



Original: English

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

Date: 20 April 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 Prosecution Notification regarding the Charges (ICC-01/14-01/21-262-Red)

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 Eric MacDonald

Counsel for the Defence

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
Mr Tars van Litsenborgh

**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’) and regulation 24(5) of the Regulations of the Court, issues this ‘Decision on Prosecution Notification regarding the Charges (ICC-01/14-01/21-262-Red)’.

I. PROCEDURAL HISTORY

1. On 9 December 2021, Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) confirmed part of the charges against Mahamat Said Abdel Kani (the ‘Accused’) relating to crimes allegedly committed at the *Office Central de Répression du Banditisme* (the ‘OCRB’) (the ‘Confirmation Decision’).¹
2. 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 ‘Prosecution’s Notification’).²
3. On 31 March 2022, the Defence filed a response to the Prosecution’s Notification (the ‘Response’).³
4. On 4 April 2022, the Prosecution requested leave to reply to the Defence’s Response (the ‘Request for Leave to Reply’).⁴
5. On 7 April 2022, the Defence objected to the Prosecution’s Request for Leave to Reply.⁵

¹ 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](#).

² ICC-01/14-01/21-262-Conf. A public redacted version was notified on the same date, [ICC-01/14-01/21-262-Red](#)

³ *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](#).

⁴ Prosecution’s request for leave to reply to “*Réponse de la Défense à la « Prosecution’s Notification Related to Incident (r) of Paragraph 33 of the Document Containing the Charges »*” (ICC-01/14-01/21-269), [ICC-01/14-01/21-271](#).

⁵ *Réponse de la Défense à la « Prosecution’s request for leave to reply to “Réponse de la Défense à la « Prosecution’s Notification Related to Incident (r) of Paragraph 33 of the Document Containing the Charges »”* (ICC-01/14-01/21-269) » (ICC-01/04-01/21-271), [ICC-01/14-01/21-273](#).

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

II. REQUEST FOR LEAVE TO REPLY

7. The Prosecution seeks leave to reply to the following two issues raised in the Response: (i) '[t]he Defence's mischaracterisation of the Court's jurisprudence and of the Confirmation Decision' in arguing that 'the confirmed charges should be read as containing an exhaustive list of victim incidents'; and (ii) '[t]he Defence's request that the Prosecution be instructed not to submit evidence related to incident (r)'.⁶

8. The Defence objects to the Prosecution Request for Leave to Reply, submitting that its Response focused on arguments raised in the Prosecution's Notification and could reasonably have been anticipated.

9. The Chamber is of the view that its determination of the matters raised in the Prosecution's Notification would not be assisted by the further submissions outlined by the Prosecution. Furthermore, it considers that the arguments contained in the Response could have been reasonably anticipated and addressed in the original filing on this matter. Therefore, the Prosecution's Request for Leave to Reply is rejected.

III. ANALYSIS

10. The Chamber notes that article 61(7) of the Statute, on the confirmation of charges proceedings, provides that the Pre-Trial Chamber is required to 'determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'. Applying this standard, the Pre-Trial Chamber will confirm those charges which are supported by sufficient evidence and/or decline to confirm those that are not so supported (or in certain circumstances request the Prosecution to consider providing further evidence, conducting further investigations or amending a charge). If the Pre-Trial Chamber declines to confirm a charge, article 61(8) of the Statute provides that the Prosecution may subsequently

⁶ [Request for Leave to Reply](#), para. 2.

request its confirmation if such a request is supported by additional evidence. Article 61(9) of the Statute provides:

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

11. In the Confirmation Decision, the Pre-Trial Chamber noted that ‘the Prosecution summarises 20 specific incidents at paragraph 33 of the DCC’ and stated that it understood ‘that this list is meant to provide examples of the conduct underlying the charges’.⁷ The Pre-Trial Chamber examined the evidence produced by the Prosecution in support of the 20 incidents and found that only 18 had been proven to the requisite standard.⁸ 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’ – the Pre-Trial Chamber then proceeded to list the 18 incidents that had been established to the required standard for confirmation.⁹

12. Regarding the incident listed at paragraph 33(r) of the document containing the charges, namely the alleged detention and mistreatment of P-1432 and P-1762 (‘Incident R’), the Pre-Trial Chamber found that, since the statements of both witnesses reveal that they were detained at the OCRB from early September 2013, the incident falls outside the temporal scope of the charges (between 12 April 2013 and 30 August 2013).¹⁰ Accordingly, Incident R did not form part of the confirmed charges and appears to have been explicitly excluded from the scope of the charges by the Pre-Trial Chamber.¹¹

13. The Prosecution Notification informed the Chamber that the Prosecution nevertheless intends to present evidence relating to Incident R, which will demonstrate

⁷ [Confirmation Decision](#), para. 80.

⁸ [Confirmation Decision](#), paras 82-122.

⁹ [Confirmation Decision](#), p. 54, para. 29.

¹⁰ [Confirmation Decision](#), paras 116-117. *See also* para. 66.

¹¹ [Confirmation Decision](#), pp. 50, 54-58, para. 29.

that P-1432 and P-1762 were in fact detained at the OCRB within the temporal scope of the charges.¹² The Prosecution submits that the document containing the charges described the incidents in a non-exhaustive manner and the Pre-Trial Chamber considered ‘the victim-incidents that took place at the OCRB as non-exhaustive’ and argues that this approach is ‘fully consistent with the Court’s legal framework and its jurisprudence’.¹³

14. 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’. The Appeals Chamber has previously held:

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.¹⁴

¹² [Prosecution’s Notification](#), para. 1.

¹³ [Prosecution’s Notification](#), para. 6, referring to 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](#) (A A2) (the ‘*Ntaganda Appeals Chamber Judgment*’), para. 327; regulation 52 of the Regulations of the Court (regulating the content of the DCC); article 74(2) (indicating that a final decision shall not exceed the facts and circumstances described in the charges and any amendments); article 67(1)(a) of the Statute (on the accused’s right to be informed promptly and in detail of the nature, cause and content of the charge).

¹⁴ [Ntaganda Appeals Chamber Judgment](#), para. 326.

15. The Chamber notes, therefore, 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 as argued by the Prosecution.¹⁵ The Chamber understands the Appeals Chamber’s ruling to mean that a 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.

16. In the present case, regarding the scale of criminality, the Chamber notes that the Pre-Trial Chamber referred to 18 incidents, described in detail and each involving a limited number of victims at one location, which comprised the factual basis for the seven Counts charged.¹⁶ Incident R was not one of these incidents, having been found to fall outside the temporal scope of the charges.¹⁷ 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 (article 25(3)(a)) and to have ordered or induced the commission of those crimes (article 25(3)(b)).¹⁸ Therefore, a high degree of proximity is alleged between the acts and conduct of the Accused and the crimes committed. The Chamber considers that these features 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.

17. Accordingly, the Chamber rejects 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.¹⁹ It considers that the scope of the charged crimes in this case is limited to the specific criminal acts listed by the Pre-Trial Chamber

¹⁵ [Prosecution’s Notification](#), para. 6.

¹⁶ [Confirmation Decision](#), pp.55-59, paras 29-30.

¹⁷ [Confirmation Decision](#), paras 116-117.

¹⁸ [Confirmation Decision](#), p.54, paras 22-24.

¹⁹ [Prosecution’s Notification](#), para. 6.

in paragraph 29 of the Confirmation Decision. Noting that the Pre-Trial Chamber found that Incident R falls outside the temporal scope of the charges, the Chamber finds 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.

18. Finally, the Chamber notes that the Defence requests the Chamber to order the Prosecution not to present evidence at trial relating to Incident R. As such evidence may be relevant to and probative of other facts set out in the charges, the Chamber does not consider it appropriate to issue such an order.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Prosecution's Request for Leave to Reply.

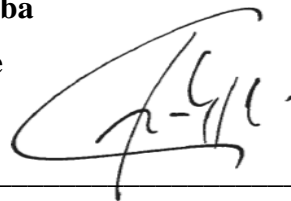
CLARIFIES that Incident R does not currently form part of the facts and circumstances described in the charges for the purposes of article 74(2) of the Statute.



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 20 April 2022

At The Hague, The Netherlands