

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 April 2025**

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba , Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godinez
Judge Keebong Paek , Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public

Public redacted version of “Prosecution response to Defence’s request to introduce prior recorded testimonies of Witnesses P-0015, P-0025, P-2926 and P-0405 pursuant to rule 68(2)(b) of the rules of procedure and evidence (ICC-01/14-01/21-931-Conf)”, ICC-01/14-01/21-938-Conf, dated 14 March 2025

Source: Office of the Prosecutor

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

☒ The Office of the Prosecutor

☒ Counsel for the Defence

☒ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☐ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the Defence

☐ States' Representatives

☐ Amicus Curiae

REGISTRY

Registrar

Mr Zavala Giler Osvaldo

☐ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and
Reparations Section

☐ Other

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) opposes the “Defence Request”¹ to introduce the prior recorded testimonies of Witnesses P-0015, P-0025, and P-2926 pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“the Rules”) since they relate to i) contested issues in the case, ii) lack sufficient indicia of reliability, and iii) contain new accounts that are internally inconsistent and contradict the evidence on the record. However, the Prosecution does not oppose the introduction of P-0405’s prior recorded testimony under Rule 68(2)(b).
2. Moreover, the Prosecution respectfully requests the Chamber; (i) to allow Witnesses P-0015 and P-0025, to testify *viva voce* or in the alternative, their prior recorded testimony to be introduced pursuant to rule 68(3) of the Rules, and (ii) to allow the introduction of P-2926’s prior recorded testimony under Rule 68(3) of the Rules.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this filing is filed as confidential because it responds to the Defence Request which was filed confidentially and refers to confidential items of evidence. A public redacted version will be filed as soon as practicable.

III. PROCEDURAL HISTORY

4. On 8 October 2024, the Chamber issued its “Third Directions on the Conduct of Proceedings” and ordered, *inter alia*, the Defence, to file their final list of witnesses, final list of evidence and complete the final disclosure of items it intends to use

¹ ICC-01/14-01/21-931-Conf (Defence Request).

during trial no later than 21 February 2025.² The Chamber also set 3 March 2025 as the deadline for the Defence to file any applications pursuant to rule 68(2) and (3) of the Rules.³

5. On 21 February 2025, the Chamber issued its decision and granted a general extension of time to 21 March 2025 for the Defence to update its final list of witnesses and list of evidence, to complete disclosure in respect of the outstanding matters identified in the Defence Request and to file any applications pursuant to rule 68 of the Rules for the four witnesses identified in the Defence Request.⁴
6. On 21 February 2025, the Defence filed its Final Witness List, indicating (i) the two witnesses it intends to call to testify fully *viva voce*, and (ii) the five witnesses whose testimony it seeks to introduce pursuant to Rule 68(2) of the Rules.⁵
7. On 3 March 2025, the Defence notified the Chamber and the participants of the withdrawal of Witness D33-P-0004 (subject of rule 68(2)(b) application).⁶
8. On 3 March 2025, the Defence submitted a request for formal submission into evidence, the prior recorded testimonies for Witnesses P-0015, P-0025, P-2926 and P-0405, pursuant to rule 68(2)(b) of the Rules.⁷

IV. APPLICABLE LAW

9. In exercising its discretion whether to allow the introduction of a prior recorded testimony or not, the Chamber may consider whether the prior recorded testimony; (i) relates to issues that are not materially in dispute, (ii) is of a cumulative or

² ICC-01/14-01/21-873, paras. 14-15.

³ ICC-01/14-01/21-873, para. 16.

⁴ ICC-01/14-01/21-920-red, paras. 26-27.

⁵ ICC-01/14-01/21-921.

⁶ Defence Email dated 3 March 2025 at 09h12 and titled « Retrait P-0004 de la liste des témoins de la Défense ».

⁷ ICC-01/14-01/21-931-Conf (Defence Request).

corroborative nature, (iii) relates to background information, (iv) is such that the interests of justice are best served by its introduction, and (v) has sufficient indicia of reliability.”⁸ These factors are merely guiding the Chamber’s discretion, but are not mandatory pre-conditions for the applicability of rule 68(2)(b) of the Rules.⁹

10. Where the Chamber concludes that a prior recorded testimony is not suitable for introduction under rule 68(2)(b) of the Rules, it may introduce it *proprio motu* pursuant to rule 68(3) of the Rules.¹⁰

V. SUBMISSIONS

A. The documents submitted by the Defence in relation to P-0015 are not prior recorded testimonies

11. The Prosecution submits that the alleged prior recorded testimony of P-0015 does not meet the criteria set out in rule 68(2)(b) of the Rules since the documents that the Defence seeks to introduce under rule 68(2)(b) are not testimonial in nature and can be sought to be submitted through other avenues.
12. . In Annex 1,¹¹ the Defense places the “Attestation” as the “*Déclaration antérieure à soumettre conformément à la Règle 68(2)(b)*”. This “Attestation” refers to “*l’article mentionné ci-dessous*”,¹² which appears to refer to CAR-D33-0014-1617 titled [REDACTED] (“the Article”). This document is an academic article written by P-0015 and [REDACTED]. CAR-D33-0014-1632 and CAR-D33-0014-1742, which are

⁸ See ‘Gicheru Rule 68(2)(b) decision’, ICC-01/09-01/20-250-Red, para. 5. See also 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 2016, ICC-01/05-01/13-1753, paras 6-7.

⁹ See ‘Ongwen Rule 68(2)(b) Decision’, ICC-02/04-01/15-596-Red, para. 6; ‘Bemba et al. Rule 68 Decision’, ICC-01/05-01/13-1478-Red-Corr, para. 95.

¹⁰ Rule 68(1) of the Rules.

¹¹ ICC-01/14-01/21-931-Conf-Anx1, p. 2.

¹² See CAR-D33-0014-2691, p. 1, para. 1.

listed as annexes or associated material,¹³ do not mention the situation in Central African Republic.

13. While the case law gives a broad interpretation of what is a prior recorded testimony, *“this does not mean that any information provided by a person can be considered to be prior recorded testimony”*.¹⁴ The Article cannot be considered a prior recorded testimony given that it is not testimonial in nature. P-0015 is expressing legal opinions and deals with some factual questions such as the alleged *“disorganisation of Seleka and Anti-balaka”*¹⁵ for which P-0015 has no personal knowledge and is not a witness as such.

B. P-0015’s alleged prior recorded testimony lacks sufficient indicia of reliability

14. The basis of knowledge is unclear. P-0015 states that in writing her Article¹⁶, she relied on open-source material as well as *“des sources sur le terrain avec un accès direct à la situation”*.¹⁷ However, neither her resume nor the footnotes in the Article indicate that she interviewed anyone in the field (*“sources sur le terrain”*) to write some of the paragraphs of the Article. Indeed, the footnotes refer to sources such as [REDACTED], other academic articles, etc... but do not refer to persons she would have interviewed or observations/findings she would have done herself when in CAR. The summary of the anticipated testimony indicates that she engaged with non-state actors on the field in [REDACTED] but does not mention CAR.¹⁸

¹³ See ICC-01/14-01/21-931-Conf-Anx1, p. 2.

¹⁴ See ICC-01/05-01/13-1478-Red-Corr, 12 November 2015, paras. 31, 32.

¹⁵ Request, para. 17.

¹⁶ CAR-D33-0014-1617

¹⁷ See CAR-D33-0014-2691, p. 1, para. 2 and ICC-01/14-01/21-931-Conf-Anx3, p. 4, para. 5.

¹⁸ ICC-01/14-01/21-931-Conf-Anx3, p. 4, para. 3.

C. P-0015's alleged prior recorded testimony relates to issues which are materially in dispute

15. P-0015's alleged prior recorded testimony relate to issues which are materially in dispute in this case. The Request indicates that P-0015 "testifies" about the absence of armed conflict in CAR between 24 March 2013 and the beginning of December 2013, an issue which is in dispute in the case. It is submitted in the Prosecution Trial Brief that a Non-International armed conflict "NIAC" existed between late 2012 until at least 10 January 2014 in CAR.¹⁹ Moreover, the Pre-Trial Chamber confirmed in its Confirmation Decision that "*at all times material to these charges, including from at least March 2013 until at least January 2014, there was an armed conflict not of an international character on the territory of CAR*".²⁰
16. In addition, in the Article, P-0015 discusses other issues which are not only materially in dispute in this case, but constitutes new accounts that are internally inconsistent and contradict the evidence on the record. For instance P-0015 discusses the existence or non-existence of an armed conflict, the alleged "disappearance"²¹ of one of the parties to the conflict, and the alleged "disorganisation of the Seleka and the Anti-balaka".²² These are issues which are materially in dispute in this case and for which this Chamber will be required to render its decision. They also constitute new accounts that are internally inconsistent and contradict the evidence on the record.
17. For all these reasons, the Prosecution submits that P-0015's alleged prior recorded testimony may not assist the judges in the manifestation of truth if introduced under Rule 68(2)(b).

¹⁹ ICC-01/14-01/21-359-Conf, para. 9.

²⁰ ICC-01/14-01/21-218-Conf, p. 51, para. 2.

²¹ CAR-D33-0014-1617, p. 4.

²² Defence Request, para. 17.

18. Consequently, the Chamber should not allow the introduction of P-0015's alleged prior recorded testimony under rule 68(2)(b). Instead, P-0015 should be called to testify *viva voce* since her evidence relate to new accounts that are internally inconsistent and contradict the evidence on the record and which are materially in dispute. Furthermore the Defence lists her as a "fact witness".²³

D. P-0025's alleged prior recorded testimony lacks sufficient indicia of reliability

19. The Prosecution submits that CAR-D33-0014-3340 lacks sufficient indicia of reliability, and should not be considered a prior recorded statement.

20. Document CAR-D33-0014-3340 is dated 17 February 2025 and was signed by Witness P-0025 alone. It doesn't meet the requirements of a prior recorded statement or testimony²⁴ since it is not countersigned by an investigator, Counsel(s) or any other representative of the SAID Defence team who interviewed the Witness.²⁵

E. P-0025's article relates to issues which are materially in dispute

21. P-0025's article, titled [REDACTED], broadly contains information about the organisation and structure of the Seleka and Anti-Balaka²⁶ during the temporal scope of this case.²⁷

²³ ICC-01/14-01/21-921-Conf-Anx2, p. 2.

²⁴ See supra note 16.

²⁵ *Contra Prosecutor v. Ali Muhammad Ali Abd-al-Rahman*, ICC-02/05-01/20-1039-Red, paras. 8-10 (wherein the Chamber found the requirements of 68(2)(b)(i) were met on the premise of the statements having been signed by the witness and interpreters who assisted the Defence witness during the interviews, coupled with the witness' acknowledgment regarding the use of the associated material together with the statements and that the testimony was provided voluntarily).

²⁶ CAR-D33-0014-2705 at 2707-2717.

²⁷ ICC-01/14-01/21-931-Conf, paras. 26-29.

22. These are core issues which are disputed between the parties,²⁸ as reflected in the *Mémoire de première instance de la Défence*,²⁹ and similarly pleaded by the SAID Defence in their Opening Submissions at the start of this trial.³⁰

23. Consequently these issues are of sufficient significance for the Trial Chamber's eventual determination of the charges against the accused, and thereby warrant Witness P-0025's oral testimony in full (*viva voce*) or at the very least via rule 68(3) of the Rules, in order for the Prosecution to have the opportunity to cross-examine him on these matters.

F. P-2926's prior recorded testimony relate to issues that are materially in dispute

24. P-2926's prior recorded testimony relates to issues that are materially in dispute, and should therefore be introduced in evidence under rule 68(3) as opposed to rule 68(2)(b). For instance:

- a. At paragraph 22,³¹ the Defence states that P-2926 prepared a Report attesting, to the absence of hierarchy and discipline within the coalition, the absence of a power figure capable of leading the country, the impotence of DJOTODIA and TIANGAYE and the presence of uncontrolled elements.³²
- b. At paragraph 33 of its Request,³³ the Defence states that P-2926 testifies on the disorganisation of the Seleka, the absence and lack of respect for hierarchy within the coalition and the non-functioning Seleka state.

²⁸ ICC-01/14-01/21-507-Red, para. 22; *Ongwen* Rule 68(2)(b) Decision, ICC-04-01/15-596-Red, para.15.

²⁹ ICC-01/14-01/21-449-Conf, paras. 239-300

³⁰ ICC-01/14-01/21-T-005-CONF-ENG-ET, p.28, lines 10-p.29, line 11 ; p.40, lines 10-15..

³¹ ICC-01/14-01/21-931-Conf, para. 22 (Defence Request).

³² CAR-OTP-2127-4289, paras. 29-30 (P-2926 report).

³³ ICC-01/14-01/21-931-Conf, para. 33 (Defence Request).

c. At paragraphs 34 and 41 of their Request,³⁴ the Defence states that P-2926 is of the opinion that the Seleka and Anti-Balaka emerged and started to be active from the last trimester of 2013.³⁵

d. At paragraph 34 of its Request,³⁶ the Defence states that P-2926 testifies on the disorganisation of the Seleka.³⁷

25. For the above reasons, the Prosecution submits that P-2926's prior statements and associated materials meet the criteria set out in rule 68(3) of the Rules. As P-2926 already agreed to submit his reports in the *Yekatom & Ngaisona* case, the Witness might certainly not object to the submission of his reports in this case and could be present in court and available for examination by the Chamber and the Parties.³⁸

G. P-0405's prior recorded testimony

26. P-0405 is a former anti-balaka, who joined self-defence groups on or about 16 November 2013.³⁹ [REDACTED].⁴⁰ His transcribed statement contains elements *inter alia* about crimes committed by the Seleka in March 2013 when the Seleka took Bangui.⁴¹

27. The Prosecution does not, in principle, oppose the introduction of P-0405's prior recorded testimony under rule 68(2)(b) of the Rules.

³⁴ ICC-01/14-01/21-931-Conf, paras. 34 and 41 (Defence Request).

³⁵ CAR-OTP-2127-4289, paras. 50-52 (P-2926 report).

³⁶ ICC-01/14-01/21-931-Conf, para. 34 (Defence Request).

³⁷ CAR-OTP-2127-4289, paras. 62-68 (P-2926 report); CAR-D33-0014-2987, p. 3009, l. 19-27 and p. 3010, l. 24 to p. 3011, l. 2 (P-2926 court transcript in *Yekatom and Ngaisona* case, T-032-CONF-FRA dated 12 May 2021).

³⁸ See ICC-01/14-01/21-932, para. 15 pending Defence contacting the witnesses (Fourth Directions on the Conduct of Proceedings).

³⁹ CAR-OTP-2107-4558, at 4563, l.139-171 to 4564, l. 175.

⁴⁰ CAR-OTP-2107-4749, at 4756, l.218-242.

⁴¹ CAR-OTP-2107-4558, at 4562, l. 122-124, l. 127-129, l. 130-133.

VI. RELIEF SOUGHT

28. For the above reasons, the Prosecution respectfully requests the Chamber:

- (i) to reject the Defence Request to introduce the prior recorded testimonies of P-0015, P-0025 and P-2926, pursuant to rule 68(2)(b) of the Rules;
- (ii) to allow P-0015 and P-0025, to testify *viva voce* or in the alternative, their prior recorded testimony to be introduced pursuant to rule 68(3) of the Rules, and
- (iii) to allow the introduction of P-2926's prior recorded testimony under rule 68(3) of the Rules.



Karim A. A. Khan KC, Prosecutor

Dated this 9th day of April 2025

At The Hague, The Netherlands