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

Date: **4 April 2022**

TRIAL CHAMBER VI

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

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

Public

**Prosecution's request for leave to reply to "*Réponse de la Défense à la «
Prosecution's Notification Related to Incident (r) of Paragraph 33 of the Document
Containing the Charges »*" (ICC-01/14-01/21-269)**

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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Other

I. INTRODUCTION

1. On 18 March 2022, the Prosecution filed its “Notification Related to Incident (r) of Paragraph 33 of the Document Containing the Charges”.¹ On 31 March 2022, the Defence responded to the Prosecution’s Notification.² The Defence requests Trial Chamber VI (the “Chamber”) to order the Prosecution not to submit evidence regarding incident (r) because it was excluded from the charges set out in the Confirmation Decision.³

2. Pursuant to regulation 24(5) of the Regulations of the Court, the Prosecution hereby seeks leave to reply to the Defence’s Request with respect to two issues:

- The Defence’s mischaracterisation of the Court’s jurisprudence and of the Confirmation Decision. In relying on ICC jurisprudence, the Defence submits that because the Prosecution did not use specific terminology in the Document Containing the Charges (“DCC”),⁴ and because the Pre-Trial Chamber entered findings with respect to all victim incidents set out in the DCC,⁵ the confirmed charges should be read as containing an exhaustive list of victim incidents.⁶
- The Defence’s request that the Prosecution be instructed not to submit evidence related to incident (r).⁷

¹ ICC-01/14-01/21-262-Red (« Notification »).

² ICC-01/14-01/21-269 (« Request »). In addition to raising new issues in response to the Prosecution’s Notification, the Defence’s Request goes beyond a mere response pursuant to regulation 24(1) of the Regulations of the Court (RoC) since it requests the Chamber to instruct the Prosecution not to submit certain evidence at trial. Thus, the Prosecution should be entitled to respond within 10 days pursuant to regulation 34(a). Out of an abundance of caution, the Prosecution has filed this document pursuant to regulation 25(5) within the three days set out in regulation 34(c).

³ Request, p. 17 (first bullet point). The Defence also requests the Chamber to order the Prosecution to respect the procedure set out in article 61(9) of the Statute.

⁴ Request, para. 23.

⁵ Request, paras. 15, 33, 35, 38.

⁶ Request, paras. 18, 22.

⁷ Request, p. 17 (first bullet point).

II. SUBMISSIONS

3. Pursuant to regulation 24(5) of the Regulations of the Court, the Prosecution seeks leave to reply with respect to two issues arising from the Defence's Request:

A. First issue: the Defence mischaracterises ICC jurisprudence and the Confirmation Decision

4. First, the Defence submits that because the DCC did not use specific terminology,⁸ and the Pre-Trial Chamber entered findings with respect to all victim incidents set out in the DCC,⁹ the confirmed charges should be read as containing an exhaustive list of victim incidents.¹⁰ The Defence relies on ICC jurisprudence (*Ntaganda* and *Abd-al-Rahman*) to support its assertion.

5. If leave to reply is granted the Prosecution will explain that:

- The Appeals Chamber has held that the Confirmation Decision defines the parameters of the charges.¹¹ This is consistent jurisprudence.¹² In this case, the Pre-Trial Chamber clearly and unambiguously described the victim incidents in the OCRB as non-exhaustive and as “examples of the conduct underlying the charges”.¹³ That the Prosecution did not use the same terminology in the DCC is not determinative in light of the clear and unambiguous language of the Confirmation Decision, which is the definitive document for the purposes of trial. The Defence did not seek leave to appeal this aspect of the Confirmation Decision. It cannot now disregard its clear wording.

⁸ Request, para. 23.

⁹ Request, paras. 15, 33, 35, 38.

¹⁰ Request, paras. 18, 22.

¹¹ [Lubanga AJ](#), para. 124.

¹² See e.g. [Ntaganda AJ](#), para. 325; see also ICC-02/05-01/20-433 (« *Abd-al-Rahman* Confirmation Decision »), para. 35; ICC-01/14-01/21-218 (« Confirmation Decision »), para. 36.

¹³ Confirmation Decision, p. 29 (para. 80) and p. 55 (para. 29).

- The fact that the Pre-Trial Chamber entered findings with respect to all the victim incidents set out in the DCC—unlike other Pre-Trial Chambers in other confirmation decisions—does not preclude this Trial Chamber from considering at trial additional victim incidents that fall within the confined and specific parameters of the charges, as long as the Accused has sufficient notice and is not prejudiced.¹⁴ As the Defence notes, the charges in this case relate to factual allegations that took place in a concrete location and within a short period of time.¹⁵ The fact that the Confirmation Decision does not exhaustively set out all the victim incidents is fully consistent with ICC jurisprudence, such as in the *Ntaganda* and *Abd-al-Rahman* cases¹⁶ where the confirmation decisions did not likewise list all victim incidents in an exhaustive manner.¹⁷ It is also consistent with the jurisprudence of the *ad hoc* tribunals,¹⁸ and with the different functions of the pre-trial chambers and the trial chambers.¹⁹ The latter are not bound by the pre-trial chambers' reasoning, evidentiary assessments or legal interpretation, and will make findings "beyond reasonable doubt" with respect to the confirmed allegations and on the basis of a holistic and comprehensive assessment of evidence submitted during the course of the trial.²⁰

¹⁴ *Contra* Request, paras. 15, 33, 35, 38.

¹⁵ Request, para. 32.

¹⁶ *Contra* Request, paras. 48, 52, 53. The Defence also disregards that, unlike in *Ntaganda*, the Prosecution is not required to file an amended DCC after the confirmation decision since the charges are clearly set out in the operative part of the Confirmation Decision; thus, the Defence's reference to jurisprudence on amended DCCs is not helpful: see Request, para. 49.

¹⁷ See ICC-02/05-01/20-626, paras. 16-26; [Ntaganda AJ](#), para. 327.

¹⁸ See e.g. [Šainović AJ](#), paras. 233-235, 558.

¹⁹ On the different functions of the Pre-Trial and Trial Chamber, see Confirmation Decision, paras. 37-42; *Abd-al-Rahman* Confirmation Decision, paras. 33-40; ICC-01/14-01/18-874 (« *Yekatom & Ngaïssona* Charges AD »), para. 46; see also ICC-01/12-01/18-608-Red-t-ENG, para. 47; ICC-01/12-01/18-923, paras. 17-20; [Chambers Practice Manual](#), para. 61.

²⁰ Contrary to the Defence assertion, the Prosecution has disclosed all evidence cited in the Notification as incriminatory prior to the last disclosure deadline of 16 August 2021 imposed by the Pre-Trial Chamber with the exception of two investigation reports (CAR-OTP-2135 and CAR-OTP-2130-7969).

B. Second issue: the Trial Chamber can rely on evidence of non-confirmed incidents

6. Second, the Defence requests the Chamber to instruct the Prosecution not to rely on evidence regarding incident (r) because the incident was not confirmed. If leave to reply is granted, the Prosecution will explain how trial chambers have consistently permitted the Prosecution to submit evidence at trial regarding non-confirmed incidents to support other allegations, such as the *mens rea* of the Accused's criminal responsibility and the contextual elements.²¹ Hence, even if assuming *arguendo* that Mr Said cannot be held responsible for incident (r)—which he can—, the Prosecution is still entitled to submit evidence regarding this incident in support of other allegations set out in the charges, such as Mr Said's *mens rea* with respect to other incidents and the contextual elements of crimes against humanity and war crimes.

III. RELIEF SOUGHT

7. For the above reasons, the Chamber should grant to the Prosecution's Request for leave to reply.



Karim A. A. Khan QC, Prosecutor

Dated this 4th day of April 2022

At The Hague, The Netherland

²¹ See e.g. ICC-02/04-01/15-1762-Red (“Ongwen TJ”), paras. 2009, 2094-2096; ICC-01/04-02/06-968, para. 13; ICC-01/04-01/06-2842 (“[Lubanga TJ](#)”), paras. 1022, 1352 (Lubanga's actions outside of the period of the charges and temporal jurisdiction were relevant as critical background evidence on the group activities and to establish the existence of the common plan); ICC-01/05-01/08-2299-Red, paras. 51, 61, 67; ICC-01/04-01/07-717 (“[Katanga Confirmation Decision](#)”), paras. 225-228; ICC-01/04-01/06-803-tEN (“[Lubanga Confirmation Decision](#)”), para. 152 (“[...] nothing prevents the Prosecution from mentioning any event which occurred before or during the commission of the [charged] acts or omissions, especially [to better understand context in which conduct occurred].”); ICC-01/04-02/06-308, para. 30 (“[...] Facts outside the temporal scope may offer useful background information or context, which is useful to understand the facts *within* the temporal scope of the charges, [they] do not extend the temporal scope of the charges.”); ICC-02/04-01/15-1210, para. 10 ; ICC-02/04-01/15-T-85-Red, page 7 line 15 to page 8 line 9. See also ICC-01/14-01/18-703-Red, para. 48 (where the Trial Chamber considered incidents which had not been confirmed as facts and circumstances underlying the contextual elements of the charges).