

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **8 August 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 *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public

**Prosecution's Response to the Defence's Request to Appeal the Decision on the
Defence's Request to reject the Prosecution's Trial Brief *in limine***

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Defence request for leave to appeal¹ the “Decision on the Defence’s Request to reject the Prosecution’s Trial Brief *in limine*”² should be dismissed because it does not raise any appealable issue arising from the Decision or show how any of the alleged issues meets the criteria for leave to appeal under article 82(1)(d).

2. The Request identifies three alleged issues (collectively, the “Issues”), namely whether the Trial Chamber:

- erred in law by allowing the Prosecution to maintain, in its Trial Brief, allegations relating to a link between Mr. SAID and CEDAD while these allegations had not been adopted by the Pre-Trial Chamber in the Decision on the Confirmation of Charges³ (“Issue 1”);
- erred in law by failing to provide reasons for its conclusion that the Confirmation Decision allowed the Prosecution to present evidence relating to events at the CEDAD to prove contextual elements of crimes against humanity (“Issue 2”);
- erred in law and fact in finding that the Prosecution did not have to explain, in its Trial Brief, how it intends to use its evidence at trial (“Issue 3”).

3. None of the Issues⁴ constitutes an appealable issue or meets the criteria for leave to appeal within the meaning of article 82(1)(d). Issue 1, not only merely disagrees with the Decision, but also concerns a matter that has already been determined by the Appeals Chamber. Issues 2 and 3 either misread or merely disagree with the Decision.

¹ ICC-01/14-01/21-440 (“Request”).

² ICC-01/14-01/21-437 (“Decision”).

³ ICC-01/14-01/21-218 (“Confirmation Decision”).

⁴ Request, Section III.1.

II. SUBMISSIONS

A. The Issues are not appealable issues within the terms of article 82(1)(d)

4. None of the Issues constitutes an appealable issue, and the Request should be rejected. For the purposes of article 82(1)(d),⁵ an issue constitutes “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”⁶ No appealable issue arises if a party misreads or misrepresents the decision or record.⁷ Moreover, the issue’s resolution must be “essential for the determination of matters arising under the judicial cause under examination”.⁸

i. Issue 1 constitutes a mere disagreement with the Decision, or concerns a matter already determined by the Appeals Chamber

5. Issue 1, relating to the Prosecution’s planned use of CEDAD-related evidence,⁹ constitutes a mere disagreement with the Decision, and in any event concerns a legal matter that has already been determined by the Appeals Chamber.

6. In a nutshell, the Defence merely expresses a disagreement with the Trial Chamber’s finding that—although Mahamat Said Abdel Kani (“Mr Said”) does not face charges for crimes allegedly committed at the CEDAD, which were not confirmed¹⁰—factual allegations or evidence relating to such matters can be relied upon in support of other parts of the case.¹¹ In other words, the Defence disagrees with the Prosecution’s right to adduce facts relating to the events at the CEDAD

⁵ [ICC-01/04-168 OA3](#), paras. 9-10. *See also* [ICC-01/04-01/06-1433 OA11](#), Dissenting Opinion of Judge Song, para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

⁶ [ICC-01/04-168 OA3](#), para. 9.

⁷ *See e.g.*, [ICC-01/04-01/10-487](#), paras. 32-33; [ICC-01/05-01/13-1489](#), paras. 9, 10; [ICC-01/05-01/08-75](#), para. 32.

⁸ [ICC-01/04-168 OA3](#), para. 9.

⁹ Request, paras. 11-16.

¹⁰ Decision, para. 21.

¹¹ Decision, para. 21.

as evidence in support of those facts or allegations which were confirmed, such as the contextual elements and the common plan charged in this case.¹²

7. This mere disagreement does not suffice to identify an appealable issue under article 82(1)(d),¹³ particularly since it challenges the Trial Chamber's broad discretion to admit and/or freely assess evidence relevant to the (confirmed) charges.¹⁴

8. In any event, this matter has already been determined by the Appeals Chamber. In *Lubanga*, the Appeals Chamber recognised the distinction between the material facts underpinning the confirmed charges (which must be pleaded in the Document Containing the Charges), and the *evidence* that may be adduced to prove those facts and charges.¹⁵ This fundamental distinction between material facts and evidence is no less relevant to trial proceedings. While Mr Said no longer faces charges based on his responsibility for alleged events at the CEDAD, the Chamber retains its broad discretion to receive *evidence* relevant to those charges which have been confirmed—and this can include evidence of events which are *not* material facts underpinning the confirmed charges. It is thus immaterial whether such events were the basis of additional charges which were not confirmed.

9. Based on the above, Issue 1 should therefore be rejected.

ii. Issues 2 and 3 either misread or constitute mere disagreements with the Decision

10. Issue 2—relating to whether the Trial Chamber properly reasoned its conclusion in relation to the use of CEDAD-related evidence at trial—is not appealable. Instead, the Defence misreads, or merely disagrees with, the Trial Chamber's conclusion that it is not barred from considering additional incidents to establish the contextual

¹² Decision, para. 21.

¹³ [ICC-01/04-168 OA3](#), para. 9. *See also* [ICC-01/05-01/08-532](#), para. 17; [ICC-01/04-01/06-1557](#), para. 30.

¹⁴ *See e.g.*, [ICC-02/05-02/09-267](#), paras. 11-12.

¹⁵ [ICC-01/04-01/06-2205 OA15 OA16](#), footnote 163. Emphasis added.

elements of confirmed charges. As the Trial Chamber recalled, the Pre-Trial Chamber did not exhaustively refer to all incidents which, in its view, formed part of the contextual elements.¹⁶

11. The Trial Chamber's reasoning is both clear and sufficient because the Decision clearly states the basis underlying its conclusion on this matter¹⁷—the incidents were non-exhaustive, and the alleged CEDAD incident can form part of the contextual elements.¹⁸ The Defence's misreading of the Decision or its disagreement with this reasoning does not mean that the reasoning is insufficient. Accordingly, Issue 2 is not appealable.

12. Likewise, Issue 3—relating to whether the Trial Chamber erred in law and fact in finding that the Prosecution did not have to explain, in its Trial Brief, how it intends to use its evidence at trial—is not appealable. Again, the Defence misrepresents the record, or merely disagrees with the Trial Chamber's conclusion that the Trial Brief should not be read in isolation but rather in conjunction with, *inter alia*, the Prosecution's rule 68 applications and other relevant evidentiary motions. The Trial Chamber stated that these applications, as well as the Trial Brief, provide sufficient information at this stage to allow the Chamber and the Defence to understand how the Prosecution intends to present its case at trial.¹⁹ As such, the Decision is based upon the opposite premise from that assumed by the Defence in Issue 3—which is that the Prosecution's explanation of the evidentiary basis for its case is adequate. The Defence merely disputes this conclusion.

13. Indeed, contrary to the Defence arguments, the Prosecution submits that the

¹⁶ Decision, para. 21.

¹⁷ [ICC-01/04-01/06-773 OA5](#), para. 20 (“[T]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion”).

¹⁸ Decision, para. 21.

¹⁹ Decision, para. 23.

Trial Brief is a coherent document, organised by clear themes, where each allegation is supported by substantive evidence. This enables the Defence and the Trial Chamber to understand its case. The Trial Brief is further supplemented by the Prosecution's applications under rule 68 and other evidentiary motions, which include specific discussion of the relevance of the evidence in question.

14. Based on the above, the Chamber should not certify Issues 2 and 3 for appeal under article 82(1)(d).

B. The Issues do not meet the requirements for leave to appeal under article 82(1)(d)

15. The Defence Request should be rejected for the reason alone that the Defence has not identified any appealable issue. In such circumstances, the Trial Chamber need not assess whether the Issues meet the other criteria under article 82(1)(d), since these requirements are cumulative.²⁰ But in any event, none of the Issues meets these other requirements, and the Request may be rejected also on that basis.

i. The Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

16. The Defence has not demonstrated that any of the Issues significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. The procedural and substantive rights and obligations of all participants, including the Accused, are respected.²¹ Contrary to the Defence submissions,²² the Decision does not allow the Prosecution to go beyond the facts and circumstances confirmed in the decision confirming the charges, and Mr Said will not be forced to defend himself against allegations that have not been confirmed. While the CEDAD charges have not

²⁰ See e.g., [ICC-01/14-01/21-275, para. 10](#); [ICC-02/04-01/15-537, para. 13](#); [ICC-01/05-01/08-980, para. 20](#).

²¹ [ICC-01/04-141](#), para. 48; [ICC-02/04-01/05-212](#), paras. 10-11; [ICC-01/04-135-tEN](#), para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

²² Request, para. 32.

been confirmed, it is clear that the Prosecution will only use CEDAD-related evidence in support of the confirmed (OCRB) charges. The Decision correctly interprets the Pre-Trial Chamber's decision on this matter, and as such the fairness of the proceedings is not significantly affected.

17. The Defence is also wrong to assert that the Decision does not allow the means necessary for the preparation of the Defence.²³ To the contrary, the Decision clearly states that the Trial Brief—as well as the other evidentiary applications filed by the Prosecution—are sufficient to understand the Prosecution's case.²⁴ In particular, the Trial Brief contains a comprehensive account of the alleged events with footnotes to the most important evidence. The Defence thus undoubtedly has the means to prepare for the Prosecution case.

18. Furthermore, and in any event, the Defence does not demonstrate how immediate resolution by the Appeals Chamber of the Issues will materially advance the proceedings. Granting the Defence's request will only delay the trial, which is set to commence in less than two months.

III. RELIEF SOUGHT

19. For the above reasons, the Prosecution requests the Trial Chamber to deny the Defence Request.



Karim A. A. Khan QC, Prosecutor

Dated this 8th day of August 2022
At The Hague, The Netherlands

²³ Request, para. 33.

²⁴ Decision, para. 22.