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Internationale**

**International
Criminal
Court**



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Date: 12 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***

URGENT

Confidential

**With Confidential *EX PARTE* Annex only available to the Office of the Prosecutor
and the Registry**

**Registry's Report on the Conduct of the Certification Process pursuant to Rule
68(2)(b) of the Rules of Procedure and Evidence**

Source: Registry

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Mr Thomas Henquet (Registry Legal
Office)

I – Introduction

1. On 8 and 23 February 2024 respectively, pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules"), the Registry transmitted to Trial Chamber VI ("Chamber") the declarations and attestations related to the prior recorded testimony of witnesses P-1523 ("Witness P-1523"), P-0529 ("Witness P-0529"), P-0882 ("Witness P-0882"), P-1825 ("Witness P-1825"), P-1277 ("Witness P-1277"), P-1427 ("Witness P-1427"), P-1432 ("Witness P-1432"), P-1970 ("Witness P-1970"), P-2042 ("Witness P-2042"), P-2295 ("Witness P-2295"), P-2087 ("Witness P-2087"), P-0100 ("Witness P-0100"), P-2239 ("Witness P-2239"), P-0966 ("Witness P-0966"), P-2386 ("Witness P-2386"), P-2337 ("Witness P-2337"), and P-1424 ("Witness P-1424"),¹ together with amendments to some of these prior recorded testimonies,² as provided by the Office of the Prosecutor ("Prosecution" and "Registry's Transmissions", respectively).

2. On 13 March 2024, the defence for Mr Mahamat Said Abdel Kani ("Defence") filed its observations on the Registry's Transmissions ("Observations").³ In the Observations, the Defence, *inter alia*, argues that (1) the Registry effectively delegated the task of re-reading the prior recorded testimony together with the witness to the Prosecution,⁴ and (2) for 14 witnesses out of the 17, any amendments made during this re-reading were compiled in a document signed by the respective witnesses in the presence of the Prosecution staff members, said documents being

¹ Registry, "Registry's Transmission of the Declarations made by Witnesses P-1523, P-0529, P-0882, P-1825, P-1277, P-1427, P-1432, P-1970, P-2042, P-2295, P-2087, P-0100, P-2239, P-0966, P-2386, P-2337, and P-1424 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence", 8 February 2024, ICC-01/14-01/21-692-Conf with Confidential *ex parte* Annexes 1-17.

² Registry, "Registry Transmission of the Amendments to the prior-recorded testimonies of Witnesses P-1523, P-0529, P-0882, P-1825, P-1277, P-1427, P-1432, P-1970, P-2042, P-2295, P-2087, P-0100, P-2239, P-0966, P-2386, P-2337, and P-1424 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence", 23 February 2024, ICC-01/14-01/21-705-Conf with Confidential Annexes 1-14.

³ Defence's Observations on the "Registry's Transmission of the Amendments to the Prior Recorded Testimonies of Witnesses P-1523, P-0529, P-0882, P-1825, P-1427, P-1432, P-1970, P-2042, P-2087, P-0100, P-2239, P-0966, P-2386 and P-2337 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence (ICC-01/14-01/21-705-Conf), 13 March 2024, ICC-01/14-01/21-721-Conf. A public redacted version was notified on 18 March 2024 (ICC-01/14-01/21-721-Red).

⁴ Defence, Observations, para. 5.

filed in the Registry's Transmissions.⁵ The Defence takes issue with this course of action and concludes from this that the Prosecution, as opposed to the Registry alone, would have taken a central role in the task of witnessing the declarations pursuant to rule 68(2)(b) of the Rules.⁶

3. On 2 April 2024, the Chamber issued the "Order for clarification in Relation to the Certification Procedure Pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence" ("Order" and "Rules", respectively),⁷ in which it instructed the Registry to submit a report as detailed in paragraph 18 stating as follows:

"The Chamber is somewhat perplexed by this state of affairs. When it appointed the [Registry Legal Office ("RLO")] to act as the Witnessing Officer and authorised him to delegate this authority to "any appropriate person", it obviously did not have in mind that the RLO would appoint the calling party to act as the Witnessing Officer. The Chamber therefore wishes to receive a detailed explanation about the entire certification process of the prior recorded testimony of P-1523, P-0529, P-0882, P-1825, P-1277, P-1427, P-1432, P-1970, P-2042, P-2295, P-2087, P-0100, P-2239, P-0966, P-2386, P-2337, and P-1424. In particular, the Registry is instructed to explain why the calling party seems to have been involved in this process; on what legal basis this was done; whether there is a record of the appointment of the different Prosecution staff members by the RLO; and what the nature and scope of any interaction between the Prosecution staff members and the Witnessing Officers was. To the extent that there are supporting documents, these should be attached to the report."⁸

The Registry hereby respectfully explains the state of affairs, which is in accordance with the established practice of the International Criminal Court ("Court").

II - Classification

4. Pursuant to regulation 23 *bis*(2) of the Regulations of the Court ("RoC"), the present report is classified as "confidential" because it refers to the Registry's Transmissions and procedures that are internal to the Registry and the Court and

⁵ Defence, Observations, paras. 5 and 6.

⁶ Defence, Observations, para. 2.

⁷ Trial Chamber VI, "Order for clarification in Relation to the Certification Procedure Pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence" ("Order"), 2 April 2024, ICC-01/14-01/21-734.

⁸ Trial Chamber VI, Order, para. 18.

bear the same level of classification. The Registry however stands ready to reclassify this report as public (with or without redactions), should the Chamber deem it appropriate for the conduct of the judicial proceedings. The annex is classified as "confidential" *ex parte* only available to the Office of the Prosecutor and the Registry because it refers to *ex parte* confidential internal communications with, *inter alia*, unredacted evidence not released to the participants.

III - Applicable law

5. The following provisions are, *inter alia*, of particular relevance to the present report: rules 68(2)(b)(ii), 68(2)(b)(iii) of the Rules. In particular, paragraphs (ii) and (iii) of rule 68(2)(b) of the Rules read as follows:

(ii) Prior recorded testimony falling under sub-rule (b) may only be introduced if it is accompanied by a declaration by the testifying person that *the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief*. Accompanying declarations may not contain any new information and must be made reasonably close in time to when the prior recorded testimony is being submitted.

(iii) Accompanying declarations must be witnessed by a person authorized to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State. The person witnessing the declaration must verify in writing *the date and place of the declaration, and that the person making the declaration:*

- *is the person identified in the prior recorded testimony;*
- *assures that he or she is making the declaration voluntarily and without undue influence;*
- *states that the contents of the prior recorded testimony are, to the best of that person's knowledge and belief, true and correct; and*
- *was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony. [Emphasis added]*

IV - Submissions

6. The Defence takes issue with the way the tasks of the re-reading by the respective witnesses of their prior recorded testimonies and the recording of amendments thereto, if any, are carried out. The Registry notes that there seems to be a

misunderstanding concerning the preparatory steps taken for the smooth conduct of the certification process. For a better understanding of such a process, the Registry hereby explains the modalities of the standard operational procedure followed on behalf of any Chamber to certify prior-recorded testimonies of either prosecution or defence witnesses pursuant to rule 68(2)(b) of the Rules.

7. The Registry further clarifies that the calling parties are in no way involved in the certification process itself, notably in the specific steps to be conducted by the Registry's representative, i.e. the Witnessing Officer, as detailed in rule 68(2)(b)(iii) of the Rules. This applies to the case at hand concerning the certification process of the 17 prosecution witnesses concerned. There is therefore no delegation or appointment of Prosecution staff members by the Chief of RLO to conduct the said certification process. Rather, preparatory steps to any certification process may require some interactions between the Witnessing Officer and the calling party, be it the Prosecution or the Defence. As per the Order, the nature and scope of such interactions are detailed below. As further explained below, these interactions should however not be construed as interfering with the certification process, which is exclusively dealt with by the Witnessing Officer, as delegated by the Chief of RLO.

8. On the day of the certification, the Witnessing Officer explains to the witness concerned the rule 68(2)(b)(ii) and (iii) requirements, including the specific elements that the Witnessing Officer "must verify". Such verification is limited in scope and is recorded in two documents named "Declaration" and "Attestation". Notably, the declaration must: (a) contain a statement by the witness that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief; (b) may not contain new information; (c) must be made reasonably close in time to the request for submission; and (d) be witnessed by a person authorised to witness such declaration with a number of requirements specified in rule 68(2)(b)(iii) of the Rules (e.g. verification of the witness's identity, voluntary declaration given without undue influence, information given to the witness on consequences of false testimony, etc...). These requirements (a) to (d) are considered in turn in the present report. The

Registry notes that the modalities of the certification process as further detailed below, have been developed since the adoption of this provision back in 2012⁹ and are followed since then so as to ensure that these legal requirements are met. Any change in these modalities would need to be carefully considered.

1 - Requirements (a) to (c) above pursuant to rule 68(2)(b) of the Rules

9. With regard to the requirements (a) to (c) above, it is the witnesses' responsibility on the day of certification to recall accurately the contents of his or her own prior-recorded testimony when collected by either of the calling parties. The witness must indeed be in a position to answer the Witnessing Officer's question on whether he recalls the truthfulness and accuracy of such contents to the best of his or her knowledge and belief. This accurate recollection is in the interest of any calling party wanting to use the contents of this evidence. It is also in the interest of the Witnessing Officer (acting on behalf of the Chamber) to prevent the witness from being called in court at a later stage, notably if the certification process proved to be meaningless because of the witness's lack of recollection.

10. In practice though, it may happen that a certain time has elapsed between the taking of the prior-recorded testimony by the calling party and the certification process. When this lapse of time occurs (i.e. several months or years), the witnesses may realistically not be in a position to remember all details of their prior-recorded testimony for them to be able to attest on the certification day that they would effectively be "true and correct to the best of [their] knowledge and belief". In this case both the requirements of truthfulness (i.e. requirement (a) above) and closeness in time (i.e. requirement (b) above) are difficult to meet. Yet, the Witnessing Officer has no control on this timing issue. Accordingly, in such a case, it is the established practice that the witnesses read once more their own prior-recorded testimonies prior to the actual day of the certification. Notably, this re-reading takes place a few days, usually one day, before the certification process. Depending on the number of pages to be read,

⁹ Rule 68 has been amended by ASP resolution ICC-ASP/12/Res.7.

this task can take several days. This is why in the annexes to the Registry's Transmissions, one can read the witnesses' confirmation of the date(s) at which they last read their prior-recorded testimony.¹⁰

(i) Re-reading of the prior recorded testimony by the witness in presence of the calling party

11. The re-reading of the prior-recorded statement is carried out by the calling party for the following reasons. First, on a legal standpoint, rule 68(2)(b)(iii) of the Rules does not require of the Witnessing Officer to re-read the prior-recorded testimony together with the witness in order for him or her to declare that its content is true and correct to the best of that witness's knowledge. Second, the fact that this witness's task remains a party-driven activity has been the standard accepted practice since the adoption of the new rule 68(2)(b) of the Rules before all Chambers of the Court in all trial proceedings for about ten years now. Third, this practice is notably justified because the calling party is the one who previously collected this evidence and is responsible for the accuracy of it in order not to misled the Chamber when formally submitted before it.

12. This long-standing practice of re-reading by the witness as organised by the calling party has been acknowledged by the Court's Chambers for both the prosecution or the defence witnesses. One can find examples of the fact that it usually occurs in presence of the calling party and usually one day before the certification process takes place in decisions dated back 2015.¹¹

13. In addition, the Registry acts on behalf of the Chamber so that the witness concerned would not need to come to testify in person in court. In this respect, the certification process mirrors the verification process made by any Chamber before the

¹⁰ See for example, P-1523 declaring to the Witnessing Officer having read the prior-recorded testimony and associated material in their entirety on 12, 13, 14 and 15 March 2023 when the actual certification took place on 15 March 2023.

¹¹ Registry, Annex I to the "Registry submission of the declarations made by witnesses CAR-OTP-P-0270 and CAR-OTP-P-0272 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence", 9 September 2015, ICC-01/05-01/13-1224-Conf-AnxI, at page 5. See OTP document filed as an annex to the Registry submission, with amendments to a prior-recorded testimony in presence of the OTP.

start of the witness questioning in court. Accordingly, the same way the Chamber would not need the testifying witnesses to re-read in court the entirety of their prior-recorded testimonies, the Witnessing Officer does not either ask the witness to re-read such prior-recorded testimonies during the certification process. The Registry submits that such re-reading during the certification process in presence of the Witnessing Officer is neither required in law nor advisable for judicial economy. This holds particularly true when the certification process takes place via video-link from locations where the connectivity may not always be stable for several days, whilst the calling party is most of the time at the location of the witness and have ample time to organise the re-reading the prior-recorded testimony by the witness (and make any amendments thereto as the case may be).

14. In view of the above, the re-reading of the prior-recorded testimony by the witness as it is practiced to date allows therefore for the certification process to be meaningful and fully complied with. This is a key preparatory step to it but is clearly not part of it. Should this be changed to the extent that the evidentiary evidence would be re-read in presence of the Witnessing Officer, the Registry submits that it would be problematic as it (1) is not legally required, (2) would not accord with the established practice and (3) would most likely impact on the Registry's neutrality as further explained below.

(ii) Practice of amendments being recorded by the witness and the calling party as part of the taking of the prior-recorded testimony

15. The Defence takes issue not only with the fact that the witnesses would re-read their prior-recorded testimony in presence of the calling party but also with the way amendments are recorded. The Registry clarifies and confirms that the witnesses may make necessary corrections to their prior-recorded statements in the context of the preparatory step of re-reading said statements. The amendments are therefore sent by the calling party to the Witnessing Officer as forming part of the documents yet to be

certified by the said Witnessing Officer and further filed with the relevant Chamber. However, in the Registry's view, this type of interaction does not render the ensuing certification process flawed because of the calling party's alleged involvement therein.

16. Rather, the coordination between the calling parties and the Witnessing Officer take place only prior to the certification process. The amendments are compiled for the purpose of the certification process and they are part of the documents to be certified. On the day of the certification process, such amendments are read in their entirety to the witness who is at full liberty to declare whether the corrections have been made voluntarily and without undue influence (i.e. requirement under rule 68(2)(b)(iii) of the Rules) and whether they are accurate or not. The Witness may as well once more make additional changes in the sole presence of the Witnessing Office; such additional changes, if any, are therefore recorded in the declaration and the attestation filed with the relevant Chamber. In that respect, the integrity of the certification process is fully preserved. The entirety of the amendments – be they the ones recorded during the re-reading or the ones recorded during the certification process, if any - are thereafter filed with the Chamber as an annex to the declaration and the attestation. The declaration is only signed by the witnesses and the Witnessing Officer and the attestation signed by the Witnessing Officer only. In the present case, the exact same procedure has been followed.

17. During the certification process, the Witnessing Officers are strictly bound by the rule 68(2)(b) requirements, namely those explicitly outlined in sub-paragraphs (ii) and (iii) of that rule, and make sure that the contents of their prior recorded testimony, including the amendments thereto, are indeed "true and correct to the best of [the witnesses'] knowledge and belief". This is what has been done for all 17 witnesses concerned and, in particular, the 14 witnesses who made amendments to their prior-recorded testimonies.

18. This practice has been consistently acknowledged by the Court's Chambers. As a matter of example, Trial Chamber VII analysed back in 2015 that what matters

ultimately for the certification process to be useful to it, is that these corrections, modifications or clarifications, if any, “may not amount to new information” as recommended in the rule 68(2)(b)(ii) of the Rules (i.e. requirement (b) in paragraph 8 above).¹² As opposed to new information, the amendments may “rather constitute part of [the] prior-recorded testimony”,¹³ in particular when these corrections consist in rectifying inadvertencies or explanations with regard to non-substantive matters. Trial Chamber VII notably determined that

“To conclude otherwise reduces the reliability of Rule 68(2)(b) prior recorded testimony for no good reason, precluding witnesses from correcting or clarifying details which – if not corrected or clarified – might be erroneously relied upon. Accordingly, the Chamber finds that the requirements of Rule 68(2)(b)(ii) and (iii) of the Rules are fulfilled.”¹⁴

20. In this example, the amendments were thereafter acknowledged by Trial Chamber VII as forming part of the prior-recorded testimony. Like for the 14 witnesses concerned in the present case, the amendments made by the witnesses were recorded during the re-reading in presence of the calling party. These tasks form part of the collection of evidence and fall under the mandate of the calling parties. In this respect, the Registry notes that the Prosecution disclosed the minutes of the meeting it had with witnesses when amending their statements. The Registry understands from this disclosure process that recording the amendments accords with the calling party’s tasks to collect evidence to be certified and not with the certification process itself.

21. If done otherwise, the Registry’s neutral role in the certification process may well be impacted since the task of recording amendments, consisting in being associated to the collection of evidence, would fall outside its mandate. In other words, departing from the established practice when it is not required in law, would also amount to interfering with the parties’ independence when interacting with their own witnesses.

¹² Trial Chamber VII, “Decision on Prosecution Rule 68(2) and (3) Requests”, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, paras. 95 and s.

¹³ *Ibid*, para. 100.

¹⁴ *Ibid*, para. 100.

2 - Requirement (d) above pursuant to rule 68(2)(b) of the Rules and nature and scope of the interactions between the calling party and the Witnessing Officer

22. As pointed out in the Order,¹⁵ for the conduct of the certification process as per rule 68(2)(b) of the Rules, the Chamber delegates its power to the Chief RLO or “any appropriate person” delegated by him to act as Witnessing Officer. The Registry clarifies in the present report that the Prosecution has not been involved in the certification process of the 17 witnesses’ prior-recorded statements.

23. The appropriate person the RLO Chief has designated as Witnessing Officer – or Certifying Officer – is always a Registry staff with appropriate experience and background, trained by RLO to be able to carry out the certification process. These trained Registry staff members are the ones meeting with the witness either in person or online to conduct the certification of their prior-recorded statements as earlier collected by the calling party. In practice and as recorded in the annexes to the Registry’s Transmissions, two different documents are produced as the result of the certification process, (1) an “attestation” signed by both the Witnessing Officer and the witness concerned and (2) a “declaration” only signed by the Witnessing Officer. Both documents are designed to comply with the requirements specified under rule 68(2)(b)(ii) and (iii) of the Rules. In the present case, the Witnessing Officers for the 17 prosecution witnesses are all working within the Registry Court Management Services (“CMS”).

24. In view of the above, the Registry thus clarifies that at no point the Prosecution has been involved in, let alone appointed for, the conduct of the certification process. The only interaction as described above is the sending by the calling party to the Witnessing Officer of the relevant materials, namely the prior-recorded testimony and the associated material bearing ERN numbers. In addition and separately, the amendments - if any - are compiled separately and sent to the Witnessing Officer.¹⁶ This interaction is identical regardless of whether the certification process takes place

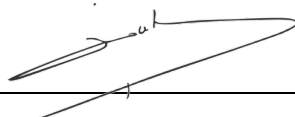
¹⁵ Trial Chamber VI, Order, para. 18.

¹⁶ See examples of interactions in Confidential *ex parte* Annex.

in person or by video-link. Only thereafter and for the purpose of the certification process, the Witnessing Officer extracts from the calling party's document the amendments themselves. The Witnessing Officer then verifies in presence of the witness alone whether the amendments are the ones said witness effectively proposed and whether they are true and accurate.

25. Furthermore, the Registry clarifies that the witness is at all times alone with the Witnessing Officer during the entirety of the certification process. The calling party is never ever privy to this process. When the certification process is on line, the calling party may assist the witness at the location only for logistical reasons, notably in order to facilitate and establish the video-connection with the Witnessing Officer. Once the connection is established, the witness is in the sole presence of the Witnessing Officer (save when an interpreter is required).

26. The Registry finally takes this opportunity to clarify that the defence in the present case would go through the exact same process and, should it deem it necessary, would be the one organising the re-reading of the prior-recorded testimonies of their own witnesses before the start of the certification process.



Marc Dubuisson, Director Division of Judicial Services

on behalf of

Osvaldo Zavala Giler, Registrar

Dated this 12 April 2024

The Hague, the Netherlands