

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **29 April 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
with Confidential Annex A**

**Prosecution's Request to vary the time limit for applications to introduce the prior
recorded testimony of 20 witnesses pursuant to Rule 68**

Source: Office of the Prosecutor

Document 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 QC
Mr Mame Mandiaye Niang
Mr Eric MacDonald

Counsel for Defence

Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
for Victims**

Ms Sarah Pellet
Mr Tars Van Litsenborgh

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation
and Reparations Section**

Other

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests an extension of time pursuant to regulation 35 of the Regulations of the Court (“Regulations”) regarding the submission of applications under rule 68 of the Rules of Procedure and Evidence (“Rules”) related to 20 witnesses. More specifically, the Prosecution requests an extension until 13 June 2022 to file rule 68 applications for 10 witnesses, and a further extension until 27 June 2022 to file applications for its last remaining 10 witnesses. The Prosecution submits that the requested extension is justified and supported by good cause for the reasons described below. Further, granting the Request would not cause undue prejudice to the Accused Mahamat Said Abdel Kani (“Mr SAID”).

II. CONFIDENTIALITY

2. This document is filed as Confidential pursuant to regulation 23*bis*(1) of the Regulations of the Court, as it contains information relating to Prosecution witnesses and other documents containing confidential information. A public redacted version will be filed as soon as practical.

III. SUBMISSIONS

3. The Trial Chamber set the deadlines for the submission of Rule 68 applications to 23 May 2022 and 13 June 2022 respectively.¹ On 29 March 2022, the Trial Chamber clarified that “all Rule 68 applications that can already be made should be submitted as soon as possible on a rolling basis, with a deadline of 23 May 2022. After that, the Chamber will only accept additional rule 68 applications if the Prosecution can show that it was not possible to make them by the 23 May 2022 deadline due to ongoing investigations or other exceptional circumstances. After 13 June 2022 no new rule 68 applications will be accepted”.²

¹ See Decision Setting the Commencement Date of the Trial and Related Deadlines, ICC-01/14-01/21-243, hereinafter “Scheduling Order” and the Directions on the Conduct of Proceedings, ICC-01/14-01/21-251, hereinafter “Directions”.

² E-Mail of the Trial Chamber dated 29 March 2022, 15:54 hours.

A. The requested extension is justified

4. Regulation 35(2) of the Regulations stipulates that the Chamber can extend the time limits “if good cause is shown”. The Appeals Chamber has held, that “[a] cause is good if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Chamber. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.”³

5. The Prosecution has started to submit on a rolling basis rule 68 applications, namely the applications for 6 witnesses it seeks to introduce pursuant to rule 68(2)(c), as well as an application to introduce the evidence of 11 witnesses pursuant to rule 68(2)(b). In addition, the Prosecution has so far submitted three applications pursuant to article 64(9) of the Statute (“Bar Table Motions”). The Prosecution is set to continue to submit on a rolling basis, the vast majority of its rule 68 applications prior to 23 May 2022.⁴

6. In its submissions leading to the first Status Conference, the Prosecution had foreshadowed its intention to rely extensively on prior recorded testimony introduced through rule 68 for the presentation of its case. At that time, the Chamber may not have had the precise contours of the Prosecution’s approach to streamlining the presentation of its case. However, the Prosecution has since identified a preliminary list of witnesses it intends to call to testify and introduce through rule 68(2)(b), rule 68(2)(c) and rule 68(3). Confidential ANNEX A to this application, provides the identity of the witnesses and their respective witness number and (ii) lists the ones to be called *viva voce* and the 68 witnesses for whom rule 68(2)(b), (c) and 68(3)

³ ICC-01/04-01/06-834OA, para. 7.

⁴ Within this latter group the only possible exception may be in relation to 3 witnesses who are set to testify soon in the *Yekatom & Ngaissona* trial and whose list of prior recorded testimony will include those trial transcripts, namely P-0975, P-1339, and P-2269, *see also* para. 11.

applications have to be submitted by 23 May 2022, according to the current deadline. Out of these 68 applications, the Prosecution seeks an extension for 20 of them.

7. There remain 28 working days to complete all necessary trial preparation steps.⁵ Beyond the 20 witnesses for which it is seeking an extension, as indicated in Annex A, and the 17 witnesses for which the Prosecution has already filed rule 68 applications, the Prosecution intends to file rule 68 applications for 41 more witnesses. This includes 21 witnesses under rule 68(2)(b) and 20 witnesses under rule 68(3). Considering the number of working days left, the number of staff members of the Prosecution team and competing tasks, the Prosecution will only be able to file rule 68 applications for 21 witnesses by 23 May 2022,⁶ and a further 10 witnesses by 13 June 2022. Thus, applications for 10 witnesses would fall outside of the outer limit of the deadline set in the Scheduling Order.

8. The Scheduling Order also instructs the Prosecution to submit all Bar Table Motions by 23 May 2022. It further orders the Prosecution to file its List of Evidence, Trial Brief, final witness list, witness summaries, and protective measures request for all witnesses by 13 June 2022. Further, the Prosecution is obliged to complete its disclosure review and its investigation in this timeframe as well. The Prosecution submits that it cannot reasonably meet all these obligations given its limited resources.

9. The Office's resource constraints are well known and have recently been under increased pressure.⁷ This significantly impacts on the Office's flexibility in allocating additional resources to teams, even if it concerns temporary additional support during

⁵ See Scheduling Order and deadline of 13 June 2022.

⁶ The Prosecution would prioritise rule 68(2) applications, the result of which is likely to have greater impact on the organisation of the trial proceedings. Thus, the next group of rule 68 applications, *i.e.*, the 30 additional applications the Prosecution considers it feasible to complete prior to 23 May 2022, would include at least 27 witnesses under rule 68(2)(b) and at least 3 witnesses under rule 68(3). The Prosecution would aim to complete the remaining rule 68(2)(b) applications as soon as possible, depending on when P-0975, P-1339, and P-2269 end up testifying in the *Yekatom & Ngaissona* trial.

⁷ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, see <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

the intensive pre-trial preparation stage. Therefore, the trial team for the SAID case has remained lean. The Prosecution submits that in all the circumstances, the requested extension is reasonable.

10. Rule 68 applications require a careful assessment of the underlying statements to be introduced, as well as the associated exhibits and related material. It is also important that a Chamber be provided with a sufficient basis to carry out the item-by-item analysis required of the rule 68 factors which may vary per case and per witness. The time necessary to file meaningful applications in this respect is indispensable. By contrast, generalised applications which may be more achievable in a shorter period risk insufficient substantiation of the relevant factors, which would defeat the underlying purpose of the rule, namely to advance the saving of time and ensuring expeditious conduct of the proceedings. Allowing the Prosecution to frame cogent applications will promote the efficacy of its approach and the expedition of the trial over the longer term.

11. In this respect it is important to note that Witnesses P-0975, P-1339 and P-2269 are scheduled to testify in the *Yekatom & Ngaissona* case in the next few months. This means the Prosecution does not yet have access to the transcripts of their in-court testimony. In order to be able to provide the Chamber and the Defence with a detailed and complete assessment and overview of their evidence and associated materials, the Prosecution would consider it prudent to wait until these transcripts are available and preferably have been disclosed to the Defence.⁸ While the Prosecution could file an initial application for each of these three witnesses by 27 June 2022, such applications will necessarily need to be amended to include the outcome of their testimony before Trial Chamber V, which amounts to prior-recorded statements for the purposes of rule 68. Alternatively, the Chamber may also want to immediately defer the submission of any rule 68 applications for Witnesses P-0975, P-1339 and P-2269 to 20 days after the

⁸ ICC-01/14-01/18-1358 + Conf-AnxA.

completion of their respective testimony. This would have the advantage for the Prosecution to concentrate (and eventually the Defence to respond) on the submission of rule 68 applications for 7 witnesses by 27 June 2022.

B. Absence of any undue prejudice

12. Granting the Request would not cause any undue prejudice. The use of rule 68(2)(b) and (3) is not new at the Court. As has been demonstrated in other cases, reliance on rule 68 at trial is possible and consistent with an accused's fair trial rights. Importantly, this mechanism can effectively reduce court time and expedite the proceedings which is conducive to good trial management. While the Chamber's discretion is broad, it bears noting that the statutory framework establishes no hard or fixed notice period for rule 68 applications. In other cases, Chambers have linked the timing of rule 68(3) applications to a particular amount of time prior to the scheduled appearances of witnesses or allowed the Prosecution to file rule 68 applications even after the start of the trial.⁹ Even if the Chamber was to grant the Prosecution's Request, this would still be the first trial for article 5 crimes where all the Prosecution's Rule 68 applications are submitted not only before the start of the trial, but three months in advance of the start of trial.¹⁰

13. Extending the deadline also would not materially affect the Defence's trial preparations. Annex A already provides a very good overview of the witnesses the Prosecution intends to rely on and call *viva voce* but also the intended rule 68 witnesses, well in advance of the start of the trial. The relevant evidence for all these witnesses have all been disclosed, with the vast majority disclosed prior to Confirmation of Charges hearing. By 27 June 2022, 3 months before the start of the

⁹ See for example ICC-01/14-01/18-1364-Red.

¹⁰ The Prosecution in the *Abd-al-Rahman* case filed their rule 68 applications before the start of trial but was still filing applications up until 2 months before the trial start date. See *Abd-al-Rahman*, ICC-02/05-01/20-579-Red, "Prosecution's fifth application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0096, P-0120 and P-0558", 7 February 2022 (filed a little over two months before the commencement of trial on 5 April 2022).

trial, the Defence will have received all rule 68 applications. The Defence will have had ample opportunity to familiarise itself with the relevant witnesses, their prior statements and evidence.

14. Additionally, the proposed extension will not impede the Defence's right under the statutory framework to fully and meaningfully examine the witnesses introduced pursuant to rule 68(3). The question of the timing of rule 68(3) applications is a distinct issue. As long as the Defence is afforded a reasonable opportunity to respond to a rule 68(3) application in advance of the witness's testimony, there can be no undue prejudicial consequence that arises as a result of the requested extension.

IV. RELIEF SOUGHT

15. For the reasons outlined above, the Prosecution requests that the Chamber extend the deadline imposed for rule 68 requests until 13 June 2022 for 10 witnesses and until 27 June 2022 for a further 10 witnesses. The Prosecution also requests the Chamber to consider the proposal submitted in paragraph 11 related to Witnesses P-0975, P-1339 and P-2269.



Karim A. A. Khan QC, Prosecutor

Dated this 29th day of April 2022
At The Hague, The Netherlands