

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 August 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

Public redacted version of

**Decision on the Certification of Accompanying Declarations Made by Witnesses
Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence**

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

Victims and Witnesses Unit

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, 67 and 69 of the Rome Statute (the ‘Statute’), rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’) and regulations 24, 28, 29, 34, and 35 of the Regulations of the Court (the ‘Regulations’) issues this ‘Decision on the Certification of Accompanying Declarations Made by Witnesses Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence’.

I. PROCEDURAL HISTORY

1. Prior to the commencement of the trial, the Office of the Prosecutor (the ‘Prosecution’) filed several requests to introduce prior recorded testimony and associated material pursuant to rule 68(2)(b) of the Rules.¹
2. On 20 October 2022, the Chamber issued the ‘Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules’, in which it granted the introduction of the prior recorded testimony and associated material of P-0100,

¹ Public Redacted Version of “Prosecution’s first request to introduce prior recorded testimony pursuant to rule 68(2)(b)”, ICC-01/14-01/21-289-Conf, dated 29 April 2022, 11 May 2022, [ICC-01/14-01/21-289-Red](#). A confidential version with Confidential Annex A was filed on 29 April 2022 (ICC-01/14-01/21-289-Conf). The witnesses are P-0100, P-1277, P-1424, P-1427, P-1523, P-1524, P-1563, P-1825, P-1970, P-2042 and P-2087; Public Redacted Version of “Prosecution’s second request to introduce prior recorded testimony pursuant to rule 68(2)(b)”, ICC-01/14-01/21-307-Conf, dated 13 May 2022, 24 May 2022, [ICC-01/14-01/21-307-Red](#). A confidential version with Confidential Annex A was filed on 13 May 2022 (ICC-01/14-01/21-307-Conf). The witnesses are P-0491, P-0510, P-0529, P-0662, P-0882, P-1808, and P-2386; Public Redacted version of “Prosecution’s third request to introduce prior recorded testimony pursuant to rule 68(2)(b)”, ICC-01/14-01/21-308-Conf, dated 13 May 2022, 24 May 2022, [ICC-01/14-01/21-308-Red](#). A confidential version with Confidential Annex A was filed on 13 May 2022 (ICC-01/14-01/21-308-Conf). The witnesses are P-0358, P-1180, P-2263, and P-2295; Public Redacted Version of “Prosecution’s fourth request to introduce prior recorded testimony pursuant to rule 68(2)(b)”, ICC-01/14-01/21-319-Conf, dated 19 May 2022, 2 June 2022, [ICC-01/14-01/21-319-Red](#). A confidential version with Confidential Annex A was filed on 19 May 2022 (ICC-01/14-01/21-319-Conf). The witness is P-0966; 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, 28 May 2022, [ICC-01/14-01/21-323-Red2](#); Public Redacted Version of “Prosecution’s sixth request to introduce prior recorded testimony pursuant to rule 68(2)(b)”, ICC-01/14-01/21-328-Conf, dated 23 May 2022, 27 May 2022, [ICC-01/14-01/21-328-Red](#). A confidential version with Confidential Annex A was filed on 23 May 2022 (ICC-01/14-01/21-328-Conf). The witnesses are P-0622, P-1289, P-1432, P-2172, P-2179, P-2239, P-2337, P-2519, P-3047.

P-1277, P-1424, P-1427, P-1523, P-1825, P-1970, P-2042, P-2087, P-0529, P-0882, P-2386 and P-0966.²

3. On 16 November 2022, the Chamber issued the ‘Decision on the Prosecution’s Fifth Request under Rule 68(2)(b) to Introduce the Prior Recorded Testimony of P-1967 and P-2280’, allowing the introduction of the prior recorded testimony and associated materials of P-2280 pursuant to rule 68(2)(b).³

4. On 21 November 2022, the Chamber issued the ‘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’ allowing the introduction of the prior recorded testimony and associated materials of P-2295 pursuant to rule 68(2)(b).⁴ On the same day, the Chamber issued the ‘Decision on the Prosecution’s Sixth Request Pursuant to Rule 68(2)(b) of the Rules’, in which it granted the request with regard to P-1432, P-2239 and P-2337.⁵

5. Following the Chamber’s decisions, on 8 February 2024 the Registry transmitted the accompanying declarations in relation to the prior recorded testimony of 17 witnesses (the ‘Transmission Report’).⁶ As the Registry had not provided the annexes in which the witnesses had made corrections and clarifications, the Chamber instructed the Registry ‘to either notify the relevant documents or at least provide a list with the references for each document and to which annex it is linked’.⁷

² Decision on the Prosecution’s First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules, 20 October 2022, filed on 20 October 2022 (ICC-01/14-01/21-507-Conf). 21 October 2022, [ICC-01/14-01/21-507-Red](#). A confidential version was filed on 20 October 2022.

³ Public Redacted Version of Decision on the Prosecution’s Fifth Request under Rule 68(2)(b) to Introduce the Prior Recorded Testimony of P-1967 and P-2280, 16 November 2022, [ICC-01/14-01/21-551-Red](#).

⁴ 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, 21 November 2022, [ICC-01/14-01/21-556](#).

⁵ Decision on the Prosecution’s Sixth Request Pursuant to Rule 68(2)(b) of the Rules, 21 November 2022, [ICC-01/14-01/21-555-Red](#). A confidential version was filed simultaneously (ICC-01/14-01/21-555-Conf).

⁶ Registry 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.

⁷ Email from the Chamber, dated 16 February 2024, at 14:08.

6. On 23 February 2024, the Registry submitted the documents containing 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 in accordance with rule 68(2)(b) of the Rules (the ‘Transmission of Amendments’).⁸

7. On 13 March 2024, following *inter partes* exchanges, the Defence filed its observations on the amendments to the prior recorded testimony of 14 witnesses who had made corrections or clarifications to their testimony (the ‘Defence Observations’).⁹ The Prosecution communicated its own position in respect of the witnesses via email on the same day (the ‘Prosecution Observations’).¹⁰

8. On 21 March 2024, the Prosecution filed its Communication of the Disclosure of Evidence on 15, 19 & 20 March 2024, which included the rule 68(2)(b) certification by local authorities of the accompanying declaration of witness P-2280.¹¹

9. On 26 March 2024, the Prosecution requested an extension of time limit to file a response to the Defence Observations (the ‘Request for Variation of Time Limit’).¹² On the same day, the Defence sent its observations on the Prosecution’s Request for Variation of Time Limit.¹³ On 27 March 2024, the Prosecution filed a response to the Defence Observations (the ‘Prosecution Response’).¹⁴

⁸ 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, 23 February 2024, ICC-01/14-01/21-705-Conf with Confidential Annexes 1-14.

⁹ Version publique expurgée des « Observations de la Défense sur la « 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) ». (ICC-01/14-01/21-721-Conf), 18 March 2024, [ICC-01/14-01/21-721-Red](#). A confidential version was filed on 13 March 2024 (ICC-01/14-01/21-721-Conf).

¹⁰ Email from the Prosecution, dated 13 March 2024, at 16:41.

¹¹ Prosecution’s Communication of the Disclosure of Evidence on 15, 19 & 20 March 2024, 21 March 2024, [ICC-01/14-01/21-727](#).

¹² Email from the Prosecution, dated 26 March 2024, at 14:21.

¹³ Email from the Defence, dated 26 March 2024, at 15:14.

¹⁴ Version publique expurgée de la « Réponse du Procureur aux observations de la Défense sur la “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-

10. On 2 April 2024, the Chamber rejected the Prosecution Response and filed the ‘Order for Clarification in Relation to the Certification Procedure Pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence’ (the ‘Order for Clarification’).¹⁵

11. On 12 April 2024, the Registry filed a ‘Report on the Conduct of the Certification Process pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence’ (the ‘Registry Report’).¹⁶ Therein, the Registry made reference, *inter alia*, to its ‘long-standing practice’ in respect of rule 68(2)(b) certifications dating back to 2015.¹⁷

12. On 19 April 2024, the Defence requested access to the Annex of the Registry Report and to the Registry submission of accompanying declarations made by witnesses CAR-OTP-P-0270 and CAR-OTP-P-0272 pursuant to rule 68(2)(b) of the Rules in the Bemba et al. case.¹⁸ Following the Defence request, on 23 April 2024 the Chamber issued an email decision, instructing the Registry to create a redacted and confidential version of the former, and instructing the Registry and the Prosecution to produce a confidential redacted version of the latter.¹⁹

13. On 29 April 2024, the Registry provided the parties with a confidential redacted version of the Annex to the Registry Report,²⁰ and a confidential redacted version of the accompanying declarations made by the witnesses in the Bemba et al. case.²¹

CONF)» , 27 mars 2024, ICC-01/14-01/21-730-Conf, 5 July 2024, [ICC-01/14-01/21-730-Red](#). A confidential version was filed on 27 March 2024.

¹⁵ Order for Clarification in Relation to the Certification Procedure Pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence, 2 April 2024, [ICC-01/14-01/21-734](#).

¹⁶ Registry Report on the Conduct of the Certification Process pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 12 April 2024, ICC-01/14-01/21-742-Conf with Confidential *ex parte* Annex only available to the Office of the Prosecutor and the Registry.

¹⁷ Registry Report, ICC-01/14-01/21-742-Conf, paras 11, 12..

¹⁸ Email from the Defence, dated 19 April 2024, at 14:02.

¹⁹ Email from the Chamber, dated 23 April 2024, at 16:04.

²⁰ Confidential Redacted Version of “Annex to the Registry’s Report on the Conduct of the Certification Process pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence”, 29 April 2024, ICC-01/14-01/21-742-Conf-Anx-Red.

²¹ Redacted version of ICC-01/05-01/13-1224-Conf-AnxI, 29 April 2024, ICC-01/14-01/21-742-Conf-AnxI-Red.

14. On 10 May 2024, the Defence filed a response to the Registry Report (the ‘Defence Response’).²²

II. ANALYSIS

A. Reclassification

15. The Chamber has taken note of the Registry’s justification for the classification as confidential of the Registry Report.²³ However, the Chamber sees no reason for this classification, as there is no reason to keep the Court’s procedural practices from the public. It therefore instructs the Registry Report to be reclassified as ‘public’.

B. Certification Process

1. Terminology

16. Before discussing the substantive arguments, the Chamber makes some terminological clarifications. In paragraph 8 of the Registry Report, the Registry uses the term “Declaration” for the document in which the witness confirms the veracity of their prior recorded testimony, whereas in paragraph 23, the same term is used to refer to the “document only signed by the Witnessing Officer”. In the annexes themselves, the French versions of the document signed by the witness are called “Attestation de la personne ayant fourni un témoignage préalablement enregistré comme prévue à la règle 68-2-biii du Règlement de Procédure et de Preuve”,²⁴ whereas the English versions are entitled “Declaration by the person who provided a prior recorded testimony in accordance with rule 68(2)(b)(iii) of the Rules of Procedure and Evidence”.²⁵ Conversely, the French version of the document signed by the person witnessing the accompanying declaration (the ‘Witnessing Officer’) is called “Déclaration du fonctionnaire habilité en vertu de la règle 68-2-b-iii du Règlement de procédure et de

²² Réponse de la Défense au « Registry’s Report on the Conduct of the Certification Process pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence » (ICC- 01/14-01/21-742-Conf), 10 May 2022, ICC-01/14-01/21-758-Conf.

²³ Registry Report, ICC-01/14-01/21-742-Conf, para. 4.

²⁴ See, for example, ICC-01/14-01/21-692-Conf-AnxIII.

²⁵ See, for example, ICC-01/14-01/21-692-Conf-AnxXIV.

preuve”,²⁶ whereas the English version thereof is called “Attestation by the Witnessing Officer pursuant to rule 68(2)(b)(iii) of the Rules of Procedure and Evidence.”²⁷

17. The Chamber notes that the English version of the Rules refers to the statement of the witness confirming the veracity of their prior recorded testimony as a “declaration”, whereas the French version uses the term “attestation” for the same. The Rules do not use a specific term to refer to the certification by the Witnessing Officer of the accompanying declaration.

18. In this decision the Chamber will use the term “accompanying declaration” to refer to the affirmation by the witness, orally or in writing, that their prior recorded testimony is true and correct to the best of their knowledge and belief. The Witnessing Officer’s act of witnessing the accompanying declaration and the written confirmation thereof will be referred to as “certification”.

2. *Involvement of the Calling Party in the Re-Reading of the Prior Recorded Testimony Before the Witnesses Made the Accompanying Declaration*

19. The facts underlying this dispute are not contested. The Chamber provisionally authorised the introduction of the prior recorded testimony of 17 witnesses pursuant to rule 68(2)(b) of the Rules before they had made the accompanying declaration. Several months after the Chamber’s provisional authorisation, the calling party met with the witnesses alone to go over their prior recorded testimony and, for 14 witnesses, recorded changes they wished to make. Following this, the calling party transmitted a report of this process to the Witnessing Officer. Shortly thereafter, the Witnessing Officer met with the witnesses and asked them to confirm that: (i) they had an opportunity to re-read their prior recorded testimony; and (ii) they stood by the changes to the prior recorded testimony made in the presence of the calling party. Based on this, the Witnessing Officer certified the accompanying declarations.

20. According to the Defence, the calling party’s involvement in the re-reading before the accompanying declaration/certification process violated rule 68(2)(b) of the Rules because it was incumbent upon the Witnessing Officer to re-read the prior recorded

²⁶ See, for example, ICC-01/14-01/21-692-Conf-AnxIII.

²⁷ See, for example, ICC-01/14-01/21-692-Conf-AnxXIV.

testimony together with the witness and to record any changes he or she might want to make before making the accompanying declaration.²⁸ In the Defence's submission, the fact that the calling party played such a significant role negatively affected the neutrality of the process. The Defence points out, in this regard, that any contact between the calling party and its witnesses is prohibited during the familiarisation period.²⁹ The Defence further claims that the procedure followed reduced the role of the Witnessing Officer to simply rubber-stamping the accompanying declaration, since: (i) the Witnessing Officer did not personally hand over the prior recorded testimony to the witness for him or her to re-read; (ii) the Witnessing Officer did not monitor the re-reading of the prior recorded testimony by the witness; and (iii) the Witnessing Officer did not personally record any changes or corrections to the prior recorded testimony made by the witness.³⁰

21. The Chamber is not persuaded by the Defence's argument that the re-reading of the witness's statement before the accompanying declaration/certification process should have been carried out by the Witnessing Officer and that the calling party should not have been involved. The Chamber notes that rule 68(2)(b)(ii) of the Rules specifies that the accompanying declaration witnessed by the Witnessing Officer 'may not contain any new information'. The logical implication is that the witness has already had an opportunity to read or re-read his or her statement and make any final adjustments or corrections, as necessary, such that the accompanying declaration/certification procedure can be carried out in compliance with these conditions in relation to a *finalised* witness statement. Moreover, the Chamber understands that it is natural that witnesses may wish to consider making changes in advance of certification, particularly in circumstances where there is a long interval between the making of the original prior recorded testimony and the certification thereof.

22. The Chamber further notes that no requirements governing such a re-reading process are set out in rule 68(2)(b) itself, in the legal framework more broadly or in

²⁸ Defence Response, ICC-01/14-01/21-758-Conf, para. 38.

²⁹ Defence Response, ICC-01/14-01/21-758-Conf, para. 36.

³⁰ Defence Response, ICC-01/14-01/21-758-Conf, para. 7.

directions given by the Chamber in this case. In the latter regard, the Chamber observes that the witness familiarisation and preparation protocols referred to by the Defence apply only to witnesses who appear in court.³¹ The restrictions imposed therein on contact between the calling party and their witnesses prior to their in-court testimony have no application in the context of the provision of rule 68(2)(b) accompanying declarations.

23. In addition, the Chamber notes that the requirements for the accompanying declaration/certification process set out in rule 68(2)(b)(ii) of the Rules specify the role of the Witnessing Officer.³² The Witnessing Officer has no obligation to re-read the prior recorded testimony with the witness as part of this process. Indeed, the Chamber notes that the *ad hoc* tribunals have issued practice directions on the accompanying declaration/certification process applicable to its equivalent rule, which prohibit the Presiding Officer (the equivalent to the Witnessing Officer) from being present or involved in any way in producing the final statement and expressly provide that the calling party must record any changes or amendments to written statements.³³

³¹ See, Protocol on the practices to be used to familiarise witnesses for giving testimony at trial, ICC-01/14-01/21-446-AnxI, paras 1-2; Witness preparation protocol, ICC-01/14-01/21-251-AnxA. Paras 1, 6, 11.

³² Rule 68(2)(b)(ii) requires: (i) verification that the person making the declaration is the person identified in the prior recorded testimony; (ii) ascertainment that they are making the declaration voluntarily and without undue influence and that, to the best of the person's knowledge and belief, the contents of their prior recorded testimony is true and correct; and (iii) warning that he or she may be subject to proceedings for having given false testimony that if the contents of the prior recorded testimony are not true.

³³ See International Residual Mechanism for Criminal Tribunals, Practice Direction on the Procedure for the Implementation of Rule 110(B) of the Rules of Procedure and Evidence, [MICT/15/Rev.1](#), 4 January 2019, para. 12. At the time the Assembly of States Parties adopted the amendment introducing rule 68(2)(b) of the Rules, the Practice Direction in relation to rule 92(bis) of the *ad hoc* tribunals' Rules of Procedure and Evidence stipulated that "The Presiding Officer may not make corrections, amendments or additions to the witness's statement. If the witness disagrees with the content of his statement, or wishes to amend it or add to it, it will be the task of the requesting party to obtain a complete and final version of the statement. The Presiding Officer may not be involved in any way in the process of correction, amendment or modification of the statement." See Practice Directions on Procedure for the Implementation of Rule 92(bis)(B) of the Rules of Procedure and Evidence, [IT/192](#), 20 July 2001. Rule 110(B) of the Rules of Procedure and Evidence of the International Residual Mechanism for Criminal Tribunals, [MICT/1/Rev.8](#), 26 February 2024. It is to be noted that the original amendment of the *ad hoc* tribunals' Rules of Procedure and Evidence, which introduced the possibility to introduce prior recorded testimony without calling the witness, was adopted in December 2000. See Rule 92(bis) of the Rules of Procedure and Evidence, [IT/32/Rev.19](#), 19 January 2001. Rule 68(2)(b) of the Rules was modelled on the rules of the *ad hoc* tribunals: see Assembly of States Parties, *Working Group on Lessons Learnt*: Second report of the Court to the Assembly of States Parties – Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), 31 October 2013, [ICC-ASP/12/37/Add.1](#), p. 19, para. 3 *et seq.*

24. Accordingly, the Chamber finds that the legal framework does not require the Witnessing Officer to carry out the process of re-reading the statement and collecting corrections, clarifications and amendments (if necessary) or prohibit the calling party from being involved at this stage.

25. The Chamber is also not persuaded by the Defence's argument that the involvement of the calling party in re-reading the statements with the witnesses prior to the accompanying declaration/certification process negatively affected the neutrality of the process in this case. The Defence has not alleged – and the Chamber sees no reason to suspect – that the Prosecution tried to influence any of the 17 witnesses when they reviewed their prior recorded testimony or that it did not faithfully record the corrections, clarifications or amendments these witnesses wished to make. Moreover, the witnesses all confirmed to the Witnessing Officer that they wished to make the corrections, clarifications or amendments recorded by the Prosecution. Accordingly, the Chamber is satisfied that the involvement of the Prosecution in re-reading the witnesses' statements did not prejudice the accompanying declaration/certification process.

26. The Chamber therefore finds that the Prosecution's involvement in the re-reading did not result in any prejudice to the Defence. Under these circumstances, the Chamber finds no reason to invalidate the certification procedure. However, the Chamber will assess (i) whether there were any concerns about the identification of any of the witnesses; and (ii) whether there is a need to revoke its provisional authorisation for any of the 14 witnesses who made corrections, clarifications or amendments to their prior recorded testimony.

3. *Verification by the Registry of Identity Documents*

27. In its Observations, the Defence draws attention to the fact that, in relation to certain witnesses, the Witnessing Officer experienced issues with the quality of the videoconference technology during the certification process.³⁴ Specifically, the

³⁴ Defence Observations, [ICC-01/14-01/21-721-Red](#), para. 10; see, for example, Annex 15 of the 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 Annexes 1-17.

Defence refers to the certification of P-1424, P-1825, and P-2386's accompanying declarations.³⁵ The Defence further points out that P-2087 has modified the date of birth mentioned in his prior recorded testimony and that this date is different from the one mentioned in the certification by the Witnessing Officer.³⁶ According to the Defence, there therefore exists no way for the parties and the Chamber to determine whether the person who signed the original prior recorded testimony is indeed the same person who provided the accompanying declaration, pursuant to rule 68(2)(b)(iii) of the Rules.³⁷ The Defence asks the Chamber to instruct the Registry to provide copies of the identity documents shown by the witnesses during the certification process.

28. The Registry did not comment on the Defence's submissions on this matter.

29. The Chamber notes that rule 68(2)(b)(iii) of the Rules specifies that the Witnessing Officer must verify the witness' identity.³⁸ As a general matter, the Chamber finds that, as a neutral organ of the Court, the Registry may be presumed to have conscientiously abided by all procedural requirements. Unless there are specific indications that the Witnessing Officer failed in his or her duty to verify the identity of a particular witnesses, there is thus no need for the Chamber or the parties to independently verify the identity of the persons who made the accompanying declarations. The Chamber therefore rejects the Defence's request to receive copies of the identity cards of all 17 witnesses.

(a) P-1424 and P-1825

30. Turning to the specific arguments raised by the Defence, the Chamber notes that, in relation to P-1424 and P-1825, there is no indication that the Witnessing Officer was unable to verify the witnesses' identities. In relation to the former, the Witnessing Officer explains that a photograph of the identity document was sent via a messaging application.³⁹ In relation to the latter, the Witnessing Officer only mentions that the connection was lost at some point due to a power outage.⁴⁰ There is no indication that

³⁵ Defence Observations, [ICC-01/14-01/21-721-Red](#), para. 10, footnote 39.

³⁶ Defence Observations, [ICC-01/14-01/21-721-Red](#), para. 12.

³⁷ Defence Observations, [ICC-01/14-01/21-721-Red](#), para. 12.

³⁸ Rule 68(2)(b)(iii) of the Rules.

³⁹ Transmission Report, ICC-01/14-01/21-692-Conf, Annex XVII.

⁴⁰ Transmission Report, ICC-01/14-01/21-692-Conf, Annex IV.

this interruption was permanent or that it prevented the Witnessing Officer from carrying out her duties.

(b) P-2386

31. As regards P-2386, the Chamber notes that the Witnessing Officer indicates that the quality of the video image did not allow her to see more than the contours of the witness' identity card and photo.⁴¹ No explanation is given as to whether and how the Witnessing Officer was nevertheless able to verify P-2386's identity.

32. The Chamber therefore orders the Witnessing Officer who certified P-2386's accompanying declaration to submit a report in which she provides further information on how she verified P-2386's identity for the purposes of meeting the requirements set out in rule 68(2)(b)(iii) of the Rules. The Chamber will consider the validity of the accompanying declaration and certification on the basis of this report⁴² and any submissions the parties may wish to make in this regard.

(c) P-2087

33. Finally, the Chamber has considered the fact that P-2087 corrected the month of his date of birth on his prior recorded testimony and explained why the date of birth on his identity card is incorrect.⁴³ The Chamber agrees that it is unfortunate that the Witnessing Officer noted the incorrect date of birth in the certification document, even though she noted that the witness had explained to her why the date mentioned on his identity card was incorrect.⁴⁴ However, the Chamber does not find this puts into question P-2087's identity.

4. Certification by Local Authorities

34. The Chamber notes that, in relation to the prior recorded testimony of P-2280, the accompanying declaration was made in the presence of and was certified by local

⁴¹ Transmission Report, ICC-01/14-01/21-692-Conf, Annex XV.

⁴² Given that the report will not become part of the evidentiary record of this case, it is not itself subject to the requirements of rule 68 of the Rules. See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Bemba Defence Application for Admission of D20-2's Prior Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules, 29 March 2015, [ICC-01/05-01/13-1753](#), para. 12; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, 11 November 2016, [ICC-01/05-01/13-2025](#), paras 6-7.

⁴³ CAR-OTP-00001470-R01.

⁴⁴ Transmission Report, ICC-01/14-01/21-692-Conf, Annex XI.

authorities. In particular, on 21 March 2024, the Prosecution disclosed a number of documents, including a *procès-verbal d'audition de témoin* in which P-2280 confirmed that his prior recorded testimony is correct, exact and truthful.⁴⁵ The witness also acknowledged that he may be subject to prosecution for giving false testimony pursuant to article 70 of the Statute. The Chamber further notes that P-2280's accompanying declaration was witnessed by a local officer who, the Chamber understands, was authorised pursuant to the laws and procedures of the State in question to witness the accompanying declaration. Although this person did not submit a separate written document in which he verified the elements listed in rule 68(2)(b)(iii), the Chamber considers that the fact that he countersigned P-2280's accompanying declaration suffices under the circumstances. Accordingly, the Chamber finds that the conditions of rule 68(2)(b) have been fulfilled.

C. Amendments to the prior recorded testimony of 1 witnesses

1. P-0100, P-0882, P-1427, P-1432, P-1523, P-1970, P-2042, and P-2087

35. According to the Prosecution, the corrections and clarifications provided by witnesses P-0100, P-0882, P-1427, P-1432, P-1523, P-1970, P-2042, and P-2087 do not contain new information within the meaning of rule 68(2)(b)(ii) of the Rules.⁴⁶ The Defence agrees that the changes made by these witnesses do not invalidate the Chamber's provisional authorisation to introduce the prior recorded testimonies pursuant to this provision.⁴⁷

36. As the Parties are in agreement, the Chamber finds that the corrections and clarifications made by these witnesses do not preclude application of rule 68(2)(b) and that the prior recorded testimonies can be introduced with the accompanying declarations.

⁴⁵ CAR-OTP-00036243, at 0004.

⁴⁶ Email from the Prosecution, dated 13 March 2024, at 16:41.

⁴⁷ Defence Observations, [ICC-01/14-01/21-721-Red](#), para. 17.

2. P-2386

37. As noted above,⁴⁸ the Chamber will consider whether the certification process for witness P-2386 complied with the requirements of rule 68(2)(b) of the Rules, on the basis of the report by the Witnessing Officer and any submissions the parties may wish to make in this regard. It is therefore premature to consider the amendments P-2386 made to his prior recorded testimony.

3. P-0966

38. The parties agree that the information provided by witness P-0966 is not ‘new’ within the meaning of rule 68(2)(b)(ii) of the Rules, but the Defence submits that the amendments to paragraphs 58 and 65 of P-0966’s prior recorded testimony should be considered as additions, rather than corrections. In other words, the Defence argues that the information contained in both the original statement as well as the accompanying declaration can be relied upon by the Parties.⁴⁹ The Prosecution did not react to the point made by the Defence.

39. The Chamber notes that P-0966 testified in case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (the ‘Yekatom and Ngaïssona Case’) and made handwritten changes to his prior recorded testimony before doing so. The amended version of his prior recorded testimony was included in the Annex to the Prosecution’s request pursuant to rule 68(2)(b) of the Rules in the present case.⁵⁰ P-0966 essentially made the same amendments to his prior recorded testimony again, before signing the accompanying declaration pursuant to rule 68(2)(b)(ii) of the Rules in this case.⁵¹ Although the corrections and clarifications provided by P-0966 to his prior recorded testimony in both cases are not exactly identical, the difference is insignificant and does not affect the analysis on the basis of which the Chamber provisionally authorised the introduction of P-0966’s prior recorded testimony.

⁴⁸ See paras 31- 32 above.

⁴⁹ Email from the Prosecution, dated 13 March 2024, at 16:41; Defence Observations, [ICC-01/14-01/21-721-Red](#), para. 23.

⁵⁰ Annex A to the Prosecution’s fourth request to introduce prior recorded testimony pursuant to rule 68(2)(b), 19 May 2022, ICC-01/14-01/21-319-Conf-AnxA, p. 2, referring to CAR-OTP-2135-2583-R01.

⁵¹ ICC-01/14-01/21-705-Conf-Anx12.

40. Specifically in relation to paragraphs 58 and 65 of P-0966's prior recorded testimony, the Chamber notes that the information which the Defence characterises as 'additions' was already contained in the corrections the witness made to this document before testifying in the *Yekatom and Ngaïssona* Case, albeit in handwritten form.⁵² This information can therefore be considered as part of P-0966's prior recorded testimony. Therefore, the Chamber finds that the corrections and clarifications made by P-0966 do not preclude application of rule 68(2)(b) of the Rules and that the prior recorded testimony can be introduced with the accompanying declaration.

4. *P-1825 and P-2337*

41. The Prosecution notes that it will not rely on the information provided by P-1825 and P-2337 in their accompanying declarations, amending certain paragraphs of their original prior recorded testimonies.⁵³ The Defence considers that the amendments made by these witnesses amount to new information pursuant to rule 68(2)(b)(ii).⁵⁴ Specifically, the Defence argues that the changes made by P-1825 to paragraphs 21 and 54, and by P-2337 to paragraph 27, amount to new information and should not be taken into account.⁵⁵

42. The Chamber observes that P-1825 testified in paragraph 21 of his original prior recorded testimony⁵⁶ that [REDACTED], and then corrected this in his accompanying declaration to say that [REDACTED].⁵⁷ P-1825 also amended paragraph 54 of his original statement by adding that he saw a vehicle with the inscription [REDACTED], which he did not mention earlier when shown photos of the vehicles by investigators.⁵⁸

43. Regarding P-2337, the Chamber observes that he made a correction to paragraph 27 of his prior recorded testimony which states the opposite of what he said in the original statement.⁵⁹ In particular, P-2337 testified in his original statement that

⁵² CAR-OTP-2135-2583-R01.

⁵³ Email from the Prosecution, dated 13 March 2024, at 16:41.

⁵⁴ Defence Observations, [ICC-01/14-01/21-721-Red](#), para. 18.

⁵⁵ Defence Observations, [ICC-01/14-01/21-721-Red](#), paras 18-20.

⁵⁶ CAR-OTP-2130-2169, at 2174, para. 21.

⁵⁷ ICC-01/14-01/21-705-Conf-Anx4.

⁵⁸ ICC-01/14-01/21-705-Conf-Anx4.

⁵⁹ CAR-OTP-2130-4699, at 4705, para. 27.

someone was not armed, which he then corrected in his accompanying declaration to say that this person was armed.⁶⁰

44. The Chamber notes that the parties are in agreement and finds that the amendments should not be relied upon. However, the Chamber finds that it would be potentially misleading to rely on the original language of the fourth sentence of paragraph 21 of P-1825's prior recorded testimony, since the witness changed part of its content. The same is true for the penultimate sentence in paragraph 27 of P-2337's prior recorded testimony. Accordingly, the Chamber will ignore these sentences entirely.

45. With this proviso, the Chamber considers that the other amendments made by P-1825 and P-2337 do not substantially change the witnesses' statements such that the Chamber's provisional authorisation pursuant to rule 68(2)(b) of the Rules should be revoked.

5. P-0529

46. The Prosecution acknowledges that the change made by P-0529 to paragraph 58 of his prior recorded testimony amounts to new information within the meaning of rule 68(2)(b)(ii) of the Rules but argues that it does not relate to the 'acts and conduct of the accused'.⁶¹ In any event, the Prosecution informed the Chamber that it would not rely on the new information.⁶²

47. The Defence submits that the amendment amounts to new information which substantially changes P-0529's original statement.⁶³ Referring to the Court's jurisprudence in *The Prosecutor v. Paul Gicheru*, the Defence argues that the Chamber's authorisation to introduce the prior recorded testimony pursuant to rule 68(2)(b) lapses once the witness makes substantial changes to their prior recorded testimony.⁶⁴ Therefore, according to the Defence, the prior recorded testimony of

⁶⁰ ICC-01/14-01/21-705-Conf-Anx14.

⁶¹ Defence Observations, [ICC-01/14-01/21-721-Red](#), para. 28. This paragraph refers to an email sent from the Prosecution to the Defence on 4 March 2024, at 22:03.

⁶² Email from the Prosecution, dated 13 March 2024, at 16:41.

⁶³ Defence Observations, [ICC-01/14-01/21-721-Red](#), para. 25.

⁶⁴ Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Public redaction version of Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(b), 15 December 2021, [ICC-01/09-01/20-250-Red](#), para. 33

P-0529 can no longer be introduced under rule 68(2)(b), but should be introduced pursuant to rule 68(3) of the Rules.

48. The Chamber finds that the information provided by P-0529 in his accompanying declaration substantially changes his prior recorded testimony. In particular, the Chamber observes that P-0529 testified in his original statement that he does not know the name of the persons who were in charge of the OCRB and SRI at the time.⁶⁵ In his accompanying declaration, however, P-0529 changed this and identifies the name of the person in charge of the OCRB as [REDACTED].⁶⁶ P-0529 explains that he knows this name due to [REDACTED].⁶⁷ Given the nature of this new information, the Chamber does not consider it appropriate to disregard it, as suggested by the Prosecution. Accordingly, the Chamber finds it more appropriate to introduce P-0529's prior recorded testimony under rule 68(3) of the Rules and therefore revokes its provisional authorisation to introduce this evidence pursuant to rule 68(2)(b) of the Rules.

6. P-2239

49. As with P-0529, the Prosecution informed the Chamber that it does not intend to rely upon the amendments provided by P-2239 to paragraphs 44 and 46 of his prior recorded testimony, as they provide substantive new information.⁶⁸ The Defence notes that the amendments made by P-2239 provide new information within the meaning of rule 68(2)(b)(ii) of the Rules and considers them to be substantial changes, such that P-2239's testimony should be introduced under rule 68(3) instead of rule 68(2)(b) of the Rules.⁶⁹

50. The Chamber observes that P-2239 testified in paragraph 44 of his prior recorded testimony that [REDACTED].⁷⁰ In his accompanying declaration, P-2239 noted that [REDACTED].⁷¹ P-2239 added that [REDACTED].⁷²

⁶⁵ CAR-OTP-2041-0031, at 0039, para. 58.

⁶⁶ ICC-01/14-01/21-705-Conf-Anx2.

⁶⁷ ICC-01/14-01/21-705-Conf-Anx2.

⁶⁸ Email from the Prosecution, dated 13 March 2024, at 16:41.

⁶⁹ Defence Observations, [ICC-01/14-01/21-721-Red](#), para. 30.

⁷⁰ CAR-OTP-2130-4729, at 4740, para. 44.

⁷¹ ICC-01/14-01/21-705-Conf-Anx11.

⁷² ICC-01/14-01/21-705-Conf-Anx11.

51. Furthermore, in paragraph 46 of his prior recorded testimony, P-2239 mentioned ‘a Seleka colonel’ but stated that he did not know his name.⁷³ P-2239 then amended this in his accompanying declaration and stated that [REDACTED].⁷⁴

52. The Chamber considers that the amendments made by P-2239 substantially change his original prior recorded testimony. Most notably, P-2239 made no mention of the name of the accused in his original statement and refers to it for the first time in his accompanying declaration. Given the nature of this new information, the Chamber does not consider it appropriate to disregard it, as suggested by the Prosecution. The Chamber thus finds that P-2239’s prior recorded testimony should be introduced under rule 68(3) instead of rule 68(2)(b) of the Rules.

53. Last, the Chamber notes that the deadline for any request for leave to appeal the present decision will fall during the summer recess. As the Chamber has imposed a moratorium on non-urgent filings during the recess, the Chamber extends the deadline for requests for leave to appeal until after the recess. Therefore, any request for leave to appeal the present decision must be filed no later than 23 August 2024.

54. Unless leave to appeal is sought, the Prosecution is instructed to inform the Chamber as well as the other parties and participants no later than 26 August 2024 whether or not it intends to call P-0529 and/or P-2239 pursuant to rule 68(3) of the Rules.

⁷³ CAR-OTP-2130-4729, at 4741, para. 46.

⁷⁴ ICC-01/14-01/21-705-Conf-Anx11.

FOR THESE REASONS, THE CHAMBER HEREBY

INSTRUCTS the Registry Report to be reclassified as public and for the Registry to provide a public redacted version of the Registry Transmission of the Declarations and the Registry Transmission of the Amendments to the Prior Recorded Testimonies;

INSTRUCTS the Prosecution to provide a public redacted version of the Prosecution Response to the Defence Observations on the Registry's Transmission,

INSTRUCTS the Defence to provide a public redacted version of the Defence Response to the Registry's Report;

FINDS that the conditions of rule 68(2)(b) of the Rules have been met in relation to P-1277, P-1424, P-2280, and P-2295;

ALLOWS the introduction pursuant to rule 68(2)(b) of the Rules of the prior recorded testimony of P-0100, P-0882, P-1427, P-1432, P-1523, P-1970, P-2042, and P-2087, as amended by the witnesses during the certification process, as well as the Associated Materials;

ALLOWS the introduction pursuant to rule 68(2)(b) of the Rules of the prior recorded testimony of P-0966, P-1825 and P-2337, as amended by the witnesses during the certification process but subject to the specifications outlined in paragraphs 42 to 44, as well as the Associated Material;

INSTRUCTS the Registry to submit a report on how P-2386's identity was verified by the Witnessing Officer no later than 30 August 2024;

REJECTS the introduction of the accompanying declarations of P-0529 and P-2239 pursuant to rule 68(2)(b) of the Rules and allows the introduction of their prior recorded testimony and Associated Materials pursuant to rule 68(3) of the Rules; and

SUSPENDS the time limit for any request for leave to appeal this decision until the end of the summer recess.



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 August 2024

At The Hague, The Netherlands