



**Original: English**

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

**Date: 19 August 2022**

**PRE-TRIAL CHAMBER II**

**Before:**

**Judge Rosario Salvatore Aitala, Presiding**

**Judge Antoine Kesia-Mbe Mindua**

**Judge Tomoko Akane**

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

**Public**

Decision on the Defence request for leave to appeal the ‘Decision on the  
“Prosecution’s application to amend the charges”’

**Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

Mr Karim A. A. Khan  
Mr Mame Mandiaye Niang

**Counsel for Mr Said**

Ms Jennifer Naouri  
Mr Dov Jacobs

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for Victims**

Ms Sarah Pellet  
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**The Office of Public Counsel  
for the Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**  
Trial Chamber VI

**PRE-TRIAL CHAMBER II** of the International Criminal Court, having regard to article 82(1)(d) of the Rome Statute (the ‘Statute’), decides on the Defence request for leave to appeal the ‘Decision on the “Prosecution’s application to amend the charges”’<sup>1</sup> as follows.

### **I. Procedural background**

1. On 9 December 2021, the Chamber confirmed part of the charges brought against Mr Said and committed him for trial.<sup>2</sup> Following the transmission of the record of the proceedings by the Registry,<sup>3</sup> the Presidency constituted and referred the case to Trial Chamber VI,<sup>4</sup> which set the date for the commencement of the trial to 26 September 2022.<sup>5</sup>

2. 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 paragraph 33 of the Document Containing the Charges (“DCC”), which Pre-Trial Chamber II did not confirm’, demonstrating that it falls ‘within the temporal scope of the charges’.<sup>6</sup>

3. On 22 April 2022, Trial Chamber VI issued its decision on the Notification<sup>7</sup> 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’.

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<sup>1</sup> *Demande d’autorisation d’interjeter appel de la « Decision on the ‘Prosecution’s application to amend the charges’ »* (ICC-01/14-01/21-396), 18 July 2022, ICC-01/14-01/21-416 (the ‘Request for Leave to Appeal’).

<sup>2</sup> Decision on the confirmation of charges against Mahamat Said Abdel Kani, 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).

<sup>3</sup> Transmission to the Presidency of the record of the proceedings, including the Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21-218-Conf, dated 09 December 2021, 10 December 2021, ICC-01/14-01/21-219-Conf with confidential *ex parte* Annexes 1-3.

<sup>4</sup> Decision constituting Trial Chamber VI and referring to it the case of The Prosecutor v. Mahamat Said Abdel Kani, 14 December 2021, ICC-01/14-01/21-220.

<sup>5</sup> Decision Setting the Commencement Date of the Trial and Related Deadlines, ICC-01/14-01/21-243.

<sup>6</sup> Prosecution’s Notification Related to Incident (r) of Paragraph 33 of the Document Containing the Charges, ICC-01/14-01/21-262-Conf (the ‘Notification’) (public redacted version notified on the same day; ICC-01/14-01/21-262-Red).

<sup>7</sup> Decision on Prosecution Notification regarding the Charges (ICC-01/14-01/21-262-Red), ICC-01/14-01/21-282 (the ‘22 April 2022 Decision’).

4. On 5 May 2022, the Prosecution requested the Chamber to amend the charges as confirmed against Mr Said, which was rejected by the Chamber in the 8 July 2022 Decision.<sup>8</sup>

5. On 18 July 2022, the Defence requested leave to appeal the 8 July 2022 Decision.<sup>9</sup>

6. On 22 July 2022, the Office of Public Counsel for Victims (‘OPCV’) and the Prosecution responded to the Request for Leave to Appeal.<sup>10</sup>

## II. Submissions

7. The Defence requests leave to appeal the 8 July 2022 Decision under article 82(1)(d) of the Statute for the following five issues:

- (i) *‘la Chambre préliminaire avait-elle le pouvoir juridique de considérer que l’ajout de nouveaux faits aux charges ne constituait pas un amendement des charges ?’* (the ‘First Issue’);
- (ii) *‘la Chambre avait-elle le pouvoir juridique d’affirmer que l’Accusation serait libre d’ajouter aux charges des incidents explicitement rejetés dans une décision de confirmation des charges, ici l’incident r) ?’* (the ‘Second Issue’);
- (iii) *‘la Chambre devait-elle prendre en compte, dans le cas d’espèce, si l’Accusation avait agi avec diligence avant de considérer de manière générale qu’elle pouvait décider d’ajouter aux charges sans contrôle judiciaire ?’* (the ‘Third Issue’);
- (iv) *‘la Chambre a-t-elle tiré les conséquences factuelles de l’évaluation de la proximité entre les faits et l’accusé pour pouvoir déterminer si les faits confirmés étaient exhaustifs ou non ?’* (the ‘Fourth Issue’);

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<sup>8</sup> Prosecution’s application to amend the charges, 5 May 2022, ICC-01/14-01/21-294-Conf (the ‘Application’) (public redacted version notified on 9 May 2022; ICC-01/14-01/21-294-Red); Decision on the ‘Prosecution’s application to amend the charges’, 8 July 2022, ICC-01/14-01/21-396 (the ‘8 July 2022 Decision’).

<sup>9</sup> Request for Leave to Appeal.

<sup>10</sup> Victims’ response to the “Demande d’autorisation d’interjeter appel de la ‘Decision on the ‘Prosecution’s application to amend the charges’” (ICC-01/14-01/21-396)” (ICC-01/14-01/21-416), ICC-01/14-01/21-426-Conf (public redacted version notified on the same day; ICC-01/14-01/21-426-Red); Prosecution’s Response to “Demande d’interjeter appel de la ‘Decision on the Prosecution’s application to amend the charges’” (ICC-01/14-01/21-416), ICC-01/14-01/21-428.

(v) *‘la Chambre avait-elle le pouvoir juridique d’[interpréter] sa propre décision au détriment de l’Accusé en violation du principe fondamental de « in dubio pro reo »?’* (the ‘Fifth Issue’).

8. According to the Defence, these issues affect the fair and expeditious conduct of the proceedings, as well as the outcome of the trial, and immediate resolution by the Appeals Chamber may materially advance the proceedings.

9. The Prosecution and the OPCV both oppose the Request for Leave to Appeal, arguing that it must be dismissed, as it fails to identify an appealable issue arising from the 8 July 2022 Decision, and thus fails to meet the requirements of article 82(1)(d) of the Statute.

### **III. Determination by the Chamber**

10. The 8 July 2022 Decision rejected a request by the Prosecution. Nonetheless, as [e]ither party may appeal decisions pursuant to article 82(1)(d) of the Statute, the Defence may also appeal a decision on a request by the opposing party. However, it is well-established in the case law of the Court that an interlocutory appeal pursuant to the aforementioned provision can only be allowed in respect of issues arising from the decision in question, provided that they do not merely constitute a disagreement and for which resolution is essential for the determination of the matter. In addition, leave to appeal can only be granted in respect of issues which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the relevant chamber, immediate appellate resolution may materially advance the proceedings. It has also been consistently held that, for the purposes of determining a request for leave to appeal, the cumulative requirements set forth in article 82(1)(d) of the Statute are the sole parameters of relevance and arguments relating to the merits or substance of the appeal are irrelevant.

#### *First and Second Issues*

11. Both the First and the Second Issues relate to the question whether the Prosecution may, at trial, add individual criminal acts to those specifically identified and mentioned in the charges as confirmed. As such, the Chamber addresses them jointly.

12. The First Issue raises the question whether the Chamber could consider that adding new facts to the charges does not constitute an amendment of the charges. The Defence submits that the Chamber adopted a restrictive interpretation of the notion of ‘charge’ by understanding it as being constituted only of a legal characterisation under article 7 or 8 of the Statute, which would exclude the facts underlying such a characterisation from its constitutive elements. In addition to allegedly contradicting both the Court’s legal framework and the Chamber’s jurisprudence,<sup>11</sup> in the Defence’s view such interpretation would also allow the Prosecution to entirely change the factual basis of the case at trial and, therefore, prevent the accused from knowing the exact facts and circumstances of the case.

13. The Second Issue concerns whether the Chamber was permitted to consider that the Prosecution may add to the charges incidents explicitly rejected in a confirmation decision (in this case, ‘Incident R’). In the Defence’s submission, the Chamber would have considered that explicitly excluding ‘Incident R’ from the scope of the charges would not prevent the Prosecution from relying on that incident at trial. The Chamber’s position would therefore be contrary to the Court’s jurisprudence, according to which the question of whether the Prosecution can rely on new facts at trial may arise only when a pre-trial Chamber has not explicitly considered or excluded those facts in the confirmation decision.<sup>12</sup>

14. The first two issues are both premised on mischaracterisations by the Defence of the 8 July 2022 Decision. The Chamber’s indication that the ‘mention of certain instances or victims in relation to the charges does not mean that any instances or victims not mentioned are “not confirmed”’ is consistent with its evidentiary analysis

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<sup>11</sup> Request for Leave to Appeal, para. 34, referring to Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the ‘Prosecution’s Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges’, 14 May 2020, ICC-01/14-01/18-517, para. 18 (the ‘14 May 2020 Decision’).

<sup>12</sup> Request for Leave to Appeal, paras 44-48, referring to Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on the updated document containing the charges, 6 February 2015, ICC-01/04-02/06-450, para. 10; Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, ICC-01/04-02/06-2666-Red, paras 336, 343 (the ‘*Ntaganda Appeals Judgment*’); Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, para. 32.

in the Confirmation Decision being ‘limited to assessing whether [...] those material facts and circumstances relevant to the charged crimes were proven to the applicable standard’ in order to determine if ‘the objective elements of the [charged] crimes [were] sufficiently established’.<sup>13</sup> Contrary to the Defence’s submission, the Chamber did not affirm that the individual criminal acts mentioned in the operative part of the Confirmation Decision are not part of the charges. Rather, it stated that the individual criminal acts underlying, and therefore constituting, the confirmed charges may be supplemented ‘so long as other material facts underpinning the confirmed crimes [...] fall within the temporal and geographical parameters [of the charges], as well as within the charged role of the accused’.<sup>14</sup> The Chamber accordingly found that ‘[t]he procedure envisaged in article 61(9) of the Statute does not constitute an appropriate avenue to request modification of the charges such as the one sought by the Prosecution in the present case’.<sup>15</sup>

15. The Defence’s submission that the 8 July 2022 Decision would allow the Prosecution to modify at trial the entire factual basis of the case, without any kind of judicial review, by adding new facts to the charges or by reintroducing individual criminal acts that were explicitly excluded in the confirmation decision. This is a misrepresentation of the Chamber’s aforementioned conclusion. Far from providing such an unfettered right to the Prosecution, the 8 July 2022 Decision clarifies that, although procedure envisaged in article 61(9) of the Statute did not constitute the appropriate avenue for the Prosecution’s request, introducing additional individual criminal acts that are claimed to fall within the scope of the confirmed charges, may be done by presenting the relevant evidence before a trial chamber, since that chamber would be competent to assess ‘whether an act falls within the scope of a crime as charged and confirmed’.<sup>16</sup>

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<sup>13</sup> 8 July 2022 Decision, para. 18.

<sup>14</sup> 8 July 2022 Decision, para. 24.

<sup>15</sup> 8 July 2022 Decision, para. 27.

<sup>16</sup> 8 July 2022 Decision, paras 26-27.

16. In addition, the Chamber notes that the Appeals Chamber already exhaustively addressed the level of detail required in the formulation and confirmation of charges,<sup>17</sup> a question underlying both the First and Second Issues, Appellate intervention on these issues would therefore not materially advance the proceedings.

### *Third Issue*

17. The Third Issue concerns whether the Chamber should have taken into account, before allegedly considering that the Prosecution may add facts to the charges without judicial review, whether it acted diligently in the present case. The Defence argues that the Chamber, consistent with its purported jurisprudence,<sup>18</sup> should have assessed whether the Prosecution was diligent in submitting the Application before addressing its merits.

18. Arguments on this matter were already presented to the Chamber in the Defence's response to the Application.<sup>19</sup> With the Third Issue, the Defence therefore attempts to reopen the debate on those arguments, thereby revealing that it merely disagrees with the way in which the Chamber considered its arguments in reaching the 8 July 2022 Decision.

19. Moreover, the Third Issue is substantiated by reference to a decision in the *Yekatom and Ngaïssona* case where, after indicating that it regarded the amendment sought by the Prosecution as a request to add a new charge under article 61(9) of the Statute, the Chamber found that none of the circumstances listed by the Prosecution qualified as a 'proper justification' warranting 'an extension of the facts and circumstances of the case'.<sup>20</sup> In the present case, contrary to the Defence's submission, it would not have been '*logique et prévisible que la même procédure s'applique*'.<sup>21</sup> Since the Chamber concluded that '[t]he procedure envisaged in article 61(9) of the Statute does not constitute an appropriate avenue to request modification of the charges

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<sup>17</sup> See *Ntaganda Appeals Judgment*, paras 320-344 quoted in the 8 July 2022 Decision, paras 14, 21-22, 25; Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled 'Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court', 1 July 2021, ICC-01/12-01/18-1562-Red, paras 4-5, 91-107.

<sup>18</sup> Request for Leave to Appeal, paras 50-52, referring to 14 May 2020 Decision, para. 31.

<sup>19</sup> Request for Leave to Appeal, paras 54-56.

<sup>20</sup> 14 May 2020 Decision, paras 20, 31.

<sup>21</sup> Request for Leave to Appeal, para. 52.



such as the one sought by the Prosecution', the Application was not treated as a request under that provision, rendering the issue of prosecutorial diligence irrelevant. Accordingly, the Third Issue appears to be based on a misunderstanding of the 8 July 2022 Decision.

#### *Fourth Issue*

20. The Fourth Issue raises the question whether the Chamber correctly assessed the proximity between the facts and the accused to determine whether the confirmed facts were exhaustive. In the view of the Defence, the Chamber would have adopted a restrictive interpretation of the Appeals Chamber's jurisprudence setting the principles for determining the expected degree of specificity of the charges according to the degree of proximity between the accused and the alleged crimes.<sup>22</sup> As a consequence, the Chamber would have mistakenly concluded that the lack of sufficient proximity between the accused and the charged crimes in the present case justified that the Prosecution could add facts to the charges without judicial review.

21. The Defence omits to indicate that, in the 8 July 2022 Decision, noting that the Appeals Chamber's jurisprudence was to be applied depending on the circumstances of the case, the Chamber set out the reasons which brought it to conclude that a high degree of proximity did not exist between the acts and conduct of Mr Said and the crimes allegedly committed.<sup>23</sup> The Defence's submissions underlying the Fourth Issue are tantamount to an expression of dissatisfaction with the Chamber's findings and interpretation of the law and, as such, constitute a mere disagreement with the outcome of the 8 July 2022 Decision.

#### *Fifth Issue*

22. The Fifth Issue addresses the question whether a Chamber could interpret the Confirmation Decision to the detriment of the accused in violation of the fundamental principle *in dubio pro reo*. The Defence asserts that what the Chamber did in the 8 July 2022 decision was to recognise the existence of an ambiguity in the Confirmation Decision, before providing a reinterpretation of that decision. In the Defence's submission, if there was a doubt as to the scope of the Confirmation Decision, it should

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<sup>22</sup> Request for Leave to Appeal, paras 58, referring to *Ntaganda* Appeals Judgment, and para. 61.

<sup>23</sup> 8 July 2022 Decision, paras 22-23.

have been resolved and clarified to the benefit of the accused: the Chamber should therefore have provided an interpretation of the Confirmation Decision which would have ensured proper notice of the charges to the accused.

23. The Defence fails to substantiate its broad and general assertions, which are therefore without impact on the proceedings. The Fifth Issue is abstract and vague as the Defence does not explain properly the nature of the purported ambiguity affecting the Confirmation Decision, nor the effect that such ambiguity would have had on the exercise of the accused's rights. The mere fact that the parties disagree about the reading of a decision by a chamber does not mean that the decision is ambiguous. The existence of such a disagreement also does not mean that a chamber tasked to decide on the disagreement necessarily has to rule in favour of the defence. That is not what the principle of *in dubio pro reo* stands for or requires. Rather, as is usual in case of an request that is opposed by the other party, the Chamber should consider the applicable law, relevant facts and all the argument, and decide on the merits. In the present case, the Defence appears to merely disagree with the outcome of the Chamber's ruling.

24. Furthermore, the Defence's reading of the Chamber's approach is inaccurate and relies on a mischaracterisation of the 8 July 2022 Decision. Far from constituting a reinterpretation of the Confirmation Decision, that decision provided clarifications on some of its aspects which were rendered necessary by the litigation resulting from the Prosecution's submission of the Notification before Trial Chamber VI. Contrary to the Defence's submission, the sentence '[t]o avoid any doubt on the side of the parties about the scope of the Confirmation Decision, which might arise at a later stage of the trial' in the 8 July 2022 Decision neither recognised that the Confirmation Decision was ambiguous, nor constituted an introductory formula to the Chamber's reinterpretation of that decision. Rather, it was limited to clarify the logical consequence that, as the number of individual criminal acts listed in the Confirmation Decision does not indicate an absolute maximum, such number 'must similarly not be understood as a minimum threshold for the existence of the crime as charged'.<sup>24</sup>

25. Since none of the issues put forward in the Defence's Request for Leave to Appeal qualifies as an appealable issue within the meaning of article 82(1)(d) of the Statute, it

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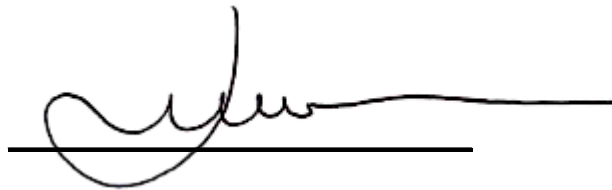
<sup>24</sup> 8 July 2022 Decision, para. 24.

is unnecessary for the Chamber to determine whether the additional cumulative requirements of that provision are met.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Defence's Request for Leave to Appeal.

Done in both English and French, the English version being authoritative.



**Judge Rosario Salvatore Aitala**

**Presiding**



**Judge Antoine Kesia-Mbe Mindua**



**Judge Tomoko Akane**

Dated this Friday, 19 August 2022

At The Hague, The Netherlands