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TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

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

**Public
With Confidential Annex A**

**Prosecution's Request for notice under regulation 55(2) of possibility of variation
with respect to individual criminal responsibility of Mr Joshua Arap Sang**

Source: 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 requests Trial Chamber V(A)¹ to provide notice pursuant to regulation 55(2) of the Regulations of the Court² with respect to Mr Joshua Arap Sang.³ The Chamber is requested to notify the Parties and participants that the legal characterisation of the facts that were confirmed by the Pre-Trial Chamber,⁴ as contained in the Updated Document Containing the Charges,⁵ may be subject to change to include individual criminal responsibility under articles 25(3)(b) and (c) of the Rome Statute for all charges against Mr Sang.

2. The Appeals Chamber has confirmed that “a principle purpose of regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute.”⁶ It is clear from the factual record now before the Chamber that there are other ways to characterise the Accused Mr Sang’s individual criminal responsibility under article 25(3) of the Statute besides article 25(3)(d). Although the case is already well advanced, notice should nevertheless be given by the Chamber as this can be done “at any time during the trial.”⁷ The Appeals Chamber has found that “the participants must be given an opportunity to make submissions at an appropriate stage of the proceedings, following notice of a possible re-characterisation, but this does not limit the Trial Chamber’s power to give such notice ‘at any time during the trial.’”⁸

Procedural history

3. In its article 58 Summons Application, the Prosecution alleged that Mr Sang bore individual criminal responsibility for crimes committed during the post-election

¹ “Chamber”.

² Unless otherwise stated, all further references in this filing to “regulations” refer to the Regulations of the Court.

³ “Request”.

⁴ “PTC”.

⁵ “UDCC”, ICC-01/09-01/11-533-AnxA-Corr, as further elucidated in the Pre-Trial Brief (“PTB”), ICC-01/09-01/11-625-Conf-AnxD.

⁶ ICC-01/04-01/06-2205, para. 77; ICC-01/04-01/07-3363, paras. 22, 104.

⁷ Regulation 55(2).

⁸ ICC-01/04-01/07-3363, para. 18.

violence period (“PEV”) pursuant to article 25(3)(a) or alternatively 25(3)(d).⁹ The PTC issued a summons for Mr Sang on the basis that there were “reasonable grounds to believe that his role is *best characterised* under article 25(3)(d) of the Statute.”¹⁰ The Pre-Trial Chamber’s wording suggests that it did not exclude the possibility that other modes of liability might also be supported by the facts alleged.

4. In its Document Containing the Charges (“DCC”) the Prosecution charged Mr Sang with criminal responsibility pursuant to article 25(3)(d) only. The DCC alleged crimes carried out by a group of persons acting with a common purpose (the “Network”) and that Mr Sang contributed to the commission of those crimes by the Network’s direct perpetrators.¹¹
5. The PTC agreed that there were substantial grounds to believe that Mr Sang is criminally responsible under article 25(3)(d)(i) of the Statute.¹² The PTC was not required to, and thus did not, make any finding on possible criminal responsibility under other modes of liability provided for in article 25(3).
6. Pursuant to the findings of the PTC, the Prosecution alleged that Mr Sang is criminally responsible under article 25(3)(d) in its UDCC¹³ and its PTB.¹⁴
7. On 12 December 2013, following an application by the Prosecution, the Chamber gave notice to the Parties that the legal characterisation of the facts in respect of Mr Ruto may be subject to change to include criminal responsibility under articles 25(3)(b), (c) or (d), in addition to 25(3)(a), for all the charges against him.¹⁵

⁹ ICC-01/09-30-Red2, pp. 16-17.

¹⁰ ICC-01/09-01/11-1, para. 38 (emphasis added).

¹¹ ICC-01/09-01/11-261-AnxA, para. 124.

¹² ICC-01/09-01/11-373, paras. 366-367.

¹³ ICC-01/09-01/11-533-AnxA-Corr, para. 121. Trial Chamber V confirmed that the presentation of the mode of liability under article 25(3)(d) in the UDCC did not exceed the scope of the charges as confirmed by the Pre-Trial Chamber, ICC-01/09-01/11-522, para. 22.

¹⁴ ICC-01/09-01/11-625-Conf-AnxD, para. 139.

¹⁵ ICC-01/09-01/11-1122.

Submissions

Applicable law

8. This Chamber has interpreted the re-characterisation process envisioned by regulation 55 to comprise three stages:
- i. “The Chamber decides whether it appears to it that the legal characterisation of facts may be subject to change [...] and gives notice to the participants of such possibility [...];
 - 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; and
 - iii. In its decision under article 74 of the Statute, the Chamber may decide, pursuant to regulation 55(1), whether to make the proposed recharacterisation for which notice was given at the first stage. Any such recharacterisation must not exceed the facts and circumstances described in the charges and any amendments to the charges.”¹⁶
9. At this stage the Prosecution only requests the Chamber to provide *notice* under regulation 55(2) that there is a *possibility* of a re-characterisation of the mode of liability with respect to Mr Sang.¹⁷ It does not request actual legal re-characterisation,¹⁸ nor any decision regarding the interpretation of article 25(3).¹⁹ Although the Prosecution summarises below its understanding of the requirements of the relevant provisions, it does so for the limited purposes of establishing the possibility of a re-characterisation. The Prosecution will present

¹⁶ ICC-01/09-01/11-1122, para. 19 (footnotes omitted).

¹⁷ *I.e.* step one of the process outlined by the Chamber.

¹⁸ ICC-01/09-01/11-1122, para. 18.

¹⁹ The Trial Chamber’s decision regarding the interpretation article 25(3) should be considered in the final judgment as indicated in ICC-01/09-01/11-1122, para. 16.

full and reasoned arguments in support of its position if and when the Chamber calls for submissions under regulation 55(2).

Article 25(3)(b)

10. Article 25(3)(b) of the Statute provides that a person shall be criminally responsible and liable for punishment for a crime within the Court's jurisdiction if that person orders, solicits or induces the commission of such crime, which in fact occurs or is attempted. Based on the plain language of article 25(3)(b), the Accused's conduct must contribute to the commission or attempted commission of the crime. PTC I found in the *Mudacumura* case that under article 25(3)(b) the culpable conduct of the suspect must have a "direct" effect on the commission or attempted commission of the crime,²⁰ but did not qualify the degree or level of contribution.²¹ Those receiving the order, or who are solicited or induced, must subsequently proceed to commit, or attempt to commit, the crimes.

11. Article 25(3)(b) does not prescribe any particular *mens rea* for ordering, soliciting and inducing, thus the general requirements under article 30 of the Statute apply. Accordingly, the Accused must be shown to have intentionally engaged in the criminal conduct (*i.e.* the act(s) of solicitation or inducement), either meaning to cause the crime or being aware that the crime would be committed in the ordinary course of events. The Prosecution submits that the Accused must have been aware that, due to the totality of the relevant facts and circumstances, which include but are not limited to his conduct, the crimes would be committed in the ordinary course of events.²²

²⁰ ICC-01/04-01/12-1, para. 63.

²¹ Since the Chamber has stated that it will not rule on the interpretation of the provisions of article 25(3) at the notice stage, the Prosecution will not make detailed submissions as to the nature of the contribution required under article 25(3)(b). Suffice it to say that the Prosecution will argue that all that need be established is the existence of a link or nexus between the act and conduct of the suspect and the commission of a crime. Unless the conduct of a suspect is so trivial that no relation between that conduct and any of the elements of the crime can be established, any contribution to the crime will be sufficient for criminal liability under article 25(3)(b).

²² *Contra*, ICC-01/04-01/12-1, para. 63, dealing with "ordering" under article 25(3)(b), where the PTC II held that "the person is at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation of the order" (emphasis added). The Prosecution submits that, at least with

Article 25(3)(c)

12. Article 25(3)(c) of the Statute provides that a person shall be criminally responsible and liable for punishment for a crime within the Court's jurisdiction if, for the purpose of facilitating the commission of such a crime, the person aids, abets or otherwise assists in its commission or its attempted commission, including by providing the means for its commission. The Prosecution submits that this broad formulation (any form of assistance) implies that the degree of assistance is not qualified. In particular, it is not necessary for the Prosecution to demonstrate that the assistance was essential, substantial or significant,²³ as long as it is proven that the conduct did in fact assist the direct perpetrator(s) in any way in the commission of the crime. Such assistance is not limited to *material* assistance, but includes *moral* assistance or support.²⁴
13. Article 25(3)(c), interpreted in conjunction with article 30, requires some form of intent in addition to knowledge.²⁵ However, the term "purpose" does not relate to the commission of the crime,²⁶ but to the act of facilitation. In other words, the commission of the crime need not be intended, the Accused need only intend or mean that his conduct facilitate the commission of the crime by others.²⁷ The knowledge requirement for aiding and abetting requires proof that the Accused

and

respect to soliciting or inducement, this additional knowledge element of causation is not supported by the plain language of articles 25(3)(b) and 30(2)(b).

²³ At the ICTY, it is necessary to establish that the assistance is "substantial": see e.g. *Prosecutor v. Šainovi et al*, IT-05-87-A, Judgement, 23 January 2014, paras.1624, 1626, 1649, 1677.

²⁴ ICTY, *Prosecutor v. Šainovi et al*, IT-05-87-A, Judgement, 23 January 2014, paras.1626, 1649; ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgement, 10 December 1998, paras.233-235; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 484.

²⁵ ICC-01/04-01/10-465-Red, para.274; ICC-01/04-02-12-4, Concurring Opinion of Judge van den Wyngaert, para. 25.

²⁶ *Contra*, Eser in Cassese et al (eds.) *The Rome Statute of the International Criminal Court: a commentary* (Oxford: OUP, 2002), pp. 801, 901-902; Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge: CUP, 2007), p. 312; Ambos in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2 Ed. (München and Oxford: C.H. Beck and Hart, 2008) ("Triffterer"), p. 757; Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (Oxford: OUP, 2010), p. 435. *But see* Piragoff and Robinson in Triffterer, pp. 855-857.

²⁷ See e.g. USA, *Rosemond v. United States*, No.12-895, slip op, 572 U.S. ____ (2014), Justice Kagan for the Court, p.14; Canada, *R. v. Hibbert*, [1995] 2 S.C.R. 973, para.39; England and Wales, *DPP for Northern Ireland v. Lynch* [1975] AC 653, 678; England and Wales, *R. v. Bryce* [2004] 2 Cr. App. R. 35, 603; England and Wales, *National Coal Board v. Gamble* [1959] 1 QB 11, 23.

was aware that the crime will be committed in the ordinary course of events by the direct perpetrators. This does not require proof of a shared intent.²⁸

Fairness to the Accused

14. The Appeals Chamber has explicitly stated that any re-characterisation pursuant to regulation 55(2) must not render the trial unfair.²⁹ However, at present the Prosecution only seeks to provide notice of possible re-characterisation. In the present circumstances, providing notice pursuant to regulation 55(2) will not affect the fairness of the trial. To the contrary, Mr Sang will benefit from timely notice regarding the possible additional modes of liability that the Chamber may consider, as this could have a bearing on the conduct of his defence (if any). It will also minimise the prospect of any undue delay that might be occasioned by any ultimate decision to re-characterise the charges at a later stage in the proceedings.
15. If and when the Chamber determines that it is appropriate to consider the *actual* re-characterisation of the charges, and having heard the oral or written submissions as to the propriety of such legal re-characterisation, it may consider the question of fairness to the Accused and, if necessary, take any steps to preserve his trial rights under regulation 55(3).

The Request does not exceed the facts and circumstances alleged in the UDCC

16. The Prosecution does not seek to modify the factual basis of the charges against Mr Sang. The Prosecution's case against Mr Sang still rests upon the same factual allegations and charges detailed in the UDCC. As such, any eventual re-characterisation would not exceed the facts and circumstances alleged. Rather, the Prosecution submits: (i) that the factual allegations are broad enough to encompass criminal liability for inducement and/or solicitation under article

²⁸ ICTY, *Prosecutor v. Blagojević & Jokić*, IT-02-60-A, Judgement, 9 May 2007, para.221; ICTY, *Prosecutor v. Simi*, IT-95-9-A, Judgement, 28 November 2006, para.86. *Contra*, ICC-01/04-01/10-465-Red, para. 281.

²⁹ ICC-01/04-01/06-2205, para. 85, ICC-01/04-01/07-3363, para. 95.

25(3)(b) and aiding, abetting and/or otherwise assisting under article 25(3)(c); and
 (ii) that the evidence on record also supports these modes of liability.³⁰

17. More specifically, there is evidence on record upon which the Chamber could hold Mr Sang criminally liable under article 25(3)(b) for having induced and/or solicited the commission of crimes against humanity for which he is charged by:

(i) Fanning the violence through the spread of hate messages explicitly revealing the desire to expel the Kikuyu;³¹

(ii) Broadcasting propaganda against PNU supporters;³²

(iii) Broadcasting preparatory meetings and event locations;³³

(iv) Organising fundraising events that financed the attacks;³⁴ and

(v) Calling on perpetrators to begin the attacks after the Presidential election results were announced;³⁵

(vi) Seeking updates on the perpetrators' progress and broadcasting live calls from perpetrators as attacks were being committed.³⁶

18. There is also evidence on record upon which the Chamber could hold Mr Sang criminally liable under article 25(3)(c) for having aided, abetted and/or otherwise assisted the commission of crimes against humanity for which he is charged. By broadcasting live calls from direct perpetrators as they were attacking the civilians, and seeking updates on their progress, Mr Sang encouraged Network

³⁰ For ease of reference, the Prosecution attaches a chart (Annex A) which sets out the facts and circumstances described in the charges for each proposed re-characterisation and the evidence on record supporting these facts. A similar chart was annexed to the Prosecution's Filing in Compliance with the Chamber's 'Order Regarding Applications for Notice of Possibility of Variation of Legal Characterization' (ICC-01/09-01/11-943-AnxA).

³¹ ICC-01/09-01/11-533-AnxA-Corr, p.38, para. 127.

³² ICC-01/09-01/11-533-AnxA-Corr, p.38, para. 126.

³³ ICC-01/09-01/11-533-AnxA-Corr, p.38, para. 126.

³⁴ ICC-01/09-01/11-533-AnxA-Corr, p.38, para. 126.

³⁵ ICC-01/09-01/11-533-AnxA-Corr, p.38, para. 128.

³⁶ ICC-01/09-01/11-533-AnxA-Corr, p.39, para. 129.

perpetrators to continue carrying out the attack and facilitated the coordination and the redeployment of resources.³⁷

19. The fact that the PTC confirmed Mr Sang's criminal responsibility under article 25(3)(d), which the PTC found to be a residual form of accessorial liability,³⁸ does not preclude this Chamber from giving notice under regulation 55 in relation to the alternative modes of liability set out in articles 25(3)(b) and (c). Regulation 55(2) does not restrict which modes of liability may be substituted for which other modes. In particular with respect to articles 25(3)(b), (c) and (d), all of which define accessory forms of liability, the Prosecution submits that the Chamber is at liberty to substitute any one for any other, provided this does not exceed the facts and circumstances described in the charges.³⁹ Neither the PTC nor this Chamber has previously considered or rejected the possibility of liability under articles 25(3)(b) and/or (c) for Mr Sang.
20. As demonstrated above, some of the factual allegations cited in the UDCC in support of liability under article 25(3)(d) can just as well support liability under articles 25(3)(b) and/or (c). The Chamber could in fact act *proprio motu* in giving regulation 55 notice at any point in the proceedings, once it becomes apparent that a legal re-characterisation of the facts may be warranted.
21. Invoking regulation 55(2) does not mean that the charges against the Accused need to be amended. Indeed, the Prosecution does not seek to do so, and the Appeals Chamber has confirmed that an amendment is not required in these circumstances: "[i]n the view of the Appeals Chamber, article 67(1)(a) of the Statute does not preclude the possibility that there may be a change in the legal characterisation of facts in the course of the trial, and without a formal

³⁷ ICC-01/09-01/11-533-AnxA-Corr, p. 39, para. 129.

³⁸ ICC-01/09-01/11-373, p. 130, para. 354.

³⁹ ICC-01/04-01/07-3436-tENG, paras. 1386-1388.

amendment to the charges.”⁴⁰ As such, the fairness of the trial is not affected as the factual basis of the charges against Mr Sang will not change.

The Request is timely

22. The Appeals Chamber in *Katanga* found that there was no reason, in principle, why notice of a proposed legal re-characterisation could not be given after the Defence had closed its case.⁴¹ The Prosecution brings this Request to enable the Chamber to provide notice much earlier: *i.e. before* the Prosecution has closed its case, and before any “no case to answer” submissions are filed. The Prosecution takes heed of this Chamber’s guidance as to timing of notice pursuant to regulation 55, in that although it “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 possible.”⁴²

23. As regards the trigger to notify a possible re-characterisation under regulation 55(2), the Chamber has stated as follows:

“The regulation gives no guidance as to the type of information that should trigger the appearance of possible recharacterisation in the view of the 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.”⁴³

24. The Prosecution submits that it is appropriate to request notification under regulation 55(2) at this point, since all of the available witnesses it wishes to call have now been heard and the Chamber has rendered its Decision on the

⁴⁰ ICC-01/04-01/06-2205, para. 84. *See also* ICC-01/09-01/11-1122, para. 39.

⁴¹ ICC-01/04-01/07-3363, para. 93.

⁴² ICC-01/09-01/11-1122, para. 27.

⁴³ ICC-01/09-01/11-1122, para. 24.

admission of prior recorded testimonies under rule 68 of the Rules of Procedure and Evidence.⁴⁴ Thus, the Parties and the Chamber now have full knowledge of the Prosecution's evidence. The Prosecution considers that the evidence led to date, together with the facts and circumstances pleaded in the UDCC, provide sufficient basis for notice to be given of a possible re-characterisation.⁴⁵

Notice before the "no case to answer" motions

25. Notice of re-characterisation may be given by the Chamber, either *proprio motu* or at the request of a party, if it appears to the Chamber that the legal characterisation of the facts may be subject to change. The Prosecution anticipates that in the context of the anticipated "no case to answer" litigation,⁴⁶ the legal characterisation of the facts alleged by the Prosecution in its UDCC may come under scrutiny.
26. In its Fifth Decision on the Conduct of Trial Proceedings, the Chamber stated that in conducting its analysis of a "no case to answer" motion, it will only be necessary to satisfy the requisite test in respect of one mode of liability "as pleaded or for which a Regulation 55 of the Regulations notice has been issued by the Chamber."⁴⁷ The Prosecution accordingly requests that the Chamber provide notice of the possibility of a legal re-characterisation under regulation 55(2) with respect to Mr Sang *before* any "no case to answer" motion is filed. Doing so will provide the Defence with adequate notice and opportunity to address all relevant modes of liability that may be established by the evidence.⁴⁸
27. The Appeals Chamber has stated that regulation 55 "exists so as to assist the judges in ensuring that justice is done in individual cases by means of giving notice that the legal characterisation of facts may be subject to change in pursuing its duty to establish the truth and 'to close accountability gaps.' [...]"

⁴⁴ ICC-01/09-01/11-1938-Conf.

⁴⁵ See Annex A.

⁴⁶ The Defence have indicated that they intend to bring such a motion. See T-192, p. 33, lns. 8-13.

⁴⁷ ICC-01/09-01-11-1334, para. 32.

⁴⁸ Provided of course that these do not go beyond the facts and circumstances alleged in the UDCC.

Giving such notice is therefore a neutral judicial act.”⁴⁹ The Prosecution submits that notice should also be given at this point so that the Chamber is not precluded from considering *all* appropriate modes of liability disclosed by the evidence in deciding on any “no case to answer” motion, thus preventing any impunity gap from arising.

28. The Prosecution notes that the Ruto Defence has requested an extension of the time limit for filing any “no case to answer” motion.⁵⁰ Should this be granted, then no urgency attaches to the present request. However, should the Chamber reject the Defence’s requests for leave to appeal the “Decision of Prosecution Request for Admission of Prior Recorded Testimony”,⁵¹ or the Ruto Defence request for the extension of the 14 day time limit, the Prosecution requests that, pursuant to regulation 35, the Chamber shortens the time limit for responses to this request to minimise any delay in the no case to answer litigation.

Relief requested

29. The Prosecution requests that the Chamber give notice to the Parties and participants pursuant to regulation 55(2) of the Regulations of the Court of the possibility that the legal characterisation of the Accused Mr Sang’s individual criminal responsibility for all counts in the UDCC may be subject to change to include liability under articles 25(3)(b) or (c) of the Statute, and that such notice be given prior to the filing of any “no case to answer” submissions.



Fatou Bensouda, Prosecutor

Dated this 8th day of September 2015
At The Hague, the Netherlands

⁴⁹ ICC-01/04-01/07-3363, para. 104. *See also* ICC-01/04-01/06-2205, para. 77.

⁵⁰ ICC-01/09-01-11-1949-Conf.

⁵¹ ICC-01/09-01/11-1940-Conf and ICC-01/09-01/11-1939-Conf respectively.

