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

Date: **28 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
*THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Confidential

Request for Extension of Time for Responding to the “Prosecution’s fifth request to introduce prior recorded testimony pursuant to rule 68(3)” (ICC-01/14-01/21-371-Conf), the “Prosecution’s sixth request to introduce prior recorded testimony pursuant to rule 68(3)” (ICC-01/14-01/21-374-Conf) and the “Prosecution’s seventh request to introduce prior recorded testimony pursuant to rule 68(3)” (ICC-01/14-01/21-376-Conf) under Regulation 35 of the Regulations of the Court

Source: Defence team for Mahamat Said Abdel Kani

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Classification

1. This application is filed as confidential pursuant to regulation 23 *bis*(2) as it refers to confidential filings.

I. Procedural History

2. On 21 February 2022, the Chamber rendered the “Decision Setting the Commencement Date of the Trial and Related Deadlines”¹ stating in particular that

it would be preferable for any requests pursuant to Rule 68 of the Rules to be filed as soon as possible. Accordingly, the Chamber instructs the Prosecution to file its applications pursuant to Rule 68 of the Rules on a rolling basis and no later than 23 May 2022.²

3. On 16 June 2022, the Defence filed the “*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*”.³ For each witness whom the Prosecution intends to have testify in court, the Defence requested in particular from the Trial Chamber up to one month’s time before the date the witness is due to testify in which to respond to any request for the admission of such witness’s prior statement pursuant to rule 68.

4. That same day, Trial Chamber VI, by email, suspended the deadlines for responding to filings ICC-01/14-01/21-348-Conf, ICC-01/14-01/21-356-Conf and ICC-01/14-01/21-357-Conf.⁴

5. On 21 June 2022, the Prosecution filed the “Prosecution’s fifth request to introduce prior recorded testimony pursuant to rule 68(3)”.⁵

6. That same day, the Prosecution filed the “Prosecution’s response to the Defence requests to vary the time limit (ICC-01/14-01/21-363-Conf)”.⁶

¹ ICC-01/14-01/21-243.

² ICC-01/14-01/21-243, para. 28.

³ ICC-01/14-01/21-363-conf.

⁴ Email from TC VI on 16 June 2022 at 19.01.

⁵ ICC-01/14-01/21-371-Conf.

⁶ ICC-01/14-01/21-369.

7. That same day, the OPCV filed the “Victims’ response to the ‘*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’ (ICC-01/14-01/21-363-Conf)”.⁷*

8. On 24 June 2022, the Prosecution filed the “Prosecution’s sixth request to introduce prior recorded testimony pursuant to rule 68(3)”.⁸

9. On 27 June 2022, the Prosecution filed the “Prosecution’s seventh request to introduce prior recorded testimony pursuant to rule 68(3)”.⁹

II. Applicable Law

10. The Defence refers to paragraphs 7 to 9 of filing ICC-01/14-01/21-300-Conf-Red.

III. Discussion

1. **The workload concerning the Prosecution’s requests under rule 68(3)**

11. The analysis of a request for the admission of prior statements pursuant to rule 68 takes a significant and incompressible amount of time. This is because, before being able to respond to a request from the Prosecution, the Defence must be able to:

12. First, familiarize itself with and analyse all the relevant documents directly relating to the witness: the witness’s prior statement, the “Annexes or Associated Material to be introduced” and the “Material necessary to understand the statement that the Prosecution does not seek to introduce as evidence”, that is, a total of 4,658 pages for the three Prosecution requests to which the Defence must respond.

13. It is important to note regarding the Prosecution’s seventh request (ICC-01/14-01/21-376-Conf) that for five of the six witnesses, in addition to the prior statements, the Prosecution is seeking to introduce into the record the transcripts of the

⁷ ICC-01/14-01/21-370-Conf.

⁸ ICC-01/14-01/21-374-Conf.

⁹ ICC-01/14-01/21-376-Conf.

examination of the witnesses in *Yekatom and Ngaissona* during trial.¹⁰ The task of analysing a transcript of a witness's examination before the ICC is a painstaking and complex exercise that requires, in particular, consideration of the various perspectives of the key persons putting questions to the witness and an understanding of how certain evidence is used during examination. It will also be necessary to watch their testimony, even just excerpts, so as to analyse, when it comes to key issues, the witness's body language and hear his or her tone of voice. In addition to the usual verification and comparison of the accounts given, the Defence will also have to verify the content of the examination-in-chief against the cross-examination conducted by the Defence teams to identify any inconsistencies and any useful information. In addition, the Defence will have to familiarize itself with evidence presented in court to the witnesses in *Yekatom and Ngaissona* that was only disclosed to it in the past few days.¹¹ A considerable amount of work is therefore involved.

14. Second, the Defence must familiarize itself with and analyse all the other material relating to the witness, which the Prosecution might not have explicitly referred to in its requests because such material relating to the testimony may by nature provide useful pieces of information for understanding its content, spotting contradictions, assessing the credibility of the witnesses, etc. – essential factors that the Defence must be able to present to the Bench. To be specific, the exercise for request ICC-01/14-01/21-376-Conf involves at least 1,855 pages.

15. Third, the Defence must familiarize itself with and analyse all the material that the Prosecution asserts corroborates the content of the witness's statement and that justifies, in its view, the admission of the prior statement pursuant to rule 68. The three Prosecution requests referred to in this response involve a considerable number of pages because the task is to analyse all the material that supposedly corroborates eight witnesses.

¹⁰ ICC-01/14-01/21-376-Conf-AnxA: P-0291, P-0884, P-2232, P-2251, P-2328.

¹¹ See email correspondence: "The Prosecution seeks the Chamber's views and guidance on the timing and procedure for filing its rule 68 applications for two witnesses".

16. Fourth, the Defence must identify and analyse (the Prosecution having failed to do so in its request) any material on record that might contradict the prior statements whose admission the Prosecution is seeking. Naturally, this exercise can only be performed once the Defence has been able to analyse each witness's prior statement in detail and so, at this stage, the Defence is not yet able to determine the number of pages concerned.

17. Fifth, the Defence must be able to undertake its own verification and investigation of the witnesses' claims in order to independently ascertain witness credibility and the plausibility of the witness's account.

18. Sixth, the Defence must subsequently have the time to write the response proper, presenting to the Chamber its own analysis of each of the Prosecution's submissions for each of the witnesses – an analysis which it will rely on in founding its position on the basis of a set of reasoned and referenced submissions. In the course of that exercise, it will also be for the Defence to determine the number of pages it will need and, therefore, it should have the time to do so before having to respond, so as to file a request for additional pages if necessary. In this regard, the Defence notes that if the extension of time is not granted in accordance with the instructions communicated by the Chamber for any request for additional pages to be filed no later than three working days before the deadline,¹² then the Defence would have to file, if necessary, requests for additional pages by Wednesday, 29 June 2022,¹³ Monday, 4 July 2022¹⁴ and Tuesday, 5 July 2022.¹⁵ Of note is that Tuesday, 5 July 2022 is also the deadline for filing requests for additional pages for the Defence's responses to the fourth, fifth and sixth rule 68(2)(b) requests to which the Defence must respond by Friday, 8 July 2022.¹⁶

19. The Defence must therefore perform a complex exercise which involves cross-checking all the information contained in the prior statement against the information contained in numerous other prior statements and hundreds of pages of evidence filed

¹² Email from TC VI on 22 June 2022 at 15.03.

¹³ For request ICC-01/14-01/21-371-Conf.

¹⁴ For request ICC-01/14-01/21-374-Conf.

¹⁵ For request ICC-01/14-01/21-376-Conf.

¹⁶ ICC-01/14-01/21-319-Conf, ICC-01/14-01/21-323-Conf and ICC-01/14-01/21-328-Conf.

in the record of the case; linking the Prosecution's assertions with the Prosecution's trial brief and the confirmation of charges decision; and identifying any relevant material for challenging the witness's account. The Defence notes that it is all the more essential for it to have the time for all this analysis work as a *prima facie* review of the two Prosecution requests has revealed that the Prosecution did not undertake the analysis work necessary to sufficiently informing the Chamber and the parties for the purpose of taking a position on its rule 68(3) requests. For instance, regarding the purported corroboration with other testimonies, the Prosecution merely compiles several lists of other witnesses whom it intends to call and generically asserts that their testimony corroborates the testimony of the witnesses whose prior statements it is seeking the admission, without explaining, witness-by-witness, topic-by-topic, incident-by-incident, how each aspect of the testimony is, in its view, corroborated. In other words, the Prosecution has made no effort to advance any argument and has therefore failed to show anything. This means that it is now left to the Defence to analyse all the material mentioned in an attempt to identify possible corroboration. This is a particularly time-consuming task because, instead of verifying the Prosecution's claims and putting them in the overall context of the prior statement and the relevant evidence, the Defence will have to analyse everything in an attempt to discern, and perhaps guess, whether there is any corroboration.

2. The importance of allowing the Defence to respond under suitable conditions: further good cause for an extension of time.

20. Generally speaking, it is important to point out that the prior statements whose admission the Prosecution is seeking are not verbatim, meaning that the parties and the Chamber cannot grasp the dynamics of the discussions with investigators, the type of questions asked (open-ended or leading) – in a non-solemn setting, no oath having been sworn – and which led to the summary presented in the prior statement. Therefore, these prior statements must be treated with caution and, if they are admitted, the procedure for their admission must allow for their in-depth analysis.

21. As part of the admission of prior statements under rule 68(3), it is crucial for the Defence to have the time to properly analyse the prior statement in detail so as to

determine whether it meets the criteria for admission under rule 68 and, above all, so as to verify – by comparing the content of the statement with the confirmation of charges decision and the Prosecution case, in particular the other requests under rule 68 and bar table motions – whether the information set out in the prior statement might be prejudicial and be information for which cross-examination, which by nature is of limited duration, will not succeed in mitigating the risks to the proceedings. This is because cross-examination can never be of the same duration as the hours that the investigators may have spent asking questions. Consequently, there is an inherent risk in the admission of a prior statement under rule 68(3) because, if it appears that the Defence needs to review all the topics addressed, it will therefore be more efficient, and in the interests of expeditiousness of the proceedings, to call the witness *viva voce*, thereby delineating the scope of the examination-in-chief and the cross-examination and limiting the topics addressed and the length of time the witness is heard. Such an assessment can only be made after an in-depth analysis of the testimony.

22. It is all the more essential for the Defence to have adequate time to exhaustively analyse all the witnesses' prior statements whose admission the Prosecution is seeking under rule 68(3) in its fifth, sixth and seventh requests as these witnesses are presenting evidence that is central to the charges brought by the Prosecution because it relates to the contextual elements of the crimes.

3. Context of the request for extension of time: the Defence's heavy workload including the "concurrent workload to prepare for trial"¹⁷ – good cause for granting an extension of time

23. Regarding the Defence's heavy workload, which constitutes good cause for granting an extension of time, the Defence refers to paragraphs 20 to 24 of its filing ICC-01/14-01/21-363-Conf.

4. Deadlines requested by the Defence under regulation 35

24. In light of the foregoing, and to enable the Defence to complete its tasks in a judicious and efficient manner, the Defence respectfully requests the Chamber to

¹⁷ ICC-01/14-01/18-749 para. 5.

afford it, for the same reasons, the same extension of time in which to respond as that requested from the Trial Chamber in its filing ICC-01/14-01/21-363-Conf (see paragraphs 25 to 35).

25. In this instance, the Defence has also taken into account the need to organize “on a rolling basis” work concerning the Prosecution’s requests under rule 68, as well as the workload entailed in responding to the Prosecution’s requests (see above), in particular the need to analyse 4,685 pages of prior statements and material referred to in the “Annexes or Associated Material to be introduced”, “Material necessary to understand the statement that the Prosecution does not seek to introduce as evidence” and the 1,855 pages of material “related to witness[es]” who form the subject of request ICC-01/14-01/21-376-Conf.

26. The Defence also took into consideration the fact that, regarding the Prosecution’s requests under rule 68(3), its request for extension of time will not affect the logistical arrangements for the trial since the Prosecution’s assumption is that, in any event, the witness will be examined during the trial hearings, and so any decision on whether to admit the prior statements of those witnesses under rule 68(3) does nothing to change the fact, that in any case, the Prosecution will have to arrange for the witness to appear and the Registry will have to arrange the witness’s familiarization. So the Chamber has also highlighted:

The Chamber considers that the rule 68(2)(b) applications have a bigger impact on trial management than the rule 68(3) applications as the decisions on the former determine whether a witness’s prior recorded testimony may be introduced in written form or whether the witness must be called to testify in person.¹⁸

27. The Defence also took into account the fact that, on 13 June 2022, the Prosecution filed a tentative list of appearance of its witness, giving the Defence an idea of the order of appearance of the Prosecution’s witnesses, which necessarily affects the organization of work for the trial. The order of appearance indicates in particular when to expect the witnesses in respect of whom requests were made under rule 68(3), allowing the Defence’s work and, hence, the Defence’s timetable for filing responses

¹⁸ ICC-01/14-01/21-341, para. 7.

to the Prosecution's rule 68(3) requests to be streamlined. Put specifically, it would be more optimal and efficient for the Defence to be placed in a position to streamline its analysis and trial preparation concerning a witness who is the subject of a rule 68(3) request: if it is able to assess the relevance of a 68(3) request and concurrently prepare its general analysis concerning that witness, it would be able to use its limited resources efficiently, instead of devoting most of them primarily to responding to 68(3) requests and then to preparing for the witness's appearance.

28. Therefore, the Defence considers that it would be judicious and efficient to ensure that it is able to respond to a request under rule 68(3) for the admission of a witness's prior statement one month ahead of the anticipated appearance of the witness.

FOR THESE REASONS, MAY IT PLEASE THE TRIAL CHAMBER TO:

- **Permit**, for each witness whom the Prosecution intends to have testify in court, the Defence up to one month's time before the date the witness is due to testify in which to respond to any request for the admission of such witness's prior statement pursuant to rule 68.

[signed]

Jennifer Naouri

Lead Counsel for Mahamat Said Abdel Kani

Dated this 28 June 2022

At The Hague, Netherlands