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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. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

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 William Samoei Ruto's 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:

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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 form of individual criminal responsibility of William Samoei Ruto ("Ruto" or the "accused") 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 re-characterize 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-01/09-01/11-T-15-ENG ET, p. 25, lines 21-25, p. 26, lines 1-18.

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 suspects (Ruto, Kosgey and Sang) after determining "that there are reasonable grounds to believe that criminal responsibility under 25(3)(a) and (d) can be attributed to the persons named in the Prosecutor's Application."[3] Regarding Ruto and Kosgey the Chamber found that "on the basis of the available material, […] indirect co-perpetration is the appropriate mode of liability".[4] As to Sang, the Chamber found on the basis of the material presented that "there are reasonable grounds to believe that his role is best characterized under article 25(3)(d) of the Statute".[5] The Pre-Trial Chamber did not address the alternative mode of liability alleged by the Prosecution (Article 25(3)(d)) as to Ruto and Kosgey, because as it explained "the possibility for the Prosecutor to charge in the alternative does not necessarily mean that the Chamber has to respond in the same manner."[6] Instead, based on what it deemed 'best practice', the Pre-Trial Chamber preferred not to make "simultaneous findings on modes of liability presented in the alternative."[7]

5. In the Document Containing the Charges ("DCC"), the Prosecution charged Ruto and Kosgey as indirect co-perpetrators under Article 25(3)(a) of the

[2] Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 15 December 2010, ICC-01/09-30-Red2, pages 16-17.
[3] Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang ("Summons Decision"), 8 March 2011, ICC-01/09-01/11-1, para. 55.
[4] Summons Decision, 8 March 2011, ICC-01/09-01/11-1, para. 38.
[5] Summons Decision, para. 38.
[6] Summons Decision, para. 36.
[7] Summons Decision, para. 36.

Statute.[8] The Pre-Trial Chamber confirmed the charges against Ruto under indirect co-perpetration theory[9] after finding that the Prosecution provided sufficient "clarification that the two suspects are charged under article 25(3)(a) of the Statute by way of presenting the elements underlying indirect-co-perpetration […]."[10] 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 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).[11]

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*.[12]

[8] Document containing the charges, 15 August 2011, ICC-01/09-01/11-261-AnxA, para. 98 and section VII (charges).
[9] 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. 299, 349.
[10] 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, para. 285.
[11] 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, para. 292.
[12] ICC-01/09-01/11-373, para. 292, fn. 474 (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).

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.[13] 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 Court,[14] in particular on the findings in the recent *Lubanga* trial judgment,[15] as well as on an independent analysis of the sources relied upon in that jurisprudence.[16]

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.[17] 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

[13] *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).
[14] *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.
[15] ICC-01/04-01/06-2842, paras. 976-1018.
[16] 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 opinion in the Lubanga Trial Judgement will guide this Chamber's interpretation of the law of indirect co-perpetration.
[17] ICC-01/04-01/07-716, para. 522.

the commission of a crime.[18] 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.[19]

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 exercise, 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 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".[20]

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",[21] but it does not define "essential" in this context. However, given that the accused alone need not exercise control over the crime,[22] "essential" cannot mean that the individual accused must have had the power to stop the crime or frustrate its commission.[23] Instead, the Majority

[18] ICC-01/04-01/06-2842, para. 984.
[19] 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-01/09-01/11-373, para. 301; ICC-01/09-02/11-382-Red,, para.399.
[20] ICC-01/04-01/06-2842, para. 994.
[21] ICC-01/04-01/06-2842, paras. 1006, 1018(ii) (emphasis added).
[22] ICC-01/04-01/06-2842, para. 994.
[23] 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, 366). The approach taken by the Majority in the Lubanga judgement resolves this apparent contradiction.

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".[24]

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,[25] explained that in practice it will often 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.[26] 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.[27] However, according to Judge Fulford, even the intermediate position might be excessive.

[24] ICC-01/04-01/06-2842, para. 1001.
[25] See ICC-01/04-01/06-803, para. 348, fn. 425 and ICC-01/04-01/07-717, para. 482, fn. 640, 642, para. 483, fn. 645, para. 485, fn. 647; *see also* ICTY, *Prosecutor v. Milomir Stakic*, Trial Chamber, Trial Judgement, Case No. IT-97-31-T, 31 July 2003, para. 40 and 440, fn. 945-948; Judge Schomburg's dissenting opinion in ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, Appeals Chamber Judgement, Appeals Chamber, Case No. ICTR-2001-64-A, 7 July 2006, para. 17, fn. 31-33, 37, which are among the main authorities relied upon by Pre-Trial Chamber I in the *Lubanga* and *Katanga* confirmation decisions.
[26] 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.
[27] *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".

As suggested in his dissenting opinion in the Lubanga Judgment, Article 25(3)(a) does not require any qualitative threshold for the contribution.[28]

13. It is not necessary to establish that the accused provided a contribution to the execution stage of the crime.[29] It is also not necessary to establish that the accused or any other co-perpetrator physically committed any of the elements of the crimes,[30] as long as it is established that "the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan".[31]

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.[32] 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.[33]

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

[28] 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.
[29] ICC-01/04-01/07-717, para. 526.
[30] 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.
[31] 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.
[32] 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.
[33] ICC-01/04-01/07-717, paras. 511-514.

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".[34] While compliance with orders[35] is one possible manner to establish this element, it is not the only one.[36] 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.[37]

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).[38] 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.[39] This element can be established through attributes of the organization, such as a large enough size

[34] 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.
[35] 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.
[36] *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).
[37] 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.
[38] ICC-01/04-01/07-717, paras. 511-518.
[39] ICC-01/04-01/07-717, paras. 516-517.

to "provide a sufficient supply of subordinates" in order to replace anyone who refused to act,[40] or through the existence of "intensive, strict, and violent training regimes".[41]

17. However, contrary to the findings of the Pre-Trial Chambers,[42] 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 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.[43] 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.[44]

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.[45] In the context of this case, it is necessary for the Prosecution to establish that the accused was

[40] ICC-01/04-01/07-717, para. 516.
[41] ICC-01/04-01/07-717, para. 518.
[42] 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.
[43] *See* Article 30(2)(a) of the Statute.
[44] *See* Article 30(2)(b). ICC-01/09-01/11-373, para. 411. ICC-01/04-01/06-803, paras. 351-352.
[45] ICC-01/04-01/06-2842, para. 1012.

aware that implementing the common plan would, in the ordinary course of events, result in the commission of the crimes charged.[46]

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.[47]

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;[48] (b) of the fundamental features of the organization;[49] and (c) of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise functional control over the crime.[50]

23. With respect to crimes against humanity, the Prosecution must further 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[51] and that the conduct was pursuant to or in furtherance of an organizational policy or common plan.[52] This element does not require proof that the accused had knowledge of all of the characteristics of the attack or the

[46] ICC-01/04-01/07-717, para. 533.
[47] Article 30(3).
[48] See, ICC-01/04-01/06-803, paras. 361-365.
[49] ICC-01/04-01/07-717, para. 534.
[50] ICC-01/04-01/06-803, paras. 366-367; ICC-01/04-01/07-717, para. 538.
[51] Elements of Crimes, Articles 7(1)(a)(3). ICC-01/09-01/11-373, para. 346.
[52] 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.

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.[53]

Request for notice to be given under Regulation 55(2) that the Chamber may re-characterize Ruto's 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 pled in relation to Ruto under Articles 25(3)(b), (c) or (d). Trial Chamber I took a similar approach in *Lubanga*, giving notice to the parties before the presentation of evidence began, that it "may modify the characterization of the facts" from international to internal armed conflict.[54]

25. To be clear, the Prosecution is not requesting the Chamber to invoke Regulation 55(1) to recharacterize the facts at this stage.[55] Rather, the Prosecution is suggesting that the Chamber should 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.[56] It will be for the Chamber to decide at a later stage whether to actually re-characterize Ruto's individual criminal responsibility and the parties will be able to litigate that issue if and when it arises.[57] 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.

[53] Elements of Crimes, Article 7 (Introduction), paragraph 2.
[54] 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.
[55] ICC-01/09-01/11-T-15-ENG ET, page 26, lines 4-8.
[56] ICC-01/09-02/11-T-15-ENG ET, page 26, lines 4-14.
[57] *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. . . ").

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. 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. [58] On the limited factual record now before the Chamber, it is apparent that the accused's individual criminal responsibility may be subject to multiple legal characterizations. This possibility triggers Regulation 55(2)'s notice requirement.

29. As explained above, the Pre-Trial Chamber confirmed the Prosecution's charges against Mr. Ruto based on the 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 this accused's criminal responsibility can be characterized. During the 11 June 2012 status conference, the Prosecution argued that the accused's criminal responsibility could equally be characterized as:

[58] 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.

- 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).

Moreover, the Prosecution is of the view that based on the evidence presented thus far, this accused's criminal responsibility could also be characterized as:

- ordering, soliciting or inducing under Article 25(3)(b); or

- aiding, abetting or otherwise assisting under Article 25(3)(c).

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:

- the Network was under responsible command and had an established hierarchy, with Mr. Ruto as the designated leader.[59]

- he also gave instructions to the perpetrators as to who they had to kill and displace and whose property they had to destroy.[60]

- Mr. Ruto was in charge of appointing commanders and divisional commanders and assigning them to specific areas and locations respectively.[61]

[59] ICC-01/09-01/11-373, para. 197 (citing statement of Witness 1, KEN-OTP-0028-0713 at 0763-0770; KEN-OTP-0028-0776 at 0805-0808; KENOTP-0028-1246 at 1297; KEN-OTP-0057-0140 at 0156; KEN-OTP-0057-0162 at 0174-0175, 0178, 0179 and 0197; KEN-OTP-0057-0181 at 0187-0188, 0197-0198, 0200, 0203; KEN-OTP-0057-0205 at 0212-0215; statement of Witness 6, KEN-OTP-0044-0003, at 0022; KEN-OTP-0051-0135 at 0169-0170, 0176, 0178 and 0223; KEN-OTP-0051-0207 at 0226; KEN-OTP-0051-0349 at 0368-0369, 0395-0396.
[60] ICC-01/09-01/11-373, para. 310 (statement of Witness 1, KEN-OTP-0028-0845 at 0904 to 0905; KEN-OTP-0028-1358 at 1390, 1401; statement of Witness 8, KEN-OTP-0052-0946 at 0969 to 0970).
[61] ICC-01/09-01/11-373, para. 328, (citing statement of Witness 2, KEN-OTP-0029-0131 at 0143 According to said witness, while Ruto was distributing the guns he said, "These are for Mount Elgon, these for South Rift, etc.").

- Mr. Ruto also had full control to decide on where and how the weapons he distributed should be used.[62]

- Mr. Ruto established a scheme of payment to the members of the organisation including the physical perpetrators […]; [t]he first was a stipend or a sort of a salary to be paid to the members of the organisation (for the purpose of motivation),[63]

- the second [scheme of payment] was a sort of a reward to be given upon the successful killing of any PNU supporter and the destruction of his/her property.[64]

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).[65] 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.[66]

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[62] *Ibid.*
[63] ICC-01/09-01/11-373, para. 320, fn 509 (citing statement of Witness 6, KEN-OTP-0051-0405 at 0417-0418), see also para. 321 fn. 511 (Statement of Witness 2, KEN-OTP-0029-0131 at 0141. Statement of Witness 4, KEN-OTP-0031-0085 at 0100) and fn. 512 (citing Statement of Witness 8, KEN-OTP-0052-0850 at 0851-0853.)
[64] ICC-01/09-01/11-373, para. 320, fn.510; see also para. 323, fn. 517 (citing statement of Witness 2, KEN-OTP-0055-0111 at 0116; KEN-OTP-0053-0256 at 0265 (providing a list of people who acquired land through their participation in the violence).
[65] *See* Thomas Weigend, Perpetration through an Organization: The Unexpected Career of a German Legal Concept, 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).
[66] ICC-01/09-01/11-373, para. 292; *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. 15 above, there is no requirement that an accused

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

- Mr. Ruto provided one of his coordinators with a sum of money to pass on to another coordinator on the ground for the purpose of securing food and transportation for the physical perpetrators.[67]

- "[…] throughout the period between 30 December 2006 and the post election violence, Mr. Ruto negotiated and supervised the purchase of guns and crude weapons to implement the criminal plan."[68]

- Mr. Ruto provided "maps marking out the areas most densely inhabited by communities perceived to be or actually siding with the PNU as well as the identification of houses and business premises owned by PNU supporters with a view toward targeting them."[69]

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 assit[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

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be able to issue binding orders for liability as indirect co-perpetrator through the use of an organization to arise.

[67] ICC-01/09-01/11-373, para. 322, fn 514 (citing statement of Witness 2, KEN-OTP-0055-0062 at 0064-0069); fn 515 (citing statement of Witness 5, KEN-OTP-0037-0039 at 0055.) and fn. 516 (citing statement of Witness 4, KEN-OTP-0031-0085 at 0100).

[68] ICC-01/09-01/11-373, para. 310, fn 506 (citing statement of Witness 1, KEN-OTP-0028-0776 at 0805-0808. Statement of Witness 2, KEN-OTP-0029-0131 at 0141, 0143. Statement of Witness 6, KEN-OTP-0044-0003 at 0025; KEN-OTP-0051-0135 at 0193; KEN-OTP-0051-0207 at 0226, 0227; KEN-OTP-0051-0349 at 0395-0396).

[69] ICC-01/09-01/11-373, para. 303 (b), fn. 487 (citing Maps and sketches provided by Witness 6, KEN-OTP-0044-0039, KEN-OTP-0044-0038. Statement of Witness 1, KEN-OTP-0028-0915 at 0922, 0931-0936, 0944-0946; KEN-OTP-0028-1358 at 1397; KEN-OTP-0057-0234 at 0246; KEN-OTP-0057-0250 at 0255-0257. Statement of Witness 2, KEN-OTP-0053-0256 at 0266; KEN-OTP-0055-0083 at 0089; Statement of Witness 4, KEN-OTP-0031-0085 at 0098, 0101; statement of Witness 5, KEN-OTP-0037 0039 at 0055. Statement of Witness 6, KEN-OTP-0051-0256, at 0275-0278; KEN-OTP-0051-0405, at 0415, 0421 to 0424, 0528; KEN-OTP-0051-0524 at 0528-0529 and 0578 to 0581 and summary of a statement of a Non-ICC witness, KEN-OTP-0051-0724).

of the crime",[70] the actions 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 paragraph 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 Ruto's contributions and the commission of the crimes, each action clearly surpasses the "any" contribution standard,[71] and there is ample evidence that Ruto created the Network or the organisation for the purpose of 'evicting' the PNU supporters. Ruto also supervised the overall planning and was responsible for the implementation of the common plan to carry out crimes committed in the entire Rift Valley.[72]

35. In sum, there are several potential ways to characterize the individual criminal responsibility of Ruto in this particular case. The Prosecution charged his individual criminal responsibility under Article 25(3(a) and the Pre-Trial Chamber determined that indirect co-perpetration is an appropriate manner in which to characterize his individual responsibility.[73] 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.

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[70] 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).
[71] *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.
[72] *See e.g.* ICC-01/09-01/11-373, para. 309, fn. 504 (citing Statement of Witness 4, KEN-OTP-0031-0085 at 0096-0097. Statement of Witness 1, KEN-OTP-0028-0845 at 0851-0854; KEN-OTP-0028-0915 at 0922) and fn. 505 (citing statement of Witness 5, KEN-OTP-0037-0039 at 0054); and para. 328.
[73] ICC-01/09-01/11-373, paras. 283-292 and 349.

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

36. Under the terms of Regulation 55(2) notice cannot actually *be* given until trial commences,[74] 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.[75] Prompt consideration and notice will enable the parties to fairly prepare and present 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.[76]

37. At the 11 June 2012 status conference, the Chamber enquired as to whether this application amounted to amending the charges by requesting alternative charges.[77] It does not.

38. *First*, the Prosecution is not suggesting any alteration of the DCC. The Prosecution is simply taking the logical step of informing the Chamber, at the earliest available opportunity, that Ruto's criminal acts lend themselves to multiple legal characterizations. This is a function of the nature of accused's conduct during the PEV which because of its various aspects may be characterized any of the modes of liability encompassed by Article 25(3).

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

[74] *See* fn. 58, 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).
[75] *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. . .").
[76] 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. 2, 19-21.
[77] ICC-01/09-01/11-T-15-ENG ET WT, p. 27, lines 1-12, 23-24.

consistent with the Statute".[78] In a case such as this, where it is 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".[79]

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".[80] 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".[81] The question of fairness is a fact-specific inquiry, which depends on the "circumstances of the case".[82]

41. In this case, giving early notice of the possibility of a recharacterization will "ensure that the trial is fair"[83] 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 his defence with full knowledge of the possible statutory provisions under consideration by the Chamber.[84] It will also ensure respect for

[78] 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 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.
[79] ICC-01/04-01/06-2205, para. 77.
[80] ICC-01/04-01/06-2205, para. 84.
[81] ICC-01/04-01/06-2205, para. 85.
[82] ICC-01/04-01/06-2205, para. 85.
[83] Article 64(2) of the Statute.
[84] 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

the accused's Article 67(1)(a) right to be informed "in detail of the nature, cause and content of the charge[s]" against him. Giving notice at the start of trial 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 accused's alleged contributions.[85]

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.[86] For example, in *Zhupnik v. Ukraine*, the European Court of Human Rights (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.[87] This cured any "defects in the first-instance proceedings".[88]

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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.

[85] *See* C. Stahn, *supra* note 75, page 28.

[86] *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).

[87] *Zhupnik v. Ukraine,* Application No. 20792/05, Judgement, 9 December 2010, paras. 35-45.

[88] *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).

The Prosecution is 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.[89]

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.[90] 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.[91] 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.[92] 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.[93] 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.[94] In the present case, early notice under Regulation 55(2) will similarly ensure that there is no possibility of unfair

[89] 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).
[90] 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.
[91] *Ibid.*, para 489.
[92] *Ibid.*, para 490.
[93] *Ibid.*, paras 492-517.
[94] *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.")

surprise, should the Chamber ultimately opt to re-characterize the accuseds' individual criminal responsibility.[95]

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, as noted *supra* Pre-Trial Chamber II confirmed that "the Prosecutor may generally charge in the alternative";[96] 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 accused's 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",[97] 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).

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

[95] 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 . . . 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.

[96] 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.

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

exceed the facts and circumstances in the charges or the amendments thereto".[98] 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.[99] Here, the Prosecution's case will, as before, be based upon the factual allegations contained in the charges.[100] 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 re-characterization at this stage would not prejudice "the preparation of the defence".[101] 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,[102] 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.

[98] ICC-01/04-01/06-2205, para. 88.
[99] 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").
[100] This is without prejudice to the Prosecution's ability to seek an amendment to the charges pursuant to Article 61(9). ,*See* ICC-01/04-01/06-2205, para. 94.
[101] Article 67(1)(b) of the Statute.
[102] *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 re-characterization 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