

**Cour
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**International
Criminal
Court**

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Date: 16 May 2022

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
*THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public

**Public Redacted Version of "Victims' response to the 'Prosecution's application to amend the charges' (ICC-01/14-01/21-294-Red)"
No. ICC-01/14-01/21-310-Conf-Exp, dated 16 May 2022**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the****Court to:*****The Office of the Prosecutor**

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I. INTRODUCTION

1. In accordance with regulations 24(2) and 34(b) of the Regulations of the Court, Counsel representing the collective interests of future applicants as well as of applicants in the proceedings (the “Legal Representative”),¹ hereby submits her response to the “Prosecution’s application to amend the charges” (the “Application”).²

2. The Legal Representative submits that the 18 incidents confirmed by Pre-Trial Chamber II (the “Pre-Trial Chamber”) in its “Decision on the confirmation of charges against Mahamat Said Abdel Kani” (the “Confirmation Decision”)³ are indicative of the occurrence of crimes, rather than constituting an exhaustive list of specific criminal acts limiting the scope of the confirmed charges. As such, the Legal Representative posits that all incidents suffered by victims within the temporal and geographical parameters of the present case, namely incidents which supposedly took place at the OCRB between 12 April and 30 August 2013 when Mahamat Saïd Abdel Kani (“Mr Saïd” or the “Accused”) was allegedly in charge of the OCRB, are to be considered part of the charges. Since both Incident (r) and Incident P-3047 fall within these parameters, she submits that there is no need for an ‘amendment’ of the charges as requested by the Prosecution.

3. In the alternative, if by extraordinary the Pre-Trial Chamber would be minded to entertain the merits of the Application, the Legal Representative submits that said Application fulfils the requirements for the amendment of charges pursuant to article 61(9) of the Rome Statute (the “Statute”) and should therefore be granted. In particular, she submits that the Application is properly supported, justified and timely.

¹ See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG CT](#), p. 47, lines 1-13.

² See the “Prosecution’s application to amend the charges”, [No. ICC-01/14-01/21-294-Conf](#) and [No. ICC-01/14-01/21-294-Red](#), 5 May 2022 (the “Application”).

³ See the “Decision on the confirmation of charges against Mahamat Said Abdel Kani” (Pre-Trial Chamber II), [No. ICC-01/14-01/21-218-Conf](#) and [No. ICC-01/14-01/21-218-Red](#), 9 December 2021 (the “Confirmation Decision”).

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, the present filing is classified as confidential *ex parte*, only available to the Legal Representative and Trial Chamber VI, since it refers to information not known to the Prosecution or the Defence. A public redacted version thereof will be filed forthwith.

III. PROCEDURAL BACKGROUND

5. On 9 December 2021, the Pre-Trial Chamber II confirmed part of the charges against Mr Saïd relating to crimes allegedly committed at the *Office Central de Répression du Banditisme* (the “OCRB”) between 12 April and 30 August 2013.⁴

6. On 18 March 2022, the Office of the Prosecutor (the “Prosecution”) filed the “Prosecution’s Notification Related to Incident (r) of Paragraph 33 of the Document Containing the Charges” (the “Notification”).⁵

7. On 20 April 2022, Trial Chamber VI (the “Trial Chamber”) clarified that Incident (r) did not form part of the facts and circumstances described in the charges for the purposes of article 74(2) of the Statute and found that is it not permissible for the Prosecution to introduce evidence at trial for the purpose of establishing Incident (r), absent an amendment to the charges (the “Notification Decision”).⁶

8. On 5 May 2022, the Prosecution filed the Application.⁷

⁴ *Ibid.*

⁵ See the “Prosecution’s Notification Related to Incident (r) of Paragraph 33 of the Document Containing the Charges”, [No. ICC-01/14-01/21-262-Conf](#) and [No. ICC-01/14-01/21-262-Red](#), 18 March 2022 (the “Notification”).

⁶ See the “Decision on Prosecution Notification regarding the Charges (ICC-01/14-01/21- 262-Red)”, [No. ICC-01/14-01/21-282](#), 20 April 2022 (the “Notification Decision”).

⁷ See the Application, *supra* note 2.

IV. SUBMISSIONS

A. An amendment of the charges is not required

9. In its Confirmation Decision, the Pre-Trial Chamber confirmed 18 out of 20 incidents which the Prosecution presented as part of the charges for crimes alleged at the OCRB between 12 April and 30 August 2013, and indicated that the list of 20 specific incidents “*is meant to provide examples of conduct underlying the charges*”.⁸ In the operative part of the Confirmation Decision, it held that “*Mr SAID 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 persons occurred, including the following:*”, followed by a list of the 18 incidents at the OCRB.⁹

10. The Legal Representative concurs with the Prosecution that the Pre-Trial Chamber’s characterisation deliberately allows for the possibility of adding additional incidents to the charges in so far as these incidents fall within the temporal scope of the confirmed charges.¹⁰ As such, incidents are to be seen as evidence of the occurrence of crimes during the charged period, and not as a limitation of the scope of the charged crimes.

11. In this regard, the Legal Representative recalls the Court’s jurisprudence, as set out by the Prosecution¹¹ and by the Trial Chamber,¹² according to which charges can be described with respect to confined temporal and geographical parameters and list individual criminal acts and victims in a non-exhaustive manner.¹³

⁸ See the Confirmation Decision, *supra* note 3, para. 80, p. 29.

⁹ *Idem*, para. 29, pp. 54 *et seq.*

¹⁰ See the Application, *supra* note 2, para. 4.

¹¹ *Idem*, para. 6. See also the Notification, *supra* note 5, para. 6.

¹² See the Notification Decision, *supra* note 6, para. 14.

¹³ See the “Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’” (Appeals Chamber), [No. ICC-01/04-02/06-2666-Red A A2](#), 30 March 2021, paras. 326-327. See also the “Decision on the ‘Prosecution’s application to amend the charges’” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-626](#), 14 March 2022, paras. 18, and 20-24.

12. Despite acknowledging the Court's jurisprudence, the Trial Chamber rejected *"the Prosecution submission that it is permissible for 'the charges to be described with respect to confined temporal and geographical parameters' and for individual criminal acts and victims to be listed in a non-exhaustive manner in the present case"*¹⁴ and considered *"that the scope of the charged crimes in this case is limited to the specific criminal acts listed by the Pre-Trial Chamber in paragraph 29 of the Confirmation Decision"*.¹⁵

13. The Trial Chamber based its rejection on the scale of criminality and the mode of individual criminal responsibility alleged, and held that *"a high degree of proximity is alleged between the acts and conduct of the Accused and the crimes committed [which] distinguish the present case from the cases of The Prosecutor v. Bosco Ntaganda and The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb') cited by the Prosecution"*.¹⁶

14. The Legal Representative first wishes to recall that the Court exercises its jurisdiction over the most serious crimes of concern to the international community as a whole, regardless of the alleged scale of criminality and the mode of individual criminal responsibility of the Accused. Accordingly, attempting to establish a hierarchy between cases ignores the extent of victimisation and suffering endured by the victims in the present case.

15. Second, the Legal Representative submits that the Trial Chamber, in adopting such a restrictive approach as to the scope of the charges, would *de facto* limit the participation at trial to Prosecution witnesses and their relatives, thereby excluding all other natural persons who qualify as victims under rule 85 of the Rules of Procedure and Evidence (the "Rules") as a result of the crimes allegedly committed by Mr Saïd.

16. Indeed, by limiting the scope of the charges to specific incidents confirmed by the Pre-Trial Chamber in its Confirmation Decision, or confirmed following an

¹⁴ See the Notification Decision, *supra* note 6, para. 17.

¹⁵ *Ibid.*

¹⁶ *Idem*, para. 16.

'amendment' thereof as the Prosecution now seeks in its Application, all other victims who have been detained at the OCRB between 12 April 2013 and 30 August 2013 while Mr Saïd was *de facto* head of the OCRB, but whose victimisation does not result from specific incidents, might somehow no longer be considered by the Trial Chamber and might not be able to participate, nor receive any reparations should the Accused be convicted. This interpretation runs contrary to the spirit of the Statute¹⁷ and the prevailing reading by Chambers of the provisions related to victims' participation.¹⁸

17. The Trial Chamber's restrictive interpretation of the scope of the charges is detrimental not only to the participation of victims in the present case, but also, as a potential precedent, to the participation of victims in other comparable cases with a rather limited temporal and geographical scope and in which there is a high degree of proximity alleged between the acts and conduct of an accused person and the crimes committed.

18. The Legal Representative recalls that the International Criminal Court is a 'victim-centered' Court. Victims have often similar but distinct interests from the Prosecution, hence the importance of their participation in the proceedings as autonomous actors. Their independent role stems from the internationally recognised rights to truth, justice and reparations, which translate into a set of procedural prerogatives in criminal proceedings. Sadly however, their unique role is not met with a right for victims to initiate an appeal in their own right against the Notification Decision.

¹⁷ See *infra*, paras. 18-19.

¹⁸ See, *inter alia*, the "Fifteenth Decision on Victims' Participation in Trial Proceedings (Group A)" (Trial Chamber V), [No. ICC-01/14-01/18-1391](#), 5 May 2022, para. 1, referring to the "Decision Establishing the Principles Applicable to Victims' Applications for Participation" (Pre-Trial Chamber II), [No. ICC-01/14-01/18-141](#), 5 March 2019, paras. 29-41; the "Decision on victims' participation at the confirmation of charges hearing and in the related proceedings" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-211](#), 15 January 2014, para. 25; and the "Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public Redacted Version)" (Pre-Trial Chamber I), [No. ICC-01/04-101-tEN-Corr](#), 17 January 2006, para. 79.

19. In light of victims' distinct and independent role, it is of crucial importance that the Court allows for all victims of crimes under its jurisdiction to step forward in order to participate to proceedings and to receive reparations; rather than limiting those rights to Prosecution witnesses. This is all the more important considering that there are numerous factors, such as a volatile security situation or ostracisation by family members or their community, which can have a deterrent effect on victims' willingness to manifest themselves in the present case. In this regard, the Legal Representative commends the Court's efforts to encourage all victims of the crimes allegedly committed by Mr Saïd to come forward and fill out participation forms,¹⁹ which now risk being in vain due to the Trial Chamber's restrictive approach.

20. Rather than seeking leave to appeal the Notification Decision, which would have been in the interest of victims in the present case and in comparable cases before this Court, the Prosecution now *"seeks to amend the charges. It is not seeking to add additional charges or to substitute more serious charges. The application only identifies further victim incidents in relation to the same crimes, committed in the OCRB detention centre within the confined temporal scope of the charges (that is, between 12 April 2013 and 30 August 2013) and while Mr SAID was de facto head of the OCRB"*.²⁰

21. Regarding Incident (r), the Prosecution submits that it possibly made a clerical mistake in referring to *"early September"* in the Document Containing the Charges (the "DCC"), and that the evidence shows that both witnesses P-1432 and P-1762 were in fact detained at the OCRB during the time relevant to the charges while Mr Saïd was the *de facto* head of the OCRB.²¹ [REDACTED].²² Since the non-inclusion of Incident (r), in the list of incidents in the Confirmation Decision,²³ is simply due to an error regarding the dates, the Legal Representative submits that a mere correction of said list would suffice.

¹⁹ See NDJONI SANGO, [RCA : la CPI appelle à la participation des victimes dans l'affaire Saïd](#), 2 April 2022.

²⁰ See the Application, *supra* note 2, para. 10 (emphasis original).

²¹ *Idem*, paras. 11 and 13.

²² [REDACTED]. [REDACTED].

²³ See the Confirmation Decision, *supra* note 3, para. 29, pp. 54 *et seq.*

22. [REDACTED]²⁴ [REDACTED].²⁵ As such, the Legal Representative submits that Incident P-3047 falls within the temporal and geographical parameters of the present case and that it should thus be considered part of the charges, without a need to amend them.

23. Although the Legal Representative posits there is no need to amend the charges for either incident to be included in the non-exhaustive list of incidents in the Confirmation Decision²⁶, she now turns to the merits of the Application in light of the requirements of article 61(9) of the Statute, if by extraordinary the Pre-Trial Chamber would be minded to entertain the merits thereof.

B. In the alternative, the Application complies with the requirements of article 61(9) of the Statute

1. The Application is properly supported and justified

24. According to the Pre-Trial Chambers in the *Kenyatta* and *Ruto and Sang* cases, article 61(9) of the Statute allows the Prosecution to request permission to amend the charges up until the commencement of the trial, provided that an application to this effect is properly supported and justified.²⁷

25. After the confirmation of the charges, *“the Chamber’s permission is a conditio sine qua non for any amendment of the charges [...], as dictated by the Statute. This statutory requirement suggests that the Prosecutor should not benefit from an unfettered right to resort to article 61(9) of the Statute at [his] ease, particularly, if such permission will negatively affect*

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ the Confirmation Decision, *supra* note 3, para. 29, pp. 54 *et seq.*

²⁷ See the “Corrigendum to ‘Decision on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” (Pre-Trial Chamber II), [No. ICC-01/09-02/11-700-Corr](#), 21 March 2013, para. 21. See also the “Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” (Pre-Trial Chamber II), [No. ICC-01/09-01/11-859](#), 16 August 2013, para. 31; and the “*Décision sur la procédure applicable suite au dépôt par le Procureur de sa requête pour corrections et modifications de la Décision de confirmation des charges*” (Pre-Trial Chamber I), [No. ICC-01/12-01/18-608-Red](#), 21 February 2020, para. 53.

*other competing interests, such as the fairness and expeditiousness of the proceedings, which would result in causing prejudice to the rights of the accused”.*²⁸

26. In this regard, the practice of the Court has clarified that article 61(9) of the Statute provides for the possibility to ask the Pre-Trial Chamber to amend the charges already confirmed in relation to their factual scope, in order to delimit the charges as precisely as possible.²⁹

27. Concerning Incident P-3047, the practice of the Court requires the Prosecution to provide reasons why evidence could not be collected prior to the confirmation of charges hearing.³⁰ In particular, the Prosecution must show that the amendment is “*necessary in order to establish the truth*” or that “*certain circumstances*” exist that justify doing so.³¹

28. In that regard, the Prosecution submits that there are substantial grounds to believe that P-3047 was unlawfully detained at the OCRB during the temporal scope of the charges, and that P-3047’s statement could not be disclosed in time for the last deadline and could thus not be added to the Prosecution’s list of evidence before the deadline of 16 August 2021.³²

29. With regard to Incident (r), the Prosecution submits that it possibly made a clerical mistake which referred to “*early September*” in the DCC, and that the evidence shows that both witnesses P-1432 and P-1762 were detained at the OCRB during the time relevant to the charges while Mr Saïd was the *de facto* head of the OCRB.³³

²⁸ See the “Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, *supra* note 27, para. 31.

²⁹ See the “*Décision sur la procédure applicable suite au dépôt par le Procureur de sa requête pour corrections et modifications de la Décision de confirmation des charges*”, *supra* note 27, para. 44.

³⁰ *Idem*, para. 53.

³¹ See the “Corrigendum to ‘Decision on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”, *supra* note 27, para. 36.

³² See the Application, *supra* note 2, paras. 28 and 30.

³³ *Idem*, paras. 11 and 13.

30. [REDACTED]³⁴ [REDACTED]³⁵ [REDACTED].³⁶ She further notes that the facts and circumstances concerning Incident (r) were originally charged and that the Prosecution is merely correcting its clerical mistake in the DCC. As to Incident P-3047, the Legal Representative considers that the Prosecution has presented proper and sufficient justification, as well as a clear explanation, as to why the evidence could not have been collected early enough for it to be submitted prior to the confirmation of charges hearing. Therefore, she posits that the Application is properly supported and justified.

2. *The Application is timely*

31. In accordance with article 61(9) of the Statute, a request to amend the charges must be brought “*before the trial has begun*”. In the *Ruto and Sang* case, the Appeals Chamber has clarified that the wording of article 61(9) of the Statute prescribes that an amendment of charges is no longer possible after the trial has begun, and that said requirement corresponds to the time of the opening statements.³⁷

32. The Appeals Chamber further held that not only must the request to amend the charges be filed before the commencement of the trial, but also that the entire process of amending the charges must be completed by that time, to ensure clarity in the parameters of the case.³⁸

33. In the present instance, the start date of the trial is set on 26 September 2022. Consequently, the request for the amendment of charges was brought well “*before the trial has begun*”. Moreover, the Prosecution submitted the Application shortly after the Notification Decision which found that it is not permissible for the Prosecution to introduce evidence at trial for the purpose of establishing Incident (r), absent an

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ See the “Decision on the Prosecutor’s appeal against the ‘Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’” (Appeals Chamber), [No. ICC-01/09-01/11-1123 OA6](#), 13 December 2013, para. 27.

³⁸ *Idem*, paras. 29 and 31.

amendment to the charges. Regarding P-3047, the Prosecution provided a clear explanation as to why the evidence could not have been collected early enough for it to be submitted prior to the confirmation of charges hearing.³⁹

34. The Legal Representative thus concurs with the Prosecution that it filed the Application in a timely manner and with due diligence, and that the Application should therefore be granted.

3. The amendment will not adversely impact the effectiveness and fairness of the proceedings

35. The Legal Representative concurs with the Prosecution that the requested amendment will not be prejudicial to the Defence as the latter has had access to the underlying evidence since before the disclosure deadlines leading up to the confirmation of charges hearing, in relation to Incident (r),⁴⁰ and since 13 September 2021 concerning Incident P-3047.⁴¹

36. The Legal Representative also notes that the requested amendment does not add additional charges, substitute more serious charges, change the Prosecution's theory of its case or require any material shift in the Defence's preparation or strategy.⁴² Therefore, in accordance with article 61(9) of the Statute and pursuant to rule 128(3) of the Rules, no additional hearing is necessary in order to decide on the Application.

37. Considering the reasons *supra*, authorising the amendment of the charges against Mr Saïd will not unduly compromise his right to be promptly informed of the nature, cause and content of the charges, to have adequate time and facilities for the preparation of his defence and to be tried without undue delay, as provided in article 67(l)(a) to (c) of the Statute.

³⁹ See the Application, *supra* note 2, paras. 34-36.

⁴⁰ *Idem*, para. 22.

⁴¹ *Idem*, para. 31.

⁴² *Idem*, paras. 26 and 31.

38. The Legal Representative further contends that the amendment requested by the Prosecution at this stage of the proceedings is in the interests of clarity and judicial economy. It is indeed in the interests of clarity, efficiency and expediency that the charges are factually accurate and that they are made available to the Defence and the Trial Chamber before the trial starts.

FOR THESE REASONS,

the Legal Representative respectfully submits that all incidents which fall within the temporal and geographical parameters of the present case, such as Incident (r) and Incident P-3047, should be considered part of the charges and that there is thus no need to amend the charges.

In the alternative, if by extraordinary the Pre-Trial Chamber would be minded to entertain the merits of the Application, the Legal Representative respectfully requests the Chamber to grant said Application with respect to both incidents.



Sarah Pellet

Dated this 16th day of May 2022

At The Hague, The Netherlands