

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 June 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

Victims' response to the "Prosecution's third request to introduce prior recorded testimony pursuant to rule 68(3)" (ICC-01/14-01/21-348-Red)

Source: Office of Public Counsel for Victims

Document 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 the Victims

Ms Sarah Pellet

Mr Tars Van Litsenborgh

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**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

I. INTRODUCTION

1. Counsel representing the collective interests of future applicants as well as of applicants in the proceedings and participating victims (the “Legal Representative”)¹ hereby submits her response in support of the “Prosecution’s third request to introduce prior recorded testimony pursuant to rule 68(3)” the “Application”).²

2. In particular, the Legal Representative submits that the requirements of rule 68(3) of the Rules of Procedure and Evidence (the “Rules”) are met regarding the documents identified by the Prosecution in its Application and in its Annex. The Legal Representative further supports the Application insofar as the Prosecution seeks leave to conduct a limited examination-in-chief of the concerned witnesses, and submits that this course of conduct will facilitate the expeditiousness and efficiency of the proceedings and is in the best interests of the witnesses given the nature of their victimisation. Further, the Legal Representative submits that the prior recorded testimony and related documents in question are corroborative of other evidence, relevant and reliable, and that their introduction will not be prejudicial to the rights of the Accused. Finally, she posits that this course of action will also promote the rights of the victims to expeditious proceedings.

3. While the express wording of rule 68(3) of the Rules only refers to the possibility for the parties and the Chamber to question the concerned witnesses, the appointed legal representative may also be authorised to question said witnesses if the personal interests of the participating victims are affected by the testimony.

¹ See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG CT](#) and [No. ICC-01/14-01/21-T-007-Red-ENT CT WT](#), p. 47, lines 12-24; the “Decision on matters relating to the participation of victims during the trial”, [No. ICC-01/14-01/21-278](#), 13 April 2022, para. 29; and the “Decision authorising 20 victims to participate in the proceedings”, [No. ICC-01/14-01/21-311](#), 27 May 2022.

² See the “Prosecution’s third request to introduce prior recorded testimony pursuant to rule 68(3)”, with Confidential Annex A, [No. ICC-01/14-01/21-348-Conf](#) and [No. ICC-01/14-01/21-348-Red](#), 8 June 2022 (the “Application”).

II. PROCEDURAL BACKGROUND

4. On 8 March 2022, the Trial Chamber VI (the “Chamber”) issued the Directions on the Conduct of Proceedings (the “Directions”).³ The Defence filed a request for reconsideration or leave to appeal said Directions on 15 March 2022,⁴ which the Chamber rejected on 8 April 2022.⁵

5. On 8 June 2022, the Prosecution filed the Application.⁶

III. SUBMISSIONS

6. The Legal Representative incorporates by reference her previous submissions regarding the legal framework for introduction of prior recorded testimony pursuant to rule 68(3), as set out in the “Victims’ consolidated response to the Prosecution’s Requests to introduce prior recorded testimony pursuant to rule 68(3) (ICC-01/14-01/21-322-Red and ICC-01/14-01/21-326-Red)” (the “Victims’ Consolidated Response”).⁷

7. The Legal Representative agrees with the Prosecution’s approach according to which the introduction of previously recorded testimony under rule 68(3) would ensure the efficiency of the proceedings by: (i) enabling the Prosecution to present its evidence in a more concise and streamlined manner; and (ii) reducing the estimated duration of its case, while minimising unnecessary repetition of the evidence.⁸ In this

³ See the “Directions on the Conduct of Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-251](#), 9 March 2022 (the “Directions”).

⁴ See the “*Demande de reconsidération ou, subsidiairement, demande d’autorisation d’interjeter appel des ‘Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-251) déposées le 9 mars 2022*”, [No. ICC-01/14-01/21-259-Conf](#) and [No. ICC-01/14-01/21-259-Red](#), 15 March 2022.

⁵ See the “Decision on Defence Request for Reconsideration or Leave to Appeal the ‘Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-251)” (Trial Chamber VI), [No. ICC-01/14-01/21-275](#), 8 April 2022.

⁶ See the Application, *supra* note 2.

⁷ See the “Victims’ consolidated response to the Prosecution’s Requests to introduce prior recorded testimony pursuant to rule 68(3) (ICC-01/14-01/21-322-Red and ICC-01/14-01/21-326-Red)”, [No. ICC-01/14-01/21-344](#), 3 June 2022 (the “Victims’ Consolidated Response”), paras. 9-12, 17-19 and 21-22, including footnotes.

⁸ See the Application, *supra* note 2, paras. 3 and 36.

regard, the introduction of evidence under rule 68(3) of the Rules has the potential to significantly enhance the expeditiousness of the proceedings.⁹ Indeed, the principal intention behind the amendment to the original rule 68, which resulted in the adoption of the current rule 68(3) of the Rules, was to reduce the length of the proceedings before the Court and streamline the presentation of evidence.¹⁰ This *rationale* is confirmed by the duty of the Chamber to ensure that the trial unfolds in a focused and expeditious manner in accordance with articles 64(2) and 67(1)(c) of the Rome Statute, while respecting the procedural rights of all participants.¹¹ Therefore, this factor is relevant when implementing rule 68(3) of the Rules.¹²

8. The Legal Representative also posits that the introduction of the prior recorded testimonies will reduce the emotional burden of the concerned witnesses since they will not have to describe again painful parts of their personal stories. This is especially true since all witnesses concerned by the Application are victims of the charged crimes at the OCRB,¹³ and, as such, run a risk of re-traumatisation which “*ought to be minimised*

⁹ See the “Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness [REDACTED] and associated material” (Trial Chamber VI), 2 November 2016, [No. ICC-01/04-02/06-1602-Red](#), 2 November 2016, para. 9. See also, the “Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055” (Trial Chamber VI), [No. ICC-01/04-02/06-961](#), 29 October 2015, para. 13; and the “Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931” (Trial Chamber VI), [No. ICC-01/04-02/06-845](#), 21 September 2015, para. 8. See also the “Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2926’s Evidence” (Trial Chamber V), [No. ICC-01/14-01/18-907-Red](#), 1 April 2021 (the “*Yekatom & Ngaïssona* Rule 68(3) Decision”), para. 16.

¹⁰ See the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’” (Appeals Chamber), [No. ICC-02/11-01/15-744 OA8](#), 1 November 2016 (the “*Gbagbo & Blé Goudé* Judgment”), para. 60. See also the *Yekatom & Ngaïssona* Rule 68(3) Decision, *supra* note 9, para. 15.

¹¹ See, *inter alia*, the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)” (Trial Chamber I), [No. ICC-02/11-01/15-573-Red](#), 9 June 2016, para. 25.

¹² See the *Gbagbo & Blé Goudé* Judgment, *supra* note 10, para. 61.

¹³ See the Application, *supra* note 2, para. 2.

where possible”.¹⁴ Moreover, due to their personal victimisation, the documents related to these witnesses may be characterised as “*crime-base evidence*” for which their introduction under rule 68(3) of the Rules is more conducive, as recalled by the Appeals Chamber.¹⁵

9. In relation to the relevance and reliability of the documents that the Prosecution seeks to introduce, the Legal Representative notes that the prior recorded testimony, including the witness’ statements, transcripts of interviews and associated exhibits, were taken pursuant to rules 111 and 112 of the Rules.¹⁶ The Legal Representative submits that the documents are reliable since the formal requirements contained in said provisions, which constitute the most important factor to be considered in this context,¹⁷ are fulfilled.

10. The Legal Representative further concurs with the Prosecution that the Accused will suffer no prejudice as a result of the introduction of the prior recorded testimony under rule 68(3).¹⁸ Indeed, said introduction carries a lower risk of interfering with the

¹⁴ See the “Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0010” (Trial Chamber VI), [No. ICC-01/04-02/06-988](#), 6 November 2015, para. 13.

¹⁵ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), [No. ICC-01/05-01/08-1386 OA5 OA6](#), 3 May 2011, para. 80.

¹⁶ See the Application, *supra* note 2, para. 37. In the established practice of the Court, the statements recorded pursuant to rule 111 of the Rules constitute prior recorded testimony for the purposes of rule 68 of the Rules. See the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, *supra* note 11, para. 5. See also, the “Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests (Trial Chamber VII)”, [No. ICC-01/05-01/13-1478-Red-Corr](#), 12 November 2015, paras. 29-31; and the *Yekatom & Ngaïssona* Rule 68(3) Decision, *supra* note 9, para. 11.

¹⁷ The Appeals Chamber concluded that the main considerations taken into account in specifically assessing indicia of reliability, were those related to the formal requirements for the taking of the witness statement and thus, in their assessment of indicia of reliability, Trial Chambers are not obliged to consider factors beyond formal requirements. See the *Gbagbo & Blé Goudé* Judgment, *supra* note 10, paras. 3, and 103-104.

¹⁸ See the Application, *supra* note 2, paras. 3 and 38-39.

fair trial rights of the Accused since the witnesses will still appear before the Chamber and will be available for questioning by the Defence.¹⁹

11. Having assessed the content of the documents sought for introduction under rule 68(3) of the Rules against the established principles in the practice of the Court,²⁰ the Legal Representative considers that the documents are corroborative of other evidence to be presented at trial.²¹ Even while they might relate to issues that are materially in dispute and/or central to core issues in the case, the Legal Representative recalls that there is no overriding reason preventing the streamlining of the presentation of evidence by allowing their admission,²² provided that the Defence is given adequate opportunity to examine the witnesses²³ and to test the entirety of the evidence, both in relation to the testimonies given in court and the prior recorded testimonies.

12. The Legal Representative also reiterates that she may be authorised to question any of the six witnesses who are intended to be present in court pursuant to rule 68(3) of the Rules on any issue addressed in their statements, if said issues affect the personal interests of the victims which have not been fully addressed during the prior questioning by the Prosecution.²⁴ She already foresees the need to question dual status individuals with respect to areas relevant to the interests of her clients and to the harm they suffered as a result of the crimes charged. In light of the purpose of rule 68(3) of the Rules, namely to shorten the in-court testimony of witnesses and expedite the proceedings,²⁵ the Legal Representative's questions will be limited to the extent of the

¹⁹ See the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", *supra* note 11, para. 24.

²⁰ See the Victims' Consolidated Response, *supra* note 7, paras. 17-19.

²¹ See the Application, *supra* note 2, paras. 2 and 39.

²² See the *Gbagbo & Blé Goudé* Judgment, *supra* note 10, paras. 67 and 69.

²³ See the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", *supra* note 11, para. 38. See also the Victims' Consolidated Response, *supra* note 7, para. 18.

²⁴ See the Victims' Consolidated Response, *supra* note 7, paras. 21-22.

²⁵ See the "Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", *supra* note 16, paras. 31 and 48. See also, the "Preliminary

victimisation and the prejudice suffered by the concerned witnesses. Concerning the other witnesses, the Legal Representative will further assess the need to preserve her clients' interests, and she may eventually introduce a request for questioning, in compliance with the Chamber's instructions on the matter.²⁶

13. Finally, the Legal Representative notes that, by virtue of the fact that the Application – if granted – will reduce the time necessary for the Prosecution to question the concerned witnesses, the Chamber may consider reducing the time granted to the Defence for questioning. This approach would be consistent with the duty of the Court under article 68(1) of the Rome Statute to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. This approach will also further limit the risk of re-traumatising the witnesses and will be in their best interest.

IV. CONCLUSION

14. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to grant the Application in its entirety.



Sarah Pellet

Dated this 20th day of June 2022

At The Hague, The Netherlands

ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931", *supra* note 9, paras. 8 and 10.

²⁶ See the Directions, *supra* note 3, paras. 26-27.