



Original: English

**No.: ICC-01/14-01/21
Date: 16 November 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 Redacted Version of

**Decision on the Prosecution's Fifth Request under Rule 68(2)(b) to Introduce the
Prior Recorded Testimony of P-1967 and P-2280**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of Victims

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
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**The Office of Public Counsel
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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*, pursuant to articles 64(2), 67(1) and 69(2) of the Rome Statute (the ‘Statute’) and rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Prosecution’s Fifth Request under Rule 68(2)(b) to Introduce the Prior Recorded Testimony of P-1967 and P-2280’.

I. PROCEDURAL HISTORY

1. On 21 February 2022, the Chamber issued the ‘Decision Setting the Commencement Date of the Trial and Related Deadlines’ setting deadlines for the filing of applications pursuant to rule 68 of the Rules by the Office of the Prosecutor (the ‘Prosecution’).¹ Further directions on the filing of applications under rule 68 of the Rules were issued on 9 March 2022.²

2. On 20 May 2022, the Prosecution submitted its fifth request to introduce prior recorded testimony pursuant to rule 68(2)(b) of the Rules (the ‘Request’).³

3. On 3 June 2022, the Common Legal Representative of Victims (the ‘CLR V’) filed her Consolidated response to the Fifth and Sixth Requests.⁴ The CLR V avers that granting the requests will ‘assist the Chamber in assessing the nature, complexity and extent of the victimisation caused by the Seleka’ and may be relevant ‘for the determination of the appropriate form and amount of reparations to be ultimately awarded to the victims concerned, should the Accused be convicted.’⁵

¹ [ICC-01/14-01/21-243](#), para. 28.

² Directions on the Conduct of Proceedings, ICC-01/14-01/21-251, paras 37-39.

³ Prosecution’s fifth request to introduce prior recorded testimony pursuant to rule 68(2)(b), ICC-01/14-01/21-323-Conf. A public redacted version was filed on 27 May 2022 ([ICC-01/14-01/21-323-Red](#)).

⁴ Victim’s consolidated response to the Prosecution’s 5th and 6th Requests to introduce prior recorded testimony pursuant to rule 68(2)(b) (ICC-01/14-01/21-323-Red and ICC-01/14-01/21-328-Red), 3 June 2022, [ICC-01/14-01/21-345](#) (the ‘Victims’ Response’).

⁵ [Victims’ Response](#), para. 15.

4. On 8 July 2022, the Defence filed its response opposing the Request and asking the Chamber to reject the introduction of the prior recorded testimony of both P-1967 and P-2280 (the ‘Response’).⁶

II. APPLICABLE LAW

5. For the applicable law, the Chamber refers to the ‘Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules’ (the ‘First Rule 68(2)(b) Decision’).⁷

III. ANALYSIS OF THE REQUEST

6. The Request pertains to two witnesses, P-1967 and P-2280. In the Prosecution’s submission, these witnesses provide pertinent background information about the *Office Central de Répression du Banditisme* (the ‘OCRB’) ‘at the time relevant to the charges, while P-1967 additionally provides information relevant to the contextual elements of crimes against humanity.’⁸

7. At the outset, the Chamber notes that, in its Response, the Defence reiterates a number of arguments that were previously raised and dealt with in the context of the First Rule 68(2)(b) Decision.⁹ The Chamber refers to its previous decision in this regard and will hereinafter only deal with the Defence’s arguments that are specific to the Request.

A. P-1967

8. The Prosecution submits that P-1967 ‘was recruited by the Seleka shortly after their takeover of BANGUI’ and ‘worked as a [REDACTED] in 2013.’¹⁰ According to the Prosecution, P-1967 ‘provides evidence related to the organisation and training of the Seleka, which is relevant to the chapeau elements of war crimes’, ‘[REDACTED]

⁶ Réponse de la Défense à la “Prosecution fifth request to introduce prior recorded testimony pursuant to Rule 68(2)(b)” (ICC-01/14-01/21-323-Conf) déposée le 20 mai 2022, 8 July 2022, ICC-01/14-01/21-395-Conf. A public redacted version was filed on 18 July 2022 ([ICC-01/14-01/21-395-Red](#)).

⁷ Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules, 20 October 2022, ICC-01/14-01/21-507-Conf (the ‘First Rule 68(2)(b) Decision’).

⁸ [Request](#), para. 8.

⁹ First Rule 68(2)(b) Decision, paras 17-22, 24, 35-42.

¹⁰ [Request](#), para. 10.

at the ceremony held on 30 August 2013 where the Seleka were ousted from the OCRB' and describes this event, and 'provides information about Seleka leaders, including [REDACTED].'¹¹

9. The Defence submits that it is essential that it be permitted to cross-examine this witness as his evidence presents unique perspectives that are not provided by any other Prosecution witness.¹² It argues that P-1967 was in a privileged position to observe the former President and his entourage, to offer a broader perspective on the situation at *Camp de Roux* and *Camp Kassai*, and [REDACTED].¹³ The Defence also submits that P-1967's testimony cannot corroborate that of P-2573 [REDACTED] because P-2573 is not a credible witness.¹⁴ Last, the Defence avers that P-1967's statement is largely based on hearsay, which is often anonymous.¹⁵

10. The Chamber notes that P-1967's prior recorded testimony does not mention the accused and does not pertain to his acts and conduct.

11. The Chamber observes that P-1967's prior recorded testimony was given: (i) in accordance with rule 111 of the Rules and signed by the witness together with the declaration that the statement was true to the best of his knowledge and recollection; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in a language the witness spoke and understood and translated by a qualified translator.¹⁶ Therefore, the Chamber is satisfied that the prior recorded testimony bears sufficient indicia of reliability for the purposes of introduction pursuant to rule 68 of the Rules.

12. The Chamber notes that P-1967 provides information regarding the Seleka leadership and the organisation of the Seleka, particularly those based in *Camp de Roux*. This information may be relevant to establishing the contextual elements of war crimes and crimes against humanity. The Chamber further notes that the facts relevant to the

¹¹ [Request](#), paras 10-12.

¹² [Response](#), para. 24.

¹³ [Response](#), para. 25.

¹⁴ [Response](#), paras 54-55.

¹⁵ [Response](#), paras 61, 63.

¹⁶ CAR-OTP-2069-0498-R01 at 0499, 0595 to 0596.

contextual elements are materially in dispute in the present case.¹⁷ In particular, the Defence contests the Prosecution's allegations regarding the level of organisation of the Seleka and the Pro-Bozizé forces.¹⁸ Given the witness's [REDACTED] at the time of events, his [REDACTED], and the extent of his knowledge regarding the Seleka leadership, the Chamber accepts the Defence argument that the witness may have further information that was not elicited by Prosecution investigators but may be of specific relevance to the Defence case.

13. The Chamber further notes that the Prosecution highlights: (i) a number of oral witnesses whose evidence is cumulative or corroborative of the witness's evidence pertaining to the OCRB; (ii) one witness who is expected to testify regarding the training at Camp Kassai; and (iii) numerous witnesses who will testify regarding the August 2013 ceremony when the Seleka were ousted from the OCRB.¹⁹ However, the Prosecution does not identify witnesses who are expected to provide oral testimony that is cumulative or corroborative of the remainder of this witness's testimony including information relating to the contextual elements that may be of interest to the Defence.

14. In these circumstances, the Chamber considers that the Defence should be afforded the opportunity to cross examine P-1967 and that it would be prejudicial to the Defence to allow introduction of the prior recorded testimony of P-1967 pursuant to rule 68(2)(b) of the Rules.

15. Therefore, the Chamber considers it appropriate to allow the introduction of P-1967's prior recorded testimony under rule 68(3) rather than rule 68(2)(b) of the Rules. The Chamber's ruling in this respect is subject to the witness's appearance before the Chamber and his consent to the introduction of his testimony pursuant to this provision. To this end, the Prosecution is to confirm by 28 November 2022 whether P-1967 will testify pursuant to rule 68(3) of the Rules.

¹⁷ [Response](#), para. 39.

¹⁸ *Mémoire de première instance de la Défense.*, 12 August 2022, ICC-01/14-01/21-449-Conf, para. 239 *et seq.*

¹⁹ [Request](#), paras 20-21.

B. P-2280

16. The Prosecution submits that ‘P-2280 is a [REDACTED] in Bangui from 23 June 2013 to 7 November 2013’ and ‘visited the OCRB seven to eight times’ during this [REDACTED].²⁰ In particular, the witness describes an occasion when a prisoner [REDACTED] was presented to him [REDACTED]; P-2280 identified this prisoner as [REDACTED] when shown photographs depicting him.²¹ The Prosecution submits that P-2280’s testimony corroborates [REDACTED] account of his mistreatment.²²

17. The Defence argues that the statement of P-2280 cannot be considered as ‘prior recorded testimony’ within the meaning of rule 68(2)(b) of the Rules as it appears to be [REDACTED].²³ The Defence also argues that P-2280’s statement cannot be regarded as corroborating other evidence either in general or specifically in relation to the mistreatment of [REDACTED] and it contests the identification methodology which led P-2280 to identify [REDACTED] in photographs.²⁴ The Defence further submits that it is essential that it be permitted to cross-examine this witness as his evidence presents unique perspectives that are not provided by any other Prosecution witness.²⁵

18. The Chamber observes that P-2280’s prior recorded testimony constitutes a witness interview recorded in the context of a [REDACTED]. The statement was given [REDACTED] and was signed by the witness, who, having read over it, declared that he stood over its contents.²⁶ Therefore, the Chamber is satisfied that the statement was given to an official authorised to collect evidence for use in judicial proceedings and that the witness understood that he was providing information that could be relied upon in the context of legal proceedings.²⁷ As such, it considers that the statement constitutes prior recorded testimony within the meaning of rule 68 of the Rules. On the basis of the foregoing, the Chamber is further satisfied that the prior recorded testimony bears

²⁰ [Request](#), para. 13.

²¹ [Request](#), paras 14-15.

²² [Request](#), para. 15.

²³ [Response](#), paras 14-19.

²⁴ [Response](#), paras 47-53, 57-60.

²⁵ [Response](#), para. 24.

²⁶ CAR-OTP-2135-3728-R01 at 3729, 3737.

²⁷ Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, paras 46-49. See also, Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on the Prosecution’s Request to Admit prior Recorded Testimony under Rule 68(3), 16 November 2021, ICC-01/09-01/20-223, paras 9-10.

sufficient indicia of reliability for the purposes of introduction pursuant to rule 68 of the Rules.

19. The Chamber notes that P-1967's prior recorded testimony does not mention the accused and does not pertain to his acts and conduct.

20. The Chamber further notes that P-2280 provides information about the situation in Bangui in 2013 and his visits to the OCB during the time of the events that are the subject of this case.²⁸ The Prosecution submits that P-2280 provides general background information about the OCB at the time relevant to the charges but the focus of its interest in this witness's testimony appears to be his ability to confirm that he saw [REDACTED] during the time that he was detained at the OCB.²⁹ Mr Said [REDACTED] and the Defence appears to dispute the evidence relating to the encounter of this witness [REDACTED] and has indicated that it disputes all facts in relation to the contextual elements.³⁰

21. Both [REDACTED] [REDACTED] detention and the occasion when [REDACTED].³¹ The Defence [REDACTED] to cross examine both witnesses. The Chamber accepts that P-2280's knowledge is limited regarding what had happened to the prisoner prior to his encounter with him [REDACTED] and that he cannot entirely corroborate [REDACTED] version of events. Nonetheless, it finds that P-2280's prior recorded testimony corroborates the [REDACTED] in essential respects regarding this encounter.

22. In reaching this conclusion, the Chamber has considered the points of potential contradiction identified by the Defence between P-2280 and [REDACTED] prior recorded testimony (regarding how P-2280 came to be at the OCB on the day that he was introduced to [REDACTED] and who arrived in the room first) and the issues raised regarding P-2280's photo identification of [REDACTED].³² However, it finds that these issues are not of such a nature or degree that they should preclude the introduction of P-2280's prior recorded testimony. The Chamber has also noted the

²⁸ CAR-OTP-2135-3728 at 3731-3736.

²⁹ [Request](#), paras 8-9, 14-15.

³⁰ [Response](#), paras 38-39, 47-53, 57-60.

³¹ [REDACTED].

³² [Response](#), paras 49, 51, 57-60.

purported contradictions between the statements of P-0338 and [REDACTED] identified by the Defence regarding [REDACTED], but it considers that P-2280 is not likely to be in a position to clarify these matters which arise from the testimony of two other witnesses.³³

23. The Defence submits that it should be permitted to question P-2280 on matters that were not addressed in his prior recorded testimony.³⁴ It argues that the witness has a unique perspective on [REDACTED].³⁵ In particular, the Defence highlights that the [REDACTED].³⁶ The Defence has not explained in its Response or in its trial brief (and it is not otherwise apparent to the Chamber) how information regarding [REDACTED] would be relevant to determining the criminal responsibility of the accused in the present case.³⁷ In view of the explanation provided by the Defence, the Chamber considers that it has not been established that it would be prejudicial to the Defence if it were not allowed to cross-examine P-2280 in relation to matters extraneous to the information provided in his prior recorded testimony.

24. Furthermore, given the content of P-2280's prior recorded testimony and the oral evidence available from other witnesses on these matters, the Chamber considers that it would be in the interests of justice to introduce the statements and associated material of P-2280 pursuant to rule 68(2)(b) of the Rules in order to streamline the presentation of evidence and to avoid calling numerous oral witnesses to testify regarding the same or similar events.

25. Taking the above into consideration, the Chamber allows the introduction of the prior recorded testimony and associated material of P-2280 pursuant to rule 68(2)(b) of the Rules.

³³ [Response](#), paras 50, 52-53.

³⁴ [Response](#), paras 20-22.

³⁵ [Response](#), para. 25.

³⁶ [Response](#), para. 25.

³⁷ The Chamber notes that the only reference to the [REDACTED] in the Defence trial brief is the following: [REDACTED]: Mémoire de première instance de la Défense, 12 August 2022, ICC-01/14-01/21-449-Conf, para. [REDACTED].

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Fifth Request in part;

ALLOWS the introduction of the prior recorded testimony and associated material of P-1967 pursuant to rule 68(3) of the Rules;

ALLOWS the introduction of the prior recorded testimony and associated material of P-2280 pursuant to rule 68(2)(b) of the Rules; and

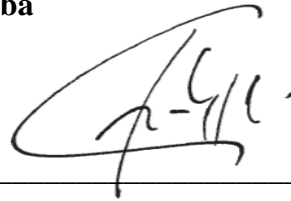
ORDERS the Registry, upon filing of the witness declaration made pursuant to rule 68(2)(b)(iii) of the Rules, to reflect in the eCourt metadata the introduction of the prior recorded testimony and associated material as identified in the present decision.



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 16 November 2022

At The Hague, The Netherlands