

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-02/05-01/20

Date: **2 March 2022**

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN
(‘ALI KUSHAYB’)***

Public

**Observations on behalf of Victims on the “Prosecution’s application for notice to
be given pursuant to Regulation 55(2)”**

Source: The Common Legal Representatives of Victims

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

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I. Introduction

1. The Common Legal Representatives of Victims (“CLRVS”) file these observations on the “Prosecution’s application for notice to be given pursuant to Regulation 55(2)”.¹
2. The CLRVS agree with the Prosecution, for the reasons set out in the Application, that it is appropriate for the Trial Chamber to give notice under Regulation 55(2) of the Regulations of the Court (“Regulations”) to the parties and participants that the possibility exists of changing the legal characterisation of the facts and circumstances described in the charges related to the Accused’s participation in the attack on Kodoom, Bindisi and surrounding areas on 15 and 16 August 2003 (Counts 1 to 11), to include the mode of liability of “ordering” under article 25(3)(b) of the Rome Statute (“Statute”).
3. Providing such notification, and at this stage of the proceedings, is in the interests of the victims, preserves the fairness and efficiency of the proceedings, accords with the Statute’s goal of ensuring accountability for atrocity crimes, and promotes the Trial Chamber’s truth-seeking function.
4. This filing is classified as public, as it only refers to submissions and information contained in the public redacted version of the Application.

II. Submissions

5. In the Application, the Prosecution requests the Trial Chamber to give notice pursuant to Regulation 55(2) of the Regulations of the possibility that the confirmed facts and circumstances underlying the crimes listed in Counts 1 to 5 and 10 to 11 in relation to the attack on Kodoom, Bindisi and surrounding areas and the crimes listed in Counts 6 to 9 in Bindisi and surrounding areas between 15 and 16 August 2003, may be subject to re-characterisation to include the mode of liability of “ordering” under Article 68(2)(b) as an alternative to or cumulative

¹ Prosecution’s application for notice to be given pursuant to Regulation 55(2), 22 February 2022, ICC-02/05-01/20-604-Conf (“Application”). A public redacted version of the Application was filed on 28 February ([ICC-02/05-01/20-604-Red](#)).

of the confirmed mode of liability of “inducing” under Article 68(2)(b). The CLRV support the Application, and request that the Trial Chamber provide the requested Regulation 55(2) notice.

6. The Prosecution submits the necessity of such notice “arises from the evidence demonstrating that Mr Abd-Al-Rahman not only exerted considerable influence over members of the Militia/Janjaweed and/or GoS Forces, prompting them to commit crimes during the attack,” as found by the Pre-Trial Chamber, “but also utilised his *de facto* position of authority to order them to do so”.² The Application further explains that “[i]n addition to the evidence set out in the Confirmation Decision and DCC, the Prosecution has [] since gathered additional corroborating evidence of the orders that Mr Abd-Al-Rahman issued during the attack on Kodoom, Bindisi and surrounding areas, which it summarised in the Trial Brief and intends to present at trial”.³
7. As submitted in the Application,⁴ the requested Regulation 55(2) notice does not exceed the facts and circumstances underlying the confirmed charges. As the Application properly recognises,⁵ the Pre-Trial Chamber’s relevant findings in the Decision on the Confirmation of Charges⁶ were not intended to be exhaustive; they were, instead, aimed at establishing the broad boundaries of the Accused’s involvement in the attack on Kodoom, Bindisi and surrounding areas.⁷ The Pre-Trial Chamber accordingly did not deem it necessary to address all of the allegations raised by the Prosecution or delineate all possible modes of liability in relation to the Accused’s conduct.⁸
8. The CLRV agree with the Prosecution⁹ that the Confirmation Decision’s factual determinations in respect of the confirmed mode of liability of “inducing”, if considered with the Pre-Trial Chamber’s factual findings on Mr Abd-Al-

² Application, para. 10.

³ Application, fn. 15.

⁴ Application, para. 12.

⁵ *Ibid.*

⁶ 9 July 2021 (corrected version 23 November 2021), ICC-02/05-01/20-433-Corr (“Confirmation Decision”).

⁷ Application, para. 12.

⁸ *Ibid.* (citing Confirmation Decision, paras 39, 95).

⁹ Application, para. 13.

Rahman's position of authority, sufficiently establish to the standard required for confirmation of the charges that the Accused was also responsible for ordering the commission of the crimes set out under Counts 1 to 11 of the charges. The Application convincingly and thoroughly identifies the factual basis for this nexus,¹⁰ as well as the details and nature of the orders allegedly issued by Mr Abd-Al-Rahman,¹¹ and his awareness that crimes would be committed as a direct consequence of such orders.¹²

9. The CLRV submit that the requirements for providing notice pursuant to Regulation 55(2) are accordingly satisfied.¹³ Importantly, the policy purposes underlying the Regulation will also be protected and advanced by the Trial Chamber issuing such notice, and doing so at this stage of the proceedings. As held by the Appeals Chamber, "a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute", by minimising "the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial".¹⁴
10. Additionally, Regulation 55(2) notice preserves and promotes the Trial Chamber's truth-finding function by better ensuring the Chamber is not constrained when qualifying the conduct of the Accused in a manner that best fits his actions in respect to the charged crimes; this is of importance to the victims and wider-public's understanding of the Accused's alleged role and responsibility for the crimes charged during the trial, and in the event of conviction.
11. Lastly, and while the Trial Chamber may provide Regulation 55(2) notice "at any time during the trial", providing such notice at this stage of the proceedings will

¹⁰ Application, paras 14-18.

¹¹ *Id.*, paras 19-22.

¹² *Id.*, paras 23-25.

¹³ Regulation 55(2) provides, in relevant part: "If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility [...]."

¹⁴ *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 the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, [ICC-01/04-01/06-2205](#), para. 77.

benefit the preparations of all parties and participants and the efficiency of the proceedings. In respect of Mr Abd-Al-Rahman's fair trial rights under Article 67(1) of the Statute, the CLRV agree with the Prosecution¹⁵ that issuance of the requested Regulation 55(2) notice now, prior to the commencement of trial, would not prejudice the Accused's rights to notice and adequate time and facilities to prepare his defence. The CLRV similarly agree with the Prosecution¹⁶ that Mr Abd-Al-Rahman is already on notice of his potential individual criminal responsibility for "ordering" in respect of the crimes charged in Mukjar and Deleig; as the Prosecution relies on much of the same evidence establishing Mr Abd-Al-Rahman's authority as a senior Militia/Janjaweed leader in respect of these incidents and in respect of its application for notice of potential re-characterisation regarding his mode of responsibility for the attack on Kodoom, Bindisi and surrounding areas, the scope of any additional preparatory work on the part of the Defence would presumably be more circumscribed.

III. Conclusion

12. For the reasons submitted above, the CLRV respectfully request the Trial Chamber to grant the Application and provide the indicated notice of the possible legal re-characterisation of Mr Abd-Al-Rahman's individual criminal responsibility under Regulation 55(2) of the Regulations.

Natalie v. Wistinghausen

Nasser Mohamed Amin Abdalla

Common Legal Representatives of Victims

Dated this 2nd of March 2022

At The Hague, the Netherlands

¹⁵ Application, paras 26-27.

¹⁶ *Id.*, para. 28.