



Original: English

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

Date: 01 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
*THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public

Decision on Prosecution Expert Witness P-3111

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
Mr Mame Mandiaye Niang

Counsel for the 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
Mr 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

TRIAL CHAMBER VI of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to articles 64 and 69 of the Rome Statute (the ‘Statute’), and regulations 29, 44 and 54 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on Prosecution Expert Witness P-3111’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 14 January 2022, the Chamber issued an order convening the first status conference and instructing the parties, participants and the Registry to make submissions on a number of issues.¹

2. On 21 January 2022, the Prosecution filed its submissions.² In these submissions, the Prosecution stated that it was considering calling two expert witnesses (including one expert on ‘Torture method of the arbatachar’) and that it would ‘endeavour, in consultation with the Defence, to jointly instruct the said experts in the interests of justice and judicial economy.’³

3. On 21 February 2022, the Chamber issued its ‘Decision Setting the Commencement of the Trial and Related Deadlines’, in which it instructed the parties to ‘jointly instruct all experts in this case’ (the ‘Order on Joint Instruction’)⁴ and also ordered the Prosecution to file its final list of witnesses by 13 June 2022.

4. On 28 February 2022, the Defence requested authorisation to appeal the Chamber’s ‘Decision Setting the Commencement of the Trial and Related Deadlines’ and asked the Chamber to certify as an issue of appeal the legality of the Order on Joint Instruction.⁵

¹ Order Convening the First Status Conference, 14 January 2022, ICC-01/14-01/21-226.

² Prosecution’s submissions pursuant to the “Order scheduling first status conference”, 21 January 2022, ICC-01/14-01/21-230-Conf (the ‘Prosecution’s Submissions’). A public redacted version was filed on 24 January 2022 (ICC-01/14-01/21-230-Red).

³ Prosecution’s Submissions, para. 13.

⁴ Decision Setting the Commencement Date of the Trial and Related Deadlines, 21 February 2022, ICC-01/14-01/21-243, para. 35.

⁵ Demande d’autorisation d’interjeter appel de la « Decision Setting the Commencement Date of the Trial and Related Deadlines » (ICC-01/14-01/21-243) rendue le 21 février 2022, 28 February 2022, ICC-01/14-01/21-246, paras 49-55.

5. On 4 March 2022, the Prosecution responded to the Defence's request to appeal the Order on Joint Instruction.⁶ In its response, the Prosecution argued at length against the authorisation for leave to appeal and stated that 'if the parties are unable to agree on experts/modalities for instructing the experts, they can bring the matter to the Chamber's attention for its guidance and/or resolution.'⁷

6. On 9 March 2022, the Chamber issued its 'Directions on the Conduct of Proceedings', in which the Chamber reiterated its instruction that all experts to be called in the present case be jointly instructed by the parties.⁸

7. On 15 March 2022, the Chamber rejected the Defence's request for leave to appeal the Order on Joint Instruction.⁹

8. On 30 May 2022, the Prosecution invited the Defence to a meeting to discuss the possibility of jointly instructing two experts selected by the Prosecution, without identifying who these experts were.¹⁰ The Defence responded the same day that it would not be available until after 6 June 2022, to which the Prosecution responded that it would prepare 'the necessary elements' to allow the Defence to make a decision. The Prosecution further suggested that it might be necessary for the Prosecution and the Defence to jointly ask for an extension of time.¹¹

9. On the same day, the Prosecution sent a letter of instruction to P-3111.¹²

10. On 5 June 2022, P-3111 completed his report.¹³

⁶ Prosecution Response to "Demande d'autorisation d'interjeter appel de la « Decision Setting the Commencement Date of the Trial and Related Deadlines » (ICC-01/14-01/21-243) rendue le 21 février 2022", 4 March 2022, ICC-01/14-01/21-249 (the 'Prosecution's Response').

⁷ Prosecution's Response, paras 21-23.

⁸ Directions on the Conduct of Proceedings, 9 March 2022, ICC-01/14-01/21-251, para. 40.

⁹ Decision on Defence Request for Leave to Appeal the 'Decision Setting the Commencement Date of the Trial and Related Deadlines' (ICC-01/14-01/21-243), 15 March 2022, ICC-01/14-01/21-258.

¹⁰ Annex A to the 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, 14 June 2022, ICC-01/14-01/21-362-Conf-AnxA (hereinafter 'Annex A').

¹¹ Annex A.

¹² CAR-OTP-2135-3352.

¹³ CAR-OTP-2135-3369.

11. On 7 June 2022, the Prosecution informed the Defence that it had identified P-3111 as an expert witness, who had already prepared an ‘initial report’ at the request of the Prosecution ‘related to the method of tying someone in a way also referred to as “arbatachar”.’¹⁴ The Prosecution then invited the Defence to inform the Prosecution by 10 June 2022 whether the Defence would join the instruction of P-3111.¹⁵

12. On 8 June 2022, the Defence responded to the Prosecution, indicating that: (i) it did not consider P-3111 qualified as an expert on the arbatachar method in the Central African context; (ii) the background information provided by the Prosecution to the expert was biased; (iii) the instructions to the expert were extremely broad and omitted caveats the Defence may have wanted to include; and (iv) the extracts from prior recorded testimonies made available to P-3111 were completely truncated and without context.¹⁶ The Defence refused to join the instruction of P-3111.¹⁷

13. On 10 June 2022, the Prosecution filed its List of Witnesses, which included P-3111 as an expert witness.¹⁸

14. On 14 June 2022, the Defence informed the Chamber of the above course of events and argued that the Prosecution’s conduct had made it impossible for the Defence to comply with the Chamber’s Order on Joint Instruction.¹⁹ The Defence therefore requested the Chamber’s permission to cross-examine P-3111 on his qualifications, methodology and conclusions.²⁰

15. The Prosecution did not respond to the Defence’s submissions.

¹⁴ Annex A to the 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, 14 June 2022, ICC-01/14-01/21-362-Conf-AnxB (hereinafter ‘Annex B’), p. 5.

¹⁵ Annex B, p. 5.

¹⁶ Annex B, pp 2-4.

¹⁷ Annex B, p. 5.

¹⁸ Prosecution’s List of Witnesses, Proposed Order of Appearance, and Summaries of Anticipated Testimony, 10 June 2022, ICC-01/14-01/21-354-Conf-AnxA.

¹⁹ 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, 14 June 2022, ICC-01/14-01/21-362-Conf, (the ‘Defence’s Submissions’), para. 60.

²⁰ Defence’s Submissions, para. 65.

II. ANALYSIS

16. The Chamber has considered the information provided by the Defence and concludes from the Prosecution's silence that it does not contest the events as described. The Prosecution's silence further suggests that the delay in taking the initiative to commence the process of jointly selecting and instructing experts was not due to any unforeseen or extraordinary circumstances beyond the Prosecution's control. There 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. It is further clear from the record that the Prosecution had the intention of calling an expert on the arbatachar method since at least February 2022. It is therefore inexplicable that the Prosecution waited until two weeks before the disclosure deadline to approach the Defence for the first time in relation to this matter.

17. Under these circumstances, the Chamber can only conclude that the Prosecution is responsible for this failure to comply with the Chamber's clear instructions.

18. The Chamber notes that the Defence does not oppose P-3111's appearance as a witness, but wishes to subject him to a *voir dire* process and cross-examine him.

19. This is exactly what the Chamber had sought to avoid by issuing the Order on Joint Instruction. Having regard to the above and to the fact that the Prosecution's Trial Brief does not appear to rely on P-3111's evidence, the Chamber orders the removal of P-3111 from the Prosecution's List of Witnesses as well as of items CAR-OTP-2135-3352, CAR-OTP-2135-3354, CAR-OTP-2135-3367, and CAR-OTP-2135-3369 from the Prosecution's List of Evidence.

FOR THESE REASONS, THE CHAMBER HEREBY

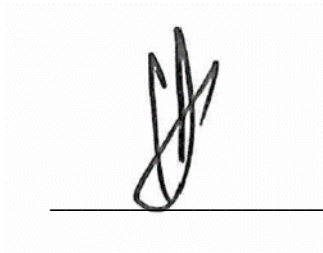
ORDERS the removal of P-3111 from the Prosecution's Witness List; and

ORDERS the removal of items CAR-OTP-2135-3352, CAR-OTP-2135-3354, CAR-OTP-2135-3367, and CAR-OTP-2135-3369 from the Prosecution's List of Evidence.

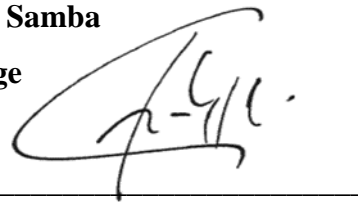


Judge Miatta Maria Samba

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 1 July 2022

At The Hague, The Netherlands