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**International
Criminal
Court**

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Date: 22 July 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 '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)"
No. ICC-01/14-01/21-426-Conf, dated 22 July 2022**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. Counsel representing the collective interests of future applicants as well as of applicants in the proceedings and participating victims (the “Legal Representative”),¹ hereby submits her 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)” (the “Defence Request”).²

2. The Legal Representative submits that the Defence Request fails to meet the criteria under article 82(1)(d) of the Rome Statute and, accordingly, must be dismissed.

II. PROCEDURAL BACKGROUND

3. On 9 December 2021, the Pre-Trial Chamber II (the “Chamber”) 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 (the “Confirmation Decision”).³

4. 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”.⁴

5. 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

¹ See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG CT](#) and [No. ICC-01/14-01/21-T-007-Red-ENT CT WT](#), p. 47, lines 12-24; the “Decision on matters relating to the participation of victims during the trial”, [No. ICC-01/14-01/21-278](#), 13 April 2022, para. 29; and the “Decision authorising 20 victims to participate in the proceedings”, [No. ICC-01/14-01/21-331](#), 27 May 2022.

² See 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)”, [No. ICC-01/14-01/21-416](#), 18 July 2022 (the “Defence Request”).

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”).

⁴ 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.

for the purposes of article 74(2) of the Statute and found that 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 (the “Notification Decision”).⁵

6. On 5 May 2022, the Prosecution filed the “Prosecution’s application to amend the charges” (the “Application”).⁶

7. On 16 May 2022, the Legal Representative responded to the Application (the “Victims’ Response”).⁷

8. On 3 June 2022, having received a French translation of the Application,⁸ the Defence filed its response thereto (the “Response to the Application”).⁹

9. On 8 July 2022, the Chamber issued its decision rejecting the Application,¹⁰ concluding that “ [...] *the charges as confirmed allow for the exercise by Trial Chamber VI of its powers and functions relevant to the assessment of the evidence relating to the additional material facts and circumstances relevant to the confirmed crimes indicated in the Application, which, as anticipated by the Prosecution, will in any event be presented at trial*” (the “Impugned Decision”).¹¹

⁵ 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).

⁶ 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.

⁷ See the “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”, [No. ICC-01/14-01/21-310-Red](#), 16 May 2022.

⁸ See the email from Pre-Trial Chamber II to parties and participants entitled “ICC-01/14-01/21- Order concerning Counsel for Mr Said and the Legal Representative of Victims’ requests in relation to the ‘Prosecution’s application to amend the charges’ (ICC-01/14-01/21-294-Conf)”, dated 13 May 2022 at 12:51.

⁹ See the “Réponse de la Défense à la ‘Prosecution’s application to amend the charges’ (ICC-01/14-01/21-294-Conf)”, [No. ICC-01/14-01/21-346-Conf](#) and [No. ICC-01/14-01/21-346-Red](#), 3 June 2022 (the “Response to the Application”).

¹⁰ See the “Decision on the ‘Prosecution’s application to amend the charges’” (Pre-Trial Chamber II), [No. ICC-01/14-01/21-396](#), 8 July 2022 (the “Impugned Decision”).

¹¹ *Ibid.*, para. 27.

10. On 18 July 2022, the Defence filed a request for leave to appeal said decision in relation to the following 5 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”);¹²
- 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”);¹³
- 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”);¹⁴
- 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”);¹⁵ and
- v) *“la Chambre avait-elle le pouvoir juridique d’interpréter [sic] sa propre décision au détriment de l’Accusé en violation du principe fondamental de ‘in dubio pro reo’”* (the “Fifth Issue”).¹⁶

III. CLASSIFICATION

11. Pursuant to regulation 23bis(1) and (2) of the Regulations of the Court, the present response is classified as confidential because contains sensitive information which is not available to the public. A public redacted version will be filed in due course.

IV. RESPONSE TO THE REQUEST

A. The criteria contained in article 82(1)(d) of the Rome Statute

12. The Legal Representative notes that Article 82(1)(d) of the Rome Statute limits the possibility to request leave to appeal to “[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the

¹² See the Defence Request, *supra* note 2, paras. 32-39.

¹³ *Ibid.*, paras. 40-49.

¹⁴ *Ibid.*, paras. 50-57.

¹⁵ *Ibid.*, paras. 58-62.

¹⁶ *Ibid.*, paras. 63-68.

trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

13. The jurisprudence of the Court established the complementary character of the two components set out in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.¹⁷

14. In this regard, the Appeals Chamber determined that “[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.¹⁸ The Appeals Chamber also stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹⁹ and defined the term ‘issue’ as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.²⁰ Accordingly, the Legal Representative underlines that the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient reason to be granted leave to appeal.²¹

15. The Appeals Chamber also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.²²

¹⁷ See, *inter alia*, the “Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, paras. 8 and 14; and the “Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-20](#), 19 August 2005, para. 21.

¹⁸ See the “Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, *ibid.*, para. 8.

¹⁹ *Idem*, para. 9.

²⁰ *Ibid.*

²¹ See the “Decision on Prosecution's Application for Leave to Appeal the ‘Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), [No. ICC-01/09-01/11-817](#), 18 July 2013, para. 12; and the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6.

²² See the “Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 17, para. 10.

16. Consequently, it must first be determined whether the purported “issue” identified in the Defence Request is an “appealable issue” within the meaning of article 82(1)(d) of the Statute, as interpreted by the jurisprudence of the Court. Indeed, *“while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”*.²³

17. Moreover, pursuant to the constant jurisprudence of the Court, *“the mere fact that an issue is of general interest [...] or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal”*,²⁴ and *“[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”*.²⁵

18. Furthermore, a Chamber presented with an application for leave to appeal must not examine or consider *“arguments on the merits or the substance of the appeal”*, since these arguments may be more appropriately considered by the Appeals Chamber when and if leave to appeal is granted.²⁶

19. According to the established jurisprudence, in analysing whether an appealable issue would ‘significantly affect’ the fair and expeditious conduct of the proceedings

²³ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 30 November 2012 (dated 29 November 2012), para. 70.

²⁴ See the “Decision on Ruto Defence’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Add New Witnesses to its List of Witnesses’” (Trial Chamber V(a)), [No. ICC-01/09-01/11-983](#), 24 September 2013, para. 20; and the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’” (Trial Chamber II), [No. ICC-01/04-01/07-2375-tENG](#), 8 September 2010, para. 4. See also the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58”, *supra* note 17, para. 21.

²⁵ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-464](#), 31 July 2013, para. 7; and the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, *ibid.*, para. 4.

²⁶ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58”, *supra* note 17, para. 22.

under article 82(1)(d) of the Rome Statute, the notion of ‘fairness’ must be understood as referring to situations *“when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”*.²⁷ In turn, ‘expeditiousness’ must be read as *“closely linked to the concept of proceedings ‘within a reasonable time’, [...] namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”*.²⁸

20. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.²⁹

B. Application of the criteria contained in article 82(1)(d) of the Rome Statute to the Defence Request

1. The purported ‘issues’ do not arise from the Impugned Decision

21. The Legal Representative submits that the Defence fails to identify an ‘issue’ that arises from the Impugned Decision, as required by article 82(1)(d) of the Rome Statute. Many of the arguments contained in the Defence Request were already litigated and presented to the Chamber by the Defence in its Response to the Application,³⁰ and were subsequently dismissed in the Impugned Decision.³¹

22. In this respect, rather than focusing on the fulfilment of the criteria for a request for leave to appeal a decision, the Defence develops its arguments on the merits of the

²⁷ See, *inter alia*, the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

²⁸ *Idem*, paras. 17 and 18.

²⁹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 17, para. 13.

³⁰ See the Response to the Application, *supra* note 9.

³¹ See the Impugned Decision, *supra* note 10.

Issues. Thereby the Defence contradicts itself when stating that the Chamber's decision on the present Request shall not "*se prononcer sur le fond des questions soulevées par une Partie [...]. Les Juges doivent uniquement déterminer si la Partie a bien identifié une question qui pourrait être susceptible d'appel*".³² The Request ought to be equally guided by this assertion. As a result, the Request intends to circumvent the purpose of such a filing by attempting to relitigate arguments previously presented to and/or rejected by the Chamber whilst deviating from the realms of article 82(1)(d) of the Statute.³³

23. In fact, it is apparent from the wording of the Request that the Defence merely disagrees with the Chamber's decision. Together with the submissions of the Prosecution and the Legal Representative of victims, the Defence's observations were duly taken into account by the Chamber in reaching its decision. In conformity with its duty, the Chamber balanced all the arguments and interests at stake in its ruling. Consequently, the contentions raised by the Defence simply reflect mere disagreements with the conclusions of the Chamber and therefore do not meet the requisite threshold for leave to appeal to be granted.

24. Moreover, the Defence is only trying to litigate issues it did not deem necessary to argue upon in its Response to the Application. Indeed, regarding the first 4 issues raised, the Defence could have responded to the related arguments had it addressed the Victims' Response. Indeed the Defence benefited from over 4 weeks to file "*a consolidated response to the Application and the LRV response thereto*".³⁴ Instead, it merely duplicated an argument about a purported *ex parte* procedure which would *de facto* elevate the Office of Public Counsel for Victims to the status of a second Prosecutor,³⁵ arguing blankly for the rest that the Victims' Response "*sort[ait] du cadre procedural the*

³² See the Defence Request, *supra* note 2, para. 24.

³³ See *supra* para. 18. See also the "Decision on Defence request for leave to appeal the 'Decision on the Defence request to terminate the proceedings and related requests'" (Trial Chamber X), [No. ICC-01/12-01/18-1099-Red](#), 29 October 2020, para. 10.

³⁴ See the email from Pre-Trial Chamber II to parties and participants entitled "ICC-01/14-01/21- Order concerning Counsel for Mr Said and the Legal Representative of Victims' requests in relation to the 'Prosecution's application to amend the charges' (ICC-01/14-01/21-294-Conf)", *supra* note 8.

³⁵ See Response to the Application, *supra* note 9, paras. 62 and 81.

present débat et [était], en grande partie, hors sujet et par conséquent ne [pouvait] être prise en compte dans la présente discussion”.³⁶ Paradoxically, it now addresses similar matters in an attempt to undermine the Impugned Decision.

25. **Regarding the First and the Second issues**, the Defence argues that the Chamber erred in adding facts to the confirmed charges, constituting a *de facto* amendment of the charges, given that it explicitly excluded the facts underlining the purported “new charge” in the Confirmation Decision.³⁷ The developments contained in the Defence Request mirror the ones made in its Response to the Application,³⁸ and in any event pertain to the substance and merits of an eventual appeal and therefore shall neither be discussed in detail in the present proceedings, nor be assessed for the purpose of the Chamber’s determination of the Defence Request.

26. The Impugned Decision appropriately ruled upon the issues at stake, providing reasoning with regard to: (i) the purpose and scope of the pre-trial proceedings and the Confirmation Decision;³⁹ (ii) the factual allegations underlying the charged crimes and their consideration as *not exhaustive but merely illustrative* of criminal acts⁴⁰ – addressing the incidents listed at paragraphs 33 and 64 of the Document Containing the Charges (the “DCC”);⁴¹ (iii) the Chamber’s assessment based on information available *at the relevant time*;⁴² (iv) the specific references to the language used in the operative part of the Confirmation Decision to introduce such examples, *i.e.* “including”;⁴³ and (v) the required level of specificity of the charges.⁴⁴ It is evident that the Impugned Decision served to *clarify* some aspects of the Confirmation Decision, without providing further findings or ruling on issues already ruled upon. It does not constitute a *de novo* assessment of the related charges. In this regard, the Defence in

³⁶ *Ibid.*, para. 35.

³⁷ See the Defence Request, *supra* note 2, paras. 32-39 and paras. 40-49 respectively.

³⁸ See the Response to the Application, *supra* note 9, paras. 22-62.

³⁹ See the Impugned Decision, *supra* note 10, paras. 12-14 and 18.

⁴⁰ *Ibid.*, paras. 12, 16 and 20-24.

⁴¹ *Ibid.*, paras. 17-19.

⁴² *Ibid.*, paras. 16, 18, 20, 22 and 26.

⁴³ *Ibid.*, para. 20.

⁴⁴ *Ibid.*, para. 21.

fact takes issue with the charges as confirmed and attempts to relitigate them at this stage of the proceedings.

27. The mere disagreement is apparent from the Defence's numerous misplaced references:

- first, to the Chamber adoption of "*une vision restrictive de ce que seraient les 'charges'*"⁴⁵ – applying its own interpretation of what constitutes the "charges", contrary to settled jurisprudence which states that it is not necessary for a charging document to exhaustively list all criminal acts underlying each charge;⁴⁶
- second, by referring to only extract of the Chamber's reasoning concerning the individual instances set out in paragraph 33 of the DCC being "*confirmed*" or "*not confirmed*"⁴⁷ – deliberately omitting the subsequent explanation regarding the applicable standard for the purpose of confirmation proceedings;⁴⁸
- third, by relying on its own understanding on the scope of the "facts" pursuant to Regulation 52 of the Regulations of the Court⁴⁹ – once again disregarding established jurisprudence on the extent of such legal requirements;⁵⁰
- fourth, by referring to a decision in the *Yekatom and Ngaïssona* case,⁵¹ extracting the wording of paragraph 18 of said decision without considering the subsequent reasoning according to which the attempted amendment of the charges encompassed factual allegations which contained distinct material facts

⁴⁵ See the Defence Request, *supra* note 2, para. 32.

⁴⁶ See the "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](#), 30 March 2021, paras. 5 and 325-327 and references therein.

⁴⁷ See the Defence Request, *supra* note 2, para. 32.

⁴⁸ See the Impugned Decision, *supra* note 10, para. 18.

⁴⁹ See the Defence Request, *supra* note 2, para. 33.

⁵⁰ See for instance the "Judgment" (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019, paras. 37-42.

⁵¹ See the Defence Request, *supra* note 2, paras. 34-35.

– differing entirely as regards specific time, place and alleged perpetrator(s);⁵²
and

- finally, the Defence infers that the Impugned Decision provides an unlimited power for the Prosecution to add facts at its own will and without judicial control.⁵³

28. [REDACTED]⁵⁴ [REDACTED].⁵⁵ Indeed, [REDACTED]. [REDACTED]. Besides, the jurisprudential references in the Defence Request regarding Issue 2 are likewise misplaced.⁵⁶

29. As a result, it is not for the Defence to challenge the Chamber's discretion in performing its duty (First Issue), nor to doubt its legal authority of ruling on matters legally assigned to it (Second Issue).

30. The Legal Representative further stresses that the very purpose of the trial stage differs from the pre-trial stage, as only at trial the charges face an in-depth analysis, allowing the relevant trial chamber to determine if the conviction threshold is met. It is thus within the functions and powers of the Trial Chamber to assess the evidence vis-à-vis de confirmed charges. This includes the analysis of evidence in support of factual allegations – in so far as the related incidents fall within the temporal scope of the confirmed charges.⁵⁷ Provided notice is given to the Defence on the content and scope of the charges before commencement of trial,⁵⁸ the inclusion of factual

⁵² See the "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'", [No. ICC-01/14-01/18-517](#), 14 May 2020, paras. 19-20 (the "*Yekatom and Ngaïssona* Decision").

⁵³ See the Defence Request, *supra* note 2, para. 38.

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ See the Defence Request, *supra* note 2, paras. 44-48.

⁵⁷ See the Impugned Decision, *supra* note 10, para. 24.

⁵⁸ *Ibid.*, para. 25. See also the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), [No. ICC-01/05-01/08-3636-Red](#), 8 June 2018, para. 186.

allegations are legally valid within the limits mentioned *supra*. This formed the basis of the Confirmation Decision, which the Impugned Decision simply highlighted.

31. The Legal Representative posits that the simple fact that the Chamber did not agree with the Defence's original argument and that the Defence finds itself unsatisfied with the result does not mean that the Chamber committed an error.⁵⁹ Such disagreement fails to constitute an appealable issue.

32. The Legal Representative recalls the Dissenting Opinion of Judge Eboe-Osui regarding mere disagreements:

"In considering what would amount to sufficient reason to grant leave, it needs to be kept in mind that in almost every decision that a Chamber makes, it is generally possible for the losing party to disagree with the Chamber. The earliest formal opportunity for the party to register that disagreement is presented by the procedure of request for leave to appeal the decision. In making that request, it all but tasks the imagination of counsel very minimally to hitch the disagreement with the Chamber's decision onto the argument that to wait for the opportunity of final appeal on the merits to litigate the disagreement entails the possibility of a risk that the Appeals Chamber may overrule the Trial Chamber on the relevant point of the decision and possibly nullify every step traceable to the point; thus resulting in ultimate delay, if the steps in question may be required to be repeated. But, this is an argument that is always present in every decision except the very plainest that any Chamber may make. It can thus not be a desirable basis to grant leave to launch an interlocutory appeal. It would render pointless the constraining requirements laid down in article 82(1)(d) of the Statute, for grant of leave for interlocutory appeals".⁶⁰

33. **Regarding the Third and the Fourth issues**, the Defence argues that the Chamber erred in deciding to purportedly add "new charges" without first verifying whether the Prosecution filed the Application in a timely manner and with due

⁵⁹ See the "Decision on the Defence Request for Leave to Appeal" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-207](#), 3 January 2014, para. 33.

⁶⁰ See the "Dissenting Opinion of Judge Eboe-Osui" annexed to the "Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'" (Trial Chamber V(a)), [No. ICC-01/09-01/11-817-Anx.](#), 18 July 2013, para. 2; and the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6.

diligence,⁶¹ and without verifying the degree of proximity between the purported “new charges” and the Accused.⁶² The developments contained in the Defence Request once more mirror developments made in its Response to the Application.⁶³

34. Corroborating the Victims’ Response, the Chamber ruled that it did not need to go through this line of argument since it determined that, contrary to the title of the Application, it was not dealing with a request to amend the charges but merely with *“evidence relating to the additional material facts and circumstances relevant to the confirmed crimes indicated in the Application, which, as anticipated by the Prosecution, will in any event be presented at trial”*.⁶⁴ 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.

35. The Defence initially quotes the same *Yekatom and Ngaïssona* decision mentioned *supra*.⁶⁵ Conveniently, it singles out a specific phrase set out at paragraph 31 of said decision – *“‘remedy’ evidentiary lacunae”* – whilst abstaining once more to place it in its context, which substantially differentiates said analysis to the present one. For instance, in the same paragraph 31, the Chamber mentioned the impact of requests for amendment intended to remedy evidentiary *lacunae* with regards to *rejected charges*.⁶⁶ Moreover, in said decision the Chamber developed its reasoning based on the premise that *“[a]llowing the Prosecutor to reintroduce non-confirmed charges for which evidence was lacking pursuant to a supplemental investigation would be tantamount to depriving this second, critical aspect of the filtering function of the Pre-Trial Chamber of any meaningful content, especially if coupled with the less demanding procedure applicable when ‘only’ an amendment is at stake”*.⁶⁷ This is not the case *sub judice*: the Chamber did not

⁶¹ See the Defence Request, *supra* note 2, paras. 50-57.

⁶² *Ibid.*, paras. 58-62.

⁶³ See the *“Réponse de la Défense à la ‘Prosecution’s application to amend the charges’* (ICC-01/14-01/21-294-Conf)’ (ICC-01/14-01/21-346-Conf)”, *supra* note 9, paras. 63-68.

⁶⁴ See the Impugned Decision, *supra* note 10, para. 27.

⁶⁵ See *supra* para. 11. See also the Defence Request, *supra* note 2, paras. 50-51.

⁶⁶ See the *Yekatom and Ngaïssona* Decision, *supra* note 52, para. 31.

⁶⁷ *Ibid.*, para. 23.

reject the related charges nor ruled upon an amendment request as such. The relevant incidents concern confirmed charges and comply with their corresponding material scope. Here again, the Defence disputes the confirmed charges.

36. Furthermore, the Defence misconstrues the Chamber's views on the Application assessment of Incident (r), emphasising the purported Prosecution's missed opportunity to appeal the Confirmation Decision.⁶⁸ The Prosecution only proceeded with the Application in response to the Notification Decision. The mere reason why the Chamber referred to the Application as a somewhat request for reconsideration was because it found that there was no need to reassess the incident, as *"it would ultimately be for the trial chamber to consider whether an act falls within the scope of a crime as charged and confirmed"*.⁶⁹ This, given that the Chamber understood the Application not as an amendment request *per se*. The Defence's repetitive submission regarding incident P-3047 is also misconstrued,⁷⁰ as it distorts the concepts of incidents and charges for the purpose of the confirmation decision.

37. Similarly, the Defence's developments upon the Chamber's assessment of the proximity between the facts and Mr Saïd is without merit.⁷¹ Its reference to the *Ntaganda* jurisprudence is unwarranted for the reasons already developed by the Chamber.⁷² The Chamber properly tackled this issue – based on its finding in the Confirmation Decision and on further considerations⁷³ – to conclude that it *"does 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 in this case must be limited to the specific criminal acts listed in paragraph 29 of the operative part of the Confirmation Decision"*.⁷⁴ Such a restrictive view on the interpretation of the

⁶⁸ See the Defence Request, *supra* note 2, para. 55.

⁶⁹ See the Impugned Decision, *supra* note 10, para. 26.

⁷⁰ See the Defence Request, *supra* note 2, para. 56.

⁷¹ *Ibid.*, paras. 58-62.

⁷² See the Impugned Decision, *supra* note 10, para. 14.

⁷³ See for instance *ibid.*, para. 15.

⁷⁴ *Ibid.*, para. 23.

Court's jurisprudence by the Defence – not by the Chamber⁷⁵ – demonstrates that the present Request lacks any basis and the purported 'issues' are instead merely disagreements with the Confirmation Decision.

38. The Legal Representative posits again that the simple fact that the Chamber did not agree with the Defence's original argument and that the Defence finds itself unsatisfied with the result does not mean that the Chamber committed an error.⁷⁶

39. **Regarding the Fifth Issue**, the Defence argues that the Chamber erred in interpreting its own decision on the confirmation of the charges, in violation of the "*in dubio pro reo*" principle.⁷⁷

40. This issue is mainly based on the Defence's refusal to accept that the Impugned decision does not constitute an amendment of the charges. As such there is no ambiguity as to the charges confirmed and the Defence does not identify any doubt that may be amenable to the application of this principle. Therefore, "*the principle in dubio pro reo [...] encapsulated in article 22 (2) of the Statute as a general principle of criminal law to be employed, where ambiguity arises, in the interpretation of the definition of a crime*"⁷⁸ does not apply to the circumstances at hand.

41. The Defence misapprehends the Chamber's reasoning with regard to its developments at paragraph 24 of the Impugned Decision on the scope of the Confirmation Decision.⁷⁹ The Chamber's purported ambiguity alluded by the Defence was nothing but a preventive and reassuring note of the threshold of incidents covered by the charges. The Chamber went further to also reassure the Accused's right to

⁷⁵ See *contra* the Defence Request, *supra* note 2, para. 61.

⁷⁶ See the "Decision on the Defence Request for Leave to Appeal" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-207](#), 13 January 2014, para. 33.

⁷⁷ See the Defence Request, *supra* note 2, paras. 63-68.

⁷⁸ See the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'" (Appeals Chamber), [No. ICC-02/11-01/15-744 OA 8](#), 1 November 2016, para. 83.

⁷⁹ See the Defence Request, *supra* note 2, para. 65.

proper notice by invoking the “*shared duty*” of the Prosecution and the chambers to safeguard this right.⁸⁰ In this respect, there was no ambiguity recognised by the Chamber on the scope of the Confirmation Decision. As a result, the *in dubio pro reo* principle has no applicability in the present instance and the Defence’s submission in this regard falls short from supporting an alleged abuse of power.⁸¹

42. Consequently, noting as underlined *supra* that the criteria of article 82(1)(d) of the Statute are cumulative in nature, since the five purported issues raised by the Defence appear to constitute mere disagreements or differences of opinions with the Chamber, or incorrect reading of the Impugned Decision, therefore not constituting appealable issues under article 82(1)(d) of the Statute, it is unnecessary to assess the other criteria under said article. Nonetheless, should the Chamber be mindful to address them, the Legal Representative is providing *infra* her analysis of the other criteria of article 82(1)(d) of the Statute.

2. The purported ‘issues’ do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their litigation before the Appeals Chamber will not materially advance the proceedings

39. If, by extraordinary, the Chamber were to find that one or several of the five purported ‘issues’ identified by the Defence arise(s) from the Impugned Decision, the Legal Representative submits that none of these purported issues have an impact on the fairness and expeditiousness of the proceedings or the outcome of the trial, as required by article 82(1)(d) of the Rome Statute.

40. In analysing whether an appealable issue would “*significantly affect*” the fair and expeditious conduct of the proceedings under article 82(1)(d) of Statute, the notion of ‘fairness’ must be understood as making reference to situations “*when a party is provided with the genuine opportunity to present its case – under conditions that do not place*

⁸⁰ See the Impugned Decision, *supra* note 10, para. 25.

⁸¹ See *supra* para. 29.

*it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”.*⁸² In turn, ‘expeditiousness’ must be read as “*closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*”.⁸³ The Appeals Chamber stated that in order to determine whether an issue would significantly affect the ‘outcome of the trial’ under article 82(1)(d) of the Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.⁸⁴

41. The Legal Representative further recalls the Dissenting Opinion of Judge Eboe-Osuji regarding mere disagreements and their impact on the fairness or expeditiousness of the proceedings, or the outcome of the trial:

*“Leave is not granted to appeal decisions of Trial Chambers, out of fear of the possibility or risk of what may or may not happen in an appeal on the merits of the case. The controlling general element of article 82(1)(d) is rather that the issue sought to be appealed must be one that ‘would significantly’ affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It is important to stress that the question is not whether the issue ‘would’ affect the fair conduct of the case or its outcome, without considering how ‘significantly’ so. Nor is the question whether the issue ‘may’ – not would – affect fair trial or the outcome, even though significantly. For leave to be granted, it needs to be seen that the issue would significantly affect the outcome of the trial or the fair and expeditious conduct of the proceedings. Both words—‘would significantly’—must be given their juristic values”.*⁸⁵

42. The Legal Representative submits that, as demonstrated *supra*, none of the five purported ‘issues’ identified by the Defence in its Request affects the fair and

⁸² See, *inter alia*, the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure”, *supra* note 27, para. 14.

⁸³ *Ibid.*, para. 18.

⁸⁴ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 17, para. 13.

⁸⁵ See the “Dissenting Opinion of Judge Eboe-Osuji”, *supra* note 60, para. 3; and the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6.

expeditious conduct of the proceedings or the outcome of the trial, and to the contrary, by virtue of being mere disagreements or incorrect readings of the Impugned Decision, would prejudice the very essence of these principles by entertaining fictions which would significantly delay the proceedings. She therefore submits that it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on any of these issues may materially advance the proceedings, in as much as such a resolution would lead undue delay of the proceedings.⁸⁶

FOR THESE REASONS, the Legal Representative respectfully requests the Chamber to dismiss the Defence Request in its entirety.



Sarah Pellet

Dated this 22nd day of July 2022

At The Hague, The Netherlands

⁸⁶ See the “Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-530](#), 8 October 2013, para. 42.