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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 response to the Defence request to vary time limits
(ICC-01/14-01/21-390)**

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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 trial in this case is set to open on 26 September 2022. The Defence has requested to extend (1) the deadline for its Trial Brief (from 12 August 2022 to 4 September 2022) and (2) the deadline for motions requiring resolution prior to the commencement of trial (from 22 July 2022 to 26 August 2022) (“Request”).¹

2. As a matter of law, the Request fails to establish “good cause” for the requested extensions, as required by regulation 35(2) of the Regulations of the Court (“Regulations”). Much of the Defence’s work referenced in the Request could have been carried out well before 13 June 2022, and the Defence’s time to work on these documents has not been significantly compressed. Furthermore, the Prosecution submits that granting the Request in full would negatively impact on the fairness and expeditiousness of the proceedings as it would affect the trial preparation of the Prosecution, OPCV, Registry, and Chamber.

3. Nevertheless, while the Prosecution submits that the Defence has not met the legal standard for either of its requested deadline extensions, as a matter of courtesy, the Prosecution does not oppose a limited extension to the Defence’s trial brief deadline. Specifically, the Prosecution would not oppose a minimal extension of no more than one week for the Defence’s trial brief, assuming that the Chamber does not intend to wait for the Defence’s trial brief before ruling upon the Prosecution’s rule 68 motions.²

¹ Requête en vertu de la Norme 35 du Règlement de la Cour visant à obtenir la prorogation des délais prévus pour déposer les requêtes portant sur des questions devant être résolues avant le début du procès et pour déposer le mémoire de la Défense, ICC-01/14-01/21-390, 5 July 2022 (“Request”).

² To be clear, the Prosecution is fully opposed to the Defence’s request for an extension of the deadline for motions requiring resolution prior to the commencement of trial.

II. SUBMISSIONS

A. The Request does not establish good cause for the proposed extensions

4. Contrary to the Defence's contention, much of the work referenced in the Request could have been carried out well before 13 June 2022, and the time after 13 June 2022 to focus on the Prosecution's Trial Brief and to prepare motions was not "*drastiquement réduit*".³

i. There has not been any unexpected significant increase in the Defence's workload

5. The Defence's argument about a purported unexpected significant increase in its workload⁴ is unfounded. *First and foremost*, contrary to the Defence's assertion,⁵ the Prosecution did submit its bar table and rule 68 motions on a "rolling basis". In accordance with the Chamber's direction, the Prosecution's filings were made in batches over 2.5 months, rather than in large omnibus motions, as the Prosecution had originally proposed.⁶ Specifically, the Prosecution filed bar table motions on 14 April 2022,⁷ 25 April 2022,⁸ 26 April 2022,⁹ 18 May 2022,¹⁰ and 23 May 2022.¹¹ Likewise, the Prosecution filed its rule 68 motions on 29 April 2022,¹² 13 May 2022,¹³ 20 May 2022;¹⁴

³ See Request, para. 9.

⁴ Request, paras. 5-9.

⁵ See Request, paras. 5-9, 12.

⁶ ICC-01/14-01/21-230-Conf, paras. 4, 18.

⁷ ICC-01/14-01/21-279-Conf.

⁸ ICC-01/14-01/21-285-Conf.

⁹ ICC-01/14-01/21-286-Conf.

¹⁰ ICC-01/14-01/21-312-Conf.

¹¹ ICC-01/14-01/21-321-Conf; ICC-01/14-01/21-325-Conf.

¹² ICC-01/14-01/21-290-Conf; ICC-01/14-01/21-289-Conf.

¹³ ICC-01/14-01/21-307-Conf; ICC-01/14-01/21-308-Conf.

¹⁴ ICC-01/14-01/21-319-Conf.

23 May 2022,¹⁵ 8 June 2022,¹⁶ 13 June 2022,¹⁷ 21 June 2022,¹⁸ 24 June 2022;¹⁹ and 27 June 2022.²⁰

6. The Defence's real complaint seems to be that the Prosecution did not start filing its bar table and rule 68 motions immediately after the Chamber's 21 February 2022 decision.²¹ This is an unrealistic expectation. It also would have led to undesirable results, including a less streamlined list of witnesses and a less coherent, less consistent set of motions that would ultimately have been more challenging for the Defence to respond to and for the Chamber to adjudicate.²²

7. In its submissions in January 2022, the Prosecution gave a rough estimate that it would call around 102 witnesses and submit around 72 requests for application of the rule 68 procedure.²³ But the Prosecution also stated that it continued to conduct further investigations and that additional witnesses might be added.²⁴ The Prosecution also stated that it was undertaking steps to attempt to streamline its presentation of evidence as much as possible,²⁵ the natural implication of which being that certain witnesses might no longer be relied upon at trial.

8. Between the late January 2022 status conference and early April 2022, the Prosecution conducted a detailed review of its potential trial witnesses, both those relied upon at confirmation and the limited pool of other witnesses who were subsequently interviewed or otherwise identified as trial witness candidates. Only after completing its full analysis could the Prosecution safely decide which witnesses

¹⁵ ICC-01/14-01/21-323-Conf; ICC-01/14-01/21-328-Conf; ICC-01/14-01/21-322-Conf; ICC-01/14-01/21-326-Conf.

¹⁶ ICC-01/14-01/21-348-Conf.

¹⁷ ICC-01/14-01/21-357-Conf.

¹⁸ ICC-01/14-01/21-371-Conf.

¹⁹ ICC-01/14-01/21-374-Conf.

²⁰ ICC-01/14-01/21-376-Conf.

²¹ Deadlines Decision, para. 28.

²² See e.g., *infra*, para. 8-9.

²³ ICC-01/14-01/21-230-Conf, paras. 8, 16-17.

²⁴ ICC-01/14-01/21-230-Conf, paras. 8, 26.

²⁵ ICC-01/14-01/21-230-Conf, para. 9.

to add, keep, or drop from its list. And only once the list of witnesses was sufficiently stable could the Prosecution reliably decide which witnesses should be proposed to be heard via the rule 68 procedure. A few examples of this process are given below:

- Close scrutiny of the evidence specifically related to the chapeau elements of the charges resulted in the decision to drop a number of witnesses cited in the Pre-Confirmation Brief, including P-0413, P-0776, P-0808, P-0889, P-0964, P-0965, P-0974, P-0976, P-1172, P-1282, P-1399, P-1521, P-1719, P-2027, and P-2841.
- After completing certain outstanding investigative tasks related to the so-called Flyers incident, the Prosecution substantially decreased the number of crime base witnesses for this incident, dropping numerous witnesses who had been cited in the Pre-Confirmation Brief, including P-0923, P-1675, P-2279, P-2253, P-2257, P-2263, P-2293, and P-2300.
- Careful scrutiny of the CEDAD-related witness evidence resulted in selecting only two CEDAD-related crime base witnesses out of the large pool of potential crime base witnesses (around 20 witnesses) previously cited in the Pre-Confirmation Brief.²⁶

9. The above are just a few examples of how the Prosecution's work in the period leading up to early April 2022 has led to a more streamlined presentation of its case. If the Prosecution had started filing rule 68 motions prior to completing this process, it would likely have filed many more separate motions, comprising many more pages, relating to a larger total number of witnesses overall. Of note, it may well have prepared a rule 68 application for one or more of the above-cited witnesses but then later either dropped them or kept them on the list even though they were no longer deemed essential; both alternatives would have resulted in a waste of time for the

²⁶ See Pre-Confirmation Brief, paras. 258-272 (referring to around 20 CEDAD-related crime base witnesses).

Chamber, Parties, and Participants and impacted on the efficiency of the proceedings. Moreover, without a solid understanding of its final witness list, the Prosecution would not have been in the position to file thematic motions that grouped related witnesses in a practical way. It would also not have been able to specify with precision how any given witness's evidence was cumulative to or corroborative of other evidence, since new witnesses were interviewed in this period and other witnesses dropped from the working list of witnesses. In sum, the record would have been more cluttered and less coherent.

10. *Second*, the Prosecution filed the vast majority of its bar table motions and rule 68 motions within the initially envisioned period.²⁷ Most importantly, all major bar table and all rule 68(2) motions, which require more comprehensive assessments than rule 68(3) motions,²⁸ were filed before 23 May 2022.²⁹ While the Prosecution filed Rule 68 motions for eight witnesses one to two weeks after the initially envisioned outer limit of 13 June 2022,³⁰ these were all requests for application of the rule 68(3) procedure, responses to which are “less demanding in terms of time and resources”.³¹

ii. The Defence had ample time to substantially advance its work before the Prosecution filed its rule 68 motions and Trial Brief

11. One of the key positions that the Defence still seems to take is that it was only able to carry out substantial work after it received the Prosecution's Trial Brief.³² The

²⁷ As the Prosecution indicated, it plans to file one more bar table motion.

²⁸ ICC-01/14-01/21-379, para. 16. *See also* ICC-01/14-01/21-369, para. 5.

²⁹ *See supra*, para. 5.

³⁰ *See e.g.*, Deadlines Decision, para. 28. *See also* ICC-01/14-01/21-251, para. 37; Email from the Chamber to the Parties, on 29 March 2022 at 15:54.

³¹ ICC-01/14-01/21-379, para. 16.

³² *See e.g.*, Request, paras. 7, 14-15, 23-25. *See also* ICC-01/14-01/21-231-Conf-Red, paras. 17, 19, 24, 42, 64-70 ; ICC-01/14-01/21-T-007-CONF-ENG, p. 34, lns. 2-5, p. 35, lns. 13-16, p. 39, ln. 9 – p. 40, ln. 2; ICC-01/14-01/21-272-Conf-Red, paras. 35, 38.

same line of argument is made in the context of rule 68 motions.³³ However, this position is problematic for a number of reasons.

12. *First*, a Trial Brief is not a document required under the Rome Statute or the Rules of Procedure and Evidence, but is rather an “auxiliary tool to the benefit of both the Chamber and the parties and participants”.³⁴ The Court’s legal framework clearly envisions that the Parties can advance their preparation work independently of, or in advance of, a Trial Brief from the Prosecution. This Chamber has previously rejected the notion that the Defence is only in a position to start preparing after it has received the Prosecution’s Trial Brief.³⁵

13. *Second*, the Prosecution’s Trial Brief is not a completely new document, prior to which the Defence has no meaningful insight into the Prosecution’s case theory. Rather, the Prosecution’s Trial Brief functions as an updated version of its Pre-Confirmation Brief. Of note, the Prosecution relies on a small set of witnesses in its Trial Brief who were not cited in its Pre-Confirmation Brief,³⁶ with only a few other new names included on the trial list of witnesses.³⁷ Most of the newly-cited witness evidence³⁸ is used in support of the chapeau elements of the charges or chain of custody, does not relate to the specific acts and conduct of Mr SAID, and is cited to support propositions that were already made in the Pre-Confirmation Brief.

14. In short, the Defence was already in the position to substantially advance its work since 30 August 2021 and did not need to wait for the Prosecution’s Trial Brief.³⁹ In particular, the Defence had time in this period to advance, *inter alia*, its: (i) missions

³³ See *e.g.*, Request, paras. 7, 9, 13, 16.

³⁴ ICC-02/11-01/15-1141, para. 9. See also ICC-01/14-01/21-381, para. 3.

³⁵ ICC-01/14-01/21-258, para. 20 (citing ICC-01/14-01/21-243 (“Deadlines Decision”), para. 22).

³⁶ P-0491, P-1523, P-1563, P-1743, P-1808, P-2269, P-2280, P-2386, P-3047, P-3064, P-3108.

³⁷ These are P-3111 (in relation to the *arbatachar* method of restraint), along with four OTP staff members included in an abundance of caution to support chain of custody if deemed necessary, namely P-3112, P-3113, P-3114, and P-3115.

³⁸ The exceptions are P-1743, P-2280, P-3047, and P-3108.

³⁹ See *e.g.*, Deadlines Decision, paras. 18-19, 22; ICC-01/14-01/21-258, para. 20.

in the field; (ii) general legal research on trial proceedings; and (iii) analysis of core incriminatory evidence, which had been available to the Defence before the confirmation hearings.⁴⁰

15. In relation to the Defence's contention that they are only able to review 50 pages of evidence per day per person,⁴¹ the authority cited is inapposite. The Defence cites the Prosecution's filing in another case, involving a different body of evidence with its own characteristics, where the Prosecution was referring to labour-intense disclosure review work. As the Chamber is undoubtedly aware, disclosure review work requires much more than just analysis of the document's value to the case, as the Prosecution must—among other things—carefully consider security issues, create pseudonyms, manually input redactions to both the item's content and data, conduct duplicate review, and create appropriate disclosure packages. This work is not analogous to the current analytic tasks of the Defence.

16. The Defence also had time over the course of this year to advance its work in relation to the rule 68 motions. As the Prosecution has consistently stated, the core incriminatory evidence was disclosed prior to the confirmation hearing. Thus, most of the underlying evidence related to the witnesses covered in the rule 68 motions was available to the Defence for its scrutiny substantially before these motions were made, and indeed certainly must have been assessed to some extent months ago, in advance of the Defence's submissions at the confirmation hearing.⁴² While it is true that specific points highlighted by the Prosecution in its rule 68 applications need to be assessed by the Defence, it is not the case that the Defence had to wait for the motions before conducting any analysis of the core incriminatory evidence or that they had to conduct a full analysis of such evidence anew after the motions were filed.

⁴⁰ Deadlines Decision, para. 11; ICC-01/14-01/21-230-Red, paras. 28-29.

⁴¹ Request, paras. 16-17.

⁴² See ICC-01/14-01/21-369, para. 7.

iii. The Defence's insistence on the full review of rule 77 materials and last minute missions are an attempt to re-litigate already dismissed arguments

17. The Defence's position that it cannot meet deadlines as it now needs to carry out a full review of rule 77 materials and missions in the field⁴³ has already been rejected by the Chamber on 21 February 2022. Specifically, the Chamber held that "as long as the Accused has received all the relevant and significant materials in the Prosecution's possession, there will be no prejudice to the rights of the Accused by proceeding to trial".⁴⁴ The Chamber further added that "[t]he Defence should therefore already be in a position to start preparing its main investigative steps" and "caution[ed] the Defence [] that it should not wait until the last moment to petition the Chamber in this regard".⁴⁵ The Chamber maintained the same position in its decision of 15 March 2022.⁴⁶

B. The Request would have negative impact on the trial preparation of the Parties, Participants, and the Chamber

18. Contrary to the Defence's assertion,⁴⁷ the requested variation of the deadlines would in fact negatively impact on the Prosecution's trial preparation. In September 2022, the Prosecution expects to focus most of its time on ensuring a streamlined and orderly opening statement and the first blocks of witness testimony. However, if the deadline for the Defence's trial brief is substantially extended, the Prosecution would need to devote time in that critical period to reviewing the Defence's trial brief and potentially re-tailoring its opening statement and witness examinations to focus on the most contested issues. The delay in the submission of the Defence's trial brief might also negatively impact on the logistical arrangements for witness testimony,

⁴³ Request, paras. 4, 9, 11, 23.

⁴⁴ Deadlines Decision, para. 22.

⁴⁵ Deadlines Decision, para. 19.

⁴⁶ ICC-01/14-01/21-258, paras. 19-20.

⁴⁷ Request, para. 27.

particularly if the Chamber is minded to wait for the Defence's trial brief before rendering its decisions on the Prosecution's rule 68 motions.

19. The postponing of the deadline by which the Parties can file motions requiring resolution before the start of trial would also negatively impact on the proceedings. The Prosecution submits that it generally would not be fair to reduce the Prosecution's normal 10-day deadline to respond to motions of this nature. However, this would then mean that the Chamber would have only three weeks to consider the Parties' submissions and rule on the matters, which may be insufficient time for a proper consideration of the issues raised, depending on their numerosity and complexity. Furthermore, while the Prosecution will endeavour to respond to any motion raised by the Defence in the normal time period, depending on the type and number of issues raised, the Prosecution may be forced to request an extension of the deadline for its response, which—if considered reasonable and granted—would further reduce the available time for the Chamber's resolution of the motion prior to the planned start date of the trial.

IV. RELIEF SOUGHT

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

- (a) reject the Defence's request to extend the 26 August 2022 deadline for submission of motions requiring resolution before the commencement of trial; and
- (b) reject the Defence's request to extend the 4 September 2022 deadline for submission of its Trial Brief, or grant the Defence a limited extension of no more than one week.



Karim A. A. Khan QC, Prosecutor

Dated this 12th day of July 2022

At The Hague, The Netherland