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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF

THE PROSECUTOR v.

ABDALLAH BANDA ABAKAER NOURAIN

Public with confidential Annex A

**Prosecution request for notice to be given of a possible recharacterisation under
Regulation 55**

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution hereby requests the Trial Chamber to provide notice, pursuant to Regulation 55(2), that there is a possibility of the facts contained in the charges being recharacterised to accord with Articles 25(3)(b), (c), (d), or 28(a). The Prosecution suggests that the Chamber should provide such notice at the earliest moment envisaged under Regulation 55(2) – the first day of trial.

2. It is necessary to provide notice under Regulation 55(2) because it is clear from the record now before the Chamber that there are multiple ways to characterise the Accused's alleged criminal responsibility under the Statute. This is a function of the breadth of the Accused's alleged acts and omissions with respect to the Haskanita attack, as well as the overlap between the forms of criminal responsibility provided in the Statute. There are five reasons why the Chamber should grant this application and provide notice of the possibility of a legal recharacterisation at the start of trial.

3. *First*, the requested relief is limited. The Prosecution requests only that *notice* be given of the *possibility* that the Chamber may opt to recharacterise the facts in the future. The Prosecution is not suggesting an *actual* legal recharacterisation at this time. That will be an issue for the Chamber to determine at a later stage. It suffices for now that notice be given of the possibility of recharacterisation. Such notice will: (i) ensure that the parties are aware of the legal framework the Chamber may ultimately employ to adjudicate this case; and (ii) remove any possibility of prejudice if the Chamber decides to recharacterise the facts in its Article 74 decision.

4. *Second*, the proposed notice is consistent with the jurisprudence of this Court. Regulation 55(2) notice has been given at an early stage in *Lubanga* and *Ruto & Sang*, and later in *Katanga* and *Bemba*. Thus, Regulation 55(2) notice has been provided in every trial before this Court, and there is nothing novel about taking the same approach in this case. The proposed notice also complies with the applicable Appeals Chamber jurisprudence because it would: (i) be issued “as early as possible”;¹ and (ii) not exceed the facts and circumstances contained in the charges.²
5. *Third*, the possibility of recharacterisation is apparent even at this early stage of proceedings. The factual record now before the Chamber demonstrates that the Accused’s alleged criminal responsibility may be subject to multiple legal characterisations, and therefore that there is a possibility of recharacterisation under Regulation 55(1) in the future. This possibility is evident from a review of the decision confirming the charges (“Confirmation Decision”) and the parties’ Rule 69 agreement (“Agreed Facts”).³ Because the possibility of legal recharacterisation is apparent on the face of these core documents, the Chamber can properly provide notice of the possibility of recharacterisation before the presentation of evidence at trial begins.
6. *Fourth*, providing notice at the start of trial will ensure that the trial is fair and expeditious, as required by Article 64(2). It will ensure the trial is fair because it will minimise the possibility of prejudice if the Chamber decides to recharacterise the facts later in the proceedings. And it will ensure the trial is expeditious because it will reduce the risk of delays, the recall of witnesses, or the need for further investigations if the Chamber decides that recharacterisation is appropriate.

¹ ICC-01/04-01/07-3363, para. 24.

² ICC-01/04-01/07-3363, para. 49; ICC-01/04-01/06-2205, para. 1.

³ See ICC-02/05-03/09-121-Corr-Red; ICC-02/05-03/09-148; ICC-02/05-03/09-148-AnxA-Red.

7. *Fifth*, the proposed notice does not impact on the Agreed Facts because they deal only with the factual propositions that are undisputed between the parties, and leave open the issue of how the Chamber may ultimately decide to characterise those facts. Providing notice will therefore not alter the scope of the trial, which will proceed on the basis of the contested issues in accordance with the Chamber's September 2011 ruling.⁴
8. In sum, providing early notice of the possibility of a legal recharacterisation will allow the Chamber to consider the Accused's alleged conduct under the multiple legal characterisations that correspond to that conduct, while at the same time ensuring that the Accused is given proper notice and that his trial is fair.

Confidentiality

9. The annex to this document is filed confidentially because it refers to sections of the Confirmation Decision and the Agreed Facts that are so designated. A public redacted version will be filed.

Procedural History

10. On 19 October 2010, the Prosecution submitted the Document Containing the Charges ("DCC"), in which it alleged that Mr. Banda was individually criminally responsible as a co-perpetrator or as an indirect co-perpetrator under Articles 25(3)(a) and/or 25(3)(f) for the charged crimes.⁵ The DCC made clear that it did not "exclud[e] any other applicable mode of liability".⁶

⁴ ICC-02/05-03/09-227, para. 46.

⁵ ICC-02/05-03/09-79-Red, para. 114.

⁶ ICC-02/05-03/09-79-Red, para. 114.

11. On 7 March 2011, Pre-Trial Chamber I issued the Confirmation Decision.⁷

The Pre-Trial Chamber assessed Mr. Banda's alleged criminal responsibility under Articles 25(3)(a) and 25(3)(f) and found substantial grounds to believe that he was responsible under those modes of liability for the crimes charged.⁸

12. On 16 May 2011, the Prosecution and Defence submitted the Agreed Facts, which relate to the Accused's role and participation in the attack on MGS Haskanita, among other matters.⁹ The parties informed the Chamber that only the following issues would be contested at trial:

- I. Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;
- II. If the attack is deemed unlawful, whether the Accused was aware of the factual circumstances that established the unlawful nature of the attack; and
- III. Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.¹⁰

13. On 28 September 2011, the Chamber issued its "Decision on the Joint Submission regarding the contested issues and the agreed facts", in which it ruled that "the trial will proceed only on the basis of the contested issues" described above.¹¹

⁷ ICC-02/05-03/09-121-Corr-Red.

⁸ ICC-02/05-03/09-121-Corr-Red, paras 95-100, 124-162.

⁹ ICC-02/05-03/09-148 and ICC-02/05-03/09-148-AnxA-Red.

¹⁰ ICC-02/05-03/09-148, para. 3.

¹¹ ICC-02/05-03/09-227, para. 46.

Submissions

I. The Chamber should provide notice of the possibility that Regulation 55 may be employed during the trial to recharacterise the facts under Articles 25(3)(b), (c), (d), or 28(a).

14. The Prosecution requests that the Chamber give notice, at the start of trial, that the Chamber may employ Regulation 55(1) to recharacterise the form of individual criminal responsibility pled in relation to the Accused. Specifically, the Chamber should give notice of the possibility of recharacterisation under Articles 25(3)(b), (c), (d), or Article 28(a).

15. Regulation 55(2) provides:

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. (emphasis added.)

16. By its terms, Regulation 55(2) is triggered by a “possibility” that the Chamber “may” decide to engage in a legal recharacterisation of the facts. When triggered by such a possibility, Regulation 55(2)’s notice requirement is mandatory – “the Chamber shall give notice”.

17. As recently noted by Trial Chamber V(A), a Regulation 55 inquiry comprises three stages:

- If the Chamber determines that there is a possibility the legal characterisation of facts may be subject to change, the Chamber is required to give notice to the participants of such a possibility;

- Having heard the evidence, the Chamber shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions as to the propriety of the legal recharacterisation contemplated; and
- Having given notice and having heard the parties, the Chamber may decide whether to make the proposed recharacterisation for which notice was given at the first stage, and to employ that recharacterisation in its Article 74 decision.¹²

18. In this application, the Prosecution is suggesting that the Chamber undertake only the first step, *i.e.*, to give notice under Regulation 55(2) that there is a possibility that Regulation 55(1) may be employed at a later date to recharacterise the facts. It will be for the Chamber to decide at a later stage whether to actually recharacterise the facts and the parties will have an opportunity to litigate the merits of that issue if and when it arises.

II. The proposed notice is consistent with the jurisprudence of this Court.

19. There is nothing exceptional about the procedure the Prosecution is proposing in this case. Indeed, Chambers in every trial at this Court have given notice under Regulation 55(2) of a possible recharacterisation of the facts. The Appeals Chamber has upheld the practice.

20. In *Lubanga*, the Trial Chamber gave notice before the presentation of evidence began that it “may modify the characterisation of the facts” from international to internal armed conflict.¹³

¹² ICC-01/09-01/11-1122, para. 19.

¹³ ICC-01/04-01/06-1084, para. 48; *see also* para. 49.

21. In a decision directly on point, Trial Chamber V(A) provided notice shortly after the commencement of the *Ruto & Sang* trial of the possibility that Mr. Ruto's alleged criminal responsibility may be recharacterised under Article 25(3)(b), (c) or (d) of the Statute.¹⁴ There, as here, the issue before the Trial Chamber was "not a question of *actual* legal recharacterisation of any facts under Regulation 55(1) [but rather] whether *notice of the possibility* of such a recharacterisation is given under Regulation 55(2) of the Regulations."¹⁵ There, as here, the Prosecution requested that Regulation 55(2) notice be given at the earliest possible stage.¹⁶ There, as here, it was apparent on the face of the documents framing the case that the accused's alleged criminal responsibility could be characterised under multiple modes of liability.¹⁷ As a result, the Chamber gave notice of "a possibility that the legal characterisation of the facts . . . may be subject to change to accord with Article 25(3)(b), (c) or (d) of the Statute".¹⁸ While the *Ruto* Chamber was not requested to give notice of a possible recharacterisation under Article 28, it nevertheless held that Regulation 55 does not limit the number of potential recharacterisations, stating as follows:

[T]he Chamber is not persuaded that the Prosecution is making a 'general invocation' of Regulation 55 of the Regulations. The Prosecution is seeking a broader invocation of Regulation 55 of the Regulations when compared to the way the regulation has been applied in other cases to date. However, Regulation 55 itself imposes no limitations on the number of potential recharacterisations which may appear to the Chamber, nor does it require the Prosecution to establish the insufficiency of existing legal characterisations before Regulation 55(2) Notice may be given.¹⁹

¹⁴ ICC-01/09-01/11-1122.

¹⁵ ICC-01/09-01/11-1122, para. 18 (emphasis in original).

¹⁶ See ICC-01/09-01/11-1122, para. 21.

¹⁷ ICC-01/09-01/11-1122, paras 24, 44; see also paras 40-41.

¹⁸ ICC-01/09-01/11-1122, page 20.

¹⁹ ICC-01/09-01/11-1122, para. 40.

22. The *Bemba* and *Katanga* Trial Chambers also gave Regulation 55(2) notice, albeit at a later stage than the Prosecution proposes here.²⁰ The Appeals Chamber upheld the *Katanga* Trial Chamber's notice decision on the basis that it was not "immediately apparent . . . that the change in the legal characterisation contemplated by the Trial Chamber would exceed the facts and circumstances described in the charges".²¹ In doing so, the Appeals Chamber held that a Chamber employing Regulation 55 "must ensure that the trial remains fair",²² and opined that notice of a possible recharacterisation under Regulation 55 "should always be given as early as possible".²³

23. The notice proposed by the Prosecution in this case complies with the principles set down by the Appeals Chamber in *Katanga*.

24. *First*, the proposed notice relates to possible recharacterisations that fall squarely within the scope of the charges. As explained in greater detail below, the possible recharacterisations are evident on the face of the facts and circumstances relied upon by the Pre-Trial Chamber in the Confirmation Decision, as well as those agreed to by the parties, which by definition fall within the scope of the charges.

²⁰ See ICC-01/05-01/08-2324, para. 5 (giving notice that "the Chamber may modify the legal characterisation of the facts so as to consider in the same mode of responsibility the alternate form of knowledge contained in Article 28(a)(i) of the Statute"); ICC-01/04-01/07-3319-tENG/FRA, page 29 (giving notice "that the mode of liability under which Germain Katanga stands charged is subject to legal recharacterisation on the basis of article 25(3)(d) of the Statute").

²¹ ICC-01/04-01/07-3363, para. 46.

²² ICC-01/04-01/07-3363, para. 1.

²³ ICC-01/04-01/07-3363, para. 24.

25. *Second*, the proposed notice would be given “as early as possible”.²⁴ While Regulation 55(2) permits the Chamber to give notice of a possible recharacterisation “at any time during the trial”, “it is best to make this assessment and issue the notice as early as is possible”.²⁵ For this reason, the Prosecution suggests that the Chamber should give notice at the first moment envisaged under Regulation 55(2) – the first day of trial.

III. The possibility of recharacterisation is apparent on the face of the materials now before the Chamber.

26. The Pre-Trial Chamber confirmed the charges against the Accused under Articles 25(3)(a) and 25(3)(f).²⁶ It is apparent, however, that those articles are not the sole provisions through which the Accused’s alleged criminal responsibility can be characterised. In the Prosecution’s view, the Accused’s alleged criminal responsibility may also be characterised as:

- Ordering, soliciting or inducing under Article 25(3)(b);
- Aiding, abetting or otherwise assisting under Article 25(3)(c);
- Contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose under 25(3)(d);
or
- Command responsibility under Article 28(a).

²⁴ ICC-01/04-01/07-3363, para. 24.

²⁵ ICC-01/09-01/11-1122, para. 27; *see also* ICC-01/04-01/07-3363, para. 24.

²⁶ ICC-02/05-03/09-121-Corr-Red, paras 95-100, 124-162.

27. The possibility that the Chamber may ultimately decide to base its Article 74 decision on the above provisions is demonstrated by even a cursory analysis of the record before the Chamber. For the sake of simplicity, it suffices to confine the analysis to the Pre-Trial Chamber's factual findings in the Confirmation Decision, as well as the Agreed Facts.²⁷

28. For ease of analysis, the relevant parts of the Confirmation Decision and Joint Submission are identified in chart form in Annex A, together with the forms of criminal responsibility to which they relate. In summary, the chart demonstrates that the Accused is alleged to have:

- Ordered troops under his control to commit the attack on MGS Haskanita, led those troops in the attack, and personally participated in the attack, all of which could fall within Article 25(3)(b) ("orders, solicits or induces") if proven to the requisite standard at trial;²⁸
- Contributed to the attack on MGS Haskanita by participating in it and in at least one meeting in which the attack was discussed, and by providing troops, equipment and materiel to carry out the attack, all of which could fall within Article 25(3)(c) ("aids, abets or otherwise assists") if proven to the requisite standard at trial;²⁹

²⁷ The Prosecution notes that the *Ruto* Trial Chamber conducted its Regulation 55(2) assessment on the basis of the Prosecution's Updated Document Containing the Charges, which the Chamber had ordered the Prosecution to file after the confirmation decision to ensure consistency between the charging document and the confirmation decision. The situation is different in this case because the Chamber has not ordered the Prosecution to file an Updated Document Containing the Charges to reflect the findings of the Confirmation Decision. In this context, the Confirmation Decision and the Agreed Facts constitute the appropriate starting point for analysing this request, since those documents outline the case and the disputed issues therein.

²⁸ See Annex A, pages 1-5.

²⁹ See Annex A, pages 5-14.

- Made the above contributions to the commission and attempted commission of crimes by a group of persons acting with a common purpose, which could fall within Article 25(3)(d) (“in any other way contributes to . . . such a crime by a group of persons acting with a common purpose”) if proven to the requisite standard at trial;³⁰
- Failed to take reasonable measures to prevent or punish subordinates under his effective authority and control, despite knowing or being on notice that they were committing or about to commit the crimes charged, which could fall within Article 28(a) if proven to the requisite standard at trial.³¹

29. As the chart annexed to this application demonstrates, there are multiple ways to characterise the Accused’s alleged individual criminal responsibility in this case. The Prosecution has charged under Articles 25(3)(a) and 25(3)(f), and the Pre-Trial Chamber confirmed that they are appropriate provisions through which to characterise the Accused’s alleged criminal responsibility. But even a surface-level analysis of the record demonstrates that Articles 25(3)(a) and 25(3)(f) are not the only modes of liability that can be employed to characterise the Accused’s alleged criminal conduct – Articles 25(3)(b), (c), (d) and 28(a) are equally applicable. Because of this dynamic, it is apparent now that the Chamber may decide to recharacterise the Accused’s alleged criminal responsibility at a later stage. This possibility triggers Regulation 55(2)’s notice provision, which requires the Chamber to give notice to the parties that it may, in the course of the proceedings, employ Regulation 55(1) to recharacterise the facts.

³⁰ See Annex A, pages 14-33.

³¹ See Annex A, pages 33-47.

IV. Providing notice at the start of trial will ensure that the trial is fair.

30. The Appeals Chamber has held that “it is preferable that notice under regulation 55 (2) of the Regulations of the Court should always be given as early as possible”.³² In this case, the Prosecution suggests that the Chamber should give notice on the first day of trial, which is the earliest moment envisaged under Regulation 55(2).

31. Providing notice at this early stage will ensure that the trial is fair, as Article 64(2) requires.³³ It will enable the parties to consider the evidence against the range of legal characterisations open to the Chamber and, if appropriate, to adapt their trial presentations accordingly. Early notice will also remove the risk of the parties being taken by surprise at the end of trial by an unexpected change in the legal framework of the case. This consideration is particularly apt at this early stage of the Court’s development, where the law on the various modes of liability remains unsettled to a certain degree.

32. Providing early notice will avoid delays and adjournments (envisaged in Regulation 55(3)(a)), the recall of witnesses (envisaged in Regulation 55(3)(b)), and will enable the Accused to prepare his defence with full knowledge of the possible statutory provisions under consideration by the Chamber.³⁴ It will also ensure respect for the Accused’s Article 67(1)(a) right to be informed “in detail of the nature, cause and content of the charge[s]” against him.

³² ICC-01/04-01/07-3363, para. 24.

³³ See ICC-01/04-01/06-2205, para. 85; ICC-01/04-01/07-3363, para. 1.

³⁴ There can be no dispute as to the Prosecution’s compliance with Regulation 52, which sets out the requirements of a DCC. Regulation 52 requires the Prosecution to provide “[a] legal characterisation of the facts”. It does not require the Prosecution to plead each and every conceivable legal characterisation. The Prosecution has complied with Regulation 52’s requirements by including in the DCC a legal characterisation under Article 25(3) that appropriately reflects the Accused’s individual criminal responsibility – a legal characterisation endorsed by the Pre-Trial Chamber. For a discussion of the difference between Regulations 52 and 55, see ICC-01/04-01/06-2205, paras 96-97.

33. As Trial Chamber V(A) observed in *Ruto*, a failure to provide early notice:

. . . may involve pressures either to reopen the case in certain respects, recall witnesses that have already testified or, out of respect for the rights of the accused, to forego legal recharacterisation that might otherwise have been in the interests of justice in the case. Such pressures are highly undesirable, and if earlier notice is given then they are avoidable.³⁵

34. Indeed, providing notice now may save time later. As the *Ruto* Chamber noted, giving notice of the possibility of recharacterisation late in proceedings increases the risk that witnesses will need to be recalled or further investigations conducted, which “could [...] significantly extend the length of the trial”.³⁶ In contrast, giving notice at the beginning of trial reduces the risk that the parties will require additional time to prepare or adapt their cases later in the proceedings, should the Chamber determine that a legal recharacterisation is appropriate.

35. Moreover, early notice will ensure compliance with general principles of international human rights law.³⁷ For example, in *Zhupnik v. Ukraine*, the ECHR held that there was no fair trial violation where the trial court convicted the applicant of an offence not charged in the indictment, without giving notice of the recharacterisation before rendering its

³⁵ ICC-01/09-01/11-1122, para. 27.

³⁶ ICC-01/09-01/11-1122, para. 42.

³⁷ See, e.g., ICTY, Trial Chamber, *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, 14 January 2000, paras 744-748 (opining that a Trial Chamber may convict an accused on the basis of a form of liability not pled in the indictment, without first notifying the defence); EHCR, *Case of Pelissier and Sassi v. France*, Application No. 25444/94, Judgment, 25 March 1999, paras 42-63 (holding that although the court below “unquestionably had [the right] to recharacterise facts”, it erred by doing so without informing the accused of the possibility of a recharacterisation before rendering the judgment); *Sadak and others v. Turkey*, Application Nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment, 17 July 2001, para. 57 (holding that although the court below “unquestionably had [the right] to recharacterise facts”, it erred because it informed the accused of the recharacterisation on “the last day of the trial, just before the judgment was delivered, which was patently too late”); *Case of I.H. and Others v. Austria*, Application no. 42780/98, Judgment, 20 April 2006, para. 34 (stating that to ensure a fair trial, “the defence must have at its disposal full, detailed information concerning . . . the legal characterisation that the court might adopt in the matter”); *Miriaux v. France*, Application No. 73529/01, Arrêt, 19 September 2006, paras 25-38 (holding that court below erred by recharacterising crimes charged without giving defence an opportunity to make submissions on the possible recharacterisation); *Mattei v. France*, Application No. 34043/02, Arrêt, 19 December 2006, paras 34-44 (same); *Seliverstov v. Russia*, Application No. 19692/02, Judgment, 25 September 2008, paras 22-23 (same); *Abramyan v. Russia*, Application No. 10709/02, Judgment, 9 October 2008, paras 34-40 (same); *Block v. Hungary*, Application No. 56282/09, Judgment, 25 January 2011, paras 22-25 (same).

judgment.³⁸ The ECHR held that there was no violation because the applicant was able to contest the recharacterisation through two levels of appellate review.³⁹ The Prosecution is suggesting a far more cautious approach here – providing notice on the first day of trial of the possibility of a legal recharacterisation at a later stage.

36. This approach mirrors that taken by the Extraordinary Chambers in the Courts of Cambodia in the *Duch* case. At the pre-trial stage, the Co-Investigating Judges did not include joint criminal enterprise (“JCE”) as a mode of liability in the charging document.⁴⁰ When the case was transferred to the Trial Chamber, the Prosecution gave notice that it would seek to apply JCE liability,⁴¹ as a result of which the Trial Chamber gave notice that the issue of JCE liability “was live before it”.⁴² In its judgment, the Chamber employed Internal Rule 98(2) – akin in many respects to Regulation 55 – to modify the legal characterisation of the accused’s individual responsibility to include JCE liability.⁴³ The Chamber found that there was “no breach of the Accused’s fair trial rights” because he was “repeatedly made aware of, and provided with a timely opportunity to address”, the possibility of a conviction under JCE.⁴⁴ In this case, early notice under Regulation 55(2) will similarly ensure that there is no possibility of unfair surprise, should the Chamber ultimately opt to recharacterise the Accused’s alleged criminal responsibility.

³⁸ *Zhupnik v. Ukraine*, Application No. 20792/05, Judgement, 9 December 2010, paras 35-45.

³⁹ *Ibid.*, para. 43; *see also* paras 39-43; *Sipavičius v. Lithuania*, Application No. 49093/99, Judgement, 21 February 2002, paras. 31-32 (holding that the recharacterisation of an offence did not violate right to a fair trial where the applicant had an opportunity to contest the reformulated charge in subsequent review proceedings); *Dallos v. Hungary*, Application No. 29082/95, Judgement, 1 March 2001, paras 48-53 (same).

⁴⁰ ECCC, Judgement, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, para. 488. Under the legal framework of the ECCC, the “Closing Order” issued by the Co-Investigating Judges contains an indictment and operates as the charging document.

⁴¹ *Ibid.*, para. 489.

⁴² *Ibid.*, para. 490.

⁴³ *Ibid.*, paras 492-517.

⁴⁴ *Ibid.*, para. 502; *see also* Decision on the Applicability of Joint Criminal Enterprise, Case No. 002/19-09-2007/ECCC/TC, 12 September 2011, paras 24-25 (“The Chamber finds that it may at any time change the legal characterisation of facts contained in the Amended Closing Order to accord with any other applicable form of criminal responsibility up to and including in the verdict.”)

- V. The proposed notice does not impact on the Agreed Facts or the scope of the trial.

37. The proposed notice would not affect the Agreed Facts or the contested issues for trial. The Prosecution is not suggesting any alteration of the facts or circumstances of the charges, nor any departure from the Agreed Facts. Rather, the Prosecution is suggesting that within the scope of the charges, there are multiple ways to characterise the Accused's alleged criminal responsibility, and that it is prudent for the Chamber to give formal notice of this fact as early as possible to avoid any possibility of unfair surprise later. The proposed notice will not alter the Chamber's ruling that "the trial will proceed only on the basis of the contested issues".⁴⁵

Conclusion

38. In light of the above, the Prosecution requests the Chamber to provide notice, pursuant to Regulation 55(2), of the possibility that the facts contained in the charges may be subject to recharacterisation under Articles 25(3)(b), (c), (d) or 28(a) of the Statute.



Fatou Bensouda
Prosecutor

Dated this 28th day of March 2014

At The Hague, The Netherlands

⁴⁵ ICC-02/05-03/09-227, para. 46.