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No.: **ICC-01/14-01/18**

Date: **28 November 2022**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of "Prosecution's Request for Submission of the Prior
Recorded Testimony of P-1172 pursuant to Rule 68(2)(c)", 28 November 2022**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Following confirmation of the death of P-1172, the Office of the Prosecutor (“Prosecution”) requests the formal submission of his prior recorded testimony pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”) and the “Initial Directions on the Conduct of the Proceedings” (“Directions”).¹ As listed in Annex A, P-1172’s prior recorded testimony (“Prior Statement”) comprise the witness’s 31 July 2018² statement to the Prosecution. Annex A also identifies the relevant paragraphs of the Confirmation Decision to which P-1172’s evidence relates. A copy of P-1172’s recently obtained death certificate is attached as Annex B.

2. The Prior Statement is admissible under rule 68(2)(c) because P-1172 has died, and: (i) the Prosecution could not anticipate the need for article 56 measures to obtain his evidence; (ii) the evidence has sufficient indicia of reliability; (iii) the evidence is relevant and probative; and (iv) there is no undue prejudice to either Accused from its submission.³ The relevance and probative value of the Prior Statement is set out in more detail below, along with other sources of corroborative evidence.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), this Request and its annexes are filed as “Confidential”, as they contain information concerning a witness which should not be made public. A “Public Redacted” version of the Request will be filed as soon as practicable.

¹ ICC-01/14-01/18-631, para. 33.

² CAR-OTP-2082-1058, and its translation CAR-OTP-2107-6070.

³ ICC-01/14-01/21-506-Conf, para. 9.

III. SUBMISSIONS

4. The Initial Directions on the Conduct of Proceedings permits the Parties to file rule 68(2)(c) applications beyond the deadline set for the Final Witness List (i.e., 9 November 2020), “should a witness become unavailable”.⁴

5. Rule 68(2)(c) empowers the Chamber to formally recognise the submission of the prior recorded testimony of a witness who has died when: (i) the necessity of measures under article 56 of the Statute could not be anticipated; (ii) the prior recorded testimony has sufficient indicia of reliability;⁵ (iii) the evidence is relevant and probative; and (iv) the submission is not prejudicial to or inconsistent with the rights of the accused.⁶ As detailed below, P-1172’s Prior Statement meets all of these criteria.

6. [REDACTED] (P-1172) was a member of the *Forces Armées Centrafricaines* (“FACA”). The witness provided evidence on the formation of the Anti-Balaka in the provinces, including in BOSSANGO, BOUCA, SIBUT, and BOKANGOLO, the role of Maxime MOKOM in the Anti-Balaka structure, and the role of other Anti-Balaka leaders.

7. P-1172’s proposed evidence on the formation of the Anti-Balaka in the provinces is cumulative to, and corroborated by, *inter alia*, the evidence of P-0808, P-0905, and P-1521. P-1172’s proposed evidence on MOKOM’s contact and coordination from ZONGO with leaders of Anti-Balaka groups in the provinces is cumulative to, and corroborated by the evidence of P-1521, P-2027, and the proposed rule 68(2)(b) evidence of P-0974. Lastly, P-1172’s proposed evidence on the roles of Anti-Balaka leaders Aimé Abel DENAMGANAI (“DENAMGANAI”), Sylvestre YAGOUZOU

⁴ ICC-01/14-01/18-631, para. 33.

⁵ ICC-01/04-02/06-1029, para. 12 ; ICC-01/14-01/21-506-Conf, para. 15.

⁶ ICC-01/12-01/18-1111-Conf, para. 7; ICC-01/05-01/08-1386, para. 78 (“*Bemba Appeals Decision*”).

("YAGOUZOU"), and Charles NGREMANGOU ("NGREMANGOU") is corroborated by, and cumulative to the evidence of P-1521, and P-0954.

a. P-1172 is unable to testify

8. On 27 November 2020, the Prosecution was informed by a friend of the witness's family that P-1172 had passed away at the end of [REDACTED], after a short illness. On 2 June 2021, the Prosecution received from the CAR government, [REDACTED] P-1172 from the FACA because he passed away on [REDACTED].⁷ The document is attached as Annex B.

b. Article 56 measures could not be anticipated

9. P-1172 was interviewed on 5 February 2017⁸ and 31 July 2018. At the time of the last interview, the witness was approximately [REDACTED] years old and did not report any serious health issues. The Prosecution remained in contact with P-1172 after his interview. As mentioned above, on 27 November 2020, while making inquiries regarding P-1172's contact details, the Prosecution was informed that P-1172 had passed away [REDACTED]. Under these circumstances, the Prosecution had no information within its possession that would prompt consideration of evidence preserving measures under article 56.

c. The tendered evidence is reliable

10. P-1172's Prior Statement is *prima facie* reliable. It is truthful, authentic, and consistent. The Prosecution obtained P-1172's Prior Statement in the ordinary course of its investigation.⁹ In accordance with rule 111, the witness's factual account was

⁷ CAR-OTP-2127-9237.

⁸ P-1172's first statement related to the Seleka and is therefore not included in present request.

⁹ See ICC-01/09-01/11-1938-Red-Corr, para. 66; see also ICC-01/05-01/13-1481-Red-Corr, para. 20.

provided voluntarily and signed by him, as well as the investigators conducting the interview.¹⁰ The Prior Statement was read by the witness before signature in a language he fully understood.¹¹ It further contains an express acknowledgement attesting to its voluntariness and the truth of its contents, to the best of the witness's knowledge and recollection.¹² Further, the Prior Statement is internally consistent, and sufficiently corroborated by other evidence in the case.¹³

11. As noted, the Prior Statement is limited to information within the witness's knowledge and experience. He was forthcoming in his interview about his lack of knowledge or lack of memory of certain events.¹⁴ Further, P-1172 gave reasonable and logical explanations in his narrative of events without any apparent embellishments or speculation, stating for example, "I cannot remember now the attacks he talked about, since it happened too long ago."¹⁵ "MOKOM did not tell me what the attack plan was ; I was not told where the attacks would be aimed at".¹⁶

12. In sum, the Prior Statement is reliable in that it (i) is signed; (ii) was given in a language the witness fully understands; (iii) contains an acknowledgement that it is accurate; (iv) is internally consistent; and (v) is predicated on information within the witness's actual knowledge, in that the witness readily admitted when he did not know certain information.¹⁷

¹⁰ ICC-01/05-01/13-1481-Red-Corr, para. 20; *see also* ICC-01/14-01/21-506-Conf, para. 11; ICC-02/04-01/15-596-Red, para. 9; ICC; ICC-01/09-01/11-1938-Corr-Red2, para. 32; ICC-01/05-01/13-1478-Red-Corr, paras. 29-31.

¹¹ CAR-OTP-2046-1003, at 1013, para. 4, and CAR-OTP-2082-1058, at 1073, para. 4.

¹² CAR-OTP-2046-1003, at 1013, para. 5, and CAR-OTP-2082-1058, at 1073, para. 5.

¹³ *See* para. 8 *infra*.

¹⁴ CAR-OTP-2082-1058, at 1062, para. 24, at 1063, para. 27, and at 1064, para. 37.

¹⁵ CAR-OTP-2082-1058, at 1064, para. 34, 36.

¹⁶ CAR-OTP-2082-1058, at 1064, para. 36.

¹⁷ CAR-OTP-2082-1058, at 1062, para. 24, at 1063, para. 27, and at 1064, para. 37.

d. P-1172's Prior Statement is relevant and probative

13. P-1172's Prior Statement is relevant and probative. It primarily goes to the formation of the Anti-Balaka in the provinces, including at BOSSANGO, BOUCA, SIBUT, and BOKANGOLO, the role of Maxime MOKOM in the Anti-Balaka structure, and the role of other Anti-Balaka leaders..

14. P-1172's Prior Statement comprises 16 pages. There are no agreements as to the facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the Prior Statement.

15. The witness's Prior Statement describes the following:

- P-1172 was a FACA Commander in [REDACTED], which is located near [REDACTED]. P-1172 fled to ZONGO in September 2013, after being detained by the Seleka. In ZONGO, P-1172 met Maxime MOKOM, as well as NGAFOU and Hervé GANAZOUI.
- P-1172 explains how people in CAR organized in the provinces, as a response to Seleka attacks, and describes how the movement, the Anti-Balaka started in BOSSANGO, BOUCA, SIBUT, and BOKANGOLO.
- P-1172 explains that MOKOM wanted him, as a military officer, to make contact with a group that ambushed the Seleka in OUHAM-BAC, to advise them on how to progress and how to set up military ambushes. P-1172 states that MOKOM was receiving information on the situation in CAR from relatives.
- After the OUHAM-BAC attack, the movement from BOSSANGO kept progressing. P-1172 states that as military from BANGUI joined them, the BOSSANGO group progressed to BOUCA, and also to SIBUT and BOKANGOLO.

- P-1172 describes MOKOM's contact and coordination from ZONGO with leaders of Anti-Balaka groups in the provinces, including ANDJILO, 'KEMBA' (aka Florent KEMA), and '12 Puissances' (aka Thierry LEBENE).
- P-1172 further explains MOKOM's interest in collecting the contact details of military personnel in BANGUI who would be willing to join the Anti-Balaka groups in the provinces, citing KONATE as an example.
- P-1172 states that after the military from BANGUI joined the movement, MOKOM no longer sought P-1172's advice.
- P-1172 reports that MOKOM would tell him about particular attacks that had taken place, including the 5 December 2013 attack in BANGUI. P-1172 describes his discussions with MOKOM prior to attack, on 3 and 4 December and that MOKOM told him that BANGUI would be attacked in the coming days.
- P-1172 explains that communications occurred by phone, or by people crossing the river from ZONGO to CAR and back.
- P-1172 states that MOKOM was angry when NGAISSONA was appointed Coordinator of the Anti-Balaka, which caused the division of the movement.
- P-1172 describes returning to CAR [REDACTED] weeks after the appointment of interim President Catherine SAMBA-PANZA in 2014, and states that MOKOM probably left ZONGO soon after him.
- P-1172 describes meetings at NGAISSONA's compounds, during which NGAISSONA attended as the coordinator of the Anti-Balaka. P-1172 was invited to one of these meetings by MOKOM, who was there with NGAISSONA and [REDACTED]. P-1172 also describes meeting MOKOM in BOEING later in 2014.
- Finally, P-1172 describes the roles of Anti-Balaka leaders such as DENAMGANAI, YAGOUZOU, and NGREMANGOU.

e. Balance of interests

16. Granting the Request advances the interests of justice. By its terms, rule 68(2)(c) does not *per se* unfairly prejudice the Defence in permitting the submission of uncross-examined evidence unrelated to the acts and conduct of the Accused.¹⁸ On the contrary, although rule 68 is an exception to the principle of orality¹⁹ and publicity,²⁰ its application “is *per se* generally considered *compatible* with the rights of the accused”²¹ and indeed all statutory rights because it is express in the Court’s procedural framework. Additionally, the Chamber’s appropriate exercise of discretion in determining the evaluative criteria as defined in the Rules, among others, serves as a sufficient procedural safeguard against potential prejudice. Similarly, the fact that the Parties can avail themselves of the provision further underscores its inherent neutrality.²² Thus, any claim of prejudice should only be entertained in light of the particular circumstances of the specific witness, their evidence, and the case — not presumptively, nor in the abstract.

17. P-1172’s evidence is manifestly relevant to the proper adjudication of salient issues in this case, and its formal submission does not cause any unfair prejudice to the Accused either in respect of the nature of rule 68(2) itself, or as applied in these circumstances.²³ P-1172’s proposed evidence on the formation of the Anti-Balaka in the provinces is cumulative to, and corroborated by, *inter alia*, the evidence of P-0808, P-0905, and P-1521. P-1172’s proposed evidence on MOKOM’s contact and coordination from ZONGO with leaders of Anti-Balaka groups in the provinces is corroborated by, and cumulative to the evidence of P-1521, P-2027, and the proposed rule 68(2)(b) evidence of P-0974. Lastly, P-1172’s proposed evidence on the roles of

¹⁸ ICC-01/05-01/13-1478-Red-Corr, paras. 38-39.

¹⁹ ICC-01/05-01/08-1386, para. 78.

²⁰ ICC-01/14-01/18-685, para. 25 (referencing articles 64(7) and 67(1)).

²¹ ICC-01/14-01/18-685, para. 26.

²² ICC-01/09-01/11-1938-Red-Corr, para. 25.

²³ ICC-01/09-01/11-1938-Red-Corr, para. 27.

Anti-Balaka leaders DENAMGANAI, YAGOUZOU, and NGREMANGOU is corroborated by, and cumulative to the evidence of P-1521, and P-0954.

18. Any potential prejudice to the Accused resulting from a prospective conviction on any of the charges that may rely to a 'decisive extent' on P-1172's Prior Statement should be evaluated by the Chamber at the end of the trial, during its assessment of the *weight* to be accorded to his Prior Statement, as foreseen by the Chamber's adoption of the submission regime.²⁴ In that assessment, the Prior Statement should be accorded weight, bearing in mind its probative value and indicia of reliability, as well as the fact that it is corroborative of other documentary evidence and testimony.

19. P-1172's Prior Statement should thus be recognised as formally submitted and the Chamber shall consider to what extent a conviction on any of the charges supported by P-1172's evidence is appropriate on the basis of *all* relevant evidence at the end of the trial.

²⁴ See ICC-01/14-01/18-631, paras. 52-53.

IV. CONCLUSION

20. For the foregoing reasons, the Prosecution requests the Chamber recognise as formally submitted the Prior Statement of P-1172 pursuant to rule 68(2)(c).

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

Karim A. A. Khan KC, Prosecutor

Dated this 28th day of November 2022
At The Hague, The Netherlands