also be *either* widespread *or* systematic. The requirement is disjunctive – the Prosecution does not have to prove that it was both.

In this case, the attack *was* widespread, in the sense that it targeted thousands of civilians, resulting in the deaths of some 1,000 victims, and the flight of about 10,000 more across the border from Nadus into Khad.

The attack also occurred, not only in Al Jamima, but at Wadi Caga and Chutri, along the 35-kilometre route that the civilians took, as they sought to flee the violence perpetrated by the QAF.

Thus, while the attack took place during the course of only a single, brutal day, it encompassed a sufficient number of victims and occurred over a sufficient distance from starting point in Al Jamima to the border crossing, to be properly seen as a widespread attack.

Moreover, an attack may be properly characterised as “widespread”, if it involves a singular incident of exceptional magnitude involving multiple killings – see, in support of this submission, *Kordić and Čerkez* (Trial Chamber), Feb. 26, 2001, para. 179 (ICTY).

Systematic

However, the attack in this case was also systematic.

It was carried out by the QAF, a military organisation, subject to a command structure, armed, and capable of carrying out operations in a coherent fashion. It obviously involved a level of planning, given how the civilians were ambushed at several points along the route of their flight.

It was also aimed at a particular group, the Nasalid – and the QAF distinguished the Nasalid, the so-called Nubian group they wanted to target, from others, such as the Kagoy, who were aligned with Arabs and whom they did not kill.

Nor were the killings random – see, for example, *Naletilić and Martinović* (Trial Chamber), March 31, 2003, para. 236 (ICTY), for the proposition that, for acts to be systematic, they cannot simply be random occurrences – and, on the evidence in this case, the acts were anything but random: they were prepared, coordinated, and organised.

Thus, the attack can also be seen as a systematic attack.

It is enough, however, for the attack to have been either systematic or widespread, for it to come within the scope of Crimes Against Humanity.

Wider context

I have focused on the events that underlie the specific charges of Murder and Forcible Transfer, as Crimes Against Humanity, against the Accused, but these events occurred in a broader context of civil war, where the UN had already raised an alarm over the targeted killing of members of the Nasalid civilian population in Al Jamima during the month of June, even before the specific events underlying the charges. This broader context should not be ignored, because it provides the backdrop and context for what happened on June 15.

Conclusion

The Court permitting, the Prosecution will, in due course, address the role of the Accused in the bloody events of June 15 at Al Jamima and beyond, as well as his knowledge and intent.

For now, in answer to the objection of the Defence, we submit that this Court is fully competent to try the Accused for the Crimes Against Humanity of Murder and Forcible Transfer, because, on the facts, the jurisdictional requirements of Crimes Against Humanity are met and the *International Crimes Act* therefore applies to this case.