



Original: English

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

Date: 12 May 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

Victims' consolidated response to the Prosecution's Requests to introduce prior recorded testimony under rule 68(2)(b) and (c) (ICC-01/14-01/21-289-Red and ICC-01/14-01/21-290-Red)

Source: Office of Public Counsel for Victims

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Mr Karim A.A. Khan
 Mr Mame Mandiaye Niang
 Mr Eric MacDonald

Counsel for the Defence

Ms Jennifer Naouri
 Mr Dov Jacobs

Legal Representatives of the Victims

Ms Sarah Pellet
 Mr Tars Van Litsenborgh

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****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**

I. INTRODUCTION

1. Counsel representing the collective interests of future applicants as well as of applicants in the proceedings (the “Legal Representative”),¹ hereby submits her consolidated response in support of the “Prosecution’s first request to introduce prior recorded testimony pursuant to rule 68(2)(b)” (the “First Application”) and the “Prosecution Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses” (the “Second Application”).²

2. The formal submission under rule 68(2)(b) of the Rules of Procedure and Evidence (the “Rules”) of the statements and associated material of Witnesses P-0100, P-1277, P-1424, P-1427, P-1523, P-1524, P-1563, P-1825, P-1970, P-2042, and P-2087 (“Eleven Witnesses”) will expedite the proceedings saving valuable court time, and would not unfairly prejudice the rights of Mr Mahamat Saïd Abdel Kani (“Mr Saïd” or the “Accused”). As stressed by the Prosecution, the proposed statements do not concern the acts or conduct of the Accused. They are limited to evidence of the crime base forming a part of the contextual elements for war crimes and crimes against humanity; in particular, they pertain to events in the Boy Rabe neighbourhood of Bangui in 2013. In addition, the statements: (i) are of a cumulative reciprocal nature, in that they refer to similar facts (ii) are corroborated by evidence which the Accused could effectively confront, including through cross-examination; (iii) relate to the relevant historical or political background; and (iv) concern the impact of crimes on victims.

3. The Legal Representative also supports the Second Application. The introduction into evidence of the prior recorded testimony of Witnesses P-0881, P-1004, P-1297, P-1313, P-1420, and P-3053 pursuant to rule 68(2)(c) is appropriate and

¹ See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG CT](#), p. 47, lines 1-13.

² See the “Prosecution’s first request to introduce prior recorded testimony pursuant to rule 68(2)(b)”, with Confidential Annex A, [No. ICC-01/14-01/21-289-Conf](#) and [No. ICC-01/14-01/21-289-Red](#), 29 April 2022 (the “First Application”); and the “Prosecution Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses”, with Confidential Annexes A and B, [No. ICC-01/14-01/21-290-Conf](#) and [No. ICC-01/14-01/21-290-Red](#), 29 April 2022 (the “Second Application”), (together the “Prosecution Applications”).

would result in enhancing the efficiency of the proceedings. The six witnesses are deceased and therefore unavailable to testify before the Court. Their prior recorded testimony – together with the associated material – is *prima facie* relevant, probative and authentic. While the statements of Witnesses P-1004 and P-3053 include references to the acts and conduct of Mr Said, the proposed evidence is overall cumulative to, and corroborated by, the evidence that will be elicited from *viva voce* witnesses at trial. Thus, the Defence will have the opportunity to challenge and refute the evidence of these six witnesses, including by the cross-examination of live witnesses who will testify on overlapping facts and evidence. Accordingly, the introduction of this evidence is not prejudicial to or inconsistent with the rights of the Accused.

4. Lastly, the Legal Representative submits that said evidence will further assist the Chamber in assessing the nature, complexity and extent of the victimisation. In addition, the admission of this evidence may also be valuable to the determination of the appropriate form and amount of reparations to be ultimately awarded to the victims concerned, should the Accused be convicted.

II. PROCEDURAL BACKGROUND

5. On 8 March 2022, the Trial Chamber VI (the “Chamber”) issued the Directions on the Conduct of Proceedings (the “Directions”).³ The Defence filed a request for reconsideration or leave to appeal said Directions on 15 March 2022,⁴ which the Chamber rejected on 8 April 2022.⁵

³ See the “Directions on the Conduct of Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-251](#), 9 March 2022 (the “Directions”).

⁴ See the “*Demande de reconsidération ou, subsidiairement, demande d’autorisation d’interjeter appel des ‘Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-251) déposées le 9 mars 2022*”, [No. ICC-01/14-01/21-259-Conf and No. ICC-01/14-01/21-259-Red](#), 15 March 2022.

⁵ See the “Decision on Defence Request for Reconsideration or Leave to Appeal the ‘Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-251)”, [No. ICC-01/14-01/21-275](#), 8 April 2022.

6. On 29 April 2022, the Prosecution filed the First and Second Application,⁶ together with the “Prosecution’s request to vary the time limit for applications to introduce the prior recorded testimony of 20 witnesses pursuant to Rule 68”.⁷

7. On 6 May 2022, the Defence filed the “*Version confidentielle expurgée de la ‘Requête de prorogation du délai de réponse à la ‘Prosecution’s first request to introduce prior recorded testimony pursuant to rule 68(2)(b) (ICC-01/14-01/21-289-Conf)’*”, à la ‘Prosecution Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses’ (ICC-01/14-01/21-290-Conf) et à la ‘Prosecution’s Request to vary the time limit for applications to introduce the prior recorded testimony of 20 witnesses pursuant to Rule 68’ (ICC-01/14-01/21-291-Conf) en vertu de la Norme 35 du Règlement de la Cour” (the “Defence Request”)⁸, to which the Prosecution responded on 10 May 2022,⁹ as instructed by the Chamber.¹⁰ The Legal Representative informed the Chamber that she would not respond to the Defence Request but respectfully specified that “*should the Chamber be minded to grant the [...] Request, an equivalent time extension be granted to her*”.¹¹

8. On 11 May 2022, the Chamber granted the Defence Request for extension of time¹² but did not similarly vary the deadline for the OPCV to respond to the same

⁶ See the Prosecution Applications, *supra* note 2.

⁷ See the “Prosecution’s request to vary the time limit for applications to introduce the prior recorded testimony of 20 witnesses pursuant to Rule 68”, [No. ICC-01/14-01/21-291-Conf](#), 29 April 2022.

⁸ See the “*Version confidentielle expurgée de la ‘Requête de prorogation du délai de réponse à la ‘Prosecution’s first request to introduce prior recorded testimony pursuant to rule 68(2)(b) (ICC-01/14-01/21-289-Conf)’*”, à la ‘Prosecution Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses’ (ICC-01/14-01/21-290-Conf) et à la ‘Prosecution’s Request to vary the time limit for applications to introduce the prior recorded testimony of 20 witnesses pursuant to Rule 68’ (ICC-01/14-01/21-291-Conf) en vertu de la Norme 35 du Règlement de la Cour”, [No. ICC-01/14-01/21-300-Conf-Red](#), 6 May 2022.

⁹ See the “Prosecution’s response to Defence extension request (ICC-01/14-01/21-300-Conf-Red)”, [No. ICC-01/14-01/21-302-Conf](#), 10 May 2022.

¹⁰ See the email from Trial Chamber VI to the parties and participants entitled “Order reducing time limit for responses to Defence request for extension of time [#300-Conf-Red]”, 9 May 2022 at 13:56.

¹¹ See the email from the Legal Representative to Trial Chamber VI entitled “RE: “Order reducing time limit for responses to Defence request for extension of time [#300-Conf-Red]”, 10 May 2022 at 09:51. The Defence did not oppose.

¹² See the “Decision on Requests to Vary the Time Limits pertaining to the Introduction of Prior Recorded Testimony of Witnesses pursuant to Rule 68 (ICC-01/14-01/21- 300-Conf-Red and ICC-01/14-01/21-291)” (Trial Chamber VI), [No. ICC-01/14-01/21-305](#), 11 May 2022.

filings on the basis that the Legal Representative had “*not provided any reasons justifying [the equivalent time extension]*”.¹³

III. SUBMISSIONS

9. Although the Court’s legal framework highlights the desirability of witnesses giving oral evidence, it also recognises that a variety of other means of introducing evidence may be appropriate. Article 68 of the Rome Statute (the “Statute”) – which is expressly referred to in the first sentence of article 69(2) as providing instances when there may be a departure from the expectation of oral evidence – expressly recognises the potential vulnerability of victims and witnesses which may require “*special means*” to be used for introducing evidence.¹⁴ One of these special means to introduce evidence is rule 68 of the Rules which is “*particularly useful for especially vulnerable witnesses such as children, victims of sexual and gender violence and persons with disabilities*”.¹⁵

10. In this regard, the Chamber held in its Directions:

“The Prosecution shall file applications pursuant to Rule 68(2) and (3) of the Rules as soon as possible and latest by the deadline set for the final list of witnesses. The applications shall be filed together with: i) copies of the previously recorded testimony or hyperlink to same; ii) other material referred to in the previously recorded testimony, without

¹³ *Idem*, para. 24. The Legal Representative notes in this regard a clear departure from the general practice of the Court consistently extending deadlines for all parties and participants, “*in the interests of fairness*” or “*to remain on the same filing schedule*”. See, *inter alia*, most recently, the “Decision on the Victims’ Request for an extension of the time limit to submit their observations on reparation proceedings” (Trial Chamber IX), [No. ICC-02/04-01/15-1910](#), 18 November 2021, para. 11; and the “Decision on the Prosecutor’s request to extend the time limit for the Prosecution’s written submissions on the review concerning reduction of sentence of Mr Ahmad Al Faqi Al Mahdi” (Appeals Chamber), [No. ICC-01/12-01/15-412](#), 31 August 2021, p. 6.

¹⁴ See article 68(2) of the Rome Statute. See also, *inter alia*, the “Corrigendum to Decision on the admissibility of four documents” (Trial Chamber I), [No. ICC-01/04-01/06-1399-Corr](#), 13 June 2008, para. 22; and the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), [No. ICC-01/05-01/08-1386 OA5 OA6](#), 3 May 2011, para. 77.

¹⁵ See BRADY (H.), “Protective and Special Measures For Victims and Witnesses”, in LEE (R.S.) (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, N.Y., Transnational Publishers, 2001, p. 455.

which the testimony would not be understandable, if this material is available to the Prosecution [...]".¹⁶

11. Trial Chambers are vested with discretion in determining whether to admit prior statements and dispense with the witness's appearance at trial upon satisfaction of the requirements listed in rule 68 of the Rules.¹⁷ In turn, rule 68(2)(a) to (d) of the Rules comprises the instances in which the Chamber may allow the introduction of previously recorded testimony when the witness who gave the previously recorded testimony is not present before it.

1. The Prosecution Application to introduce eleven witness statements under rule 68(2)(b) of the Rules

12. Pursuant to rule 68(2)(b), the Chamber may allow the introduction of that previously recorded testimony if it goes to proof of a matter other than the acts and conduct of an accused. The expression "*acts and conduct of the accused*" refers to "*the personal actions and omissions of the accused as opposed to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged*".¹⁸

13. Rule 68(2)(b) further sets out a *non-exhaustive* list of factors to assess whether the prior recorded testimony may be allowed into evidence. A Trial Chamber shall consider, *inter alia*, whether the prior recorded testimony: (i) relates to issues that are not materially in dispute or is of a cumulative or corroborative nature – in that other witnesses will give or have given oral testimony of similar facts – or relates to background information; (ii) is as such that the interests of justice are best served by its introduction; (iii) has sufficient *indicia* of reliability and; (iv) is accompanied by a declaration by the testifying person that the content of the prior recorded testimony is

¹⁶ See the Directions, *supra* note 3, para. 38(i)-(ii).

¹⁷ See, *inter alia*, the "Decision on Prosecution Rule 68(2) and (3) Requests" (Trial Chamber VII), [No. ICC-01/05-01/13-1478-Red-Corr](#), 12 November 2015, para. 95; and the "Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules (Trial Chamber IX)", [No. ICC-02/04-01/15-596-Red](#), 18 November 2016, para. 6.

¹⁸ See the "Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(c)" (Trial Chamber III), [No. ICC-01/09-01/20-235-Red](#), 26 November 2021, para. 9.

true and correct to the best of that person's knowledge and belief and witnessed by a person authorised to that effect by the relevant Chamber.¹⁹

14. In considering whether the prior recorded testimony goes to proof of *"a matter other than the acts and conduct of the accused"*, Trial Chambers assessed not only the content of the testimony sought to be introduced, but also the intended use thereof by the requesting party.²⁰ Accordingly, Trial Chambers admitted prior recorded statements where they only concerned the acts and conduct of persons other than the Accused,²¹ and rejected the introduction of similar testimonies submitted with the primary intention to prove that an accused carried out the alleged conduct.²²

15. Chambers have considered that *"previously recorded testimony"* encompasses not only *"testimony sworn under oath or affirmation"*, but also *"written statements"*, *"transcripts of interviews"* and *"[e]xhibits associated with these recordings [...] so long as the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced"*.²³ Furthermore, the admission into evidence of prior recorded testimony under

¹⁹ See also the "Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules" (Trial Chamber IX), *supra* note 17, para. 5.

²⁰ See, *inter alia*, the "Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules" (Trial Chamber VII), [No. ICC-01/05-01/13-1430](#), 29 October 2015, para. 6; and "Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests" (Trial Chamber VII), [No. ICC-01/05-01/13-1478-Red-Corr](#), 12 November 2015, para. 34. See also the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)" (Trial Chamber I), [No. ICC-02/11-01/15-573-Red](#), 9 June 2016, para. 10.

²¹ See the "Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", *supra* note 20, para. 102.

²² See the "Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b)", *supra* note 20, para. 8.

²³ See the "Public Redacted Version of Corrigendum: Decision on Prosecution Request for Admission of Prior Recorded Testimony" (Trial Chamber V(a)), [No. ICC-01/09-01/11-1938-Corr-Red2](#), 28 August 2015, paras. 32-33. See also the "Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", *supra* note 20, para. 29; the "Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103" (Trial Chamber VI), [No. ICC-01/04-02/06-1029](#), 20 November 2015, paras. 23 and 35; the "Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103", *supra* note 31, paras. 7 and 15; and the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", *supra* note 20, para. 5.

rule 68(2)(b) of the Rules is in the interests of justice when it offers material advantages such as avoiding witnesses unnecessarily repeating their evidence once it has been recorded and shorten the trial period.²⁴ Lastly, when admitting into evidence any prior recorded witness testimony, Trial Chambers must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused.²⁵

16. The materials identified in the First Application and related to the Eleven Witnesses all constitute “*previously recorded testimony*” within the meaning of rule 68(2)(b) of the Rules, as defined *supra*. None of them mention the Accused or anything about his acts and conduct.²⁶ Instead, they are limited to evidence of the crime base forming a part of the contextual elements for war crimes and crimes against humanity; in particular, they pertain to events in the Boy Rabe neighbourhood of Bangui in 2013.

17. Moreover, the testimonies and related materials possess sufficient indicia of reliability²⁷ and are corroborative of evidence which will be provided by witnesses who will testify *viva voce* during the trial.²⁸ In addition, their introduction through rule 68(2)(b) would also protect the rights of the participating victims to fair and expeditious proceedings, while sparing the witnesses the burden of appearing in person and avoiding the risk of re-traumatisation.²⁹

²⁴ See the “Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules”, [No. ICC-02/04-01/15-596-Red](#), 18 November 2016, para. 16.

²⁵ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), [No. ICC-01/05-01/08-1386 OA5 OA6](#), 3 May 2011, para. 78.

²⁶ See the First Application, *supra* note 2, paras. 11-13.

²⁷ See the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, *supra* note 20, para. 22. According to Trial Chamber I, the statements of witnesses taken by the Office of the Prosecutor pursuant to rule 111 of the Rules and under all applicable guarantees, including Article 54(1) of the Statute, bear sufficient indicia of reliability.

²⁸ See the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, *supra* note 20, para. 22. According to Trial Chamber I, the statements of witnesses taken by the Office of the Prosecutor pursuant to rule 111 of the Rules and under all applicable guarantees, including Article 54(1) of the Statute, bear sufficient indicia of reliability.

²⁹ See the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, *supra* note 20, 9 June 2016, para. 21.

18. Therefore, granting the First Application will also be in line with the Chamber's duty to ensure that the trial is fair and expeditious and that it is conducted with due regard to the protection of victims and witnesses pursuant to article 64(2) of the Statute. This also falls within the Chamber's obligation to take appropriate measures for the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, according to article 68(1) of the Statute.

19. Finally, due to the nature of the previously recorded testimonies and related materials of the Eleven Witnesses which (i) go to proof of a matter other than the acts and conduct of Mr Said; (ii) do not cover disputed or critical and live issues and (iii) are cumulative or corroborative of other evidence, their admission into evidence is not prejudicial to or inconsistent with the rights of the Accused.

2. The Prosecution Application to introduce the prior recorded testimony of six witnesses' statements under rule 68(2)(c) of the Rules

20. Pursuant to rule 68(2)(c) of the Rules, the Chamber may allow the introduction of such testimony when the following three requirements are met: (i) the prior recorded testimony comes from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; (ii) the necessity of measures under article 56 could not be anticipated; and (iii) the prior recorded testimony has sufficient indicia of reliability.³⁰ Differently from rule 68(2)(b), sub-rule (c)(ii) does not prevent the introduction of material that goes to the acts and conduct of the accused but nonetheless provides that it "*may be a factor against its introduction, or part of it*". In the *Ntaganda* case, Trial Chamber VI considered not allowing the introduction of testimony if it is "[s]o proximate to the accused, [...] that it would be unfair to allow its admission under Rule 68(2)(c) of the Rules."³¹

³⁰ See the "Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(c)", *supra* note 18, para. 8.

³¹ See the "Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103" (Trial Chamber VI), [No. ICC-01/04-02/06-1205](#), 11 March 2016, para. 18.

21. Having comprehensively reviewed the content of the Second Application and the details provided in Annex A and B, the Legal Representative posits that the Prosecution meets all requirements under rule 68(2)(c) of the Rules. In fact, the evidence of four of the witnesses, namely P-0881, P-1297, P-1313, and P-1420, relates entirely to aspects of the chapeau elements of war crimes and crimes against humanity. It is also cumulative to, and corroborates, the evidence of other witnesses, including witnesses who will testify at trial. In the same vein, while the evidence of two witnesses – namely Witnesses P-1004 and P-3053 – additionally refers to the acts and conduct of the Accused, the proposed evidence is nonetheless overall cumulative to, and corroborated by, the evidence that will be elicited from *viva voce* witnesses at trial. Thus, the Defence will also have the opportunity to challenge and refute the evidence of these two witnesses, including by the cross-examination of witnesses who will testify on overlapping facts and evidence.

22. Moreover, the Prosecution has sufficiently explained the relevance, probative value and reliability of these statements and associated material. The Prosecution further demonstrated that the necessity of article 56 measures could not be anticipated in relation to any of the six witnesses in question. The Legal Representative concurs with the Prosecution that the statements and associated material are reliable and authentic and face no procedural bars to be formally submitted through rule 68(2)(c) of the Rules.

23. Accordingly, the introduction of this evidence is not prejudicial to or inconsistent with the rights of the Accused. As held by Trial Chamber IX in the *Ongwen* case, the ultimate prejudice which the Defence may suffer depends on the nature of the material and how said material is discussed during the trial, and whether the Chamber relies on such material in its judgment and in what manner.³² Therefore, undue prejudice determinations at the point of submission can only be done reliably

³² See the “Decision on Prosecution Request to Submit Interception Related Evidence” (Trial Chamber IX), [No. ICC-02/04-01/15-615](#), 1 December 2016, para. 10.

for items where it is immediately obvious that they cannot be fairly relied upon for any purpose.³³

24. The Legal Representative posits that granting the Second Application will be in line with the Chamber's duty to ensure the expeditiousness of the proceedings pursuant to article 64(2) of the Statute. The admission of the six statements and associated material pursuant to rule 68(2)(c) will provide additional and relevant evidence to the evidence provided by witnesses testifying in court on overlapping facts, possibly resulting in a reduction of time needed for examining in court witnesses and therefore the overall court time, and thus responding to both the right of the Accused and to the interest of victims to expeditious proceedings.

25. Finally, the submission of these statements and associated material will further assist the Chamber in assessing the nature, complexity and extent of the victimisation caused by the Seleka. In addition, the admission of said material may also be valuable for the determination of the appropriate form and amount of reparations to be ultimately awarded to the victims concerned, should the Accused be convicted.

FOR THESE REASONS, the Legal Representative respectfully requests the Chamber to grant the First and Second Prosecution Applications.



Sarah Pellet

Dated this 12th day of May 2022

At The Hague, The Netherlands

³³ *Idem*, para. 11.