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**International
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Court**

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Date: **24 April 2014**

TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

Public

Public redacted version of the “Defence response to ‘Prosecution request for notice to be given of a possible recharacterisation under Regulation 55’”

Sources: Defence Team of Abdallah Banda Abakaer Nourain

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

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Other

I. Introduction

1. A fundamental duty of the Trial Chamber is to “ensure that the trial remains fair.”¹

The defence for Mr. Abdallah Banda Abakaer Nourain (“Defence”) respectfully submits that the Trial Chamber should decline on grounds of fairness to exercise its discretionary power to give notice pursuant to Regulation 55(2) of the Regulations of the Court (“Regulations”) of the possibility that the facts contained in the charges may be subject to re-characterisation under Articles 25(3)(b), (c), (d) or 28(a) of the Statute and, thus, dismiss the *Prosecution request for notice to be given of a possible recharacterisation under Regulation 55*.²

II. Submissions

2. The decision of a Trial Chamber whether or not to give notice of the possibility that the facts contained in the charges may be subject to re-characterisation under Regulation 55 is a discretionary one. When considering the express wording of Regulation 55, Trial Chamber V(A) in the *Ruto & Sang* case observed that:

*...the words ‘appears to the Chamber’ in Regulation 55(2) of the Regulations give the Chamber a discretionary power when making a Regulation 55(2) Assessment. Thus the Chamber has the authority under Regulation 55(2) of the Regulations to decline to consider recharacterisations proposed by the parties and participants at a given time during the trial if giving Regulation 55(2) Notice would result in unfairness.*³

3. The Defence also submits that the power granted to a Trial Chamber by Regulation 55 is an exceptional power to be used sparingly so as to remain

¹ *Prosecutor v. Katanga*, Judgement 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”, ICC-01/04-01/07-3363, 27 March 2013 (“**Katanga Appeals Decision**”), para. 1. See also Rome Statute (“**Statute**”), Articles 64(2), 64(3)(a), 64(8)(b), 67(1) and *Prosecutor v. Lubanga*, 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 characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, para. 85 (“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.”).

² ICC-02/05-03/09-549 (“**Regulation 55 Request**”).

³ *Prosecutor v. Ruto and Sang*, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, ICC-01/09-01/11-1122, 12 December 2013 (“**Ruto Regulation 55 Decision**”), para. 24.

consistent with the statutory scheme of which it is part and to encourage diligent prosecutions.

4. Of further preliminary note is the fact that Trial Chambers are not bound by the decisions of other Chambers in other cases. When deciding whether to exercise any of the Regulation 55 powers, a Chamber should be guided by the particular facts and circumstances of the case before it. The fact that notice of a possible re-characterisation of the facts has been given under Regulation 55(2) in other cases is of minimal relevance and persuasive value.⁴
5. Set in this context, the Defence submits that the Regulation 55 Request should be dismissed for the following three reasons in order to prevent significant prejudice to the Defence in this case and to ensure Mr. Banda's right to a fair trial.

(1) Regulation 55 Request not timeously made; prejudice to Defence investigations

6. The Prosecution has not acted with the necessary and requisite diligence in filing the Regulation 55 Request. As the Appeals Chamber has confirmed, "*parties must submit motions that have repercussions on the conduct of the trial in 'a timely manner'.*"⁵ This principle is particularly significant in these circumstances because the Prosecution's delay endangers the fairness of the proceedings. As Trial Chamber V(A) underlined in relation to Regulation 55, "*waiting to give such notice increases the chances of prejudice to the Defence.*"⁶

⁴ *Contra* Regulation 55 Request, paras. 4, 19-25.

⁵ See *Prosecutor v. Katanga*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", ICC-01/04-01/07-2259 OA10, 12 July 2010, para. 54 ("[A] party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness. The Appeals Chamber agrees with the Trial Chamber's conclusion that parties must submit motions that have repercussions on the conduct of the trial in "a timely manner". The Appeals Chamber interprets "timely manner" to mean that the parties must act within a reasonable time. However, what is reasonable or unreasonable in relation to time always turns on all the circumstances of the case, including the conduct of the person seeking the Court's assistance").

⁶ *Ruto* Regulation 55 Decision, para. 27.

7. While the Prosecution correctly states the jurisprudence that notice under Regulation 55 should be given “*as early as possible*”,⁷ the assertion that “*the first day of trial*” is the “*first moment envisaged under Regulation 55(2)*” that notice may be given is plainly wrong and not supported by the jurisprudence.⁸
8. In the *Lubanga* case, Regulation 55 notice on the re-characterisation of the nature of the armed conflict was given thirteen months prior to the start of trial.⁹ In the *Ruto & Sang* case, while the decision giving notice under Regulation 55(2) was rendered three months after the opening of trial, Trial Chamber V(A) acknowledged “*that...Notice could have been given at an even earlier point during the trial proceedings than now.*”¹⁰ In fact, Trial Chamber V(A) noted that the pleadings “*in the charging document can also sufficiently inform the Chamber as to the apparent possibility of an eventual change in the legal characterisation.*”¹¹ There was thus no legal barrier to the Prosecution submitting this motion many months, indeed years, earlier.
9. Given the practice of the Prosecution in other cases¹² and the above jurisprudence, there is no reason why the Prosecution in this case should have left the filing of the Regulation 55 Request until just over a month before the now vacated 5 May 2014 start of trial. This is especially so in a case where the Decision confirming the charges (“DCC”) was issued on 8 March 2011,¹³ the

⁷ Regulation 55 Request, para. 25 citing to the *Ruto* Regulation 55 Decision, para. 27 and the *Katanga* Appeals Decision, para. 24. See also para. 30.

⁸ Regulation 55 Request, para. 25.

⁹ *Prosecutor v. Lubanga*, 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, ICC-01/04-01/06-1084, 13 December 2007.

¹⁰ *Ruto* Regulation 55 Decision, para. 28.

¹¹ *Ibid.*, para. 24.

¹² E.g. in the *Ruto & Sang* case, the Prosecution first broached the issue of Regulation 55 in July 2012. See 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, 3 July 2012.

¹³ Corrigendum of the “Decision on the Confirmation of Charges”, ICC-02/05-03/09-121-Conf-Corr.

Prosecution submitted, on 19 November 2012, that it was trial-ready,¹⁴ the trial date was set on 6 March 2013¹⁵ and the deadline for final Prosecution disclosure was fixed as 2 May 2013.¹⁶ This Application was not made until 28 March 2014. The Prosecution offers no explanation for this inexcusable delay. Indeed, the Prosecution's submissions that "*the possibility of re-characterisation is apparent even at this early stage of proceedings*" serve to underline its own failing to take action earlier.¹⁷

10. The Prosecution's dilatory execution of its duties is particularly prejudicial in the context of this case where the Defence's investigations are disproportionately impacted by the serious challenges arising from the Situation in Darfur.¹⁸ As previously advised, due to the inability of the Defence to conduct investigations in Sudan, and the consequent lack of access to direct sources of evidence [REDACTED], investigations and trial preparations are time consuming and, even otherwise minor investigatory tasks, can require considerable effort.¹⁹ Therefore, it is no answer to these difficulties to argue that "*the requested relief is limited.*"²⁰ Further, in these circumstances, it is disingenuous to submit that giving notice now will "*enable the Accused to prepare his defence with full knowledge of the possible statutory provisions under consideration by the Chamber.*"²¹ [REDACTED], and as further focused by the DCC and May 2011 agreement on contested issues and facts.²² Rather, in order to help mitigate the Defence's investigatory challenges and to prevent prejudice in this case, the Regulation 55

¹⁴ Prosecution's Submissions on the Possible Date for Commencement of the Trial, 19 November 2012, ICC-02/05-03/09-421-Red.

¹⁵ Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, ICC-02/05-03/09-455, 6 March 2013.

¹⁶ Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, ICC-02/05-03/09-455, para. 19.

¹⁷ Regulation 55 Request, para. 5. See also paras. 24, 26, 27, 29.

¹⁸ The nature of this case and the extensive agreed facts mean that the inability to investigate in Sudan benefits the Prosecution and prejudices the Defence. [REDACTED]

¹⁹ ICC-02/05-03/09-422-Conf-Red, paras. 26, 28, 29, 30.

²⁰ Regulation 55 Request, para. 3.

²¹ *Ibid.*, para. 32.

²² ICC-02/05-03/09-148 and confidential annex thereto.

Request should have been filed at a much earlier point in proceedings – in fact years before, given that the charges were confirmed in 2011. On this basis alone, the Regulation 55 Request should be dismissed.

(2) Case which Mr. Banda requires to meet is undergoing significant legal and evidential changes

11. The engagement of Regulation 55 will add considerably to the difficulties and prejudice faced by the Defence. Despite the charges having been confirmed some three years ago and the date of final disclosure being some eleven months ago, recent disclosures and filings by the Prosecution indicate that considerable energy has been expended in the last few months (apparently beginning in September last year) to not only prepare for the start of trial but to undertake substantive additional investigations. The results are four re-interviews of three core witnesses,²³ the proposed addition of five new witnesses²⁴ [REDACTED]²⁵ The Defence notes that three of the re-interviews were conducted in the last month and concerned two witnesses with whom the Defence had requested to interview in November 2012. These efforts are not solely explained by the “loss” of one *viva voce* trial witness²⁶ but, the Defence submits, indicate serious failings in the core Prosecution case.²⁷

12. The Defence recalls that the Prosecution does not have an unlimited prerogative to continue investigating the same facts and circumstances after they have been

²³ P-0355 was interviewed for the third time on 16 September 2013 and his statement disclosed to the Defence on 10 December 2013. P-0419 was interviewed for the third time between 12-14 March 2014 and his statement disclosed on 18 March 2014. P-0446 was interviewed for the third and fourth time between 23-25 March 2014 and 4-6 April 2014 and his statements disclosed on 2 April and 11 April 2014 respectively.

²⁴ Prosecution application to amend its list of witnesses and evidence, ICC-02/05-03/09-557-Conf, 11 April 2014. In this application, the Prosecution seeks to add P-0441, P-449, P-0455, P-0460, and P-0511.

²⁵ ICC-02/05-03/09-T-25-CONF-ENG ET 07-04-2014, p. 1, lines 14-22.

²⁶ Of note is the fact that the evidence of P-0442 potentially still remains available to the Prosecution if, as indicated, the Prosecution seeks the admission of this witness’ evidence under Rule 68 of the Rules of Procedure and Evidence. See the Prosecution’s submissions on this point at ICC-02/05-03/09-557-Conf, para. 16.

²⁷ As acknowledged by the Prosecution Senior Trial Attorney: “We re-interviewed these two witnesses because when I came here, read through their statements and looked at them, there were clear inconsistencies that were diametrically opposed, there were areas that were not clear and that’s why they were re-interviewed to clear those up.” (ICC-02/05-03/09-T-24-ENG ET, p. 9, line 24 to p. 10, line 2.)

confirmed.²⁸ However, it appears that, for whatever reason, the Prosecution has decided to actively re-engage in the re-investigation of this case years after confirmation and effectively at the eleventh hour.

13. This re-engagement – while a cause for concern in and of itself – is a factor which must also be considered when assessing fairness for the purposes of the Regulation 55 Request. In sum, the entire case is undergoing fundamental shifts, evidentially and, if the Regulation 55 Request is granted, legally. This will render the trial unfair because the Defence will need to investigate the new evidence plus review the legal aspects of the defence case. This is particularly so when the law in respect of the various modes of liability pursuant to Article 25(3) of the Statute is not settled. Article 25(3)(d) – which is included in the Regulation 55 Request – 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.²⁹ There is no definitive view yet on the legal ingredients of this mode of liability. Indeed, different Pre-Trial Chambers in the *Kenya I* case and the *Mbarushimana* case expressed differing views as to its elements.³⁰ It is yet to be the subject of Trial Chamber or Appeals Chamber consideration. To raise the spectre of Article 23(3)(d), along with the other new modes of liability, at this late stage is highly prejudicial because, in addition to preparing for the start of trial (and the considerable logistical challenges this presents), the Defence will have to review the legal aspects and implications of the defence case in light of these

²⁸ See *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728, 26 April 2013, para. 119 citing to *Prosecutor v. Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, ICC-01/04-01/07-568 OA3, 13 October 2006, paras. 51-52.

²⁹ 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, pp. 21-22.

³⁰ Compare *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, 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, ICC-01/09-01/11-373, 23 January 2012, paras. 351-354.

potential legal changes, the exact parameters of which are in some respects still uncertain.

(3) Agreed Facts

14. One of the unusual features of this case, as acknowledged by this Trial Chamber, is that “[t]he Agreement [on the Agreed Facts] reached by the parties covers a significant part of the factual allegations contained in the charges.”³¹ The extensive Agreed Facts³² significantly alleviate the Prosecution’s burden of proof. It bears recalling that the parties, following extensive discussions *inter se*, [REDACTED], entered into the Agreed Facts on 16 May 2011, just 3 months after the charges against Mr. Banda were confirmed and on the basis of the mode of liability which was then in issue.³³

15. The Prosecution’s attempts to argue that the Agreed Facts have no link to the legal characterisation of the charges and, thus, there will be no prejudice to the fairness of the trial if the Regulation 55 Request is granted do not withstand scrutiny.³⁴ In fact, the Prosecution’s submissions in this respect are disingenuous in view of the above mentioned discussions, the context of which the Prosecution is well aware concerned indirect co-perpetration. Critically, the Agreed Facts are used in the annex to the Regulation 55 Request to support the Prosecution’s assertions that Mr. Banda’s alleged criminal responsibility could be characterised under multiple modes of liability.³⁵ A stark example of the implication of any re-characterisation in this case is that Mr. Banda’s role changes from being possibly liable for making an essential contribution to the crimes alleged to being possibly liable for making a significant but not necessarily essential contribution.³⁶

³¹ Decision on the Joint Submission regarding the contested issues and the agreed facts, ICC-02/05-03/09-227, 28 September 2011, para. 24.

³² ICC-02/05-03/09-148-Conf-AnxA, 16 May 2011 (“**Agreed Facts**”).

³³ Of relevance is also the fact that, at this time, the Court’s jurisprudence on Regulation 55 was still relatively undeveloped. E.g. the *Katanga* Appeals Chamber Decision was issued on 27 March 2013.

³⁴ Regulation 55 Request, paras. 7. See also para. 8.

³⁵ ICC-02/05-03/09-549-Conf-AnxA.

³⁶ [REDACTED]

16. The use of the Agreed Facts to justify characterising Mr. Banda's alleged responsibility under different modes of liability infringes both his right to silence and his privilege against self-incrimination. The Defence submits that the existence of Regulation 55 at the time the Agreed Facts were entered into cannot be used to counter the Defence argument that serious fair trial right issues are engaged where the Prosecution now seeks to use the Agreed Facts to prove modes of liability not included in the DCC nor properly particularised as set out in the annex to the Regulation 55 Request³⁷ at the time the Agreed Facts were entered into. Applying the reasoning of Judge Van den Wyngaert, if it is argued that Mr. Banda should have taken the possibility of a re-characterisation into consideration when entering into the Agreed Facts, this begs the question why the Prosecution did not think of this possibility itself at the time, and, if it did so, why it did not find it necessary to make the relevant Regulation 55 request.³⁸

17. Indeed, the Defence submits that it is unreasonable to expect an accused and his counsel to adequately and comprehensively assess or appreciate in the abstract the various forms of potential participation which might be charged. To require the Defence to consider Article 25(3) generally in every case 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 charges against him*" – which includes both the factual allegations and the legal characterisation.

³⁷ In this regard, the Defence notes the importance placed by Trial Chamber V(A) on the additional submissions which were filed by the Prosecution on the order of the Chamber in order to ensure that "the Ruto Defence is informed in detail of the facts and circumstances which are being relied upon for the proposed recharacterisations". See *Ruto* Regulation 55 Decision, para. 43(ii).

³⁸ *Prosecutor v. Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-AnxI, 7 March 2014, para. 56: "The argument that Germain Katanga must have been aware of the existence of regulation 55 cannot be used against him in this context. Indeed, if it is argued that Germain Katanga should have taken the possibility of a recharacterisation into consideration when deciding to give testimony under oath, this begs the question why the Chamber did not think of this possibility itself at the time and, if it did so, why it did not find it necessary to inform the accused of the fact that the Chamber would consider Germain Katanga's evidence for a possible recharacterisation").

18. In addition, if the Regulation 55 Request is granted, it will be a powerful disincentive to other accused to agree facts to such an extent and at such an early stage in other cases.

19. Accordingly, the Defence submits that the Prosecution's intention to use the Agreed Facts to prove modes of liability not charged in the DCC demonstrates starkly the manifest unfairness of the Regulation 55 Request in this case. The request should, therefore, be dismissed.

Annex to the Regulation 55 Request

20. The Defence does not comment at this stage as to the facts and circumstances itemised in the annex to the Regulation 55 Request and in the further details provided therein or their adequacy. In accordance with the *Ruto* Regulation 55 Decision, the Defence submits that such submissions should properly be made at stage two of the Regulation 55 inquiry (if such a stage is reached in this case).³⁹

III. Classification

21. This filing is submitted confidentially because it refers to: (i) [REDACTED]; (ii) confidential prosecution evidence; and (iii) submissions made at a status conference at which only the Prosecution, the Defence and the Registry were present. A redacted version will be filed in due course.

IV. Relief Requested

22. For the foregoing reasons, the Defence respectfully requests that the Trial Chamber dismiss the Regulation 55 Request.

23. If, notwithstanding the foregoing, the Trial Chamber is minded to grant the request, the Defence requests that the Prosecution be ordered to file a Pre-Trial

³⁹ *Ruto* Regulation 55 Decision, para. 19ii (“[h]aving heard the evidence in the case, 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 actual legal recharacterisation”).

Brief “explaining its case with reference to the evidence it intends to rely on at trial”⁴⁰ and the new modes of liability.⁴¹

Respectfully Submitted,



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Lead Counsel
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Dated this 24th day of April 2014

At The Hague, Netherlands

⁴⁰ *Ruto* Regulation 55 Decision, para. 45 citing to Annex B of the Prosecution’s provision of updated Pre-Trial Brief, ICC-01/09-01/11-625-AnxB-Red.

⁴¹ *Ruto* Regulation 55 Decision, p. 22, Disposition.