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Date: **25 July 2012**

TRIAL CHAMBER V

Before:

**Judge Kuniko Ozaki, Presiding
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

**Defence Response to the “Prosecution’s application for notice to be given under
Regulation 55(2) with respect to certain crimes charged”**

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

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I. INTRODUCTION

1. The Defence of Ambassador Muthaura (“Defence”) presents its response to the Prosecution’s application for notice to be given under Regulation 55(2) with respect to certain crimes charged.¹
2. The Prosecution’s application relates to two discrete categories of acts alleged in the Document Containing Charges (“DCC”): 1) forcible circumcision and penile amputation, and 2) looting and destruction of property. The Prosecution takes issue with Pre-Trial Chamber II’s (“PTC”) characterisation of forcible circumcision and penile amputation as “other inhumane acts” under article 7(1)(k) of the Rome Statute and looting and destruction of property only as predicate acts underlying the charge of deportation or forcible transfer under article 7(1)(d).²
3. The Prosecution argues that the PTC erred in characterising these acts as it did. The Prosecution submits that forcible circumcision and penile amputation can and should be characterized as other forms of sexual violence under article 7(1)(h), and that looting and destruction of property, in addition to being predicate acts for deportation or forcible transfer, can and should be construed as predicate acts underlying the charge of persecution under article 7(1)(d). The Prosecution further gives notice that at trial it shall request the Trial Chamber (“Chamber”) to characterize these acts as such.³
4. The Prosecution also argues that Regulation 55(2)’s mandatory notice provision requires that notice be given at the earliest possible stage and that

¹ Prosecution’s application for notice to be given under Regulation 55(2) with respect to certain crimes charged, ICC-01/09-02/11-445.

² ICC-01/09-02/11-445, para. 2.

³ ICC-01/09-02/11-445, para. 2.

by its terms, Regulation 55(2) is triggered by a “possibility” that the Chamber may decide to engage in a legal re-characterisation of the facts.⁴

5. The Prosecution additionally submits that in this case, Regulation 55(2)’s notice requirement can be invoked even before trial begins, and that on the limited factual record now before the Chamber, it is apparent that the facts *may be subject to multiple legal characterizations* and that this possibility triggers Regulation 55(2)’s notice requirement.⁵
6. The Defence submits that the Prosecution request should be dismissed as premature and/or for exceeding the permissible contours of Regulation 55. The Defence respectfully argues that Regulation 55(2) does not contemplate the issuance of notice, as requested by the Prosecution at this stage of proceedings and in the circumstances of the present case.

II. PROCEDURAL HISTORY

7. The confirmation of charges hearing was held from 21 September to 5 October 2011. On 23 January 2011, the PTC confirmed charges against Ambassador Muthaura and Mr Kenyatta and committed them to trial.⁶
8. On 29 March 2012, the ICC Presidency constituted Trial Chamber V, referred this case to it for the conduct of the subsequent phase of the proceedings, and transmitted the full record of the proceedings before the PTC to Trial Chamber V.⁷
9. On 14 May 2012, the Trial Chamber issued its decision scheduling a status conference in which it ordered the parties to submit their observations on

⁴ ICC-01/09-02/11-445, paras 16, 30.

⁵ ICC-01/09-02/11-445, para. 17 (emphasis added).

⁶ ICC-01/09-02/11-382-Conf.

⁷ ICC-01/09-02/11-414.

whether they intend to make applications for a legal re-characterisation of facts under Regulation 55 of the Regulations of the Court.⁸

10. During the status conference held on 12 June 2012, the Prosecution was requested to file written submissions on the issue of re-characterisation by 3rd July 2012 and the Defence and Victims Legal Representative to file written responses within 21 days.⁹
11. On 3 July 2012, the Prosecution submitted its request that the Chamber give notice to the participants under regulation 55(2) that there is a possibility that the Chamber may invoke Regulation 55(1) at a later date to re-characterise the facts.¹⁰

III. SUBMISSIONS

a. The Application is Premature

12. The Prosecution erroneously implies that the *Lubanga* case provides authority for the proposition that a notice pursuant to Regulation 55(2) can always be triggered at the start of trial.¹¹ The *Lubanga* decision dealt with a fairly straight forward scenario in which the Trial Chamber was being requested to provide an alternative legal definition to a factual scenario that was largely uncontested.
13. The application of Regulation 55(2) and (3) is not a mechanical exercise to be implemented as a matter of course in each and every case that enters the trial stage at the ICC. As the Appeals Chamber has noted in *Lubanga*, Regulation 55(2) and (3) set out stringent safeguards for the protection of the rights of

⁸ ICC-01/09-02/11-422.

⁹ ICC-01/09-02/11-T-18-ENG, p. 37. The Defence notes that pursuant to Regulation 33(d) of the Regulations of the Court, “documents shall be filed [...], at the latest, on the first working day of the Court following the expiry of the time limit.”

¹⁰ ICC-01/09-02/11-445.

¹¹ ICC-01/09-02/11-445, paras 27-28.

the accused, which are to be implemented by taking into account the particular circumstances of each case.¹²

14. Moreover, the Trial Chamber's decision in *Lubanga* cannot oust the express provisions of Regulation 55(2) which provide that a legal re-characterization of facts and circumstances may only be done by the Trial Chamber after the trial has commenced. Regulation 55(2) states:¹³

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. 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.

15. Significantly, Article 61(9) of the Statute establishes a clear demarcation between the end of the jurisdiction of the Pre-Trial Chamber and the beginning of that of the Trial Chamber. This demarcation is the commencement of trial. Before the commencement of trial, the power to frame and alter charges is exclusively a function of the Pre-Trial Chamber. After the commencement of trial, the Trial Chamber is vested, under the Rome Statute, with two limited powers: to grant or reject the Prosecutor's application to withdraw the charges, and to modify the legal characterisation of the facts under Regulation 55.¹⁴

16. Consequently, the Trial Chamber cannot engage in a legal characterisation of the facts pursuant to Regulation 55 before the start of trial. This is contrary to the Prosecution's argument that there is nothing that expressly bars the Trial

¹² *Prosecutor v Lubanga*, Judgement of the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of the Trial Chamber I of 14th 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. 85.

¹³ Regulation 55(2) of the Regulations of the Court (emphasis added).

¹⁴ ICC-01/04-01/06, paras 13-14.

Chamber from invoking Regulation 55(2) at this stage of the proceedings.¹⁵ In fact, the regulation itself expressly states that it can only be triggered during the trial.

17. In the present case, the possible re-characterisation envisaged by the Prosecution that might be conducted during trial is not informed by the Chamber's assessment of the facts "after having heard the evidence".¹⁶ On the contrary, the necessity to re-characterise the facts emerges from the Prosecution's submission that the PTC erred in its decision on the legal characterisation of facts pleaded in the amended DCC.¹⁷ No sufficient facts have yet been placed before the Chamber for any assessment. Consequently, Regulation 55 does not support the notice requested. It therefore follows that the Prosecution's Application is premature.
18. The Prosecution submits that while the decision on whether to actually re-characterize the facts is for another day, if the chamber considers now that there is so much as a possibility of a re-characterization, then it must give notice of this possibility under regulation 55(2).¹⁸ This submission is also misconceived.
19. Without a proper factual basis, any notice under Regulation 55(2) is no more than a theoretical possibility that in the future a different qualification of the offence could be advanced. Such a theoretical possibility is for all practical purposes of no value.¹⁹

¹⁵ ICC-01/09-02/11/445, para. 17.

¹⁶ Regulation 55, being an indivisible provision, provides the same safeguards to the rights of the accused in all its sub-regulations. Consequently, the safeguard in sub-regulation 1 that the chamber's decision recharacterising the facts be subject to Article 74 is also applicable in sub-regulation 2 in so far as the Chamber's decision to recharacterize the facts is based only on evidence submitted and discussed before it at trial.

¹⁷ ICC-01/09-02/11-445, para. 2.

¹⁸ ICC-01/09-02/11-445, para. 16.

¹⁹ See for instance *I.H and Others v Austria*, Judgement of 20 April 2006, para. 28, in which the European Court of Human Rights agreed with the defence that "... it could not be decisive whether there was the theoretical possibility of a different qualification of the offence by the Prosecution and the Trial Court which the defence should have anticipated"; see also *Kamasinki v Austria*, Judgement of 19 December 1989, series A no 168,

20. Notice should not be given on the basis of a mere fleeting and speculative possibility that circumstances may arise in the future to necessitate re-characterization. A possible re-characterization of facts and circumstances should be sufficiently detailed in order to properly and adequately put the accused on notice of the case that he would ultimately defend and in respect of which he should prepare. Providing notice in a factual vacuum creates unnecessary ambiguity and uncertainty regarding the case the accused will meet at trial and violates his rights to be informed promptly of the nature and cause of charges against him. Article 67(1)(a) states:²⁰

In the determination of any charge, *the accused shall be entitled* to a public hearing, having regard to the provision of this Statute, to a fair hearing conducted impartially, and *to the following minimum guarantees*, in full equality:

To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

21. The facts and circumstances that the Chamber would take into account in any consideration of the possible change in the legal characterization of an alleged crime should be sufficiently detailed and should include the elements of the offences. In *Lubanga*, the Appeals Chamber was critical of the Trial Chamber for issuing notice for re-characterization under Regulation 55 on the basis of extremely “thin” explanations regarding the facts and circumstances, and for failing to provide any details as to the elements of the offences the inclusion of which it contemplated, or to consider how these elements were covered by the facts and circumstances described in the charges.²¹

pages 36-37 and 79, which states that, “particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him”.

²⁰ Article 67(1)(a) of the Rome Statute (emphasis added).

²¹ ICC-01/04-01/06-2205, para. 109. The chamber held that: “The Trial Chamber’s explanations in the Impugned Decision and the Clarification regarding the facts and circumstances are extremely thin. The Trial

22. In his assessment of Regulation 55 in his dissenting opinion in *Lubanga*, His Honour Judge Fulford noted “that the Court would need to investigate whether the facts and circumstances exceeding those described in the Amended Document Containing Charges are to be relied on in order to establish the crimes proposed [...], and specifically as regards the facts relating to the alleged personal criminal responsibility of [the accused], in terms of both the *actus reus* and the necessary *mens rea*”.²²
23. As the European Court of Human Rights has stated, “in criminal matters the provision of full, detailed information concerning the charges against a defendant, and *consequently the legal characterisation that the court might adopt in the matter*, is an essential prerequisite for ensuring that the *proceedings are fair*”.²³
24. In the instant application, the Prosecution does not provide sufficient details on the basis of which the Chamber could give a proper and effective notice pursuant to Regulation 55(2). The Application for notice does not contain the elements of crimes covered by the facts and circumstances suggested for re-characterization and an explanation of how they are subsumed into the counts envisaged. Rather, the Prosecution’s Application merely lists the facts and circumstances and submits that they predicate further charges than those already confirmed by the PTC.²⁴
25. While Regulation 55 permits the Chamber to re-qualify the legal characterization of the facts, this power must be interpreted and applied in a manner consistent with the Statute and Rules of Procedure and Evidence, in

Chamber neither provided any details as to the elements of the offences the inclusion of which it contemplated, nor did it consider how these elements were covered by the facts and circumstances described in the charges”.

²² Second Corrigendum to “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ of 17 July 2009”, ICC-01/04-01/06-2069-Anx1, para. 48.

²³ *Pelissier and Sassi v France*, ECtHr, para. 52 (emphasis added).

²⁴ ICC-01/09-02/11-445, paras 4-12.

particular, the rights of the accused under Article 67(1)(a). Furthermore, Regulation 55 expressly includes the requirement that the Trial Chamber ensure that the accused has adequate time and facilities to prepare his defence.²⁵ In *Lubanga*, the Appeals Chamber recognized that Regulation 55(2) and (3) was intentionally drafted to avoid violations of this right by setting out several stringent safeguards for the protection of the rights of the accused.²⁶

26. The Prosecution admittedly does not expressly seek a re-characterization of these facts at this point but rather only a “notice to the participants under regulation 55(2) that there is a possibility that regulation 55(1) may be employed at a later date to recharacterize certain facts and that 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*”.²⁷

27. It therefore follows that the Prosecution’s invitation to the Chamber to invoke Regulation 55(2) now due to a possible future process under sub-regulation 1 serves no practical purpose and should be rejected on that basis alone.

b. The Prosecution misinterprets the scope of Regulation 55 and its application in this case

28. The Prosecution argues that Regulation 55(2)’s notice requirement can be invoked in this case even before the trial begins because based on the limited factual record now before the Chamber it is apparent that the facts may be

²⁵ Regulation 55(3)(a) states that the Chamber shall in particular ensure that the accused shall “have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67(1)(b)”.

²⁶ ICC-01/04-01/06-2205, para. 83.

²⁷ ICC-01/09-02/11-445, para. 14 (emphasis added).

subject to multiple legal characterizations and that this possibility triggers Regulation 55(2)'s notice requirement.²⁸

29. The Defence submits that the Pre-Trial Chamber plays a central role in finalizing the scope of the charges in terms of the factual circumstances on which they are based, for the purposes of trial. In *Katanga and Ngudjolo* the Pre-Trial Chamber held that "the decision on the confirmation of charges crystallizes the facts and circumstances accepted in that decision in support of the charges it has confirmed. This is one of the fundamental reasons for the existence of the Pre-Trial Chamber, the purpose of which is to enable trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain and accessible to the accused [...]"²⁹
30. Without a sufficient factual basis, an attempt to apply Regulation 55(2) in this case at this stage would prejudice the accused.
31. His Honour Judge Fulford has underscored the difficulties surrounding the interpretation of the proper scope of the exercise of the Trial Chamber's powers under Regulation 55. In his dissenting opinion in *Lubanga*, he states that, "[...] in due course, the jurisprudence of the Court will need to define the relationship between Article 61(9) and Regulation 55 and in particular the dividing line between amending the charges, adding additional charges or substituting more serious charges on the one hand; and modifying the legal characterization of the facts and circumstances on the other".³⁰
32. Without a proper factual basis, the Trial Chamber in this case is not in a position to determine if the notice it is being asked to provide now will ultimately lead to amending the charges, adding additional charges or

²⁸ ICC-01/09-02/11-445, para. 2.

²⁹ ICC-01/04-01/07-1547-tEng, para. 31.

³⁰ ICC-01/04-01/06-2069-Anx1, para. 43.

substituting more serious charges as opposed to simply redefining their legal character.

33. In *Lubanga*, the Appeals Chamber noted, *inter alia*, that Regulation 55 does not stipulate what changes in the legal characterisation may be permissible, that the particular circumstances of the case will have to be taken into account, that Regulation 55(2) and (3) must be respected in order to safeguard the rights of the accused, and that the change in the re-characterisation must not lead to an unfair trial.³¹
34. Without a proper and sufficient factual basis, it will be difficult for the Chamber to determine what changes in the legal characterisation may ultimately be possible or even permissible in the particular circumstances of this case and therefore any notice at this stage would be speculative.
35. Indeed it has been stated that “whether a proposed modification of the legal characterization of facts is, in reality, an amendment to or addition to, or substitution for the charge, is (at the very least) a question of fact and degree, to be assessed on a case by case basis”,³² and that, “for additional charges, or to substitute more serious charges, there must be a further confirmation of charges hearing”.³³ The Defence submits that this kind of assessment accords with the statutory right of the accused and cannot be undertaken without a proper factual basis.
36. Shibahara and Schabas, in their commentary on Article 61(9) of the Statute, clearly state that, “A new hearing must be held, when the Prosecutor seeks to add additional charges or to substitute more serious charges”.³⁴ When a

³¹ ICC-01/04-01/06-2205, para. 100.

³² ICC-01/04-01/06-2069-Anx1, para. 53(iii).

³³ ICC-01/04-01/06-2069-Anx1, para. 13.

³⁴ K. Shibahara and W. Schabas, “Article 61”, in *Commentary on the Rome Statute*, O. Triffterer, ed., p. 1180.

lesser offence is replaced or substituted by a more serious one, article 61(9) should apply and not Regulation 55.

(i) There is no factual and/or legal basis for seeking to re-characterize forcible circumcision and penile amputation as other forms of sexual violence

37. Pre-Trial Chamber II characterized forcible circumcision and penile amputation as “other inhumane acts” under Article 7(1)(k) of the Statute and confirmed that charge,³⁵ but declined to confirm the charge of “other forms of sexual violence” under Article 7(1)(g), holding that the evidence did not establish the sexual nature of the acts of forcible circumcision and penile amputation.³⁶ In its application, the Prosecution submits that the Pre-Trial Chamber erred in characterizing these acts in this way. The Prosecution further pledges to request the Chamber in future to re-characterize these acts as “other forms of sexual violence” under Article 7(1)(g).³⁷

38. It is with regard to this future request that the Prosecution requests the Chamber to issue notice to the participants under Regulation 55(2).

39. From a factual standpoint, the PTC held that “not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence [...] [and] the determination of whether an act is of a sexual nature is inherently a question of fact”.³⁸ It concluded that the evidence placed before it “did not establish the sexual nature of the acts of forcible circumcision and penile amputation” and that

³⁵ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, paras 270-277, 280.

³⁶ ICC-01/09-02/11-382-Red, para. 266.

³⁷ ICC-01/09-02/11-445, para. 2.

³⁸ ICC-01/09-02/11-382-Red, para. 265.

"it appeared from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over another".³⁹

40. The PTC did not say that under different factual circumstances, forcible circumcision and penile amputation could not constitute other forms of sexual violence. Although the Prosecution argues that forcible circumcision and penile amputation are inherently sexual in nature, it does not address the PTC's analysis of the evidence which resulted in the PTC finding that the acts in this case were not sexual in nature.
41. In view of the fact that the PTC's decision was guided by the facts and circumstances as presented by the Prosecution, and in the absence of an alternative factual basis at this stage, the Prosecution's request for notice to be given of possible re-characterisation of forcible circumcision and penile amputation as other forms of sexual violence under Article 7(1)(g) is without merit.
42. Moreover, any argument that regardless of the factual circumstances, forcible circumcision and penile amputation should always be characterized as other forms of sexual violence is erroneous and without a proper legal basis.

(ii) Prosecutor's request to re-characterise forcible circumcision and penile amputation is an impermissible attempt to overturn the PTC decision

43. The Defence further submits that the Prosecution's categorization of *forcible circumcision and penile amputation* in this case as forms of sexual violence is an impermissible attempt to seek a reversal of an express decision of the PTC in relation to charges as confirmed by the PTC.

³⁹ ICC-01/09-02/11-382-Red, para. 266.

44. Regulation 55 cannot be used to circumvent the express statutory framework of the Rome Statute, which defines the different responsibilities between the Pre-Trial and Trial Chambers, nor can it be used to allow the Prosecution a second bite at recasting parts of its case that have been expressly rejected by the PTC, and for which the Prosecution did not avail itself of the statutory right of seeking leave to appeal within the permitted time frame for appellate review of the impugned portion of the PTC decision. The Prosecution is expressly requesting this Chamber, at paragraph 18 of its Application, to take a *different interpretation* to that of the PTC, which is undoubtedly a request by the Prosecution to the Chamber to effectively “reverse” the finding of the PTC on the subject. The Trial Chamber cannot act as an appellate court in relation to Pre-Trial Chamber decisions.⁴⁰ Furthermore, this Chamber has ruled that the charges cannot include matters which have been “expressly rejected by the PTC”.⁴¹ The request of the Prosecutor in this regard is clearly outside the remit of Regulation 55.
45. The jurisprudence of the Court gives a substantial margin of deference to the Pre-Trial Chamber as far as confirmed charges are concerned. As observed by Trial Chamber I in *Lubanga*,⁴²

“[...] there is no hierarchy of status between [the Pre-Trial Chamber and the Trial Chamber]. The Trial Chamber has not been given an appellate jurisdiction over any decision of the Pre-Trial Chamber (although as set out above, the Trial Chamber is not bound by the decisions of the Pre-Trial Chamber on evidential or procedural issues) and most particularly the Trial Chamber has not been given a power to review the only decision of the Pre-Trial Chamber that is definitely binding on the Trial Chamber: the decision on the confirmation of charges. Contrary to the submissions of the

⁴⁰ ICC-01/04-01/06-1084, paras 43-44.

⁴¹ Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, ICC-01/05-01/08-836, paras 29-37.

⁴² 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 should be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 43.

Prosecution, the Trial Chamber has severely limited authority as regards the content of the charges”.

46. The *Lubanga* Trial Chamber further underscored the dangers inherent in any precipitate attempt to review decisions of the Pre-Trial Chamber, an exercise that would “frequently involve revisiting a large part of the evidence, the submissions and the applicable law considered by the Pre-Trial Chamber”.⁴³
47. This charge has already been considered by a competent Pre-Trial Chamber and a decision issued declining to confirm the same. The Defence submits that the Prosecution’s request in respect of this charge is tantamount to turning the Trial Chamber into a court of appellate jurisdiction, a position that would violate the statutory and legal instruments establishing the Court and would certainly be antithetical to the objectives of Regulation 55⁴⁴ and to the fairness and expeditiousness of the proceedings.

(iii) *There is no factual and/or legal basis for seeking to ‘re-characterize’ looting and destruction of property as predicate acts underlying the charge of persecution*

48. The PTC classified looting and destruction of property as predicate acts underlying the charge of “deportation or forcible transfer of populations”

⁴³ ICC-01/04-01/06-1084, para. 44.

⁴⁴ Trial Chamber I has clarified the relationship between the Pre-Trial Chamber and the Trial Chamber in the following terms, “The Trial Chamber has not been given an appellate jurisdiction over any decision of the Pre-Trial Chamber (although as set out above the Trial Chamber is not bound by the decision of the Pre-Trial Chamber on evidential or procedural issues), and most particularly the Trial Chamber has not been given a power to review the only decision of the Pre-Trial Chamber that is definitely binding on the Trial Chamber: the Decision on the confirmation of charges. Contrary to the submissions of the Prosecution, the Trial Chamber has severely limited authority as regards the content of the charges. It is noteworthy that if the Prosecution are correct as regards their proposed first route, the consequences for the institutional framework of the ICC and expeditious justice would be profound. It would mean that contrary to the express provisions of the Statute, there are two independent routes by which the parties can challenge the Decision on the confirmation of charges: first, by way of an appeal to the Appeals Division and, second, on an application to the Trial Chamber to strike down part, or all of the decision on the basis that the Pre-Trial Chamber had acted *ultra vires* (and, in all likelihood, for other reasons not canvassed before this bench. In our judgement recognizing or creating this second avenue of appeal would be an institutional development of such significance that it is dependent on being included as an express provision approved by the Assembly of State Parties. In its absence, the Trial Chamber cannot nullify or ignore Pre-Trial Chamber’s Decision on the Confirmation of charges”, ICC-01/04-01/06-1084, paras 43-44 (emphasis added).

under Article 7(1)(d) and confirmed that charge,⁴⁵ but correctly declined to consider the issue of looting and destruction of property with respect to the persecution charge on the basis that to do so would be tantamount to requesting the Prosecutor to consider adding a new charge.⁴⁶ The Defence agrees with the logic of the PTC, and submits that the request of the Prosecutor in this regard can only be considered as adding a new charge, and is therefore outside the scope of Regulation 55. The Prosecution has failed to provide any cogent basis as to why the matter was not the subject of an application for leave to appeal and the prosecution does not make any submission on why a request was not made to the PTC to add such a charge pursuant to Article 61(9) of the Statute.

49. The Prosecution argues that the PTC misconstrued and incorrectly circumscribed its allegations regarding looting and destruction of property and, as a result, declined to consider those allegations with respect to the charge of persecution. The Prosecution submits that the Trial Chamber should take a different approach and consider looting and destruction of property as predicate acts underlying both the persecution charge as well as the confirmed charge of “deportation or forcible transfer of populations”.⁴⁷

50. In proposing such an approach – which, as submitted above, constitutes a request to add a new charge – the Prosecution provides an ill conceived and erroneous interpretation of the Appeals Chamber’s holding in *Lubanga* that “article 74 (2) of the Statute confines the scope of Regulation 55 to the facts and circumstances described in the charges and any amendment thereto”.⁴⁸

The ‘charges’ are of course the charges as confirmed by the Pre-Trial

⁴⁵ ICC-01/09-02/11-382-Red, paras 244, 279.

⁴⁶ ICC-01/09-02/11-382-Red, para. 286.

⁴⁷ ICC-01/09-02/11-445, paras 23-25.

⁴⁸ *Prosecutor v Lubanga*, Judgement of the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of the Trial Chamber I of 14th 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. 93 (emphasis added).

Chamber, and “[i]n 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”.⁴⁹ Accordingly, and contrary to the Prosecution’s submission at paragraph 39 of its Application that the facts in question merely need be “included in the original charges”, any facts explicitly rejected by the Pre-Trial Chamber with respect to a specific charge – *here destruction of property and looting as predicate acts underlying the charge of persecution* – cannot be reanimated by the Trial Chamber through the mechanism of Regulation 55.

51. The Prosecution’s proposal is all the more surprising given its submissions in the above mentioned *Lubanga* Appeal proceeding that “both negotiating history and scholarly writings confirm the position that a Trial Chamber remains at all times bound by the facts and circumstances pleaded by the Prosecution as confirmed by the Pre-Trial Chamber.”⁵⁰ The PTC found that the Prosecution did not plead persecution through property destruction and looting,⁵¹ and the Prosecution, its present objections notwithstanding and as noted above, did not seek leave to appeal this finding. In fact, the present submissions of the Prosecutor were triggered only by the invitation of the Trial Chamber. The Defence agree with the Prosecution’s former stated position, and submit that the Prosecution’s avowed intention to request a ‘re-characterisation’ of the facts to include property destruction and looting as predicate acts underlying a charge of persecution falls wholly outside the scope of Regulation 55.

⁴⁹ ICC-01/04-01/06-2205, footnote 163.

⁵⁰ *Prosecutor v. Lubanga*, Prosecution’s Document in Support of Appeal against the “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” and urgent request for suspensive effect, 14 September 2009, ICC-01/04-01/06-2120, para. 33 (emphasis added).

⁵¹ ICC-01/09-02/11-382-Conf., paras 284-286.

RELIEF REQUESTED

For the reasons detailed above, the Defence respectfully requests that the Chamber denies the Prosecution's request for notice to be issued to the participants under Regulation 55(2) in respect of a possible re-characterisation of the facts regarding forcible circumcision and penile amputation, and looting and destruction of property as predicate acts to the crime of persecution.

Respectfully Submitted,



Karim A. A. Khan, QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 25th day of July 2012

At Kuala Lumpur, Malaysia