

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

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

**Date: 28 July 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 Defence's Request to reject the Prosecution's Trial Brief *in limine***

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan  
Mr Mame Mandiaye Niang

**Counsel for 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**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

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**TRIAL CHAMBER VI** of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to article 74 of the Rome Statute (the ‘Statute’), and regulations 36 and 38 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Defence’s Request to reject the Prosecution’s Trial Brief *in limine*’.

## I. PROCEDURAL HISTORY

1. On 13 June 2022, the Office of the Prosecutor (the ‘Prosecution’) filed the ‘Prosecution’s Trial Brief’ (the ‘Trial Brief’).<sup>1</sup>
2. On 15 July 2022, the Defence filed the ‘Demande de rejet *in limine* du « Prosecution’s Trial Brief » (ICC-01/14-01/21-359-Conf).’ (the ‘Request’). In the Request, the Defence requests the Chamber to, *inter alia*, reject the Trial brief *in limine* and order the Prosecution to re-file its Trial Brief.<sup>2</sup>
3. On 22 July 2022, the Prosecution filed its response to the Request (the ‘Response’).<sup>3</sup> In the Response, the Prosecution submits that the Request should be rejected.
4. On 22 July 2022, the Common Legal Representative of Victims informed the Chamber that she does not intend to file a response to the Request.<sup>4</sup>

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<sup>1</sup> Prosecution’s Trial Brief, 13 June 2022, ICC-01/14-01/21-359-Conf. A public redacted version was notified on 28 July 2022 (ICC-01/14-01/21-359-Red).

<sup>2</sup> Demande de rejet *in limine* du « Prosecution’s Trial Brief » (ICC-01/14-01/21-359-Conf)., 15 July 2022, ICC-01/14-01/21-414-Conf. A public redacted version was notified on 22 July 2022 (ICC-01/14-01/21-414-Red).

<sup>3</sup> Prosecution’s response to the Defence request to reject the Prosecution’s Trial Brief *in limine* (ICC-01/14-01/21-414-Conf), 22 July 2022, ICC-01/14-01/21-427.

<sup>4</sup> Email from the Common Legal Representative to the Chamber dated 22 July 2022 at 13:56.

## II. SUBMISSIONS

5. In the Request, the Defence makes three principal submissions: (i) that the Trial Brief exceeds the number of pages allowed;<sup>5</sup> (ii) that the Trial Brief goes beyond the confirmed charges with regards to references concerning the *Comité Extraordinaire pour la Défense des Acquis Démocratiques* (CEDAD);<sup>6</sup> and (iii) that the Trial Brief fails to explain how the Prosecution intends to use a large majority of its evidence and thus does not fulfil its function of being a useful document for the preparation of the trial.<sup>7</sup>

6. In respect of the first submission, the Defence avers that the Trial Brief is 126 pages,<sup>8</sup> and thus exceeds the number of pages allowed by regulation 38(1) of the Regulations, which provides that a trial brief shall not exceed 120 pages.<sup>9</sup> Similarly, the Defence notes that the Trial Brief contains numerous voluminous and argumentative footnotes, as well as extensive quotes, which is in violation of regulation 36(3) of the Regulations.<sup>10</sup> The Defence submits that the Trial Brief should therefore be rejected *in limine*.<sup>11</sup>

7. In respect of the second submission, the Defence submits that the Trial Brief goes beyond the confirmed charges with regards to the events concerning the CEDAD.<sup>12</sup> The Defence observes that the Trial Brief makes multiple reference to Mr Said's alleged role at the CEDAD, which the Defence submits is impermissible as this goes beyond the 'facts and circumstances' confirmed by the Pre-Trial Chamber.<sup>13</sup> In this regard, the Defence highlights that the Pre-Trial Chamber found that there was an insufficient link between Mr Said and the events at the CEDAD and declined to confirm the charges in

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<sup>5</sup> Request, paras 9-15.

<sup>6</sup> Request, paras 16-21.

<sup>7</sup> Request, paras 22-32.

<sup>8</sup> Request, para. 9.

<sup>9</sup> Request, para. 13.

<sup>10</sup> Request, paras 10-11.

<sup>11</sup> Request, para. 15.

<sup>12</sup> Request, paras 16-21.

<sup>13</sup> Request, paras 17-18.

this regard.<sup>14</sup> This in turn, the Defence argues, should lead to the rejection *in limine* of the Trial Brief.<sup>15</sup>

8. Furthermore, the Defence avers that the Pre-Trial Chamber did not confirm, in the context of the discussion on the contextual elements, the facts alleged at the CEDAD.<sup>16</sup> Specifically, the Defence makes reference to, *inter alia*, the operative part of the Confirmation Decision,<sup>17</sup> which the Defence notes did not make reference to the CEDAD. This in turn indicates, according to the Defence, that the Pre-Trial Chamber deliberately chose to exclude the allegations at the CEDAD from its determination of the contextual elements in this case.<sup>18</sup>

9. Last, in respect of the third submission, the Defence submits that the Trial Brief must allow the Defence to understand the nature of the case the Prosecution will present at trial.<sup>19</sup> Specifically, according to the Defence, the Trial Brief completes the Confirmation Decision, indicating to the Defence what has changed, particularly with respect to evidence and witnesses, since the pre-trial phase.<sup>20</sup> The Defence avers that only the Trial Brief can allow the Defence to understand how the Prosecution intends to utilise the hundreds of pieces of evidence and the statements of its 85 witnesses.<sup>21</sup> The Defence submits that the Trial Brief fails to accomplish this.<sup>22</sup>

10. In particular, the Defence notes that only 542 out of the 2994 pieces of evidence are mentioned in the Trial Brief.<sup>23</sup> The remaining items are not mentioned and the Defence argues that it is left unable to understand how the Prosecution intends to use this evidence.<sup>24</sup> This in turn, the Defence avers, leaves it unable to adequately work on

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<sup>14</sup> Request, para. 16.

<sup>15</sup> Request, para. 18.

<sup>16</sup> Request, para. 19.

<sup>17</sup> See Decision on the confirmation of charges against Mahamat Said Abdel Kani, 9 December 2021, ICC-01/14-01/21-218-Conf. A public redacted version was notified on the same day ([ICC-01/14-01/21-218-Red](#)) (the ‘Confirmation Decision’), p. 51 *et seq.*

<sup>18</sup> Request, para. 20.

<sup>19</sup> Request, para. 22.

<sup>20</sup> Request, para. 22.

<sup>21</sup> Request, paras 23-24, 29.

<sup>22</sup> Request, para. 24.

<sup>23</sup> Request, para. 25.

<sup>24</sup> Request, para. 25.

the Prosecution's evidence and prepare for trial.<sup>25</sup> The Defence similarly rejects the Prosecution's submissions that 'it was not possible to cite every single item of evidence in that document' and that 'the Trial Brief is meant to be read along with the Prosecution's bar table motions and annexes; rule 68 motions and annexes; list of witnesses; witness summaries (which include P-3111); and list of evidence'.<sup>26</sup> In this respect, the Defence submits that: (i) the Prosecution should have requested additional pages so that it could have produced a more useful document;<sup>27</sup> and (ii) the Trial Brief is supposed to be an autonomous document and that, by the Prosecution's logic, the Defence and the Chamber are required to refer to hundreds of pages in separate requests, which in turn undermines the very use of a Trial Brief.<sup>28</sup>

11. Based on the foregoing, the Defence requests that the Chamber reject the Trial Brief *in limine* and order the Prosecution to: (i) file a trial brief of 120 pages; (ii) remove any allegation which goes beyond the 'facts and circumstances' described in the charges confirmed by the Pre-Trial Chamber; (iii) file a useful trial brief which explains how the Prosecution intends to use its evidence at trial; and (iv) draw the consequences of the present situation and allow the Defence to have the necessary time and facilities to prepare for trial under good conditions.<sup>29</sup>

12. In the Response, the Prosecution submits that the Request should be rejected.<sup>30</sup> First, while the Prosecution acknowledges that the Trial Brief 'does indeed exceed the page limit' and that it 'should have requested an extension of the page limit', the 'derogation was minimal' and due to a 'good faith oversight'.<sup>31</sup> In this regard, the Prosecution submits that this was 'due to competing obligations at the time'.<sup>32</sup>

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<sup>25</sup> Request, para. 25.

<sup>26</sup> Request, paras 27 and 30, quoting to Prosecution's Request Under Regulation 35 for an Extension of Time to Seek an Agreement with the Defence on a Joint Expert on the *Arbatachar* Method of Restraint or, alternatively, Request for Reconsideration of the Chamber's Decision to Remove P-3111 from the Prosecution's List of Witnesses, 8 July 2022, [ICC-01/14-01/21-399](#), para. 16.

<sup>27</sup> Request, para. 28.

<sup>28</sup> Request, paras 31-32.

<sup>29</sup> Request, p. 10.

<sup>30</sup> Response, para. 1.

<sup>31</sup> Response, para. 3.

<sup>32</sup> Response, para. 3.

13. The Prosecution further avers that the Trial Brief covers ‘the evidence and legal propositions related to seven counts of crimes against humanity and war crimes [...] which require in-depth legal analysis’<sup>33</sup> and that ‘[a]ll sections of the Trial include substantively relevant information’. In this regard, the Prosecution argues that ‘the unfortunate derogation from the page limit [...] should not stand in the way of the Chamber accepting the entirety of the document submitted.’<sup>34</sup> In addition, the Prosecution submits that accepting the current version of the Trial Brief ‘does not cause any prejudice to the Accused’ as the Trial Brief provides ‘additional notice to the Accused’ and gives the Defence five additional pages of detail regarding its ‘case against Mr Said, as well as how the Prosecution intends to use the underlying evidence to establish the relevant material facts’.<sup>35</sup>

14. Second, in respect of the Defence’s submissions regarding inclusion of allegations regarding the CEDAD, the Prosecution submits that ‘[a]t no point has the Prosecution suggested to reintroduce unconfirmed charges related to the CEDAD incidents against Mr SAID’.<sup>36</sup> In this regard, the Prosecution argues that it may rely on evidence concerning the CEDAD to prove its case, noting that it has referred to such evidence ‘for the limited purposes of: (i) proving chapeau elements of article 7 of the Rome Statute; (ii) describing the Seleka individuals mentioned in the Trial Brief, in relation to the OCRB incidents; and (iii) establishing the common plan in relation to the crimes at the OCRB by referring to, *inter alia*, the subsequent same pattern of conduct at the CEDAD by the same alleged co-perpetrators’.<sup>37</sup> Similarly, the Prosecution avers that while the Pre-Trial Chamber ‘refused to confirm the charges in relation to SAID’s individual criminal responsibility for the CEDAD incidents, it did not deny the existence of alleged crimes being committed at the CEDAD’<sup>38</sup> and that in relation to the contextual elements of crimes against humanity the Pre-Trial Chamber ‘specifically included the words “such as” when setting out several incidents which

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<sup>33</sup> Response, para. 4.

<sup>34</sup> Response, para. 5.

<sup>35</sup> Response, para. 7.

<sup>36</sup> Response, para. 9.

<sup>37</sup> Response, para. 9.

<sup>38</sup> Response, para. 10.

form part of the widespread and systematic attack against the civilian population’.<sup>39</sup> Furthermore, the Prosecution refers to the fact that several other trial chambers ‘have confirmed that the use of evidence relating to unconfirmed charges for purposes other than reintroducing the same charges is permissible.’<sup>40</sup>

15. Last, in respect of the Defence’s argument to the effect that the Trial Brief fails to explain how the Prosecution intends to use a large majority of its evidence, the Prosecution submits that it is not required to cite every piece of evidence in its Trial Brief.<sup>41</sup> The Prosecution argues that while the Trial Brief assists in helping to ‘navigate the Prosecution’s case and what it considers the most important evidence’, ‘it has to be read together with the other auxiliary documents and requests that equally serve the purpose of providing the Defence notice within the terms of its right under article 67(1)(a)’.<sup>42</sup>

16. Furthermore, the Prosecution specifically notes that the ‘bar table motions provide additional detailed information of the Defence to comprehend the relevance of each piece of non-testimonial evidence’ and it ‘would have convoluted the Trial Brief were the Prosecution required to cite every one of the approximately 750 items submitted from the bar table’.<sup>43</sup> Similarly, the Prosecution provides that ‘[f]urther to the submissions in the Trial Brief, the Prosecution has submitted motions pursuant to rule 68 of the Rules for certain witnesses and provided witness summaries for all trial witnesses’.<sup>44</sup>

### III. ANALYSIS

17. The issue before the Chamber is whether the Trial Brief should be dismissed *in limine* due to various defects as alleged by the Defence. Turning to the first principal submission by the Defence, the Chamber observes that the Trial Brief is 128 pages, including both the cover page and notification page. As noted by the Defence, pursuant

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<sup>39</sup> Response, para. 10.

<sup>40</sup> Response, para. 10.

<sup>41</sup> Response, para. 11.

<sup>42</sup> Response, para. 11.

<sup>43</sup> Response, para. 12.

<sup>44</sup> Response, para. 12.



to regulation 38(1) of the Regulations, '[u]nless otherwise ordered by the Chamber' the page limit for a trial brief shall not exceed 120 pages.

18. The Chamber notes that the Prosecution did not seek leave of the Chamber for additional pages and finds that the Prosecution is in breach of regulation 38(1) of the Regulations. The Chamber expects all parties and participants to act diligently and strictly abide by the page limits set by both the Chamber and the Regulations. The Chamber notes that Prosecution could have easily requested an extension of the page limit, as indeed it has done on numerous occasions, yet failed to do so in this instance. The Chamber regrets this failure by the Prosecution and expects it to act more attentively in future.

19. The above notwithstanding, the Chamber does not find that this violation should lead to the rejection of the Trial Brief *in limine*. First, the Chamber accepts the Prosecution's submission that the failure to abide by the page limit was not in bad faith. Second, the Chamber observes that the number of extra pages over the page limit is relatively minimal compared to the overall length of the document. Third, the Chamber notes that the failure to abide by the page limit results in more information being provided to the Defence and as such is not prejudicial. For the foregoing reasons, the Chamber similarly rejects the Defence's submissions in respect of the alleged violation of regulation 36(3) of the Regulations through the inclusion of substantial submissions in footnotes. While the Chamber accepts the Defence's submissions that there has been a violation of regulation 36(3) of the Regulations, the Chamber finds that this violation does not prejudice the Defence. The Chamber notes that the purpose of regulation 36(3) of the Regulations is largely to ensure the compliance with page limits and, in the present instance, only a minimal number of footnotes contain substantial submissions. Accordingly, the Defence's submissions on this point do not warrant *in limine* dismissal of the Trial Brief.

20. The Chamber will now turn to the Defence's submissions to the effect that the Trial Brief goes beyond the confirmed charges with regard to the events concerning the CEDAD and therefore should be rejected. For the reasons that follow, the Chamber finds that the Defence's submissions on this point should also be dismissed.

21. The Chamber notes that the scope of this case is determined by the parameters set by the Pre-Trial Chamber in the Confirmation Decision.<sup>45</sup> In this regard, the Pre-Trial Chamber declined to confirm the charges against Mr Said relating to the alleged events at the CEDAD<sup>46</sup> and therefore Mr Said does not face charges before this Chamber for crimes allegedly committed at the CEDAD. However, this does not mean that factual allegations or evidence relating to these matters cannot be relied upon in support of other parts of the case. Indeed, the Chamber observes that the Prosecution seeks to rely on evidence relating to the CEDAD in support of, *inter alia*, the contextual elements and the common plan alleged in this case, and does not seek to reintroduce unconfirmed charges.<sup>47</sup> Similarly, contrary to the Defence's assertions, the Chamber finds that the Pre-Trial Chamber did not exhaustively refer to all incidents which in its view formed part of the contextual elements,<sup>48</sup> and as a result, the Chamber is not barred from considering such incidents. Accordingly, the Defence's submissions are rejected.

22. The Chamber is also unpersuaded by the Defence's arguments that the Trial Brief fails to explain how the Prosecution intends to use a large majority of its evidence and thus does not fulfil its function of being a useful document for the preparation of the trial. While the Chamber recognises that there are multiple items on the Prosecution's List of Evidence which are not referenced in the Trial Brief, as per article 74(2) of the Statute, the Chamber can base its judgment only on evidence 'submitted and discussed before it at trial'. Accordingly, to the extent that an item of evidence has not been submitted or discussed the Chamber will not base its judgment upon it. That notwithstanding, the Chamber stresses that the above in no way predetermines how the Chamber may use or evaluate the evidence submitted or discussed before it.

23. Furthermore, in connection with the foregoing, the Chamber finds that the Trial Brief should not be read in isolation, and must be viewed in conjunction with, *inter alia*, the Prosecution's applications pursuant to rule 68 of the Rules and motions for the introduction of evidence other than through a witness. The Chamber notes that these applications, as well as the Trial Brief, provide sufficient information at this stage to

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<sup>45</sup> [Confirmation Decision](#), para. 36.

<sup>46</sup> [Confirmation Decision](#), para. 153.

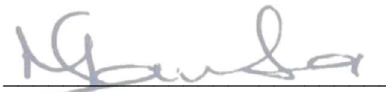
<sup>47</sup> *See* Request, para. 9 and references therein.

<sup>48</sup> *See, for example* [Confirmation Decision](#), para. 18.

allow the Chamber and the Defence to understand how the Prosecution intends to present its case at trial. To the extent that the Prosecution may wish to use additional items of evidence from the List of Evidence in the course of the trial, the Chamber will take this into consideration and ensure that the Defence is not unduly prejudiced. Accordingly, the Defence's submissions in this regard are also rejected.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.



**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 28 July 2022

At The Hague, The Netherlands