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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 document

**Public redacted version of the 20 August 2014 Prosecution application to add
documentary and witness material to its list of evidence**

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The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart, Deputy Prosecutor
Mr Julian Nicholls, Senior Trial Lawyer

Counsel for the Defence

Mr Karim A.A. Khan, QC
Mr David Hooper, QC

Legal Representatives of the Victims

Ms Hélène Cissé
Mr Jens Dieckmann

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to Article 69(3) and Regulation 35(2), the Prosecution seeks leave to add the following 15 items to its list of evidence:

- Two press releases issued by groups that perpetrated the Haskanita attack (the Accused's JEM faction and SLA-Unity) in which the groups deny their involvement in the attack on the AU peacekeepers and condemn it.¹ These denials are false and demonstrate that the Accused and his co-perpetrators tried to cover up their involvement because they knew the attack was wrong. The false denials are inconsistent with the narrative the Accused has advanced before this Court – that he believed the attack to be lawful – and are evidence that his defence is a *post-facto* attempt to justify actions he knew to be wrong. The false denials go to the second contested issue – the Accused's knowledge that the attack was unlawful.
- The transcript of a 16 May 2014 interview with P-0441,² six photographs shown to him during the interview,³ and three additional photographs identified as relevant as a result of the information he provided during the interview.⁴ The interview and photographs are relevant to the second contested issue. They demonstrate that the attackers tried to conceal that they had stolen AMIS vehicles from MGS Haskanita, which reveals their awareness that their actions were unlawful.
- A United Nations report on the “principles and guidelines” for peacekeeping missions.⁵ The report speaks to the third contested issue – AMIS' status as a peacekeeping mission in accordance with the UN Charter.

¹ DAR-D05-0001-0044, DAR-OTP-0154-0387 (English translation at DAR-OTP-0193-0353).

² DAR-OTP-0193-0048.

³ DAR-OTP-0191-0436, DAR-OTP-0191-0437, DAR-OTP-0191-0438, DAR-OTP-0191-0439, DAR-OTP-0191-0440, DAR-OTP-0191-0441. These are annotated and redacted versions of DAR-OTP-0178-0102, DAR-OTP-0178-0110, DAR-OTP-0178-0124, DAR-OTP-0178-0132, DAR-OTP-0178-0134, DAR-OTP-0172-0702.

⁴ DAR-OTP-0178-0173, DAR-OTP-0178-0174, DAR-OTP-0178-0177.

⁵ DAR-OTP-0192-0357.

- Two transcripts of the Defence's interview with P-0439.⁶
2. The additions will provide the Chamber with a more complete view of the Haskanita attack and will better enable it to adjudicate the contested issues. The Prosecution acknowledges that some of the items could have been included on its May 2013 list of evidence. The paramount consideration, however, is ensuring that justice is done, which requires the Chamber to have access to evidence which may assist in its task. In this case, there is every reason to permit the requested additions. The materials are already in the possession of the Defence, are few in number, straightforward in substance, and short. There can be no real prejudice to the Defence, particularly given the substantial adjournment of the trial, which provides more than enough time for the Defence to undertake any additional preparations. Because the additional evidence will assist the Court in determining the truth and will not cause undue prejudice to the Defence, the additions should be authorised.
 3. The requested additions are attached as annexes B to E. For ease of reference, the Prosecution has listed those items, together with the items on the May 2013 list of evidence,⁷ and the items whose admission was sought in the Prosecution's two applications to amend its lists of witnesses and evidence,⁸ in a chart attached as annex A.

Confidentiality

4. This submission is designated confidential because it refers to confidential filings and evidence designated confidential by the defence in the *Abu Garda* case.⁹ Annexes A, B, C-2, D and F are designated confidential because they contain, or refer to, information that may lead to the identification of trial witnesses, for whom protective measures may be sought. Annex C-1 is designated confidential, *ex parte* because it contains unredacted versions of

⁶ DAR-D07-0439-0001, DAR-D07-0439-0057.

⁷ ICC-02/05-03/09-469-Conf-AnxA.

⁸ ICC-02/05-03/09-557-Red, ICC-02/05-03/09-589-Red2.

⁹ DAR-D05-0001-0044 and DAR-D05-0001-0019. Pursuant to Regulation 42(2), the confidentiality designation applicable in the *Abu Garda* case continues to have effect in this case unless revised.

materials disclosed in redacted form. The redacted versions are included in Annex C-2.

Procedural history

5. On 6 March 2013, the Chamber set 2 May 2013 as the final deadline for the submission of the Prosecution's updated lists of witnesses and evidence.¹⁰ The Prosecution filed its updated list of evidence on 2 May 2013 and advised the Chamber that its witness list was the same as that filed on 5 August 2011.¹¹
6. When P-0442's withdrawal as a *viva voce* witness made it necessary to seek to add P-0441 back onto the witness list,¹² the Prosecution determined that it was necessary to interview P-0441 regarding a series of photographs he provided in 2010. For this purpose, the Prosecution conducted a brief interview with P-0441 on 16 May 2014. The Prosecution disclosed the interview transcript and related exhibits to the Defence on 11 July 2014 and gave notice that it would seek to add the materials to its list of evidence.¹³
7. On 25 July 2014, the Prosecution advised the Defence of its intention to seek the addition of 24 items to its list of evidence and invited the Defence to state whether it objected to the proposed additions.¹⁴ On 4 August 2014, the Defence replied that it did not object to P-0439's interview but objected to the other items.¹⁵ The Prosecution has reduced the number of items it seeks to add to only eight of the items listed in the 25 July letter, together with the seven items related to P-0441's May 2014 interview, for a total of 15 items.

¹⁰ ICC-02/05-03/09-455, paras. 19 and 25(iii).

¹¹ ICC-02/05-03/09-469, para. 6; ICC-02/05-03/09-469-Conf-AnxA.

¹² See ICC-02/05-03/09-557-Red, para.5.

¹³ Annex F.

¹⁴ Annex F.

¹⁵ Annex F.

Submissions

- A. The Chamber may permit the addition of evidence if: (i) Regulation 35(2) is satisfied; or (ii) the additional evidence will assist the Chamber to determine the truth and will not cause undue prejudice to the Defence.

8. In relevant part, Regulation 35(2) provides:

After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

9. Where the requirements of Regulation 35(2) are met, the use of additional evidence is permitted “so long as such additions do not cause undue prejudice to the Defence”.¹⁶

10. Where the requirements of Regulation 35(2) are not met, Trial Chamber II suggested in *Katanga* that the Prosecution must:

... convince the Chamber of the significance and relevance of the newly discovered evidence and the need for the Chamber to consider it in the interest of having a better understanding of the case and the establishment of the truth. It does not suffice, in this regard, for the Prosecution simply to argue that the evidence is new. Instead, the Prosecution must either show that the new evidence is more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case.¹⁷

11. The *Katanga* Trial Chamber also considered whether the proposed addition would “interfere with the Defence’s right to have adequate time to prepare for the trial”, which is “a case by case” analysis, “taking into consideration the nature and volume of the new elements”.¹⁸

12. In *Ruto*, Trial Chamber V(a) permitted the Prosecution to add re-interview statements of existing witnesses because the addition was “in the interests of justice” and did “not particularly burden the Defence”.¹⁹ The Chamber also

¹⁶ ICC-01/09-01/11-899-Red, paras. 16-17; see also ICC-01/04-01/07-1590, para. 12 (stating that where Regulation 35(2) is satisfied, “the Chamber will in principle allow the late submission, unless this would cause undue prejudice to the Defence”).

¹⁷ ICC-01/04-01/07-1336, para. 30; see also ICC-01/04-01/07-1515-Corr, para. 37.

¹⁸ ICC-01/04-01/07-1515-Corr, para. 62.

¹⁹ ICC-01/09-01/11-762, paras. 57-58.

authorised the addition of detailed maps on the basis that they “may be beneficial for [the Chamber’s] understanding of the evidence”.²⁰

13. Also instructive are decisions authorising the addition of witnesses. Even where the requirements of Regulation 35(2) have not been satisfied, Chambers have authorised additional witnesses who “bring[] to light otherwise unknown facts which have a significant bearing upon the case”,²¹ or whose evidence “is of such a nature that it will contribute to a better understanding of the case and the establishment of the truth”.²²

B. The addition of P-0439’s Defence interview should be authorised under Regulation 35(2).

14. The addition of the transcripts of P-0439’s Defence interview is warranted under Regulation 35(2) because: (i) the interview took place in July 2013, after the 2 May 2013 deadline for the Prosecution’s list of evidence; and (ii) the Defence did not disclose the transcripts until 9 May 2014, a year after deadline. Thus, the Prosecution was unable to comply with the deadline or to seek an extension in advance “for reasons outside [its] control”.²³

15. Adding the transcripts to the list will not unduly burden the Defence since the Defence conducted the interview and has therefore been aware of its content since it took place in July 2013. Indeed, the Defence does not object to the addition of the transcripts.²⁴

²⁰ ICC-01/09-01/11-762, para. 59.

²¹ ICC-01/09-02/11-832, para. 16.

²² ICC-01/04-01/07-1590, para. 17.

²³ Regulation 35(2).

²⁴ Annex F.

C. The addition of the remaining items should be authorised under Article 69(3) because they will assist the Chamber to determine the truth and will not prejudice the Defence unduly.

16. The Defence has previously argued that Prosecution applications to add evidence “should be dismissed on principle”.²⁵ This formalistic argument misstates the “principle” that should guide the Chamber. The relevant principle is the goal of determining the truth through fair and expeditious trials. The rigid approach advanced by the Defence loses sight of this fundamental goal and seeks to elevate procedure over substance, even though this may deprive the Chamber of relevant evidence.
17. In a case such as this, where the start of trial has been delayed for years for a variety of reasons, including [REDACTED],²⁶ it is proper for the Prosecution to use the extended pre-trial period to continue to prepare its case. This preparation includes consideration of any unexplored investigative avenues and the re-review of materials obtained previously to determine whether any important items may have been overlooked.
18. When the above process reveals a need to add evidence, the Chamber should not dismiss applications on procedural grounds, as the Defence suggests. Instead, the Chamber should take a substantive approach, aimed at ensuring that the trial has the greatest scope for determining the truth, while at the same time ensuring that it remains fair, as Article 64(2) requires. In doing so, it is appropriate for the Chamber to determine two key questions: (i) whether the additional evidence is likely to assist in determining the truth and arriving at a just verdict; and (ii) whether authorising the use of the additional evidence would cause undue prejudice to the Defence such that it would render the trial unfair.

²⁵ ICC-02/05-03/09-574-Red2, para. 3; *see also* ICC-02/05-03/09-592-Red, para. 5 (advancing “the principled argument that the Prosecution should not be entitled to rely on the fruits of investigations conducted years after confirmation without proper justification”).

²⁶ [REDACTED].

19. If the additional evidence is likely to assist in determining the truth and would not render the trial unfair, the Chamber should grant the request. This approach, which is consistent with that taken in the *Katanga, Ruto and Kenyatta* cases at this Court,²⁷ and at the ICTY,²⁸ would advance the Court's work in a sensible manner, yield fair results, and ensure that the Chamber's substantive truth-finding role is not constrained by unnecessary procedural rigidity.

a. False denial documents.

20. The false denial documents issued by the rebel groups involved in the attack²⁹ speak to the second contested issue – the Accused's awareness that the Haskanita attack was unlawful. The Prosecution's case is that the Accused knew that the attack was unlawful banditry rather than a legitimate action under the laws of war. The denials were issued immediately after the attack and provide contemporaneous evidence of the attackers' state of mind. They demonstrate that the attackers sought to deny their involvement in the attack and shift blame to others. These denials are at odds with the narrative the Accused has advanced before this Court – that he carried out the attack in the belief it was lawful.

21. [REDACTED].³⁰ [REDACTED].³¹

22. DAR-OTP-0154-0387 is a 2 October 2007 statement issued by the Commander in Chief of SLA-Unity, one of the rebel groups that carried out the Haskanita

²⁷ ICC-01/04-01/07-1590, para.17, ICC-01/09-01/11-762, paras. 57-58, ICC-01/09-02/11-832, para.16.

²⁸ See, e.g., ICTY, Appeals Chamber, *Prosecutor v. Popovic et al*, 14 December 2007, Decision on appeals admitting material related to Borovcanin's questioning, IT-05-88-AR73.1, paras. 37-39 (upholding decision to permit additions to the Prosecution's list of evidence during trial where the additions were in the interests of justice and the accused's rights were safeguarded); ICTY, Trial Chamber, *Prosecutor v. Stanisic and Simatovic*, 1 April 2011, Decision on Nineteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Mladic Audio Files) and Motion for Admission of Excerpts from Mladic Audio Files, IT-03-69-T, paras. 10-11 (permitting the Prosecution to supplement its list of evidence during trial, in part because the "small number and relatively small volume" of the materials reduced any defence burden); ICTY, Trial Chamber, *Prosecutor v. Mladic*, 17 December 2013, Decision on Prosecution Motion to Admit Evidence of Thomas Knustad and Zlatko Medjedovic Pursuant to Rule 92 *quarter* and to Add Three Documents to the Rule 65 *ter* Exhibit List, IT-09-92-T, para. 5 (permitting the Prosecution to supplement its list of evidence during trial even though it failed to show good cause for the additions).

²⁹ DAR-D05-0001-0044 and DAR-OTP-0154-0387 (English translation at DAR-OTP-0193-0353).

³⁰ See [REDACTED].

³¹ DAR-D05-0001-0044, at 0045.

attack.³² SLA-Unity calls the attack “disgraceful and malicious”,³³ purports to “strongly condemn” it, and attempts to shift responsibility by suggesting that “government troops and *Janjaweed* militia” carried out the attack, rather than SLA-Unity and the Accused’s JEM faction.³⁴

23. These documents were designed to convey the impression that the Accused’s JEM faction and SLA-Unity were not involved in the Haskanita attack. This is false, as the Accused has admitted.³⁵ The significance of the false denials lies in what they reveal about the attackers’ state of mind. The documents show that in the immediate aftermath of the attack, the attackers lied about their involvement, engaging in a misinformation campaign designed to cover up their actions and blame others. These are not the actions of individuals who believed they had acted lawfully. They are the actions of people who knew they had done something wrong.

24. If, as the Defence suggests, the Accused and his co-perpetrators believed they acted lawfully in attacking MGS Haskanita, their statements would reflect that position. They would have released statements suggesting that the attack on MGS Haskanita was militarily justified and “necessary because the base was providing military assistance to the Government of Sudan”. They did the opposite. Instead of seeking to justify their actions (as people who believe they acted properly do), they disavowed their actions and blamed them on others (as people often do when they know they have done wrong). For this reason, the false denials are relevant to the second contested issue – the Accused’s state of mind – and tend to show that the Accused and his co-perpetrators knew the attack was unlawful. The Chamber’s assessment of this issue will be assisted by consideration of these materials.

³² English translation at DAR-OTP-0193-0353.

³³ DAR-OTP-0193-0353, at 0354.

³⁴ DAR-OTP-0193-0353, at 0354.

³⁵ See ICC-02/05-03/09-148, para.3; see also [REDACTED].

25. Furthermore, permitting the Prosecution to add the false denials to the list of evidence will not cause undue prejudice to the Defence.
26. *First*, the false denials are brief – each is a single page – and can be analysed in short order.
27. *Second*, DAR-D05-0001-0044 will be familiar to the Accused’s Counsel since he submitted it in the *Abu Garda* case in which he was counsel. There is thus no question of unfair surprise.
28. *Third*, the Defence has “had an opportunity to prepare for similar evidence”,³⁶ which reduces any possible prejudice. Other false denials on the Prosecution’s operative list of evidence include DAR-OTP-0179-0170 ([REDACTED]), DAR-OTP-0179-0171 ([REDACTED]), and DAR-OTP-0154-0197³⁷ (11 October 2007 “founding declaration” from the Accused’s JEM faction, which, among other things, condemns the Haskanita attack). Moreover, Mr Abu Garda admitted during his confirmation hearing that he “condemned th[e] attack at that time”.³⁸
29. In this regard, although the false denials the Prosecution seeks to add in this motion are consistent with those already on the list, this does not make their addition unnecessary. The documents also have differences – in language, dates, recipients and authors. Importantly, the additional false denials demonstrate the scale of the disinformation campaign. This is not a situation where an alleged perpetrator made a single errant remark that can readily be explained away. On the contrary, the documents demonstrate that the attackers made concerted efforts to convey the same (false) message to a wide audience. The scale of the disinformation campaign becomes clear when the false denials already on the list are viewed alongside those the Prosecution seeks to add in this motion.

³⁶ ICC-01/09-02/11-832, paras. 14 and 16.

³⁷ English translation at DAR-OTP-0156-0096.

³⁸ ICC-02/05-02/09-T-12-Red-ENG WT, page 52, line 13.

30. *Fourth*, although one of the documents (DAR-OTP-0154-0387/DAR-OTP-0193-0353) was issued by SLA-Unity and not the Accused's JEM faction, it is proper to use the document in the Accused's trial because inferences regarding an alleged perpetrator's state of mind can be drawn from the conduct of a co-perpetrator. It is undisputed that SLA-Unity acted with the Accused's JEM faction in attacking MGS Haskanita,³⁹ and the statements of SLA-Unity may therefore be used to support inferences regarding the Accused's state of mind.

31. *Fifth*, the adjournment of the trial has provided the Defence with substantial additional time to prepare. The scheduled trial date is three months away.⁴⁰ That is enough time to prepare to defend a straightforward case like this from scratch, and more than adequate to prepare for the materials the Prosecution seeks to add in this and its previous applications. In this regard, it bears noting that the Defence responses to the Prosecution's previous two applications to add evidence fail to identify any specific prejudice caused by the requested additions and rely instead upon generalised objections to investigations after confirmation.⁴¹ The Prosecution submits that the Defence has failed to identify any specific prejudice because there is none.⁴²

b. P-0441's 16 May 2014 interview.

32. During his brief (13-page) 16 May 2014 interview, P-0441 explained that his photographs were taken after the Haskanita attack and included vehicles stolen in the attack.⁴³ P-0441 identified DAR-OTP-0172-0702 as an AMIS vehicle stolen in the Haskanita attack and explained that the Accused instructed the rebel troops to "remove[] the UN [sic] logos" because "they

³⁹ See ICC-02/05-03/09-148, para.3; see also [REDACTED].

⁴⁰ See ICC-02/05-03/09-590-Red, p.10.

⁴¹ See generally ICC-02/05-03/09-574-Red2 and ICC-02/05-03/09-592-Conf.

⁴² As explained previously, and as the Defence concedes, the Prosecution is entitled to continue to investigate after confirmation. See ICC-02/05-03/09-589-Red2, para. 34 (Prosecution submission), ICC-02/05-03/09-592-Conf, para. 5 (Defence concession).

⁴³ DAR-OTP-0193-0048, at 0054, 0056-59.

[the Accused and other rebel commanders] knew that they committed a crime".⁴⁴

33. The Prosecution seeks to add: (i) the interview transcript;⁴⁵ (ii) the photographs shown to P-0441 during the interview (without which the interview cannot be understood);⁴⁶ and (iii) three photographs not shown to P-0441 during the interview but which contain the same type of vehicle he identified as having been stolen from MGS Haskanita.⁴⁷

34. The information contained in the interview will assist the Court in determining the truth in this case, particularly with respect to the second contested issue – the Accused's knowledge that the attack was unlawful. Although the Accused has admitted to [REDACTED],⁴⁸ he has not admitted that he knew this conduct to be unlawful. P-0441's evidence is relevant to this issue. As explained above, P-0441 states that the attackers attempted to disguise the stolen AMIS vehicles by removing their logos,⁴⁹ which is evidence that the attackers knew they had acted unlawfully by stealing them from MGS Haskanita. The evidence will thus assist the Chamber in resolving the second contested issue.

35. Adding the transcript and associated photographs to the list of evidence provides the Defence with notice of P-0441's anticipated testimony. As in *Ruto*, the addition of the transcript "put[s] the Defence on notice of issues that may arise during the testimony of the witnesses concerned",⁵⁰ and should be authorised on this basis. Adding the materials will not cause undue prejudice to the Defence for at least three reasons.

⁴⁴ DAR-OTP-0193-0048, at 0057-59.

⁴⁵ DAR-OTP-0193-0048.

⁴⁶ DAR-OTP-0191-0436, DAR-OTP-0191-0437, DAR-OTP-0191-0438, DAR-OTP-0191-0439, DAR-OTP-0191-0440, DAR-OTP-0191-0441.

⁴⁷ DAR-OTP-0178-0173, DAR-OTP-0178-0174, DAR-OTP-0178-0177.

⁴⁸ [REDACTED].

⁴⁹ DAR-OTP-0193-0048, at 0057-59.

⁵⁰ ICC-01/09-01/11-762, para. 57.

36. *First*, the materials are few in number and can be analysed in short order.

Indeed, the transcript is only 13 pages long and deals with a single issue.

37. *Second*, the Defence has been on notice since 11 July 2014 that the Prosecution would seek to add the transcript and related photographs to its list of evidence.⁵¹

38. *Third*, the adjournment of the trial provides the Defence with ample time to analyse the materials and to prepare for their use at trial.

c. UN Peacekeeping “Principles and Guidelines” document.

39. DAR-OTP-0192-0357 is the UN’s “Principles and Guidelines” document for peacekeeping operations.⁵² It will assist the Court in determining the truth with respect to the third contested issue – the peacekeeping nature of AMIS – because the document specifically provides for “involvement of regional arrangements and agencies in the maintenance of international peace and security, provided such activities are consistent with the purposes and principles outlined in . . . the UN Charter”.⁵³ It is the Prosecution’s case that the AMIS mission was consistent with such principles. Also relevant is the description of the three main features characterising a peacekeeping operation,⁵⁴ which, in the Prosecution’s view, AMIS possessed. Pre-Trial Chamber I relied upon the report in the *Abu Garda* confirmation of charges decision.⁵⁵

40. Adding the document to the list will not cause undue prejudice to the Defence for at least four reasons.

41. *First*, the volume is limited – one 53-page document, which deals with one issue.

⁵¹ See Annex F.

⁵² While the document post-dates the Haskanita attack, it is relevant because it reflects the “lessons learned of the past sixty years of United Nations peacekeeping”. DAR-OTP-0192-0357, at 0363.

⁵³ DAR-OTP-0192-0357, at 0365.

⁵⁴ DAR-OTP-0192-0357, at 0374-0376.

⁵⁵ ICC-02/05-02/09-243-Red, para. 71, n. 99.

42. *Second*, the document is straightforward and does not require any particular expertise to decipher.

43. *Third*, Defence Counsel will be familiar with the document since it was relied upon by the Pre-Trial Chamber in the *Abu Garda* case.⁵⁶

44. *Fourth*, and as explained above, the adjournment of the trial provides the Defence with ample time to prepare.

Relief requested

45. For the foregoing reasons, the Prosecution respectfully requests the Chamber to authorise the addition of the following items to its list of evidence:

DAR-D05-0001-0044, DAR-OTP-0154-0387 (English translation at DAR-OTP-0193-0353), DAR-OTP-0193-0048, DAR-OTP-0191-0436, DAR-OTP-0191-0437, DAR-OTP-0191-0438, DAR-OTP-0191-0439, DAR-OTP-0191-0440, DAR-OTP-0191-0441, DAR-OTP-0178-0173, DAR-OTP-0178-0174, DAR-OTP-0178-0177, DAR-D07-0439-0001, DAR-D07-0439-0057, DAR-OTP-0192-0357.



Fatou Bensouda
Prosecutor

Dated this 20th day of August 2014

At The Hague, The Netherlands

⁵⁶ *Ibid.*