



**Original: English**

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

**Date: 18 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**

**Decision on the Prosecution's application for notice to be given pursuant to  
Regulation 55(2)**

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

**The Office of the Prosecutor**

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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for Victims**

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. On 22 February 2022, the Chamber received the ‘Prosecution’s application for notice to be given pursuant to Regulation 55(2)’ (the ‘Application’).<sup>1</sup>
2. The Application relates to Counts 1-11 of the charges, concerning alleged crimes committed in Kodoom, Bindisi and surrounding areas between 15 and 16 August 2003. In particular, the relevant charges are for the crimes of intentionally directing attacks against the civilian population as a war crime pursuant to Article 8(2)(e)(i) of the Statute (Count 1), murder as a crime against humanity pursuant to Article 7(1)(a) and as a war crime pursuant to Article 8(2)(c)(i) of the Statute (Counts 2-3), pillaging as a war crime pursuant to Article 8(2)(e)(v) of the Statute (Count 4), destruction of property as a war crime pursuant to Article 8(2)(e)(xii) of the Statute (Count 5), other inhumane acts as a crime against humanity pursuant to Article 7(1)(k) of the Statute (Count 6), outrages upon personal dignity as a war crime pursuant to Article 8(2)(c)(ii) of the Statute (Count 7), rape as a crime against humanity pursuant to Article 7(1)(g) and as a war crime pursuant to Article 8(2)(e)(vi) of the Statute (Counts 8-9), forcible transfer as a crime against humanity pursuant to Article 7(1)(d) of the Statute (Count 10) and persecution as a crime against humanity pursuant to Article 7(1)(h) of the Statute (Count 11).
3. The mode of Mr Abd-Al-Rahman’s alleged individual criminal responsibility, charged in all counts under Article 25(3)(b) of the Statute, is that of ‘inducing’.<sup>2</sup>
4. The Application is designed to give notice to the parties that this specific legal characterisation of Mr Abd-Al-Rahman’s alleged individual criminal responsibility may be subject to a change namely to ‘ordering’, still within Article 25(3)(b) of the Statute.<sup>3</sup>
5. The Prosecution argues that ‘[t]here is sufficient evidence in the factual findings by Pre-Trial Chamber II [...] to establish substantial grounds to believe that “ordering” would be a suitable mode of liability for Mr Abd-Al-Rahman’s individual criminal responsibility’, and that ‘[b]y re-characterising the exact nature of Mr Abd-Al-Rahman’s responsibility, within the narrow scope of already confirmed facts and

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<sup>1</sup> ICC-02/05-01/20-604-Conf. A public redacted version is also available, *see* ICC-02/05-01/20-604-Red.

<sup>2</sup> *See* Pre-Trial Chamber II, Corrected version of ‘Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), 9 July 2021, ICC-02/05-01/20-433, 23 November 2021, ICC-02/05-01/20-433-Corr, pages 67-68 (hereinafter: ‘Decision on the Confirmation of Charges’).

<sup>3</sup> Application, ICC-02/05-01/20-604-Red, para. 2.

circumstances, the Chamber will provide for a more fair and accurate representation of his level of participation in the attack on Kodoom, Bindisi and surrounding areas consistent with his participation in other charged attacks'.<sup>4</sup> The Prosecution further argues that 'seeking notice of the potential legal re-characterisation of Mr Abd-Al-Rahman's individual criminal responsibility at this very early stage fully respects the rights of the Accused and can result in no prejudice to the Defence' and that '[w]hile indeed it will remain possible to give such notice later in the proceedings, considerations of procedural economy favour doing so at this point'.<sup>5</sup>

6. On 2 March 2022, the common legal representatives of victims filed the 'Observations on behalf of Victims on the "Prosecution's application for notice to be given pursuant to Regulation 55(2)"', supporting the Application.<sup>6</sup>

7. On 4 March 2022, the Defence filed the 'Response to Prosecution's application for notice to be given pursuant to Regulation 55(2) of the Regulations of the Court', objecting to the Application.<sup>7</sup>

8. The Defence posits that the Prosecution had the opportunity to include 'ordering' under Article 25(3)(b) of the Statute in the charges presented before the Pre-Trial Chamber, but chose to limit the charges under Counts 1-11 to 'inducing' under Article 25(3)(b) of the Statute.<sup>8</sup> It argues that it is 'fundamentally incongruous for the Prosecution to now ask the Trial Chamber to invoke Regulation 55 of the RoC to "provide for a more fair and accurate representation" of the accused's alleged level of participation in the attack on Kodoom, Bindisi and surrounding areas, "consistent with his participation in other charged attacks"'.<sup>9</sup> The Defence also criticises the Prosecution for 'not even begin[ning] to provide an explanation for the change in its case theory'.<sup>10</sup>

9. Legal re-characterisation of facts and the giving of notice under Regulation 55(2) is a prerogative of the Chamber, and is not dependent on a request from a party or a

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<sup>4</sup> Application, ICC-02/05-01/20-604-Red, paras 3-4. *See also* paras 9-25.

<sup>5</sup> Application, ICC-02/05-01/20-604-Red, para. 5. *See also* paras 26-28.

<sup>6</sup> ICC-02/05-01/20-613 (hereinafter: 'Victims' Response').

<sup>7</sup> ICC-02/05-01/20-617 (hereinafter: 'Defence Response'). The response was originally filed as 'confidential', but reclassified as 'public' on 9 March 2022.

<sup>8</sup> Defence Response, ICC-02/05-01/20-617, paras 8-12.

<sup>9</sup> Defence Response, ICC-02/05-01/20-617, paras 11-13, *referring to* Application, ICC-02/05-01/20-604-Red, para. 4.

<sup>10</sup> Defence Response, ICC-02/05-01/20-617, para. 18.

participant.<sup>11</sup> Whereas it is obviously preferable that the legal characterisation of the facts, including any suitable alternative charges as the case may be, is correctly identified by the Prosecution at the outset in the document containing the charges submitted under Rule 121(3) of the Rules, failure to do so cannot be a reason to deprive the Trial Chamber of its power to re-characterise the facts under Regulation 55. For this reason, the Chamber rejects the Defence's argument.

10. Further, the Defence argues that the Application is unnecessary, since 'ordering' and 'inducing' differ *in abstracto* only in the additional legal requirement of position of authority required for the former, and therefore, logically, if the elements of 'inducing' are not made out at trial, 'requiring proof of an additional element [...] will not save the Prosecution from an inevitable failure to establish liability'.<sup>12</sup> The Defence, submits that 'the addition of "ordering" does nothing to close any "potential accountability gaps"'.<sup>13</sup>

11. The Defence's argument is constructed on the Prosecution's statement that '[a] principal purpose of regulation 55 is to close any potential accountability gaps that might arise as a result of the legal qualifications confirmed in the pre-trial phase that turn out to be incorrect' and on a reference to a prior decision of another Trial Chamber.<sup>14</sup>

12. In the view of the Chamber, there is nothing in the text of Article 74(2) of the Statute, Regulation 55 or any other relevant provision of the applicable law which would suggest that legal re-characterisation of facts is permissible only if the original legal characterisation is not sustained. A change from a general to a more specific legal characterisation is not incompatible with Regulation 55. Therefore, where the difference in two possible characterisations is that one requires one or more additional elements but the factual matrix is the same, then such a change can be countenanced under Regulation 55. It may also be added that, in this case, albeit less drastically, the

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<sup>11</sup> See also Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom's Individual Criminal Responsibility, 2 June 2020, ICC-01/14-01/18-542, para. 16 ('*Yekatom* Decision under Regulation 55').

<sup>12</sup> Defence Response, ICC-02/05-01/20-617, para. 22.

<sup>13</sup> Defence Response, ICC-02/05-01/20-617, para. 22.

<sup>14</sup> Defence Response, ICC-02/05-01/20-617, para. 19, referring to Application, ICC-02/05-01/20-604-Red, para. 7; *Yekatom* Decision under Regulation 55, ICC-01/14-01/18-542, para. 10.

purpose of closing accountability gaps would be served.<sup>15</sup> The argument of the Defence is therefore not premised on a tenable interpretation of the applicable law and is rejected.

13. Article 74(2) of the Statute provides that the decision of the Trial Chamber on the guilt or innocence of the accused ‘shall not exceed the facts and circumstances described in the charges and any amendments to the charges’. While the Statute limits the Trial Chamber to the statement of the facts of the charges as confirmed by the Pre-Trial Chamber, no such limitation is given as concerns the legal characterisation of the facts.<sup>16</sup> Indeed, Regulation 55(1) of the Regulations states that ‘[i]n its decision under article 74, the Chamber may change the legal characterisation of the facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges’.

14. Regulation 55(2) establishes certain procedural requirements when it appears to the Chamber that the legal characterisation of the facts may be subject to change, namely: (a) the Chamber shall give notice to the participants of such a possibility; and (b) having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions.

15. Under Regulation 55(3), the Chamber shall, in particular, ensure that the accused has adequate time and facilities for the effective preparation of his or her defence in accordance with Article 67(1)(b) of the Statute, and, if necessary, the opportunity to examine again, or have examined again, a previous witness, to call a new witness, or to present other evidence admissible under the Statute in accordance with Article 67(1)(e) of the Statute. As stated recently by the Appeals Chamber, the protection of the rights

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<sup>15</sup> See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, 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 characterization 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 (OA 15 OA16), para. 77.

<sup>16</sup> See also Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’, 1 July 2021, ICC-01/12-01/18-1562-Red (OA3), para. 1 (hereinafter: ‘*Al-Hassan Appeal Judgment*’).

of the accused in the process of legal re-characterisation of facts is among the main goals of Regulation 55.<sup>17</sup>

16. The jurisprudence of the Appeals Chamber provides further guidance in respect of the question of when notice under Regulation 55 should be given; particularly, as in the present case, before the opening statements and the presentation of evidence. When ruling, in another case, on an interlocutory appeal, on precisely this issue, the Appeals Chamber held that the ordinary meaning of the phrase “at any time during the trial” in the context of Regulation 55, does not exclude the stage after a Trial Chamber is seized of a case and before opening statements.<sup>18</sup> In another case, the Appeals Chamber also held that notice under Regulation 55(2) should be given as early as possible.<sup>19</sup>

17. Notice under Regulation 55 essentially depends on (i) whether it appears to the Chamber that the legal characterisation of facts may be subject to change, (ii) that the prospective legal re-characterisation of facts does not exceed the facts and circumstances of the charges, and (iii) that the participants, in particular the Defence, have an opportunity to be properly heard on the matter. In the following analysis, the Chamber will examine the Application under these three principal legal considerations.

18. As a preliminary step, it is necessary to identify the facts of which the legal characterisation may be subject to change. In this case, the facts and circumstances of the charges are comprehensively stated in the operative part of the decision on the confirmation of charges.<sup>20</sup> There is therefore no need, in the present context, to look beyond the operative part of the decision on the confirmation of charges, such as the reasoning contained in that decision, or to the document containing the charges

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<sup>17</sup> *Al-Hassan* Appeal Judgment, ICC-01/12-01/18-1562-Red (OA3), para. 3.

<sup>18</sup> Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court”, 18 December 2015, ICC-02/11-01/15-369 (OA7), para. 1.

<sup>19</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment 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”, 27 March 2013, ICC-01/04-01/07-3363 (OA13), para. 24.

<sup>20</sup> Decision on the Confirmation of Charges’, ICC-02/05-01/20-433-Corr, pages 54-70. *See also* para. 117.

submitted by the Prosecution under Rule 121(3) of the Rules of Procedure and Evidence (the ‘Rules’).<sup>21</sup>

19. The text of the charges includes the following facts and circumstances relevant for the assessment of the proposed potential legal re-characterisation of facts. First, it includes, in a preliminary section to be read in conjunction with the sub-sections related to, *inter alia*, Counts 1-11,<sup>22</sup> an elaboration of facts alleged to place Mr Abd-Al-Rahman in a position of authority and influence.<sup>23</sup> The more specific factual assertions are placed within five factors: (a) Mr Abd-Al-Rahman was a senior Militia/*Janjaweed* leader;<sup>24</sup> (b) Mr Abd-Al-Rahman cooperated with senior Government of Sudan (GoS) officials and senior members of GoS forces;<sup>25</sup> (c) Mr Abd-Al-Rahman cooperated with GoS officials at the locality level;<sup>26</sup> (d) Mr Abd-Al-Rahman cooperated with and/or exerted influence over certain members of the GoS forces at the locality level;<sup>27</sup> and (e) Mr Abd-Al-Rahman issued orders to members of GoS forces including, in particular, those of lower rank.<sup>28</sup>

20. As concerns specifically Counts 1-11, the facts and circumstances of the charges include allegations that Mr Abd-Al Rahman ‘led these operations and decided the route, the tactics and when to move from one village to the next’, and that he ‘**gave instructions during the operation to members of the GoS Forces to follow him from one village to the next and to carry on with the attack**’ (emphasis added).<sup>29</sup> The statement of the facts and circumstances of the charges refers to Mr Abd-Al-Rahman leading the attack, coordinating operations with members of the Popular Defence Forces and other Militia/*Janjaweed* leaders, carrying on with the attack despite objections expressed by some of those involved in the attack, including

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<sup>21</sup> See *Al-Hassan* Appeal Judgment, ICC-01/12-01/18-1562-Red (OA3), para. 5 (stating that this may be permissible ‘[w]here the confirmation decision does not directly address certain factual allegations advanced by the Prosecutor’).

<sup>22</sup> Decision on the Confirmation of Charges, ICC-02/05-01/20-433-Corr, p. 52, para. 13.

<sup>23</sup> Decision on the Confirmation of Charges, ICC-02/05-01/20-433-Corr, pp. 52-54, paras 14-26.

<sup>24</sup> Decision on the Confirmation of Charges, ICC-02/05-01/20-433-Corr, p. 52, paras 16-19.

<sup>25</sup> Decision on the Confirmation of Charges, ICC-02/05-01/20-433-Corr, p. 53, paras 20-21.

<sup>26</sup> Decision on the Confirmation of Charges, ICC-02/05-01/20-433-Corr, p. 53, para. 22.

<sup>27</sup> Decision on the Confirmation of Charges, ICC-02/05-01/20-433-Corr, pp. 53-54, paras 23-25.

<sup>28</sup> Decision on the Confirmation of Charges, ICC-02/05-01/20-433-Corr, p. 54, para. 26.

<sup>29</sup> Decision on the Confirmation of Charges, ICC-02/05-01/20-433-Corr, p. 57, para. 55.



*Militia/Janjaweed*, and finally to his conspicuous presence and approval, even if tacit, as the crimes were carried out.<sup>30</sup>

21. The parties also discuss in their submissions the application of the evidentiary standard at confirmation by the Pre-Trial Chamber and whether the Pre-Trial Chamber's findings can be considered 'exhaustive', as well as evidentiary issues related to the trial.<sup>31</sup> In light of what is set out above as to the requirements of Regulation 55, and considering that the facts and circumstances of the charges are clearly defined in the operative part of the decision on the confirmation of charges, these submissions are not relevant for the determination of the matter in issue and therefore are not specifically addressed in this ruling.

22. Taking into account the relevant factual allegations in the charges, and noting the Prosecution's submissions as to the anticipated contents of the evidence it intends to submit in this regard,<sup>32</sup> it appears to the Chamber that the legal characterisation of the facts may be subject to change to include the mode of liability of 'ordering' under Article 25(3)(b) of the Statute.

23. It is the assessment of the Chamber at this time that the proposed potential legal re-characterisation of the facts relating to the accused's individual criminal responsibility concerning Counts 1-11 of the charges would not exceed the facts and circumstances of the case.

24. In the assessment of the Chamber, the notice of possible legal re-characterisation of the facts as proposed does not place any discernible additional burden on the Defence. This is because the possible re-characterisation is to a similar characterisation of individual criminal responsibility within the same sub-paragraph of Article 25(3) of the Statute, and because notice is given early, before the commencement of the trial. In the Chamber's view, other than providing for *addenda* to trial briefs, as discussed below, there is no need for any other measures to be taken in this regard. As part of the trial, the parties and participants will have the opportunity to make submissions as to the appropriateness of the actual legal re-characterisation of facts.

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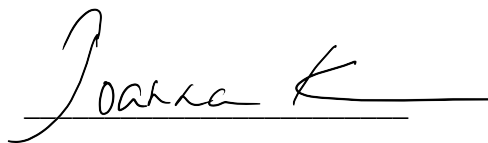
<sup>30</sup> Decision on the Confirmation of Charges, ICC-02/05-01/20-433-Corr, pp. 57-58, para. 55.

<sup>31</sup> Application, ICC-02/05-01/20-604-Red, *e.g.* paras 3, 12; Defence Response, ICC-02/05-01/20-617, paras 15-17, 23.

<sup>32</sup> See Corrected Version of "Prosecution's Trial Brief", 5 January 2022, ICC-02/05-01/20-550-Conf-Exp, 21 January 2022, ICC-02/05-01/20-550-Conf-Exp-Corr, sections E.1, G.

25. For the foregoing reasons, notice is given to the participants of the possibility that the legal characterisation of the facts under Counts 1-11 may be subject to change to include the mode of liability of ‘ordering’ under Article 25(3)(b) of the Statute. The Chamber emphasises that such notice is merely a notice of the *possibility* that the legal characterisation of facts may be subject to change. It is without prejudice to the factual and legal findings which the Chamber will make at the appropriate time.

26. The Prosecution is directed to file an addendum to its Trial Brief, laying out its case in relation to the possible legal re-characterisation of facts, by 25 March 2022. The Defence may file an addendum to its ‘Pre-Trial Brief ‘ on this issue by 4 April 2022.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 18 March 2022

At The Hague, The Netherlands