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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. WILLIAM SAMOEI RUTO
AND JOSHUA ARAP SANG***

Public

**Joint Defence Response to Submissions of Victims' Representative
on Regulation 55 and Article 25(3)**

Source: Defence for Mr. William Samoei Ruto
Defence for Mr. Joshua Arap Sang

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
Cynthia Tai, Trial Attorney

Counsel for William Ruto

David Hooper QC
Kioko Kilukumi Musau

Counsel for Joshua Sang

Joseph Kipchumba Kigen-Katwa
Philemon K.B. Koech, Joel Kimutai Bosek

Legal Representatives of the Victims

Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Counsel Support Section

Deputy Registrar

Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 15 June 2012, Trial Chamber V issued an *Order setting the deadline for submissions on Regulation 55 and Article 25(3)* (“Order”).¹ The Victims’ Representative made submissions on 4 July 2012,² wherein she requested the Trial Chamber:

to give notice to the participants now that it expects, at the end of the trial, to consider whether of [*sic*] 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).³

2. The defence for Mr. Ruto and the defence for Mr. Sang both object to the Victims’ Representative’s request because it is premature, it runs contrary to the purpose of Regulation 55, and it is not legally tenable to recharacterize them as suggested. Consequently, the Trial Chamber should not provide notice to the participants that it may change the legal characterization of facts.

II. SUBMISSIONS

Timing of the Request for Modification of Legal Characterization is Premature

3. The defence notes that per the terms of Regulation 55 the responsibility for providing notice to the participants of a possible modification of the legal characterisation of facts lies solely with the Trial Chamber.⁴ Such notice is triggered “at any time during the *trial*” when “it appears to the Chamber that the legal characterization of facts may be subject to change...”.
4. Though certainly early notice of such a modification is necessary in order for the defence to know and challenge the case against it, notice at this stage would be premature and too unspecific to be useful. For instance, the prosecution has been ordered to file an updated Document Containing the Charges (DCC), based on the

¹ *Prosecutor v. Ruto and Sang*, ICC-01-09/01-11-426, Order setting the deadline for submissions on Regulation 55 and Article 25(3), 15 June 2012.

² *Prosecutor v. Ruto and Sang*, ICC-01-09/01-11-436, Submissions of the Victims’ Representative on Regulation 55 and Article 25(3), 4 July 2012 (“Submissions”).

³ Submissions, para. 47.

⁴ In fact, during the discussions of the Working Group of Judges on Regulation 55, the judges explicitly rejected proposals to grant the parties a formal right to request a change in legal characterization. Giving this power to the parties was seen to potentially “compromise the trial” in that the Prosecutor could seek to re-open the trial any time it received new evidence or witnesses. Carsten Stahn, p. 26.

confirmation of charges decision, by 21 August 2012.⁵ Regulation 52 stipulates that the charges as laid out in the DCC will consist of a statement of facts ... which provides a sufficient legal and factual basis to bring the person to trial, and a legal characterization of the facts. Therefore, any notice of a proposed modification to the legal characterization of the facts must necessarily be subsequent to the production of the updated DCC. This is because Regulation 55 must be read in light of, and is restricted by, Article 74(2),⁶ which requires that the final decision or judgement of the Trial Chamber must be based on an evaluation of the evidence and *must not exceed the facts and circumstances in the charges*. At this stage, the defence is not even sure what the specific facts and circumstances in the charges in the updated DCC will be, so the Victims' Representative's references at para. 21 to the original DCC and the amended DCC may no longer be accurate.

5. Even once the defence receives the updated DCC, the defence will not be in a position to address the substantive merits of whether the legal characterization should be modified. There is no evidence on record that would allow the defence to adequately consider and argue its position substantively. The terms of Regulation 55 itself states that only after "having heard the evidence", the Chamber "shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral and written submissions". Should the Chamber, at some later stage, give the participants notice of a possible modification of the legal characterization of facts, then the defence will address the merits in detail. The defence suggests that an appropriate stage to do this might be after the close of the prosecution's case.
6. However, the Chamber, when entertaining the Victims' Representative's request, should keep in mind the general submissions below with regard to the purpose and scope of Regulation 55.

⁵ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-439, Order for the Prosecution to file an updated document containing the charges, 5 July 2012, para. 10.

⁶ The Appeals Chamber is of the view that "article 74(2) of the Statute confines the scope of Regulation 55 to the facts and circumstances described in the charges and amendment thereto. If applied with such limitation, Regulation 55 is consistent with article 74(2) of the Statute". *Prosecutor v. Lubanga*, ICC-01/04/01-06-2205 OA15 OA 16, Judgement 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 Characterization of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, 8 December 2009 ("Lubanga Reg 55 Appeal Decision"), para. 98.

Request Runs Counter to Intention of Judges when Drafting Regulation 55

7. The Victims' Representative's request to modify the legal characterization and essentially delineate additional charges under either Article 7(1)(h) or Article 7(1)(k) runs counter to the intention of the judges in adopting Regulation 55, namely that charges and trials be focused and not over-reaching. As His Honour Hans-Peter Kaul explained, when the judges began to work on drafting the Regulations, they tried to accomplish the following objectives:
 - (1) to streamline trials as far as possible;
 - (2) to avoid, as much as possible, long and detailed, and possibly insufficiently substantiated, indictments with a multitude of alternative or cumulative charges that would have to be decided on separately in the course of the trial;
 - (3) to limit the average length of trials as far as possible;
 - (4) to avoid crafting endless judgements extending to hundreds of pages;
 - (5) to prevent, where possible, trials being hijacked by the defendant [...];
 - (6) to protect, above all, the rights of the accused and the defense, including the accused's right to trial without undue delay in accordance with Article 67, para. 1(c).⁷
8. Specifically, HHJ Kaul stated that Regulation 55, whose adoption "was not entirely uncontroversial" was deemed

essential to avoid lengthy indictments with cumulative and alternative charges. The judges want to conduct focused trials on clearly delineated charges, in the interest both of judicial economy and of the defense.⁸
9. In light of these objectives of Regulation 55, the Victims' Representative's arguments that cumulative *charging* is permissible, even while cumulative *convictions* may not be permissible,⁹ must fail.
10. Furthermore, it is the prosecution that must ultimately determine and litigate its case as confirmed by the Pre-Trial Chamber. The prosecution is not required to charge a defendant with every possible crime. A report by the Office of the Prosecutor has indicated that its strategy is to show a sample of crimes, which are reflective of the gravest incidents and the main types of victimization. This enables

⁷ Hans-Peter Kaul, *Developments at the International Criminal Court, Construction Site for More Justice: The International Criminal Court after Two Years*, 99 AM. J. INT'L L. 370 (2005), p. 376-7.

⁸ *Ibid.*, p. 377.

⁹ Submissions, paras 43-46.

the prosecution to bring more cases and to deliver more efficient justice.¹⁰ The Victims' Representative's request has the potential to require the prosecution to shift its focus and to litigate several specific charges (burning/destruction of property/looting/physical injury) rather than broad charges which may encompass the same acts (persecution). This could result in an even lengthier pre-trial period and the need for additional witness testimony.

Untenable Legal Recharacterization of the Facts under Article 7(1)(h) or 7(1)(k)

11. The Victims' Representative submits that acts of destruction and/or burning of property, infliction of injuries and looting can amount to the crime of humanity of persecution under 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 under Article 7(1)(k) of the Statute. When the Victims' Representative raised essentially the same question during the confirmation proceedings¹¹ (under the Pre-Trial Chamber's Article 61(7)(c)(ii) power rather than the Trial Chamber's Regulation 55 power), the majority of the Pre-Trial Chamber noted that acts of burning, looting and destruction of property were already encompassed as the "coercive acts" of forcible transfer.¹² Additionally, the Pre-Trial Chamber noted that forcible transfer constituted acts of persecution, thus these concerns were already adequately addressed in the charges as confirmed.¹³ Thus there is no "accountability gap", contrary to the Victims' Representative's submissions at paras 33-35.
12. In any event, acts of destruction or burning of properties, looting and infliction of injury, cannot explicitly support a charge of persecution pursuant to Article 7(1)(h). The Elements of Crimes states that the alleged persecution must severely deprive, contrary to international law, one or more persons of fundamental rights. The acts causing this deprivation must be connected with another act referred to

¹⁰ Office of the Prosecutor, "Report on Prosecutorial Strategy", 14 September 2006, p. 5-6, as quoted in Sienna Merope, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, Crim. L Forum, 311 (2011), p. 320.

¹¹ *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-344, Final written observations of the Victims' Representative in relation to the confirmation of charges hearing, 30 September 2011.

¹² In the Elements of Crimes, Article 7(1)(d) defines forcible transfer as: The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other *coercive acts*.

¹³ *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01-11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 277.

in Article 7. Destruction or burning or burning of property, looting, and infliction of non-serious injury are not listed as any of the acts defined in Article 7.

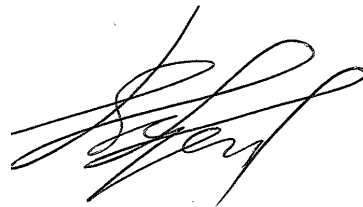
13. Likewise, acts of destruction or burning of properties, looting, and physical injuries, as defined by the Victims' Representative, cannot support a charge of inhumane acts. According to Article 7(1)(k), crimes against humanity include "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The prosecution must prove that the inhumane act is of a similar gravity to the other acts defined in Article 7, that it caused great suffering or serious injury to mental or physical health, and that the perpetrator intended it to cause great suffering or serious injury to mental or physical health.
14. It is not sufficient to posit, as the Victims' Representative does, that an injury was caused or that burning or looting of property occurred; the injury must have been severe and intended and the burning or looting of property must have caused great suffering and also have been intended.
15. According to the Elements of Crimes, the provision of Article 7 "must be strictly construed, taking into account that the crimes against humanity as defined in Article 7 are among the most serious crimes of concern to the international community as a whole (...)." In light of these provisions and of the definition of inhumane act, the Defence submits that it is highly questionable whether destruction of property and looting fall within this category. It can be argued that the other acts defined by Article 7, murder, extermination, enslavement, torture, sexual slavery, rape, etc., are of a graver nature.
16. With respect to the infliction of physical injuries, the defence submits that given the lack of any specification of the charges concerning the occurrence, details, degree and intent to commit such injuries, it is not possible to conclude that such injuries are of a severity which would fall within the category of acts of a similar character to the other acts defined in Article 7. This would likely require the prosecution to adduce further evidence and legal submissions in this regard.

III. CONCLUSION

17. The defence for Mr. Ruto and the defence for Mr. Sang therefore request the Trial Chamber not to give notice to the participants at this time that the facts may be subject to legal recharacterization. To do so would be premature and such a request would likely fail on the merits. However, both defence teams reserve the right, set out in Regulation 55(2), to address further the substantive aspects of the Victims' Representative's request if the Trial Chamber does exercise its discretion in favour of providing the requested notice.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 25th day of July 2012
In The Hague



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua Arap Sang
Dated this 25th day of July 2012
In Nairobi