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**International
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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 THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. MAHMAT SAID ABDEL KANI***

Public

**Prosecution's Response to "Demande d'interjeter appeal de la 'Decision on the
Prosecution's application to amend the charges'" (ICC-01/14-01/21-416)**

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 (“the Pre-Trial Chamber”) should dismiss the Defence request for leave to appeal¹ the Decision on the Prosecution’s application to amend the charges² because it does not raise any appealable issue arising from the Decision or show how any of the alleged Issues meet the other criteria for leave to appeal under article 82(1)(d).

2. The Request identifies five alleged issues (collectively, the “Issues”), namely whether the Pre-Trial Chamber:

- had the power to consider that adding new facts to the charges does not constitute an amendment of the charges (Issue 1);
- had the power to decide that the Prosecution is free to add to the charges incidents explicitly rejected in a decision confirming the charges, namely “incident R” (Issue 2);
- should have taken into account, in this case, whether the Prosecution has acted with diligence before deciding in a general manner that the Prosecution can add to the charges without any judicial control (Issue 3);
- assessed the factual consequences of the evaluation of the proximity between the facts and the accused to determine if the facts confirmed were exhaustive or not (Issue 4);
- had the power to interpret its own decision to the detriment of the accused in violation of the fundamental principle of *in dubio pro reo* (Issue 5).

3. None of these Issues³ constitute an appealable issue within the meaning of article 82(1)(d): Issue 1 concerns a matter that has already been determined by the Appeals Chamber; Issue 2 results from a mischaracterisation of the Decision; and

¹ ICC-01/14-01/21-416 (“Request”).

² [ICC-01/14-01/21-396](#) (“Decision”).

³ Request, Section III.1.

Issues 3-5 constitute mere disagreements with the Decision. Issue 3 further mischaracterises the Decision and does not arise from it, as it concerns a question that was not found by the Pre-Trial Chamber to be essential for the determination of the matter before it. Issue 5 also does not arise from the Decision but concerns an issue that was not adjudicated by the Pre-Trial Chamber. The Request should fail on this basis alone.

4. In any event, none of the Issues meet the criteria for leave to appeal under article 82(1)(d). The Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and an immediate resolution by the Appeals Chamber of the Issues would not materially advance the proceedings.

II. SUBMISSIONS

A. The Issues are not appealable issues within the terms of article 82(1)(d)

5. None of the Issues constitute an appealable issue and the Request should be rejected on that basis alone. For the purposes of article 82(1)(d),⁴ an issue constitutes “an identifiable subject or topic requiring a decision for its resolution”, and its resolution is “essential for the determination of matters arising under the judicial cause under examination”.⁵

6. Paragraphs 17-21 and 26-27 of the Request are copied verbatim from the Defence Response to the Prosecution Application to Amend the Charges.⁶ Thus, they merely repeat the Defence’s prior arguments that have been duly considered and rejected by the Pre-Trial Chamber, but they do not raise any appealable issues or show how the Issues meet the criteria for leave to appeal. They are therefore not relevant to the

⁴ [ICC-01/04-168 OA3](#), paras. 9.

⁵ [ICC-01/04-168 OA3](#), para. 9-10. *See also* [ICC-01/04-01/06-1433 OA11](#), Dissenting Opinion of Judge Song, para. 4, specifying that “[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

⁶ ICC-01/14-01/21-346-Conf, paras. 4-7 (repeated in paras.13-16 of the Request), 8-11 (repeated in paras.17-19 of the Request); 2-3 (repeated in paras. 26-27 of the Request).

question before the Pre-Trial Chamber and should thus be disregarded.⁷

7. Paragraphs 28-31 are also not relevant to the question before the Pre-Trial Chamber and should be disregarded. First, instead of seeking to identify a discrete issue arising from the Decision, they concern the entirety of the Decision.⁸ Second, they amount to a mere misunderstanding of the Decision.⁹ Contrary to the Defence submissions, the Decision does not allow for an amendment of the charges,¹⁰ nor does it create uncertainty regarding the scope of the charges¹¹ or empty the process of confirmation of charges of its meaning.¹² The consequence of the Decision is that, consistent with the Court's jurisprudence,¹³ the Prosecution needs not seek an amendment of the charges in order to add incidents when they fall within the relevant scope of the confirmed charges.

i. Issue 1 has already been determined by the Appeals Chamber

8. Issue 1 on whether the Pre-Trial Chamber had the power to consider that adding new facts to the charges did not constitute an amendment of the charges is not appealable because it concerns a matter that has already been fully adjudicated by the Appeals Chamber.¹⁴ It is therefore not "essential for the determination of matters arising under the judicial cause under examination".¹⁵

9. As noted by the Pre-Trial Chamber in its Decision,¹⁶ the *Ntaganda* Appeals Chamber addressed the issue of "whether charges must be formulated and confirmed with respect to individual criminal acts".¹⁷ The Appeals Chamber confirmed that

⁷ See [ICC-02/05-01/20-682](#), para. 7.

⁸ See [ICC-01/12-01/18-734](#), para. 14; [ICC-01/05-01/13-877](#), para. 7.

⁹ See [ICC-02/11-01/15-756](#), para. 10.

¹⁰ *Contra* Request, para. 28.

¹¹ *Contra* Request, para. 29.

¹² *Contra* Request, para. 30.

¹³ See [ICC-01/04-02/06-2666-Red](#), para. 327 ("it is not necessarily inconsistent with article 74(2) of the Statute for the Prosecutor to formulate and for the pre-trial chamber to confirm charges that do not consist of an exhaustive list of individual criminal acts"); see also para. 326 (quoting [ICC-01/05-01/08-3636-Anx1-Red](#), paras. 27-28); [ICC-02/05-01/20-626](#), paras. 18, 20, 22-24.

¹⁴ *Contra* Request, paras. 32-39. See e.g. [ICC-01/05-01/08-2487-Red](#), para. 28; [ICC-02/05-01/20-682](#), para. 7.

¹⁵ [ICC-01/04-168 OA3](#), para. 9.

¹⁶ [Decision](#), paras. 14, 21-22.

¹⁷ See [ICC-01/04-02/06-2666-Red](#) ("*Ntaganda* AJ"), paras. 322-326 (quoting [ICC-01/05-01/08-3636-Anx1-Red](#), paras. 27-28).

charges can be described with respect to confined temporal and geographical parameters and individual criminal acts and victims can be listed in a none-exhaustive manner. It held as follows:

- “[C]harges must be described in such a way that the trial chamber as well as the parties and participants are able ‘to determine with certainty which sets of historical events, in the course of which crimes under the jurisdiction of the Court are alleged to have been committed form part of the charges, and which do not. It is not necessarily the case that such determination is possible only where the charging documents list all criminal acts underlying each charge exhaustively.’”¹⁸
- “While in such a case the document containing the charges may also list or make reference to specific criminal acts, the scope of the case is not necessarily limited to them – ‘other criminal acts not mentioned in the document containing the charges may still fall within the – broadly described – facts and circumstances of the charges’.”¹⁹
- “[I]t is not necessarily inconsistent with article 74(2) of the Statute for the Prosecutor to formulate and for the pre-trial chamber to confirm charges that do not consist of an exhaustive list of individual criminal acts.”²⁰

10. The *Al Hassan* Appeals Chamber further clarified that in “cases where each criminal act is specified in the Prosecutor’s charging document, the pre-trial chamber need not make findings exhaustively on each individual criminal act underlying the crimes charged. Given the early stage of the case, the pre-trial chamber will assess the charges at the macro-level to move forward only with those charges that are sufficiently well grounded in evidence.”²¹ The Appeals Chamber thus allowed for the possibility that a pre-trial chamber may choose to either conduct a thorough analysis

¹⁸ [Ntaganda AJ](#), para. 326.

¹⁹ [Ntaganda AJ](#), para. 326.

²⁰ [Ntaganda AJ](#), para. 327.

²¹ ICC-01/12-01/18-1562-Red (“[Al Hassan Regulation 55 AD](#)”), para. 92.

of all the factual allegations underpinning a charge brought by the Prosecutor, or to only analyse a sample, before concluding that the charge, as a whole, had been established to the necessary degree.²² In the latter case, the confirmation decision would not contain an analysis of every factual allegation brought by the Prosecutor. And trial chambers must consider the confirmation decision and the document containing the charges “to fully ascertain the ‘facts and circumstances described in the charges’”.²³

11. Moreover, under Issue 1 the Defence has mischaracterised the Decision first by stating that it limits the definition of the charges to the “general judicial qualification”²⁴ and second by claiming that the Decision gives the Prosecution the freedom to present at trial any fact or circumstance that it wishes to.²⁵ However, the Decision, as noted above, merely provides that the Prosecution would not be required to seek an amendment of the charges in order to add incidents when those incidents fall within the relevant scope of the confirmed charges.²⁶ The Decision does not contradict the Pre-Trial Chamber’s decision in *Yekatom and Ngaissana*.²⁷ Each decision is rendered based on the circumstances of the case. In *Yekatom and Ngaissana* the Pre-Trial Chamber did not allow the Prosecution to amend the charges and add factual allegations related to a rape victim because in its view that crime of rape was allegedly “committed under factual circumstances entirely other than the ones relevant to the confirmed charge as regards specific time, place, alleged perpetrators”.²⁸

ii. Issue 2 results from a mischaracterization of the Decision

12. Issue 2 on whether the Pre-Trial Chamber had the power to confirm that the Prosecution is free to add to the charges incidents explicitly rejected in a decision on the confirmation of charges (here “Incident R”) is not appealable because it results

²² [Al Hassan Regulation 55 AD](#), para. 94.

²³ [Al Hassan Regulation 55 AD](#), paras. 93-94.

²⁴ Request, para. 33.

²⁵ Request, paras. 36-38.

²⁶ [Decision](#), para. 27.

²⁷ [ICC-01/14-01/18-517](#). *Contra* Request, paras. 34-35.

²⁸ *See* [ICC-01/14-01/18-517](#), para. 20.

from a mischaracterisation of the Decision.²⁹

13. Incident R was not included in the Decision Confirming the Charges³⁰ because the Pre-Trial Chamber considered that the Prosecution did not submit evidence demonstrating that the incident falls within the temporal scope of the charges brought against Mr. Said.³¹ The Decision does not give the Prosecution the freedom to re-add Incident R as rejected. Rather the Pre-Trial Chamber held that it is for the Trial Chamber to decide based on the evidence before it, which acts [including Incident R] fall within the scope of the charges (including its temporal scope) as confirmed by the Pre-Trial Chamber.³²

iii. Issue 3 is not essential for the determination of the matter before the Pre-Trial Chamber, and it mischaracterises the Decision

14. Issue 3 on whether the Pre-Trial Chamber should have considered, in this case, if the Prosecution acted with diligence before considering that the Prosecution could add charges without judicial control is not appealable.³³

15. Issue 3 mischaracterises the Decision. The Pre-Trial Chamber did not find that the Prosecution can add to the charges without being subject to any judicial control. Instead, it held that it was for the Trial Chamber to determine whether the evidence presented by the Prosecution relates to facts and circumstances as confirmed by the Pre-Trial Chamber.³⁴ In any event, the question regarding the Prosecution's diligence is not relevant to the Decision and would not have impacted the Pre-Trial Chamber's determination of the matter.³⁵ This is because the Chamber did not grant the Prosecution's request to amend the charges.

²⁹ *Contra* Request, paras. 40-49. See e.g., [ICC-01/04-01/10-487](#), paras. 32-33.

³⁰ [ICC-01/14-01/21-218-Red](#) ("Decision Confirming the Charges").

³¹ [Decision](#), para. 26.

³² [Decision](#), paras. 26-27.

³³ *Contra* Request, paras. 50-57.

³⁴ [Decision](#), paras. 26-27.

³⁵ *Contra* Request paras. 50-57. See e.g., [ICC-02/04-01/15-537](#), para. 8; [ICC-01/05-01/08-980](#), paras. 17-19.

iv. Issue 4 constitutes a mere disagreement with Pre-Trial Chamber

16. Issue 4 relating to the evaluation of the proximity between the facts and the accused is not appealable. Instead, the Defence merely disagrees with the Pre-Trial Chamber's conclusion that in the present case there was no factual reasons for limiting the scope of the charged crimes "to the specific criminal acts listed in paragraph 29 of the operative part of the Confirmation Decision".³⁶ Mere disagreements do not amount to an appealable issue.³⁷ In addition, the Defence does not provide any arguments showing an error in the Pre-Trial Chamber's decision or why the Chamber's conclusion in this respect would amount to an appealable issue.³⁸ Unsubstantiated claims³⁹ or general complaints⁴⁰ have previously found not to be sufficient to be a party's burden under article 82(1)(d).

v. Issue 5 does not arise from the Decision but concerns an issue that was not adjudicated by the Pre-Trial Chamber

17. Issue 5 on whether the Pre-Trial Chamber had the power to interpret its own decision to the detriment of the Accused does not arise from the Decision.⁴¹ The Defence has not argued that the Decision Confirming the Charges was unclear and contrary to the Defence's assertion the Pre-Trial Chamber did not recognise that it was. "To avoid any doubt [...] about the scope of the Confirmation Decision, which might arise at a later stage of the trial",⁴² the Pre-Trial Chamber only emphasised that the number of examples in the Confirmation Decision should neither be considered as indicating an absolute maximum, nor should it be understood as a minimum threshold for the existence of the crime as charged.⁴³

³⁶ [Decision](#), para. 23; *Contra Request*, paras. 58-62.

³⁷ *See e.g.*, [ICC-01/12-01/18-342-Red](#), para. 23

³⁸ *See generally* Request, Section III.2.

³⁹ [ICC-01/09-01/11-1154](#), para 26.

⁴⁰ [ICC-01/04-01/06-2463](#), para. 31.

⁴¹ *Contra Request*, paras. 63-69. *See e.g.*, [ICC-01/14-01/18-206](#), para.10.

⁴² [Decision](#), para. 24.

⁴³ [Decision](#), para. 24. *Contra Request*, paras. 65-67.

B. The Issues do not meet the requirements for leave to appeal under article 82(1)(d)

18. The fact that the Defence has not identified any appealable issue constitutes by itself a basis for rejecting the Defence Request. The Pre-Trial Chamber does not need to assess whether the Issues meet the other criteria under article 82(1)(d). But in any event, none of the Issues meets these requirements and the Request may be rejected also on that basis.

i. The Issues do not significantly affect the fair and expeditious conduct of the proceedings

19. The Defence has not demonstrated that any of the Issues significantly affect the fair and expeditious conduct of the proceedings. The procedural and substantive rights and obligations of all participants, including the Accused, are respected.⁴⁴ Contrary to the Defence's submissions, the Decision does not permit the Prosecution to add any incidents to the confirmed charges. The Decision merely reiterates that an amendment of the charges in this case would not be needed for the Prosecution to present any evidence that relates to the scope of the charges as confirmed by the Pre-Trial Chamber.

20. Moreover, to add evidence that falls within the scope of the charges, the Prosecution should notify the Accused. As correctly noted by the Pre-Trial Chamber, "[t]he 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."⁴⁵ The Accused has received proper notice of the content and scope of the charges against him and the trial has not yet started.⁴⁶ Thus, the Defence's submissions that the Decision puts the

⁴⁴ [ICC-01/04-141](#), para. 48; [ICC-02/04-01/05-212](#), paras. 10-11; [ICC-01/04-135-tEN](#), para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

⁴⁵ [Decision](#), para. 25.

⁴⁶ Prosecution's Trial Brief (ICC-01/14-01/21-359-Conf), paras. 243-251 and List of Evidence (ICC-01/14-01/21-358+Conf-Anxs at Annex H and J).

accused in the uncertainty is incorrect.⁴⁷

21. The Defence has not made any argument with respect to how the issues affect the expeditious conduct of the proceedings.

ii. The Issues would not significantly affect the outcome of the trial

22. The issues have no possible implications on the outcome of the trial,⁴⁸ and the Defence has not established the contrary.⁴⁹ The Defence's argument that the outcome of the trial would be affected because Mr. Said can be convicted on the basis of facts explicitly rejected by the Pre-Trial Chamber or new facts added to the charges should be rejected. As argued above, the Defence's submission is based on a misunderstanding of the Decision. The Pre-Trial Chamber did not permit the Prosecution to add new facts and strictly limited it to presenting evidence that relates to the scope of the confirmed charges.

23. The fact that the *Ruto* Single judge granted the Prosecution a request for leave to appeal a decision related to the amendments of the charges and found that it can affect the outcome of the trial, does not mean that every decision related to amendments of the charges automatically affects the outcome of the trial.⁵⁰ First, the Decision is not one on the amendment of charges. The Pre-Trial Chamber expressly rejected the Prosecution's request to that effect. Second, and in any event, whether an issue meets the criteria for leave to appeal must be determined on a case by case basis and is dependent on the facts specific to each case.

iii. An immediate resolution of the Issues would not materially advance the proceedings

24. Finally, arguing that the Accused risks to go to trial on the basis of facts explicitly rejected or facts that could have been added to the charges, does not demonstrate that

⁴⁷ *Contra* Request, paras. 69-70, 74.

⁴⁸ See e.g., [ICC-01/04-168 OA3](#), para. 13.

⁴⁹ *Contra* Request, paras. 71-73.

⁵⁰ *Contra* Request, paras. 72-73.

an immediate resolution of the issues would materially advance the proceedings.⁵¹ And as argued above, the Defence's submission are based on its misunderstanding of the Decision. In addition, the fact that the *Ruto* Single judge granted the Prosecution a request for leave to appeal a decision related to the amendments of the charges and found that it could materially advance the proceedings, does not mean that every decision related to amendments of the charges automatically advance the proceedings.⁵² This Decision does not grant an amendment of the charges and, in any event, each decision must be determined on the basis of its own facts.

25. As stated by the Appeals Chamber, this requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "'move forward'; by ensuring that the proceedings follow the right course".⁵³ In this case, the proceedings are following the right course. The Accused has been aware of the charges confirmed against him since 9 December 2021⁵⁴ and those charges remained the same following the Decision.

III. RELIEF SOUGHT

26. For the above reasons, the Prosecution requests the Pre-Trial Chamber to deny the Defence Request.



Karim A. A. Khan QC, Prosecutor

Dated this 22nd day of July 2022
At The Hague, The Netherlands

⁵¹ *Contra* Request, paras. 75-76.

⁵² *Contra* Request, paras. 77-78.

⁵³ [ICC-01/04-168](#), paras. 14-15, 18.

⁵⁴ [ICC-01/14-01/21-218-Red.](#)