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

Date: **28 October 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**

Further Redacted Version of "Public Redacted Version of 'Prosecution's fifth request to introduce prior recorded testimony pursuant to rule 68(2)(b)', ICC-01/14-01/21-323-Conf, dated 20 May 2022", ICC-01/14-01/21-323-Red, dated 27 May 2022

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I. INTRODUCTION

1. The Prosecution hereby requests that the Chamber introduce into evidence the statements and associated material (“Prior Recorded Testimonies”)¹ of two Witnesses—P-1967 and P-2280 (“Two Witnesses”)—pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“Request”).

2. The Prior Recorded Testimonies are reliable, probative, and relevant to the charges. They do not go to the acts and conduct of Mahamat Said Abdel Kani (“Mr SAID”). Instead, they pertain to the crime base of the charges against Mr SAID as well as the contextual elements of crimes against humanity. Specifically, one witness is a French Gendarme who visited the *Office Central de Répression du Banditisme* (“OCRB”) in 2013, and one witness who worked as a photographer at the Camp de Roux in 2013 for President Djotodia.

3. The introduction of the Prior Recorded Testimonies would be in the interests of justice. The Prosecution estimates that it would save up to 8 hours of direct examination time. Granting the Request would accordingly enhance the expeditiousness of the proceedings and save valuable court time and resources.

4. The introduction of the Prior Recorded Testimonies would not prejudice the rights of the Accused. They are cumulative to and corroborative of the evidence of other witnesses who will testify in court and can be cross-examined about the same

¹ Annex A (A1 to A2) lists the prior recorded testimonies of P-2280 and P-1967. This is comprised of their witness statements (at I) and associated material (at II). Where items are necessary to understand a particular witness’s prior recorded testimony, but the Prosecution does not seek to introduce those items into evidence, those items are also referenced (at III). These materials are all hyperlinked. See Directions on the conduct of the proceedings, ICC-01/14-01/21-251, para. 38(i)-(ii).

topics. This includes at least ten OCRB crime-base witnesses and at least ten insiders with important OCRB-related information.²

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(1), the Request and its annexes are filed as confidential because they refer to the identities of Prosecution witnesses and confidential items of evidence. A public redacted version will be filed as soon as possible.

III. APPLICABLE LAW

6. The Prosecution relies on its previous submissions on the legal framework for introduction of prior recorded testimony pursuant to rule 68(2)(b), as set out in its first application under rule 68(2)(b).³

7. While the Prosecution notes the recent judgment of the majority of the Appeals Chamber in *Al Hassan*,⁴ Judge Ibañez dissenting,⁵ this casts no doubt upon the admissibility of the Prior Recorded Testimonies under rule 68(2)(b). In particular, nothing in the charges in this case requires the Chamber to treat the acts and conduct of persons described in the Prior Recorded Testimonies as the acts and conduct of Mr SAID himself.⁶ Indeed, in *Ntaganda*, the Appeals Chamber recently confirmed that

² The exact numbers will likely be slightly higher for both categories, but the Prosecution reserves the right to make its final decision on its witness list and proposed mode of testimony on 13 June 2022, the date it has been ordered to file its final list of witnesses. As the responses to the present motion will likely be filed after 13 June 2022, the Prosecution respectfully refers the Defence and Chamber to its final list of witnesses and witness summaries, once filed.

³ Prosecution's first request to introduce prior recorded testimony pursuant to rule 68(2)(b), ICC-01/14-01/21-289-Conf, 29 April 2022, paras. 7-10, 11 (fn. 8), 46-50.

⁴ ICC-01/12-01/18-2222 OA5 ("*Al Hassan* Rule 68(2)(b) Appeal Judgment").

⁵ ICC-01/12-01/18-2222-Anx OA5.

⁶ *Al Hassan* Rule 68(2)(b) Appeal Judgment, para. 54. While the majority of the Appeals Chamber seemed to define the 'acts and conduct' test more broadly than in previous decisions of the Court, the two authorities upon which it relied might suggest a narrower interpretation of its meaning. See fns. 98-99 (citing *Prosecutor v. Galić*, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), IT-98-AR73.2, 7 June 2002, para. 10; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Prosecutor's Motion to Admit Witness Statement from Joseph

evidence going to the acts and conduct of persons whose crimes could be imputed to Mr Ntaganda (as an indirect co-perpetrator) should *not* be treated as Mr Ntaganda's own acts and conduct.⁷ While the Appeals Chamber has certainly re-emphasised the need for due caution in considering whether it is appropriate to receive evidence under rule 68(2)(b),⁸ it also warned against any application of the concept of 'acts and conduct' "in a manner that may defeat the objective of rule 68".⁹ It recognised that "'crime-base' evidence" may well be appropriately received under rule 68(2)(b).¹⁰

IV. SUBMISSIONS

A. The Prior Recorded Testimonies Go to Proof of Matters Other than the Acts and Conduct of the Accused

8. Neither of the Prior Recorded Testimonies mention Mr SAID or anything about his acts and conduct. Nor do they even reflect on the acts and conduct of other Seleka at the OCRB. Instead, P-2280 and P-1967 both provide pertinent background information about the OCRB at the time relevant to the charges, while P-1967 additionally provides information relevant to the contextual elements of crimes against humanity.

Serugendo, 15 December 2006, para. 9). In *Galić*, at the passage cited, the ICTY Appeals Chamber made clear that the 'acts and conduct' test applies to "any act or conduct *of the accused* upon which the prosecution relies" to establish that the accused is responsible for the alleged crimes by the means appropriate to whichever mode of liability is charged, and in particular stressed that this does "*not*" extend to "the acts and conduct of others for which the accused is charged in the indictment with responsibility." This is the basis for the previously consistent jurisprudence of this Court: *see, e.g.*, ICC-02/04-01/15-596-Red, para. 12. In *Karemera*, in the passage quoted, the ICTR Trial Chamber considered on the particular facts of the case that general references to senior "MRND" or government officials amounted to references to the acts and conduct of the accused themselves, since "[a]n Accused need not be specifically named" for their acts and conduct to be identified as such, and the Accused in that case were charged with using their "power and authority as high level MRND political party leaders" to carry out the charged crimes. The charges in this case are not materially analogous to those in *Karemera*.

⁷ ICC-01/04-02/06-2666-Red A A2, para. 631.

⁸ *Al Hassan* Rule 68(2)(b) Appeal Judgment, paras. 55, 78-83.

⁹ *Al Hassan* Rule 68(2)(b) Appeal Judgment, para. 55.

¹⁰ *Al Hassan* Rule 68(2)(b) Appeal Judgment, para. 55.

B. The Prior Recorded Testimonies are Relevant and Probative

9. Both Prior Recorded Testimonies are relevant and probative. P-1967 details aspects relevant to the contextual elements, such as training and organisation of the Seleka, and provides background information that helps establish the timeframe of the charges. For his part, P-2280 provides general background information about the OCRB and corroborates P-0547's account of being mistreated at the OCRB. Key aspects of each witness's evidence are further highlighted below.

P-1967

10. P-1967 worked as a [REDACTED] in 2013. He was recruited into the Seleka shortly after their takeover of BANGUI. P-1967 provides evidence related to the organisation and training of the Seleka, which is relevant to the chapeau elements of war crimes. For example, he estimates that around 1500-1800 Seleka elements were based at *Camp de Roux* at the outset; later, this was reduced to 1000 elements as some were re-deployed to other locations.¹¹ P-1967 also explains that the Seleka elements were issued ID cards¹² and received training at *Camp de Roux*.¹³

11. P-1967 [REDACTED] at the ceremony held on 30 August 2013 where the Seleka were ousted from the OCRB. He explains that President DJOTODIA and Minister BINOUA on 30 August 2013 addressed the Seleka rebels at the *Direction Generale de Police* at the rear of the OCRB premises, where they had gathered for a special meeting. President DJOTODIA and Minister BINOUA spoke to the Seleka there and asked them to leave the OCRB premises and the Police headquarters, because those were not military locations and the policemen should be left to run these premises by themselves. The witness also remembers the Seleka saying that they would not leave

¹¹ **P-1967**: CAR-OTP-2069-0498 at 0508, para. 47.

¹² **P-1967**: CAR-OTP-2069-0498 at 0505, 0508, 0518, paras. 33, 49, 96-97; Annex 5: CAR-OTP-2069-0604.

¹³ See, e.g., **P-1967**: CAR-OTP-2069-0498 at 0508-0509, 0518, paras. 47, 54, 96.

without payment. He believes Minister BINOUA then agreed to pay them on the condition that they leave the said premises.¹⁴

12. Finally, P-1967 provides information about Seleka leaders, including [REDACTED].¹⁵

P-2280

13. P-2280 is a [REDACTED] in Bangui from 23 June 2013 to 7 November 2013.¹⁶ In this time, he visited the OCRB seven to eight times.¹⁷

14. P-2280 describes how in August 2013, just before Commissioner MALLO left the OCRB, a prisoner was presented to him [REDACTED]. P-2280 confirms that he took photos of the man [REDACTED].¹⁸

15. The witness was shown two photos of a man, and he recognized the man in the photos as the same injured man who was presented to him at the OCRB.¹⁹ Those two photos were provided by [REDACTED] during his interview with the Prosecution and depict the injuries [REDACTED] sustained on account of the torture the Seleka inflicted on him at the OCRB.²⁰ Accordingly, the Prosecution submits that the injured man P-2280 saw in August 2013 was [REDACTED] and that P-2280's prior recorded testimony therefore serves as corroboration to [REDACTED] account of his mistreatment.

¹⁴ **P-1967**: CAR-OTP-2069-0498 at 0582 (referencing P8301174 to P8301201, which are CAR-OTP-2069-3221 to CAR-OTP-2069-3246).

¹⁵ See, e.g., **P-1967**: CAR-OTP-2069-0498 at 0575-0579; [CAR-OTP-2069-2543](#); [CAR-OTP-2069-0670](#); [CAR-OTP-2069-0671](#); [CAR-OTP-2069-1991](#); [CAR-OTP-2069-2329](#) [CAR-OTP-2069-2430](#); [CAR-OTP-2069-2506](#); [CAR-OTP-2069-2747](#); [CAR-OTP-2069-2889](#) ([REDACTED] Seleka leadership in 2013).

¹⁶ **P-2280**: CAR-OTP-2116-0725 at 0725.

¹⁷ **P-2280**: CAR-OTP-2116-0725 at 0727.

¹⁸ **P-2280**: CAR-OTP-2116-0725 at 0727-0730.

¹⁹ **P-2280**: CAR-OTP-2116-0725 at 0733 (recognising the man shown in the pictures registered at CAR-OTP-2018-0598 and CAR-OTP-2018-0600).

²⁰ [REDACTED].

C. The Prior Recorded Testimonies Have Sufficient Indicia of Reliability

16. The Prior Recorded Testimonies have the necessary indicia of reliability for introduction into evidence. The Two Witnesses have signed their statements, attesting that their testimony was read back to them, was given voluntarily, and that their contents were true to the best of their recollection of the events.²¹

17. In the case of P-1967, the witness confirmed that the statement was read to him in French, a language he understands, and confirmed its accuracy.²² His statement also bears the signature of an interpreter, certifying that he has orally translated the statement from the English language to the French language in the presence of the witness who appeared to have heard and understood the translation.²³

18. P-2280 [REDACTED].²⁴

19. The statements of both witnesses are coherent and internally consistent. Furthermore, each witness mentions events that are corroborated by other evidence.²⁵ Each witness generally distinguishes between information about which they have direct knowledge and information that they acquired from other sources.

D. The Prior Recorded Testimonies Are Cumulative to or Corroborative of Other Evidence, including that of Live Witnesses Who Can Be Cross-Examined by the Defence

²¹ **P-1967**: CAR-OTP-2069-0498 at 0595; **P-2280**: CAR-OTP-2116-0725 at 0733.

²² **P-1967**: CAR-OTP-2069-0498 at 0595-0596.

²³ **P-1967**: CAR-OTP-2069-0498 at 0596.

²⁴ **P-2280**: CAR-OTP-2116-0725.

²⁵ See, e.g., regarding the ceremony on 30 August 2013, **P-0787**: CAR-OTP-2130-0893 at 0917, para. 101 (Fr); **P-0338**: CAR-OTP-2130-5761 at 5788-5789, paras. 150-156; **P-1737**: CAR-OTP-2130-2086 at 2101, para. 70; **P-2105**: CAR-OTP-2081-0037 at 0053-0058 paras. 97-138 (Fr) (commenting on the same photos); **P-1762**: CAR-OTP-2073-0568 at 0581-0582, paras. 80-82. Regarding the mistreatment of P-0547, see **P-0547 (1st Statement)**: CAR-OTP-2025-0566 at 0575, paras. 56-60 (Eng); **P-0547 (2nd Statement)**: CAR-OTP-2084-0036 at 0043, paras. 25-26 (Eng).

20. The Prior Recorded Testimonies are cumulative to or corroborative of other evidence, including the evidence of witnesses whom the Prosecution expects to testify live.

21. In relation to P-1967 and P-2280's evidence, which pertains to the OCRB, the witnesses who will be available for cross-examination on the same or similar topics include the following OCRB crime base witnesses (P-0481, P-0547, P-1429, P-1743, P-1762, P-2241, P-2400, P-2607, P-2692, P-2931, P-3056, and P-3064) and insiders with important OCRB-related information (P-0338, P-0435, P-0787, P-1167, P-1737, P-2105, P-2161, P-2240, P-2478, P-2504, and P-2563).²⁶ Of particular note, P-0338, P-0435, P-0787, and P-1737 speak about the same ceremony at the OCRB that P-1967 speaks about. Similarly, P-1967's evidence regarding the training afforded to Seleka elements at Camp Kassai is corroborated by P-2573, whom the Prosecution also plans to call live and make available for cross-examination.

22. In addition to corroborating the above-mentioned witnesses who will be available for cross-examination, the Prior Recorded Testimonies are also cumulative to and corroborative of the evidence of other witnesses²⁷ and documentary evidence.²⁸

E. The Prior Recorded Testimonies Refer to Matters that are not Materially Disputed

23. As noted above, the Two Witnesses do not provide linkage evidence to Mr SAID. The Prosecution submits that the factual allegations put forth by the Two Witnesses

²⁶ As noted above (*see supra*, para. 4, fn. 2), the Prosecution reserves the right to make modifications to its preliminary witness list and proposed mode of testimony until 13 June 2022, the date it has been ordered to file its final list of witnesses. This flexibility is required in light of certain witness management and other unavoidable ongoing issues. As the responses to the present motion will likely be filed after 13 June 2022, the Prosecution would respectfully request that the Defence and Chamber's assessment be informed by the final list of witnesses and witness summaries. Specifically, in the possible—though unlikely—circumstance that any of the mentioned witnesses do not appear on that final list as *viva voce* or 68(3) witnesses, then they are no longer relevant here.

²⁷ For **P-1967** and **P-2280**, this includes **P-1432**, **P-2239**, and **P-2179**.

²⁸ *See* CAR-OTP-2034-1740; CAR-OTP-2034-2669; CAR-OTP-2034-2798; [CAR-OTP-2018-0584](#); [CAR-OTP-2018-0586](#); [CAR-OTP-2018-0588](#), CAR-OTP-2018-0590, CAR-OTP-2018-0592, CAR-OTP-2018-0594, CAR-OTP-2018-0596 and CAR-OTP-2018-0598; [CAR-OTP-2018-0600](#) and [CAR-OTP-2018-0602](#).

are unlikely to be materially in dispute as they provide background and corroborative information, which is relevant to the overall case but not proximate to the Accused.

F. The interests of justice would be served by introducing the Prior Recorded Testimonies

24. The interests of justice would be advanced by the introduction of the Prior Recorded Testimonies via rule 68(2)(b). The Prosecution has estimated it will require an average of 4 hours for its examination of each crime base or chapeau-related witness. Accordingly, granting the Request would result in saving approximately 8 hours of direct examination time, thereby advancing the expeditiousness of the proceedings.

25. Granting the Request would also reduce the amount of time the Chamber would spend hearing a repetition of the similar evidence on similar topics. Furthermore, the Two Witnesses would be saved the disruption of having to travel to appear in court, and the Court would preserve valuable resources that could be used for other purposes.

G. Introduction of the Prior Recorded Testimonies is not prejudicial to or inconsistent with the rights of the accused

26. Introducing the evidence of the Two Witnesses under rule 68(2)(b) is not prejudicial to or inconsistent with the rights of the Accused. As noted above, this evidence is cumulative to or corroborative of other evidence.

27. The Defence is unrestricted in its ability to call evidence to rebut the assertions of the Two Witnesses or to address any issues in the evidence in its oral or written submissions. Furthermore, the Defence will also be able to cross-examine other Prosecution witnesses that will testify live before the Chamber about the same topics

as those referred to by the Two Witnesses. Those other witnesses will often be in a position to provide much more detail about the relevant topics than the Two Witnesses.

28. In these circumstances, it is unnecessary to call the Two Witnesses to testify live, and the Chamber may dispense with examination by the parties without prejudicing the rights of the Accused.

V. RELIEF SOUGHT

29. For the above reasons, the Prosecution requests the Chamber to introduce into evidence the Prior Recorded Testimonies, as set out in Annex A to this filing, subject to the fulfilment of rules 68(2)(b)(ii) and (iii).

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

Karim A. A. Khan KC, Prosecutor

Dated this 28th day of October 2022

At The Hague, The Netherland