

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: **21 June 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 requests to vary the time limit (ICC-01/14-01/21-363-Conf)

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

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

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 Prosecution opposes the Defence's request to vary the time limit "Requête de prorogation du délai de réponse à la « Prosecution's third request to introduce prior recorded testimony pursuant to rule 68(3)» (ICC-01/14-01/21-348-Conf), à la « Prosecution's Request for In-Court Protective Measures » (ICC-01/14-01/21-356-Conf) et à la « Prosecution's fourth request to introduce prior recorded testimony pursuant to rule 68(3) » (ICC-01/14-01/21-357-Conf) en vertu de la Norme 35 du Règlement de la Cour" ("Requests").¹

2. The Requests are not justified; the Defence's proposed approach would undermine the efficiency, planning and overall trial management of the Chamber. The Prosecution would be open to a reasonable but limited extension of time of a few days per request, but submits that all motions should be adjudicated before the start of trial in order to enable planning of hearings and witness appearance not just for the Parties but also for the Chamber and the Registry, specifically the Victims and Witnesses Unit ("VWU").

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court ("Regulations"), this response is filed as confidential, because it responds to a filing with the same classification. The Prosecution submits it can be reclassified as public, when the Chamber renders a public decision.

¹ ICC-02/05-01/21-363-Conf.

III. SUBMISSIONS

A. The Request does not show good cause

4. The Defence requests to be allowed to respond to Prosecution's requests under rule 68(3) up to as little as one month before the scheduled testimony of each witness. Similarly, the Defence requests to be allowed to respond to the application for in-court protective and special measures up to one month before the scheduled testimony of a witness. For both requests good cause is not shown within the meaning of regulation 35(2) of the Regulations. In fact, if the requests were granted, planning of witness testimony would be immensely complicated and a streamlined Prosecution case rendered impossible.

5. Defence's arguments regarding the extent of preparation required to be able to meaningfully respond to rule 68(3) requests are exaggerated. These requests require less comprehensive analysis to respond to than motions under rule 68(2)(b). For the latter, it is vital that the Defence highlights potential inconsistencies to demonstrate why the witness should be called live, since it otherwise will not be able to challenge his/her evidence. This is in stark contrast to rule 68(3) witnesses who will appear live and the Defence will be able to cross-examine at length on any aspect of their evidence introduced in writing. In particular, the Defence's right to question the witnesses concerned, including to address any issues of credibility or probative value and matters of an exculpatory nature, remains unchanged. Rule 68(3) of the Rules is namely not intended to replace oral testimony but, rather, complements it.²

6. The Prosecution has explained why the testimonies whose introduction it seeks under rule 68(3) have sufficient indicia of reliability. For a response to be meaningful, the Defence does not have to identify every piece of information that may contradict

² ICC-02/05-01/20-559-Red, para. 12.

a witness's statement. There is a difference between being able to meaningfully respond to a rule 68(3) request and conducting a full analysis of all relevant information on the witness to effectively and comprehensively cross-examine him or her. The analysis described by the Defence is necessary for the latter but not the former.

7. The Prosecution's rule 68(3) requests predominantly recite the evidence of witnesses, of which the Defence has been well informed before the start of the trial. The vast majority of these materials has been disclosed as incriminating already prior to the start of the confirmation of charges hearing, was relied upon in the Pre-Confirmation Brief, or disclosed closely after this brief was filed, providing the Defence months to engage with the relevant material in a meaningful way. Further, the Prosecution had provided a complete overview of those witnesses for whom it intends to seek an introduction pursuant to rule 68 with its own extension request on 29 April 2022.³ While there were slight adjustments to this list, the Defence was put on notice for the vast majority of witnesses. Contrary to the Defence assertion, the Prosecution's case has remained the same since the confirmation proceedings.

8. Moreover, all Prosecution's requests also include detailed annexes with not just the statements and associated material, but also other relevant material which the Prosecution does not seek to introduce under rule 68(3) but which helps understand the witness' testimony. All this assists the Defence and the Chamber to assess the requests. Against this backdrop, the Defence's arguments would suggest that the latter is only starting to consider these materials at this point, which seems unlikely and, in any event, cannot be a reason for extension of time limits.

³ ICC-01/14-01/21-291.

9. In its request for In-Court Protective Measures (“ICPM”) the Prosecution has set out for each witness the proposed measures and the reasons for requesting these. The Defence has all information necessary at its disposal to respond meaningfully.

10. The Defence has ample time to respond to the different requests filed by the Prosecution as these have been submitted on a rolling basis and for each, responses must be filed within 10 days, in accordance with regulation 34(b) of the Regulations.

11. The Prosecution concedes that in advance of trial also the Defence has to complete a multitude of different tasks and would therefore not oppose a limited but reasonable extension request of several days per motion which would not risk to upend the efficiency of the trial preparation phase.

B. The Request undermines the efficiency of the proceedings

12. Early resolution of rule 68(3) requests and request for ICPM is important for the efficient conduct of proceedings, including management of time and logistics in facilitating witness testimony. The Chamber itself recognised the importance of early adjudication of these motions by ordering filing of motions by 23 May 2022 and 13 June 2022 the latest, and then granting a modest extension request until 27 June 2022.

13. Knowing in advance what witnesses will testify under rule 68(3) is crucial for temporal and logistical planning. Early resolution means that the witnesses can be informed and explained the manner in which their interaction with the Court will take place. Time estimates for all witnesses in advance, whilst requiring some flexibility, enables the Registry to plan the various steps that need to be taken before the witness appears. It ensures that the witnesses are informed in advance when they will appear and for how long they will be away; it ensures smooth sequencing of witnesses without gaps and efficient trial management. It allows for better planning both for the Chamber, the Registry as well as for the Parties. This planning, importantly, is done

many months in advance, in particular in a situation like the Central African Republic, where the logistics are particularly challenging because of security and other considerations.

14. With regard to ICPM, having this request resolved as soon as possible is important for the Prosecution's Protection Services Unit ("PSU") and the VWU. Both entities need to be able to plan and set necessary steps in motion. Further, it is crucial for the witnesses' own well-being. Witnesses who are granted ICPM can be reassured that their identity will be protected; and for those who may not be granted ICPM, if any, the calling party and the VWU must consider potential risks and put contingencies in place.

C. Prompt resolution of rule 68(3) and ICPM requests is in the interest of the Accused

15. Granting the Defence Request would disrupt the efficiency and expeditiousness of the proceedings. The use of rule 68(3) and ICMPs is not new at the Court. The trial is set to begin on 26 September 2022. Mahamat Said Abdel Kani is in pre-trial detention and has a right to fair proceedings which are conducted as efficiently and expeditiously as possible. In this spirit, the Prosecution has met all deadlines set by the Chamber to ensure that the various pre-trial issues can be considered and resolved in advance of the trial.

16. All motions submitted by any party pursuant to rule 68 or article 68 should be adjudicated well in advance (and certainly much more than a month before the witness's appearance before the Chamber) to enable proper planning of all actors involved. The Prosecution thus calls for the resolution of these motions well in advance of the trial and will also ensure to respond to similar submissions by the Defence in due course well in advance of appearance of their witnesses.

IV. RELIEF SOUGHT

17. For the above reasons, the Prosecution requests that the Chamber reject the Requests.



Karim A. A. Khan QC, Prosecutor

Dated this 21st day of June 2022
At The Hague, The Netherland