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

Date: **1 August 2023**

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 *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public
with Confidential Annex A**

**Public Redacted Version of “Prosecution’s Request under Rule 68(2)(c) to Introduce
the Prior Recorded Testimony of P-0975”, ICC-01/14-01/21-627-Conf, dated 31 July
2023**

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. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber VI (“Chamber”) to introduce into evidence the prior recorded testimony of P-0975 pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”). The Prosecution provides in Confidential Annex A, the list of material it seeks to formally submit for this witness (hereinafter referred to as “Documents”).

2. The Documents can be introduced pursuant to rule 68(2)(c) of the Rules as P-0975 cannot be located and is therefore unavailable to testify before the Court. P-0975’s prior recorded testimony is relevant, probative, and bears sufficient indicia of reliability. The need for article 56 measures could not have been anticipated. The introduction of this evidence is not prejudicial to or inconsistent with the rights of Mahamat Said Abdel Kani (“Mr SAID”).

3. The Documents listed in Confidential Annex A encompass P-0975’s statements of 11 and 12 August 2016,¹ the Witness’ waiver of his right to counsel pursuant to article 55(2)(d), dated 11 August 2016,² a document shown to and explained by the Witness during his interview,³ as well as an Investigation Report confirming the reasonable diligence measures so far undertaken by the Prosecution to contact and locate P-0975.⁴

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this Request and its annex are filed as “Confidential” because they contain information concerning a

¹ CAR-OTP-2033-7885, and translation CAR-OTP-2107-1329.

² CAR-OTP-2033-7896.

³ CAR-OTP-2006-1210.

⁴ CAR-OTP-00001687.

witness which should not be made public. A public redacted version will be filed as soon as possible.

III. APPLICABLE LAW

5. In its Directions on the Conduct of Proceedings (“Directions”),⁵ the Chamber determined that the Prosecution may file applications for the admission of prior recorded testimony pursuant to rule 68(2) of the Rules. Pursuant to rule 68(2)(c) of the Rules, the chamber may allow the introduction of the previously recorded testimony of a witness who is not present before it 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.⁶
6. Rule 68(2)(c)(ii), does not prevent the introduction of material that goes to the acts and conduct of an accused, though it may be a factor against its introduction or part of it.⁷ “Acts and conduct” go beyond the personal actions and omissions of the accused,⁸ and may include the acts and conduct of other persons where this is relied upon to prove the acts and conduct of the accused.⁹

IV. SUBMISSIONS

7. The pre-conditions of rule 68(2)(c) are met in relation to P-0975 because i) he is unavailable to testify as he cannot be located; ii) his evidence is relevant, has

⁵ ICC-01/14-01/21-251, para. 38.

⁶ *Gicheru*, ICC-01-09-01/20-235-Red, para.8.

⁷ ICC-01/14-01/21-506-Conf, para. 10; *Gicheru*, ICC-01-09-01/20-235-Red, para. 28.

⁸ *Al Hassan Appeals Chamber Judgment*, ICC-01/12-01/18-2222, paras. 54-55.

⁹ ICC-01/14-01/21-506-Conf, para. 21.

sufficient indicia of reliability, and is probative; and iii) the necessity of measures under article 56 of the Rome Statute (“Statute”) could not be anticipated.

A. P-0975 has become unavailable to testify due to obstacles that could not be overcome with reasonable diligence, and therefore cannot be located

8. P-0975 has become unavailable within the meaning of rule 68(2)(c) due to the following events between 2021 to 2023 leading up to his inaccessibility, and on the premise of the reasonable diligence measures discussed below, undertaken by the Prosecution to secure his attendance before the Court.

9. [REDACTED],¹⁰ [REDACTED].

10. [REDACTED].¹¹

11. [REDACTED].¹²

12. [REDACTED].¹³ [REDACTED].¹⁴

13. [REDACTED].¹⁵ [REDACTED].¹⁶

14. [REDACTED].¹⁷

15. [REDACTED].¹⁸

¹⁰ Investigation Report CAR-OTP-00001687 at 000002.

¹¹ CAR-OTP-00001687 at 000003.

¹² CAR-OTP-00001687 at 000003.

¹³ [REDACTED], CAR-OTP-00001687 at 000003.

¹⁴ CAR-OTP-00001687 at 000003.

¹⁵ CAR-OTP-00001687 at 000004.

¹⁶ CAR-OTP-00001687 at 000004.

¹⁷ CAR-OTP-00001687 at 000004.

¹⁸ CAR-OTP-00001687 at 000004.

16. [REDACTED].¹⁹

17. [REDACTED].²⁰

18. [REDACTED].²¹

i. The broad interpretation of “unavailability” in rule 68(2)(c)

19. ‘Unavailability’ has been interpreted broadly in *Bemba et al.* to go beyond what was originally envisaged by Rule 92 quater (A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia.

20. The *Bemba et al.* Chamber held that “ [...] unlike Rule 92 quater (A) ... which refers to the admission of a prior statement of a person ‘who has subsequently died, or who can no longer with the reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally’, the drafting history of the amended Rule 68(2)(c) of the Rules makes clear that the intention of the drafters ... was to comparatively broaden the ICTY provision to include ‘a situation in which it was not possible to secure or reach a witness, although the witness could, with reasonable diligence be traced’(...).”²²

21. Consequently in *Bemba et al* the Chamber deemed [REDACTED].²³

22. In *Al Hassan*, the Chamber considered that factors such as failure to establish contact with a witness and failure by relevant state authorities to execute

¹⁹ CAR-OTP-00001687 at 000004 – 000005.

²⁰ CAR-OTP-00001687 at 000005.

²¹ CAR-OTP-00001687 at 000004 – 000005.

²² *Bemba et al*, ICC-01/05-01/13-1481-Red, para. 16.

²³ *Bemba et al*, [REDACTED].

summonses because a witness cannot be located, can render a witness unavailable to testify.²⁴

23. The above case law and aforementioned sequence of events demonstrate P-0975's inaccessibility for over two years, and the reasonable diligence exercised by the Prosecution during that period to overcome the existing obstacles hindering P-0975 from testifying orally before the Court, demonstrate that there is no reasonable likelihood that P-0975 can be contacted, located or that a summons to secure his testimony could be successfully executed in the circumstances.

B. Article 56 measures could not be anticipated

24. P-0975 was interviewed on 11 and 12 August 2016. [REDACTED]. Between 2016 and 2021, there were no indications that evidence preserving measures were warranted.

25. [REDACTED], these circumstances did not necessitate article 56 measures either, because preserving P-0975's evidence would require reliable contact with the Witness, which by then the Prosecution no longer had. Furthermore, the Prosecution did not have at the time, and neither has now, information in its possession indicating that P-0975's health situation was of such gravity as to warrant article 56 measures.

²⁴ *Al Hassan*, ICC-01/12-01/18-2114-Conf, paras 24-26.

C. P-0975's prior recorded testimony is relevant, reliable and has probative value

26. Witness P-0975's prior recorded testimony comprises his statement,²⁵ its annex²⁶ and a declaration²⁷ shown to the Witness during his interview. P-0975's evidence is relevant to the chapeau elements of article 8 of the Statute, specifically, the existence of a non-international armed conflict between the Seleka and Anti-Balaka during the period material to the charges. P-0975 provides evidence about the Seleka's arrival in Bangui, the Anti-Balaka's formation, gathering and training in Gobere.²⁸

27. The Witness also confirms that by September 2013 the Anti-Balaka were engaged in intense hostilities with the Seleka in western CAR, starting in Bossangoa,²⁹ culminating in a large-scale assault on Bangui by the Anti-Balaka on 5 December 2013.³⁰

28. P-0975's statement is *prima facie* probative, reliable and was voluntarily provided.³¹ He further attested that he understood his statement could be used in judicial proceedings before the Court and that he could be called to testify as a witness.³² P-0975's statement was taken in compliance with rule 111 of the Rules.³³ The Witness gave his statement in French, a language the Witness fully spoke and understood, translated and certified by a qualified interpreter.³⁴ P-0975 initialled

²⁵ CAR-OTP-2033-7885 and translation CAR-OTP-2107-1329.

²⁶ CAR-OTP-2033-7896.

²⁷ CAR-OTP-2006-1210.

²⁸ See Pre-Confirmation Brief, ICC-01/04-01/21-155-Red, paras. 33-38, 45-46.

²⁹ P-0975: CAR-OTP-2107-1329-R01 at 1335, para. 32.

³⁰ P-0975: CAR-OTP-2107-1329-R01 at 1336, paras. 37-40.

³¹ CAR-OTP-2033-7885 at 7895 (witness acknowledgment section of P-0975's statement).

³² CAR-OTP-2033-7885 at 7895 (witness acknowledgment section of P-0975's statement).

³³ CAR-OTP-2033-7885 at 7885-7886 (dates, times and places of, and all persons present during the questioning).

³⁴ CAR-OTP-2033-7885 at 7895 (interpreter certification section of P-0975's statement).

each page and signed an attestation confirming the veracity and authenticity of the content of his statement in the presence of the Prosecution investigators.³⁵

29. The statement of P-0975 provides a detailed account of what happened to him and what he witnessed. He describes the events in a coherent and consistent manner. P-0975's evidence is also reliable and truthful because it is cumulative to and corroborates other evidence, including that of Witnesses P-2251, P-2328 and P-2232 whose evidence was granted under rule 68(3) of the Rules.³⁶

D. The introduction of the Documents is not prejudicial to or inconsistent with the rights of Mr SAID

30. Introducing the evidence of P-0975 under rule 68(2)(c) of the Rules causes no undue prejudice to Mr SAID. The evidence is cumulative to or corroborates other evidence to be presented at trial.³⁷
31. Further, P-0975's evidence does not go to central issues of events at the OCRB or the acts and conduct of Mr SAID. Instead the Witness' evidence pertains to only background information and events relevant to the chapeau elements of war crimes.
32. The Defence will have the opportunity to cross-examine the Prosecution witnesses that will testify before the Chamber about the same topics as those referred to by P-0975, including those identified as being corroborated. The Defence will also have the opportunity to rebut the evidence of P-0975, by presenting its own evidence.

³⁵ CAR-OTP-2033-7885 at 7895 (witness acknowledgment section of P-0975's statement).

³⁶ ICC-01/14-01/21-571-Conf.

³⁷ ICC-01/12-01/18-1588-Red, para.10 (noting factors that a Chamber may take into account in assessing potential impact on the Accused, including "whether the evidence provides background information or is central to core issues in the case" and "whether the evidence is cumulative or corroborative of other evidence").

33. The Chamber will make its final assessment as to the authenticity, relevance, probative value and prejudicial effect based on the entire record at the end of the case.³⁸ Only by then will the Chamber determine the proper weight to be given to each piece of evidence submitted on the record and, as appropriate, pursuant to which mode it was submitted.

V. RELIEF SOUGHT

34. For the above reasons, the Prosecution requests the Chamber to accept as formally submitted into evidence the prior recorded testimony of P-0975 and associated documentation, as set out in Annex A to this filing.



Karim A. A. Khan KC, Prosecutor

Dated this 1st day August 2023
At The Hague, The Netherlands

³⁸ *Ntaganda*, ICC-01/04-02/06-1802-Conf, para. 30; *Ntaganda*, ICC-01/04-02/06-1653, para. 23 (referring to *Ntaganda*, ICC-01/04-02/06-1029, para. 27 and *Ruto and Sang*, ICC-01/09-01/11-1938-Corr-Red2, paras. 60, 81, 111 and 128).