

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

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

**Date: 2 April 2024**

**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**

**Order for Clarification in Relation to the Certification Procedure Pursuant to  
rule 68(2)(b) of the Rules of Procedure and Evidence**

**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  
Ms Holo Makwaia

**Counsel for the Defence**

Ms Jennifer Naouri  
Mr Dov Jacobs

**Legal Representatives of Victims**

Ms Sarah Pellet

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
for Participation/Reparations**

**The Office of Public Counsel  
for Victims**

**The Office of Public Counsel  
for the Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

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**TRIAL CHAMBER VI** of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to articles 64, 67 and 69 of the Rome Statute (the ‘Statute’), rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’) and regulations 24, 28, 29 and 34 of the Regulations of the Court (the ‘Regulations’) issues this ‘Order for Clarification in Relation to the Certification Procedure Pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence’.

## **I. PROCEDURAL HISTORY**

1. The Office of the Prosecutor (the ‘Prosecution’) has filed several requests to introduce prior recorded testimony and associated material pursuant to rule 68(2)(b) of the Rules.<sup>1</sup>

2. On 20 October 2022, the Chamber issued its Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b), in which it granted the introduction of the prior recorded testimony and associated material of P-0100, P-1277, P-1424, P-1523, P-1825, P-1970, P-2042, P-2087, P-0529, P-0882, P-2386 and P-0966.<sup>2</sup> On 21 November 2022, the Chamber issued its Decision on the Prosecution Requests pursuant to Rule 68(2)(b) allowing the introduction of the prior recorded testimony and associated materials of P-2295 pursuant to rule 68(2)(b).<sup>3</sup> On the same day, the Chamber issued its Decision on the Prosecution’s Sixth Request Pursuant to

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<sup>1</sup> Prosecution’s first request to introduce prior recorded testimony pursuant to rule 68(2)(b), 29 April 2022, ICC-01/14-01/21-289-Conf with Confidential Annex A. A public redacted version was filed on 11 May 2022 ([ICC-01/14-01/21-289-Red](#)). The witnesses are P-0100, P-1277, P-1424, P-1427, P-1523, P-1524, P-1563, P-1825, P-1970, P-2042 and P-2087; Prosecution’s second request to introduce prior recorded testimony pursuant to rule 68(2)(b), 13 May 2022, ICC-01/14-01/21-307-Conf with Confidential Annex A. A public redacted version was notified on 24 May 2022 ([ICC-01/14-01/21-307-Red](#)). The witnesses are P-0491, P-0510, P-0529, P-0662, P-0882, P-1808, and P-2386; Prosecution’s third request to introduce prior recorded testimony pursuant to rule 68(2)(b), 13 May 2022, ICC-01/14-01/21-308-Conf. A public redacted version was filed on 24 May 2022 ([ICC-01/14-01/21-308-Red](#)). The witnesses are P-0358, P-1180, P-2263, and P-2295; Prosecution’s fourth request to introduce prior recorded testimony pursuant to rule 68(2)(b), 19 May 2022, ICC-01/14-01/21-319-Conf with Confidential Annex A. A public redacted version was notified on 2 June 2022 ([ICC-01/14-01/21-319-Red](#)). The witness is P-0966; Prosecution’s sixth request to introduce prior recorded testimony pursuant to rule 68(2)(b), 23 May 2022, ICC-01/14-01/21-328-Conf with Confidential Annex A. A public redacted version was notified on 27 May 2022 ([ICC-01/14-01/21-328-Red](#)). The witnesses are P-0622, P-1289, P-1432, P-2172, P-2179, P-2239, P-2337, P-2519, P-3047.

<sup>2</sup> 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. A public redacted version was notified on 21 October 2022 ([ICC-01/14-01/21-507-Red](#)).

<sup>3</sup> Decision on the Prosecution Requests pursuant to Rule 68(2)(b) to Introduce the Prior Recorded Testimony of P-0358, P-1180, P-2263 and P-2295, 21 November 2022, [ICC-0114-0121-556](#).

Rule 68(2)(b) of the Rules, in which it granted the request with regard to P-1432, P-2239 and P-2337.<sup>4</sup>

3. Following the Chamber's decisions, on 8 February 2024 the Registry transmitted the declarations and attestations in relation to the prior recorded testimony of 17 witnesses ('Transmission Report').<sup>5</sup> As the Registry had not provided the annexes in which the witnesses had made corrections and clarifications, the Chamber instructed the Registry "to either notify the relevant documents or at least provide a list with the references for each document and to which annex it is linked".<sup>6</sup> Subsequently, on 23 February 2024, the Registry submitted the documents containing the amendments to the prior recorded testimonies of witnesses P-1523, P-0529, P-0882, P-1825, P-1427, P-1432, P-1970, P-2042, P-2087, P-0100, P-2239, P-0966, P-2386 and P-2337 in accordance with rule 68(2)(b) of the Rules ('Transmission of Amendments').<sup>7</sup>

4. On 13 March 2024, following *inter partes* exchanges, the Defence filed its Observations on the Amendments to the Prior Recorded Testimonies of 14 witnesses who had made corrections or clarifications to their testimony ('Defence Observations').<sup>8</sup> The Prosecution communicated its own position in respect of the witnesses via email on the same day.<sup>9</sup>

5. On 26 March 2024, the Prosecution requested an extension of time to file a response to the Defence's observations ('Request for Variation of Time Limit').<sup>10</sup> On

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<sup>4</sup> Decision on the Prosecution's Sixth Request Pursuant to Rule 68(2)(b) of the Rules, 21 November 2022, ICC-01/14-01/21-555-Conf. A public redacted version was notified on the same day ([ICC-01/14-01/21-555-Red](#)).

<sup>5</sup> Registry's Transmission of the Declarations made by Witnesses P-1523, P-0529, P-0882, P-1825, P-1277, P-1427, P-1432, P-1970, P-2042, P-2295, P-2087, P-0100, P-2239, P-0966, P-2386, P-2337, and P-1424 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 8 February 2024, ICC-01/14-01/21-692-Conf with Confidential *ex parte* Annexes 1-17.

<sup>6</sup> Email from Trial Chamber VI, 16 February 2024, at 14:08.

<sup>7</sup> Registry's Transmission of the Amendments to the Prior Recorded Testimonies of Witnesses P-1523, P-0529, P-0882, P-1825, P-1427, P-1432, P-1970, P-2042, P-2087, P-0100, P-2239, P-0966, P-2386 and P-2337 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 23 February 2024, ICC-01/14-01/21-705-Conf with Confidential Annexes 1-14.

<sup>8</sup> Defence's Observations on the "Registry's Transmission of the Amendments to the Prior Recorded Testimonies of Witnesses P-1523, P-0529, P-0882, P-1825, P-1427, P-1432, P-1970, P-2042, P-2087, P-0100, P-2239, P-0966, P-2386 and P-2337 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence (ICC-01/14-01/21-705-Conf), 13 March 2024, ICC-01/14-01/21-721-Conf. A public redacted version was notified on 18 March 2024 ([ICC-01/14-01/21-721-Red](#)).

<sup>9</sup> Email from the Prosecution, 13 March 2024, at 16:41.

<sup>10</sup> Email from the Prosecution, 26 March 2024, at 14:21.

the same day, the Defence sent its observations on the Prosecution's Request for Variation of Time Limit.<sup>11</sup> On 27 March 2024, the Prosecution filed a response to the Defence Observations ('Prosecution Response') on the Transmission of Amendments.<sup>12</sup>

## II. PRELIMINARY MATTERS

6. The Chamber notes that the Prosecution filed its Response to the Defence Observations two days after the applicable time limit. The Chamber further notes that the Prosecution was well aware of this fact, since it had sent a request via email to ask for an extension of time limit the day after the deadline expired and the day before filing the Response to the Defence Observations.

7. In light of this, the Chamber rejects the Response to the Defence Observations *in limine* for the following reasons.

8. First, the Prosecution had already submitted its own Observations on the outcome of the *inter partes* process via email on the same day as the Defence.<sup>13</sup> The Prosecution was therefore not entitled to file a response. It should instead have requested permission to file a reply pursuant to regulation 24(5) of the Regulations.

9. Second, the Prosecution filed the Response to the Defence Observations after the applicable time limit, without waiting for the Chamber's decision on the Prosecution's Request for Variation of Time Limit.

10. Third, the Request for Variation of Time Limit was not properly motivated, as the Prosecution made no effort to explain which exceptional circumstances had made it impossible to make a request for extension of time limit before the lapsing of the time limit or indeed to show good cause for why additional time was needed to file its response.

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<sup>11</sup> Email from the Defence, 26 March 2024, at 15:14.

<sup>12</sup> Prosecution's Response to the Defence's observations on the "Registry's Transmission of the Amendments to the Prior Recorded Testimonies of Witnesses P-1523, P-0529, P-0882, P-1825, P-1427, P-1432, P-1970, P-2042, P-2087, P-0100, P-2239, P-0966, P-2386 and P-2337 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence", 27 March 2024, ICC-01/14-01/21-730-Conf.

<sup>13</sup> Email from the Prosecution, 13 March 2024, at 16:41.

11. The Chamber also finds that the blatant ignoring of time limits and other procedural requirements is unbecoming for the Prosecution and falls short of the highest standards of professionalism which the Office professes to aspire to.<sup>14</sup>

### **III. SUBMISSIONS**

12. In its Observations, the Defence argues that the procedure that was followed in this case to implement the requirements of rule 68(2)(b)(ii) of the Rules was defective. According to the Defence, rule 68(2)(b)(ii) provides no role for the parties as the task of witnessing the declarations of testifying persons belongs exclusively to the Registry.<sup>15</sup> The Defence claims that the Prosecution played a central role in the production of the declarations.<sup>16</sup> In particular, the Defence argues that the Registry effectively delegated the task of re-reading the prior recorded testimony together with the witness to the Prosecution.<sup>17</sup> The latter prepared a document in which the witness made corrections or clarifications to their prior recorded testimony. This document was then signed by the witness in the presence of Prosecution staff members.<sup>18</sup> According to the Defence, the Registry simply copied the relevant sections from the reports prepared by the Prosecution into a separate document that was then signed by the witness in the presence of representative of the Registry.<sup>19</sup>

13. As noted above, the Prosecution did not submit its observations on the rule 68(2)(b) procedure in time and the Chamber will thus not consider them.

### **IV. ANALYSIS**

14. The Chamber recalls that in its decisions provisionally authorising the introduction of the prior recorded testimony of the 17 witnesses involved, it appointed the Senior Legal Advisor of the Registry Legal Office ('RLO'), or any other appropriate

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<sup>14</sup> Regulation 17 of the Regulations of the Office of the Prosecutor.

<sup>15</sup> Defence Observations, para. 2.

<sup>16</sup> Defence Observations, para. 3.

<sup>17</sup> Defence Observations, para. 5.

<sup>18</sup> Defence Observations, para. 5.

<sup>19</sup> Defence Observations, para. 6.

person delegated by him, to be the person authorised to witness declarations made pursuant to rule 68(2)(b)(iii) of the Rules for the purposes of this case.<sup>20</sup>

15. The Chamber notes that the Registry's Transmission Report states that "the Chief of the Registry Legal Office ("RLO") delegated his authority to several Registry Officials (designated for each witness as "Witnessing Officer") to witness the declarations relating to Witnesses P-1523, P-0529, P-0882, P-1825, P-1277, P-1427, P-1432, P-1970, P-2042, P-2295, P-2087, P-0100, P-2239, P-0966, P-2386, P-2337, and P-1424."<sup>21</sup> The Transmission Report makes no reference to any authority being delegated to members of the Prosecution.

16. The Chamber further notes that, in the Transmission of Amendments, the Registry expresses its regret for not having included the documents containing the amendments to the prior recorded testimony of 14 witnesses.<sup>22</sup> But it does not mention any involvement of the Prosecution in the production of these documents.

17. Yet, the Chamber observes that the language contained in the 14 documents containing amendments is identical to passages from as many documents produced by the Prosecution that were disclosed to the Defence.<sup>23</sup> All these documents bear the same title: "REUNION AVEC LE PROCUREUR RELEVANT DE LA REGLE 68-2-b du Règlement de procédure et de preuve de la Cour pénale international (CPI)". Neither the Transmission Report, nor the Transmission of Amendments make reference to or acknowledge the existence of the abovementioned documents that were produced by the Prosecution. Said documents also make no mention of any instrument delegating the witnessing authority pursuant to rule 68(2)(b) to the Prosecution staff members who signed them.

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<sup>20</sup> 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. A public redacted version was notified on 21 October 2022 ([ICC-01/14-01/21-507-Red](#)).

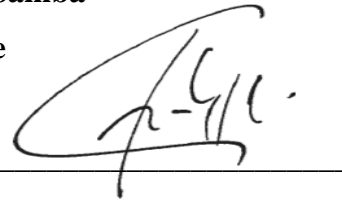
<sup>21</sup> Transmission Report, para. 4.

<sup>22</sup> Transmission of Amendments, para. 7, with reference to P-1523, P-0529, P-0882, P-1825, P-1427, P-1432, P-1970, P-2042, P-2087, P-0100, P-2239, P-0966, P-2386 and P-2337.

<sup>23</sup> In particular, items CAR-OTP-00001303, CAR-OTP-00001310, CAR-OTP-00001343, CAR-OTP-00001370, CAR-OTP-00001379, CAR-OTP-00001432, CAR-OTP-00001448, CAR-OTP-00001450, CAR-OTP-00001470, CAR-OTP-00001374, CAR-OTP-00001495, CAR-OTP-00001503, CAR-OTP-00001517, and CAR-OTP-00001522.

18. The Chamber is somewhat perplexed by this state of affairs. When it appointed the RLO to act as the Witnessing Officer and authorised him to delegate this authority to “any appropriate person”, it obviously did not have in mind that the RLO would appoint the calling party to act as the Witnessing Officer. The Chamber therefore wishes to receive a detailed explanation about the entire certification process of the prior recorded testimony of P-1523, P-0529, P-0882, P-1825, P-1277, P-1427, P-1432, P-1970, P-2042, P-2295, P-2087, P-0100, P-2239, P-0966, P-2386, P-2337, and P-1424. In particular, the Registry is instructed to explain why the calling party seems to have been involved in this process; on what legal basis this was done; whether there is a record of the appointment of the different Prosecution staff members by the RLO; and what the nature and scope of any interaction between the Prosecution staff members and the Witnessing Officers was. To the extent that there are supporting documents, these should be attached to the report.



**FOR THESE REASONS, THE CHAMBER HEREBY****REJECTS** the Response to the Defence Observations *in limine*;**INSTRUCTS** the Registry to submit a report as detailed in paragraph 18 no later than Friday 12 April 2024.**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 02 April 2024

At The Hague, The Netherlands