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

**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**

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

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**Unrepresented Applicants
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

TRIAL CHAMBER VI of the International Criminal Court (the ‘Chamber’), 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 Requests pursuant to Rule 68(2)(b) to Introduce the Prior Recorded Testimony of P-0358, P-1180, P-2263 and P-2295’.

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 13 May 2022, the Prosecution submitted its third request to introduce prior recorded testimony pursuant to rule 68(2)(b) of the Rules (the ‘Third Request’).³ The Third Request pertains to the prior recorded testimony of four crime-base witnesses: P-0358, P-1180, P-2263 and P-2295.

3. On 25 May 2022, the Common Legal Representative of Victims (the ‘CLRV’) filed its response to the Third Request (the ‘Victims’ Response’).⁴

¹ Decision Setting the Commencement Date of the Trial and Related Deadlines, 21 February 2022, [ICC-01/14-01/21-243](#), para. 28.

² Directions on the Conduct of Proceedings, 9 March 2022, ICC-01/14-01/21-251 (the ‘Directions’), paras 37-39.

³ 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).

⁴ Victims’ consolidated response to the Prosecution’s 2nd and 3rd Requests to introduce prior recorded testimony pursuant to rule 68(2)(b) (ICC-01/14-01/21-307-Red and ICC-01/14-01/21-308-Red), 25 May 2022, ICC-01/14-01/21-330.

4. On 1 July 2022, after having obtained an extension of time,⁵ the Defence filed its response to the Third Request (the ‘Defence Response’).⁶

II. APPLICABLE LAW

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

III. ANALYSIS

6. The Third Request pertains to four witnesses (P-0358, P-1180, P-2263 and P-2295) whose evidence is mainly relevant to charged incident (h) as well as some aspects of the contextual elements. Incident (h) involves the alleged detention of a group of 16 individuals at different locations, including the OCRB. In addition to being detained at the OCRB, the Prosecution also alleges that the Seleka at the OCRB flogged and beat these individuals. Although the detention and alleged mistreatment of these individuals at *Camp de Roux* and the Ngaragba prison is not part of the charges, it is potentially relevant for the contextual elements.

7. Both the Prosecution and the CLRV claim that the conditions of rule 68(2)(b) of the Rules have been met. The Prosecution estimates that granting the Third Request will ‘save up to 16 hours of direct examination time.’⁸ The CLRV, for its part, argues that granting the Third Request 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.’⁹

8. In the Defence Response, the Defence reiterates a number of arguments that were previously raised and dealt with in the context of the Chamber’s Decision on the

⁵ Decision on Defence Request for Extension of Time for Responses to Rule 68(2)(b) Applications (ICC-01/14-01/21-313-Conf-Exp), 19 May 2022, ICC-01/14-01/21-314.

⁶ Réponse de la Défense à la “Prosecution third request to introduce prior recorded testimony pursuant to Rule 68(2)(b)” (ICC-01/14-01/21-308-Conf) déposée le 13 mai 2022, 1 July 2022, ICC-01/14-01/21-386-Conf.

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, paras 9-42 (a [public redacted version](#) of this decision was filed on 21 October 2022) (the ‘First Rule 68(2)(b) Decision’).

⁸ Third Request, para. 3.

⁹ Victims’ Response, para. 14.

Prosecution's First, Second and Fourth Requests pursuant to rule 68(2)(b) of the Rules.¹⁰ 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 Third Request.

A. Overview of the prior recorded testimony to be submitted pursuant to rule 68(2)(b) of the Rules

1. P-0358

9. P-0358's prior recorded testimony relates mainly to his role at one of Bangui's hospitals and what he witnessed in that capacity. In particular, P-0358 provided two lists¹¹ of alleged victims of violence who were brought to the hospital from 22 March 2013 onwards.¹² He also provided a number of photographs of some such alleged victims.¹³ In addition, P-0358 describes the alleged arrest and subsequent detention at *Camp de Roux* of two hospital staff members in relation to an incident involving the production of a pamphlet.¹⁴ The witness also describes seeing a number of bodies in the hospital morgue, which were allegedly identified as being victims of an incident at PK9 in mid-July 2013.¹⁵ Finally, P-0358 also mentions an attack around 5 December 2013 when the anti-Balaka (unsuccessfully) tried to retake Bangui, specifically noting an influx of Muslim civilian victims.¹⁶ P-0358 provides no information at all about the OCRB and does not mention the accused.

2. P-1180

10. P-1180 is an alleged victim of incident (h).¹⁷ According to his prior recorded testimony, P-1180 was detained at the OCRB between 10 and 17 July 2013.¹⁸ He also claims to have been beaten and whipped at the OCRB.¹⁹

11. The Chamber notes that, in addition to testimony about events at the OCRB, P-1180's statement contains information about the witness' arrest and subsequent

¹⁰ ICC-01/14/01/21/507-Red.

¹¹ CAR-OTP-2043-0603 and CAR-OTP-2043-0605.

¹² CAR-OTP-2043-0433, at 0436-0437, paras 22-29.

¹³ CAR-OTP-2043-0433, at 0437-0438, paras 30-36.

¹⁴ CAR-OTP-2043-0433, at 0444-0447, paras 80-95.

¹⁵ CAR-OTP-2043-0433, at 0447-0448, paras 96-106.

¹⁶ CAR-OTP-2043-0433, at 0450, paras. 117-119.

¹⁷ Third Request, para. 12.

¹⁸ CAR-OTP-2043-0483, at 0504-0505.

¹⁹ CAR-OTP-2043-0483, at 0504.

detention at *Camp de Roux*²⁰ and Ngaragba prison.²¹ The witness also recounts witnessing the killing of several individuals by Seleka members during P-1180's detention. In particular, the Witness mentions two occasions when he observed killings. During the first, two persons were shot and the witness was ordered to dump their bodies in the Oubangui river.²² During the second, the witness describes an attack where three people were mutilated and killed at night in the hills near *Camp de Roux*.²³

12. Significantly, P-1180 also states that the Colonel in charge of the OCRB during his time there was not from CAR and did not speak Sango very well.²⁴

3. P-2263

13. Like P-1180, P-2263 is an alleged victim of incident (h).²⁵ According to P-2263's prior recorded testimony, he was detained at the OCRB for seven days where he suffered severe flogging and beating.²⁶

14. P-2263 also claims to have been detained at *Camp de Roux* and Ngaragba prison. He corroborates P-1180's account about two men being killed by Seleka members near the bank of the Oubangui river.²⁷ The witness further describes the commander of the OCRB and testifies that this individual spoke Sango well but with a foreign accent and speculates that he may have hailed from Sudan or Chad.²⁸ P-2263 also accuses this OCRB commander of having ordered the witness and other detainees to be beaten.²⁹

4. P-2295

15. P-2295 is also an alleged victim of incident (h). He claims to have been detained at the OCRB for two to three days and also describes being flogged there by the

²⁰ CAR-OTP-2043-0483, at 0489-0490, paras 40-45.

²¹ CAR-OTP-2043-0483, at 0505-0506, paras 164-170.

²² CAR-OTP-2043-0483, at 0497-0498, paras 97-103.

²³ CAR-OTP-2043-0483, at 0499-0500, paras 117-121.

²⁴ CAR-OTP-2043-0483, at 0505, para. 162.

²⁵ Third Request, para. 8

²⁶ CAR-OTP-2091-3074, at 3077-3083, paras 17-36.

²⁷ CAR-OTP-2089-1229, at 1234, para. 45.

²⁸ CAR-OTP-2091-3074, at 3079, para. 21.

²⁹ CAR-OTP-2091-3074, at 3079, para. 21.

Seleka.³⁰ Like P-1180 and P-2263, he also testifies to having been arrested and detained in *Camp de Roux*³¹ and Ngaragba prison.³² The witness states that in Ngaragba prison President DJOTODIJA came to visit and promised that he would call the Prosecutor to ensure that all innocent people would be released.³³ P-2295 does not mention Mr Said or the commander of the OCRB in his statement.

B. Analysis of criteria set out in rule 68(2)(b) of the Rules

1. Whether the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused

16. According to the Prosecution, none of the four witnesses testify about Mr Said or any other matters related to his acts and conduct. The Defence points out that the testimony of all four witnesses is related to charged crimes that are directly attributed to Mr Said. It would therefore be illogical, according to the Defence, to consider that their testimony does not relate to the acts and conduct of the accused.³⁴ For reasons set out in its Decision on the Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses,³⁵ the Chamber rejects the Defence's interpretation of the notion of 'acts and conduct of the accused'.

2. Whether the evidence relates to background information and/or issues that are not materially in dispute

17. According to the Prosecution, the factual allegations contained in the witnesses' testimony are not materially in dispute (as opposed to the legal significance of these facts).³⁶ The Defence contests this and states that it disputes the entirety of the allegations concerning the incidents that allegedly occurred at the OCRB, including incident (h).³⁷

18. The Chamber takes note of the Defence's position, but cannot fail to observe that the Defence does not articulate any specific points of disagreement in relation to

³⁰ CAR-OTP-2130-9460, at 9465, paras 25-26.

³¹ CAR-OTP-2130-9460, at 9464, paras 19-24.

³² CAR-OTP-2130-9460, at 9466-9467.

³³ CAR-OTP-2130-9460, at 9466, para. 30.

³⁴ Defence Response, paras 16-21.

³⁵ 20 October 2022, ICC-01/14-01/21-506-Conf, paras 17-21 (a [public redacted version](#) was filed on 26 October 2022).

³⁶ Third Request, para. 25.

³⁷ Defence Response, para. 22.

the allegations underlying incident (h). To the extent that the Defence is simply taking the position that it does not concede any of the Prosecution's allegations and wants to put the Prosecution to the proof, this cannot be an obstacle to the introduction of the four prior recorded testimonies pursuant to rule 68(2)(b) of the Rules. Indeed, accepting such a view would be akin to giving the Defence a *de facto* veto right, which is clearly not what rule 68(2)(b) of the Rules envisages.

19. Nevertheless, the Chamber notes that, although some of the evidence of the four witnesses does indeed relate to background information, the core of P-1180, P-2263, and P-2295's testimony relates to the same charged incident. Moreover, as noted above, P-1180 and P-2263 both gave evidence about the commander of the OCRB, without identifying this person. This issue is clearly relevant to a central and contested question in this case. The Chamber therefore considers it is important that the Defence have an opportunity to examine these two witnesses on this point.

20. In relation to P-0358, the Chamber notes that he has provided two lists³⁸ purporting to record the number of persons who were either killed or injured and brought to one of the main hospitals in Bangui during the time of the Seleka takeover of Bangui.

21. The Defence objects to the introduction of the two lists prepared by P-0358 on the following grounds: (i) the two documents are neither signed nor dated; (ii) P-0358 does not explain the methodology of how the information was collected or the sources thereof; (iii) although P-0358 stated that he was not in a position to determine the cause of death, the document indicates that torture was the cause; (iv) although P-0358 stated that two bodies were retrieved from the river, the document does not include this information; and (v) the witness claimed that the majority of the individuals mentioned in the documents were victims of the Seleka, but no information is provided about how he knows this.³⁹

³⁸ CAR-OTP-0243-0603 and CAR-OTP-2043-0605.

³⁹ Defence Response, paras 73-77.

22. The Defence also objects to the introduction of several photos⁴⁰ on the grounds that it is impossible to date the pictures and that there is no information about the circumstances in which the photos were taken or why they were taken.⁴¹ The Defence concludes that P-0358 must be called to testify about the abovementioned documents and photos.⁴²

23. The Chamber takes note of the Defence's concerns and agrees that it is important that the Defence have an opportunity to question P-0358 in relation to the two lists and the photographs. Indeed, he is the only witness who is in a position to explain how the information was compiled and which sources were relied upon for this purpose. Given the significance of the alleged scale of victimisation by the Seleka, the Chamber considers it important to give the Defence an opportunity to question P-0358 about the exact meaning and reliability of the content of the lists.

3. Whether the evidence has sufficient indicia of reliability

24. The Chamber observes that all the prior recorded testimony sought to be introduced 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 or her 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 interpreted by a qualified interpreter. Therefore, the Chamber is satisfied that the prior recorded testimonies bear sufficient indicia of reliability for the purposes of introduction pursuant to rule 68(2)(b) of the Rules.

4. Whether the evidence is cumulative or corroborative

25. The Prosecution states that it will call at least ten other witnesses who were detained at the OCRB at different points in time and whose accounts are similar to those of P-1180, P-2263 and P-2295 in many aspects.⁴³ In addition, the Prosecution will also

⁴⁰ CAR-OTP-2043-0703 to CAR-OTP-2043-0720.

⁴¹ Defence Response, paras 78-79.

⁴² Defence Response, para. 80.

⁴³ Third Request, para. 23.

call P-1743, who allegedly is also a direct victim of incident (h). According to the Prosecution, P-1743 will address all aspects of this incident.⁴⁴

26. The Defence argues that there are a number of contradictions between several of the witnesses. The Chamber will deal with them in turn.

First, the Defence claims that there is a direct contradiction between P-1180 and P-2263 when it comes to the question whether at *Camp de Roux* they were transferred from one cell to another as a group or whether the former was left behind.⁴⁵ The Chamber recognises that there indeed appears to be a contradiction between P-1180⁴⁶ and P-2263's⁴⁷ testimony when it comes to whether or not they were moved together from one cell to another at *Camp de Roux*. This is not inconsequential, since P-1180's statement goes on to claim that he witnessed the alleged killing of three men that same night.⁴⁸ This would obviously not be possible if he had indeed stayed together with P-2263 in the same cell. In light of the considerations outlined above in relation to the importance of the testimony of these two witnesses, the Chamber considers that the Defence should be afforded an opportunity to cross-examine these two witnesses in relation to this apparent contradiction between their statements.

27. Second, the Defence points out that, whereas P-1180 and P-2263 both claim to have been detained at the OCRB for a period of 7 days, P-2295, who was supposedly detained together with the two aforementioned witnesses, claims to have been detained for only two to three days.⁴⁹ Similarly, the Defence points out that, whereas P-2295 affirms that no one of the group of detainees was interrogated at the OCRB, P-2263 claims that they were.⁵⁰ The Chamber recognises that the accounts of these witnesses differ in relation to some details. However, the Chamber is of the view that any deficiencies in this respect are not of such a nature or degree as to preclude the introduction of P-2295's prior recorded testimony at this stage.

⁴⁴ Third Request, para. 23.

⁴⁵ Defence Response, para. 30.

⁴⁶ CAR-OTP-2043-0483, at 0499, para. 116.

⁴⁷ CAR-OTP-2089-1229, at 1237, para. 56.

⁴⁸ CAR-OTP-2043-0483, at 0499-500, paras 116-122.

⁴⁹ Defence Response, para. 28.

⁵⁰ Defence Response, para. 29.

28. Third, the Defence also claims that P-2295 is incapable of corroborating anything, because he himself claims to have little knowledge about what happened.⁵¹ The Chamber rejects the Defence's characterisation of P-2295's testimony as being generally incapable of corroborating the testimonies of other witnesses. The witness merely acknowledged that he knows very little personal information about his fellow detainees at *Camp de Roux* and afterwards the OCRB.⁵² This does not make him an overall unreliable witness. Similarly, as noted, the fact that P-2295 claims to have been detained at the OCRB for a shorter period than the other witnesses does not mean that P-2295 would be unable to corroborate anything.

29. The Chamber also notes that the Prosecution will call P-1743, whose expected testimony overlaps in large part with the most salient parts of P-1180, P-2263, and P-2295's testimony insofar as it relates to the OCRB. It is true that P-1743 did not witness the arrest of the other witnesses and therefore cannot corroborate that part of their testimony. However, it is not a requirement that there is a full overlap between the content of the prior recorded testimony introduced via rule 68(2)(b) of the Rules and the expected testimony of the relevant viva voce witnesses. The Chamber is therefore satisfied that there will be sufficient other witnesses who will give evidence on similar facts as P-2295.

5. *Whether it is in the interests of justice to introduce the prior recorded testimony under rule 68(2)(b) of the Rules*

30. For the reasons explained above, the Chamber is of the view that it might be prejudicial to the accused if the prior recorded testimony of P-0358, P-1180, and P-2263 were introduced without an opportunity to cross-examine them. The Chamber does not see similar prejudice in relation to P-2295. Indeed, his evidence is, to some extent, repetitive. The Chamber therefore finds that it would be in the interests of justice to introduce the prior recorded testimony of P-2295 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. In this regard, the Chamber

⁵¹ Defence Response, para. 31.

⁵² CAR-OTP-2130-9460, at 9464.

notes that P-1180, P-1743, and P-2263 will testify orally before the Chamber should the Prosecution wish to rely upon them.

6. Associated materials

31. The Defence objects to the introduction of all the associated materials on the ground that, as a matter of principle, the Prosecution ought to introduce all evidence through witnesses so that they can be questioned about the authenticity, reliability and probative value of the items.⁵³ However, the Chamber notes that the Defence's arguments in this regard are focused almost entirely on the lists and photographs annexed to P-0358's prior recorded testimony. Since the Chamber rejects the Prosecution's request in relation to P-0358, there is no need to discuss this matter further.

32. In relation to the associated materials of P-2295's prior recorded testimony, the Chamber notes that these are three items that were commented upon by the witness in his prior recorded testimony.⁵⁴ Moreover, two of the items were provided by the witness to the Prosecution.⁵⁵ Under these circumstances, the Chamber can see no reason to reject these associated materials.

7. Conclusion

33. In summary, the Chamber rejects the Prosecution's request to introduce the prior recorded testimony of P-0358, P-1180 and P-2263 under rule 68(2)(b) of the Rules, and instead authorises the introduction of their prior recorded testimony pursuant to rule 68(3) of the Rules, should the Prosecution wish to rely on these witnesses. In this regard, the Prosecution must inform the Chamber and the parties by 5 December 2022 whether it wishes to avail itself of this option.

34. In respect of P-2295, in light of the foregoing, the Chamber sees no impediment to the introduction of his prior recorded testimony⁵⁶ and associated material⁵⁷ pursuant to rule 68(2)(b) of the Rules.

⁵³ Defence Response, para. 71.

⁵⁴ CAR-OTP-2130-9460, at 9467, paras 36-37.

⁵⁵ CAR-OTP-2091-3191 and CAR-OTP-2091-3192, see CAR-OTP-2130-9460, at 9467, para. 37.

⁵⁶ CAR-OTP-2130-9460-R01 and R02; CAR-OTP-2135-1852-R01.

⁵⁷ CAR-OTP-2008-2415; CAR-OTP-2091-3191; and CAR-OTP-2091-3192.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request in part;

ALLOWS the introduction of the prior recorded testimonies of -P-2295 as well as the associated materials pursuant to rule 68(2)(b) of the Rules;

ORDERS the Registry, upon filing of the witness declarations 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; and


ALLOWS the introduction of the prior recorded testimonies of P-0358, P-1180 and P-2263 pursuant to rule 68(3) of the Rules.



Judge Miatta Maria Samba



Judge María del Socorro Flores Liera



Judge Sergio Gerardo Ugalde Godínez

Done in both English and French, the English version being authoritative.

Dated 21 November 2022

At The Hague, The Netherlands