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

Date: **9 August 2022**

**TRIAL CHAMBER VI**

**Before:** Judge Miatta Maria Samba, Single 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**

**Public Redacted Version of “Prosecution’s Request to Vary the Time Limit” ICC-01/14-01/21-434-Conf, dated 25 July 2022**

**Source:** Office of the Prosecutor

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

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## I. INTRODUCTION

1. On 21 February 2022, in its Decision Setting the Commencement Date of the Trial and Related Deadlines (“Scheduling Order”), Trial Chamber VI (“Chamber”) instructed the Prosecution to file all motions to introduce evidence other than through a witness by 23 May 2022, but also stated that the deadline “is without prejudice to the Prosecution’s right to submit additional requests once the trial has commenced.”<sup>1</sup> Notwithstanding the latter language that implies there may be no need to seek to vary the time limit, in an abundance of caution, the Prosecution hereby requests an extension of time pursuant to regulation 35 of the Regulations of the Court (“Regulations”) and 64(9)(a) and 69(2)-(4) of the Rome Statute (“Statute”), so that the Prosecution may submit a request for formal submission of 20 items from the bar table.
  
2. Meeting the set deadline was outside the Prosecution’s control for these items. Further, an extension of time of the lapsed deadline is in the interest of justice and will not prejudice the Accused’s right to a fair trial under article 67(1), especially as all items have already been included on the Prosecution’s List of Evidence and were disclosed to the Defence prior to 13 June 2022. Some of the items were also included in the Annex to the motion pursuant to rule 68(3) for P-3108 and cited in the Prosecution’s Trial Brief.
  
3. Should the request be granted, the Prosecution will be able to demonstrate that the items *prima facie* satisfy the criteria for submission. They are relevant to material issues at trial, probative, and bear sufficient indicia of reliability. They are also cumulative to or corroborative of other Prosecution evidence. Their submission would assist the Chamber in determining the truth and contribute to an expeditious trial.

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<sup>1</sup> Decision Setting the Commencement Date of the Trial and Related Deadlines (“Scheduling Order”), ICC-01/14-01/21-243, para. 29.

## II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this submission confidential because it contains information regarding Prosecution evidence and refers to confidential filings. A public redacted version will be filed as soon as practicable.

## III. SUBMISSIONS

### A. Request for extension of time pursuant to regulation 35(2)

#### *1. The requirements of regulation 35(2) are met*

5. Regulation 35(2) of the Regulations provides that the Chamber “may extend or reduce a time limit if good cause is shown [...]. After the lapse of time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”

6. The Appeals Chamber has held that “[a] cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.”<sup>2</sup>

7. Even if the terms of regulation 35(2) are not met, Chambers may nevertheless grant extension of time. As the *Ntaganda* Trial Chamber held (for comparable circumstances of additions to a list of witnesses after the relevant deadline), these additions “may, in principle, be made when the terms of Regulation 35(2) of the Regulations are met or, even where the terms of that regulation have not been met,

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<sup>2</sup> ICC-01/04-01/07-653, para. 5.

where to do so would nonetheless be in the interests of justice and the determination of the truth.<sup>3</sup>

8. The Prosecution submits that the extension of time is reasonable under the circumstances. Regarding the submission of documentary evidence, the Chamber set the deadline for 23 May 2022, but also envisioned that the Prosecution might need to file additional motions in a later part of the proceedings. Specifically, in its Scheduling Order, the Chamber included that the deadline regarding Bar Table Motions “is without prejudice to the Prosecution’s right to submit additional requests once the trial has commenced.”<sup>4</sup>

9. Prior to 23 May 2022, the Prosecution filed 6 Bar Table Motions, which cover the vast majority of its non-witness evidence in line with the Chamber’s instructions. The items at issue now are an additional focused batch of documents identified shortly before or after the 23 May deadline, but before trial, and which have already been included on the List of Evidence. Thus, the Prosecution does not seek to include any additional items on its List of Evidence or add witnesses to its List of Witnesses, and proper notice has been provided in time for the main judicial deadlines set by the Chamber.

*(a) Materials subject to the requested extension*

10. The items are directly relevant to issues at trial, namely: (1) Mr SAID’s individual criminal responsibility, (2) to corroborate accounts of Prosecution witnesses, some of whom will testify and, (3) to aspects of the contextual elements of crimes against humanity.

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<sup>3</sup> ICC-01/04-02/06-1733, para. 6.

<sup>4</sup> Scheduling Order, para. 29.

11. The 20 items are the following: (i) judicial files on the criminal proceedings [REDACTED] and registers collected from the *Tribunal de Grande Instance* in Bangui related to the “Flyers incident”<sup>5</sup>; (ii) documents relevant to the chain of custody of the items collected from the *Tribunal de Grande Instance*;<sup>6</sup> (iii) Call Data Records (“CRDs”), collected from communications service providers in CAR [REDACTED], which were analysed by P-3108;<sup>7</sup> (iv) a photo depicting a male tied in the so called *arbatachar* method, exemplifying this mode of severe mistreatment and torture;<sup>8</sup> (v) a report on the assessment of seized handsets and associated devices<sup>9</sup> attributed to Prosecution witness P-0349, which is relevant to phone attribution; (vi) a list provided by [REDACTED] of Seleka elements stationed at the CEDAD in 2013, which is corroborative of the anticipated testimony of Witnesses P-2105 and P-0664, both to be called to testify *viva voce*; and (vii) a Human Rights Watch report related to the attack on the 7<sup>th</sup> arrondissement,<sup>10</sup> corroborating the anticipated testimony for instance of Witness P-0312.

*(b) The Prosecution was unable to file within the time limit*

12. The Prosecution can demonstrate that the submission of the above noted items as part of a request pursuant to article 64(9) was objectively not possible before the 23 May deadline had lapsed. The Prosecution, however, was able to add them to the List of Evidence and disclose them prior to the 13 June 2022 deadline.

13. The Prosecution was unable to collect, register and properly review the judicial files and the registers of the *Tribunal de Grande Instance*<sup>11</sup> before the 23 May 2022

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<sup>5</sup> CAR-OTP-2135-3192; CAR-OTP-2135-3202; CAR-OTP-2135-3264; CAR-OTP-2136-0699. See Prosecution’s Trial Brief, paras. 172-179 and the Pre-Trial Chamber’s Confirmation Decision (Operative Part), para. 29 h).

<sup>6</sup> CAR-OTP-2136-1041; CAR-OTP-2136-0684 and CAR-OTP-2136-0693.

<sup>7</sup> CAR-OTP-2030-0324; CAR-OTP-2030-0325; CAR-OTP-2030-0329; CAR-OTP-2019-1360; CAR-OTP-2019-1361; CAR-OTP-2030-0323; CAR-OTP-2112-1592; CAR-OTP-2069-0469; CAR-OTP-2010-0565.

<sup>8</sup> CAR-OTP-2135-3398.

<sup>9</sup> CAR-OTP-2135-3402.

<sup>10</sup> CAR-OTP-2001-1759.

<sup>11</sup> CAR-OTP-2135-3192, CAR-OTP-2135-3202, CAR-OTP-2135-3264; CAR-OTP-2136-1041, CAR-OTP-2136-0684, CAR-OTP-2136-0693 and CAR-OTP-2136-0699.

deadline. The judicial documents were collected only shortly before the expiration of the deadline set for the Prosecution for its last disclosure, the List of Evidence, and Trial Brief, namely between mid-May and 6 June 2022 respectively. The collection of these items was labour intensive, requiring two consecutive missions and multiple meetings with the competent national authorities, which are documented in the investigation reports written by the investigators involved.<sup>12</sup> The items, which are judicial registers and files, had to be registered and reviewed for relevance. Then, their disclosure also had to be administered, including to review for any standard redactions. Their inclusion in a Bar Table Motion was therefore not possible prior to the 23 May 2022 deadline.

14. The Prosecution was also not able to submit the CDRs as part of a Bar Table Motion prior to the 23 May 2022 deadline. The report by P-3108 needed to be finalised subsequent to the disclosure of the CDRs because the volume of the materials required further analysis to assist the comprehension of the data and identify specifically relevant materials. The CDRs and related documentary evidence<sup>13</sup> were disclosed and added to the List of Evidence by 13 June 2022. They were analysed by P-3108, whose report<sup>14</sup> and associated documents were registered on 27 May 2022, disclosed on date 30 May 2022, and referenced in the annex to a rule 68(3) motion filed on 24 June 2022.<sup>15</sup> In the process of finalising the rule 68(3) motion for P-3108 and assessing the related materials, the Prosecution concluded that the raw CDRs themselves, on which [REDACTED] analysis is based, are documentary evidence and should therefore be submitted through a Bar Table Motion supplementing the request pursuant to rule 68(3).<sup>16</sup>

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<sup>12</sup> CAR-OTP-2136-0657; CAR-OTP-2135-3179.

<sup>13</sup> CAR-OTP-2030-0324, CAR-OTP-2030-0325, CAR-OTP-2030-0329, CAR-OTP-2019-1360, CAR-OTP-2019-1361, CAR-OTP-2030-0323, CAR-OTP-2112-1592, CAR-OTP-2069-0469 and CAR-OTP-2010-0565.

<sup>14</sup> CAR-OTP-2136-0675.

<sup>15</sup> ICC-01/14-01/21-374-Conf.

<sup>16</sup> The *Yekatom & Ngaissona* Trial Chamber recently affirmed such an approach. *See below* paras. 31-35.

15. The same reasoning applies to the photo and report on the assessment of seized handsets and associated devices,<sup>17</sup> which sets out the relevant data extracted from handsets and SIM cards seized from [REDACTED]. The sources referenced in this report are relevant for two attributions referenced by P-3108 in her analysis report regarding Mr SAID's CDRs. This report was completed and registered on 9 June 2022 and disclosed on 13 June 2022. This report is relevant to the assessment of two call data attributions made by P-3108. The attributions are individually specified in the report of P-3108 and referenced in CAR-OTP-2136-0675 and CAR-OTP-2135-3521 as well as its Annex at CAR-OTP-2135-3523.<sup>18</sup>

16. Finally, the CEDAD list of elements provided by [REDACTED] and the Human Rights Watch report have both been disclosed as incriminatory prior to the 13 June 2022 deadline and have been added to the Prosecution's List of Evidence and to its Trial Brief. In its final review of the List of Evidence shortly before it was filed on 13 June 2022, the Prosecution discovered that these had inadvertently not been added to a request pursuant to article 64(9) before. The Prosecution is now seeking to rectify this oversight as far in advance of the trial as possible.

17. Following on the above, the Prosecution deems that its incapability to meet the 23 May 2022 deadline was for sound reasons, which objectively provide justification for its inability to comply with the deadline. The Prosecution has made every effort to meet all the Chamber's deadlines and requests this extension of time now as early as possible given the circumstances and its competing procedural obligations in advance of the start of the trial. All items were either collected after 23 May 2022 or were identified by the Prosecution shortly after this deadline as meriting an inclusion on its List of Evidence as part of its focussed and targeted review of the main evidence in the case.

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<sup>17</sup> CAR-OTP-2135-3398 and CAR-OTP-2135-3402.

<sup>18</sup> [REDACTED].



(c) *The extension of time is in the interest of justice*

18. The Prosecution submits that an extension of the time limit would be in the interests of justice and the determination of the truth, and consistent with the Chamber's functions pursuant to article 64(2) and 69(3) of the Statute. This position was taken in similar circumstances by previous Chambers.<sup>19</sup> The items of evidence are already included on the List of Evidence and disclosed. They have been cited in the Trial Brief as appropriate or are referenced in other auxiliary products or by witnesses including P-3108 in her prior recorded testimony. The Bar Table motion would set out for each of the items in detail its relevance and probative value, and that the items are also reliable and authentic. The Prosecution will also set out that these items are to be considered documentary and not testimonial in nature. Having access to this information will enable the Chamber to consider their probative value, eventually their weight and ultimately therefore contribute to establishing the truth.

(d) *The extension of time is not prejudicial to the Accused*

19. Extending the lapsed deadline for the submission of the items is not prejudicial to the Accused. The items have all been disclosed and added to the List of Evidence in time for the disclosure deadline and the majority have been cited in the Prosecution's Trial Brief. They are limited in scope and do not cause any undue burden at this stage of the proceedings. Extending the deadline to ensure the submission of the items now – before the start of the trial – further *enhances* the Defence's ability to prepare for the trial rather than negatively affecting it.

20. While the original deadline has lapsed, if the extension is granted, the relevant request for these items would be submitted well ahead of the start of the trial. The Chamber has broad discretion in regulating the proceedings before it. In this context, it bears noting that the statutory framework establishes no hard or fixed notice period

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<sup>19</sup> See above at para.7

for bar table motions. In other cases, Chambers have allowed such motions well into trial.<sup>20</sup> As noted above, the Chamber itself indicated in its Scheduling Order that such motions could still be submitted after the trial has commenced. Even if this request were granted, it would still be the first trial for article 5 crimes in which all bar table motions are filed well in advance of the start of trial.

21. Finally, granting the extension and therefore allowing the Prosecution to file the motion does not impede the Defence's right to fully and meaningfully contest the evidence at trial. The question of the submission of the items is a distinct issue. As long as the Defence is afforded a reasonable opportunity to respond to the article 64(9) application, there can be no prejudicial effect.

#### IV.RELIEF SOUGHT

22. For the above reasons, the Prosecution respectfully requests that the Chamber extend the lapsed deadline to submit non-witness related evidence pursuant to regulation 35(2) of the Regulation.




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**Karim A. A. Khan QC, Prosecutor**

Dated this 9<sup>th</sup> day of August 2022

At The Hague, The Netherland

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<sup>20</sup> See for instance in *Yekatom and Ngaissona*, ICC-01/14-01/18-1499, *Abd-al-Rahman*, ICC-02/05-01/20-478, paras. 55-56.