

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 5 March 2025

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba, Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godinez
Judge Keebong Paek , Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public

Public redacted version of “Victims' Observations regarding the Defence's Notification of its List of Witnesses”, No. ICC-01/14-01/21-929-Conf, dated 28 February 2025

Source: Office of Public Counsel for Victims

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

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☒ Counsel for the Defence
D33

☒ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☒ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the Defence

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☐ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and
Reparations Section

☐ Other

I. INTRODUCTION

1. Counsel representing the collective interests of applicants in the proceedings and participating victims (the “Common Legal Representative”)¹ hereby submits her observations regarding the Defence’s Notification of its List of Witnesses.²

II. PROCEDURAL BACKGROUND

2. On 8 October 2024, Trial Chamber VI (the “Chamber”) issued the Third Directions on the Conduct of Proceedings,³ instructing the Defence to submit its final lists of witnesses and of evidence by 21 February 2025.⁴

3. On 12 December 2024, the Defence informed the Chamber of its intention to present a case.⁵

4. On 17 January 2025, the Defence submitted a preliminary list of witnesses.⁶

¹ See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG-CT and No. ICC-01/14-01/21-T-007-Red-ENG](#), p. 47, lines 12-24; the “Decision on matters relating to the participation of victims during the trial” (Trial Chamber VI), [No. ICC-01/14-01/21-278](#), 13 April 2022, para. 29; the “Decision authorising 20 victims to participate in the proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-331](#), 27 May 2022; the “Second Decision Authorising Victims to Participate in the Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-640-Conf](#) and [No. ICC-01/14-01/21-640-Red](#), 8 November 2023; the “Third Decision Authorising Victims to Participate in the Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-695-Conf](#) and [No. ICC-01/14-01/21-695-Red](#), 14 February 2024; the “Fourth Decision Authorising Victims to Participate in Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-812](#), 22 July 2024; and the “Fifth Decision Authorising Victims to Participate in the Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-906](#), 13 December 2024.

² See the “*Notification de la liste de témoins et de la liste des éléments de preuve de la Défense conformément à la ‘Third Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-873) rendue par la Chambre de première instance VI le 8 octobre 2024.*”, with Confidential Annexes 1, 2, and 3, [No. ICC-01/14-01/21-921](#), 21 February 2025 (the “Defence’s Notification of its List of Witnesses”).

³ See the “Third Directions on the Conduct of Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-873](#), 8 October 2024.

⁴ *Idem*, paras. 14-15.

⁵ See the “*Notification de la Défense conformément au paragraphe 12 de la ‘Third Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-873) rendue par la Chambre de première instance VI le 8 octobre 2024.*”, [No. ICC-01/14-01/21-904](#), 12 December 2024.

⁶ See the “*Version confidentielle expurgée de la ‘Notification de la Défense conformément à la ‘Third Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-873) rendue par la Chambre de première instance VI le 8 octobre 2024.’*”, [No. ICC-01/14-01/21-908-Conf-Red](#) and [No. ICC-01/14-01/21-908-Red](#), 17 January 2025.

5. On 30 January, in response to an order of the Chamber,⁷ the Defence submitted observations on a number of issues relating to its preliminary list of witnesses.⁸

6. On 21 February 2025, the Chamber partially granted a Defence request for an extension of time,⁹ ordering the latter to file a list of witnesses and a list of evidence on 21 February 2025, whilst authorising it to update said lists in respect of outstanding matters by no later than 21 March 2025.¹⁰

7. On the same day, the Defence filed its list of evidence and its list of witnesses,¹¹ which lists the Defence Co-Counsel (the “Defence Counsel”) as a *viva voce* witness.¹²

8. On 25 February, the Chamber invited the parties and participants to submit any observations regarding Defence Counsel testifying in the present proceedings by no later than 28 February 2025.¹³

⁷ See the “Order in relation to the Defence Notification of its Preliminary List of Witnesses” (Trial Chamber VI), [No. ICC-01/14-01/21-909](#), 24 January 2025.

⁸ See the “Version confidentielle expurgée des ‘Observations de la Défense conformément à l’ordonnance rendue par la Chambre le 24 janvier 2025 (ICC-01/14-01/21-909)’, No. ICC-01/14-01/21-912-Conf-Exp”, [No. ICC-01/14-01/21-912-Conf-Red](#) and [No. ICC-01/14-01/21-912-Red](#), 3 February 2025.

⁹ See the “Version confidentielle expurgée de la ‘Demande d’extension de délais ciblée pour terminer des actes d’enquêtes en cours conformément à la Norme 35 du Règlement de la Cour’ ICC-01/14-01/21-917-Conf-Exp”, [No. ICC-01/14-01/21-917-Conf-Red](#) and [No. ICC-01/14-01/21-917-Red](#), 18 February 2025. See also the submissions by the Prosecution and the Common Legal Representative in this regard: the “Réponse de l’Accusation à la ‘Demande d’extension de délais ciblée pour terminer des actes d’enquêtes en cours conformément à la Norme 35 du Règlement de la Cour’”, [No. ICC-01/14-01/21-918-Conf](#), 20 February 2025; and the “Victims’ Response to the ‘Version confidentielle expurgée de la ‘Demande d’extension de délais ciblée pour terminer des actes d’enquêtes en cours conformément à la Norme 35 du Règlement de la Cour’ ICC-01/14-01/21-917-Conf-Exp’ (No. ICC-01/14-01/21-917-Conf-Red)”, [No. ICC-01/14-01/21-919-Conf](#) and [No. ICC-01/14-01/21-919-Red](#), 20 February 2025.

¹⁰ See the “Decision on the Defence’s Request for an Extension of Time to File its Final List of Witnesses, List of Evidence and Complete Disclosure” (Trial Chamber VI), [No. ICC-01/14-01/21-920-Red](#), 21 February 2025.

¹¹ See the Defence’s Notification of its List of Witnesses, *supra* note 2.

¹² See Annex 2 to the Defence’s Notification of its List of Witnesses, [No. ICC-01/14-01/21-921-Conf-Anx2](#), 21 February 2025.

¹³ See the email from the Chamber to the parties and participants on 25 February 2025 at 12:37, entitled “Regarding the Defence’s Notification of its List of Witnesses”.

III. CLASSIFICATION

9. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, the present filing is classified as “confidential”, since it refers to documents filed with the same classification. A public redacted version will be filed in due course.

IV. SUBMISSIONS

10. The Common Legal Representative opposes the possibility for the Defence Counsel to testify for the following reasons.

11. First, counsel are not allowed to appear as a witness before the Court in proceedings in which they represent a client, unless if their testimony relates to: (1) an uncontested issue; or (2) the nature and value of legal services rendered in the case. Specifically, article 12(3) of the Code of Professional Conduct for Counsel (the “Code of Conduct for Counsel”) articulates an impediment to representation, prohibiting counsel from acting *“in proceedings in which there is a substantial probability that Counsel or an associate of Counsel will be called to appear as a witness”*.¹⁴ Article 12(4) of the Code of Conduct for Counsel makes further reference to article 16 therein, which requires counsel to *“exercise all care to ensure that no conflict of interest arises”*.¹⁵

12. The Common Legal Representative notes that the Code of Conduct for Counsel is *“part of the Court’s applicable law under article 21(1)(a) of the Statute”*,¹⁶ and may serve as an *“appropriate guide to fairness at trial”*, particularly in light of its purposes of ensuring that a person is suitable to act as counsel and of preventing conflicts of interest.¹⁷

13. In the present case, the Defence intends to call Defence Counsel to testify about a field mission conducted in May 2024 in Bangui, and, in particular, about the

¹⁴ See article 12(3) of the [Code of Professional Conduct for Counsel](#).

¹⁵ *Idem*, article 16(1).

¹⁶ See the “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence’” (Appeals Chamber), [No. ICC-01/09-02/11-365 OA3](#), 10 November 2011, para. 48.

¹⁷ *Idem*, para. 51.

methodology followed and the information gathered during said mission.¹⁸ In other words, Defence Counsel's expected testimony does not relate to any of the exceptions provided for under article 12(3) of the Code of Conduct for Counsel,¹⁹ and is simply not permissible under the Court's legal framework.

14. The Common Legal Representative underlines that nearly identical provisions exist in the applicable law of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"),²⁰ the International Criminal Tribunal for Rwanda,²¹ the Special Court for Sierra Leone,²² and the International Residual Mechanism for Criminal Tribunals,²³ emphasising the incompatibility of serving as both counsel and witness in the same proceedings. For instance, before the ICTY, the relevant provision led to the withdrawal of Mladen Markač's counsel in the *Gotovina et al.* case due to the *likelihood* of counsel being called as a witness.²⁴

15. Second, even if it were allowed under the Court's legal framework, serving as both counsel and witness in the same proceedings raises significant questions of objectivity and credibility, greatly limiting the probative value of counsel's testimony. In this regard, the Common Legal Representative recalls Defence Counsel's previous attempt to testify from the bar on the same topic as outlined in the summary of his anticipated testimony,²⁵ and the Chamber's decision to disregard the information

¹⁸ See Annex 3 to the Defence's Notification of its List of Witnesses, [No. ICC-01/14-01/21-921-Conf-Anx3](#), 21 February 2025, p. 11.

¹⁹ See *supra*, para. 11.

²⁰ See article 26 of the [Code of Professional Conduct for Counsel Appearing before the International Tribunal](#) (ICTY).

²¹ See article 16 of the [Code of Professional Conduct for Defence Counsel](#) (ICTR).

²² See article 12 of the [Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone](#).

²³ See article 21 of the [Code of Professional Conduct for Defence Counsel Appearing before the Mechanism and other Defence Team Members](#).

²⁴ See ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.1, "[Decision on Miroslav Šeparović's Interlocutory Appeal against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct](#)" (Appeals Chamber), 4 May 2007, paras. 17-18.

²⁵ See the transcript of the hearing held on 10 October 2024, [No. ICC-01/14-01/21-T-121-ENG ET WT](#), p. 48, lines 1-6; and Annex 3 to the Defence's Notification of its List of Witnesses, *supra* note 18, p. 11.

provided.²⁶ Moreover, the Defence itself acknowledged that [REDACTED],²⁷ not to mention the impact on the credibility of his testimony if Defence Counsel himself were to appear as a witness.

16. Finally, Defence Counsel is not a professional investigator, nor is his role in the proceedings compatible with the role of an investigator. Investigators of the Court are, like counsel, bound by their own specific Code of Conduct.²⁸ In addition to their obligation to comply with the Court's legal framework,²⁹ which includes, for investigators of the Prosecution, the obligation to disclose exculpatory evidence to the defence,³⁰ investigators shall, *inter alia*: (i) "*always pay particular attention to the integrity of evidence*";³¹ and (ii) "*not deceive or knowingly mislead the Court*", which requires "[taking] all necessary steps to correct any error or inaccuracy made by him or her as soon as possible after becoming aware of the error or inaccuracy".³²

17. The Code of Conduct for Investigators does not contain a prohibition for investigators to appear as witnesses, [REDACTED]. In any case, investigators' professional obligations referred to *supra*³³ are highly conducive to credible and reliable testimony, particularly regarding the methodology of their investigations. Defence Counsel, on the other hand, is not bound by the Code of Conduct for Investigators, but by the Code of Conduct for Counsel, which requires him to put his client's interests above any other interests.³⁴

18. For all of these reasons, the Common Legal Representative opposes the possibility of the Defence Counsel testifying, even with respect to the Defence's

²⁶ See the transcript of the hearing held on 10 October 2024, *supra* note 25, p. 48, lines 12-14.

²⁷ See the transcript of the hearing held on 20 September 2024, [No. ICC-01/14-01/21-T-114-CONF-ENG CT](#), p. 35, lines 13-14.

²⁸ See the [Code of Conduct for Investigators](#).

²⁹ *Idem*, article 4(2).

³⁰ See article 67(2) of the [Rome Statute](#).

³¹ See article 8(4) of the [Code of Conduct for Investigators](#).

³² *Idem*, article 8(5).

³³ See *supra*, para. 16.

³⁴ See article 16(1) of the [Code of Professional Conduct for Counsel](#).

methodology and the information gathered during a field mission in Bangui.³⁵ In any event, such a testimony would not it be in the interest of judicial economy, given its very limited probative value, if any.³⁶

Respectfully submitted,



Sarah Pellet

Dated this 5th day of March 2025

At The Hague, The Netherlands

³⁵ See *supra*, para. 13.

³⁶ See *supra*, para. 15.