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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN DARFUR, SUDAN

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

Confidential

**Prosecution's consolidated Response to Defence's observations under Rule 122(3)
(ICC-02/05-01/20-387-Conf and ICC-02/05-01/20-390)**

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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I. INTRODUCTION

1. The Pre-Trial Chamber II ("Chamber") should reject the Defence's *Premières observations de la Défense en vertu de la Règle 122-3*¹ ("First Observations") and its *Deuxièmes observations de la Défense en vertu de la Règle 122-3*² ("Second Observations") as they lack merit.

II. CLASSIFICATION

2. This filing is classified as confidential in accordance with regulation 23*bis*(2) of the Regulations ("Regulations") of the Court since it responds to a request filed as confidential.

III. PROCEDURAL HISTORY

3. On 29 March 2021, the Prosecution filed the Document Containing the Charges³ ("DCC").

4. On 12 May 2021, the Defence filed its First Observations, challenging the regularity of the DCC. In its submission, the Defence alleges that the DCC:

- i. violates article 67(1)(a) of the Statute as it presents new charges not contained in the Warrants of Arrest which would negatively impact the Defence's preparation for the confirmation of charges hearing⁴;
- ii. violates regulation 52(b) of the Regulations, as the references to the "surrounding areas" make the geographic scope of the charges imprecise⁵;

¹ [ICC-02/05-01/20-387-Conf](#) ("First Observations").

² [ICC-02/05-01/20-390](#) ("Second Observations").

³ [ICC-02/05-01/20-325-Conf-Anx1-Corr2](#) ("DCC").

⁴ [First Observations](#), paras. 15-27.

⁵ [First Observations](#), paras. 31-36.

- iii. violates regulation 52(c) of the Regulations, as the presentation of cumulative charges based on the same facts makes the legal qualification of the facts imprecise⁶; and
- iv. causes confusion and violates the Court's jurisprudence and the suspect's rights when it presents alternative modes of liability for several charges⁷.

5. On 17 May 2021, the Defence filed its Second Observations, challenging the regularity of the List of Evidence ("LoE") submitted by the Prosecution, as well as raising questions on the regularity of the pre-confirmation phase. In sum, the Defence:

- v. questions the number of items included in the LoE⁸;
- vi. asserts that the Prosecution did not comply with the Chamber's *Second Order on disclosure and related matters*⁹ ("Order") as it does not provide information regarding the relevance of each of the items listed in the LoE to the case¹⁰; and
- vii. references past submissions questioning the preliminary proceedings that were, at the time, still pending before the Chamber¹¹.

IV. SUBMISSIONS

6. The Prosecution will address separately each of the seven issues raised by the Defence in the First Observations and the Second Observations.

(i) The DCC gives notice of the charges

7. Contrary to the Defence's submissions in its First Observations,¹² the Prosecution is not limited by the charges listed in the Warrants of Arrest for the formulation of the DCC. Even though the Warrants of Arrest serve as a basis for the

⁶ [First Observations](#), paras. 38-41.

⁷ [First Observations](#), paras. 43-50.

⁸ [Second Observations](#), paras. 8, 13-14.

⁹ [ICC-02/05-01/20-169](#).

¹⁰ [Second Observations](#), paras. 9-12, 14-23.

¹¹ [Second Observations](#), para. 24.

¹² [First Observations](#), para. 15.

suspect to appear before the Court, it is in the DCC that the formal charges are presented¹³. It is through the DCC that the suspect receives notice of the charges,¹⁴ and not through the reading of the arrest warrants in their first appearance before the Chamber, as alleged by the Defence¹⁵.

8. The Prosecutor, therefore, in the preparation of the DCC, is not limited by the charges listed in the Warrants of Arrest, as the Rome Statute permits the inclusion of new charges after the investigation has further developed, or even after the confirmation hearing takes place, pursuant to articles 61(4) and 61(9), respectively.

9. Furthermore, the procedure referred to in article 61(9) of the Statute is only applicable to the addition of charges after the confirmation hearing takes place, not before¹⁶.

10. Additionally, the suspect's rights to receive adequate notice of the charges and to have sufficient time to prepare his defence were not negatively impacted.

11. Rule 121(3) of the Rules of Procedure and Evidence of the Court (the "Rules") expressly states that the Prosecutor shall present the charges up to 30 days prior to the date of the confirmation hearing, a deadline that was fully observed in the case. Furthermore, pursuant to rule 121(4) of the Rules, the Prosecution may present amended charges no later than 15 days before the confirmation hearing.

12. The case law of the Court, moreover, demonstrates that the suspect's right to receive adequate notice of the charges is fully respected by the communication of the charges via the document containing the charges pursuant to the deadline set out in

¹³ *Kenyatta*, Decision on the content of the updated document containing the charges, [ICC-01/09-02/11-584](#), 28 December 2012, para. 18: "[T]he charges are formulated by the prosecution prior to the confirmation hearing and are presented in the DCC".

¹⁴ *Bemba et al*, Judge Eboe-Osuji partially dissenting opinion, [ICC-01/05-01/13-992-Annex-Corr](#), 17 June 2015, para. 9.

¹⁵ [First Observations](#), para. 16.

¹⁶ *Lubanga*, Judgment on Regulation 55 Appeal, [ICC-01/04-01/06-2205](#), 8 December 2009, para. 94: "[...] As the Prosecutor notes, the incorporation of new facts and circumstances into the subject matter of the trial would alter the fundamental scope of the trial. [...]". (*emphasis added*)

the Rules. In the *Gbagbo*¹⁷ and the *Lubanga*¹⁸ cases, the Appeals Chamber determined that to properly observe the suspect's right under articles 61 and 67 of the Statute, the person shall be provided with a copy of the document containing the charges no later than 30 days before the confirmation hearing.

13. In this case, the DCC was presented almost 60 days before the confirmation hearing, thereby adequately putting the suspect on notice of the charges brought against him.

14. In conclusion, the Prosecution was entitled to present additional charges in its DCC and there has been no prejudice to the Defence.

(ii) The description of the location of the charged incidents is sufficiently precise

15. The First Observations challenge the precision of the charges contained in the DCC on different grounds, the first of which relates to the alleged imprecision of the geographic delimitation of the charged incidents. In sum, the Defence alleges that by mentioning the "surrounding areas" to the main charged incidents (Kodoom and Bindisi, Mukjar and Deleig), the Prosecution made the geographic scope of the charges impossible to define¹⁹ and, thus, violated regulation 52(b) of the Regulations.

16. While referring to "surrounding areas", the Prosecution focusses in this filing only on the meaning of the term when it was used to indicate the locations where crimes were committed, as other uses of the expression do not impact the understanding of the DCC.

17. In this regard, jurisprudence of the Court establishes that references to "surrounding or neighbouring villages" are permissible when the geographic area in

¹⁷ [ICC-02/11-01/11-572](#), para. 36.

¹⁸ [ICC-01/04-01/06-3121-Red](#), paras. 118-119.

¹⁹ [First Observations](#), paras. 31-32.

question is narrow and can be sufficiently determined when the DCC is read in conjunction with other documents²⁰.

18. In this case, reading the DCC in conjunction with the Pre-Confirmation Brief²¹ ("PCB") provides the precise geographic delimitation required²². These documents, while describing in detail the charged incidents, provide concrete criteria to the understanding those references, contrary to the Defence's submissions²³.

19. In the context of the Kodoom and Bindisi incident, the "surrounding areas" simply refer to the forest, fields and mountain areas people tried to flee to in the course of this single, continuous attack²⁴. The recourse to the mention of "surrounding areas" in this context is justified as: (a) some of the charged crimes occurred as the victims tried to flee the attacks²⁵ on Kodoom and Bindisi²⁶, which may, therefore, have taken place outside Kodoom and Bindisi; and (b) the exact limits of Kodoom and Bindisi are fluid and are not clearly ascertainable²⁷.

20. In the context of Mukjar incident²⁸, the Prosecution mentions "surrounding areas" only in count 21 (persecution) of the DCC²⁹. Similarly, in counts 18-20 (murder, attempted murder) in the DCC the Prosecution refers to the crimes occurring "outside of Mukjar". The terms "surrounding areas" and "outside of Mukjar" in these counts refer only to execution sites. As explained in the pre-confirmation brief³⁰ these execution sites were north of Mukjar in the direction of Garsila.

²⁰ *Mbarushimana*, Decision on the confirmation of charges, [ICC-01/04-01/10-465-Red](#), 16 December 2011, para. 84.

²¹ [ICC-02/05-01/20-346-Conf-AnxA](#) ("PCB").

²² DCC, para. 5; PCB, footnote 631 to para. 200.

²³ [First Observations](#), para. 16.

²⁴ PCB, para. 151.

²⁵ *Ntaganda*, Trial Chamber, Decision on the updated document containing the charges, [ICC-01/04-02/06-450](#), 6 February 2015, para. 73.

²⁶ PCB, paras. 158-159, 161, 163, 180, 192, 194-196. See, for example, the statements of P-0007 (DAR-OTP-0088-0060 at 0071, para. 43) and P-0011 (DAR-OTP-0088-0219 at 0231, paras. 73-74) regarding counts 2 and 3 charged in the DCC.

²⁷ *Ntaganda*, Trial Chamber, Decision on the updated document containing the charges, [ICC-01/04-02/06-450](#), 6 February 2015, para. 74.

²⁸ DCC, paras. 85-88. PCB, paras. 245, 248-249, 252, 254-255.

²⁹ DCC, paras. 85-88.

³⁰ See, for example, PCB, para. 245, and sources cited therein.

21. In relation to the Deleig incident, the expression “surrounding areas” is also used to refer to the areas around Deleig where the executions took place³¹. The facts relating to these executions, including their approximate locations, are set out in the PCB with as much specificity as possible based on the available evidence.

22. In conclusion, the facts presented in the DCC and the PCB are sufficiently detailed and specific to properly inform the suspect of the charges against him, and no prejudice flows to him from the use of the term “surrounding areas”.

(iii) The cumulative charges are sufficiently described and individualised

23. The Defence argues that the legal qualification of the facts presented in the DCC is imprecise, as the DCC includes cumulative charges³² based on the same facts, without properly identifying the different constituent elements of each crime. The Defence further alleges that the Prosecution has not separately indicated which pieces of evidence relate to each of the charges, and that this impairs the Defence’s ability to prepare.³³

24. These allegations are generic and lack merit. The Defence simply alleges, without providing any example, that cumulative charges contained in the DCC are imprecise. At no point does the Defence demonstrate, at minimum, which of the constituent elements of the charged crimes were not demonstrated. On this basis alone, the Defence’s observations should be rejected.

25. Nonetheless, even on their merit these allegations cannot be sustained. Not all the charges listed by the Defence³⁴ were presented as cumulative. In relation to those charges that are in fact based on the same or similar facts, the Prosecution submits the

³¹ DCC, 130-131. PCB, paras. 306-327.

³² Counts 6-7, 8-9, 12- 16, 17- 20, 22-26, 27-30 ([First Observations](#), para. 38)

³³ [First Observations](#), paras. 39-41.

³⁴ [First Observations](#), para. 38.

Chamber should confirm all such charges for trial if the evidentiary standard is met, and leave the final determination of the correct charge or charges to the Trial Chamber. The Trial Chamber will be best-placed, having heard all of the evidence, to assess whether the facts establish materially distinct crimes, in which case it may enter cumulative convictions, or whether they do not, in which case the TC should only convict on the more specific crime.³⁵

26. Moreover, the DCC, as well as the PCB, pursuant to the Court's jurisprudence³⁶, properly identifies and differentiates each of the constituent elements of the charges.

(iv) The presentation of alternative modes of liability is compatible with the legal framework applicable to the case and the Court's jurisprudence

27. Similarly, whenever the Prosecution is able to identify that the suspect's particular acts or course of conduct fit the parameters of more than one mode of liability, it can present charges based on these different modes of liability³⁷.

28. In this case, the DCC, supported by the evidence referenced in the PCB, thoroughly describes the various types of conduct of the suspect that give rise to the

³⁵ *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, [ICC-02/04-01/15-422-Red](#), 23 March 2016, para. 30: "The Chamber is not persuaded by the Defence submissions. Arguments concerning the permissibility of cumulative convictions are extraneous to the question of whether this Chamber should allow the Prosecutor to charge Dominic Ongwen with more than one crime on the same set of facts, and present these charges to the Trial Chamber. The Chamber is of the view that questions of concurrence of offences are better left to the determination of the Trial Chamber. Indeed, article 61(7) of the Statute mandates the Chamber to decline to confirm charges only when the evidence does not provide substantial grounds to believe that the person committed the charged crime and not when one possible legal characterisation of the relevant facts is to be preferred over another, equally viable. When the Prosecutor meets the applicable burden of proof, the Chamber shall confirm the charges as presented". See also *Ntaganda*, [ICC-01/04-02/06-309](#), para. 100.

³⁶ *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, [ICC-02/04-01/15-422-Red](#), 23 March 2016, paras. 32-33. *Bemba*, ICC-01/05-01/08-424, 15 June 2009, para. 202. See also Paragraph 68 of the Chambers Practice Manual.

³⁷ Item 67 of the Chambers Practice Manual. *Ruto & Sang*, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, [ICC-01/09-01/11-373](#), paras 284-285. *Gbagbo*, "Decision on the confirmation of charges against Laurent Gbagbo", [ICC-02/11-01/11-656-Red](#), 12 June 2014, para. 227. *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, [ICC-01/04-02/06-309](#), 14 June 2014, para. 100. *Blé Goudé*, "Decision on the confirmation of charges against Charles Blé Goudé", [ICC-02/11-02/11-186](#), 12 December, 2014, para. 133. *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, [ICC-02/04-01/15-422-Red](#), 23 March 2016, para. 35.

charges under multiple modes of liability and forms of commission, which, contrary to the Defence's submission, is permissible.

29. Furthermore, the Defence, once again, limits its observation to a generic challenge to the charges presented in the DCC without properly identifying any issue related to them. Having established that the presentation of different modes of liability and form of commission is entirely acceptable, this request should also be dismissed.

(v) The LoE reflects the complexity and extensive nature of the charges

30. As demonstrated by the Defence in its Second Observations³⁸, the Prosecution has carefully sorted the evidence in its possession to only include in its LoE the most relevant exhibits in the case, amounting to a small percentage of the items disclosed.

31. In any event, the Prosecution has been disclosing evidence to the Defence since 22 July 2020 on a monthly basis and, pursuant to the Chamber's Order³⁹, since October 2020 on a rolling basis, providing the Defence with sufficient time to review all items disclosed, including the ones listed in the LoE⁴⁰.

(vi) All items listed in the LoE are relevant to the case and contain information in this regard

32. In its Order, the Chamber instructed that "the relevance of the evidence disclosed should be clear⁴¹" and, thus, "the Prosecutor shall indicate, for each disclosed item, which sections are deemed to contain incriminating and/or exonerating information"⁴².

³⁸ [Second Observations](#), para. 8. The exact percentage of the total of items disclosed to the Defence that are included in the LoE is 21.33%.

³⁹ [ICC-02/05-01/20-169](#), para. 17.

⁴⁰ *Kenyatta*, "Decision on the "Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) ...", Pre-Trial Chamber II, [ICC-01/09/02/11-315](#), 12 September 2011, para. 20.

⁴¹ [ICC-02/05-01/20-169](#), para. 23.

⁴² [ICC-02/05-01/20-169](#), para. 24.

33. The Prosecution has complied with this Order, providing in the "Disclosure Notes" field in the eCourt database, for each piece of evidence disclosed, a detailed list of its incriminating, exonerating and information defined in rule 77 of the Rules. The Prosecution has properly demonstrated the relevance of the items disclosed to the Defence after the Order⁴³ – and not only of those included in the LoE- fully complying with its statutory disclosure obligations and the Chamber's Order.

34. The Prosecution was under no obligation to include the "Disclosure Notes" field in the LoE, as such information is accessible to the Defence, the Chamber and the participants, in the eCourt database. Therefore, the allegations made by the Defence in its Second Observations in relation to the Prosecution's failure to comply with the Chamber's instructions are incorrect and should be dismissed.

(vii) Additional challenges to the pre-confirmation phase of proceedings

35. In its Second Observations, the Defence recalls its pending requests before the Chamber, deeming them part of the challenge to the regularity of the pre-confirmation phase of proceedings. In this regard, the Defence lists the following issues as unresolved and indicates that it shall raise them during the confirmation hearing: (a) challenge to jurisdiction of the Court⁴⁴; (b) non-admissibility of evidence submitted by the Prosecution⁴⁵; (c) non-admissibility of the DCC⁴⁶; (d) lack of legal basis for the Prosecution to conduct operations in the territory of Sudan⁴⁷; (e) the inappropriate risk created by the Prosecution for conducting investigations in Sudan and the impossibility to protect victims, witnesses and other people in the Sudanese territory⁴⁸;

⁴³ All items disclosed as INCRIM and PEXO contain a detailed "Disclosure Note". In relation to the items disclosed as Rule 77, the Prosecution fully complied with the Chamber except for the items disclosed prior to the Chamber's Order and for the items collected from the United Nations Commission of Inquiry (UNCOI), that the Defence agreed to receive in bulk. The Prosecution is currently reviewing these Rule 77 items again in order to complete their Disclosure Notes.

⁴⁴ [ICC-02/05-01/20-302](#).

⁴⁵ [ICC-02/05-01/20-322](#); [ICC-02/05-01/20-349-Red](#); [ICC-02/05-01/20-389](#).

⁴⁶ [ICC-02/05-01/20-387-Red](#).

⁴⁷ [ICC-02/05-01/20-231-Red](#); [ICC-02/05-01/20-269](#); [ICC-02/05-01/20-272-Red](#); [ICC-02/05-01/20-317-Red](#); [ICC-02/05-01/20-340-Conf-Exp](#).

⁴⁸ *Ibidem*.

(f) non-cooperation of the United Nations with the activities of the Court⁴⁹; (g) inappropriateness of the modalities of admission of victims' participation in the case⁵⁰; (h) the Prosecution's incapacity to prove the link of the suspect to the alias Ali Kushayb⁵¹; and (i) the Defence's past observations regarding the procedure to be adopted for the confirmation hearing⁵², which dwell on some the issues already listed above.

36. Most of the issues identified by the Defence have already been decided by this Chamber⁵³. For the remaining issues, in light of the economy of procedure, the Prosecution refers to its prior submissions⁵⁴.

V. RELIEF SOUGHT

37. For the foregoing reasons, the Prosecution requests the Chamber to reject the Defence's First Observations and Second Observations.



Fatou Bensouda, Prosecutor

Dated this 27th day of May 2021

At The Hague, The Netherlands

⁴⁹ [ICC-02/05-01/20-269](#).

⁵⁰ [ICC-02/05-01/20-282](#); [ICC-02/05-01/20-320](#); [ICC-02/05-01/20-370-Corr.](#)

⁵¹ [ICC-02/05-01/20-235](#).

⁵² [ICC-02/05-01/20-363-Red.](#)

⁵³ [ICC-02/05-01/20-391](#); [ICC-02/05-01/20-277](#); [ICC-02/05-01/20-314](#); [ICC-02/05-01/20-398](#); [ICC-02/05-01/20-338](#); [ICC-02/05-01/20-378](#); [ICC-02/05-01/20-402](#).

⁵⁴ [ICC-02/05-01/20-369](#); [ICC-02/05-01/20-399](#); [ICC-02/05-01/20-224](#).