

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 September 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

**Decision on the Prosecution's Request to Vary the Time Limit
to Submit Non-Witness Related Evidence**

Decision 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

Ms Holo Makwaia

Counsel for the Defence

Ms Jennifer Naouri

Mr Dov Jacobs

Legal Representatives of Victims

Ms Sarah Pellet

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**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

TRIAL CHAMBER VI of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to articles 64, 67 and 69(3) of the Rome Statute (the ‘Statute’), and rule 68 of the Rules of Procedure and Evidence (the ‘Rules’) issues this ‘Decision on the Prosecution’s Request to Vary the Time Limit to Submit Non-Witness Related Evidence’.

I. PROCEDURAL HISTORY

1. On 21 February 2022, the Chamber imposed a deadline for the Office of the Prosecutor (the ‘Prosecution’) to submit motions to request the submission of evidence other than through a witness by no later than 23 May 2022 (the ‘Deadline’).¹ The Chamber expressly stated that this was without prejudice to the Prosecution’s right to submit additional evidence once the trial has commenced.
2. On 14 April,² 25 April,³ 26 April,⁴ 17 May,⁵ and 23 May 2022,⁶ the Prosecution submitted six motions to submit evidence other than through a witness.
3. On 13 June 2022, the Prosecution filed its List of Evidence.⁷
4. On 25 July 2022, the Prosecution made a request to vary the Deadline in relation to 20 items of evidence pursuant to regulation 35 of the Regulations (the ‘Request’).⁸

¹ Decision Setting the Commencement Date of the Trial and Related Deadlines, ICC-01/14-01/21-243, para. 29.

² Prosecution’s First Application for Submission of Documents from the Bar Table Pursuant to Article 64(9), ICC-01/14-01/21-279.

³ Prosecution’s Second Application for Submission of Documents from the Bar Table Pursuant to Article 64(9)", ICC-01/14-01/21-285.

⁴ Prosecution’s Third Application for Submission of Documents from the Bar Table Pursuant to Article 64(9), ICC-01/14-01/21-286.

⁵ Prosecution’s Fourth Application for Submission of Documents from the Bar Table Pursuant to Article 64(9), ICC-01/14-01/21-312.

⁶ Prosecution’s Fifth Application for Submission of Documents from the Bar Table Pursuant to Article 64(9), ICC-01/14-01/21-321; and Prosecution’s Sixth Application for Submission of Documents from the Bar Table Pursuant to Article 64(9), ICC-01/14-01/21-325.

⁷ Prosecution’s List of Evidence, ICC-01/14-01/21-358 + confidential annexes.

⁸ Prosecution’s Request to Vary the Time Limit, ICC-01/14-01/21-434-Conf. A public redacted version was notified on 9 August 2022.

5. On 5 August 2022, the Defence responded to the Request, asking for it to be rejected (the ‘Response’).⁹

6. The Common Legal Representative of Victims did not submit views and concerns on this matter.

II. SUBMISSIONS

7. The Prosecution avers that it has submitted its Request out of an abundance of caution, since the Chamber expressly stated that the Deadline was without prejudice to the Prosecution’s right to submit additional requests once the trial has commenced.¹⁰

8. In terms of whether the conditions of regulation 35(2) of the Regulations are met, the Prosecution claims that it identified the 20 items of evidence, which are already included in its List of Evidence, ‘shortly before or after’ the Deadline.¹¹ The Prosecution invokes a number of what it describes as ‘sound reasons, which objectively provide justification for its inability to comply with the deadline.’¹² In particular, the Prosecution claims that ‘[a]ll items were either collected after [the Deadline] or were identified by the Prosecution shortly after this deadline as meriting an inclusion on its List of Evidence as part of its focused and targeted review of the main evidence in the case.’¹³

9. The Prosecution further argues that the extension of the time limit is in the interests of justice and not prejudicial to the accused.¹⁴

10. The Defence recognises that the Prosecution has the right to submit additional evidence, but argues that this right only applies after the commencement of the trial.¹⁵ The Defence claims that allowing the Prosecution to submit additional bar table

⁹ Réponse de la Défense à la « Prosecution’s Request to Vary the Time Limit » (ICC-01/14-01/21-434-Conf), ICC-01/14-01/21-443-Conf.

¹⁰ Request, paras 1, 8.

¹¹ Request, para. 9.

¹² Request, paras 12-17.

¹³ Request, para. 17.

¹⁴ Request, paras 18-21.

¹⁵ Response, para. 6.

motions between the Deadline and the start of the trial would take up time which the Defence needs to focus on the preparation of the trial.¹⁶

11. According to the Defence, eight of the items of evidence were included in annexes H and I of the List of Evidence, indicating that the Prosecution already asked for their submission through rules 68(2)(b) and 68(3) of the Rules of Procedure and Evidence (the ‘Rules’).¹⁷ The Defence also points out that three of the items are not included in the List of Evidence but are mentioned in the Prosecution’s sixth request pursuant to rule 68(3) of the Rules as evidence which the Prosecution does not seek to introduce as evidence.¹⁸

12. The Defence further contests the Prosecution’s explanation as to why it was impossible to meet the Deadline. In particular, the Defence claims that 13 items have been in the Prosecution’s possession for a long time.¹⁹ In relation to the other 7 items, the Defence argues that, although the Prosecution only obtained them after the Deadline, the Prosecution has not provided any justification for why the Prosecution could not have collected them sooner, since it had access to the relevant source since 2015.²⁰

13. Finally, the Defence contests the Prosecution’s claim that all of the items are ‘non-witness related evidence’ and purports to show that all 20 items can be linked to specific witnesses.²¹

¹⁶ Response, paras 8-11.

¹⁷ Response, para. 12.

¹⁸ Response, para. 13.

¹⁹ Response, para. 15.

²⁰ Response, para. 16.

²¹ Response, paras 17-25.

III. ANALYSIS

A. The request for variation of time limit.

14. The Chamber has considered the Request and finds it inapposite. First, as the Chamber made clear in the Decision Setting the Commencement Date of the Trial and Related Deadlines, the Deadline only applies until the commencement of the trial.²² Although the Prosecution was instructed to file all applications to introduce evidence other than through a witness before the Deadline, the Chamber left open the possibility of making additional requests once the trial has commenced. The purpose behind this approach was twofold: first, to ensure early notice of which items of evidence the Prosecution intends to rely on that will not be introduced through a witness; and second, to give the Defence adequate time to respond to such applications well before the start of the trial.

15. In other words, the door to submitting additional applications to introduce evidence other than through a witness is not entirely closed, but there is a moratorium on such requests between the Deadline and the commencement of the trial. Moreover, as the Defence correctly notes, the possibility of submitting additional applications after the commencement of the trial is not unlimited. Indeed, the Chamber will not allow the Prosecution to submit large volumes of additional items of evidence after the commencement of the trial in a manner that would be prejudicial to the Defence. The Prosecution should therefore only resort to making requests to introduce evidence other than through a witness after the commencement of the trial when it is not possible to introduce the items through a witness.

16. Based on the above, the Chamber finds that the Request is inapposite and must be rejected.

B. Items not included on the List of Evidence

17. The Chamber also cannot fail to note that, contrary to what the Prosecution maintains,²³ not all items mentioned in the Request are included in its List of Evidence.

²² ICC-01/14-01/21-243, para. 29.

²³ Request, paras 2, 14, 18.

Indeed, three Call Data Records (hereinafter the ‘Missing CDR’s’)²⁴ are not included in the List of Evidence. The Chamber can therefore only conclude that there must have been an oversight on the part of the Prosecution in relation to the inclusion of the Missing Items in the List of Evidence.²⁵

18. Be that as it may, the Chamber notes that the Missing CDR’s are relevant and should be included in the List of Evidence because they are part of the raw data that was used by P-3108 to prepare the Telecommunications Report.²⁶ Indeed, all Missing CDR’s²⁷ are referenced in an annex to P-3108’s report (CAR-OTP-2136-0683),²⁸ which is included in the List of Evidence.²⁹ However, the Chamber notes that CAR-OTP-2136-0683 appears to be an outdated version of this annex. Indeed, in its sixth request to introduce prior recorded testimony pursuant to rule 68(3) of the Rules, the Prosecution has asked for authorisation to add a corrected version of this annex³⁰ to its List of Evidence.³¹ The Defence does not object to this.³²

²⁴ CAR-OTP-2112-1592, CAR-OTP-2069-0469, and CAR-OTP-2010-0565.

²⁵ However, the Chamber notes that the Missing CDR’s were included in the Prosecution’s sixth request to introduce prior recorded testimony pursuant to rule 68(3) of the Rules, which was filed shortly after the List of Evidence. *See* Annex A to the Prosecution’s sixth request to introduce prior recorded testimony pursuant to rule 68(3) and to include two items to the List of Evidence, 24 June 2022, ICC-01/14-01/21-374-Conf-AnxA. Remarkably, this motion contains a request to add items of evidence to the List of Evidence (see below), but this does not include the Missing Items. *See* Public Redacted Version of “Prosecution’s sixth request to introduce prior recorded testimony pursuant to rule 68(3) and to include two items to the List of Evidence”, ICC-01/14-01/21-374-Conf, dated 24 June 2022, 28 June 2022, ICC-01/14-01/21-374-Red, paras 22-25.

²⁶ TELECOMMUNICATIONS REPORT / Review of Call Data Records and other telecommunications of Mahamat Said Abdel Kani, CAR-OTP-2136-0675.

²⁷ Two of the Missing Items, i.e. CAR-OTP-2069-0469 and CAR-OTP-2010-0565, are also referenced in other documents, none of which are on the List of Evidence.

²⁸ The metadata of this document do not explain the nature of this document or its relation to P-3108’s report, but the Chamber was able to surmise this relationship from other disclosed documents.

²⁹ Annex I to the Prosecution’s List of Evidence, ICC-01/14-01/21-358-Conf-AnxI.

³⁰ CAR-OTP-2135-3523. *See also* Corrigendum to Review of Call Data Records and other telecommunications of Mahamat Said Abdel Kani, CAR-OTP-2135-3521.

³¹ Prosecution’s sixth request to introduce prior recorded testimony pursuant to rule 68(3) and to include two items to the List of Evidence, 24 June 2022, ICC-01/14-01/21-374-Conf, paras 22-25.

³² Corrigendum de la « Réponse consolidée de la Défense aux sept demandes déposées par l’Accusation en vertu de la Règle 68(3) (ICC-01/14-01/21-322-Conf, ICC-01/14-01/21-326-Conf, ICC-01/14-01/21-348-Conf, ICC-01/14-01/21-357-Conf, ICC-01/14-01/21-371-C Conf, ICC-01/14-01/21-374-Conf et ICC-01/14-01/21-376-Conf) » déposée le 20 juillet 2022 (ICC-01/14-01/21-417-Conf), 30 July 2022, ICC-01/14-01/21-417-Conf-Corr, paras 182-185.

19. In light of the above, the Chamber considers that the Prosecution must ensure that the List of Evidence contains the most up-to-date version of the annex to P-3108's report as well as all the CDR's that are referenced in it.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

INSTRUCTS the Prosecution to file an updated List of Evidence in line with paragraphs 18 and 19 above; and

INSTRUCTS the Prosecution to ensure that all relevant metadata are complete and correct.

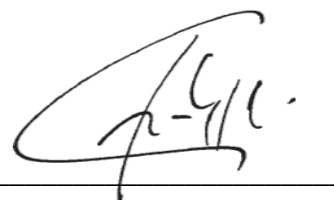


Judge Miatta Maria Samba

Presiding Judge



Judge María del Socorro Flores Liera



Judge Sergio Gerardo Ugalde Godínez

Done in both English and French, the English version being authoritative.

Dated 8 September 2022

At The Hague, The Netherlands