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TRIAL CHAMBER V

Before: **Judge Kuniko Ozaki, Presiding Judge**
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND UHURU MUIGAI KENYATTA

Public document

Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accuseds' individual criminal responsibility

Source: **The Office of the Prosecutor**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Fatou Bensouda
Adesola Adeboyejo

Counsel for Francis Kirimi Muthaura
Karim A. Khan QC, Essa Faal, Kennedy Ogetto and Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta
Steven Kay QC and Gillian Higgins

Legal Representatives of Victims
Morris Anyah

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Silvana Arbia
Didier Preira, Deputy-Registrar

Defence Support Section

Victims and Witnesses Unit
Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Prosecution hereby submits its observations on the law of indirect co-perpetration under Article 25(3)(a) of the Statute, together with its application for notice to be given under Regulation 55(2) of the Regulations of the Court that the accuseds' form of individual criminal responsibility may be subject to legal recharacterization by the Chamber.[1]

2. With respect to the law on indirect co-perpetration, the elements laid down by the Pre-Trial Chamber are largely correct, but require certain adjustments. The Prosecution submits that the analysis advanced below represents the law of indirect co-perpetration and, subject to any intervening jurisprudential developments, should guide the Chamber's adjudication of this case.

3. With respect to Regulation 55, it is clear from the factual record now before the Chamber that there are multiple ways to characterize the accuseds' individual criminal responsibility under Article 25(3) of the Statute. This is a function of the breadth of their alleged contributions to the crimes charged, which span the entirety of Article 25(3). For this reason, the Chamber may decide to employ Regulation 55 to recharacterize the form of responsibility charged. This possibility requires the Chamber to give notice to the parties under Regulation 55(2) that the issue of the accuseds' individual criminal responsibility is "in play" and is subject to a determination by the Chamber at a later date. Such notice is required as a matter of statutory law, will ensure the fairness of proceedings, and is consistent with the jurisprudence of the Pre-Trial, Trial and Appeals Chambers of this Court.

[1] ICC-01/09-02/11-T-18-ENG CT WT, page 37, lines 1-12. The Chamber set a 30-page limit for this submission. *See* ICC-01/09-02/11-T-18-ENG CT WT, page 37, lines 11-14.

Procedural History: the form of individual criminal responsibility confirmed by the Pre-Trial Chamber and its view of the law of indirect co-perpetration

4. In its Article 58 summons application, the Prosecution alleged that the accused bore individual criminal responsibility for crimes committed during the post-election violence period ("PEV") pursuant to Articles 25(3)(a) and in the alternative 25(3)(d) of the Statute.[2] The Pre-Trial Chamber issued a summons for the accused after finding "reasonable grounds to believe that [they] are criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute".[3] The Pre-Trial Chamber did not address the alternative mode of liability alleged by the Prosecution (Article 25(3)(d)), but explained that the Chamber's Article 25(3)(a) analysis was "without prejudice to further evidence at a later stage of the proceedings which would establish individual criminal responsibility for the crimes under a different mode of liability".[4]

5. In the Document Containing the Charges ("DCC"), the Prosecution charged the accused as indirect co-perpetrators under Article 25(3)(a) of the Statute.[5] The Pre-Trial Chamber confirmed the charges under this legal theory.[6] In its decision on the confirmation of charges ("Confirmation Decision"), the Pre-Trial Chamber laid down an eight element test for indirect co-perpetration under Article 25(3)(a):

> (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other coperpetrator(s) must carry out essential contributions in a coordinated manner

[2] Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-02/11-35-Red2, pages 16-18.
[3] Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-1, para 56.
[4] ICC-01/09-02/11-1, para 52.
[5] Document containing the charges, 2 September 2001, ICC-01/09-02/11-280-AnxA, para 76 and section VII (charges).
[6] Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, paras 298; 428.

> which result in the fulfillment of the material elements of the crime; (iii) the suspect must have control over the organization; (iv) the organization must consist of an organized and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).[7]

6. In support, the Pre-Trial Chamber relied on its own jurisprudence in the *Bemba* case, and that of Pre-Trial Chamber I in *Katanga* and *Al Bashir*.[8]

The Trial Chamber may depart from the Pre-Trial Chamber's test

7. As a preliminary matter, Article 21(2) of the Statute permits the Trial Chamber to depart from the Pre-Trial Chamber's interpretation of Article 25(3), including its eight-part test for indirect co-perpetration.[9] As discussed below, the Prosecution submits that the Chamber should depart from the Pre-Trial Chamber's test in certain respects.

The law of indirect co-perpetration

8. Article 25(3)(a) does not lay out the precise elements of indirect co-perpetration. While different interpretations are possible, the Prosecution advances a position that builds on prior jurisprudence on the matter by this

[7] ICC-01/09-02/11-382-Red, para 297.
[8] ICC-01/09-02/11-382-Red, para 297, n.538 (citing Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, paras 350-351; Pre-Trial Chamber I "Decision on the confirmation of charges" against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, paras 500-514, 527-539; Pre-Trial Chamber I, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-3, paras 209-213).
[9] *See* Article 21(2) of the Statute ("The court *may* apply principles and rules of law as interpreted in its previous decisions") (emphasis added); *see also* Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, paras 1007-1011 (Trial Chamber I departed from the legal test laid down by Pre-Trial Chamber I in the *Lubanga* confirmation decision).

Court,[10] in particular on the findings in the recent *Lubanga* trial judgment,[11] as well an analysis of the sources relied upon in that jurisprudence.[12]

I. Existence of a common plan or agreement

9. The Prosecution must establish the existence of a common plan between two or more persons, including the accused.[13] The Prosecution is not required to prove that the plan was specifically directed at committing a crime. It is sufficient to establish that the common plan included "a critical element of criminality", namely that its implementation will, in the ordinary course of events, lead to the commission of a crime.[14] Moreover, the common plan need not be explicit and can be inferred from circumstantial evidence, such as the subsequent concerted action of the co-perpetrators.[15]

II. The accused's individual contribution

10. The Prosecution agrees with the Majority in the *Lubanga* case that co-perpetration under Article 25(3)(a) "requires that the offence be the result of the combined and coordinated contributions of those involved […]. None of the participants exercises, individually, control over the crime as a whole but, instead, the control over the crime falls in the hands of a collective as such. Therefore, the prosecution does not need to demonstrate that the

[10] *See*, *e.g.*, ICC-01/09-02/11-382-Red, para 297; Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, 23 February 2012, ICC-01/09-01/11-373, para 292; Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gadaffi, Saif Al-Islam Gadaffi and Abdullah Al Senussi, 27 June 2011 ICC-01/11-12, para 69.
[11] ICC-01/04-01/06-2842, paras 976-1018.
[12] The Prosecution notes the Separate Opinion of Judge Adrian Fulford appended to the Lubanga Judgment Pursuant to Article 74 of the Statute (ICC-01/04-01/06-2842). In his opinion, Judge Fulford argues that the text of the Statute does not support the "control of the crime theory" underlying the Pre-Trial Chambers' co-perpetration jurisprudence and proposes an alternate test. While Judge Fulford's opinion certainly articulates a plausible reading of Article 25(3)(a), the Prosecution proceeds on the basis that the basic framework laid down by the Pre-Trial Chambers and the Majority in the Lubanga Trial Judgement will guide this Chamber's interpretation of the law of indirect co-perpetration.
[13] ICC-01/04-01/07-716, para 522.
[14] ICC-01/04-01/06-2842, para 984.
[15] ICC-01/04-01/06-2842, para 984, para 988; Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, para 345; ICC-01/09-02/11-382-Red, para 399; ICC-01/09-01/11-373, para 301.

contribution of the accused, taken alone, caused the crime; rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan".[16]

11. The *Lubanga* Majority also concludes that "the accused [must] provide an essential contribution to the common plan that resulted in the commission of the relevant crimes",[17] but it does not define "essential" in this context. However, given that the accused alone need not exercise control over the crime,[18] "essential" cannot mean that the individual accused must have had the power to stop the crime or frustrate its commission.[19] Instead, the Majority emphasized that "the co-perpetrator's role is to be assessed on a case-by-case basis" and that this assessment "involves a flexible approach, undertaken in the context of a broad inquiry into the overall circumstances of a case".[20]

12. The Prosecution agrees with flexibility, but would disagree with the requirement that the contribution be "essential". Rather, a flexible approach that does not require an accused's individual control over the success of the crime is consistent with the origins of the theory of co-perpetration. For example, Claus Roxin, upon whose scholarship the existent jurisprudence on co-perpetration draws heavily,[21] explained that in practice it will often

[16] ICC-01/04-01/06-2842, para 994.
[17] ICC-01/04-01/06-2842, paras 1006, 1018(ii) (emphasis added).
[18] ICC-01/04-01/06-2842 para.994.
[19] The concept of joint control over the crime is inconsistent with a requirement that each individual co-perpetrator has the power to frustrate its commission. Nevertheless, it should be noted that although Pre-Trial Chamber I required that each co-perpetrator (including the accused) has the ability to frustrate the commission of the crimes by not carrying out the task assigned to him or her (ICC-01/04-01/06-803, para 342; Decision on the Confirmation of Charges, ICC-01/04-01/07-717, para 525), it endorsed to some extent the concept of "joint" control over the crime (ICC-01/04-01/07-717, paras 524, 538; ICC-01/04-01/06-803, paras 322, 341-342 and 366). The approach taken by the Majority in the Lubanga judgement resolves this apparent contradiction.
[20] ICC-01/04-01/06-2842, para 1001.
[21] *See* ICC-01/04-01/06-803 para 348, n.425 and ICC-01/04-01/07-717 para 482, nn.640 & 642, para 483, n.645, para 485, n.647; *see also* ICTY, *Prosecutor v. Milomir Stakic*, Trial Chamber, Trial Judgement, Case No. IT-97-31-T, 31 July 2003, paras 40 and 440, nn.945-948; Judge Schomburg's dissenting

not be possible to determine after the fact whether the crime would have been committed absent the contribution of the accused. This analysis would require a hypothetical judgment about how events would have played out without the actor's contribution, which is necessarily a speculative inquiry.[22] For this reason, it may be unhelpful to read into the Statute a requirement that the contribution be "essential". The Prosecution thus agrees with Roxin insofar as, if any qualitative assessment of the contribution is required, it should be enough if the accused's contribution, assessed after the fact, was substantial. This means that the crime may have been possible to commit absent the accused's contribution, but such commission would have been significantly more difficult.[23] However, according to Judge Fulford, even the intermediate position might be excessive. As suggested in his dissenting opinion in the Lubanga Judgment, Article 25(3)(a) does not require any qualitative threshold for the contribution.[24]

13. It is not necessary to establish that the accused provided a contribution to the execution stage of the crime.[25] It is also not necessary to establish that the accused or any other co-perpetrator physically committed any of the elements of the crimes,[26] as long as it is established that "the objective

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opinion in ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, Appeals Chamber Judgement, Appeals Chamber, Case No. ICTR-2001-64-A, 7 July 2006, para 17, nn.31-33, 37, which are among the main authorities relied upon by the Pre-Trial Chamber in the *Lubanga* and *Katanga* confirmation decisions.

[22] Claus Roxin, *Täterschaft und Tatherrschaft*, Seventh Edition, (Berlin, New York, Walter de Gruyter 2000) ("Roxin"), pages 282-283; *Thomas Weigend*, 'Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges', (2008) 6 Journal of International Criminal Justice 3, at page 480.

[23] *See* Roxin pages 280, 282-285: Substantial (*wesentlich*), as opposed to essential (*unentbehrlich* or *unerläßlich).* See also Tröndle/Fischer, 54th ed, Art 25, para. 12a; Leipziger Kommentar, Vol. I, 12th ed., Art 25, para. 188: "wesentlich erschwert".

[24] Judge Fulford found that "the use of the word 'commits' [referred to in Article 25(3)(a)] simply requires an operative link between the individual's contribution and the commission of the crime. […] [T]he Prosecution must simply demonstrate that the individual contributed to the crime by committing it with another or others." (ICC-01/04-01/06-2842, Dissenting Opinion Judge Fulford, para.15. Judge Fulford found that the "degree of participation" is one of the factors listed in Rule 145(1)(c) to determine the sentence of a convicted person (para.9). Indeed, the inclusion of that consideration as a sentencing matter confirms that the contribution need not be essential or even substantial.

[25] ICC-01/04-01/07-717, para 526.

[26] ICC-01/04-01/06-2842, para 1003; *see also* Roxin page 280; ICTY, *Prosecutor v. Dusko Tadic*, Appeals Chamber, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, para 196.

elements of an offence are carried out by a plurality of persons acting within the framework of a common plan".[27]

III. Use of another person or an organized and hierarchical apparatus of power

14. Indirect co-perpetrators may commit a crime through one or more persons, or acting through an organized and hierarchical apparatus of power.[28] Under the latter scenario (which is applicable to this case), the Prosecution must establish the existence of an organization that is based on hierarchical relationships between superiors and subordinates.[29]

IV. Ability to cause the organization to contribute to the crime

15. This element must be proven only if the accused is alleged to have acted through an organized and hierarchical apparatus of power. The Prosecution submits that to satisfy this element, it must prove that the accused has the ability to cause the organization to contribute to the crime. For example, in the *Katanga* Confirmation Decision, Pre-Trial Chamber I articulated this concept as requiring a showing that the accused "mobilize[d] his authority and power within the organization to secure compliance with his orders".[30] While compliance with orders[31] is one possible manner to establish this

[27] ICC-01/04-01/07-717, paras 495-497. For indirect co-perpetration, the material elements of the crimes are carried out by persons who form part of the organized and hierarchical apparatus of power referred to below.
[28] ICC-01/04-01/07-717, paras 495-498; *see also Stefano Manacorda & Chantal Meloni*, 'Indirect Perpetration versus Joint Criminal Enterprise', (2011) 9 Journal of International Criminal Justice 1, at 169-170.
[29] ICC-01/04-01/07-717, paras 511-514.
[30] ICC-01/04-01/07-717, paras 511-514. The Prosecution notes that the *Katanga* Confirmation Decision uses the term "control over the organization". Since this element should not be confused with the separate requirement of the collective control over the crime by all co-perpetrators, the Prosecution focuses on the essence of this element, namely the accused's individual ability to use the organization as a tool to contribute to the commission of the crime.
[31] ICC-01/04-01/07-717, paras 497-498, 500-510, 514; Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para 78; *see also* Roxin, C., Straftaten im Rahmen organisatorischer Machtapparate', *Goltdammer's Archiv für Strafrechet* (1963), pages 193-207; Ambos, K., *La parte general del derecho penal internacional* (Montevideo, Temis, 2005), page 240.

element, it is not the only one.[32] It may also be met, for example, by a showing that the accused possessed a power of veto within the organization, or that he had the capacity to hire, train, impose discipline and provide resources to the subordinates.[33]

V. The organization is composed of "fungible individuals" capable of replacement by others

16. Like element (IV), this element must be proven only if the accused is alleged to have acted through an organized and hierarchical apparatus of power. This element overlaps to some extent with element (IV).[34] It requires that the implementation of the will of the co-perpetrators cannot be compromised by any particular subordinate's failure to comply because the individual subordinates within the organization were fungible.[35] This element can be established through attributes of the organization, such as a large enough size to "provide a sufficient supply of subordinates" in order to replace anyone who refused to act,[36] or through the existence of "intensive, strict, and violent training regimes".[37]

17. However, contrary to the findings of the Pre-Trial Chambers,[38] this element does not necessarily require the Prosecution to establish the subordinates' almost automatic compliance with "orders" of a superior. Compliance with an order may be sufficient to demonstrate that the organization is composed

[32] *See* Thomas Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept', 9 Journal of International Criminal Justice 1, pages 95-101 (noting that under the theory as originally articulated, the touchstone is the "dominance" enjoyed by the perpetrator behind the perpetrator, not orders as such).
[33] ICC-01/04-01/07-717, para 513. These examples are not exhaustive, neither are they indicative of the level of participation that is required to establish responsibility for indirect co-perpetration. They only serve the purpose of demonstrating that a person can move an organization to contribute to a crime by ways other than ordering.
[34] ICC-01/04-01/07-717, paras 511-518.
[35] ICC-01/04-01/07-717, paras 516-517.
[36] ICC-01/04-01/07-717, para 516.
[37] ICC-01/04-01/07-717, para 518.
[38] ICC-01/04-01/07-717, paras 515-516, 518 ; ICC-01/09-02/11-Red, para 297; ICC-01/09-01/11-373-Red, para 292.

of fungible individuals, but it is not the only way to making that showing. Actions and attributes other than orders, such as those referred to in the previous paragraph, may also be capable of establishing this element.

VI. The subjective elements of indirect and direct co-perpetration

18. Article 30 provides that individual criminal responsibility arises only if the material elements of a crime are committed with intent and knowledge.

a. The accused acted with intent

19. The Prosecution must prove that the accused meant to engage in the relevant conduct.[39] In relation to a consequence, the Prosecution must show that the accused (a) meant to cause the consequence; or (b) was aware that the consequence would occur in the ordinary course of events.[40]

20. The concept of "awareness that a consequence will occur in the ordinary course of events" means that, based on how events ordinarily develop, the accused anticipated that the consequence would occur in the future.[41] In the context of this case, it is necessary for the Prosecution to establish that the accused was aware that implementing the common plan would, in the ordinary course of events, result in the commission of the crimes charged.[42]

b. The accused had the requisite knowledge

21. The Prosecution must establish that the accused was aware that the circumstances relevant to the underlying crimes existed, or that, in the ordinary course of events, his or her conduct would bring about the objective elements of the crime.[43]

[39] Article 30(2)(a) of the Statute.
[40] *See* Article 30(2)(b); ICC-01/09-01/11-373, para 411; ICC-01/04-01/06-803, paras 351-352.
[41] ICC-01/04-01/06-2842, para 1012.
[42] ICC-01/04-01/07-717, para 533.
[43] Article 30(3).

22. For indirect co-perpetration through an organized and hierarchical apparatus of power, the Prosecution must establish that the accused was aware (a) that the common plan or agreement involved an element of criminality;[44] (b) of the fundamental features of the organization;[45] and (c) of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise functional control over the crime.[46]

23. With respect to crimes against humanity, the Prosecution must establish that the accused either knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population[47] and that the conduct was pursuant to or in furtherance of an organizational policy or common plan.[48] This element does not require proof that the accused had knowledge of all of the characteristics of the attack or the precise details of the plan or policy of the State or organization. This element may be satisfied if the accused intended to further such an attack.[49]

Request for notice to be given under Regulation 55(2) that the Chamber may recharacterize the accuseds' form of individual criminal responsibility

24. The Prosecution requests that the Chamber give notice, before or on the first day of trial, that the Chamber may employ Regulation 55(1) in the course of the proceedings to re-characterize the form of individual criminal responsibility under Articles 25(3)(a), (b) or (c). Trial Chamber I took a similar approach in *Lubanga*, giving notice to the parties before the

[44] *See* ICC-01/04-01/06-803, paras 361-365.
[45] ICC-01/04-01/07-717, para 534.
[46]ICC-01/04-01/06-803, paras 366-367; ICC-01/04-01/07-717, para 538.
[47] Elements of Crimes, Articles 7(1)(a)(3); ICC-01/09-02/11-382-Red, para 417.
[48] There is no explicit reference to knowledge of the policy element. However, as the second paragraph of the Introduction to the Elements of Crimes under Article 7 indicates, it is not required that the perpetrator knew the precise details of the policy. This implies that some awareness of an underlying policy is required, even if it leaves considerable ambiguity as to the extent of that awareness: Robinson D., 'The Elements of Crimes against Humanity',(Transnational Publications, 2001) Lee et al. (ed.), in ICC: Elements of Crimes and Rules of Procedure and Evidence, page 73. Note that Canada and Germany suggested that specific knowledge of the underlying policy should not be required.
[49] Elements of Crimes, Article 7 (Introduction), paragraph 2.

presentation of evidence began, that it "may modify the characterization of the facts" from international to internal armed conflict.[50]

25. To be clear, the Prosecution is not requesting the Chamber to invoke Regulation 55(1) to recharacterize the facts at this stage.[51] Rather, the Prosecution is suggesting that the Chamber give notice to the participants under Regulation 55(2) that there is a *possibility* that Regulation 55(1) may be employed at a later date to recharacterize certain facts.[52] It will be for the Chamber to decide at a later stage whether to actually recharacterize the accuseds' individual criminal responsibility and the parties will be able to litigate that issue if and when it arises.[53] For now, it is sufficient for the Chamber to ensure that Regulation 55(2)'s notice requirements are complied with. It is this limited relief that the Prosecution seeks in this application.

Regulation 55(2)'s mandatory notice provision requires notice to be given at the earliest possible stage.

26. Regulation 55(2) is a notice provision. In relevant part, it provides:

> If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts **may** be subject to change, the Chamber **shall give notice** to the participants of such a **possibility** and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. . . (emphasis added).

27. By its terms, Regulation 55(2) is triggered by a "possibility" that the Chamber "may" decide to engage in a legal recharacterization of the facts.

[50] Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para 48; *see also* para 49.
[51] ICC-01/09-02/11-T-18-ENG CT WT, page 31, lines 20-24.
[52] ICC-01/09-02/11-T-18-ENG CT WT, page 31, lines 25 to page 32, line 19.
[53] *See* Regulation 55(2) ("If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall . . . at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. . . ").

When triggered by such a possibility, Regulation 55(2)'s notice requirement is mandatory – "the Chamber *shall* give notice".

28. In this case, Regulation 55(2)'s notice requirement can be invoked even before trial begins.[54] On the limited factual record now before the Chamber, it is apparent that the accuseds' individual criminal responsibility may be subject to multiple legal characterizations. This possibility triggers Regulation 55(2)'s notice requirement.

29. As explained above, the Prosecution charged, and the Pre-Trial Chamber confirmed, a theory of indirect co-perpetration under Article 25(3)(a) of the Statute. However, the specific facts of this case reflect that indirect co-perpetration is not the sole manner in which the accuseds' criminal responsibility can be characterized. The Prosecution acknowledges that the accuseds' criminal responsibility could equally be characterized as:

- ordering, soliciting or inducing under Article 25(3)(b);
- aiding, abetting or otherwise assisting under Article 25(3)(c); or
- contributing "[i]n any other way" to a crime committed by a "group of persons acting with a common purpose" under Article 25(3)(d).

30. The possibility that the Chamber may ultimately decide to base its Article 74 decision on Articles 25(3)(b), (c) or (d) is demonstrated by even a cursory analysis of the evidentiary record now available to the Chamber. For the sake of simplicity, it suffices to confine the analysis to the evidence the Pre-Trial Chamber relied upon in its Confirmation Decision, which demonstrates, among other things, that:

[54] Regulation 55(2) authorizes the Chamber to give notice "if, at any time during the trial" it appears that there might be a change in characterisation. The Prosecution does not read that provision to intentionally bar the Chamber from giving appropriate notice even in advance of the start of trial.

- Messrs Muthaura and Kenyatta "specifically directed the Mungiki to commit the crimes in Nakuru and Naivasha";[55]

- Mr Muthaura instructed Mr Ali to ensure that Kikuyu youth heading to the Rift Valley to carry out the attacks were not "to be disturbed" by the Police;[56]

- Mr Kenyatta gave "direction[s]" and a "mandate" to an individual "to coordinate the Mungiki for the purposes of the attack in Nakuru";[57]

31. While the Pre-Trial Chamber held that these actions could be characterized as forms of indirect co-perpetration, it is clear that this is not the only manner in which they can be categorized. In the Prosecution's view, they can equally be classified as "order[ing], solicit[ing] or induc[ing]" under Article 25(3)(b).[58] Indeed, if one accepts the Pre-Trial Chamber's view of the law of indirect co-perpetration – and as explained above, this Chamber is not bound to do so – it follows that facts sufficient to demonstrate indirect co-perpetrator liability under Article 25(3)(a) are also sufficient to demonstrate liability under Article 25(3)(b) because the issuance of "orders" is part of the Pre-Trial Chamber's eight element co-perpetration test.[59]

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[55] ICC-01/09-02/11-382-Red, para 404; *see also* paras 341-344 (citing statement of Witness OTP-4, KEN-OTP-0043-0002, at 0039-0041; KEN-OTP-0002-0015, at 0069-0070; summary of statement of Witness OTP-1, KEN-OTP-0053-0026, at 0026).

[56] ICC-01/09-02/11-382-Red, para 342 (citing statement of Witness OTP-4, KEN-OTP-0043-0002, at 0040); *see also* para 379 (citing statement of Witness OTP-4, KEN-OTP-0043-0002, at 0040).

[57] ICC-01/09-02/11-382-Red, para 385 (citing statement of Witness OTP-11, KEN-OTP-0052-1469, at 1482; statement of Witness OTP-12, KEN-OTP-0060-0385, at 0389-0390; statement of Witness OTP-4, KEN-OTP-0043-0002, at 0041); *see also* para 396 (citing statement of Witness OTP-11, KEN-OTP-0052-1292, at 1304).

[58] *See Thomas Weigend*, Perpetration through an Organization: 'The Unexpected Career of a German Legal Concept', (2011) 9 Journal of International Criminal Justice, 91, at 101-105 (noting that in practice, it is difficult to draw bright line distinctions between instigation and perpetration through another).

[59] ICC-01/09-02/11-382-Red, para 297; *see also Stefano Manacorda & Chantal Meloni*, 'Indirect Perpetration versus Joint Criminal Enterprise', (2011) 9 Journal of International Criminal Justice 159, at 171-172 (noting the practical difficulties of drawing bright line distinctions between indirect co-perpetration and ordering). The Prosecution stresses, however, that as explained at para. 17 above, there is no requirement that an accused be able to issue binding orders for liability as indirect co-perpetrator through the use of an organization to arise.

32. The Pre-Trial Chamber also relied in its Confirmation Decision upon evidence demonstrating that:

- Messrs Kenyatta and Muthaura brokered a deal with Maina Njenga, under which Mr Njenga "agreed to the common plan and placed the Mungiki at the disposal of Mr. Muthaura and Mr. Kenyatta" in exchange for concessions favorable to him and the Mungiki,[60] and that Mr Kenyatta provided millions of Kenyan shillings to Maina Njenga for this purpose;[61]

- Mr Kenyatta "was in charge of the provision of financial and logistical support to the direct perpetrators of the crimes",[62] and that among other actions, he gave millions of Shillings to (i) "coordinate the Mungiki attack in Naivasha"; [63] (ii)"buy the guns that were used in the attack in Nakuru";[64] (iii) fund a "group of Mungiki from Thika to participate in the attack in Naivasha" and to "hire[ ] a lorry by which the Mungiki from Thika were transported to . . . Naivasha";[65]

[60] ICC-01/09-02/11-382-Red, paras 362-368, 406 and 408 and the evidence cited therein.
[61] ICC-01/09-02/11-382-Red, paras 363 (citing statement of Witness OTP-11, KEN-OTP-0052-1292, at 1296; KEN-OTP-0052-1523, at 1528; statement of Witness OTP-12, KEN-OTP-0060-0272, at 0297); 364 (citing statement of Witness OTP-12, KEN-OTP-0060-0074, at 0089; KEN-OTP-0060-0272, at 0297; KENOTP-0060-0325, at 0333-0334; statement of Witness OTP-11, KEN-OTP-0052-1292, at 1295; KEN-OTP-0052-1523, at 1527).
[62] ICC-01/09-02/11-382-Red, para 384; *see also* paras 385-396 and 405 and the evidence cited therein.
[63] ICC-01/09-02/11-382-Red, para 334 (citing statement of Witness OTP-11, KEN-OTP-0052-1451, at 1463; KEN-OTP-0052-1469, at 1485; KEN-OTP-0052-1506, at 1514); *see also* paras 335-336 (citing statement of Witness OTP-12, KEN-OTP-0060-0405, at 0408, 0419; summary of statement of Witness OTP-6, KEN-OTP-0053-0015, at 0019); 386 (citing statement of Witness OTP-11, KEN-OTP-0052-1469, at 1485; KEN-OTP-0052-1487, at 1494; statement of Witness OTP-12, KEN-OTP-0060-0112, at 0118).
[64] ICC-01/09-02/11-382-Red, para 334 (citing statement of Witness OTP-11, KEN-OTP-0052-1451, at 1463). The Pre-Trial Chamber also relied upon evidence demonstrating that Mr Kenyatta advised the coordinator of the Nakuru attacks "on how to get the necessary funds for the purchasing of the weapons to be used by the attackers in Nakuru". ICC-01/09-02/11-382-Red, para 385 (citing statement of Witness OTP-11, KEN-OTP-0052-1451, at 1463; KEN-OTP-0052-1469, at 1482; statement of Witness OTP-12, KEN-OTP-0060-0385, at 0389-0390; KEN-OTP-0060-0112, at 0126; statement of Witness OTP-4, KEN-OTP-0043-0002, at 0041).
[65] ICC-01/09-02/11-382-Red, paras 387-393 and evidence cited therein; *see also* para 395 (citing statement of witness OTP-12, KEN-OTP-0060-0365, at 0375; KEN-OTP-0060-0405, at 0408-0412; statement of witness OTP-11, KEN-OTP-0052-1305, at 1308, 1312).

- ". . . Mr. Muthaura also provided institutional support for the execution of the crimes on behalf of the PNU Coalition, using the tools available to him by virtue of his *de facto* authority",[66] including, among other matters, "ensuring that weapons and uniforms would be provided to the attackers in Nakuru from Nakuru State House";[67]

33. While the Pre-Trial Chamber characterized these actions as forms of indirect co-perpetration, they can equally be classified as "aid[ing], abet[ting] or otherwise assist[ing] . . . including providing the means for [the crimes'] commission", under Article 25(3)(c). Even assuming, for the sake of argument, that accessory liability under Article 25(3)(c) requires "a substantial effect on the commission of the crime",[68] the acts listed above surpass that threshold because they were vital enabling actions that permitted the crimes to be committed.

34. Similarly, each of the actions listed above in paragraphs [30] and [32] can be characterized as "any other [form of] contribut[ion] to the commission or attempted commission of such a crime by a group of persons acting with a common purpose", under Article 25(3)(d). Given the direct link between the accuseds' contributions and the commission of the crimes, each action clearly surpasses the "any" contribution standard,[69] and there is ample evidence that the accused and others involved in implementing the common plan acted with the common purpose of ensuring that the PNU retained

[66] ICC-01/09-02/11-382-Red, para 377; *see also* para 405.
[67] ICC-01/09-02/11-382-Red, para 378 (citing statement of Witness OTP-11, KEN-OTP-0052-1469, at 1470).
[68] ICC-01/04-01/06-2842, para 997. The Prosecution acknowledges the *obiter dicta* nature of the quoted statement and does not suggest that it represents a definitive interpretation of Article 25(3)(c).
[69] *See* Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, ICC-01/04-01/10-514, Separate Opinion of Judge Silvia Fernandez de Gurmendi, para 12. Even if the Chamber were to hold that Article 25(3)(d) requires a "significant contribution" by the accused – and it does not – the above actions surpass that bar in that they were enabling actions that permitted the crimes to be committed. *See* Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras 283-285.

power by any means necessary, including through attacks against perceived ODM supporters.[70]

35. In sum, there are several potential ways to characterize the individual criminal responsibility of the accused in this particular case. The Prosecution charged indirect co-perpetration under Article 25(3(a) and the Pre-Trial Chamber confirmed that this is an appropriate manner in which to characterize the accuseds' individual responsibility.[71] But the facts demonstrate that, in addition to indirect co-perpetration, Articles 25(3)(b), (c) and (d) may equally be applicable. Because of this, it would also be appropriate to provide notice under Regulation 55(2) that the Chamber may, in the course of the proceedings, invoke Regulation 55(1) to recharacterize the facts.

Providing notice at the start of trial will further the fairness of the proceedings.

36. At the 12 June 2012 status conference, the Muthaura Defence argued that this application should be rejected as "premature".[72] The Prosecution respectfully disagrees. As noted previously, the terms of Regulation 55(2) suggest that notice should be given during the trial,[73] but this does not prevent the Prosecution from applying, and the Chamber from considering, the issue now. Notice should be given as soon as feasible, to protect the fair trial rights of the parties. It thus is wholly illogical to delay notice.[74] Prompt consideration and notice will enable the parties to fairly prepare and present

[70] *See*, *e.g.*, ICC-01/09-02/11-382-Red, paras 301-308, 310-314, 333-336, 341-344, 360-368, 375-379, 400, 404-406, 408-409 and the evidence cited therein.
[71] ICC-01/09-02/11-382-Red, paras 298, 428.
[72] ICC-01/09-02/11-T-18-ENG CT WT, page 35, line 23.
[73] See fn. 53, above, citing Regulation 55(2): "If at any time during the trial . . ."); *but see* ICC-01/04-01/06-1084, paras 48-49 (providing Regulation 55(2) notice in advance of trial).
[74] *See* C. Stahn, Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55, 16 Crim. L. Forum 1 (2005), at page 28 ("If a Trial Chamber should, for example, be of the opinion that the facts and circumstances described in the charges establish a different form of perpetration or participation than that identified in the charges, it may raise this point at the beginning of the trial proceedings and notify the participants of an envisaged change in legal qualification at that early stage. This type of ''early warning'' may foster judicial efficiency. . .").

their cases, without the risk of being taken by surprise at the end of trial by an unexpected change in the legal framework of the case.[75]

37. The Defence has also suggested that this application "amounts to alternative charging by the back door", that "the Pre-Trial Chamber, pursuant to Article 61(7)(c), could have amended the charges", and because it did not, the present application is somehow inconsistent with "the scheme of the Rome Statute".[76] This objection is misplaced.

38. *First*, the Prosecution is not suggesting any alteration of the charging document. The Prosecution is simply taking the logical step of informing the Chamber, at the earliest available opportunity, that the accuseds' criminal acts lend themselves to multiple legal characterizations.[77] This is a function of the facts of the case, which reflect that the accuseds' alleged conduct during the PEV "runs the gamut of [Article] 25(3)",[78] in the sense that they formulated the common plan, brokered the deal with the Mungiki that enabled the plan to be implemented, and contributed by directing the perpetrators and providing financial, logistical and institutional support.[79]

39. Regulation 55 caters for this precise scenario. It creates a procedure – separate and apart from the pre-trial charging and confirmation process – that enables the Trial Chamber to properly adjudicate cases that fit more than one legal theory, and to ensure against "accountability gaps, a purpose that is fully consistent with the Statute".[80] In a case such as this, where it is

[75] For a discussion of this principle in a different context, *see* Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, paras 3, 19-21.
[76] ICC-01/09-02/11-T-18-ENG CT WT, page 35, lines 13-22.
[77] The suggestion that the Pre-Trial Chamber "could have amended the charges" pursuant to Article 61(7)(c) is wrong.. *See* ICC-01/09-02/11-T-18-ENG CT WT, page 35, lines 14-15. Article 61(7)(c) permits the Pre-Trial Chamber to "request the Prosecutor to consider . . . [a]mending a charge". It does not grant the Pre-Trial Chamber the authority to amend the charges itself.
[78] ICC-01/09-02/11-T-18-ENG CT WT, page 33, line 22 to page 34, line 5.
[79] *See supra*, paras 30 and 32.
[80] Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal

possible to characterize the facts in multiple ways, Regulation 55 enables the Trial Chamber to recharacterize the facts itself. As the Appeals Chamber explained, this procedure is separate from an amendment to the charges under Article 61(9): "article 61(9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure".[81]

40. The Appeals Chamber has made clear that Regulation 55 permits "a change in the legal characterization of facts in the course of the trial, and without a formal amendment to the charges".[82] A critical proviso is that "the modification of the legal characterisation of facts in the course of the trial must not render that trial unfair".[83] The question of fairness is a fact-specific inquiry, which depends on the "circumstances of the case".[84]

41. In this case, giving early notice of the possibility of a recharacterization will "ensure that the trial is fair"[85] because it will enable the parties to present their evidence and examine witnesses with all possibilities in mind. Advance knowledge can only help the accused and advance the interests of a fair trial. It will avoid delays and adjournments (envisaged in Regulation 55(3)(a)), the recall of witnesses (envisaged in Regulation 55(3)(b)), and will enable the accused to prepare their defence with full knowledge of the possible statutory provisions under consideration by the Chamber.[86] It will also ensure respect for the accuseds' Article 67(1)(a) right to be informed "in

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characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205, para 77.

[81] ICC-01/04-01/06-2205, para 77.

[82] ICC-01/04-01/06-2205, paras 84.

[83] ICC-01/04-01/06-2205, para 85.

[84] ICC-01/04-01/06-2205, para 85.

[85] Article 64(2) of the Statute.

[86] There can be no dispute as to the Prosecution's compliance with Regulation 52, which sets out the requirements of a DCC. Regulation 52 requires the Prosecution to provide "a legal characterization of the facts". It does not require the Prosecution to plead each and every conceivable legal characterization. The Prosecution has complied with Regulation 52's requirements by including in the DCC a legal characterization under Article 25(3) that appropriately reflects the accuseds' individual criminal responsibility – a legal characterization endorsed by the Pre-Trial Chamber. For a discussion of the difference between Regulations 52 and 55, *see* ICC-01/04-01/06-2205, para 97.

detail of the nature, cause and content of the charge[s]" against them.[87] Giving notice as early as possible is also appropriate because the possibility of a legal recharacterization in this case is self-evident from the outset due to the breadth of the accuseds' alleged contributions.[88]

42. Moreover, early notice will ensure compliance with general principles of international human rights law, which permit changes in the legal characterization of facts, so long as the accused has an adequate opportunity to respond to the possible recharacterization.[89] For example, in *Zhupnik v. Ukraine*, the ECHR held that there was no violation of the applicant's fair trial rights where the trial court convicted him of an offence not charged in the indictment, and without giving notice of the recharacterization before rendering its judgment, because the applicant was able to contest the trial court's recharacterization through two levels of appellate review. [90] This cured any "defects in the first-instance proceedings".[91] The Prosecution is

[87] *See infra*, note 89.
[88] *See* C. Stahn, *supra* note 74, page 28.
[89] *See* ICTY, Trial Chamber, *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgement, 14 January 2000, paras 744-748 (opining that a Trial Chamber may convict an accused on the basis of a form of liability not pled in the indictment, without first notifying the defence); EHCR, *Case of Pelissier and Sassi v. France*, Application No. 25444/94, Judgment, 25 March 1999, paras 42-63 (holding that although the court below "unquestionably had [the right] to recharacterise facts", it erred by doing so without informing the accused of the possibility of a recharacterization before rendering the judgment*); Sadak and others v. Turkey*, Application Nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment, 17 July 2001, para 57 (holding that although the court below "unquestionably had [the right] to recharacterise facts", it erred because it informed the accused of the recharacterization on "the last day of the trial, just before the judgment was delivered, which was patently too late"); *Case of I.H. and Others v. Austria*, Application no. 42780/98, Judgment, 20 April 2006, para 34 (stating that to ensure a fair trial, "the defence must have at its disposal full, detailed information concerning . . . the legal characterisation that the court might adopt in the matter"); *Miraux v. France*, Application No. 73529/01, Arrêt, 19 September 2006, paras 25-38 (holding that court below erred by recharacterizing crimes charged without giving defence an opportunity to make submissions on the possible recharacterization); *Mattei v. France*, Application No. 34043/02, Arrêt, 19 December 2006, paras 34-44 (same); *Seliverstov v. Russia*, Application No. 19692/02, Judgement, 25 September 2008, paras. 22-23 (same); *Abramyan v. Russia*, Application No. 10709/02, Judgment, 9 October 2008, paras 34-40 (same); *Block v. Hungary*, Application No. 56282/09, Judgement, 25 January 2011, paras. 22-25 (same).
[90] *Zhupnik v. Ukraine*, Application No. 20792/05, Judgement, 9 December 2010, paras. 35-45.
[91] *Ibid.*, para 43; *see also* paras 39-43; *Sipavičius v. Lithuania*, Application No. 49093/99, Judgement, 21 February 2002, pars. 31-32 (holding that the recharacterisation of an offence did not violate right to a fair trial where the applicant had an opportunity to contest the reformulated charge in subsequent review proceedings); *Dallos v. Hungary*, Application No. 29082/95, Judgement, 1 March 2001, paras. 48-53 (same).

suggesting a far more cautious approach here – providing notice *on the first day of trial* of the possibility of a legal recharacterization at a later date.[92]

43. This mirrors the approach taken by the Extraordinary Chambers in the Courts of Cambodia in the *Duch* case. At the pre-trial stage in that case, the Co-Investigating Judges chose not to include joint criminal enterprise ("JCE") as a mode of liability in the charging document.[93] At the first hearing before the Trial Chamber, the Co-Prosecutors provided notice that they would seek to apply JCE liability to the accused, and later filed a written submission to that effect.[94] Following the Prosecution submission, the Chamber put the parties on notice that the issue of JCE liability "was live before it" and would be ruled upon in the judgment.[95] In its judgment, the Chamber employed Internal Rule 98(2) – akin in many respects to Regulation 55 – to modify the legal characterization of the accused's individual responsibility to include JCE liability.[96] In doing so, the Chamber found that there was "no breach of the Accused's fair trial rights", because he was "repeatedly made aware of, and provided with a timely opportunity to address", the possibility of a conviction under a JCE theory of liability.[97] In the present case, early notice under Regulation 55(2) will similarly ensure that there is no possibility of unfair surprise, should the Chamber ultimately opt to recharacterize the accuseds' individual criminal responsibility.[98]

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[92] Should the Chamber ultimately decide to recharacterize the facts, the participants will also have "the opportunity to make oral or written submissions" on the proposed recharacterization. *See* Regulation 55(2).
[93] ECCC, Judgement, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, para 488. Under the legal framework of the ECCC, the "Closing Order" issued by the Co-Investigating Judges contains an indictment and operates as the charging document.
[94] *Ibid.*, para 489.
[95] *Ibid.*, para 490.
[96] *Ibid.*, paras 492-517.
[97] *Ibid.*, para 502; *see also* Decision on the Applicability of Joint Criminal Enterprise, Case No. 002/19-09-2007/ECCC/TC, 12 September 2011, paras. 24-25 ("The Chamber finds that it may at any time change the legal characterisation of facts contained in the Amended Closing Order to accord with any other applicable form of criminal responsibility up to and including in the verdict.")
[98] This position is consistent with Pre-Trial Chamber III's "Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute" in the *Bemba* case. ICC-01/05-01/08-388. Unlike the situation in *Bemba*, there is no suggestion of a possible legal recharacterization that could "material[ly] change . . .

44. *Second*, even if providing *notice* under Regulation 55(2) could somehow be equated to alternative *charging* – and it cannot – nothing in the Court's legal framework prevents the consideration of alternative modes of liability. On the contrary, Pre-Trial Chamber II noted recently that "the Prosecutor may generally charge in the alternative",[99] and the inclusion of Regulation 55 in the Court's legal framework demonstrates that alternative legal characterizations may be considered where appropriate on the facts of the case.

45. In this case, the Prosecution charged a form of individual criminal responsibility that, in its view, appropriately captures the accuseds' contributions to the crimes. This form of responsibility was endorsed by the Pre-Trial Chamber in its Confirmation Decision. As the Pre-Trial Chamber held in *Bemba*, it is now "for the Chamber to characterize the facts", [100] and, if sees fit, to employ Regulation 55 for that purpose. While the decision on whether to actually recharacterize the facts is for another day, it is apparent now that such a recharacterization is a possibility – which requires notice to be given under Regulation 55(2). This is not "alternative charging by the back door".[101] It is a proper application of the Court's statutory provisions.

46. *Third*, and finally, this application for notice is consistent with the Appeals Chamber's admonition in *Lubanga* that Regulation 55 "may not be used to exceed the facts and circumstances in the charges or the amendments

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the subject-matter and the scope of the proceedings". *See id.*, para 23; *see also* paras 22, 28. On the contrary, if one accepts the prevailing Article 25(3) jurisprudence, the forms of liability contained in Article 25(3)(b), (c) and (d) are to a large degree "lesser included" forms of liability, which involve a lesser degree of participation than indirect co-perpetration under Article 25(3)(a). *See, e.g.*, ICC-01/04-01/06-2842, para 997. For the same reason, this approach is consistent with Pre-Trial Chamber I's articulation of the purpose of Article 61(7)(c) in the Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 14 May 2007, para 203.

[99] Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-1, para 36.

[100] ICC-01/05-01/08-424, para 201 (citing ICC-01/05-01/08-14-tENG, para 25).

[101] ICC-01/09-02/11-T-18-ENG CT WT, page 35, lines 11-12.

thereto".[102] This application is limited to the facts and circumstances contained in the charges. There is no suggestion of extending them. Prejudice does not occur when additional legal characterizations are raised that are based upon facts included in the original charges.[103] Here, the Prosecution's case will, as before, be based upon the factual allegations contained in the charges.[104] There will be no shift that would require burdensome additional preparation on the part of the Defence. For this reason, giving notice of the possibility of a recharacterization at this stage would not prejudice "the preparation of the defence".[105] Any possibility of additional burden is further reduced due to the overlap between the requirements of Article 25(3)(a) on the one hand and Articles 25(b), (c) and (d) on the other,[106] and the fact that subsections (b), (c) and (d) are, in large measure, lesser included forms of the mode of liability delineated in subsection (a).

47. For the above reasons, the Prosecution submits that providing Regulation 55(2) notice on the first day of trial is an entirely proper application of the Court's statutory provisions and will further the fairness of proceedings. The Defence's arguments to the contrary are without merit.

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[102] ICC-01/04-01/06-2205, para 88.
[103] For a discussion of this principle in the context of amendments to the charging document, *see* ICTY, *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34, Decision on Vinko Martinovic's Objection to the amended Indictement and Mladen Naletilic's preliminary Motion to the amended Indictment, 14 February 2001, page 7 ("Given that the facts upon which the new count is based were in the Original Indictment, there has been no need for the accused to conduct any new inquiries, approach new witnesses, or expend any additional resources. Accordingly, the accused have failed to establish that they have been prejudiced in the preparation of their defence"); ICTY, *Prosecutor v Mejakic et al.*, Case No. IT-02-65, Decision on the Consolidated Indictment, 21 November 2002, page 4 ("many of the facts upon which the new charges are based were included in the original indictments . . . in the view of the Chamber, the amendments do not prejudice the accused in the preparation of their defence").
[104] This is without prejudice to the Prosecution's ability to seek an amendment to the charges pursuant to Article 61(9), which is undisputed between the parties. *See* ICC-01/09-02/11-T-18-ENG, page 46, lines 3-4 ("if in due course further witnesses appear then, of course, a DCC can be amended again"); *see also* ICC-01/04-01/06-2205, para 94.
[105] Article 67(1)(b) of the Statute.
[106] *See, e.g.*, para 31, *supra* (discussion of the overlap between the Pre-Trial Chamber's conception of co-perpetration under Article 25(3)(a) and "ordering" under Article 25(3)(b)).

Relief Requested

48. In relation to the interpretation of the law on indirect co-perpetration, the Prosecution requests that the Chamber inform the parties that the Chamber may depart from the legal test laid down by the Pre-Trial Chamber in the Confirmation Decision.

49. In relation to Regulation 55, the Prosecution requests that the Chamber give formal notice, under Regulation 55(2), that the form of individual criminal responsibility charged may be subject to legal recharacterization under Articles 25(3)(b), (c) or (d), and to give such notice before or on the first day of trial.

Fatou Bensouda,
Prosecutor

Dated this 3rd day of July, 2012
At The Hague, The Netherlands