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TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

Public

**Defence Response to Prosecution Filing in Compliance with the Chamber's 'Order
Regarding Applications for Notice of Possibility of Variation of Legal
Characterisation'**

Source: Defence for Mr. William Samoei Ruto

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

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I. Introduction

1. By its “Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation” (“Order”),¹ the Trial Chamber ordered the Prosecution and the Legal Representative for Victims (“LRV”) to file, by 17 September 2013, any additional details to their earlier filings and submissions relating to notice to be given under Regulation 55(2) of the Regulations of the Court (“Regulations”). The Chamber granted the defence until 24 September 2013 “to raise reasoned objections, if any, following receipt of the additional details”.²
2. Further to the Order, on 17 September 2013, the Prosecution filed the “Prosecution Filing in Compliance with the Chamber’s ‘Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation’ (“Prosecution Filing”).³ The LRV submitted no additional details.
3. The defence for Mr. William Samoei Ruto (“Defence”), in line with its prior submissions on this matter, submits that the Prosecution Filing and the Prosecution’s underlying application for notice to be issued pursuant to Regulation 55(2) of the Regulations should be rejected and no such notice given.

II. Background

4. The Prosecution first made an application (“Prosecution Application”) for notice to be given under Regulation 55(2) of the Regulations with respect to Mr. Ruto’s individual criminal responsibility, on 3 July 2012.⁴ This was followed on 4 July 2012, by the then LRV’s application (“LRV Application”) that such notice go beyond that contained in the Prosecution Application.⁵ On 12 August 2013, responding to the Chamber’s “Order requesting submissions on the conduct of

¹ 5 September 2013, ICC-01/09-01/11-907 05-09-2013.

² Order, p. 6.

³ ICC-01/09-01/11-943.

⁴ Prosecution’s Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto’s individual criminal responsibility, ICC-01/09-01/11-433.

⁵ Submissions of the Victims’ Representative on Regulation 55 and Article 25(3), ICC-01/09-01/11-436.

proceedings”,⁶ the Prosecution took the opportunity to raise the matter again by requesting the Chamber to give such notice before trial so as to “minimise any prejudice to the right of the Accused to have adequate opportunity to respond to and prepare for possible re-characterization”.⁷ At the status conference held on 19 August 2013, the parties and the participants further addressed the Chamber as to whether notice should be given.

5. The Defence responded both in writing⁸ and orally⁹ to the Prosecution and LRV applications.
6. In the recent Order, the Trial Chamber requested *“additional details from the Prosecution and LRV in order to rule on the relief requested. The Chamber consider[ed] that the Prosecution and LRV need to exhaustively indicate the facts and circumstances described in the charges that would support the proposed recharacterisations”*.¹⁰ The Chamber directed the Prosecution and the LRV “to submit, no later than 17 September 2013, any additional details”.¹¹
7. On 17 September 2013, the Prosecution submitted further details in the annex to the Prosecution Filing.¹² The Chamber granted the Defence “until 24 September 2013 to raise reasoned objections, if any, following receipt of the additional details provided by the Prosecution or LRV”.¹³

⁶ 20 June 2013, ICC-01/09-01/11-778.

⁷ Prosecution’s Second Submission on the Conduct of Proceedings, ICC-01/09-01/11-848, para. 7.

⁸ Defence Response to Prosecution’s Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto’s individual criminal responsibility, 24 July 2012, ICC-01/09-01/11-442, paras. 31-38; Joint Defence Response to Submissions of Victims’ Representative on Regulation 55 and Article 25(3), 25 July 2012, ICC-01/09-01/11-444.

⁹ ICC-01/09-01/11-T-24-Red-ENG, p. 6, line 2 to p. 16, line 10 and p. 22, line 21 to p. 24, line 21.

¹⁰ Order, para. 10.

¹¹ Order, p. 6.

¹² ICC-01/09-01/11-943-AnxA.

¹³ Order, p. 6.

III. Submissions on the Prosecution Filing and Prosecution and LRV applications for notice to be given pursuant to Regulation 55(2) of the Regulations

8. As a preliminary matter, in respect to the application made by the then LRV in July 2012,¹⁴ the Defence notes that the current LRV has not submitted any further filing or details. While the Defence relies on its original submissions made in the “Joint Defence Response to Submissions of Victims’ Representative on Regulation 55 and Article 25(3)”,¹⁵ in view of the LRV not having made additional submissions pursuant to the Order, the Defence submits that the Trial Chamber should now treat the LRV Application as abandoned.
9. As noted at paragraph 5 above, the Defence has previously responded, both in writing and orally, to the Prosecution Application, of which the Prosecution Filing forms part, and refers to those submissions in full. In this filing, the Defence makes further observations. In particular, the Defence addresses the issue of whether it is appropriate to give notice pursuant to Regulation 55(2) at this time and in the manner suggested by the Prosecution.
10. Contrary to the submission by the Prosecution, it is unnecessary to put the Defence on notice of the Trial Chamber’s authority contained in Regulation 55 of the Regulations. The Defence is well aware of the content of Regulation 55 and the decisions that have been taken by three Trial Chambers regarding Regulation 55 – Trial Chambers I, II and III – and the Appeals Chamber in the *Lubanga* and *Katanga* cases. The Appeals Chamber in *Lubanga*¹⁶ found that Regulation 55 “fits within the procedural framework” of the ICC, was not inherently incompatible with Article 61(9) of the Statute, and avoided “the risk of acquittals that are merely the result of legal qualifications confirmed at the pre-trial phase that turn out to be incorrect”, which would frustrate the Statute’s aim “to put an end to

¹⁴ Submissions of the Victims’ Representative on Regulation 55 and Article 25(3), ICC-01/09-01/11-436.

¹⁵ 25 July 2012, ICC-01/09-01/11-444.

¹⁶ Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205 OA 15 OA 16 (hereafter “*Lubanga* Judgment”).

impunity’”.¹⁷ However, both in the *Lubanga* and *Katanga*¹⁸ cases, the Appeals Chamber emphasised that in exercising Regulation 55 utmost care is necessary in order to preserve the rights of the accused. As stated in the *Lubanga* Judgment:¹⁹

Human rights law demands that the modification of the legal characterisation of facts in the course of the trial must not render that trial unfair. The Appeals Chamber notes in this context that article 67 (1) (b) of the Statute provides for the right of the accused person to “have adequate time and facilities for the preparation of the defence”. It is to avoid violations of this right that Regulation 55 (2) and (3) set out several stringent safeguards for the protection of the rights of the accused. How these safeguards will have to be applied to protect the rights of the accused fully and whether additional safeguards must be implemented has not been fully considered in the context of the present appeal and will depend on the circumstances of the case.

11. It is with that statutory scheme in mind that the present request for notice by the Prosecution should be viewed. The power created by Regulation 55 is vested in the Trial Chamber itself, in the context of its decision making under Article 74 of the Statute. It does not exist as a means for extending the Prosecution’s choices as to the charges to be considered by the Chamber. It is not analogous to a common law regime of indictment and consequent amendment. The Defence submits that the power granted the Chamber by Regulation 55 is an exceptional power to be used sparingly so as to remain consistent with the statutory scheme of which it is part.

12. The Prosecution is not seeking a specific reclassification, nor even suggesting an alternative reclassification. The Prosecution has been at pains to emphasise, as stated in its original application, that “the Prosecution is not requesting the

¹⁷ *Lubanga* Judgment, para. 77 (internal reference omitted).

¹⁸ Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, 27 March 2013, ICC-01/04-01/07-3363 (“*Katanga* Judgment”).

¹⁹ *Lubanga* Judgment, para. 85.

Chamber to invoke Regulation 55(1) to recharacterize the facts at this stage”,²⁰ and, as repeated by Prosecution counsel at the oral hearing in August this year: *“At the outset I should make clear that this is not a request for an amendment of charges. It is not even a request for the immediate recharacterisation of the facts. It is simply a request that notice be given to the Defence formally by the Chamber that there is a possibility of the recharacterisation of facts...”*.²¹ Indeed, *“the Prosecution submits that if the case goes according to plan, if all the Prosecution witnesses arrive at trial, if all Prosecution witnesses come up to proof, then recharacterisation may not be necessary”*.²² It would appear to be a possibility of a possibility. Even so, the Prosecution Application extends to several possibilities.

13. The Prosecution submits *“that all the following forms of liabilities are engaged by the allegations confirmed by the Pre-Trial Chamber, that is in terms of 25(3)(a), (b), (c) and (d), all four forms of liability, and the Prosecution accordingly requests that the Defence be so notified”*.²³
14. This amounts to seeking a general invocation of Regulation 55 so that the Defence is given notice of a possible re-characterisation of the mode of liability of the accused under all the available heads set out under Article 25(3) – the only excluded heads being genocide (25(3)(e)) and inchoate crimes (25(3)(f)). The Defence submits that such a general notice would undermine the statutory structure of the Court and in particular the fundamental rights of Mr. Ruto. Were Regulation 55 to be available at this stage of a trial and to this great an extent, then most accused persons brought before the ICC must appreciate that they would stand trial effectively on all the modes of liability contained in Article 25. This risks amounting to a ‘Prosecutor’s Charter’. It will not encourage diligent prosecution but favour the indolent prosecutor who can charge at what might be

²⁰ Prosecution Application, para. 25.

²¹ ICC-01/09-01/11-T-24-Red-ENG, p. 4, lines 4 to 7.

²² ICC-01/09-01/11-T-24-Red-ENG, p. 4, lines 23 to 25.

²³ ICC-01/09-01/11-T-24-Red-ENG, p. 5, lines 19 to 22.

viewed as the highest level of culpability and then seek to rely on the Trial Chamber ‘to put things right’.

15. No Chamber has previously been presented with such a bold proposal as that made by the Prosecution in this case. In the *Lubanga* case, to which the Prosecution makes reference, notice was given at the outset of trial but in respect of a discrete and extensively discussed issue in that case, namely that the Chamber “may modify the characterization of the facts” with respect to the nature of the conflict – from international to internal armed conflict.²⁴ This notice amounted essentially to addressing what was a technical matter that plainly fell within the object of Regulation 55. In the *Katanga* case, notice was similarly given in respect of the very same technical matter as to the nature of the conflict.²⁵ The notice in the *Katanga* case relating to the possible change of the mode of liability, which was the contentious matter, was given at the very the end of the trial, well into the period of judicial deliberations under Article 74.²⁶ While the timing was contentious, the notice was given by the majority *after* their consideration of all the evidence. In the *Bemba* case, notice was given at the close of the prosecution case, in respect of the Chamber’s possible consideration of command responsibility as “should have known” rather than “known”²⁷ – an issue previously argued in that case. The defence of Mr. Bemba did not seek leave to appeal that decision.

16. Each of these three cases, which are the only examples to date, are examples of notice being given pursuant to Regulation 55 *proprio motu* by the Trial Chamber – not at the behest of the prosecution – and at a time when the Chamber could see

²⁴ Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 48.

²⁵ Ordonnance relative aux modalités de présentation des conclusions orales, 20 April 2012, ICC-01/04-01/07-3274.

²⁶ Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA.

²⁷ 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, 21 September 2012, ICC-01/05-01/08-2324, para. 5.

the lay of the land and hold an informed view said to justify a specific recharacterisation.

17. The Prosecution argues that in this case to give such notice would “be prudent and that the Chamber should rather err on the side of caution in this respect” in order “to avoid claims of prejudice by the Defence later in the case”.²⁸ The Prosecution submits that providing the accused with notice now will be a service to the accused and “will facilitate the fairness of the proceedings”.²⁹ The Prosecution argues, referring to Regulation 55(2), that the giving of notice is mandatory in the present circumstances, stating that “*on the limited factual record now before the Chamber, it is apparent that the accused’s individual criminal responsibility may be subject to multiple legal characterizations. This possibility triggers Regulation 55(2)’s notice requirement*”.³⁰ The Defence submits that this interpretation conflicts with the spirit and substance of the Statute and in particular with the Article 67 rights of Mr. Ruto “[t]o be informed promptly and in detail of the nature, cause and content of the charge[s]” and “[t]o have adequate time and facilities for the preparation of the defence”. Such general notice *ipso facto* cannot be fair to the accused.

18. The Defence agrees that the giving of early notice pursuant to Regulation 55, in an appropriate case, is undoubtedly of great assistance to an accused and to those that advise him. The Appeals Chamber, in *Katanga*, stated that it is “preferable that notice under Regulation 55(2) of the Regulations of the Court should always be given as early as possible”.³¹ However, the objective of early notice is fairness, which is lost when the notice relates, as in the present case, to an unfocused and general invoking of all modes of liability. The accused is provided no more benefit by such a notice than he possesses by his knowledge of

²⁸ ICC-01/09-01/11-T-24-Red-ENG, p. 5, line 7.

²⁹ ICC-01/09-01/11-T-24-Red-ENG, p. 19, line 9.

³⁰ Prosecution Application, para. 28.

³¹ *Katanga* Judgment, para. 24. In *Katanga*, notice was given eight months after the bench retired to consider its decision under Article 74.

the existence of Regulation 55. While early notice of possible change is an essential fairness to an accused, it ceases to be so when done on the scale and in the manner proposed by the Prosecution.

19. The Defence submits that providing Mr. Ruto with notice invoking all alternative modes of liability at this stage of the trial will be unfair. Each of the various modes of liability carries with it a different narrative and a different slant against which the facts of the case will be viewed. As the Appeal Chamber observed in *Katanga*: “[A]s pointed out by the Trial Chamber, focusing on certain facts to the exclusion of others will necessarily alter the narrative: indeed, it would appear inevitable that a change in characterisation would result in a change of narrative to a certain extent.”³² It is unreasonable to expect an accused to address or to appreciate all the varied factors that such a broad and multiple form of potential participation involves, nor for his counsel to be able to deal adequately and comprehensively with them. Such a blanket notice moves a long way from the statutory framework and the requirement under article 67(1)(a) for an accused to be informed “promptly and in detail of the nature, cause and content of the charge” – which includes both the factual allegations and their legal characterisation.

20. To seek to engage Regulation 55 in this way will add considerably to the difficulties facing Mr. Ruto. This is not a domestic court where the Defence is concerned with cases of less complexity within a system with clear parameters and settled jurisprudence. The law in respect of the various modes of liability pursuant to Article 25(3) of the Statute is not settled. Few of the issues arising from any one of the sub-sections of this article have been the subject of final determination by the Appeals Chamber. Much remains uncertain in this respect.

21. The concept of indirect co-perpetration pursuant to Article 25(3)(a) of the Statute as interpreted by the Pre-Trial Chambers of the Court, provides a complex set of

³² *Katanga* Judgment, para. 58.

elements that must be satisfied. Many of these elements and theories associated with them have yet to be examined by the Trial Chambers or the Appeals Chamber. Article 25(3)(b) (“Orders, solicits or induces”) and Article 25(3)(c) (“aids, abets or otherwise assists”) has never been charged or defined in any ICC case and therefore the definition and parameters of these modes of liability are unclear. Article 25(3)(d) is arguably the most controversial mode of liability under the Statute. The inclusion of this provision “gave rise to divergent views” in the words of the drafters.³³ There is no definitive view yet on the legal ingredients of this mode of liability. Indeed, different Pre-Trial Chambers in this case and in the *Mbarushimana* case expressed differing views as to its elements.³⁴ It is yet to be the subject of Trial Chamber or Appeals Chamber consideration. Nor is it clear that Article 25(3) provides for a ‘hierarchy’ of liability.

22. Regulation 55 is a power to be exercised by the Chamber. The question, therefore, is whether the *Chamber* considers, at this stage of proceedings, that the present charges against Mr. Ruto based on Article 25(3)(a), as found by the Pre-Trial Chamber, are inadequate, thereby requiring a notice of potential reclassification? The Defence submits that it is only when that determination by a Chamber arises as a ‘real’, rather than a fanciful possibility that the Chamber should begin to consider invoking Regulation 55. At present, the Prosecution submission, a submission that adheres to the appropriateness of Article 25(3)(a) being the correct form of participation with respect to Mr. Ruto, provides the Chamber with no proper basis to consider that the present mode of liability is or might be inadequate. As noted above, the Prosecution does not argue that to be the case. The Prosecution does not even suggest that another of the proffered modes of liability might be more appropriate or become more appropriate.

³³ United Nations General Assembly Preparatory Committee on the Establishment of the International Criminal Court, Decisions Taken by the Preparatory Committee at its session held from 11 to 21 February 1997, U.N. Doc. A/AC.249/1997/L.5, 12 March 1997, pgs. 21-22.

³⁴ Compare *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras. 268-340, with *Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, paras. 351-354.

Instead, the Prosecution desires the whole lot to be deemed ‘appropriate’. Such a possibility, sustained by a trawl through the Document Containing the Charges and selecting bits of the same that could be packaged up to form a different basis of viewing the case³⁵ does not, the Defence submits, inform the Chamber sufficiently as to the need or merit of such notice being given now.

23. The Defence do not comment at this stage as to the facts and circumstances itemised in the annex to the Prosecution Filing and in the further details provided therein or their adequacy. It is not necessarily the case that facts and circumstances applicable to Article 25(3)(a) translate or transmute into facts and circumstances that support other proposed characterisations. ‘Orders’, for example, to undertake a particular act itemised under Article 25(3)(a) do not necessarily amount to ‘orders’ to commit the types of crimes specified under Article 25(3)(b) of the Statute.
24. The giving of notice pursuant to Regulation 55 is an important and significant event. In the event it arises it occurs at a particular juncture in a case when the full merits of such notice can be viewed in light of the circumstances at the time and addressed by the defence. The Defence submits that that moment has not arisen in this case and indeed may never arise. The Prosecution Application, including the Prosecution Filing, should therefore be rejected.

IV. Relief Requested

25. For the reasons submitted above as well as in the Defence’s previous submissions on this matter, the Defence respectfully requests the Trial Chamber not to act on the Prosecution Application and Prosecution Filing to give notice pursuant to Regulation 55(2) of the Regulations.

³⁵ See the annex to the Prosecution Filing (ICC-01/09-01/11-943-AnxA).

26. Additionally, the Defence submits that the Trial Chamber should treat the LRV Application as abandoned, and in any event, for the reasons submitted above as well as in the Defence's previous submissions on the LRV Application, the Trial Chamber should not act on the LRV Application to give notice pursuant to Regulation 55(2) of the Regulations.

Respectfully submitted,



Karim A.A. Khan QC
Lead Counsel for Mr. William Samoei Ruto

Dated this 24th Day of September 2013
At The Hague, the Netherlands