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TRIAL CHAMBER V

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

SITUATION IN THE REPUBLIC OF KENYA

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

PUBLIC DOCUMENT

Submissions of the Victims' Representative on Regulation 55 and Article 25(3)

Source: Victims' Representative

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

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Introduction

1. In its order of 14 May 2012 scheduling the status conference held on 11 June 2012,¹ the Trial Chamber requested the parties to make submissions on a number of items, including “N. Whether the parties intend to make applications for a legal recharacterisation of the facts under Regulation 55 of the Regulations.”² The Chamber also ordered the parties and the legal representative of the victims “to make written submissions on their interpretation in law of the modes of individual criminal responsibility applicable to the present case and file such submissions no later than 25 June 2012.”³
2. In its response to that order, the Prosecution indicated that it “intends to make an application for formal notice to be given to the parties and participants, under Regulation 55(2) that certain facts may be subject to legal re-characterization at the trial stage. This application will be made well in advance of trial.”⁴
3. At the status conference held on 11 June 2012, the Prosecution reiterated its intention to file such an application, and indicated that the application would relate to the modes of liability. The Prosecution indicated specifically that its application would refer to the mode of liability for one of the accused, Mr Ruto. Mr Ruto is currently charged as an indirect co-perpetrator under Article 25(3)(a) of the Statute. While the Prosecution continues to maintain that this mode of liability applies, it submits that the Chamber may want to give notice that Article 25(3)(d) may also apply. Further to questions posed by the Chamber, the Prosecution clarified that this application would not seek to introduce an amendment to the charges or alternative charging, but would alert the Chamber that it should give notice that regulation 55(1) may apply in accordance with regulation 55(2). The Defence made no objections.⁵

¹ ICC-01/09-01/11-413, “Order scheduling a status conference”.

² *Ibid.*, para 3.

³ *Ibid.*, para 5.

⁴ ICC-01/09-01/11-417, “Prosecution’s Submissions on the Agenda for Status Conference”, 28 May 2012, para 31.

⁵ ICC-01/09-01/11-T-15-ENG, Transcript of the status conference held on 11 June 2012 (“**Transcript of the status conference of 11 June 2012**”), page 25, line 16 to page 30, line 25.

4. The victims' representative also referred to regulation 55 in her submissions during the status conference, in relation to acts of destruction of property, looting and physical injuries.⁶
5. Following the Status Conference, the Chamber gave the following order:

... the Chamber amends its order of 14 May 2012 and sets a new deadline of 4 July 2012 for submissions from the Office of the Prosecutor and the legal representative addressing Regulation 55 as well as the interpretation in law of the mode of criminal responsibility applicable in the present case. These submissions are not to exceed 30 pages.⁷
6. The present submissions are filed pursuant to that order.

I. Regulation 55

(a) The law

7. Regulation 55 of the Regulations of the Court provides as follows:

Authority of the Chamber to modify the legal characterisation of facts

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 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 and 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 purpose 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*

⁶ *Ibid.*, page 34, line 25 to page 36, line 18.

⁷ ICC-01/09-01/11-426, "Order setting the deadline for submissions on Regulation 55 and Article 25(3)", 15 June 2012, para 1.

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

(i) *Substantive aspect*

8. The Appeals Chamber held in a decision in the *Lubanga Dyilo* case (the “**Lubanga Dyilo Appeal Decision**”) that regulation 55, correctly interpreted, is not inherently incompatible with articles 52 and 61(9) of the Statute, with general principles of international law, or with the rights of the accused.⁸
9. It is submitted that the expression “legal characterisation of the facts” in regulation 55(1) and (2) is not further qualified by the wording of regulation 55. The expression would extend to legal characterisation of the substantive crime established by the facts, or the legal characterisation of the mode of liability of a particular accused for the crime charged, or both.
10. Furthermore, it is submitted that the reference to “the facts” in regulation 55(1) and (2) is not necessarily confined to the specific facts charged that would constitute the legal elements of the substantive crime or mode of liability originally charged. According to the plain text of regulation 55, re-characterisation may be undertaken on the basis of any of “the facts and circumstances described in the charges and any amendments to the charges”, whether or not a specific fact or circumstance is (or is alleged to be) a necessary element of any of the existing substantive charge or mode of liability.
11. The Appeals Chamber has held that regulation 55 (2) and (3) of the Regulations of the Court may not be used to exceed the facts and circumstances described in the charges or any amendment thereto.⁹ However, provided that the facts and circumstances described in the charges (or any amendment thereto) are not exceeded, it is submitted that there is no reason why regulation 55 should be confined to such of the

⁸ ICC-01/04-01/06-2205, *Prosecutor v. 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’”, Appeals Chamber, 8 December 2009 (“**Lubanga Dyilo Appeal Decision**”), paras 66-87.

⁹ *Ibid.*, generally, but especially para 1.

facts and circumstances described in the charges that constitute a necessary element of one of the existing substantive charges or modes of liability.

12. It is acknowledged that the Appeals Chamber said in a footnote in the *Lubanga Diyilo* Appeal Decision as follows:

In the view of the Appeals Chamber, the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (I) (a) of the Statute.¹⁰

13. However, this was a passing observation in a footnote to a lengthy decision, and cannot be taken to be a definitive, considered and detailed finding by the Appeals Chamber on the scope of the expression “the facts” in regulation 55. The Appeals Chamber does not say in this footnote that the expression “the facts” is confined to those facts that constitute a necessary element of one of the existing substantive charges or modes of liability. The Appeals Chamber refers merely to such facts that “support” the legal elements of the crime charged, and uses this expression to distinguish other facts in the Document Containing the Charges which are merely “background or other information”. It is submitted that an alleged fact in the Document Containing the Charges may “support” the legal elements of the crime charged without being a necessary element of the crime.
14. To give an obvious example, suppose that a person is charged with murder as a crime against humanity (Article 7(1)(a) of the Statute), and suppose that the Document Containing the Charges alleges that the murder was committed “with intent to destroy, in part, an ethnic group, as such”. Such intent to destroy an ethnic group is not a necessary element of murder as a crime against humanity. However, it is submitted that a factual allegation in the Document Containing the Charges, that the accused had such an intent, could obviously be the basis for a decision under

¹⁰ *Ibid.*, para 90, footnote 163.

regulation 55 to change the legal characterisation of the facts to a charge of genocide (Article 6(a) of the Statute). The alleged fact that the accused had such an intent, even if not a necessary element of the crime originally charged, must be considered to be an alleged fact that “supports” the legal elements of the crime originally charged, within the meaning of the Appeals Chamber’s footnote quoted above. Such an alleged fact, even if not a necessary element of the crime originally charged, could not be considered to be merely “background or other information” within the meaning of the Appeals Chamber’s footnote. Rather, it is submitted that this example is a paradigm situation in which the use of regulation 55 would be appropriate.

15. It is further submitted that the reference in regulation 55 to the “the facts and circumstances described in the charges” means the *substance* of what is alleged in the Document Containing the Charges, rather than the formal wording used. In the example just given, the Document Containing the Charges would not need to use the actual words “intent to destroy, in part, an ethnic group, as such”. If this was the substance of the facts that are alleged, that would suffice.

(ii) *Procedural aspect*

16. In relation to the procedure for an exercise of the power under regulation 55, it is noted that the exercise by the Trial Chamber of its power under regulation 55(1) is undertaken “[i]n its decision under article 74”. By definition, the power is therefore only exercised at the end of the trial process. Regulation 55(2) and (3) provides that where it appears to the Chamber that it may in its final judgment change the legal characterisation of the facts, the participants are to be given the opportunity to make oral and written submissions. Respect for the rights of the accused (and also those of other participants) obviously requires this. However, in giving notice under regulation 55(2), the Chamber is merely foreshadowing the possibility of something that might occur in the final judgment, in order that the parties have the opportunity to present their views on that possibility before the Chamber reaches a decision. The regulation 55 decision itself is not taken, one way or the other, during the course of the trial.

17. As regulation 55(2) makes clear, the *possibility* that the Chamber may apply regulation 55 in the final judgment may appear to the Chamber “at any time during the trial”. In some cases, that possibility may already be apparent at the commencement of trial. In other cases, the possibility may only become apparent towards the end of trial, once the Chamber has heard the evidence.
18. It is further submitted that it is evident from the wording of regulation 55 that the Chamber may, throughout the course of the trial, give ongoing consideration to the possibility that it might, when preparing its final judgment, exercise the power under regulation 55(1). The potential application of regulation 55 is not something to be argued once and decided at the trial. Even where the Chamber forms a view at one stage in the trial that it does not intend to exercise the power, that would not preclude the Chamber from reconsidering the matter at a later stage of the trial.
19. It is accepted that consideration as to whether the power should be exercised should however be undertaken as early as possible, 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.

(b) Burning/destruction of property, looting and physical injuries

20. At the pre-trial phase, the victims’ representative repeatedly raised the victims’ concern that the charges in this case do not expressly include acts of destruction/burning of property, looting, and infliction of physical injuries, notwithstanding that the Document Containing the Charges alleges that such acts were committed against the victims, and notwithstanding that even witnesses called by the suspects at the confirmation of charges hearing acknowledged that such acts were committed.¹¹

¹¹ ICC-01/09-01/11-263, “Request by the Victims’ Representative for authorisation by the Chamber to make written submissions on specific issues of law and/or fact”, 15 August 2011; ICC-01/09-01/11-T-5, transcript of the confirmation of charges hearing, 1 September 2011, p.83 line 20 to p.85 line 6; ICC-01/09-01/11-T-12, transcript of the confirmation of charges hearing, 8 September 2011, p.29 line 18 to p.34 line 8; ICC-01/09-01/11-333, “Renewed Request by the Victims’ Representative for authorisation by the Chamber to make written submissions in specific issues of law and/or fact”, 16 September 2011; ICC-01/09-01/11-344, “Final written observations of the Victims’ Representative in relation to the

21. Both the original version of the Document Containing the Charges dated 1 August 2011,¹² and the amended version dated 15 August 2011,¹³ referred expressly to the evidence of destruction and burning of property,¹⁴ looting,¹⁵ and infliction of injuries.¹⁶
22. Despite this, the paragraphs of the Document Containing the Charges referring to the count of persecution do not expressly refer to destruction or burning of property as an aspect of the acts of persecution. (See especially paragraph 133, wording of Counts 5 and 6 : "... persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing *murder, torture, and deportation or forcible transfer of population*" [emphasis added]). Nor are these acts specifically referred to in Counts 3 or 4.
23. The victims' representative represents 326 victims.¹⁷ In their requests for participation in proceedings and reparations, virtually all of these victims have indicated that they have suffered loss as a result of destruction of property.
24. Furthermore, the Pre-Trial Chamber's decision of 8 March 2011, issuing the summonses to appear to the three suspects, referred expressly to the evidence of destruction and burning of property.¹⁸
25. As the victims' representative submitted to the Pre-Trial Chamber in a filing of 15 August 2011:

In circumstances where virtually the entirety of such a large number of victims in a case have suffered loss as a result of

confirmation of charges hearing", 30 September 2011; ICC-01/09-01/11-367, "Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims", 9 November 2011.

¹² ICC-01/09-01/11-242-AnxA (the "**original Document Containing the Charges**").

¹³ ICC-01/09-01/11-261-AnxA (the "**amended Document Containing the Charges**").

¹⁴ Paras 26(6), 31, 37, 39, 41, 44, 74, 75, 79, 81, 85, 88, 89, 94, 101 of both the original Document Containing the Charges and the amended Document Containing the Charges.

¹⁵ Paras 31, 37, 85, 88, 94, 101 of both the original Document Containing the Charges and the amended Document Containing the Charges.

¹⁶ Paras 21, 38, 39, 89 of both the original Document Containing the Charges and the amended Document Containing the Charges.

¹⁷ The number of victims participating in this case was originally 327. One victim has died. See: Transcript of status conference of 11 June 2012, page 2, lines 23-24

¹⁸ ICC-01/09-01/11-01, "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", Pre-Trial Chamber II, 8 March 2011, at paras 17, 18, 19, 31, 42 and 46.

destruction and/or burning of property, and have specifically indicated an intention to seek reparations for such loss, and in circumstances where the evidence relied on in support of the charges clearly includes evidence of destruction and/or burning of property, it must be a matter of most serious concern that destruction and/or burning of property has not been clearly included in the charges proposed to be brought by the Prosecutor.¹⁹

26. In that filing, the victims' representative sought to raise the questions of whether acts of destruction and/or burning of property, infliction of injuries and looting can amount to the crime against humanity of persecution (article 7(1)(h) of the Statute), or the crime against humanity of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health (article 7(1)(k) of the Statute).
27. On 19 August 2011, the Single Judge of the Pre-Trial Chamber issued a decision on that filing of the victims' representative, rejecting the victims' representative's request to present submissions on the issue.²⁰ The Single Judge stated that the reason for rejecting the request was that it was premature, given that the confirmation hearing in the case had not yet taken place.²¹ At the confirmation of charges hearing, the victims' representative foreshadowed that she would therefore be filing a further request in relation to this matter after the confirmation of charges hearing.²²
28. Accordingly, after the confirmation of charges hearing, the victims' representative raised the matter again in a filing dated 16 September 2011.²³ That filing, in addition to reiterating the concerns of the victims expressed in the earlier 15 August 2011 filing, noted that in the course of the confirmation of charges hearing, statements were made repeatedly about the widespread acts of destruction of property (both homes and businesses) and looting, and that statements were also made about the

¹⁹ ICC-01/09-01/11-263, "Request by the Victims' Representative for authorisation by the Chamber to make written submissions on specific issues of law and/or fact", 15 August 2011, at para. 13.

²⁰ ICC-01/09-01/11-274, "Decision on the 'Request by the Victims' Representative for authorisation by the Chamber to make written submissions on specific issues of law and/or fact'", Pre-Trial Chamber II, 19 August 2011.

²¹ *Ibid.*, at para. 9.

²² ICC-01/09-01/11-T-12, Transcript of the confirmation of charges hearing, 8 September 2011, page 32 lines 18-24.

²³ ICC-01/09-01/11-333, "Renewed Request by the Victims' Representative for authorisation by the Chamber to make written submissions in specific issues of law and/or fact", 16 September 2011.

infliction of injuries.²⁴ That filing noted that Defence counsel and Defence witnesses at the confirmation of charges hearing had acknowledged that such crimes were committed.²⁵ The filing went on to argue that what was even more significant was “the fact that allegations of acts of burning and destruction of property and looting feature so prominently and centrally in the *Prosecution case*”.²⁶ The filing set out some five pages of quotes from the transcript of the confirmation of charges hearing, in which references to such crimes were made by Mr Moreno Ocampo, as well as by Prosecution counsel Ms Tai, Ms Corrie and Ms Renton.²⁷

29. The Single Judge ruled on the victims’ representative’s filing of 16 September 2011 in a decision dated 22 September 2009.²⁸ In that decision, the Single Judge noted that:

In the view of the victims' legal representative, the issue at stake is of utmost concern for the 327 victims admitted in the present case, since almost the totality of them has indicated that they have suffered material harm as a result of destruction of property. In addition, during the confirmation of charges hearing, statements were made that acts of destruction of property, looting and infliction of physical injuries were carried out. The victims' legal representative recalls that Mr. Ruto himself as well as the two witnesses called by his Defence team acknowledged that such acts were committed during the post-election violence in Kenya. Furthermore, it is significant in the opinion of the victims' legal representative that “allegations of acts of burning and destruction of property and looting feature so prominently and centrally in the *Prosecution case*”. (Footnotes omitted.)²⁹

In that decision, the Single Judge furthermore stated that she was “of the view that the personal interests of the victims in the present case are indeed affected by the issue raised”,³⁰ and the decision authorised the victims’ representative to address this issue in her final written submissions on the confirmation of charges.³¹

²⁴ *Ibid.*, para 12.

²⁵ *Ibid.*, para 13, giving transcript references to a statement of counsel for Mr Ruto, and the testimony of Mr Cheramboss and Mr Murei.

²⁶ *Ibid.*, para 14.

²⁷ *Ibid.*, para 15.

²⁸ ICC-01/09-01/11-338, “Decision on the ‘Renewed Request by the Victims’ Representative for authorisation by the Chamber to make submissions on specific issues of law and/or fact’”, Pre-Trial Chamber II, 22 September 2011.

²⁹ *Ibid.*, para 6.

³⁰ *Ibid.*, para 10.

³¹ *Ibid.*, para 12.

30. The victims' representative's final submissions on the confirmation of charges were filed on 30 September 2009.³² In that document, the victims' representative made the following submissions:

11. For all of the reasons given by the victims' representative in those previous observations referred to in the previous paragraph, it is submitted that the Pre-Trial Chamber should exercise its power under Article 61(7)(c)(ii) of the Statute to request the Prosecutor to consider amending the charges:

- a. by expressly specifying that Count 5 and Count 6 encompass additionally acts of destruction of property, and looting, and the infliction of physical injuries; and
- b. by adding counts of the crime against humanity of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health (Article 7(1)(k) of the Statute), in relation to the acts of destruction of property, and looting, and the infliction of physical injuries.

12. Without prejudice to the totality of the victims' representative's earlier observations, it is submitted that this is a compelling case for the Chamber to exercise that power. In particular, there is apparently no issue at all that there was widespread destruction and looting of property. Almost all of the 327 victims represented suffered from it. They will be seeking reparations for these acts, and destruction and looting of property and injury is thus of such central importance to the case that it is difficult to see any basis upon which it could be justifiably be ignored. Judicial efficiency and the aim of avoiding an undue multiplicity of charges is hardly a justification in circumstances where there is no dispute that such acts occurred. For similar reasons, it is submitted that there is no justifiable reason for excluding acts of looting and infliction of physical injuries.

31. The Pre-Trial Chamber's decision on the confirmation of charges (the "**Confirmation of Charges Decision**")³³ said the following in relation to this issue:

275. In this context, the Chamber recalls the request put forward by the Legal Representative of victims during the confirmation hearing and reiterated in subsequent filings, including the Final Written Observations, whereby she requests the Chamber "to exercise its power under Article 61(7)(c)(ii) of the Statute [to

³² ICC-01/09-01/11-344, "Final written observations of the Victims' Representative in relation to the confirmation of charges hearing", 30 September 2011.

³³ ICC-01/09-01/11-373, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", Pre-Trial Chamber II, 23 January 2012 (the "**Confirmation of Charges Decision**").

adjourn the confirmation hearing and] [...] request the Prosecutor to consider amending the charges" [...]

276. At the outset, the Chamber acknowledges the suffering that victims have faced as a result of the attack against the Kenyan civilian population and wishes to express its dismay of such practices. However, being a judicial body, the Chamber must always reflect its opinions through the scope of law, and thus, perform its functions within the parameters dictated by the Court's statutory provisions.

277. The Chamber observes that, contrary to the Legal Representative of victims' claim that the acts of destruction of property, looting, and the infliction of physical injuries were "ignored", the reference to these acts is actually acknowledged by the Prosecutor in different paragraphs in his Amended DCC as means that the Network perpetrators employed to forcibly displace and persecute the PNU supporters." In Sections VI(A) and VII(B) above, the Chamber found that there are substantial grounds to believe that members of the Network perpetrated acts of looting, burning and destruction of property, which forced PNU supporters to relocate elsewhere. Thus, the Chamber has already made a determination that the acts of burning, looting and destructing property were the "coercive acts" (see in this regard the first element of deportation or forcible transfer in the Elements of Crimes) through which forced displacement actually occurred. Since the Chamber has already found that the acts of forced displacement also constitute acts of persecution as they were directed against a particular group for reason of their perceived political affiliation, the Chamber is of the view that the acts of destruction of property and looting are already encompassed in counts 5 and 6, contrary to what the Legal Representative of victims argues.

278. Moreover, the Chamber is of the view that article 61(7)(c)(ii) of the Statute only allows the Chamber to request the Prosecutor to consider amending a charge. Accordingly, the Chamber cannot, on the basis of this provision, request the Prosecutor to consider adding a new charge as the Legal Representative of victims' requests. For these reasons, the Chamber rejects the request of the Legal Representative of victims.

32. The victims' representative acknowledges the finding by the Pre-Trial Chamber that acts of burning, looting and destructing property are already encompassed within the existing charges. In effect, these acts are all under the umbrella of existing, more general charges.

33. Nevertheless, without prejudice to the fact that such acts may be included within the umbrella of existing charges, the victims' representative submits that there is every reason why acts of destruction and/or burning of property, infliction of injuries and looting should also, independently of this, be specifically referred to in the description of the counts as well as included as express independent charges in the event of a conviction.
34. First, if all of the elements of these specific crimes are satisfied on the evidence presented at trial, it would not be in the interests of justice if an acquittal were nonetheless to follow, for the technical reason that some other element specific to the umbrella charge was not proved on the evidence. For instance, on the charges as presently formulated, the accused could not be convicted on counts 3 or 4 in respect of these acts, if some element specific to the crimes of forcible transfer or deportation were not satisfied on the evidence.
35. Secondly, the crimes of destruction and/or burning of property, infliction of injuries and looting are very serious crimes, and have had a huge impact on the victims and their communities. It is appropriate that these acts be acknowledged as crimes that have been perpetrated directly against the victims, rather than be treated as merely "acts" by which a different crime (deportation or forcible transfer) was indirectly committed.
36. This is so especially, for instance, in cases where victims did not actually leave their home areas. In such cases, even if the purpose of the destruction and/or burning of property, infliction of injuries and looting was to coerce the victims to leave their home areas, the perpetrator would not have *committed* deportation or forcible transfer in cases where the victim did not in fact leave as a result of the crimes. At best, there would have been an *attempted* deportation or forcible transfer. However, Mr Ruto has only been charged under the mode of liability in Article 25(1)(a) of the Statute (committing the crime), and therefore any *attempted* deportation or forcible transfer would not be within the charges as presently formulated against Mr Ruto. In the case of Mr Sang, the mode of liability charged is Article 25(3)(d), which includes criminal liability where a person "contributes to the commission or *attempted* commission of ... a crime" (emphasis added). Nevertheless, in a case where a person

has been the *actual* victim of the total destruction and looting of their home, and has been the *actual* victim of unlawfully inflicted physical injuries, it would simply fail to do justice to the case to treat the victim as no more than a victim of “an *attempted* deportation or forcible transfer”.

37. Thirdly, the selection of the crimes may be relevant to sentencing. It is submitted that the Chamber should make a decision on whether or not the accused are guilty of the crimes of destruction and/or burning of property, infliction of injuries and looting, so that they can be taken into account in sentencing as such. It is not conceded that the sentence would necessarily be less if such acts were considered merely as acts by which deportation or forcible transfer was committed or attempted, rather than as independent crimes. However, it can be expected that the Defence might seek to argue this. At this early stage in the development of the legal system of the Court, such uncertainties should be avoided.
38. Ultimately, for justice to be seen to be done, any charges and convictions should reflect the evidence of what actually happened. The criminal justice system exists to serve the community at large, most members of which are not lawyers, let alone international criminal lawyers versed in the subtleties and complexities of the international legal system. The victims, and the broader community in Kenya and internationally, saw systematic destruction and burning of property, infliction of injuries and looting as the signature feature of the events of December 2007-January 2008. They have not seen these crimes charged as such in this case. Even if international criminal lawyers can be expected to understand that these acts have been incorporated under the umbrella of charges of forcible transfer, or attempted forcible transfer, the community at large will not understand this. They will be left with the sense that justice has not been done. Victims who did not leave their home locations will feel this particularly.
39. Burning and destruction of property, and looting, and the infliction of physical injuries, are acts that will amount to the crime against humanity of persecution (article 7(1)(h) of the Statute), or the crime against humanity of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health (article 7(1)(k) of the Statute), if the elements of those

crimes are otherwise met. On the findings of the Pre-Trial Chamber in the Confirmation of Charges Decision, these acts were means by which the crimes currently charged were allegedly committed. It follows that the Document Containing the Charges already alleges, in relation to these specific acts, that they were committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, and that these acts satisfy the elements of persecution (Article 7(1)(h) of the Statute). Further, these acts were inherently, by their nature and gravity, “similar” to other acts referred to in Article 7(1) of the Statute (see the Elements of Crimes, Article 7(1)(k), element 2 and accompanying footnote). Inherently, by their nature, these acts were, within the meaning of Article 7(1)(k) of the Statute, intended to cause great suffering or serious injury to body or to mental or physical health.

40. The Prosecution’s own case is that the campaign of crimes as a whole, including the acts of destruction of property, infringed upon the fundamental rights of the victims.

In presenting its case, the Prosecution has stated:

The Prosecution submits that in the execution of those crimes, that is, by killing persons that they perceived to be supporters of the PNU political party, by destroying their property, and by forcibly expelling them from their homes, network perpetrators severely deprived these people of their fundamental rights, contrary to international law.³⁴

41. This confirms the Prosecution’s own theory that acts of destruction of property were, in the same way as acts of murder and forcible expulsion, part of one attack that “deprived [the victims] of their fundamental rights, contrary to international law”.
42. In the present case, in the Document Containing the Charges, the alleged acts of destruction of property, and looting, and the infliction of physical injuries are clearly acts which support the existing charges (see especially paragraph 31 above); they are not merely “background or other information” (compare paragraph 13 above).

³⁴ ICC-01/09-01/11-T-6-Red-ENG, Transcript of the confirmation of charges hearing, 2 September, page 53 lines 21-25.

43. At this early stage in the development of the legal system of the Court, the extent to which an accused can be convicted cumulatively of more than one crime based wholly or partly on the same conduct is a question which cannot be considered to be settled. In the legal system of the *ad hoc* international criminal tribunals, the law in this respect is now clear:

The jurisprudence on cumulative convictions has been thoroughly addressed at the international tribunals. The test to determine the permissibility of cumulative convictions was set out in the *Čelebići* Appeal Judgment, which stated:

Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.³⁵

44. If the same approach were to be adopted in the legal system of this Court, then the accused in this case might be cumulatively convicted, for instance, of both:

- a. the crime against humanity of “other inhumane acts” (Article 7(1)(k) of the Statute) in respect of destruction of property, and looting, and the infliction of physical injuries, and
- b. the crime against humanity of deportation or forcible transfer (Article 7(1)(d) of the Statute),

even though acts of destruction of property, and looting, and the infliction of physical injuries formed part of the factual basis of each of these crimes. This is

³⁵ Special Court for Sierra Leone, *Prosecutor v. Sesay, Kallon and Gbao* (RUF Cases), Case No. SCSL-04-15-A, Appeal Judgment, 26 October 2009, para 1190.

because each of these crimes contains a materially distinct element not contained in the other.

45. It is submitted, however, that it is unnecessary at this stage to argue or determine the legal principles of cumulative convictions in the legal system of this Court. Such issues would fall to be addressed at the end of the trial. At this stage, it is merely submitted as follows. If one act of an accused may form part of the factual basis or more than one crime of which that accused may be cumulatively convicted, then under regulation 55 the Court must have the power to change the legal characterisation of facts such that facts are characterised as forming the basis of two distinct crimes rather than as a single crime.
46. As submitted in paragraphs 16-17 above, the decision as to whether to exercise the power under regulation 55(1) in this way in this case will fall to be made by the Court only at the end of the trial. However, pursuant to regulations 55(2) and (3), the Chamber should at an early stage give notice to the participants of such a possibility.
47. It is submitted for all of the reasons above that the Chamber should therefore give notice to the participants now that it expects, at the end of the trial, to consider whether of acts of burning/destruction of property, and looting, and the infliction of physical injuries for which the accused may be found to be individually criminally responsible amounts, in itself, in addition to or instead of the crimes of which they are charged, to the crimes of:
 - a. “other inhumane acts” (Article 7(1)(k) of the Statute);
 - b. “persecution” (Article 7(1)(h) of the Statute).
48. By giving such notice now, the Chamber will ensure that the participants will be aware of this issue, and will have a full opportunity to address it, when presenting evidence, when examining or cross-examining witnesses, and when presenting their opening and closing submissions in the case.

(c) Other potential application of regulation 55 in the present case

49. As noted above, Mr Ruto has only been charged with the mode of liability under Article 25(3)(a) (committing the crime).

50. The Pre-Trial Chamber's Confirmation of Charges Decision assumes that the facts alleged against Mr Ruto, if proved, will amount to "indirect co-perpetration", and that this is a mode of liability that falls under Article 25(3)(a) of the Statute.³⁶
51. While the Prosecution continues to maintain that this mode of liability applies, it submits that the Chamber may want to give notice that Article 25(3)(d) (contribution to the crime in other ways) may also apply.
52. At this early stage in the development of the legal system of this Court, where there is limited jurisprudence on the requirements of different modes of liability, especially at the Appeals Chamber level, it is submitted that the Court should be open to exploring the potential applicability of other modes of liability under Article 25 as the case progresses, with a simultaneous view to the potential applicability of regulation 55.
53. The line between Article 25(3)(a) and Article 25(3)(d) of the Statute has not been clearly drawn in the case law, and the victims' representative supports the submission that the participants should be on notice of the potential applicability of both modes of liability in the case of Mr Ruto.
54. Furthermore, at this early stage in the development of the legal system of this Court, it cannot be taken as settled to what extent some modes of liability under Article 25 may be "lesser included" forms of other modes of liability. In some national legal systems, where a person is charged with "committing" an offence, but the evidence produced at trial establishes only that the person aided and abetted the crime, the person can be convicted of aiding and abetting, even though this mode of liability has not been specifically charged. Whether that is possible in the legal system of this Court has not been definitively resolved, and may be a matter to be argued in final submissions at the end of the trial. It is submitted that all participants should therefore also be on notice, both in relation to Mr Ruto and Mr Sang, that the applicability of the mode of liability in Article 25(1)(c) (aiding and abetting) may be a live issue in the present case.

³⁶ Confirmation of Charges Decision, paras. 292, 301-349.

II. Interpretation of modes of liability

55. The Chamber has invited the victims' representative to file, simultaneously with the Prosecution, submissions addressing the interpretation in law of the modes of criminal responsibility applicable in the present case.
56. The victims' representative would request, with respect, that she be permitted to file any such submissions after the submissions of the Prosecution have been filed.³⁷
57. Any such submissions, to be meaningful, would have to be directed to the particular circumstances of the present case, rather than simply presenting an abstract and academic treatment of the law on modes of liability.
58. It is for the Prosecution to determine what case it intends to bring against the accused. The victims' representative has concerns about the appropriateness of presenting submissions on how the relevant modes of liability would apply in relation to the alleged facts of this case, even before the Prosecution has presented its view. At this stage, the victims' representative has not even seen all of the evidence of the case. The victims' representative would request that she instead be permitted to present any observations on the submissions of the Prosecution, once these have been filed.



Sureta Chana
Victims' Representative

Dated this 4th day of July 2012

At London, United Kingdom

³⁷ While acknowledging that the *Prosecutor v. Muthaura and Kenyatta* case is a separate case to the present proceedings, it is observed that in similar factual circumstances, this Chamber has in that other case given the victims' representative the possibility of responding to the Prosecution's submissions. See: ICC-01/09-02/11-T-18-ENG, Transcript of the status conference held on 12 June 2012, page 37, lines 11-14.