

**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 Defence Request for Leave to Appeal (ICC-01/14-01/21-440) and
Reasons for Decision Rejecting Leave to Appeal (ICC-01/14-01/21-425)**

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

The Office of the Prosecutor

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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
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States Representatives

Amicus Curiae

REGISTRY

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Mr Peter Lewis

Counsel Support Section

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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 article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this ‘Decision on Defence Request for Leave to Appeal (ICC-01/14-01/21-440) and Reasons for Decision Rejecting Leave to Appeal (ICC-01/14-01/21-425)’.

I. DECISION ON DEFENCE REQUEST FOR LEAVE TO APPEAL (ICC-01/14-01/21-440)

A. Procedural History

1. On 28 July 2022, the Chamber rejected the Defence request for the trial brief filed by the Office of the Prosecutor (the ‘Prosecution’) to be dismissed *in limine* (the ‘Impugned Decision’).¹
2. On 3 August 2022, the Defence requested leave to appeal the Impugned Decision and identified three issues for appeal (the ‘Request’).²
3. On 8 August 2022, the Prosecution filed a response to the Request, arguing that none of the issues for which leave to appeal is sought are appealable issues (the ‘Response’).³
4. On 8 August 2022, the Common Legal Representative of Victims informed the Chamber that she did not intend to respond to the Request.⁴

B. Submissions

1. First Issue

5. The Defence argues that the Chamber erred in law in allowing the Prosecution to maintain allegations that would link Mr Said to the *Comité Extraordinaire pour la Défense des Acquis Démocratiques* (CEDAD) in the trial brief, although Pre-Trial

¹ Decision on the Defence’s Request to reject the Prosecution’s Trial Brief *in limine*, 28 July 2022, [ICC-01/14-01/21-437](#).

² Demande d’autorisation d’interjeter appel de la « Decision on the Defence’s Request to reject the Prosecution’s Trial Brief *in limine*» (ICC-01/14-01/21-437)., 3 August 2022, [ICC-01/14-01/21-440](#).

³ 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*, 8 August 2022, [ICC-01/14-01/21-445](#).

⁴ Email received at 10:46 on 8 August 2022.

Chamber II (the ‘Pre-Trial Chamber’) declined to confirm this part of the charges.⁵ The Defence submits that the Pre-Trial Chamber found that no link had been demonstrated between Mr Said and the CEDAD and that, as a result, the confirmed charges make no mention of the CEDAD in relation to the alleged crimes, the contextual elements or the mode of responsibility.⁶ It submits that allegations relating to links between Mr Said and the CEDAD would exceed the facts and circumstances described in the charges.⁷

6. The Prosecution submits that this is not an appealable issue as it constitutes a mere disagreement with the Prosecution’s right to adduce evidence regarding the CEDAD in support of confirmed factual allegations such as those underpinning the contextual elements and the common plan in this case.⁸ It argues that the identified issue is not appealable as it challenges the Chamber’s discretion to admit and freely assess evidence and has, in any event, already been resolved by the Appeals Chamber.⁹

2. *Second Issue*

7. The Defence submits that the Chamber erred in law by failing to provide reasoning for its conclusion that the decision on the confirmation of charges allows the Prosecution to reintroduce allegations relating to the CEDAD in the context of the contextual elements of crimes against humanity despite the fact that the Pre-Trial Chamber had explicitly excluded all mention of the CEDAD in the operative part of the Confirmation Decision.¹⁰

8. In the Prosecution’s submission, the Defence either misreads or merely disagrees with the Chamber’s decision, which clearly states the basis for its conclusion.¹¹

3. *Third Issue*

9. The Defence argues that the Chamber erred in law and in fact in finding that the Prosecution did not have to explain in its trial brief how it intends to use every item of

⁵ [Request](#), paras 11-16.

⁶ [Request](#), para. 14.

⁷ [Request](#), para. 15.

⁸ [Response](#), para. 6.

⁹ [Response](#), paras 7-8.

¹⁰ [Request](#), paras 17-23.

¹¹ [Response](#), paras 10-11.

evidence included in its List of Evidence at trial.¹² The Defence submits that the Impugned Decision did not address the question it raised, which was whether it had been informed in detail and sufficiently in advance of how the Prosecution intends to use its evidence such that it was in a position to prepare before the start of the trial and that it erred in law in basing its decision on article 74 of the Statute.¹³ The Defence further argues that the Chamber erred in fact in finding that the lack of information in the trial brief regarding how the Prosecution intends to use its evidence could be offset by the rule 68 requests and bar table motions as these filings provide only generic and vague guidance as to the usefulness of the evidence.¹⁴

10. The Prosecution contends that the Defence misrepresents the record, or merely disagrees with the Chamber's conclusions that: (i) the trial brief should be read in conjunction with relevant evidentiary motions; and (ii) these motions provide sufficient information at this stage regarding how the Prosecution intends to present its case.¹⁵

C. Applicable Law

11. The Chamber recalls previous jurisprudence regarding the application of article 82(1)(d) of the Statute.¹⁶ Thus, in considering the Request, the Chamber must have regard to whether: (i) the matter is an 'appealable issue'; (ii) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome

¹² [Request](#), paras 24-31.

¹³ [Request](#), paras 25-26.

¹⁴ [Request](#), paras 30-31.

¹⁵ [Response](#), para. 12.

¹⁶ Decision on Defence Request for Reconsideration or Leave to Appeal the 'Directions on the Conduct of Proceedings' (ICC-01/14-01/21-251), [ICC-01/14-01/21-275](#), paras 9-11; Decision on Defence Request for Leave to Appeal the 'Decision Setting the Commencement Date of the Trial and Related Deadlines' (ICC-01/14-01/21-243), 15 March 2022, [ICC-01/14-01/21-258](#), paras 11-15; *See also* Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Demande d'autorisation d'interjeter appel de la 'Decision on the request for suspension of the time limit to respond to the Prosecutor's Trial Brief submitted by the Defence for Mr Gbagbo' (ICC-02-11-01/15-1141), 13 April 2018, [ICC-02/11-01/15-1150](#), para. 8; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Defence request for leave to appeal the decision appointing experts on reparations, 29 June 2017, [ICC-01/05-01/08-3536](#) (the '*Bemba Gombo* Decision'), paras 4-7; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, [ICC-02/04-01/15-1331](#) (the '*Ongwen* Decision'), para. 8.

of the trial; and (iii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁷

12. Regarding the first criterion, the Appeals Chamber has held:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.¹⁸

13. The three criteria under article 82(1)(d) of the Statute are cumulative.¹⁹ Therefore, failure to fulfil one or more of the criteria will result in dismissal of the Request.²⁰

D. Analysis

14. For the reasons set out below, the Chamber is not persuaded that the issues identified in the Request satisfy the requirements of article 82(1)(d) of the Statute.

15. Regarding the first issue as to whether allegations pertaining to events at the CEDAD should be struck out because they exceed the facts and circumstances described in the charges, the Chamber notes that most of the evidence that the Prosecution intends to lead on this point is also of relevance to other aspects of the case as it includes other information regarding, for example, events in Boy Rabé or the OCRB and the organisation and activities of the Seleka. As most of this evidence will be heard in any event, the Chamber is of the view that the fair and expeditious conduct of proceedings would not be significantly affected if the Appeals Chamber were to decide the matter differently. In addition, the Chamber considers that it is impossible to determine at this point that the outcome of the trial could be significantly affected by these allegations being maintained. As such, the Chamber considers that it would not

¹⁷ [Bemba Gombo Decision](#), para. 4; [Onqwen Decision](#), para. 8.

¹⁸ *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para. 9.

¹⁹ [Bemba Gombo Decision](#), para. 5; [Onqwen Decision](#), para. 8.

²⁰ [Bemba Gombo Decision](#), para. 5; [Onqwen Decision](#), para. 8.

materially advance proceedings for this matter to be resolved in an interlocutory appeal at this stage.

16. Regarding the second issue as to the alleged lack of reasoning in the Impugned Decision, the Chamber considers that the Request fails to engage with the full reasoning set out therein, instead referring to one of the considerations alone. As such, the Chamber considers that the issue identified by the Defence isolates a point of law or of fact without engaging with the overall reasoning, misrepresents the Impugned Decision and does not constitute an appealable issue.

17. Regarding the third issue, the Chamber considers that the alleged error in the legal basis for the decision does not constitute an appealable issue as any error in this regard would not have impacted on the outcome of the Impugned Decision. The reference to article 74 of the Statute in the Impugned Decision was only a part of the Chamber's reasoning, which was also based on its determination that sufficient information has been provided at this stage to allow the Chamber and the Defence to understand how the Prosecution intends to present its case at trial.²¹ Regarding the alleged factual error in respect of the latter determination, the Chamber notes that the Defence raises again the same arguments that it presented to the Chamber in the litigation that led to the Impugned Decision. As such, the Chamber considers that the issue identified constitutes a mere disagreement with its determination and it finds that the resolution of this matter is not essential for the determination of matters arising in the judicial cause under examination.

18. As the three issues identified for appeal do not fulfil one or more of the criteria under article 82(1)(d) of the Statute, the Request must be rejected.

II. REASONS FOR DECISION ICC-01/14-01/21-425

A. Introduction

19. On 21 July 2022, the Chamber rejected the Defence's request for leave to appeal the decision refusing an extension of time for the Defence to file motions requiring

²¹ [Impugned Decision](#), para. 23.

resolution prior to the commencement of trial pursuant to rule 134 of the Rules (hereinafter: ‘Rule 134 Motions’) and to submit its trial brief, by issuing a decision with reasons to follow (the ‘Decision’).²² The Chamber refers to the Decision for the outline of the procedural history leading to its issuance.²³ The reasons for the Decision are set out below.

B. Submissions

20. The Defence requested leave to appeal the following issues: (i) the Chamber erred in law and in fact in failing to explain how it would have taken into account, when evaluating the feasibility of deadlines that were initially set in a particular context, how the Defence’s workload might evolve, particularly in light of how the Prosecution implemented the Chamber’s instructions;²⁴ (ii) the Chamber erred in fact by misrepresenting the position of the Defence (in referencing submissions to the effect that it was not in a position to properly prepare its case until after receipt of the Prosecution’s Trial Brief) which meant that it failed to take into account the specificity of the Defence argument in the present case, which is that much supplementary preparation begins after receipt of this document;²⁵ and (iii) the Chamber erred in fact in finding that the Defence had all the elements that would allow it to prepare in a continuous manner and in full knowledge of the case from the beginning of the trial preparation phase, although the case file shows that the Prosecution’s case changed between 28 January and 13 June 2022 and disclosure of information by the Prosecution is continuously accumulating.²⁶

C. Analysis

21. At the outset, the Chamber underlines that the scope of the decision impugned in the Defence Submissions was whether the deadlines for filing the Defence trial brief

²² Decision on the Defence’s Request for Leave to Appeal the ‘Decision on the Defence’s Request for an Extension of Time to File Motions Pursuant to Rule 134 of the Rules and Submit its Trial Brief’, 21 July 2022, [ICC-01/14-01/21-425](#).

²³ [Decision](#), paras 1-4.

²⁴ Demande d’autorisation d’interjeter appel de la « Decision on the Defence’s Request for an Extension of Time to File Motions Pursuant to Rule 134 of the Rules and Submit its Trial Brief » (ICC-01/14-01/21-411), 21 July 2022, ICC-01/14-01/21-419-Conf; a public redacted version was filed on the same day ([ICC-01/14-01/21-419-Red](#)) (the ‘Defence Submissions’), p. 4.

²⁵ [Defence Submissions](#), p. 8.

²⁶ [Defence Submissions](#), p. 9.

and Rule 134 Motions should be extended.²⁷ The Chamber observes that these filings were not required and indeed the Defence initially objected to filing a trial brief and was merely invited to do so.²⁸

22. Against this background, the Chamber was not persuaded that the issues identified in the Defence Submissions constituted appealable issues.

23. Regarding the first issue, the Chamber notes that the Defence raised the same arguments that it presented in the litigation leading to the impugned decision highlighting the various tasks it must accomplish in the lead-up to trial and the effect that the late filing of a number of Prosecution requests had on its preparation. It argued that the Chamber failed to provide reasons as to why this context would not impact on the deadlines set for the Defence trial brief and Rule 134 Motions.

24. The Chamber considers that this argument misinterprets the impugned decision and the role of the Chamber. The impugned decision provided the reasons for the Chamber's view that good cause had not been made out for an extension of the deadlines in respect of the two documents. It was not the role of the Chamber to explain in this context how the various tasks of the Defence could have been organised or prioritised in order to meet particular filing deadlines in the context described. As such, the Chamber considers that the first issue is not an appealable issue.

25. Regarding the second and third issues, the Chamber notes that the Defence appears to allege a wider error in terms of being deprived of the opportunity to fully exercise its right to have the time and facilities required to prepare in violation of article 67(1) of the Statute more generally rather than any error affecting the outcome of the impugned decision.²⁹ The Chamber notes that the impugned decision maintained the deadline for two documents that are preliminary in nature, do not require complete defence preparation prior to their filing and do not represent the final opportunity for

²⁷ Decision on the Defence's Request for an Extension of Time to File Motions Pursuant to Rule 134 of the Rules and Submit its Trial Brief, 15 July 2022, [ICC-01/14-01/21-411](#), para. 16.

²⁸ Decision Setting the Commencement Date of the Trial and Related Deadlines, 21 February 2022, ICC-01/14-01/21-243, para. 27; Observations de la Défense de Monsieur Saïd en application de l' « Order Scheduling the First Status Conference » (ICC-01/14-01/21-226), ICC-01/14-01/21-231-Conf-Exp; a public redacted version was filed on the same day ([ICC-01/14-01/21-231-Red2](#)), para. 70.

²⁹ [Defence Submissions](#), paras 32-33, 35.

the Defence to make its case. The Chamber's position as set out in the impugned decision was that the Defence had sufficient time and information to be able to meet the filing deadlines for the Rule 134 Motions and the trial brief. In arguing generally that the Defence has not been afforded sufficient time and information to be able to prepare in advance of the trial, the issues identified by the Defence do not engage with the impugned decision. Therefore, the Chamber considers that the second and third issues are wider in scope than and do not arise from the impugned decision. As such, the Chamber finds that the second and third issues are not appealable issues.

26. As the three issues identified for appeal do not fulfil the criteria under article 82(1)(d) of the Statute, the Chamber rejected the request for leave to appeal the decision refusing an extension of time for the Defence to file Rule 134 Motions and to submit its trial brief.³⁰

³⁰ [Decision](#), p. 4.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the request for leave to appeal the decision not to dismiss the Prosecution's trial brief *in limine*, and

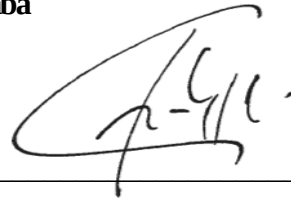
ADOPTS the reasons set out above for Decision ICC-01/14-01/21-425.



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