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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 submissions regarding Incidents c) and q) of the Trial Brief

Source: Office of the Prosecutor

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I. INTRODUCTION

1. Pursuant to the Trial Chamber VI's ("Chamber") order of 21 July 2022¹, the Prosecution hereby provides additional submissions on whether the addition of incidents (c) and (q) to the list of charged incidents in the Prosecution's Trial Brief is permissible absent a formal amendment of the charges.

2. The addition of the incidents related to the Victim-Witnesses P-1762, P-1432 and P-3047 ("Incidents (c) and (q)") to the list of charged incidents in the Trial Brief is permissible absent a formal amendment of the charges. These incidents fall squarely within the parameters of the charges, and their inclusion in the Trial Brief will enable the Chamber to make the necessary assessments either before the start of trial, or to defer this to the end of the proceedings after the evidence has been heard. Mahamat Said Abdel Kani ("Mr SAID") is not prejudiced as he has received sufficient prior notice, including through the Trial Brief and relevant rule 68 applications, that the Prosecution seeks to establish his criminal responsibility also on the basis of the evidence for those incidents.

II. SUBMISSIONS

A. Procedural History

3. On 9 December 2021 the Pre-Trial Chamber confirmed the charges in the case against Mr SAID with regards to the incidents at the OCRB.²

4. On 18 March 2022, the Prosecution notified Mr SAID and informed Trial Chamber VI that it intended "to present evidence at trial related to incident (r) at

¹ Email from Trial Chamber VI dated 21 July 2022, 10:57 hrs.

² ICC-01/14-01/21-218-Conf (the 'Confirmation Decision') (public redacted version notified on the same day; ICC-01/14-01/21- 218-Red).

paragraph 33 of the Document Containing the Charges (“DCC”)³, which Pre-Trial Chamber II did not confirm”, on the basis that it falls “within the temporal scope of the charges.”⁴

5. On 20 April 2022, Trial Chamber VI issued its decision on the Notification and concluded that, since “Incident R does not currently form part of the facts and circumstances described in the charges,” “it is not permissible for the Prosecution to introduce evidence at trial for the purpose of establishing Incident R, absent an amendment to the charges.”⁵

6. Following this decision, on 5 May 2022, the Prosecution filed the Application requesting the Chamber to amend the charges pursuant to article 61(9) of the Rome Statute (the “Statute”) and rule 128 of the Rules of Procedure and Evidence (the “Rules”).⁶ The Prosecution requested to include Incident R, which was included in paragraph 33(r) of the Prosecution’s DCC and is now Incident q) of the Trial Brief, and the incident related to P-3047, which was not listed in the DCC because the evidence was obtained after the filing of the DCC.

7. On 23 May 2022, the Prosecution filed its second request to introduce prior recorded testimony pursuant to rule 68(3), which included the application for Witness P-1762.⁷ The Prosecution added a caveat in a footnote stating that P-1762’s evidence was part of the Prosecution’s application to amend the charges which was pending before Pre-Trial Chamber II.⁸ That same day, the Prosecution filed its sixth request to introduce prior recorded testimony pursuant to rule 68(2)(b) which included the

³ (“Notification”).

⁴ ICC-01/14-01/21-262-Red.

⁵ ICC-01/14-01/21-282, para. 17 and disposition.

⁶ ICC-01/14-01/21-294-Red.

⁷ ICC-01/14-01/21-326-Conf, paras. 12-15.

⁸ ICC-01/14-01/21-326-Conf, fn. 15.

applications for Witnesses P-1432 and P-3047.⁹ The Prosecution added the same caveat in a footnote as for P-1762.¹⁰

8. On 13 June 2022, the Prosecution filed its Trial Brief. There, it included incidents c) and q) and summarised the relevant evidence pertaining to Witnesses P-1762, P-1432 and P-3047.¹¹ The Prosecution added the caveat in footnotes to each incident that facts related to P-3047, P-1762 and P-1432 were included, in an abundance of caution, in the request to amend the charges but that at the time of filing the Brief a decision of the Pre-Trial Chamber was pending.

9. On 8 July 2022, the Pre-Trial Chamber issued its decision on the “Prosecution’s application to amend the charges”.¹² The Chamber rejected the Prosecution’s request but at the same time clarified the scope of the charges as set out in the Confirmation Decision.

10. In para. 25, the Pre-Trial Chamber held that:

“The Prosecution and the chambers confirming a case and hearing a trial have a shared duty to ensure that the accused has received proper notice of the content and scope of the charges against him or her by the time the trial commences. A pre-trial chamber can provide such notice in the confirmation decision. It would be unworkable for the Prosecution to come back to the relevant pre-trial chamber every time it has identified one or more further victims of a specific crime that has already been confirmed. However, the Defence needs to be put on notice. Subsequent to the confirmation decision, and prior to the commencement of the trial, the burden to provide notice shifts to the Prosecution: more detailed notice must be promptly provided if and when information has become available that allows further specification. This may be done by way of auxiliary documents, such as a **trial brief**.”¹³

⁹ ICC-01/14-01/21-328-Conf, paras. 16-18, 34-37.

¹⁰ ICC-01/14-01/21-328-Conf, fns. 40, 103.

¹¹ ICC-01/14-01/21-359-Red, paras. 148-150, 243-251.

¹² ICC-01/14-01/21-396.

¹³ ICC-01/14-01/21-396, para. 25 (emphasis added).

11. Following this Decision, the Prosecution informed the Chamber and the Parties on 18 July 2022¹⁴ that it had set out the material facts and supporting evidence in relation to P-1432, P-1762 and P-3047 (paras. 148-150) in its Trial Brief,¹⁵ and as such, believed it had provided the Accused with sufficiently detailed notice in line with the Pre-Trial Chamber's decision. However, to err on the side of caution, the Prosecution requested guidance as to whether the Chamber would deem any additional submissions on this issue necessary.

12. The Defence responded on 19 July 2022,¹⁶ noting that there are currently two decisions in this case that do not have the same content: one from Trial Chamber VI requiring the Prosecution to obtain an amendment to the charges for the addition of any new incident (ICC-01/14-01/21-282, para. 17) and one from the Pre-Trial Chamber stating the opposite (ICC-01/14-01/21-396, para. 25). The Defence noted that the only decision with the force of *res judicata* is the decision of Trial Chamber VI, since the Prosecution did not appeal it. On the contrary, the Pre-Trial Chamber's decision of 18 July 2022 was not yet final, as a Defence application for leave to appeal¹⁷ was pending. The Defence considered it appropriate for the Prosecution to file a written submission explaining its own understanding of the legal situation in relation to the charges, to which the Defence could respond.

13. Following this, the Chamber issued an order on 21 July 2022, acknowledging that "the Pre-Trial Chamber's decision has introduced an element of legal and procedural uncertainty regarding the scope of the charges in the present case."¹⁸ The Chamber considered it "necessary to address this uncertainty prior to the commencement of the trial. It must therefore determine, in light of the confirmation of charges decision and

¹⁴ Prosecution's email dated 18 July 2022, 20:37 hrs.

¹⁵ See ICC-01/14-01/21-359, paras. 148-150 (relating to P-3047) and 243-251 (relating to P-1432 and P-1762).

¹⁶ Defence's email dated 19 July 2022, 10:42 hrs.

¹⁷ ICC-01/14-01/21-416.

¹⁸ Trial Chamber's Communications dated 21 July 2022, 10:45 hrs.

the above mentioned decision, whether the addition of incidents (c) and (q) to the list of charged incidents in the Trial Brief is indeed permissible absent a formal amendment of the charges.”¹⁹

B. It is permissible to include incidents c) and q) absent a formal amendment to the charges

14. The Prosecution submits that it is permissible to include incidents c) and q) in the Trial Brief’s list of incidents without formally amending the charges. While the Prosecution did seek an amendment, it only did so following the Chamber’s decision of 22 April 2022. As set out in its Notification, the Prosecution understood the Confirmation Decision to enable the Prosecution to include further incidents insofar as they fell within the scope of the charges. The question of whether the evidence actually supports the charges is within the Chamber’s inherent power to determine at trial.

15. The Confirmation Decision defines the parameters of the charges and the scope of the trial. In paragraph 29 of the operative part of the Confirmation Decision, the Pre-Trial Chamber set out in a non-exhaustive manner the incidents for which Mr SAID can be brought to trial and on which the charges are based.²⁰ This means that additional victim incidents other than those expressly described therein can be added if (i) they fall within the parameters of the charges and (ii) the accused receives proper notice. As both conditions are fulfilled concerning incidents c) and q), their inclusion in the Trial Brief was and is permissible.

¹⁹ Trial Chamber’s Communications dated 21 July 2022, 10:45 hrs.

²⁰ See ICC-01/14-01/21-218-Red (“[Confirmation Decision](#)”), p. 55, para. 29, operative part (where the Chamber found that “Mr SAID was in charge of the OCRB detention centre, and the OCRB operating there, at the times when the arrest, detention and/or mistreatment of persons occurred, including the following” and specified 18 of the 20 incidents relevant to the OCRB); see also p. 29, para. 80 (where the Pre-Trial Chamber stated that it “understands that this list [of incidents] is meant to provide examples of the conduct underlying the charges.”).

1. Incidents c) and q) fall within the charges

16. As outlined in previous submissions²¹ and most recently in the Trial Brief,²² the evidence demonstrates that incidents c) and q) fall within the scope of the charges as defined by the Prosecution in its DCC and subsequently in the Confirmation Decision.²³ These previous submissions are hereby included by reference.

2. The scope of the charges are sufficiently defined to allow inclusion of incidents c) and q)

17. As this Chamber has recognised²⁴, the Pre-Trial Chamber is responsible for defining the parameters of the charges.²⁵ The Confirmation Decision constitutes the final, authoritative document setting out the charges and the scope of the trial.²⁶

18. In deciding upon the Prosecution's request to amend the charges to include the incidents involving Witnesses P-1763, P-1432 and P-3047, and in line with well-established appeals jurisprudence, the Pre-Trial Chamber recalled the limited and specific purpose and scope of the confirmation proceedings.²⁷ It set out that the incidents listed in paragraph 29 of the operative part of the Confirmation Decision are "examples" which "ought not to be understood as limitative or restrictive" and that

²¹ See paras. 4-6 above.

²² See above at fn. 10.

²³ See fn. 19 above. Confirmation Decision, p. 29, para. 80 and p. 55, para. 29, operative part.

²⁴ ICC-01/14-01/21-437, para. 21 ("The Chamber notes that the scope of this case is determined by the parameters set by the Pre-Trial Chamber in the Confirmation Decision").

²⁵ ICC-01/12-01/18-1562-Red ("[Al Hassan Regulation 55 AD](#)"), para. 92 (finding that one of the principal functions of the pre-trial chamber is "to ensure that there is a case worthy of trial and to define the parameters of the subject matter of that trial").

²⁶ See [Chambers Practice Manual](#), para. 57; [Lubanga AJ](#), para. 124. See also [Bemba et al. AJ](#), para. 196 ("[...] it is the decision on the confirmation of charges [], as opposed to the [DCC], which constitutes the authoritative statement of the charges. Thus, while the confirmation decision must necessarily be understood in the context of the confirmation proceedings as a whole, including the [DCC], it is the confirmation decision that serves as a basis for the trial"); [Bemba et al. 10 June 2015 Decision on Auxiliary Documents](#), para. 15 (concluding that under the Rome Statute, "the trial chamber is bound by the factual description of the charges, as determined by the Pre-Trial Chamber in the confirmation decision").

²⁷ ICC-01/14-01/21-396 ("[Said PTC Article 61\(9\) Decision](#)"), para. 13; see also [Confirmation Decision](#), para. 35; ICC-02/05-01/20-626 ("[Abd-al-Rahman Article 61\(9\) Decision](#)"), para. 16; [Abd-al-Rahman Confirmation Decision](#), paras. 34, 39; ICC-01/12-01/18-1562-Red ("[Al-Hassan regulation 55 AD](#)"), paras. 92-94, 106.

“there can be [] further instances beyond those specifically mentioned”.²⁸ It further held that the “specific criminal acts [...] must not [...] be considered as definitive or exhaustive, as they reflect the Chamber’s assessment of the available evidence at the time of confirmation” and that “the extent of victimisation in connection with the confirmed charges was broader than the individual examples it specifically mentioned in the operative part of the Confirmation Decision”.²⁹

19. The Pre-Trial Chamber observed that, with respect to the instances mentioned in paragraphs 33(a) and (r) of the Prosecution’s DCC, the Chamber could not make a determination to the relevant standard at confirmation (*reasonable basis to believe*) based on the evidence before it.³⁰ However, it emphasised that this does not mean that the instances or victims not mentioned in the Confirmation Decision are “not confirmed”.³¹

20. The Pre-Trial Chamber’s decision is consistent with Appeals Chamber jurisprudence holding that “it is not necessarily the case that [...] the charging documents list all criminal acts underling each charge exhaustively. Depending on the circumstances of the case, the charges may be described in a less specific manner, for instance, by specifying a period of time during which and an area where criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims”.³² The Appeals Chamber further held that “[w]hether such description of the charges is sufficient for the purposes of article 74(2) of the Statute will depend, *inter alia*, on the scale of criminality and the mode of individual criminal responsibility alleged”.³³

²⁸ [Said PTC Article 61\(9\) Decision](#), para. 16.

²⁹ [Said PTC Article 61\(9\) Decision](#), para. 20. The explicit language used confirms it, namely the word “including”.

³⁰ [Said PTC Article 61\(9\) Decision](#), para. 18.

³¹ [Said PTC Article 61\(9\) Decision](#), para. 18.

³² ICC-01/04-02/06-2666-Red (“[Ntaganda AJ](#)”), para. 326.

³³ [Ntaganda AJ](#), para. 326.

21. The Pre-Trial Chamber recalled that the scale of criminality and the mode of liability are “the guiding criteria” but that such criteria are to be applied “[d]epending on the circumstances of the case”. It did not consider that “in the present case such a ‘high degree of proximity’ exists between the acts and conduct of Mr SAID and the crimes allegedly committed that the scope of the charged crimes [...] must be limited to the specific criminal acts listed in paragraph 29 of the operative part of the Confirmation Decision”.³⁴

22. In this case, the seven crimes with which Mr SAID is charged were allegedly committed in the OCRB detention centre by Mr SAID jointly with others, including by Seleka elements under his command, during the time period (12 April to 30 August 2013) that Mr SAID was “effectively in charge of the OCRB as its *de facto* Director”.³⁵ The Pre-Trial Chamber found that “the Seleka elements at the OCRB were under the command of Mr Said”³⁶ and that “Mr Said had authority over all OCRB detainees”.³⁷ Mr SAID together with the OCRB-Seleka targeted perceived Bozizé supporters by arresting, detaining and mistreating them at the OCRB.³⁸ Mr SAID is allegedly responsible for the charged crimes “[d]ue to his position and presence at the OCRB”³⁹ and because he “was in charge of the OCRB detention centre, and the OCRB Seleka operating there, at the times when the arrest, detention and/or mistreatment of the persons occurred”.⁴⁰

23. No two cases are alike, and the guiding criteria will therefore not be exhaustive.⁴¹ The permissibility of the charging approach will depend on the circumstances of each

³⁴ [Said PTC Article 61\(9\) Decision](#), para. 23. The Defence has sought to appeal this decision. At the time of filing this submission, the Pre-Trial Chamber has not yet decided on the Defence’s request.

³⁵ [Confirmation Decision](#), para. 69.

³⁶ [Confirmation Decision](#), para. 70.

³⁷ [Confirmation Decision](#), para. 70.

³⁸ [Confirmation Decision](#), operative part, p. 53, para. 25.

³⁹ [Confirmation Decision](#), para. 76.

⁴⁰ [Confirmation Decision](#), operative part, p. 55 para. 29.

⁴¹ The Prosecution notes that, like Mr Said, Mr Abd-al-Rahman was highly proximate to the crimes in Kodoom, Brindisi, Mukjar and Deleig, and he directly perpetrated some of the crimes in Mukjar and Deleig: ICC-02/05-01/20-433-Corr (“[Abd-al-Rahman Confirmation Decision](#)”), pp. 50-71 (operative part). Mr Ntaganda was also on

case.⁴² The characteristics of this case and the specific parameters of the charges (crimes committed in a confined detention centre by a specific group of perpetrators under Mr SAID's control and with his essential contributions) permit the charging approach adopted by the Pre-Trial Chamber and therefore the inclusion of incidents c) and q) in the Trial Brief without a formal amendment.

3. The Chamber is now competent to determine whether the incidents fall within the charges beyond a reasonable doubt

24. For the reasons summarised above, the Pre-Trial Chamber rejected the Prosecution's request to formally amend the charges and held that *the charges as confirmed allow for the Trial Chamber to determine, on the basis of the evidence before it, whether the two acts fall within the scope of the charges.*⁴³ Similarly, the Prosecution included incidents c) and q) in its Trial Brief and set out that the evidence it intends to call before the Trial Chamber will demonstrate that these incidents fall within the parameters of the charges and should therefore form part of the evidence considered at trial.⁴⁴

the ground during the first operation in the *Ntaganda* case, and, in addition to indirect co-perpetration, was also convicted with the direct perpetration of murder and persecution of one person: [Ntaganda TJ](#), paras. 737-742; 745-752.

⁴² ICC-01/04-02/06-2359 ([Ntaganda TJ](#)), para. 1112 (where the Chamber found that the charges were sufficiently specific for enlistment and conscription of child soldiers even if they were framed with broad temporal and geographic parameters (from on or about 6 August 2002 to on or about 31 December 2003, in Ituri) because of the continuous nature of the crimes and because these acts were committed "in the institutionalised coercive environment of the UPC/FPLC, in similar circumstances over a period of time"); *see also* para. 1113 (with respect to the use of child soldiers, the Chamber required a higher degree of specificity because "active participation in hostilities is temporary in nature under IHL and that individuals cease to actively participate when not engaged in combat related activities"). *See further* on the crime of rape in some contexts: ICC-02/04-01/15-1762-Red ([Ongwen TJ](#)), para. 2097 (noting that the five witnesses of child soldiers who suffered rape and other sexual and gender-based crimes were "simply examples of a much larger group of women who are the victims of these crimes" and that these crimes are "systemic in nature"); [Ntaganda TJ](#), para. 968 (where the Trial Chamber found that the same parameters of the charges were sufficiently specific (Ituri, from on or about 6 August 2002 to on or about 31 December 2003) due to the "nature of the crimes" of rape and sexual slavery and that "the perpetrators and victims moved around within the specified territory").

⁴³ [Said PTC Article 61\(9\) Decision](#), paras. 26-27.

⁴⁴ *See above* at fn. 10.

25. The Chamber may now make this determination based on the evidence before it, which was already disclosed or, alternatively, defer this determination to the deliberation stage of trial judgment based on all the evidence submitted and discussed.⁴⁵ By including these incidents in the Trial Brief, and summarising the evidence and providing all relevant sources, the Prosecution has facilitated the Trial Chamber's ability to assess whether incidents c) and q) fall within the scope of the charges.

B. Mr Said has received sufficient notice

26. Mr SAID has received sufficient and prompt notice that incidents c) and q) fall within the scope of the charges and that the Prosecution is seeking to establish his criminal responsibility with respect to these two incidents. As noted above, the Prosecution provided such notice in the Prosecution's Notification on 18 March 2022⁴⁶ and then again explicitly in its Trial Brief on 13 June 2022.⁴⁷ The Prosecution provided further notice in its rule 68 applications relating to the three witnesses. The Pre-Trial Chamber's Decision of 8 July 2022 confirmed that Mr SAID could be brought to trial for incidents other than those described in the charges, thus including incidents c) and q) if the Trial Chamber confirmed, based on the evidence before it, that the incidents fell within the parameters of the charges.

⁴⁵ The *Al-Hassan* Trial Chamber chose to follow this course of action: [ICC-01/12-01/18-923-Red](#), paras. 17-20. The *Al-Hassan* confirmation decision contained typos in a date and name and the Prosecution requested the Trial Chamber to correct these two aspects in the self-contained document of charges (that the Trial Chamber had prepared at the beginning of trial to facilitate the reading of the charges to the accused). The Trial Chamber found that "[c]onsistent with what was noted by PTC I, the Chamber considers that these issues may be raised again and will be adjudicated during the course of the trial, in light of the evidence submitted before it"). PTC I had similarly held that the Trial Chamber was competent to make this determination: see [ICC-01/12-01/18-608-Red](#), paras. 46 ("It falls within the Trial Chamber's ultimate discretion to determine, within the bounds of the factual scope of the charges confirmed by the Pre-Trial Chamber, the sequence of events in detail on the basis of the evidence adduced and canvassed by the parties before the Bench") and 47 ("Given that the Trial Chamber will assess new evidence presented by the parties and participants and hear viva voce witnesses, it is, in making a determination as to the truth, better placed than the Pre-Trial Chamber to establish the precise sequence of the events").

⁴⁶ [ICC-01/14-01/21-262-Red](#).

⁴⁷ [ICC-01/14-01/21-359-Red](#), paras. 243-251 (in relation to witnesses P-1432 and P-1762) and paras. 148-150 (P-3047).

27. Leading the evidence at trial causes no undue prejudice to Mr SAID as he has had ample time to prepare his defence with respect to these two incidents. The Prosecution emphasises that it will not seek to establish Mr SAID's responsibility for incidents other than those set out in the Trial Brief, for which the evidence is summarised. Nor could the Prosecution do so without the Chamber's leave since the deadlines to disclose incriminatory evidence and to add witnesses to its list of witnesses and evidence have expired. Hence, Mr SAID can prepare his defence accordingly. Conversely, excluding incidents c) and q) from the trial would be manifestly unfair to the affected victims who would be deprived of their right to the truth and adequate reparations reflecting the harms suffered if a conviction is entered.⁴⁸

V. CONCLUSION

28. For the reasons set out above, the Prosecution respectfully requests the Chamber to find that (i) it is permissible to add incidents c) and q) to the Trial Brief and lead evidence accordingly at trial; and that (ii) Mr SAID has received proper notice of these facts and of the Prosecution's intention to seek his criminal responsibility for these two incidents.



Karim A.A. Khan Q.C., Prosecutor

Dated this 16th day of August 2022

At The Hague, The Netherlands

⁴⁸ The Appeals Chamber has held: "A convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case." See ICC-01/04-01/06-3129 ("[Lubanga Reparations Appeals Judgment](#)"), para. 118. The Inter-American Court of Human Rights has consistently held that the right of victims of serious human rights violations to the truth is important not only for individuals but for the society as a whole, and is itself an important means of reparation. See e.g. IACHR, Case of Blanco-Romero et al. v. Venezuela, "Order of the Inter-American Court of Human Rights", 28 November 2005, paras. 95-96; IACHR, Case of the "Mapiripán Massacre" v. Colombia, "Judgment", 15 September 2005, paras. 216, 297-298; IACHR, Case of the Moiwana Community v. Suriname, "Judgment", 15 June 2005, paras. 204-205.