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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

**Defence response to “Prosecution request for partial reconsideration of decision
ICC-02/05-03/09-227”**

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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I. Introduction

1. In two separate decisions in September 2011 this Trial Chamber confirmed that the *Corrigendum of the "Decision on the Confirmation of Charges"* ("Confirmation Decision")¹ is "*the relevant document for defining the scope of the trial proceedings*" in this case.² This approach is consistent with the approaches taken by Trial Chambers in the majority of the trials at this court.³ In 2012, Trial Chamber V departed from this approach in the two *Kenya* cases, finding that "*the description of the charges in the DCC, amended to harmonise it with the findings made in the Confirmation Decision, rather than the Confirmation Decision itself, provides a sufficiently authoritative statement of the charges relevant to the trial proceedings.*"⁴
2. On 29 April 2014, sixteen months after their issuance, the Prosecution in this case reacted to the *Kenya* decisions by filing the *Prosecution request for partial reconsideration of decision ICC-02/05-03/09-227* ("Request").⁵ The defence for Mr. Abdallah Banda Abakaer Nourain ("Defence") respectfully submits that the Trial Chamber should dismiss the Request because it has not been timeously made. Even setting aside this preliminary defect, the Prosecution also fails to establish that the necessary circumstances exist which justify the exceptional remedy of reconsideration of the Decision, namely that it is manifestly unsound and its consequences are manifestly unsatisfactory, or new or previously unavailable

¹ ICC-02/05-03/09-121-Conf-Corr, 7 March 2011.

² Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, ICC-02/05-03/09-214, 12 September 2011, para. 33. *See also* Decision on the Joint Submission regarding the contested issues and the agreed facts, ICC-02/05-03/09-227, 28 September 2011 ("**Decision**").

³ *See Prosecutor v. Lubanga*, Order for the prosecution to file an amended document containing the charges, ICC-01/04-01/06-1548, 9 December 2008, para. 14 and *Prosecutor v. Lubanga*, Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paras. 7-8. *See also Prosecutor v. Katanga & Ngudjolo*, Decision on the Filing of a Summary of the Charges by the Prosecutor, ICC-01/04-01/07-1547-tENG, 21 October 2009 ("**Katanga & Ngudjolo Charges Decision**"), para. 16; *Prosecutor v. Katanga & Ngudjolo*, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, ICC-01/04-01/07-956, para. 9 and *Prosecutor v. Bemba*, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, ICC-01/05-01/08-836, 20 July 2010 (notified on 21 July 2010) ("**Bemba DCC Decision**"), para. 37.

⁴ *Prosecutor v. Ruto & Sang*, Decision on the content of the updated document containing the charges, ICC-01/09-01/11-522, 28 December 2012, para. 18. *See also Prosecutor v. Kenyatta*, Decision on the content of the updated document containing the charges, ICC-01/09-02/11-584, 28 December 2012, para. 22.

⁵ ICC-02/05-03/09-572.

information requires its reconsideration. Further, even if, *arguendo*, the test for reconsideration is met, the Decision is correct.

II. Submissions

(1) *The Request has not been timeously made; impact on Mr. Banda's fair trial rights*

3. Given the Prosecution's reliance on jurisprudence which was issued by Trial Chamber V sixteen months ago as the bedrock of its Request,⁶ it is clear that the Prosecution has not acted with the necessary and requisite diligence in filing the Request. On this basis alone the Request should be dismissed.
4. The Defence position is supported by the Appeals Chamber's finding that "*parties must submit motions that have repercussions on the conduct of the trial in 'a timely manner'.*"⁷ On any analysis, if granted, the Request would have significant "*repercussions on the conduct of the trial.*"
5. Fundamental to a fair trial is the right of an accused "[t]o be informed promptly and in detail of the nature, cause and content of the charge[s]" brought against him.⁸ For over three years, the Defence has proceeded on the basis that the charges Mr. Banda faces are set out in the Confirmation Decision. If the Request is granted, the serious repercussions on the conduct of the trial are evident. Allegations, including those which the Trial Chamber previously expressly determined were

⁶ See, e.g., Request, paras. 2, 9, 11, 12, 14, 19 and 21.

⁷ 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").

⁸ Rome Statute ("Statute"), Article 67(1)(a).

“not...clarified or detailed in the Confirmation Decision”,⁹ could now form part of the charges against Mr. Banda.

6. In addition, and pursuant to the Decision, the Defence has prepared for trial on the understanding that *“the trial will proceed on the basis of the contested issues”* and *“the parties shall not present evidence or make submissions other than on the issues that are contested”*.¹⁰ Based on the example relied upon at paragraph 1 of the Request, and despite the Prosecution’s assertions otherwise,¹¹ it appears the Prosecution wishes to assert and rely on allegations – such as the circumstances in which AMIS personnel were killed or wounded –which have no bearing on the three contested issues. If this is not the case, the Defence queries why other examples of allegations included in the Document Containing the Charges (“DCC”)¹² and relevant to proof of the contested issues but not expressly rejected by the Pre-Trial Chamber in the Confirmation Decision were not identified in the Request.
7. In light of the significant repercussions on the conduct of the trial, there is no reason why the Prosecution in this case should have left the filing of the Request until 29 April 2014. The Prosecution states that *“it is proper for [it] to raise the issue now in light of its duty to assist the Court in reaching correct decisions”*¹³ but offers no explanation for the inexcusable delay in exercising its “duty”. Indeed, the Request is now part of a course of dilatory conduct by the Prosecution in this case which gives rise to serious concern and prejudice to the Defence.¹⁴ As the Trial Chamber is aware, failure by the Prosecution to act in a timely manner is particularly prejudicial in the context of this case where the Defence’s

⁹ Decision, para. 35 (emphasis omitted).

¹⁰ Decision, para. 46.

¹¹ Request, para. 27.

¹² Document Containing the Charges submitted pursuant to Article 61(3) of the Statute, ICC-02/05-03/09-79-Conf, 19 October 2010.

¹³ Request, para. 28.

¹⁴ See, e.g., Prosecution request for notice to be given of a possible recharacterisation under Regulation 55, ICC-02/05-03/09-549, 28 March 2014; Prosecution application to amend its lists of witnesses and evidence, ICC-02/05-03/09-557-Conf, 11 April 2014.

investigations are disproportionately impacted by the serious challenges arising from the Situation in Darfur.¹⁵

(2) The Request fails to justify that the exceptional remedy of reconsideration is merited

8. Reconsideration is an exceptional remedy which is available only in limited circumstances.¹⁶ The Prosecution fails to establish these circumstances in the Request.
9. *First*, the two decisions of Trial Chamber V which the Prosecution relies on in support of the Request¹⁷ are not new or previously unavailable information which requires this Trial Chamber to reconsider its ruling in the Decision that the Confirmation Decision is the relevant document for defining the scope of the trial proceedings in this case.¹⁸ At this court, Trial Chambers are not bound by the decisions of other Chambers in other cases. Therefore, the Prosecution's assertion that the "*more recent decisions in the Kenya cases have clarified that the DCC continues to define the scope of the charges after confirmation*" is without merit.¹⁹ These decisions have not "*clarified*" but have departed from the previous jurisprudence. The fact that Trial Chamber V's decisions were issued subsequent to the Decision does not elevate them in any way. Similarly, the Prosecution's statement that the two Trial Chamber V decisions represent "*the prevailing jurisprudence of the Court*" is also incorrect.²⁰ The weight of authority as evidenced by the approach taken by the Trial Chambers in the majority of the cases before

¹⁵ See, e.g., Defence response to 'Prosecution request for notice to be given of a possible recharacterisation under Regulation 55, ICC-02/05-03/09-568, 22 April 2014, fn 18; Confidential Redacted Version of "Defence Submissions on the Possible Date for the Commencement of the Trial" filed on 19 November 2012, ICC-02/05-03/09-422-Conf-Red, 21 November 2012, paras. 26, 28, 29, 30.

¹⁶ *Prosecutor v. Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013 ("**Kenyatta Reconsideration Decision**"), para. 11.

¹⁷ Request, para. 11 referring to ICC-01/09-01/11-522 and ICC-01/09-02/11-584 at fn. 13.

¹⁸ Request, para. 8 citing to ICC-01/05-01/08-1691-Red, para. 17 and the *Kenyatta* Reconsideration Decision, para. 12.

¹⁹ Request, para. 21 (emphasis added).

²⁰ Request, para. 21.

this Court conforms with that taken in the Decision.²¹ In this legal context, the Defence submits that only a relevant later legal finding of the Appeals Chamber would provide the necessary “*important new information*” required to trigger reconsideration because only the Appeals Chamber has the authority to bind Trial Chambers.²² This conclusion is impliedly acknowledged by the Prosecution in paragraph 8 of the Request where the only relevant authority referred to is the *Kenyatta* Reconsideration Decision in which Trial Chamber V(B) held that the issuance of a judgement by the Appeals Chamber²³ satisfied the reconsideration standard.²⁴

10. *Second*, the ruling at paragraph 33 of the Decision is not “*manifestly unsound and its consequences...manifestly unsatisfactory*”.²⁵ In the Request, the Prosecution makes the general but unsupported assertion that “[i]f left uncorrected, the relevant parts of the Decision could cause a notice problem at trial that may restrict the Chamber’s ability to adjudicate the case.”²⁶ In fact, the only specific example the Prosecution provides regarding the consequences of the Decision is that dealing with the circumstances in which AMIS personnel were killed or wounded.²⁷ However, the fact that AMIS personnel were killed or injured during the course of the attack on the MGS Haskanita on 29 September 2007 is covered by the agreed facts.²⁸ Accordingly, in these circumstances, the fact that certain of the allegations concerning the death and injury of AMIS personnel cannot be asserted against Mr. Banda at trial does not result in manifestly unsatisfactory

²¹ *Supra*, fn. 3.

²² *Kenyatta* Reconsideration Decision, para. 12 (“where the Appeals Chamber has reversed a decision which was grounded on the same reasoning and resulting in a similar outcome as the Excusal Decision, the Chamber considers that the present circumstances satisfy the reconsideration standard discussed above”).

²³ *Prosecutor v. Ruto & Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, ICC-01/09-01/11-1066 OA5, 25 October 2013.

²⁴ *Kenyatta* Reconsideration Decision, para. 12.

²⁵ Request, para. 8 citing to ICC-01/04-01/06-2705, para. 18 and the *Kenyatta* Reconsideration Decision, para. 11.

²⁶ Request, para. 3 (emphasis added).

²⁷ Request, para. 1.

²⁸ ICC-02/05-03/09-148-Conf-AnxA, 16 May 2011 (“**Agreed Facts**”), paras. 23-24.

consequences. Rather, it is in conformity with the prior agreement of the parties, as confirmed by the Trial Chamber in the Decision, that *“the parties shall not present evidence or make submissions other than on the issues that are contested.”*²⁹

11. In conclusion, the Prosecution fails to satisfy the high threshold required for reconsideration and the Request should be dismissed on this basis.

(3) The Decision is correct

12. If, *arguendo*, the Trial Chamber considers that the test for reconsideration is satisfied in the Request and that it is appropriate to reconsider the relevant part of the Decision, the Defence submits that, for the following four reasons, the Prosecution fails to establish that the Decision is *“an incorrect statement of law”*.³⁰
13. *First*, the Prosecution erroneously argues that, if it is not permitted to rely on an allegation which was not dealt with in the Confirmation Decision, then this *“would [be to] 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.”*³¹ This criticism fails to properly appreciate the role of the Pre-Trial Chamber in confirming the charges and setting the factual parameters on which the trial will proceed. Trial Chamber II in the *Katanga & Ngudjolo* case helpfully articulated the role and purpose of the pre-trial phase as follows:

In providing for a pre-trial phase, whose culminating point is the decision on the confirmation of the charges, rendered following an adversarial hearing, and in requiring the Trial Chamber to be bound by the facts and circumstances described in the charges as thus confirmed, and by them alone, the Statute does not allow either the Chamber, or even the Prosecutor, to add new facts in the course of the trial as and when they are disclosed by the ongoing investigations. Thus it should be recalled that the filing of the Confirmation Decision represents not the starting point of the preliminary proceedings but in fact their termination...the decision on the

²⁹ Decision, para. 46(ii).

³⁰ Request, para. 2.

³¹ Request, para. 13.

*confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed. This is one of the fundamental reasons for the existence of the Pre-Trial Chamber, the purpose of which is to enable the trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain, and accessible to the accused.*³²

14. Therefore, properly considered, the Pre-Trial Chamber performs the vital role of crystallising the case for the purposes of trial rather than shrinking it.

15. *Second*, the Prosecution's reliance on various statements made by Pre-Trial Chambers at paragraphs 15 to 17 of the Request does not advance its position because these statements concern "subsidiary facts" or background information³³ and not "material facts", that is "*those facts and circumstances which underlie the charges*".³⁴ The circumstances in which AMIS personnel were killed or wounded are not "subsidiary" facts. Nor does it appear that the Common Legal Representative intended to treat them as such.³⁵ Further, the Pre-Trial Chamber's silence on these allegations means they are not part of the charges. On any view, including the fact that the Agreed Facts has rendered the leading of evidence on this point unnecessary, the Prosecution would not be entitled to lead and rely on

³² *Katanga & Ngudjolo Charges Decision*, para. 22.

³³ See Confirmation Decision, para. 36 ("it is important to bear in mind the distinction between, on the one hand, the facts and circumstances underlying the charges (that is, "the facts and circumstances described in the charges" within the meaning of article 74(2) of the Statute and regulation 55(1) of the Regulations) and, on the other hand, other facts which are not mentioned in the charge but which are subsidiary or otherwise related to them, in particular since proof of the material facts may be inferred from them. Furthermore, these subsidiary facts are also relevant to the extent that they provide background information") (emphasis added). See also *Prosecutor v. Gbagbo*, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, ICC-02/11-01/11-325, 14 December 2012, para. 27 ("Accordingly, in the event that any charges are confirmed, the factual parameters of the case at trial are determined by the charges as presented by the Prosecutor, to the extent confirmed by the Pre-Trial Chamber. Such delimiting effect can only be ascribed to those facts and circumstances which underlie the charges and must be described therein ("material facts"). Conversely, no constraining power is attributed to those factual allegations presented by the Prosecutor in the DCC, or at the confirmation of charges hearing, with a view to demonstrating or supporting the existence of material facts ("subsidiary facts"). Such subsidiary facts may be analysed by the Pre-Trial Chamber insofar as relevant to determine the existence of material facts, but are not themselves part of the charges and are not subject to confirmation by the Pre-Trial Chamber under article 61(7) of the Statute") (emphasis added).

³⁴ *Prosecutor v. Gbagbo*, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, ICC-02/11-01/11-325, 14 December 2012, para. 27.

³⁵ Decision, para. 30 ("The legal representative argues that the killing of unarmed persons in these circumstances constitutes a war crime").

at trial evidence concerning the killing or injuring of AMIS personnel during the attack.

16. *Third*, the Prosecution, in paragraph 18 of the Request, further misunderstands the role of the Pre-Trial Chamber. It appears that the Prosecution believes that if the Decision is not reconsidered it effectively means that a Pre-Trial Chamber is “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.”³⁶ This view is incorrect. Instead, the Pre-Trial Chamber is accorded the discretion under Statute to “accept certain facts and to reject others, so as to ultimately confirm only those charges for which it considers that there is ‘sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged’”.³⁷ By making the Pre-Trial Chamber the “arbiter of the facts”,³⁸ it fulfils the following vital functions: (i) “protecting the rights of the Defence against ‘wrongful and wholly unfounded charges’”;³⁹ (ii) ensuring judicial economy by “preventing those cases that do not meet the requisite evidentiary standard at the pre-trial stage from proceeding to trial”;⁴⁰ and (iii) as detailed above, crystallising the facts and circumstances accepted in the confirmation decision in support of the charges it has confirmed.

17. Based on the foregoing, it is clear that the Prosecution’s reliance on the *Lubanga* Appeals Chamber judgement in paragraph 18 of the Request is misplaced since that judgement concerned the Trial Chamber’s erroneous conclusion that it had the power “to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor [which] would be contrary to the distribution of powers under the Statute.”⁴¹ As discussed above, the facts and circumstances underlying the

³⁶ Request, para. 18.

³⁷ *Katanga & Ngudjolo Charges Decision*, para. 16.

³⁸ *Bemba DCC Decision*, para. 32.

³⁹ Confirmation Decision, para. 31.

⁴⁰ Confirmation Decision, para. 31.

⁴¹ *Prosecutor v. Lubanga*, 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

charges are properly determined by the Pre-Trial Chamber. Regulation 55 of the Regulations of the Court only permits a Trial Chamber to amend the legal characterisation of the facts and circumstances confirmed by the Pre-Trial Chamber.

18. *Fourth*, contrary to the Prosecution's position, the Court's statutory regime does not demonstrate that the document containing the charges as opposed to the confirmation decision is the operative charging document.⁴² As noted by Trial Chamber II, the only references to the "document containing the charges" in the Court's legal instruments are in the sections dealing with the pre-trial phase of proceedings.⁴³ Further, the Prosecution's argument that Article 61(9) and Rule 128(1) do not mention amendments to the "confirmation decision" cuts both ways as these provisions also do not mention "amendments to the document containing the charges."⁴⁴ Instead, the provisions mention amendments to the "charges". The charges (which comprise the facts and circumstances and the legal characterisation of the facts)⁴⁵ are to be found in the confirmation decision. While the elements which make up the charges may be found in different parts of the confirmation decision,⁴⁶ they are identifiable and, indeed, were collated in

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 OA16, 8 December 2009, para. 94.

⁴² Request, para. 22.

⁴³ *Katanga & Ngudjolo* Charges Decision, para. 15. In this regard, the following are of note: (i) Article 61(3)(a) which is in Part 5 (Investigation and Prosecution) (as opposed to Part 6 (The Trial)) of the Statute refers to the "document containing the charges"; (ii) Rule 121(3), which is found in Chapter 5 (Investigation and prosecution) Section V (Proceedings with regard to the confirmation of charges under Article 61), of the Rules of Procedure and Evidence, refers to the provision by the Prosecution of a "detailed description of the charges"; and (iii) Regulation 52 of the Regulations of the Court which is titled "Document containing the charges" is in Chapter 3 (Proceedings before the court) Section 2 (Pre-Trial) of the Regulations.

⁴⁴ Request, para. 23.

⁴⁵ *Katanga & Ngudjolo* Charges Decision, paras. 10, 19.

⁴⁶ *See, e.g., Prosecutor v. Lubanga*, Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 8 ("The two paragraphs of the Decision on the Confirmation of Charges cited above contain the legal characterisation of the facts, including the mode of liability, the temporal framework of the crimes and the fact that the alleged conscription and enlistment was "into" the Force Patriotique pour la Libération du Congo ("FPLC"). The Pre-Trial Chamber, in this section, did not expressly identify the facts that supported each of the legal elements of the crimes charged. However, they were referred to in other sections of the Decision and the Trial Chamber has ensured that the present Judgment does not exceed the facts and circumstances established by the Pre-Trial Chamber") (emphasis added).

a summary in the *Katanga & Ngudjolo* case.⁴⁷ Accordingly, the argument that in order to amend the charges, there must be a “*charging document for the Prosecutor to amend, i.e., a DCC*” is unduly narrow.⁴⁸ In order to amend, the “charges”, all that is required is for the charges to be identified from an analysis of the confirmation decision (in a fashion similar to the summary prepared in *Katanga*) and an application made in accordance with the relevant statutory provisions. If there is a concern that the Prosecution has included “facts and circumstances” which do not properly form part of the charges in the application to amend, then such concern can be addressed during the amendment process.

19. Of further note is that neither Article 74(2) of the Statute nor Regulation 55 of the Regulations of the Court refers to the “document containing the charges”. The Defence submits that this is further evidence that this document does not retain a role post-confirmation. Instead, the key term in these provisions is “charges”. As discussed above, the “charges” can be identified by reference to the confirmation decision and, indeed, have been so identified in the Article 74 judgement in *Lubanga*⁴⁹ and the summary prepared by the Prosecution in *Katanga*.⁵⁰

20. On the basis of the foregoing, the Defence submits that the Prosecution’s challenge to the correctness of the relevant part of the Decision can be dismissed.

III. Relief Requested

21. For the foregoing reasons, the Defence respectfully requests that the Trial Chamber dismiss the Request.

⁴⁷ *Katanga & Ngudjolo* Charges Decision, para. 29.

⁴⁸ Request, para. 23.

⁴⁹ *Prosecutor v. Lubanga*, Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012.

⁵⁰ *Katanga & Ngudjolo* Charges Decision.

Respectfully Submitted,



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Dated this 21st day of May 2014

At The Hague, Netherlands