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TRIAL CHAMBER V

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public document

**Prosecution's application for notice to be given under Regulation 55(2) with
respect to certain crimes charged**

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Introduction

1. In accordance with the Trial Chamber's 12 June 2012 instruction,¹ the Prosecution hereby submits its application for notice to be given under Regulation 55(2) of the Regulations of the Court that certain crimes may be subject to legal recharacterization by the Chamber.

2. The Prosecution's application is limited to two discrete categories of acts pled in the Document Containing the Charges ("DCC"): forcible circumcision/penile amputation and looting/destruction of property. The Pre-Trial Chamber characterized forcible circumcision and penile amputation as "other inhumane acts" under Article 7(1)(k) of the Statute and property destruction as a predicate act underlying the charge of deportation or forcible transfer under Article 7(1)(d). In the Prosecution's submission, the Pre-Trial Chamber erred in characterizing these acts in this way. Forcible circumcision and penile amputation can and should be characterized as "other forms of sexual violence" under Article 7(1)(g). Looting and the destruction of property can and should be considered as predicate acts underlying the charge of persecution under Article 7(1)(h), as well as the charge of deportation or forcible transfer under Article 7(1)(d). At trial, the Prosecution will request the Trial Chamber to characterize these acts in this manner.

3. Consistent with the approach taken by Trial Chamber I in *Lubanga*, this Chamber should give notice under Regulation 55(2) that it may, in the course of proceedings, engage in a legal characterization of the facts

¹ ICC-01/09-02/11-T-18-ENG CT WT, page 37, lines 15-16. The Chamber set a 30-page limit for this submission. *See* ICC-01/09-02/11-T-18-ENG CT WT, page 37, lines 11-14. It is the Prosecution's understanding that the same 30 page limit applies to this filing. Should the Prosecution have been mistaken in this understanding, it hereby respectfully applies in the alternative for a retroactive extension of the page limit in view of the importance of the issues canvassed. Prosecution humbly submits that the need to provide full and comprehensive arguments to the Chamber justifies the extension.

regarding forcible circumcision, penile amputation, looting and the destruction of property. Such notice will ensure the fairness of proceedings and is consistent with the jurisprudence of the Pre-Trial, Trial and Appeals Chambers of this Court.

Procedural History

Forcible circumcision and penile amputation

4. In the DCC, the Prosecution included factual allegations regarding forcible circumcision and penile amputation, including the following:

- “The attacks also resulted in the . . . forcible circumcision and penile amputation . . . of perceived ODM supporters”;²
- “Nakuru also recorded . . . six cases of male penile amputation and traumatic circumcision”;³
- “At least four cases of traumatic circumcision were reported during the period...” in Naivasha;⁴
- Attackers “went from house to house rounding up and forcibly circumcising Luo men using pangas and broken bottles”;⁵
- “Forty-five cases of sexual violence were reported during this [24 and 27 January 2008] period, including forced male circumcision and rapes. Six people were treated at the Provincial General Hospital of Nakuru for traumatic circumcision and penile amputation”;⁶
- “The attackers . . . forcibly circumcised Luo men. In one incident, a perceived ODM supporter was ambushed by a group of pro-PNU youth who cut off his testicles and placed them in his hands before cutting off his penis and putting it in his mouth”;⁷
- “Four cases of forcible circumcision were reported” in Naivasha;⁸

² ICC-01/09-02/11-280-AnxA, para 24.

³ ICC-01/09-02/11-280-AnxA, para 32.

⁴ ICC-01/09-02/11-280-AnxA, para 33.

⁵ ICC-01/09-02/11-280-AnxA, para 59.

⁶ ICC-01/09-02/11-280-AnxA, para 63.

⁷ ICC-01/09-02/11-280-AnxA, para 69.

⁸ ICC-01/09-02/11-280-AnxA, para 74.

5. The Pre-Trial Chamber made the following factual findings in relation to the Prosecution’s allegations of forcible circumcision and penile amputation:
- “Mungiki attackers carried out acts of forcible circumcision and penile amputation against Luo men as part of the attack on the perceived ODM supporters between 24 and 27 January 2008 in or around Nakuru and on 27 and 28 January 2008 in or around Naivasha”;⁹
 - “[M]any surviving victims endured mutilations and other severe injuries to their bodies”, including “forcible circumcision and penile amputation”;¹⁰
6. In terms of legal characterization, the Chamber classified forcible circumcision and penile amputation as “other inhumane acts” under Article 7(1)(k), and confirmed that charge.¹¹ The Chamber declined to confirm the charge of “other forms of sexual violence” under Article 7(1)(g)¹² holding that the evidence did “not establish the sexual nature of the acts of forcible circumcision and penile amputation” charged.¹³

Looting and destruction of property

7. In the DCC, the Prosecution included the following factual allegations regarding looting and property destruction:
- “The attacks also resulted in the . . . looting and destruction of the properties of perceived ODM supporters”;¹⁴
 - “perceived ODM supporters [were subjected] to systematic acts of . . . looting, burning and destruction of their properties”;¹⁵

⁹ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para 260; *see also* paras 261-263 and evidence cited therein.

¹⁰ ICC-01/09-02/11-382-Red, para 271; *see also* para 272 and evidence cited therein.

¹¹ ICC-01/09-02/11-382-Red, paras 270-277, 280.

¹² ICC-01/09-02/11-382-Red, page 154.

¹³ ICC-01/09-02/11-382-Red, para 266; *see also* para 270.

¹⁴ ICC-01/09-02/11-280-AnxA, para 24.

¹⁵ ICC-01/09-02/11-280-AnxA, para 31.

- In Naivasha, “[t]he direct perpetrators . . . destroyed at least 300 houses and businesses believed to belong to ODM supporters”;¹⁶
- In Naivasha, “[t]he Mungiki members worked with pro-PNU youth burning, destroying and/or looting the property and businesses of perceived ODM supporters”;¹⁷
- In Naivasha, the attackers targeted and vandalized the houses of persons believed to be hosting or housing ODM supporters”;¹⁸
- “[T]he Mungiki and pro-PNU youth targeted a house in Naivasha where a perceived ODM supporter was known to live . . . The attackers poured petrol on the house, set it on fire and completely destroyed it”;¹⁹

8. With respect to these allegations, the Pre-Trial Chamber made the following factual findings:

- “[T]he evidence establishes that the destruction of homes in residential areas [and other factors] amounted to coercion, which caused the attacked residents of Nakuru and Naivasha to leave their homes and seek shelter in IDP camps”;²⁰ “[T]he acts of destruction of property were indeed carried out as alleged by the Prosecutor”;²¹ “[H]omes and businesses belonging to perceived ODM supporters were destroyed by the Mungiki as part of the attack . . . such destruction of property was used, amongst other coercive acts, as a means to ensure forcible transfer or deportation”;²²

9. In terms of legal characterization, the Pre-Trial Chamber classified the destruction of property as a predicate act underlying the charge of deportation or forcible transfer under Article 7(1)(d) and confirmed that

¹⁶ ICC-01/09-02/11-280-AnxA, para 33.

¹⁷ ICC-01/09-02/11-280-AnxA, para 68.

¹⁸ ICC-01/09-02/11-280-AnxA, para 68.

¹⁹ ICC-01/09-02/11-280-AnxA, para 70.

²⁰ ICC-01/09-02/11-382-Red, para 244 and evidence cited therein; *see also* paras 248 & 252 and evidence cited therein.

²¹ ICC-01/09-02/11-382-Red, para 279.

²² ICC-01/09-02/11-382-Red, para 279.

charge.²³ The Chamber also accepted that the evidence underlying the charge of deportation or forcible transfer established that acts of looting of personal properties occurred.²⁴ These acts are an integral part of the Prosecution's charge of deportation or forcible transfer as consistently pleaded by the Prosecution and confirmed by the Chamber.²⁵

10. However, the Pre-Trial Chamber held that the destruction of property did not support the "other inhumane acts" charge because the evidence "fail[ed] to establish that such conduct caused 'serious injury to mental health' within the definition of other inhumane acts pursuant to article 7(l)(k) of the Statute".²⁶

11. Moreover, the Pre-Trial Chamber refused to consider looting and property destruction as predicate acts supporting the persecution charge under Article 7(1)(h).²⁷ In reaching this conclusion, the Chamber referred to an argument raised by the Legal Representative of Victims that the Chamber should "adjourn the hearing and request the Prosecutor to 'consider amending the legal characterization of the facts'" to characterize the "'acts of destruction, looting, and/or theft of property . . . as underlying acts of the crimes against humanity of persecution'".²⁸

12. In declining to consider the evidence of looting and property destruction with respect to the persecution charge, the Chamber reasoned as follows:

[T]he Prosecutor decided to charge as persecution only the alleged destruction of property causing mental suffering of a degree which would qualify it as other inhumane acts within the meaning of

²³ ICC-01/09-02/11-382-Red, para 244 (holding that the destruction of property "amounted to coercion, which caused the attacked residents of Nakuru and Naivasha to leave their homes"); *see also* para 279 (holding that the "destruction of property was used, amongst other coercive acts, as a means to ensure forcible transfer or deportation").

²⁴ ICC-01/09-02/11-382-Red, para 134.

²⁵ ICC-01/09-02/11-382-Red, para 268.

²⁶ ICC-01/09-02/11-382-Red, para 279.

²⁷ ICC-01/09-02/11-382-Red, paras 284-286.

²⁸ ICC-01/09-02/11-382-Red, para 284.

article 7(1)(k) of the Statute, but not destruction of property and looting as such. In the view of the Chamber, in doing so, the Prosecutor exercised his discretion to proffer charges, since he could have chosen otherwise, and could have included destruction of property *per se*, as well as looting, in the charge of persecution. In these circumstances, the Chamber considers that to adjourn the hearing as requested by the Legal Representative of Victims would mean to go beyond the factual ambit of the charges in the present case, and would therefore be tantamount to requesting the Prosecutor to consider adding a new charge.²⁹

Submissions

13. 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 acts of (i) forcible circumcision and penile amputation as “other forms of sexual violence” under Article 7(1)(g); and (ii) looting and property destruction as predicate acts underlying the charge of persecution under Article 7(1)(h), as well as the charge of deportation or forcible transfer under Article 7(1)(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.³⁰
14. To be clear, the Prosecution is not requesting the Chamber to invoke Regulation 55(1) to recharacterize the facts at this stage.³¹ Rather, the Prosecution is suggesting that the Chamber give notice to the participants under Regulation 55(2) that there is a *possibility* that Regulation 55(1) may be

²⁹ ICC-01/09-02/11-382-Red, para 286.

³⁰ 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.

³¹ ICC-01/09-02/11-T-18-ENG CT WT, page 31, lines 20-24.

employed at a later date to recharacterize certain facts.³² It will be for the Chamber to decide at a later stage whether to actually recharacterize the facts and the parties will be able to litigate that issue if and when it arises.³³ For now, it is sufficient for the Chamber to ensure that Regulation 55(2)'s notice requirements are complied with. It is this limited relief that the Prosecution seeks in this application.

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

15. 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).

16. 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”.

17. In this case, Regulation 55(2)'s notice requirement can be invoked even before trial begins.³⁴ On the limited factual record now before the Chamber, it is apparent that the facts may be subject to multiple legal characterizations. This possibility triggers Regulation 55(2)'s notice requirement.

³² ICC-01/09-02/11-T-18-ENG CT WT, page 31, lines 25 to page 32, line 19.

³³ 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. . .”).

³⁴ 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.

Forcible circumcision and penile amputation may be characterized as other forms of sexual violence under Article 7(1)(g)

18. The Pre-Trial Chamber held that the acts of forcible circumcision and penile amputation did not support the Prosecution's "other forms of sexual violence" charge because there was, in the Chamber's view, no showing that the acts were "of a sexual nature", as required by the Elements of Crimes.³⁵ In the Prosecution's submission, it is open to this Chamber to reach a different conclusion for the simple reason that forcible circumcision and penile amputation are inherently sexual in nature.³⁶
19. The harm caused by the amputation or disfigurement of one's sexual organs is not merely physical; it also attacks the victim's sexuality. This is particularly true in patriarchal societies, where an assault on a man's sexual organs also constitutes an assault on his masculinity and identity within society. It is simply impossible to divorce the physical harm caused by forcible circumcision and penile amputation from the harm caused to the victim's sexuality. It is this latter form of harm – to the victim's sexuality – that is inherently "of a sexual nature".³⁷
20. This has been recognized in the jurisprudence of the *ad hoc* tribunals and in scholarship. The ICTY has opined that "[s]exual violence would also include such crimes as sexual mutilation",³⁸ and has gone so far as to characterize a

³⁵ ICC-01/09-02/11-382-Red, paras 264-266; *see also* Elements of Crimes, Article 7(1)(g)-6.

³⁶ It is well-established that the Pre-Trial Chamber's legal and evidentiary findings are not binding on the Trial Chamber. *See* 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, paras 43, 47-50; Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, para 44 ("there is nothing to prevent the Prosecution or the Defence from requesting that the Trial Chamber reconsider the legal characterisation of the facts described in the charges against Thomas Lubanga Dyilo and as confirmed by the Chamber").

³⁷ Elements of Crimes, Article 7(1)(g)-6.

³⁸ ICTY, *Prosecutor v. Kvočka*, Case No. IT-98-30-T, Trial Chamber, Judgement, 2 November 2001, n.343.

threat to cut off a woman's breast as a form of "sexual assault",³⁹ thus recognizing the inherently sexual nature of the disfigurement of sexual organs.⁴⁰ The Special Court for Sierra Leone has done the same, holding that "sexual mutilations, with the rebels slitting the private parts of several male and female civilians with a knife" constitutes a form of sexual violence.⁴¹

21. Scholars concur that genital mutilation is inherently sexual in nature.⁴² For example, Niamh Hayes has argued that the Pre-Trial Chamber's decision not to recognize penile amputation and forced circumcision as a form of sexual violence in this case is:

. . . beyond comprehension, unsupported by sufficient legal reasoning or citation to any relevant legal authority, and demonstrative of an entirely unnecessary hostility and reactionary conservatism towards the concept of progressively interpreting existing criminal provisions to permit the fullest examination and representation of the sexualised nature of violence committed during armed conflict. By the Chamber's logic, if women of a particular ethnicity were consistently targeted for and subjected to crude attempts at female genital mutilation, ostensibly to establish the cultural superiority of another ethnic group which followed the practice, there would be nothing inherently sexual about the violent excision of their clitoris or other external sexual organs. I would argue that it is

³⁹ ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Trial Chamber, Judgment, 1 September 2004, paras 517-518, 1013; *see also* ICTY, *Prosecutor v. Tadić*, Trial Chamber, Case No. IT-94-1-A, Judgment, 15 July 1999, para 198 (concluding that a victim "was compelled sexually to mutilate [another victim] by biting off one of his testicles.").

⁴⁰ *See also id.*, para 1013 (characterizing as sexual assault forcing a woman to undress in front of cheering enemy soldiers and policemen).

⁴¹ SCSL, *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Judgment, March 2009, para 1208.

⁴² *See, e.g.*, Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 New Eng. J. Int'l & Comp. L. 119, 124 (2005) (noting that during the negotiations of the Rome Statute, "[t]he delegates deliberately decided to include a 'basket' clause – 'or any other form of sexual violence' - to ensure that acts such as forced nudity and sexual mutilation, or any other similarly degrading acts invented by perpetrators in the future, could be prosecuted by the ICC as war crimes and crimes against humanity."); Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l L. 288, 305 (2003) ("Increasingly, th[e] prohibition [in the laws of warfare] extends to other forms of sexual violence, including . . . sexual mutilation, sexual humiliation . . ."); Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 Eur. J. Int'l L. 253, 256-257 (2007) (arguing that castration should be recognized as a form of sexual violence).

equally ridiculous to assert with a straight face that, as a matter either of fact or of law, there is nothing sexual about the full or partial amputation of a man's penis as it is to argue that the severity of physical injury inflicted by means of sexual violence is a more relevant legal factor than the sexualised nature of the violence itself.⁴³

22. Given the inherently sexual nature of forcible circumcision and penile amputation, the Prosecution submits that the Trial Chamber should ultimately characterize these acts as forms of sexual violence under Article 7(1)(g).⁴⁴ Should the Chamber consider that there is a possibility that it may take this approach, Regulation 55(2) requires that notice be given of this possibility.

Looting and property destruction may be considered as predicate acts for the charge of persecution under Article 7(1)(h)

23. As explained above, the Pre-Trial Chamber concluded that looting and property destruction could not be considered as predicate acts supporting the persecution charge under Article 7(1)(h).⁴⁵ This conclusion was based upon a faulty premise – namely, that the Prosecution “decided to charge as persecution only the alleged destruction of property causing mental suffering of a degree which would qualify it as other inhumane acts within the meaning of article 7(1)(k) of the Statute, but not . . . in the charge of persecution”.⁴⁶ This is incorrect.

24. The Prosecution did not limit its charges in the manner suggested by the Pre-Trial Chamber. On the contrary, the factual allegations in the DCC

⁴³ Niamh Hayes, *Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court*, in Ashgate Research Companion to International Criminal Law: Critical Perspectives 30 (Hayes, McDermott & Schabas, eds. 2012).

⁴⁴ In this submission, the Prosecution does not address the possibility of cumulative convictions based on the same underlying conduct. That issue is outside the scope of this submission, which is limited to Regulation 55(2) notice, required whenever there is a possibility that the Trial Chamber may opt for a different legal characterization than that charged.

⁴⁵ ICC-01/09-02/11-382-Red, paras 284-286.

⁴⁶ ICC-01/09-02/11-382-Red, para 286.

regarding looting and property destruction are presented in relation to the individual crime-base incidents and are not limited to any particular charge. The Pre-Trial Chamber recognized this elsewhere in the Confirmation Decision, holding that the destruction of property constituted a predicate act underlying the Article 7(1)(d) deportation or forcible transfer charge;⁴⁷ a finding inconsistent with the Chamber's suggestion that the Prosecution's allegations regarding looting and property destruction were limited to the other inhumane acts charge under Article 7(1)(k).⁴⁸

25. The Prosecution emphasized that its allegations were not limited to the inhumane acts charge at the confirmation hearing, explaining that the Prosecution was relying on the evidence of looting and property destruction in support of the persecution charge.⁴⁹ Simply put, the Pre-Trial Chamber misconstrued and incorrectly circumscribed the Prosecution's allegations regarding looting and property destruction, and as a result, declined to consider those allegations with respect to the persecution charge. The Trial Chamber should take a different approach and consider the evidence regarding looting and property destruction as predicate acts supporting the persecution charge.⁵⁰

26. Should the Chamber consider that there is a possibility that it may ultimately consider evidence regarding looting and property destruction

⁴⁷ ICC-01/09-02/11-382-Red, para 244.

⁴⁸ ICC-01/09-02/11-382-Red, para 286.

⁴⁹ ICC-01/09-02/11-T-6-ENG ET WT, page 3, line 11 to page 4, line 25 (“The Prosecution submits that in the execution of these crimes [of persecution], that is, by . . . destroying and looting the[victims’] properties, the perpetrators thereby severely deprived these people of their fundamental rights contrary to international law.”).

⁵⁰ It is well-established that looting and property destruction may, as a matter of law, constitute predicate acts supporting a persecution charges under Article 7(1)(h). *See, e.g.*, 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 277 (holding that “acts of looting, burning and destruction of property” constituted predicate acts underlying the charge of persecution under Article 7(1)(h)); *see also* para 271; Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07-3, pages 6, 8, 10, 14 (issuing arrest warrant for charges of crimes against humanity of persecution, predicated in part upon “pillaging and destruction of property”); ICTY, Trial Chamber, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, 14 January 2000, para 631 (holding that “attacks on property can constitute persecution”).

with respect to the Article 7(1)(h) persecution charge, Regulation 55(2) requires that notice be given of this possibility.

Giving notice of a possible recharacterization at the start of trial is consistent with the Court's jurisprudence

27. In ruling on this issue, the Chamber may wish to consider the approach taken by Trial Chamber I in *Lubanga*, which faced a closely analogous situation. In the confirmation decision in that case, the Pre-Trial Chamber had reframed certain of the Prosecution's charges, adding "the ingredient of international armed conflict", which the Prosecution had not pled in the DCC.⁵¹ Before the start of trial, the Prosecution brought the issue to the Trial Chamber's attention and requested the Chamber to give notice that it may, in the course of proceedings, employ Regulation 55 to re-characterize the facts.⁵² The Trial Chamber agreed, holding that:

. . . this is likely to emerge as an issue at the conclusion of the evidence in the case, and the parties and participants are, accordingly, on notice (pursuant to Regulation 55(2)) that there is a possibility that the Chamber may modify the characterisation of the facts so as to delete the international armed conflict ingredient . . . thereby re-characterising it as internal.⁵³

28. This Chamber should take the same approach. As in *Lubanga*, the Pre-Trial Chamber incorrectly characterized the acts of forcible circumcision, penile amputation, looting and destruction of property and/or improperly reframed the Prosecution's charges with respect to those acts. As in *Lubanga*, the Prosecution has given notice that it will request the Chamber to characterize the acts differently when adjudicating this case. As in *Lubanga*,

⁵¹ ICC-01/04-01/06-1084, paras 20-25.

⁵² ICC-01/04-01/06-1084, para 29. The Prosecution also argued that the Trial Chamber could remedy the Pre-Trial Chamber's error by ruling that the Pre-Trial Chamber's legal characterization was *ultra vires*, and null and void. The Trial Chamber rejected this argument.

⁵³ ICC-01/04-01/06-1084, para 48; *see also* para 49 (stating that "[t]he parties and the participants are on notice that this is an issue that may arise and they should prepare their cases" accordingly).

the Chamber should give notice now to ensure that the parties can “prepare their cases on the basis that the Bench may [re-characterize the facts]”⁵⁴

29. The Prosecution’s decision not to seek leave to appeal these issues does not limit the Chamber’s ability to grant the relief sought. As the *Lubanga* Pre-Trial Chamber held when refusing to grant leave to appeal the confirmation decision in that case, “there is nothing to prevent the Prosecution or the Defence from requesting that the Trial Chamber reconsider the legal characterisation of the facts described in the charges against Thomas Lubanga Dyilo and as confirmed by the Chamber”.⁵⁵ This is precisely what the Prosecution will do here, and if the Chamber considers that there is a possibility that it may ultimately accept the Prosecution’s position, Regulation 55(2) requires the Chamber to give notice of this possibility.

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

30. At the 12 June 2012 status conference, the Muthaura Defence argued that this application should be rejected as “premature”.⁵⁶ The Prosecution respectfully disagrees. As noted previously, the terms of Regulation 55(2) suggest that notice should be given during the trial,⁵⁷ 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.⁵⁸ Prompt consideration and notice will enable the parties to fairly prepare and present

⁵⁴ ICC-01/04-01/06-1084, para 49.

⁵⁵ Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, para 44.

⁵⁶ ICC-01/09-02/11-T-18-ENG CT WT, page 35, line 23.

⁵⁷ See fn. 33, 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).

⁵⁸ See C. Stahn, *Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55*, 16 *Crim. L. Forum* 1 (2005), at page 28 (“If a Trial Chamber should, for example, be of the opinion that the facts and circumstances described in the charges establish a different form of perpetration or participation than that identified in the charges, it may raise this point at the beginning of the trial proceedings and notify the participants of an envisaged change in legal qualification at that early stage. This type of ‘early warning’ may foster judicial efficiency. . .”).

their cases, without the risk of being taken by surprise at the end of trial by an unexpected change in the legal framework of the case.⁵⁹

31. The Defence has also suggested that this application “amounts to alternative charging by the back door”, that “the Pre-Trial Chamber, pursuant to Article 61(7)(c), could have amended the charges”, and because it did not, the present application is somehow inconsistent with “the scheme of the Rome Statute”.⁶⁰ This objection is misplaced.
32. *First*, the Prosecution is not suggesting any alteration of the charging document. The Prosecution is simply taking the logical step of informing the Chamber, at the earliest available opportunity, that two discrete categories of acts lend themselves to multiple legal characterizations.⁶¹
33. Regulation 55 caters for this precise scenario. It creates a procedure – separate and apart from the pre-trial charging and confirmation process – that enables the Trial Chamber to properly adjudicate cases that fit more than one legal theory, and to ensure against “accountability gaps, a purpose that is fully consistent with the Statute”.⁶² 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

⁵⁹ For a discussion of this principle in a different context, *see* Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, paras 3, 19-21.

⁶⁰ ICC-01/09-02/11-T-18-ENG CT WT, page 35, lines 13-22.

⁶¹ The suggestion that the Pre-Trial Chamber “could have amended the charges” pursuant to Article 61(7)(c) is wrong.. *See* ICC-01/09-02/11-T-18-ENG CT WT, page 35, lines 14-15. Article 61(7)(c) permits the Pre-Trial Chamber to “request the Prosecutor to consider . . . [a]mending a charge”. It does not grant the Pre-Trial Chamber the authority to amend the charges itself.

⁶² 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.

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”.⁶³

34. 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”.⁶⁴ 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”.⁶⁵ The question of fairness is a fact-specific inquiry, which depends on the “circumstances of the case”.⁶⁶

35. In this case, giving early notice of the possibility of a recharacterization will “ensure that the trial is fair”⁶⁷ because it will enable the parties to present their evidence and examine witnesses with all possibilities in mind. Advance knowledge can only help the accused and advance the interests of a fair trial. It will avoid delays and adjournments (envisaged in Regulation 55(3)(a)), the recall of witnesses (envisaged in Regulation 55(3)(b)), and will enable the accused to prepare their defence with full knowledge of the possible statutory provisions under consideration by the Chamber.⁶⁸ It will also ensure respect for the accuseds’ Article 67(1)(a) right to be informed “in detail of the nature, cause and content of the charge[s]” against them.⁶⁹ Giving notice before or at the start of trial is also appropriate because the

⁶³ ICC-01/04-01/06-2205, para 77.

⁶⁴ ICC-01/04-01/06-2205, paras 84.

⁶⁵ ICC-01/04-01/06-2205, para 85.

⁶⁶ ICC-01/04-01/06-2205, para 85.

⁶⁷ Article 64(2) of the Statute.

⁶⁸ There can be no dispute as to the Prosecution’s compliance with Regulation 52, which sets out the requirements of a DCC. Regulation 52 requires the Prosecution to provide “a legal characterization of the facts”. It does not require the Prosecution to plead each and every conceivable legal characterization. The Prosecution has complied with Regulation 52’s requirements by including in the DCC a legal characterization under Article 25(3) that appropriately reflects the accuseds’ individual criminal responsibility – a legal characterization endorsed by the Pre-Trial Chamber. For a discussion of the difference between Regulations 52 and 55, *see* ICC-01/04-01/06-2205, para 97.

⁶⁹ *See infra*, note 71.

possibility of a legal recharacterization in this case is self-evident from the outset.⁷⁰

36. 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.⁷¹ For example, in *Zhupnik v. Ukraine*, the ECHR held that there was no violation of the applicant's fair trial rights where the trial court convicted him of an offence not charged in the indictment, and without giving notice of the recharacterization before rendering its judgment, because the applicant was able to contest the trial court's recharacterization through two levels of appellate review.⁷² This cured any "defects in the first-instance proceedings".⁷³ The Prosecution is suggesting a far more cautious approach here – providing notice before or *on the first day of trial* of the possibility of a legal recharacterization at a later

⁷⁰ See C. Stahn, *infra* note 58, page 28.

⁷¹ 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"); *Miroux 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, Judgment, 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, Judgment, 25 January 2011, paras. 22-25 (same).

⁷² *Zhupnik v. Ukraine*, Application No. 20792/05, Judgement, 9 December 2010, paras. 35-45.

⁷³ *Ibid.*, para 43; see also paras 39-43; *Sipavičius v. Lithuania*, Application No. 49093/99, Judgement, 21 February 2002, paras. 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).

date.⁷⁴ In the present case, early notice under Regulation 55(2) will similarly ensure that there is no possibility of unfair surprise, should the Chamber ultimately opt to recharacterize the relevant facts.⁷⁵

37. *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 legal characterizations of criminal acts. On the contrary, Pre-Trial Chamber II noted recently that “the Prosecutor may generally charge in the alternative”,⁷⁶ and the inclusion of Regulation 55 in the Court’s legal framework demonstrates that alternative legal characterizations may be considered where appropriate on the facts of the case.

38. In this case, the Pre-Trial Chamber opted to characterize certain facts in a restrictive and incorrect manner. As the Pre-Trial Chamber held in *Bemba*, at trial, it will be “for the Chamber to characterize the facts”,⁷⁷ 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, if the Chamber considers now that there is so much as a possibility of a recharacterization, then it must give notice of this possibility under Regulation 55(2). This is not “alternative charging by the back door”.⁷⁸ It is a proper application of the Court’s statutory provisions.

⁷⁴ 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).

⁷⁵ 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. 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.

⁷⁶ 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.

⁷⁷ ICC-01/05-01/08-424, para 201 (citing ICC-01/05-01/08-14-tENG, para 25).

⁷⁸ ICC-01/09-02/11-T-18-ENG CT WT, page 35, lines 11-12.

39. *Third*, and finally, this application for notice is consistent with the Appeals Chamber's admonition in *Lubanga* that Regulation 55 "may not be used to exceed the facts and circumstances in the charges or the amendments thereto".⁷⁹ 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.⁸⁰ Here, the Prosecution's case will, as before, be based upon the factual allegations contained in the charges.⁸¹ There will be no shift that would require burdensome additional preparation on the part of the Defence. For this reason, giving notice of the possibility of a recharacterization at this stage would not prejudice "the preparation of the defence".⁸²

40. For the above reasons, the Prosecution submits that providing Regulation 55(2) notice before or 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.

Relief Requested

41. The Prosecution requests that the Chamber give Regulation 55(2) notice, before or on the first day of trial, that the Chamber may employ

⁷⁹ ICC-01/04-01/06-2205, para 88.

⁸⁰ 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 Indictment 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. Mejkic 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").

⁸¹ This is without prejudice to the Prosecution's ability to seek an amendment to the charges pursuant to Article 61(9), which is undisputed between the parties. See ICC-01/09-02/11-T-18-ENG, page 46, lines 3-4 ("if in due course further witnesses appear then, of course, a DCC can be amended again"); see also ICC-01/04-01/06-2205, para 94.

⁸² Article 67(1)(b) of the Statute.

Regulation 55(1) in the course of the proceedings to re-characterize the acts of (i) forcible circumcision and penile amputation as “other forms of sexual violence” under Article 7(1)(g); and (ii) looting and property destruction as predicate acts underlying the charge of persecution under Article 7(1)(h), as well as the charge of deportation or forcible transfer under Article 7(1)(d).



Fatou Bensouda,
Prosecutor

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