

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **22 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 *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Confidential

**Prosecution's response to the Defence request to reject the Prosecution's Trial Brief
in limine (ICC-01/14-01/21-414-Conf)**

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 Prosecution opposes the Defence's "Demande de rejet *in limine* du « Prosecution's Trial Brief » (ICC-01/14-01/21-359-Conf)" ("Request").¹ Although the Prosecution's Trial Brief does indeed exceed the page limit under regulation 38(1) of the Regulations of the Court by 5 pages, rejecting the Prosecution's Trial Brief would not serve the interests of justice.² In addition, the removal of the Prosecution's evidence and arguments in relation to the CEDAD incidents from its Trial Brief is also unwarranted as these are within the facts and circumstances confirmed by the Pre-Trial Chamber II in its Decision on the confirmation of charges against Mr. SAID ("Confirmation Decision") and including such evidence is also consistent with the Court's jurisprudence. Finally, the Defence's request for the Prosecution to submit a "useful" Trial Brief should be rejected as it is neither required nor necessary.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court ("Regulations"), this response is filed as confidential because it is made in response to the Defence's filing of the same classification. In addition, it refers to the Trial Brief, which is also still confidential. The Prosecution will submit a public redacted version of this filing as soon as practical.

¹ ICC-01/14-01/21-414-Conf ("Request").

² See regulation 29(1).

III. SUBMISSIONS

A. The excess of the page limit in the Prosecution's Trial Brief is minimal, it was made in good faith, and causes no prejudice to the Defence

3. The Prosecution submits that the Defence's request to reject the Prosecution's Trial Brief in its entirety *in limine*³ should be dismissed as such conclusion would not serve the interests of justice.⁴ While the Prosecution's Trial Brief does indeed exceed the page limit under regulation 38(1) by 5 pages, and the Prosecution should have requested an extension of the page limit pursuant to regulation 38(1) before the filing of its Trial Brief on 13 June 2022,⁵ this derogation was minimal, namely less than 5% of the allotted page limit of 120 pages. In addition, it was due to a good faith oversight. When editing the Trial Brief before filing, the Prosecution regrettably oversaw the requirement under regulation 38(1). This was due to competing obligations at the time, including completing its list of evidence,⁶ list of witnesses, proposed order of appearance and summaries of anticipated testimony,⁷ request for in-court protective measures,⁸ and several rule 68 applications.⁹ The Prosecution assures the Chamber that it will be more attentive to page limits in future filings.

4. In contrast to regulation 35, there is no express provision for retroactive extension of the page limit. However, had the Prosecution requested an extension of pages, it would have been able to explain that there are exceptional circumstances within the meaning of regulation 37(2) to justify the extension of five pages. The Trial Brief covers the evidence and legal propositions related to seven counts of crimes against humanity and war crimes, some of which are complex crimes, which require

³ Request, para. 15.

⁴ See regulation 29(1) of the Regulations.

⁵ ICC-01/14-01/21-359-Conf ("Prosecution's Trial Brief").

⁶ ICC-01/14-01/21-358.

⁷ ICC-01/14-01/21-354.

⁸ ICC-01/14-01/21-356-Conf.

⁹ See e.g., ICC-01/14-01/21-357-Conf; ICC-01/14-01/21-348-Conf.

in-depth legal analysis and setting out relevant jurisprudence. Further, the contextual elements of both crimes against humanity and war crimes needed to be set out in an understandable and exhaustive manner, especially considering that the Defence has indicated that it will challenge that these elements are met¹⁰ and has not agreed to any proposed facts of a substantive nature thus far.¹¹

5. The Prosecution's Trial Brief sets out in a concise but detailed manner the main evidence and legal propositions of the Prosecution. The Trial Brief references over 80 witnesses and over 500 pieces of evidence in total; and it shows how this evidence relates to the material facts as confirmed by the Pre-Trial Chamber. All sections of the Trial Brief include substantively relevant information, while being tightly drafted to enable readability and focus on what matters most to the Prosecution's case. Therefore, the unfortunate derogation from the page limit under regulation 38(1) should not stand in the way of the Chamber accepting the entirety of the document submitted.¹²

6. The Defence's assertion that the Prosecution made substantial arguments in its footnotes¹³ is unsupported. In line with regulation 36(3), all footnotes in the Prosecution's Trial Brief are used to support the substantial arguments made in the main body of the text. Indeed, the examples referred to by the Defence in the Request – i.e., footnotes 815, 817, 835, 865 and 982 – all cite sources to support the Prosecution's propositions and arguments made in the body of the text. While the Prosecution at times added short summaries of cited sources in footnotes for the Chamber's smoother reading, these do not amount to substantial arguments.

¹⁰ See e.g., ICC-01/14-01/21-T-005-Red2-ENG, p. 2, ln. 8 – p. 18, ln. 6; p. 22, ln. 17 – p. 27, ln. 15; p. 28, ln. 10 – p. 46, ln. 5.

¹¹ ICC-01/14-01/21-387.

¹² See e.g., ICC-01/04-168, para. 4.

¹³ Request, paras. 10-12.

7. Finally, accepting the current version of the Trial Brief with its additional five pages does not cause any prejudice to the Accused. As held by the Appeals Chamber, the Trial Brief is an auxiliary document, whose purpose it is to provide additional notice to the Accused to ensure that his right under article 67(1)(a) to be informed in detail of the nature, cause and content of the charges is fully protected.¹⁴ Thus, providing the Defence with an additional five pages of details regarding the Prosecutors case against Mr Said, as well as how the Prosecution intends to use the underlying evidence to establish the relevant material facts does not cause any prejudice to the Accused. In contrast, the requested rejection of the Prosecution's Trial Brief in its entirety would prejudice the Accused,¹⁵ as would any requirement for the Prosecution to file a substantially shortened version of its Trial Brief.

B. The Prosecution may rely on evidence concerning the CEDAD to prove its case as described in its Trial Brief

8. The Chamber should reject the Defence's request to order the removal of information relevant to the CEDAD from the Prosecution's Trial Brief because, in its view, it exceeded the facts and circumstances confirmed by the Pre-Trial Chamber.¹⁶

9. In its Trial Brief, the Prosecution relied on evidence regarding the CEDAD in a manner consistent with the Pre-Trial Chamber's findings in its Confirmation Decision. Specifically, the Prosecution referred to evidence about the CEDAD in its Trial Brief for the limited purposes of: (i) proving chapeau elements of article 7 of the Rome Statute;¹⁷ (ii) describing the Seleka individuals mentioned in the Trial Brief, in relation to the OCRB incidents;¹⁸ and (iii) establishing the common plan in relation to the

¹⁴ ICC-01/04-01/06-3121-Red, para. 124; ICC-01/04-02/06-2666-Red, para. 325. *See also* ICC-02/11-01/15-1141, para. 9.

¹⁵ *See supra*, para. 6. *Contra*, Request, paras. 22, 28.

¹⁶ *See* Request, para. 21.

¹⁷ *See e.g.*, Prosecution's Trial Brief, paras. 23, 72-75, 77, 79, 91, 97, 101-103, 107.

¹⁸ *See e.g.*, Prosecution's Trial Brief, paras. 119, 122, 124.

crimes at the OCRB by referring to, *inter alia*, the subsequent same pattern of conduct at the CEDAD by the same alleged co-perpetrators.¹⁹ At no point has the Prosecution suggested to reintroduce unconfirmed charges related to the CEDAD incidents against Mr SAID.

10. The material facts and legal propositions for which evidence in relation to the CEDAD is included in the Trial Brief is consistent with the Confirmation Decision and the Court's jurisprudence. 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 or the fact that several Seleka members close to Mr SAID were involved in these crimes.²⁰ 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 form part of the widespread and systematic attack against the civilian population in Bangui perceived to be BOZIZE supporters at the relevant time.²¹ Several Trial Chambers in the past have confirmed that the use of evidence relating to unconfirmed charges for purposes other than reintroducing the same charges is permissible.²²

C. The Prosecution is not required to cite every piece of evidence in its Trial Brief

11. The Chamber should further reject the Defence's request that the Chamber orders the Prosecution to resubmit a "useful" Trial Brief which effectively cites all submitted evidence.²³ The Trial Brief assists the Chamber, Parties and Participants to navigate the Prosecution's case and what it considers its most important evidence. But it has to be read together with the other auxiliary documents and requests that equally

¹⁹ See *e.g.*, Prosecution's Trial Brief, para. 329.

²⁰ See *e.g.*, Confirmation Decision, para. 127.

²¹ Confirmation Decision (Operative part), para. 18.

²² See *e.g.*, ICC-02/04-01/15-T-85-Red2-ENG, pp. 7-8; ICC-02/04-01/15-1210, para. 10; ICC-01/04-02/06-968, paras. 13-16.

²³ See Request, paras. 22-32, p. 10.

serve the purpose of providing the Defence notice within the terms of its right under article 67(1)(a), including the List of Evidence,²⁴ that includes all items of evidence relied on by the Prosecution in this case.

12. Moreover, the Prosecution's bar table motions provide additional detailed information for the Defence to comprehend the relevance of each piece of non-testimonial evidence as understood by the Prosecution. 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 and this was also not instructed by the Chamber.²⁵ That said, documents from all collections which were included in the bar table motions were also cited in the brief. Further 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 on 12 July 2022. This latter auxiliary document complements the Trial Brief and the List of Evidence.

IV. RELIEF SOUGHT

13. For the above reasons, the Prosecution requests the Chamber to reject the Request.



Karim A. A. Khan QC, Prosecutor

Dated this 22nd day of July 2022
At The Hague, The Netherlands

²⁴ See ICC-01/04-01/06-3121-Red, para. 124; ICC-01/04-02/06-2666-Red, para. 325. *See also* ICC-02/11-01/15-1141, para. 9.

²⁵ ICC-01/14-01/21-24, para. 23.