

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 September 2022

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba, Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godínez

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public

Decision on the Scope of 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
Ms Holo Makwaia

Counsel for the Defence

Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Ms Sarah Pellet

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

TRIAL CHAMBER VI of the International Criminal Court (the ‘Chamber’), in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to articles 61(7)-(9) and 74(2) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Scope of the Charges’.

I. PROCEDURAL HISTORY

1. On 16 August 2021, the Office of the Prosecutor (the ‘Prosecution’) filed the document containing the charges against Mahamat Said Abdel Kani (the ‘Document Containing the Charges’).¹
2. On 9 December 2021, Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) confirmed part of the charges against the Accused relating to crimes allegedly committed at the *Office Central de Répression du Banditisme* (the ‘OCRB’) (the ‘Confirmation of Charges Decision’), but determined that incident R relating to the detention of P-1432 and P-1762 (hereinafter: ‘Incident R’) falls outside the temporal scope of the charges.²
3. On 18 March 2022, the Prosecution informed the Chamber that it intended to present evidence relating to Incident R, which will demonstrate that P-1432 and P-1762 were in fact detained at the OCRB within the temporal scope of the charges (the ‘Prosecution’s Notification’).³
4. On 31 March 2022, the Defence filed a response to the Prosecution’s Notification.⁴

¹ ICC-01/14-01/21-144-Conf (public redacted version and its corrected version notified, respectively, on 16 August 2021 (ICC-01/14-01/21-144-Red) and 27 October 2021 (ICC-01/14-01/21-144-Red-Corr); corrected confidential version and its public redacted version notified, respectively, on 26 October 2021 (ICC-01/14-01/21-144-Conf-Corr) and 1 December 2021 ([ICC-01/14-01/21-144-Corr-Red](#))), with confidential annexes A and B (corrected confidential version of annex B notified on 20 August 2021 (ICC-01/14-01/21-144-Conf-AnxB-Corr); corrected confidential and public redacted versions of annex A notified on 27 October 2021 (ICC-01/14-01/21-144-Conf-AnxA-Corr; ICC-01/14-01/21-144-AnxA-Red-Corr)).

² Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21-218-Conf. A public redacted version was notified on the same date, [ICC-01/14-01/21-218-Red](#).

³ Prosecution’s Notification Related to Incident (r) of Paragraph 33 of the Document Containing the Charges, ICC-01/14-01/21-262-Conf. A public redacted version was notified on the same date, [ICC-01/14-01/21-262-Red](#)

⁴ *Réponse de la Défense à la « Prosecution’s Notification Related to Incident (r) of Paragraph 33 of the Document Containing the Charges »* (ICC-01/04-01/21-262-Conf), [ICC-01/14-01/21-269](#).

5. The Office of Public Counsel for Victims did not file observations on the Prosecution's Notification.

6. On 20 April 2022, the Chamber determined 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 'Decision on the Prosecution's Notification').⁵

7. On 5 May 2022, the Prosecution requested the Pre-Trial Chamber 'to amend the charges pursuant to article 61(9) of the Statute and rule 128 of the Rules of Procedure and Evidence by including two additional victim incidents at the OCRB that fall within the temporal scope of the confirmed charges, in particular Incident R and an incident of detention involving P-3047 (the 'Request for Amendment of the Charges').⁶

8. On 16 May 2022, the Office of Public Counsel for Victims responded to the Request for Amendment of the Charges.⁷

9. On 3 June 2022, the Defence responded to the Request for Amendment of the Charges.⁸

10. On 8 July 2022, the Pre-Trial Chamber rejected the Request for Amendment of the Charges on the basis that the scope of the charged crimes in this case is not limited to the specific criminal acts listed in the operative part of the Confirmation of Charges Decision and an amendment under article 61(9) of the Statute is not necessary in order to include additional criminal acts (the 'Decision Rejecting the Amendment Request').⁹

11. On 21 July 2022, following a request for guidance from the Prosecution, the Chamber informed the parties and participants that it considered it necessary to resolve

⁵ Decision on Prosecution Notification regarding the Charges (ICC-01/14-01/21-262-Red), 20 April 2022, [ICC-01/14-01/21-282](#), para. 17.

⁶ Prosecution's application to amend the charges, 5 May 2022, ICC-01/14-01/21-294-Conf; a public redacted version was filed on 9 May 2022 (ICC-01/14-01/21-294-Red).

⁷ Victims' response to the "Prosecution's application to amend the charges" (ICC-01/14-01/21-294-Red), ICC-01/14-01/21-310-Conf-Exp; a public redacted version was filed on the same day ([ICC-01/14-01/21-310-Red](#)).

⁸ 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; public redacted version notified on 13 June 2022 ([ICC-01/14-01/21-346-Red](#)).

⁹ Decision on the 'Prosecution's application to amend the charges', 8 July 2022, [ICC-01/14-01/21-396](#).

the legal and procedural uncertainty regarding the scope of the charges in the present case and allowed a further opportunity for submissions on this issue.¹⁰

12. On 16 August 2022, the Prosecution filed its submissions.¹¹

13. On 17 August 2022, the Defence filed its submissions.¹²

14. On 17 August 2022, the Common Legal Representative for Victims informed the Chamber that she did not intend to file further submissions on the issue of whether it is permissible to add incidents absent an amendment of the charges and instead referred the Chamber to her filings before the Pre-Trial Chamber.¹³

15. On 19 August 2022, the Pre-Trial Chamber rejected a request for leave to appeal filed by the Defence on the Decision Rejecting the Amendment Request.¹⁴

16. On 22 August 2022, the Common Legal Representative for Victims informed the Chamber that she did not intend to file a response to the Defence submissions.¹⁵

II. ANALYSIS

17. The Chamber notes that article 74(2) of the Statute provides, in relevant part, that the Trial Chamber's 'decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges'. In the case of *The Prosecutor v. Bosco Ntaganda* (the 'Ntaganda Case'), the Appeals Chamber held:

¹⁰ Email sent on 21 July 2022 at 10:45.

¹¹ Prosecution's submissions regarding Incidents c) and q) of the Trial Brief, 16 August 2022, [ICC-01/14-01/21-452](#).

¹² Soumissions de la Défense conformément à l'ordonnance de la Chambre de première instance du 21 juillet 2022 invitant les Parties à déposer des écritures à la suite de la « Decision on the 'Prosecution's application to amend the charges' » rendue par la Chambre préliminaire le 18 juillet 2022., 17 August 2022, ICC-01/14-01/21-455 (the 'Defence Submissions').

¹³ Email received on 17 August 2022 at 12:09, referring to Victims' response to the 'Prosecution's application to amend the charges' (ICC-01/14-01/21-294-Red), 16 May 2022, ICC-01/14-01/21-310-Conf-Exp; a public redacted version was filed the same day ([ICC-01/14-01/21-310-Red](#)) and 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), 22 July 2022, ICC-01/14-01/21-426-Conf; a public redacted version was filed the same day ([ICC-01/14-01/21-426-Red](#)).

¹⁴ Decision on the Defence request for leave to appeal the 'Decision on the "Prosecution's application to amend the charges"', 19 August 2022, ICC-01/14-01/21-456.

¹⁵ Email received on 22 August 2022 at 15:23.

For the purposes of article 74(2) of the Statute, the charges 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. Depending on the circumstances of the case, the charges may be described in a less specific manner, for instance, by specifying a period of time during which and an area where criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims. 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’. Whether such description of the charges is sufficient for purposes of article 74(2) of the Statute will depend, *inter alia*, on the scale of criminality and the mode of individual criminal responsibility alleged.¹⁶

18. The Pre-Trial Chamber and the Trial Chamber have adopted different interpretations of article 74(2) of the Statute and the application of the above-mentioned jurisprudence to the present case. For the purposes of the trial, it is the Trial Chamber’s responsibility to ensure that the Prosecution’s factual allegations do not exceed the facts and circumstances described in the charges and to satisfy itself as to its jurisdiction to determine matters that may arise in the course of proceedings. The Chamber has carefully considered the Pre-Trial Chamber’s interpretation of ‘the facts and circumstances described in the charges’ within the meaning of article 74(2) of the Statute and its interpretation of the scope of the charges confirmed in this case, but it cannot reconcile itself to the Pre-Trial Chamber’s interpretation for the reasons set out below.

19. As acknowledged by the Pre-Trial Chamber, the Appeals Chamber has determined that the scale of criminality and the mode of individual criminal responsibility alleged are the guiding criteria in determining whether 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.¹⁷ The Chamber understands the Appeals Chamber’s ruling to mean that a

¹⁶ [Ntaganda Appeals Chamber Judgment](#), para. 326.

¹⁷ [Decision Rejecting the Amendment Request](#), para. 22.

broader description of the charges may be acceptable for the purpose of article 74(2) of the Statute in cases where the extent of the criminality is of a larger scale and the accused is further removed from the scene of the crimes.

20. In the present case, regarding the scale of criminality, the Chamber notes that the Pre-Trial Chamber referred to 18 incidents that were established to the required standard, which were described in detail and each involved the detention and mistreatment of a limited number of victims at one detention site.¹⁸ Given the types of criminal cases that are tried before this Court, the Chamber does not consider the charges in this case to exemplify large-scale criminality such that a less specific framing of the charges could be justified. To the contrary, the Chamber considers the scale of criminality alleged in the present case to be comparatively limited.

21. Regarding the mode of individual criminal liability, the Chamber notes that the Accused is alleged to have been the *de facto* head of the OCRB and, in that capacity, to have committed the charged crimes jointly with others (as a direct co-perpetrator under article 25(3)(a)) and to have ordered or induced the commission of those crimes (under article 25(3)(b)).¹⁹ Specifically, in the Confirmation of Charges Decision, the Pre-Trial Chamber found that: (i) Mr Said had command over the Seleka elements and authority over all detainees at the OCRB; (ii) ‘Mr Said was present on a daily basis at the OCRB’, ‘was always present when the detainees were checked’ and from time to time slept in his office inside the OCRB main building;²⁰ (iii) ‘throughout the relevant period, individuals were arrested (and often beaten)’ and brought to the OCRB by groups of armed Seleka elements and that, ‘in some instances, Mr Said personally participated in and/or conducted arrests and brought detainees to the OCRB’;²¹ (iv) Mr Said decided ‘whether new detainees, who were systematically brought before him upon their arrival at the OCRB, would be detained and in which cell’; ‘decided whether detainees should be released and, in some cases, whether personally or through his subordinates, asked detainees or their families for ransom in exchange for their release’;²² (v) Mr Said was

¹⁸ [Confirmation of Charges Decision](#), para. 122; pp. 55-59, paras 29-30.

¹⁹ [Confirmation of Charges Decision](#), para. 70, p. 54, paras 22-24.

²⁰ [Confirmation of Charges Decision](#), para. 71.

²¹ [Confirmation of Charges Decision](#), para. 73.

²² [Confirmation of Charges Decision](#), para. 75.

responsible for the ‘dire conditions’ in which the detainees were kept due to his position and presence at the OCRB;²³ (vi) there was an underground cell, ‘[d]irectly by Mr Said’s office’ in which detainees considered as dangerous were held in dreadful conditions and ‘Mr Said decided which detainees would be placed in the underground cell and issued orders to this effect’;²⁴ (vii) Mr Said (a) was often present during the mistreatment of detainees; (b) ‘oversaw the OCRB-Seleka when detainees were being mistreated’; and (c) ‘instructed OCRB-Seleka to mistreat detainees’;²⁵ and (viii) Mr Said ‘personally participated in the mistreatment of a detainee held in the underground cell by beating, whipping and hitting him on his head with the butt of his rifle, and in the violent interrogation of another’.²⁶

22. Based on the foregoing, the Chamber considers that a high degree of proximity is alleged between the Accused and the crimes committed. He is alleged to have been responsible for the detention centre where the crimes were carried out, to have been physically present there on a daily basis when the crimes were committed, to have decided the fate of individual detainees and to have been responsible for their conditions of detention, to have been present when they were mistreated, to have instructed his subordinates to mistreat them and to have personally mistreated them himself.

23. Given the alleged physical proximity of the Accused to the crimes, the alleged form of criminal responsibility, and the limited scale of criminal acts alleged, the Chamber considers that, in the present case, the facts and circumstances described in the charges must be defined in relation to individual criminal acts.

24. The Chamber further notes that the Prosecution framed 20 incidents in an exhaustive way in the Document Containing the Charges.²⁷ In line with its role under article 61(7) of the Statute, the Pre-Trial Chamber examined each of these incidents to determine whether they had been established to the required standard.²⁸ It found that

²³ [Confirmation of Charges Decision](#), para. 76.

²⁴ [Confirmation of Charges Decision](#), para. 77.

²⁵ [Confirmation of Charges Decision](#), para. 79.

²⁶ [Confirmation of Charges Decision](#), para. 79.

²⁷ In framing the charged incidents in the document containing the charges, the Prosecution did not use the word ‘including’: [Document Containing the Charges](#), para. 33: ‘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 *the following persons occurred*:’ (emphasis added).

²⁸ [Confirmation of Charges Decision](#), paras 82-122.

Incident R fell outside of the temporal scope of the charges brought by the Prosecution and that, in respect of another incident, the Prosecution had ‘failed to provide sufficient evidence on the identities of the alleged victims or whether they were targeted as perceived Bozizé supporters’.²⁹ The Pre-Trial Chamber found that the remaining 18 incidents had been established to the required standard, but added the word ‘including’ before the list of incidents set out in the operative part of the Confirmation of Charges Decision.³⁰ Given the content of the Document Containing the Charges, as well as the manner in which the Pre-Trial Chamber confirmed the charges, the Chamber considers that, in this case, it was not possible to include an open-ended provision concerning the charges in the Confirmation of Charges Decision.³¹

25. Therefore, based on its interpretation of the Appeals Chamber ruling as set out in the *Ntaganda Case* and considering the manner in which the charges were framed by the Prosecution and confirmed by the Pre-Trial Chamber, the Chamber finds that the scope of the charged crimes in the present case is limited to the specific incidents listed by the Pre-Trial Chamber in paragraph 29 of the operative part of the Confirmation of Charges Decision. The Pre-Trial Chamber’s recent interpretation of the Confirmation of Charges Decision has not altered this view and the Chamber maintains its Decision on the Prosecution’s Notification.

FOR THESE REASONS, THE CHAMBER HEREBY

CLARIFIES that the scope of the charged criminal acts in this case is limited to the specific criminal acts listed by the Pre-Trial Chamber in paragraph 29 of the operative part of the Confirmation of Charges Decision.

²⁹ [Confirmation of Charges Decision](#), paras 82-83; 116-117.

³⁰ [Confirmation of Charges Decision](#), p. 54, para. 29: Under the heading ‘*The Charged Crimes*’, the Pre-Trial Chamber confirmed 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*’ (emphasis added) – the Pre-Trial Chamber then proceeded to list the 18 incidents that had been established to the requisite standard for confirmation.

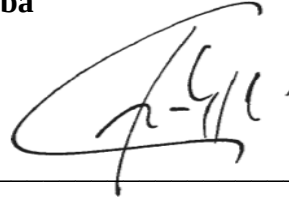
³¹ *See, inter alia*, Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Order regarding the content of the charges, 20 November 2012, [ICC-01/09-02/11-536](#), para. 7 and footnote 13; Chambers Practice Manual, Fifth edition Adopted following the judicial retreat of 2021, para. 61: In a decision confirming the charges the operative part shall reproduce verbatim the charges presented by the Prosecutor as confirmed by the Pre-Trial Chamber.



Judge Miatta Maria Samba
Presiding Judge



Judge María del Socorro Flores Liera



Judge Sergio Gerardo Ugalde Godínez

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

Dated 6 September 2022

At The Hague, The Netherlands