

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-01/11  
Date: 12 December 2013

**TRIAL CHAMBER V(A)**

**Before:** Judge, Chile Eboe-Osuji, Presiding  
Judge Olga Herrera Carbuccion  
Judge Robert Fremr

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF**  
***THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

**Public with Public Annex A**

**Decision on Applications for Notice of Possibility of Variation of Legal  
Characterisation**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Mr Anton Steynberg

**Counsel for William Samoei Ruto**

Mr Karim Khan  
Mr David Hooper  
Mr Essa Faal  
Ms Shyamala Alagendra

**Counsel for Joshua Arap Sang**

Mr Joseph Kipchumba Kigen-Katwa  
Ms Caroline Buisman

**Legal Representatives of Victims**

Mr Wilfred Nderitu

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V(A)** ( the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 64(2) and 67(1) of the Rome Statute (the ‘Statute’) and Regulations 24(5), 35(2), 52 and 55 of the Regulations of the Court (the ‘Regulations’), issues this Decision on Applications for Notice of Possibility of Variation of Legal Characterisation.

## **I. Procedural history**

1. On 3 July 2012, the Office of the Prosecutor (the ‘Prosecution’) filed an application (the ‘Prosecution Application’) for notice to be given under Regulation 55(2) of the Regulations with respect to Mr Ruto’s individual criminal responsibility.<sup>1</sup>
2. On 4 July 2012, the then Legal Representative of Victims (the ‘LRV’) filed submissions seeking that notice be given under Regulation 55 of the Regulations for possible recharacterisations above and beyond those contained in the Prosecution Application (the ‘LRV Application’).<sup>2</sup>
3. On 24 July 2012, the defence team for Mr Ruto (the ‘Ruto Defence’) responded to the Prosecution Application.<sup>3</sup>
4. On 25 July 2012, the defence team for Mr Sang (the ‘Sang Defence’) filed a response to the Prosecution Application.<sup>4</sup>

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<sup>1</sup> 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, 3 July 2012, ICC-01/09-01/11-433.

<sup>2</sup> Submissions of the Victims’ Representative on Regulation 55 and Article 25(3), 4 July 2012, ICC-01/09-01/11-436. On 23 November 2012, Mr Wilfred Nderitu was appointed as the new LRV. See Decision appointing a common legal representative of victims, 23 November 2012, ICC-01/09-01/11-479.

<sup>3</sup> Defence Response to 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, 24 July 2012, ICC-01/09-01/11-442.

<sup>4</sup> Defence Response to 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, 25 July 2012, ICC-01/09-01/11-443.

5. Also on 25 July 2012, the Ruto Defence and Sang Defence (collectively, the 'Defence') jointly responded to the LRV Application.<sup>5</sup>
6. On 12 August 2013, the Prosecution reiterated its request for the Chamber to give notice prior to or at the commencement of trial that it may change the legal characterisation of the form of individual criminal responsibility of Mr Ruto.<sup>6</sup>
7. On 19 August 2013, a status conference was held where, *inter alia*, the parties and participants further addressed whether notice should be given for any of the proposed recharacterisations.<sup>7</sup>
8. On 5 September 2013, the Chamber issued an order directing the Prosecution and LRV to: (i) exhaustively set out all the 'facts and circumstances described in the charges' for each proposed recharacterisation and (ii) indicate any such fact or circumstance in the original wording of those allegations.<sup>8</sup> These additional details were to be submitted on 17 September 2013, and the defence teams were to present any further objections by 24 September 2013.<sup>9</sup>
9. On 9 September 2013, a status conference was held wherein the Presiding Judge, noting that the present Applications remained pending, announced that '[t]he pending decision may decline to give the notice at all, or it may give notice in whole as requested, or in part. In the meantime, it will be prudent for parties and participants to anticipate any of those possibilities in their conduct of litigation hereon going forward, including in their opening statements'.<sup>10</sup>

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<sup>5</sup> Joint Defence Response to Submissions of Victims' Representative on Regulation 55 and Article 25(3), 25 July 2012, ICC-01/09-01/11-444.

<sup>6</sup> Prosecution's Second Submission on the Conduct of Proceedings, 12 August 2013, ICC-01/09-01/11-848.

<sup>7</sup> Transcript of Hearing, 19 August 2013, ICC-01/09-01/11-T-24-CONF-ENG.

<sup>8</sup> Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation, 5 September 2013, ICC-01/09-01/11-907.

<sup>9</sup> ICC-01/09-01/11-907, page 6.

<sup>10</sup> Transcript of Hearing, 9 September 2013, ICC-01/09-01/11-T-26-Red-ENG, page 29, lines 13-17.

10. On 17 September 2013, the Prosecution filed its submission as directed by the Chamber in its 5 September 2013 order (the 'Prosecution Additional Submission').<sup>11</sup> The LRV did not submit any additional details.
11. On 24 September 2013, the Ruto Defence filed additional submissions on the Prosecution Application (the 'Ruto Defence Additional Submission').<sup>12</sup> The Sang Defence did not file any further response.
12. On 26 September 2013, the Prosecution sought leave to reply to the Ruto Defence Additional Submission, wishing to make a further submission regarding: (i) whether the Ruto Defence exceeded the Chamber's 5 September 2013 order by not confining the Ruto Defence Additional Submission only to the information provided in the Prosecution Additional Submission and, (ii) in the alternative, to reply to the new arguments raised in the Ruto Defence Additional Submission.<sup>13</sup>

## II. Analysis and conclusions

### 1. *The Ruto Defence Additional Submission and the Prosecution request for leave to reply*

13. As two preliminary matters, the Chamber will briefly consider whether to allow the Ruto Defence Additional Submission and to grant the Prosecution leave to reply.<sup>14</sup>
14. The Chamber recalls that, in its order of 5 September 2013, it granted 'the Defence until 24 September 2013 to raise reasoned objections, if any, following receipt of the additional details provided by the Prosecution or LRV'.<sup>15</sup> The plain language

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<sup>11</sup> Prosecution Filing in Compliance with the Chamber's 'Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation', 17 September 2013, ICC-01/09-01/11-943 (with one annex).

<sup>12</sup> Defence Response to Prosecution Filing in Compliance with the Chamber's 'Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation', 24 September 2013, ICC-01/09-01/11-985.

<sup>13</sup> Prosecution's request for to reply to Defence filing ICC-01/09-01/11-985, 26 September 2013, ICC-01/09-01/11-990-Conf, paras 12-13.

<sup>14</sup> Pursuant to Regulation 24(5) of the Regulations: 'Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations'.

<sup>15</sup> ICC-01/09-01/11-907, page 6.

of the Chamber's order did not limit the scope of the Ruto Defence Additional Submission to the information contained in the Prosecution Additional Submission, and the Chamber sees no reason not to consider the Ruto Defence Additional Submission in full.

15. As to the Prosecution's request for leave to reply, the Chamber considers that the Ruto Defence Additional Submission raises arguments which are already addressed by the Prosecution, to one degree or another, in its previous submissions. The Chamber does not consider that granting leave to reply would be of assistance in the present case and therefore rejects this request by the Prosecution.

2. *The scope of the Chamber's inquiry and the applicable law*

16. The Chamber notes that the parties' submissions regarding giving notice under Regulation 55(2) of the Regulations also focus on the interpretation to be given to Article 25(3) of the Statute. The Chamber's decision solely relates to the Regulation 55(2) portions of these submissions. No decision is made at this time as regards the interpretation of Article 25(3) of the Statute. Any decision in that regard will be considered as part of the final judgment in the case.

17. Regulation 55 of the Regulations provides (emphasis added):

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterization 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. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

18. It is to be emphasised at the outset that the present issue before the Chamber is not a question of *actual* legal recharacterisation of any facts under Regulation 55(1) of the Regulations. Rather, the issue is whether *notice of the possibility* of such a recharacterisation is given under Regulation 55(2) of the Regulations.

19. From the language of the provision, a Regulation 55 inquiry may comprise three stages:

- i. The Chamber decides whether it appears to it that the legal characterisation of facts may be subject to change ('Regulation 55(2) Assessment') and the Chamber gives notice to the participants of such a possibility ('Regulation 55(2) Notice');<sup>16</sup>
- ii. Having heard the evidence in the case, the Chamber shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions as to the propriety of the actual legal recharacterisation;<sup>17</sup> and
- iii. In its decision under Article 74 of the Statute, the Chamber may decide, pursuant to Regulation 55(1) of the Regulations, whether to make the proposed recharacterisation for which notice was given at the first stage.<sup>18</sup>

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<sup>16</sup> Regulation 55(2) of the Regulations.

<sup>17</sup> Regulation 55(2) of the Regulations.

<sup>18</sup> Regulation 55(1) of the Regulations.

Any such recharacterisation must not exceed the facts and circumstances described in the charges and any amendments to the charges.<sup>19</sup>

20. The Appeals Chamber has emphasised that making the proposed recharacterisation must not render the trial unfair.<sup>20</sup> As such, when making a Regulation 55(2) Assessment, the Chamber must remain mindful of the rights of the accused. In particular, the Chamber must ensure that the accused: (i) receives the specific facts within the ‘facts and circumstances described in the charges’ which may be relied upon<sup>21</sup> and (ii) the accused is given adequate time and facilities for the effective preparation of his or her defence.<sup>22</sup>

### 3. *The proper time to make a Regulation 55(2) Assessment*

21. The Prosecution requested that the Chamber give Regulation 55(2) Notice for its proposed recharacterisations ‘on or before the first day of trial’.<sup>23</sup> The Prosecution argued that notice should be given as soon as feasible to protect the rights of the parties and that it is ‘wholly illogical to delay notice’.<sup>24</sup> The Prosecution submitted that giving early notice will ensure the trial is fair because it will enable the parties to present their evidence and examine witnesses with all possibilities in mind.<sup>25</sup>

22. The LRV submitted that ‘[i]t is accepted that consideration as to whether the power should be exercised should however be undertaken as early as possible,

<sup>19</sup> Article 74(2) of the Statute; Regulation 55(1) of the Regulations.

<sup>20</sup> Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, 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, OA15, OA16 (‘Lubanga OA15-16 Judgment’), para. 85; Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, 27 March 2013, ICC-01/04-01/07-3363, OA13 (‘Katanga OA13 Judgment’), para. 95.

<sup>21</sup> Katanga OA13 Judgment, ICC-01/04-01/07-3363, paras 100-01. *See also* Article 67(1)(a) of the Statute.

<sup>22</sup> Regulation 55(3)(a) of the Regulations; Article 67(1)(b) of the Statute.

<sup>23</sup> Prosecution Application, ICC-01/09-01/11-433, para. 24.

<sup>24</sup> Prosecution Application, ICC-01/09-01/11-433, para. 36.

<sup>25</sup> Prosecution Application, ICC-01/09-01/11-433, para. 41.



and that in cases where it is possible to consider the matter prior to commencement of the trial, it is desirable for the Chamber to do so. This would serve the purpose of regulation 55 (2) and (3), which is to ensure that the parties and participants can prepare adequately'.<sup>26</sup>

23. The Defence argued that '[t]hough certainly early notice of such a modification is necessary in order for the defence to know and challenge the case against it, notice at this stage would be premature and too unspecific to be useful'.<sup>27</sup> The Ruto Defence argued that there is no evidential basis for why the Prosecution seeks relief under Regulation 55(2) of the Regulations at this time and that the Prosecution Application 'has no legal purpose'.<sup>28</sup> The Ruto Defence also submitted that '[t]he giving of notice pursuant to Regulation 55 is an important and significant event' and that such notice should be given at a time when the Chamber can see 'the lay of the land' and hold 'an informed view' to justify a specific recharacterisation.<sup>29</sup>

24. The Chamber emphasises at the outset that notice of any legal recharacterisation depends on whether and when it *appears to the Chamber* that legal recharacterisation *may be possible* in this case. The Chamber considers that the words 'appears to the Chamber' in Regulation 55(2) of the Regulations give the Chamber a discretionary power when making a Regulation 55(2) Assessment. Thus, the Chamber has the authority under Regulation 55(2) of the Regulations to decline to consider recharacterisations proposed by the parties and participants at a given time during the trial if giving Regulation 55(2) Notice would result in unfairness. The regulation gives no guidance as to the type of information that should trigger the appearance of possible recharacterisation in the view of the

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<sup>26</sup> LRV Application, ICC-01/09-01/11-436, para. 35.

<sup>27</sup> ICC-01/09-01/11-444, para. 4.

<sup>28</sup> ICC-01/09-01/11-T-24-CONF-ENG, p. 8, lines 12-14.

<sup>29</sup> Ruto Defence Additional Submission, ICC-01/09-01/11-985, paras 16, 24.

Chamber. Evidence led before the Chamber in the course of the trial can certainly trigger the apparent possibility of legal recharacterisation. However, for an application for the notice of a possibility of a legal recharacterisation, facts and circumstances pleaded in the charging document can also sufficiently inform the Chamber as to the apparent possibility of an eventual change in legal characterisation.

25. The Chamber is mindful of the text in Regulation 55(2) of the Regulations, saying: 'and having heard the evidence, [the Chamber] shall, at an appropriate stage of the proceedings, give the participants an opportunity to make oral or written submissions'. In the Chamber's view, however, that text need not be taken as informing when the notice of possibility of recharacterisation may be given. The better view is that the text speaks to the need to hear submissions from the parties, after evidence has been led in the case, before the actual change in legal characterisation. The Chamber is thus not persuaded by the Defence submission that notice of the possibility of recharacterisation may not be given unless evidence has been heard in the case.
26. Other Defence arguments related to the timeliness of the Applications are also unpersuasive because they confuse the difference between making a legal recharacterisation under Regulation 55(1) of the Regulations and giving notice of a proposed recharacterisation under Regulation 55(2) of the Regulations. The Defence submitted that '[i]f the [P]rosecution is apprehensive as to the appropriateness of the present characterisation then it should make a decision now and apply, on clear grounds, for recharacterisation. It should not seek to have the Chamber refer, in a general manner, to the Chamber's capacity to recharacterise'.<sup>30</sup> Similarly, the Ruto Defence argued at the 19 August 2013 status

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<sup>30</sup> ICC-01/09-01/11-442, para. 32.

conference that it is 'not on notice until the Court decides to recharacterise the facts'.<sup>31</sup> These arguments cannot be sustained because it is premature to speak of actually making any of the proposed recharacterisations. Legal recharacterisations can only be made in the trial judgment; the only relief which the Chamber could grant now would be to give Regulation 55(2) Notice, which is precisely the relief sought by the Prosecution and LRV.

27. Although a Regulation 55(2) Assessment, for purposes of notice of a possibility of recharacterisation, may be done at any time during the trial, the Chamber considers that it is best to make this assessment and issue the notice as early as is possible, particularly in circumstances in which the Prosecution has made an early application for this notice on the basis of the facts and circumstances pleaded in the charging document. This is consistent with the guidance of the Appeals Chamber, which stated that '[...] it is preferable that notice under regulation 55(2) of the Regulations of the Court should always be given as early as possible [...]'.<sup>32</sup> Despite any additional preparation time which comes from giving Regulation 55(2) Notice, waiting to give such notice increases the chances of prejudice to the Defence. The remediation of this prejudice may involve pressures either to reopen the case in certain respects, recall witnesses that have already testified or, out of respect for the rights of the accused, to forego legal recharacterisation that might otherwise have been in the interests of justice in the case. Such pressures are highly undesirable, and if earlier notice is given then they are avoidable.

28. The Chamber acknowledges that Regulation 55(2) Notice could have been given at an even earlier point during the trial proceedings than now. However, this is the first extended break in the proceedings since the Prosecution Additional

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<sup>31</sup> ICC-01/09-01/11-T-24-CONF-ENG, p. 8, lines 2-3.

<sup>32</sup> Katanga OA13 Judgment, ICC-01/04-01/07-3363, para. 24.

Submission was filed and the Chamber required additional time to deliberate on the legal and factual complexity raised by the relief sought.

29. For these reasons, the Chamber finds that: (i) it is not premature to examine the Prosecution and LRV Applications at this time and (ii) any Regulation 55(2) Assessment should be made as early as is possible in order to best ensure a fair and expeditious trial.

4. *The Chamber's Regulation 55(2) Assessment for the proposed notice of legal recharacterisations*

30. The Chamber recalls that, in the confirmation decision in this case, a Pre-Trial Chamber II majority confirmed charges against Mr Ruto on an Article 25(3)(a) 'indirect co-perpetration' theory for the crimes against humanity of: murder (Article 7(1)(a) of the Statute), deportation or forcible transfer of population (Article 7(1)(d) of the Statute) and persecution (Article 7(1)(h) of the Statute).<sup>33</sup> The Pre Trial Chamber confirmed the charges against Mr Sang for the same crimes pursuant to Article 25(3)(d) of the Statute.<sup>34</sup>

31. In their respective applications, the Prosecution and LRV propose an array of legal recharacterisations beyond those ruled upon by the Pre-Trial Chamber. The Chamber will now turn to these proposed possible recharacterisations.

*i. Prosecution Application*

32. The Prosecution submitted that, on the analysis done by the Pre-Trial Chamber, 'there are several potential ways to characterize the individual criminal responsibility of Ruto in this particular case'.<sup>35</sup> The Prosecution argued that the

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<sup>33</sup> Pre-Trial Chamber II, 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 ('Confirmation Decision'), para. 349.

<sup>34</sup> Confirmation Decision, ICC-01/09-01/11-373, para. 367.

<sup>35</sup> Prosecution Application, ICC-01/09-01/11-433, para. 35.

facts 'demonstrate' that, in addition to 'indirect co-perpetration', Article 25(3)(b)<sup>36</sup>, (c)<sup>37</sup> and (d)<sup>38</sup> may equally be applicable.<sup>39</sup> The Prosecution emphasised that: (i) it is not suggesting any alteration of the document containing the charges (now filed as the 'Updated DCC'),<sup>40</sup> but a procedure under Regulation 55 of the Regulations which is separate and apart from the pre-trial charging and confirmation process,<sup>41</sup> (ii) even if giving Regulation 55(2) Notice could somehow be equated with alternative charging, nothing in the Court's legal framework prevents the consideration of alternative modes of liability<sup>42</sup> and (iii) giving notice of a possibility of a recharacterisation at this stage would not prejudice the Defence, in particular because there is an overlap between the requirements of Article 25(3)(a) and those of Article 25(3)(b)-(d).<sup>43</sup> The Prosecution requested that the Chamber give Regulation 55(2) Notice that there is a possibility that the form of individual criminal responsibility charged may be subject to legal re-characterisation under Article 25(3)(b), (c) or (d), and to give such notice before or on the first day of trial.<sup>44</sup>

33. In Annex A of the Prosecution Additional Submission, filed further to the Chamber's direction, the Prosecution sets out the facts and circumstances described in the Updated DCC which can be relied upon in support of its

<sup>36</sup> This provision covers liability for a person who '[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted'.

<sup>37</sup> This provision covers liability for a person who '[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.

<sup>38</sup> This provision covers liability for a person who '[i]n any other way, contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) [b]e made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) [b]e made in the knowledge of the intention of the group to commit the crime'.

<sup>39</sup> Prosecution Application, ICC-01/09-01/11-433, para. 35.

<sup>40</sup> Corrigendum to Annex A to the Prosecution's Submission of Updated Document Containing the Charges pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522), 1 July 2013, ICC-01/09-01/11-533-AnxA-Corr.

<sup>41</sup> Prosecution Application, ICC-01/09-01/11-433, paras 38-39.

<sup>42</sup> Prosecution Application, ICC-01/09-01/11-433, para. 44.

<sup>43</sup> Prosecution Application, ICC-01/09-01/11-433, para. 46.

<sup>44</sup> Prosecution Application, ICC-01/09-01/11-433, para. 49.

proposed recharacterisations.<sup>45</sup> Using only language from the Updated DCC, the Prosecution aims to show how the facts and circumstances described in the charges can correspond to Article 25(3)(b) ordering/soliciting,<sup>46</sup> Article 25(3)(b) inducing,<sup>47</sup> Article 25(3)(c)<sup>48</sup> and Article 25(3)(d)<sup>49</sup> of the Statute.

34. The Ruto Defence responded that the Prosecution's approach to recharacterisation undermines the utility of Regulation 52 of the Regulations, which requires a 'precise form of participation under articles 25 and 28' in the document containing the charges.<sup>50</sup> The Ruto Defence argued that, if the notice sought by the Prosecution were to be granted, the accused would 'effectively be on notice for, and have to defend himself against, all forms of participation under Article 25. This results in inappropriate uncertainty as to the charges and considerably lengthens the trial process [...]'.<sup>51</sup> The Ruto Defence argued that the Prosecution is 'not willing to concede they've got it wrong and that [its charged] mode of liability is doomed',<sup>52</sup> submitting that the Prosecution should have either withdrawn the charges<sup>53</sup> or sought to amend them<sup>54</sup> instead of seeking relief under Regulation 55 of the Regulations. The Ruto Defence argued that giving a general invocation of Regulation 55 of the Regulations 'would not encourage diligent prosecution' and that the Prosecution provided 'no proper basis that the present mode of liability is or might be inadequate'.<sup>55</sup> The Ruto Defence responded that the relief sought by the Prosecution is of such a scale and manner

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<sup>45</sup> Annex A of Prosecution Additional Submission, ICC-01/09-01/11-943-AnxA.

<sup>46</sup> Annex A of Prosecution Additional Submission, ICC-01/09-01/11-943-AnxA, pages 2-4.

<sup>47</sup> Annex A of Prosecution Additional Submission, ICC-01/09-01/11-943-AnxA, pages 4-5.

<sup>48</sup> Annex A of Prosecution Additional Submission, ICC-01/09-01/11-943-AnxA, pages 5-7.

<sup>49</sup> Annex A of Prosecution Additional Submission, ICC-01/09-01/11-943-AnxA, pages 7-13.

<sup>50</sup> ICC-01/09-01/11-442, para. 36.

<sup>51</sup> ICC-01/09-01/11-442, para. 36. *See also* Ruto Defence Additional Submission, ICC-01/09-01/11-985, paras 17-19 (arguing that such general and unfocused notice cannot be fair to the accused).

<sup>52</sup> ICC-01/09-01/11-T-24-CONF-ENG, p. 9, lines 20-21.

<sup>53</sup> ICC-01/09-01/11-T-24-CONF-ENG, p. 6, lines 11-16.

<sup>54</sup> ICC-01/09-01/11-T-24-CONF-ENG, p. 9, lines 23-25.

<sup>55</sup> Ruto Defence Additional Submission, ICC-01/09-01/11-985, para. 22.

that '[t]he accused is provided no more benefit by such a notice than he possesses by his knowledge of the existence of Regulation 55'.<sup>56</sup>

35. The Ruto Defence ultimately submitted that the Prosecution's Application should be rejected in full.<sup>57</sup>

36. The Chamber's Regulation 55(2) Assessment for the Prosecution's proposed recharacterisations is based on the following considerations.

37. First, the Chamber notes that Annex A of the Prosecution Additional Submission clarifies that it is not the intention of the Prosecution to seek legal recharacterisation in any way that exceeds the facts and circumstances described in the charges. That notwithstanding, if Regulation 55(2) Notice is given the Defence is still entitled to later argue, *inter alia*, that the proposed recharacterisations exceed the scope of the charges and that they are unduly cumulative. The Defence would be given an opportunity to make full submissions on these points, as is required by Regulation 55(2) of the Regulations. These arguments would be given full consideration when the Chamber considers its final decision on whether to legally recharacterise the facts.

38. The Ruto Defence does not object to the sufficiency of what Annex A of the Prosecution Additional Submission aims to show, submitting that '[t]he Defence do not comment at this stage as to the facts and circumstances itemised in the [Prosecution Additional Submission] and the further details provided therein or their adequacy'.<sup>58</sup> Without prejudice to the Defence being able to make further submissions at a later time as to whether making the proposed recharacterisations would exceed the scope of the charges, the Prosecution has substantiated to the

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<sup>56</sup> Ruto Defence Additional Submission, ICC-01/09-01/11-985, para. 18.

<sup>57</sup> ICC-01/09-01/11-442, para. 38.

<sup>58</sup> Ruto Defence Additional Submission, ICC-01/09-01/11-985, para. 23.

Chamber's satisfaction for present purposes how the proposed recharacterisations fall within the scope of the existing charges.

39. Second, the Chamber emphasises the difference between amending the charges and giving Regulation 55(2) Notice. The Chamber notes that Pre-Trial Chamber II dismissed the Prosecution's attempt to bring alternative modes of liability in this case<sup>59</sup> and that the Prosecution did not seek an amendment of the charges for any of its proposed legal recharacterisations pursuant to Article 61(9) of the Statute.<sup>60</sup> However, the Chamber does not consider that seeking an amendment of the charges is necessarily a prerequisite to or a substitute for seeking Regulation 55(2) Notice. As stated by the Appeals Chamber: 'article 61 (9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure'.<sup>61</sup> The Chamber therefore considers that its authority to give the Regulation 55(2) Notice requested is consistent with Pre-Trial Chamber II's authority which it exercised when confirming the charges in this case.

40. Third, the Chamber is not persuaded that the Prosecution is making a 'general invocation' of Regulation 55 of the Regulations. The Prosecution is seeking a broader invocation of Regulation 55 of the Regulations when compared to the

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<sup>59</sup> Pre-Trial Chamber II, 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. As stated by the Pre-Trial Chamber (emphasis added):

Although the Prosecutor may generally charge in the alternative, he should be consistent throughout his Application about the actual mode(s) of liability that he intends to present to the Chamber. Moreover, the possibility for the Prosecutor to charge in the alternative does not necessarily mean that the Chamber has to respond in the same manner. *In particular, the Chamber is not persuaded that it is best practice to make simultaneous findings on modes of liability presented in the alternative.* A person cannot be deemed concurrently as a principal and an accessory to the same crime. Thus, it is the Chamber's view that an initial decision has to be made on the basis of the material provided, as to whether there are reasonable grounds to believe that Ruto, Kosgey and Sang bear criminal responsibility for the crimes against humanity that occurred in the specific locations in the Republic of Kenya, as discussed in section II above, either as co-perpetrators, indirect co-perpetrators, or any other form of liability presented or that the Chamber finds appropriate.

<sup>60</sup> Article 61(9) of the Statute provides, in relevant part: '[a]fter the charges are confirmed and before the trial has begun, the Prosecutor may, with permission of the Pre-Trial Chamber and after notice to the accused, amend the charges'.

<sup>61</sup> Lubanga OA15-16 Judgment, ICC-01/04-01/06-2205, para. 77.



way the regulation has been applied in other cases to date. However, Regulation 55 itself imposes no limitations on the number of potential recharacterisations which may appear to the Chamber, nor does it require the Prosecution to establish the insufficiency of existing legal characterisations before Regulation 55(2) Notice may be given. As the Appeals Chamber has noted, in response to an argument that the application of Regulation 55 of the Regulations be limited to 'lesser included offences': 'Regulation 55 does not stipulate, beyond what is contained in subregulation 1, what changes in the legal characterisation may be permissible'.<sup>62</sup>

41. The Chamber agrees that a general invocation which does no more than note the existence of Regulation 55 of the Regulations is insufficient to inform the accused of a potential change in legal characterisation.<sup>63</sup> However, to describe the Prosecution Application in this way is to mischaracterise it. The Prosecution identifies specific proposed recharacterisations and requests the Chamber to give notice formally through the application of Regulation 55(2) of the Regulations. The Chamber considers that the relief sought is sufficiently concrete that it can be granted in full conformity with the rights of the accused.

42. Fourth, the Chamber does not consider that giving notice of the Prosecution's proposed recharacterisations would unduly lengthen the trial process. Rejecting the relief sought now and leaving open the possibility of giving Regulation 55(2) Notice in the future may not make the trial meaningfully shorter than making a clear Regulation 55(2) Assessment now for the proposed recharacterisations. If Regulation 55(2) Notice were to be given at a later stage of the proceedings, the potential need to recall witnesses or conduct further investigation could actually significantly extend the length of the trial.

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<sup>62</sup> Lubanga OA15-16 Judgment, ICC-01/04-01/06-2205, paras 99-100.

<sup>63</sup> This conclusion is consistent with the jurisprudence of the European Court of Human Rights. European Court of Human Rights, *I.H. and Others v. Austria*, Judgment, 20 April 2006, No. 42780/98, paras 32-34.

43. Fifth, the Chamber notes the concerns of the Ruto Defence that giving the requested Regulation 55(2) Notice would cause unfairness to the accused, but the Chamber does not consider that giving such notice in the present case would cause unfairness. The Chamber emphasises that: (i) it is an early point in the trial proceedings, allowing for the Ruto Defence to be given an adequate opportunity to adapt its strategy in view of a Regulation 55(2) Notice decision, (ii) the Prosecution Additional Submission was ordered by the Chamber to ensure that the Ruto Defence is informed in detail of the facts and circumstances which are being relied upon for the proposed recharacterisations, (iii) the Chamber made an express indication on the day before the commencement of the trial that the Ruto Defence was to anticipate that the requested Regulation 55(2) Notice may be given in their conduct of litigation going forward and (iv) the Ruto Defence is free to request that safeguards be adopted as a consequence of giving Regulation 55(2) Notice, including, but not limited to, those contained in Regulation 55(2)-(3) of the Regulations.
44. For these reasons, the Chamber, pursuant to Regulation 55(2) of the Regulations, finds that, with respect to Mr Ruto, it appears to the Chamber that there is a possibility that legal characterisation of the facts set out in Annex A of the present decision<sup>64</sup> may be subject to change to accord with liability under Article 25(3)(b), (c) or (d) of the Statute. In this respect, the relief sought in the Prosecution's Application is granted.
45. As a final point, on 9 July 2012, the Chamber directed the Prosecution to file a pre-trial brief 'explaining its case with reference to the evidence it intends to rely on at trial'.<sup>65</sup> Although the trial has now commenced, the Chamber considers it of assistance to have an addendum to this brief prepared wherein the Prosecution

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<sup>64</sup> This annex is a reproduction of Annex A of the Prosecution Additional Submission (ICC-01/09-01/11-943-AnxA).

<sup>65</sup> Annex B of Prosecution's provision of updated Pre-Trial Brief, ICC-01/09-01/11-625-AnxB-Red

explains its case, with accompanying evidence, under each of the proposed legal characterisations for which Regulation 55(2) Notice has now been given. The Prosecution is directed to file this addendum within 30 days of notification.

*ii. LRV Application*

46. The LRV argued that other modes of liability may apply to the conduct of both accused, drawing particular attention to liability under Article 25(3)(c) of the Statute.<sup>66</sup> In addition, the LRV argued that: (i) burning/looting, property destruction and infliction of physical injury may be recharacterised as an underlying act of persecution pursuant to Article 7(1)(h) of the Statute and (ii) burning/looting, property destruction and infliction of physical injury may be recharacterised as other inhumane acts pursuant to Article 7(1)(k) of the Statute.<sup>67</sup>
47. The Defence responded to the LRV Application by arguing that it is premature, runs contrary to the purpose of Regulation 55 of the Regulations and that it is not legally tenable to recharacterise the facts as the LRV proposes.<sup>68</sup> The Ruto Defence also argued that, by not filing any additional details as directed by the Chamber in its order of 5 September 2013, the Chamber should now treat the LRV Application as abandoned.<sup>69</sup>
48. The Chamber recalls that, in its order of 5 September 2013 it considered that the ‘Prosecution and LRV need to exhaustively indicate the facts and circumstances described in the charges that would support the proposed recharacterisations’ and that ‘[s]uch a showing allows for the Defence to be able to make full submissions on whether the facts and circumstances described in the charges are exceeded and, if notice under Regulation 55(2) of the Regulations is given, to be informed in detail of the factual allegations to which any potential change in the legal

<sup>66</sup> LRV Application, ICC-01/09-01/11-436, paras 52-54.

<sup>67</sup> LRV Application, ICC-01/09-01/11-436, para. 47.

<sup>68</sup> ICC-01/09-01/11-444, para. 2.

<sup>69</sup> Ruto Defence Additional Submission, ICC-01/09-01/11-985, para. 8.

characterisation of the facts relate'.<sup>70</sup> The LRV was then directed to exhaustively set out the facts and circumstances described for each proposed recharacterisation.<sup>71</sup> Despite this direction, the LRV did not file the information by the deadline provided by the Chamber.

49. As the Chamber was never given the information which it considered necessary for evaluating the LRV's relief sought, the Chamber rejects the relief sought in the LRV Application as being insufficiently substantiated.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Prosecution's request for leave to reply to the Ruto Defence Additional Submission;

**PROVIDES NOTICE**, pursuant to Regulation 55(2) of the Regulations, that, with respect to Mr Ruto, it appears to the Chamber that there is a possibility that the legal characterisation of the facts set out in Annex A of the present decision may be subject to change to accord with Article 25(3)(b), (c) or (d) of the Statute;

**REJECTS** the relief sought in the LRV Application;

**DIRECTS** the Prosecution to provide an addendum to its pre-trial brief in accordance with paragraph 45 of the present decision; and

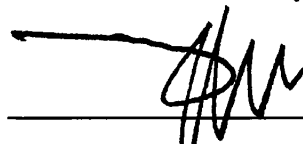
**DECIDES**, in view of the upcoming winter recess and pursuant to Regulation 35(2) of the Regulations, that the time limit for leave to appeal the present decision shall run as of 7 January 2014.

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<sup>70</sup> ICC-01/09-01/11-907, para. 10.

<sup>71</sup> ICC-01/09-01/11-907, page 6.

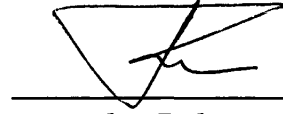
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**Judge Chile Ebo-Osuji, Presiding Judge**

  
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**Judge Olga Herrera Carbuccia**

  
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**Judge Robert Fremr**

Dated 12 December 2013

At The Hague, The Netherlands