



Original: English

No.: ICC-02/05-03/09

Date: 29 April 2014

**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**

**Prosecution request for partial reconsideration of decision ICC-02/05-03/09-227**

**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. In the 28 September 2011 “Decision on the Joint Submission regarding the contested issues and agreed facts” (“Decision”), a previous composition of this Chamber considered the legal representative of victims’ objection that the agreed facts do not reference the alleged killing and injury of unarmed persons.<sup>1</sup> In paragraph 33, the Chamber stated as follows:

The allegations advanced by the legal representative, serious as they are, were not discussed by the Pre-Trial Chamber in the Decision on the Confirmation of the Charges (“Confirmation Decision”). The circumstances in which AMIS personnel were killed or wounded by the attackers were not sufficiently “identified” in the Confirmation Decision so as to give the accused adequate notice for the purposes of trial in accordance with Article 67(l)(a) of the Statute. Therefore, those allegations cannot be asserted against the accused at trial. It is true that the Confirmation Decision refers to witnesses’ statements, submitted by the prosecution for the purposes of the confirmation of the charges, and that those witnesses gave evidence on the facts put forward by the legal representative. However, the Confirmation Decision does not describe with sufficient clarity and detail the particular circumstances in which some of the individuals were killed or wounded to satisfy the requirements of Article 67(l)(a) of the Statute, as interpreted by the Appeals Chamber.<sup>2</sup>

2. The Prosecution respectfully submits that the above is an incorrect statement of law and should be clarified and reconsidered, particularly in light of two subsequent decisions in the Kenya cases.<sup>3</sup> These decisions demonstrate that the Prosecution’s Document Containing the Charges (“DCC”) remains the operative charging document after confirmation and that allegations contained in the DCC may be relied upon at trial unless the Pre-Trial Chamber rejects them in the confirmation decision. In the Prosecution’s view, the articulation of the law in the Kenya decisions is correct since, under this Court’s statutory framework, the DCC, not the confirmation decision, is the operative charging document at trial. Moreover, a Pre-Trial Chamber’s decision to confirm a charge should be understood to confirm all allegations related to the charge, unless the Chamber states otherwise in its confirmation decision.

<sup>1</sup> ICC-02/05-03/09-227, paras. 29-36.

<sup>2</sup> ICC-02/05-03/09-227, para. 33 (emphasis added, internal citations omitted).

<sup>3</sup> ICC-01/09-01/11-522; ICC-01/09-02/11-584.

3. If left uncorrected, the relevant parts of the Decision could cause a notice problem at trial that may restrict the Chamber's ability to adjudicate this case. The purpose of this submission is to provide the Chamber with the relevant legal framework, and to request the Chamber to clarify that:

- The operative charging document in this case is the 19 October 2010 DCC;<sup>4</sup> and
- Allegations contained in the DCC may be relied upon at trial unless the Pre-Trial Chamber rejected them in the confirmation decision.

### **Procedural history**

4. The Prosecution filed its DCC in this case on 19 October 2010.<sup>5</sup>
5. On 7 March 2011, Pre-Trial Chamber I issued its decision on the confirmation of charges, in which it decided "that the charges brought against [the Accused] are confirmed and to commit them to a Trial Chamber for trial on the charges as confirmed . . .".<sup>6</sup>
6. On 12 September 2011, the Chamber issued its "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation",<sup>7</sup> where it stated, among other things, that "in line with other Trial Chambers' findings under the Statute, the Decision on the Confirmation of Charges (and not an amended DCC) is the relevant document for defining the scope of the trial proceedings".<sup>8</sup> In support, the Chamber cited two decisions of Trial Chamber II in *Katanga* and a decision of Trial Chamber III in *Bemba*.<sup>9</sup>
7. On 28 September 2011, the Chamber issued the Decision.

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<sup>4</sup> ICC-02/05-03/09-79-Conf, ICC-02/05-03/09-79-Red.

<sup>5</sup> ICC-02/05-03/09-79-Conf, ICC-02/05-03/09-79-Red.

<sup>6</sup> ICC-02/05-03/09-121-Corr-Red, page 74.

<sup>7</sup> ICC-02/05-03/09-214.

<sup>8</sup> ICC-02/05-03/09-214, para. 33.

<sup>9</sup> ICC-02/05-03/09-214, para. 33 (ICC-01/04-01/07-1547-tENG, ICC-01/04-01/07-956, ICC-01/05-01/08-836 (incorrectly cited as ICC-01/04-01/06-836)).

## Submissions

8. Chambers have discretion to reconsider their decisions when a decision is manifestly unsound and its consequences are manifestly unsatisfactory,<sup>10</sup> or when new or previously unavailable information requires that the Chamber reconsider its previous ruling.<sup>11</sup> In *Kenyatta*, the Trial Chamber applied this standard to vacate a decision based on an intervening development in the law.<sup>12</sup>
  
9. This Chamber should take the same approach here in light of subsequent jurisprudence holding that an allegation contained in a Prosecution DCC may be relied upon at trial unless the Pre-Trial Chamber rejected the allegation during the confirmation process. As explained below, there is no requirement that an allegation be mentioned in the confirmation decision in order for it to be relied upon at trial. If the confirmation decision is silent on an allegation and fails to address it one way or another, the allegation survives to trial and may be relied upon by the Prosecution when presenting its case, and by the Chamber when rendering its Article 74(2) decision. The Chamber should reconsider the Decision, to the extent it suggests otherwise.

A. Allegations in a DCC may be relied upon at trial unless the Pre-Trial Chamber rejected them in the confirmation decision.

10. The Prosecution acknowledges that it may not rely upon allegations explicitly rejected in the confirmation decision. However, where a Pre-Trial Chamber confirms a charge, all other allegations in the DCC relating to that charge may be relied upon at trial, even where they are not discussed in the confirmation decision. There is only one situation where the Prosecution is prevented at trial from relying on an allegation contained in its DCC, which is where the confirmation decision expressly rejects that allegation by finding that there is

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<sup>10</sup> See, e.g., ICC-01/04-01/06-2705, para. 18; ICC-01/09-02/11-863, para. 11.

<sup>11</sup> See, e.g., ICC-01/05-01/08-1691-Red, para. 17.

<sup>12</sup> ICC-01/09-02/11-863, para. 12.

insufficient evidence to establish the allegation to the “substantial grounds” threshold required at confirmation.

11. The above analysis is supported by two decisions from Trial Chamber V, which were issued after the Decision and are directly on point.<sup>13</sup> During litigation over the content of the updated DCCs in *Ruto & Sang* and *Kenyatta*, the Trial Chamber addressed and rejected Defence arguments that an allegation can be relied upon at trial only if the Pre-Trial Chamber relied upon the allegation in the confirmation decision.<sup>14</sup> The Trial Chamber stated:

... when determining whether there is sufficient evidence to establish substantial grounds to believe that the crimes charged were committed, the Pre-Trial Chamber may not have examined in detail, in its Confirmation Decision, each factual allegation contained in the DCC and it may have chosen to focus on only some selected allegations and evidence sufficient for the task before it. However, this does not mean that the Pre-Trial Chamber did not confirm the charges themselves, as well as the facts and circumstances described in those charges and their legal characterisation, unless it explicitly declined to do so. For these reasons, the Chamber is not persuaded that, as a general principle, the Pre-Trial Chamber's silence on relevant statements of facts made in the DCC should result in their removal from the post-confirmation Updated DCC. The Chamber will thus, in principle, authorise the prosecution to retain such factual allegations in the Updated DCC.<sup>15</sup>

12. On the basis of this analysis, the Chamber held that “the Confirmation Decision cannot be expected to serve as the only authoritative statement of the charges for the trial”.<sup>16</sup> Rather, the Chamber held that the DCC, amended to ensure consistency with the confirmation decision, would remain the operative charging document for trial.<sup>17</sup>

13. The Prosecution submits that this is the correct analysis. When a Pre-Trial Chamber confirms a charge, the Chamber should be understood to have impliedly confirmed all allegations in the DCC related to the charge, unless the Chamber specifies otherwise. The issue is not whether the Pre-Trial Chamber *relied upon* an allegation in the confirmation decision, but whether

<sup>13</sup> ICC-01/09-01/11-522; ICC-01/09-02/11-584.

<sup>14</sup> ICC-01/09-01/11-522, paras. 12-20; ICC-01/09-02/11-584, paras. 16-23.

<sup>15</sup> ICC-01/09-01/11-522, paras. 19-20; ICC-01/09-02/11-584, para. 23. (Emphasis added).

<sup>16</sup> ICC-01/09-01/11-522, para. 18; ICC-01/09-02/11-584, para. 22.

<sup>17</sup> ICC-01/09-01/11-522, para. 18; ICC-01/09-02/11-584, para. 22.

the Pre-Trial Chamber *rejected* an allegation. The Prosecution acknowledges that if the confirmation decision explicitly rejects an allegation, the allegation cannot form part of the case at trial. But where the confirmation decision is simply silent on an allegation, that allegation should be able to be relied upon at trial. To rule otherwise would shrink the case for no reason and limit the Trial Chamber's role to ratifying or rejecting the Pre-Trial Chamber's factual analysis and theory of the case, rather than conducting an analysis of its own. This is not the intent behind the confirmation process.<sup>18</sup> To limit the scope of the trial to allegations mentioned in the confirmation decision could easily lead to situations where elements of a charge a Pre-Trial Chamber never intended to reject, but simply decided not to address, are wrongly deemed not to have been confirmed.

14. At confirmation, the Pre-Trial Chamber need only satisfy itself that there are "substantial grounds to believe" the person committed the crime charged, and need not enter a finding on every allegation in the DCC. Instead, the Pre-Trial Chamber may choose to restrict its analysis to those allegations that, in its view, are sufficient to establish the crime and mode of liability charged to the requisite standard. The limited scope of confirmation proceedings,<sup>19</sup> combined with the requirement that confirmation decisions be issued within 60 days of the confirmation hearing,<sup>20</sup> means that Pre-Trial Chambers often focus their confirmation decisions "on evidence which [they find] relevant and sufficient to evaluate elements of a given crime according to the requisite threshold and [may choose] not to analyse in detail each of the facts and circumstances described in the charges contained in the DCC".<sup>21</sup>

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<sup>18</sup> In a different context, the Appeals Chamber has rejected the notion that the Trial Chamber is "constrained exclusively to using the precise characterisations established by the Pre-Trial Chamber at a much earlier stage of the proceedings and with a necessarily more restricted view of the case as a whole". ICC-01/04-01/07-3363 OA 13, para. 57. *See also* para. 58 ("The Appeals Chamber also does not accept that a change in the narrative exceeds *per se* the facts and circumstances described in the charges.").

<sup>19</sup> *See* ICC-01/04-01/10-514, para. 47.

<sup>20</sup> Regulation 53.

<sup>21</sup> ICC-01/09-01/11-522, para. 17; ICC-01/09-02/11-584, para. 21.

15. Against this backdrop, it is incorrect to restrict the trial to the factual allegations explicitly mentioned in the confirmation decision. As the Pre-Trial Chamber noted in this case:

. . . no delimiting or otherwise constraining power can be ascribed to facts and circumstances which, despite having been mentioned or dealt with at the pre-trial stage, do not appear in the charges as confirmed by the Chamber. These include, most notably, all the facts and circumstances that are referred to in the document containing the charges or in the decision on the confirmation of charges but do not appear in the confirmed charge as such.<sup>22</sup>

16. Other Pre-Trial Chambers have endorsed the view that a confirmation decision's silence on a factual allegation contained in the DCC does not prevent the allegation from being relied upon at trial. In the Kenya cases, Pre-Trial Chamber II explained that it would:

. . . not engage in an examination of each and every subsidiary fact which is mentioned in the document containing the charges and upon which the Prosecutor relies to prove the existence of one or more facts described in the charges . . . this does not prevent the Prosecutor from relying on these or other subsidiary facts in the future, in the same way that the parties are not precluded from relying at trial upon new or additional evidence from that presented at the pre-trial stage of the case.<sup>23</sup>

17. Pre-Trial Chamber I has taken the same view in the *Gbagbo* and *Blé Goudé* cases.<sup>24</sup>

18. A Pre-Trial Chamber should not be vested with the authority to modify the scope of the Prosecution's charges by picking and choosing factual allegations for mention in the confirmation decision. Indeed, a rule that restricts the trial only to allegations mentioned in the confirmation decision would enable a Pre-Trial Chamber effectively to amend the Prosecution's charges via the back door, in violation of the Statute's separation of powers. In *Lubanga*, the Appeals Chamber held that permitting Trial Chambers to amend the charges *proprio motu* via Regulation 55 would "be contrary to the distribution of powers under the Statute," which gives the Prosecutor the authority to amend

<sup>22</sup> ICC-02/05-03/09-121-Corr-Red, para. 36.

<sup>23</sup> ICC-01/09-02/11-382-Red, para. 60; ICC-01/09-01/11-37, para. 48.

<sup>24</sup> ICC-02/11-01/11-325, para. 27; ICC-02/11-02/11-57, para. 11.



the charges.<sup>25</sup> If the analysis in paragraph 33 of the Decision were followed, it would enable Pre-Trial Chambers effectively to amend the charges by mentioning in the confirmation decision only those allegations that the Pre-Trial Chamber wished to see pursued, in violation of the Appeals Chamber's ruling in *Lubanga*.

19. In sum, there is no legal requirement for confirmation decisions to mention all factual allegations proven to the substantial grounds threshold, and in practice, they do not. It would therefore be incorrect to restrict trial only to those factual allegations mentioned in the confirmation decision. The correct analysis should be to permit all allegations contained in the DCC to be relied upon at trial, unless they were rejected in the confirmation decision.<sup>26</sup> To rule otherwise would restrict the Trial Chamber to a factual analysis that mirrors that undertaken by the Pre-Trial Chamber, which may be substantially narrower than the analysis the Trial Chamber believes is warranted after hearing all the evidence at trial.

B. The DCC, not the confirmation decision, is the operative charging document at trial.

20. The analysis in paragraphs 33-39 of the Decision appears to have been informed by the suggestion in *Katanga* that after confirmation, the DCC "can no longer serve as a reference for the hearings on the merits" and "the decision on the confirmation of the charges is the only document which can serve as a reference during Trial Chamber proceedings".<sup>27</sup> To the extent that the above can be read as suggesting that the DCC ceases to have legal effect after confirmation, the Prosecution submits that it is incorrect.

21. As stated above, more recent decisions in the Kenya cases have clarified that the DCC continues to define the scope of the charges after confirmation and that the only allegations that may not be relied upon at trial are those the Pre-

<sup>25</sup> ICC-01/04-01/06-2205 OA15 OA16, para. 94.

<sup>26</sup> ICC-01/09-01/11-522, paras. 12-20; ICC-01/09-02/11-584, paras. 16-23.

<sup>27</sup> ICC-01/04-01/07-1547-tENG, paras. 14, 16 (cited at ICC-02/05-03/09-214, para. 33 n.86).

Trial Chamber explicitly rejected in the confirmation decision.<sup>28</sup> To the extent the *Katanga* jurisprudence is inconsistent with these rulings, it is not good law and no longer represents the prevailing jurisprudence of the Court. Further, and as explained below, that interpretation was incompatible, first, with the separation of powers under the Statute, whereby the Prosecution – and not the Pre-Trial Chamber – is the charging organ; and second, with the principle that the *charges* – and not the judicial ruling confirming them – define the scope of the trial.

22. Indeed, this Court's statutory regime demonstrates that the DCC, not the confirmation decision, is the operative charging document for trial. The relevant provisions are Articles 61(9) and 74(2), Rule 128(1) and Regulation 55(1).

23. Article 61(9) and Rule 128(1) establish a procedure through which "the Prosecutor" may "amend the charges" in the period between the issuance of the confirmation decision and the start of trial.<sup>29</sup> These provisions work only if there is a charging document for the Prosecutor to amend, *i.e.*, a DCC. If, as the *Katanga* jurisprudence appears to suggest, the confirmation decision were intended to become the operative charging document after confirmation, Article 61(9) and Rule 128(1) would speak in terms of "amendments to the confirmation decision", which would need to be done by the Pre-Trial Chamber, not the Prosecution. That the provisions speak in terms of amendments to "the charges" by "the Prosecutor" indicates that the DCC remains the operative charging document after confirmation.

24. This conclusion is supported by Article 74(2) and Regulation 55(1), which require the Trial Chamber to evaluate the evidence offered at trial against "the charges and any amendments to the charges". Article 74(2) and

<sup>28</sup> ICC-01/09-01/11-522, paras. 12-20; ICC-01/09-02/11-584, paras. 16-23.

<sup>29</sup> Article 61(9) requires that notice to the accused be given and permission from the Pre-Trial Chamber be obtained.

Regulation 55(1) would make no sense if, as the *Katanga* jurisprudence appears to suggest, the DCC can no longer be used as a reference point after confirmation. Those provisions make clear that the charges: (i) are the reference point against which the Trial Chamber must evaluate the evidence presented at trial; and (ii) may be amended after confirmation, which presuppose that they continue to have legal effect at the trial stage.

25. The Appeals Chamber has confirmed that it is “the ‘facts and circumstances described in the charges’ that defines the subject-matter of the trial”.<sup>30</sup> Judge Ušacka reinforced this point in a dissenting opinion in *Ruto*, where she observed that after the charges have been confirmed, “[t]he relevant ‘text’ is the Prosecutor’s document containing the charges, as confirmed by the Pre-Trial Chamber pursuant to article 61 (7) of the Statute. Thus, an ‘amendment’ [under Article 61(9)] refers to any alteration to the document containing the charges”.<sup>31</sup>

26. In sum, the Court’s statutory framework and jurisprudence demonstrate that the operative charging document at trial is the DCC, not the confirmation decision.

C. The Chamber should reconsider the relevant parts of the Decision and give notice that allegations included in the DCC may be relied upon at trial unless the Pre-Trial Chamber rejected them in the confirmation decision.

27. To be clear, the Prosecution is not asking the Chamber to reverse the disposition of the Decision, which limits the trial to the three contested issues.<sup>32</sup> Rather, the Prosecution is asking the Chamber to give notice that in light of recent jurisprudence clarifying the law, the Chamber is departing from the analysis contained in paragraphs 33-39 of the Decision. Providing such notice before trial will ensure that the Defence is not unfairly prejudiced if allegations included in the DCC, but not mentioned in the confirmation

<sup>30</sup> ICC-01/04-01/07-3363 OA 13, para. 49.

<sup>31</sup> ICC-01/09-01/11-1123-Anx OA6, para. 15.

<sup>32</sup> ICC-02/05-03/09-227, para. 46.

decision, are relied upon at trial. Addressing this issue before trial will diminish the chances of ancillary litigation during the trial and will therefore further the expeditiousness of proceedings.

28. Finally, there would be no merit to any suggestion that this application should be denied because the Prosecution did not seek leave to appeal the Decision. *First*, there is no statutory rule that prevents a party from requesting reconsideration of a decision it chose not to appeal, where reconsideration is warranted by new information or legal developments. *Second*, it would not have been appropriate for the Prosecution to seek leave to appeal the Decision because the Chamber's analysis in paragraphs 33-39 does not have a material impact on the disposition of the Decision, with which the Prosecution agrees. *Third*, it is proper for the Prosecution to raise this issue now in light of its duty to assist the Court in reaching correct decisions. Where, as here, a party believes that an error of law may cause a notice problem or otherwise undermine the fair and expeditious nature of the proceedings, it is appropriate for the party to bring that issue to the Chamber's attention so that it can be addressed.<sup>33</sup>

### **Relief requested**

29. The Prosecution respectfully requests the Chamber to reconsider the Decision to the extent it is inconsistent with the legal analysis outlined above, and to give notice that:

- The operative charging document in this case is the 19 October 2010 DCC;<sup>34</sup> and

<sup>33</sup> In a different context, Trial Chamber V(A) noted the importance of providing the defence with early notice regarding the basis upon which the case would proceed. See ICC-01/09-01/11-1122, para. 27.

<sup>34</sup> ICC-02/05-03/09-79-Conf, ICC-02/05-03/09-79-Red.

- Allegations contained in the DCC may be asserted at trial and relied upon at trial unless the Pre-Trial Chamber rejected the allegations in the confirmation decision.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 29<sup>th</sup> day of April 2014

At The Hague, The Netherlands