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

Date: **28 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 *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public
with Confidential Annex A**

**Public Redacted Version of “Prosecution’s sixth request to introduce prior recorded testimony pursuant to rule 68(3) and to include two items to the List of Evidence”,
ICC-01/14-01/21-374-Conf, dated 24 June 2022**

Source: Office of the Prosecutor

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The Office of the Prosecutor

Mr Karim A.A. Khan QC

Mr Mame Mandiaye Niang

Counsel for Defence

Ms Jennifer Naouri

Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
for Victims**

Ms Sarah Pellet

Tars Van Litsenborgh

**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. Pursuant to rule 68(3) of the Rules of Evidence and Procedure ("Rules"), the Prosecution requests that Trial Chamber VI ("Chamber"): (i) allow the introduction into evidence of the report and associated material, provided by Witness P-3108 ("Prior Recorded Testimony") and (ii) allow the Prosecution to conduct a streamlined supplementary examination of P-3108 to clarify certain points and elaborate on specific issues of particular relevance to the case ("Request").¹
2. Receiving P-3108's Prior Recorded Testimony under rule 68(3) will enhance the expeditiousness of the proceedings by reducing the length of the Witness's in-court testimony from 4 hours to 1 hour, thus saving 3 hours of court time.
3. Witness P-3108 is an investigative Analyst with the Office of the Prosecutor ("OTP"). She conducted an analysis of the Call Data Records ("CDR") which included telephone numbers attributed to Mahamat Said Abdel Kani ("Mr SAID"). Her Prior Recorded Testimony is relevant, reliable, probative, and corroborated by other evidence.
4. Introduction of P-3108's Prior Recorded Testimony is not prejudicial to or inconsistent with the rights of the Accused, as P-3108 will be fully available for cross-examination by the Defence and for any further questioning by the Chamber.
5. The Prosecution also requests the Chamber to authorise the addition of a corrigendum to the report of P-3108 and the corrected Annex A to the report to its List of Evidence ("LoE"). The addition is warranted and appropriate in the circumstances as they complete the testimony of P-3108 and were disclosed to the Defence on 23 June

¹ Annex A lists the prior recorded testimony of P-3108. This is comprised of her report and an Annex to the report (at I) and associated material (at II). Where items are necessary to understand P-3108's prior recorded testimony, but the Prosecution does not seek to introduce those items into evidence, those items are also referenced (at III). The materials are all hyperlinked. *See* Directions on the conduct of the proceedings, ICC-01/14-01/21-251, para. 38(i)-(ii).

2022. The addition to the LoE causes no prejudice to a fair trial. To the contrary, they include corrections of a clerical nature and two substantive changes, which assist in the Chamber's understanding of the evidence and thus ultimately in the determination of the truth.

II. CONFIDENTIALITY

6. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Request and its Annex are filed as confidential because they contain information that may identify P-3108 and because they refer to confidential items of evidence. A public redacted version will be filed as soon as practicable.

III. APPLICABLE LAW

7. The Prosecution relies on its previous submissions about the legal framework for introduction of prior recorded testimony pursuant to rule 68(3), as set out in its first application under rule 68(3).² The Prosecution specifically notes that greater discretion is afforded to trial chambers when applying rule 68(3) of the Rules, since this provision typically carries a lower risk of interference with the fair trial rights of the Accused than rule 68(2)(b).³

IV. SUBMISSIONS

A. P-3108's Prior Recorded Testimonies should be conditionally introduced into evidence pursuant to rule 68(3)

8. Witness P-3108 will testify live before the Chamber. Her Prior Recorded Testimony should be introduced into evidence pursuant to rule 68(3), subject to the

² Prosecution's first request to introduce prior recorded testimony pursuant to rule 68(3), ICC-01/14-01/21-322-Conf, 20 May 2022, paras. 5-12.

³ ICC-02/05-01/20-559-Red, para. 11, referring to: ICC-01/14-01/18-907-Red, para. 14.

fulfilment of the conditions set out by the rule. It consists of a report produced by the Witness, dated 27 May 2022, and associated material - an excel table, labelled Annex A. The latter is an integral part of the report. In accordance with the established jurisprudence of the Court,⁴ such associated material must also be introduced in order to ensure full understanding of the submitted testimony.

The Prior Recorded Testimony is Relevant and Probative

9. P-3108 is an investigative Analyst with the OTP. The Prosecution seeks to introduce her report and the associated Annex on the review of the Accused's CDR and other communications as summary evidence.⁵

10. The report explains the methodology utilised for the review and analysis of the CDR. It also outlines the process by which phone numbers were attributed to particular individuals, based on an analytical assessment to determine reliable sources.

11. The purpose of the review conducted by P-3108 was to identify relevant communications of the Accused from the CDR. In particular, the Prior Recorded Testimony highlights the intersection of Mr SAID's calls with other persons relevant to the events charged, [REDACTED].⁶ The regular contacts [REDACTED] outlined in P-3108's report corroborate the Prosecution's evidence that Mr SAID coordinated and

⁴ See e.g. ICC-02/05-01/20-559-Red, para. 17, referring to: ICC-01/14-01/18-907-Red, para. 13; ICC-01/12-01/18-987-Red, para. 17.

⁵ The Prosecution notes that it deems necessary to submit the CDR themselves which are listed in Annex A under III. by way of a Bar Table Motion pursuant to article 64(9) of the Statute. These have been included on the Prosecution's List of Evidence on 13 June 2022. A Bar Table Motion will be filed in the coming days and well in advance of the start of the trial.

⁶ P-3108: CAR-OTP-2136-0675 at 0677-0679, Annex to Report: CAR-OTP-2135-3387, Corrigendum to the Report: CAR-OTP-2135-3521 and corrected Annex to the Report CAR-OTP-2135-3387: CAR-OTP-2135-3523.

cooperated with these persons regularly, held a central role in the Seleka leadership and a leading role at the OCRB.⁷

12. The Annex to P-3108's report specifically indicates:⁸

- [REDACTED];⁹
- [REDACTED];¹⁰
- [REDACTED],¹¹ [REDACTED].

13. Further, the CDR, obtained by the Prosecution, corroborate the testimony of witnesses, most notably P-2105 and P-0338, who explain [REDACTED]. P-3108's findings corroborate the evidence of P-2105 and P-0338 that Mr SAID [REDACTED].¹²

14. Further, the CDR of one of the numbers [REDACTED], namely [REDACTED], corroborates documentary evidence collected by the Prosecution, in particular the [REDACTED]¹³ and [REDACTED].¹⁴

(i) Granting the Request Would Advance the Expeditionousness of the Proceedings

15. The Prosecution estimates that a full direct examination of P-3108 would require at least 4 hours of court time. If P-3108's evidence is introduced pursuant to rule 68(3) of the Rules, the Prosecution would seek only 1 hour for supplemental examination of

⁷ See Prosecution's Trial Brief ICC-01/14-01/21-359-Conf, 13 June 2022, paragraphs 122 – 126.

⁸ CAR-OTP-2135-3523.

⁹ ICC-01/14-01/21-359-Conf, 13 June 2022, paras. 118 – 121.

¹⁰ ICC-01/14-01/21-359-Conf, 13 June 2022, paras. 122 and 125.

¹¹ P-2105: CAR-OTP-2078-0003-R01 at 0013-0014, para. 62 (Fr); P-0338: CAR-OTP-2068-0244-R01 at 0246, para. 14 (Eng).

¹² P-2105: CAR-OTP-2078-0003-R01 at 0016, para. 78 (Fr); P-0338: CAR-OTP-2068-0244-R01 at 0257, para. 76 (Eng).

¹³ [REDACTED]: CAR-OTP-2023-0646 at 0647.

¹⁴ [REDACTED]: CAR-OTP-2125-0936.

this witness. Thus, if the Request is granted, the Prosecution estimates saving at least 3 hours of court time.

(ii) The Prior Recorded Testimony Bears Sufficient Indicia of Reliability for Introduction into Evidence

16. P-3108's report and associated document bear sufficient indicia of reliability for introduction into evidence. The report contains the name of the author, a Prosecution staff member, and is dated. The report explains the methodology and key findings, and is supplemented by the excel table.

17. P-3108's testimony is intended to assist the Chamber to navigate the relevant evidence, specifically by identifying the contacts and communications of Mr SAID from CDR and other sources collected during the course of the investigation that would otherwise require the Chamber to sift through large volumes of raw data. The report annexes the extracted data in the form of Call Sequence Tables (CST) and references the underlying sources for the corresponding attributions, permitting independent verification. P-3108 has extensive experience in the handling and analysis of CDR.

(iii) Introduction of the Prior Recorded Testimony is not Prejudicial To or Inconsistent with the Rights of the Accused

18. The introduction of P-3108's Prior Recorded Testimony into evidence is not prejudicial to the Accused or inconsistent with his right to a fair trial.

19. P-3108 will still appear in court for a limited examination by the Prosecution. Importantly, the Defence will have full opportunity to examine the witness. The right of Mr SAID's counsel to cross-examine P-3108, including addressing any issues of credibility or probative value and any matters of an exculpatory nature, remains

unchanged. Rule 68(3) of the Rules is namely not intended to replace oral testimony but, rather, complements it.¹⁵

20. The Defence has been in possession of the first version of P-3108's report¹⁶ for almost a year¹⁷ and has received the final version of the report on 30 May 2022.¹⁸ The Defence is also in possession of all sources utilised by P-3108 to attribute phone numbers and thus can question her in detail regarding her methodology and the sources of attribution. The basis for the source attributions made by P-3108 are provided in the Prior Recorded Testimony and P-3108 can be questioned in detail on how she reached her conclusions as to their reliability.

D. The Prosecution should be allowed to conduct a focused supplementary examination of the Witness

21. If the Request is granted, the Prosecution requests permission to conduct a limited supplementary examination of P-3108 of no more than 1 hour in order to clarify specific points.

E. Request to include two items to the List of Evidence

22. The Prosecution requests the Chamber to grant leave to add the items CAR-OTP-2135-3521 and CAR-OTP-2135-3523 to its LoE. On 13 June 2022 the Prosecution filed its LoE. Only after finalising her report, which was added to the LoE and had been disclosed, and after the deadline set for the LoE had passed, did P-3108 discover an

¹⁵ ICC-02/05-01/20-559-Red, paras. 12 and 35.

¹⁶ First version of the Report: CAR-OTP-2130-8495 and Annex to the Report: CAR-OTP-2130-8500.

¹⁷ The item was disclosed to the Defence on 30 August 2021, *see* Pre-Confirmation Rule 77 package 018, 30 August 2021 and Pre-Trial Reclassification to INCRIM package 003, 21 April 2022.

¹⁸ Pre-Trial INCRIM package 072, 30 May 2022.

issue concerning a source attribution which she explains in the corrigendum to her report.¹⁹ As outlined in the corrigendum report, P-3108's overall assessment did not change on account of her discovery but she determined that making these corrections would lead to full accuracy, greater clarity and readability of her analysis.

23. The items are relevant and have significant probative value. They are listed in Annex A by ERN. P-3108 acted diligently in submitting the corrections. Her revisions assist the Chamber, Parties and Participants in their truth-seeking function.

24. Reliance on these two additional documents causes no undue prejudice to the Defence. On the contrary, the necessity for the changes was discovered only a few days after P-3108's first report was registered, disclosed and added to the LoE. This request is made in close proximity to the Prosecution's deadline to submit its LoE and well in advance of the start of trial. Further, the additional clerical changes are minimal and enhance the readability of the report and the CST Annex for the Chamber, Parties and Participants.

25. The Prosecution does not consider this to merit a request for the variation of the time limit in accordance with regulation 35 of the Regulations of the Court but rather a request for leave from the Chamber to add items to the List of Evidence following the precedent of the *Yekatom & Ngaissona* case. However, should the Chamber take a different view, the Prosecution respectfully submits that the arguments set out above are also directly relevant under regulation 35(2) of the Regulations as the discovery of the errors by P-3108 fell in the time directly after the Prosecution's deadline and time was needed to write and register her corrigendum. The substantive error discovered merited a correction as it is not merely clerical but relevant to her overall prior recorded testimony.

¹⁹ P-3108 further noticed that the CST Annex did not identify specifically the exact page references within certain source attributions and set out to correct these clerical errors for better readability.

V. RELIEF SOUGHT

26. For the above reasons, the Prosecution requests that the Chamber:

- (i) Introduce into evidence the Prior Recorded Testimony of P-3108, as set out in Annex A to this filing, subject to the fulfilment of conditions of rule 68(3) of the Rules;
- (ii) Allow the Prosecution to conduct a limited supplementary examination of P-3108 of no more than 1 hour;
- (iii) Grant leave to the Prosecution to add the items CAR-OTP-2135-3521 and CAR-OTP-2135-3523, which are included in Annex A, to the Prosecution's List of Evidence.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan QC, Prosecutor

Dated this 28th day of June 2022

At The Hague, The Netherlands