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No.: **ICC-01/14-01/21**

Date: **10 January 2022**

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba, Presiding Judge
Judge Maria del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Gordinez

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public

**Prosecution's Response to the Defence request to halt trial preparation pending the
determination of any future interlocutory appeal requests or preliminary
proceedings (ICC-01/14-01/21-222)**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Prosecution submits that the Request to start trial preparations only when the confirmation of the charges decision (“Confirmation Decision”)¹ against Mahamat Said Abdel Kani (“Mr. SAID”) is definitive and the confirmation procedure is closed (“Request”)² should be rejected. The Confirmation Decision *is* definitive—unless and until amended or set aside on appeal and the Request amounts to an improper attempt to suspend the operation of the decision and should be dismissed on this ground alone. But even on the merits, commencing trial preparation in parallel with any possible challenge to the confirmation decision does not prejudice Mr SAID, but rather supports his right to fair and expeditious proceedings.

II. SUBMISSIONS

A. There is no legal requirement to delay trial preparation

2. The Confirmation Decision *is* definitive—unless and until amended or set aside on appeal. The legal consequences of the confirmation of charges are that the case proceeds to trial, with all the procedural consequences attendant thereon. Thus, if the Defence wishes to avoid those consequences, it must seek leave to appeal the Confirmation Decision and also request a suspensive effect pursuant to article 82(3) of the Rome Statute (“Statute”). Halting trial preparations now would amount to a *de facto* suspension of the proceedings by the Trial Chamber, even though appellate proceedings have not even been initiated. Thus, the Request is procedurally flawed and should be dismissed on this basis alone.

¹ ICC-01/14-01/21-218-Red.

² « *Demande de la Défense visant à ce que soit garanti le respect de la théorie des apparences, le respect de la présomption d’innocence de Monsieur Said et l’équité de la procédure dans le cadre de la mise en œuvre du droit qu’ont les Parties d’épuiser les voies de recours à leur disposition pour contester la décision de confirmation des charges, condition pour que cette décision de confirmation des charges devienne définitive et que la procédure préliminaire soit close* », ICC-01/14-01/21-222, 15 December 2021 (“Request”).

3. Under article 61(11) of the Statute and rules 129-130 of the Rules of Evidence and Procedure (“Rules”), Pre-Trial Chamber II no longer retains general competence in the case, with the exception of the adjudication of requests for leave to appeal³ and without prejudice to the procedures envisaged in article 61(8) and (9) of the Statute. The Trial Chamber is now in charge of trial preparation, but the Pre-Trial Chamber II remains competent to adjudicate any challenges to the Confirmation Decision. Granting the Request would mean that a suspensive effect normally only granted upon request in appellate proceedings and in exceptional circumstances by the Appeals Chamber is introduced through the back door.⁴

4. The Defence cites past cases in which appellate proceedings were exhausted before trial proceedings were initiated.⁵ However, this practice has been revisited. The Chambers Practice Manual, updated most recently in November 2019, reflects the evolution of past practices in line with the principles stipulated in the Statute and the Rules and calls for expeditiousness and for trial preparations to begin as soon as the record is transmitted to the Trial Chamber.⁶

B. Halting trial preparations would not benefit but prejudice the Accused

5. The Defence’s suggestion that initiating trial preparations might lead to an appearance of judicial bias⁷ is unfounded. Contrary to the Defence’s assertions,⁸ expediting the trial proceedings by conducting necessary procedural and logistical preparations does not harm, but *benefits*, the Accused. The Chamber has the duty pursuant to article 67(1)(c) of the Statute to ensure that Mr. SAID’s right to be tried

³ ICC-01/14-01/21-218-Red, para. 154.

⁴ Articles 82(1)(d) and 82(3) of the Statute; Rule 155(6) of the Rules. *See also* ICC-01/09-01/11-1370, para. 6; ICC-01/09-01/11-862; ICC-01/05-01/08-817, para. 11; ICC-01/04-01/06-2953, para. 82; ICC-01/13-43, para. 7; ICC-01/09-01/11-391, para. 9.

⁵ Request, paras. 20-25.

⁶ Chambers Practice Manual (2019), paras. 69, 71-74.

⁷ Request, para. 32.

⁸ Request, paras. 31-32.

without undue delay and within a reasonable time is respected at all stages of the proceedings. This has also been emphasized by the Defence in its Request.⁹

6. The Defence has failed to demonstrate that commencing trial preparations would create a suspicion of improper interference with the administration of justice if a future request to seek leave to appeal the Confirmation Decision has not yet been decided. The charges have been partially confirmed against Mr. SAID,¹⁰ and the record of the case was transmitted first to the Presidency¹¹ and thereafter to Trial Chamber VI for the trial proceedings.¹² Thus, standard procedures, which are outlined also in the Chambers Practice Manual,¹³ have been applied in the interest of the Accused and the efficiency of the proceedings.

7. Article 64(2) of the Statute provides that Trial Chamber VI should ensure a fair and expeditious trial with respect for the rights of the Accused and rule on any other relevant matters pursuant to article 64(6)(f) of the Statute. Under the Statute, the Trial Chamber, subject only to the powers of the Appeals Chamber, is the ultimate guardian of a fair and expeditious trial.¹⁴ The principle of expeditiousness informs article 64 of the Statute, which regulates specifically the functions and powers of the Trial Chamber upon assignment of a case.¹⁵

8. The fact that Trial Chamber VI was constituted and the record of the case transmitted does not render the statutory powers of the Pre-Trial Chamber II obsolete and does not infringe on the rights of the Accused.¹⁶ Articles 61(11) and 64(6)(a) of the Statute foresee that once the charges have been confirmed, the constituted Trial Chamber may for the purpose of subsequent proceedings, exercise any function of the

⁹ Request, paras. 29, 31.

¹⁰ ICC-01/14-01/21-218-Red, 9 December 2021.

¹¹ ICC-01/14-01/21-219-conf.

¹² ICC-01/14-01/21-223-conf.

¹³ Chambers Practice Manual (2019), para. 69.

¹⁴ ICC-01/04-01/06-2582, para. 47; see also ICC-01/04-01/06-568, para. 76.

¹⁵ ICC-02/05-01/20-517, para. 50.

¹⁶ See also Chambers Practice Manual (2019), para. 70.

Pre-Trial Chamber subject to articles 61(8), 61(9), 64(4) and 82(1)(d) of the Statute. In particular, article 64(4) provides that the Trial Chamber may refer preliminary issues back to the Pre-Trial Chamber if necessary. These provisions illustrate the limitations of the Trial Chamber's powers by those which remain vested exclusively in the Pre-Trial Chamber, even after the case has been committed to a Trial Chamber.¹⁷

9. Pre-Trial Chamber II also emphasised in its Confirmation Decision that the immediate transmission of the record to the Presidency and to the constituted Trial Chamber will expedite the beginning of the preparation for the trial which “will be directly instrumental and materially contribute to Mr Said’s right to have his case adjudicated as expeditiously as possible”¹⁸ in accordance with article 67(1)(c) of the Statute. Further, Pre-Trial Chamber II also properly balanced the rights of the Accused in exercising its discretion and in deciding *proprio motu* that the time limit for filing an application for leave to appeal shall be suspended until the translation of its Confirmation Decision into French is submitted by the Registry in the record of the case.¹⁹ However, the Defence is not obliged to wait for the translation and can request leave to appeal the Confirmation Decision at any time.

C. Procedural fairness is not affected by trial preparations

10. It is in the interest of justice and the interests of all the Parties and participants that fair and expeditious proceedings are advanced through trial preparation, especially as Mr. SAID is in detention. It is for this reason that the Chambers Practice Manual requires the Trial Chamber to proceed expeditiously after it is constituted, including taking procedural and logistical decisions, even if the Confirmation Decision is appealed.²⁰ In order to fulfil its obligation pursuant to rule 132(1) of the Rules the Trial Chamber is to hold a status conference promptly after it is constituted

¹⁷ ICC-01/05-01/13-992, para. 14.

¹⁸ ICC-01/14-01/21-218-Red, para. 155.

¹⁹ ICC-01/14-01/21-218-Red, para. 154.

²⁰ Chambers Practice Manual (2019), paras. 71-74.

in order to set the date of the trial.²¹ Furthermore, Trial Chamber VI is able to take decisions on procedural and logistical matters to advance the proceedings based also on previous decisions taken by the Pre-Trial Chamber II.²²

11. There is also judicial precedent for beginning trial preparations even if a Confirmation Decision is challenged. The recent proceedings in the *Abd-Al-Rahman* case, which are also noted by the Defence,²³ exemplify that a practice of expediting trial preparation before a confirmation of the charges decision is definitive is not only possible but also in line with the Statute and the Rules.²⁴ Following the example of the *Abd-Al-Rahman* case, Trial Chamber VI can set out, at or before the first status conference, preliminary directions that reflect the consolidated practice of ICC Trial Chambers.²⁵

12. The Prosecution submits that preparatory measures would advance the fair and expeditious conduct of the proceedings and thus ensure that the rights of Mr. SAID are respected. Preparing and holding a status conference with the parties and issuing directives as early as possible will provide clarity and ensure that the trial – should the Confirmation Decision be definitive – commences without undue delay. Such measures would also not impede on Mr. SAID's right to seek leave to appeal the Confirmation Decision nor would any other procedural rights be infringed. On the contrary, Mr. SAID can now seize the Trial Chamber or challenge any decisions taken by the Trial Chamber on issues on which the Trial Chamber is competent.

²¹ Chambers Practice Manual (2019), para. 71.

²² See Chambers Practice Manual (2019), paras. 77 and 94.

²³ Request, para. 28.

²⁴ ICC-02/05-01/20-433-Corr; ICC-02/05-01/20-440; ICC-02/05-01/20-446; ICC-02/05-01/20-451; ICC-02/05-01/20-517; ICC-02/05-01/20-T-013-ENG ET WT 08-09-2021, page 77, lines 11-12 (open session); ICC-02/05-01/20-T-013-FRA CT WT 08-09-2021, page 73, lines 9-10 (*audience publique*).

²⁵ See Chambers Practice Manual (2019), para. 74.

III. RELIEF SOUGHT

13. For the above reasons, the Request should be rejected.

A handwritten signature in blue ink, appearing to read 'Karim A. A. Khan', followed by a horizontal line and a period.

Karim A. A. Khan QC, Prosecutor

Dated this 10th day of January 2022

At The Hague, The Netherlands