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No.**: ICC-01/14-01/21**
Date: **8 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*

Public

Prosecution's Request Under Regulation 35 for an Extension of Time to Seek an Agreement with the Defence on a Joint Expert on the *Arbatachar* Method of Restraint or, alternatively, Request for Reconsideration of the Chamber's Decision to Remove P-3111 from the Prosecution's List of Witnesses

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. On 1 July 2022, the Trial Chamber ordered that a medical expert witness, P-3111, be removed from the Prosecution's witness list and that the related materials be removed from the Prosecution's list of evidence.[1] In so doing, the Chamber recalled that it had ordered the Parties to jointly instruct all experts in this case[2] and that P-3111 was not a jointly instructed expert.[3] It found that the Prosecution was responsible for the failure to comply with the Chamber's instruction to jointly instruct all experts.[4]

2. Pursuant to regulation 35 of the Regulations of the Court ("Regulations"), the Prosecution hereby requests additional time to seek to agree with the Defence on a joint expert on the *arbatachar* method of restraint, a key issue in this case. The Prosecution made a good faith error in its understanding of the practical implications of the Chamber's initial Order on Joint Instruction. The proposed expertise is important to the Prosecution's case and would contribute to establishing the truth.

3. Alternatively, the Prosecution requests the Trial Chamber to use its inherent powers to reconsider its decision to remove P-3111 and the related materials from the Prosecution's list of witnesses and list of evidence. Hearing P-3111's evidence is in the interests of justice and does not cause any unfair prejudice to the Defence. Indeed, the Defence does not object to the Prosecution calling P-3111 as a witness, but merely requests to be given an opportunity to examine him. While the Prosecution acknowledges that it should have engaged with the Defence on the matter earlier, striking P-3111 from the Prosecution's witness list is a drastic and disproportionate remedy. Reconsideration is thus warranted because the legal standard is met.

II. SUBMISSIONS

A. Request for extension of time

4. Regulation 35(2) of the Regulations provides that the Chamber may extend a time limit if good cause is shown.[5] The Appeals Chamber has considered a good faith mistake to be a

[1] Decision on P-3111, ICC-01/14-01/21-385, 1 July 2022 ("Decision on P-3111"), p. 7.
[2] Decision on P-3111, para. 3 (citing the Decision Setting the Commencement Date of the Trial and Related Deadlines, ICC-01/14-01/2-243, 21 February 2022 "Order on Joint Instruction", para. 35).
[3] Decision on P-3111, paras. 12-14.
[4] Decision on P-3111, para. 17.
[5] Regulation 35(2).

relevant factor in finding that a filing was not made within the time limit for reasons outside the control of the party making the filing.[6] In addition, it has repeatedly held that the importance of an issue and its potential impact on the proceedings may justify an extension of time.[7]

5. Pursuant to regulation 35 of the Regulations, the Prosecution requests additional time to seek to agree with the Defence on a joint expert on the *arbatachar* method of restraint. The Prosecution made a good faith error in its understanding of the procedure for instructing of experts. In addition, the proposed medical expert evidence is critically important to the Prosecution's case and would contribute to establishing the truth in this case.

(i) The Prosecution's good faith error in interpreting the Order on Joint Instruction

6. The Prosecution by no means meant to violate the Chamber's Order on Joint Instruction and was acting in good faith. While it is true the Prosecution initiated consultation with the Defence and instruction of the expert only two weeks before the disclosure deadline, this should not be understood as an attempt to intentionally disregard or circumvent the Chamber's Order on Joint Instruction.

7. Contrary to what the Chamber may have been left to assume,[8] the Prosecution wishes to clarify that it did not fully understand the practical implications of the Chamber's Order on Joint Instruction. This affected its decision on when and how it ought to engage with the Defence to seek the joint instruction of expert witnesses.

8. While paragraph 40 of the Conduct of Proceedings decision states that the participants are "directed to jointly instruct any experts," both paragraphs 41 and 43 of that same decision refer to scenarios where the Parties have not agreed on a particular expert witness.[9] For example, paragraph 41 sets out the procedure to be followed where a non-calling party wishes to challenge the expertise of an expert called by another party.[10] Similarly, paragraph 43 sets out a procedure for the Chamber to hear expert evidence from both Parties on the same issue in a continuous block of testimony.[11] Therefore, while the Prosecution certainly understood it

[6] *See e.g.*, ICC-02/04-01/05-306, paras. 6-8; ICC-02/04-148 OA, paras. 7-8.
[7] ICC-01/04-01/10-497 OA4, para. 6: "Given the specific circumstances at hand, namely the particular nature, importance and possible impact of a decision on the confirmation of charges on a suspect, the fundamental importance of the document in support of the appeal to the merits of the appeal […] the Appeals Chamber considers that good cause has been shown". *See also* ICC-01/05-01/08-827 OA3, paras. 3, 7; ICC-01/04-02/12-60 A, para. 12; ICC-01/04-02/12-130 A, para. 12.
[8] *See* Decision on P-3111, para. 16 (finding that "[t]here is also no indication that there was any confusion on the part of the Prosecution in terms of the practical implications of the Order on Joint Instruction.").
[9] Directions on the Conduct of Proceedings, ICC-01/14-01/21-251, 9 March 2022, paras. 40-43.
[10] *Id.*, para. 41.
[11] *Id.*, para. 43.

was meant to make a reasonable effort to engage with the Defence and to seek to agree on the joint instruction of expert witnesses, it also assumed that it would not be barred from calling an expert witness merely because the Defence was not in agreement.

9. For this reason, even though time was limited and the interaction with the Defence brief, the Prosecution believed that it was able to add P-3111 to the list of witnesses and include his material on the list of evidence. It also believed that this option had been foreseen in paragraphs 41 and 43 of the Directions on the Conduct of Proceedings.

10. In retrospect, the Prosecution should have sought clarification of the procedure envisioned by the Chamber well in advance of its major deadlines. This is particularly true given that this is the first occasion where an ICC Trial Chamber has ordered all experts to be jointly instructed.

11. In addition, the delay in engaging with the Defence with a view to instructing a joint expert was also impacted by a thinly staffed Prosecution team prioritising other highly intensive, and more immediate, procedural obligations,[12] resulting in insufficient time to attend to this one.

12. As the Chamber rightly noted, the Prosecution had identified its wish to seek this sort of expertise in February 2022. However, thereafter it took the Prosecution time to identify a range of suitable experts, assess availability, and liaise internally on the operational and logistical

[12] The Prosecution's focus in this period has been on ensuring a tight, streamlined presentation of its evidence that would promote the fairness and expeditiousness of the proceedings. Of particular note, the Prosecution has been working for months to streamline its witness list as much as possible, including by preparing detailed witness summaries, including for a number of witnesses who were eventually dropped from the list. This process resulted in a substantial reduction of the Prosecution's proposed witness list from over 100 witnesses to 85 witnesses. Furthermore, the Prosecution was ordered to file all its rule 68 applications and bar table motions in advance of its disclosure and trial brief deadline. Despite this early deadline (which, while reasonable and practical, was unexpected given that no other Trial Chamber had ever ordered all rule 68 and bar table motion applications to be filed so early in the proceedings, and most trial teams have filed these motions substantially later, even months or years after the commencement of trial), the Prosecution managed to comply with only a minimal extension requested. The deadlines set by the Trial Chamber were especially challenging given the Prosecution's proposed extensive use of the rule 68 procedure in some form for the majority of its witnesses; the Prosecution had informed the Chamber of its intended approach at the January 2022 status conference. For rule 68 applications, see ICC-01/14-01/21-289-Conf; ICC-01/14-01/21-290-Conf; ICC-01/14-01/21-307-Conf; ICC-01/14-01/21-308-Conf; ICC-01/14-01/21-319-Conf; ICC-01/14-01/21-322-Conf; ICC-01/14-01/21-323-Conf; ICC-01/14-01/21-326-Conf; ICC-01/14-01/21-328-Conf; ICC-01/14-01/21-348-Conf; ICC-01/14-01/21-357-Conf; ICC-01/14-01/21-371-Conf; ICC-01/14-01/21-376-Conf; for bar table motions, see ICC-01/14-01/21-279-Conf; ICC-01/14-01/21-285-Conf; ICC-01/14-01/21-286-Conf; ICC-01/14-01/21-312-Conf; ICC-01/14-01/21-321-Conf; ICC-01/14-01/21-325-Conf; for detailed witness summaries, see ICC-01/14-01/21-354-Conf-AnxC; for list of witnesses and proposed order of appearance, see ICC-01/14-01/21-354-Conf-AnxA and ICC-01/14-01/21-354-Conf-AnxB; for in-court protective measures, see ICC-01/14-01/21-356-Conf.

requirements of such an instruction. In hindsight, the Prosecution should have prioritised these steps above other competing procedural responsibilities.[13]

13. The Prosecution further regrets that it did not take the opportunity to respond to the Defence's filing on 14 June 2022[14] and to set out its understanding of the conduct of proceedings decision and other circumstances described above. To be clear, the Prosecution opted not to respond for two main reasons. First, because the Defence did not request any particular remedy given that it would have an opportunity to cross-examine P-3111.[15] Second, the Prosecution team had to balance competing priorities, including at this point in the proceedings: (a) to prepare three additional rule 68 requests for 8 witnesses before 27 June 2022, work which was particularly complex as 5 of the witnesses were insiders who had also testified in the *Yekatom and Ngaissona* case;[16] (b) to respond to other Defence filings that did seek specific remedies;[17] and (c) to carry out other time-sensitive tasks, such as advancing *inter-partes* dialogue on agreed facts and videolink testimony, preparing English translations of certain witness statements per the Chamber's request, and progressing public redacted versions of the Trial Brief and numerous other filings over the last few weeks.

14. The Prosecution did not anticipate that there was any risk that it would be barred from presenting P-3111's evidence. However, the Prosecution now recognises that it should have provided more information to the Chamber to explain the circumstances.

(ii) The proposed expert evidence is important to the Prosecution's case and would contribute to establishing the truth

15. The Prosecution submits that the proposed forensic medical expertise on the *arbatachar* technique is important to the Prosecution's case and would contribute to the establishment of the truth. Specifically, a medical expert can provide information about the physiological effects of this technique. This expertise can supplement other witness testimony about their experience of the physical consequences of the *arbatachar* technique. Their testimony will be detailed but

[13] *See* below, para. 13.
[14] *Information de la Défense afin de porter au dossier de l'affaire les éléments utiles non communiqués par l'Accusation concernant le déroulé de l'instruction de P-3111 par le Bureau du Procureur et la position de la Défense à cet égard*, ICC-01/14-01/21-362-Conf, 14 June 2022 (« Defence Information »).
[15] *See* Defence Information, para. 65.
[16] ICC-01/14-01/21-371-Conf; ICC-01/14-01/21-374-Conf-Corr; ICC-01/14-01/21-376-Conf.
[17] ICC-01/14-01/21-363-Conf; ICC-01/14-01/21-364-Conf; ICC-01/14-01/21-367-Conf.

it will be provided by lay persons, rather than medical professionals who can describe in forensic terms the effects and potential risks of being tied in such a method.

16. To be clear, while the Prosecution did not specifically cite P-3111 in its Trial Brief,[18] that does not mean that the Prosecution considers his testimony to be inconsequential. Due to his importance to the Prosecution case, P-3111 was included on the list of witnesses, and the key aspects of his testimony were summarised in the witness summary document. The Prosecution further notes that while it has summarised the key evidence in its Trial Brief, it was not possible to cite every single item of evidence in that document, while also ensuring a concise length and crisp presentation. As the Prosecution has noted elsewhere,[19] the Trial Brief is meant to be read along with the Prosecution's bar table motions and annexes; rule 68 motions and annexes; list of witnesses; witness summaries (which include P-3111); and list of evidence.

(iii) Proposed Way Forward

17. Given the above, the Prosecution seeks an extension of time to further engage with the Defence with a view to agreeing on the joint instruction of P-3111. If in spite of reasonable efforts to do so, it cannot reach an agreement with the Defence on this witness, the Prosecution would propose to the Defence one or more alternative expert witnesses who could be jointly agreed and instructed on the same matter. The Chamber should set a concrete deadline for the Prosecution and the Defence to explore the joint instruction of an expert witness.

18. In case the Prosecution and the Defence fail to reach an agreement within the set deadline, the Prosecution would bring the matter to the Chamber's attention. It would then seek permission to request that the Chamber allow the Prosecution to include P-3111 or another expert witness considered by the Parties on its List of Witnesses.

B. Request for reconsideration

19. Although an exceptional measure, a Chamber has discretion to reconsider its own decisions in some circumstances. Such circumstances include where, "a clear error of reasoning" has been demonstrated; if it "is necessary to prevent an injustice"; if the decision

[18] *See* Decision on P-3111, para. 19 (noting that the Prosecution's Trial Brief does not appear to rely on P-3111's evidence).
[19] ICC-01/14-01/21-381, paras. 3-5.

rendered is "manifestly unsound"; or when its consequences are "manifestly unsatisfactory."[20] These criteria need not be demonstrated cumulatively.[21]

20. If the Chamber is not minded to allow the Prosecution additional time to seek agreement with the Defence on a joint *arbatachar* expert, the Prosecution in the alternative requests that the Trial Chamber reconsider its decision to remove P-3111 and the related material from the Prosecution's list of witnesses and list of evidence.

21. To the extent that the Chamber struck P-3111 from the Prosecution's list of witnesses because he was not a jointly instructed expert, the Prosecution believes the legal standard for reconsideration is met.[22]

22. If an agreement between the Prosecution and the Defence were a necessary pre-condition for the Prosecution to call any expert witnesses, the Defence could effectively veto Prosecution evidence. Such an approach, adopted here or in the future, would undermine the fundamental fairness of the proceedings. It would conflict with the Prosecution's ability to present its case and to meet its burden of proof. It would also deprive the Court of evidence that could contribute to the establishment of the truth.

23. While the Prosecution could—and in hindsight it should—have reached out to the Defence earlier with a view to seeking an agreement on the joint instruction of an expert witness, the remedy imposed is excessive in the circumstances, as it affects the fairness of the proceedings and the Court's truth-seeking function. Indeed, as noted above, the Chamber's own conduct of proceedings decision envisions scenarios whereby the arties do not agree on a joint expert, setting out procedures for challenging a witness's expertise or for hearing expert evidence from different parties in one group of testimony.[23]

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[20] ICC-02/05-01/20-163-tENG, para. 12; ICC-02/11-01/15-1355-Red, para. 27; ICC-01/04-01/06- 2705, paras. 13-18; ICC-02/05-01/20-517, para. 10; ICC-02/05-01/20-172, para. 17; ICC-01/04-02/06-519, para. 12; ICC-02/04-01/15-468, para. 4; ICC-02/04-01/15-1547, paras. 6-7; ICC-01/14-01/18-447, para. 16; ICC-01/04- 02/06-1049-Red, para. 12. The Prosecution notes that the Appeals Chamber has affirmed that this Court may exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule expressly provides for it (ICC-01/04-01/06-772 OA4, paras.36-39).

[21] *See e.g.* ICC-01/04-02/06-519, para. 12; ICC-02/04-01/15-468, para. 4; ICC-02/04-01/15-1547, paras. 6-7; ICC-01/04- 02/06-1049-Red, para. 12; ICC-02/05-01/20-163-tENG, para. 12.

[22] ICC-02/05-01/20-163-tENG, para. 12; ICC-02/11-01/15-1355-Red, para. 27; ICC-01/04-01/06- 2705, paras. 13-18; ICC-02/05-01/20-517, para. 10; ICC-02/05-01/20-172, para. 17; ICC-01/04-02/06-519, para. 12; ICC-02/04-01/15-468, para. 4; ICC-02/04-01/15-1547, paras. 6-7; ICC-01/14-01/18-447, para. 16; ICC-01/04- 02/06-1049-Red, para. 12. The Prosecution notes that the Appeals Chamber has affirmed that this Court may exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule expressly provides for it (ICC-01/04-01/06-772 OA4, paras.36-39).

[23] Directions on the Conduct of the Proceedings, ICC-01/14-01/21-251, paras. 41, 43.

24. At the same time, allowing the Prosecution to call P-3111 would not cause unfair prejudice to the Defence, especially given the Defence is not opposed to it. The Prosecution duly disclosed all relevant information about P-3111 to the Defence and put him on the list of witnesses within the deadline of 13 June 2022. Thus, the Defence received sufficient notice that the Prosecution intends to call the expert as a *viva voce* witness, and the Defence will have sufficient time to fully assess his qualifications and testimony and to prepare for his cross-examination.

25. The Chamber noted that the Defence wishes to subject P-3111 to a *voir dire* process and cross-examine him, and that "this is exactly what the Chamber had sought to avoid by issuing the Order on Joint Instruction."[24] Respectfully, the time that would be expended on this process is likely to be minimal given the narrow scope of the P-3111's report and his proposed expertise, namely the medical effects of a particular form of restraint. Even if P-3111 had the status of a joint expert, both the Prosecution and Defence would undoubtedly seek time to examine him, so the comparative impact on the expeditiousness of the examination of P-3111 would be negligible.

III. RELIEF SOUGHT

26. For the above reasons, the Prosecution requests that the Chamber:

a. grant the Prosecution additional time to seek an agreement with the Defence on a joint expert on the *arbatachar* method of restraint.

b. alternatively, reconsider its decision and allow the Prosecution to include P-3111 and the related materials in the Prosecution's list of witnesses and list of evidence.

Karim A. A. Khan QC, Prosecutor

Dated this 8th day of July 2022
At The Hague, The Netherland

[24] Decision on P-3111, para. 19.