

**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***

Confidential

Decision on the Prosecution's Request to Issue a Summons for P-0975

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	
Registrar Mr Osvaldo Zavala Giler	Counsel Support Section Mr Pieter Vanaverbeke
Victims and Witnesses Unit Nigel Verrill	Detention Section
Victims Participation and Reparations Section	Other

TRIAL CHAMBER VI of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to Articles 64(2), 64(6)(b) and (f), 93(1)(a),(b), (d) and (l) and 99(1) of the Rome Statute (the ‘Statute’), rules 65, 134(3), 171(5) of the Rules of Procedure and Evidence; and regulation 24 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Prosecution’s Request to Issue a Summons for P-0975’.

I. PROCEDURAL HISTORY & SUBMISSIONS

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

2. On 10 June 2022, the Prosecution filed its list of witnesses, in which it presaged that it would make a request pursuant to rule 68(2)(b) of the Rules in relation to P-0975.² At the time, it was anticipated that P-0975 would testify in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (the ‘Yekatom and Ngaïssona Case’), and the deadline for the submission of rule 68 requests pertaining to this witness was extended until 20 days after the completion of his testimony.³ Further extensions were subsequently granted to facilitate efforts to locate the witness.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 ICC-01/14-01/21-354-Conf-AnxA (Row 24).

³ Directions on the Conduct of Proceedings, [ICC-01/14-01/21-251](#), paras 37-39; Decision on Requests to Vary the Time Limits pertaining to the Introduction of Prior Recorded Testimony of Witnesses pursuant to Rule 68 (ICC-01/14-01/21-300-Conf-Red and ICC-01/14-01/21-291), 11 May 2022, [ICC-01/14-01/21-305](#), para. 17.

⁴ Email from the Chamber, 7 September 2022, at 09:35; Prosecution’s Request to vary the limit for application to introduce the prior recorded testimony of witnesses P-2269 and P-0975 pursuant to Rule 68, 15 December 2022, ICC-01/14-01/21-574-Conf-Exp. A confidential redacted version was filed on the same day (ICC-01/14-01/21-574-Conf-Red) and a public redacted version was filed on 20 January 2023 ([ICC-01/14-01/21-574-Red](#)); Email from the Defence, 11 January 2023, at 14:56; Email from the CLRV, 11 January 2023, at 17:39; Email from the Chamber, 13 January 2023, at 10:38; Email from the Prosecution, 13 February 2023, at 16:39; Email from the Defence, 14 February 2023 at 13:07; Email from the CLRV, 14 February 2023 at 14:25; Email from the Chamber, 1 June 2023, at 11:35; Email from the Prosecution, 8 June 2023 at 13:18; Email from the Defence, 12 June 2023, at 15:40; Email from the Chamber, 12 June 2023, at 17:49.

3. On 31 July 2023, the Prosecution filed a request under rule 68(2)(c) of the Rules to introduce the prior recorded testimony of P-0975 (the 'Rule 68(2)(c) Request').⁵ The Defence responded on 24 August 2023.⁶

4. On 2 October 2023, the Chamber issued its Decision on the Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Two Witnesses (the 'Rule 68(2)(c) Decision'), in which it rejected the Rule 68(2)(c) Request and ordered the Prosecution to take further steps to ascertain the whereabouts of P-0975, including by requesting a summons or state cooperation, as appropriate, and to report to the Chamber by 20 November 2023.⁷

5. On 19 October 2023, the Prosecution filed a request to summon P-0975 (the 'Request').⁸ In particular, the Prosecution asks the Chamber to

require the assistance of the Central African Republic ("CAR") or any State, on whose territory P-0975 may be found, to take all necessary measures to compel the Witness' testimony before the Court, including to locate, summons, and/or provisionally detain him, as necessary to ensure his prompt appearance via video-link, pursuant to articles 64 and 93(1)(b), (d) and (l).

6. On 13 November 2023, the Defence submitted its response to the Request (the 'Response').⁹ According to the Defence, the Prosecution has failed to comply with the Chamber's instructions in the Rule 68(2)(c) Decision to take further steps to ascertain the whereabouts of this witness and further argues that the Request does not meet the specificity and necessity requirements for the issuance of a summons to appear. In terms

⁵ Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of P-0975, 31 July 2023, ICC-01/14-01/21-627-Conf. A public redacted version was notified on 1 August 2023 ([ICC-01/14-01/21-627-Red](#)).

⁶ Réponse consolidée de la Défense à la « Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of P-0975 » (ICC-01/14-01/21-627-Conf) et la « Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of P-2269 » (ICC-01/14-01/21-628-Conf), 24 August 2023, ICC-01/14-01/21-633-Conf. A public redacted version was notified on the same day ([ICC-01/14-01/21-633-Red](#)).

⁷ ICC-01/14-01/21-637-Conf.

⁸ Prosecution's Request to Summon a Witness, 19 October 2023, ICC-01/14-01/21-638-Conf-Exp. A confidential redacted version of the Request was filed on 25 October 2023. On 7 November 2023, the Chamber ordered the reclassification of the Request from Confidential *ex parte* to Confidential (email from Trial Chamber VI to parties and participants, sent on 7 November 2023 at 11:34. On 20 November 2023, the Prosecution filed a public redacted version of its Request ([ICC-01/14-01/21-638-Red](#)).

⁹ Réponse de la Défense à la « Prosecution's request to summon a witness » (ICC-01/14-01/21-638-Conf), 13 November 2023, ICC-01/14-01/21-641-Conf. A public redacted version was filed on 20 November 2023 ([ICC-01/14-01/21-Red](#)).

of specificity, the Defence argues that, as long as there are doubts about the whereabouts of the witness, the criterion of specificity cannot be satisfied. In terms of necessity, the Defence argues that the Prosecution has failed to take all reasonable steps to locate P-0975 and to obtain his cooperation. Under these circumstances, the Defence claims, it has not been established that it is necessary to issue a summons for P-0975.

7. On 17 November 2023, the Prosecution filed a reply to the Response (the 'Reply'), asking the Chamber to dismiss the Response, which it characterises as a request for reconsideration of the Rule 68(2)(c) Decision.¹⁰

8. On 20 November 2023, the Defence filed a motion to reject the Prosecution's Reply *in limine*, arguing that the Prosecution has failed to comply with the conditions of regulation 24(5) of the Regulations of the Court.¹¹

9. On 20 November 2023, the Prosecution informed the Chamber that it has "no further update with respect to the whereabouts of Witness P-0975" and that a "summons request is now before the Chamber in compliance to your instructions" (the 'Notification').¹²

II. PRELIMINARY MATTERS

10. Before analysing the Prosecution's Request, the Chamber must first address the admissibility of the Prosecution's Reply.

11. The Chamber rejects the Prosecution's characterisation of the Response as a request for reconsideration. Far from taking issue with the Rule 68(2)(c) Decision, the Defence correctly points out that the Prosecution has failed to comply with it. Indeed, the Chamber recalls that it ordered the Prosecution to

¹⁰ Prosecution's Reply to "Réponse de la Défense à la « Prosecution's request to summon a witness », 13 November 2023, ICC-01/14-01/21-641-Conf, 17 November 2023, ICC-01/14-01/21-646-Conf, para. 12. A public redacted version of the Reply was filed on 20 November 2023 ([ICC-01/14-01/21-646-Red](#)).

¹¹ Demande de rejet *in limine* de la « Prosecution's Reply to « Réponse de la Défense à la « Prosecution's request to summon a witness » » 13 November 2023, ICC-01/14-01/21-641-Conf », (ICC-01/14-01/21-646-Conf), 20 November 2023, ICC-01/14-01/21-649-Conf. A public redacted version was filed on 20 November 2023 ([ICC-01/14-01/21-646-Red](#)).

¹² Email from the Prosecution to Trial Chamber VI, received on 20 November 2023 at 10:06.

Take further steps to ascertain the whereabouts of P-0975 and to report to the Chamber by 20 November 2023¹³

12. Moreover, as the Defence points out, the Prosecution should have sought the Chamber's leave to submit a reply, as is required by regulation 24(5) of the Regulations. Given its failure to do so, the Chamber rejects the Reply *in limine*.

III. APPLICABLE LAW

13. As confirmed by the Appeals Chamber, article 64(6)(b) of the Statute gives trial chambers the power to compel the appearance of witnesses before the Court by creating a legal obligation for the individual concerned.¹⁴ Furthermore, pursuant to article 93(1)(b) of the Statute, States Parties shall comply with requests by the Court to assist in the taking of evidence, including by serving a summons upon a witness and compelling them to appear in person. If the witness consents thereto, he or she may choose to testify at the seat of the Court and States Parties are bound to facilitate this. If the witness does not want to travel to the seat of the Court, he or she can be compelled to testify via video-link or the Trial Chamber may hear their testimony *in situ*.¹⁵

14. As with any cooperation request, the requesting party must satisfy three cumulative requirements, namely: (i) relevance, (ii) specificity and (iii) necessity.

15. When evaluating necessity in the context of issuing a summons to a witness, the Chamber has to consider whether: (a) the anticipated testimony of the witness is potentially necessary for the determination of the truth and (b) a summons, as a compulsory measure, is necessary to obtain the testimony of the witness.¹⁶

¹³ Rule 68(2)(c) Decision, ICC-01/14-01/21-637, operative part.

¹⁴ Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 9 October 2014, [ICC-01/09-01/11-1598](#) (the 'Summons Judgment'), paras 107, 113.

¹⁵ Summons Judgment, paras 130-132.

¹⁶ Trial Chamber X, *The Prosecutor v. Ak Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of Corrigendum of 'Decision on the Prosecution's urgent request to summon witnesses', 26 October 2020, [ICC-01/12-01/18-1130-Red](#), paras 7 and 10; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on the 'Prosecution's Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses', 6 October 2015, ICC-01/05-01/13-1343-Conf (public redacted version notified on 3 December 2015, [ICC-01/05-01/13-1343-Red](#)) (the 'Bemba et al. Summons Decision'), para. 18,

16. Failure to meet any of these requirements will result in a rejection of the Request.

IV. ANALYSIS

A. Relevance

17. The Chamber has considered P-0975's prior recorded testimony and agrees with the Prosecution that it is potentially relevant in relation to the contextual elements of war crimes.

B. Specificity

18. Although the Request does not contain all the relevant identifying information for P-0975, the Chamber is satisfied that this information is available in his prior recorded testimony¹⁷ and can be provided to the Registry.

19. The Chamber is also satisfied that the available information is specific enough to justify making a cooperation request from the Central African authorities. However, the Chamber notes that the Prosecution seems to suggest that the Court should also ask other States Parties to look for P-0975.¹⁸ Such an open-ended suggestion is too vague, since it is not the Chamber's or the Registry's responsibility to investigate in which other countries P-0975 might currently reside. The Chamber will therefore only consider the request in relation to the Central African Republic (the 'CAR').

C. Necessity

1. *The Anticipated Testimony of the Witness is Potentially Necessary for the Determination of the Truth*

20. Given the contested nature of the contextual elements in this case, the Chamber consider it is necessary to hear P-0975's testimony on this issue.

referring to Trial Chamber V(A), *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, [ICC-01/09-01/11-1274-Corr2](#), para. 181; Trial Chamber V(B), *The Prosecutor v Uhuru Kenyatta*, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, [ICC-01/09-02/11-908](#), para. 100, n. 216; Trial Chamber IV, *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 September 2013, ICC-02/05-03/09-504Conf-Exp (public redacted version notified the same day, [ICC-02/05-03/09-504-Red](#)), para. 4.

¹⁷ CAR-OTP-2033-7885.

¹⁸ Request, para. 1: "hereby requests the Chamber to require the assistance of the Central African Republic ("CAR") or any State, on whose territory P-0975 may be found".

2. *It is Necessary to Obtain the CAR's cooperation to locate P-0975*

21. The Chamber agrees with the Defence that the Prosecution has failed to comply with the Chamber's instruction in the Rule 68(2)(c) Decision. As far as the Chamber can ascertain from the Request and the Notification, the Prosecution has not taken any independent steps to locate P-0975 since the Rule 68(2)(c) Decision. The Chamber recognises that it had foreshadowed the possibility for the Prosecution to request a summons,¹⁹ but this clearly did not give the Prosecution licence to sit idle and transfer the burden of finding its own witness to the Chamber and the Registry. Indeed, there was nothing to prevent the Prosecution from making its own request for assistance from the CAR authorities to help locate P-0975.

22. Be that as it may, the Chamber accepts that the best chance of locating P-0975 is to ask the CAR authorities. Given the current stage of the proceedings and the fact that the Prosecution case is well underway, the Chamber finds that it has now become necessary for it to request the CAR authorities for assistance.

3. *A Summons, as a Compulsory Measure, is Necessary to Ascertain P-0975's Willingness to Testify*

23. Given the Prosecution's inaction, there is still no further information as to (i) whether P-0975 is still alive; (ii) if so, where he currently resides; and (iii) whether or not he is willing to testify.

24. The Chamber notes, in this regard, that summonses have generally only been issued in relation to witnesses whose unwillingness to testify was either established or assumed.²⁰ The Chamber also notes that, in the *Gicheru* case, the Chamber issued a summons against a witness on the basis of the fact that he had broken off all

¹⁹ Rule 68(2)(c) Decision, ICC-01/14-01/21-637, para. 17.

²⁰ See, for example, Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution Request to Summon a Witness, 8 January 2021, ICC-01/14-01/18-804-conf, para. 20 (where the Chamber found that "P-2645 indicated that he no longer wished to cooperate or receive correspondence from the Court"); Decision on the Prosecution Requests to Summon Witnesses P-2606 and P-2269, 31 January 2023, ICC-01/14-01/18-1738-Conf, para. 11 (where the Chamber noted that "interactions with the witness in the lead-up to its last contact with him 'suggest that he is deliberately avoiding further contact'" and para. 15 (where the Chamber notes that the witness had ceased to cooperate with the Prosecutor and even simulated his own death in order to avoid further contact); Bemba et al. Summons Decision, [ICC-01/05-01/13-1343](#), para. 24 (where the Chamber noted that "the information before the Chamber points to the witnesses maintaining their earlier uncooperative positions").

communication with the Court,²¹ only for the Prosecution to request the withdrawal of the summons after it had re-established contact with the witness and the latter proved willing to testify voluntarily.²² In other words, as long as there is a realistic chance that the witness can be found and asked whether or not he is willing to testify voluntarily, it would be premature to issue a summons to compel P-0975 to testify.

25. As the Chamber noted in the Rule 68(2)(c) Decision, based on the available information, it is not possible to make a determination as to P-0975's willingness to testify.²³ The Chamber emphasises, in this regard, that the Prosecution has not claimed that P-0975 is *unwilling* to testify. Instead, all of its submissions in relation to this witness relate to his alleged *unavailability*.²⁴ The Prosecution makes no effort in the Request to show P-0975's unwillingness to testify. Nevertheless, the Prosecution asks the Chamber to require the CAR to "provisionally detain [P-0975], as necessary to ensure his prompt appearance via video-link".²⁵

26. Since it is not clear at this juncture whether or not P-0975 is unwilling to testify, it would seem disproportionate to ask the CAR authorities to detain P-0975 or to use other measures to force him to give testimony. The Chamber instead considers that the first priority is to locate P-0975 and to ascertain his willingness to testify in this case. The Chamber therefore instructs the Registry to prepare and transmit a request for assistance to the CAR authorities pursuant to article 93(1)(a) of the Statute to locate P-0975 and to serve a summons pursuant to article 93(1)(b) and (d) of the Statute on him to appear before the Chamber in order to explain whether or not he is still willing to testify as a witness for the Prosecution.

27. The Registry is further instructed to offer P-0975 the possibility to have appointed a legal counsel free of charge who can assist him before and during his initial appearance before the Chamber. If P-0975 does not wish to appear in person, he may

²¹ Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on the Prosecution Request for a Summons for P-0743, 2 February 2022, ICC-01/09-01/20-272-Conf, para. 4.

²² Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on the Prosecution Request to Withdraw a Summons, 21 March 2022, ICC-01/09-01/20-308-Conf, para. 6 where the Chamber agreed that "the summons is no longer necessary".

²³ Rule 68(2)(c) Decision, para. 14.

²⁴ See Request, paras 11-19; Rule 68(2)(c) Request, [ICC-01/14-01/21-627](#), paras 9-18.

²⁵ Request, para. 1.

elect to be represented by the abovementioned court-appointed counsel or another counsel of his choice. In that case, there is no need for the witness to travel to the ICC Field Office to make an appearance via video link.

FOR THESE REASONS, THE CHAMBER HEREBY

REQUESTS the assistance of the Central African authorities with regard to (i) locating P-0975; (ii) serving him with a summons to appear before the Chamber within two weeks; and (iii) implementing and enforcing this summons unless the witness elects to be represented by counsel;

SUMMONS P-0975 to appear before the Chamber within two weeks after being notified of this summons in order to explain whether or not he is willing to testify in the case *The Prosecutor v. Mahamat Said Abdel Kani*;

DIRECTS the Registry to:

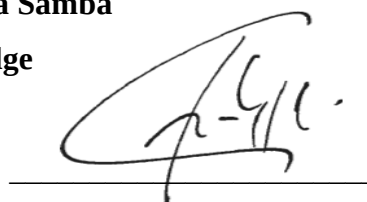
- a. Prepare and transmit the abovementioned cooperation request to the Central African authorities;
- b. Collaborate where necessary and appropriate with the Central African authorities;
- c. Prepare and transmit the abovementioned summons to appear for P-0975;
- d. Identify a qualified lawyer to assist P-0975 and appoint him or her if the witness so wishes;
- e. Report on the implementation of the abovementioned steps.



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 2 April 2024

At The Hague, The Netherlands