

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 10 May 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**

**Public Redacted Version of “Victims’ response to the ‘Prosecution’s Second  
Application for Submission of Documents from the Bar Table Pursuant to Article  
64(9)’ (ICC-01/14-01/21-285-Conf)”**

**No. ICC-01/14-01/21-298-Conf, dated 6 May 2022**

**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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**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
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**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. In accordance with regulations 24(2) and 34(b) of the Regulations of the Court, Counsel representing the collective interests of future applicants as well as of applicants in the proceedings (the “Legal Representative”),<sup>1</sup> hereby submits her response in support of the “Prosecution’s Second Application for Submission of Documents from the Bar Table Pursuant to Article 64(9)” (the “Application”).<sup>2</sup>

2. In particular, the Legal Representative agrees with the Prosecution that the 61 items of evidence from the bar table (the “Bar Table Items”), which comprise of evidence related to the targeting of members of the FACA and of certain neighbourhoods in Bangui, like Boy Rabe, and related to the role and conduct of Mahamat Saïd Abdel Kani (“Mr Saïd” or the “Accused”) after the time relevant to the charges, are relevant and appear probative for Trial Chamber VI’s (the “Chamber”) determination of material issues in the present case. This is in accordance with articles 64(9)(a), 69(3) and 69(4) of the Rome Statute (the “Statute”), rule 63(2) of the Rules of Procedure and Evidence (the “Rules”), and the Directions on the Conduct of Proceedings (the “Directions”).<sup>3</sup> Indeed, said submission will ensure the expeditiousness of the proceedings while fully respecting the rights of the Accused, pursuant to articles 64(2) and 69(4) of the Statute.

3. Moreover, the Legal Representative submits that said evidence will further assist the Chamber in assessing the nature, complexity and extent of the victimisation. In addition, the admission of the Bar Table Items may also be valuable to the determination of the appropriate form and amount of reparations to be ultimately awarded to the victims concerned, should the Accused be convicted.

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<sup>1</sup> See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG CT](#), p. 47, lines 1-13.

<sup>2</sup> See the “Prosecution’s Second Application for Submission of Documents from the Bar Table Pursuant to Article 64(9), with Confidential Annex A”, [No. ICC-01/14-01/21-285-Conf](#) and [No. ICC-01/14-01/21-285-Red](#), 25 April 2022 (the “Application”).

<sup>3</sup> See the “Directions on the Conduct of Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-251](#), 9 March 2022 (the “Directions”).

## II. CONFIDENTIALITY

4. Pursuant to regulation 23bis(2) of the Regulations of the Court, the present filing is classified as “confidential”, since it refers to a document which was filed with the same classification. A public redacted version thereof will be filed forthwith.

## III. PROCEDURAL BACKGROUND

5. On 8 March 2022, the Chamber issued the Directions.<sup>4</sup> The Defence filed a request for reconsideration or leave to appeal said Directions on 15 March 2022,<sup>5</sup> which the Chamber rejected on 8 April 2022.<sup>6</sup>

6. On 25 April 2022, the Prosecution, after being granted an extension of the page limit of the Annex,<sup>7</sup> filed its Application.<sup>8</sup>

## IV. SUBMISSIONS

7. In its Directions, the Chamber held the following:

*“Generally, the Chamber will recognise the submission of [documentary, digital or physical evidence] without a prior ruling on the admissibility of the evidence. The Chamber will ultimately assess the relevance, probative value and potential prejudice of the evidence (the ‘standard evidentiary criteria’) as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused, in its judgment pursuant to Article 74 of the Statute. During its deliberations, the Chamber will consider all the standard evidentiary criteria for each item of evidence submitted, though it may not necessarily discuss in the judgment every submitted item. At the same time, [...] it will make discrete determinations on the admissibility of specific evidence or categories of evidence in accordance with requirements of the Statute. On this point, the Chamber observes that Rule 64(1) of the Rules requires the parties and participants to raise issues as to admissibility of evidence, including on any of the standard*

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<sup>4</sup> See the Directions, *supra* note 3.

<sup>5</sup> See the “*Demande de reconsidération ou, subsidiairement, demande d’autorisation d’interjeter appel des ‘Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-251) déposées le 9 mars 2022*”, [No. ICC-01/14-01/21-259-Conf and No. ICC-01/14-01/21-259-Red](#), 15 March 2022.

<sup>6</sup> See the “*Decision on Defence Request for Reconsideration or Leave to Appeal the ‘Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-251)*”, [No. ICC-01/14-01/21-275](#), 8 April 2022.

<sup>7</sup> See the Email correspondence from the Chamber to the parties and participants on 25 April 2022 at 08:56.

<sup>8</sup> See the Application, *supra* note 2.

*evidentiary criteria, at the time when the evidence is submitted to the Chamber or immediately after such an issue becomes known. The Chamber in its discretion may decide to rule on any such specific objection in advance of the judgment, particularly when it is necessary for a fair and expeditious trial as mandated by Article 64(2) of the Statute. In this regard, the Chamber recalls that the legal framework of the Court contains a number of exclusionary rules which mandate that certain evidence is inadmissible in the proceedings. Rulings on the potential application of any such rule must be rendered separately from, and preliminarily to, the assessment of evidence for a decision under Article 74 of the Statute. Further, the Chamber recognises that specific issues may arise where it will be necessary to rule on an evidentiary challenge at the time it is raised in order to provide clarity to the parties and participants, to avoid the calling of unnecessary evidence or to otherwise advance the fairness or efficiency of the trial proceedings”.<sup>9</sup>*

8. As for the submission of evidence other than through a witness, the Chamber instructed that a party or participant wishing to tender evidence shall: (i) file a written application containing a short description of the content of each item, an index or the most relevant portions of the document or recording (in the case of a lengthy document), and a short description of its relevance and, *prima facie* probative value; and (ii) inquire, before submitting the application, whether the opposing participant consents or objects and include this information in the table.<sup>10</sup> Furthermore, in the *Yekatom and Ngaïssona* case, Trial Chamber V held that the short description of the asserted relevance and probative value of an item submitted through written filings does not prevent the submitting party from making the “*same or similar arguments wholesale*” for a number of items within a certain category of documents, provided that said short description is sufficiently clear and applicable to the item.<sup>11</sup> Trial Chamber V also considered this approach to be “*in the interest of efficiency in order not to burden the Chamber and the participants with repetitive submissions*”.<sup>12</sup>

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<sup>9</sup> See the Directions, *supra* note 3, paras. 15-21.

<sup>10</sup> *Idem*, paras. 45-46.

<sup>11</sup> See the “Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence)” (Trial Chamber V), [No. ICC-01/14-01/18-1359](#), 12 April 2022, para. 8 (the “*Yekatom and Ngaïssona* Decision on Prosecution’s First Bar Table Request”).

<sup>12</sup> *Ibid.*

9. In the *Ongwen* case, Trial Chamber IX held that it will generally recognise the formal submission of evidence when submitted formally by the participants during trial, while deferring broader considerations of the standard evidentiary criteria, and relevance and probative value, in particular, until deliberation.<sup>13</sup> Trial Chamber IX further stressed that this general approach does not involve making any relevance, probative value or potential prejudice assessments at the point of submission of the evidence – not even on a *prima facie* basis.<sup>14</sup> Therefore, it is only when procedural bars are raised that the relevant chamber will rule upfront on certain issues related to the admissibility of evidence.<sup>15</sup>

10. In the Application, the Prosecution submits archive documents obtained from the *Primature*, the Office of the Prime Minister of the Central African Republic (the “CAR”) in Bangui, which are directly relevant to the following five issues to be discussed at trial:

- (a) The organisation of the parties to the conflict and the existence of ongoing armed hostilities;
- (b) The structure and functioning of the Seleka armed group in the period relevant to the charges;
- (c) The targeting of members of the FACA;
- (d) The targeting of certain neighbourhoods in Bangui, like Boy Rabe, and other additional incidents relevant for the chapeau elements of crimes against humanity; and
- (e) The role and conduct of Mr. Saïd after the time relevant to the charges.<sup>16</sup>

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<sup>13</sup> See the “Decision on Prosecution Request to Submit Interception Related Evidence” (Trial Chamber IX), [No. ICC-02/04-01/15-615](#), 1 December 2016 (the “*Ongwen* Decision on Interception Related Evidence”), paras. 4-5. See also the *Yekatom and Ngaïssona* Decision on Prosecution’s First Bar Table Request, *supra* note 11, paras. 10-11, referring to the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber V, Presiding Judge), [No. ICC-01/14-01/18-631](#), 26 August 2020 (the “*Yekatom and Ngaïssona* Initial Directions”). See also the “Directions on the conduct of proceedings” (Trial Chamber I), [No. ICC-02/05-01/20-478](#), 4 October 2021, para. 25.

<sup>14</sup> See the *Ongwen* Decision on Interception Related Evidence, *supra* note 13, para. 7.

<sup>15</sup> See the “Decision on Defence Request for Leave to Appeal the Decision Recognising Interception Related Evidence as Submitted” (Trial Chamber IX), [No. ICC-02/04-01/15-641](#), 20 December 2016, para. 8. See also the *Yekatom and Ngaïssona* Decision on Prosecution’s First Bar Table Request, *supra* note 11, para. 12, referring to the *Yekatom and Ngaïssona* Initial Directions, *supra* note 13.

<sup>16</sup> See the Application, *supra* note 2, para. 7.

11. Having comprehensively reviewed the content of the Application, the details provided in Annex A and the relevant documents, the Legal Representative posits that the submission of the Bar Table Items does not raise any procedural bars enshrined in the Statute or in the Rules. Nor is there any need for the Chamber to exceptionally consider standard evidentiary criteria at this point of the submission of the evidence since no such determination is presently required in order to ensure the fairness and expeditiousness of the trial proceedings.

12. In addition, the Legal Representative posits that the Prosecution sufficiently explains in the Application the relevance of the Bar Table Items, even if a number of these items pre-date or post-date the relevant period. As held by Trial Chamber IX in the *Ongwen* case, the fact that evidentiary items submitted through a bar table motion may be technically falling outside the temporal scope of the case does not constitute a procedural bar preventing the recognition of said items.<sup>17</sup> Indeed, the fact that an event or events occurred outside the temporal scope of the case does not make it automatically irrelevant for the charged crimes since issues related to the temporal scope of certain items concern the relevance of the materials, which is in turn part of the Chamber's final evidentiary assessment when deliberating its judgment.<sup>18</sup>

13. Furthermore, the Prosecution is submitting via the bar table nine documents which relate [REDACTED].<sup>19</sup> As again held by Trial Chamber IX in the *Ongwen* case, there is no procedural bar impeding the submission of materials associated with [REDACTED].<sup>20</sup> Indeed, [REDACTED].<sup>21</sup> [REDACTED].<sup>22</sup> Thus, there exist no procedural bars that would preclude the submission of said nine documents.

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<sup>17</sup> See the "Decision on Prosecution's Request to Submit 1006 Items of Evidence", [No. ICC-02/04-01/15-795](#), 28 March 2017, para. 7 (the "*Ongwen* Decision on 1006 Items of Evidence").

<sup>18</sup> *Ibid.*

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].

14. With regard to the authenticity and reliability of the Bar Table Items, the Prosecution argues that it obtained all documents from the Office of the Prime Minister of the CAR, an objective primary source; that the documents themselves provide further indicia of authenticity and reliability, which is commented upon for each item in Annex A; and that the chain of custody of the documents is established for each document.<sup>23</sup> The Legal Representative concurs with the Prosecution that the documents are reliable and authentic and face no procedural bars to be formally submitted through a bar table motion.

15. The Legal Representative also observes that the submission of the Bar Table Items is not prejudicial to Mr. Saïd. As held by Trial Chamber IX in the *Ongwen* case, the ultimate prejudice which the Defence may suffer depends on the nature of the material and how said material is discussed during the trial, and whether the Chamber relies on such material in its judgment and in what manner.<sup>24</sup> Therefore, undue prejudice determinations at the point of submission can only be done reliably for items where it is immediately obvious that they cannot be fairly relied upon for any purpose.<sup>25</sup> Having conducted a detailed review of the Application, Annex A and the documents concerned, the Legal Representative posits that none of the Bar Table Items leads the Chamber to immediately conclude at this juncture that an undue prejudice determination needs to be made.

16. Furthermore, the Legal Representative contends that the Defence will not be prejudiced because: (i) the Bar Table Items have been disclosed in a timely manner by the Prosecution, thus ensuring the rights of the Accused regarding notice and trial preparations;<sup>26</sup> (ii) in the Application and Annex A, the Prosecution provides a clear description and itemised assessment of the relevance and probative value for each

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<sup>23</sup> See the Application, *supra* note 2, paras. 19-22.

<sup>24</sup> See the *Ongwen* Decision on Interception Related Evidence, *supra* note 13, para. 10.

<sup>25</sup> *Idem*, para. 11.

<sup>26</sup> *Idem*, para. 25.

piece of evidence, together with an indication of their incriminatory character;<sup>27</sup> (iii) Mr. Saïd currently has the opportunity to advance any objections or observations on any of the Bar Table Items, which the Chamber will take into account in its final assessment of the evidence;<sup>28</sup> (iv) Mr. Saïd also has the right to [REDACTED] submit exculpatory evidence throughout the trial;<sup>29</sup> and (v) the submission of the Bar Table Items does not relieve the Prosecution of its burden of proof or shift said burden to the Defence since the method of submission of documentary evidence has no bearing on how the Chamber will eventually evaluate the evidence.<sup>30</sup>

17. The Legal Representative posits that granting the Application will be in line with the Chamber's duty to ensure the expeditiousness of the proceedings pursuant to article 64(2) of the Statute. The recognition of the Bar Table Items will obviate the need to call more witnesses to attest to the authenticity of said items and shorten the overall length of the examination of witnesses at trial. This course of conduct will also enable a reduction of time needed for the trial, therefore responding to both the right of the Accused and to the interest of victims to expeditious proceedings.

18. Finally, the submission of the Bar Table Items will further assist the Chamber in assessing the nature, complexity and extent of the victimisation caused by the Seleka. In addition, the admission of the items may also be valuable for the determination of the appropriate form and amount of reparations to be ultimately awarded to the victims concerned, should the Accused be convicted.

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<sup>27</sup> *Idem*, para. 24. See also the *Yekatom and Ngaïssona* Decision on Prosecution's First Bar Table Request, *supra* note 11, para. 8.

<sup>28</sup> *Idem*, para. 11.

<sup>29</sup> [REDACTED].

<sup>30</sup> See the *Ongwen* Decision on 1006 Items of Evidence, *supra* note 17, para. 49.

**FOR THESE REASONS**, the Legal Representative respectfully requests the Chamber to grant the Application.

A handwritten signature in black ink, appearing to read 'Sarah Pellet', followed by a period.

Sarah Pellet

Dated this 10<sup>th</sup> day of May 2022

At The Hague, The Netherlands