

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 5 September 2013

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

**Order Regarding Applications for Notice of Possibility of Variation of Legal
Characterisation**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan

Mr David Hooper

Mr Essa Faal

Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court (the 'Court'), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 64(2) and 67 of the Rome Statute (the 'Statute') and Regulations 24, 28 and 55 of the Regulations of the Court (the 'Regulations'), issues this Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation.

1. On 3 July 2012, the Office of the Prosecutor (the 'Prosecution') filed an application (the 'Prosecution Application') for notice to be given under Regulation 55(2) of the Regulations with respect to Mr Ruto's individual criminal responsibility.¹
2. On 4 July 2012, the then Legal Representative of Victims (the 'LRV') filed submissions seeking that notice be given under Regulation 55 of the Regulations for possible recharacterisations above and beyond those contained in the Prosecution Application (the 'LRV Application').²
3. On 24 July 2012, the defence team for Mr Ruto (the 'Ruto Defence') responded to the Prosecution Application.³
4. On 25 July 2012, the defence team for Mr Sang (the 'Sang Defence') filed a response to the Prosecution Application.⁴
5. Also on 25 July 2012, the Ruto Defence and Sang Defence (collectively, the 'Defence') jointly responded to the LRV Application.⁵

¹ 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, 3 July 2012, ICC-01/09-01/11-433.

² Submissions of the Victims' Representative on Regulation 55 and Article 25(3), 4 July 2012, ICC-01/09-01/11-436. On 23 November 2012, Mr Wilfred Nderitu was appointed as the new LRV. *See* Decision appointing a common legal representative of victims, 23 November 2012, ICC-01/09-01/11-479.

³ 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.

⁴ 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, 25 July 2012, ICC-01/09-01/11-443.

⁵ Joint Defence Response to Submissions of Victims' Representative on Regulation 55 and Article 25(3), 25 July 2012, ICC-01/09-01/11-444.

6. On 12 August 2013, the Prosecution reiterated its request for the Chamber to give notice prior to or at the commencement of trial that it may change the legal characterisation of the form of individual criminal responsibility of Mr Ruto.⁶
7. On 19 August 2013, a status conference was held where, *inter alia*, the parties and participants further addressed whether notice should be given for any of the proposed recharacterisations.⁷
8. In paragraphs 30-32 of the Prosecution Application, the Prosecution details facts and circumstances described in the confirmation decision which could correspond to liability under Article 25(3)(b)-(d) of the Statute.⁸ When asked at the 19 August 2013 status conference whether these passages exhaustively set out the facts and circumstances intended to be relied upon, the Prosecution replied that 'they were intended to be indicative and examples rather than an exhaustive list'.⁹ The Prosecution argued that its submissions were sufficient to warrant Regulation 55(2) Notice being given at this stage.¹⁰
9. The LRV argues that other modes of liability may apply to the conduct of both accused, drawing particular attention to liability under Article 25(3)(c) of the Statute.¹¹ In addition, the LRV argues that: (i) burning/looting, property destruction and infliction of physical injury may be recharacterised as an underlying act of persecution pursuant to Article 7(1)(h) of the Statute and (iii) burning/looting, property destruction and infliction of physical injury may be recharacterised as other inhumane acts pursuant to Article 7(1)(k) of the Statute.¹² However, the LRV also does not exhaustively set out the facts and circumstances

⁶ Prosecution's Second Submission on the Conduct of Proceedings, 12 August 2013, ICC-01/09-01/11-848.

⁷ Transcript of Hearing, 19 August 2013, ICC-01/09-01/11-T-24-Red-ENG.

⁸ Prosecution Application, ICC-01/09-01/11-433, paras 30-32.

⁹ ICC-01/09-01/11-T-24-Red-ENG, page 19, lines 17-25, to p. 20, lines 1-4.

¹⁰ ICC-01/09-01/11-T-24-Red-ENG, page 22, lines 10-18.

¹¹ LRV Application, ICC-01/09-01/11-436, paras 51-54.

¹² LRV Application, ICC-01/09-01/11-436, para. 47.

described in the charges which would support the proposed legal recharacterisations.

10. In the circumstances, the Chamber requires additional details from the Prosecution and LRV in order to rule on the relief requested. The Chamber considers that the Prosecution and LRV need to exhaustively indicate the facts and circumstances described in the charges that would support the proposed recharacterisations. Such a showing allows for the Defence to be able to make full submissions on whether the facts and circumstances described in the charges are exceeded and, if notice under Regulation 55(2) of the Regulations is given, to be informed in detail of the factual allegations to which any potential change in the legal characterisation of the facts relate.¹³ Although the Appeals Chamber has considered it permissible to give additional details subsequent to giving notice under Regulation 55(2) of the Regulations in order to clarify the facts and circumstances being relied upon,¹⁴ the Chamber considers it best for the Defence to be able to defend against giving notice of proposed legal recharacterisations with full clarity as to what factual allegations could be relied upon.

11. The Chamber recalls that, for purposes of this trial, the charging document is the Prosecution's Updated Document Containing the Charges ('Updated DCC').¹⁵ Accordingly, the Chamber directs the Prosecution and LRV to provide all the facts

¹³ See Appeals Chamber, *The Prosecutor v. Germain Katanga*, 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, OA 13, para. 101 ('if a Trial Chamber gives notice under regulation 55 (2) of the Regulations of the Court, the Trial Chamber may also need to indicate upon which specific facts, within the "facts and circumstances described in the charges", it intends to rely').

¹⁴ ICC-01/04-01/07-3363, para. 101 ('[s]uch information, however, may be provided not only at the time of giving notice under regulation 55 (2) of the Regulations of the Court, but also, in an adequate manner, subsequently in the proceedings').

¹⁵ Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-01/11-522, para. 18. For the Updated DCC itself, see Corrigendum to Annex A to the Prosecution's Submission of Updated Document Containing the Charges pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522), 7 January 2013, ICC-01/09-01/11-533-AnxA-Corr (corrigendum notified 25 January 2013).

and circumstances described in the Updated DCC which would support the proposed recharacterisations in their respective applications.

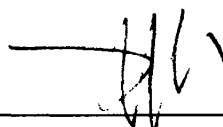
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS the Prosecution and LRV to submit, no later than 17 September 2013, any additional details in accordance with the above considerations and following guidelines:

- i. all the 'facts and circumstances described in the charges' should be presented separately for each proposed recharacterisation; and
- ii. any such fact or circumstance should be indicated in the original wording of those allegations; and


GRANTS the Defence until 24 September 2013 to raise reasoned objections, if any, following receipt of the additional details provided by the Prosecution or LRV.

Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding Judge



Judge Olga Herrera Carbuca

Judge Robert Fremr

Dated 5 September 2013

At The Hague, The Netherlands